

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' REPLY TO OPPOSITION TO  
MOTION FOR RELIEF FROM STAY**

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**I. APPELLEES FAIL TO EXPLAIN HOW *NORDYKE* IS LIKELY TO ADDRESS ISSUES RELEVANT TO *PERUTA* IN LIGHT OF THE QUESTION PRESENTED IN *NORDYKE* BEING MOOTED**

Appellees provide no support for their conclusory prediction that the en banc panel in *Nordyke* is likely to decide issues “highly relevant to the *Peruta* case.” Nor do they address Appellants’ assertions about the significance of the developments at oral argument before the en banc panel in *Nordyke*.

Instead, Appellees simply discount those assertions as Appellants’ “interpretation” of the commentary from the *Nordyke* hearing. Appellees’ Opp’n Mot. Relief Stay 2 (Doc. No. 85). But, it is not Appellants’ “interpretation” that the question of law presented in *Nordyke* is no longer in dispute, it is a fact.

The panel of this Court in *Nordyke* articulated the question presented in that case as: “[W]hether the Second Amendment prohibits a local government from *banning* gun shows on its property.” *Nordyke v. King*, 644 F.3d 776, 780 (9th Cir. 2011) (emphasis added). Alameda County has, in fact, conceded that the ordinance challenged in *Nordyke* does *not* ban gun shows. Oral Argument at 1:02, *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). As Chief Judge Kozinski commented, and Appellants point out in their motion, Alameda County is judicially estopped from taking a different position. *Id.* at 55:26;

Appellants' Mot. Relief Stay 7 (Doc. No. 84-1). Thus, the en banc panel no longer has a justiciable controversy before it appropriate for an appellate court to decide. *See Frank v. Minn. Newspaper Ass'n, Inc.*, 490 U.S. 225, 227 (1989) (holding that no justiciable case existed where a newspaper challenged a statute prohibiting the publication of prize lists, and the government conceded on appeal that the statute did not apply to non-commercial publishing of prize lists by newspapers). *See also Powell v. McCormack*, 395 U.S. 486, 496 n.7 (1969) (recognizing that the court's inability to consider the merits of a moot case "is a branch of the constitutional command that the judicial power extends only to cases or controversies") (citing *Sibron v. New York*, 392 U.S. 40, 57 (1968)).

Appellees also assert that regardless "a remand order may offer some guidance." Appellees' Opp'n Mot. Relief Stay 3 (Doc. No. 85). But to justify staying an appeal, the question is not whether a court's action *may* offer some guidance, but rather, as Appellants point out in their motion, whether issues relevant to both cases are *likely* to be addressed. Appellees' Mot. Relief Stay 8-9 (Doc. No. 84-1) (citing *Dependable Highway Express, Inc. v. Navigators Ins. Co.*, 498 F.3d 1059, 1066 (9th Cir., 2007); *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1113 (9th Cir. 2005); Christopher A. Goelz et al., Federal Ninth Circuit Civil Appellate Practice ¶¶ 6:137-6:138.1 (Cole Benson et al. eds., 2011)). Not even

Appellees assert that a remand order in *Nordyke* is likely to address issues relevant in *Peruta*, only that it is possible.

Finally, Appellees make much of the potential impact on judicial economy that may result by lifting the stay. But since the likelihood that the *Nordyke* en banc panel will address issues relevant to this case is now very low, it is likewise unlikely that continuing the current stay will further the interests in judicial economy that the stay was meant to serve. In any event, the likelihood that any interest in judicial economy will be furthered must be considered along with the harm the stay imposes upon Appellants' exercise of a fundamental right. Each day the stay remains in place, Appellants are irreparably harmed by being prohibited from exercising a fundamental right. Justification for Appellants' to tolerate that injury is premised on nothing more than a hope that by staying the adjudication of Appellants' claims pending the outcome of *Nordyke*, some interest in judicial economy *might be* served. And, as *Nordyke's* long and repetitive history demonstrates, Appellants' injury could very well continue for years without any likely – or probable – countervailing interest in judicial economy being served. Neither the case law concerning the propriety of staying cases nor equity support such a scenario.

## II. CONCLUSION

Because Appellees have failed to explain why *Nordyke* remains relevant to this appeal, and the interest of judicial economy is thus unlikely to be compromised, Appellants' Motion For Relief From Stay should be granted.

Date: May 25, 2012

MICHEL & ASSOCIATES, P.C.

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

**CERTIFICATE OF SERVICE**

I hereby certify that on May 25, 2012, an electronic PDF of **APPELLANTS' REPLY TO OPPOSITION TO 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 25, 2012

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