No. 12-17808

IN THE

United States Court of Appeals for the Ninth Circuit

GEORGE K. YOUNG, JR.,

Plaintiff-Appellant,

v.

STATE OF HAWAII, ET AL,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Hawaii, No. 1:12-cv-00336-HG-BMK
District Judge Helen Gillmor

STATE OF HAWAII'S MOTION TO INTERVENE UNDER 28 U.S.C. § 2403

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STATE OF HAWAII'S MOTION TO INTERVENE

The State of Hawaii seeks leave to intervene in this action pursuant to 28 U.S.C. § 2403(b) for the purpose of defending the constitutionality of Hawaii Revised Statutes § 134-9 in *en banc* proceedings. Section 2403(b) entitles a State to intervene in any case "to which a State or any agency, officer, of employee thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn into question." Those requirements are satisfied here: A panel of this Court found part of section 134-9 "void" and in violation of the Second Amendment, slip op. at 58-59, and Defendant-Appellees—the County of Hawaii and several county officials—are not "agenc[ies]" or "officers[s]" of the State and cannot represent its views. Indeed, the posture of this case is virtually indistinguishable from the one in *Yniguez* v. *State of Arizona*, 939 F.2d 727, 739 (9th Cir. 1991), *vacated on other grounds*, 520 U.S. 43 (1997) (granting intervention pursuant to section 2403). The State is accordingly entitled to intervene under section 2403(b). Both Defendant-Appellees and the Plaintiff consent to this motion.

STATEMENT

Hawaii Revised Statutes § 134-9 requires individuals to obtain a license to carry a pistol or revolver on their person in public. Haw. Rev. Stat. § 134-9(c). To obtain a license to carry a concealed weapon, an individual must "show reason to

fear injury to the applicant's person or property." *Id.* § 134-9(a). To obtain an open-carry license, a person must demonstrate that she is "engaged in the protection of life and property." *Id.*

Since 2008, Plaintiff George Young has filed a series of *pro se* lawsuits against the State of Hawaii, the County of Hawaii, and several state and local officials, contending that section 134-9 violates various provisions of the U.S. Constitution. The District Court for the District of Hawaii dismissed Young's first two suits in 2008 and 2009, holding that his claims against the State were barred by sovereign immunity and that he failed to state a claim on the merits. *See Young v. Hawaii*, 548 F. Supp. 2d 1151 (D. Haw. 2008); *Young v. Hawaii*, No. 08-540, 2009 WL 874517 (Apr. 1, 2009).

In 2012, Young filed the present suit. As in his earlier lawsuits, Young named as defendants the State of Hawaii, its then-Governor, Neil Abercrombie, its then-Attorney General, David Louie (collectively, "the State"), the County of Hawaii, its then-Mayor, William Kenoi, the Hilo County Police Department, and the County's then-Chief of Police, Harry Kubojiri (collectively "the County"). Also as in his prior suits, Young alleged that section 134-9 violates the Bill of Attainder Clause, the Contracts Clause, the Second Amendment, the Ninth Amendment, and the Privileges and Immunities Clause. D. Ct. Dkt. 1, at Page ID # 1-53.

The State and the County again moved to dismiss Young's suit. The State argued that the claims against the State were barred by Eleventh Amendment immunity and that Young's complaint violated Rule 8(a). D. Ct. Dkt. 25-1. The County contended that Young lacked standing and failed to state a claim. D. Ct. Dkt. 23-1. The District Court granted both motions to dismiss, holding among other things that the claims against the State were barred by sovereign immunity and that section 134-9 does not violate the Second Amendment. *See Young v. Hawaii*, 911 F. Supp. 2d 972 (2012).

On appeal, Young declined to challenge any portion of the District Court's holding except its conclusion that section 134-9 does not violate the Second Amendment. *See* Slip op. at 8-9, nn. 1, 3. Because Young did not appeal the dismissal of the claims against the State, the State "[b]eliev[ed] itself no longer a party to the case," and filed several briefs as amicus curiae to defend the District Court's judgment on the merits. *Id.* at 8 n.1; *see* Amicus Curiae Brief of the State of Hawaii, Dkt. 35; Supplemental Amicus Brief of the State of Hawaii, Dkt. 91.

A panel of this Court reversed the District Court's holding on the merits. The panel found that the Second Amendment encompasses a right to "carry a firearm openly for self-defense outside of the home." Slip op. at 6. It further reasoned that "section 134-9's limitation on the open carry of firearms to those 'engaged in the protection of life and property' violates the core of the Second

Amendment and is void." *Id.* at 53. The panel concluded that "the County may not constitutionally enforce such a limitation on applicants for open carry licenses." *Id.*

On August 2, the Court granted Appellees a 45-day extension of time to file a petition for rehearing and a petition for rehearing en banc. Dkt. 134.

ARGUMENT

The State of Hawaii has a statutory right to participate in *en banc* proceedings in this suit pursuant to 28 U.S.C. § 2403(b). Section 2403(b) states that:

> In any action, suit, or proceeding in a court of the United States to which a State or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall * * * permit the State to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The State shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

This Court has explained that, under section 2403(b), "a state *must* be permitted to intervene if a state officer is not already party to an action in which the constitutionality of a state law is challenged." *Perry* v. *Brown*, 671 F.3d 1052, 1071 (9th Cir. 2012) (emphasis in original), *vacated on other grounds*, 570 U.S. 693 (2013).

Section 2403(b) "confers a right to intervene in any 'court of the United States,' a phrase which includes a circuit court of appeals." *Yniguez* v. *State of Ariz.*, 939 F.2d 727, 739 (9th Cir. 1991), *vacated on other grounds*, 520 U.S. 43 (1997); *see also Argonaut Ins. Co.* v. *Halvanon Ins. Co.*, 24 Fed. App'x 756, 759 (9th Cir. 2001) (recognizing that Section 2403(b) may apply at the rehearing stage). To invoke that right, a State need only demonstrate (1) that there is an appellate proceeding in which the constitutionality of a state statute is at stake; and (2) that no state party is currently participating in the proceeding. *Yniguez,* 939 F.2d at 739-740. When these criteria are met, a State must be allowed to participate in appellate proceedings, regardless of whether it has secured dismissal from the suit at an earlier stage in the case. *Id.* As this Court explained in *Yniguez*, "[s]o long as there is * * * an appeal" pending, a State "may file a brief and participate in oral argument," even if it previously "asked the district court to dismiss [the State] as a party." *Id.* at 740. Any other rule would allow the court of appeals to "pass a judgment on the constitutionality of [state] law without hearing the views of the [S]tate," a "result * * * contrary to both the letter and spirit of section 2403(b)." *Id.* at 739.

Both of section 2403(b)'s requirements are easily satisfied in this case. The panel held that "section 134-9's limitation on the open carry of firearms to those 'engaged in the protection of life and property' violates the core of the Second

Amendment and is void." Slip op. at 52-53. The County has indicated its intent to seek *en banc* rehearing of that decision. *See* Dkt. 132. There is no question that the constitutionality of section 134-9 will be at stake in those *en banc* proceedings.

There is also no doubt that—unless the State of Hawaii is permitted to intervene—this Court will be forced to "pass judgment on the constitutionality of [section 134-9] without hearing the views of" the State of Hawaii. *Yniguez*, 939 F.2d at 739. The County of Hawaii is not an "agency" of the State. 28 U.S.C. § 2403(b); *see Kahale* v. *City & County of Honolulu*, 90 P.3d 233 (Haw. 2004) ("A county * * * is not an executive department, board, or commission of the State." (citation omitted)); *Fordyce* v. *City of Seattle*, 55 F.3d 436, 442 (9th Cir. 1995) (concluding that the City of Seattle is not an agency of the State of Washington under section 2403 because "Eleventh Amendment immunity does not extend to counties or similar municipal corporations"). And the County's attorneys cannot represent the State's views in civil litigation: Under Hawaii law, only the Attorney General and his deputies are authorized to "appear for the State * * * in all courts of record." Haw. Rev. Stat. § 28-1; *see Island-Gentry Joint Venture* v. *State, Through State Bd. of Land & Nat. Res.*, 554 P.2d 761, 766 (Haw. 1976) (holding that "the Attorney General * * * has *exclusive* authority to control and manage for the State all phases of civil litigation in which the State has an interest" (emphasis added)).

Because the constitutionality of section 134-9 is at stake and because no state party is currently participating in the proceedings, section 2403(b) mandates that the "court shall * * * permit the State to intervene."

CONCLUSION

Hawaii's motion to intervene pursuant to 28 U.S.C. § 2403(b) should be granted.

Respectfully submitted,

/s/ Neal K. Katyal

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CERTIFICATE OF COMPLIANCE

I certify that the forgoing Motion complies with the type-volume limitation of Fed. R. App. 27 because it contains 1,565 words. This Motion complies with the typeface and type style requirements of Fed. R. App. P. 27 because this brief has been prepared in a proportionally spaced typeface using Word 14-point Times New Roman typeface.

/s/ Neal Kumar Katyal
Neal Kumar Katyal

CERTIFICATE OF SERVICE

I hereby certify that on August 16, 2018, I filed the foregoing Motion 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/ Neal Kumar Katyal
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