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CALIFORNIA LITIGATION UPDATE

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HISTORIC BRIEFS ON SECOND AMENDMENT “INCORPORATION” FILED IN GUN SHOW BAN APPEAL

Following on the heels of the June 2008 Supreme Court ruling in *District of Columbia v. Heller* that the Second Amendment does protect a fundamental individual right, a California law suit that has been bouncing back and forth in the court for almost ten years has become the unlikely vehicle by which the question of whether the Second Amendment is “incorporated” so it restricts state and local gun control efforts (in addition to federal gun control efforts via the *Heller* ruling) may be answered.

Today members of an NRA led coalition filed a flurry of “friend of the court” amicus briefs in the case of *Nordyke v. Alameda*, now before the Ninth Circuit Court of Appeals. The *Nordyke* case was filed by gun show promoters challenging an ordinance that bans guns on county property (effectively banning the gun show at the county fairgrounds).

A number of police unions and several cities filed amicus briefs on behalf of Alameda, arguing against incorporation. All of the briefs are posted at www.calgunlaws.com.

The case has a long history going back almost ten years. Alameda County passed the ordinance in August of 1999. Gun show promoters Russ and Sally Nordyke filed suit in federal court to prevent enforcement of the ordinance. The suit alleged that state law preempted the ordinance and that the ordinance violated First Amendment free speech guarantees. The District court denied their request for a preliminary injunction to stop the ordinance from being enforced.

The Nordykes appealed to the Ninth Circuit Court of Appeals. The three judge panel assigned to the case referred it to the California Supreme Court to determine the state law question of whether the ordinance was preempted by state law. The California Supreme Court decided that state law did not preempt the ordinance and then referred the case back to the Ninth Circuit. (That preemption decision was heavily relied on by San Francisco in the *Fiscal* case.)

The Ninth Circuit three judge panel heard arguments on the remaining federal law issue; whether the ordinance violated the First Amendment, in February 2003. Remarkably, the court also agreed to hear arguments that the ordinance was invalid under the Second Amendment. NRA submitted an amicus brief on the issue at that time, and lead the efforts of several other amicus submissions.

The three judge panel first determined that possession of firearms is not always a form of speech and therefore is not protected by the First Amendment. It did, however, essentially invite the plaintiffs to amend their pleadings and show that speech might be implicated in a particular situation and to litigate that “ass applied” challenge in the trial court.

Additionally, the Ninth Circuit panel determined in 2003 that the Second Amendment did not prohibit this ordinance, but not necessarily because the panel actually thought that was the case. The panel said it was bound by Ninth Circuit precedent that had adopted a “collective rights” view of the Second Amendment in *Hickman v. Block*, 81 F.3d 98 (9th Cir. 1996). Significantly, the panel concluded that the precedent adopting the “collective rights” view of the Second Amendment was wrongly decided, but held that this precedent could only be overturned by an eleven judge (*en banc*) panel (or by the United States Supreme Court). The

Nordyke court also sharply criticized a then-recent decision by another three judge panel of the Ninth Circuit, *Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir. 2002).

So the Nordykes petitioned for an *en banc* panel hearing. The court denied the request, but five judges dissented from his denial, and another judge expressed his agreement with the positions contained within the dissent. Several dissents laid out or adopted remarkably articulate arguments that the Second Amendment is an individual right, just like the rest of the Bills of Rights. Some of the dissents were written by rather liberal judges.

A petition for review by the United State Supreme Court was submitted. The NRA and other filed an amicus brief asking the Supreme Court to hear the case on August 27, 2004. The Supreme Court denied review on September 27, 2004.

The case was then sent back to the trial court, and an amended Complaint was filed. The Nordykes asked to be allowed to make their Second Amendment claim (along with the "as applied" First Amendment claim) again at that time, but the request was denied. Cross-Motions for Summary Judgment were heard on October 31, 2006. The motions were ruled on March 31, 2007, with the trial court granting the County's motion and ruling that the Nordykes had no valid claim.

The Nordykes appealed to the Ninth Circuit again on May 25, 2007. The Nordykes filed their briefs on the First Amendment issue, expecting to be assigned to a new three judge panel.

Then the *Heller* case was decided. That prompted the Nordyke's lawyer to ask the Ninth Circuit to allow additional briefing on the Second Amendment issue in light of the *Heller* ruling. Interestingly, and perhaps significantly, the lawyers for the County joined in the request.

The request was granted, and the original three judge panel that had spoken favorably about the Second Amendment took the case back.

With the supplemental briefs on the incorporation issue filed, the Court will now set a date for oral argument. The Court will almost certainly have to decide the incorporation question, and then (assuming they find that the Second Amendment applies to the states) either decide whether the gun show ban ordinance violates the Second Amendment or send the case back (remand) to the trial court to make that determination.

C. D. "Chuck" Michel
Managing Partner
TRUTANICH-MICHEL, LLP, Attorneys at Law
Los Angeles Office
180 East Ocean Blvd., Suite 200
Long Beach, CA 90802
Phone: 562-216-4441 / Fax: 562-216-4445
Email: cmichel@tmlp.com
Website: www.chuckmichel.com
Gun law info: www.calgunlaws.com

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