UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CHARLES NICHOLS,

Plaintiff,

v.

KAMALA D. HARRIS, in her official capacity as Attorney General of California,

Defendant.

Case No. CV 11-9916 SJO (SS)

ORDER ACCEPTING FINDINGS, CONCLUSIONS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Second Amended Complaint, all the records and files herein, the Report and Recommendation of the United States Magistrate Judge, Plaintiff's Objections, and Defendant's Response to Plaintiff's Objections. After having made a de novo determination of the portions of the Report and Recommendation to which Objections were directed, the Court concurs with and accepts the findings and conclusions of the Magistrate Judge. In addition, the Court will address certain arguments raised by Plaintiff in his Objections.

Plaintiff asserts that the Ninth Circuit's recent decision in Peruta v. County of San Diego, 742 F.3d 1144 (9th Cir. 2014), has been "stayed" and is neither binding on this Court nor relevant to his claims. (Obj. at 8). Plaintiff is mistaken.

On February 28, 2014, the Ninth Circuit stayed the issuance of the mandate in Peruta pending briefing and a decision on a motion for rehearing en banc. See Peruta v. County of San Diego, 9th Cir. Case No. 10-56971 (Dkt. No. 126, entered Feb. 28, 2014) (order extending time for filing petition for rehearing en banc and staying mandate). However, entry of the mandate is merely a "ministerial act," White v. Klitzkie, 281 F.3d 920, 924 n.4 (9th Cir. 2002), that "formally marks the end of appellate jurisdiction." Northern California Power Agency v. Nuclear Regulatory Com'n, 393 F.3d 223, 224 (D.C. Cir. 2004) (internal quotation marks omitted). A panel decision of the Ninth Circuit is binding on lower courts as soon as it is published, even before the mandate issues, and remains binding authority until the decision is withdrawn or reversed by the Supreme Court or an en banc court. See, e.g., Gonzalez v. Arizona, 677 F.3d 383, 389 n.4 (9th Cir. 2012) (en banc) ("[A] published decision of this court constitutes binding authority which 'must be followed unless and until overruled by a body competent to do so.'") (quoting Hart v. Massanari, 266 F.3d 1155, 1170 (9th Cir. 2001)); United States v. Gomez–Lopez, 62 F.3d 304, 306 (9th Cir. 1995) ("The government first urges us to ignore Armstrong since we have stayed the mandate to allow filing of a petition for certiorari; this we will not do, as Armstrong is the law of this circuit.");

Castillo v. Clark, 610 F. Supp. 2d 1084, 1122 n.17 (C.D. Cal. 2009) ("Although the Ninth Circuit has granted a stay of the mandate in Butler, the panel decision remains the law of the Circuit."). Indeed, three weeks after the stay in Peruta issued, the Ninth Circuit vacated a district court decision in another matter and remanded the case "for further proceedings consistent with Peruta." See Baker v. Kealoha, __ Fed. Appx. __, 2014 WL 1087765 at *1 (9th Cir. Mar. 20, 2014). As of the date of this Order, Peruta remains binding precedent on this Court.

Plaintiff further appears to misinterpret the import of the Peruta court's clarification in footnote 19 that it was not "ruling on the constitutionality of California statutes." (Obj. at 2) (quoting Peruta, 742 F.3d at 1173 n.19). This footnote is part of the discussion in which the Ninth Circuit explained that because the Second Amendment does not protect any particular mode of carry, a claim that a state must permit a specific form of carry, such as open carry, fails as a matter of law. See id. at 1172-73 ("As the California legislature has limited its permitting scheme to concealed carry -- and has thus expressed a preference for that manner of arms-bearing -- a narrow challenge to the San Diego County regulations on concealed carry, rather than a broad challenge to the state-wide ban on open carry, is permissible."). Accordingly, Peruta did not rule on the overall

constitutionality of California statutes because it accepted the lawfulness of California's firearms regime, including the state's preference for concealed carry over open carry. Id. at 1172.

Plaintiff suggests that the Ninth Circuit's recent decision in Jackson v. City and County of San Francisco, __ F.3d __, 2014 WL 1193434 (9th Cir. Mar. 25, 2014), is helpful to his case as he opens his Objections with a lengthy quotation from that decision. (See Obj. at 1-2) (quoting Jackson, 2014 WL 1193434 at *4-5). However, Plaintiff does not explain why the passages he quotes support his claims. The Jackson court found that two San Francisco Police Code regulations that prohibit the unsecured storage of handguns in residences and the sale of "hollow point" ammunition passed constitutional muster. Id. at *1. In the passages quoted by Plaintiff, the court determined that the plaintiff could bring a facial challenge to section 4512, which requires that handguns in residences be stored in a locked container, disabled with an approved trigger lock, or carried on the person over the age of 18, despite the Jackson plaintiff's concession that locked storage is appropriate in some circumstances. Id. at *5. Again, as Plaintiff has failed to articulate in his Objections why he believes Jackson changes the outcome here, the Objections do not alter the Court's ultimate resolution of Plaintiff's claims.

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Finally, Plaintiff asserts that he does in fact have standing to assert an equal protection challenge to California Penal Code Section 25850 due to its allegedly racist origin and application because contrary to the criminal complaint on which the Magistrate Judge relied, he is not white but of "mixed race" heritage. (Obj. at 16). Plaintiff's equal protection claim still fails, however, because as the Magistrate Judge observed, Plaintiff did not squarely raise a race-based challenge to Section 25850 against the Attorney General. (Report and Recommendation at 26-27).

To state an equal protection claim under section 1983, a plaintiff typically must allege that "'defendants acted with an intent or purpose to discriminate against the plaintiff based upon membership in a protected class.'" Furnace v. Sullivan, 705 F.3d 1021, 1030 (9th Cir. 2013) (quoting Barren v. Harrington, 152 F.3d 1193, 1194 (9th Cir. 1998) (emphasis added)). Even liberally construed, the Second Amended Complaint fails to make any connection between Plaintiff's race and the allegedly racist design motivating the passage of the facially race-neutral predecessor to Section 25850. Indeed, the record in this case, including Plaintiff's Second Amended Complaint and Plaintiff's Motion for Partial Summary Judgment, is devoid of any allegation that Plaintiff is a member of a racial minority whose members were the intended target of the legislature's alleged racial animus in enacting the predecessor to Section 25850. Despite three opportunities to state his claims, Plaintiff simply did not raise a race-based Fourteenth Amendment claim in this action.

Assertion of a new claim on summary judgment is improper. Coleman v. Quaker Oats Co., 232 F.3d 1271, 1294 (9th Cir. 2000). Accordingly, even if Plaintiff is of "mixed race" heritage, he may not raise new claims at this late stage of the litigation.

IT IS ORDERED that Plaintiff's Motion for Partial Summary Judgment is DENIED.

IT IS FURTHER ORDERED that Defendant's Motion for Judgment on the Pleadings is GRANTED and that Judgment be entered in favor of Defendant Kamala D. Harris.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: May 1, 2014.

S. James Otero

S. JAMES OTERO
UNITED STATES DISTRICT JUDGE