

No. 07 – 15763 [DC# CV 99-4389-MJJ]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RUSSELL ALLEN NORDYKE; et al.,
Plaintiffs - Appellants,

vs.

MARY V. KING; et al.,
Defendants - Appellees.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

**APPELLANTS' SUPPLEMENTAL BRIEF
PURSUANT TO JULY 19, 2010 ORDER**

Donald E. J. Kilmer, Jr.*
Law Offices of Donald Kilmer
1645 Willow Street, Suite 150
San Jose, California 95125
Vc: 408/264-8489 Fx: 408/264-8487
E-Mail: Don@DKLawOffice.com

Don B. Kates
Attorney at Law
22608 N.E. 269th Avenue
Battleground, Washington 98604
Vc: 360/666-2688 Fx: 360/666-3303
E-Mail: DonKates@earthlink.net

Counsel for Plaintiff - Appellants

Co-Counsel for Plaintiff - Appellants

**Counsel of Record*

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CORPORATE DISCLOSURE STATEMENT

T S TRADE SHOWS is the business name used by RUSSELL and SALLIE NORDYKE to conduct business as gun show promoters throughout Northern and Central California. The business is wholly owned by the Nordykes.

VIRGIL McVICKER is president of the MADISON SOCIETY, a not-for-profit Nevada Corporation with its registered place of business in Carson City, Nevada. The Madison Society has chapters throughout California. The society is a membership organization whose purpose is preserving and protecting the legal and constitutional right to keep and bear arms for its members and all responsible law-abiding citizens. It is not a publicly traded corporation.

Dated: August 18, 2010

/s/

Donald E. J. Kilmer, Jr. [SBN: 179986]
LAW OFFICES OF DONALD KILMER
1645 Willow Street, Suite 150
San Jose, California 95125
Voice: (408) 264-8489
Fax: (408) 264-8487
E-Mail: Don@DKLawOffice.com

INTRODUCTION

This appeal will require an answer to two questions: (1) are the rights asserted by the Appellants protected by the Constitution, and (2) what level of scrutiny applies to an infringement of those rights?¹

POSTURE | STATEMENT OF THE CASE

In *McDonald v. Chicago*, 177 L. Ed. 2d 894 (2010), the Supreme Court agreed with this panel's view that the Second Amendment applies to state and local governments through the 14th Amendment Due Process clause. *Nordyke v. King*, 563 F.3d 439 (9th Cir. 2009). On July 12, 2010, the *en banc* panel issued an order vacating that opinion and remanding the case to this panel. Supplemental briefing was ordered on July 18, 2010.

The trial court rejected Appellants' First Amendment and Equal Protection claims and granted summary judgment to the County. Even on appeal, Appellants are entitled to all favorable factual inferences on those claims. *Eastman Kodak Co. v. Image Technical Services, Inc.* 504 U.S. 451, 456 (1992).

¹ This mirrors the approach taken by the 3rd Circuit in the recent case of *US v. Marzzarella*, 2010 U.S. App. LEXIS 15655 (July 29, 2010). That Court went on in fn.4 to opine: "*We think this implies the structure of First Amendment doctrine should inform our analysis of the Second Amendment.*"

The Second Amendment claim is on appeal from the trial court's denial of a motion to amend the complaint. In order to find that amendment of the complaint would be futile, the Court is required to adjudicate facts in the same manner as a motion to dismiss under Fed. R. Civ. Pro. 12(b)(6). *Adorno v. Crowley Towing & Transp. Co.* 443 F.3d 122, 126 (1st Cir. 2006).

Given this case's present posture and the recent developments in Second Amendment law, it is surprising the County has not requested that the matter be returned to the trial court for discovery and further litigation. The Appellants agree that the matter may be resolved by this Court without a remand to the trial court², but the consequence of that development has to be a judicial finding that the County has offered **no evidence** to support its bald assertion that banning gun shows at the Fairgrounds, by banning guns at gun shows, will reduce crime in Alameda County.

STATEMENT OF FACTS

The critical facts in this case are undisputed. See Joint Statement of Undisputed Facts reproduced in Appendix A. [ER, Vol III, Tab 12.]

² However, the Appellants have never waived any evidentiary burdens imposed on the County by the Fed. R. Civ. Pro. or by a constitutional analysis.

The Nordykes conducted gun shows at the Alameda County Fairgrounds without incident for 10 years before the county enacted the challenged ordinance. (See Appendix B.) The Nordykes have continued to conduct gun shows throughout Northern California without incident of any kind. Special Agents from the California Department of Justice, tasked with enforcing federal and state law at all guns shows throughout California, testified that the Nordyke gun shows comply with all federal and state laws. The County has conceded all of these facts. [JSUF ¶¶ 33, 34, 43, 44, 49, 50, 85]

Pursuant to the Gun Show Enforcement Act of 2000 (Appendix C.) guns at gun shows must be secured in a manner that prevents their operation. The only exception is during an actual demonstration by the seller to a potential buyer so that the condition of the firearm can be inspected. Guns at gun shows may not be handled by minors. Guns that are brought to gun shows by patrons and exhibitors must be tagged and the person responsible for the firearm must have a government issued photo identification. No person may simultaneously possess a firearm and ammunition for that firearm (excepting peace officers). The county concedes that these laws and regulations are obeyed by the Appellants. [JSUF ¶¶ 43, 44, 51, 52, 53, 54, 55, 56, 57]

In contrast, the County-favored Scottish Games bring unregulated firearms onto the fairgrounds for mock battles. The County concedes that the participants in those mock battles load live, albeit blank, ammunition into their firearms, and fire them at one another. There is no evidence that the participants in the mock battles comply with any of the other safety measures required of gun shows by state law. (e.g., restrictions on minors, safety ties, photo-ID, etc..) [JSUF ¶¶ 16, 17, 31, 40, 41, 42]

The Nordykes sought an informal determination from County Counsel whether gun shows are an exception to the ordinance. It is undisputed that the County failed to respond to the Nordykes' inquiries. [JSUF ¶¶ 12, 14, 18, 21, 25, 88, 89, 90]

The County concedes that possession of a gun at a gun show is expressive conduct, thus making that possession a species of speech protected by the First Amendment.³ Paradoxically, the County has maintained that gun shows and gun sales can still take place on county property (e.g., the Fairgrounds) as long as no guns are present.

³ Possession of guns at gun shows is expressive conduct, which is likely to be understood by its intended audience. [Order Granting Summary Judgment. ER, Vol. III of IV, Tab: 17, ER page no.: 0625]

Extending this cognitive dissonance, the County has conceded that firearm sales at gun shows require the physical presence of a firearm to insure compliance with state/federal laws regarding firearm sales. Thus the County is making the fantastic claim that its property is simultaneously a zone where guns can still be sold, but that federal/state laws can be disregarded during the sale. [JSUF ¶¶ 14, 38] This is not even a rational interpretation of their own ordinance.

On May 20, 1999, Defendant King sent a memorandum, copied to the Board of Supervisors, requesting that County Counsel research a way to prohibit gun shows at the Fairgrounds. The memorandum bases that request on political philosophy. In press releases and speeches, the County, speaking through King, stated the purpose of the Ordinance: That the county should not provide “[...] *a place for people to display guns for worship as deities for the collectors who treat them as icons of patriotism.*” [JSUF ¶¶ 9, 11]

Appellants are entitled to the factual inference that their gun shows were targeted for extinction because of the political values expressed at gun shows and the County’s disagreement with those values. This is straight up view-point discrimination. See e.g., *Madison Joint Sch. Dist. Wisconsin Employment Relations Comm’n*,

429 U.S. 167, 176 (1976). See also: *Child Evangelism Fellowship of S.C. v. Anderson School Dist. Five*, 470 F.3d 1062 (4th Cir. 2006) (“The ‘viewpoint discrimination’ prohibited in all forums is ‘an egregious form of content discrimination’ in which the government ‘targets not subject matter, but particular views taken by speakers on a subject.’”) Targeting disfavored groups is also relevant to a determination of discriminatory intent. *Romer v. Evans*, 517 U.S. 620 (1996).

Though the County claims public safety as a pretext for their ordinance, it has produced no evidence that it will deter the kind of criminal conduct like the horrific shooting at the Alameda County Fair in 1998. The perpetrator of that crime was convicted of pre-existing state law felonies and sentenced to prison. Subsequent to that shooting, the County installed metal detectors at the Fairgrounds to screen for unlawfully carried weapons. [JSUF ¶¶ 1, 2, 3, 48]

ARGUMENT

I. THE RIGHTS ASSERTED BY THE PLAINTIFF/APPELLANTS ARE PROTECTED BY THE UNITED STATES CONSTITUTION.

This case raises First Amendment, Second Amendment and Equal Protection issues in conjunction with historically law-abiding gun shows at the Alameda County Fairgrounds.

A. POSSESSION OF A FIREARM AT A GUN SHOW IS EXPRESSIVE CONDUCT PROTECTED BY THE FIRST AMENDMENT.

The County has conceded this issue in the trial court and the trial court made that finding. See fn. 3, *supra*. Appellants aver that since the Ordinance purports to generally regulate expressive conduct with guns on county property – including exempting the Scottish Games and guns used in motions pictures, television and theatrical productions – that the Ordinance must be subject to the strict scrutiny test laid down in *Texas v. Johnson*, 491 U.S. 397 (1989).

View-point based regulations of speech are subject to strict scrutiny. “A regulation is content based if either the underlying purpose of the regulation is to suppress particular ideas or, if the regulation, by its terms, singles out particular content for differential treatment.” *Berger v. City of Seattle*, 569 F.3d 1029, 1051 (9th Cir. 2009). The uncontradicted evidence is that the “purpose” of the ordinance is to ban the expressive conduct at gun shows.

Finally, because the County has engaged in a preference for expression with guns by the Scottish Games, over the expression with guns at gun shows, a strict scrutiny analysis is necessary because: “Quite apart from the purpose or effect of regulating content, [...] the

Government may commit a constitutional wrong when by law it identifies certain preferred speakers. [...] The First Amendment protects speech and speaker, and the ideas that flow from each.” Citizens United v. F.E.C., 175 L. Ed. 2d 753, 899 (2010).

B. POSSESSION FOR EXHIBITION OR SALE OF A FIREARM IS A RIGHT PROTECTED BY THE SECOND AMENDMENT.

The “*central holding in Heller: [is] that the Second Amendment protects a personal right to keep and bear arms for lawful purposes, **most notably** for self defense within the home.” McDonald v. Chicago, 177 L. Ed. 2d 894, 922 (2010) (emphasis added). Although self-defense in the home was the concrete right discussed in *Heller*; with this clarification from *McDonald*, the Second Amendment need not be interpreted that narrowly. See: *Nordyke v. King*, 563 F.3d at 458.*

Appellants submit that the bundle of rights protected by the Second Amendment includes the right to possess and acquire firearms. There is ample legal authority for the Court to make that finding. Admittedly the Second Amendment does not expressly mention acquiring firearms, but that right is as implicit in the Second Amendment, as the right to acquire books, crucifixes, menorahs and bibles is in the First Amendment.

1. At Least One State Supreme Court has Interpreted the “Right to Keep and Bear Arms” to Include the Right to Acquire Arms.

Since California’s Constitution fails to recognize⁴ a “right to keep and bear arms,” this Court should look to other state constitutions where the right is recognized for guidance.

In *Andrews v. State* – cited favorably in *Heller*, 128 S.Ct. 2783, 2806, 2809, 2818 (2008), the High Court of Tennessee found much in common between that State’s guarantee of the “right to keep and bear arms” and the Second Amendment. It held:

The right to keep and bear arms, necessarily involves the right to purchase them, to keep them in a state of efficiency for use, and purchase and provide ammunition suitable for such arms, and keep them in repair. [...]

Andrews v. State, 50 Tenn. 165, 178, 8 Am. Rep. 8, 13 (1871).

2. Congress has Recognized that the “Right to Keep and Bear Arms” Includes the Right to Engage in Commercial Transactions to Acquire Firearms.

In 2005 Congress passed the Protection of Lawful Commerce in Arms Act. The PLCAA⁵ is founded on the Second Amendment and asserts Congressional authority to protected those rights under the 14th

⁴ *Kasler v. Lockyer*, 23 Cal.4th 472, 480 (2000)

⁵ Public Law 109-92, 15 U.S.C. § 7901-7903.

Amendment. Congressional purposes are set forth in Section (2)(b):

(2) To preserve a citizen's access to a supply of firearms and ammunition for all lawful purposes, including hunting, self-defense, collecting, and competitive or recreational shooting.

(3) To guarantee a citizen's rights, privileges, and immunities, as applied to the States, under the Fourteenth Amendment to the United States Constitution, pursuant to section 5 of that Amendment.

(5) To protect the right, under the First Amendment to the Constitution, of manufacturers, distributors, dealers, and importers of firearms or ammunition products, and trade associations, to speak freely, to assemble peaceably, and to petition the Government for a redress of their grievances.

Similarly, Congress expressed an intent to broadly protect the “right to keep and bear arms” when it passed the Firearm Owners’ Protection Act of 1986.⁶ The Congressional findings in FOPA bundled the Second with the Fourth, Fifth, Ninth and Tenth Amendments to clarify that the “right to keep and bear arms” includes the practice of allowing licensed gun dealers, under rules and regulations prescribed by the Secretary, to conduct business at temporary locations such as gun shows. The County has conceded that these federal (and state) laws⁷ are obeyed by Appellants’ gun shows.

⁶ Public Law 99-308, 18 U.S.C. § 921 *et seq.*

⁷ See: 18 U.S.C. § 923(j), 27 CFR § 478.23, 27 CFR § 478.100 *et seq.*

Congress's recognition that the Second Amendment includes the right to acquire firearms is entitled to deference.

In *Field v. Clark*, 143 U.S. 649, 691, this court declared that ". . . *the practical construction of the Constitution, as given by so many acts of Congress, and embracing almost the entire period of our national existence, should not be overruled, unless upon a conviction that such legislation was clearly incompatible with the supreme law of the land.*" The rule is one which has been stated and applied many times by this court. As examples, see *Ames v. Kansas*, 111 U.S. 449, 469; *McCulloch v. Maryland*, 4 Wheat. 316, 401; *Downes v. Bidwell*, 182 U.S. 244, 286.

United States v. Curtiss-Wright Export Corp. et al.
299 U.S. 304, 328; 57 S. Ct. 216, 225 (1936)

With no guidance from the Supreme Court, and a silent California Constitution, this Court is free to consult other state constitutions and Congress for an understanding of the scope of the right and various applications of the Second Amendment.⁸

C. POSSESSION OF A FIREARM AT A GUN SHOW, WHEN GUNS ARE PERMITTED AT OTHER EVENTS AT THE FAIRGROUNDS, IMPLICATES 14TH AMENDMENT EQUAL PROTECTION.

As noted above, guns at gun shows are more strictly regulated than guns at the Scottish Games. Guns at gun shows are secured

⁸ See also Right to Keep and Bear Arms Report of the Subcommittee on the Constitution of the United States Senate (1982) "*what is protected is an individual right of a private citizen to own and carry firearms in a peaceful manner.*"

pursuant to state law. [JSUF ¶ 52] While the guns at the Scottish Games are **secured** pursuant to a county ordinance. [JSUF ¶¶ 16, 17, 31, 40-42] The controversy is easily resolved, the Appellants are entitled to the favorable inference that guns at gun shows are either as, or more strictly, regulated than guns at the Scottish Games. *Eastman Kodak Co. v. Image Technical Services, Inc.* 504 U.S. 451, 456 (1992).

An Equal Protection analysis involving a fundamental right (whether First or Second Amendment) requires application of strict scrutiny. See: *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972) and *Carey v. Brown*, 447 U.S. 455 (1980).

II. THE COURT SHOULD APPLY STRICT SCRUTINY TO THE ALAMEDA ORDINANCE, REGARDLESS OF WHICH CLAIM IS ADVANCED.

What all three aspects of this case have in common, is that once it is established that Alameda's ordinance infringes on Appellants' rights under these constitutional doctrines, the Ordinance must serve some **compelling governmental interest**. Furthermore, the government must demonstrate that: (1) the ordinance was **narrowly tailored** to achieve a legitimate objective and (2) there must be **evidence** for believing the ordinance will work.

A. ALAMEDA HAS FAILED TO DEMONSTRATE A LEGITIMATE COMPELLING INTEREST ADDRESSED BY ITS ORDINANCE.

The County has failed to demonstrate that its ordinance addresses a compelling interest that is not already addressed by the California Penal Code (for prosecuting crimes committed with guns) or by the installation of metal detectors (for detecting unlawfully carried guns). A recent *en banc* panel of this Court struck down regulations of expressive conduct on public property on mere intermediate scrutiny grounds, in part because:

[...] [T]he Supreme Court has consistently struck down prior restraints on speech where a state could achieve its purported goal of protecting its citizens from wrongful conduct by punishing only actual wrongdoers, rather than screening potential speakers.[...]

Berger v. City of Seattle, 569 F.3d 1029, 1044 (9th Cir. 2009)

Stripped of any public safety interest that duplicates state law, the ordinance is exactly what Appellees intended – a ban on gun shows at the Fairgrounds. The intention to suppress gun shows is amply illustrated by the ordinance’s exemption for possession of guns at the Scottish Games but not gun shows. The difference is that gun display is incidental to mock battles. The display of guns is the *raison d’être* for gun shows.

When fundamental rights are at stake, and the government fails to identify a compelling interest for interfering with those rights then the statute/ordinance in question must give way. See: *Citizens United v. F.E.C.*, 175 L. Ed. 2d 753, 798-799 (2010).

B. THE ORDINANCE IS NOT NARROWLY TAILORED TO ADDRESS A LEGITIMATE COMPELLING INTEREST.

Appellees may argue that their statements about suppressing gun shows should be disregarded. After all, the ordinance makes vague claims about reducing gun violence. That begs the question of method. How could banning guns only from County property reduce gun violence? The county has not produced evidence that gun violence is confined to or different on county property than elsewhere. There is only one, even theoretical, basis for asserting that banning guns from County property could reduce gun violence: Appellees think gun shows promote gun ownership, and that gun ownership means more violence, therefore curbing gun ownership will curb gun violence.

In a post-*Heller*, post-*McDonald* world this argument is *per se* invalid.

[T]he Second Amendment right will to some extent limit the legislative freedom of the States, but this is always true when a Bill of Rights provision is incorporated. Incorporation always restricts experimentation and local

variations, but that has not stopped the Court from incorporating virtually every other provision of the Bill of Rights. "[T]he enshrinement of constitutional rights necessarily takes certain policy choices off the table." *Heller*, 554 U.S., at ___, 128 S. Ct. 2783, 171 L. Ed. 2d at 684. This conclusion is no more remarkable with respect to the Second Amendment than it is with respect to all the other limitations on state power found in the Constitution.

McDonald v. City of Chicago, 177 L. Ed. 2d 894, 928-929

The County has not tied a single crime to the gun shows. Nor has the County even attempted to establish an evidentiary basis for a secondary effects analysis when state action burdens a fundamental right on the grounds of advancing public safety. See generally: *Renton v. Playtime Theatres Inc.* (1986) 475 U.S. 41; and *City of Los Angeles v. Alameda Books, Inc.*, (2002) 535 U.S. 425.

C. THE FAIRGROUNDS IS NOT A "SENSITIVE PLACE."

The County presented no evidence that the Fairgrounds is a "sensitive place." *Heller*, addressed this issue at 128 S.Ct. at 2816-17:

[W]e do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on ***longstanding prohibitions*** on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms. (emphasis added.)

How can the fairgrounds be sensitive to gun show guns, but not the Scottish Games' guns? How can the fairgrounds be a sensitive place if secured guns are possessed at gun shows, but not-so-sensitive when guns are possessed by "*authorized participants in a motion picture, television, video, dance or theatrical production or event, [...]?*"? How can the fairgrounds be a "sensitive place" when the ordinance exempts imitation firearms or BB guns and air rifles? An airport "sterile area" would not tolerate the presence of imitation firearms. Licensees with permits to carry firearms under California Penal Code Section 12050 are exempt from the ordinance. A jail or prison does not permit licensees to retain their weapons when visiting inmates.

Local public buildings are exempt from the ordinance. "Local public buildings" are defined in the California Penal Code. But this state law allows guns in government buildings, for the **purpose of conducting a law-abiding gun show.**⁹ By its own terms, the Ordinance concedes that the County's local buildings are not "sensitive" when they are hosting "law-abiding" gun shows.

Consider these additional facts regarding non-sensitive places:

⁹ See: Cal. Pen. Code §§ 171b(b)(7)(A) and 171b(b)(7)(B).

- The publication: Gun Shows: Brady Checks and Crime Gun Traces was jointly published in January 1999 by the U.S. Department of Justice, the Department of the Treasury and the BATF. Gun shows are described on page 4. “*Ordinarily, gun shows are held in public arenas, civic centers, fairgrounds, and armories,...*”¹⁰
- On May 22, 2009, President Obama signed into law a bill, based on the Second Amendment, that permits law-abiding citizens to possess firearms in National Parks – consistent with the law of the state in which the park is located. See: The Credit Card Act of 2009.¹¹

These facts can be judicially noticed for the proposition that public places, where many people gather, like: parks, fairgrounds, public arenas, civic centers, and government buildings where gun shows take place, are **not** longstanding examples of historically “sensitive places.” Alameda should not be permitted to boot-strap a “sensitive places” designation of the Fairgrounds without evidence or some other compelling reason.

D. THE ORDINANCE CANNOT SURVIVE INTERMEDIATE SCRUTINY.

Even assuming this Court were to diverge from a First Amendment-type strict scrutiny analysis for the Second Amendment

¹⁰ Available at: <http://www.atf.gov/publications/download/treas/treas-gun-shows-brady-checks-and-crime-gun-traces.pdf>

¹¹ Public Law 111-24 § 512 (Protecting Americans from Violent Crime).

suggested by the Supreme Court and the Third Circuit¹², and apply intermediate scrutiny to the Ordinance, this Court should still grant relief to the Appellants.

The County has not produced any constitutionally sanctioned evidence that the community evil (gun violence) that they claim as the (pretextual) justification for their ordinance will be addressed by a gun ban on county property. Interpreting the rationale set forth in *City of Los Angeles v. Alameda Books, Inc.*, (2002) 535 U.S. 425, the Seventh Circuit held:

[...] [B]ecause books (even of the "adult" variety) have a constitutional status different from granola and wine, and laws requiring the closure of bookstores at night and on Sunday are likely to curtail sales, the public benefits of the restrictions must be established by evidence, and not just asserted. The evidence need not be local; Indianapolis is entitled to rely on findings from Milwaukee or Memphis (provided that a suitable effort is made to control for other variables). See *Andy's Restaurant*, 466 F.3d at 554-55. **But there must be evidence; lawyers' talk is insufficient.** (Emphasis added.)

Annex Books v. City of Indianapolis,
581 F.3d 460, 463 (7th Cir. 2009)

¹² US v. Marzzarella, 2010 U.S. App. LEXIS 15655 (July 29, 2010), fn.4, “[A]ddressing the scope of the individual right to bear arms, we look to other constitutional areas for guidance in evaluating Second Amendment challenges. We think the First Amendment is the natural choice.”

The point is that (adult) books occupy the same relationship to the First Amendment, that guns occupy with respect to the Second Amendment. Restrictions on the right that purport to address some public interest must be based on constitutionally significant evidence.

Finally, the County's Ordinance cannot pass the strict "means and ends" testing currently required under Ninth Circuit law when evaluating "time, place and manner" regulations of expressive conduct. See generally: *Berger v. City of Seattle*, 569 F.3d 1029 (9th Cir. 2009).

CONCLUSION

This case can be seen as being about commerce in guns. But that view is incomplete. From its inception this ordinance has been about suppressing the display of guns because of opposition to their symbolism and their utility for exercising a fundamental right.

Appellants presented hundreds of declarations from people attesting that they pay to attend gun shows to see exhibits of historical and modern guns and lectures and discussions of guns and their history. In that respect Appellants' gun shows are precisely analogous to the display of weapons in the Arms and Armor Gallery in New York's Metropolitan Museum of Art. Of course, gun shows also display guns for sale – just as art galleries display and sell art reproductions and

CERTIFICATE OF SERVICE

On this, the 18th day of August, 2010, I served the foregoing APPELLANTS' SUPPLEMENTAL BRIEF PURSUANT TO JULY 19, 2010 ORDER by electronically filing it with the Court's ECF/CM system, which generated a Notice of Filing and effects service upon counsel for all parties in the case. [By agreement, hard-copy service of County Counsel Richard Winnie has been waived by T. Peter Peirce, Attorney of Record for Appellees.]

I declare under penalty of perjury that the foregoing is true and correct.

Executed this the 18th day of August, 2010.

/s/ Donald Kilmer
Attorney of Record for Appellants

1 Donald E. J. Kilmer, Jr. [SBN: 179986]
2 LAW OFFICES OF DONALD KILMER
3 1645 Willow Street, Suite 150
4 San Jose, California 95125
5 Voice: (408) 264-8489
6 Fax: (408) 264-8487
7 E-Mail: Don@DKLawOffice.com

8 Attorney for Plaintiffs

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FILED**

SEP - 5 2006

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA
11 SAN FRANCISCO DIVISION

12 RUSSELL ALLEN NORDYKE, et al.,

13 Plaintiffs,

14 vs.

15 MARY V. KING, et al.,

16 Defendants.

Case No.: CV-99-04389-MJJ

JOINT STATEMENT OF UNDISPUTED
FACTS

Date: October 3, 2006
Time: 9:30 a.m.
Judge: Honorable Martin Jenkins
Courtthouse: U.S. Court House
450 Golden Gate Avenue
San Francisco, CA 94102

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18 The parties hereby stipulate that the following facts are undisputed for purposes of
19 Defendants' pending summary judgment motion. The Defendants object to the inclusion
20 of some of the facts for the reasons noted immediately underneath each particular fact
21 objected to. The undisputed facts set forth herein may be challenged and/or objected to
22 by any party at a later stage of the proceedings in this case, consistent with the Federal
23 Rules of Evidence, the Federal Rules of Civil Procedure and all Local Rules.

UNDISPUTED FACT	EVIDENTIARY SUPPORT
1. On July 4, 1998 a shooting occurred at the Alameda County Fairgrounds (a.k.a. Pleasanton Fairgrounds) during the annual County Fair. The shooting resulted in gunshot wounds to 8 people.	1. Declaration of James Knudsen: Exhibit A attached to DEFENDANTS' MOTION FOR SUMMARY JUDGMENT.

COPY

Donald Kilmer
Attorney at Law
1645 Willow St.
Suite 150
San Jose, CA 95125
Vc: 408/264-8489
Fx: 408/264-8487

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UNDISPUTED FACT

EVIDENTIARY SUPPORT

<p>2. The July 4, 1998 shooting incident resulted in the arrest and conviction of the shooter: Jamai Johnson. He was sentenced to California State Prison upon conviction.</p>	<p>2. DEFENDANTS' RESPONSES TO PLAINTIFFS' REQUEST FOR ADMISSION: #26.</p>
<p>3. The July 4, 1998 shooting incident at the Pleasanton Fairgrounds was not associated in any way with any of the Plaintiffs or their activities during gun shows at the Pleasanton Fairgrounds.</p> <p>Defendant's Objection(s): Relevance.</p>	<p>3. DEFENDANTS' RESPONSES TO PLAINTIFFS' REQUEST FOR ADMISSION: #30 and #31.</p>
<p>4. The Defendant COUNTY OF ALAMEDA BOARD OF SUPERVISORS is the duly elected legislative body with the power to pass ordinances in accordance with the county charter and in accordance with the laws of the State of California. The BOARD OF SUPERVISORS also has ultimate administrative authority over the Pleasanton Fairgrounds.</p>	<p>4. Paragraph 31 of the Defendants' AMENDED ANSWER TO THIRD AMENDED COMPLAINT.</p>
<p>5. In 1999, Defendants MARY V. KING, GAIL STEELE, WILMA CHAN, KEITH CARSON, and SCOTT HAGGERTY were the duly elected members of the Board of Supervisors for the County of Alameda, California.</p>	<p>5. Paragraph 32 of the Defendants' AMENDED ANSWER TO THIRD AMENDED COMPLAINT.</p>
<p>6. The Alameda County Fairgrounds (aka: The Pleasanton Fairgrounds) is located in Alameda County. Public and private events are scheduled at the fairgrounds on a regular basis.</p>	<p>6. Paragraph 33 of the Defendants' AMENDED ANSWER TO THIRD AMENDED COMPLAINT.</p>
<p>7. The Alameda County Fairgrounds is situated within a Public and Institutional zoning district on unincorporated county property within the City of Pleasanton, California. The Fairgrounds were awarded to the County in a Final Order of Condemnation filed on November 17, 1965 "for public purposes, namely, for the construction thereon of necessary public buildings, . . ." [See: <u>County of Alameda v. Meadowlark Dairy Corp, Ltd.</u>; Case No.: 322722]</p> <p>Defendant's Objection(s): Relevance.</p>	<p>7. Paragraph 34 of the Defendants' AMENDED ANSWER TO THIRD AMENDED COMPLAINT.</p>

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<p>8. The Alameda County Fair Association is a non-profit corporation which manages the fairgrounds through an Operating Agreement with the County of Alameda.</p>	<p>8. Paragraph 35 of the Defendants' AMENDED ANSWER TO THIRD AMENDED COMPLAINT.</p>
<p>9. On May 20, 1999, Defendant, Mary V. King sent a memorandum to County Counsel – Richard Winnie – requesting that he research a way to prohibit gun shows on County Property.</p> <p>Defendant's Objection(s): Relevance.</p>	<p>9. DEFENDANTS' RESPONSE TO PLAINTIFFS' REQUEST FOR ADMISSION: #1, #2, and #3. See Exhibit A of the PLAINTIFFS' REQUEST FOR ADMISSION.</p>
<p>10. On July 20, 1999, Alameda County Supervisor, Mary V. King issued a press release announcing a proposed ordinance to restrict firearm possession on county property.</p> <p>Defendant's Objection(s): Relevance.</p>	<p>10. DEFENDANTS' RESPONSE TO PLAINTIFFS' REQUEST FOR ADMISSION: #6, #7 and #8. See Exhibit B of the PLAINTIFFS' REQUEST FOR ADMISSION.</p>
<p>11. On July 20, 1999, Alameda County Supervisor, Mary V. King made a speech in connection with the announcement of a proposed ordinance prohibiting possession of firearms on county property.</p> <p>Defendant's Objection(s): Relevance.</p>	<p>11. DEFENDANTS' RESPONSE TO PLAINTIFFS' REQUEST FOR ADMISSION: #11, #12 and #13. See Exhibit C of the PLAINTIFFS' REQUEST FOR ADMISSION.</p>
<p>12. On July 26, 1999, Plaintiffs' Counsel sent a letter to Alameda County Counsel requesting clarification of the terms on the proposed ordinance and requesting informal resolution of any issues relating to implementation and interpretation of the Ordinance as it applied to gun shows.</p> <p>Defendant's Objection(s): Relevance.</p>	<p>12. PLAINTIFFS' INITIAL DISCLOSURES under F.R.C.P. 26 – See: <u>Exhibit H</u> attached thereto.</p>
<p>13. On August 17, 1999, the Alameda County Board of Supervisors adopted Ordinance No.: 0-2000-11. Which later became Section 9.12.120 of the Code of Alameda County. The Ordinance prohibits the possession of firearms on County Property, including the Fairgrounds.</p>	<p>13. DEFENDANTS' RESPONSE TO PLAINTIFFS' REQUEST FOR ADMISSION: #16, #17 and #18. See Exhibit D of the PLAINTIFFS' REQUEST FOR ADMISSION.</p>

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<p>14. On August 23, 1999, Richard Winnie, Alameda County Counsel, sent a letter and copy of the Ordinance to Richard K Pickering, the General Manager of the Pleasanton Fairgrounds. The letter disagrees with the press reports that the ordinance prevents gun shows, and asserts that gun shows may be conducted on the fairgrounds without the presence of firearms. The letter also states that the Ordinance does not proscribe the sale of firearms or ammunition on county property, provided that such articles cannot be displayed on the premises.</p>	<p>14. DEFENDANTS' RESPONSE TO PLAINTIFFS' REQUEST FOR ADMISSION: #16, #17 and #18. See Exhibit D of the PLAINTIFFS' REQUEST FOR ADMISSION.</p>
<p>15. In a September 7, 1999 letter, the General Manager of the Alameda County Fairgrounds requested a written plan from the Nordyke Plaintiffs asking that they explain how they would conduct their gun show at the Alameda County Fairgrounds in compliance with the Ordinance.</p>	<p>15. PLAINTIFFS' INITIAL DISCLOSURES under F.R.C.P. 26 – See: <u>Exhibit H</u> attached thereto. And <u>Exhibit B</u> attached to DEFENDANTS' MOTION FOR SUMMARY JUDGMENT.</p>
<p>16. During the months of August and September, 1999 the Scottish Caledonian Games contacted the Fairground's Manager, the Alameda County Sheriff, Alameda County Counsel and Defendant Scott Haggerty regarding the Ordinance's impact on the Scottish Games held at the Fairgrounds. The Scottish Games involve the display/possession of rifles with blank cartridges in connection with historical re-enactments of gun battles.</p> <p>Defendant's Objection(s): Relevance as to first sentence.</p>	<p>16. Deposition of Rick K. Pickering. 9:16 – 14:12; 26:6 – 26:22; 30:7 – 34:8 and 78:18 – 80:9.</p>
<p>17. The Scottish Caledonian Games, another cultural event that takes place at the Pleasanton Fairgrounds, which involves the possession and display of firearms was not required to submit a written plan for conducting their event in compliance with the Ordinance.</p> <p>Defendant's Objection(s): Relevance.</p>	<p>17. Deposition of Rick K. Pickering. 9:16 – 14:12; 26:6 – 26:22; 30:7 – 34:8 and 78:18 – 80:9.</p>

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<p>18. On September 16, 1999, Plaintiffs' Counsel sent a second letter to Alameda County Counsel seeking to avoid litigation regarding the Ordinance and its effect on Plaintiffs' gun shows. The letter also stated that Plaintiffs could not practically or profitably conduct a gun show without guns.</p>	<p>18. PLAINTIFFS' INITIAL DISCLOSURES under F.R.C.P. 26 – See: <u>Exhibit H</u> attached thereto.</p> <p>And <u>Exhibit C</u> attached to DEFENDANTS' MOTION FOR SUMMARY JUDGMENT.</p>
<p>19. On September 17, 1999, the Plaintiffs filed this action.</p>	<p>19. Judicial Notice of Docket Report.</p>
<p>20. On September 20, 1999, Alameda County Counsel Richard Winnie sent a letter to the Alameda Board of Supervisors recommending changes to the Ordinance.</p> <p>Defendant's Objection(s): Relevance.</p>	<p>20. DEFENDANTS' RESPONSE TO PLAINTIFFS' REQUEST FOR ADMISSION: #21, #22 and #23. See: <u>Exhibit E</u> of the PLAINTIFFS' REQUEST FOR ADMISSION.</p>
<p>21. On September 24, 1999, Plaintiffs' Counsel sent a third letter to Alameda County Counsel seeking to avoid litigation and maintain the status quo in order to explore options regarding the Ordinances' application to gun shows at the Alameda County Fairgrounds.</p>	<p>21. PLAINTIFFS' INITIAL DISCLOSURES under F.R.C.P. 26 – See: <u>Exhibit H</u> attached thereto.</p>
<p>22. On September 28, 1999, The Alameda County Board of Supervisors passed Ordinance 0-2000-22, which amended Alameda County Code Section 9.12.120.</p>	<p>22. See Exhibit A attached to DEFENDANTS' MOTION FOR SUMMARY JUDGMENT.</p>
<p>23. The Ordinance still prohibits the possession of firearms on County property.</p>	<p>23. See Exhibit A attached to DEFENDANTS' MOTION FOR SUMMARY JUDGMENT. 9-12-120(b).</p>
<p>24. The Ordinance contains an exception for the possession of firearms for: "authorized participants in a motion picture, television, video, dance or theatrical production or event, when the participant lawfully uses the firearm as part of that production or event, provided that when such firearm is not in the actual possession of the authorized participant, it is secured to prevent unauthorized use."</p>	<p>24. See Exhibit A attached to DEFENDANTS' MOTION FOR SUMMARY JUDGMENT. 9-12-120(f)(4).</p>
<p>25. On October 19, 1999, Defendants' Counsel responded to Plaintiffs' overtures to avoid litigation in a letter to Plaintiffs' Counsel.</p>	<p>25. PLAINTIFFS' INITIAL DISCLOSURES under F.R.C.P. 26 – See: <u>Exhibit H</u> attached thereto.</p>

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<p>26. On October 20, 1999, Plaintiff's Counsel sent a letter to the General Manager of the Pleasanton Fairgrounds requesting contractual and/or legal authority for his request that Plaintiffs provide a written plan for conducting gun shows in compliance with the ordinance.</p>	<p>26. PLAINTIFFS' INITIAL DISCLOSURES under F.R.C.P. 26 – See: <u>Exhibit H</u> attached thereto.</p> <p>See also Exhibit D attached to DEFENDANTS' MOTION FOR SUMMARY JUDGMENT.</p>
<p>27. November 3, 1999, this Honorable Court issued an Order denying Plaintiffs' request for pre-trial injunctive relief.</p>	<p>27. Judicial Notice of Docket Report.</p>
<p>28. Plaintiffs (Nordykes) canceled the gun show scheduled for the weekend of November 6/7, 1999 due to:</p> <ul style="list-style-type: none"> a. prevent the fraud of hosting a gun-less gun show, b. the Court's November 3, 1999 Order denying injunctive relief, c. the demand by the fairgrounds to produce a written plan for hosting a gun-less gun show, which the Plaintiffs were unable to do. d. cancellation of reservations by several vendors and exhibitors due to the passage of the Ordinance. <p>Defendant's Objection(s): Relevance.</p>	<p>28. See ¶¶ 34 and 35 of the AMENDED VERIFIED COMPLAINT FOR DAMAGES, INJUNCTION, AND DECLARATORY JUDGMENT. Entered on the Docket on November 16, 1999.</p>
<p>29. In a December 10, 1999 letter, the Events Coordinator of the Alameda County Fairgrounds released all reserved dates held for Plaintiffs for the year 2000.</p> <p>Defendant's Objection(s): Relevance.</p>	<p>29. PLAINTIFFS' INITIAL DISCLOSURES under F.R.C.P. 26 – See: <u>Exhibit H</u> attached thereto.</p>
<p>30. On January 5, 2000, the Events Coordinator of the Alameda County Fairgrounds sent a letter to the Nordykes returning their deposits for the year 2000, because Plaintiffs could not produce a plan to hold gun shows (without firearms) that would comply with the Ordinance.</p>	<p>30. PLAINTIFFS' INITIAL DISCLOSURES under F.R.C.P. 26 – See: <u>Exhibit H</u> attached thereto.</p> <p>See also Exhibit E attached to DEFENDANTS' MOTION FOR SUMMARY JUDGMENT; and declaration of Rick Pickering at ¶ 6.</p>

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<p>31. As of November 3, 2005, The Scottish Games have never been required to submit a plan (written or otherwise) about how their show would comply with the Ordinance. Instead, the Alameda County Counsel and Alameda County Sheriff simply “assured” the Fairground’s management that the Scottish Games complied with the Ordinance as amended.</p> <p>Defendant’s Objection(s): Relevance.</p>	<p>31. Deposition of Rick K. Pickering. 9:16 – 14:12; 26:6 – 26:22; 30:7 – 34:8 and 78:18 – 80:9.</p>
<p>32. To date, the Nordykes have not explained how they could conduct a gun show at the Alameda County Fairgrounds (without firearms) consistent with the Ordinance.</p>	<p>32. Declaration of Rick Pickering at ¶ 7.</p>
<p>33. In 2005, the Nordykes held multiple gun shows in California.</p>	<p>33. See Exhibit F attached to DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT.</p>
<p>34. In 2005, there were at least 22 gun shows in California.</p>	<p>34. See Exhibit G attached to DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT.</p>
<p>35. Plaintiffs’ gun shows “bring hundreds, if not thousands, of firearms to one location.”</p>	<p>35. THIRD AMENDED COMPLAINT at ¶ 60.g.</p>
<p>36. Plaintiffs’ gun shows “involve the exhibition, display and offering for sale” of firearms.</p>	<p>36. THIRD AMENDED COMPLAINT at ¶ 17.</p>
<p>37. Attendance at the Plaintiffs’ gun shows at the Alameda County Fairgrounds was at least 4,000 people.</p>	<p>37. THIRD AMENDED COMPLAINT at ¶ 45.</p>
<p>38. At Plaintiffs’ gun shows, in order for a firearm to be sold, it must be physically inspected by both the seller and the buyer to insure correct documentation of the serial number, make, model and caliber of the weapon; and to insure that the firearm may be legally sold.</p> <p>Defendant’s Objection(s): Relevance and Question of Law.</p>	<p>38. THIRD AMENDED COMPLAINT at ¶¶ 60.i – 60.n.</p>

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<p>39. Fairground’s Manager, Richard Pickering, based on his knowledge of firearms and his experience as an NRA instructor is not aware that any firearms subject to the County’s ban on possession, and not within an exception to the ban, have been allowed on the Fairgrounds.</p>	<p>39. Declaration of Richard Pickering at ¶ 9.</p>
<p>40. The Scottish Games events held at the Alameda County Fairgrounds involve historical re-enactments of gun battles.</p>	<p>40. Declaration of Richard Pickering at ¶ 13.</p>
<p>41. The General Manager, Richard Pickering, has no personal knowledge of any live ammunition being used in the historical re-enactments that are part of the Scottish Games, and that he would take immediate steps to prevent or prohibit the use of live ammunition in such a situation, and that rifles used during the historical re-enactments are required to be unloaded or loaded with blank cartridges.</p>	<p>41. Declaration of Richard Pickering at ¶ 13.</p>
<p>42. According to Richard Pickering, as part of the Ordinance being enforced, it is only those persons directly participating in the historical re-enactments who may possess a rifle, and those persons are required to have the firearm in their actual possession and when not in their possession, to secure the rifle.</p>	<p>42. Declaration of Richard Pickering at ¶ 13. See also: Exhibit A (§ 9.12.120(f)(4)) attached to DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT.</p>
<p>43. Defendants have no evidence of any violent criminal activity occurring at any gun show hosted by the Nordykes and held at the Alameda County Fairgrounds for the years 1991 through Feb. 27, 2006. Defendant’s Objection(s): Relevance.</p>	<p>43. DEFENDANTS’ RESPONSE TO PLAINTIFFS’ REQUEST FOR ADMISSION: #30.</p>
<p>44. Defendants have no evidence of any violation of federal or state firearm laws occurring at any gun show hosted by the Nordykes and held at the Alameda County Fairgrounds for the years 1991 through February 27, 2006. Defendant’s Objection(s): Relevance.</p>	<p>44. DEFENDANTS’ RESPONSE TO PLAINTIFFS’ REQUEST FOR ADMISSION: #31.</p>

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UNDISPUTED FACT

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<p>45. The Alameda Ordinance contains no language directing any interested party to any particular department or agency of the County of Alameda for decisions regarding interpretations of the Ordinance.</p> <p>Defendant's Objection(s): Relevance.</p>	<p>45. DEFENDANTS' RESPONSE TO PLAINTIFFS' REQUEST FOR ADMISSION: #35.</p>
<p>46. The Alameda Ordinance does not prohibit an offer to sell a firearm.</p>	<p>46. DEFENDANTS' RESPONSE TO PLAINTIFFS' REQUEST FOR ADMISSION: #41.</p>
<p>47. The Alameda Ordinance does not prohibit the actual sale of a firearm.</p>	<p>47. DEFENDANTS' RESPONSE TO PLAINTIFFS' REQUEST FOR ADMISSION: #41.</p>
<p>48. Sometime after the July 4, 1998 shooting, the Alameda County Fair Association purchased metal detectors for the purpose of detecting weapons at the entrance to the County Fairgrounds.</p> <p>Defendant's Objection(s): Relevance.</p>	<p>48. DEFENDANTS' RESPONSE TO PLAINTIFFS' REQUEST FOR ADMISSION: #27.</p>
<p>49. Randi Rossi, the Director of the Firearms Division of the California Department of Justice, is aware of no violations of any state or federal laws occurring at the gun shows hosted by the Nordykes. Furthermore, the Nordykes are in compliance with the promoter requirements of California Penal Code § 12071.4, a.k.a.: Gun Show Enforcement and Security Act of 2000.</p> <p>Defendant's Objection(s): Relevance and Question of Law.</p>	<p>49. Deposition of Randi Rossi. 16:12 – 22:18.</p>
<p>50. Ignatius Chinn, a Special Agent Supervisor with the Firearms Division of the California Department of Justice, is aware of no violations of any federal and/or state laws by the Nordykes while putting on their gun shows.</p> <p>Defendant's Objection(s): Relevance.</p>	<p>50. Deposition of Ignatius Chinn. 12:5 – 12:8.</p>

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<p>51. California Penal Code § 12071.4 otherwise known as the Gun Show Enforcement and Security Act of 2000 became state law after the Nordykes canceled their last show at the Alameda County Fairgrounds in November, 1999.</p> <p>Defendant's Objection(s): Relevance and Question of Law.</p>	<p>51. REQUEST FOR JUDICIAL NOTICE Re: LEGISLATIVE HISTORY OF PENAL CODE § 12071.4.</p>
<p>52. California Penal Code § 12071.4(b)(5) requires gun show promoters to verify that all firearms in their possession at the show or event will be unloaded, and that the firearms will be secured in a manner that prevents them from being operated except for brief periods when the mechanical condition of a firearm is being demonstrated to a prospective buyer.</p> <p>Defendant's Objection(s): Relevance and Question of Law.</p>	<p>52. REQUEST FOR JUDICIAL NOTICE Re: California Penal Code § 12071.4(b)(5).</p>
<p>53. California Penal Code § 12071.4(g) mandates that no person at a gun show or event, other than security personnel or sworn peace officers, shall possess at the same time both a firearm and ammunition that is designed to be fired in the firearm. Vendors having those items at the show for sale or exhibition are exempt from this prohibition.</p> <p>Defendant's Objection(s): Relevance and Question of Law.</p>	<p>53. REQUEST FOR JUDICIAL NOTICE Re: California Penal Code § 12071.4(g).</p>
<p>54. California Penal Code § 12071.4(h) mandates no member of the public who is under the age of 18 years shall be admitted to, or be permitted to remain at, a gun show or event unless accompanied by a parent or legal guardian. Any member of the public who is under the age of 18 shall be accompanied by his or her parent, grandparent, or legal guardian while at the show or event.</p> <p>Defendant's Objection(s): Relevance and Question of Law.</p>	<p>54. REQUEST FOR JUDICIAL NOTICE Re: California Penal Code § 12071.4(h).</p>

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<p>55. California Penal Code § 12071.4(i) mandates that persons other than show or event security personnel, sworn peace officers, or vendors, who bring firearms onto the gun show or event premises shall sign in ink the tag or sticker that is attached to the firearm prior to being allowed admittance to the show or event, as provided for in subdivision (j).</p> <p>Defendant's Objection(s): Relevance and Question of Law.</p>	<p>55. REQUEST FOR JUDICIAL NOTICE Re: California Penal Code § 12071.4(i).</p>
<p>56. California Penal Code § 12071.4(k) mandates all persons possessing firearms at the gun show or event shall have in his or her immediate possession, government-issued photo identification, and display it upon request, to any security officer, or any peace officer.</p> <p>Defendant's Objection(s): Relevance and Question of Law.</p>	<p>56. REQUEST FOR JUDICIAL NOTICE Re: California Penal Code § 12071.4(k).</p>
<p>57. California Penal Code § 12071.4(j) mandates that all firearms carried onto the premises of a gun show or event by members of the public shall be checked, cleared of any ammunition, secured in a manner that prevents them from being operated, and an identification tag or sticker shall be attached to the firearm, prior to the person being allowed admittance to the show. The identification tag or sticker shall state that all firearms transfers between private parties at the show or event shall be conducted through a licensed dealer in accordance with applicable state and federal laws. The person possessing the firearm shall complete the following information on the tag before it is attached to the firearm:</p> <ul style="list-style-type: none"> (1) The gun owner's signature. (2) The gun owner's printed name. (3) The identification number from the gun owner's government-issued photo identification. <p>Defendant's Objection(s): Relevance and Question of Law.</p>	<p>57. REQUEST FOR JUDICIAL NOTICE Re: California Penal Code § 12071.4(j).</p>

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<p>58. Plaintiff DARYL DAVIS has testified through declaration, that he is a member of the “gun culture” and that possession of a gun at a gun show supports, and is intended to convey, his belief that the Second Amendment protects an individual right to “keep and bear arms.”</p> <p>Defendant’s Objection(s): Relevance.</p>	<p>58. See DECLARATION OF DARYL DAVIS, Plaintiff. ¶¶ 10 – 15.</p>
<p>59. Plaintiff DARYL DAVIS has testified through declaration, that he supports the National Rifle Association’s interpretation of the Second Amendment; and that he attends gun shows with guns in order to support the NRA by actually engaging the act of possessing a firearm at a gun show in a jurisdiction (Northern California) where that right is called into question by current state and federal case law.</p> <p>Defendant’s Objection(s): Relevance and Question of Law.</p>	<p>59. See DECLARATION OF DARYL DAVIS, Plaintiff. ¶¶ 10–15.</p>
<p>60. Plaintiff DARYL DAVIS has testified that there is a great likelihood that others would understand these messages. This is based on his own observations of people possessing and handling guns at gun shows he has attended.</p> <p>Defendant’s Objection(s): Relevance and Hearsay.</p>	<p>60. See DECLARATION OF DARYL DAVIS, Plaintiff. ¶¶ 16 – 18.</p>
<p>61. Plaintiff DUANE DARR has testified through declaration, that he is a member of the “gun culture” and that possession of a gun at a gun show supports, and is intended to convey, his belief that the Second Amendment protects an individual right to “keep and bear arms.”</p> <p>Defendant’s Objection(s): Relevance.</p>	<p>61. See DECLARATION OF DUANE DARR, Plaintiff. ¶¶ 8 – 12.</p>

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UNDISPUTED FACT

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<p>62. Plaintiff DUANE DARR has testified through declaration, that he supports the National Rifle Association’s interpretation of the Second Amendment; and that he attends gun shows with guns in order to support the NRA by actually engaging the act of possessing a firearm at a gun show in a jurisdiction (Northern California) where that right is called into question by current state and federal case law.</p> <p>Defendant’s Objection(s): Relevance and Question of Law.</p>	<p>62. See DECLARATION OF DUANE DARR, Plaintiff. ¶¶ 8– 12.</p>
<p>63. Plaintiff DUANE DARR has testified that there is a great likelihood that others would understand these messages. This is based on his own observations of people possessing and handling guns at gun shows he has attended.</p> <p>Defendant’s Objection(s): Relevance and Hearsay.</p>	<p>63. See DECLARATION OF DUANE DARR, Plaintiff. ¶¶ 13 – 16.</p>
<p>64. Plaintiff DUANE DARR has testified that the physical presence of a firearm is necessary to conduct and contract for the sale of a firearm, especially antique firearms.</p> <p>Defendant’s Objection(s): Relevance.</p>	<p>64. See DECLARATION OF DUANE DARR, Plaintiff. ¶¶ 13 – 16.</p>
<p>65. Plaintiff JESS GUY has testified through declaration, that he is a member of the “gun culture” and that possession of a gun at a gun show supports, and is intended to convey, his belief that the Second Amendment protects an individual right to “keep and bear arms.”</p> <p>Defendant’s Objection(s): Relevance.</p>	<p>65. See DECLARATION OF JESS GUY, Plaintiff. ¶¶ 8 – 19.</p>

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UNDISPUTED FACT

EVIDENTIARY SUPPORT

<p>66. Plaintiff JESS GUY has testified through declaration, that he supports the National Rifle Association's interpretation of the Second Amendment; and that he attends gun shows with guns in order to support the NRA by actually engaging the act of possessing a firearm at a gun show in a jurisdiction (Northern California) where that right is called into question by current state and federal case law.</p> <p>Defendant's Objection(s): Relevance and Question of Law.</p>	<p>66. See DECLARATION OF JESS GUY, Plaintiff. ¶¶ 8 – 19.</p>
<p>67. Plaintiff JESS GUY has testified that there is a great likelihood that others would understand these messages. This is based on his own observations of people possessing and handling guns at gun shows he has attended.</p> <p>Defendant's Objection(s): Relevance and Hearsay.</p>	<p>67. See DECLARATION OF JESS GUY, Plaintiff. ¶¶ 20 – 21.</p>
<p>68. Plaintiff JESS GUY attended the NORDYKE'S gun show at the Santa Clara County Fairgrounds on the weekend of April 8 & 9, 2006. He was present when the pictures that are attached to his declaration were taken and he made the observations set forth in paragraphs 22.a. – 22.s of his declaration.</p> <p>Defendant's Objection(s): Relevance.</p>	<p>68. See DECLARATION OF JESS GUY, Plaintiff. ¶¶ 22 – 24.</p>
<p>69. Plaintiff VIRGIL Mc VICKER has testified through declaration, that he is a member of the "gun culture" and that possession of a gun at a gun show supports, and is intended to convey, his belief that the Second Amendment protects an individual right to "keep and bear arms."</p> <p>Defendant's Objection(s): Relevance.</p>	<p>69. See DECLARATION OF VIRGIL Mc VICKER, Plaintiff. ¶¶ 12 – 14.</p>

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UNDISPUTED FACT

EVIDENTIARY SUPPORT

<p>70. Plaintiff VIRGIL Mc VICKER has testified through declaration, that he supports the National Rifle Association’s interpretation of the Second Amendment; and that he attends gun shows with guns in order to support the NRA by actually engaging the act of possessing a firearm at a gun show in a jurisdiction (Northern California) where that right is called into question by current state and federal case law.</p> <p>Defendant’s Objection(s): Relevance and Question of Law.</p>	<p>70. See DECLARATION OF VIRGIL Mc VICKER, Plaintiff. ¶¶ 12 – 14.</p>
<p>71. Plaintiff VIRGIL Mc VICKER has testified that there is a great likelihood that others would understand these messages. This is based on his own observations of people possessing and handling guns at gun shows he has attended.</p> <p>Defendant’s Objection(s): Relevance Hearsay.</p>	<p>71. See DECLARATION OF VIRGIL Mc VICKER, Plaintiff. ¶¶ 15 – 18.</p>
<p>72. Plaintiff MIKE FOURNIER has testified through declaration, that he is a member of the “gun culture” and that possession of a gun at a gun show supports, and is intended to convey, his belief that the Second Amendment protects an individual right to “keep and bear arms.”</p> <p>Defendant’s Objection(s): Relevance.</p>	<p>72. See DECLARATION OF MIKE FOURNIER, Plaintiff. ¶¶ 5 – 7.</p>
<p>73. Plaintiff MIKE FOURNIER has testified through declaration, that he supports the National Rifle Association’s interpretation of the Second Amendment; and that he attends gun shows with guns in order to support the NRA by actually engaging the act of possessing a firearm at a gun show in a jurisdiction (Northern California) where that right is called into question by current state and federal case law.</p> <p>Defendant’s Objection(s): Relevance and Question of Law.</p>	<p>73. See DECLARATION OF MIKE FOURNIER, Plaintiff. ¶¶ 5 – 7.</p>

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UNDISPUTED FACT

EVIDENTIARY SUPPORT

<p>74. Plaintiff MIKE FOURNIER has testified that there is a great likelihood that others would understand these messages. This is based on his own observations of people possessing and handling guns at gun shows he has attended.</p> <p>Defendant's Objection(s): Relevance and Hearsay.</p>	<p>74. See DECLARATION OF MIKE FOURNIER, Plaintiff. ¶¶ 8 – 9.</p>
<p>75. Plaintiff MIKE FOURNIER does not have a permit to carry concealed weapons pursuant to California Penal Code § 12050.</p>	<p>75. See DECLARATION OF MIKE FOURNIER, Plaintiff. ¶¶ 10 – 13.</p>
<p>76. Plaintiff MIKE FOURNIER sells, at his store and at gun shows, many of the same kinds of engraved and commemorative firearms that are shown in the book <u>Steel Canvas – The Art of American Arms</u>, by R.L. Wilson.</p> <p>Defendant's Objection(s): Relevance.</p>	<p>76. See DECLARATION OF MIKE FOURNIER, Plaintiff. ¶¶ 10 – 13.</p>
<p>77. Patrons and exhibitors attend gun shows for various reasons, but overwhelmingly attend them in order obtain political information about their “right to keep and bear arms” and to assemble with like-minded individuals regarding their common culture (i.e., the gun culture.)</p> <p>Defendant's Objection(s): Relevance.</p>	<p>77. See the more than 300 THIRD PARTY DECLARATIONS IN SUPPORT OF INJUNCTIVE RELIEF filed on or about September 17, 1999; including the DECLARATION OF AMY HO which includes the statistical breakdown regarding statements made by patrons and exhibitors filed the same day.</p>
<p>78. Patrons and exhibitors at Plaintiffs’ gun shows are strongly opposed to attending gun shows, and overwhelmingly state that they will not attend gun shows, where the possession of firearms, and the therefore the presence of firearms is prohibited.</p> <p>Defendant's Objection(s): Relevance.</p>	<p>78. See video taped interviews of patrons and exhibitors attending the April 8/9, 2006 gun show at the Santa Clara County Fairgrounds, attached to: DECLARATION OF PLAINTIFFS’ COUNSEL DONALD KILMER RE: TAPED INTERVIEWS AT T.S. GUN SHOW AT SANTA CLARA COUNTY FAIRGROUNDS APRIL 8/9, 2006.</p>
<p>79. Guns and the possession of guns, especially at gun shows, can convey political messages.</p> <p>Defendant's Objection(s): Relevance and Hearsay.</p>	<p>79. See: PLAINTIFFS EXPERTS’ REPORT.</p>

Donald Kilmer
Attorney at Law
1645 Willow St.
Suite 150
San Jose, CA 95125
Vc: 408/264-8489
Fx: 408/264-8487

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UNDISPUTED FACT

EVIDENTIARY SUPPORT

<p>80. The possession of firearms on county property, and therefore the ability to hold gun shows on county fairgrounds, has been banned in the counties of: Alameda, Sonoma, San Mateo, Marin; and the City of Santa Cruz.</p> <p>Defendant's Objection(s): Relevance and Lack of Foundation.</p>	<p>80. PLAINTIFFS' INITIAL DISCLOSURES under F.R.C.P. 26 – See: <u>Exhibit N</u> attached thereto.</p>
<p>81. Plaintiffs RUSSELL and SALLIE NORDYKE have testified through their declarations, that they are members of the “gun culture” and that possession of a gun at a gun show supports, and is intended to convey, their belief that the Second Amendment protects an individual right to “keep and bear arms.”</p> <p>Defendant's Objection(s): Relevance.</p>	<p>81. See: DECLARATION OF RUSSELL AND SALLIE NORDYKE. ¶¶ 27 & 28.</p>
<p>82. Plaintiffs RUSSELL and SALLIE NORDYKE have testified through their declarations, that they support the National Rifle Association's interpretation of the Second Amendment; and that they host gun shows with guns, in part, in order to support the NRA by actually engaging the act of possessing a firearm at a gun show in a jurisdiction (California) where that right is called into question by current state and federal case law.</p> <p>Defendant's Objection(s): Relevance and Question of Law.</p>	<p>82. See: DECLARATION OF RUSSELL AND SALLIE NORDYKE. ¶¶ 27 & 28.</p>
<p>83. Plaintiffs RUSSELL and SALLIE NORDYKE have testified that there is a great likelihood that others would understand these messages. This is based on their own observations of people possessing and handling guns at gun shows they host and promote.</p> <p>Defendant's Objection(s): Relevance and Hearsay.</p>	<p>83. See: DECLARATION OF RUSSELL AND SALLIE NORDYKE. ¶¶ 29 – 37.</p>

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UNDISPUTED FACT

EVIDENTIARY SUPPORT

<p>84. Plaintiffs RUSSELL and SALLIE NORDYKE are unwilling to commit a fraud upon their regular exhibitors, vendors and patrons by hosting a gun-less gun show. They maintain that the very idea is absurd.</p> <p>Defendant's Objection(s): Relevance and Question of Law.</p>	<p>84. See: DECLARATION OF RUSSELL AND SALLIE NORDYKE. ¶¶ 29 – 37.</p>
<p>85. Plaintiffs RUSSELL and SALLIE NORDYKE maintain that they comply with all Federal and State Laws regulating the firearms industry and gun shows in particular, and that they are members of the National Association of Arms, Inc., and that they follow that associations guidelines for conduct safe and lawful gun shows.</p> <p>Defendant's Objection(s): Relevance and Question of Law.</p>	<p>85. See: DECLARATION OF RUSSELL AND SALLIE NORDYKE. ¶¶ 29 – 37.</p>
<p>86. There is no gun show loophole at California Gun Shows that comply with California law.</p> <p>Defendant's Objection(s): Relevance and Question of Law.</p>	<p>86. Deposition of Randi Rossi. 11:9 – 16:12.</p> <p>See: DECLARATION OF RUSSELL AND SALLIE NORDYKE. ¶¶ 32 & 33.</p>
<p>87. Plaintiffs RUSSELL and SALLIE NORDYKE have sustained monetary losses in the form of lost profits from the ban on gun shows at the Alameda County Fairgrounds. They also have monetary losses (though not sought in this suit) from the ban on gun shows in the Counties of Marin, Sonoma and San Mateo.</p> <p>Defendant's Objection(s): Relevance and Lack of Foundation.</p>	<p>87. See: DECLARATION OF RUSSELL AND SALLIE NORDYKE. ¶ 36.d.</p>
<p>88. Alameda County Counsel's Office is authorized to interpret the Ordinance and its exceptions.</p> <p>Defendant's Objection(s): Relevance.</p>	<p>88. DEFENDANTS' RESPONSES TO PLAINTIFFS' INTERROGATORIES. #21.A.</p>

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UNDISPUTED FACT

EVIDENTIARY SUPPORT

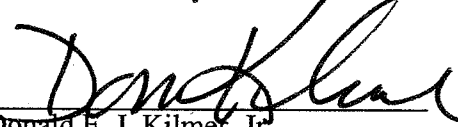
<p>89. Richard Pickering, General Manager of the Alameda County Fairgrounds, has no authority to grant exceptions to Alameda County Ordinances.</p> <p>Defendant's Objection(s): Relevance.</p>	<p>89. See <u>Exhibit 8</u> attached to Deposition of Rick K. Pickering.</p>
<p>90. Richard Pickering, General Manager of the Alameda County Fairgrounds, referred all decisions about exceptions to Alameda Ordinance to County Counsel and/or the Alameda County Sheriff.</p> <p>Defendant's Objection(s): Relevance.</p>	<p>90. Deposition of Rick K. Pickering. 36: 18 – 39:18 and 72:19 – 75:2. 80: 1 – 10.</p>
<p>END OF DOCUMENT</p>	<p>END OF DOCUMENT</p>


The parties agree, by and through counsel, that facsimile signatures shall constitute originals.

SO STIPULATED.

Date: Sept 1, 2006

Date: September 1, 2006


 Donald E. J. Kilmer, Jr.
 Attorney for Plaintiffs


 T. Peter Pierce
 Attorney for Defendants

Chapter 9.12

FIREARMS AND DANGEROUS WEAPONS

9.12.120 Possession of firearms on county property prohibited.

A. Findings. The board of supervisors finds that gunshot fatalities and injuries are of epidemic proportions in Alameda County. During the first five years of the 1990's, eight hundred seventy-nine (879) homicides were committed using firearms, and an additional one thousand six hundred forty-seven (1,647) victims were hospitalized with gunshot injuries. Firearms are the leading cause of death among young people between the ages of fifteen (15) and twenty-four (24) in Alameda County. Between July 1, 1996 and June 30, 1997, one hundred thirty-six (136) juveniles were arrested in Oakland for gun-related offenses. On July 4, 1998 a shooting incident on the Alameda County Fairgrounds resulted in several gunshot wounds, other injuries and panic among fair goers. Prohibiting the possession of firearms on county property will promote the public health and safety by contributing to the reduction of gunshot fatalities and injuries in the county.

B. Misdemeanor. Every person who brings onto or possesses on county property a firearm, loaded or unloaded, or ammunition for a firearm is guilty of a misdemeanor.

C. County Property. As used in this section, the term county property means real property, including any buildings thereon, owned or leased by the county of Alameda (hereinafter "county"), and in the county's possession, or in the possession of a public or private entity under contract with the county to perform a public purpose, including but not limited to real property owned or leased by the county in the unincorporated and incorporated portions of the county, such as the county park in Sunol and the Alameda County Fairgrounds in the city of Pleasanton, but does not include any "local public building" as defined in Penal Code Section 171b(c), where the state regulates possession of firearms pursuant to Penal Code Section 171b.

D. Firearm. "Firearm" is any gun, pistol, revolver, rifle or any device, designed or modified to be used as a weapon, from which is expelled through a barrel a projectile by the force of an explosion or other form of combustion. "Firearm" does not include imitation firearms or BB guns and air rifles as defined in

Government Code Section 53071.5.

E. Ammunition. "Ammunition" is any ammunition as defined in Penal Code Section 12316(b)(2).

F. Exceptions. Subsection 9.12.120B does not apply to the following:

1. A peace officer as defined in Title 3, Part 2, Chapter 4.5 of the California Penal Code (Sections 830 et seq.);
2. A guard or messenger of a financial institution, a guard of a contract carrier operating an armored vehicle, a licensed private investigator, patrol operator, or alarm company operator, or uniformed security guard as these occupations are defined in Penal Code Section 12031(d) and who holds a valid certificate issued by the Department of Consumer Affairs under Penal Code Section 12033, while actually employed and engaged in protecting and preserving property or life within the scope of his or her employment;
3. A person holding a valid license to carry a firearm issued pursuant to Penal Code Section 12050;
4. The possession of a firearm by an authorized participant in a motion picture, television, video, dance or theatrical production or event, when the participant lawfully uses the firearm as part of that production or event, provided that when such firearm is not in the actual possession of the authorized participant, it is secured to prevent unauthorized use.
5. A person lawfully transporting firearms or ammunition in a motor vehicle on county roads;
6. A person lawfully using the target range operated by the Alameda County sheriff;
7. A federal criminal investigator or law enforcement officer; or
8. A member of the military forces of the state of California or of the United States while engaged in the performance of his or her duty.

G. Severability. If any provision of this section or the application thereof to any

person or circumstance is held invalid, such invalidity shall not affect any other provision or application of this section which can be given effect without the invalid provision or application, and to this end the provisions of this section are severable.

(Ord. 2000-22, 1999: Ord. 2000-11 § 1)

**CALIFORNIA GUN SHOW SECURITY
AND ENFORCEMENT ACT OF 2000**

CALIFORNIA PENAL CODE SECTION 12071.4

12071.4. (a) This section shall be known, and may be cited as, the Gun Show Enforcement and Security Act of 2000.

(b) All gun show or event vendors shall certify in writing to the producer that they:

(1) Will not display, possess, or offer for sale any firearms, knives, or weapons for which possession or sale is prohibited.

(2) Acknowledge that they are responsible for knowing and complying with all applicable federal, state, and local laws dealing with the possession and transfer of firearms.

(3) Will not engage in activities that incite or encourage hate crimes.

(4) Will process all transfers of firearms through licensed firearms dealers as required by state law.

(5) Will verify that all firearms in their possession at the show or event will be unloaded, and that the firearms will be secured in a manner that prevents them from being operated except for brief periods when the mechanical condition of a firearm is being demonstrated to a prospective buyer.

(6) Have complied with the requirements of subdivision (e).

(7) Will not display or possess black powder, or offer it for sale.

(c) All firearms transfers at the gun show or event shall be in accordance with applicable state and federal laws.

(d) Except for purposes of showing ammunition to a prospective buyer, ammunition at a gun show or event may be displayed only in closed original factory boxes or other closed containers.

(e) Prior to the commencement of a gun show or event, each vendor shall provide to the producer all of the following information relative to the vendor, the vendor's employees, and other persons, compensated or not, who will be working or otherwise providing services to the public at the vendor's display space if firearms manufactured after December 31, 1898, will be offered for sale:

(1) His or her complete name.

(2) His or her driver's license or state-issued identification

card number.

(3) His or her date of birth.

The producer shall keep the information at the show's or event's onsite headquarters for the duration of the show or event, and at the producer's regular place of business for two weeks after the conclusion of the show or event, and shall make the information available upon request to any sworn peace officer for purposes of the officer's official law enforcement duties.

(f) Vendors and employees of vendors shall wear name tags indicating first and last name.

(g) No person at a gun show or event, other than security personnel or sworn peace officers, shall possess at the same time both a firearm and ammunition that is designed to be fired in the firearm. Vendors having those items at the show for sale or exhibition are exempt from this prohibition.

(h) No member of the public who is under the age of 18 years shall be admitted to, or be permitted to remain at, a gun show or event unless accompanied by a parent or legal guardian. Any member of the public who is under the age of 18 shall be accompanied by his or her parent, grandparent, or legal guardian while at the show or event.

(i) Persons other than show or event security personnel, sworn peace officers, or vendors, who bring firearms onto the gun show or event premises shall sign in ink the tag or sticker that is attached to the firearm prior to being allowed admittance to the show or event, as provided for in subdivision (j).

(j) All firearms carried onto the premises of a gun show or event by members of the public shall be checked, cleared of any ammunition, secured in a manner that prevents them from being operated, and an identification tag or sticker shall be attached to the firearm, prior to the person being allowed admittance to the show. The identification tag or sticker shall state that all firearms transfers between private parties at the show or event shall be conducted through a licensed dealer in accordance with applicable state and federal laws. The person possessing the firearm shall complete the following information on the tag before it is attached to the firearm:

- (1) The gun owner's signature.
- (2) The gun owner's printed name.
- (3) The identification number from the gun owner's

government-issued photo identification.

(k) All persons possessing firearms at the gun show or event shall have in his or her immediate possession, government-issued photo identification, and display it upon request, to any security officer, or any peace officer.

(l) Unless otherwise specified, a first violation of this section is an infraction. Any second or subsequent violation is a misdemeanor. Any person who commits an act which he or she knows to be a violation of this section is guilty of a misdemeanor for a first offense.