No. 07 – 15763 [DC# CV 99-4389-MJJ]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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RUSSELL ALLEN NORDYKE; et al.,
*Plaintiffs - Appellants*,

vs.

MARY V. KING; et al.,
*Defendants - Appellees*.

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

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# APPELLANTS' MOTION FOR SUPPLEMENTAL BRIEFING

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## INTRODUCTION

This is a request that the Court order the parties to file supplemental briefs in light of the (en banc) order filed on July 12, 2010. That order directed the original panel to engage in further consideration of the case in light of the United States Supreme Court's decision in *McDonald v. City of Chicago*, No. 08-1521.

## STATEMENT OF CASE

On July 29, 2009, an order was issued that this case be reheard en banc. Oral argument took place on September 24, 2009. On the same day as oral argument (within hours), the Court issued the following order: "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 Ass'n of Am., Inc. v. City of Chicago*, No. 08-1497." [Docket Entry No. 121]

Certiorari was granted in only one of the cases: *McDonald v. Chicago*, 130 S.Ct 48, on September 30, 2009. The question before the Supreme Court was: "***Whether the Second Amendment right to keep and bear arms is incorporated as against the States by the***

***Fourteenth Amendment's Privileges or Immunities or Due Process Clauses.***"

The *McDonald* case was argued and submitted on March 2, 2010. The Supreme Court's opinion was filed on June 28, 2010. *McDonald v. Chicago*, 561 U.S. ___ (2010)

Appellants filed a Federal Rule of Appellate Procedure 28(j) letter on July 9, 2010 citing the Supreme Court's opinion in *McDonald*. [Docket Entry: 126]

On July 12, 2010, the en banc panel issued an order vacating the *Nordyke v. King,* 563 F.3d 439 (9th Cir. 2009) opinion and remanding the case to the original panel for further consideration in light of *McDonald v. City of Chicago*, 08-1521. [Docket Entry: 127]

## ARGUMENT

Among other issues that were resurrected in this case by *McDonald*, the County has never proffered any evidence that the fairgrounds is a sensitive place. Because the Supreme Court was unequivocal in its pronouncement that the Second Amendment is a fundamental right – that must now be respected by state and local

governments – it is imperative that this Court put the County to its constitutional burdens of producing evidence (rather than conclusory statements) that they are addressing a compelling government interest and that the County's means are narrowly tailored to that interest.

The controlling opinions in *McDonald* also placed great weight on congressional interpretation of fundamental rights as found in the statutory language of the *Civil Rights Act of 1866*, the *Civil Rights Act of 1871* and the *Freedmen's Bureau Act*. (Slip Opinion of the Court at 26-27, 29, 32 and Concurring Opinion at 30-31.) In any supplemental briefing, Appellants would urge this Court to mirror that analysis.

For example, in the Protection of Lawful Commerce in Arms Act (PLCAA)[1], Congress addressed the nature and scope of the right protected by the Second Amendment. In § 2(b)(2) of the PLCAA, Congress is advancing a constitutionally inspired policy of protecting "*a citizen's access to a supply of firearms and ammunition for all lawful purposes, including hunting, self-defense, collecting and competitive or recreational shooting*." Law-abiding, well-regulated gun shows – an undisputed fact in this case – advance this Second Amendment policy.

[1] Public Law 109-92, 15 U.S.C. § 7901-7903

Thus Congress recognizes that the Second Amendment means more than mere possession of a handgun in the home. Since California's Constitution[2] does not recognize a "right to keep and bear arms" – the field is unoccupied and the U.S. Congress is as good an authority (or better) for determining the scope of this right as any other branch (or level)[3] of our elected governments.

Since the en banc panel ordered "further consideration" of the entire opinion in light of *McDonald*, it is an open (reopened?) question whether the equal protection analysis equating the Scottish Games with the gun shows is still valid.

The guns at gun shows are secured pursuant to state law. [JSUF ¶ 52] The guns at the Scottish Games are secured pursuant to a county ordinance. [JSUF ¶¶ 16, 17, 31, 40-42] Appellants contend that this is a distinction without a difference; or at a minimum, that this fact (equating gun shows with the Scottish Games) cannot be resolved at the summary judgment stage of these proceedings.

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[2] See *Kasler v. Lockyer*, 23 Cal.4th 472, 480 (2000).

[3] It is late in the game for either the County of Alameda (or the State of California for that matter) to claim that they "know" what the scope of the Second Amendment is, when they have maintained all along that it is a meaningless anachronism that does not define a fundamental right.

Both a fundamental rights (First and/or Second Amendment) and equal protection analysis requires the government to: (1) produce evidence, (2) that demonstrates a compelling interest, (3) and prove that the government's regulation is not more restrictive of the right(s) than is necessary to address the compelling interest. See: *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972).

On this record, the County has failed meet their constitutional burdens; and in light of the Supreme Court's discussion of the fundamental nature of the rights protected by the Second Amendment in *McDonald*, this Court should order supplemental briefing. ____

**MOTION**

Appellants hereby move the Court for the following orders:

1. 45 calendar days from the issuance of any order, the parties shall simultaneously file supplemental briefs addressing how the *McDonald* decision impacts this case. The parties may also discuss and analyze persuasive and binding authority on any issue already properly before the Court. The briefs shall comply with Federal Rule of Appellate Procedure 32 for principal briefs. [See Rule 32(a)(7)(B)(i) for definition of principal brief.]

2. 15 calendar days after the parties file briefs pursuant to paragraph 1, the parties may file optional reply briefs that shall comply with Federal Rule of Appellate Procedure 32. [See Rule 32(a)(7)(B)(ii) for definition of reply brief.]

3. Any amicus briefs shall comply with Federal Rule of Appellate Procedure 29.

## AUTHORITY

Federal Rule of Appellate Procedure 28(c) provides authority for supplemental briefing upon a party's motion.

Respectfully Submitted, July 13, 2010.

s/ Donald Kilmer /

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