

No. 07 – 15763 [DC# CV 99-4389-MJJ]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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' MOTION FOR LEAVE TO FILE A REPLY BRIEF
IN SUPPORT OF PANEL REHEARING
AND/OR *EN BANC* REHEARING**

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Co-Counsel for Plaintiff - Appellants

**Counsel of Record*

Motion

There are no rules of appellate procedure, nor any Ninth Circuit specific rule, which provides for a “right” to file a reply brief to an answer for petition for rehearing. However, the Rutter Group, California Practice Guide: Federal Ninth Circuit Civil Appellate Practice does suggest that a motion with a proposed (short) reply attached would not be an unreasonable request to the Court. See: Rutter Group Practice Guide: Ninth Circuit Appellate Practice, 11:200 *et seq.*, Chapter 11,F.

Plaintiff-Appellants hereby request leave of the Court to file the attached 6-page reply brief in support of their petition for rehearing and/or rehearing *en banc*.

Respectfully Submitted on July 18, 2011,

/s/ Donald Kilmer

Attorney for Appellants.

CERTIFICATE OF SERVICE

On this, July 18, 2011, I served the foregoing:

1. **APPELLANTS' MOTION FOR LEAVE TO FILE A
REPLY BRIEF IN SUPPORT OF PANEL REHEARING
AND/OR *EN BANC* REHEARING**
2. **[Proposed] APPELLANTS' REPLY BRIEF IN
SUPPORT OF PANEL REHEARING AND/OR *EN
BANC* REHEARING**

by electronically filing it with the Court's ECF/CM system, which generated a Notice of Filing and effects service upon counsel for all parties in the case. [By agreement, hard-copy service of County Counsel Richard Winnie has been waived by T. Peter Peirce, Attorney of Record for Appellees.]

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 18th Day of July, 2011,

/s/ Donald Kilmer
Attorney of Record for Appellants

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Counsel for Plaintiff - Appellants

Co-Counsel for Plaintiff - Appellants

**Counsel of Record*

CORPORATE DISCLOSURE STATEMENT

T S TRADE SHOWS is the business name used by RUSSELL and SALLIE NORDYKE to conduct business as gun show promoters throughout Northern and Central California. The business is wholly owned by the Nordykes.

VIRGIL McVICKER is president of the MADISON SOCIETY, a not-for-profit Nevada Corporation with its registered place of business in Carson City, Nevada. The Madison Society has chapters throughout California. The society is a membership organization whose purpose is preserving and protecting the legal and constitutional right to keep and bear arms for its members and all responsible law-abiding citizens. It is not a publicly traded corporation.

Dated: July 18, 2011

/s/

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REPLY BRIEF – RE: PANEL REHEARING

Defendant-Appellees manage to – both – misconstrue the Appellant’s Petition for Panel Rehearing and introduce misconstrued facts that beg for relief under Fed. R. App. Proc. 35 and 40(a)(2).

Appellant’s petition for panel rehearing was not seeking to advance a preemption arguments in the Court of Appeals. Defendant-Appellees are correct – that no new arguments can be advanced in the Court of Appeals that were not preserved below.

A fair reading of the petition for panel rehearing is as a request for instructions/clarification to the trial court upon remand, as to whether the preemption claim can be reasserted in the trial court. The request was made to avoid the necessity of another appeal involving process instead of substance. The case law permitting a clarifying instruction from the original panel is set forth in the petition.

Defendant-Appellees have themselves introduced “facts” that either: (1) are misconstrued by the panel, or (2) are in conflict with undisputed facts, and if material to the resolution of the case, forms a procedural basis for reversing the summary judgment. This alone would give rise to a panel rehearing under Fed. R. App. Proc. 40(a)(2).

Starting on page 8 of their Response, the Defendant-Appellees assert the falsehood: “When the manager of the County fairgrounds requested a written plan from the Nordykes showing how their next event would fall within the one of the excepted categories, the Nordykes refused to submit a plan and instead filed this lawsuit.”

Plaintiff-Appellants had thought that this “factual” controversy was put to rest by a clarifying letter filed by Appellants on August 5, 2009, Docket Entry # 105. The undisputed sequence of events, from the Joint Statement of Undisputed Facts (JSUF) from the trial court are:

- a. JSUF # 12 refers to a July 26, 1999, letter generated by plaintiffs’ counsel to Alameda County Counsel requesting clarification of how the ordinance would apply to their gun shows. County Counsel did not respond to this letter, or any other letter directed to their office by plaintiffs’ counsel.
- b. JSUF # 14 refers to an August 23, 1999, letter from County Counsel to the County Fairgrounds Manager providing notice of, and an interpretation of the ordinance, stating that firearms shall not be displayed at the fairgrounds.
- c. JSUF #88 – 90 sets forth the admissions by the County that

the fairgrounds manager had no authority to interpret the ordinance or grant exceptions to the ordinance, making his demand for a written plan a futile gesture. Furthermore, County Counsel was the only entity entitled to interpret the ordinance and he had already stated that no firearms could be displayed at the fairgrounds.

- d. JSUF #31 is an admission by the County that the Scottish Games have never been required to submit a written plan about how their event (with functioning firearms, firing blanks in mock battle) is an exception to the ordinance.
- e. JSUF # 15 refers to a September 7, 1999, letter from the Alameda County Fairgrounds to the Nordykes requesting a written plan for conducting a gun show in compliance with the Alameda ordinance.
- f. JSUF #18 refers to a September 16, 1999, un-answered letter from Plaintiffs' counsel to Alameda County Counsel seeking to avoid litigation and/or mitigate damages.
- g. JSUF #20 refers to a September 20, 1999, letter from the Alameda County Counsel to the Alameda Board of

Supervisors recommending changes to the ordinance ,which now includes the exceptions that magically include the Scottish Games, but not gun shows. The letter states that the ordinance makes no substantive changes to the ordinance. (i.e., it still bans gun shows)

- h. JSUF #21 refers to a September 24, 1999, un-answered letter from plaintiffs' counsel to Alameda County Counsel still seeking to avoid litigation and/or mitigate damages.
- i. JSUF # 26 refers to an October 20, 1999, letter from plaintiffs' counsel to the Fairgrounds' Manager requesting authority for his demand for a written plan, while making assurances that the Nordykes fully intended to comply with all contractual and statutory legal obligations.
- j. JSUF #30 refers to a January 5, 2000, letter from the Fairgrounds' Manager releasing all gun show dates and refunding the Nordykes' deposit because they could not submit a plan for holding a gun show in compliance with an ordinance that precludes the possession of firearms at gun shows at the fairgrounds.

- k. JSUF #23 is the County's admission that their ordinance still prohibits the possession of firearms on county property.

All of these letters are part of the trial court record below and can be produced again to this Court along with the JSUF if requested.

These attempts to avoid litigation by the plaintiffs, coupled with the undisputed facts from the trial court, should put to rest the bizarre notion that the Nordykes opted out of holding gun shows in compliance with exception #4 of the ordinance by not submitting "a written plan."

Furthermore, the County has admitted that Nordykes' gun shows have complied with all federal laws and the California Gun Show Enforcement Act of 2000 [JSUF # 43, 44, 49 thru 57 and 85], including provisions in that state law requiring:

- (1) that all guns be "secured" at gun shows and
- (2) the provisions that the gun show promoters submit written security plans (to the California Department of Justice) as part of their compliance with California Penal Code §§ 12071.1 and 12071.4.

If the Court has misconstrued these fact, now is the time to correct it.

REPLY BRIEF - RE: REHEARING *EN BANC*

Plaintiff-Appellants have nothing to add to their opening petition for rehearing *en banc*, except to urge consideration of the letters of supplemental authority that have been filed, and to note that the Defendant-Appellees appear to misunderstand the purpose of Fed. R. App. Proc 28(j).

The letters submitted by the Appellants regarding the decisions in the United States Supreme Court¹ and the Seventh Circuit² were offered as part of appellate counsel's continuing duty to keep the Court apprized of developments in First and Second Amendment law that are germane to this case.

Respectfully Submitted this July 18, 2011,

/s/

Donald Kilmer
Attorney for Appellants

/s/

Don B. Kates
Attorney for Appellants

¹ *Sorrell v. IMS Heath*, (2011) 564 U.S. ____ and *Brown v. Entertainment Merchants Association*, (2011) 564 U.S. ____.

² *Ezell, et al., v. City of Chicago*, (7th Cir.) No. 10-3525.

CERTIFICATE OF COMPLIANCE

This brief contains 1015 words, excluding the part of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed.R.App.P. 32(a)(5) and the type style requirements of Fed.R.App.P. 32(a)(6) because this brief has been prepared in proportionally spaced typeface using WordPerfect Version 12 in Century Schoolbook 14 point font.

Date: July 18, 2011

/s/

Donald Kilmer, Attorney for Appellants

CERTIFICATE OF SERVICE

On this, July 18, 2011, I served the foregoing APPELLANTS' REPLY BRIEF IN SUPPORT OF PETITION FOR PANEL REHEARING AND/OR *EN BANC* REHEARING by electronically filing it with the Court's ECF/CM system, which generated a Notice of Filing and effects service upon counsel for all parties in the case. [By agreement, hard-copy service of County Counsel Richard Winnie has been waived by T. Peter Peirce, Attorney of Record for Appellees.]

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 18th Day of July, 2011,

/s/ Donald Kilmer
Attorney of Record for Appellants