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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

CIVIL NO. 19-00157 JMS-RT

DEFENDANT CLARE E.
CONNORS'S REPLY IN SUPPORT
OF MOTION TO STAY
PROCEEDINGS; CERTIFICATE OF
SERVICE

No Hearing Date Set

Judge: Hon. J. Michael Seabright

capacity as Attorney General of
Hawai‘i,

Defendants.

**DEFENDANT CLARE E. CONNORS’S REPLY IN SUPPORT OF
MOTION TO STAY PROCEEDINGS**

Plaintiffs’ opposition fails to persuasively respond to the motion to stay proceedings filed by Defendant Clare E. Connors, in her official capacity as Attorney General of Hawai‘i (“Defendant”), and joined by Defendants City & County of Honolulu, and Susan Ballard, in her official capacity as Police Chief of the City & County of Honolulu. *See* ECF Nos. 27, 31.

I. The Orderly Course of Justice and the Hardship or Inequity in Going Forward.

The overlap between this case and *Young v. Hawaii*, No. 12-17808, is undeniable. Plaintiffs themselves admit that a significant constitutional question – whether the Second Amendment protects a right to carry firearms outside the home – “is at issue both in *Young* and the present case.” *Opp.* at 11. The centrality of this issue to Plaintiffs’ case and to *Young* cannot be ignored. The *Young* panel decision squarely addressed the question, *see Young v. Hawaii*, 896 F.3d 1044, 1048 (9th Cir. 2018) (“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.”); *id.* at 1070 (concluding that the

“core” of the Second Amendment includes “the right to carry a firearm openly for self-defense”); the Ninth Circuit voted that the panel decision be reheard *en banc*, see *Young v. Hawaii*, 915 F.3d 681 (9th Cir. 2019), placing the question before the Ninth Circuit *en banc* panel anew; and Plaintiffs, in their motion for a preliminary injunction in this case, characterized “whether the Second Amendment protects a right to carry handguns outside the home” as a “critical question,” ECF No. 19-1 at PageID # 80. It makes little sense for this Court to decide such a central, “critical question” when that very same question is pending before the Ninth Circuit. See *Hawai‘i v. Trump*, 233 F. Supp. 3d 850, 855 (D. Haw. 2017) (“Because many of the State’s legal arguments . . . are presently before the Ninth Circuit, it 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.”).¹

In the motion to stay proceedings, Defendant outlined other ways in which Plaintiffs’ case mirrors and depends upon *Young*. See Mot. at 9-12. In response,

¹ Contrary to Plaintiffs’ assertions, the State and the County of Hawai‘i have not sought to “avoid” the constitutional issues raised in *Young* (and repeated by Plaintiffs in this lawsuit). Opp. at 6. The State and the County, in seeking *en banc* review of the *Young* panel’s decision, directly addressed the constitutional issues over multiple pages of their *en banc* petition. See ECF No. 27-4 at PageID #s 446-51. That, in a portion of their *en banc* petition, the State and the County requested remand, does nothing to diminish the fact that the constitutional issues Plaintiffs raise are squarely teed up in *Young*.

Plaintiffs have attempted to recharacterize their legal challenge and create distance between this case and *Young* when no such distance actually exists.

Plaintiffs, for example, suddenly contend that their challenge “does not depend” on the *Young* panel’s interpretation of Hawai‘i Revised Statutes (“HRS”) § 134-9. *See* Opp. at 8. That assertion is wholly inconsistent with Plaintiffs’ own submissions to this Court. Plaintiffs have repeatedly relied on the *Young* panel’s erroneous conclusion that HRS § 134-9 operates as a total ban on carry by ordinary citizens because it authorizes only security guards and those similarly employed to obtain open carry licenses. In their Complaint, after describing the Ninth Circuit panel’s ruling in *Young*, Plaintiffs alleged that “county police chiefs grant carry licenses *only* to employees of private security firms, while denying essentially all applications from ordinary citizens.” ECF No. 1 at PageID #s 3, 15. Plaintiffs’ motion for preliminary injunction contains the same sorts of assertions. *See* ECF No. 19-1 at 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.”); *id.* at PageID # 76 (citing reports purportedly demonstrating that “police chiefs grant the vast majority of carry license applications from ‘employees of private security firms,’ while denying essentially all carry license applications from ‘private citizens’—*i.e.*, everybody else.”). In their preliminary injunction motion, Plaintiffs also contended that HRS § 134-9 cannot survive any level of

scrutiny because – as the *Young* panel erroneously concluded – it operates as a total ban on carry by ordinary citizens. *See* ECF No. 19-1 at PageID #s 94-100.

Because Plaintiffs have so clearly made the *Young* panel’s interpretation of HRS § 134-9 a cornerstone of their legal challenge, their new contention that their lawsuit “does not depend on” that interpretation, and that the correct interpretation of HRS § 134-9 is “irrelevant,” *Opp.* at 8, 10, strains credulity. The Ninth Circuit’s *en banc* interpretation of HRS § 134-9 cannot possibly be “irrelevant” to this case; Plaintiffs’ challenge is to that same statute. Plaintiffs’ only explanation as to why *Young* is “irrelevant” is that “[n]o matter how [HRS § 134-9] 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.” *Opp.* at 10-11. But that, of course, is still a rehash of Mr. Young’s argument. *See, e.g.,* Opposition to Petition for Rehearing *En Banc, Young v. Hawaii*, No. 12-17808, Dkt. 171-1 at 7 (“Until Hawaii provides a real world means for an ordinary, law-abiding citizen like Mr. Young to carry a handgun for self-defense, there is no basis to disturb the Panel’s eminently correct conclusion that section 134-9 ‘violates the core of the Second Amendment and is void.’”).

At the end of the day, Plaintiffs’ Complaint makes plain what Plaintiffs now seek to obscure. There, Plaintiffs openly admitted that through this litigation, they

seek to “put to the test” the State and the County of Hawaii’s argument before the *Young en banc* panel “that Hawaii law does not limit issuance of open carry licenses to only private security officers.” *Id.* at PageID # 3. In light of that admission, Plaintiffs’ new effort to divorce their litigation from *Young* is entirely unconvincing. Plaintiffs contend that Defendant has “misse[d] Plaintiffs’ point,” but their alleged “point” – “explaining precisely why their challenge is distinguishable from *Young*,” *Opp.* at 10 – bears no resemblance to the contention Plaintiffs actually made in their Complaint. Far from “distinguish[ing]” *Young*, Plaintiffs directly invoked *Young* and announced their intention to litigate the same issues pending before the Ninth Circuit in that case. In their opposition, Plaintiffs insist that they “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,” but their argument makes little sense, and still fails to remove this case from *Young*’s shadow.

In their final effort to distinguish themselves from *Young*, Plaintiffs argue that their challenge raises an issue absent from *Young*, namely “the constitutionality of section 134-9’s requirement that open carry licenses be only granted ‘where the urgency or the need has been sufficiently indicated.’” *Opp.* at 11 (brackets omitted). The “urgency” or “need” requirement, however, is directly at issue in *Young*. The State and the County of Hawai‘i, for example, have

challenged the *Young* panel’s interpretation of HRS § 134-9 as limiting open carry licenses to security guards and the like by, in part, relying on the “urgency” or “need” language in HRS § 134-9. *See, e.g.*, ECF No. 27-4 at PageID # 436 (“[T]he panel invalidated Hawaii’s law on the ground that it limits open-carry licenses to ‘security guards’ and other individuals whose jobs entail protecting life and property. But that is just wrong. By its plain terms, Hawaii Revised Statutes § 134-9 makes open-carry licenses available to *any* otherwise-qualified individual who ‘sufficiently indicate[s]’ an ‘urgency’ or ‘need’ to carry a firearm and who is ‘engaged in the protection of life and property.’ Haw. Rev. Stat. § 134-9(a).” (citation omitted)). The State and the County have also argued, as Judge Clifton pointed out in his dissent to the *Young* panel opinion, that the panel’s decision conflicted with decisions of the Second, Third, and Fourth Circuits upholding statutes containing virtually indistinguishable “good cause” requirements. *See id.* at PageID #s 437, 442. The “urgency” or “need” requirement in HRS § 134-9 is undoubtedly at issue in the *Young en banc* proceedings.

In light of the incredible similarity between this case and *Young*, Defendant’s argument that a stay of these proceedings is warranted goes beyond the “mere cost of litigation.” *Opp.* at 7. As Defendant outlined in her motion, courts have consistently recognized that a stay is appropriate where appellate proceedings may clarify, or even decide, the issues in a pending case. *See Mot.* at

13-16. The hardship in proceeding without a stay under such circumstances is “not merely proceeding in the ordinary course of litigation,” but “proceeding . . . in the face of a pending decision that may substantially revise the [controlling] standard.” *Matera v. Google Inc.*, No. 15-CV-04062-LHK, 2016 WL 454130, at *4 (N.D. Cal. Feb. 5, 2016). Given that the Ninth Circuit’s binding, *en banc* decision in *Young* would provide this Court with the controlling standard, and “could obviate the need for this Court to decide the same issues” pending here, *Trump*, 233 F. Supp. 3d at 855, failing to wait for that decision risks inconsistent rulings, the need for relitigation, waste of the parties’ and the Court’s resources, and prejudice to both parties, *see Matera*, 2016 WL 454130, at *4; *Karoun Dairies, Inc. v. Karlacti, Inc.*, Civ. No. 08CV1521 AJB-WVG, 2013 WL 4716202, at *3 (S.D. Cal. Sept. 3, 2013).

The need for a stay here also goes beyond “the possibility of change in the law” that Plaintiffs say “*always* exists.” Opp. at 8. This case raises the same legal issues, about the same statute, as *Young*. Characterizing the potential effect of the *Young* decision as nothing more than the possible change in law that “*always* exists” severely understates the connection between this case and *Young*.

Plaintiffs, however, contend that this Court need not be concerned with the Ninth Circuit’s binding precedent in *Young* because the U.S. Supreme Court’s decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008), already tells this

Court everything it needs to know. Opp. at 8. That is wrong. *Heller* dealt with a ban on handgun possession in the home, *id.* at 573, not public carry of a firearm, and left many questions, including the extent of Second Amendment protection outside the home, unanswered. Plaintiffs' own motion for preliminary injunction, moreover, does more than simply cite *Heller* and proclaim victory, undermining Plaintiffs' suggestion that this Court needs nothing but *Heller* to decide this case. *See* ECF No. 19-1.

II. Possible Damage.

Plaintiffs complain that a stay of this case could last years. *See, e.g.*, Opp. at 5. But that speculation does not preclude a stay of these proceedings. *See, e.g.*, *Moskowitz v. Am. Sav. Bank, F.S.B.*, Civ. No. 17-00299 HG-KSC, 2017 WL 10661887, at *1-3 (D. Haw. Oct. 30, 2017) (staying case in spite of contention that it “could cause a delay of several years” because the stay was limited to a decision by the D.C. Circuit, and it made “little sense for the parties and the Court to proceed with litigation while applicable standards remain unsettled,” given that “requiring the parties to go forward will cause them to spend time and money conducting discovery on a critical issue of liability without knowing what law will ultimately apply at summary judgment or at trial—a fool’s errand, to say the least” (citation omitted)).

Plaintiffs, moreover, fail to acknowledge that *New York State Rifle & Pistol Association, Inc. v. City of New York*, No. 18-280 (“NYSR&PA”), the case for which the Ninth Circuit stayed *en banc* proceedings in *Young*, may very well be mooted by a proposed rule expected to be adopted in mid-May. See ECF No. 27-6 at PageID #s 547-48. Mr. Young, in fact, brought this to the Ninth Circuit’s attention, requesting that the *en banc* oral argument in his case “be scheduled as soon as the final rule is implemented.” ECF No. 27-6 at PageID # 545. Plaintiffs’ years-long stay, therefore, appears unlikely in light of the record evidence.

A stay also should not be denied solely because Plaintiffs raise Second Amendment claims. The Ninth Circuit, for example, saw fit to stay *Young* in light of NYSR&PA, despite the fact that Mr. Young’s claims are based on the Second Amendment. See ECF No. 27-5 at PageID # 544.

For these reasons, Plaintiffs’ arguments against a stay of these proceedings pending the Ninth Circuit’s decision in *Young* should be rejected. Defendant’s motion demonstrates that the orderly course of justice, measured by simplification of the issues in this case, along with the hardship and inequity both parties may suffer if a stay is denied, weigh overwhelmingly in favor of a stay, especially in light of the minimal potential damage that a stay may cause. Defendant, therefore,

respectfully requests that her motion be granted, and that these proceedings be stayed pending the Ninth Circuit's *en banc* decision in *Young*.

DATED: Honolulu, Hawai'i, May 8, 2019.

/s/ Clyde J. Wadsworth

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CIVIL NO. 19-00157 JMS-RT
CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served electronically through the Court's CM/ECF system or conventionally by mailing copies via US Mail, postage prepaid, upon the following:

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DATED: Honolulu, Hawai'i, May 8, 2019.

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