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February 27, 2006

Hon. Rafi Manoukian - Mayor  
Hon. Ara Narjarian - Councilmember  
Hon. Frank Quintero - Councilmember  
Hon. Dave Weaver - Councilmember  
Hon. Bob Yousefian - Councilmember  
CITY OF GLENDALE  
613 East Broadway  
Glendale, CA 91206-4391

**VIA FAX (818) 241-5386 & U. S. CERTIFIED MAIL**

**Re: Pre-Litigation Demand  
City of Glendale Proposed Ordinance  
Prohibiting of Possession of Firearms and  
Ammunition on City Property**

Dear Councilmembers:

We write on behalf of our clients the National Rifle Association and the California Rifle and Pistol Association.

It has come to our attention that Glendale is considering adoption of an ordinance that would ban the sale of firearms or ammunition on city property as a means to ban gun shows in the City. This is scheduled to be considered at tomorrow's council meeting.

In the City Attorney's report on the legality of such an ordinance, he references two lawsuits that involved challenges to these types of ordinances, and concludes that the "dust has settled" and these cases are resolved so that there are no legal obstacle to adopting an ordinance such as this.

This is inaccurate. While certain gun ban advocacy groups have been spreading this misinformation to local governments, the truth is that the *Nordyke* civil rights violation litigation is alive and well, having survived a post-appeal motion to dismiss brought by the defendant County of Alameda. The gun show promoter's First Amendment claims in the *Nordyke* case were found to be viable, and the plaintiffs are now conducting discovery to satisfy the court. A copy of the District Court ruling is attached.

Councilmembers:  
February 27, 2006  
Page 2

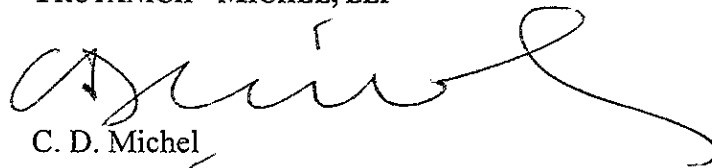
It will be a relatively simple matter to establish the evidence that the court has held necessary to substantiate the First Amendment claim in the *Nordyke* case, at which point Alameda County will face a claim for millions of dollars in lost revenue, damages, and the plaintiff's attorney's fees. Individual Supervisors face the potential for a punitive damages award.

If the City decides to go forward with this ordinance nonetheless, our clients and others would file a similar lawsuit.

We respectfully submit that it would be wise to wait until the dust *truly* has settled before proceeding with an ordinance that would expose the City and its officials to, at a minimum, the attorney fees necessary to defend the ordinance, as well as expose the City to potential liability for violating the First Amendment and contract rights of the show promoter, exhibitors, and attendees.

Sincerely,

**TRUTANICH • MICHEL, LLP**



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CDM/ca  
Enc.

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**VIA FAX (818) 547-3402 & U. S. CERTIFIED MAIL**

FILED

SEP 27 2005

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

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

RUSSELL ALLEN NORDYKE, et al.,

No. C 99-04389 MJJ

Plaintiffs,

v.

**ORDER DENYING DEFENDANTS'  
MOTION TO DISMISS**

MARY V. KING, et al.,

Defendants.

Pending before the Court is Defendants' Motion to Dismiss the First Claim in Plaintiffs' Third Amended Complaint (Doc. #102). Plaintiffs have filed an Opposition (Doc. #110), and Defendants have filed a Reply (Doc. #111). For the following reasons, the Court denies Defendants' Motion.

I. Background

Plaintiffs bring this action pursuant to 42 U.S.C. §1983, alleging that Alameda County Ordinance Code Section 9.12.120<sup>1</sup> infringes on their free speech rights protected under the United States and California Constitutions. (Doc. #100 "Third Amended Complaint" at ¶11.) The group of Plaintiffs consists of Russell and Sallie Nordyke, who have been promoting gun shows at the Alameda County Fairgrounds since 1991, as well as twelve gun show vendors, exhibitors, and patrons. (*Id.* at ¶¶17-28.) In their First Claim for Relief, Plaintiffs allege that they "have historically brought firearms onto . . . the Alameda County Fairgrounds for various symbolic and expressive purposes[.]" (*Id.* at ¶74.) They allege that, by prohibiting possession of firearms at the Fairgrounds, the Ordinance prevents them from engaging in this expressive conduct, and makes gun shows virtually impossible. (*Id.* at ¶¶71-72.)

Procedurally, Plaintiffs' First Claim for Relief represents their fourth attempt at asserting a viable

<sup>1</sup>Specifically, Section 9.12.120(b) provides: "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."

1 First Amendment claim. Initially, Plaintiffs alleged that the Ordinance prevented them from conducting  
2 their trade show business and violated their right to free speech. To prevent Defendants from enforcing  
3 the Ordinance, Plaintiffs sought a temporary restraining order. (Docs. #1, #38.) After this Court denied  
4 Plaintiffs' request, Plaintiffs filed an interlocutory appeal. Construing Plaintiffs' First Amendment claim  
5 as a facial challenge to the Ordinance, the Ninth Circuit affirmed. *Nordyke v. King*, 319 F.3d 1185, 1189  
6 (9<sup>th</sup> Cir. 2003). In evaluating Plaintiffs' claim, the Court noted that gun possession may qualify as  
7 speech when there is "an intent to convey a particularized message, and the likelihood is great that the  
8 message would be understood by those who viewed it." *Id.* (citing *Spence v. Washington*, 418 U.S. 405,  
9 410-11 (1974)). However, because Plaintiffs did not allege that the Ordinance is directed narrowly and  
10 specifically at expression, and because possession of a gun is not commonly associated with expression,  
11 the court held that Plaintiffs' facial challenge failed. *Id.* at 1190. In a footnote, the court also indicated  
12 that its holding did not prevent Plaintiffs from bringing an "as applied" challenge to the Ordinance. *Id.*  
13 at 1190 n.3.

14 Seizing on this language, Plaintiffs filed a Second Amended Complaint, re-casting their claim  
15 as an "as applied" First Amendment challenge.<sup>2</sup> (Doc. #88.) Specifically, Plaintiffs alleged that as  
16 applied to their use of the Fairgrounds, the Ordinance violated their freedom of expression by making  
17 gun shows impossible. In support of their position that gun possession amounts to expressive conduct,  
18 Plaintiffs alleged that they had historically brought firearms to the Fairgrounds to: (1) serve as mediums  
19 of political messages that are inextricably intertwined with the actual firearm; (2) emphasize the military  
20 and historical importance of guns; (3) instruct others about safe and responsible gun storage and  
21 handling; and (4) facilitate legal education of the public of their rights and duties as gun owners. (Doc.  
22 #97 at 4.) Defendants moved to dismiss Plaintiffs' claim pursuant to Rule 12(b)(6). (Doc. #92.) This  
23 Court granted Defendants' Motion, reasoning:

24 Based on these allegations, the Court finds that Plaintiffs have not  
25 adequately alleged that they intended to convey *a particularized message*  
by possessing guns on County property. *See Spence v. Washington*, 418

26  
27 <sup>2</sup>Plaintiffs filed an Amended Complaint in November 1999, which Defendants moved to dismiss.  
28 However, before the Court could rule on the Motion, Plaintiffs filed their interlocutory appeal. After  
the Ninth Circuit issued its decision and the case continued in this Court, Plaintiffs filed their Second  
Amended Complaint, superceding the Amended Complaint and mooted Defendants' Motion to  
Dismiss.

1 U.S. 405, 410-11 (1974). For example, Plaintiffs' mere recital of  
2 "political messages that are inextricably intertwined with the actual  
3 firearm" fails to allege the "particularized" nature of the political message  
4 being communicated by gun possession. Furthermore, given the  
5 ambiguous nature of the alleged "political message," it is completely  
6 unclear from the face of the complaint that the likelihood was great that  
7 this message would be understood by those who received it.

8 Plaintiffs' additional allegations fare no better. Clearly for gun  
9 possession to constitute speech, there must be a concrete and necessary  
10 relationship between the possession of the gun and the message being  
11 communicated. *See Norðyke*, 319 F.3d at 1190. [] In other words, the  
12 particularized message being communicated must originate from and be  
13 closely tethered to the actual act of gun possession. Here, Plaintiffs'  
14 allegations that they intended to communicate the military and historic  
15 importance of guns, the legal education of the general public about guns,  
16 and instruct in safe and responsible gun storage and handling are  
17 insufficient. Simply stated, these allegations lack the required nexus  
18 between the communication (the particularized message) and the actual  
19 act [of] gun possession. These intended communications did not stem  
20 from Plaintiffs' actual possession of a gun. In fact, each of these  
21 messages could have been clearly communicated without the use of a gun  
22 at all.

23 Given Plaintiffs' failure to adequately allege that their possession  
24 of guns intended to convey a particular message, their "as applied" First  
25 Amendment challenge must fail. Accordingly, the Court **GRANTS**  
26 Defendants' motion to dismiss Plaintiffs' freedom of expression claim  
27 with leave to amend.

28 (Doc. #97 at 4-5.) Plaintiffs subsequently filed a Third Amended and/or Supplemental Complaint,  
wherein they re-assert their as applied First Amendment claim. (Doc. #100 at 29.) In an attempt to cure  
the deficiencies outlined above, Plaintiffs have added paragraphs 85 and 86(a)-(g). (*Id.* at 33 n.5.)  
Defendants now move to dismiss Plaintiffs' First Claim for Relief pursuant to Federal Rule of Civil  
Procedure 12(b)(6). (Doc. #102.)

## II. Legal Standard

A motion to dismiss pursuant to Rule 12(b)(6) tests the legal sufficiency of a claim. *Navarro v. Block*, 250 F.3d 729, 732 (9<sup>th</sup> Cir. 2001). Because the focus of a 12(b)(6) motion is on the legal sufficiency, rather than the substantive merits of a claim, the Court ordinarily limits its review to the face of the complaint. *See Van Buskirk v. Cable News Network, Inc.*, 284 F.3d 977, 980 (9<sup>th</sup> Cir. 2002). Generally, dismissal is proper only when the plaintiff has failed to assert a cognizable legal theory or failed to allege sufficient facts under a cognizable legal theory. *See SmileCare Dental Group v. Delta Dental Plan of Cal., Inc.*, 88 F.3d 780, 782 (9<sup>th</sup> Cir. 1996); *Balisteri v. Pacifica Police Dep't*, 901 F.2d

1 696, 699 (9<sup>th</sup> Cir. 1988); *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 534 (9<sup>th</sup> Cir. 1984).  
2 Further, dismissal is appropriate only if it appears beyond a doubt that the plaintiff can prove no set of  
3 facts in support of a claim. *See Abramson v. Brownstein*, 897 F.2d 389, 391 (9<sup>th</sup> Cir. 1990). In  
4 considering a 12(b)(6) motion, the Court accepts the plaintiff's material allegations in the complaint as  
5 true and construes them in the light most favorable to the plaintiff. *See Shwarz v. United States*, 234  
6 F.3d 428, 435 (9<sup>th</sup> Cir. 2000).

7 III. Discussion

8 A. Plaintiffs' Federal First Amendment Claim

9 The key question the Court must resolve is whether gun possession, in the manner and context  
10 in which Plaintiffs have alleged, amounts to speech sufficient to sustain Plaintiffs' free expression claim.  
11 Defendants contend that, even considering Plaintiffs' supplemental allegations, Plaintiffs have failed to  
12 allege that their act of possessing guns qualifies as expressive conduct. Specifically, Defendants argue  
13 that the Third Amended Complaint is "devoid of any specific factual allegations regarding (1) any  
14 particularized message [P]laintiffs intend to convey through gun possession, and (2) any likelihood that  
15 any message will be understood by those who receive it." (Reply at 3.) Plaintiffs, however, maintain  
16 that they have set forth sufficient allegations to sustain their First Amendment claim.

17 To allege a viable First Amendment challenge to the Ordinance, Plaintiffs must allege that the  
18 Ordinance infringes upon speech. As detailed above, certain conduct may qualify as speech when there  
19 is an intent to convey a particularized message, and there is a great likelihood that the audience would  
20 understand that message. *Nordyke III*, 319 F.3d at 1190. Thus, the Court must review whether Plaintiffs  
21 have adequately alleged that their act of possessing guns at guns shows fits the definition of expressive  
22 conduct. While Plaintiffs' prior allegations were deficient in this respect, Plaintiffs' Third Amended  
23 Complaint contains sufficient allegations to defeat Defendants' 12(b)(6) Motion.

24 Looking at Plaintiffs' supplemental allegations more closely, in paragraph 86 of the Third  
25 Amended Complaint, Plaintiffs proffer eight examples of how possession of a firearm at the gun shows  
26 conveys particularized messages. These messages include: (1) advocating the position that the Second  
27 Amendment should be interpreted to protect an individual's right to bear arms; (2) conveying the  
28 message that possession of guns is patriotic; (3) celebrating and expressing solidarity with "gun culture";

1 (4) expressing one's "friendl[iness] to gun owners and hunters"; (5) expressing "support[] [for] the  
2 National Rifle Association's (and the Attorney General's, and the Secretary of State's) interpretation of  
3 the Second Amendment"; (6) displaying guns "for various purposes, including but not limited to  
4 commercial, education, patriotic and political messages"; and (7) demonstrating support for the private  
5 ownership of firearms. Additionally, Plaintiffs allege that the Ordinance "chills" and/or makes military  
6 ceremonies impossible by preventing Junior ROTC members, military reservists, and veterans from  
7 possessing firearms as part of military ceremonies on the Fairgrounds. Plaintiffs also allege that, "gun  
8 shows are like stationary parades of innumerable ideas and themes, which the United States Supreme  
9 Court found did not require a particularized message to be afforded First Amendment [p]rotection, (*Id.*  
10 at ¶86(g)) (citing *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 515 U.S. 557, 568  
11 (1995)).

12         Reviewing Plaintiffs' new allegations, the Court finds that, although the majority of the  
13 supplemental allegations suffer from the same deficiencies as those in the Second Amended Complaint,  
14 Plaintiffs have sufficiently articulated an intent to convey a particularized message that will be  
15 understood by those who view it. Specifically, Plaintiffs have alleged that their act of possessing guns  
16 at a gun show serves to express their firmly-held belief that individuals should have a protected right  
17 under the Second Amendment to bear arms. Plaintiffs have also alleged that their act of possessing  
18 firearms conveys the message that they "support[] the National Rifle Association's (and the Attorney  
19 General's, and the Secretary of State's) interpretation of the Second Amendment." As Plaintiffs point  
20 out, this message has special significance in California in light of the Ninth Circuit's decision holding  
21 that the Second Amendment "offers no protection for the individual's right to bear arms." *Nordyke III*,  
22 319 F.3d at 1191 (citing *Hickman v. Block*, 81 F.3d 98, 102 (9<sup>th</sup> Cir. 1996)).

23         Further, Plaintiffs have sufficiently alleged that there is a great likelihood that observers will  
24 understand their message that individual's should have a Constitutionally-protected right to bear arms.  
25 In paragraph 86(d), Plaintiffs have allege that the attendees of the gun show, many of whom are members  
26 of the "gun culture", would readily perceive that the individual carrying the weapon supports the view  
27 that individuals should have a protected right to bear arms under the Second Amendment. Taken  
28 together, Plaintiffs have articulated a particularized political statement that they intend to convey through

1 possessing guns at gun shows, and that there is a great likelihood that gun show participants will  
2 recognize this message. Moreover, Plaintiffs' message advocating recognition of an individual's right  
3 to bear arms is not merely closely tethered to their act of possessing guns, but is actually embodied in  
4 such conduct. Thus, Plaintiffs have sufficiently alleged that their conduct, at least to the extent described  
5 above, constitutes speech.<sup>3</sup>

6 With respect to Plaintiffs' remaining allegations, the Court finds that they are inadequate to  
7 establish that gun possession amounts to speech. Specifically, Plaintiffs allege that possessing a gun at  
8 gun shows generally conveys one's solidarity with gun culture and a person's "friendl[iness] to gun  
9 owners and hunters." Rather than articulating particularized messages, these allegations amount to  
10 vague notions about the gun possessor's general attitude. Likewise, Plaintiffs' allegations that displaying  
11 firearms at gun shows conveys broad, categorical statements, including "commercial, education[al],  
12 patriotic and political messages," also fail for lack of specificity. Furthermore, Plaintiffs have failed to  
13 allege that there is a great likelihood that an observer would understand any of these purported messages.

14 Nevertheless, Defendants argue that, even if the Court finds that Plaintiffs have sufficiently pled  
15 an as-applied First Amendment claim, Plaintiffs' claim fails because: (1) the Ordinance furthers a  
16 substantial public interest in protecting the safety of persons on County property that is unrelated to  
17 suppressing speech; (2) a sufficiently important governmental interest in regulating non-speech exists  
18 that justifies the incidental limitation on Plaintiffs' First Amendment rights; and (3) the Ordinance is a  
19 reasonable time, place, and manner restriction. Each of Defendants' arguments requires the Court to  
20 consider facts outside of Plaintiffs' Third Amended Complaint. Accordingly, these arguments exceed  
21

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22 <sup>3</sup>In contrast to paragraphs 60-67, which the Court addressed in its prior Order, Plaintiffs' have  
23 now alleged that their use of a gun is intended to convey a message. Previously, Plaintiffs merely  
24 alleged that the Ordinance unlawfully hindered their ability to speak about certain gun-related issues.  
25 For instance, in paragraph 60(b), Plaintiffs alleged that the Ordinance prevents Plaintiff Jess B. Guy from  
26 "conduct[ing] mini-seminars by displaying various actual firearms to illustrate to patrons what types of  
27 firearms do and do not require registration under the new California Assault Weapons Statute." However, in that scenario, the guns are not conveying a message, nor is Plaintiff Guy engaging in  
28 conduct with the gun in an effort to convey a particularized message. Instead, Mr. Guy, himself, is the speaker; the guns are merely demonstrative aids that he uses to reinforce his message. Stated another way, Mr Guy is speaking about guns, not using a gun to speak. While the Ordinance may prohibit Mr. Guy from possessing guns when conducting his seminar, it does not prohibit him from holding such seminars or otherwise conveying information relating to the gun registration laws. According to Plaintiffs' supplemental allegations, by prohibiting gun possession, the Ordinance prevents Plaintiffs from speaking through that conduct. Thus, Plaintiffs have now sufficiently alleged that the Ordinance chills speech.

1 the scope of a 12(b)(6) motion, and are more appropriately raised in a motion for summary judgment.  
2 The Court will therefore deny Defendants' Motion to Dismiss with respect to them without prejudice  
3 to Defendants re-asserting the arguments on summary judgment.

4 B. Plaintiffs' State-Law First Amendment Claim


5 In paragraph 72 of the Third Amended Complaint, Plaintiffs allege that the Ordinance violates  
6 their right to freedom of expression under the California Constitution. Defendants contend that  
7 Plaintiffs' claim fails because the rights protected by Article I of the California Constitution are not  
8 violated unless a person has been prohibited from speaking. According to Defendants, because the  
9 Ordinance does not prohibit anyone from speaking, but rather prohibits the possession of firearms on  
10 County property, Plaintiffs' claim fails as a matter of law. However, as set forth above, because  
11 Plaintiffs have adequately alleged that the Ordinance infringes on expressive conduct, Plaintiffs' state  
12 law-based claim remains viable.

13 IV. Conclusion

14 For the foregoing reasons, the Court **DENIES** Defendants' Motion to Dismiss the First Claim  
15 in Plaintiffs' Third Amended Complaint (Doc. #102).

16 **IT IS SO ORDERED**

17  
18 Dated: September 27, 2005

  
MARTIN J. JENKINS  
UNITED STATES DISTRICT JUDGE

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# HP LaserJet 3200se



HP LASERJET 3200

FEB-27-2006 4:06PM

## Fax Call Report

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### FAX TRANSMITTAL SHEET

TO: Alex D.  
FAX NO: 818 546 -3310  
TEL. NO: 818 546 3304  
FROM: Chuck Michel  
DATE: 2/27/06  
RE: Glendale Gen Show

THIS FAX CONTAINS COVER PAGE PLUS \_\_\_\_\_ PAGES. IF YOU DO NOT RECEIVE ALL PAGES PLEASE CONTACT \_\_\_\_\_ AT (562) 216-4444.

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