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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

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

Plaintiffs,

v.

SUSAN BALLARD, Police Chief of the City & County of Honolulu; CITY & COUNTY OF HONOLULU; and CLARE E. CONNORS, Attorney General of Hawaii,

Defendants.

Case No. 19-00157JMS-RT

PLAINTIFFS' OPPOSITION TO DEFENDANT CLARE E. CONNORS'S MOTION TO STAY PROCEEDINGS

Hearing date and time to be determined following briefing

Date: _____
Time: _____

FACTUAL AND PROCEDURAL BACKGROUND

I. POSTURE OF THIS CASE

Plaintiffs are responsible, law-abiding Hawaii residents who seek to protect themselves from violent crime by carrying a handgun outside their homes, and a Hawaii non-profit corporation representing its similarly situated members. They applied with the Defendant Chief of Police Susan Ballard for both open and concealed carry licenses, but the Chief denied each of their applications. Under Hawaii law, the ability to lawfully carry a handgun is confined to those who can prove an "exceptional" need for self-defense, or who are "engaged in the protection of life and property" and have "sufficiently indicated" an "urgency" or special "need" to carry a firearm. H.R.S. section 134-9(a). Although Plaintiffs meet all other qualifications for obtaining a license, in Defendants' view, their desire to carry a firearm for general self-defense does not satisfy the "exceptional" need or "urgency" showing necessary to obtain a license to carry, either openly or concealed.

On March 29, 2019, Plaintiffs sued, alleging that the denial of their carry license applications violates their right to bear arms guaranteed by the Second Amendment. Plaintiffs also allege that section 134-9 violates the Second Amendment by limiting open carry licenses to applicants "[w]here the urgency or the need has been sufficiently indicated." H.R.S. § 134-9(a); Compl. 3, ECF No. 1.

On April 11, 2019, Plaintiffs' moved for a preliminary injunction to prevent the continued deprivation of their fundamental rights while this case proceeds towards a resolution on the merits. On April 17, Defendant Attorney General Connors filed a motion seeking to stay this case pending the Ninth Circuit's en banc

decision in *Young v. Hawaii*, No. 12-1780. Soon after, Defendants Susan Ballard and the City and County of Honolulu filed a Conditional Joinder to the Attorney General's Motion to Stay.

II. POSTURE OF YOUNG V. HAWAII

In 2018, a three-judge panel of the Ninth Circuit held that HRS section 134-9 violates the Second Amendment because it "amounts to a destruction of the core" Second Amendment right" to bear arms for self-defense. *Young v. Hawaii*, 896 F.3d 1044, 1070 (9th Cir. 2018). As explained in the State's memorandum in support of its motion to stay, the *Young* panel interpreted section 134-9 to authorize only "security guard[s]" and those similarly employed" to obtain open carry licenses. *Id*; Mem. Supp. Mot. to Stay ("Mot.) 3-4, ECF No. 27-1 (citing *Young*, 896 F.3d at 1070). Ultimately, the panel concluded that because the Second Amendment "does not protect a right to bear arms only as a security guard," section 134-9's "violates the core of the Second Amendment and is void." *Young*, 896 F.3d at 171.

The State subsequently filed a petition for rehearing en banc, mainly arguing that the panel's decision rested on a fundamental misunderstanding of Hawaii's law—that HRS section 134-9 only authorizes open carry licenses for security guards and the like. *See* Petition for Rehearing En Banc, *Young v. Hawaii*, 915 F.3d 681 (9th Cir. 2019) (No. 12-17808); Mot. 4. Based on that perceived error, the State's petition asks the Court to "grant rehearing, vacate the panel's decision, and remand the case to the District Court so that it can be reassessed based on an accurate understanding of Hawaii law." Petition for Rehearing at 3, *Young*, 915 F.3d 681.

Earlier this year, the Ninth Circuit issued an order scheduling Young for en

banc oral argument. But before the *Young* arguments had a chance to take place, the Ninth Circuit stayed the en banc proceedings pending the Supreme Court's resolution of *New York State Rifle and Pistol Association, Inc. v. City of New York* (*NYSRPA*). Order, *Young v. Hawaii*, No. 12-17808 (9th Cir. Feb. 14, 2019), ECF No. 209. Just days ago, the Supreme Court denied Respondents' request in that matter to hold the briefing schedule in abeyance as a result of a proposed rule change that Respondents argued might moot the case. Order, *NYSRPA v. City of New York*, No. 18-280 (U.S. Apr. 29, 2019). The parties are thus moving forward with briefing *NYSRPA* before the Supreme Court, though the case has not yet been calendared for oral argument.

LEGAL STANDARD

Staying a case is extraordinary relief that should only be granted upon a showing of sufficient grounds warranting exercise of the Court's power to do so. *Va. Petrol. Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958). To determine whether to issue a stay pending resolution of another case, the Ninth Circuit routinely applies a three-factor test described in *Landis v. North American Co*., 299 U.S. 248 (1936). *Landis* instructs courts to examine: (1) the "possible damage which may result from the granting of a stay"; (2) "the hardship or inequity which a party may suffer in being required to go forward"; and (3) "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." *Lockyer v. Mirant Corp*., 398 F.3d 1098, 1110 (9th Cir. 2005) (citing *Landis*, 299 U.S. at 255).

Under this test, the "proponent of a stay bears the burden of establishing its need." *Clinton v. Jones*, 520 U.S. 681, 708 (1997) (citing *Landis*, 299 U.S. at 255). If there is "even a fair possibility" of harm to the opposing party, the moving party "must make out a clear case of hardship or inequity in being required to go forward." *Landis*, 299 U.S. at 255.

ARGUMENT

The stay sought by the State here is extraordinary. At base, the State asks this Court to postpone resolution of Plaintiffs' constitutional claims pending the outcome of a Supreme Court case that is not yet scheduled for oral argument and then, after that, await the Ninth Circuit's en banc resolution of *Young v. Hawaii*—which itself is not scheduled for oral argument. This process could easily take years. Such a severe delay to the vindication of Plaintiffs' constitutional rights outweighs any harms identified by the State in moving forward with this case. This is particularly true given the State's position that the *Young* panel's decision rested on an incorrect interpretation of section 134-9, and that the Ninth Circuit should remand *Young* to this Court to reevaluate it under the proper interpretation of that law. Because Plaintiffs' challenge does not rely on the interpretation of section 134-9 announced in *Young*, that is something the Court can simply do now. For the reasons below, the State has not made the requisite showing under *Landis* for the extraordinary relief it seeks. Its request for a stay should therefore be denied.

I. GRANTING A STAY WOULD IRREPARABLY HARM PLAINTIFFS AND FIREARM OWNERS THROUGHOUT THE STATE

Staying this case pending the Ninth Circuit's resolution of *Young* would cause

serious and irreparable harm to Plaintiffs and other law-abiding citizens who seek to exercise their right to bear arms outside the home. The State suggests, however, that any harm to Plaintiffs would be "minimal" because this case is "at an early stage of litigation." Mot. 17 (quoting *Matera v. Google*, 2016 WL 454130 at *4 (Feb. 5, 2016). Its reasoning is unpersuasive.

In *Matera*, the court noted that the plaintiffs had not yet filed a preliminary injunction motion and that the Supreme Court would rule on a likely dispositive case within the next four months. *Matera*, 2016 WL 454130 at *3-4. Even under those circumstances, the court held that the harm from the brief delay of relief from statutory violations weighed slightly *against* issuing a stay. *Id.* at *4.

By contrast, Plaintiffs have already moved for a preliminary injunction to halt the violation of their constitutional rights. Pls.' Mot. Prelim. Inj., ECF No. 19. And there is no timeframe for the resolution of *Young*. In fact, the Ninth Circuit stayed consideration of *Young* pending the Supreme Court's decision in the *NYSRPA* case, which itself is still being briefed. Order, *Young*, No. 12-17808, ECF No. 209. The State would thus have Plaintiffs sit on their hands for years before even having an opportunity for relief. Worse still, the State is simultaneously urging the Ninth Circuit to *avoid* the constitutional questions Plaintiffs raise and remand *Young* to do exactly what Plaintiffs are already doing here. Petition for Rehearing at 3, *Young*, 915 F.3d 681.

Further, the State's motion ignores the true nature of the harm to Plaintiffs. No matter when this litigation began, a stay will prolong *constitutional injuries* to Plaintiffs through the continued and indefinite denial of their fundamental right to

carry a firearm for self-defense. Ordering a stay will extend the uncertainty about whether Plaintiffs may exercise their rights without fear of criminal prosecution, undeniably irreparable harm.

The Ninth Circuit has long held that the loss of First Amendment rights—for even minimal periods of time—constitutes irreparable injury. *Assoc. Press v. Otter*, 682 F.3d 821, 826 (9th Cir. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). This principle applies equally to the Second Amendment, and perhaps even more so in this context, where the ability to carry a firearm for self-defense could mean the difference between life and death. *See* Order Granting Prelim. Inj. at 56, *Duncan v. Becerra*, 265 F. Supp. 3d 1106, 1135 (S.D. Cal. June 29, 2017). Plaintiffs deserve to have their claims heard without undue—and indefinite—delay. Every minute the State successfully stalls this case, Plaintiffs and firearm owners throughout the state suffer real, irreparable harm under HRS section 134-9. And with a stay, that harm could endure for years.

Plaintiffs thus have a paramount interest in seeing this case—and their pending motion for preliminary injunction—resolved as soon as possible. Both the concrete and potential damage that would befall Plaintiffs as a result of such an extraordinary delay strongly counsels against issuing a stay.

II. DEFENDANTS WILL NOT SUFFER HARDSHIP ABSENT A STAY

A party must make a clear case of hardship or inequity to obtain a stay. *Landis*, 299 U.S. at 255. The State has not made its case. The State argues that litigating this case now could potentially "compound the time and resources necessary to litigate this case." Mot. 15. But the mere cost of litigation "required to defend a suit, without

more, does not constitute a 'clear case of hardship or inequity' within the meaning of *Landis*." *Lockyer*, 398 F.3d at 1112. Whether the burdens of litigating this case rise to the level of serious hardship thus rests largely on the State's speculation that the Ninth Circuit's decision in *Young* will " 'substantially revise the [controlling] standard.' " Mot. 16 (quoting *Matera* 2016 WL 454130 at *4). But any change to the analytical framework with respect to the issues here is unlikely to lead to a different result because this case deals with a ban on Second Amendment conduct, and the Supreme Court has already unequivocally expressed how courts should handle such infringements. *See District of Columbia v. Heller*, 554 U.S. 570 (2008). Further, any change that may result from the Supreme Court's review of *NYSRPA* is likely to *bolster* Plaintiffs' claim, not undermine it. And, in all events, the possibility of change in the law *always* exists, so speculation that it might do so here is not a sufficient reason to grant an (indefinite) stay—particularly where constitutional rights are concerned.

What's more, the State believes that the *Young* panel's decision "rested on a fundamental misunderstanding of Hawaii's law" and so requested that the Ninth Circuit remand the case for further consideration under its interpretation of section 134-9. Mot. 4. But Plaintiffs' challenge does not depend on either of the potential interpretations of that law. So the State cannot seriously claim that it is harmed by having to litigate Plaintiffs' claim under the very interpretation it asks the Ninth Circuit to adopt. This is especially true given that, if the Ninth Circuit grants the State the relief it seeks and remands *Young*, that case will be in the same position Plaintiffs' case is in now.

Finally, allowing the case to proceed poses only a minor inconvenience to the State. Should this Court reject Plaintiffs' claims, the State will suffer no meaningful harm, certainly none that would outweigh the harm to Plaintiffs resulting from indefinitely stalling this case. If the Ninth Circuit intends to decline the State's request for remand and rule on the merits in *Young*, it can always make that intention clear by staying any relief this Court might grant pending an appeal of that order. That approach would avoid the very real likelihood that Plaintiffs' claims will be delayed for years, and potentially only to have the Ninth Circuit remand *Young* without ruling on the merits. It also preserves the State's ability to request a stay from the Ninth Circuit which is in a better position to know what it intends to do in *Young*.

Under these facts, the State has failed to establish that any burden of moving forward with this case would present a "clear case of hardship or inequity." *Landis*, 299 U.S. at 255.

III. DEFENDANTS HAVE NOT SHOWN THAT THE ORDERLY COURSE OF JUSTICE SUPPORTS A STAY

Ultimately, the thrust of the State's basis for seeking a stay is "that the Ninth Circuit is poised to decide" the issues here during the en banc proceedings in *Young*. Mot. 11. But, again, the State has urged the Ninth Circuit to *avoid* those issues. The State's Petition for Rehearing En Banc in *Young* lays out its request: "the Court should grant rehearing, vacate the panel's decision, and remand the case to the District Court so that it can be reassessed based on an accurate understanding of Hawaii law." Petition for Rehearing *En Banc*, *Young v. Hawaii*, No. 12-17808 at 3.

As the State notes, the three-judge panel that considered *Young* construed HRS section 134-9 as only allowing security guards to acquire carry permits, *Young,* 896 F.3d 1044, 1070—an interpretation the State argues is erroneous. Mot. 4. The State is thus asking the Ninth Circuit to avoid reaching the merits and instead remand *Young* to this Court to reevaluate it with the understanding that individuals other than security guards can qualify (at least theoretically) for a carry license.

In doing so, the State effectively seeks to have the Ninth Circuit place *Young* in *exactly the same position* Plaintiffs are currently in. This is because Plaintiffs' challenge does *not* depend on whether the Ninth Circuit's interpretation of HRS section 134-9 is correct. For, even if section134-9 allows non-security guards to obtain licenses, it still allows the government to deny Plaintiffs (and other law-abiding citizens) a carry license and thus deprives them of their right to bear arms. The notion that others might be allowed to exercise their right—whether in theory (as is the case here) or in reality—is irrelevant.

The State next argues that "the fundamental premise of Plaintiffs' argument [is] squarely in dispute in the *Young en banc* proceedings," and that Plaintiffs acknowledge as much. Mot. 12 ("[P]laintiffs here put to the test defendants State of Hawaii's and County of Honolulu's 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."). The State misses Plaintiffs' point. Plaintiffs are, in fact, explaining precisely why their challenge is distinguishable from *Young*. Again, whether the *Young* panel's interpretation of section 134-9 is correct is irrelevant. No matter how that section is interpreted, Plaintiffs contend that a policy that allows the

government to deny carry licenses to law-abiding citizens violates the Second Amendment, whether that statute limits issuance to security guards or not. Plaintiffs are not testing the interpretation of HRS section 134-9, but its effect—to deny carry licenses to Plaintiffs and virtually all law-abiding citizens.

Additional litigation in the district court would need to take place following a remand in *Young* regardless. Thus, if the Ninth Circuit grants the State the relief it seeks, denying the State's stay request here will not result in any undue expenditure of judicial resources.

Similarly, while the right to bear arms beyond the home under Hawaii law is at issue both in *Young* and the present case, Plaintiffs here are *also* directly challenging the constitutionality of section 134-9's requirement that open carry licenses be only granted "[w]here the urgency or the need has been sufficiently indicated." Compl. 3. Young does *not* raise this claim. *Young*, 896 F.3d 1044, fn. 2 ("Young does not address the additional limitation in section 134-9 providing that an open carry license may only be granted "[w]here the urgency or the need has been sufficiently indicated." . . . Thus, we do not decide whether such requirement violates the Second Amendment.) Simply put, this case is not identical to *Young*. Plaintiffs' challenge raises issues with section 134-9 that are not present in *Young*, and which the State has argued in fact plague *Young* (so much so that it should be remanded to this Court).

Finally, even if staying this case could potentially promote judicial economy, it would not suffice to warrant a stay. "[W]hile it is the prerogative of the district court to manage its workload, case management alone is not necessarily a sufficient

ground to stay proceedings." *Depend. Hwy. Express v. Navigators Ins. Co.*, 498 F.3d 1059, 1066 (9th Cir. 2007). In other words, conserving judicial resources is an insufficient reason to impose a stay that would harm Plaintiffs without mitigating any clear hardship identified by the Attorney General.

CONCLUSION

Because the Landis factors weigh against a stay, this Court should deny the Attorney General's request to stay this case.

Dated: May 1, 2019

Respectfully submitted,

/s/ James Hochberg

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