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CITY AND COUNTY OF HONOLULU and LOUIS KEALOHA

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI'I

KIRK C. FISHER, Plaintiff, vs. LOUIS KEALOHA, as an individual and in his official capacity as Honolulu Chief of Police; PAUL PUTZULU, as an individual and in his official capacity as former Honolulu Acting Chief of Police; CITY AND COUNTY OF HONOLULU; HONOLULU POLICE DEPARTMENT and DOE DEFENDANTS 1-50, Defendants.	)	CIVIL NO. CV11 00589 ACK-BMK DEFENDANTS CITY AND COUNTY OF HONOLULU AND LOUIS KEALOHA'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION FILED MARCH 19, 2012; CERTIFICATE OF SERVICE **Hearing**: Date: June 4, 2012 Time: 10:00 a.m. Judge: Honorable Alan C. Kay Trial: November 14, 2012

DEFENDANTS CITY AND COUNTY OF HONOLULU AND LOUIS KEALOHA'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION FILED MARCH 19, 2012

COME NOW, Defendants CITY AND COUNTY OF HONOLULU and LOUIS KEALOHA (collectively hereinafter the "Defendants" or "City Defendants") by and through their attorneys, Robert Carson Godbey, Corporation Counsel, and D. Scott Dodd, Deputy Corporation Counsel, and hereby file their Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction filed May 19, 2012 ("motion for preliminary injunction") (ECF Nos. 18, 18-1, 18-2) and scheduled for hearing on June 4, 2012 at 10:00 a.m. before the Honorable Alan C. Kay.

I. INTRODUCTION

Plaintiff Kirk C. Fisher ("Plaintiff") filed his Complaint ("Complaint") on September 28, 2011. Plaintiff's Complaint alleges two Counts: 1) violation of his Second Amendment right to bear arms, applicable to the states through the Fourteenth Amendment; and 2) A violation of his Fourteenth Amendment due process rights predicated upon a violation of his Second Amendment right to bear arms. Pursuant to Federal Rules of Civil Procedure Rule 12(b), Defendant

According to the Complaint, on November 5, 1997, Plaintiff was arrested on two counts of Abuse of Family or Household Member. *See*, Complaint, (ECF No. 1), ¶ 15. Plaintiff pleaded guilty on December 3, 1997 to two counts of

Harassment and sentenced to six months probation. Id., ¶ 18. On November 4, 1998, the Honorable Dan Kochi issued an "Order Permitting Return of Firearms, Ammunition, Permits and Licenses, With Conditions," which ordered the return of the firearms surrendered pursuant to Hawai'i Revised Statutes § 134-7(b) ("HRS"). Id., ¶ 20. Then in 2009, Plaintiff submitted an application for an additional firearm which was denied via letter dated October 9, 2009. Id., ¶ 23. In addition to denying the application, the letter further ordered Plaintiff to surrender any firearms in his possession pursuant to HRS § 134-7.

Plaintiff alleges that the denial of his application for a firearm permit violated his rights under the Second and Fourteenth Amendments to the Constitution of the United States ("Constitution"). Id., ¶ 48. Plaintiff further alleges that Defendants "propagated customs, policies, and practices that violate Plaintiff's rights by arbitrarily and unconstitutionally denying his permit application." Id., ¶ 50.

On March 19, 2012, Plaintiff filed his motion for injunction concurrently with his oppositions to the City Defendants' respective motions to dismiss. On April 19, 2012, the Court issued its Order Granting Defendant City and County of Honolulu's Motion for "Partial" Dismissal of the Complaint, and Granting in Part and Denying in Part Defendant Louis Kealoha's Motion for "Partial" Dismissal of the Complaint. (ECF No. 25). In that Order, the Court stated that:

> The Court denies the motion to dismiss the claims against Kealoha in his official capacity to the extent that Plaintiff seeks injunctive relief for alleged violations of his Second and Fourteenth Amendment rights under Section 1983. However, the claims against Defendant Kealoha in his individual capacity are dismissed without prejudice based on a finding of qualified immunity.

See ECF No. 25, at page 50. Pursuant to the Court' Order, the only remaining claim is that against Defendant Kealoha in his official capacity for Plaintiff's requested injunctive relief. Id.

Pursuant to the instant motion, Plaintiff seeks a preliminary injunction compelling Defendants, their officers, agents, servants, employees, and all persons in active concert or participation with them who receive notice of the order to rescind the prior denial of Mr. Fisher's permit to acquire firearms and issue a permit authorizing Mr. Fisher to acquire firearms. As will be shown below, Plaintiff's arguments are erroneous in numerous respects in that they misstate facts and Hawaii law and ignore widely-recognized limits on the individual right to bear arms.

II. DISCUSSION

A. Plaintiff Is Not Entitled to a Preliminary Injunction

In order to prevail on a motion for a preliminary injunction, a plaintiff must establish: (i) that he is likely to succeed on the merits; (ii) that he is likely to suffer irreparable harm in the absence of preliminary relief; (iii) that the balance of equities tips in his favor; and (iv) that an injunction is in the public interest. Winter

v. Natural Res. Def. Council, Inc., 555 U.S. 7 (2008). "Injunctive relief is an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." Winter, 555 U.S. at 22. The Ninth Circuit has also recognized an alternate formulation of the Winter test, pursuant to which "serious questions going to the merits and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." Farris v. Seabrook, 667 F.3d 1051, 1057 (9th Cir. 2012).

"Under Winter, plaintiffs must establish that irreparable harm is likely, not just possible, in order to obtain a preliminary injunction." Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1131 (9th Cir. 2011) (*citing* Winter, 129 S.Ct. at 375-76). The granting or denial of a preliminary injunction lies within the discretion of the district court and an appellate court will reverse the denial of a preliminary injunction only if the district court abused its discretion or relied on an erroneous legal premise or clearly erroneous finding of fact. Associated General Contractors of California, Inc. v. Coalition for Economic Equity, 950 F.2d 1401, 1405 (9th Cir. 1991). For the reasons set forth below, the instant case is not that exceptional case that meets the four-part Winter test. Consequently, Plaintiff is not entitled to a preliminary injunction against City or Kealoha.

B. Plaintiff Cannot Demonstrate a Likelihood of Success on the Merits

In District of Columbia v. Heller, the Supreme Court recognized that the Second Amendment protects the individual right to keep and bear arms for self defense. 554 U.S. 570 (2008). At issue in Heller were two restrictions: (1) a ban on handgun possession in the home, which the Court characterized as among the most restrictive in the "history of our Nation"; and (2) the requirement that firearms be kept inoperable at all times. Id. at 628. The Supreme Court held that the District of Columbia's prohibition on operable handguns in the home was unconstitutional because the right to self-defense is central to the Second Amendment and the regulation extended to the home, "where the need for defense of self, family, and property is most acute." Id. at 628.

In so holding, the Supreme Court recognized that the right to bear arms is not unlimited, noting that "the majority of 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues." Id. at 626. The Court also stated, "we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment," however "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms" by certain classes of persons, such as the mentally ill and convicted felons, and in certain places constituting security concerns. Id. at 626–27 & n. 26. The Supreme Court

suggested that the core purpose of the right conferred by the Second Amendment was to permit "law-abiding, responsible citizens to use arms in defense of hearth and home." Id. at 635. Two years later, in McDonald v. City of Chicago, the Supreme Court held that the Second Amendment right to keep and bear arms is fully applicable to the States by virtue of the Fourteenth Amendment. 130 S.Ct. 3020 (2010). In McDonald v. City of Chicago, the Supreme Court stated that its "central holding" in Heller was "that the Second Amendment protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home." 130 S.Ct. 3020, 3044 (2010) (emphasis added).

In the wake of Heller, many courts have observed that although the Supreme Court did not set the outer bounds of the Second Amendment, it did explicitly state that "[l]ike most rights, the right secured by the Second Amendment is not unlimited." *See* Kachalsky v. Cacace, No. 10-CV-5413 (CS), 2011 WL 3962550 (S.D.N.Y. Sept. 2, 2011) (*citing* Heller, 554 U.S. at 626)). Courts that have had occasion to consider the outer limits of the Second Amendment rights espoused in Heller have recognized that an "emphasis on the Second Amendment's protection of the right to keep and bear arms for the purpose of 'self defense in the home' permeates the [Supreme] Court's decision and forms the basis for its holding – which, despite the Court's broad analysis of the Second Amendment's text and

historical underpinnings, is actually quite narrow." Kachalsky, 2011 WL 3962550 at *19.

In Heller, the Supreme Court did not decide the level of constitutional scrutiny to be applied in reviewing restrictions upon a person's Second Amendment right to bear arms. Heller, 554 U.S. at 624. The Ninth Circuit had occasion to consider this issue in Nordyke v. King, holding that "only regulations which substantially burden the right to keep and to bear arms trigger heightened scrutiny." 644 F.3d 776, 786 (9th Cir. 2011). However, the court decided to rehear Nordyke en banc and declared that its earlier opinion may not be cited as precedent by or to any court in this Circuit. *See* Nordyke v. King, 664 F.3d 774, (9th Cir. 2011). On March 20, 2012, an en banc panel of the Ninth Circuit Court of Appeals heard arguments and ordered the dispute to mediation. Nordyke v. King, No. 07-15763 (9th Cir. Apr. 4, 2012). Accordingly, the state of Second Amendment case law in this Circuit, and the applicable level of scrutiny, is in flux.

As made clear in this Court's April 19, 2012 Order (ECF No. 25), Plaintiff's likelihood of success on the merits of his claim is low. In that Order, the Court denied the claims against Kealoha in his official capacity to the extent that Plaintiff seeks injunctive relief for alleged violations of his Second and Fourteenth Amendment rights under Section 1983. Defendant Kealoha is entitled to raise the defense of qualified immunity, and because the state of the law with respect to this

area is not clearly established, Kealoha will likely be successful in his bid for qualified immunity. Because Plaintiff is unlikely to succeed on the merits, his motion for a preliminary injunction should be denied.

C. Plaintiff Has Not Demonstrated That He Would Suffer Irreparable Harm

Plaintiff claims that he will suffer both an irreparable liberty interest and a property interest if not granted a preliminary injunction. *See* ECF No. 18-2, page 16 - 17. However, Plaintiff's arguments are not persuasive. A plaintiff seeking a preliminary injunction must show that "irreparable injury is likely in the absence of an injunction"; the mere *possibility* of irreparable harm is insufficient. Winter, 555 U.S. at 22 (emphasis added). Here, Plaintiff has failed to establish that he will suffer irreparable harm in the absence of a preliminary injunction. He has not shown that any of the alleged harm is likely to be anything more than mere speculation, which is inadequate to establish irreparable harm. *See* Winter, 555 U.S. at 8.

Plaintiff argues that "the loss of … freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury," and that "[w]hen liberties are infringed, irreparable injury is presumed," *citing* Ezrell v. Chicago, 651 F.3d 684 (7th Cir. 2011) (ECF No. 18-2, page 16). But in Ezell, the court was dealing with an ordinance that impinged upon the right to possess firearms in defense of the home, a constitutional right recognized in Heller. Ezell at 691. Thus, while a

question might remain as to whether the right at issue there had been infringed, the right itself had been recognized. In contrast, here, Plaintiff is claiming irreparable harm should be presumed from the "violation" of a constitutional right he claims he suffered. Furthermore, in Ezell, the court was faced with a facial challenge to the statute and individual harm was, therefore, irrelevant. Id. at 9-10. Here, however, Plaintiff has sought injunctive relief, at least in part, based upon an "as applied" challenge. Individual harm is, therefore, quite relevant here. Plaintiff here fails to mention any individual harm other than the "infringement" of his liberty. As discussed above, such contention is highly questionable. Managa v. Williams, unreported, 2008 WL 2388652 (E.D.Cal. 2008) (*citing* Caribbean Marine Servs. Co. v. Baldrige, 844 F.2d 668, 674 (9th Cir.1988) *and* Goldie's Bookstore, Inc. v. Superior Court, 739 F.2d 466, 472 (9th Cir.1984)). The Court should find, accordingly, that Plaintiff has failed to prove that he will suffer irreparable harm if injunctive relief is denied.

D. The Injunctive Relief Sought Could Likely Harm the Public Interest

Plaintiff argues that it is in the public interest to issue his requested injunction as the "applicants who are not statutorily disqualified in the State of Hawaii could suffer deprivation of their Second Amendment rights because of HPD's unconstitutional actions." (ECF No. 18-2, page 19). But what Plaintiff's requested injunction could do is to impair HPD's (in other words, the City's)

ability to properly perform its function in carefully screening applicants for firearm possession. Plaintiffs' requested injunction could possibly permit the carrying of any firearm by any person without regard to their training or intent to use the weapon for crimes of violence, without regard to whether the person was intoxicated, and without limitation as to the nature of the public place.

Plaintiff claims that "Hawaii law already prohibits and/or prevents unsuitable applicants from carrying firearms, including but not limited to the criminal prohibitions codified in 18 U.S.C. § 922," and "people who are statutorily disqualified to obtain and possess firearms will continue to be denied permits and/or criminally prosecuted." (ECF No. 18-2, page 20). And with specific regard to conditions in Hawaii, Plaintiff attempts to show a correlation between increased gun ownership and decreased crime, noting that "[s]pecifically, in Hawai'i, ownership has set un set unprecedented records for four consecutive years",[1] while pointing out that, "violent crime has not increased." (ECF No. 18-2, page 20).

It is because dangerous weapons are at issue and the public interest is at risk that the Fourth Circuit noted it did not want to be responsible "for some unspeakably tragic act of mayhem because in the peace of our judicial chambers we miscalculated as to Second Amendment rights" *See* U.S. v. Masciandaro, 638 F.3d 458, 475 (4th Cir. 2011) (noting that the "danger would rise exponentially" if

[1] Motion, pp. 20 (citing the Criminal Justice Data Brief for 2010, 2009, 2008 and 2007).

the right to carry weapons moved from the home to the public square). The public interest is not served by subjecting the public to such increased risks. It is specifically because of the harm such an injunction might cause that the City Defendants respectfully request that this Court deny Plaintiff's requested injunction.

III. CONCLUSION

Plaintiff has not demonstrated irreparable harm, has not shown that he is likely to prevail on the merits of his case, and has not shown that his requested injunction is in the public good. Therefore, based upon these reasons, and because the requested injunction will likely harm the public interest, City Defendants respectfully assert that the instant motion for a preliminary injunction should be denied.

DATED: Honolulu, Hawai'i, Wednesday, May 23, 2012.

ROBERT CARSON GODBEY
Corporation Counsel

By: /s/ D. Scott Dodd
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Deputy Corporation Counsel

Attorney for Defendants
CITY AND COUNTY OF HONOLULU and
LOUIS KEALOHA

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