

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' MOTION FOR
SUPPLEMENTAL BRIEFING**

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INTRODUCTION

This is a request that the Court order the parties to file supplemental briefs after the United States Supreme Court issues its decision in *McDonald v. City of Chicago*, No. 08-1521.

STATEMENT OF FACTS

On April 20, 2009 the three-judge panel filed its opinion in *Nordyke v. King*, 563 F.3d 439 (9th Cir. 2009). [Docket Entry No. 84]

On May 18, 2009, the Court ordered the parties to file simultaneous briefs to determine whether the case should be reheard en banc. [Docket Entry No. 87]

On June 8, 2009, the parties filed their briefs in compliance with the Court's May 18th Order. [Docket Entries 89 and 90]

On July 29, 2009, an order was issued that this case be reheard en banc. Oral argument was set for 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 case: *McDonald v. Chicago*, 130 S.Ct 48, on September 30, 2009. The question before the Supreme Court is: “***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 case was argued and submitted on March 2, 2010.

After principal briefing, Appellants submitted several letters under Federal Rule of Appellate Procedure 28(j). Most of these dealt with developments regarding Second Amendment Incorporation. [See Docket Entries: 89, 95, 96 and 97] These supplemental citations will be rendered moot by the opinion in *McDonald v. City of Chicago*.

However, two other letters dealt with developments in the law related to the First Amendment and Equal Protection issues that are still in play in *Nordyke*. This second category of letters cited cases from the New York Court of Appeals and the Seventh Circuit regarding evidentiary burdens on governments when courts apply intermediate scrutiny analysis to fundamental rights. [See Docket Entries 94 and 117] Both cases¹ stood for the proposition that governments must do

¹ *Jiovon Anonymous, a Minor v. City of Rochester*, 2009 NY Slip Op 04697, was filed on June 9, 2009 and *Annex Books, Inc. v. City of Indianapolis*, 581 F.3d

more than cite conclusory crime statistics that have no (or minimal) relationship to the activity (presumably including expressive conduct) that is the target of the law.

Additionally, *Berger v. City of Seattle*, 569 F.3d 1029 (9th Cir. 2009), an en banc case, filed on June 24, 2009, was cited by Appellants during en banc oral argument. This case addresses permissible regulations of expressive conduct in the context of public fora.

Because these various cases were being filed after the *Nordyke* panel issued its opinion on April 20, 2009, neither party engaged in any analysis or discussion of these cases – outside of their Rule 28(j) citation and/or a mention during en banc oral argument. As of March 19, 2010, none of the cases in this second category have been disturbed or modified by a court with the power to review those cases.

MOTION

Appellants hereby move the Court for the following orders:

1. 45 calendar days after the United States Supreme Court files its decision in *McDonald v. City of Chicago*, No. 08-1521, the parties shall simultaneously file supplemental briefs addressing how that

460 (7th Cir. 2009) was filed September 3, 2009.

decision impacts this case. The parties may also discuss and analyze persuasive and binding authority in other cases filed since April 20, 2009. 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, March 22, 2010.

s/ Donald Kilmer /

Donald Kilmer
Counsel for 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) .

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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:

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/s/ David Speakman