IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANDREW NAMIKI ROBERTS, Plaintiffs-Appellants, v. AL CUMMINGS, in his Official Capacity as the State Sheriff Division Administrator; CLARE E. CONNORS, in her Official Capacity as the Attorney General of the State of Hawaii, Defendants-Appellees, and SUSAN BALLARD, in her Official Capacity as the Chief of Police of Honolulu County[1], Defendant.	No. 21-15562

APPELLANT'S REPLY TO APPELLEES' OPPOSITION TO PLAINTIFF-APPELLANT'S MOTION FOR SUMMARY DISPOSITION

COMES NOW, Plaintiff-Appellant Andrew Namiki Roberts, and files this, his Reply to Appellees' Opposition to Plaintiff-Appellant's Motion for Summary Disposition and replies as follows:

The Appellee's question this Court's jurisdiction under § 1291. Distilled down to the essence, the Appellees' argument is that at some point in the future, this case will be unstayed. According to them, because, at some undetermined point in the future,

[1] Defendant Ballard was dismissed in the district court on July 11, 2018. *See* Docket No. 28.

the case will be unstayed, it is not an indefinite stay, and thus, not appealable. But tellingly (and not surprisingly), they cannot pinpoint a specific time when the case will be unstayed. They claim that the "stay will only last as long as the Supreme Court proceedings in *Young* are pending, then the case may proceed." *See* Defs'. Opp. at p. 7. But they shouldn't make that claim because they don't know exactly when the district court will allow the case to proceed *on its own merits*.

Further, the history of the case disproves the Appellees' assertion. As briefed in Appellant's Motion, the district court's reasons for staying the case have come and gone, with no relief for the Appellant and then when the condition precedent to lift the stay is satisfied, the district court changes the reasoning for the stay. Based on the past practice of the district court, it is very likely that once this condition for lifting the stay has been satisfied, the district court will list yet another reason for why it needs to stay this case.

The Appellees also cite to a news article, the same one cited by the district court (which was not made an exhibit to any motion or reply or placed upon the docket of the district court by either party) for the proposition that *Young* will definitely be appealed to the Supreme Court. Until a petition has been filed, it hasn't been appealed to the Supreme Court and should not even be a consideration for the district court or this Court.

In any event, the Appellees' Opposition reads as if there is no currently controlling precedent in the Second Amendment realm. They claim "Supreme Court

review of *Young* could confirm the current Ninth Circuit law regarding the Second Amendment, or radically change it." *Id.* at p. 12. They also claim that "[b]oth parties are likely to suffer if the stay is reversed and proceedings in this case continue. Any litigation undertaken before resolution of the Supreme Court's proceedings in *Young* would lack the direction of controlling law, leaving the parties to guess at what the Court will hold on the relevant issues." *Id.* at p. 14. With all due respect, this position is wholly meritless. The central issue in *Young* is whether the Second Amendment right extends outside the home. The central issue in this case is whether electric arms are protected by the Second Amendment. That is an issue that has been widely litigated and a consensus has emerged.

Mr. Roberts raises the merits of his case to show the absurdity of Appellees' argument. As such, a brief recitation of the case law, as briefed in the district court, applied to the facts of this case, will be set forth herein:

H.R.S. §134-16 provides that "It shall be unlawful for any person, including a licensed manufacturer, licensed importer, or licensed dealer, to possess, offer for sale, hold for sale, sell, give, lend, or deliver any electric gun. …" This provision serves to outlaw the possession and use of Tasers and other electronic arms such as stun guns, even within home.

The Second Amendment protects bearable arms "commonly possessed by law-abiding citizens for lawful purposes". *See Fyock v. City of Sunnyvale*, 779 F.3d 991, 998, 2015 U.S. App. LEXIS 3471, *16. Forty-eight (48) states currently allow electric arms

possession. The parties stipulated that there are over 4.7 million electric arms owned by private citizens for the lawful purpose of self-defense.

Four courts to rule on electric arms have agreed they receive Second Amendment protection. "Having received guidance from the Supreme Court in *Caetano II*, we now conclude that stun guns are 'arms' within the protection of the Second Amendment". *Ramirez v. Commonwealth,* 479 Mass. 331, 337 (2018). *See also, People v. Yanna*, 297 Mich. App. 137 (2012) and *People v. Webb*, 2019 IL 122951. And each of these state courts then struck their state's bans on electric arms. A federal court in New York declared that "New York's sweeping prohibition on the possession and use of tasers and stun guns by all citizens for all purposes, even for self-defense in one's own home, must be declared unconstitutional in light of [*Heller*]." *Avitabile v. Beach*, 368 F. Supp. 3d 404, 421 (N.D.N.Y. 2019).

Hawaii's ban on electric arms, for all uses even in the home, is a categorical ban on a commonly used arm. Controlling Supreme Court precedent holds that a categorical ban on handguns within the home is unconstitutional. *See District of Columbia v. Heller*, 554 U.S. 570 (2008). In *Caetano v. Massachusetts*, 136 S. Ct. 1027 (2016), a **unanimous** Supreme Court issued a per curiam reversal of the Massachusetts Supreme Judicial Court's upholding of a ban on stun guns. Concurring in the opinion, Justice Alito stated, "While less popular than handguns, stun guns are widely owned and accepted as a legitimate means of self-defense across the country." *Caetano v. Massachusetts*, 136 S. Ct. 1027, 1033 (March 21, 2016) (Alito, J., concurring).

This case is not as complex and without precedent as Appellees suggest. Hawaii bans Tasers and stun guns in the home. *Heller*, which is still controlling law, holds that a categorical ban on handguns in the home is unconstitutional. *Caetano* then comes out in 2016 on the very issue of stun guns, and reverses the Massachusetts Supreme Judicial Court's upholding of its ban on stun guns.

This case does not need to be stayed pending whatever happens in *Young*. The primary issue in *Young* is whether and to what degree the Second Amendment right extends outside the home. Whatever happens in *Young*, it will not change the Second Amendment jurisprudence as applied to an in-home possession ban on an arm that has already been reviewed and struck down by numerous courts.

Appellees try to say this stay isn't indefinite, but this Court's precedent suggests that it is: The stay "term is indefinite … because the stay terminates upon the 'resolution of the [Ma] appeal,' if the Supreme Court should grant certiorari to review this court's decision in Ma, the stay could remain in effect for a lengthy period of time, perhaps for years if our decision in Ma is reversed and the case is remanded for further proceedings." *Hoeun Yong v. INS*, 208 F.3d 1116, 1119 (9th Cir. 2000).

Appellees' last argument is that the Hawaii legislature has pending legislation. Defs'. Opp. at p. 17. This has been done before, and again, nothing has happened. It strains credulity that a plaintiff coming into court with a complaint that he is being deprived of a constitutional right must yield to the legislature's will. "The constitution, therefore, declares, that the constitution itself, and the laws passed in pursuance of its

provisions, shall be the supreme law of the land, and shall control all State legislation and State constitutions, which may be incompatible therewith; and it confides to this Court the ultimate power of deciding all questions arising under the constitution and laws of the United States." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 400 (1819). Hawaii's ban violates an enumerated right. A right considered fundamental by the Supreme Court. *See McDonald v. City of Chi.*, 561 U.S. 742, 770, 130 S. Ct. 3020, 3038 (2010).

This Court should not countenance delay when fundamental rights are at stake. Appellees claim that "[t]his case is at a relatively early stage, when potential damage from a stay, if any, is 'minimal.'" Defs'. Opp. at p. 15. This case has proceeded through discovery, experts designated, and summary judgment fully briefed and a hearing on the summary judgment motion already has taken place. Whatever Appellees mean by a "relatively early stage" doesn't make sense.

The Appellees pile speculation upon conjecture to try to claim the stay isn't indefinite, but as briefed in Appellant's Motion, the stay is indefinite. This Court has jurisdiction under § 1291 because it is an indefinite stay and the district court has committed clear error and abused its discretion by indefinitely staying this case. This Court should lift the stay and remand for further proceedings.

CONCLUSION

The Court should reverse the district court's latest stay order and remand for further proceedings.

Respectfully submitted, this the 14th of April, 2021.

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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 1,434 words and was prepared using Microsoft Word 365 in Garamond 14-point font, a proportionally spaced typeface.

/s/ Stephen D. Stamboulieh
Stephen D. Stamboulieh

CERTIFICATE OF SERVICE

I hereby certify that on April 14, 2021, 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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