

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Case No. 10-36094

MONTANA SHOOTING SPORTS ASSOCIATION, SECOND
AMENDMENT FOUNDATION, Inc., and GARY MARBUT
Plaintiffs/Appellants,

vs.

ERIC H. HOLDER, Jr.,
Attorney General of the United States
Defendant/Appellee.

On Appeal from the United States District Court
For the District of Montana, Missoula Division
The Hon. Donald W. Molloy, Presiding District Judge

***SECOND UNOPPOSED MOTION AND BRIEF
TO SUSPEND BRIEFING SCHEDULE***

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MOTION

Appellants Montana Shooting Sports Association, Second Amendment Foundation, Inc., and Gary Marbut (“Appellants”), in accordance with and pursuant to FED. R. APP. P. 27 and Circuit Rule 27-1(6), hereby requests a suspension of the briefing schedule for 24 additional days until June 13, 2011, due to the Court’s May 2, 2011, decision in *Nordyke v. King*, No. 07-15736, a case that has set precedent regarding the issues presented in this matter.

Counsel for the United States has been contacted and does not object to this motion. The United States maintains its position, however, that Plaintiffs did not plead a Second Amendment claim in this case.

BRIEF

The current briefing schedule requires the opening brief to be filed on or before May 20, 2011. *See* Dkt. Entry No. 10, Order, dated February 23, 2011. The briefing schedule should be suspended as a result of the Court’s decision in *Nordyke* because the outcome of *Nordyke* has an impact on the arguments made in this matter.

Likewise, the legal theory focus and subject matter of any motions may be significantly altered based on the decision of the Appeals Court in *Nordyke*.

In this case, Appellants argued below, *inter alia*, that because of the ruling in *Nordyke v. King*, 563 F.3d 439 (9th Cir. 2009), the Second Amendment entails a fundamental right under the Fourteenth Amendment of the U.S. Constitution. On July 29, 2009, the Ninth Circuit ordered an *en banc* rehearing of *Nordyke*, and in the interim, the Court ordered that the “three-judge panel opinion shall not be cited as precedent by or to any court of the Ninth Circuit.” *See Nordyke v. King*, 575 F.3d 890 (9th Cir. 2009). The *Nordyke* case was reargued *en banc* on September 24, 2009,; however, no decision was issued. Instead, upon issuance of the United States Supreme Court’s decision in *McDonald v. City of Chicago*, __ U.S. __, 130 S.Ct. 3020, L.Ed.2d 894 (2010), *Nordyke* was remanded to the original panel for further consideration in light of the *McDonald* decision. *See Nordyke v. King*, 611 F.3d 1015 (9th Cir. 2010). Oral arguments occurred in *Nordyke* on

October 19, 2010. In January, 2011, the parties to *Nordyke* submitted supplemental authority to the Court.

In the instant appeal, on February 23, 2011, upon Appellants' unopposed motion, the Court granted a stay of appellate proceedings until May 20, 2011, in order for the parties to adequately consider and brief the Court's anticipated decision in *Nordyke*. *See* Dkt Entry 10.

On May 2, 2011, the Court issued its decision in *Nordyke*, in which the Court held that only regulations which substantially burden the right to keep and bear arms trigger heightened scrutiny under the Second Amendment. The Court declined to decide precisely what type of heightened scrutiny applies to laws that substantially burden Second Amendment rights.

The Court's *Nordyke* opinion, therefore, has a substantial bearing on the incorporation issues raised in this case by Appellants and the arguments that Appellants – and indeed, that Appellees and amicus – will likely make in their briefing before the Court. As such, the briefing schedule should be suspended for an additional 24 days until

June 13, 2011, in order for the parties and amicus to adequately brief the new standard articulated by the Court in *Nordyke*.

CONCLUSION

The briefing schedule in this matter should be suspended for 24 additional days in order to allow the parties to adequately brief the new standard articulated by the Court in *Nordyke*, among other things. In light of the foregoing, good cause exists for the Court to suspend the briefing until June 13, 2011.

Dated this 2nd day of May, 2011.

Respectfully Submitted,
SULLIVAN, TABARACCI & RHOADES, P.C.

By: /s/ Quentin M. Rhoades
Quentin M. Rhoades
For Appellants

**CERTIFICATION OF COMPLIANCE
REQUIRED BY CIRCUIT RULE 32(e)(4)**

Pursuant to FED. R. APP. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the undersigned certifies that the attached Principal Brief is proportionately spaced, has a typeface of Century 14 points or more and contains 599 words and no more than 120 words per page.

Dated this 2nd day of May, 2011.

Respectfully Submitted,
SULLIVAN, TABARACCI & RHOADES, P.C.

By: /s/ *Quentin M. Rhoades*
Quentin M. Rhoades
For Appellants

CERTIFICATE OF SERVICE

This is to verify that on this 2nd day of May, 2011, a copy of the foregoing was duly served on the following persons by the following means:

- | | |
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| <u> 1 </u> | CM/ECF |
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