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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF HAWAII

ANDREW NAMIKI ROBERTS,

Plaintiff,

vs.

CLARE E. CONNORS, in her Official  
Capacity as the Attorney General of the  
State of Hawaii, and AL CUMMINGS,  
in his Official Capacity as the State  
Sheriff Division Administrator,

Defendants.

CIVIL NO. 18-00125 HG-RT

DEFENDANTS CLARE E. CONNORS  
AND AL CUMMINGS’  
MEMORANDUM IN OPPOSITION TO  
PLAINTIFF’S MOTION TO LIFT  
STAY AND RE-URGE SUMMARY  
JUDGMENT [ECF No. 84];  
DECLARATION OF CARON M.  
INAGAKI; EXHIBITS “A”-“E”;  
CERTIFICATE OF SERVICE

TRIAL: Vacated  
Honorable Helen Gillmor

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**DEFENDANTS CLARE E. CONNORS AND AL CUMMINGS’  
MEMORANDUM IN OPPOSITION TO PLAINTIFF’S MOTION TO  
LIFT STAY AND RE-URGE SUMMARY JUDGMENT [ECF No. 84]**

Defendants CLARE E. CONNORS,<sup>1</sup> in her Official Capacity as the Attorney General of the State of Hawaii, and AL CUMMINGS, in his Official Capacity as the State Sheriff Division Administrator (collectively “Defendants”), hereby oppose the Motion to Lift Stay and Re-urge Summary Judgment filed by Plaintiff ANDREW NAMIKI ROBERTS (“Plaintiff”) on March 24, 2021.

**I. BACKGROUND.**

On April 2, 2018, Plaintiff filed his Complaint challenging the constitutionality of Haw. Rev. Stat. § 134-16, which generally prohibits the possession and sale of electric guns. ECF 1, 3.

On December 17, 2018, the parties stipulated to stay the proceedings based on proposed legislation on electric guns pending before the 2019 session of the Hawaii State Legislature. ECF 41. Ultimately, the proposed legislation did not pass.

On August 2, 2019, Plaintiff filed his Motion for Summary Judgment. ECF 51. On September 4, 2019, Defendants filed their Cross-Claim for Summary Judgment and Memorandum in Opposition to Plaintiff’s Motion. ECF 54.

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<sup>1</sup> CLARE E. CONNORS is automatically substituted for RUSSELL SUZUKI pursuant to Fed. R. Civ. P. Rule 25(d).

On November 26, 2019, the District Court stayed the proceedings pending a decision by the U.S. Supreme Court in *New York Pistol and Rifle Association, Inc. v. City of New York*, No. 18-280 (U.S.). ECF 71. The Supreme Court eventually issued its decision on April 27, 2020. *See New York Pistol & Rifle Ass’n, Inc. v. City of New York*, 140 S. Ct. 1525 (2020).

On June 17, 2020, the District Court stayed the proceedings based on the pendency of the Ninth Circuit en banc proceedings in *Young v. Hawaii*, No. 12-17808 (9th Cir.). ECF 79. The Court also based the stay on the fact that legislation on electric guns was pending before the 2020 Hawaii State Legislature. *Id.*

On July 20, 2020, Plaintiff filed a Motion to Lift Stay. ECF 80.

On August 14, 2020, the District Court denied Plaintiff’s Motion to Lift Stay and decided to continue the stay pending a decision in *Young*. ECF 81, 82. The Court also relied on “the reasons previously stated in the Minute Order dated June 17, 2020.” ECF 82.

On March 24, 2021, the Ninth Circuit issued its en banc decision in *Young v. Hawaii*, No. 12-17808, 2021 WL 1114180 (9th Cir. Mar. 24, 2021) (en banc).

On March 24, 2021, Plaintiff filed the instant Motion to Lift Stay and Re-urge Summary Judgment. ECF 84.

On March 25, 2021, the District Court denied Plaintiff’s Motion to Lift Stay and Re-urge Summary Judgment, determining that it would not act until the *Young* proceedings have concluded.<sup>2</sup> ECF 85. The Court further noted that, according to a report from the Honolulu Star-Advertiser, Alan Beck, who is the plaintiff’s attorney in *Young*, and an attorney for Plaintiff in the present case, stated that Mr. Young will be asking the Supreme Court to review the *Young* decision. *Id.* See also Associated Press, *Ruling upholds Hawaii’s limits on carrying guns in public*, Honolulu Star-Advertiser (Mar. 24, 2021), <https://www.staradvertiser.com/2021/03/24/breaking-news/ruling-upholds-hawaiis-limits-on-carrying-guns-in-public/> (“George Young’s lawyer said he will ask the U.S. Supreme Court to review the case. ‘We are hopeful the Supreme Court will grant review in Mr. Young’s case,’ attorney Alan Beck said.”).

Plaintiff filed a Notice of Appeal from the denial of the Motion on March 26, 2021. ECF 86. Plaintiff also filed a Motion for Summary Disposition in the Ninth Circuit on March 31, 2021. 9th Cir. DktEntry 2-1. Defendants filed a Memorandum in Opposition to Plaintiff’s Motion for Summary Disposition on April 9, 2021. DktEntry 7-1. Plaintiff filed a Reply on April 14, 2021. DktEntry 8.

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<sup>2</sup> Because the Motion was ruled on the day after it was filed, Defendants did not have an opportunity to file a response at that time, thus necessitating the instant Memorandum in Opposition.

On April 26, 2021, the Supreme Court granted certiorari in another Second Amendment case—*New York State Rifle and Pistol Association v. Corlett*, No. 20-843 (U.S. April 26, 2021) (Order granting certiorari) (*See* Exhibit “A”).

On May 11, 2021, the Plaintiff in *Young v. Hawaii* submitted his Petition for Writ of Certiorari to the Supreme Court for filing. *See Young v. Hawaii*, No. \_\_\_\_ (U.S. submitted May 11, 2021) (Petition for Writ of Certiorari) (*See* Exhibit “B”). Consequently, beyond the statement made by his attorney to the news media, Mr. Young has actually submitted his Petition to the Supreme Court.<sup>3</sup>

Moreover, as of the current date, a bill that would repeal and replace Hawaii’s electric gun statutes and could moot the present case—House Bill (“HB”) 891—has been passed by both houses of the Hawaii State Legislature and is awaiting approval by the Governor. *See HB 891 Measure Status*, Hawaii State Legislature, [https://www.capitol.hawaii.gov/measure\\_indiv.aspx?billtype=HB&billnumber=891&year=2021](https://www.capitol.hawaii.gov/measure_indiv.aspx?billtype=HB&billnumber=891&year=2021) (last visited May 17, 2021) (*See* Exhibit “C”).

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<sup>3</sup> Thus, the suggestion that Plaintiff made to the Ninth Circuit in his Motion for Summary Disposition that the plaintiff in *Young*—also represented by Mr. Beck—might not appeal the case to the Supreme Court, notwithstanding the announcement to that effect to the news media, was not true. *See* Motion, DktEntry 2-1, at 5 (“[T]here is no end in sight because the district court has stayed Roberts’ matter pending the outcome of a non-related case **which** may or **may not be appealed to the Supreme Court** and then which may or may not be granted by the Supreme Court[.]” (emphasis added)).



On May 13, 2021, the Ninth Circuit entered an order remanding the case to the District Court. DktEntry 11. The Ninth Circuit noted that the challenged stay order did not set forth the District Court’s analysis or explain its weighing of the relevant factors. *Id.* The Ninth Circuit remanded for the limited purpose of allowing the District Court “to reconsider<sup>4</sup>] its decision and to set forth its reasons for whatever decision it reaches, so that [the Ninth Circuit] can properly exercise [its] powers of review.” *Id.*

The Ninth Circuit directed the District Court to issue its ruling on remand within 30 days of the order and directed Plaintiff to file a status report and/or motion for appropriate relief within 7 days of the District Court’s ruling. *Id.*

On May 19, 2021, the District Court authorized Defendants to file the instant Memorandum in Opposition, and the Court also authorized Plaintiff to file a Reply. ECF 92.

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<sup>4</sup> It is well settled that, on reconsideration, a District Court may consider “newly discovered evidence[.]” *See Kona Enterprises, Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000). Moreover, Defendants could not “reasonably have . . . raised [the new circumstances] earlier in the litigation” because Defendants were not given an opportunity to file a written response to Plaintiff’s Motion prior to the March 25, 2021 decision and the new events had not yet occurred. *See id.*

## II. ARGUMENT.

### A. The District Court Should Exercise its Discretion to Continue the Stay Pending the Supreme Court's Consideration of the *Corlett* and/or *Young* Cases.

“[A] District Court has broad discretion to stay proceedings as an incident to its power to control its own docket.” *Clinton v. Jones*, 520 U.S. 681, 706-07 (1997). Courts have 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). “The trial court possesses the inherent power to control its own docket and calendar.” *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).

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. 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.

*Leyva v. Certified Grocers of Cal., Ltd.*, 593 F.2d 857, 863-64 (9th Cir. 1979);

*Mediterranean Enterprises, Inc.*, 708 F.2d at 1465.

In considering whether to stay a pending proceeding, the court must balance “the interests of the parties, the public, and the court.” *Blue Cross & Blue Shield of Ala. v. Unity Outpatient Surgery Ctr., Inc.*, 490 F.3d 718, 724 (9th Cir. 2007).

Where it is proposed that a pending proceeding be stayed, the competing interests which will be affected by the granting or refusal to grant a stay must be weighed. Among those competing interests are the **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.

*Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1110 (9th Cir. 2005) (citing *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962)) (emphases added). *See also Matera v. Google Inc.*, Case No. 15-cv-04062-LHK, 2016 WL 454130, at \*1-\*5 (N.D. Cal. Feb. 5, 2016) (applying these factors as *Landis* factors, based on *Landis*, 299 U.S. at 254-55).

### 1. 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 staying these proceedings. *See id.* at \*1.

Supreme Court review of *Corlett* or *Young* could affect the current law applied by the Courts of Appeals regarding the Second Amendment. There are strong reasons to stay proceedings in these circumstances. 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.” *Hawaii v. Trump*, 233 F. Supp. 3d 850, 855 (D. Haw. 2017). Litigating this case without the Supreme Court’s controlling authority would “require[] the parties to expend significant time and expense to litigate issues . . . that may be completely invalidated by the [Court’s] decision.” *Karoun Dairies, Inc. v. Karlacti, Inc.*, Civil No. 08cv1521 AJB (WVG), 2013 WL 4716202, at \*3 (S.D. Cal. Sept. 3, 2013). 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 id.* (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 the District Court “reaches conclusions contrary to those reached by the [Supreme Court], it would result in significant confusion and would likely extend litigation in order to address the inconsistent decisions.” *See Karoun Dairies*, 2013 WL 4716202, at \*5.

## 2. Hardship or Inequity in Going Forward

Both 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 *Corlett*, or potentially *Young*, would lack the direction of controlling law, leaving the parties to guess at what the Court 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. A Supreme Court decision in *Corlett* or *Young* could potentially “require relitigation of this case in accordance with its ruling,” *see id.* 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.” *See Karoun Dairies*, 2013 WL 4716202, at \*3. The public would also be harmed by the uncertainty caused by conflicting decisions and the waste of time and resources needed to reconcile them. *See Blue Cross & Blue Shield of Ala.*, 490 F.3d at 724 (balancing, among other things, the interest of the public).

### 3. Possible Damage

Any possible damage from the granting of a stay is more than outweighed by the other two factors. In terms of work spent on this case, it is still at a relatively early stage, when potential damage from a stay would be “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.”). The case has not yet gone to trial. The only substantive motions filed have been Defendant SUSAN BALLARD’s Motion to Dismiss (which was essentially resolved by agreement) and the two pending Motions for Summary Judgment. The Court has not issued a decision on the Motions for Summary Judgment. Furthermore, Plaintiff never filed a Motion for a Preliminary Injunction and apparently does not fear any imminent concrete injury. *See id.* (“Like all litigants, Plaintiff has a substantial interest in obtaining a prompt adjudication of his claims and a determination of whether the conduct of which he complains warrants injunctive relief. However, Plaintiff has not moved for a preliminary injunction[.]”).

Based on the three interests described above, the District Court would be justified in exercising its discretion to continue the stay pending a Supreme Court decision in *Corlett* or *Young*. It should also be noted that staying cases pending a decision by the Supreme Court is not unusual—the Ninth Circuit has itself issued

such stays in the past. The Ninth Circuit en banc panel in *Young* did exactly that. *See Young v. Hawaii*, No. 12-17808 (9th Cir. Feb. 14, 2019) (en banc) (Order staying proceedings) (*See* Exhibit “D”). The Ninth Circuit also stayed an appeal pending a Supreme Court decision in *Consumer Financial Protection Bureau v. Cashcall, Inc.*, Nos. 18-55407 & 18-55479, 2019 WL 5390028 (9th Cir. Oct. 21, 2019) (Order staying proceedings). And in *Ganezer v. Directbuy, Inc.*, 571 F.3d 846 (9th Cir. 2009) (Order vacating and remanding), the Ninth Circuit vacated a District Court judgment and remanded with instructions for the District Court to stay the proceedings pending a Supreme Court decision.

The Ninth Circuit has already started staying Second Amendment cases based specifically on *Corlett*. The Ninth Circuit recently ordered that an appeal already set for oral argument be held in abeyance pending *Corlett*. *See Teter v. Connors*, No. 20-15948 (9th Cir. April 27, 2021) (Order holding case in abeyance) (*See* Exhibit “E”). This was ordered even though *Teter* relates to a ban on butterfly knives, while *Corlett* relates to concealed carry of firearms. Consequently, this Court would be justified in exercising its discretion to stay the present case as well.

**B. In Addition to Continuing the Stay Based on *Corlett* and/or *Young*, the District Court Should Continue the Stay Based on the Pending Legislation.**

Other stays previously issued in this case were based not only on the pendency of Second Amendment cases in the Supreme Court or in the Ninth

Circuit, but were also based on the fact that bills were pending in the Hawaii State Legislature that could significantly affect the regulation of electric guns in Hawaii. ECF 41, 79, 82. The amendments proposed in these bills represent a shift in approach from banning electric guns to regulating the sale of electric guns and could render this case moot.

At the present time, one such bill is on the verge of being enacted. House Bill (“HB”) 891 was introduced in the Legislature on January 27, 2021. *See HB 891 Measure Status* (Exhibit “C”). It passed the House Committee on Consumer Protection and Commerce on February 4, 2021. *Id.* It passed the House Committee on Judiciary and Hawaiian Affairs on March 3, 2021. *Id.* It passed the full House on March 9, 2021 and was transmitted to the Senate. *Id.* It passed the Senate Judiciary Committee on March 19, 2021. *Id.* It passed the full Senate with an amendment and was transmitted to the House on April 7, 2021. *Id.*

Due to a slight disagreement between the House and the Senate versions, it was sent to Conference Committee. *Id.* On April 23, 2021, the Conference Committee recommended that the bill be passed with amendments. *Id.* On April 27, 2021, both the House and the Senate voted on and passed the amended bill. *Id.*

On April 28, 2021, the bill was transmitted to the Governor. *Id.* The Governor could sign the bill at any time, but the latest date that he can sign it is July 6, 2021. *See Haw. Const. art. III, § 16* (45 business days after adjournment,



which was on April 29, 2021). It should be noted that this bill was originally part of the Governor's own legislative package. *See HB 891 Measure Status* ("Package: Governor").

Under such circumstances, it makes little sense to resume the proceedings in this case.

### **III. CONCLUSION.**

For the foregoing reasons, the District Court should again exercise its discretion to deny Plaintiff's Motion to Lift Stay when it complies with the Ninth Circuit's directive to reconsider its prior decision and to set forth its reasons on remand.

DATED: Honolulu, Hawaii, May 24, 2021.

*s/ Caron M. Inagaki*

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