

No. 12-57049

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DOROTHY MCKAY et al.,

Plaintiffs-Appellants,

v.

SHERIFF SANDRA HUTCHENS, et al.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
(SACV 12-1458JVS)

**APPELLANTS' MOTION FOR RELIEF FROM STAY AND REQUEST
FOR ISSUANCE OF MEMORANDUM OPINION IN ACCORD WITH
CHOVAN, PERUTA, RICHARDS, AND BAKER; DECLARATION OF ANNA
M. BARVIR**

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Peruta v. San Diego County,

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,

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STATUTES, RULES & REGULATIONS

18 U.S.C. § 922(g)(9). 3

In accordance with Federal Rule of Appellate Procedure 27 and Ninth Circuit Rule 27-1, Plaintiff-Appellants Dorothy McKay, Diana Kilgore, Phillip Wilims, Fred Kogen, David Weiss, and the CRPA Foundation (collectively “Appellants”) hereby respectfully move this Court for relief from its sua sponte order dated November 12, 2013 (Docket No. 64), which stayed proceedings in the present matter (“*McKay*”) pending resolution of the following cases: *United States v. Chovan*, No. 11-50107 (submitted 2/15/12); *Peruta v. County of San Diego*, No. 10-56971 (submitted 12/6/12); *Richards v. Prieto*, No. 11-16255 (submitted 12/6/12); and *Baker v. Kealoha*, No. 12-16258 (submitted 12/6/12).¹

Appellants further ask that this Court issue a memorandum opinion vacating the district court’s decision denying McKay’s motion for a preliminary injunction and remanding for further proceedings consistent with *Peruta*.

I. INTRODUCTION

This Court stayed the present appeal pending resolution of *Chovan*, *Peruta*, *Richards*, and *Baker*. Each of these cases involve Second Amendment rights. *Chovan* addressed the constitutionality of a law making it illegal for domestic

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. Appellees’ counsel indicated that Appellees neither oppose nor join this motion. Decl. of Anna M. Barvir Supp. Appellants’ Mot. Lift Stay ¶ 3.

violence misdemeanants to possess firearms. The court's initial task in deciding that case was to fashion an analytical framework for reviewing Second Amendment challenges, something that had not yet been done in the Ninth Circuit. The remaining cases involved various Second Amendment challenges to the "good cause" policies enacted and enforced by the Sheriff's of San Diego County and Yolo County, as well as the State of Hawaii with regard to issuing permits allowing for the concealed carry of handguns, and specifically addressing the validity of the respective "good cause" policies, policies nearly identical to the one at issue in *McKay*.

Each of these policies rejects a general desire to carry a handgun for self-defense purposes as "good cause" for granting a concealed carry permit to an otherwise fully qualified permit applicant. Plaintiffs in each of these cases note that those policies effect a near-ban on the right of competent, law-abiding adults to bear arms and claim that these near-bans necessarily infringe upon and are inimical to their Second Amendment rights.

Because of the likely impact of the *Chovan* decision on the proper analytical framework for Second Amendment cases in this Circuit, and the obvious impact of the "good cause" cases, this Court vacated the submission of *McKay* shortly after oral argument and stayed further proceedings pending the outcome of those cases.

Those cases have now been decided and are dispositive as to the “good cause” issue, and militate in favor of lifting the stay in this matter to allow the *McKay* parties to move forward.

Appellants therefore bring this motion to have the stay lifted and to proceed with this appeal. Appellants respectfully suggest that the Court issue a Memorandum Opinion incorporating *Peruta*, vacating the District Court’s Order denying McKay’s motion for preliminary injunction, and remanding the case for further proceedings, similar to what was done in both *Richards* and *Baker*. *McKay* is now in the same position as those cases, i.e., fully briefed and argued, and should be similarly treated.

II. STATUS OF CASES RELATED TO THE STAY

The present appeal, which involves constitutional challenges to Orange County’s local policy for issuing licenses to carry firearms in public, was stayed November 12, 2013 (Docket No. 64), pending resolution of the four cases noted above. The status of those cases is as follows.

Chovan: This Court’s decision in *United States v. Chovan*, 735 F. 3d 1127 (9th Cir. 2013), set forth an analytical framework for Second Amendment challenges as part of its review of a challenge to the federal prohibition on gun possession by domestic violence misdemeanants, 18 U.S.C. § 922(g)(9). In

Chovan, this Court applied a two-step analysis that “(1) asks whether the challenged law burdens conduct protected by the Second Amendment and, (2) if so, directs courts to apply an appropriate level of scrutiny.” 735 F. 3d at 1136-37. To determine the appropriate level of scrutiny, *Chovan* looked to “how close the law comes to the core of the Second Amendment right” and “the severity of the law’s burden on the right.” *Id.* at 1138. In that case, the court found the possession restriction did substantially burden core conduct, i.e., the ability to engage in armed self-defense, but applied only intermediate scrutiny because the right-holder was not a law-abiding adult. The court upheld the dispossession law, finding it substantially related to the state’s important interest in reducing firearms related injuries in domestic violence situations. *Id.* at 1142.

The *Chovan* panel sua sponte ordered parties to brief whether the case should be reviewed en banc. *Chovan* filed his brief on February 18, 2014. The Court's decision on whether to accept en banc review is pending.

Peruta: More recently, in *Peruta v. San Diego County*, 742 F.3d 1144 (9th Cir. 2014), this Court applied *Chovan*’s framework in finding San Diego’s handgun carry license policy—one effectively identical to the “good cause” policy at issue in *McKay*—categorically invalid. The Court followed *Chovan* by first conducting an in-depth historical review of the right to public carry. In doing so,

the Court confirmed that public carry is indeed core conduct and protected under the Second Amendment. 742 F.3d 1144, 1166 (“[T]he carrying of an operable handgun outside the home for the lawful purpose of self-defense, though subject to traditional restrictions, constitutes ‘bear[ing] Arms’ within the meaning of the Second Amendment.”). Turning to the burden analysis, the Court then found that the San Diego Sheriff’s “good cause” policy approaches a near-prohibition of the right to bear arms, and that the “severity” of such a burden on law-abiding adults rendered the policy categorically invalid. In keeping with the Supreme Court’s ruling in *District of Columbia v. Heller*, 554 U.S. 570 (2008), the *Peruta* panel found there was no need to decide which level of scrutiny applied under *Chovan*’s second prong because the policy would not have survived *any* heightened scrutiny. *Id.* at 1175-76; *see Heller*, 544 U.S. at 628-29.

The defendants in *Peruta* have chosen not to appeal. Motions to intervene in *Peruta* have been filed by three non-parties, each seeking to petition for en banc review. Appellants filed an opposition to those motions on March 26, 2014. The panel has not yet decided whether to allow any of these non-parties to intervene. If one or more are allowed to intervene, then the court may consider their petitions for en banc review.

Richards: Based on *Peruta*, this Court also recently invalidated Yolo

County Sheriff Prieto’s “good cause” policy in *Richards v. Prieto*, No. 11-16255, 2014 WL 843532 (9th Cir. Mar. 5, 2014). The court did not address Richards’ claim that the state’s regulatory regime was invalid in any respect. Rather, it found the local sheriff’s “good cause” policy—just like Sheriff Gore’s policy in *Peruta*—resulted in the denial of carry permits to otherwise qualified applicants, thereby violating their Second Amendment rights. *Id.* at *1. *Richards* was up on appeal from cross-motions for summary judgment; the Court reversed and remanded that case in a memorandum opinion incorporating *Peruta*, issued March 5, 2014. *Ibid.* Yolo County asked for en banc review by petition filed March 18, 2014. The petition is pending.

Baker: This Court also found *Peruta* dispositive in invalidating Hawaii’s similarly-restrictive “good cause” policy in *Baker v. Kealoha*, No. 12-16258, 2014 WL 1087765 (9th Cir. Mar. 20, 2014). Like *McKay*, *Baker* was on appeal from denial of a motion for preliminary injunction. The court vacated and remanded *Baker* by memorandum opinion on March 20, 2014. *Id.* at 1. Hawaii asked for an extension to file an en banc petition. The Court granted the request by Order dated April 2, 2014, extending the date to file until April 17, 2014.

The memorandum opinions in *Richards* and *Baker* are attached for the Court’s convenience. 9th Cir. R. 30-1.4.

III. DISCUSSION

Sheriff Hutchens's "good cause" policy at issue in *McKay* is effectively identical to the "good cause" policies that this Court found unconstitutional in *Peruta*, *Richards*, and *Baker* and should be declared invalid for the same reasons. As noted above, Appellants suggest that the Court follow the procedure used by the panel in *Richards* and *Baker* and issue a brief Memorandum opinion invalidating that policy and remanding it to the district court for further proceedings. This would allow the *McKay* parties the opportunity to more fully participate in any post-appeal proceedings affecting their case, rather than be relegated to the sidelines watching others fight similar—but not identical—battles, the results of which will nonetheless dictate the outcome in *McKay*.

Of course, predicting what further proceedings *might* take place or how and when some or all of these matters *might* reach final resolution—or whether the concealed carry issue will stop with the *Peruta* decision—is a near impossible task. And, in large part, that is why appellate courts generally disfavor staying one appeal while awaiting results in another. Cal. Prac. Guide Fed. 9th Cir. Civ. App. Prac. Ch. 6-B (courts seldom grant motions to stay an appeal pending disposition of another appeal unless the motion is unopposed). In any event, Appellants now oppose the stay and respectfully request that they be permitted to participate in

whatever post-appeal activities might arise; they will be denied that opportunity if their case remains stayed.

IV. CONCLUSION

This case now stands in the same position as *Richards* and *Baker* did a few weeks ago: fully briefed and argued, and effectively decided by this Court's recent decision in *Peruta*. Both of those cases have since been decided via memorandum opinions. For the reasons stated above, Appellants in *McKay* respectfully request that this Court similarly resolve their case. Appellants ask that this Court lift the stay currently in effect in their case and issue a memorandum opinion vacating the district court's denial of McKay's motion for preliminary injunction and remanding the case for further proceedings in accordance with this Court's decision in *Peruta*.

Date: April 07, 2014

MICHEL & ASSOCIATES, P.C.

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

DECLARATION OF ANNA M. BARVIR

I, Anna M. Barvir, declare as follows:

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 Associate attorney at Michel & Associates, P.C., attorneys of record for Appellants. I am familiar with the facts and pleadings herein. The following is within my personal knowledge and if called and sworn as a witness, I could and would competently testify thereto.

2. On November 12, 2013, the Court issued an order sua sponte staying proceedings in this matter pending resolution of the following cases: *United States v. Chovan*, No. 11-50107 (submitted 2/15/12); *Peruta v. County of San Diego*, No. 10-56971 (submitted 12/6/12); *Richards v. Prieto*, No. 11-16255 (submitted 12/6/12); and *Baker v. Kealoha*, No. 12-16258 (submitted 12/6/12).

3. On April 4, 2014, I contacted the attorney for Defendants-Appellees (Appellees), Marianne Van Riper, via electronic mail (e-mail) asking whether Appellees would oppose this motion. Ms. Van Riper responded via e-mail on April 7, 2014 indicating that Appellees neither oppose nor join this motion.

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

Executed this 7th day of April, 2014, at Long Beach, California.

/s/ Anna M. Barvir

Anna M. Barvir

CERTIFICATE OF SERVICE

I hereby certify that on April 07, 2014, an electronic PDF of **APPELLANTS' MOTION FOR RELIEF FROM STAY AND REQUEST FOR ISSUANCE OF MEMORANDUM OPINION IN ACCORD WITH *CHOVAN, PERUTA, RICHARDS, AND BAKER*; DECLARATION OF ANNA M. BARVIR** 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 07, 2014

/s/ C. D. Michel
C. D. Michel
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