

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

EDWARD PERUTA, et. al.,  
*Plaintiffs-Appellants,*  
v.  
COUNTY OF SAN DIEGO, et. al.,  
*Defendants-Appellees.*

No. 10-56971  
D.C. No. 3:09-cv-02371-IEG-BGS  
U.S. District Court for Southern  
California, San Diego

**APPELLANTS' MOTION FOR RELIEF FROM STAY**

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**TO THE COURT AND TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

In accordance with Federal Rule of Appellate Procedure 27 and Ninth Circuit Rules 27-1 and 27-10, Plaintiff-Appellants Edward Peruta, Dr. Leslie Buncher, Mark Cleary, James Dodd, Michelle Laxson, and California Rifle and Pistol Association Foundation (collectively “Appellants”) hereby respectfully move this Court for relief from its sua sponte order dated December 20, 2011 (Docket No. 77), which stayed proceedings in the present matter (“*Peruta*”) pending this Court’s en banc review and decision in *Nordyke v. King*, Ninth Circuit Case No. 07-15763 (“*Nordyke*”).<sup>1</sup>

**I. INTRODUCTION**

This Court stayed the present appeal pending resolution of *Nordyke* – a case also involving Second Amendment rights, though different ones – due to concerns that *Nordyke* might address dispositive Second Amendment principles potentially relevant here. The stay is no longer warranted, however, because the forthcoming

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<sup>1</sup> In accordance with Ninth Circuit Rule 27-1(2) and Advisory Committee Note to Circuit Rule 27-1 paragraph 5, Appellants’ counsel contacted counsel for Appellees in order to determine whether they oppose this motion. Appellees’ counsel indicated that Appellees do oppose this motion. (Declaration of Sean A. Brady Supp. Appellants’ Mot. Lift Stay ¶ 3.)

en banc decision in *Nordyke* will almost certainly not address substantive constitutional or factual issues before this Court in *Peruta*.

Appellants therefore bring this motion to have the stay lifted and to proceed with this appeal so as to avoid further delaying vindication of their fundamental, constitutional rights.

## II. FACTUAL BACKGROUND

The present appeal – which involves constitutional challenges to San Diego County’s policy for issuing licenses to carry firearms in public – was recently stayed pending a decision by an en banc panel of this Court in *Nordyke*. *Nordyke* involves a challenge to an Alameda County ordinance making it a misdemeanor, with several exceptions, to possess a firearm or ammunition on county property – one of those exceptions being a person having the kind of license Appellants here seek from San Diego County. Alameda County, Cal., Gen. Ordinance Code § 9.12.120(b). The Nordykes operated a gun show on county property, and claimed the ordinance’s effective ban on their gun show violates, inter alia, their Second Amendment right to engage in the commerce of firearms. *Nordyke v. King*, No. 07-15763, slip op. at 5635-36 (9th Cir. May 2, 2011).

*Nordyke* has a long and tortured procedural history. It stretches out over twelve years and has included an interlocutory appeal of a motion to dismiss, a certified question to the California Supreme Court, two previous opinions from this Court vacated due to rehearing en banc, two remands to the district court, and one remand to the merits panel by the en banc Court. *Nordyke v. King*, 644 F.3d 776, 781-82, 794-95 (9th Cir. 2011), *reh'g en banc granted*, No. 07-15763, 2011 WL 5928130 (9th Cir. Nov. 28, 2011). Most of *Nordyke*'s procedural history – aside from the mere fact the case has remained unresolved for so long – is not relevant to this motion. For purposes here, this Court can begin with the lifting of the stay it placed on *Nordyke* in 2009 pending the United States Supreme Court's resolution of the Second Amendment incorporation issue decided in *McDonald v. City of Chicago*, 561 U.S. 2025, 130 S. Ct. 3020 (2010). Order Vacating Submission Pending Disposition of *McDonald v. City of Chicago, Ill., Nordyke v. King*, No. 07-15763 (9th Cir. Sept. 24, 2009).

The first action in *Nordyke* by this court following *McDonald* was an en banc panel vacating the pre-*McDonald* opinion and remanding the case to the appellate panel for consideration in light of the *McDonald* decision on July 12, 2010. *Nordyke v. King*, 611 F.3d 1015 (9th Cir. 2010) (en banc). A week later the panel ordered all parties to file supplemental briefing addressing the impact of the

*McDonald* decision and any other issue before the court, including the applicable level of scrutiny for the Second Amendment claim. Order Requesting Supplemental Briefing, *Nordyke*, No. 07-15763 (9th Cir. July 19, 2010). That briefing culminated with oral arguments on October 19, 2010, at which point the case was submitted.

In the meantime, *Peruta*, which was originally filed on October 23, 2009, proceeded in the district court unstayed. The parties in *Peruta* filed cross motions for summary judgment, which were argued and submitted on November 15, 2010, approximately one month after *Nordyke* was submitted. Minute Order, *Peruta v. County of San Diego*, 758 F. Supp. 2d 1106 (S.D. Cal. 2010) (No. 09-12371). The district court in *Peruta* issued an order denying Plaintiffs'-Appellants' motion and granting Defendants'-Appellees' motion on December 10, 2010. *Peruta*, 758 F. Supp. 2d 1106. Plaintiffs'-Appellants' timely filed their notice of appeal with this Court on December 14, 2010. Plaintiffs' Notice of Appeal, *Peruta*, 758 F. Supp. 2d 1106 (No. 09-02371).

The panel in *Nordyke* issued its opinion on May 2, 2011, which, inter alia, established a general standard of review for Second Amendment claims. *Nordyke v. King*, No. 07-15763, slip op. at 5637-44 (9th Cir. May 2, 2011). The *Peruta* Appellants filed their opening appellate brief with this Court later that same



month, addressing all potentially applicable standards of review for Second Amendment claims, including that which was articulated in *Nordyke*. Appellants' Opening Br. 23-47, May 23, 2011 (Doc. No. 13.) Appellees filed their responsive appellate brief on August 12, 2011, and Appellants replied on September 6, 2011.

On November 28, 2011, this Court issued an order granting the *Nordyke* plaintiff-appellants' motion seeking en banc rehearing of their case and declaring the three judge panel decision to be without precedential value. *Nordyke v. King*, 664 F.3d 774 (9th Cir. 2011). Before a date for oral argument in *Peruta* was set, this Court issued an order sua sponte on December 20, 2011 to stay *Peruta* pending *Nordyke*'s en banc review – which order is the subject of this motion. Order Staying Proceedings, Dec. 20, 2011 (Doc. No. 77).

On January 3, 2012, *Peruta* Appellants filed a Motion for Reconsideration of Order Staying Proceedings, insisting “*Nordyke* is distinguishable from *Peruta* both in terms of its facts and issues presented” and, therefore, “neither *Nordyke*'s outcome nor the standard of review that the en banc panel adopts will be dispositive in resolving this [*Peruta*] case.” Appellants' Mot. Recons. 2, Jan. 3, 2012 (Doc. No. 78-1). In denying Appellants' unopposed motion, this Court opined that a decision in *Nordyke* “may contain legal analysis that would assist in the resolution of this [*Peruta*] appeal.” Order Den. Appellants' Mot. Recons., Jan.

24, 2012 (Doc. No. 79).

### III. CURRENT STATUS

On March 19, 2012, nearly two months after denying Appellants' Motion for Reconsideration of Order Staying Proceedings, *Nordyke* was reargued before an en banc panel of this Court. Oral Argument, *Nordyke v. King*, 664 F.3d 774 (No. 07-15763)(9th Cir. argued Mar. 19, 2012). During the first portion of oral argument, the en banc panel seemed to suggest, in allegiance with the original panel's decision, that there were unresolved factual issues with the Second Amendment claim that warranted a remand to the district court for sorting out. Oral Argument at 1:10, *Nordyke*, 664 F.3d 774 (No. 07-15763), *available at* [http://www.ca9.uscourts.gov/media/view\\_subpage.php?pk\\_id=0000008949](http://www.ca9.uscourts.gov/media/view_subpage.php?pk_id=0000008949) (last accessed May 15, 2012). For example, the panel asked "doesn't this case have to go back to the district court for there to be an amendment to the pleadings to conform to the many constitutional changes, and from my perspective and more importantly, to have some discovery done to find out what exactly is involved here." *Id.* The panel also suggested that "maybe what we need is a fuller factual record before we answer the difficult question of whether this is or is not a 'sensitive place' within the meaning of . . . *Heller*," *id.* at 4:39, to which counsel for the Nordykes answered "yes . . . we may need to go back to the district court to

develop the record . . . . [,]" *id.* at 4:56, and with the “reinvigoration of the Second Amendment, it is going to be necessary to develop a fact pattern . . . . [,]" *id.* at 6:25.

But, then defendant-appellee Alameda County revealed – apparently to the surprise of the panel and counsel for the Nordykes – that it interpreted the exceptions to its challenged ordinance as allowing the Nordykes’ gun show, as long as all firearms were secured by being tethered to an immovable object. *Id.* at 31:25.

This revelation prompted several of the Judges to suggest the case is no longer justiciable, with the Chief Judge commenting to counsel for the Nordykes, “[T]hey [Alameda County] said you could do it [have guns shows] now, they did it in court, they’re judicially estopped, so you won, so why don’t you go home?”, *id.* at 55:26, and “ok, case over, right? You no longer have a controversy,” *id.* at 1:00:05. To which the Nordykes’ counsel responded that it was the first time he heard Alameda County take that position, *id.* at 1:00:50, and suggested that because it took twelve years of litigation to get to that point, a hearing on what fees and costs his clients are entitled to may be appropriate, *id.* at 1:00:19.

Two weeks later, on April 4, 2012, the *Nordyke* en banc panel issued an order deferring submission of the case for 45 days and referring the parties to

mediation so they could “attempt to settle this dispute by agreeing on the conditions for holding gun shows at the Alameda County fairgrounds . . . .” Order Deferring Submission at 3660, *Nordyke*, 664 F.3d 774 (No. 07-15763).

That day a Mediator from this Court issued an additional order setting a conference on April 13, 2012 for the parties to discuss “settlement potential.” Order Setting Assessment Conference, *Nordyke*, 664 F.3d 774 (No. 07-15763). Counsel for all parties attended that conference. Upon conclusion of the conference, the Mediator is reported to have concluded that there is no reasonable possibility that the parties will be able to resolve their dispute through mediation and that the matter should go back to the en banc panel for a decision.

#### **IV. DISCUSSION**

##### **A. Relief from Stay Is Warranted Because Recent Developments in *Nordyke* Indicate Its Resolution Will Not Affect the Resolution of This Case**

“[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.” *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). But, this Court has made clear that staying a case pending the resolution of another is improper where issues relevant to both cases are unlikely to be addressed. *Dependable Highway Express, Inc. v. Navigators Ins.*

*Co.*, 498 F.3d 1059, 1066 (9th Cir., 2007) (holding that a stay is proper “pending [the] resolution of independent proceedings *which bear upon the case*”]) (emphasis added); *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1113 (9th Cir. 2005) (suggesting a *Landis* stay is improper where the other proceeding “is unlikely to decide, or to contribute to the decision of, the factual and legal issues” presented); *see also* Christopher A. Goelz et al., *Federal Ninth Circuit Civil Appellate Practice* ¶¶ 6:137-6:138.1 (Cole Benson et al. eds., 2011) (explaining that Courts seldom grant motions to stay an appeal pending disposition of another appeal unless “*resolution of the pending appeal will be dispositive of the appeal . . . [being] stayed*”) (emphasis added).

This Court implemented a stay here to wait and see if the anticipated en banc *Nordyke* decision will provide legal analysis affecting *Peruta*. Order Staying Proceedings, *Peruta*, 758 F. Supp. 2d 1106 (No. 09-12371). Presumably, the Court was concerned that resolution of this case may depend on the *Nordyke* en banc panel’s potential determination of questions about the Second Amendment’s scope and applicable standard of review, and that proceeding was not in the interest of judicial economy and might risk inconsistent legal analyses. It is now evident, however, that the Court’s concerns in that regard are unlikely to materialize.

Alameda County's insistence at oral argument that its challenged ordinance does not prohibit gun shows seems to have mooted the entire controversy at issue in *Nordyke* (i.e., whether in light of the Second Amendment right to engage in commerce of firearms, a county may prohibit gun shows on its property). The panel's various comments and questions to that effect at oral argument confirm that it did not see a different conclusion of the case. Oral Argument at 1:00:04, *Nordyke*, 664 F.3d 774 (No. 07-15763). Even counsel for the Nordykes had no substantial reason to offer as to why the case is not now moot; rather, counsel could only express indignation (albeit likely warranted) that so much litigation was conducted to arrive at such a resolution.

If the controversy in *Nordyke* is now moot, any decision coming from the en banc panel should not, and almost certainly will not, address the substantive issues in *Peruta*. See *Flast v. Cohen*, 392 U.S. 83, 94 (1968) ("The jurisdiction of federal courts is defined and limited by Article III of the Constitution. In terms relevant to the question for decision . . . the judicial power of federal courts is constitutionally restricted to 'cases' and 'controversies.' ") Rather, the court should, and likely will, dismiss the action as to the Second Amendment claim.

Even before Alameda County's revelation, the en banc panel seemed to develop a consensus that factual issues with the case remain, suggesting that if not

entirely moot, the case is instead destined for remand. Oral Argument at 1:00, *Nordyke*, 664 F.3d 774 (No. 07-15763). And counsel for the Nordykes seemed to agree with that consensus. *Id.* at 1:39. A remand to the district court would certainly require removal of the stay here. First, *Peruta* would be procedurally further along than *Nordyke*. It would make little sense to stay in place an appeal fully briefed before this Court pending factual development of a case before a district court. And, regardless, the facts of *Nordyke* have absolutely no bearing on *Peruta* – the former concerning the right to engage in the commerce of firearms and the latter concerning the right to carry a firearm for self-defense.

Whether the next procedural action in *Nordyke* is a dismissal, a remand to the district court for factual development, or a formal written decision from the en banc panel, there is little risk in lifting the stay now. The en banc panel cannot address the merits of the Nordykes' Second Amendment claim because the question presented to the court has changed. *Nordyke* has now – to the extent a justiciable controversy even remains – become about how a gun show can be conducted pursuant to Alameda County's disputed ordinance, rather than whether a gun show can constitutionally be banned. That is a factual dispute specific to *Nordyke*, not a dispute over general legal principles that would be relevant to the *Peruta* appeal.

In any event, this Court presumably has access to the written decision the en banc panel has presumably already prepared, which the Court can consult in order to confirm lifting the stay here will not be problematic.

Because the issues that might remain in *Nordyke* are not likely to have an impact on the outcome of *Peruta*, the stay now in place has become improper under the Court's own standards for staying an appeal. It should be lifted.

**B. Lifting the Stay Will Not Be Detrimental to the Court or the Parties**

Since the risk that *Nordyke* will address issues relevant to this appeal is minimal, judicial economy will not be affected by lifting the stay. Nor will lifting the stay unduly prejudice any party to this, or any other, action. This appeal has already been fully briefed by both sides. And, since the lower court's decision being appealed here was issued prior to the *Nordyke* decision that was reviewed en banc, *Nordyke*'s being remanded, dismissed, or decided based on factual contentions will have no impact on *Peruta*. Moreover, in the unlikely event the en banc panel issues a decision upholding the three-judge panel's decision, the parties here have already briefed its impact on this appeal.

If the stay remains, however, Appellants will continue to suffer irreparable harm by being deprived of exercising their fundamental right to bear arms, *see*



*McDonald v. City of Chicago*, 561 U.S. 2025, 130 S. Ct. 3020, 3041-44 (2010);  
*see also Ezell v. City of Chicago*, 651 F.3d 684, 699-700 (7th Cir. 2011), a right  
the denial of which can have life or death consequences. And, using *Nordyke*'s  
long and convoluted history as a reasonable barometer, to continue the stay in this  
case until resolution of *Nordyke* effectively subjects Appellants to such harm  
indefinitely.

## V. CONCLUSION

For these reasons, Appellants hereby respectfully request that the Order  
staying their appeal pending resolution of *Nordyke* be lifted, and the case set for  
hearing at the Court's earliest convenience.

Date: May 18, 2012

MICHEL & ASSOCIATES, P.C.

/s/ C. D. Michel  
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Attorneys for *Plaintiffs-Appellants*

**CERTIFICATE OF SERVICE**

I hereby certify that on May 18, 2012, an electronic PDF of **APPELLANTS' MOTION FOR RELIEF FROM STAY** was uploaded to the Court's CM/ECF system, which will automatically generate and send by electronic mail a Notice of Docket Activity to all registered attorneys participating in the case. Such notice constitutes service on those registered attorneys.

Date: May 18, 2012

/s/ C. D. Michel  
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**DECLARATION OF SEAN A. BRADY IN SUPPORT OF APPELLANTS'  
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**Counsel for Plaintiffs-Appellants**

**DECLARATION OF SEAN A. BRADY**

I, Sean A. Brady, declare as follows:

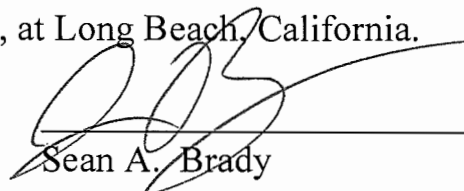
1. I am an attorney at law duly licensed to practice in the State of California and before the Ninth Circuit Court of Appeals. I am an Associate attorney at Michel & Associates, P.C., attorneys of record for Appellants. I am familiar with the facts and pleadings herein. The following is within my personal knowledge and if called and sworn as a witness, I could and would competently testify thereto.

2. On December 20, 2011, the Court issued an order sua sponte staying proceedings in this matter pending the rehearing en banc decision in *Nordyke v. King*, Ninth Circuit Case No. 07-15763.

3. On May 15, 2012, I contacted the attorney for Defendants-Appellees (Appellees), James Chapin, via electronic mail (e-mail) asking whether Appellees would oppose this motion. Mr. Chapin responded via e-mail on May 18, 2012 indicating that Appellees oppose this motion.

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

Executed this 18<sup>th</sup> day of May, 2012, at Long Beach, California.

  
Sean A. Brady

**CERTIFICATE OF SERVICE**

I hereby certify that on May 18, 2012, an electronic PDF of **DECLARATION OF SEAN A. BRADY IN SUPPORT OF APPELLANTS' MOTION FOR RELIEF FROM STAY** was uploaded to the Court's CM/ECF system, which will automatically generate and send by electronic mail a Notice of Docket Activity to all registered attorneys participating in the case. Such notice constitutes service on those registered attorneys.

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