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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

ANDREW NAMIKI ROBERTS Plaintiff, v. CLARE 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 Action No. 1:18-cv-00125-HG-RT)) PLAINTIFF'S REPLY TO DEFENDA-) NTS' OPPOSITION TO PLAINTIFF'S) MOTION TO LIFT STAY AND RE-) URGE SUMMARY JUDGMENT [93];) CERTIFICATE OF SERVICE))))) JUDGE: Hon. Helen Gillmor)) TRIAL: Vacated) HEARING: November 26, 2019

PLAINTIFF'S REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION TO LIFT STAY AND RE-URGE SUMMARY JUDGMENT

Plaintiff will point out one omission in Defendants' recitation of the background. In Plaintiff's July 27, 2020 Motion to Lift Stay [ECF #80], the Defendants did not oppose the requested relief. Of course, now the Defendants provide a full-throated defense of this Court's stay order.

An indefinite stay places a litigant out of court. "[L]engthy and indefinite stays place a plaintiff effectively out of court. Such an indefinite delay amounts to a refusal to proceed to a disposition on the merits." *Blue Cross & Blue Shield of Ala. v. Unity Outpatient Surgery Ctr., Inc*., 490 F.3d 718, 724 (9th Cir. 2007). This Court continues to stay the matter pending some other condition precedent since November 26, 2019. First it was the Supreme Court's resolution in *New York Rifle*. Then it was the Ninth Circuit's en banc resolution in *Young v. Hawaii,* No. 12-17808, and that maybe the legislature would act a second time. Now it is the actual conclusion of *Young*, and only the Supreme Court knows how long that will take. *See Landis v. N. Am. Co*., 299 U.S. 248, 257, 57 S. Ct. 163, 167 (1936) ("When once those limits have been reached, the fetters should fall off… [a]n order which is to continue by its terms for an immoderate stretch of time is not to be upheld as moderate because conceivably the court that made it may be persuaded at a later time to undo what it has done").

Let it be clear, the Plaintiff has not called into question a district court's ability to control its own docket. That is black letter law and Plaintiff does not challenge that. But what a district court cannot do is place a plaintiff out of court with an indefinite stay. This is what has occurred here. The Defendants claim this Court should continue the stay for four reasons and none of them are valid.

First, they claim "Supreme Court review of *Corlett* or *Young* could affect the current law applied by the Courts of Appeals regarding the Second Amendment." *See* Opp. Memo. at p. 7. Both of those cases hinge on whether the Second Amendment applies outside the home. As this Court is aware, the instant case is whether Hawaii's ban on electric arms violates the Second Amendment. The Defendants seem to allege that "controlling law is unclear." *Id*. But this is an issue that has been widely litigated and a consensus has emerged and there is no lack of clarity.

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 already 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, "[w]hile 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 Defendants 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 came out in 2016 on the very issue of stun guns and reversed the Massachusetts Supreme Judicial Court's upholding of its ban on stun guns. Where is this supposed lack of clarity that a ruling in a handgun carry case for outside-the-home carry would help?

Defendants next argument is that "[b]oth parties are likely to suffer if the stay is reversed and proceedings in this case continue." *See* Opp. Memo. at 9. What an extraordinary statement! A Plaintiff has come into court alleging a constitutional violation, and the Defendant claims that the Plaintiff will suffer if his case goes forward. The Defendants completely ignore Plaintiff's constitutional rights. The Plaintiff suffers through this stay. Plaintiff's rights deserve to be vindicated in this Court and just because it is a Second Amendment right at issue does not mean that it is a second-class right. *See McDonald v. City of Chi*., 561 U.S. 742, 780, 130 S. Ct. 3020, 3044 (2010).

"It is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Why haven't the Defendants addressed this in their response? It is because it cuts to the heart of the stay and demonstrates why the continued stay is error.

Defendants' third argument is a downplaying of the posture of this case. Summary judgment has been briefed and a hearing held. Discovery has been completed. The Defendants claim "the case has not yet gone to trial". Opp. Memo. at 10. But not having gone to trial isn't the test here. Neither is Plaintiff not moving for a preliminary injunction. *Id*. A preliminary injunction is not a condition precedent for having the Court rule on a motion for summary judgment.[1] In any event, the "possible damage from the granting of a stay"[2] is the continued infringement of Plaintiff's rights, which the Defendants conveniently ignore.

Lastly, the Defendants cite to cases that have been stayed and point to *Teter v. Connors*, No. 20-15948 (9th Cir. April 27, 2021) which was stayed by the Ninth Circuit recently. *Teter v. Connors* was not stayed in the district court, despite this matter being stayed. *Teter* was filed on April 10, 2019 in this Court. *See Teter, et al., v. Clare E. Connors, et al*, Civil Action No. CV19-00183-ACK-WRP. Summary judgment motions were filed and a hearing was held. The Honorable Judge Kay issued his ruling on May 13, 2020. [Docket No. 61, Filed May 13, 2020]. In any

[1] "… [The Supreme Court] has cautioned, a federal court's 'obligation' to hear and decide a case is 'virtually unflagging.'" *Sprint Communs., Inc. v. Jacobs*, 571 U.S. 69, 77, 134 S. Ct. 584, 591 (2013) (additional citation omitted).

[2] Whatever is meant by the "granting of a stay", it doesn't make any sense. The case is currently stayed. The case has been stayed since after the hearing on the summary judgment motions.

event, *Teter* has been stayed in the Ninth Circuit for a grand total of less than a month so far.

In *Todd Yukutake, et al. v. Clare E. Connors, et al.*, Civil Action No. 19-00578-JMS-RT, on October 30, 2020, The Honorable Chief Judge Seabright stayed the matter pending the outcome of the en banc decision in *Young* [See Dockets #77 and #79]. The day after *Young* was decided, the almost five-month stay was lifted [See Docket #80] and the case is progressing. Why does this case need to be stayed?[3]

And in their final argument, Defendants point to legislation that has passed and "transmitted to the Governor". Opp. Memo. at 12. And if the Governor signs this bill, it still doesn't go into effect until January 1, 2022[4] and there will be no relief until next year. How long does a plaintiff have to wait to have his rights vindicated? Mr. Roberts filed his case on April 2, 2018 and has been stayed since November 26, 2019. It is an indefinite stay. The stay "term is indefinite … because the stay terminates upon the 'resolution of the [*Young*] appeal,' if the Supreme Court should

[3] From November 26, 2019 until this reply was filed, the days of the stay are calculated at 548 days; or 1 year, 6 months and 1 day; or 18 months and 1 day.

[4] But maybe it won't be signed by the Governor because if this bill passes, electric livestock cattle prods will be illegal: (See https://www.capitol.hawaii.gov/session2021/bills/HB891_CD1_.pdf removing exemption for "electric livestock prod", page 24). The legislature could have also inadvertently banned electrical stimulation devices for physical therapy/chiropractic therapy ("'Electric gun'" means any portable device that is designed to discharge electric energy, charge, voltage, or current into the body through direct contact or utilizing a projectile.")

grant certiorari to review this court's decision in [*Young*], the stay could remain in effect for a lengthy period of time, perhaps for years if our decision in [*Young*] is reversed and the case is remanded for further proceedings." *Hoeun Yong v. INS*, 208 F.3d 1116, 1119 (9th Cir. 2000) (substituting *Young* in brackets).

This case does not need to be stayed pending whatever happens in *Young* (or *Corlett*). The primary issue in *Young* (and *Corlett*) is whether and to what degree the Second Amendment right extends outside the home. Whatever happens in *Young/Corlett* 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.

Wherefore, premises considered, Plaintiff requests that the stay be lifted and the Court to rule on Plaintiff's Motion for Summary Judgment [ECF # 51].

Dated: May 26, 2021.

Respectfully submitted,

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