

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 RECONSIDERATION  
OF ORDER STAYING PROCEEDINGS**

---

C. D. Michel (S.B.N. 144258)

*Lead Counsel*

Glenn S. McRoberts (S.B.N. 144852)

Sean A. Brady (S.B.N. 262007)

Bobbie K. Ross (S.B.N. 273983)

MICHEL & ASSOCIATES, P.C.

180 East Ocean Blvd., Suite 200

Long Beach, CA 90802

Tel. No. (562) 216-4444

Fax No: (562) 216-4445

e-mail: [cmichel@michellawyers.com](mailto:cmichel@michellawyers.com)

**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, Plaintiffs-Appellants Edward Peruta, Dr. Leslie Buncher, Mark Cleary, James Dodd, Michelle Laxson, and California Rifle and Pistol Association Foundation (collectively “Appellants”) hereby respectfully request reconsideration of the Court’s order dated December 20, 2011 (Docket Entry No. 77), which stayed proceedings in this 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>

Appellants ask the Court to reconsider and rescind its Order on the grounds that a stay will delay justice for Appellants while providing no significant benefit to this Court, either in managing its docket or in resolving the issues presented in this case. *Nordyke* is distinguishable from *Peruta* both in terms of its facts and issues presented. As a result, neither *Nordyke*’s outcome nor the standard of review that the en banc panel adopts will be dispositive in resolving this case.

---

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

## DISCUSSION

Although the appeal in *Nordyke* has been pending throughout the duration of *Peruta*, neither this Court nor the district court has found it necessary to stay this case until now, even though the issues before the en banc panel in *Nordyke* are identical to those that were before the three-judge panel previously. Nor has any party to this action sought a stay at trial, upon appeal, or now. Nothing has changed over the course of the *Peruta* litigation except that: (1) this case has now been fully briefed; and (2) as explained in Appellants' Rule 28(j) letter of October 20, 2011, this case has been simplified by the passage of California Assembly Bill 144 ("AB 144").<sup>2</sup> Appellants see no reason to change course and stay the action at this point.

Appellants understand the rationale for staying *some* Second Amendment cases pending the decision in *Nordyke*, inasmuch as that case will provide some guidance as to the applicable standard of review in this Circuit. But, for the reasons stated below, the standard of review ultimately adopted by the en banc panel in *Nordyke* will not impact this case because the restrictions at issue here are unconstitutional under any permissible standard of review. Like the ordinances

---

<sup>2</sup> A copy of Appellants' Rule 28(j) letter outlining the impact of AB 144 is attached as Exhibit "A."

held unconstitutional in *District of Columbia v. Heller*,<sup>3</sup> the restrictions challenged here impose categorical burdens on core Second Amendment rights and therefore cannot survive under any standard of review that is consistent with *Heller*. Indeed, the resolution of this case can be resolved by citation to and application of the basic analysis of *Heller* while following *Heller*'s lead of not specifying a standard of review. The proper resolution of this case is no more dependent on the applicable standard of review than was *Heller* itself.

Simply put, there is no compelling reason to delay justice in this matter. This case is ready to be heard.

**I. Resolution of *Nordyke* Will Not Be Dispositive to Resolution of this Case Because the Facts and Issues Presented Differ in Material Ways**

Courts seldom grant motions to stay an appeal pending disposition of another appeal unless the motion is unopposed and it is readily apparent that resolution of the pending appeal will be dispositive of the appeal being stayed.<sup>4</sup> Neither of those conditions is satisfied here. The stay was not requested by the parties and is opposed by Appellants, who allege an ongoing violation of their

---

<sup>3</sup> 554 U.S. 570 (2008).

<sup>4</sup> See CHRISTOPHER A. GOELZ, ET AL., FEDERAL NINTH CIRCUIT CIVIL APPELLATE PRACTICE ¶¶ 6:137-6:138.1 (Cole Benson, et al., eds., The Rutter Group, 2011); see also, e.g., *Landis v. N. Am. Co.*, 299 U.S. 248, 256-257 (1936) and *Leyva v. Certified Grocers of California, Ltd.*, 593 F.2d 857, 863-864 (9th Cir. 1979) (citing *Landis*).

constitutional rights. And the en banc panel's resolution of *Nordyke* will be no more dispositive in this case than was the three-judge panel's decision, which did not precipitate a stay. The two cases are so factually dissimilar as to make any potential analysis applied in *Nordyke* of little relevance here.

**A. The Complete Deprivation of Appellants' Ability to Carry Arms in Public Is Unconstitutional Regardless of the En Banc Panel's Resolution of *Nordyke***

**1. Like the Ordinance in *Heller*, the Policy Challenged Here Is Unconstitutional Under Any Standard of Review**

Appellants here assert that because it is illegal to carry a firearm in public without a Carry License, the County's requirement that applicants may only receive such a license if they demonstrate some special need beyond a desire for self-defense is an unconstitutional restriction on their Second Amendment right to bear arms for self-defense. (Appellants' Opening Brief (AOB) 4-5, 14-16.) This is especially so given the recent signing into law of AB 144, which bans the unloaded open carry of handguns statewide.<sup>5</sup> Taken together, AB 144 and the County's

---

<sup>5</sup> As explained in detail in Appellants' October 20, 2011 Rule 28(j) Notice of Supplemental Authority (Docket Entry No. 71), AB 144 added Section 26350 to the California Penal Code, making it a misdemeanor to carry on one's person or in a car while in any public place an unloaded, unconcealed handgun. As such, it invalidates the district court's primary reasoning for ruling against Appellants, namely, that their Second Amendment rights were not burdened since they had the option to carry an unloaded firearm openly along with ammunition for instant loading. (Appellants' Notice of Supplemental Authority, Oct. 20, 2011.)

requirement produce a de facto categorical ban on carrying a firearm outside the home. Accordingly, the only question in this case is whether the core Second Amendment right of law-abiding people to carry a firearm for self-defense is a right that extends outside the home. So long as the answer is yes (which it must be under *Heller*), the County's de facto categorical ban cannot withstand *any* level of scrutiny, as the Constitution does not allow categorical bans on core Second Amendment rights. *Cf. Heller*, 554 U.S. at 629. This has been Appellants' position all along.<sup>6</sup>

*Peruta* differs from *Nordyke* in that critical respect. Unlike Appellants here, the plaintiffs in *Nordyke* have not alleged that Alameda County's ordinance making it a misdemeanor to bring onto or possess a firearm or ammunition on county property<sup>7</sup> directly restricts exercise of their core Second Amendment right to carry a firearm for self-defense. *See Nordyke v. King*, 644 F.3d 776, 786-87 (9th Cir. 2011) (“[Plaintiffs] do not allege that they wish to carry guns on county property for the purpose of defending themselves while on that property.”), *reh'g en banc granted*, No. 07-15763, 2011 WL 5928130 (9th Cir. Nov. 28, 2011). In

---

<sup>6</sup> “As in *Heller*, this Court need look no further or consider what form of heightened scrutiny is appropriate. County's policy of denying CCWs to law-abiding citizens is invalid in a post-*Heller* world, at least in the absence of generally available open loaded carry.” (AOB 35.)

<sup>7</sup> *See* Alameda Code § 9.12.120(b).

fact, the Alameda County ordinance exempts from its restriction holders of a valid Carry License,<sup>8</sup> and thus could not create the same kind of categorical restriction at issue here. The *Nordyke* plaintiffs have instead argued that the ordinance burdens their ability to display or sell guns, which, in turn, burdens their Second Amendment rights. *See id.*

The extent to which the Second Amendment prohibits burdening the ability to display or sell guns does not necessarily affect resolution of the issues presented here, and certainly does not affect this case in a manner that justifies imposing a stay over Appellants' objection. To be sure, if the en banc panel in *Nordyke* holds the Alameda County ordinance unconstitutional under whatever standard of review it ultimately adopts, the policy challenged here is *a fortiori* unconstitutional, as a total ban on carrying firearms for self-defense is self-evidently a more severe burden on Second Amendment rights than a ban on displaying or selling guns on county property. But if the en banc panel upholds the ordinance challenged in *Nordyke*, or concludes that some burdens on Second Amendment rights are subject to something less than strict scrutiny, that does not have the converse implication for this case.

---

<sup>8</sup> *See* Alameda Code § 9.12.120(f)(3).

Even if there is some permissible level of burden that may be placed on the ability to display or sell weapons, or some sufficiently strong state interest that might justify certain burdens on the exercise of Second Amendment rights, neither of those conclusions could render constitutional a *total ban* on the core right of law-abiding individuals to carry a weapon for self-defense outside the home. Because whatever standard of review *Nordyke* ultimately adopts and however it applies that standard to the readily distinguishable facts of that case cannot undermine Appellants' basic argument as to why the policy they challenge is unconstitutional, there is no reason to further delay resolution of their appeal and vindication of their Second Amendment rights.

**B. Any Equal Protection Analysis that Might Come From the En Banc Review of *Nordyke* Is of Little Consequence Here**

As Appellants explain in their Reply brief, the *Nordyke* panel incorrectly stated the applicable law in its Equal Protection analysis, contradicting longstanding and uncontroversial doctrines laid down by the U.S. Supreme Court; namely, that classifications that might restrain fundamental rights are subject to strict scrutiny. (*See* Appellants' Reply Brief (RB) 25 & n.15.) Those doctrines control here, and nothing from the *Nordyke* en banc panel can change that.

Moreover, even assuming *arguendo* that *Nordyke* could affect the analysis of Appellants' facial Equal Protection claim, resolution of that claim is not necessary

to grant Appellants the relief they seek. With the passage of AB 144, there is no longer an intermediate form of the right – *i.e.*, the ability to carry an unloaded handgun openly with ammunition at hand for loading upon attack. As a result, there are only two groups of people, those who can generally carry a handgun in public pursuant to a license and those who are completely barred from doing so. There either is a right to publicly carry a firearm for self-defense in non-sensitive places, in which case Appellants should win their Second Amendment claim and enjoy the relief they seek regardless of their facial Equal Protection claim, or there is no such right, in which case they would lose both claims.

Finally, Appellants’ as-applied Equal Protection challenge does not depend on a fundamental rights analysis (although it deserves one) because they assert that Appellees’ practice of favoring certain applicants in the issuance of Carry Licenses does not even meet rational basis review. (*See* AOB 58-59; RB 25-27.) Therefore, even if this Court found there is no right to armed self-defense in public, Appellants’ as-applied Equal Protection claim would still be unaffected by *Nordyke* and can be analyzed pursuant to current, binding Ninth Circuit precedent. *See Guillory. v. Orange County*, 731 F.2d 1379, 1383 (9th Cir. 1984).

## II. Staying *Peruta* Pending Resolution of *Nordyke* Would Result in Unnecessary Delay and Deny Appellants' Constitutional Rights

“[T]he interests affected by the grant or denial of a stay may be substantial.” *Appellate Review of Stay Orders in the Federal Courts*, 72 Colum. L. Rev. 518, 525 (1972). And here, the interests affected by the Court’s recent *sua sponte* stay of proceedings are not only “substantial,” they involve a fundamental, enumerated right, the denial of which is irreparable by definition. *See Ezell v. City of Chicago*, 651 F.3d 684, 699-700 (7th Cir. 2011). The denial of a constitutional right is generally a classic irreparable injury that would counsel against deferring proceedings. And the denial of the Second Amendment right to armed self-defense, in particular, can have life or death consequences.

Imposing an unnecessary stay that will needlessly delay resolution of Appellants’ constitutional challenge is particularly inequitable because it frustrates Appellants’ efforts to distill their case to its essence in hopes of expediting vindication of their Second Amendment rights. As explained in detail in their successful opposition to a recent motion to join their case with another factually similar licensing case (but one raising different legal challenges and seeking different remedies),<sup>9</sup> Appellants here have identified *one aspect* of a local policy

---

<sup>9</sup> (*See* Appellants’ Opposition to *Richards v. Prieto* Appellants’ Motion to Align Oral Argument with Related Case 9-15 (Docket Entry No. 44).

that caused their constitutional injuries and have challenged that discrete policy.

They seek an equally narrow remedy at the local level.

Specifically, Appellants are asking the Court to invalidate only that portion of San Diego County's policy that rejects "general self-defense purposes" as sufficient "good cause" for issuing a Carry License where the applicant is otherwise qualified. Appellants do not examine, nor do their claims require examination of, what else might constitute "good cause" or "bad," or what constitutes "good moral character." They focus on San Diego County's unconstitutional decision to find "self-defense" insufficient cause for a Carry License, rather than challenging the State's overall public carry regulatory scheme.

In short, Appellants have presented this Court with a discrete issue that does not implicate the issues in *Nordyke*. Indeed, this appeal is twice-removed from the *Nordyke* appeal, first because it *directly* implicates the core Second Amendment right to self-defense and second because it involves a government action that categorically precludes exercise of that right. While the *Nordyke* en banc panel will likely address the standard of review issue that *Heller* did not need to resolve, that issue is no more relevant here than it was in *Heller*.<sup>8</sup> Whatever level of scrutiny

---

<sup>8</sup> See Order Requesting Supplemental Briefing, *Nordyke v. King*, No. 07-15763 (9th Cir. July 19, 2010) (Docket Entry No. 129) (requesting additional briefing on "the level of scrutiny that should be applied to the ordinance in question.")

governs other infringements of Second Amendment rights, a categorical ban on the exercise of a core constitutional right is de facto unconstitutional. One does not need to know what standard of review governs time, place, and manner restrictions in a limited, public forum to know that a prior restraint violates the First Amendment. By the same token, one does not need to know the answer to the question in *Nordyke* to conclude that a complete ban on carrying a firearm for self-defense purposes violates the Second Amendment. The discrete issue presented here can and should be resolved quickly to restore Appellants' constitutional rights without further delay.

### CONCLUSION

The risk of this case and *Nordyke* producing duplicative and potentially conflicting rulings is minimal; it does not warrant staying this case. The County's policy challenged here is unconstitutional under any standard of review, as it imposes a categorical ban on the core Second Amendment right to carry a firearm for self-defense. As a result, even if the ordinance challenged in *Nordyke*

---

(emphasis added); *see also Nordyke* at 785-86, refusing to decide what type of heightened scrutiny applies once a "substantial burden" on a Second Amendment right is established after determining the ordinance at issue did not constitute such a burden.

withstands constitutional scrutiny, or is subjected to something less than strict scrutiny review, that will not affect resolution of the case at hand.

Accordingly, Appellants respectfully request that the Order staying their appeal be rescinded, the stay be lifted, and the case be set for hearing at the Court's earliest convenience. Doing so will still leave the option of a stay open at a later time, if the merits panel finds it warranted.

Date: January 3, 2012

MICHEL & ASSOCIATES, P.C.

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

**CERTIFICATE OF SERVICE**

I hereby certify that on January 3, 2012, an electronic PDF of Appellants' Appellants' Motion For Reconsideration of Order Staying Proceedings 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.

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