IN THE

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

01-2321

FRANK KRASNER ENTERPRISES, LTD., *et al.*,

Plaintiffs/Appellees,

v.

MONTGOMERY COUNTY, MARYLAND,

Defendant/Appellant

On Appeal from the United States District Court for the District of Maryland
(Honorable Marvin J. Garbis)

BRIEF OF MONTGOMERY COUNTY, MARYLAND

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JURISDICTIONAL STATEMENT

This action for declaratory, injunctive and monetary relief challenges the validity of a local law enacted by Montgomery County, Maryland. Among the various federal constitutional and civil rights claims and the state statutory and constitutional claims are allegations that the local law violates free speech and equal protection guarantees. The plaintiffs also claim that the law is preempted by State law and beyond the authority of the County to apply within the City of Gaithersburg, Maryland. The complaint invokes, on behalf of several plaintiffs, subject matter jurisdiction in the United States District Court for the District of Maryland under 28 U.S.C. §§ 1331, 1343(a)(3), and 2201 as to its federal claims, and 28 U.S.C. § 1367 as to its pendent state-law claims. (J.A. 9) Following an expedited and abbreviated bench trial, judgment was entered against the County on a pendent state-law claim on October 5, 2001, pursuant to a judgment order that the district court expressly intended to "to be a final judgment within the meaning of Rule 58 of the Federal Rules of Civil Procedure." (J.A. 451) The County timely noted an appeal on October 31,

2001. (J.A. 455) This Court has jurisdiction of the appeal under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. Do the Krasner appellees lack standing to challenge the County funding restriction because they are neither applicants for nor recipients of County funds?

II. Did the district court erroneously conclude that the County funding restriction constitutes the regulation of gun sales for State Weapons-Preemption law purposes and, therefore, is restrained by the Tillie-Frank law from being applied within the City of Gaithersburg?

III. Is the County funding restriction a constitutionally permissible spending condition that does not offend free speech guarantees?

IV. Is the County funding restriction a constitutionally permissible spending condition that does not deny Krasner the equal protection of the laws because the classifications it draws do not discriminate against Krasner and, in any event, are rationally based?

STATEMENT OF THE CASE

The action was instituted on the joint complaint of Frank Krasner Enterprises, Ltd. (d/b/a Silverado Promotions and Silverado Gun Show)("Silverado"), RSM, Inc. (d/b/a Valley Gun and Police)("Valley Gun"), and Robert D. Culver ("Culver") (J.A. 10).[1] The complaint challenged, on federal constitutional grounds and state constitutional and statutory grounds, the validity of three provisions of the Montgomery County Code (MCC §§ 57-1, 57-11, and 57-13) enacted by Chapter 11 (Bill No. 2-01) of the 2001 Laws of Montgomery County, as applied to Montgomery County Agricultural Center, Inc. ("ACI"), which owns the Montgomery County Agriculture Center in Gaithersburg, Maryland.[2] The primary state law claim the only claim decided by the district court is a state

[1]Silverado is a corporate organizer of gun shows; Valley Gun is a corporate gun dealer that displays and sells firearms at gun shows; Culver is a resident of Montgomery County and a member of Montgomery Citizens For A Safer Maryland ("MCSM"), an organization that maintains a "discussion/information" table at gun shows. Culver sues individually and on behalf of MCSM. (J.A. 10) For convenience, Silverado, Valley Gun and Culver are referred to collectively as "Krasner" when appropriate.

[2]ACI and Gaithersburg are not parties to this litigation. Neither has sought leave to intervene, and neither has participated as *amicus curiae* or otherwise.

preemption challenge to the validity of MCC § 57-13, a statutory funding restriction that: (1) prohibits Montgomery County from giving financial or in-kind support to any organization that allows the display and sale of guns at a facility owned or controlled by the organization; and (2) requires an organization that receives direct financial support from the County to pay the County the value of that support, plus interest, if the organization allows the display and sale of guns at its facility after receiving the support.[3] (J.A. 19) The complaint also alleged that § 57-13 ("the funding restriction") violates federal and state commercial-free-

[3]The other two challenged provisions are § 57-11, a regulatory provision that generally prohibits the sale, transfer, possession, or transportation of a handgun, rifle, or shotgun, or ammunition in or within 100 yards of a place of public assembly; and § 57-1, which defines a term used in § 57-11. At the very outset of this litigation, however, the County advised the district court that it had no intention of attempting to apply § 57-11 and its definitional companion within the City of Gaithersburg because the County, in enacting these provisions, recognized that state and municipal law prevented the County from regulating those activities within that municipality. *See Frank Krasner Enterprises, Ltd., v. Montgomery County*, 166 F. Supp. 2d 1058, 1061 n. 5 (D. Md. 2001). Indeed, at argument below, Krasner narrowed both its preemption challenge and its constitutional challenges to only subsection (b) of § 57-13. (J.A. 374)

speech guarantees, federal and state core-speech guarantees, federal equal protection guarantees, and federal freedom of assembly guarantees.[4]

Following an expedited and abbreviated bench trial,[5] the district court issued a Memorandum of Decision as to its findings of fact and conclusions of law in compliance with Rule 52(a) of the Federal Rules of Civil Procedure, and an order in which it directed that judgment be entered against the County on the state preemption claim. (J.A. 451) The court also permanently enjoined the County from enforcing the funding restriction within the City of Gaithersburg. (J.A. 452) Because it had found the funding restriction "unenforceable against Krasner's gun show at the Agricultural Center under state law," the

[4]In responding to a Motion for a Preliminary Injunction designed to permit an October 2001 gun show, the County pointed out that a preliminary injunction was unnecessary because § 57-13 was not effective until December 1, 2001. 166 F. Supp. 2d at 1060.

[5]The parties filed cross motions for summary judgment; however, the County disputed the allegation that the Agricultural Center is the only facility in Montgomery County at which a gun show may be held, and Mr. Krasner admitted, during his direct examination at trial, that he had attended a gun show at another location in Montgomery County, but claimed that the location was not suitable. (J.A. 289) The County also disputed the allegation that a gun show cannot be held without the ability to sell guns at the show.

district court concluded that it "need not reach ... the free speech issues raised by the Plaintiffs." 166 F. Supp. 2d at 1063.

STATEMENT OF FACTS

ACI is a private, non-profit corporation that owns and operates the Montgomery County Agricultural Center in Gaithersburg, Maryland. (J.A. 168) ACI has received "financial support" from the County on three occasions over the ten years immediately preceding the filing of this action: (1) a one-time $250,000 grant from the County Department of Economic Development ("DED") to construct the Agricultural Welcoming Center (now the "Heritage Building") at the Agricultural Center;[6] (2) an additional $36,500 DED grant to complete the Agricultural Center's Heritage Building;[7] and (3) a one-time $220,000 Cultural Facility Improvement Grant from the County Department of Recreation for the purchase of a permanent cover for the racing park area and the installation of a

[6]These funds were appropriated in the County's FY 1999 Budget (July 1, 1998 through June 30, 1999) and disbursed to ACI in FY 1999. (J.A. 171)

[7]These funds were appropriated in the County's FY 2002 Budget and were to be disbursed to ACI prior to December 1, 2001. (J.A. 172)

digital marquee.[8] The funding restriction does not apply to any of these grants because they were either paid or encumbered prior to the effective date of the funding restriction. *Frank Krasner Enterprises, Ltd.,* 166 F. Supp. 2d at 1062 n. 6.

The Memorandum of Decision of the district court, which was the trier of fact, contains the pertinent background:

> For some ten years or more, Plaintiff, Frank Krasner and his company, Frank Krasner Enterprises, Ltd., d/b/a Silverado Promotions and Silverado Gun Show ("Krasner") have presented gun shows in various locations in Maryland. Krasner's gun shows consisted of one or more indoor open spaces with from about 110 to 400 tables rented by exhibitors. The exhibitions include vendors selling guns of various (legal) types, vendors selling gun-related merchandise, organizations involved in gun-related activities, etc. Krasner derives income from the rental of table space by vendors and admission fees.

166 F. Supp. 2d at 1059 (footnote omitted).[9] The court

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[8]These funds were appropriated originally in the County's FY 2001 Budget; however, only $32,000 was disbursed to ACI in FY 2001. At the time of the trial of this matter, the County expected to disburse the balance to ACI during the then current fiscal year (July 1, 2001 through June 30, 2002). (J.A. 172)

[9]The district court elaborated on the term "gun show" in a footnote:

also found that Valley Gun, a licensed firearm dealer in Maryland, has been a regular exhibitor at Silverado's gun shows in Maryland, and that Valley Gun takes firearms to the gun show for display and for sale in compliance with pertinent state and federal laws. *Id.*

Montgomery Citizens for a Safe Maryland ("MCSM") is a group of citizens interested in gun matters that espouses political views in favor of gun ownership, and seeks to persuade like-minded citizens to exercise political rights to promote gun owners' rights. 166 F. Supp. 2d at 1060. MCSM has been a regular exhibitor at Silverado's gun shows. *Id.* MCSM's members, including Culver, staff the table, engage in largely gun-related discourse with gun show attendees, and distribute written materials relating to gun safety and their political viewpoint. *Id.*

Prior to the enactment of the challenged County law,

> The term "gun show" is generally understood by gun aficionados to describe a gathering at which firearms are displayed and sold as distinct from an "exhibition" at which the weapons are displayed but not sold."

Id. at 1059 n. 1.

Silverado planned to present gun shows in October 2001 and January 2002 at the Agricultural Center, which, in the view of the district court, "appears [to be] the only location in [Montgomery County] that is both suitable for and would accommodate a gun show of the type presented by [Silverado]." *Id.* at 1060 n. 2.[10] Valley Gun and MCSM planned to participate in those gun shows as they had in the past. 166 F. Supp. at 1060.

SUMMARY OF ARGUMENT

Standard of Review. On appeal from a bench trial, this Court reviews the district court's findings of fact for clear error, and its conclusions of law *de novo*. Fed. R. Civ. P. 52(a); *Williams v. Sandman*, 187 F.3d 379, 381 (4th Cir. 1999).

Standing. Silverado, Valley Gun, Culver and MCSM lack standing to maintain this action. None is a present or past grantee of any County funding, and none has alleged any need or desire to seek County funding. Their alleged injuries would result, not from any action of the

[10]The decision below inadvertently refers to the Center as appearing to be the only suitable location in "Maryland." The trial court intended to state that it appeared to be the only location in "Montgomery County, " and issued a corrected page. (J.A. 454-454a)

County, but only from the independent decision of ACI not to host gun shows. The only entity directly affected by the potential application of the funding restriction in connection with the Agricultural Center is ACI, which is not a party to this proceeding.

State Preemption. The district court erroneously decided that the State Weapons-Preemption law and Tillie-Frank restraints combine to prohibit the application of the County funding restriction to ACI. The district court's error is twofold: (1) the funding restriction does not constitute the regulation of the sale of guns for State Weapons-Preemption law purposes; and (2) Tillie-Frank restraints do not apply to County laws that restrict County funding. For these reasons, the funding restriction unlike §§ 57-11 (the regulatory provision that the County acknowledges is subject to Tillie-Frank restraints) and 57-1 (which defines a term used in the regulatory provision) is neither preempted nor otherwise restrained by State law.[11]

[11]Following the noting of this appeal, the County moved this Court to certify to the Court of Appeals of Maryland the novel and controlling state law questions presented by the district court's decision and judgment. The motion was denied.

Constitutional Claims.[12] The free-speech guarantees protect speech, not conduct. The funding restriction is directed only at conduct, not at speech or viewpoint. Other than the sale of weapons, nothing that occurs at a gun show is material to this content-neutral, viewpoint-neutral funding restriction. Even if the funding restriction implicated speech, the core speech challenge lacks merit because this content-neutral, viewpoint-neutral law neither forecloses core speech nor effectively prohibits County fund recipients from engaging in protected conduct outside the scope of the County's funding programs. The commercial free-speech challenge is equally unavailing. Not only is the funding restriction content-neutral and viewpoint neutral, but it also passes the traditional test for commercial-speech

[12]Although the district court failed to reach the constitutional claims, Krasner, in opposing the County's motion to certify the state preemption questions to Maryland's highest court, contended that the constitutional claims nevertheless are before this Court on appeal and should be decided by this Court. In order to provide for a full discussion of those claims, the County, therefore, has elected to address, in this brief, the constitutional claims raised but not decided below. This Court, of course, may leave those issues for initial consideration by the district court on remand, should the judgment below be reversed. *See* Appellee's Response, pp. 12-13.

regulations because it is supported by a substantial County interest, materially advances that interest, and is narrowly drawn. Indeed, although the applicable standard is yet to be articulated, the Supreme Court has indicated that commercial-speech limitations on the exercise of a spending power are even less exacting than the relatively relaxed test for regulatory provisions that restrain commercial speech.

The funding restriction also does not contravene Krasner's freedom of assembly rights, or deny Krasner the equal protection of the laws. The restriction does not ban gun shows, the sale of guns, or discussions or assemblies of any kind, and it is rationally based.

ARGUMENT

I. Silverado, Valley Gun, and Culver lack standing to challenge the validity of the County funding restriction because they are neither applicants for nor recipients of County funds.[13]

In order to maintain a claim in a federal court, a party must satisfy the standing requirements of ARTICLE III

[13]The County challenged Krasner's standing in its Motion for Summary Judgment. However, having tried the case, the district court denied the parties' summary judgment motions as moot, and did not address the standing issue in its Memorandum of Decision. (J.A. 453)

of the Constitution: (1) "an injury in fact;" (2) "a causal connection between the injury and the conduct complained of;" and (3) a likelihood that the injury will be "redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The causal connection element of standing requires that "the injury ... be "fairly ... traceable] to the challenged action of the defendant, and not ... the result [of] the independent action of some third party not before the court." *Id.* (quoting *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976)).

In the specific context of gun sale restrictions, the Southern District of California found that plaintiffs lacked standing to challenge the constitutionality of the Violent Crime Control and Law Enforcement Act ("Crime Control Act") because the act did not directly injure the plaintiffs. *See San Diego County Gun Rights Comm. v. Reno*, 926 F. Supp. 1415, 1423 (S.D. Cal. 1995), *aff'd*, 98 F. 3d 1121 (9th Cir. 1996). The plaintiffs in *San Diego County* alleged that the Crime Control Act's provisions caused an increase in the prices of certain weapons. *Id*. Because "[n]othing in the Crime Control Act direct[ed]

manufacturers or dealers to raise the price of assault weapons," and "it [was] not the defendants who ha[d] raised the prices of weapons at issue, but third parties such as weapon dealers and manufacturers," the court found that the plaintiff's economic injury did not satisfy the standing requirements. *Id.* Moreover, in every core speech funding restriction case decided by the Supreme Court (there are no commercial speech funding cases), the disappointed funding beneficiary was a party. *See, e.g., Legal Services Corporation v. Velazquez,* 531 U.S. 533 (2001); *Board of Regents of the University of Wisconsin System v. Southworth,* 529 U.S. 217 (2000); and *Rust v. Sullivan,* 500 U.S. 173 (1991).

In the present case, the challenged law does nothing more than place a condition upon certain County expenditures, and the only entity to which that law applies is ACI, which is not a party to this proceeding. No party at bar is a present, past or future beneficiary of any County funding. None of their alleged injuries results from any "action of the defendant" as *Lujan* requires. Any alleged injury or threatened injury results from the independent decision of ACI not to host

gun shows. The funding restriction does not prohibit gun shows or gun-related speech. Nor does it prohibit any party to this action from engaging in any activity, even at a gun show at the Agricultural Center. The funding restriction, therefore, does not directly interfere with the rights of any of the Krasner parties.

Absent a claim of direct infringement, the Krasner appellees must premise their constitutional challenge on the funding restriction's impact on ACI's rights. However, "Federal courts must hesitate before resolving a controversy, even one within their constitutional power to resolve, on the basis of rights of third persons not parties to the litigation." *Singleton v. Wulff,* 428 U.S. 106, 114 (1976). The reasons for this prudential limitation on third-party standing are two-fold:

> First, courts should not adjudicate such rights unnecessarily, and it may be that in fact the holders of those rights either do not wish to assert them or will be able to enjoy them regardless of whether the in-court litigation is successful or not .... Secondly, the parties themselves usually will be the best proponents of their own rights.

428 U.S. at 114.

There are exceptions to this presumption against third-party standing, but only if three conditions are

met: (1) a litigant must have suffered some injury in fact; (2) the plaintiff must have a close relationship to a third party; and (3) some hindrance to the third party's ability to assert his or her own interests must exist. *Powers v. Ohio*, 499 U.S. 400, 411 (1991). Even assuming that the first two prongs of this test are satisfied, Krasner cannot meet the third.

ACI, a private corporation that is wholly independent of the County, is not so powerless that it is unable to assert its own constitutional rights. Nor has Krasner proffered any evidence in support of such a proposition. Thus, under traditional third-party standing rules, Krasner cannot assert the rights of ACI to attack the funding restriction.

For all of these reasons, Krasner lacks standing to challenge the constitutionality of § 57-13. The judgment below, therefore, should be vacated and the matter remanded to the district court with instructions to dismiss the complaint for lack of standing.

II. The district court erroneously concluded that the funding restriction constitutes the regulation of gun sales for State Weapons-Preemption law purposes and, therefore, is restrained by the Tillie-Frank law from being applied within the City of

Gaithersburg.

"Montgomery County is a home rule county, having adopted a charter pursuant to Article XI-A of the Maryland Constitution." *Haub v. Montgomery County*, 353 Md. 448, 450, 727 A.2d 369-370 (1999). Maryland's Charter home rule enables a county to enjoy a significant amount of self-governance by transferring from the State to the county the power to enact local laws on a wide variety of subjects, as enumerated by the Legislature in the Express Powers Act. *Ritchmount Partnership v. Board of Supervisors of Elections*, 283 Md. 48, 57, 388 A.2d 523, 529 (1978). Included among these express powers is the authority to pass such laws as may be deemed expedient in maintaining the peace, good government, health and welfare of the county. MD. ANN. CODE ART. 25A, § 5(S). This provision is a general-welfare clause or general-grant-of-power clause. *Montgomery Citizens League v. Greenhalgh*, 253 Md. 151, 161, 252 A.2d 242, 247 (1969). It gives charter counties a wide array of legislative and administrative powers over local affairs and is to be liberally construed. *Ritchmount Partnership*, 283 Md. at 57, 388 A.2d at 529; *Montgomery*

Citizens League, 253 Md. at 161-62, 252 A.2d at 247. In addition to this broad authority, the authority to fix county expenses is implicit in the Charter Home Rule Article and inherent in all Maryland counties. *Schneider v. Lansdale*, 191 Md. 317, 325-26, 61 A.2d 671, 674-75 (1948). Nevertheless, the State, by public general law, may preempt any county local law including a funding restriction in one of three ways: (1) preemption by conflict; (2) express preemption; or (3) implied preemption. *See Holiday Point Marina Partners v. Anne Arundel County,* 349 Md. 189, 209, 707 A.2d 829, 839 (1998).[14] *See also East v. Gilchrist,* 296 Md. 368, 463 A.2d 285 (1983) (holding that a valid order of the Maryland Secretary of Health and Mental Hygiene

[14]Express preemption exists when a county law or ordinance "deal[s] with matters which are part of an entire subject matter on which the Legislature has expressly reserved to itself the right to legislate." *County Council for Montgomery County v. Montgomery Association*, 274 Md. 52, 59, 333 A.2d 596, 600 (1975). Implied preemption sometimes called preemption by occupation arises "when the General Assembly has acted with such force that an intent by the State to occupy the entire field must be implied." *Id.* Preemption by conflict is an application of the principle embodied in the Charter Home Rule Article of the Maryland Constitution that local laws that conflict with public general laws are invalid. *Id.*

instructing the County to construct and operate a sanitary landfill required the County to provide the necessary funds notwithstanding Section 311A of the County Charter, which prohibits the expenditure of County funds for the operation of a landfill system of refuse disposal on land zoned for residential use).

In balancing the relative authority of counties and municipalities, the Maryland General Assembly, through the enactment of a public general law that has come to be known as the Tillie-Frank law, has preempted county law in certain circumstances by enabling municipalities to insulate themselves from county laws on subjects on which both municipalities and counties may legislate.[15] Under this law, County legislation does not apply in a municipality if the legislation:

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[15]The Tillie-Frank law was designed to supercede the decision of the Court of Appeals of Maryland in *Town of Forest Heights v. Tillie Frank*, 291 Md. 331, 435 A.2d 425 (1981), in which a divided Court held that a charter county ordinance prevails over a conflicting municipal ordinance. Because the case altered the commonly understood relationship between home rule counties and municipalities, legislation reestablishing the previously perceived balance between county and municipal ordinances was soon enacted. *See* 81 *Op. Att'y Gen*. [Md.] ___ (1996) [Opinion No. 96-025 (September 3, 1996)], 1996 Md. AG LEXIS 24.

(1) by its terms exempts the municipality;

(2) *conflicts* with legislation of the municipality enacted under a grant of legislative authority provided either by public general law or its charter; or

(3) *relates* to a subject with respect to which the municipality has a grant of legislative authority provided either by public general law or its charter and the municipality, by ordinance or charter amendment having prospective or retrospective applicability, or both:

(i) specifically exempts itself from such county legislation; or

(ii) generally exempts itself from all county legislation, covered by such grants of authority to the municipality.

MD. ANN. CODE art. 23A, § 2B(a) (emphasis added).[16] Exercising its Tillie-Frank authority, the City of Gaithersburg has generally exempted itself from all County legislation on any subject on which the City also has legislative authority.[17]

The funding restriction does not exempt recipients of County funds who are located within the City of

[16]Certain categories of County laws, however, apply within all municipalities, *e.g.*, certain "County revenue or tax legislation [and] legislation adopting a county budget...." § 2B (b)(2).

[17]*See* GAITHERSBURG CITY CODE, § 2-6 (the "Gaithersburg exemption ordinance").

Gaithersburg. Neither does it conflict with any Gaithersburg ordinance. However, the State Weapons-Preemption law implicates the Tillie-Frank law because it authorizes both counties and municipalities "to *regulate* the purchase, sale, transfer, ownership, possession, and transportation of ... weapons and ammunition ... within 100 yards of ... places of public assembly...."[18] Therefore, by virtue of the combination of the Tillie-Frank law, the Weapons-Preemption law, and the Gaithersburg exemption ordinance, the City of Gaithersburg is, as the County readily acknowledges, insulated from County legislation that "*regulate[s]* the purchase, sale, transfer, ownership, possession, and transportation of [certain] weapons and ammunition ... within 100 yards of parks, churches, schools, public buildings, and places of public assembly ...." (Emphasis added.) It does not follow, however, that the funding restriction is similarly restrained. Rather, the funding restriction is inhibited by this combination only if it constitutes the *regulation* of the sale of guns for the purposes of the State Weapons-Preemption law and is not

[18]MD. ANN. CODE art. 27, § 36(H)(emphasis added).

otherwise exempted from Tillie-Frank restraints.

Following federal caselaw regarding the limits of Congress' spending power as applied to the States, the district court concluded, as a matter of *State* law, that the County funding restriction constitutes *regulation* because, in the district court's view, the spending being controlled does not have a direct relationship to the purpose of the legislation. 166 F. Supp. 2d at 1062-63. In doing so, the district court relied on federal cases that are inapposite. Each case addresses the unique relationship between the Congress and the sovereign States under the form of federalism enshrined in the Constitution, and the resulting limitation on Congress' power to condition federal grants.[19] These cases neither control nor provide meaningful guidance for determining whether, under the law of Maryland, the County's funding restriction constitutes *regulation* for purposes of the State Weapons-Preemption law, and, if it does, whether it is regulating a matter on which the City of Gaithersburg

[19]*See, e.g., New York v. United States,* 505 U.S. 144, 171-72 (1992); *James Island Public Service District v. City of Charleston*, 269 F.3d 323 (4th Cir. 2001), on matters that are unrelated to legitimate federal interests.

also has the authority to legislate.[20]

Under Maryland law, the spending power of a County implicitly includes exceedingly broad authority to set conditions on the expenditure and receipt of its funds:

> [I]n the absence of some provision of law to the contrary, constitutional or statutory, the County may impose such conditions *as to it appear proper* upon those who wish to receive County funds including a direction as to the manner of expenditure of those funds.

Prince George's County v. Chillum-Adelphi Volunteer Fire Department, Inc., 275 Md. 374, 383, 340 A.2d 265, 270 (1975) (emphasis added). Thus, in the context of a dispute concerning a county's authority to condition the use of its funds by volunteer fire companies, Maryland's highest court distinguished between a county's authority to impose conditions or requirements under its funding authority ("funding regulations") and its authority to impose conditions or requirements under its police power ("police power regulations"):

[I]f a given volunteer fire company elects to

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[20]Even if the *James Island* test applied, the funding restriction would pass because *James Island* does not require *a direct relationship* between the spending being controlled and the purpose of the legislation merely that the condition be "*reasonably related* to the purpose of the expenditure." 269 F.3d at 326-27.

> *accept County funds, then it follows that the County may impose conditions on the granting and use of those funds*, *e.g.*, that the company's books would be kept in a certain manner, that the funds granted would be only expended for certain specified purposes, and that to assure the County of this fact the company's books would be subject to audit by persons designated for that purpose by the County. Indeed, the County might well specify that no part of the funds would be expended for new equipment without advance approval of the County, might say what type of equipment could be purchased with funds from the County, and might provide for the manner of maintaining equipment purchased with County funds. In other words, *the County may impose reasonable regulations relative to the funds which come from it.* On the other hand, if a volunteer fire company does not accept County funds, it is only subject to such regulations of the County as may be imposed under the police power.

275 Md. at 382-83, 340 A.2d at 271 (emphasis added). *See also Wilson v. Board of Supervisors of Elections of Baltimore City*, 273 Md. 296, 328 A.2d 305 (1974) (upholding the validity of a proposed Baltimore City Charter Amendment that would forbid the erection of a stadium for professional sports in the City of Baltimore "with the use of any funds, credit or guarantee of the City").[21]

[21]"We see no difference between the situation that would prevail without this charter amendment if the representatives of the people of Baltimore City, the City Council, determined that no funds of the City of

Also instructive is the decision in *Montgomery County v. Maryland Soft Drink Association*, 281 Md. 116, 377 A.2d 486 (1977), in which the City of Rockville, Maryland, argued that County laws taxing distributors of non-reusable beverage containers were regulatory Acts under the guise of a tax and, therefore, could not be applied within the City of Rockville. The Court concluded that they were revenue measures, not regulatory measures, because:

> the raising of revenue is their dominant thrust. Stripped of the imposition of the tax itself and the necessary accompanying definitions, the bills would be virtually meaningless. In no real sense is any effort made in the bills to regulate those distributors directly affected by the tax. Nor is it properly our concern that a possible collateral economic effect of the tax may be to regulate the consumer's purchasing habits.

281 Md. at 132-35, 377 A.2d at 494-96.[22]

Baltimore should be spent on a relocated stadium and the situation which would prevail if this amendment were adopted, in which case the people of the City of Baltimore, the final masters, would be making a similar declaration." 273 Md. at 303, 328 A.2d at 310.

[22]The Court of Appeals also rejected the City's argument that the legislative history confirmed the regulatory nature of the enactments: "[I]f legislative enactments otherwise establish themselves as valid revenue measures, we do not examine the motives of legislators who voted for them, even assuming that regulation was their objective." 281 Md. at 133, 377

As applied to ACI an entity that permits its facility to be used for gun shows at which guns are displayed and sold the funding restriction surely is reasonably related to the use of County funds. The dominant thrust of § 57-13 is to restrain the use of County funds for such facilities. Stripped of its funding provisions, § 57-13 would be meaningless.[23] The County has a legitimate public-welfare interest in not funding a facility at which guns are sold, directly or indirectly, and it is entirely reasonable for the County to conclude that the funding restriction is properly applied to any grantee whose facility could accommodate a gun show. The law of Maryland requires nothing further. The funding restriction is a valid exercise of the County's spending power, and it does not, under Maryland law, constitute a regulation for purposes of the State Weapons-Preemption

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A.2d at 495 (citation omitted).

[23]The district court's concern that the condition imposed by § 57-13 requires no relationship between the County's spending being controlled and the organizations' permitting the display and sale of firearms *anywhere* and *any time* after December 1, 2001, is ill-founded. First, ACI has yet to apply for or receive any funds that would be subject to the condition. Second, there is nothing in the record even suggesting that ACI owns any facility other than the Agricultural Center.

law because, unlike § 57-11, it is not imposed under the police power.

Finally, even if the funding restriction were a "regulation" for State Weapons-Preemption law purposes, it would not trigger Tillie-Frank restraints. The Tillie-Frank law restrains an otherwise applicable County law only if the municipality has the authority to legislate on the subject of the County law. The subject of the funding restriction is the use of County funds for a facility owned or controlled by a County fund recipient. Conditions on the use of County funds is, under current State law, exclusively a matter of County concern. Although the Tillie-Frank law, combined with the State Weapons-Preemption law, authorizes the City of Gaithersburg to prevent County laws *regulating* the possession and sale of guns (*e.g.*, § 57-11) from applying within that municipality, it does not restrain the County from restricting the use of County funds for such activities within the City of Gaithersburg because the City of Gaithersburg clearly has no authority legislative or otherwise over County spending or County grant recipients as such. In this regard, the County's

spending authority, not surprisingly, is very much like its revenue authority and its budget authority, both of which the Tillie-Frank law expressly applies within all municipalities in the County. *See* MD. ANN. CODE art. 23A, § 2B(b)(2). Just as Tillie-Frank expressly does not apply to legislation adopting a county budget, so, too, it necessarily does not apply to other exercises of the County's spending authority because municipalities have no authority to legislate on that subject.

For these reasons, the district court erred in holding that the funding restriction "is unenforceable against Krasner's gun show at the Ag Center under State law." 166 F. Supp. at 1063.

III. The County funding restriction is a constitutionally permissible spending restraint that does not offend free-speech guarantees.

The First Amendment of the Constitution of the United States prohibits the Congress from making "any law abridging the freedom of speech...." U.S. CONST., AMEND. I. And this free-speech guarantee is applied to the States and their political subdivisions through the Due Process Clause of the Fourteenth Amendment. *Central Hudson Gas & Electric Corp. v. Public Service Commission*,

447 U.S. 557, 561(1980). Maryland's organic law also contains a free-speech guarantee, MD. DECL. RIGHTS, art. 40, and it has been interpreted to be "co-extensive with the freedoms protected by the First Amendment." *Jakanna Woodworks, Inc. v. Montgomery County*, 344 Md. 584, 595, 689 A.2d 65, 70 (1997).

Regulations of speech are subject to varying degrees of review under the First Amendment. Those that suppress, disadvantage, or impose differential burdens upon core-free speech because of its content are subjected to the most exacting scrutiny. *See Turner Broadcasting Systems v. F.C.C.*, 512 U.S. 622, 642 (1994). Core-free-speech-regulatory restraints that are justified without reference to the content of the regulated speech are generally subject to some form of intermediate scrutiny. *See United States v. O'Brien*, 391 U.S. 367 (1968). Commercial speech, although protected from unwarranted governmental regulation, enjoys "'a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values,' and is subject to modes of regulation that might be impermissible in the realm of noncommercial expression.'

" *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469, 477 (1989) (quoting *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 456 (1978)). Non-regulatory restraints such as funding-power restraints are subject to less exacting constitutional limitations than restraints that regulate directly; even those that deny funds for the exercise of core-speech rights do not, absent more, offend free-speech guarantees.[24] And, of course, laws that regulate conduct, but not expression, do not even implicate free-speech guarantees. *See Texas*

[24]*See Maher v. Roe*, 432 U.S. 464, 474 (1977) (Upholding a state welfare regulation under which Medicaid recipients received payments for services related to childbirth, but not for nontherapeutic abortions, the Court said that the government may "make a value judgment favoring childbirth over abortion, and ... implement that judgment by the allocation of public funds"); *Regan v. Taxation With Representation*, 461 U.S. 540, 549 (1983) ("[A] legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right."); *Harris v. McRae* , 448 U.S. 297, 317 (1983) ("A refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity); *Rust v. Sullivan,* 500 U.S. at 192 ("The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other").

v. Johnson, 491 U.S. 397, 404 (1989).

The funding restriction does not restrict speech, is content neutral, and does not discriminate based on viewpoint.

Krasner's free-speech claims necessarily present the threshold question of whether the challenged funding provision restricts speech and it is Krasner's obligation, as those desiring to engage in assertedly expressive conduct, to demonstrate that the First Amendment even applies. *See Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 n. 5 (1984). Krasner has not sustained this crucial burden.

The funding restriction does not prohibit speech or expression of any kind, not even that commercial speech arguably contained in the display or demonstration of guns.[25] It does not discriminate based on viewpoint. All this content-neutral law does is: (1) prohibit *the County* from funding (*i.e.*, giving financial or in-kind support to) an organization that permits the *display* <u>*and*</u> *sale* of guns at a facility owned or controlled by the organization; and (2) impose on such organizations an

[25]For example, § 57-13 does not prohibit Mr. Culver or MCSM from discussing any issues and providing information to anyone at gun shows or anywhere else.

obligation to repay County financial support received after December 1, 2001, if the organization permits the *display and sale* of guns after receiving such County support. Displaying guns without selling guns does not offend § 57-13. Neither is it implicated by the mere display of guns or the sale of guns at any facility not owned by an entity funded by the County. Only the post-December 1, 2001, sale of guns at a facility owned or operated by an organization funded by the County after December 1, 2001, triggers this carefully aimed provision.

Krasner relied below on *Northern Indiana Gun and Outdoor Shows, Inc. v. Hedman*, 104 F. Supp. 2d 1009, 1014 (N.D. Ind. 2000), for the proposition that "a proposal to engage in the sale of a firearm is protected as commercial speech under the First Amendment." The *Hedman* court, however, concluded that the sale of a firearm is not protected speech. Indeed, upholding a municipal policy that banned firearms and ammunition from a publicly owned civic center, that court concluded that taking guns into a public center was not expressive in nature, did not convey a particular message, and thus was

not protected speech. 104 F. Supp. 2d at 1012-13. *Hedman*, therefore, supports the validity of § 57-13.

Nordyke v. Santa Clara County, 110 F. 3d 707 (9th Cir. 1997), which *Hedman* quotes, also supports the validity of § 57-13. Although the Ninth Circuit concluded that an offer to sell guns or ammunition does no more than propose a commercial transaction and, therefore, is protected commercial speech, the Court expressly agreed that "the act of exchanging money for a gun is not ‘speech’ within the meaning of the First Amendment." *Id.* at 710. *See also Suter v. City of Lafayette*, 67 Cal. Rptr. 2d 420, 431 (Cal. App. 1997), *pet. for review denied*, 1997 Cal. LEXIS 8365 (Cal. 1997) ("Appellants misconstrue the nature of commercial speech in the First Amendment context. Commercial activity, such as selling or buying a product, is not accorded First Amendment protection.")

For these reasons, § 57-13 does not proscribe any speech at any gun show even at a facility funded by the County and does not implicate speech, viewpoint or even expressive conduct. It is a funding restraint based solely on conduct: the sale of a gun.

Even if it implicates core free-speech, § 57-13 is a permissible funding restriction.

Even if the funding restriction somehow implicates free speech, Krasner's core speech challenges must fail for at least two reasons. First, the challenged law does not foreclose Krasner's ability to engage in the speech they seek to protect. Second, the Constitution does not require the County to subsidize the exercise of Krasner's free-speech rights.

As noted earlier, the funding restriction, which is a content-neutral and viewpoint neutral law, does not prohibit Krasner from engaging in anything whether it be speech or conduct. Only the independent decisions of a facility owner or operator who obtained (and/or wants to retain the ability to seek) County funding after December 1, 2001, will prevent a facility from being used for the display and sale of guns. Indeed, even a facility owner or operator who has received County funding may elect to permit such use and reimburse the County for its funding. The funding restriction itself neither prohibits Krasner from nor penalizes them for exercising their free-speech rights.

In addition, both the executive branch of the federal

government and the Congress have frequently used the spending power to further broad policy objectives by conditioning the receipt of federal funds on the recipient's compliance with federal statutory and administrative restraints or requirements, and the Supreme Court has repeatedly upheld this technique for inducing state and local governments, as well as private entities, to cooperate with federal policies. *See Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980).[26] The mere fact that a funding restriction requires organizations that receive government support to make a choice between accepting funds subject to its conditions or declining the government subsidy and financing their own unsubsidized programs does not render a funding restriction unconstitutional:

> By accepting Title X funds, a recipient voluntarily consents to any restrictions placed on any matching funds or grant-related income. Potential grant recipients can choose between

[26]"Congress has frequently employed [its] Spending Power to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives." So, too, has the President. Indeed, the latest and one of the more highly publicized federal spending power restrictions is the funding limitations that the President has imposed on stem-cell research.

> accepting Title X funds -- subject to the Government's conditions that they provide matching funds and forgo abortion counseling and referral in the Title X project -- or declining the subsidy and financing their own unsubsidized program. We have never held that the Government violates the First Amendment simply by offering that choice.

See Rust, 500 U.S. at 199 n. 5.

On the contrary, the Supreme Court has "held in several contexts that a [government's] decision not to subsidize the exercise of a fundamental right does not infringe the right...." *Regan*, 461 U.S. at 546; *see also Cammarano v. United States*, 358 U.S. 498, 515 (1959) (Douglas, J., concurring) (rejecting the "notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State"). A government's mere refusal to subsidize a right "places no governmental obstacle in the path" of a plaintiff who seeks to exercise that right. *Harris v. McRae*, 448 U.S. 297, 315 (1983); *Buckley v. Valeo*, 424 U.S. 1, 94-95 (1976). "A refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity." *Harris*, 448 U.S. at 317 n.19. "[S]ubsidies are just that, subsidies ...; to avoid the force of the regulations, [a funding recipient]

can simply decline the subsidy." *Rust*, 500 U.S. at 198 n.5.

Rust v. Sullivan strongly supports the proposition that the First Amendment does not require the County to fund facilities that are used for gun shows. *Rust* involved a federal program that established clinics to provide subsidies for doctors to advise patients on a variety of family planning topics. Congress, however, did not view abortion as being within its family planning objectives, and, therefore, it forbad physicians employed by grantees from discussing abortion with their patients. *Id.* at 179-80. The *Rust* plaintiffs challenged the restrictions claiming that the regulations constituted impermissible viewpoint discrimination favoring an anti-abortion position over a pro-abortion position, and required recipients to relinquish their right to engage in abortion advocacy and counseling in exchange for the subsidy.

In upholding the statute's constitutionality, the majority explained that selectively funding a program to encourage certain activities the government believes to be in the public interest does not constitute viewpoint

discrimination. 500 U.S. at 192. On the other hand, the cases in which the Court has struck funding provisions down as violative of free-speech guarantees involved situations where the government placed a condition on the recipient of the subsidy rather than on a particular program or service. These conditions violated free-speech guarantees because they prohibited the recipient from engaging in the protected conduct outside the scope of the program. 500 U.S. at 197-98.

Rust teaches that the County may make a value judgment favoring a limitation on access to guns over supporting access to guns, and it may implement that judgment by the allocation of public funds.[27] As in *Rust*, ACI is entirely free to permit its lessees to display and sell guns at gun shows at the Agricultural Center, so long as it does not obtain County support for the center. Indeed, even after obtaining County support, ACI may permit such sales, but it must then repay the County.

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[27]At a time when many other local governments throughout the Nation are suing gun manufacturers for the costs incurred by them as a result of the use of guns, the County's choice of limiting its funding resources to programs that do not further those costs is exactly the type of public decision-making the Court approved in *Rust*.

The recent decision in *Legal Services Corporation v. Velazquez*, 531 U.S. 533 (2001), has not invalidated funding restrictions such as §57-13. In *Legal Services Corporation* ("*LSC*"), the majority held that Congress violated First Amendment rights when it imposed on Legal Services Corporation grantees a funding restriction that barred their lawyers from efforts, while serving individual clients, to amend or otherwise challenge existing welfare law. Noting that the purpose of the First Amendment is to "assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people," 531 U.S. at 548 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)), the Court concluded that the effect of the restriction was "to prohibit advice or argumentation that existing welfare laws are unconstitutional or unlawful." *Id.* at 547. "Here, notwithstanding Congress' purpose to confine and limit its program, the restriction operates to insulate current welfare laws from constitutional scrutiny and certain other legal challenges, a condition implicating central First Amendment concerns." *Id.* "The Constitution does not permit the government to

confine litigants and their attorneys in this manner. We must be vigilant when Congress imposes rules and conditions which in effect insulate its own laws from legitimate judicial challenge." *Id.* at 548. The majority distinguished *Rust* on the basis, among others, that in *Rust* "Congress had not discriminated against viewpoints on abortion, but had 'merely chosen to fund one activity to the exclusion of the other,' " *Id.* at 541 (quoting *Rust*, 500 U.S. at 193).[28] Following the decision in *LSC*, the Fifth Circuit tested, under core free-speech standards, an amendment to a Louisiana Supreme Court Rule limiting the circumstances under which unlicensed law

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[28]The five-member majority also distinguished *Rust* on the basis of a private/public speaker distinction that drew an emphatic dissent from Justice Scalia and severe criticism in other quarters, and is not applicable to funding conditions that are not viewpoint based. *See, e.g.,* Gozdor, Christopher A., Note: *Legal Services Corp. v. Velazquez: a Problematic Commingling of Unconstitutional Conditions And Public Fora Analysis Yields a New Grey Area For Free Speech*, 61 Md. L. Rev. 454 (2002) ("The majority inappropriately applied the Court's public fora and unconstitutional conditions precedent to the facts of Velazquez. It would have been more prudent for the Court to have analyzed Velazquez as a case of content-based discrimination because the conditions banned LSC clients from challenging or defending existing welfare law."); Comment: *The Supreme Court's Decision in Legal Services Corporation v. Velazquez and the Analysis Under the Unconstitutional Conditions Doctrine*, 79 Denv. U.L. Rev. 157 (2001).

students could engage in the practice of law. *Southern Christian Leadership Conference v. Supreme Court of the State of Louisiana*, 252 F.3d 781 (5th Cir.), *cert. denied* , 151 L. Ed. 2d 381 (2001). The amendment prohibited clinical student practitioners "from representing in the role of attorneys an otherwise qualified individual or organization for purposes of that representation. *Id.* at 785. After reviewing *Rust* and *LSC*, the court "conclude[d] that a refusal to promote private speech is not on a par with a regulation that prohibits or punishes speech, or which excludes a speaker from a public or nonpublic forum." *Id.* at 795.

Unlike the restraints on lawyers' advice, § 57-13 is a restraint on the County's support of private facilities at which guns are sold. No one is precluded from engaging in the assertedly protected speech. The law does not discriminate against viewpoints on anything. Anyone may hold and participate in gun shows, engage in related speech, and sell guns at any facility. The County simply will not support a facility at which guns are sold. Therefore, even if § 57-13 implicates private speech, it is merely a permissible refusal not to promote

such speech.

The funding restriction also passes muster under an expressive speech challenge.

The Supreme Court has been careful to distinguish commercial speech from speech at the core of the First Amendment's free-speech guarantees. Although commercial speech is protected from unwarranted governmental regulation, it is subject to greater limitations than may be imposed on expression not solely related to economic interests. *See Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. at 561. Furthermore, although the Supreme Court has yet to test a funding restriction under *commercial* free-speech restraints, its conclusion that "the constitutional limitations on Congress when exercising its spending power are less exacting than those on its authority to regulate directly," *South Dakota v. Dole*, 483 U.S. at 209 (citing *United States v. Butler*, 297 U.S. at 66), suggests that funding restrictions that restrain commercial speech are to be tested under a yet-to-be-articulated standard that is even more deferential than the relatively relaxed *Central Hudson* test for regulatory provisions that restrain such speech.

Under the *Central Hudson* test, the County may freely regulate commercial speech that concerns unlawful activity or is misleading. A restriction on commercial speech that does not concern unlawful activity is permissible if the government: (1) asserts a substantial interest in support of its regulation; (2) establishes the restriction directly and materially advances the interest; and (3) demonstrates that the regulation is narrowly drawn. *Id.* Section 57-13 satisfies the *Central Hudson* test.

The County has a sufficiently substantial interest in not supporting an organization that permits the display and sale of guns at gun shows in the organization's facility. The mischiefs presented by the sale and proliferation of guns, even at gun shows in heavily regulated Maryland, are abundantly sufficient to constitute a substantial interest in not supporting an organization that permits the sale of guns at its facility. The display and sale of guns at gun shows provides immediate access to guns in a place of public assembly, increases the proliferation of guns (both regulated and unregulated), facilitates illegal gun

sales, and contributes to gun violence. Indeed, there is increasing evidence that gun shows facilitate illegal sales and gun trafficking:

> Illegal gun show sales can occur in several ways, including: (a) straw man purchases, ... (b) out-of-state sales by FFLs [Federal Firearms Licensees], (c) sales from allegedly "personal" collections that are in fact offered for sale on a regular basis at gun shows and are not actually personal collections, or (d) sales by individuals who are not FFLs to minors or felons. In most states, transactions at gun shows by individuals who are not FFLs require no background check, so the seller may not know that the purchaser is a proscribed person.

A Gun Policy Glossary: Policy, Legal, and Public Health Terms, The Johns Hopkins Center for Gun Policy and Research, (March 2000), p. 9. Moreover, based on a review of "314 [then] recent [ATF] investigations that involved gun shows in some capacity," a 1999 joint report of the U.S. Department of Justice, the U.S. Department of the Treasury, and the U.S. Bureau of Alcohol, Tobacco and Firearms, "indicated that gun shows provide a forum for illegal firearms sales and trafficking." GUN SHOWS: BRADY CHECKS AND CRIME GUN SHOWS, Joint Report of the Department of the Treasury, Department of Justice, and the Bureau of Alcohol, Tobacco and Firearms (January

1999), p. 6.

Responding to these kinds of concerns, the County, even before the enactment of Chapter 11 of the LAWS OF MONTGOMERY COUNTY (2001), exercised its police power to prohibit the sale, transfer, possession, or transportation of a handgun, rifle, or shotgun, or ammunition for these firearms, in or within 100 yards of a place of public assembly. MCC § 57-11(a) (formerly § 57-7A(a)). The public safety interest underlying that statutory policy is manifest. And that policy is furthered by Chapter 11's funding restraints. The County will not support organizations that permit guns to be sold at their places of public assembly. Indeed, the legislative history of Chapter 11 (then Bill 2-01) expressly identified the problem addressed by the Bill as follows:

> County financial support for organizations that host gun shows may help promote the sale of guns, contrary to the County's general policy of limiting the proliferation of handguns and other weapons in the County. Gun show sales are subject to general State laws regarding the transfer of firearms, but the transitory nature of gun shows makes enforcement of these requirements especially difficult.

(J.A. 239) Clearly, the County has a substantial

interest in not supporting an organization that permits the sale of guns at places of public assembly the organization owns or controls.

The second prong of the *Central Hudson* test requires that the challenged provision advance the government interest in a direct and material way. *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487 (1995). The funding restriction clearly satisfies that requirement by directly and materially advancing the County's interest in not supporting the sale of guns and the all too frequently demonstrated dangers to the public welfare that such sales can nurture.

Finally, the funding restriction also is sufficiently narrowly drawn. The differences between commercial speech and noncommercial speech are, for the purpose of the last of the *Central Hudson* prongs, especially significant. The Supreme Court has "made clear that the 'least restrictive means' test has no role in the commercial speech context." *Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 632 (1995) (quoting *Fox*, 492 U.S. at 480). Instead, for commercial-speech purposes, the Court requires merely "a 'fit' between the legislature's ends

and the means chosen to accomplish those ends." *Id.* And the fit does not have to be perfect, just reasonable. Neither must it represent the single best disposition, just "one whose scope is 'in proportion to the interest served,' that employs not necessarily the least restrictive means but ... a means narrowly tailored to achieve the desired objective." *Id.*

A reasonable 'fit' exists between the County's ends and § 57-13. Indeed, that "fit" is perfect, and the law's carefully limited scope, as demonstrated above, certainly is "in proportion to the interest served," and narrowly tailored to achieve the desired objective that the County not support organizations that permit their places of public assembly to be used for the sale of guns.[29]

The funding restriction does not prohibit any of the Krasner appellees from doing or saying anything. All it does is: (1) prohibit *the County* from giving financial or in-kind support to an organization that permits the

[29]The reach of § 57-13 also is in direct proportion to the benefit conferred, especially with respect to the kinds of long-term capital improvements the County occasionally funds at the Agricultural Center.

display and sale of guns at a facility owned or controlled by the organization; and (2) impose on such organizations an obligation to repay County financial support received after December 1, 2001, if the organization permits the display and sale of guns after receiving such County support. Displaying guns without selling guns does not offend either the funding restraint that § 57-13(a) imposes on the County or trigger the post-December 1, 2001, County funding recipient's obligation under § 57-13(b) to repay the County. Neither is § 57-13 contravened by the display and sale of guns at a facility not owned or controlled by an entity funded by the County. Only the post-December 1, 2001, sale of displayed guns at a facility owned or operated by an organization funded by the County after December 1, 2001, triggers this narrowly drawn provision. The "fit" between the County's ends and the legislative means it has chosen to achieve those ends is not just a reasonable fit, it is a perfect fit. The County avoids supporting the sale of guns at a place of public assembly by restricting its financial and in-kind support for places of public assembly at which guns are sold.

For all of these reasons, the funding restriction does not offend free-speech guarantees.[30]

IV. The County funding restriction does not deny Krasner the equal protection of the laws because the classifications the law draws are rationally based.

The Equal Protection Clause of the Fourteenth Amendment prohibits the States from "deny[ing] any person ... the equal protection of the laws." [31] This is, of course, an important safeguard that applies equally to political subdivisions such as counties. It also is, in the words of Mr. Justice Holmes, the "usual last refuge

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[30]Although the complaint does not contain a separate freedom of assembly count, Krasner, nevertheless, attempted below to pursue one as an offspring of its free-speech claim. It is easily and properly rejected. Just as non-regulatory restraints, even those that deny funds for the exercise of core speech rights, do not, absent more, offend free-speech guarantees, *a fortiori*, they do not contravene the guarantee of freedom of assembly that is a component of the free-speech guarantee.

[31]"Although the Maryland Constitution contains no express equal protection clause, it is settled that the Due Process Clause ... contained in Article 24 of the Maryland Declaration of Rights embodies the concept of equal protection of the laws to the same extent as the Equal Protection Clause of the Fourteenth Amendment." *Murphy v. Edmonds*, 325 Md. 342, 353, 601 A.2d 102, 107 (1992). And Supreme Court opinions concerning the Equal Protection Clause are practically direct authorities with regard to Article 24 of the Maryland Declaration of Rights. 325 Md. at 343, 601 A.2d at 108.

of constitutional arguments." *Buck v. Bell*, 274 U.S. 200, 208 (1927).

The funding restriction does not discriminate against Krasner. If it did, however, it would easily pass the rational basis test under which Krasner challenges it. This traditional equal protection analysis permits legislative bodies a wide scope of discretion in enacting laws that affect some groups of citizens differently than others. Under this test, the County Council is presumed to have acted within its constitutional power despite the fact that, in practice, its enactment may result in some inequality, and equal protection guarantees are offended only if the classification rests on grounds wholly irrelevant to the achievement of the County objective. *Reed v. Reed,* 404 U.S. 71, 77 (1971). A statutory discrimination will not be set aside under the rational basis test if *any* state of facts reasonably *may be conceived* to justify it; only totally irrational classifications fail this least restrictive standard. *See FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993). So deferential is this test that it denies the challenging party any right to offer evidence to seek to

prove that the legislative body is wrong in concluding that its classification will serve the purpose it has in mind, so long as the question is at least debatable and the legislative body could rationally have decided that its classification would foster its goal. *See City of New Orleans v. Dukes*, 427 U.S. 297 (1976); *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961).

Given the proliferation of firearms and the seemingly daily reports of firearms violence in the D.C. area, and the County policy embodied in MCC § 57-11(a), there is an abundantly clear rational basis for Montgomery County not to fund organizations that contribute to the proliferation of guns by permitting weapons to be sold at their facilities. Krasner's equal protection claim, therefore, is patently lacking in merit.

CONCLUSION

The County, in the exercise of its broad, discretionary spending power, makes financial support available to a number of private organizations whose activities, in the view of the governing body of the County, contribute to the public welfare and are consistent with County policy and public safety. As a

matter of legitimate and substantial County interest and policy, Montgomery County has decided not to support the proliferation of guns through the sale of guns at places of public assembly.

State law does not inhibit the application of a funding restriction embodying that fiscal policy decision to grantees located within the City of Gaithersburg or anywhere else. Neither is the County constitutionally required to support those activities or constitutionally prohibited from withholding its financial or in-kind support from those who permit such activities at their facilities, especially when, as here, the withholding of that support is sufficiently rationally related and tailored to further that substantial interest and policy. Nothing in the content-neutral, viewpoint neutral, funding restriction under attack in this case interferes with free speech, expression, assembly, or denies Krasner the equal protection of the laws.

Krasner's attempt to have this Court force the County to fund places of public assembly that permit events at which guns are sold, therefore, must be rejected, the judgment below reversed, and the case remanded to the

district court for the entry of a judgment in favor of the County on every count in the complaint.

Respectfully submitted,

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REQUEST FOR ORAL ARGUMENT

The County respectfully requests that this case be set for oral argument.

(Insert the Court’s form Certificate of Compliance with Type Face and Length Limitations)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two copies of Appellant's Brief and the Joint Appendix were sent by first class mail, postage prepaid, this ___ day of September, 2002, to Jonathan P. Kagan, Esquire and Alexander J. May, Esquire, attorneys for the Plaintiffs/Appellees, at BRASSEL & BALDWIN, P.A., 112 West Street, Annapolis, MD 21401.

_____

Judson P. Garrett, Jr.

ADDENDUM

Excerpts from THE CONSTITUTION OF THE UNITED STATES OF AMERICA
AMENDMENT I . . . . . Add. 2
AMENDMENT XIV, Section 1 . . . . . Add. 2

Excerpts from THE UNITED STATES CODE
Title 28 U.S.C. § 1291 . . . . . Add. 2
Title 28 U.S.C. § 1331 . . . . . Add. 2
Title 28 U.S.C. § 1343(a)(3) . . . . . Add. 2
Title 28 U.S.C. § 1367 . . . . . Add. 3
Title 28 U.S.C. § 2201 . . . . . Add. 4

Federal Rules of Civil Procedure
Rule 58 . . . . . Add. 4

Excerpts from THE MARYLAND DECLARATION OF RIGHTS
Article 24 . . . . . Add. 5
Article 40 . . . . . Add. 5

Excerpts from the ANNOTATED CODE OF MARYLAND
Article 23A, § 2B . . . . . Add. 5
Article 25A, § 5(S) . . . . . Add. 8
Article 27, § 36H . . . . . Add. 9

Excerpts from THE MONTGOMERY COUNTY CODE
Sec. 57-1 . . . . . Add. 10
Sec. 57-11 . . . . . Add. 10
Sec. 57-13 . . . . . Add. 13

Excerpt from the GAITHERSBURG CITY CODE
Sec. 2-6 . . . . . Add. 13

2001 LAWS OF MONTGOMERY COUNTY Ch. 11 (Bill No. 2-01) Add. 15

Excerpts from The Constitution of the United States of America

Amendment I

> Congress shall make no law ... abridging the freedom of speech, ... or the right of the people peaceably to assemble ....

Amendment XIV

> Section 1.
>
> No State shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Excerpts from The United States Code

Title 28 U.S.C. § 1291.

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States ..., except where a direct review may be had in the Supreme Court....

Title 28 U.S.C. § 1331.

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

Title 28 U.S.C. § 1343(a)(3).

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * *

(3) To redress the deprivation, under color of

any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States....

Title 28 U.S.C. § 1367.

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if--

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

(e) As used in this section, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

Title 28 U.S.C. § 2201.

(a) In a case of actual controversy within its jurisdiction, ... any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

(b) For limitations on actions brought with respect to drug patents see section 505 or 512 of the Federal Food, Drug, and Cosmetic Act

Federal Rules of Civil Procedure

Rule 58.

Subject to the provisions of Rule 54(b): (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court; (2) upon a decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the form of the judgment, and the clerk shall thereupon enter it. Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a). Entry of the judgment shall not be delayed, nor the time for appeal extended, in order to tax costs or award fees, except that, when a timely motion for attorneys' fees is made under Rule 54(d)(2), the court, before a notice of appeal has been filed and has become effective, may order that the motion have the same effect under Rule 4(a)(4) of the Federal Rules of Appellate Procedure as a timely motion under Rule 59. Attorneys shall not submit forms of judgment except upon the direction of the court, and these directions shall not be given as a matter of course.

Excerpts from THE MARYLAND DECLARATION OF RIGHTS

Article 24

That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land.

Article 40

That ... every citizen of the State ought to be allowed to speak, write and publish his sentiments on

all subjects, being responsible for the abuse of that privilege.

Excerpts from the ANNOTATED CODE OF MARYLAND:

Article 23A, § 2B. Application of county legislation to municipalities.

(a) County legislation made inapplicable in municipality. -- Except as provided in subsection (b) of this section, legislation enacted by a county does not apply in a municipality located in such county if the legislation:

(1) By its terms exempts the municipality;

(2) Conflicts with legislation of the municipality enacted under a grant of legislative authority provided either by public general law or its charter; or

(3) Relates to a subject with respect to which the municipality has a grant of legislative authority provided either by public general law or its charter and the municipality, by ordinance or charter amendment having prospective or retrospective applicability, or both:

(i) Specifically exempts itself from such county legislation; or

(ii) Generally exempts itself from all county legislation covered by such grants of authority to the municipality.

(b) Categories of county legislation applicable in municipalities. -- Notwithstanding the provisions of subsection (a) (2) and (3) of this section, the following categories of county legislation, if otherwise within the scope of legislative powers granted the county by the General Assembly, shall nevertheless apply

within all municipalities in the county:

(1) County legislation where a law enacted by the General Assembly so provides;

(2) County revenue or tax legislation, subject to the provisions of Article 24 of the Code, the Tax-General Article, and the Tax-Property Article, or legislation adopting a county budget; and

(3) County legislation which is enacted in accordance with requirements otherwise applicable in such county to legislation that is to become effective immediately and which also meets the following requirements:

(i) The legislative body of the county makes a specific finding based on evidence of record after a hearing held in accordance with the requirements of subparagraph (ii) hereof that there will be a significant adverse impact on the public health, safety, or welfare affecting residents of the county in unincorporated areas if such county legislation does not apply in all municipalities located in such county;

(ii) The legislative body of the county conducts a public hearing at which all municipalities in the county and interested persons shall be given an opportunity to be heard, notice of which is given by the mailing of certified mail notice to each municipality in the county not less than 30 days prior to the hearing and by publication in a newspaper of general circulation in the county for 3 successive weeks, the first publication to be not less than 30 days prior to the hearing; and

(iii) The county legislation is enacted by the

affirmative vote of not less than two-thirds of the authorized membership of the county legislative body.

(4) County legislation which is enacted in accordance with the procedures set forth in paragraph (3) of this subsection shall be subject to judicial review of the finding made under paragraph (3) (i) of this subsection and of the resultant applicability of such legislation to municipalities in the county by the circuit court of the county in accordance with the provisions of the Maryland Rules governing appeals from administrative agencies. Any appeal shall be filed within 30 days of the effective date of such county legislation. In any judicial proceeding commenced under the provisions of this paragraph, the sole issues are whether the county legislative body (1) complied with the procedures of paragraph (3) of this subsection, and (2) had before it sufficient evidence from which a reasonable person could conclude that there will be a significant adverse impact on the public health, safety, or welfare affecting residents of the county in unincorporated areas if such county legislation does not apply in all municipalities located in the county. The issues shall be decided by the court without a jury. In the event that the court reverses such finding, the legislation shall continue to apply in unincorporated areas of the county and the applicability of such county legislation in municipalities shall be governed by the provisions of subsection (a) of this section. The decision of the

circuit court in any such proceeding shall be subject to further appeal to the Court of Special Appeals by the county or any municipality in the county.

(c) Municipal legislation making county legislation inapplicable. -- Notwithstanding the provisions of subsection (b) (3) of this section, county legislation enacted in accordance with the procedures and requirements thereof shall nevertheless be or become inapplicable in any municipality which has enacted or enacts municipal legislation that:

(1) Covers the same subject matter and furthers the same policies as the county legislation;

(2) Is at least as restrictive as the county legislation; and

(3) Includes provisions for enforcement.

(d) Administration or enforcement of municipal legislation. -- Any municipality may, by ordinance, request and authorize the county within which it is located to administer or enforce any municipal legislation. Upon the enactment of such an ordinance, such county may administer or enforce such municipal legislation on such terms and conditions as may mutually be agreed.

(e) Definitions. -- As used in this section:

(1) "County" means any county, regardless of the form of county government, including charter home rule, code home rule, and county commissioners; and

(2) "Legislation" means any form of county or municipal legislative enactment, including a law, ordinance, resolution and any action by which a county budget is

adopted.

Article 25A, § 5(S).

The foregoing or other enumeration of powers in this article shall not be held to limit the power of the county council, in addition thereto, to pass all ordinances, resolutions or bylaws, not inconsistent with the provisions of this article or the laws of the State, as may be proper in executing and enforcing any of the powers enumerated in this section or elsewhere in this article, as well as such ordinances as may be deemed expedient in maintaining the peace, good government, health and welfare of the county.

Provided, that the powers herein granted shall only be exercised to the extent that the same are not provided for by public general law....

Article 27, § 36H. State preemption of weapons and ammunition regulations.

(a) Handguns, rifles, shotguns, and ammunition. -- Except as provided in subsections (b), (c), and (d) of this section, the State of Maryland hereby preempts the rights of any county, municipal corporation, or special taxing district whether by law, ordinance, or regulation to regulate the purchase, sale, taxation, transfer, manufacture, repair, ownership, possession, and transportation of the following:

(1) Handgun, as defined in § 36F (b) of this article;

(2) Rifle, as defined in § 36F (d) of this article;

(3) Shotgun, as defined in § 36F (g) of this article; and

(4) Ammunition and components for the above enumerated items.

(b) Exceptions. -- Any county, municipal corporation, or special taxing district may regulate the purchase, sale, transfer, ownership, possession, and transportation of the weapons and ammunition listed in subsection (a) of this section:

(1) With respect to minors;

(2) With respect to these activities on or within 100 yards of parks, churches, schools, public buildings, and other places of public assembly; however, the teaching of firearms safety training or other educational or sporting use may not be prohibited; and

(3) With respect to law enforcement personnel of the subdivision.

(c) Authority to amend local laws or regulations. -- To the extent that local laws or regulations do not create an inconsistency with the provisions of this section or expand existing regulatory control, any county, municipal corporation, or special taxing district may exercise its existing authority to amend any local laws or regulations that exist before January 1, 1985.

(d) Discharge of handguns, rifles, and shotguns. -- In accordance with law, any county, municipal corporation, or special taxing district may continue to regulate the discharge of handguns, rifles, and shotguns, but may not prohibit the discharge of firearms at established ranges.

Excerpts from THE MONTGOMERY COUNTY CODE

Sec. 57-1. Definitions.

In this Chapter [57], the following words and phrases have the following meanings:

* * *

Gun show: Any organized gathering where a gun is displayed for sale.

Place of public assembly: A "place of public assembly" is a government owned park identified by the Maryland-National Capital Park and Planning Commission; place of worship; elementary or secondary school; public library; government-owned or -operated recreational facility; or multipurpose exhibition facility, such as a fairgrounds or conference center. A place of public assembly includes all property associated with the place, such as a parking lot or grounds of a building.

Sec. 57-11. Firearms in or near places of public assembly.

(a) A person must not sell, transfer, possess, or transport a handgun, rifle, or shotgun, or ammunition for these firearms, in or within 100 yards of a place of public assembly.

(b) This section does not:

(1) prohibit the teaching of firearms safety or other educational or sporting use in the areas described in subsection (a);

(2) apply to a law enforcement officer, or a security guard licensed to carry the firearm;

(3) apply to the possession of a firearm or ammunition in the person’s own home;

(4) apply to the possession of one firearm, and ammunition for the firearm, at a business by either the owner or one authorized employee of the business;

(5) apply to the possession of a handgun by a person who has received a permit to carry the handgun under State law; or

(6) apply to separate ammunition or an unloaded firearm:

(A) transported in an enclosed case or in a locked firearms rack on a motor vehicle; or

(B) being surrendered in connection with a gun turn-in or similar program approved by a law enforcement agency.

(c) This section does not prohibit a gun show at a multipurpose exhibition facility if:

(1) the facility's intended and actual primary use is firearms sports (hunting or target, trap, or skeet shooting) or education (firearms training); or

(2) no person who owns or operates the facility or promotes or sponsors the gun show received financial or in-kind support from the County (as defined in Section 57-13(a)) during the preceding 5 years, or after December 1, 2001, whichever is shorter; and

(A) no other public activity is allowed at the place of public assembly during the gun show; and

(B) if a minor may attend the gun show:

(i) the promoter or sponsor of the gun show provides to the Chief of Police, at least 30 days before the show:

(a) photographic identification, fingerprints, and any other information the Police Chief requires to conduct a background check of each individual who is or works for any promoter or sponsor of

the show and will attend the show; and

(b) evidence that the applicant will provide adequate professional security personnel and any other safety measure required by the Police Chief, and will comply with this Chapter; and

(ii) the Police Chief does not prohibit the gun show before the gun show is scheduled to begin because:

(a) the promoter or sponsor has not met the requirements of clause (i); or

(b) the Police Chief has determined that an individual described in clause (i)(a) is not a responsible individual.

(d) Notwithstanding subsection (a), a gun shop owned and operated by a firearms dealer licensed under Maryland or federal law on January 1, 1997, may conduct regular, continuous operations after that date in the same permanent location under the same ownership if the gun shop:

(1) does not expand its inventory (the number of guns or rounds of ammunition displayed or stored at the gun shop at one time) or square footage by more than 10 percent, or expand the type of guns (handgun, rifle, or shotgun) or ammunition offered for sale since January 1, 1997;

(2) has secure locks on all doors and windows;

(3) physically secures all ammunition and each firearm in the gun shop (such as in a locked box or case, in a locked rack, or with a trigger lock);

(4) has adequate security lighting;

(5) has a functioning alarm system connected to

a central station that notifies the police; and

(6) has liability insurance coverage of at least $1,000,000.

§ 57-13. Use of public funds.

(a) The County must not give financial or in-kind support to any organization that allows the display and sale of guns at a facility owned or controlled by the organization. Financial or in-kind support means any thing of value that is not generally available to similar organizations in the County, such as a grant, special tax treatment, bond authority, free or discounted services, or a capital improvement constructed by the County.

(b) An organization referred to in subsection (a) that receives direct financial support from the County must repay the support if the organization allows the display and sale of guns at the organization's facility after receiving the County support. The repayment must include the actual, original value of the support, plus reasonable interest calculated by a method specified by the Director of Finance.

Excerpt from the GAITHERSBURG CITY CODE

Sec. 2-6. Exemption from Montgomery County legislation and regulations within the city.

[P]ursuant to the authority granted by article 23A, section 2B(a), of the Annotated Code of Maryland, as enacted by chapter 398 of the Laws of Maryland, 1983, and further pursuant to chapter 33 of the Laws of Montgomery County, 1984, as codified in Chapter 2, Section 2-96 of the Montgomery County Code (1972 edition, as amended), as may hereafter from time to time be amended, the City of Gaithersburg, Maryland, is hereby declared exempt from any and all legislation and regulations pertaining hereto, heretofore or hereafter enacted

by Montgomery County, Maryland, relating to any subject or matter upon which the mayor and city council of the city, or the City of Gaithersburg, as a municipal corporation, has been heretofore or is hereafter granted legislative authority, with [certain] exceptions....