

No. 07 – 15763 [DC# CV 99-4389-MJJ]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
– En Banc –

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

vs.

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

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

**APPELLANTS' REPLY RE:
SUPPLEMENTAL BRIEFING**

Donald E. J. Kilmer, Jr.
Law Offices of Donald Kilmer
1645 Willow Street, Suite 150
San Jose, California 95125
Vc: 408/264-8489 Fx: 408/264-8487
E-Mail: Don@DKLawOffice.com

Counsel for Plaintiff - Appellants

Don B. Kates
Attorney at Law
22608 N.E. 269th Avenue
Battleground, Washington 98604
Vc: 360/666-2688 Fx: 360/666-3303
E-Mail: DonKates@earthlink.net

Co-Counsel for Plaintiff - Appellants

Appellants' Reply

_____Appellees appear to misread Appellants' motion. Both the Introduction and the specific request for relief clearly requested that this Court order supplemental briefing from the parties 45 days after the Supreme Court issues its decision in *McDonald v. City of Chicago*, No. 08-1521.

Appellees' objection to the request to brief the impact of cases filed after April 20, 2009, is without merit for at least three reasons:

1. F.R.App.Proc. 28(j), only permits 350 words, by way of letter to the Court, for the purpose of bringing supplemental authority to the Court's attention. Appellants contend that this is hardly a substitute for analysis and argument in a case of constitutional importance.
2. On May 18, 2009, this Court ordered the parties to submit briefs under F.R.App.Proc. 35(a) on the issue of whether this case should be reheard *en banc*. [Docket Entry #87] Neither the order nor the appellate rule authorized the parties to submit briefs on the merits. Notwithstanding that fact, the authorities that the Appellants have suggested could use

further analysis (other than the limitations of a 28(j) letter or oral argument) were all published after the due date this Court set for the F.R.App.Proc. 35(a) briefs.

3. Finally, Appellants' request is not even controversial.

"Absent manifest injustice," the Ninth Circuit should take into account all changes in the law occurring after the appeal is filed but before a decision is rendered. *Miller v.*

Fairchild Industries, Inc., 885 F.2d 498, 509 (9th Cir. 1989).

Because this Court's July 29, 2009 *en banc* order vacated the prior opinion, this appeal is still pending and no decision has been rendered. Therefore, under current circuit rules, any post-appeal change in the law should be fair play in any subsequent and/or supplement briefing.

Appellants pray for the relief requested in their motion for supplemental briefing.

Respectfully Submitted, April 1, 2010.

s/ Donald Kilmer/

Donald Kilmer
Counsel for the Appellants.

9th Circuit Case Number(s) 07-15763

CERTIFICATE OF SERVICE

When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that 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 on (date) .

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature (use "s/" format)

CERTIFICATE OF SERVICE

When Not All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that 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 on (date) Apr 1, 2010 .

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

Signature (use "s/" format)

/s/ David Speakman