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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

BARRY BAUER, STEPHEN WARKENTIN, NICOLE FERRY, LELAND ADLEY, JEFFREY HACKER, NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., CALIFORNIA RIFLE PISTOL ASSOCIATION FOUNDATION, HERB BAUER SPORTING GOODS, INC.,

Plaintiffs,

v.

KAMALA HARRIS, in Her Official Capacity as Attorney General For the State of California; STEPHEN LINDLEY, in His Official Capacity as Acting chief for the California 21 Department of Justice, and DOES 1-10,

Defendants.

1:11-cv-1440-LJO-MJS

DEFENDANTS' NOTICE OF MOTION AND MOTION TO STAY

Date: April 18, 2012
Time: 8:30 AM
Courtroom: 4/ 7th Floor
Judge Hon. Lawrence J. O'Neill
Trial Date None
Action Filed: August 25, 2011

TO PLAINTIFFS AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that defendants Attorney General Kamala D. Harris and Firearms Bureau Chief Stephen Lindley (defendants) hereby move this Court for an order staying this action in its entirety pending the decision in *Nordyke v. King,* and that this motion shall be heard on April 18, 2012, at 8:30 a.m., before the Honorable Lawrence J. O'Neill, in Courtroom 4 on the Seventh Floor, of the above captioned court located at 2500 Tulare Street, Fresno, California 93721. This motion to stay is based on the following grounds:

1. A stay is warranted because the resolution of *Nordyke v. King* will likely determine the standard of review for Second Amendment cases. The proposed stay would be for a reasonable amount of time, there would be little or no hardship to plaintiffs and no hardship for defendants if the stay is granted.

2. This motion is based on this notice and motion, the declaration of Susan K. Smith, the Request for Judicial Notice and to all documents submitted in support of the Defendants' Motion to Stay the Action.

Dated: March 21, 2012

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
TAMAR PACHTER
Supervising Deputy Attorney General

/s/ Susan K. Smith
SUSAN K. SMITH
Deputy Attorney General
Attorneys for Defendants Attorney General Kamala D. Harris and Chief of the Firearms Bureau Stephen Lindley in Their Official Capacities

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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

BARRY BAUER, STEPHEN WARKENTIN, NICOLE FERRY, LELAND ADLEY, JEFFREY HACKER, NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., CALIFORNIA RIFLE PISTOL ASSOCIATION FOUNDATION, HERB BAUER SPORTING GOODS, INC., Plaintiffs, **v.** **KAMALA HARRIS, in Her Official Capacity as Attorney General For the State of California; STEPHEN LINDLEY, in His Official Capacity as Acting Chief for the California Department of Justice, and DOES 1-10,** Defendants.	1:11-cv-1440-LJO-MJS **DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO STAY** Date: April 18, 2012 Time: 8:30 AM Courtroom: 4/ 7th Floor Judge Hon. Lawrence J. O'Neill Trial Date None **Action Filed: August 25, 2011**

I. INTRODUCTION

Attorney General Kamala D. Harris and Chief of the Bureau of Firearms Stephen Lindley ("defendants") move this court for an order staying this action pending the outcome of the en

banc decision in *Nordyke v. King*, 644 F.3d 776 (9th Cir. 2011), *rehearing en banc granted*, No. 07-15763, 2011 U.S.App. LEXIS 23703 (9th Cir. Nov. 28, 2011).

California allows qualified individuals to purchase firearms, and requires them to pay modest fees for the transaction. As provided in the Penal Code,[1] these regulatory fees are placed in the Dealers Record of Sale Special Account Fund of the General Fund ("DROS"), which funds costs related to Department of Justice regulatory and enforcement activity related to the sale, purchase, possession, loan or transfer of firearms. *See* Cal. Penal Code § 28225. The fees vary depending on the quantity of arms in the transaction, but average about $19 per firearm transaction. A separate $15 fee is paid to obtain a handgun safety certificate which is good for two years and covers as many handguns as one owns or wants to purchase during that time period. The fee for the handgun safety certificate goes into a separate fund, the Firearms Safety and Enforcement Fund ("Firearms Fund"). Similarly, a separate $5 fee for each firearm transaction goes into the Firearms Fund.

A group of individuals, two non-profit organizations and a business brought this action against defendants, alleging that the DROS fees and related fees violate their Second Amendment right to bear arms. Plaintiffs acknowledge that the fees are "moderate amounts," but contend that they are excessive nonetheless because they fund regulatory and enforcement costs in excess of the costs of "lawful firearm transactions." First Amended Complaint for Declaratory and Injunctive Relief ("FAC" or "Complaint") ¶¶ 130, 136.

In *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. Chicago*, ___ U.S. ___, 130 S.Ct. 3020 (2010), the Supreme Court held that the Second Amendment protects an individual's right to keep and bear arms for self-defense in the home. The Court held that because this right is "fundamental to our scheme of ordered liberty" it applies to the states by incorporation through the Due Process Clause of the Fourteenth Amendment. *McDonald*, ___ U.S. ___, 130 S.Ct. at 3036-37, 3041-44; *see also Heller*, 554 U.S. at 595.

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[1] All references to the Penal Code are to the California Penal Code.

Defendants move to stay this action pending the outcome of the en banc decision in *Nordyke v. King*. At issue in *Nordyke* is the standard of review in Second Amendment cases. 644 F.3d at 782-83. Specifically, the en banc panel will decide whether firearms regulations are subject to strict scrutiny, whether only those regulations that substantially burden the right to keep and bear arms in self defense are subject to heightened scrutiny or strict scrutiny, or if some other standard applies. The Supreme Court in *McDonald* and *Heller* did not articulate a standard of review, leaving it open to the courts of appeals and the district courts. *Id.; see also Heller*, 554 U.S. at 629, 634; *McDonald,* 130 S.Ct. at 3036-37, 3041-44.

Although plaintiffs allege the conclusion that their right to keep and bear arms has been infringed, they have not alleged that the fees to which they object have prevented them from purchasing firearms. Rather, plaintiffs allege the fees are unconstitutional because they fund regulatory and enforcement costs with which plaintiffs do not agree. There is no case law to support this argument. To the contrary, *McDonald* and *Heller* support California's right to propound "laws imposing conditions and qualifications on the commercial sale of arms." Thus, defendants plan to challenge the sufficiency of the Complaint with a motion for judgment on the pleadings pursuant to Federal Rules of Civil Procedure rule 12(c).

A stay pending the outcome of the *Nordyke* decision is warranted in these circumstances because the resolution of that case will determine the relevant standard of review for purposes of challenging the Complaint. The proposed stay would not be indefinite because the en banc hearing occurred on March 19, 2012. There is no or little hardship to plaintiffs as a decision on the standard of review will also assist them in responding to defendants' dispositive motions, and because they are not prevented from obtaining firearms in the interim. Also, a stay would promote the interest of judicial economy. There is no reason for the District Court to guess at the appropriate standard of review for a motion for judgment on the pleadings when the Ninth Circuit is poised to decide a standard. Additionally, the standard of review will assist the parties in defining what types of discovery, if any, are needed.

II. CALIFORNIA PENAL CODE PROVISIONS

Plaintiffs challenge the following sections of the California Penal Code:

Penal Code section 28225(a) provides that "the Department of Justice may require the dealer to charge each firearm purchaser a fee not to exceed fourteen dollars ($14), except that the fee may be increased at a rate not to exceed any increase in the California Consumer Price Index . . .."

Section 28225(b) goes on to provide that "[t]he fee shall be no more than is necessary to fund the following" and specifies more than ten costs, including for example, the cost of furnishing firearm purchaser information (as required by Penal Code sections 28160 and 28165), the cost of electronic or telephonic transfer of that information, funds for the State Department of Mental Health and local mental health facilities for state mandated local costs resulting from reporting requirements imposed by the Welfare and Institutions Code, funds for Department of Justice "firearms-related regulatory and enforcement activities related to the sale, purchase, loan, or transfer of firearms pursuant to this chapter."

Section 28225(c) states:

> The fee established pursuant to this section shall not exceed the sum of the actual processing costs of the department, the estimated reasonable costs of the local mental health facilities for complying with the reporting requirements imposed by paragraph (3) of subdivision (b), the costs of the State Department of Mental Health for complying with the requirements imposed by paragraph (4) of subdivision (b), the estimated reasonable costs of local mental hospitals, sanitariums, and institutions for complying with the reporting requirements imposed by paragraph (5) of subdivision (b), the estimated reasonable costs of local law enforcement agencies for complying with the notification requirements set forth in subdivision (a) of section 6385 of the Family Code, the estimated reasonable costs of local law enforcement agencies for complying with the notification requirements set forth in subdivision (c) of Section 8105 of the Welfare and Institutions Code imposed by paragraph (7) of subdivision (b), the estimated reasonable costs of the Department of food and Agriculture for the costs resulting from the notification provisions set forth in Section 5343.5 of the Food and Agricultural Code, the estimated reasonable costs of the department for the costs associated with subdivisions (d) and (e) of Section 27560, and the estimated reasonable costs of department firearms-related regulatory and enforcement activities related to the sale, purchase, possession, loan, or transfer of firearms pursuant to any provision listed in Section 16580.

California Penal Code section 28235 specifies that moneys received by the department pursuant to this article shall be deposited in the Dealers' Record of Sale Special Account of the

General Fund "for expenditure by the department to offset the costs incurred pursuant to" an itemized list of sections in the Penal Code dealing with the Control of Deadly Weapons.

California Penal Code section 28300(c) allows the Department of Justice to require firearm dealers to charge each person who obtains a firearm a fee not to exceed $5 for each transaction, and this fee is then placed in the Firearms Safety and Enforcement Special Fund.

California Penal Code section 31650(c) allows the Department of Justice to charge a certified instructor teaching handgun safety up to $15 for each handgun safety certificate issued by that instructor "to cover the department's cost in carrying out and enforcing this article, and enforcing this title, as determined annually by the department." The instructor may charge up to $25, but $15 of the fee must be forwarded to the Department of Justice.

III. THE ALLEGATIONS OF THE COMPLAINT

The Complaint alleges that the five individual plaintiffs have purchased firearms in the last five years, and in conjunction with the purchases, have paid all applicable fees, but do not specify the exact fees paid by each plaintiff. FAC ¶¶ 20-25. Specifically, plaintiff Bauer has purchased firearms and paid each of the "Challenged Fees." FAC ¶ 20 "Challenged Fees" are defined as "those fees levied on the transfer of firearms" pursuant to Penal Code sections 28225 (a)-(c), 28300(c), 23690(a) and 31650(c). FAC ¶¶ 9, 20. It is unclear how much plaintiff Bauer has paid in fees to the State of California. FAC ¶ 20. Additionally, the Complaint alleges that plaintiff Bauer is injured by being forced to facilitate "unlawful fee collection activities" in his role as owner of plaintiff Herb Bauer Sporting Goods, Inc. ("Bauer Sporting Goods"), a licensed firearms dealer that sells a variety of firearms. FAC ¶ 29. Plaintiffs Warkentin and Hacker have each purchased multiple firearms in the last five years and paid about $136 in fees for the purchase of at least six firearms and a handgun safety certificate. Plaintiff Ferry has purchased handguns in the last five years and paid all applicable fees, including a $15 handgun safety certificate, but does not state how much she has paid in other fees. FAC ¶ 23. Plaintiff Adley has purchased multiple firearms in the last five years and paid all applicable fees, including a $15 handgun safety certificate, but does not state how much he has paid in other fees. FAC ¶¶ 24-25.

Plaintiff National Rifle Association ("NRA") is a non-profit organization with its principal place of business in Fairfax, Virginia. FAC ¶ 26. The purpose of the NRA is to protect the right of "law-abiding citizens to keep and bear firearms." *Id.* Plaintiff NRA brings this action on behalf of itself, "its hundreds of thousands of members in California," including plaintiffs Bauer, Warkentin, Adley and Hacker. *Id.* Plaintiff California Rifle and Pistol Association Foundation ("CRPAF") is a non-profit organization with headquarters in Fullerton, California. FAC ¶ 27. CRPAF's purpose is to "raise awareness about unconstitutional laws, defend and expand the legal recognition of the rights protected by the Second Amendment." *Id.* CRPAF brings this action on behalf of itself and its tens of thousands of supporters in California, including plaintiff Bauer, who have been, are being, and will in the future be subjected to the "Challenged Fees." FAC ¶ 28.

Plaintiff Bauer Sporting Goods is a California corporation with its principal place of business in the County of Fresno, California and it is a licensed firearms dealer under both California and federal law. FAC ¶ 29. As a licensed firearms dealer, plaintiff Bauer Sporting Goods collects the "Challenged Fees" from firearm transferees pursuant to California law.

Plaintiffs allege that defendants violated their constitutional rights to "acquire firearms as guaranteed by the Second and Fourteenth Amendments" by charging the Challenged Fees. FAC ¶ 157. Specifically, they allege that defendants abused their discretion by applying the fees in an unconstitutional manner and propagating customs, policies and practices that infringe on their rights. FAC ¶¶ 156-159 (First Claim for Relief). Plaintiffs seek declaratory relief and an order enjoining defendants from engaging in such customs, polices and practices. FAC ¶ 159. Additionally, plaintiffs allege that certain fees required by Penal Code sections 28225, 28235, 28300 and 31650 violate their Second Amendment right to keep and bear arms, and thus are facially invalid. FAC ¶¶ 160-162 (Second Claim for Relief). Plaintiffs seek declaratory and injunctive relief preventing defendants from enforcing or acting pursuant to California Penal Code sections 28225, 28235, 28300 and 31650. *Id.* at ¶ 162.

In addition, plaintiffs seek "remedies pursuant to 42 U.S.C. § 1983 and for an award of reasonable attorneys' fees, costs, and expenses pursuant to 42 U.S.C. § 1988, and/or other applicable state and federal law . . . " FAC at p. 37:2-4.

IV. ARGUMENT

This case should be stayed in its entirety pending a decision from the en banc court in *Nordyke v. King*. A district court has the discretion to control the disposition of cases on its docket in light of proceedings in another case. *See Landis v. North Am. Co.*, 299 U.S. 248, 254 (1936); *see also Yong v. INS*, 208 F.3d 1116, 1119 (9th Cir. 2000). In assessing the propriety of a stay, a court must "balance the length of the stay against the strength of the justification given for it." *Yong*, 208 F.3d at 1119.

> Among those competing interests are the possible damage which may result from the granting of a stay, the hardship or inequity which a party may suffer in being required to go forward, and the orderly course of justice measured in terms of simplifying or complicating issues, proof, and questions of law which could be expected to result from a stay.

Lockyer v. State of Cal., 398 F.3d 1098, 1110 n. 11 (9th Cir. 2005) (citing *CMAX, Inc. v. Hall*, 300 F.2d 265 (9th Cir. 1962); *see also Landis*, 299 U.S. at 254. "A stay should not be granted unless it appears likely the other proceedings will be concluded within a reasonable time in relation to the urgency of the claims presented to the court." *Lockyer.* 398 F.3d at 1111 (internal quotation marks omitted); *see also Dependable Highway Express, Inc. v. Navigators Ins. Co.*, 498 F.3d 1059, 1066 (9th Cir. 2007) (noting that "[g]enerally, stays should not be indefinite in nature"); *Jeffries v. Wood*, 103 F.3d 827, 827 (9th Cir. 1996) (en banc panel announcing outcome of decision before issuing decision because several Ninth Circuit panels stayed proceedings with similar questions).[2]

Here, the stay would be reasonably short, definite in nature and would lead to no or little damage to the plaintiff. A stay would be beneficial to the defendants. The Ninth Circuit has heard an en banc hearing on March 19, 2012, in *Nordyke v. King*, 644 F.3d 776 (9th Cir. 2011, *rehearing en banc granted*, No. 07-15763, 2011 U.S.App. LEXIS 23703 (9th Cir. Nov. 28, 2011).

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[2] Several Ninth Circuit panels have stayed proceedings pending the outcome of *Nordyke v. King*. *See Peruta v. County of San Diego*, No. 10-56971 (denying appellants' motion for reconsideration of order staying appeal pending decision in *Nordyke*); *Richards v. Prieto*, No. 11-16255 (stays appeal pending *Nordyke*); *Mehl v. Blanas*, No. 08-15773 (submission of the case vacated pending issuance of the mandate in *Nordyke*); *Rothery v. County of Sacramento*, No. 09-16852 (staying proceedings due to *Nordyke* until June 8, 2012) [Attached as A, B, C and D to Request for Judicial Notice filed simultaneously with this Motion].

The length of a potential stay would not be excessive as the en banc hearing has already taken place. There is no definitive time for a decision, but it takes approximately 16.3 months for a case to be resolved by the appellate court after the notice of appeal has been filed. *See* Judicial Business 2010, Table B-4, *available at* http://www.uscourts.gov/Statistics/JudicialBusiness/JudicialBusiness2010.aspx (last visited March 5, 2012). The time period for a stay in this case will likely be much shorter as the briefs have been filed and the hearing has taken place. Thus, the time period for the stay, although not precisely known, would be reasonable.

Pending a stay, plaintiffs would face little or no damage as they have not alleged in their Complaint that they are unable to purchase firearms pending the resolution of this matter before the Court. See generally Complaint. To the contrary, plaintiffs admit that the fees have been paid by plaintiffs (or will be paid by members of plaintiffs), collected and firearms have been purchased. FAC ¶¶ 20-25, 26, 28, 29. The damage to plaintiffs, pending a stay, would be minimal or nonexistent as they have been able to purchase firearms. Defendants would benefit from a stay because a decision in *Nordyke* will likely decide a standard of review applicable to Second Amendment cases in the Ninth Circuit. An opinion on the standard of review is essential to defendants' argument and this question of law will likely be answered in *Nordyke*. *See Lockyer*, 398 F.3d at 1110. As discussed below, this standard of review will govern any dispositive motions made by defendants. Thus, a stay should be granted because the time period for the stay would be reasonable, there would be no or little damage to the plaintiff, and a stay would benefit the defendants.

Additionally, a stay would promote judicial economy or the "orderly course of justice" in several ways. *See Lockyer*, 398 F.3d at 1110. First, the en banc panel will likely rule on the appropriate standard of review applicable to Second Amendment cases. *Nordyke*, 644 F.3d at 782-783. This decision will govern this Court's substantive rulings on dispositive motions. The Complaint only seeks relief for alleged violations of the Second Amendment. In order to determine whether the state regulations at issue are constitutional, this Court will need to

determine and apply a standard of review – the same standard of review which will be determined by the en banc opinion in *Nordyke* will likely be controlling in the matter before this Court.

Second, the standard of review will help define the scope and focus of discovery, if any is needed, for the claims at issue. For instance, if heightened scrutiny applies only to regulations that substantially burden the right to keep and bear arms, then the parties may focus on whether the regulation "leaves law-abiding citizens with reasonable alternative means for obtaining firearms sufficient for self-defense purposes." *Nordyke*, 644 F.3d at 787. This may not require any discovery at all, and may be resolved by dispositive motions. Conversely, if all regulations are subject to strict scrutiny, then the parties may focus discovery on the effectiveness of the regulations at issue here. *Id.* at 784-85.

In light of the foregoing, a limited stay of proceedings is appropriate pending a decision of the en banc panel decision in *Nordyke*.

CONCLUSION

For all of these reasons, the Court should grant defendants' motion to stay pending a decision from the en banc court in *Nordyke v. King*.

Dated: March 21, 2012

Respectfully Submitted,

KAMALA D. HARRIS
Attorney General of California
TAMAR PACHTER
Supervising Deputy Attorney General

/s/ Susan K. Smith
SUSAN K. SMITH
Deputy Attorney General
Attorneys for Defendants Attorney General Kamala D. Harris and Chief of the Firearms Bureau Stephen Lindley in Their Official Capacities

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Document in ProLaw

CERTIFICATE OF SERVICE

Case Name: **Barry Bauer, et al. v. Kamala Harris, et al.** No. **1:11-cv-1440-LJO-MJS**

I hereby certify that on March 21, 2012, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

DEFENDANT'S NOTICE OF MOTION STAY

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO STAY

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on March 21, 2012, at Los Angeles, California.

Rosa Macias	/s/ Rosa Macias
Declarant	Signature

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