

No. 14-15408 [DC# CV 13-05807-RMW]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LEONARD FYOCK, et al.,

Plaintiffs-Appellants,

v.

CITY OF SUNNYVALE, et al.,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

**APPELLANTS' MOTION TO STAY APPEAL;
DECLARATION OF ANNA M. BARVIR**

C. D. Michel (S.B.N. 144258)
Clinton B. Monfort (S.B.N. 255609)
Sean A. Brady (S.B.N. 262007)
Anna M. Barvir (S.B.N. 268728)
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

Counsel for Plaintiffs-Appellants

TABLE OF CONTENTS

	PAGE(S)
I. FACTUAL AND PROCEDURAL BACKGROUND.	1
II. DISCUSSION..	6
A. A Stay Is Warranted Because the Final Disposition of Other Second Amendment Cases Will Affect the Resolution of This Case.	7
B. A Stay Is in the Interest of Judicial Economy.	11
C. A Stay Will Not Unduly Prejudice Any Other Party.	13
III. CONCLUSION..	14
DECLARATION OF ANNA M. BARVIR.	15
CERTIFICATE OF SERVICE.	17

TABLE OF AUTHORITIES

PAGE(S)

FEDERAL CASES

Baker v. Kealoha,
No. 12-16258 (9th Cir. 12-16258, 2014). *passim*

Dependable Highway Express, Inc. v. Navigators Ins. Co.,
498 F.3d 1059 (9th Cir. 2007). 7

Dist. of Columbia v. Heller,
554 U.S. 570 (2008). 6, 8, 9

Jackson v. City and County of San Francisco,
No. 12-17803, 2014 WL 1193434 (9th Cir. Mar. 25, 2014) *passim*

Landis v. N. Am. Co.,
299 U.S. 248 (1936). 7, 11

Leyva v. Certified Grocers of Cal., Ltd.,
593 F.3d 857 (9th Cir. 1979). 7

Lockyer v. Mirant Corp.,
398 F.3d 1098 (9th Cir. 2005). 7

McDonald v. Chicago,
561 U.S. 3025 (2010). 6, 9

Nordyke v. King,
681 F.3d 1041 (9th Cir. 2012). 9, 10

TABLE OF AUTHORITIES (CONT.)

PAGE(S)

FEDERAL CASES (CONT.)

Peruta v. County of San Diego,
742 F.3d 1144 (9th Cir. 2014). *passim*

Richards v. Prieto,
No. 11-16255, 2014 WL 843532 (9th Cir. Mar. 5, 2014). *passim*

United States v. Chovan,
735 F.3d 1127 (9th Cir. 2013) *passim*

STATUTES, RULES & REGULATIONS

City of Sunnyvale Municipal Code § 9.44.050. 2

City of Sunnyvale Municipal Code § 706. 2

California Penal Code § 32310. 2

California Penal Code § 32400. 2

California Penal Code § 32450. 2

In accordance with Federal Rule of Appellate Procedure Rule 27 and Ninth Circuit Rule 27-1, Plaintiffs-Appellants Leonard Fyock, Scott Hochstetler, William Douglas, David Pearson, Brad Seifers, and Rod Swanson respectfully move this Court for a stay pending disposition of *Jackson v. City and County of San Francisco*, No. 12-17803, *United States v. Chovan*, No. 11-50107, *Peruta v. County of San Diego*, No. 10-56971, *Richards v. Prieto*, No. 11-16255, and *Baker v. Kealoha*, No. 12-16258.¹

A stay of proceedings is appropriate because when one of these five cases are reheard or reheard en banc, they will likely address relevant issues and ultimately assist the resolution of this case. A stay is in the interest of judicial economy—saving the Court and all parties from wasting substantial resources and limiting the risk of creating inconsistent legal precedent regarding Second Amendment issues in the Ninth Circuit. Further, a stay will not unduly prejudice any other party or any other action.

I. FACTUAL AND PROCEDURAL BACKGROUND

In November 2013, the City of Sunnyvale voters passed Measure C, which

¹ 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 to determine whether they oppose this motion. Counsel for Appellees have indicated that they will oppose this motion. Decl. of Anna M. Barvir Supp. Appellants' Mot. to Stay ("Barvir Decl.") ¶ 2.

included Sunnyvale Municipal Code section 9.44.050 (“the Ordinance”). Although the election results were scheduled to be certified by the Sunnyvale City Council in January 2014, the Council expedited the certification of the vote on November 26, 2013, causing the Ordinance to take effect on December 6, 2013, two months earlier than originally scheduled.

The Ordinance prohibits any person, corporation, or other entity in the City of Sunnyvale from possessing ammunition magazines with the capacity to accept more than ten rounds. Sunnyvale, Cal., Muni. Code § 9.44.050(a). Unless exempted, any person who possessed any magazine prohibited by the Ordinance prior to its effective date had until March 6, 2014, to surrender them to the Sunnyvale Department of Public Safety for destruction, sell or transfer them to a properly licensed vendor in accordance with state law, or remove them from the City of Sunnyvale. Sunnyvale, Cal., Muni. Code § 9.44.050(b). Anyone failing to comply with the Ordinance is subject to criminal penalties, including incarceration. Sunnyvale, Cal., Muni. Code § 706.²

In addition to violating Sunnyvale residents’ Second Amendment right to possess constitutionally protected magazines—itsself irreparable harm—the

² Effective January 1, 2000, California state law prohibits the manufacture, importation, sale, gift, or loan of magazines capable of holding more than ten rounds. Cal. Penal Code §§ 32310, 32400-50.

Ordinance caused permanent irreparable injury to those residents forced to surrender their magazines or to lawfully sell or transfer them before March 6, 2014.

To prevent the forced removal of their protected magazines and incurable injury, Appellants took every step to enjoin the Ordinance before the pending March 6 deadline. Because time was of the essence, Appellants filed their lawsuit in the district court ten days after the Ordinance took effect, on December 16, 2013. Pls.' Compl., ECF No. 1. Seven days later, on December 23, Appellants filed a motion for preliminary injunction. Pls.' Mot. Prelim. Inj., ECF No. 32-1. Appellants also asked the district court to expedite its ruling on their motion. Pls.' Mot. Expedite, ECF No. 31-3. And they filed an opposition to the City's request to enlarge time and to allow discovery to take place before consideration of Appellants' preliminary injunction motion. Pls.' Opp'n, ECF No. 28. The district court heard argument on the motion for preliminary injunction on February 21, 2014. Civil Mins., ECF No. 51.

Despite Appellants' persistent efforts to obtain an injunction before the March 6, 2014, deadline to prevent irreparable harm to their constitutional and property interests, the district court denied the motion for preliminary injunction on March 5, 2014. Order, Mar. 5, 2014, ECF No. 56. With no time to lose,

Appellants immediately filed a notice of appeal to the Ninth Circuit and filed an emergency motion for injunction pending appeal later that day. Dkt. No. 3-1 The Ninth Circuit denied Appellants' emergency motion on March 6, 2014. Dkt. No. 8.

On March 10, 2014, Appellants filed an Emergency Application for Injunction Pending Appeal to the Honorable Justice Anthony Kennedy. The Application was denied two days later.

Although the Ordinance is now in effect and law-abiding Sunnyvale residents who disposed of their magazines are now permanently dispossessed of their constitutionally protected magazines, Appellants must continue their appeal to prevent the ongoing, albeit less time-sensitive, irreparable harm that each resident endures by the violation of their Second Amendments.

Due to unforeseen circumstances, on March 20, 2014, Appellants filed a motion for an extension of time to file their Opening Brief. Dkt. No.11. This Court granted Appellants' motion on March 25, 2014, clarifying that further delay in filing the opening brief is disfavored and failure to timely file the opening brief will result in the dismissal of the appeal. Dkt. No. 12.³

The next day, however, the Ninth Circuit issued its ruling in *Jackson v. City*

³ Should this motion be denied, Appellants have no issue meeting their Opening Brief deadline of May 2, 2014. Barvir Decl., ¶ 3.

and County of San Francisco, upholding San Francisco's firearm locked-storage requirement and ban on the sale of common self-defense ammunition. 2014 WL 1193434 (9th Cir. Mar. 25, 2014). Appellants' counsel, who also represent the *Jackson* plaintiffs-appellants, will be filing a petition for rehearing or rehearing en banc, which is due on or before May 8, 2014. Barvir Decl., ¶ 4.

In addition to *Jackson*, four other cases dealing with critical Second Amendment issues that are likely to settle questions about the analytical framework for Second Amendment challenges are being considered by the Ninth Circuit for rehearing or rehearing en banc. At least one of these cases is likely to be selected in the near future.

In *Chovan*, the Ninth Circuit recently granted the appellant's motion to file an oversized petition for rehearing or rehearing en banc submitted on February 18, 2014. Order, *United States v. Chovan*, 735 F.3d 1127 (9th Cir. Nov. 18, 2013) (No. 11-50107), ECF No. 59. Review of that petition is pending.

In *Peruta*, on February 27, 2014, the State of California and the Brady Campaign to Prevent Gun Violence filed a motion to intervene. Brady Mot. Intervene, *Peruta*, 742 F.3d 1144 (9th Cir. Feb. 13, 2014) (No. 10-56971), ECF No. 123-1; Cal. Mot. Intervene, *id.*, ECF No. 122-1. On the same day, the California Police Chiefs Association and California Peace Officers Association

filed a petition for rehearing en banc. Cal. Pol. Chiefs Ass'n Pet. Reh'g En Banc, *id.*, ECF No. 121-1. If the Ninth Circuit allows any of those parties to intervene, their petitions for rehearing en banc will be considered filed.

On March 18, 2014, the defendants-appellees in *Richards* filed their petition for rehearing en banc. Pet. Reh'g En Banc, *Richards v. Cnty. of Yolo*, 2104 WL 843532 (9th Cir. Mar. 5, 2014) (No. 11-16255), ECF No. 72. And in *Baker*, the Ninth Circuit granted the defendants-appellees' motion for an extension of time to file their petition for panel rehearing and/or rehearing en banc on or before April 17, 2014. Order, *Baker v. Kealoha*, 2014 WL 1087765 (9th Cir. Mar. 20, 2014) (No. 12-16258), ECF No. 58.

For the reasons detailed below, a stay of appellate proceedings pending the disposition of any or all five of these cases after rehearing or rehearing en banc is appropriate.

II. DISCUSSION

The Supreme Court recently established that individuals have a fundamental right to possess firearms for lawful purposes and this right applies to state and local governments. *Dist. of Columbia v. Heller*, 554 U.S. 570 (2008); *McDonald v. Chicago*, 561 U.S. 3025 (2010). Even so, most of the legal territory of the Second Amendment remains unsettled—with cases rapidly changing the uncharted

framework almost daily. Indeed, there are a handful of Second Amendment cases being considered for rehearing or rehearing en banc in this circuit alone, including *Jackson*, *Chovan*, *Peruta*, *Richards*, and *Baker*.

“[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). A stay is warranted here because a disposition upon rehearing or rehearing en banc in any of these five cases will almost certainly direct the resolution of this case, it is in the interest of judicial economy, and it will not unduly prejudice any other party or action.

A. A Stay Is Warranted Because the Final Disposition of Other Second Amendment Cases Will Affect the Resolution of This Case

Staying a case pending the resolution of another is proper where issues relevant to both cases are likely to be addressed. *Dependable Highway Express, Inc. v. Navigators Ins. Co.*, 498 F.3d 1059, 1066 (9th Cir. 2007) (citing *Leyva v. Certified Grocers of Cal., Ltd.*, 593 F.3d 857 (9th Cir. 1979)). This is especially so where the other proceeding is likely to decide, or to contribute to the decision of, the factual and legal issues presented. *See Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1113 (9th Cir. 2005). And, here, the resolution of important issues in

Jackson, *Chovan*, *Peruta*, *Richards*, or *Baker*, including the proper framework for analyzing Second Amendment challenges, is almost certain to be dispositive of this case.

Jackson is directly on point, as appellants in both cases advocate that a ban on arms commonly used for self-defense is categorically invalid without resort to means-end scrutiny. Because the *Jackson* panel ignored the possibility that such bans might be categorically invalid under *Heller* and *Peruta* and instead applied mere intermediate scrutiny, the *Jackson* plaintiffs-appellants will soon seek en banc review. *See* Barvir Decl. ¶ 4. Any en banc decision in *Jackson* will provide more definitive answers to the *Fyock* parties and panel regarding the appropriate means of analyzing laws that ban the sale or possession of items protected by the Second Amendment.

A stay is likewise warranted in case *Chovan*, *Peruta*, *Richards*, or *Baker* is selected for rehearing or en banc review. While not addressing a nearly identical legal question as *Jackson* does, review of any of these four cases will likely settle issues that are equally relevant to this case.

Chovan, a case challenging a statute barring domestic violence misdemeanants from possessing firearms, was the first case to establish an analytical framework for Second Amendment cases in the Ninth Circuit since

Nordyke v. King, 681 F.3d 1041 (9th Cir. 2012), was overturned. There, the Court adopted a two-step inquiry looking first to whether the challenged law implicates Second Amendment conduct and, if it does, applying the appropriate level of scrutiny based on the nature of the conduct restricted and the severity of the burden imposed. 735 F.3d 1127, 1136-38 (9th Cir. 2013). If the Court reconsiders *Chovan*, the two-step Second Amendment analysis applied in that case will almost certainly be adopted, clarified, modified, or rejected, directly impacting the legal analysis that must be made in this Second Amendment case.

Likewise, if *Peruta* is taken en banc, its disposition will also affect the outcome of this case, for *Peruta* answers similarly important questions about the proper means of analyzing Second Amendment challenges. There, the Court recognized, as *Heller* did, that any law that would amount to a destruction of a Second Amendment right is invalid without resort to any level of scrutiny (i.e., categorically invalid). *Peruta*, 742 F.3d 1144, 1175-76 (9th Cir. 2014). In so doing, it sought to harmonize the *Chovan* two-step approach with clear direction from *Heller* and *McDonald* regarding the importance of the Second Amendment and the approach to take when a challenged law flatly prohibits protected conduct. *Id.* at 1150. *Peruta* suggests that less burdensome laws would be subject to *Chovan*'s two-step analysis. If *Peruta* is reheard, it will adopt or reject the panel's

categorical invalidation of laws that prohibit Second Amendment conduct, an approach directly advocated for by the *Fyock* Appellants here.

Finally, because the panel in both *Richards* and *Baker* relied entirely on *Peruta* in reaching those decisions, if either is selected for review, the Court will necessarily focus on whether *Peruta*'s Second Amendment analysis is proper—again, adopting or rejecting a test that calls for invalidation of flat bans without resort to means-end review.

Because final review of each of these cases will almost certainly narrow the issues and assist in the determination of the questions of law at issue here, *Fyock* should be stayed until any or all of these five cases are reheard. Indeed, the relief Appellants seek is much like that independently granted by this Court in various Second Amendment appeals recently before the Ninth Circuit.

During the pendency of *Nordyke*, another case that was on course to clarify the scope and analysis of the right arms, nearly every civil case raising a Second Amendment issue found itself waiting further direction from the Court sitting en banc. For instance, the Court in *Peruta* implemented a stay to wait and see if the anticipated *Nordyke* en banc decision would provide any legal analysis affecting deliberation and argument in *Peruta*. Order Staying Proceedings, *Peruta*, 742 F.3d 1144, ECF No. 77.

More recently, the Court ordered a stay in *McKay v. Hutchens*, a case regarding the issuance of licenses to publicly carry firearms, pending the panel disposition of *Peruta*, *Richards*, and *Baker*, cases which address similar issues. Order Staying Proceedings, *McKay v. Hutchens*, No. 12-57049 (Nov. 12, 2013), ECF No. 64. As Second Amendment law remains unsettled in this Circuit, it has indeed become commonplace to stay appeals in such challenges to prevent the waste of resources and to promote judicial efficiency. The Court should likewise exercise its discretion to do so here.

B. A Stay Is in the Interest of Judicial Economy

A stay is appropriate when it serves the interests of judicial economy and efficiency. *See Landis*, 299 U.S. at 254 (“Occasions may arise when it would be ‘a scandal to the administration of justice’ . . . , if power to coordinate the business of the court efficiently and sensibly were lacking altogether.) Here, a stay will reduce the risk of inconsistent legal analyses. If this case proceeds on course, the parties’ briefs will be due before *Jackson*, *Chovan*, *Peruta*, *Richards*, and *Baker* change or clarify the analytical framework for Second Amendment challenges. The parties’ briefs then may be based on wholly inoperative legal analyses. Thus, the work of several attorneys over many weeks will be for naught. And thousands of dollars will be wasted.

Compounding this problem, more time and more money will be spent to inform the *Fyock* Court of significant authority handed down after the parties' initial briefs are filed, but before the Court rules. Indeed, if any of the five cases change the Second Amendment landscape before the Court issues its opinion, the parties may be limited to brief (350-word) summaries of the relevant cases presented in letters submitted under Rule 28(j). In that instance, the parties may not present further argument based on the binding, new authority. Fed. Rule App. Proc. 28(j). Even if this Court receives ten pithy 28(j) letters, such letters will be insufficient when the majority of the Court's ruling will be informed by hundreds pages of largely irrelevant briefing.

While it is true the Court could order supplemental briefing to address significant developments in Ninth Circuit Second Amendment jurisprudence, this is precisely the inefficiency that Appellants seek to avoid. It is probable that at least one significant Second Amendment case with bearing on the outcome of *Fyock* will be reheard. Because this is foreseeable, the Court should exercise its discretion to issue a stay now, eliminating the need for further briefing which will be unnecessary if we simply wait until *Jackson*, *Chovan*, *Peruta*, *Richards*, and *Baker* are finalized.

In contrast, an immediate stay is in the interest of judicial economy and

efficiency. Not only will the parties save a substantial amount of time and money in preparing their briefs, knowing that the authority on which their briefs rely is definitive. Further, this Court's time will be best spent considering well-thought out arguments based on the proper legal analysis for Second Amendment cases in the Ninth Circuit.

C. A Stay Will Not Unduly Prejudice Any Other Party

Importantly, granting a stay in *Fyock* in order to wait for a more definitive ruling in a case or cases highly likely to direct the analysis and outcome of this case will not unduly prejudice any other party. Since this legal challenge was first filed in December 2013, the City's enforcement of the Ordinance has continued unabated, and the law will continue to remain in full effect at least until this Court or another finally rules on Appellants' claims.

Merely pausing this appeal while other cases move forward will bring no harm to the City, which will be free to continue enforcement of the law and which will not waste countless hours litigating a case under a potentially improper legal standard. In short, a stay will merely preserve that status quo and party resources pending resolution of various legal questions that will likely drive the outcome of this case.

If anyone is to be harmed by a stay, it is Appellants themselves, who will

continue to see their constitutional rights abridged as long as the law is in force. Indeed, Appellants have the most to gain from moving this case along to a speedy conclusion. But they understand that more is to be gained from waiting until this Court has the legal authority on which their claim rests is final.

III. CONCLUSION

Appellants respectfully request that this Court grant a stay of appellate proceedings pending the final disposition of *Jackson, Chovan, Peruta, Richards* or *Baker* at its earliest convenience. The relief Appellants seek will ensure judicial efficiency, prevent the substantial waste of resources, and will not harm any other party. If none of the five cases are selected for rehearing or rehearing en banc, the temporary stay can be immediately lifted, and this Court will be able to resolve this case without the risk of being inconsistent with opinions and analyses of an en banc court.

Date: April 4, 2014

MICHEL & ASSOCIATES, P.C.

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

DECLARATION OF ANNA M. BARVIR

I, Anna M. Barvir, declare:

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 attorney at Michel & Associates, P.C., attorneys of record for Plaintiffs-Appellants Leonard Fyock, Scott Hochstetler, William Douglas, David Pearson, Brad Seifers, and Rod Swanson. I have personal knowledge of the facts set forth herein and if called as a witness I could and would competently testify thereto.

2. On or about March 31, 2014, I contacted counsel of record for the City of Sunnyvale, Mayor Anthony Spitaleri, and Chief Frank Grgurina (collectively, “the City”), via e-mail regarding any objection to Appellants’ Motion to Stay Appeal. On or about April 2, 2013, the City’s counsel responded via e-mail, indicating they would oppose Appellants’ motion.

3. I am the attorney primarily responsible for preparing Appellants’ Opening Brief in this case. I currently have no issue meeting the Opening Brief deadline of May 2, 2014, should this motion be denied.

4. With the other counsel of record for Appellants, I also represent the plaintiffs-appellants in *Jackson v. City and County of San Francisco*. We will be filing a petition for rehearing or rehearing en banc in *Jackson*. The current

deadline for that petition is May 8, 2014.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed the 4th day of April, 2014, at Long Beach, California.

/s/ Anna M. Barvir
Attorney for *Plaintiffs-Appellants*

CERTIFICATE OF SERVICE

I hereby certify that on April 4, 2014, an electronic PDF of **APPELLANTS' MOTION TO STAY APPEAL; DECLARATION OF ANNA M. BARVIR IN SUPPORT** 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: April 4, 2014

/s/ C. D. Michel
C. D. Michel
Attorney for *Plaintiffs-Appellants*
Leonard Fyock, Scott Hochstetler,
William Douglas, David Pearson,
Brad Seifers, and Rod Swanson