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16 IN THE UNITED STATES DISTRICT COURT

17 FOR THE EASTERN DISTRICT OF CALIFORNIA

18	Ivan Peña, et al.,)	Case No. 2:09-CV-01185-FCD-KJM
19)	
20	Plaintiffs,)	JOINT STATUS REPORT
21)	
22	v.)	
23)	
24	Wilfredo Cid,)	
25)	
26	Defendant.)	
27	_____)	

28 JOINT STATUS REPORT

The parties hereby submit this joint status report:

Plaintiffs' Position:

No reason exists to delay the resolution of this case any further, as the issues remaining for decision in *Nordyke* are entirely irrelevant to the determination of this case. Moreover, notwithstanding counsel's diligent efforts, *Nordyke* appears interminable. The case was filed in 1999. It has been heard by the Ninth Circuit three times, including en banc after a sua sponte call

1 for a vote, and had even passed through the California Supreme Court on a certified question.
2 Following the panel's next decision, it could well return before the en banc court, and perhaps
3 reach the Supreme Court. Awaiting a resolution of *Nordyke* would amount to an indefinite stay.
4

5 Considering *Nordyke*'s lack of relevance to the issues in this case, the Court should not
6 prolong the process any longer, but rather, issue a scheduling order for the refiling of dispositive
7 motions.

8 Not all cases dealing with a particular constitutional provision have relevance to each
9 other. For example, the answer to a question of whether a form of expressive conduct qualifies as
10 protected speech under the First Amendment will not inform a time, place, or manner dispute.
11 And the question of whether particular police conduct qualifies as a "search" or "seizure" for
12 Fourth Amendment purposes will have no bearing on an unrelated dispute as to whether the
13 police in a particular case used excessive force, rendering a seizure unreasonable.
14

15 Likewise, while the ultimate decision in *Nordyke* might someday answer interesting and
16 important Second Amendment questions regarding the regulation of gun sales, the possession of
17 guns on public property, or perhaps the standard of review to be employed in construing the
18 Second Amendment in some regulatory circumstances,¹ none of these questions have anything to
19 do with this case. *Nordyke* deals with a ban on the possession of guns, generally, at a county
20 fairgrounds. Nothing in the challenged law classifies guns. The question is whether guns,
21 generally, can be possessed on the fairgrounds, and if so, for what purposes and under what
22 restrictions.
23
24

25
26 ¹The Supreme Court has already answered this question, outside the carrying context, by
27 determining that the Second Amendment secures a "fundamental" right. *McDonald v. City of*
28 *Chicago*, 130 S. Ct. 3020, 2010 U.S. Lexis 5523 at *64 (2010) (majority op.); at *113 (Thomas,
J.). In the carrying context, the test appears to be one of time, place, and manner. *District of*
Columbia v. Heller, 128 S. Ct. at 2783, 2816-17 (2008); *McDonald*, at *79 (plurality op.).

1 In contrast, *this* case questions whether California has banned particular handguns that
2 qualify as protected arms under the Second Amendment. The relevant test, announced by the
3 Supreme Court and not at all implicated in *Nordyke*, holds that “the sorts of weapons protected
4 [by the Second Amendment are] those ‘in common use at the time.’” *District of Columbia v.*
5 *Heller*, 128 S. Ct. 2783, 2817 (2008) (quoting *United States v. Miller*, 307 U. S. 174, 179
6 (1939)). “[T]he Second Amendment does not protect those weapons not typically possessed by
7 law-abiding citizens for lawful purposes.” *Heller*, 128 S. Ct. at 2815-16.
8

9 As *Heller* demonstrated, the question of which weapons would be expected in common
10 use for traditional lawful purposes has nothing to do with any balancing test. *Heller* held that
11 handguns, generally, are in the protected category without engaging in any balancing test or even
12 explicitly defining any such test. Indeed, the Supreme Court forcefully rejected the notion that the
13 Second Amendment should be interpreted by means of any interest-balancing test. *Heller*, 128 S.
14 Ct. at 2821. The question here is categorical, similar to a First Amendment question of whether
15 something qualifies as protected “speech” or a Fourth Amendment question of whether police
16 conduct constituted a “search” or “seizure.” If the guns banned by the challenged laws are
17 protected, the laws fail. If the guns are not protected, the laws survive. What people may or may
18 not do with these guns are matters for a different case.
19
20

21 Respectfully, Plaintiffs ask that the Court issue a scheduling order for the re-filing of
22 dispositive motions.
23

24 Defendant's Position:

25 This case involves Second Amendment and equal protection challenges to California's
26 Unsafe Handgun Act, a law that regulates the sale of handguns. The case last came before the
27 Court on October 2, 2009, in connection with defendant Wilfredo Cid's motion to dismiss. The
28

1 Court did not rule on that motion, but instead stayed the case in its entirety pending the Ninth
2 Circuit's decision in *Nordyke v. King*. For the reasons below, this case should remain stayed in
3 its entirety pending the decision in *Nordyke*.
4

5 Before the Court stayed this case last October, the parties had the opportunity to brief the
6 stay issue. Plaintiffs argued that the Court should stay the case only until the Supreme Court *or*
7 Ninth Circuit resolved the issue of whether the Second Amendment applies to state and local
8 governments. (Mem. & Order filed Oct. 2, 2009, at 2.) At the time, the incorporation issue was
9 central in *McDonald v. City of Chicago*, a Seventh Circuit case in which the Supreme Court had
10 granted certiorari, and *Nordyke*, which was before an en banc panel of the Ninth Circuit. In
11 contrast to plaintiffs, defendant Cid argued that any stay should remain in effect pending the
12 resolution of *Nordyke*, which the en banc panel had put on hold pending *McDonald*. (Id.)
13

14 In its stay order, this Court agreed with Cid. (Mem. & Order filed Oct. 2, 2009, at 2.)
15 The Court explained that the Supreme Court had granted certiorari in *McDonald*, which involved
16 the incorporation issue. (Id. at 3 & 5.) The Court further explained that once *McDonald* was
17 decided, the decision in *Nordyke* "will also evaluate a firearms regulation in light of [the
18 Supreme Court's 2008 decision in *District of Columbia v. Heller*] and *McDonald*. *Such*
19 *evaluation will almost certainly provide crucial direction to the court in its analysis of the*
20 *firearms regulation in this case.*" (Id. at 5, emphasis added.) The Court therefore stayed this
21 case "in its entirety pending the Ninth Circuit's en banc decision in *Nordyke v. King*." (Id.) The
22 Court required the parties to "submit a joint status report to the court within ten days of the Ninth
23 Circuit's order." (Id.)
24

25 On June 28, 2010, the Supreme Court issued its opinion in *McDonald*, which resolved the
26 incorporation issue. The Court held that "the Second Amendment right is fully applicable to the
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28

1 States." *McDonald v. City of Chicago*, 561 U.S. ----, 130 S.Ct. 3020, 3026, --- L.Ed.2d ----
2 (2010).

3 Then, on July 12, 2010, the *Nordyke* en banc panel issued a one-sentence order, which
4 read in full:
5

6 The panel opinion in *Nordyke v. King*, 563 F.3d 439 (9th Cir. 2009), is vacated and the
7 case is remanded to that panel for further consideration in light of *McDonald v. City of*
8 *Chicago*, No. 08-1521, slip op. (U.S. June 28, 2010).

9 (Order filed July 12, 2010 (Doc. No. 127), *Nordyke v. King*, No. 07-15763 (9th Cir.).)

10 Arguably, the Ninth Circuit's remand order is an order that triggered the parties'
11 obligation to file a joint status report. Out of an abundance of caution, Cid has therefore
12 participated in the preparation of this report.

13 Nevertheless, the one-sentence remand order in *Nordyke* is hardly the meaningful
14 decision from the Ninth Circuit that this Court and the parties have been waiting for. It therefore
15 does not justify lifting the stay in this case, which should remain in effect until the three-judge
16 panel issues the decision. As this Court has already observed, the decision in *Nordyke* will
17 involve the evaluation of a firearms regulation in light of *Heller* and *McDonald* and "will almost
18 certainly provide crucial direction to the court in its analysis of the firearms regulation in this
19 case." (Mem. & Order filed Oct. 2, 2009, at 5.) That such an evaluation will now come from the
20 three-judge panel, as opposed to the en banc panel, does not suddenly make that evaluation less
21 important than it was when this case was initially stayed. This Court should therefore reject any
22 assertion that the Ninth Circuit's evaluation of a firearms regulation in *Nordyke* is irrelevant, just
23 like the Court rejected that argument when the parties first briefed the extent and scope of any
24 stay.
25
26
27

28 Finally, this Court should be aware that the three-judge panel has now called for

1 supplemental briefing in *Nordyke*. The briefs are to address "(1) the impact of [*McDonald*] on
2 the disposition of this case; and (2) any other issue properly before this court, including the level
3 of scrutiny that should be applied to the ordinance in question." (Order filed July 19, 2010 (Doc.
4 No. 129), *Nordyke v. King*, No. 07-15763 (9th Cir.)) Thus, more than ever, it is apparent that
5 the Ninth Circuit is poised to offer crucial direction to this and other courts called to evaluate
6 firearms regulations.
7

8 Accordingly, this case should remain stayed in its entirety pending the decision in
9 *Nordyke*.

10 Dated: August 5, 2010

Respectfully submitted,

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