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' PETITION FOR PANEL REHEARING AND/OR *EN BANC* REHEARING

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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: May 23, 2011

/s/

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INTRODUCTION

This petition seeks a Panel Rehearing and/or modification of the panel's decision on the limited question: Does the same reasoning for remanding the case to the District Court (changes in the law since 2004) to litigate a Second Amendment claim, imply that the original state-law preemption claims can also be replead?

This petition also seeks *En Banc* Rehearing of this matter for three reasons: (1) To consider the exceptionally important question of why – with respect to the Second Amendment, an enumerated fundamental right – the verb clause "undue burden" is an appropriate substitute for the verb "infringed." (2) In order to insure uniformity of Ninth Circuit decisions, whether the test in *U.S. v. O'Brien*, 391 U.S. 367 (1968) used by the *Nordyke* panel is congruent with this Court's *en banc* application of that test as set forth in *Berger v. City of Seattle*, 569 F.3d 1029 (9th Cir. 2009). And (3), to determine why the original panel treated Nordykes' equal protection claim like a substantive due process claim.

REQUEST FOR PANEL REHEARING

A petition for panel rehearing is appropriate if the court's directions to the district court or agency are vague or confusing. FRAP Rule 35. *International Chem. Workers Union Council of United Food & Comm'l Workers Int'l v. NLRB*, 467 F.3d 742, 745 (9th Cir. 2006) – petition granted and directions to NLRB on remand made explicit; *In re Yagman*, 803 F.2d 1085 (9th Cir. 1986) – court modified its decision to eliminate confusion, but denied petition for rehearing.

In its order for remand, the panel noted that the amended complaint was tendered to the trial court in 2004. That fact, coupled with the intervening Second Amendment law developed since then, made it appropriate to permit Plaintiffs to amend their Second Amendment claims. *Nordyke,* 2011 U.S. App. LEXIS 8906, *29 – 30.

The same can be said for the state-law preemption claims that were adjudicated back in 2002. Declining to answer the full question that was certified to it (*Nordyke v. King*, 229 F.3d 1266 (2000)), the California Supreme Court – "decline[d] to address whether the Ordinance is partially preempted by the above statutes." *Nordyke v. King*, 27 Cal 4th 875, 884-85 (2002). Instead the California Supreme

Court went on to hold that: "[...W]hether or not the Ordinance is partially preempted, Alameda County has the authority to prohibit the operation of gun shows held on its property, and, at least to that extent, may ban possession of guns on its property." *Id*, at 885.

An important contextual consideration is that the California Supreme Court was voicing an opinion premised on its own recent ruling that the California Constitution has no analogue to the Second Amendment's "right to keep and bear arms." *Kasler v. Lockyer*, 23 Cal. 4th 472 (2000). Federal law was in accord. *Hickman v. Block*, 81 F.3d 98 (9th Cir. 1998).

Justice Brown in a very prescient dissent reminded everyone: "[T]he county did not enact a prohibition against gun shows. Instead, the county prohibited, with limited exceptions, the possession of firearms on county property." *Nordyke v. King*, 27 Cal. 4th 875, 885. She went on to strongly suggest that challenges to local regulations that impact fundamental rights – like the First Amendment – might obtain different results under the preemption analysis of *Sherwin-Williams Co. v. City of Los Angeles,* 4 Cal. 4th 893 (1993). *Nordyke v. King*, at 885-86. Furthermore, recent analysis by the California Court

of Appeals in *Fiscal v. City of San Francisco*, 158 Cal. App. 4th 895 (2008) on implied preemption, coupled with the findings in *McDonald v. Chicago*, 117 L. Ed 2d 894 (2010), suggest that the Alameda ordinance may be vulnerable to another preemption attack. This arises not only as a stand alone cause of action, but would have apparently been useful during the panel's analysis of the first prong of the *O'Brien* test: "*Because the Nordykes no longer argue that the County lacks the power to regulate firearms possession on county property, see Nordyke II, 27 Cal. 4th 875, 118 Cal. Rptr. 2d 761, 44 P.3d 133 (stating that the Ordinance is not preempted by state law), we need not address the first prong*." *Nordyke*, 2011 U.S. App. LEXIS 8906, *42.

The *Nordyke* Plaintiffs remain caught in the exact same Catch-22 conundrum with regard to the 'resolved' preemption claims as they were when they sought leave to amend their complaint to add a Second Amendment claim (i.e., changes in the law since 2004 may produce a different result). Plaintiff/Appellants hereby request that the panel indicate whether the state-law preemption claims can be replead upon remand.

PETITION FOR EN BANC REHEARING

Pursuant to FRAP Rule 35, *en banc* rehearings are considered in cases where it is necessary to maintain uniformity of Ninth Circuit's decisions and/or when the proceeding involves "a question of exceptional importance."

On at least one prior occasion this Court thought the issues raised by this case were important enough for a *sua sponte* call for *en banc* review. *Nordyke v. King,* 575 F.3d 890 (9th Cir. 2009). Furthermore, it would appear that constitutional scrutiny of Second Amendment rights is piquing the interest of the United States Supreme Court. On May 16, 2011, the High Court called for a response from the State of Maryland to a petition for a writ of certiorari in *Williams v. Maryland*, U.S. Supreme Court Docket # 10-1207. That state's high court practically issued a challenge to the U.S. Supreme Court when it filed an opinion saying: "*[I]f the Supreme Court, in [its Heller and McDonald decisions] means its holding to extend beyond home possession [of firearms], it will need to say so more plainly*." *Williams v. State*, 417 Md. 479, 10 A.3d 1167 (2011).

STATEMENT OF FACTS

The facts set forth in the panel opinion are a good introduction to the controversy, but some additional facts are necessary to flesh out this petition:

1. That guns at gun shows are either objects of instruction, objects of art or objects of commerce. They are required to be rendered safe by the state laws that regulate gun shows. Among the regulations rendering them inert are: (1) they must remain unloaded, (2) and the actions must be secured to prevent functioning with plastic/nylon straps. The County admits that the Nordykes have complied with these, and all other federal and state laws regulating gun shows.

2. The County amended its ordinance once already during this litigation. It did so to accommodate the military/historical re-enactors of the Scottish Games so that they could engage in expressive conduct with their guns at the fairgrounds, which involves loading firearms with blanks and shooting them at each other in mock battles. Banning gun shows was not inadvertent or incidental.

3. The local police chief and the California Department of Justice testified that the Nordyke's gun shows pose no crime burden on the community. The County also admitted that gun shows are not a source of crime and that all federal and state laws regarding firearm possession and sale are complied with at the Nordyke's gun shows.

4. Alameda County Counsel interpreted the ordinance as prohibiting guns at guns shows, making any requirement that the Nordykes submit a plan for how to comply with the ordinance a futility.

5. After the July, 1998 shooting at the county fair, Alameda

> County installed metal detectors at the entrance to the fairgrounds to screen for illegally carried weapons.

Specific citations to the record can be made available if the case is accepted for rehearing.

DISCUSSION

I. THE PANEL'S APPROACH TO THE CASE DOES NOT COMPORT WITH SUPREME COURT OR CIRCUIT PRECEDENT.

A. THERE IS NO REASON TO TREAT THE SECOND AMENDMENT DIFFERENT FROM OTHER FUNDAMENTAL RIGHTS.

The Supreme Court gave express instructions that the Second Amendment should not be accorded a lesser status among the Bill of Rights. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3044 (2010).

There is just no reason to treat the Second Amendment like a 'red-headed-step-child' when there are conventional constitutional doctrines available for adjudicating enumerated fundamental rights.

The panel chose to apply an 'undue burden' test and treat the Second Amendment like an unenumerated – substantive due process – right to an abortion (even while asserting that abortion itself may no longer be a fundamental right.) *Nordyke*, 2011 U.S. App. LEXIS 8906, *20-22 and fn.8. The panel does not explain why the verb clause 'undue burden' is an appropriate substitute for the verb 'infringed.'

Judge Kozinski (before he became Chief Judge) was on target in his dissent from rehearing *en banc* in *Silveira v. Lockyer*, when he said:

> Judges know very well how to read the Constitution broadly when they are sympathetic to the right being asserted. We have held, without much ado, that "speech, or . . . the press" also means the Internet, see *Reno v. ACLU*, 521 U.S. 844, 138 L. Ed. 2d 874, 117 S. Ct. 2329 (1997), and that "persons, houses, papers, and effects" also means public telephone booths, see *Katz v. United States*, 389 U.S. 347, 19 L. Ed. 2d 576, 88 S. Ct. 507 (1967). When a particular right comports especially well with our notions of good social policy, we build magnificent legal edifices on elliptical constitutional phrases – or even the white spaces between lines of constitutional text. See, e.g., *Compassion in Dying v. Washington*, 79 F.3d 790 (9th Cir. 1996) (en banc), rev'd sub nom. *Washington v. Glucksberg*, 521 U.S. 702, 138 L. Ed. 2d 772, 117 S. Ct. 2258, 117 S. Ct. 2302 (1997). But, as the panel amply demonstrates, when we're none too keen on a particular constitutional guarantee, we can be equally ingenious in burying language that is incontrovertibly there.
>
> It is wrong to use some constitutional provisions as spring-boards for major social change while treating others like senile relatives to be cooped up in a nursing home until they quit annoying us. As guardians of the Constitution, we must be consistent in interpreting its provisions. If we adopt a jurisprudence sympathetic to individual rights, we must give broad compass to all constitutional provisions that protect individuals from tyranny. If we take

> a more statist approach, we must give all such provisions narrow scope. Expanding some to gargantuan proportions while discarding others like a crumpled gum wrapper is not faithfully applying the Constitution; it's using our power as federal judges to constitutionalize our personal preferences.
>
> *Silveira v. Lockyer,* 328 F.3d 567 (2003)

Unless/until the Nordykes return to the trial court and try to amend their claims with newly relevant facts to support a Second Amendment claim, the primary right they are seeking to vindicate on this record is their right to engage in the 'lawful purpose' of commerce in firearms. A right for which they are already licensed and well-regulated by the State of California.

Nordykes are not asserting a right to compel the County to open its fairgrounds for their gun shows. The County did not close the fairgrounds to the possession of all guns. *Palmer v. Thompson*, 403 U.S. 217 (1971). They are simply asking to compete on a level playing field with all the other lawful commerce that takes place at that venue.

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 fact pattern in *Heller,* the rights under the Second Amendment should not be confined to the facts of one case.

The Second Amendment, like the First, must include the right to possess and acquire the constitutionally protected means of exercising the right – books, newspapers and arms.

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 recognize a "right to keep and bear arms" (See: *Kasler v. Lockyer*, 23 Cal.4th 472, 480 (2000)), a federal court can 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 PLCAA[1] is founded on the Second Amendment and asserts Congressional authority to protect those rights under the 14th 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.[2] The Congressional findings in FOPA bundled

[1] Public Law 109-92, 15 U.S.C. § 7901-7903.

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

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) laws are obeyed by Appellants' gun shows.

Congress's recognition that the Second Amendment includes the right to acquire firearms is also 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.[3]

The panel's stingy approach to the lawful commerce rights protected by the Second Amendment is both unnecessary and a departure from established constitutional doctrine on adjudicating fundamental rights.

B. 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. As the Ordinance purports to maintain exceptions for expressive conduct with guns during the Scottish Games, motions pictures, television and theatrical productions, the County is engaged in regulating expressive conduct with guns. This is an exact match to the analysis of Texas flag burning statute. Therefore the Ordinance should have been subjected to the rigorous strict scrutiny test laid down in *Texas v. Johnson*, 491 U.S. 397 (1989) and not the speed bump of *U.S. v. O'Brien*, 391 U.S. 367 (1968).

But even if the Ordinance's impact on the Nordykes' gun shows is

[3] 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*."

to receive only intermediate scrutiny, the panel did not apply the modified-*O'Brien* test as set forth by an *en banc* panel of this Court in *Berger v. City of Seattle*, 569 F.3d 1029, 1051 (9th Cir. 2009). Part of that modified test is to take a close look at view-point based regulations of speech. "*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*, 569 F.3d at 1051. The uncontradicted evidence is that the ordinance bans expressive conduct at gun shows while permitting expressive conduct with guns at the Scottish Games and other entertainment events.

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).

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

The panel shrugged off the Nordykes' equal protection claim by treating it like a substantive due process claim under *Albright v. Oliver*, 510 U.S. 266 (1994). Their mistake was in ignoring binding Ninth Circuit precedent that 'equal protection' with regard to a fundamental right is a separate and distinct legal theory that is not subject to the *Albright/Oliver* substantive due process 'merger' analysis. See: *Carpenteria Valley Farms, Ltd., v. County of Santa Barbara*, 344 F.3d 822 (9th Cir. 2003) for another case that pleads First Amendment and Equal Protection claims arising out of the same facts.

Nordykes contend that guns at gun shows are more strictly regulated and safer than guns at the Scottish Games. E.g., guns at gun shows are secured, unloaded and rendered inert pursuant to state law. While the guns at the Scottish Games are secured pursuant to a county ordinance that only requires guns to remain in the possession of the owner. The factual controversy is easily resolved, the *Nordyke* Plaintiffs were entitled to the favorable inference that guns at state regulated 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 PANEL SHOULD HAVE APPLIED 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 possessed guns). A recent *en banc* panel of this Court struck down regulations of expressive conduct on pubic 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 set forth in the ordinance's legislative history and its exemption for possession of guns at the Scottish Games. 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. *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.

The County may argue their Ordinance makes (vague) claims about reducing gun violence. To presume such a purpose for the Ordinance just begs the question of method: How does 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. There is only one, even theoretical, basis for asserting that banning guns from County property could reduce gun violence: The County thinks that gun shows promote gun ownership, and that gun ownership means more violence, therefore curbing commerce in firearms will curb gun violence. That 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 any crime to gun shows. Nor have they produced any evidence of secondary effects for an analysis when state action burdens a fundamental right on the grounds of advancing public safety. *Renton v. Playtime Theatres Inc.* (1986) 475 U.S. 41; *City of Los Angeles v. Alameda Books, Inc.*, (2002) 535 U.S. 425.

C. THE ORDINANCE CANNOT SURVIVE INTERMEDIATE SCRUTINY.

Even assuming this Court were to diverge from First Amendment-type strict scrutiny analysis for the Second Amendment, as was suggested by the Supreme Court and the Third and Fourth Circuits[4], and apply intermediate scrutiny to the Ordinance, this Court should still grant relief to the Nordykes.

The County has not produced any constitutionally sanctioned evidence that the community evil (gun violence) 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:

[4] *United States v. Marzzarella*, 2010 U.S. App. LEXIS 15655, and *United States v. Chester*, 2010 U.S. App. LEXIS 26508. *But cf.*: *United States v. Skoien*, 2009 U.S. App. LEXIS 25375.

> [...] [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)

Books occupy the same relationship to the First Amendment, that guns occupy with respect to the Second. Commercial restrictions on either that purport to address public safety must be based on 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. *Berger v. City of Seattle*, 569 F.3d 1029 (9th Cir. 2009).

CONCLUSION

The original panel should take up the discreet issue for rehearing as requested and/or the Ninth Circuit sitting *en banc* should take up this exceptionally important case to insure uniformity of Circuit decisions.

Respectfully Submitted this May 23, 2011,

/s/
Donald Kilmer
Attorney for Appellants

/s/
Don B. Kates
Attorney for Appellants

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Circuit Rule 32–3(3) because this brief contains 4,184 words, excluding the part of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed.R.App.P. 32(a)(5) and the type style requirements of Fed.R.App.P. 32(a)(6) because this brief has been prepared in proportionally spaced typeface using WordPerfect Version 12 in Century Schoolbook 14 point font.

Date: May 23, 2011

/s/
Donald Kilmer, Attorney for Appellants

CERTIFICATE OF SERVICE

On this, May 23, 2011, I served the foregoing APPELLANTS' PETITION FOR PANEL REHEARING AND/OR *EN BANC* REHEARING 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 23RD day of May, 2011.

/s/ Donald Kilmer
Attorney of Record for Appellants