

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

APPELLEES' OPPOSITION TO MOTION TO STAY APPEAL

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TABLE OF CONTENTS

I. BACKGROUND1

II. DISCUSSION.....3

 A. A Stay Pending the Resolution of Jackson, Chovan, Peruta,
 Richards and Baker is Not Warranted Because Appellants Have
 Failed to Show that Decisions in Those Cases Are Likely to
 Affect The Disposition of this Case3

 B. A Stay Will Result in Undue and Unnecessary Delay5

 C. Judicial Economy Cannot Justify This Stay.....8

III. CONCLUSION.....9

CERTIFICATE OF SERVICE 11

TABLE OF AUTHORITIES

FEDERAL CASES

Clinton v. Jones,
520 U.S. 681, 708 (1997)3

Dependable Highway Exp., Inc. v. Navigators Ins. Co.,
498 F.3d 1059 (9th Cir. 2007)6

District of Columbia v. Heller,
742 F.3d 1144 (9th Cir. 2014)4

Fyock v. City of Sunnyvale,
No. C-13-5807-RMW, 2014 WL 984162 (N.D. Cal. Mar. 5, 2014)4

Heller v. D.C.,
670 F.3d 1244 (D.C. Cir. 2011).....4

Jackson v. San Francisco,
No. 09-02143 (May 5, 2009)7

Landis v. N. Am. Co.,
299 U.S. 248, 255 (1936)8

Leyva v. Certified Grocers of Cal., Ltd.,
593 F.2d 857 (9th Cir.1979)6

Lockyer v. Mirant Corp.,
398 F.3d 1098 (9th Cir. 2005)3, 8

McKay v. Hutchens,
No. 12-57049 (Nov. 12, 2013)7

New York State Rifle & Pistol Ass’n, Inc. v. Cuomo,
No. 13-CV-291S, 2013 WL 6909955 (W.D.N.Y. Dec. 31, 2013).....4

Peruta v. Cnty. of San Diego,
No. 09-02371 (Oct. 23, 2009) passim

San Francisco Veteran Police Officers Ass’n v. City & Cnty. of San Francisco,
No. C 13-05351 WHA, 2014 WL 644395 (N.D. Cal. Feb. 19, 2014)4

Shew v. Malloy,
No. 3:13CV739 AVC, 2014 WL 346859 (D. Conn. Jan. 30, 2014).....5

Yong v. I.N.S.,
208 F.3d 1116 (9th Cir. 2000).....6

STATE AND CITY STATUTES

Cal. Penal Code
§ 323102
§ 32400-50.....2

Sunnyvale Mun. Code
§ 9.44.0501
§ 9.44.050(a).....2

FEDERAL RULES AND REGULATIONS

Fed. R. App. P. Rule 271

Ninth Cir. Rule 27-1.....1

In accordance with Federal Rule of Appellate Procedure Rule 27 and Ninth Circuit Rule 27-1, Defendants-Appellees the City of Sunnyvale, the former Mayor of Sunnyvale, and the Chief of the Sunnyvale Department of Public Safety Frank Grgurina, in their official capacity, oppose Plaintiffs-Appellants'¹ motion to stay the appeal 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.

Fyock's requested indefinite stay would not promote the orderly course of justice because none of these cases, even should one or more be reheard or reheard *en banc*, will likely address the issue raised by this appeal—the constitutionality of a prohibition on possessing large capacity magazines (LCMs)—or disturb the now well-accepted intermediate scrutiny standard of review on slight burdens of Second Amendment rights. The requested stay would also unduly delay this litigation, and not promote judicial economy. Accordingly, a stay would not assist the resolution of this case and the motion should be denied.

I. BACKGROUND

In November 2013, the City of Sunnyvale voters overwhelmingly passed Measure C, which added section 9.44.050 to the Sunnyvale Municipal Code (“the

¹ For convenience, Plaintiffs-Appellants are hereafter sometimes referred to collectively as “Fyock,” and Defendants-Appellee are referred to as “Sunnyvale.”

Ordinance”). The Ordinance prohibits the possession of large capacity magazines (LCMs), *i.e.*, ammunition magazines with the capacity to accept more than ten rounds. Sunnyvale, Cal., Muni. Code § 9.44.050(a).² The Ordinance took effect on December 6, 2013.

Alleging that the Ordinance violated their Second Amendment rights, Appellants brought suit on December 16, 2013. Pls.’ Compl., ECF No. 1. Appellants then moved to enjoin enforcement of the Ordinance, which required Sunnyvale residents to move their LCMs outside of Sunnyvale by March 6, claiming that they would be irreparably harmed should they be forced to do so. Pls.’ Mot. Prelim. Inj., ECF No. 32-1. The District Court denied Appellant’s motion, finding, *inter alia*, that they were not likely to succeed on the merits of their claim. Order, Mar. 5, 2014, ECF No. 56. Appellants appealed the District Court’s decision to the Ninth Circuit. Dkt. No. 3-1. This Court denied their emergency motion for an injunction pending appeal. Dkt. No. 8. Appellants then filed an Emergency Application for Injunction Pending Appeal to the Honorable Justice Anthony Kennedy, who denied the Application. Dkt. No. 13 at 4.

For the reasons detailed below, a stay of appellate proceedings in this case pending the disposition of these five other appeals is unwarranted.

² State law has prohibited the manufacture, importation, sale, gift, or loan (but not the possession) of these magazines for over a decade. Cal. Penal Code §§ 32310, 32400-50.

II. DISCUSSION

A. **A Stay Pending the Resolution of *Jackson*, *Chovan*, *Peruta*, *Richards* and *Baker* is Not Warranted Because Appellants Have Failed to Show that Decisions in Those Cases Are Likely to Affect The Disposition of this Case.**

Fyock has not shown that the disposition of *Jackson*, *Chovan*, *Peruta*, *Richards* or *Baker* is likely to affect the outcome of this case. “The proponent of a stay bears the burden of establishing its need.” *Clinton v. Jones*, 520 U.S. 681, 708, (1997)(internal citations omitted). Among other interests, when determining whether to grant a stay, courts consider “the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and *questions of law* which could be expected to result from a stay.” *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1110 (9th Cir. 2005)(emphasis added).

Here, Fyock vaguely contends that a stay is warranted because several other pending appeals “are likely to settle questions about the analytical framework for Second Amendment challenges.” Dkt. No. 13 at 5. This is obviously speculative, and Fyock does not, and cannot, articulate what might change as a result of these other appeals, or how this appeal would be affected by any new opinions. Indeed, there is no question or conflict about the correct legal framework to apply in this appeal—in Second Amendment challenges, the Ninth Circuit has consistently applied the two-step analysis adopted by a unanimous panel in *Chovan*. See *Jackson*, WL 1193434 at *3 (9th Cir. Mar. 25, 2014). *Peruta* applied an exception

to that framework-derived from the Supreme Court’s analysis in *District of Columbia v. Heller* –that applies to the “rare” law that is found to destroy the Second Amendment right. *Peruta*, at 742 F.3d 1144, 1170 (9th Cir. 2014)(citing *Heller*, 554 U.S. 570, 628-29 (2008)). But *Peruta* also reaffirmed *Chovan*’s two-step analysis. *Id.* at 1150.³ Moreover, the Ninth Circuit’s approach is consistent with the other circuits, the Third, Fourth, Fifth, Sixth, Tenth and D.C. Circuit, that have considered the issue. *See id.* (collecting cases).

There is also no issue regarding the proper framework for analyzing laws limiting the size of LCMs. Every court to consider the constitutionality of such laws thus far has not only upheld such limits, but has done so applying the basic two-step analysis articulated in *Chovan*. *See Heller v. D.C.*, 670 F.3d 1244 (D.C. Cir. 2011); *Fyock v. City of Sunnyvale*, No. C-13-5807-RMW, 2014 WL 984162 (N.D. Cal. Mar. 5, 2014); *San Francisco Veteran Police Officers Ass’n v. City & Cnty. of San Francisco*, No. C 13-05351 WHA, 2014 WL 644395 (N.D. Cal. Feb. 19, 2014); *New York State Rifle & Pistol Ass’n, Inc. v. Cuomo*, No. 13-CV-291S, 2013 WL 6909955, at *12–13 (W.D.N.Y. Dec. 31, 2013); *Shew v. Malloy*, No. 3:13CV739 AVC, 2014 WL 346859, at *6–7 (D. Conn. Jan. 30, 2014).

Predicting the outcome of any of these other appeals, let alone the potential precedential impact of a yet-to-be written opinion, is entirely speculative, doubly

³ *Baker* and *Richards* rely on *Peruta*’s analysis; they need not be discussed independently.

so considering that none of the other appeals address limits on LCMs. Should any of these cases be reheard, it is unclear whether the new opinions will have any bearing at all on the facts and law at issue in this case. Second Amendment cases rely in large part on historical and fact-specific inquiries into the right and law at issue. *See Peruta*, at 1150-51. *Peruta* involves California's good cause concealed-carry gun permitting framework, *Jackson* concerns San Francisco's safe storage law and prohibition on hollow-point ammunition, and *Chovan* addresses the federal ban on firearm possession by domestic violence misdemeanants. This case, in contrast, involves Sunnyvale's prohibition on possessing LCMs. Given the nature of Second Amendment analysis, as well as the distinct statutes and ordinances at issue in the five cases, any resulting opinions may be readily distinguishable.

Chovan, *Peruta* and *Jackson* are in accord with the principle that laws that would destroy a Second Amendment right are invalid under any level of scrutiny, while those that merely burden the right are subject to *Chovan*'s two-step analysis. The Court is well equipped to determine the constitutionality of laws limiting LCMs now, without waiting on the final resolution of the five cases.

B. A Stay Will Result in Undue and Unnecessary Delay

The Court should deny Fyock's motion because, if granted, it would result in an indefinite stay. A stay "should not be granted unless it appears likely that the

other proceedings will be concluded within a reasonable time.” *Leyva v. Certified Grocers of Cal., Ltd.*, 593 F.2d 857, 863–64 (9th Cir.1979); *see also Dependable Highway Exp., Inc. v. Navigators Ins. Co.*, 498 F.3d 1059, 1066 (9th Cir. 2007)(noting the “general policy favoring stays of short, or at least reasonable, duration.”) With the nature of his emergency unchanged, Fyock now requests that this Court stay proceedings during the entire disposition of up to five separate cases, involving different plaintiffs and defendants, and distinct statutes and ordinances. But the request provides no specific deadline that would terminate the stay. Petitions for rehearing have not yet been filed in *Jackson* and *Peruta*, and petitions have not been granted in *Chovan*, *Richards* or *Baker*. Dkt. No. 13 at 5. Should a Court grant a rehearing in any of these cases, the parties’ briefs may not even be due for many months.

It is unclear whether or when this Court would issue any new opinions. And any resulting opinion from the Court would not necessarily end Sunnyvale’s wait--having already appealed an order from this case to Justice Kennedy, Appellants’ counsel (who are involved in several of the appeals) have made plain their desire for Supreme Court review. The delay would likely drag on for a lengthy period of time. *Cf. Dependable Highway*, at 1067 (citing *Yong v. I.N.S.*, 208 F.3d 1116, 1119 (9th Cir. 2000), and noting in its determination that the district court abused its discretion in granting an indefinite stay that “[a] stay that terminated upon the

resolution of an appeal could “remain in effect for a lengthy period of time, perhaps for years if litigation dragged on.”).

Sunnyvale likely faces lengthy litigation as it is. The complaints in *Peruta* and *Jackson*, for example, were both filed in 2009. *Peruta v. Cnty. of San Diego*, No. 09-02371 (Oct. 23, 2009). ECF No. 1; *Jackson v. San Francisco*, No. 09-02143 (May 5, 2009), ECF No. 1. Fyock has requested two extensions of the deadline to file his opening brief.⁴ These extensions alone, should the Court grant the second one, will result in a *de facto* stay of two months. Additional delays are unwarranted.

Fyock claims that it has become common for this Circuit to stay appeals in Second Amendment cases, citing as two examples *Peruta*,⁵ 10-56971 Dkt. No. 77; and *McKay v. Hutchens*, No. 12-57049 (Nov. 12, 2013), Dkt. No. 64. As Fyock notes, though, the Court granted the stays in those cases on its own initiative, and not at the request of one of the parties. *Id.* That this Court has occasionally ordered unsolicited stays does not support Fyock’s request for a stay, which is based on nothing more than its unsubstantiated hope that the law might change in its favor in the interim.

⁴ In the interest of professional courtesy, Sunnyvale did not oppose these requests.

⁵ The Appellants in *Peruta*, represented by counsel for Appellants here, actually opposed the Court’s *sua sponte* stay order. Appellants’ Motion for Reconsideration of Order Staying Proceedings, 10-56971, Dkt. No. 78-1.

Nor does it follow that all parties in Second Amendment cases, especially those who oppose the stay as does Sunnyvale, should be forced to wait indefinitely for resolution of their appeal merely because there are other appeals raising Second Amendment issues. As the Supreme Court explains, “[o]nly in rare circumstances will a litigant in one c[a]se be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both.” *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1109 (9th Cir. 2005), citing *Landis v. N. Am. Co.*, 299 U.S. 248, 254, 255 (1936). Circumstances do not warrant doing so here. There is no need for the City of Sunnyvale to sit idle while appellants hope and wait for one case that might conceivably change the law in their favor.

C. Judicial Economy Cannot Justify This Stay

Fyock has not shown that any questions of law to be decided in *Peruta*, *Jackson* or *Chovan* are likely to assist this Court, let alone entirely dispose of this case as he claims. Dkt. No. 13 at 7-8. Thus, a theoretical gain in judicial economy is insufficient to justify an indefinite stay. *See Dependable Highway*, 498 F.3d at 1066 (citing *Lockyer*, 398 F.3d at 1112 and finding that “while it is the prerogative of the district court to manage its workload, case management, standing alone is not necessarily sufficient ground to stay proceedings.”).

Fyock’s purported intentions to conserve the parties’ resources is undermined by his own actions. Fyock’s counsel, who is involved in *Jackson* and

Peruta, was surely aware of the posture of these cases when they filed the lawsuit underlying this appeal. *Jackson* was argued and taken under submission two months before appellants brought their lawsuit in this case. 12-17803, Dkt. No. 57. *Peruta* had been under submission for over a year. 10-56971, Dkt. No. 107. Yet Appellants continued their lawsuit for several months despite these cases pending. They continue their appeal now, despite conceding that the harm they allegedly suffer is “less time-sensitive” Dkt. No. 13 at 4, and not so irreparable so as to deter them from staying their own appeal indefinitely.

It is only after Appellants was denied relief from the District Court, the Ninth Circuit, and Justice Kennedy that they now seeks a stay. Appellants’ attempt to stay proceedings at this point betrays the unrealistic hope that lies behind this motion—that the law will somehow change in their favor. *See* Dkt. No. 13 at 14 (Appellants “understand that more is to be gained from waiting.”). But neither hope nor claims of judicial economy can justify this stay.

III. CONCLUSION

Sunnyvale is entitled to clear up any cloud of legal uncertainty that may linger over the Ordinance, passed by a strong majority of its residents, and to settle the rights of all residents of the City of Sunnyvale, including Fyock. For the reasons stated above, Sunnyvale respectfully requests that the Court deny Fyock’s

motion to stay appellate proceedings pending the final disposition of *Jackson*,
Chovan, *Peruta*, *Richards* or *Baker*.

Dated: April 17, 2014

FARELLA BRAUN + MARTEL LLP

By: /s/ Roderick M. Thompson

Attorney for Defendants-Appellees

CERTIFICATE OF SERVICE

I hereby certify that I filed an electronic PDF of **APPELLEES’
OPPOSITION TO MOTION TO STAY APPEAL** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 17, 2014. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: April 17, 2014

By: /s/ Roderick M. Thompson
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