IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GEORGE K. YOUNG, JR., Plaintiff-Appellant, v. STATE OF HAWAII, et al., Defendants-Appellees,	No. 12-17808

PLAINTIFF-APPELLANT'S REPLY TO DEFENDANTS' RESPONSE IN OPPOSITION TO SUMMARY REVERSAL

Plaintiff-Appellant, George Young, respectfully submits this Reply to the Opposition of the Hawaii Appellees to Young's request for summary reversal. For the reasons set forth in that motion and below, that motion should be granted.

Hawaii first argues nothing in the Supreme Court's decision *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S.Ct. 2111 (2022), can be read as mandating reversal of the district court's order dismissing Young's complaint for failure to state a claim. Nonsense. Young was denied a permit for the simple reason that he failed to meet the "good cause" required by Hawaii law for the issuance of either a concealed carry permit or an open carry permit. *See Young v. Hawaii*, 992 F.3d 765, 777 (9th Cir. 2021) (en banc). The district court held that the Second Amendment did not apply outside the home and dismissed the complaint for failure to state a claim upon which relief could be granted on that basis. *Young v. Hawaii*, 911 F.Supp.2d 972, 777, 989 (D.Haw. 2012) (noting that Chief Kubojiri determined that Young had neither shown an 'exceptional

case[] or demonstrated urgency"' and holding that Second Amendment "establishes only a narrow individual right to keep an operable handgun at home for self-defense"). This Court, sitting en banc, affirmed on that basis. *Young v. Hawaii*, 992 F.3d 765, 813 (9th Cir. 2021)(en banc) ("we can find no general right to carry arms into the public square for self-defense").

The *Bruen* Court rejected that conclusion, stating "[t]o confine the right 'to bear' arms to the home would nullify half of the Second Amendment's operative protections" and "would make little sense given that self-defense is 'the central component of the [Second Amendment] right itself.'" Slip op. at 24, quoting *District of Columbia v. Heller*, 554 U.S. 570, 599 (2008). The Court thus held there is indeed a "general right to publicly carry arms for self-defense." Slip op. at 22. The Court in *Bruen* also specifically identified the Hawaii statute as one of six State "may issue" statutes that impose a "proper cause" requirement that were analogous to the New York statute at issue in that case. *Bruen*, slip op. at 5-6 & n.2. The Court made clear that the "proper cause" requirements of all these "may issue" statutes were categorically unconstitutional as a matter of law because they allowed the licensing official to exercise discretion over whether to issue the permit, unlike the objective standards employed by "shall issue" statutes in 43 other States. *Bruen*, slip op. at 24 n.8.

The Supreme Court expressly vacated this Court's decision and remanded the case for reconsideration in light of its decision in *Bruen*. That decision plainly requires reversal here. Young's motion for summary reversal is thus well-founded. There is no

need for supplemental briefing on this point. There are no factual issues. This Court should immediately resolve Young's decade long quest to vindicate his constitutional rights.

Defendants state that "[t]his is an appeal from the district court's grant of a motion to dismiss under FRCP Rule 12. No trial has occurred and no summary judgment motions have been filed; Appellees have not even filed answers yet." Opp. at 2. On this record, none of that is remotely relevant to Young's request for summary reversal. It is undisputed that the sole reason for the denial was that Young lacked the same type of "proper cause" that the *Bruen* Court held to be categorically unconstitutional. The Court in *Bruen* thus did not merely vacate the lower court's dismissal and remand for fact-finding. Rather, the Court "reversed" that dismissal. Here, as in *Bruen*, that denial is unconstitutional and the judgment below sustaining that determination should be reversed. Period. Full stop.

Hawaii also argues that the Court's mandate has not yet issued and thus it would be "premature" to immediately order a reversal. Again, nonsense. Hawaii has neither filed a petition for rehearing with the Supreme Court nor even suggested that it was even considering doing so. The GVR order of the Supreme Court was entered June 30, 2022. By the time this case is decided on remand, the 25 days allowed for the mandate to issue under the Supreme Court Rules will have long passed. An "immediate reversal" in these circumstances is plainly one that takes place on July 25, 2022, or as soon thereafter as is feasible.

Hawaii also relies heavily on the July 7, 2022, formal Opinion just released by the Hawaii Attorney General where the Attorney General has advised the Chiefs of Police of Hawaii to no longer enforce the requirement, found in Hawaii Revised Statutes ('HRS') § 134-9, that the applicant for a concealed carry permit must show an "exceptional case" justifying a permit. Hawaii argues that this Opinion suggests that dismissal of the complaint continues to be the "correct result." (Opp. at 7). Apparently, Hawaii believes (without actually making the argument) that this Opinion is sufficient to render this case moot. Once again, nonsense. Young has yet to receive his permit, he seeks damages, and the Hawaii statute remains on the books, un-enjoined. This case is not moot.

The Hawaii Attorney General apparently now agrees that the "exceptional case" requirement is unconstitutional under *Bruen*, but the Opinion insists that the "proper cause" requirement for open carry remains constitutional. The Opinion's concession as to the concealed carry statue is, at most, is a voluntary cessation of conduct and one that the Attorney General of Hawaii is free to reverse. It is well-established that the defendant's voluntary cessation of conduct does not moot a case. *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). *See also United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953) (allowing a voluntary cessation to moot a case would impermissibly mean that "[t]he defendant is free to return to his old ways" and "a public interest in having the legality of the practices settled, militates against a mootness conclusion"). "As long as the parties have a concrete interest*, however small*, in the outcome of the

litigation, the case is not moot." *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (emphasis added). The defendant bears a "heavy burden" to make such a showing of mootness. *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 222 (2000) (per curiam). Similarly, as the Supreme Court stated recently, "[a] case is not moot . . . unless 'it is impossible for [us] to grant any effectual relief.'" *United States v. Washington*, 142 S.Ct. 1976, 1983 (2022) (quoting *Mission Product Holdings, Inc. v. Tempnology, LLC*, 139 S.Ct. 1652, 1660 (2019) (brackets the Court's)). *See also Chafin,* 568 U.S. at 172 ("a case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party") (citation and internal quotes omitted).

Hawaii's argument fails on all these grounds. Hawaii has not even attempted to carry the heavy burden of showing mootness. This Court can easily grant relief to Young by ordering Hawaii to issue a permit, which is, of course, the relief that Young has sought for over a decade. The Supreme Court entered precisely such an order in *Heller*. *See Heller*, 554 U.S. at 635 ("Assuming that Heller is not disqualified from the exercise of Second Amendment rights, the District must permit him to register his handgun and must issue him a license to carry it in the home."). The Court can also order Hawaii not to enforce its existing statute that imposes the "exceptional case" requirement or issue declaratory relief that the statute is unconstitutional. That statute remains on the books. It has not been repealed or enjoined.

In this regard, this case is wholly unlike *NYSRPA, Inc. v. City of New York*, 140 S.Ct. 1525 (2020). In that case, the Court held that the case became moot when the

"State of New York amended its firearm licensing statute, and the City amended the rule" in such a manner as to accord the plaintiffs "the precise relief that [plaintiffs] requested in the prayer for relief in their complaint." (140 S.Ct. at 1526). There, it was literally impossible for the Court to grant relief and the plaintiffs had not sought damages. Not only had the City repealed the offending ordinance, "the State enacted a law making the old New York City ordinance illegal." (140 S.Ct. at 1528) (Alito, J., dissenting).

Here, in contrast, Hawaii has not repealed its statute. The Hawaii Attorney General (or her successor) could rescind her Opinion and return Hawaii to its "old ways" in an instant. An actual injunction is thus more than appropriate, as such an injunction would be binding on Hawaii, regardless of the views of this Attorney General or her successors. Alternatively, the Court could grant Young full declaratory relief, even without injunctive relief. *See, e.g.*, *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 121 (1974) (noting that even though events had effectively mooted the request for injunctive relief, "the parties to the principal controversy ... may still retain sufficient interests and injury as to justify the award of declaratory relief"); *Steffel v. Thompson*, 415 U.S. 452, 469 (1974) ("different considerations enter into a federal court's decision as to declaratory relief, on the one hand, and injunctive relief, on the other"). It is plainly not "impossible" for this Court to accord Young relief.

Indeed, there is no guarantee that the Attorney General's opinion will be sufficient, even in this case. Attorney General opinions "are not binding" as a matter of

Hawaii law, *Kepo'o v. Watson*, 87 Haw. 91, 99 n.9 (1998), and thus the respective county police chiefs are free to ignore the Attorney General's Opinion. Indeed, on its face, the Opinion simply purports to "advise" and recommend that chiefs "should" no longer limit concealed carry permits to the "exceptional case." Opinion at 6. Nothing in the Opinion purports to bind local officials. Nothing in the Attorney General's Opinion actually compels the County of Hawaii to take any action, much less action on Young's application for a permit. *See, e.g., Firefighters Local Union No. 1784 v. Stotts,* 467 U.S. 561, 585 (1984) (O'Connor, J., concurring) (collecting cases) ("When collateral effects of a dispute remain and continue to affect the relationship of litigants, the case is not moot.").

Moreover, the Supreme Court has "warn[ed] against accepting as 'authoritative' an Attorney General's interpretation of state law." *Stenberg v. Carhart*, 530 U.S. 914, 940 (2000). That warning is especially salient here. The Attorney General's Opinion was released publicly on July 10, 2022,[1] the day before the Defendants filed their opposition (but dated July 7, 2022). This is the second time in this case that the Attorney General has released a last-minute opinion for the obvious purpose of influencing these proceedings. For all the reasons courts are skeptical of voluntary cessation of illegal government conduct, *see*, *e.g.*, *Bell v. City of Boise*, 709 F.3d 890, 898 (9th Cir. 2013), courts should be even more skeptical of a non-binding Attorney General Opinion that runs

[1] https://ag.hawaii.gov/publications/ag-opinions/ (referencing 2022/07/10 as the date for the opinion).

contrary to actual practice. *See Young*, 992 F.3d at 856 (O'Scannlain, J., dissenting) (discussing the Attorney General's first opinion letter and noting "the State has not shown that it has taken any action to remedy the putatively 'incorrect' interpretation of section 134-9 that continues to be enforced in Hawaii County and throughout the state"). Furthermore, Young seeks "compensatory and punitive damages". *Young v. Hawaii*, 992 F.3d at 777. This "provide[s] the necessary redress for a completed violation of a legal right." *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 802, 209 L. Ed. 2d 94 (2021). Under *Uzuegbunam*, the fact that Young seeks damages also precludes mootness.

Finally, Hawaii argues that this Court should allow supplemental briefing on Young's Due Process Clause claim and prior restraint claim. The due process claim challenged the lack of a mechanism for appealing a chief's denial of an application for a permit and that due process requires some sort of hearing. *See Young*, 992 F.3d at 826. This Court affirmed dismissal on grounds that Young had not exhausted his administrative remedies. *Id.* at 827-28. The Court affirmed dismissal of the prior restraint claim on grounds that "the prior restraint doctrine does not apply to Second Amendment challenges involving firearm-licensing laws." *Id.* at 828.

Further briefing these two claims is pointless. There is no need to reach these other claims, as the Second Amendment claim is fully dispositive of this appeal and can accord Young full relief. Courts, including this Court, typically decline to reach other issues when one claim or issue is "dispositive" of the case. *See, e.g.*, *Pineda-Betancourt v. Wilkinson*, 835 Fed. Appx. 300, 302 (9th Cir. 2021) (mem); *Cassidy v. Colvin*, 2015 WL

720787 at *4 (N.D. Cal. 2015). While Hawaii wants briefing and reinstatement of these parts of the en banc opinion in order to provide "guidance" (Opp. at 5), Defendants are free to rely on the en banc Court's disposition of such claims, notwithstanding the vacature of the Court's judgment and remand for reconsideration in light of *Bruen*. Courts can assess the validity or merit of any such reliance in the unlikely event that there is a need to do so. There is no need to further drag out this litigation. Defendants' request for supplemental briefing should be denied. This Court should grant the motion for summary reversal. Enough is enough.

CONCLUSION

The Court should reverse the district court with instructions to enjoin the offending law and instruct the district court to order Defendants to issue Young his permit immediately.

Respectfully submitted, this the 14th day of July, 2022.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing complies with the type-volume, typeface, and type-style requirements of Federal Rule of Appellate Procedure 27 because it contains 2,264 words and was prepared using Microsoft Word 365 in Garamond 14-point font, a proportionally spaced typeface.

/s/ Stephen D. Stamboulieh
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CERTIFICATE OF SERVICE

I hereby certify that on July 14, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I also hereby certify that the participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Stephen D. Stamboulieh
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