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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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IVAN PENA, ROY VARGAS, DONA
CROSTON, BRETT THOMAS, SECOND
AMENDMENT FOUNDATION, INC.,
and THE CALGUNS FOUNDATION,
INC.,

2:09-cv-01185 FCD KJM

Plaintiffs,

v.

MEMORANDUM AND ORDER

WILFREDO CID,

Defendant.

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This matter is before the court on defendant Wilfredo Cid's ("defendant" or "Cid") motion to dismiss plaintiff Ivan Pena, Roy Vargas, Dona Croston, Brett Thomas, Second Amendment Foundation, Inc., and The Calguns Foundation, Inc.'s (collectively, "plaintiffs") complaint. In addition to their opposition to defendant's motion, plaintiffs filed a Notice of Possible Relevant Authority, informing the court that the Ninth Circuit

1 was rehearing en banc the matter of Nordyke v. King, 575 F.3d 890
2 (9th Cir. 2009) (granting petition for rehearing en banc). On
3 September 28, 2009, the court issued a minute order directing the
4 parties to file supplemental briefing regarding why this action
5 should not be stayed. In their reply, plaintiffs request a stay
6 pending resolution of the incorporation issue by either the
7 Supreme Court of the Ninth Circuit, withdraw their pending motion
8 for summary judgment, and seek an order allowing discovery to
9 proceed. Defendant Cid requests that this order be stayed
10 pending the Ninth Circuit's en banc decision in Nordyke v. King.
11 For the reasons set forth below,¹ the court STAYS this action
12 pending the Ninth Circuit's en banc decision in Nordyke v. King.

13 This case arises out of plaintiffs' challenge to the
14 constitutionality of California's "Handgun Roster Scheme" set
15 forth in California Penal Code §§ 12125-30. (Pls.' Am. Compl.,
16 filed May 11, 2009, ¶¶ 12-25.) Plaintiffs allege that these
17 sections violate the Second Amendment by banning access to
18 handguns whose possession is constitutionally protected. (Id. ¶¶
19 53-57.) Plaintiffs also allege that these limitations violate
20 their rights to equal protection. (Id. ¶ 59.)

21 In June 2008, the Supreme Court issued its decision in
22 District of Columbia v. Heller, 128 S. Ct. 2783 (2008), holding
23 that the Second Amendment conferred an individual right to keep
24 and bear arms and that statutes enacted in the District of
25 Columbia violated those rights. The Court's decision in Heller,

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27 ¹ Because oral argument will not be of material
28 assistance, the court orders this matter submitted on the briefs.
E.D. Cal. Local Rule 78-230(h).

1 however, did not address whether the Second Amendment is
2 incorporated and thus, applies against states and local
3 governments. In April 2009, the Ninth Circuit issued its
4 decision in Nordyke v. King, 563 F.3d 439 (9th Cir. 2009),
5 holding that the Due Process Clause of the Fourteenth Amendment
6 incorporates the Second Amendment, but concluding that the
7 ordinance at issue did not violate the plaintiffs' constitutional
8 rights. In July 2009, the Ninth Circuit accepted the case for
9 rehearing en banc and directed that "[t]he three-judge panel
10 opinion shall not be cited as precedent by or to any court of the
11 Ninth Circuit." Nordyke, 575 F.3d 890. The en banc panel heard
12 oral argument on the matter on September 24, 2009. On September
13 25, 2009, the court vacated submission, pending the Supreme
14 Court's disposition of Maloney v. Rice, No. 08-1592, McDonald v.
15 City of Chicago, 08-1521, and National Rifle Ass'n of America,
16 Inc. v. City of Chicago, No. 08-1497. On September 30, 2009, the
17 Supreme Court granted the petition for a writ of certiorari in
18 McDonald. -- S. Ct. --, 2009 WL 1631802 (Sept. 30, 2009).

19 A district court has the discretionary power to control the
20 disposition of the cases on its docket "in a manner which will
21 promote economy of time and effort for itself, for counsel, and
22 for the litigants." CMAX, Inc. v. Hall, 300 F.2d 265, 268 (9th
23 Cir. 1962); see Landis v. N. Am. Co., 299 U.S. 248, 254 (1936).
24 How these objectives can be achieved "calls for the exercise of
25 judgment, which must weigh competing interests and maintain an
26 even balance." Landis, 299 U.S. at 254-55; see Lockyer v. Miran
27 Corp., 398 F.3d 1098, 1110 (9th Cir. 2005) ("Where it is proposed
28 that a pending proceeding be stayed, the competing interests

1 which will be affected by the granting or refusal to grant a stay
2 must be weighed."). Such competing interests include "the
3 possible damage which may result from the granting of a stay, the
4 hardship or inequity which a party may suffer in being required
5 to go forward, and the orderly course of justice measured in
6 terms of the simplifying or complicating of issues, proof, and
7 questions of law which could be expected to result from a stay."
8 CMAX, 300 F.2d at 268.

9 "A trial court may, with propriety, find it is efficient for
10 its own docket and the fairest course for the parties to enter a
11 stay of an action before it, pending resolution of independent
12 proceedings which bear upon the case." Lockyer, 398 F.3d at 1111
13 (quoting Levya v. Certified Grocers of Cal., Ltd., 593 F.2d 857,
14 863-64 (9th Cir. 1979); see Landis, 299 U.S. at 255 (rejecting as
15 "too mechanical and narrow" the view that there is no power to
16 stay a proceeding upon the outcome of a controversy to which the
17 litigant is a stranger). These separate proceedings may be
18 judicial, administrative, or arbitral in nature, and proper
19 imposition of a stay does not require that the issues in such
20 separate proceedings are necessarily controlling of the action
21 before the court. Id. (quoting Levya, 593 F.2d at 863-64).
22 However, "[a] stay should not be granted unless it appears likely
23 the other proceedings will be concluded within a reasonable time
24 in relation to the urgency of the claims presented to the court."
25 Id. (quoting Levya, 593 F.2d at 864).

26 The issues to be addressed by the court in Nordyke are broad
27 in scope and material to the case brought by plaintiffs.
28 Specifically, a foundational issue in both Nordyke and in this

1 case is whether the Second Amendment is incorporated and thus,
2 applicable to state and local governments. The issue of
3 incorporation has been addressed by the Second and Seventh
4 Circuits; in contrast to the Ninth Circuit's decision in Nordyke,
5 these courts held that the Second Amendment was not incorporated.
6 The Supreme Court granted certiorari in McDonald, one of the
7 cases from the Seventh Circuit addressing this issue. Further,
8 the en banc decision in Nordyke will also evaluate a firearms
9 regulation in light of Heller and McDonald. Such evaluation will
10 almost certainly provide crucial direction to the court in its
11 analysis of the firearms regulation in this case.

12 **CONCLUSION**

13 For the foregoing reasons, this action is STAYED in its
14 entirety pending the Ninth Circuit's en banc decision in Nordyke
15 v. King. The parties shall submit a joint status report to the
16 court within ten days of the Ninth Circuit's order.

17 IT IS SO ORDERED.

18 DATED: October 2, 2009

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FRANK C. DAMRELL, JR.
21 UNITED STATES DISTRICT JUDGE
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