

CIVIL NO: 07-15763

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

RUSSELL ALLEN NORDYKE, et al.,

Plaintiffs and Appellants,

vs.

MARY V. KING, et. al.,

Defendants and Appellees.

APPEAL FROM A JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA

HON. MARTIN J. JENKINS
(CASE No. CV-99-04389-MJJ)

**APPELLEES' RESPONSE TO APPELLANTS' MOTION FOR
SUPPLEMENTAL BRIEFING**

RICHARD E. WINNIE
COUNTY COUNSEL
COUNTY OF ALAMEDA

SAYRE WEAVER (116957)
T. PETER PIERCE (160408)
VERONICA S. GUNDERSON (252158)
RICHARDS, WATSON & GERSHON
A PROFESSIONAL CORPORATION
355 SOUTH GRAND AVENUE, 40TH FLOOR
LOS ANGELES, CA 90071
TELEPHONE: (213) 626-8484
FACSIMILE: (213) 626-0078
ppierce@rwglaw.com
Attorneys for Defendants and Appellees

I. INTRODUCTION

As explained more fully below, Appellees object to Appellants' motion for supplemental briefing. To the extent that Appellants ask this Court to enter an order *now* for supplemental briefing on the yet to be issued decision in *McDonald v. City of Chicago*, No. 08-1521 (U.S., certiorari granted September 30, 2009), the motion is premature. To the extent Appellants' motion seeks additional briefing on cases handed down *before* oral argument was heard in this case and that Appellants have already briefed or had opportunity to brief in Fed. Rule of App. Procedure (FRAP) Rule 28(j) letters to this Court, this motion is inappropriate.

II. SUPPLEMENTAL BRIEFING ON THE IMPACT OF MCDONALD V. CITY OF CHICAGO IS PREMATURE

On September 24, 2009, this Court heard oral argument in this matter, took it under submission, and later that day issued an order stating: "Submission is vacated pending the Supreme Court's disposition of *Maloney v. Rice*, No. 08-1592, *McDonald v. City of Chicago*, No. 08-1521, and *National Rifle Association of America, Inc. v. City of Chicago*, No. 08-1497." The petition for certiorari in *McDonald v. City of Chicago*, consolidated with *National Rifle*

Association of America, Inc. v. City of Chicago by the Seventh Circuit on September 29, 2009, was granted by the Supreme Court on September 30, 2009. The United States Supreme Court took *McDonald* under submission on March 2, 2010 after hearing oral argument. As of the date of this response, no decision in these cases has been handed down by the Supreme Court.

Appellants' motion for supplemental briefing on the impact of *McDonald* on the issues in this case is thus premature. If this Court decides that it wishes to receive supplemental briefing on any issue in this case, after the decision in *McDonald* is handed down, Appellees do not object to such supplemental briefing.

Additionally, with respect to Appellants' specific request for supplemental briefing on Second Amendment issues in this case, Appellees do not object to renewal of Appellants' motion *after* the decision in *McDonald* is handed down. Appellants' request for supplemental briefing prior to a decision in *McDonald* is premature, because until *McDonald* is handed down, this Court is not in a position to determine if supplemental briefing should take place in light of that decision. Therefore, Appellees' request that this Court deny this aspect of the pending motion without prejudice.

III. THIS COURT SHOULD DENY APPELLANTS' REQUEST TO REARGUE PREVIOUSLY BRIEFED AND DISCUSSED CASES

Appellants' motion also requests that this Court allow additional briefing on three First Amendment cases decided prior to the September 24, 2009 oral argument in this case, which Appellants had the opportunity to argue to this Court on that date.

Appellants concede that two of these cases, *Jiovon Anonymous, a Minor v. City of Rochester*, 2009 NY Slip Op 04697, and *Annex Books, Inc. v. City of Indianapolis*, 581 F.3d 460 (7th Cir. 2009), were briefed by Appellants pursuant to FRAP 28(j) before the en banc argument. Specifically, on June 10, 2009, Appellants filed an FRAP 28(j) letter briefing *Jiovon Anonymous, a Minor v. City of Rochester* and on September 14, 2009, Appellants filed an additional FRAP 28(j) letter briefing *Annex Books, Inc. v. City of Indianapolis*. Additionally, Appellants concede that they argued *Berger v. City of Seattle*, 569 F.3d 1029 (9th Cir. 2009), to the en banc panel on September 24, 2009. Had they wished to brief *Berger* in an FRAP 28(j) letter, they had the opportunity to do so.

Appellants have had their opportunity to brief *and* argue all of these cases. Therefore, these cases have already received the attention

of this Court. Appellants' request for supplemental briefing on *Jiovon Anonymous*, *Annex Books, Inc.*, and *Berger v. Seattle* is thus inappropriate. Accordingly, Appellees request that this Court deny Appellants' motion to the extent it seeks such additional briefing.

IV. CONCLUSION

For the reasons set forth above, Appellants' motion should be denied in part without prejudice, and denied in part with prejudice as to Appellants' request for further briefing on *Jiovon Anonymous*, *Annex Books, Inc.*, and *Berger v. Seattle*.

DATED: March 31, 2010

RICHARD E. WINNIE
COUNTY COUNSEL
COUNTY OF ALAMEDA
RICHARDS, WATSON & GERSHON
A Professional Corporation
SAYRE WEAVER
T. PETER PIERCE
VERONICA S. GUNDERSON

By: s/ Sayre Weaver
Sayre Weaver
Attorneys for Defendants and
Appellees

CERTIFICATE OF SERVICE

I hereby certify that on March 31, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

C.D. Michel
Trutanich Michel, LLP
180 East Ocean Blvd., Suite 200
Long Beach, CA 90802

Don B. Kates
22608 N.E. 269th Avenue
Battleground, WA 98604

Richard E. Winnie
Office of County Counsel
1221 Oak Street, Suite 463
Oakland, CA 94612-4296

Vanessa A. Zecher
Law Offices of Vanessa A. Zecher
111 West of St. John Street, Suite 710
San Jose, CA 95113

s/ Karen Forrand
Karen Forrand