21-1658

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

JOHN DOES 1-10,

Plaintiff-Appellant,

—against—

SUFFOLK COUNTY, NEW YORK,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK (CENTRAL ISLIP)

APPELLEE'S BRIEF IN OPPOSITION TO APPELLANTS' MOTION FOR PRELIMINARY INJUNCTION

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PRELIMINARY STATEMENT

Defendant-Appellee the County of Suffolk ("the County") (sued herein as Suffolk County, New York) submits this brief in opposition to the motion of Plaintiffs-Appellants "John Does" 1-10 ("the Does") for a preliminary injunction pending determination of their appeal from the Memorandum of Decision and Order of the United States District Court of the Eastern District of New York, the Hon. Gary R. Brown presiding, dated June 26, 2021, and permission to proceed anonymously.

Critically, no Court of the State of New York has ever held that the Delta Level Defense CT4-2A ("CT4-2A") is not a prohibited assault weapon under N.Y. Penal Law § 265.00 et seq. Nevertheless, this action by the Does, who remain unidentified, turns on their categorical assertion that the CT4-2A is not an assault weapon as that term is defined by § 265.00 (22), and therefore the County's alleged policy of asking that the firearms be presented for inspection and disposition is unconstitutional. [1] District Court rightfully dismissed the action, observing that the

[1] The Does contend that that the County's intention, as expressed in the letters they received from the Police Department, is to confiscate their CT4-2As and arrest them for their possession. No such policy is stated in the letters. The letters plainly require only that the firearms be presented for "inspection" and "disposition", and that no one who complies will be arrested for possessing the weapon. None of the Does claim to have been arrested even though the first letters were sent out over two months ago.

Does "would have this Court usurp the functions of state judges and juries, by declaring" the CT4-2A is not an assault weapon under New York State Law (pp. 4-5, Memorandum of Decision and Order).

The Does now ask this Honorable Court to grant the preliminary injunction that the court below declined to issue. Although not an aspect of a preliminary injunction, they also request that they be allowed to prosecute this action anonymously.

While the dismissal of the complaint eliminated the need for District Court to pass upon their application for a preliminary injunction, Judge Brown nevertheless cogently explained why the Does fail to establish that they are entitled to injunctive relief to abide the case. They fail to demonstrate a likelihood of success on the merits, His Honor noted, because the temporary enjoinder of state investigations and prosecutions under the New York Penal Law they seek is beyond the jurisdiction of the federal courts. Granting the preliminary injunction demanded would tread on "separation of powers concerns" in that it would interfere with the free exercise of prosecutors' discretionary powers over their prosecutions, and called for a first impression interpretation of state law (pp. 3-4). Furthermore, the constitutional prohibition against advisory opinions proscribes the preliminary injunction requested since the arrests and prosecutions purportedly feared by the Does are entirely "theoretical" (p. 5).

The Court below also indicated that the Does' motion was "procedurally defective" under Fed. R. Civ. P. 10 (a) due to their failure to name themselves in the title of the complaint and provide more than a "threadbare" justification for doing so (p.2).

After the Does' previous emergency motion (docket entry no.14) was denied on July 23, 2021 without prejudice to renewal due to their failure to comply with Fed. R. App. P. 8 (a) (1) (docket entry no. 36), the Does returned to District Court, filing at one page letter motion asking for a "stay of the June 23, 2021 Order". The lower Court noted that "it is unclear the nature of the relief plaintiffs are seeking." The Court denied the motion on the grounds that the Does could not establish that the lack of a stay would cause irreparable injury; the Court could not assess the effect of a stay on any parties or on the public interest; and its "considered view" that the Does are unlikely to prevail on the merits.

Evidently, the arrests and prosecutions forecasted by the Does remain entirely theoretical, since in again moving this Court for a preliminary injunction, they point to no actual arrest or prosecutions.

The correctness of District Court's Memorandum and Decision of Order warrants denial of the extraordinary temporary relief they now seek.

LEGAL STANDARD

A District Court's grant or denial of a preliminary injunction is reviewed for abuse of discretion. *Woodstock Ventures, LC v. Woodstock Roots LLC*, 837 F. App'x 837, 838 (2d Cir. 2021) citing *SG Cowen Sec. Corp. v. Messih*, 224 F.3d 79, 81 (2d Cir. 2000). "Such an abuse of discretion ordinarily consists of either applying an incorrect legal standard or relying on a clearly erroneous finding of fact." *Woodstock Ventures, LC*, 837 F. App'x 837 quoting *Jolly v. Coughlin*, 76 F.3d 468, 473 (2d Cir. 1996) (quoting *King v. Innovation Books, a Div. of Innovative Corp.*, 976 F.2d 824, 828 (2d Cir. 1992)).

The standard for a grant of a preliminary injunction is "demanding." *Woodstock Ventures, LC*, 837 F. App'x 837. "[I]njunctive relief [is] an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Id.*, quoting *Salinger v. Colting,* 607 F.3d 68, 79 (2d Cir. 2010) (quoting *Winter v. Nat. Res. Def. Council, Inc.,* 555 U.S. 7, 22, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008)). Such relief should not be granted "unless the movant, by a clear showing, carries the burden of persuasion." *Id.*, quoting *Mazurek v. Armstrong*, 520 U.S. 968, 972, 117 S. Ct. 1865, 138 L. Ed. 2d 162 (1997).

The appellate court is free to affirm the denial of a preliminary injunction "on any ground [that] finds support in the record." *No Spray Coal., Inc. v. City of New*

York, 252 F.3d 148, 150 (2d Cir. 2001) quoting *Beal v. Stern*, 184 F.3d 117, 122 (2d Cir. 1999).

A district court's decision to grant or deny the sealing of a record is reviewed for abuse of discretion. *Anonymous v. Medco Health Sols., Inc*., 588 F. App'x 34, 56 (2d Cir. 2014) citing *United States v. Doe*, 63 F.3d 121, 125 (2d Cir. 1995). A "presumption of immediate public access attaches [to some judicial documents] under both the common law and the First Amendment." *Anonymous*, 588 F. App'x 34. The presumption of public access "can be overcome only by specific, on-the-record findings that higher values necessitate a narrowly tailored sealing." *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 126 (2d Cir. 2006).

POINT I

DISTRICT COURT CORRECTLY REFRAINED FROM ADDRESSING THE MOTION

Judge Brown pinpointed three insurmountable obstacles preventing the Does from succeeding on the merits. Specifically, those hurdles are that granting the relief sought would a) exceed the authority of the federal courts under *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908) and *Rizzo v. Goode*, 423 U.S. 362, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976); b) "tread[] on separation of powers concerns" since the judiciary cannot interfere with prosecutors' control over their prosecutions;

and c) transgress the Constitution's prohibition on advisory opinions as the alleged anticipated arrests and prosecutions were "squarely in the realm of the theoretical" (p. 5).

Although District Court did not actually rule that it was required to abstain from adjudicating the dispute under *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), the Does assert that the denial of temporary relief was in error because *Younger* abstention does not apply. Leaving this discontinuity aside for the moment, the Does proffer three reasons why *Younger* abstention supposedly does not apply to their motion: a) they claim to challenge a policy as opposed to a state statute; b) there are no pending prosecutions against them; and c) the inchoate prosecutions would fall within the bad faith/retaliation exception to *Younger* abstention.

The first of these arguments elevates form over substance. Whether or not the County "policy", as the Does characterize it, abridges their constitutional rights turns on whether the CT4-2A is an "assault weapon" as that term is defined by § 265.00 (22), a state statute. If the weapon is an "assault weapon", possession of which is criminal under N.Y. state law, then it is a New York state statute that the Does actually challenge. It is only if the CT4-2A is not an illegal assault weapon under the N.Y. Penal Law that County policy is the true target of this action. See *Juzumas*

v. Nassau Cty., 417 F. Supp. 3d 178, 186–187 (E.D.N.Y. 2019) (county cannot be held liable for enforcing state law).

In either case, the present motion cannot be adjudicated without resolving the question of whether the CT4-2A is an assault weapon under New York law, a question not yet addressed by the courts of the State of New York.

The Does' second and third contentions are circular and contradictory. They implore the Court to protect them from what they argue is a looming likelihood of arrest and prosecution pursuant to New York State statute. Simultaneously, they argue that the predicted actions of the prosecutors and police for which they sue are so divorced from state criminal prosecution that *Younger* abstention does not preclude the federal courts from intervening in those criminal law enforcement activities. In plain language, they cannot expect to have it both ways.

In any event, District Court did not explicitly rely on *Younger* in declining to determine the Does' motion for preliminary injunctive relief. Rather, the court below held that it would exceed its authority and tread on separation of powers concerns to embroil itself in state prosecutorial matters by granting the relief requested (pp. 2-3).

Last, the Does offer no palpable support for their suggestion that the bad faith/retaliation exception to *Younger* applies: they merely proclaim that the exception fits. None of the several anonymous declarations submitted in support of

the motion below present any evidence of ill motivation on the part of prosecutors or police. Such barebones, superficial assertion of an unsavory motive fails to except this case from *Younger*. *Schorr v. Dopico*, 205 F. Supp. 3d 359, 364 (S.D.N.Y. 2016), *aff'd*, 686 F. App'x 34 (2d Cir. 2017) (S.D.N.Y. 2016) ("Without specific and plausible allegations supporting the complaint's allegation of bad faith, the case is subject to *Younger* abstention"). See also *Astoria Gen. Contracting Corp. v. Off. of Comptroller of City of New York*, 159 F. Supp. 3d 385, 398 (S.D.N.Y. 2016) (party invoking the bad faith exception must prove that "state proceeding was initiated with and animated by a retaliatory harassing or other illegitimate motive.").

POINT II

THE DOES HAVE NOT SHOWN THAT THEY ARE LIKELY TO PREVAIL ON THE MERITS

"[I]njunctive relief [is] an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Woodstock Ventures, LC v. Woodstock Roots LLC*, 837 F. App'x 837, 838 (2d Cir. 2021) quoting *Salinger v. Colting*, 607 F.3d 68, 79 (2d Cir. 2010) (quoting *Winter v. Nat. Res. Def. Council, Inc*., 555 U.S. 7, 22, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008). Such relief should not be granted "unless the movant, by a clear showing, carries the burden of persuasion." I*d.*, quoting *Mazurek v. Armstrong*, 520 U.S. 968, 972, 117 S. Ct. 1865, 138 L. Ed. 2d 162 (1997).

Clearly, as the County now explains, the Does have not shown an entitlement to the extraordinary remedy of a temporary injunction pending disposition of their appeal.

A. The CT4-2A is Not a Legal Weapon.

The Does argue that the CT4-2A cannot be an illegal assault weapon prohibited under § 265.00 (22) because it is not a pistol, rifle or shotgun, or made from a pistol, rifle of shotgun.

The contention that the CT4-2A is not a pistol and therefore not an assault weapons is so inconsistent with New York Law as to border on the frivolous. Tellingly, the Does do not point to any section of the New York Penal Law as the basis for their assertion that the CT4-2A is not a pistol. Although N.Y. Penal Law § 265.00 includes definitions of rifle and shotgun at subsections 11 and 12 respectively, it contains no definition of "pistol." In fact, "[n]o particular form or shape is necessary to constitute a pistol" under New York law. *People v. Ande*rson, 236 A.D. 586, 589, 260 N.Y.S. 329 (App. Div. 1932). Nor is there any statutory support for excluding the CT4-2A from the category of pistols on the basis that it was not designed or intended to be fired with one hand. On the contrary, § 265.00 (22) (c) (ii) explicitly defines a semi-automatic pistol with a second or protruding handgrip that can be held by the non-trigger hand as an assault weapon. The Does' other hypothesis- that the CT4-2A cannot be an assault weapon because it is not

designed for concealment and only concealable guns must be licensed- turns logic on its head. The definition of assault weapons at § 265.00 (22) includes specified shotguns and rifles, two types of weapons that are not readily concealable. Moreover, by definition, assault weapons are *per se* illegal and therefore cannot be licensed to civilians regardless of their size.

Truly, the CT4-2A is an assault weapon under the New York Penal Law because it is semi-automatic, accepts a detachable magazine, has a second handgrip and has a manufactured weight of over 50 ounces when unloaded, a characteristic of an assault weapon pursuant to § 265.00 (22) (c) (vii) [2]

The Does' argument that the CT4-2A is alternatively not a rifle because it has a forearm brace and is therefore not intended to be fired from the shoulder as contemplated by § 265.00 (11) is also flawed. It is the objective features of a firearm configured with a stabilizing brace that determine whether or not it is a rifle, not the mere presence of a stabilizing or arm brace alone. https://www.federalregister.gov/documents/2021/06/10/2021-12176/factoring-criteria-for-firearms-with-attached-stabilizing-braces (The "ATF's longstanding and publicly known position is that a firearm does not evade classification under the [National Firearms Act] because the firearm is configured with a device marketed

[2] According to Delta Level Defense's website at http://www.deltaleveldefense.com/ct4-2a-other-firearm, the manufactured weight of the CT4-2A is 4.5 to 6.5 pounds.

as a 'stabilizing brace' or 'arm brace.' … Accordingly, ATF must evaluate on a case-by-case basis whether a particular firearm configured with a 'stabilizing brace' bears the objective features of a firearm designed and intended to be fired from the shoulder and is thus subject to the NFA. The use of a purported 'stabilizing brace' cannot be a tool to circumvent the NFA (or the [Gun Control Act]) and the prohibition on the unregistered possession of 'short-barreled rifles.'") [3]

B. Alternatively, Holding that the CT4-2A is a Legal Weapon Would Require Interpreting New York State Law as a Matter of First Impression.

The Does offer several reasons why, in their opinion, the CT4-2A should not be classified as a pistol or rifle under the New York Penal Law. Yet, the inescapable fact remains that, as recognized by District Court, the Courts of New York State have never so held ("Worse yet, this case seeks a determination from this Court interpreting state criminal laws without the benefit of, and in anticipation of, potential interpretations by state courts in contemplated criminal proceedings. Plaintiffs would have this Court usurp the functions of state judges and juries by declaring, in their words, that the Delta Level Defense CT4-2A Other Firearm is not a firearm, pistol, rifle, shotgun, or assault weapon as defined by Penal Law § 265.00

3 The Bureau of Alcohol, Tobacco and Firearms has proposed an amendment to 21 C.F.R 478.11 and 479.11 to modify the definition of "rifle" to clarify that it can include weapons with an attached "stabilizing brace" that has objective design features and characteristics that indicate that the firearm is designed to be fired from the shoulder.

…It is difficult to imagine an act that could further offend the principles of comity.") (pp. 4-5) (internal quotation marks omitted).

That the firearm is purportedly not an assault weapon under the statutes of other jurisdictions is not dipositive as to the meaning of § 265.00 (22) and is obviously not a substitute for a New York court ruling that the weapon is not a pistol or rifle under the New York Penal Law.

C. The Does Have Failed to Show That Their Constitutional Rights Are Implicated.

Insofar as the CT4-2A is an illegal assault weapon under state law, it is contraband *per se* and there is no constitutional interest in its possession. *Illinois v. Caballes*, 543 U.S. 405, 408, 125 S. Ct. 834, 837, 160 L. Ed. 2d 842 (2005) ("interest in possessing contraband cannot be deemed 'legitimate'").

Even if the lawfulness of the firearm were questionable, the Does fall far short of demonstrating the likelihood of their constitutional rights being violated by the policy. They have presented no evidentiary support for the conclusion that they will be permanently deprived of their firearms without compensation. Nothing in the letters received by them (Exhibit 1) states that the weapons will be permanently retained by the County without compensation. Nothing prevents the return of the guns to the owners if their possession is determined to be lawful.

Above all, the letters state unequivocally that the recipients "will not be charged with any crime(s) related to the purchasing of this firearm, should you

comply with this request and present the firearm to the Suffolk County Police Department, pursuant to this letter." It is only if the recipient "fail[s] to present the weapon" that they may be subject to arrest and criminal charges for the "purchase and continued possession of said firearm." (Exhibit 1). Thus, it is entirely within the Does' control whether they choose to trigger their own arrests.

Furthermore, to the extent that the Does fail to show that the policy mandates permanent dispossession without compensation, the Fourteenth Amendment does not necessarily compel a pre-deprivation hearing. *Razzano v. County of Nassau*, 765 F.Supp. 2d 176, 186 (E.D.N.Y. 2011) (pre-deprivation process may not be required for "exigent circumstances" created by need to seize guns).

POINT III

NO NEED FOR A TEMPORARY INJUNCTION HAS BEEN ESTABLISHED

Granted, "a strong showing of a constitutional deprivation that results in non-compensable damages ordinarily warrants a finding of irreparable harm." *A.H. by & through Hester v. French*, 985 F.3d 165, 176 (2d Cir. 2021). The Does however do not establish an actual constitutional deprivation or resultant non-compensable damages. Additionally, the public interest would not be furthered by imposing an injunction pending appeal.

A. No Harm Warranting This Court's Intervention is Demonstrated.

None of the Does claim to have been arrested. In fact, they do not identify anyone who has been arrested due to the County's enforcement of New York's assault weapons prohibition. They do not allege that any of their CT4-2As were seized without compensation. Notwithstanding, they attempt to liken themselves to plaintiffs in *Jefferson v. Rose*, 869 F. Supp. 2d 312 (E.D.N.Y. 2012) and *Young v. New York City Transit Authority*, 903 F.2d 146 (2d Cir. 1990), to shore up their clearly dubious assertion that they face an actual and imminent threat of irreparable harm.

Correctly, the "policy" they contest is not comparable to the government actions challenged in *Jefferson* and *Young*. The constitutionality of New York Penal Law sections was at bottom in both of those cases. In distinction, the Does do not, at least not overtly, take issue with New York's assault weapons ban. Rather, they characterize their attack as one against only the County's interpretation of the statute to include CT-42As, necessitating a judicial interpretation wholly of state law before the constitutional question can be reached. Again, District Court rightfully recognized that the federal courts are not the correct forum to conduct this analysis in the first instance.

Perhaps the obligation to show irreparable harm may be less where a plaintiff claims that their constitutional rights will be abridged. However, the Does cite no

authority for the notion, inherent in their position, that raising a constitutional challenge permits the federal courts to engage in otherwise inappropriate and unnecessary interpretation of state law.

B. The Does Have Not Shown That a Temporary Injunction is in The Public Interest.

The Does' thesis that a temporary injunction is in the public interest cannot be accepted without also accepting their contention that the CT4-2a is a legal weapon under New York state law. Again, this foundational assertion is incorrect and depends on the meaning of state law.

Beyond that, it is simply cannot reasonably be said that the public interest weighs in favor of those who wish to possess these semi-automatic pistols, and against the government's interest in regulating the possession of lethal weapons.

POINT IV

THE DOES' MOTION TO HIDE THEIR IDENTITIES IS WITHOUT MERIT

District Court did not engage in the balancing test of *Sealed Plaintiff v. Sealed Defendant*, 537 F.3d 185 (2d Cir. 2008), nor did it need to. The Does did not move below to proceed anonymously and the complaint was dismissed ("plaintiffs proceeded anonymously without leave of court") (p. 2).

There is still no compelling need to address the request at this juncture. The action has been dismissed. If a preliminary injunction is to be denied, it remains to be seen whether they Does will perfect their plenary appeal. Unless this case proceeds further, their request to remain anonymous will essentially be academic.

Nevertheless, the balance of the *Sealed Plaintiff* factors do not weigh in favor of the Does' pleas for secrecy. The public interest in knowing the litigants' identities is not weak. If the possession of CT4-2As is lawful under New York State law, then there is no harm in the Does' identities being known. On the other hand, if the weapons are illegal assault weapons, the public is entitled to know who possesses such firearms. The supposed risk of retaliatory physical or mental harm is utter speculation in the absence of any supporting evidence. Moreover, the Does do not claim that the public, as opposed to County law enforcement personnel, pose any threat to them whatsoever. The matters at issue are neither highly sensitive or personal. *Id.* at 190. While the defendant is a government entity, that factor alone is not dispositive as to deem it so "would lead inappropriately, to granting anonymity to any plaintiff suing the government to challenge a law or regulation." *Plaintiffs # 1-21 v. Cty. of Suffolk*, 138 F. Supp. 3d 264, 277–78 (E.D.N.Y. 2015) quoting *Doe v. Merten*, 219 F.R.D. 387, 394 (E.D. Va. 2004).

CONCLUSION

Plaintiffs-Appellants' motion for a preliminary injunction pending determination of their appeal from the Memorandum of Decision and Order of the United States District Court of the Eastern District of New York, the Hon. Gary R. Brown, presiding, dated June 26, 2021, and permission to proceed anonymously, should be denied in its entirety.

Dated: Hauppauge, New York
July 30, 2021

Respectfully submitted,

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By: */s/ Arlene S. Zwilling*
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CERTIFICATION

Arlene S. Zwilling certifies that the following statements are true: The attached document complies with the type-volume limitations of Federal Rule of Appellate Procedure 27(d) (2). The word processing program used in the production of the within brief is Microsoft Word, which has determined that the within defendants-appellees Brief contains 3,793 words. The type font for the text of the brief is Times New Roman and the point size is 14 points. The type font for the Table of Contents and Table of Authorities and footnotes if applicable is Times New Roman and the point size is 14 points. All text, except block quotations that are more than two lines, are in double spaced type.

/s/ Arlene S. Zwilling

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