

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI'I

RONALD G. LIVINGSTON;
MICHAEL J. BOTELLO; KITIYA M.
SHIROMA; JACOB STEWART; and
HAWAII RIFLE ASSOCIATION,

Plaintiffs,

v.

SUSAN BALLARD, in her official
capacity as Police Chief of the City &
County of Honolulu; CITY &
COUNTY OF HONOLULU; and
CLARE E. CONNORS, in her official
capacity as Attorney General of
Hawai'i,

Defendants.

CIVIL NO. 19-00157 JMS-RT

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MEMORANDUM IN SUPPORT OF
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Defendant Clare E. Connors, in her official capacity as Attorney General of Hawai‘i (“Defendant”), respectfully requests that proceedings in this case be stayed pending the Ninth Circuit’s *en banc* decision in *Young v. Hawaii*, No. 12-17808, a case involving the same legal issues presented herein. Plaintiffs seek to litigate those issues before this Court despite the fact that the Ninth Circuit is poised to decide them.

BACKGROUND

I. *Young v. Hawaii*

In 2012, George Young sued the State of Hawai‘i, the County of Hawai‘i,¹ and various State and County officials in this Court, contending, *inter alia*, that Hawai‘i’s statute governing licenses to carry firearms – Hawaii Revised Statutes (“HRS”) § 134-9² – violates his Second Amendment right to the public carry of a firearm for self-defense. *See* Complaint, *Young v. Hawaii*, Civ. No. 12-00336 HG-BMK, ECF No. 1, attached hereto as Exhibit “A.”

¹ In their Complaint, Plaintiffs repeatedly identify the “County of Honolulu” as a party in *Young*. *See* ECF No. 1 at ¶¶ 3, 39. That is incorrect. The County of Hawai‘i, not the City & County of Honolulu, is party to *Young*.

² HRS § 134-9 provides, in pertinent part:

In an exceptional case, when an applicant shows reason to fear injury to the applicant’s person or property, the chief of police of the appropriate county may grant a license to an applicant who is a citizen of the United States of the age of twenty-one years or more or to a duly accredited official representative of a foreign nation of the age of twenty-one years or more to carry a pistol or revolver and ammunition therefor concealed on the person within the county where the license is granted. Where the urgency or the need has been sufficiently indicated, the respective chief of police may grant to an applicant of good moral character who is a citizen of the United States of the age of twenty-one years or more, is engaged in the protection of life and property, and is not prohibited under section 134-7 from the ownership or possession of a firearm, a license to carry a pistol or revolver and ammunition therefor unconcealed on the person within the county where the license is granted.

Haw. Rev. Stat. § 134-9(a).

Judge Gillmor dismissed the suit, concluding that HRS § 134-9 “do[es] not restrict the core protection afforded by the Second Amendment” because it “only appl[ies] to carrying a weapon in public.” *See Young v. Hawaii*, 911 F. Supp. 2d 972, 990 (D. Haw. 2012). Judge Gillmor explained that HRS § 134-9 survives intermediate scrutiny, given the government’s “important and substantial interest in safeguarding the public from the inherent dangers of firearms,” and the reasonable relation between the government’s interest and the statutory limitations, which “enabl[e] officials to effectively differentiate between individuals who need to carry a gun for self-defense and those who do not.” *Id.* at 991.

In 2018, a divided, three-judge panel of the Ninth Circuit reversed. *See Young v. Hawaii*, 896 F.3d 1044 (9th Cir. 2018). The panel majority held that the “core” of the Second Amendment includes “the right to carry a firearm openly for self-defense.” *Id.* at 1070. The panel concluded that the text of the Second Amendment “implies” that it “protect[s] at least some level of carrying in anticipation of conflict outside of the home,” and the panel relied heavily on “nineteenth century judicial interpretations of the right to bear arms” to find a broad right to open carry. *Id.* at 1053, 1054.

HRS § 134-9, according to the panel, “amounts to a destruction of th[at] core Second Amendment right.” *Id.* at 1070. As the panel read it, HRS § 134-9 authorizes only “security guard[s]” and those “similarly employed” to obtain open

carry licenses. *Id.* It rested that interpretation almost exclusively on the fact that, during oral argument, counsel for the County of Hawai‘i was unable to identify individuals other than security guards to whom that County had issued open carry licenses. *Id.* Because the Second Amendment “does not protect a right to bear arms only as a security guard,” the panel reasoned, “section 134-9’s limitation on the open carry of firearms to those ‘engaged in the protection of life and property’ violates the core of the Second Amendment and is void.” *Id.* at 1071.

The State of Hawai‘i and the County of Hawai‘i filed a petition for rehearing *en banc*, contending that the panel’s decision rested on a fundamental misunderstanding of Hawaii’s law, namely that HRS § 134-9 authorizes open carry licenses only for “security guards” and other individuals whose job entails the protection of life and property. *See* Petition for Rehearing *En Banc*, *Young v. Hawaii*, No. 12-17808, attached hereto as Exhibit “B,” at 8-11. The petition noted that, by its plain terms, HRS § 134-9 authorizes police chiefs to issue open carry licenses to any otherwise-qualified individual who “sufficiently indicate[s]” the “urgency or the need” for a firearm and “is engaged in the protection of life and property.” *Id.* at 8. The State and the County pointed out that HRS § 134-9 nowhere states that a person’s *job duties* must involve the protection of life and property. *Id.* In support of this interpretation, the State and the County attached a formal legal opinion of the Attorney General of Hawai‘i clarifying that HRS § 134-

9 permits the issuance of open-carry licenses to private individuals, and not just private security officers. *Id.* at 9

The petition for rehearing *en banc* also contended that the panel's decision created a split between the Ninth Circuit and at least three other circuits on the question of whether the Second Amendment protects an unqualified right to carry firearms openly outside of the home. *Id.* at 11-13. It also noted that the decision was irreconcilable with the Ninth Circuit's *en banc* decision in *Peruta v. County of San Diego*, 824 F.3d 919 (9th Cir. 2016).

Early this year, a majority of nonrecused active Ninth Circuit judges voted that *Young* be reheard *en banc*. *See Young v. Hawaii*, 915 F.3d 681 (9th Cir. 2019). Pursuant to the Ninth Circuit's order regarding *en banc* review, the three-judge panel disposition may not be cited as precedent by or to any court of the Ninth Circuit. *Id.*

The Ninth Circuit subsequently stayed *en banc* proceedings in *Young* pending the issuance of an opinion by the United States Supreme Court in *New York State Rifle & Pistol Association, Inc. v. City of New York*, No. 18-280 ("NYSR&PA"). *See Order, Young v. Hawaii*, No. 12-17808, ECF No. 209 (February 14, 2019), attached hereto as Exhibit "C." The City of New York recently informed the Supreme Court that it has proposed a rule that, if adopted as

planned in mid-May, “would render [NYSR&PA] moot.” *Young v. Hawaii*, No. 12-17808, ECF No. 221-1, attached hereto as Exhibit “D.”

II. The Present Case

On March 29, 2019, after the Ninth Circuit’s stay order in *Young*, Plaintiffs Ronald G. Livingston, Michael J. Botello, Kitiya M. Shiroma, Jacob Stewart, and the Hawaii Rifle Association (“Plaintiffs”) filed a Complaint in this Court challenging the constitutionality, under the Second Amendment, of the very same statute at issue in *Young*: HRS § 134-9. *See* ECF No. 1. Plaintiffs, like Mr. Young before them, contend that there is a Second Amendment right to carry a firearm in public for self-defense, and that HRS § 134-9 violates that right. *See id.* at PageID # 20 (requesting that this Court “[d]eclare that the Second Amendment protects the right of ordinary, law-abiding citizens to carry a handgun outside the home for self-defense” and “[d]eclare that the provisions of H.R.S. § 134-9(a) that prevent ordinary, law-abiding citizens from carrying handguns outside the home or place of business for self-defense in some manner, either concealed or openly, are unconstitutional facially and as applied to plaintiffs”).

STANDARD

This Court has the inherent power to stay proceedings “in the interests of judicial efficiency and fairness.” *Fed. Home Loan Mortg. Corp. v. Kama*, Civ. No. 14-00137 ACK-KSC, 2016 WL 922780, at *9 (D. Haw. Mar. 9, 2016); *see also*

Mediterranean Enterprises, Inc. v. Ssangyong Corp., 708 F.2d 1458, 1465 (9th Cir. 1983). The “power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.” *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936); *see also Moskowitz v. Am. Sav. Bank, F.S.B.*, Civ. No. 17-00299 HG-KSC, 2018 WL 6628937, at *2 (D. Haw. Sept. 4, 2018) (“District courts have ‘broad discretion to stay proceedings as an incident to its power to control its own docket.’” (quoting *Clinton v. Jones*, 520 U.S. 681, 706-07 (1997))).

In considering whether to stay a pending proceeding, “the competing interests which will be affected by the granting or refusal to grant a stay must be weighed.” *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962). Those interests include:

[T]he possible damage which may result from the granting of a stay, the hardship or inequity which a party may suffer in being required to go forward, and the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay.

CMAX, 300 F.2d at 268.

The Ninth Circuit has made clear that “a trial court may, with propriety, find it is efficient for its own docket and the fairest course for the parties to enter a stay of an action before it, pending resolution of independent proceedings which bear upon the case.” *Mediterranean Enterprises*, 708 F.2d at 1465 (quoting *Leyva v.*

Certified Grocers of Cal., Ltd., 593 F.2d 857, 863 (9th Cir. 1979)). “This rule applies whether the separate proceedings are judicial, administrative, or arbitral in character, and does not require that the issues in such proceedings are necessarily controlling of the action before the court.” *Id.* (quoting *Leyva*, 593 F.2d at 863-64).

ARGUMENT

Proceedings in this case should be stayed pending the Ninth Circuit’s *en banc* decision in *Young*. Given that Plaintiffs raise *the very same* legal issues pending before the Ninth Circuit in *Young*, a stay will serve the “orderly course of justice” by “simplifying . . . issues, proof, and questions of law.” *CMAX*, 300 F.2d at 268. A stay of these proceedings will cause minimal, if any, damage, while the failure to issue a stay, such that litigation continues, will likely result in hardship to both parties, and to the Court. Without a stay, the parties may incur needless expense, and judicial resources may unnecessarily be expended, because of uncertainty in the controlling law, and the potential need for relitigation following the Ninth Circuit’s decision in *Young*. The prudent course, considering “economy of time and effort for [the court], for counsel, and for litigants,” *Landis*, 299 U.S. at 254, is to stay these proceedings, and permit the Ninth Circuit to first provide its binding *en banc* opinion in *Young*.

I. The Orderly Course of Justice

The orderly course of justice, “measured in terms of the simplifying . . . of issues, proof, and questions of law,” weighs overwhelmingly in favor of a stay of these proceedings. *CMAX*, 300 F.2d at 268.

This case is a near mirror image of *Young*. It arises out of similar factual circumstances – the denial of carry license applications – and challenges the very same Hawai‘i statute – HRS § 134-9 – on the very same legal basis – that the statute violates a Second Amendment right to carry a firearm in public for self-defense. *Compare* Exhibit “A” at 10 (contending that HRS § 134-9 “openly denies [Young’s] free exercise to carry a firearm for the lawful purpose of personal self-defense”), *and Young*, 896 F.3d at 1049 (“Primarily alleging that denying his application for a handgun license violates his Second Amendment right to carry a loaded firearm in public for self-defense, Young requested, among other things, injunctive and declaratory relief from the enforcement of section 134-9’s licensing requirements.”), *with* ECF No. 1 at PageID # 20 (Plaintiffs requesting that this Court “[d]eclare that the Second Amendment protects the right of ordinary, law-abiding citizens to carry a handgun outside the home for self-defense” and “[d]eclare that the provisions of H.R.S. § 134-9(a) that prevent ordinary, law-abiding citizens from carrying handguns outside the home or place of business for

self-defense in some manner, either concealed or openly, are unconstitutional facially and as applied to plaintiffs”).

Plaintiffs’ recently filed motion for a preliminary injunction confirms that this case is little more than an attempt to have this Court litigate *Young*. Plaintiffs acknowledge that their case “only” challenges “the provisions of Hawaii law that prevent plaintiffs and other ordinary law-abiding Hawaii residents from carrying handguns outside their homes or places of business for the lawful purpose of self-defense” – the very same provisions at issue in *Young*. ECF No. 19-1 at PageID # 75. And plaintiffs admit that “[t]he critical question” in determining whether Hawaii’s law “burdens conduct protected by the Second Amendment is . . . whether the Second Amendment protects a right to carry handguns outside the home,” *id.* at PageID # 80 – the very same question at issue in *Young*, *see* 896 F.3d at 1048 (“We must decide whether the Second Amendment encompasses the right of a responsible law-abiding citizen to carry a firearm openly for self-defense outside of the home.”).³

³ Plaintiffs admit that the Ninth Circuit’s *en banc* decision in *Peruta v. County of San Diego*, 824 F.3d 919 (9th Cir. 2016), which concluded that the Second Amendment does not protect a right of a member of the general public to carry *concealed* firearms in public, is binding precedent, foreclosing their challenge to the extent it relates to concealed carry before this Court. *See* ECF No. 19-1 at PageID # 93 n.1.

Despite the fact that the Ninth Circuit is poised to decide that question, and thus provide this Court with controlling precedent, Plaintiffs argue the issue themselves, over fifteen pages of their memorandum in support of their motion for a preliminary injunction. *See* ECF No. 19-1 at PageID #s 80-94. Throughout those pages, Plaintiffs often regurgitate the *Young* panel opinion’s analysis – the very opinion that the Ninth Circuit voted to rehear *en banc*, and that was stripped of precedential value in this Circuit. *Compare Young*, 896 F.3d at 1052-53, 1070-71, *with* ECF No. 19-1 at PageID # 80-83, 94-97. And, in arguing that the Second Amendment protects a right to carry a firearm outside the home, Plaintiffs cite the very same case law the *Young* panel relied on to find such a right. *Compare* ECF No. 19-1, PageID # 87-88 (citing *Nunn v. State*, 1 Ga. 243 (1846); *Andrews v. State*, 50 Tenn. 165 (1871); *State v. Chandler*, 5 La. Ann. 489 (1850); and *State v. Reid*, 1 Ala. 612 (1840)), *with Young*, 896 F.3d at 1055-56, 1058 n.10 (citing the same cases). This is not surprising – Plaintiffs openly admit that the panel opinion in *Young* “squarely discuss[ed]” the question they present to this Court. ECF No. 19-1 at PageID # 92. Given that admission, Plaintiffs cannot possibly contest that the *en banc* proceedings in *Young* directly affect their case.

Even the second portion of Plaintiffs’ argument – that HRS § 134-9 fails any applicable level of scrutiny, *see* ECF No. 19-1 at PageID # 94-100 – finds its origins in *Young*. The premise of Plaintiffs’ argument is that HRS § 134-9

operates as a total ban on carry by ordinary citizens, and that erroneous idea comes directly from the panel decision in *Young*. Compare ECF No. 19-1, PageID # 70 (“In practice, a license to carry is confined to law enforcement and security guards, and denied altogether to ordinary private citizens, like plaintiffs.”), with *Young*, 896 F.3d at 1070-71 (reading HRS § 134-9 to authorize only “security guard[s]” and those “similarly employed” to obtain open carry licenses, and concluding that “[t]he typical, law-abiding citizen in the State of Hawaii is therefore entirely foreclosed from exercising the core Second Amendment right to bear arms for self-defense”). In seeking rehearing *en banc*, the State of Hawai‘i and the County of Hawai‘i directly and vigorously challenged the panel’s interpretation of HRS § 134-9, see Exhibit “B” at 8-11, placing the fundamental premise of Plaintiffs’ argument squarely in dispute in the *Young en banc* proceedings. Plaintiffs acknowledge this, but nonetheless seek to litigate the very same issue before this Court. See ECF No. 1, PageID #3 (“[P]laintiffs here put to the test defendants State of Hawaii’s and County of Honolulu’s⁴ primary basis for seeking *en banc* review in *Young*—that Hawaii law does not limit issuance of open carry licenses to only private security officers.”).

Given the overlap between this case and *Young*, the orderly course of justice demands staying these proceedings pending the Ninth Circuit’s *en banc* decision.

⁴ See *supra* n.1.

The Ninth Circuit’s determination as to whether the Second Amendment protects a right to carry firearms openly outside of the home, its interpretation of HRS § 134-9, and its ruling as to whether that statute infringes on any Second Amendment right, will directly impact, and likely be dispositive of, this case. *See Hawai‘i v. Trump*, 233 F. Supp. 3d 850, 855 (D. Haw. 2017) (issuing a stay where “the Ninth Circuit’s ruling . . . will likely be dispositive of, or at least dispositive of many of the issues presented” in the stayed case); *Karoun Dairies, Inc. v. Karlacti, Inc.*, Civ. No. 08CV1521 AJB-WVG, 2013 WL 4716202, at *3 (S.D. Cal. Sept. 3, 2013) (issuing a stay where “the Ninth Circuit will consider issues that will also need to be considered by the Court in this case”).

The reason to stay proceedings in these circumstances is clear. As this Court has put it, “[t]he appellate court’s binding decision[] . . . could obviate the need . . . to decide the same issues” pending before the Ninth Circuit. *Trump*, 233 F. Supp. 3d at 855. “[I]t makes little sense to expend the resources necessary for a full presentation of those same issues in this forum while awaiting guidance from the appellate court.” *Id.* Where the controlling law is unclear, and an appellate court is set to decide that controlling law, “[t]he more efficient course is to await a pronouncement from the governing appellate bodies.” *Id.* Litigating this case without the Ninth Circuit’s controlling authority would “require[] the parties to expend significant time and expense to litigate issues . . . that may be completely

invalidated by the Ninth Circuit’s decision.” *Karoun Dairies*, 2013 WL 4716202, at *3. In this case, there is significant risk that the “[c]onsiderable resources necessary for litigating . . . may be wasted if the appellate court’s controlling decision changes the applicable law or the relevant landscape of facts that need to be developed.” *Trump*, 233 F. Supp. 3d at 856.

The possibility of inconsistent rulings also weighs in favor of staying these proceedings. *See Trump*, 233 F. Supp. 3d at 856 (noting that granting a stay would “reduce the risk of inconsistent rulings that the appellate courts might then need to disentangle”); *Kama*, 2016 WL 922780, at *10 (in *sua sponte* staying further proceedings, citing concern “with the possibility of inconsistent rulings if the proceedings continue prior to resolution of the related appeals”). If proceedings in this case continue, and this Court “reaches conclusions contrary to those reached by the Ninth Circuit, it would result in significant confusion and would likely extend litigation in order to address the inconsistent decisions.” *Karoun Dairies*, 2013 WL 4716202, at *5.

In short, this case presents the very strongest circumstances for a stay in the orderly course of justice. The circumstances here go *beyond* what numerous courts have cited as sufficient to issue a stay. Even though a stay “does not require that the issues in [an independent] proceeding[] are necessarily controlling of the action before the court,” *Mediterranean Enterprises*, 708 F.2d at 1465 (quoting *Leyva*,

593 F.2d at 863-64), the Ninth Circuit’s *en banc* decision *would* control disposition of the same issues raised here. And even though a stay may be issued where independent proceedings will merely “simplify” or “clarify” the issues, the Ninth Circuit’s *en banc* opinion will likely *decide* the issues presented here. *CMAX*, 300 F.2d at 268; *Kama*, 2016 WL 922780, at *9; *Karoun Dairies*, 2013 WL 4716202, at *4. The orderly course of justice, including considerations of judicial economy, weigh overwhelmingly in favor of a stay of these proceedings. *See Matera v. Google Inc.*, No. 15-CV-04062-LHK, 2016 WL 454130, at *2 (N.D. Cal. Feb. 5, 2016) (“Considerations of judicial economy are highly relevant in determining whether this factor weighs in favor of a stay.” (brackets, internal quotation marks, and citation omitted)). As this Court has noted, “a stay is the most efficient and fairest course of action where” – as here – “there are independent and likely controlling proceedings which bear upon th[e] case.” *Trump*, 233 F. Supp. 3d at 856.

II. Hardship or Inequity in Going Forward

Both parties are likely to suffer if a stay is denied and proceedings in this case continue. Any litigation undertaken before the Ninth Circuit’s ruling in *Young* would lack the direction of controlling law, leaving the parties to guess at what the Ninth Circuit will hold on the relevant issues. This uncertainty would only compound the time and resources necessary to litigate this case.

More significantly, the entire effort could very well be futile. If this case proceeds without awaiting the Ninth Circuit's decision in *Young*, the parties and the Court may "waste time on [] issue[s] that may be fully adjudicated by the Ninth Circuit." *Karoun Dairies*, 2013 WL 4716202, at *3; *see also Matera*, 2016 WL 454130, at *4 ("[T]he parties are likely to expend considerable resources on discovery and briefing which may be wasted if [the United States Supreme Court's decision in] *Spokeo* ultimately requires dismissal (or modification) of Plaintiff's Complaint."). The Ninth Circuit's decision in *Young* may "require relitigation of this case in accordance with its ruling," *Karoun Dairies*, 2013 WL 4716202, at *3, resulting in additional expense to the parties, and burden on the Court's resources. This hardship is "not merely proceeding in the ordinary course of litigation." *Matera*, 2016 WL 454130, at *4. "[I]t is proceeding . . . in the face of a pending decision that may substantially revise the [controlling] standard." *Id.* Failure to impose a stay in these circumstances "would result in prejudice to both parties." *Karoun Dairies*, 2013 WL 4716202, at *3.

III. Possible Damage

The orderly course of justice, measured by simplification of the issues in this case, along with the hardship and inequity both parties will likely suffer if a stay is denied, strongly outweigh any possible damage from the granting of a stay. *See CMAX*, 300 F.2d at 268. This case is at its very earliest stage, when potential

damage from a stay, if any, is “minimal.” *Matera*, 2016 WL 454130, at *4 (“In contrast with a case where a stay might disrupt proceedings after years of litigation, this case is at an early stage of litigation.” (citation and internal quotation marks omitted)). The Ninth Circuit’s *en banc* opinion in *Young* may undermine Plaintiffs’ legal arguments, but that “is not the kind of prejudice which should move a court to deny a requested postponement.” *CMAX*, 300 F.2d at 269. If Plaintiffs’ “case is weak, justice will be served by having that fact revealed prior to the district court [proceedings].” *Id.*

CONCLUSION

For the foregoing reasons, Defendant respectfully requests that proceedings in this case be stayed pending the Ninth Circuit’s *en banc* decision in *Young v. Hawaii*, No. 12-17808.

DATED: Honolulu, Hawai‘i, April 17, 2019.

/s/ Clyde J. Wadsworth

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