No. 21-15562

In the United States Court of Appeals for the Ninth Circuit

ANDREW NAMIKI ROBERTS

Plaintiff-Appellant,

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,

Defendant.

Appeal from the United States District Court
For the District of Hawaii,
Civ. No. 18-cv-00125-HG-KSC
United States District Court Senior Judge Helen Gillmor

Appellant's Reply Brief

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INTRODUCTION

The Defendants-Appellees' Answering Brief attempts to paint a picture that Mr. Roberts' appeal (and Mr. Roberts' case below) is moot. But, as explained in Mr. Roberts' Opening Brief and further here, it is not moot at all. Mr. Roberts' has a live claim for damages, and Defendants-Appellees' assertion that H.R.S. § 134-51 does not apply to the carry of electric weapons (but then arguing in the alternative that even if it does, it does not matter because home possession of electric weapons would be allowed and thus, ignoring the actual Complaint at issue) is not as well-settled as Defendants-Appellees would like this Court to believe. It is nice though, that the Defendant-Appellee Attorney General has essentially provided an opinion on whether H.R.S. § 134-51 prohibits the carry of electric weapons, but as will be explained later, it is a volte-face from her previous filing in her Cross Motion for Summary Judgment, and in any event, is not binding on either this Court or the Hawaii Legislature.

I. H.R.S. § 134-51 May or May Not Apply to the Carrying of Electric Arms

The Defendants state that "Section 134-51 also does not amount to a ban on electric guns. Section 134-51 prohibits the carrying, concealed or unconcealed, of certain enumerated weapons and other "deadly or dangerous weapon[s]." Pursuant to a well-established line of Hawai'i cases, an electric gun is not a "deadly or dangerous weapon" under the statute. While electric guns are instruments designed to inflict

bodily injury, they also have "normal or lawful use[s]" and "have recognized uses of a socially acceptable nature." Defs.' Br. at 12.

There are curious issues with this statement. None of the cases cited discuss electric arms, because electric arms have been banned in Hawaii and are still banned, at least until the new law goes into effect on January 1, 2022. It is good that the Defendants have finally acknowledged that electric arms have "normal or lawful use[s]". But opinions of attorney generals "cannot by itself establish 'clearly established law[]'" and "the courts are not bound by an Attorney General's opinions, although they are generally regarded as highly persuasive" *Price v. Akaka*, 3 F.3d 1220, 1225 (9th Cir. 1993) (citations and punctuation omitted).

There is an open question as to why the Defendants argued the exact opposite in the district court. FER003 (Heading: "1. Electric Guns are Dangerous and Unusual Weapons" and "Electric guns are 'dangerous' because, even if they are less lethal than firearms, they can still cause death"). FER003. And then, "electric arms are dangerous in a way that is unique to them, and which is not shared by ordinary firearms. Electric guns, when used improperly and without adequate controls, can be used as instruments of torture." FER005. And also that "electric guns are also not 'typically' used for the remaining 'lawful' purpose – self-defense." FER006.

So now, electric weapons have "normal or lawful use[s]" and "have recognized uses of a socially acceptable nature[]" (Defs.' Br. at 12), but in the district court electric weapons were torture machines and dangerous and unusual weapons. FER003-

FER006. These positions are simply irreconcilable. If they are "normal and lawful", then H.R.S. § 134-51 won't apply and carry of electric weapons outside the home is lawful and Mr. Roberts has nothing to worry about. But if, as the Defendants argued in their cross-motion, they are dangerous and unusual weapons, not protected by the Second Amendment and probably torture machines, then if Mr. Roberts carries one (when they are legal to purchase, which is still not yet), then he will likely be arrested for carrying under Section 134-51. Either way, the Court should "declare the rights and other legal relations of any interested party seeking such declaration…" (28 U.S.C. § 2201(a)) as Mr. Roberts' requested in his Amended Complaint. ER057.

Later on in their brief, the Defendants take an alternative position that Section 134-51 only prohibits the "'carrying' of deadly or dangerous weapons, concealed or unconcealed. See § 134-51. In other words, it applies only to the concealed carry or open carry of electric guns in public. With the enactment of Act 183, there is no question that ordinary civilians can now own, possess, and use electric guns, at the very least within their homes." Defs.' Br. at p. 27. The Defendants first take the position that the statute does not apply to the carry of electric guns ("Act 183 clearly permits people to carry or possess electric guns regardless of the location" (Defs.' Br. at 11) and then takes an alternative position that well, maybe if it doesn't allow carry, possession in the home is still allowed (Defs.' Br. at 27).

In any event, Mr. Roberts asked the district court for an "order" declaring H.R.S. § 134-51 "unconstitutional and violates the Second Amendment to the United States

Constitution as applied to Mr. Roberts and facially to the extent it prohibits him from keeping within a vehicle, carrying and arming himself with an electric gun" and for an "order" declaring "H.R.S § 134-51 and other applicable Hawaii law unenforceable as applied to Mr. Roberts and facially to the extent it prohibits using, keeping, possession within a vehicle, carrying, bearing and arming oneself with electric arms or alternatively a declaration that HI Rev Stat § 134-51 does not apply to electric arms." ER058. Mr. Roberts has not received the complete relief sought and will not receive the complete relief sought if this Court allows this matter to be mooted simply because the underlying electric arm ban is repealed, but the Section 134-51 issue is not resolved.

II. Mr. Roberts Made Both a Facial and As-Applied Challenge

Defendants claim that Mr. Roberts has only raised a facial challenge because he "never actually tried to purchase or carry an electric gun." Defs.' Br. at 13. And then, unironically, attach the portion of Mr. Roberts' Complaint where Mr. Roberts emailed the Honolulu Police Department asking them if it was still enforcing the ban on electric arms. "[W]e enforce our state laws as it is written" was the response Mr. Roberts received after he inquired. SER101-SER102. What the Defendants are saying is that Mr. Roberts must have broken the law first before he can challenge the statutes as-applied.

But this is not how the law works and the Defendants do not cite to a case that says that he must have tried to carry an illegal electric arm, or attempted to purchase an illegal electric arm, or anything else of that nature. "Damocles's sword does not have

to actually fall on all appellants before the court will issue an injunction." *League of Women Voters of the United States v. Newby*, 426 U.S. App. D.C. 67, 75, 838 F.3d 1, 9 (2016). It is not required to break the law first in order to challenge it.

The Supreme Court has stated that "the distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge. The distinction is both instructive and necessary, for it goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint." *Citizens United v. FEC*, 558 U.S. 310, 331 (2010). The Court, depending on how it distinguishes the as-applied or facial challenge, can craft the remedy it desires to give the proper relief to Mr. Roberts.

In any event, Mr. Roberts plainly made both a facial and as-applied challenge and sought a remedy that specifically challenges Section 134-51, both facially and as-applied, (*see* ¶¶3, 5 - Prayer for Relief, ER058) and only for the portion that would bar him from "keeping within a vehicle, carrying and arming himself with an electric gun" and "using, keeping, possession within a vehicle, carrying, bearing and arming oneself with electric arms or alternatively a declaration that HI Rev Stat § 134-51 does not apply to electric arms[]." ER058.

Defendant's argument also runs contrary to circuit precedent. Defendant contends that Plaintiff cannot raise an as-applied challenge because he did not "actually tried to purchase or carry an electric gun". Defs.' Br. at p. 13. In *Jackson v. City and County*

of San Francisco, this Court ruled on an as-applied Second Amendment challenge to San Francisco's ban on the sale of hollow point ammunition and a requirement that handguns be locked when not used. Just like Mr. Roberts, the plaintiffs in *Jackson* did not engage in the prohibited conduct challenged. Rather they submitted declarations stating that they wished to engage in the prohibited conduct just like Mr. Roberts:

> One petitioner, an elderly woman who lives alone, explained that she is currently forced to store her handgun in a lock box and that if an intruder broke into her home at night, she would need to "turn on the light, find [her] glasses, find the key to the lockbox, insert the key in the lock and unlock the box (under the stress of the emergency), and then get [her] gun before being in position to defend [herself]." Declaration of Espanola Jackson in Support of Motion for Preliminary Injunction, Record in Case 3:09-cv-02143 (ND Cal.), Doc. 136-3

Jackson v. City & Cty. of S.F., 576 U.S. 1013, 1015-16 (2015) (Thomas, J., dissenting).

And as the defendant in *Jackson* pointed out in its Answering Brief as to the ammunition law challenged:

> In support of their preliminary injunction motion, five of the individual plaintiffs stated (in boilerplate recitations) that, but for the City's ammunition ordinance, they would purchase ammunition regulated by § 613.10(g) within San Francisco's city limits, and that they are irreparably harmed by their inability to do so.

Answering Brief of Defendant-Appellee, *Jackson v. San Francisco* 17-803 at p. 45.

Despite this, the Court ruled on the Plaintiffs as-applied challenge. "We begin by addressing Jackson's facial and as-applied challenge to the constitutionality of section 4512, which requires handguns to be stored in a locked container when not carried on the person." *Jackson v. City & Cty. of S.F.*, 746 F.3d 953, 961 (9th Cir. 2014).

Like the Plaintiff in this matter, the plaintiffs in *Jackson* submitted declarations that they would engage in prohibited conduct but for the laws challenged and the Ninth Circuit found that was sufficient to bring an as-applied challenge. Therefore, Defendants' position is not only wrong, but is also foreclosed by precedent. Furthermore, Defendants had an opportunity to raise this argument in the cross motions for summary judgement filed in the trial court below. They did not and have thus, waived this argument in this appeal. Mr. Roberts' has properly made an as-applied challenge.

III. Sovereign Immunity Has Been Waived

Defendants claim that the damages provision in Mr. Roberts' First Amended Complaint was only against Defendant Chief Susan Ballard, who was later dismissed from the case. However, the actual request in the First Amended Complaint states that the Plaintiff requests "Damages to be determined at trial." ER058. It cannot be fairly read to be as narrow as Defendants wish. And if the Defendants truly believed this, then they would not have mentioned a sovereign immunity defense in their answer. FER010.

But this is not a difficult case to demonstrate that the Defendants completely waived any claim of sovereign immunity as this Circuit's precedence is crystal clear in this instance: "A state waives its Eleventh Amendment immunity if it 'unequivocally evidence[s its] intention to subject itself to the jurisdiction of the federal court.' *Hill v. Blind Indus. & Servs. of Md.*, 179 F.3d 754, 758 (9th Cir. 1999). A state may waive its

sovereign immunity through 'conduct that is incompatible with an intent to preserve that immunity.' *Id.* We have found that state defendants engaged in conduct 'incompatible with' an intent to preserve sovereign immunity when they raised a sovereign immunity defense only belatedly, after extensive proceedings on the merits." *Johnson v. Rancho Santiago Cmty. Coll. Dist.*, 623 F.3d 1011, 1021 (9th Cir. 2010).

The State Defendants have clearly waived any sovereign immunity claims in this matter. Their only assertion of this defense is that they "baldly asserted in [their] Answer that" the Plaintiff's claims are barred by the Eleventh Amendment to the Constitution and that Plaintiff's Amended Complaint is barred by the doctrine of sovereign immunity (FER010), the Defendants "litigated the suit on the merits, participated in discovery, and filed … a summary judgment motion without pressing a sovereign immunity defense." *Johnson*, 623 F.3d at 1022. Defendants argued their Cross-Motion in the district court and participated in this appeal as well and only responded to Mr. Roberts' assertion that he is owed damages for the Defendants' violations of Mr. Roberts' constitutional rights by invoking sovereign immunity.

"Although the District asserted its sovereign immunity in its opposition to the plaintiffs' application to file an amended complaint to include a prayer for nominal damages, it did not assert a sovereign immunity defense in the summary judgment briefing filed after the plaintiffs amended their complaint. []In circumstances like these, we deem the defendant to have made a tactical decision to delay asserting the sovereign immunity defense. Such tactical delay 'undermines the integrity of the judicial system[,]

. . . wastes judicial resources, burdens jurors and witnesses, and imposes substantial costs upon the litigants.' Having chosen 'to defend on the merits in federal court,' the District will 'be held to that choice.'" *Johnson*, 623 F.3d at 1022 (citations omitted).

"When a plaintiff 's constitutional rights have been violated, nominal damages may be awarded without proof of any additional injury." *N.Y. State Rifle & Pistol Ass'n v. City of N.Y.*, 140 S. Ct. 1525, 1535 (2020) (Alito, J., dissenting). Because Defendants have waived any sovereign immunity defense, they are not protected from damages and Mr. Roberts' reliance on *New York State Rifle & Pistol Ass'n v. City of New York*, 140 S.C. 1525 (2020) is not misplaced, and this case is not moot.

IV. The District Court's Stay is an Indefinite Stay

The Defendants boldly predict that the "stay will not be lengthy or indefinite inasmuch as the actions that the District Court is awaiting have definite finish lines." Defs.' Br. at p. 30. The stay has already lasted from November 26, 2019. Mr. Roberts submits that the two years this stay has already lasted is already a lengthy stay. The district court clearly ordered in its March 25, 2021 Minute Order (ER009) that "[t]he Court will not act until the Young proceedings have concluded." This is not a "definite" finish line, just like Mr. Roberts stated in his Opening Brief (pages 8-9). And the district court's response to this Court's limited remand order doesn't compel a different outcome because it didn't use the word "concluded" in the court's election to "continue the stay". ER015.

Given the multiple stays already entered in this matter, it is *highly* unlikely the district court will immediately lift the stay of this matter as soon as the Supreme Court either grants or denies certiorari to Mr. George K. Young, Jr.'s petition. And if the Supreme Court grants George Young's petition for certiorari, what incentive would the district court have to lift the stay at that point? None. Because anything that happens post-granting of Mr. Young's petition is pure speculation. The Supreme Court could grant, vacate and remand or any other number of things. All of which would contribute to the already lengthy stay imposed by the district court.

The district court's response to this Court's limited remand order sets forth the background that it was the court that handled George Young's case when it was filed on June 6, 2012 and that it "granted a Motion to Dismiss filed by the defendants [in that case]" on November 19, 2012. And then that Mr. Young's case was appealed on December 21, 2012. ER010. This "background" doesn't involve Mr. Roberts' case even a little and shouldn't influence his case at all. Nor should it matter who Mr. Roberts' attorneys are in this case. ("Attorneys Beck and Stamboulieh have continued to represent both Mr. Young and Plaintiff Roberts through the present time." ER011). This Court should decide this matter based on the premise that the trial court has decided upon a course of indefinitely staying this matter by finding *any* reason to stay this matter and will continue to do so unless ordered to do otherwise by this Court.

For the reasons briefed in Mr. Roberts' Opening Brief, the stay is indefinite, and the Court has jurisdiction over this indefinite stay, just as the motions panel held: "[w]e

have jurisdiction under 28 U.S.C. § 1291 to review stay orders that impose lengthy or indefinite delays and 'place a plaintiff effectively out of court.'" *Roberts v. Cummings*, No. 21-15562, 2021 U.S. App. LEXIS 14276, at *1 (9th Cir. May 13, 2021) (quoting *Blue Cross & Blue Shield of Ala. v. Unity Outpatient Surgery Ctr., Inc.*, 490 F.3d 718, 724 (9th Cir. 2007). Nothing has changed since then.

CONCLUSION

As Defendants point out, "[t]he basic question in determining mootness is whether there is a present controversy as to which effective relief can be granted." *Doe No. 1 v. Reed*, 697 F.3d 1235, 1238 (9th Cir. 2012). Assuming that this Court agrees with the Attorney General Defendant that H.R.S. § 134-51 does not preclude the carry of electric guns, meaning that electric guns are not "deadly or dangerous weapon[s]", there still exists a live controversy over damages. Circuit precedent compels that conclusion. As such, there is still effective relief which may be granted, and thus, this case is not moot.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(f) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), it contains 2,921 words and complies with the word limit of Cir. R. 32-1.

2. This brief complies with the typeface and type size requirements of Fed. R. App. P.32(a)(5) and (6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 365 in 14-point Garamond.

Dated: December 1, 2021.

/s/ Stephen D. Stamboulieh
Stephen D. Stamboulieh

CERTIFICATE OF SERVICE

I hereby certify that on December 1, 2021, I filed the foregoing Appellants' Opening Brief 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 certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Stephen D. Stamboulieh
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