DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER
ENTITIES WITH A DIRECT FINANCIAL INTEREST IN LITIGATION

Only one form need be completed for a party even if the party is represented by more than one attorney. Disclosures must be filed on behalf of individual parties as well as corporate parties. Disclosures are required from amicus curiae only if amicus is a corporation. Counsel has a continuing duty to update this information. Please file an original and three copies of this form.

No. 01-2321 Caption: Frank Krasner Enterprises, LTD., et al. v. Montgomery County, Maryland

Pursuant to FRAP 26.1 and Local Rule 26.1,

Frank Krasner Enterprises, LTD., et al. who is Appellees,
(name of party/amicus) (appellant/appellee/amicus)

makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity?
   ( ) YES (X) NO
2. Does party/amicus have any parent corporations?
   ( ) YES (X) NO
   If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity?
   ( ) YES (X) NO
   If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))?
   ( ) YES (X) NO
   If yes, identify entity and nature of interest:

5. Is party a trade association?
   ( ) YES (X) NO
   If yes, identify all members of the association, their parent corporations, and any publicly held companies that own 10% or more of a member's stock:

(signature)
Jonathan P. Kagan

10/28/02
(date)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes and Constitutional Provisions

Other Authorities

STATEMENT OF ISSUES

I. WHETHER A GUN SHOW PROMOTER AND EXHIBITORS HAD STANDING TO CHALLENGE MONTGOMERY COUNTY'S GUN SHOW LAW (§ 57-13) AFTER THE PRIVATE FACILITY WHICH HOSTED THE SHOWS BANNED ALL FUTURE SHOWS AFTER THE LAW WAS PASSED.

II. WHETHER THE DISTRICT COURT PROPERLY FOUND THAT § 57-13 WAS A GUN SALE REGULATION ENACTED BY THE COUNTY IN THE GUISE OF A SPENDING PROVISION IN VIOLATION OF MARYLAND'S TILLIE FRANK LAW.

III. WHETHER § 57-13 CREATES AN INCIDENTAL BURDEN ON COMMERCIAL AND NON-COMMERCIAL FREE SPEECH AT GUN SHOWS AND SHOULD BE DECLARED INVALID UNDER THE O'BRIEN AND CENTRAL HUDSON TESTS.

IV. WHETHER § 57-13 INFRINGES UPON A GUN SHOW EXHIBITOR'S RIGHT TO ASSEMBLE.

V. WHETHER § 57-13 VIOLATES A GUN SHOW PROMOTER AND EXHIBITOR'S EQUAL PROTECTION RIGHTS.

STATEMENT OF THE CASE

On June 22, 2001, Appellees Frank Krasner Enterprises, Ltd., d/b/a Silverado Promotions and Silverado Gun Show ("Krasner"), RSM, Inc., d/b/a Valley Gun and Police Supply ("RSM"), and Robert D. Culver, individually and on behalf of a citizens group called "Montgomery Citizens for a Safer Maryland," ("MCSM")[1] filed suit against Appellant Montgomery County, Maryland ("the County") seeking to have § 57-13 of the County

[1] Collectively, Appellees will be referenced as "Krasner."

Code declared invalid and unconstitutional. (J.A. 9). Krasner promoted two gun shows annually at the Montgomery County Fairgrounds which is owned by the Montgomery County Agricultural Center, Inc., in Gaithersburg, Maryland ("Ag Center"). (J.A. 5).

On May 16, 2001, the County passed § 57-13 that effectively banned guns shows in the County by prohibiting funding to and sanctioning any exhibition facility that allowed a gun show. (Add. 15). Krasner sued for declaratory relief (Count I); 42 U.S.C. § 1983 (violation of commercial free speech) (Count II); violation of Maryland Declaration of Rights, Article 40 (commercial free speech) (Count III); 42 U.S.C. § 1983 (violation of non-commercial free speech) (Count IV); violation of Maryland Declaration of Rights, Article 40 (non-commercial free speech) (Count V); 42 U.S.C. § 1983 (violation of equal protection) (Count VI); and for an injunction (Count VII). (J.A. 9-36).

Along with the Complaint, Krasner filed a Motion for Preliminary Injunction and Motion for Summary Judgment as to Counts I, II and III. (J.A. 4). On July 11, 2001, the County filed an Opposition to the Motion for Preliminary Injunction. (J.A. 4). On July 13, 2001, the County filed an Answer. Id. On July 18, 2001, Krasner filed a Reply regarding the Motion for Preliminary Injunction. Id.

On July 20, 2001, a motions hearing was held before the Honorable Marvin J. Garbis in the United States District Court for the District of Maryland. (J.A. 4). On July 23, 2001, the district court granted in part, and denied in part, Krasner's Motion for Preliminary Injunction. Id. The district court temporarily enjoined the County from enforcing or threatening to enforce § 57-13 so as to impose sanctions with regard to the gun show to be held in October 2001 at the Ag Center. (J.A. 5).

On August 9, 2001, Krasner filed a Supplemental Motion for Summary Judgment as to all counts. Id. On August 21, 2001, the County filed an Opposition to the motion, and filed its own Motion for Summary Judgment. (J.A. 6). On September 12, 2001, Krasner filed an Opposition to the County's Motion for Summary Judgment. (J.A. 7).

On September 25, 2001, a bench trial was held before Judge Garbis. Id. For the purposes of trial, the parties agreed to a stipulation of certain facts and to the admission of certain affidavits in lieu of testimony. (J.A. 168-69). At trial, Krasner called three witnesses: (1) Frank Krasner; (2) Sanford Abrams on behalf of RSM; and (3) Robert Culver on behalf of MCSM. The County called no witnesses.

On October 4, 2001, the district court entered judgment in favor of Krasner and issued a Permanent Injunction stating:

> Montgomery County, Maryland is hereby restrained and enjoined from seeking to apply Montgomery County Code § 57-13 to impose sanctions and/or to withhold funding from the organization owning and/or operating the Montgomery County Fairgrounds Agricultural Center by virtue of its permitting Plaintiff Frank Krasner Enterprises, Ltd. d/b/a Silverado Promotions and Silverado Gun Show to conduct gun shows therein at which guns are displayed and sold legally.

(J.A. 452).

The district court found that § 57-13 violated Maryland's Tillie Frank law because the law was preempted under State law since the gun show took place in the City of Gaithersburg. (J.A. 448-49). Thus, the district court did not reach the constitutional issues raised by Krasner. (J.A. 449). Based upon the decision at trial, the district court found the cross motions for summary judgment moot. (J.A. 453). The County noted a timely appeal.

STATEMENT OF THE FACTS

A. Krasner's Gun Shows at the Ag Center.

Since 1990, Krasner has been promoting and organizing approximately eight to ten gun shows per year throughout Maryland. (J.A. 254). For the last twelve years, two of those shows have been held annually at the Ag Center in January and October. (J.A. 260-61). The Ag Center is privately owned by a non-profit group and is located completely within the

jurisdiction of the City of Gaithersburg. (J.A. 168). Krasner leases space from the Ag Center for the shows. (J.A. 261).

Over the last twelve years Krasner has established substantial goodwill among its exhibitors, visitors, and the Ag Center. (J.A. 194). An average of anywhere from 1,500 to 2,300 visitors attend each gun show at the Ag Center. (J.A. 267). There have been approximately 40,000 attendees since 1990. (J.A. 194).

Gun shows at the Ag Center run for two consecutive days. (J.A. 194). Krasner rents approximately 220 to 320 tables. (J.A. 264). The shows are a collector's marketplace for books, outdoor equipment, clothing and firearms. (J.A. 259, 266). Only about 20 to 25% of the tables are rented to federally licensed firearms dealers. (J.A. 265-66). The other tables are rented to businesses selling firearms related merchandise, and to organizations that distribute information related to the use, possession, or sale of firearms. (J.A. 266).

RSM is a regular exhibitor at Krasner's gun shows in the County that not only sells firearms and related equipment, but also discusses the use of firearms and appraises firearms. (J.A. 323, 328-29).

Since approximately 1996, a County citizens group, MCSM, has regularly hosted a table at these gun shows. (J.A. 358). MCSM is dedicated

to education on public safety issues, law enforcement issues, and the right of home and personal self-defense pursuant to the Second Amendment. (J.A. 195, 360-61). MCSM discusses their issues with attendees at the gun shows and distributes literature. (J.A. 359-362).

Krasner's gun shows in the County provide a unique forum for MCSM because as a County based group, they are able to meet individuals face to face who are interested in listening and participating in the issues they discuss. (J.A. 363-64). At recent shows, face to face discussion resulted in over 3,000 petitions being signed in 6 days of show, generated approximately 600 letters to County advertisers, generated nearly 500 letters hand delivered to each of approximately 15 members of Congress, and resulted in dozens of voter registrations, and other similar signature critical activities. (J.A. 179).

In the twelve years that Krasner has organized and promoted gun shows throughout Maryland, there have been no arrests, firearms violations, incidents of violence, or other problems at any of the shows, including the shows in the County. (J.A. 269). Krasner has strict security at all gun shows and complies with all state, federal, and local laws with regard to the display and transfer of firearms. (J.A. 267-269). Krasner strictly complies with the law that requires all firearm purchasers in Maryland to undergo the

same waiting period and background checks as customers who purchase firearms from the licensed premise of a federal firearms dealer. (J.A. 331-334). There is no gun show loophole in Maryland.

B. The County's gun show law - § 57-13.

On May 16, 2001, the County Council enacted Bill 2-01, concerning "Weapons – Gun Shows," which changed and amended Chapter 57 of the County Code regarding the sale, transfer, possession, and transportation of certain firearms in the County. (Add. 15). The law was executed on May 29, 2001, with an effective date of August 28, 2001. Id.

The preamble to the law states its purpose is to, "prohibit County funding for any organization that allows the sale, transfer, possession, or transportation of certain firearms at certain exhibition facilities." (Add. 15). Specifically, § 57-13, entitled "Use of Public Funds" was enacted which states:

> (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.

(Add. 20).

Section 2 of Bill 2-01 states that § 57-13 applies to: "(1) support that an organization receives from the County after December 1, 2001; and (2) the display of a gun for sale at the facility after December 1, 2001." Section 57-13 expires on December 1, 2011. (Add. 21).

C. Krasner's Gun Shows Cancelled.

After the passage of § 57-13, the Ag Center notified Krasner that its gun shows scheduled for October 2001 and January 2002 were cancelled because of § 57-13. (J.A. 52). In its letter to Krasner, the Ag Center complimented Krasner on "The professional manner in which you have conducted these shows...." Id. The decision to cancel the shows was not based on any safety concerns. Rather, the Ag Center was "forced to make financial decisions to stop conducting activities which would invoke the County to impose financial sanctions on the Ag Center." Id.

Over the past ten years, the County had provided over $500,000 to the Ag Center on three occasions. A $250,000 grant was issued to the Ag Center in 1999 to construct the Agricultural Welcoming Center. (J.A. 171-72). A

$220,000 Cultural Facility Improvement Grant was issued in the 2001 Fiscal Year Budget for the purchase of a permanent cover for the racing park area and installation of a digital marquee. Id. At the time of trial, only $32,000 of this grant had been disbursed to the Ag Center, and the remainder was anticipated to be disbursed after December 1, 2001, when § 57-13 took effect. Id. Further, a $36,500 Cultural Facility Improvement Grant was issued in the 2002 Fiscal Year Budget to complete the Heritage Building, which had not been disbursed at the time of trial. Id. None of these grant monies related in any way to Krasner's gun shows, nor did Krasner benefit from the money in any way.

During consideration of § 57-13, the Ag Center submitted a statement to the County Council in opposition to the bill stating, in part:

> Our opposition to this bill relates to its intent to single out the AG Center and apply financial pressure to exact compliance on a political issue that is unrelated to our organization or its stated mission. If political pressure can be exacted to force our compliance on this issue, the door is open for other groups to jump on the proverbial band wagon in the future.

(J.A. 247d).

There is no suitable alternative venue for Krasner to hold its gun shows in the County. (J.A. 288, 293, 439). There is no location that is as well known, centrally located or large enough to accommodate a show of

this size. (J.A. 290-93). Further, the undisputed expert testimony of the parties at trial was that a gun show cannot exist without the ability to sell firearms. (J.A. 274-75, 340, 343-44).

After the district court entered a preliminary injunction against the enforcement of § 57-13, on August 29, 2001, the Ag Center voted to allow the October 2001 gun show. (J.A. 107). A bench trial was held on September 25, 2001, and on October 4, 2001, the district court entered a permanent injunction against the County from enforcement of § 57-13 at the Ag Center for Krasner's gun shows. (J.A. 452).

SUMMARY OF ARGUMENT

Krasner had standing to challenge § 57-13. The district court implicitly rejected the County's contention that Krasner lacked standing by holding a preliminary injunction hearing and a trial on the merits. (J.A. 433). Krasner suffered actual harm (cancellation of his gun show) that was causally connected to the enactment of § 57-13 and not the result of an independent decision of the Ag Center. Additionally, a favorable decision for Krasner redressed the harm. After the district court entered a preliminary injunction, the Ag Center voted to have the gun show. Krasner, RSM and MCSM had standing to assert their own rights to challenge the regulatory

effect of § 57-13 under Maryland law, as well as the law's infringement on their constitutional rights.

After extensive briefing and a full trial on the merits, the district court understood the full reach and effect of § 57-13 and found that it was an attempt by the County to regulate the sale of firearms at the Ag Center in the City of Gaithersburg. (J.A. 448). The district court properly held the law was unenforceable in Gaithersburg under Maryland's Tillie Frank law because Gaithersburg had a specific grant of legislative authority to regulate firearms within its borders. (J.A. 448-49). Gaithersburg had generally exempted itself from all such County legislation. (J.A. 442). Further, the district court properly rejected § 57-13 as a valid spending provision because there was no necessary nexus at all between the purpose of the County's expenditures and the condition (prohibition against gun shows) sought to be imposed. (J.A. 446). The regulatory effect of § 57-13 was a finding of fact by the trial court, and thus, should not be disturbed unless this Court finds clear error. The district court did not abuse its discretion, and the finding of preemption under Maryland law should be affirmed.

Since the district court held § 57-13 invalid under Maryland law, it did not reach the constitutional issues raised by Krasner. (J.A. 449). The district court noted, however, "that the parties have raised serious questions,

some of first impression." (J.A. 449). To the extent this Court reaches the constitutional issues, this Court should find that § 57-13 is unconstitutional because it infringes upon the commercial and non-commercial free speech rights of RSM and MCSM. Specifically, MCSM engages in pure political speech related to firearms and other issues, and RSM displays firearms, offers them for sale, and discussed firearms and related issues.

Section 57-13 created an effectual ban on all gun shows in the County because, as the district court found, there is no other suitable venue in the County to hold a gun show. (J.A. 439). The law targeted gun shows and the district court understood the intent and effect of the law. (J.A. 438). Specifically, the district court properly understood the phrase "display and sale of guns" in the context of § 57-13 to mean a gun show. Id. The undisputed evidence at trial was that gun shows would not exist without the ability to display and sell firearms. (J.A. 274-75, 340, 343-44). As the district court found, if "sale" is taken out of the equation, the event becomes an "exhibition," not a gun show and no one would attend. (J.A. 438 n.1).

Thus, while § 57-13 appears on its face to be content-neutral and not specifically targeted at speech, the provision has the clear incidental effect of burdening the free speech rights of MCSM and RSM at gun shows. As an incidental restriction on free speech, § 57-13 should be examined under the

four part test in United States v. O'Brien, 391 U.S. 367 (1968). A similar four-part test in Central Hudson should be applied to the law since it infringes on commercial free speech. Under these tests, § 57-13 fails because it does not further a substantial governmental interest and the restriction on speech is greater than is essential to further the alleged governmental interest. Thus, the Court should find § 57-13 unconstitutional.

For the same reasons, § 57-13 violates MCSM and RSM's right to assemble under the First Amendment. They are groups clearly engaged in expressive association. Section 57-13 significantly affects their ability to advocate their viewpoints because it has the intended effect of banning all gun shows in the County, since there is no suitable alternative venue for the groups to reach their intended audience.

Lastly, the Court should find that § 57-13 does not survive constitutional scrutiny under the Equal Protection Clause because the provision does not advance a legitimate governmental interest and there is no rational relationship between the law and the governmental interest asserted. There is no evidence in the legislative record that gun shows in the County posed any threat to public safety. This Court should affirm.

ARGUMENT

I. A GUN SHOW PROMOTER AND EXHIBITORS HAD STANDING TO CHALLENGE MONTGOMERY COUNTY'S GUN SHOW LAW (§ 57-13) AFTER THE PRIVATE FACILITY WHICH HOSTED THE SHOWS BANNED ALL FUTURE SHOWS AFTER THE LAW WAS PASSED.

The district court implicitly rejected the County's lack of standing argument by holding a preliminary injunction hearing, a full trial on the merits, and finding in favor of Krasner. In analyzing a decision on Article III standing, this Court reviews the district court's factual findings for clear error, and considers the legal question of whether a party possesses standing to sue as a de novo matter. Piney Run Preservation Ass'n v. County Com'rs of Carroll County, 268 F.3d 255, 262-63 (4th Cir. 2001).

Pursuant to Article III of the Constitution, federal courts are restricted to the adjudication of "cases" and "controversies." The standing requirement therefore "ensures that a plaintiff has a sufficient personal stake in a dispute to render judicial resolution appropriate." Id. (*quoting* Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 204 F.3d 149, 153 (4th Cir. 2000)). Further, the standing inquiry also "tends to assure that the legal questions presented to the court will be resolved, not in the rarefied atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." Id. (*citing* Valley Forge

Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982).

A party possesses Article III standing if (1) he or she has suffered an "injury in fact," (2) that is fairly traceable to the challenged action of the defendant, and (3) it is likely that the injury will be redressed by a favorable decision. Id.; see also Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).

Krasner met the three-prong constitutional test for standing because the actual harm Krasner suffered (the cancellation of the gun show) was directly related to § 57-13, and a favorable ruling by the district court redressed the harm.

A. Krasner suffered actual injuries.

The first element of standing is that the plaintiff must have suffered an "injury in fact." Lujan, 504 U.S. at 560. A plaintiff can show an "injury in fact" when he or she suffers "an invasion of a legally protected interest which is concrete and particularized, as well as actual or imminent." Gaston Copper, 204 F.3d at 154; see also Defenders of Wildlife, 504 U.S. at 560. Section 57-13 infringes upon Krasner's rights to hold a lawful gun show at the Ag Center and thus, infringes on all the commercial and non-commercial free speech exercised by MCSM and RSM at such shows.

The Ag Center's reason for canceling future gun shows was undeniably stated in its June 15, 2001 correspondence to Mr. Krasner, which states, "...based on recent Montgomery County legislation directed, in part, at gun shows on fairgrounds, we have been forced to make financial decisions to stop conducting activities which would invoke the County to impose financial sanctions on the Ag Center." (J.A. 52). The Ag Center's letter demonstrated that the cancellation of the annual gun shows held at the Ag Center is a concrete and actual injury to Krasner, not merely conjecture or hypothetical. The Ag Center's reasoning for canceling future gun shows is a direct result of the County's passing § 57-13.

The County's argument that the Ag Center is the only entity affected by § 57-13 completely ignores Krasner, RSM, and MCSM's own rights, of which no other individual could assert on their behalf.[2]

Krasner is neither interested in, nor are attempting to, assert rights, if any, of the Ag Center. In Simon v. Eastern Kentucky Welfare Rights Organization, the United States Supreme Court framed the question of standing as "whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal court

[2] Because Krasner is properly asserting their own constitutional rights and not the rights of a third party, the Court need not analyze whether third-party standing is appropriate.

jurisdiction and to justify exercise of the court's remedial powers on his behalf." Simon, 426 U.S. 26, 38 (1976)(*quoting* Warth v. Seldin, 422 U.S. 490, 498-499) (1975)). Krasner had a personal stake in the outcome of this matter, *i.e.*, whether § 57-13 is upheld will dictate whether Krasner can host and participate in gun shows in the County as they have consistently done for the past 12 years.

The County's argument that "[n]o party at bar is a present, past or future beneficiary of any county funding" and "in every core speech funding case decided by the Supreme Court . . . the disappointed funding beneficiary was a party," is a red herring because funding is not the injury complained of by Krasner. (Appellant's Brief 12). Krasner has never received any funding from the County. (J.A. 293). Until the Ag Center has either been denied funding or sanctioned under the new law for allowing a gun show on the premises, the Ag Center would not have any standing to challenge the law. The County fails to articulate what "rights" of the Ag Center that Krasner is asserting. Krasner is challenging the regulatory and unconstitutional intended effect of § 57-13 which is to ban gun shows in the County by sanctioning facilities who receive any financial or in-kind support from the County, even though completely unrelated to the facilities decision to allow the lawful display and sale of firearms on its property. Krasner felt the

direct affect of the law and their injuries were actual, not conjectural or hypothetical.

B. The cancellation of Krasner's gun show was causally connected to the enactment of § 57-13, and was not the result of an independent decision of the Ag Center.

The County argues that Krasner's injury results "from the independent decision of the ACI not to host gun shows." (See Appellant's Brief at 13). The County's argument lacks merit. The Ag Center clearly stated in its June 15, 2001 correspondence that the cancellation of gun shows at its facility was directly based on § 57-13. (J.A. 52). In addition, as evidenced by the Board of Director's vote on August 29, 2001, the Ag Center allowed Krasner to host the October 2001 gun show after the preliminary injunction was granted. (J.A. 107). The fact that the Ag Center voted to allow Krasner to host the October 2001 gun show is evidence that its previous decision to cease hosting the shows was not an independent decision of the Ag Center, but rather a decision solely based on the enactment of § 57-13. Thus, Krasner's injuries are directly traceable to the enactment of § 57-13, and the second prong of the standing test is met.

C. A favorable decision for Krasner redressed the harm.

A decision in favor of Krasner produced a change in the Ag Center's position on hosting gun shows, as evidenced by the June 15 and August 30,

2001 letters to Mr. Krasner (J.A. 52, 107). Absent § 57-13, Krasner will be able to continue to hold gun shows at the Ag Center as he has for the last twelve years. Therefore, Krasner met all three elements for standing, and the district court did not abuse its discretion in implicitly rejecting any lack of standing argument and deciding the case on the merits.

II. THE DISTRICT COURT PROPERLY FOUND THAT § 57-13 WAS A GUN SALE REGULATION ENACTED BY THE COUNTY IN THE GUISE OF A SPENDING PROVISION IN VIOLATION OF MARYLAND'S TILLIE FRANK LAW.

A. The district court did not abuse its discretion in holding that § 57-13 was a gun sale regulation.

Under Count I of the Complaint, Krasner sought declaratory relief to have § 57-13 declared invalid. (J.A. 19). Krasner argued that § 57-13 was invalid under Maryland law because it constituted an attempt to regulate the sale of firearms within the City of Gaithersburg, where the Ag Center is located and the gun shows take place. The district court agreed:

> [T]he Court holds § 57-13 to constitute an attempt to regulate the sale of firearms. By virtue of the Tillie Frank law and the Gaithersburg City Code § 2-6, County Code § 57-13 cannot be enforced with respect to the display and sale of guns in Gaithersburg. Therefore, the County cannot enforce § 57-13 with regard to gun shows held in the Ag Center located in the City of Gaithersburg.

(J.A. 448-49).

The issue for the district court was whether § 57-13 was a discretionary spending provision or a regulatory measure. (J.A. 443). The court concluded "that § 57-13 is a gun sale regulation enacted by Montgomery County in the guise of a discretionary spending provision." Id. The County does not disagree that the validity of § 57-13 turns on whether or not it is a regulation. The County acknowledges that the City of Gaithersburg is insulated from County legislation which "regulates 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...." (Appellant's Brief at 18). The County acknowledged that other parts of the same gun show bill, §§ 57-1 and 57-11, were gun sale regulation provisions that could not be applied within the City of Gaithersburg by virtue of the Tillie Frank law. (J.A. 442 n.5). See Md. Ann. Code art 23A, § 2B(a)(3) (2001 Repl. Vol.)(Maryland's Tillie Frank law -- Application of County Legislation to Municipalities) (Add. 5-6); Md. Ann. Code art. 27, § 36H(b)(1997 Repl. Vol.)(Maryland's State Weapons Preemption law)(Add. 9); § 2-6 Gaithersburg City Code (General Exemption from Montgomery County Legislation Regulations within City)(Add. 13-14).

The issue as to whether § 57-13 constituted a gun sale regulation was an inherently factual inquiry which should be reviewed under a clearly erroneous standard. The inquiry involved understanding the intent and effect of § 57-13 in the context of gun shows and how gun sales take place in Maryland. The district court considered the testimony of two of the parties who qualified as experts on these issues at trial.

The district court did not abuse its discretion in finding that § 57-13 was a gun sale regulation and thus is preempted under Maryland law. In Nelson-Salabes, Inc., v. Morningside Development, LLC, 284 F.3d 505 (4th Cir.2002), this Court set forth the standard of review in bench trials:

> We review for clear error findings of fact made by a district court sitting without a jury.... We may only set aside such a finding when we are left with the definite and firm conviction that a mistake has been made, and we may not do so simply because we might have found to the contrary.... On the other hand, when we review the legal conclusions of a district court, we do so on a de novo basis.... And in considering mixed questions of law and fact, we review the factual portion of the inquiry for clear error and the legal conclusions de novo...

Id. at 512 (citations omitted).

The district court made two important factual findings. First, the court understood the distinction between a "gun show" and an

"exhibition." (J.A. 438 n.1). The court noted "[t]he 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 weapons are displayed but not sold." Id. The importance is that the court understood that the phrase "display and sale of guns" in the context of § 57-13 meant a gun show, and rejected the County's argument below that Krasner could hold gun shows without selling any guns. The County repeatedly argues "[d]isplaying guns without selling guns does not offend § 57-13." (Appellant's Brief at 27). Such avoidance is a fundamental flaw that permeates the County's entire argument.

The definition of a gun show under State and County law (display and sale) is consistent with the unopposed testimony of Mr. Krasner and Mr. Abrams who have a combined more than 40 years of experience dealing with guns shows. Mr. Krasner has been promoting gun shows in Maryland for the last twelve years and holds approximately 10 shows throughout Maryland each year. (J.A. 254-55). Mr. Abrams has participated in approximately 15 - 20 gun shows per year for 30 years. (J.A. 322, 324). Mr. Krasner and Mr. Abrams both state with certainty that without the ability to sell and display firearms at a gun show, there would be no shows. (J.A. 274-75, 340, 343-44).

The second important finding by the court was that "the Ag Center is the only location in [Montgomery County] that is both suitable for, and would allow on the premises, a gun show of the type presented by Krasner." (J.A. 439 n.2, 454). Since there are no other gun shows held in the County other then Krasner's shows § 57-13 had the intended effect of operating as a total ban. The district court rejected the County's argument and evidence at trial that there were other suitable venues. (J.A. 173-74, 208-26).

As part of its factual inquiry, the district court examined the legislative record, which reflects the true and intended purpose of the law, namely, to regulate gun shows. (J.A. 89-102, 239). The minutes of the May 16, 2001 County Council meeting when § 57-13 was enacted confirms the purpose of the law:

> Councilmember Berlage explained that the *purpose of the subject bill is to regulate the sale and transfer of guns*, not to make the operation of the fairgrounds more difficult. . . . Mr. Berlage said that he believes the bill is needed because guns are far too freely available in this country and are the cause of many deaths and injury not only from crimes of violence but from accidental shootings as well. . . . He said that in his opinion, the bill introduced by Mr. Ewing will help reduce the availability of guns and the likelihood that these guns will fall into the hands of people who use them in acts of violence or in accidental shootings.

(J.A. 93)(emphasis added).

The goals and objectives listed in the Legislative Request Report for § 57-13 state: "To prohibit gun shows and similar transitory events in the County, involving the sale and possession of firearms." (J.A. 239). The County ignores the true intent of the law which is to regulate the sale and access to guns at gun shows.

Two recent Supreme Court of California decisions regarding a county's ability to regulate the sale of firearms at gun shows located within a municipality do not lend any support to the County's preemption argument. See Great Western Shows, Inc. v. County of Los Angeles, 44 P.3d 120 (Cal. 2002); Nordyke v. King, 44 P.3d 133 (Cal.2002). In Great Western, the County of Los Angeles passed an ordinance which prohibited the sale of firearms and/or ammunition on county property. Great Western, 44 P.3d at 123-24. A gun show promoter who held an annual gun show at the Los Angeles County Fairgrounds sued to enjoin that statute because the fairgrounds was in the City of Pomana, and the gun show promoter argued that the ordinance was preempted under California law. Id. at 123. The California Supreme Court upheld the county ordinance. The Court held that state gun show statutes did not mandate that counties use their property for such shows and, thus, if the county

allowed such shows, it could impose more stringent restrictions on the sale of firearms then state law prescribed. Id. at 130-31.

Further, the Court found that the county ordinance disallowing gun show sales on county property did not propose a complete ban on all gun shows within the county. Id. at 129-30. This factual finding is in stark contrast to the district court's findings in this case. The district court found that the Ag Center "is the only location in [Montgomery County] that is both suitable for, and would allow on the premises, a gun show of the type presented by Krasner." (J.A. 439 n.2).

In Nordyke, the California Supreme Court upheld a similar statute in Alameda County that prohibited the possession of firearms on county property based on the same reasoning in Great Western. Nordyke, 44 P.3d at 136-37. A gun show promoter sued the county over enforcement of the ordinance as it pertained to gun shows at the fairgrounds in the City of Pleasanton. Id. at 135-36. These two cases are clearly distinguishable based upon the fact that both counties sought to regulate the sale and possession of firearms *on their own property*, and the statutes did not preclude other gun shows within those counties. In this case, the district court properly held that § 57-13 was a gun sale regulation which reaches

private property, and the effect of the law is to ban all gun shows in the County because there are no suitable alternatives. The district court did not abuse its discretion, and this Court should affirm.

B. The district did not abuse its discretion in holding that § 57-13 was not a valid spending provision because no nexus existed between the purpose of the County's expenditure and the condition of prohibiting gun shows.

In holding that § 57-13 was a gun sale regulation, the district court rejected the argument that the law was a valid county spending provision. (J.A. 443). The district court found that in order for a law to be upheld as a valid spending measure, the condition must be "reasonably related to the purpose of the expenditure." (J.A. 446). The district court held "...there is no necessary nexus at all between the purpose of the County's expenditures and the condition (prohibition of display and sale of guns) sought to be imposed." (J.A. 446). This issue involved a factual inquiry, and thus, should be reviewed under the clearly erroneous standard. The conclusions reached by the district court were based upon the Court's understanding of the intent and effect of § 57-13 in the context of gun shows in the County. The district court's rejection of the County's argument that § 57-13 was a valid exercise of the county's spending power was not an abuse of discretion, and this Court should affirm.

The district court found "instructive analogous federal cases in which it was necessary to distinguish between the exercise of spending discretion and the exercise of regulatory authority." (J.A. 444). The court set forth a four-part test applied by this Court in James Island Public Service Dist. v. City of Charleston, 249 F.3d 323 (4th Cir. 2001). (J.A. 446). In James Island, the Court stated:

> Although broad, the congressional spending power has limits. Federal expenditures must (1) benefit the general welfare, and the conditions imposed on their receipt must be (2) unambiguous, (3) "reasonably related to the purpose of the expenditure," and (4) cannot violate "any independent constitutional prohibition."

Id. at 326-27(*citing* New York v. United States, 505 U.S. 144, 171- 72 (1992); see also West Virginia v. U.S. Dept. of Health and Human Services, 289 F.3d 281, 291 (4th Cir. 2002); South Dakota v. Dole, 483 U.S. 203, 207-08 (1987) (both cases citing the four-part test).

In South Dakota v. Dole, South Dakota brought an action challenging the constitutionality of a federal statute conditioning the states' receipt of a portion of federal highway funds on the adoption of a minimum drinking age of 21. Dole, 483 U.S. at 205. Although the Court upheld the statute in Dole as a valid use of Congress' spending power, it noted that Congress' spending power is not unrestricted. Id. at 207. As the district court found in this case,

the Supreme Court held that "the condition imposed by Congress is directly related to one of the main purposes for which highway funds are expended – safe interstate travel." Id. at 208. (J.A. 447).

Further, the district court analyzed Rust v. Sullivan, 570 U.S. 173 (1991), a case relied on by the County for the proposition that "the First Amendment does not require the County to fund facilities that are used for gun shows." (Appellant's Brief at 31). While the district court did not reach Krasner's First Amendment claims, the court explained why the conditional funding grant in Rust was a valid spending provision as compared to § 57-13, which constituted an invalid regulation. The district court stated, "the federal grants at issue were for the purpose of establishing "family planning" programs and therefore the condition regarding abortion was closely related to the overall purpose of the funding." (J.A. 447).

Under the "reasonable relationship" requirement set forth in James Island, and discussed by the district court in other federal cases, the district court held that § 57-13 was a gun sale regulation under the pretext of a spending provision. (J.A. 443). "In sharp contrast, 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." (J.A. 448).

The County argues the district court's analysis of these federal cases is "inapposite." (Appellant's Brief at 19). Instead of distinguishing the federal cases, the County cites several Maryland cases that are truly not relevant, and thus, not discussed by the district court.

The County relies on Prince George's County v. Chillum-Adelphi Volunteer Fire Dept., Inc., 275 Md. 374 (1975), for the proposition that the County has "exceedingly broad authority to set conditions on the expenditure and receipt of its funds." (Appellant's Brief at 19-20). The issue in Chillum-Adelphi was whether Prince George's County had the power to control the activities of volunteer fire companies. Id. at 379. Prince George's County made certain changes to its county charter and county code regarding volunteer fire companies. Id. at 379-80. The Court stated that it was beyond dispute that the police power delegated to charter counties included the power to regulate private business to the extent necessary to protect the public health, safety, and welfare. Id. at 382. Thus, a county which has the responsibility for fire prevention and fire suppression certainly has the power to reasonably regulate volunteer fire companies to protect the public. Id. The issue as to whether or not a given regulation was within the scope of Prince George's County's power was not before the Court. Id. at 382-83. Thus, the Court, in dictum, stated, "[w]e can only set forth the

standard which will control the resolution of any future disputes as to a given regulation." Id. at 382." The Court held:

> It goes without saying that in the absence of some provision to the contrary, constitutional or statutory, the county may impose such conditions as to it appears proper upon those who wish to receive county funds including a direction as to the manner of expenditure of those funds. In this instance, no provision of law to the contrary has been cited or found.

Id. at 381. The Court noted, however, that "the county may impose reasonable regulations relative to the funds which come from it." Id. at 383.

The dictum set forth by the Court in Chillum-Adelphi is consistent with the federal cases cited by the district court and does not lend any support for the County's position. In this case, statutory provisions exist which preempted the County from regulating gun sales. In Chillum-Adelphi, Prince George's County did not face any constitutional or statutory provisions that would have applied to any of conditions placed on funding. To the contrary, Prince George's county was careful to avoid any preemption issues. Section 32-18 of the Prince George's County Code which authorized a fire tax did not apply to the City of Takoma Park within the limits of Prince George's County because the city had its own express authority to regulate fire prevention within its boundaries. Id. at 380.

Additionally, the Court noted that the county could impose conditions as long as they were "reasonable regulations relative to the funds which come from it." Id. at 383. This requirement is no different from the third prong of the test set forth in James Island that requires a federal expenditure be "reasonably related to the purpose of the expenditure." James Island, 249 F.3d at 326-27.

As the district court held, § 57-13 has no nexus between the purpose of the expenditure and the condition against gun shows. (J.A. 446). Section 57-13 does not condition funding as part of the County's budgetary process. The county enacted the law as part of the County Code on "Weapons—Gun Shows." Further, § 57-13 forbids any private facility from receiving any funding of any type if it holds a gun show, and sanctions such private facility it does so regardless of whether any of the funding was related to hosting such gun shows.

The additional Maryland cases cited by the County do not provide for any support of § 57-13. The County relies on Montgomery County v. Maryland Soft Drink Assn., Inc., 281 Md. 116, 377 A.2d 486 (1977). In Maryland Soft Drink, plaintiffs challenged the county's imposition of a tax on non-returnable beverage containers. Id. at 118. The Court upheld the tax and found that it was not a sales tax which would have been prohibited

under state law. Id. at 126. The City of Rockville intervened and argued that the tax was a regulatory measure as opposed to a revenue provision. Id. at 131-32. The Court disagreed with the City's argument but stated, "[a]s we have said in a similar context, 'regulatory acts passed under the guise of revenue acts must be held void.'" Id. at 132. (*quoting* Theatrical Corp. v. Brennan, 180 Md. 377, 385, 24 A.2d 911 (1942); Anne Arundel County v. English, 182 Md. 514, 520-21, 35 A.2d 135 (1943)). The issue became whether "the beverage container tax was in reality such a regulatory measure." Id. at 133. The Court reviewed the tax and held "that it is primarily a revenue raising device, rather than a means of regulating non-reusable beverage containers." Id. at 134. The Court cited the criteria for determining whether a particular legislative act is a revenue measure or a regulatory measure:

> . . . A regulatory measure may produce revenue, but in such a case, *the amount must be reasonable and have some definite relation to the purpose of the act.* A revenue measure, on the other hand, may also provide for regulation, but if the raising of revenue is the primary purpose, the amount of the tax is not reviewable by the courts. . . . Where the fee is imposed for the purpose of regulation, and the statute requires compliance with certain conditions in addition to the payment of the prescribed sum, such sum is a license properly imposed by virtue of the police power; but where it is exacted solely for revenue purposes and its

> payment gives the right to carry on the business without any further conditions, it is a tax.

Id. at 133 (*quoting* Theatrical Corp., 180 Md. at 381-82) (emphasis added).

Unlike the beverage container tax in Maryland Soft Drink which the Court found to be a revenue provision, § 57-13 is clearly a gun sale regulation which the district court properly found preempted under State law. Section 57-13 was not enacted, as the County would now have the Court believe, as part of the County's fiscal budgeting process without any regard to its regulatory effect. Nor was the law enacted based on any concern or debate regarding the allocation of scarce public resources according to public priorities and the public interest.

Striking down § 57-13 in violation Tillie Frank does not affect or interfere with the County's spending power in any way. The County is still free to grant or deny financial aid to private entities in the future as part of its annual budget process. Councilmember Praisner, who voted against the bill, stated in the record "that the Council can decide on a case by case basis whether to support funding for activities at the fairgrounds." (J.A. 93). The district court did not abuse its discretion and should be affirmed.

III. SECTION 57-13 CREATES AN INCIDENTAL BURDEN ON COMMERCIAL AND NON-COMMERCIAL FREE SPEECH AT GUN SHOWS AND SHOULD BE DECLARED INVALID UNDER THE O'BRIEN AND CENTRAL HUDSON TESTS.

Since the district court invalidated § 57-13 on state preemption grounds, it did not reach the free speech issues raised by Krasner. (J.A. 449). If this Court affirms the district court on the preemption issue, it also need not reach the constitutional issues. A basic tenet of federal jurisprudence is that the Court will not hypothetically discuss a constitutional issue if one does not exist. See Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936)("It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision in a case.")(Brandeis, J., concurring); Lambrecht v. FCC, 958 F.2d 382, 389-90 (D.C. Cir. 1992)("When a federal court is asked to answer a constitutional question, basic tenets of judicial restraint and separation of powers call upon it first to consider alternative grounds for resolution."); see also Pons v. Lorillard, 549 F.2d 950, 954 (4th Cir. 1977) (Butzner, J., concurring)("Since the statute settles the controversy, I find no occasion for embarking on the constitutional quest which my brothers pursue.").

To the extent this Court reaches the constitutional issues, which the district court noted involve "series questions, some of first impression," this

Court should affirm because § 57-13 violates Krasner, RSM, and MCSM's commercial and non-commercial free speech rights, rights to peacefully assemble, and the Equal Protection Clause.

Gun shows encompass a significant amount of commercial and non-commercial free speech protected by the First Amendment. Gun shows provide an opportunity for the free flow of commercial and non-commercial information. Exhibitors like Mr. Abrams advertise, display, and discuss firearms with the public. (J.A. 325-26, 328-29). Firearms exhibitors and non-firearms exhibitors at gun shows have an interest in conveying truthful information about their products to the public, and the public has a corresponding interest in receiving truthful information about those products. See Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 564 (2001) (tobacco retailers and manufacturers have an interest in conveying truthful information about their products to adults and adults have a corresponding interest in receiving truthful information about tobacco products). Additionally, there is a substantial amount of non-commercial core free speech that takes place at gun shows by individuals such as Mr. Culver, on behalf of a citizens group, MCSM. (J.A. 357-62). Mr. Culver provides show attendees copies of MCSM letters, encourages them to sign on to letters or write their own letters to legislators on Second Amendment rights and other

issues. (J.A. 360-61). Mr. Culver talks to attendees about current petition and letter drives targeted at government officials, agencies, advertisers and elected legislators relating to Second Amendment rights and legislation, as well other related issues. (J.A. 360-62). Mr. Abrams' commercial speech as it relates to "the sale and display of guns" should also be recognized under the First Amendment. The sale of firearms, while heavily regulated under federal and state law, concerns a lawful activity and thus, the advertising and display of firearms at these shows should be protected from arbitrary and capricious governmental intrusion.

Several courts have held that the lawful offer to sell firearms was constitutionally protected commercial speech for First Amendment purposes. In Northern Indiana Gun and Outdoor Shows, Inc. v. Hedman, 104 F. Supp.2d 1009 (2000), United States District Court for the Northern District of Indiana held that: "An offer to sell firearms at a gun show concerns lawful activity, and case law supports the conclusion that 'a proposal to engage in such a transaction is protected as commercial speech under the First Amendment.'" Id. at 1014 (*quoting*, Nordyke v. Santa Clara County, 110 F.3d 707, 711 (9th Cir. 1997)).

The County argues that § 57-13 "does not prohibit speech or expression of any kind" and does not "prohibit [MCSM and RSM] from

discussing issues and providing information for gun owners." (Appellant's Brief at 26). Absent from the County's Brief is any discussion on the meaning, intent, or effect of § 57-13. The County unreasonably argues that "display and sale" does not mean a "gun show," but only means "sale" and that a gun show can occur without the ability to sell guns. The County argues "[d]isplaying guns without selling guns does not offend § 57-13." (Appellant's Brief at 27). In interpreting the word "sale," the County also urges the Court to carve out an exception to the definition of "sale" by stating that the term does not include "offer to sell." Counsel for the County argued that § 57-13 does not prohibit the display and verbal "offer to sell" a firearm at a gun show, but only the actual "sale" itself, *i.e.*, the "closing in the contract." (J.A. 417-18, 422). The County cites no support for this exception in the legislative record.[3] The County ignores the incidental

[3] To understand the flaw in the County's definition of sale as the "closing of the contract," it is important to understand the practice of how firearms' sales take place at gun shows. There is a seven-day waiting period in Maryland for the sale of regulated firearms such as a hand guns or assault weapons, and thus, they are not delivered at a gun show. (J.A. 332). For the sale of unregulated firearms, such as rifles or shotguns there is an FBI check that may take up to three days, and approximately 30% of the time the gun cannot be delivered at the gun show. (J.A. 335-36). Under Maryland law, the sale of a firearm takes place at the time of delivery. See Opinion of the Office of the Attorney General, 75 Md. Op. Atty. Gen. 230 (December 4, 1990). Thus, under Maryland law, the phrase "sale of guns at a facility," as set forth in § 57-13, would mean only those guns that are delivered to the buyer at the show. The language would not cover guns that are under

effects that § 57-13 has on MCSM and RSM by banning gun shows in the County.

In the Court's July 23, 2001 Memorandum regarding the Preliminary Injunction, the Court stated:

> The Court should note that the parties have presented significant issues regarding § 57-13, in particular those relating to the phrase "display and sale of guns." For example, what is the precise meaning of the phrase in context, whether there are aspects of a sale that constitute commercial speech and other aspects that are action not subject to First Amendment protection, etc.

(J.A. 4-5).[4]

After extensive briefing and a full trial, the district court understood that the phrase "display and sale of guns" in the context of § 57-13 meant a gun show. (J.A. 438 n.1). This definition of the phrase is clear from the County ordinance that specifically defines a "gun show" as "any organized

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contract to be purchased and delivered later at the dealers' store (which includes all handguns and other regulated firearms). This interpretation would be the result of the County's argument that § 57-13 does not target gun shows, but only the "sale" of guns (the closing of the contract). This interpretation creates an absurd result that the County could not have intended. Thus, the County interprets "sale," as the "closing of the contract."

[4] The July 23, 2001 Memorandum and Order is Docket Entry No. 12 in the Record.

gathering where a gun is displayed for sale." (Add. 16)(emphasis added). The undisputed expert testimony from two of the parties at trial was that there would be no gun shows without the ability to sell guns. (J.A. 274-76, 340-47). The County's argument § 57-13 does not effect gun shows because Krasner can still have a show where guns are displayed but not sold was rejected and unsupported by any evidence. The terms "display" and "sale" are inextricably linked. The court further found there is no other suitable alternative location in the County for Krasner to hold gun shows. (J.A. 439 n. 2). Thus, the intended effect of the law was to operate as a ban of gun shows in the County.

The County's argument that no commercial or non-commercial speech is implicated has no merit and the Court should apply the appropriate constitutional tests to determine the validity of § 57-13. The test in commercial free speech cases is set forth in Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 553 (2001), and the test for incidental burdens on core free speech is stated in United States v. O'Brien, 391 U.S. 367 (1968). The tests are practically identical, and under each one, § 57-13 should be declared invalid.

In recognition of the "distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech," the Supreme Court developed a framework for analyzing regulations of commercial speech that is "substantially similar" to the test for time, place, and manner restrictions. Lorillard, 533 U.S. at 553 (citations omitted). The analysis contains four elements:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Id. (*quoting* Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, 563 (1980)).

Section 57-13 on its face only regulates the "display and sale" of firearms at certain facilities in the County and as such the law may be labeled a "content-neutral restriction" because it limits speech "without regard to the content or communicative impact of the message conveyed." Geoffrey R. Stone, Content-Neutral Restrictions, 54 U. Chi. L. Rev. 46, 48

(1987). Examples of content-neutral restrictions are laws that restrict noisy speeches near a hospital, ban billboards in residential communities, limit campaign contributions, prohibit the destruction of draft cards, or prohibit leafleting or posting signs. Id. These examples of content-neutral restrictions, however, directly target speech.

Section 57-13 falls into another category of content-neutral restrictions. Section 57-13 is a law that primarily aims at non-expressive activity (gun shows), but in its application incidentally restricts free speech that takes place at the shows.

The seminal case addressing the issue of content-neutral incidental restrictions on the freedom of expression is United States v. O'Brien, 391 U.S. 367 (1968). In O'Brien, O'Brien was convicted in federal court for burning his selective service registration certificate on the steps of a South Boston Courthouse. Id. at 369-70. O'Brien burned his registration card as part of a demonstration symbolizing his anti-war beliefs. Id. The Court noted at the outset of the case that the federal law prohibiting the destruction of the draft cards "plainly does not abridge free speech on its face. . . . [The law] on its face deals with conduct having no connection with speech. It prohibits the knowing destruction of certificates issued by the Selective Service System, and there is nothing necessarily expressive about such

conduct." Id. at 374. The Court noted, "This Court has held that when 'speech' and 'non-speech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms." Id. at 376.

In upholding the law and O'Brien's conviction, the Court articulated a four-part test for examining the constitutional validity of incidental restrictions on First Amendment freedoms:

> . . . [W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. at 376-77.

The Court in Arcara v. Cloud Books, Inc., 478 U.S. 697 (1986), addressed the issue of whether the First Amendment bars enforcement of a statute authorizing closure of a premises found to be used as a place for prostitution because the premises were also used as an adult bookstore. Id. at 698. In Arcara, the owners of an adult bookstore were found liable for nuisance under a New York public health law because prostitution and other

various illicit sexual activities were found to have taken place on the premises. Id. at 698-99. Pursuant to the nuisance law, the property was closed down for one year. The owners argued that the nuisance law was unconstitutional because it infringed upon their First Amendment rights to operate an adult bookstore. The New York Court of Appeals subjected the nuisance provision to the O'Brien test, and held that the law's application to the bookstore was unconstitutional. The Supreme Court reversed and found that "the First Amendment is not implicated by the enforcement of a public health regulation of general application against the physical premises in which respondents happen to sell books." Id. at 707. The Court distinguished the case from O'Brien and explained that the O'Brien test was not applicable because ". . . unlike the symbolic draft card burning in O'Brien, the sexual activity carried on in this case manifests absolutely no element of protected expression." Id. at 705.

The Arcara Court attempted to define the circumstances under which the courts should apply First Amendment scrutiny under the O'Brien test to generally applicable content-neutral laws which have the incidental effect of burdening expression. The Arcara Court stated:

> . . . [W]e have subjected such restrictions to scrutiny only where it was conduct with a significant expressive element that drew the legal remedy in the first place, as in *O'Brien*, or where a

> statute based on a nonexpressive activity has the inevitable effect of singling out those engaged in expressive activity, as in *Minneapolis Star*. This case involves neither situation, and we conclude the First Amendment is not implicated by the enforcement of a public health regulation of general application against the physical premises in which respondents happen to sell books.

Id. at 706-07 (footnote omitted).

One commentator summarized the status of the law on incidental restrictions on free speech after Arcara:

> The general presumption is that incidental restrictions do not raise a question of first amendment review. The presumption is waived, however, whenever an incidental restriction either has a highly disproportionate impact on free expression or directly penalizes expressive activity. And the later exception is applied quite liberally whenever the challenged restriction significantly limits the opportunities for free expression.

Content-Neutral Restrictions, 54 U. Chi. L. Rev. at 114.

This Court should find that the application of § 57-13 in this case implicates the First Amendment and apply the O'Brien test. Section 57-13 implicates the First Amendment under both scenarios set forth by the Arcara Court. Section 57-13 as applied has a highly disproportionate impact on the free speech of MCSM and RSM because the law targets gun shows. Thus,

the law has the effect of singling out those who attend these shows both as exhibitors and attendees to exercise their rights to free speech.

Further, § 57-13 has the direct effect of penalizing MCSM and RSM's free speech at gun shows. The Arcara Court cited two cases in this category that involved "governmental regulation of conduct that has an expressive element." Arcara, 478 U.S. at 703-04. The Court applied the O'Brien test in both cases, stating:

> In *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984), we considered the application of a ban on camping and sleeping in Lafayette Park and on the Mall in Washington, D.C., to demonstrators who sought to sleep overnight in these parks as a protest of the plight of homeless people. Again in *United States v. Albertini*, 472 U.S. 675, 105 S.Ct. 2897, 86 L.Ed.2d 536, (1985), we considered a protester's conviction for reentering a military base after being subject to an order barring him from entering that establishment based on his previous improper conduct on the base. In each of these cases we considered the expressive element of the conduct regulated and upheld the regulations as constitutionally permissible.

Id. at 704. Thus, the Arcara Court embraced the holding in Albertini as an example of when the courts should apply the O'Brien test to incidental restrictions on free speech.

No cases have been found which address the facts presented in this case, but Albertini is closely analogous and provides the appropriate analysis

consistent with O'Brien and Arcara. In United States v. Albertini, 472 U.S. 675 (1985), Albertini, a civilian, obtained access to a military base and vandalized property in 1972. Id. at 677. He was issued a formal "bar letter" that stated that Albertini was banned from the military base and could not re-enter without permission. Id. at 677-78. Nine years later, the military base was having an annual open house to celebrate Armed Forces Day and the public was invited to the base. Id. at 678. Albertini entered the base during the open house to engage in a peaceful demonstration criticizing the nuclear arms race and passing out leaflets. Id. Albertini was arrested for violating a federal statute for re-entering the base without permission after receiving a "bar letter." Id. at 679.

One of the issues raised by Albertini was that the First Amendment bars his conviction under the federal statute because he had a right to hold signs and distribute leaflets at the base during a public open house. Id. at 684-86. The federal statute at issue was content-neutral and did not regulate expressive activity. Id. at 687. Although the statute was content-neutral and did not target speech, the Court found that the First Amendment was implicated because the statute acted as an incidental burden on Albertini's free speech rights to distribute leaflets at a public open house at the base. Id.

at 687-90. The Court applied the O'Brien test and found that the federal statute was valid and affirmed Albertini's conviction.

In this case, similar to Albertini, § 57-13 is a content-neutral regulation that does not on its face target speech. Like Albertini, § 57-13 acts as a ban on property (no gun shows). The ban on gun shows in the County created by § 57-13 has a substantial chilling effect upon MCSM and RSM's free speech rights at such shows. As such, this Court should find that the First Amendment is implicated and, like the Albertini Court, should apply intermediate level scrutiny as set forth in O'Brien. See also Connection Distributing Co. v. Reno, 154 F.3d 281, 292 (1998) (statute may be stricken as unconstitutional under First Amendment if it has substantial chilling effect upon protected speech).

A. Section 57-13 Should Be Declared Unconstitutional Under the O'Brien and Central Hudson Tests.

Section 57-13 does not survive constitutional scrutiny under the O'Brien or Central Hudson tests. The first element of the test is that the government regulation must be within the constitutional powers of the government. O'Brien, 391 U.S. at 376. The County has the power to enact laws that are for the health, safety and welfare of its citizens, and has broad authority to make decisions regarding its spending of County funds. The first element of the Central Hudson test is that the speech is protected and

concerns a lawful activity that is not misleading. Central Hudson, 447 U.S. at 563. The speech at gun shows meets this requirement.

The second prong of the O'Brien and Central Hudson tests state that the regulation will be justified if it "furthers an important or substantial governmental interest." Id. The County's asserted interest is not substantial. The County argues that "[t]he display and sale of guns at gun shows provides immediate access to guns in a place of public assembly, increases the proliferation of guns. . ., facilitates illegal gun sales and contributes to gun violence." (Appellant's Brief at 36). The County's alleged interests completely lack any factual bases or support in the legislative record. There is absolutely no evidence that any gun shows in the County have facilitated illegal gun sales or contributed to gun violence. In fact, the evidence is to the contrary. There has been no problems with Krasner's gun shows. (J.A. 269-70).

Further, Maryland has some of the strictest gun control laws in the country that require background checks and a seven-day waiting period for the purchase of "regulated firearms." Additionally, Maryland has closed any "gun show loophole" by requiring the same background checks and the seven-day waiting period at gun shows.

The County cites two reports from the Johns Hopkins Center for Gun Policy and Research in 2000, and a joint report issued by several federal agencies in 1999. (Appellant's Brief at 36-7). Reference to these reports and allegations of illegal sales and gun trafficking are improper because no such evidence was presented before the County Council when the bill was passed, nor were these reports part of the legislative record. Further, the reports describe problems in other states that, unlike Maryland, have a waiting period and have closed any loopholes.

The only interest asserted in the legislative record is a generalized interest in banning gun shows and access to guns. The minutes of the County Council meeting on May 16, 2001 when § 57-13 was enacted reflects the asserted governmental interest.[5] (J.A. 89-102).

The position of the County Council Vice President was summarized as follows:

> . . . .Mr. Silverman said that the issue before the council is gun shows, and he believes that there is no need for gun shows in the County. He pointed out that there are many gun shops in the County where individuals can look at guns or purchase them if they choose to do so, and if people want to go to gun shows, Mr. Silverman suggested that there are gun shows in other areas of the Metropolitan-Washington Region. In his opinion, the Council should do everything it can to prohibit or discourage the holding of gun shows in the County through

[5] There are nine members of the Montgomery County Council. Bill 2-01 passed by a narrow margin, 5-4.

> some type of funding restriction such as the restriction contained in the legislation.

(J.A. 92).

The view of the President of the County Council who co-sponsored the bill was summarized as follows:

> President Ewing expressed the view that the attitude concerning guns is steadily changing throughout the United States, and he believes that it is clear that County residents do not want guns to be easily available, accessible, or on display in public places. He said in a poll about guns published by the Gazette Newspaper and sponsored by WTOP Radio and the Baltimore Sun Newspaper, 68 percent of those responding said that they would like to see all hand guns banned. . . . Mr. Ewing explained that the purpose of the bill is to reduce the easy availability of guns, and although it restricts the location of gun shows, it is not targeted at the fairgrounds.

(J.A. 93).

Thus, the only asserted interest by the County in passing § 57-13 is a generalized interest in restricting the access of guns by banning gun shows in the County. While this general goal may sound good, such an interest is nether substantial, legitimate, nor real because there is no evidence linking the sale of firearms at gun shows in the County to crimes of violence and accidental shootings.

In Nordyke v. Santa Clara County, 110 F.3d 707 (9th Cir. 1997), the Ninth Circuit applied the Central Hudson test to an addendum to Santa Clara's lease of the fairgrounds to a gun show operator which prohibited the

sale of guns at the fairgrounds. In analyzing the gun sale ban in the addendum to the lease, the Ninth Circuit stated:

> Whether the addendum "directly advances the governmental interest asserted" must be answered negatively. It is, to repeat, neither an ordinance nor a ban on gun shows. At most, it merely reflects certain concerns about the proliferation of guns and their use in the commission of crimes, while permitting the continuation of gun shows at the Fairgrounds. As Judge Ware noted, "by banning gun sales only at the Fairgrounds, the Board achieves nothing in the way of curtailing the overall possession of guns in the County."

Id. at 713 (citations omitted).

In Northern Indiana Gun and Outdoor Shows, Inc. v. Hedman, 104 F.Supp.2d 1009 (N.D. Ind. 2000), the United States District Court for the Northern Division of Indiana found that a Civic Center's "no gun" policy survived scrutiny under the Central Hudson test. The Hedman Court held:

> . . . The testimony from people who provided and supervised security at the gun show conflicted as to whether safety is a concern at gun shows with guns and ammunition. The court finds that the city's concerns about safety in the Century Center are valid concerns and constitute a substantial governmental interest. The court also finds that the "no weapons or ammunition on the premises" policy serves that interest narrowly.

Id. at 1015. In Hedman, there was evidence in the record that there were safety issues regarding persons being injured and risk of fire because of

individuals smoking at the gun shows, and there were safety issues regarding exhibitors not tying down weapons. Id. at 1015-16.

In this case, unlike in Hedman, there was no evidence of any safety issues at the gun shows in the County. These concerns do not exist because Krasner operates under guidelines that prevent these issues from arising. The Ninth Circuit decision in Nordyke is also on point. The County's generalized interests in limiting the accessibility of firearms to county residents is nether substantial, legitimate, nor real because there is no evidence in the County linking the sale of firearms at gun shows to crimes of violence or accidental shootings. The Court should find that § 57-13 does not further an important or substantial governmental interest under the O'Brien and Central Hudson tests.

The third prong of the O'Brien test is that the governmental interest must be unrelated to the suppression of free expression. O'Brien, 391 U.S. at 376. Section 57-13 acts as an effective ban on gun shows but does not target speech or expression directly, only the "display and sale" of guns.

The last prong of the O'Brien and Central Hudson tests is that the incidental restriction on the alleged First Amendment freedoms must be no greater than essential to the furtherance of the governmental interest. Id.; Central Hudson, 447 U.S. at 563. In United States v. Albertini, the Court

characterized this prong as follows, "Instead an incidental burden on speech is no greater that is essential, and therefore it is permissible under O'Brien, so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." 472 U.S. 675, 689 (1985). Section 57-13 fails to meet the last prong of the tests because there is no evidence whatsoever that such a ban on gun shows in the County would promote the asserted governmental interest of limiting access to guns that may be used by people in acts of violence or in accidental shootings in the County. Without any showing in the legislative record that such a gun show ban would promote the asserted governmental interest, the incidental restriction on free speech is not justified. Thus, the Court should find that § 57-13 is invalid under the O'Brien and Central Hudson tests.

Montgomery County may rely upon Northern Indiana Gun & Outdoors, Inc. v. Hedman, for the proposition that the taking of guns into a civic center is not political speech entitled to First Amendment protection. 104 F.Supp.2d 1009, 1012–14 (2000). In Hedman, Plaintiff challenged a policy at the civic center that stated that there shall be no guns on the premises. One of the constitutional challenges to the policy was that the policy infringed upon Plaintiff's First Amendment rights of "political speech." In Hedman, there was only one Plaintiff, Northern Indiana Gun

and Outdoor Show, which sponsored and promoted the shows. While the facts of the case indicate that the National Rifle Association of America ("NRA") had a booth at the Northern Indiana Gun and Outdoor Shows, recruited members, and informed members on its position on legislation at the gun shows, the NRA was not a party to the case. Plaintiff argued that the "no weapons on the premises" policy constituted an abridgement of expressive activity. Id. at 1013. Thus, the issue became whether having firearms on the premises in any way constituted expressive conduct protected by the First Amendment. The Hedman Court did not address the free speech issues regarding the rights of groups such as the NRA who attended the shows. The court held that the evidence was not sufficient to support Plaintiff's claim for abridgement of political speech. The court stated: "There was no testimony at trial from which it could be concluded that having guns on the premises conveyed a particular message to anyone. [Plaintiff] has not carried its burden of demonstrating that the conduct that the defendant seeks to regulate at the Century Center contains an expressive component; accordingly, [Plaintiff] has not shown that the First Amendment supports injunctive relief." Id. at 1013–14. Thus, the Hedman decision does not address the issue presented in this case as to whether MCSM and RSM's free speech rights are infringed upon by the gun show ban. The Court

should find that § 57-13 as applied to MCSM and RSM does implicate the First Amendment and hold the law invalid under the O'Brien and Central Hudson tests.

B. Section 57-13 cannot escape constitutional scrutiny because it involves funding.

The mantra of the County is that § 57-13 represents its decision not to "subsidize" gun shows. (Appellant's Brief at 28-35). The County's decision to subsidize the Ag Center does not create a subsidy for Krasner who does not receive any money from the County. (J.A. 293).

The County relies on Regan v. Taxation with Representation, 461 U.S. 540 (1983) for the proposition that the County can decide whether or not to subsidize the exercise of RSM and MCSM's free speech rights. (Appellant's Brief at 30). In Regan, the Court upheld an IRS statute that granted tax exemption for certain nonprofit organizations that do not engage in substantial lobbying activities. Regan, 461 U.S. at 545. However, the County fails to recognize that the reasoning behind the Regan Court's holding was firmly based on the fact that:

> The Code does not deny [Appellant] the right to receive deductible contributions to support its non-lobbying activity, nor does it deny [Appellant] any independent benefit on account of its intention to lobby. Congress has merely refused to pay for the lobbying out of public monies. This Court has never held that the Court must grant a benefit such

> as [Appellant] claims here to a person who wishes to exercise a constitutional right.

Id. at 545. Unlike the facts in Regan, § 57-13 unequivocally prohibits RSM and MCSM from engaging in the exercise of permissible and constitutionally guaranteed commercial and non-commercial free speech by essentially banning gun shows, as was the County's stated intention when it passed the law.

The County's attempt to distinguish the holding in Legal Services Corp. v. Velazquez, 531 U.S. 533 (2001), to support its argument that § 57-13 is a valid funding restriction is misplaced. (Appellant's Brief at 32). Rather, this Court should adopt the reasoning and holding in LSC and find that § 57-13 impermissibly restricts RSM and MCSM's free speech rights.

In LSC, the Court invalided a restriction on federal funds that forbid Legal Services Corporation lawyers to engage in legal representation involving an effort to challenge the validity of welfare laws. Id. at 1044. The Court held that this restriction violated Legal Services Corporation's attorneys' free speech rights under the First Amendment. Id. The Court stated, "When the government creates a limited forum for speech, certain restrictions may be necessary to define the limits and purposes of the program." Id. at 1050.

The County unreasonably argues that the present case is distinguishable from LSC because § 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." (Appellant's Brief at 34). This argument should fail because the speech involved in the current case is between private parties and is similar to the speech at issue in LSC, namely, private speech between an attorney and client. Section 57-13 infringes upon the private commercial and non-commercial free speech rights of RSM and MCSM's, and therefore LSC is controlling.

Further, § 57-13 violates the "independent constitutional bar" limitation on the County's spending power because it violates RSM and MCSM's First Amendment guarantees. See Lawrence County v. Lead-Deadwood School Dist., 469 U.S. 256, 258 (1985)(state statute requiring local governments to distribute federal payments in lieu of taxes was invalid because it violated the Supremacy Clause); Buckley v. Valeo, 424 U.S. 1, 135 (1976)(invalidated certain provisions of the Federal Election Campaign Act because violated the First Amendment and Appointments Clause); King v. Smith, 392 U.S. 309, 333 (1968)(invalided state statute that attempted to define "parent" because inconsistent with the federal Social Security Act);

United States v. Butler, 297 U.S 1, 68-69 (1936)(invalidated federal statute because violated the Tenth Amendment).

Just because the County uses its funding power to regulate gun shows does not mean the law can escape constitutional analysis as the County would urge this Court to do. Since the law infringes upon free speech, § 57-13 should be analyzed and declared invalid under the Central Hudson test as set forth above.

IV. SECTION 57-13 INFRINGES UPON A GUN SHOW EXHIBITOR'S RIGHT TO ASSEMBLE UNDER THE FIRST AMENDMENT.

MCSM and RSM's First Amendment claims encompass the part of the First Amendment that reads: "Congress shall make no law ... abridging ... the right of the people peaceably to assemble and to petition the Government for the redress of grievances." U.S. Const. amend I. The right to assembly includes meeting for purposes that the government would like to target for eradication. Schneck v. Pro Choice Network of Western New York, 519 U.S. 357 (1997). "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech . . . Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic,

religious or cultural matters and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460-61 (1958). "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly." Id. "There can no longer be any doubt that freedom to associate with others for the common advancement of political beliefs and ideas is a form of 'orderly group activity' protected by the First and Fourteenth Amendments." Kusper v. Pontikes, 414 U.S. 51, 56-57 (1973).

The rights of MCSM and RSM to freely associate at gun shows with members of the public in the County is completely hindered by the passage of § 57-13 because the law acts as a ban on shows in the County. The Supreme Court has held that there are two kinds of freedom of association that are constitutionally protected: intimate association and expressive association. Pi Lambda Phi Fraternity, Inc. v. University of Pittsburgh, 229 F.3d 435, 441 (3rd Cir. 2000); Roberts v. United States Jaycees, 468 U.S. 609 (1984) (summarizing these two forms of associational freedoms).

In Boy Scouts of America v. Dale, 530 U.S. 640 (2000), the Court used a three-step process to analyze the Boy Scouts' expressive association claim. Pi Lambda Phi, 229 F.3d at 442 (citations omitted). The Third Circuit summarized the test as follows:

> First, the Court considered whether the group making the claim engaged in expressive association. . . . The Court then analyzed whether the state action at issue significantly affected the group's ability to advocate its viewpoints. . . . Finally, it weighed the state's interest implicated in its action against the burden imposed on the associational expression to determine if the state interest justified the burden.

Id. (citations omitted).

First, MCSM and RSM are clearly groups engaged in expressive association. Second, § 57-13 significantly affects the groups ability to advocate its viewpoints because the law has the intended effect of banning all gun shows in the County and thus there are no suitable alternative venues for the group to reach their intended audience. (J.A. 365). Lastly, as set forth in detail above, the County has not asserted a legitimate interest that would justify the burdens the associational expression that occurs at the gun shows. Thus, the Court should find that § 57-13 is unconstitutional under the free assembly clause.

V. SECTION 57-13 VIOLATES A GUN SHOW PROMOTER AND EXHIBITOR'S EQUAL PROTECTION RIGHTS.

Under Count VI of the Complaint, Krasner and RSM claimed that § 57-13 violates the Equal Protection Clause. (J.A. 31-3). The banning of the otherwise lawful display and sale of firearms at private exhibition facilities through the denial of financial support by the County improperly discriminates against individuals and entities that display and sell firearms without any rational basis or legitimate health, safety, or public welfare concern.

Under the Fourteenth Amendment, no State shall ". . . deny any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV. In Northern Indiana Gun & Outdoor Shows, Inc. v. Hedman, 104 F.Supp.2d 1009 (N.D. Ind. 2000), the operator of a gun show brought a section 1983 action against the City, the Mayor, and Civic Center Officials, alleging that the Center's "no gun" policy violated the operators' constitutional rights under the First and Fourteenth Amendments. 104 F. Supp. 2d at 1010. Plaintiffs in Hedman also made a similar equal protection claim. In addressing Krasner's equal protection arguments, the United States District Court for the Northern Division of Indiana stated:

> To establish its claim that the defendants violated NIGOS's right to equal protection, NIGOS must show that the Century Center treated NIGOS

> differently from equal persons or organization and that the "no weapons on the premises" policy of the Century Center either had no legitimate governmental purpose or did not have even a rational relationship to its legitimate governmental purpose. . . .

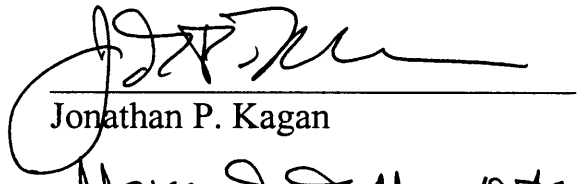
Hedman, 104 F.Supp.2d at 1017 (citations omitted). In Hedman, since the Court found that the policy met the Central Hudson test, the equal protection claim did not have any merit. Id.

The Court should find that § 57-13 violates the Equal Protection Clause because it cannot withstand scrutiny even under the deferential rational basis test. Even assuming for the sake of argument, that limiting access to guns is a legitimate governmental purpose, there is no rational relationship between banning gun shows in the County and limiting access to guns that are used in crimes of violence or accidental shootings in the County.

CONCLUSION

For the reasons set forth above, Appellees Frank Krasner Enterprises, Ltd., d/b/a Silverado Promotions and Silverado Gun Show, RSM, Inc., d/b/a Valley Gun and Police Supply, and Robert D. Culver, Individually and on behalf of the Citizens Group "Montgomery Citizens for a Safer Maryland," respectfully request that the Court affirm the district court.

Respectfully submitted,



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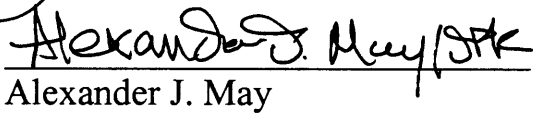

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 01-2321 **Caption:** Frank Krasner Enterprises, LTD., et al. v. Montgomery County, Maryland

CERTIFICATE OF COMPLIANCE UNDER FED. R. APP. P. 32(A)(7)

COUNSEL MUST COMPLETE AND INCLUDE THIS CERTIFICATE IMMEDIATELY BEFORE THE CERTIFICATE OF SERVICE FOR ALL BRIEFS FILED IN THIS COURT.

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☒ Fourteen point, proportionally spaced, serif typeface (such as CG Times or Times New Roman). Do NOT use sans serif typeface such as Arial or any font which does not have the small horizontal or vertical strokes at the ends of letters). Specify software name and version, typeface name, and point size below (for example, WordPerfect 8, CG Times, 14 point):

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2. EXCLUSIVE of the corporate disclosure statement; table of contents; table of citations; statement with respect to oral argument; any addendum containing statutes, rules, or regulations; and the certificate of service, the brief contains (SELECT AND COMPLETE ONLY ONE):

☐ _____ Pages (give specific number of pages; may not exceed 30 pages for opening or answering brief or 15 pages for reply brief); OR

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_____ 10/28/02

Signature of Filing Party Date

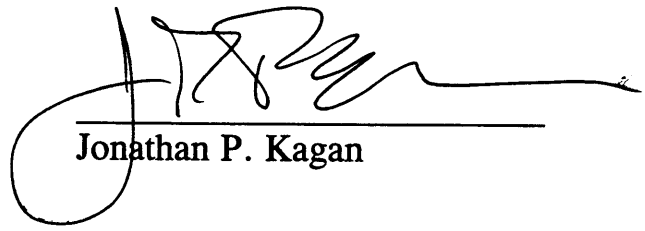
Jonathan P. Kagan

REQUEST FOR ORAL ARGUMENT

Appellees respectfully request that this case be set for oral argument.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 28, 2002, two copies of Appellee's Brief was mailed, postage prepaid, to Charles W. Thompson, Jr., County Attorney, Marc P. Hansen, Chief, General Counsel Division, Karen L. Federman Henry, Principal Counsel for Appeals, Clifford L. Royalty, Associate County Attorney and Judson P. Garrett, Jr., Principal Counsel for Opinions and Advise, Executive Office Building, 101 Monroe Street, Third Floor, Rockville, Maryland 20850-2589, Attorneys for Appellant.



Jonathan P. Kagan

ADDENDUM

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....

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

Bill No. 2-01
Concerning: Weapons – Gun Shows
Revised: May 16, 2001 Draft No. 9
Introduced: January 23, 2001
Enacted: May 16, 2001
Executive: May 29, 2001
Effective: August 28, 2001
Sunset Date: See Sec. 2
Ch. 11, Laws of Mont. Co. 2001

COUNTY COUNCIL
FOR MONTGOMERY COUNTY, MARYLAND

By: Council President Ewing and Councilmember Silverman

AN ACT to:

(1) generally prohibit the sale, transfer, possession, or transportation of certain weapons at or within 100 yards of certain exhibition facilities;
(2) prohibit County funding for any organization that allows the sale, transfer, possession, or transportation of certain firearms at certain exhibition facilities;
(3) make technical and stylistic changes to County law regarding weapons; and
(4) generally amend County law regarding weapons at or near certain exhibition facilities.

By amending and adding to
Montgomery County Code
Chapter 57, Weapons

Boldface	*Heading or defined term.*
Underlining	*Added to existing law by original bill.*
[Single boldface brackets]	*Deleted from existing law by original bill.*
Double underlining	*Added by amendment.*
[[Double boldface brackets]]	*Deleted from existing law or the bill by amendment.*
* * *	*Existing law unaffected by bill.*

The County Council for Montgomery County, Maryland approves the following Act:

Section 1. Chapter 57 of the County Code is amended as follows:

57-1. Definitions.

In this Chapter, 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; [or] 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.

* * *

[57-2A.]

57-3. Change in urban area boundary.

* * *

[57-3.]

57-4. Discharge of guns in the urban area.

A person, other than a peace officer or employee of the Maryland Department of Natural Resources performing official duties, must not discharge a gun within the urban area. Except as provided in Sections [57-5] 57-7 and [57-7A] 57-11, a person may discharge a gun:

* * *

[57-4.]

57-5. Discharge of guns outside the urban area.

* * *

(b) Except as provided in Sections [57-5] 57-7 and [57-7A] 57-11, a person may discharge a gun:

* * *

[57-4A.]

57-6. Discharge of bows.

* * *

[57-5.]

57-7. Access to guns by minors.

* * *

[57-5A.]

57-8. Child [Safety Handgun Devices and Handguns] safety handgun devices and handguns.

* * *

[57-6.]

57-9. Unlawful ownership or possession of firearms.

* * *

[57-7.]

57-10. Keeping guns on person or in vehicles.

* * *

[57-7A.]

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.

[[(c)]]

(d) * * *

57-12. **Sale of fixed ammunition.**

* * *

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 [[or in-kind]] support from the County [[after January 1, 2001,]] must repay the support if the organization allows the display and sale of guns at the organization's facility [[within 10 years]] 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.

[57-8.]

57-14. Exemptions from [[provisions of chapter]] Chapter.

* * *

Nothing in this Chapter applies to the purchase, ownership, or possession of a bona fide antique [[guns which are]] gun that is incapable of use as a gun. Except as provided in Sections [57-5] 57-7 and [57-7A] 57-11, nothing in this Chapter prohibits the owner or tenant of any land from carrying or discharging a firearm on that land for the purpose of killing predatory animals which prey on, damage or destroy property, livestock, or crops.

* * *

[57-9.]

57-15. Penalty.

Any violation of this Chapter or a condition of an approval certificate issued under this Chapter is a Class A violation to which the maximum penalties for a [class] Class A violation apply. Any violation of Section [57-5A] 57-8 is a Class A civil violation.

* * *

Sec. 2. Effective dates.

(a) Section 57-13 of the County Code, as amended by Section 1 of this Act, applies to:

(1) support that an organization receives from the County after December 1, 2001; and

(2) the display of a gun for sale at the facility after December 1, 2001.

(b) Section 57-13 expires on December 1, 2011.

Approved:

Blair G. Ewing, President, County Council — May 21, 2001 Date

Approved:

Douglas M. Duncan, County Executive — May 29, 2001 Date

This is a correct copy of Council action.

Mary A. Edgar, CMC, Clerk of the Council — May 30, 2001 Date