21-1658-cv

United States Court of Appeals
for the
Second Circuit

JOHN DOES 1-10,

Plaintiffs-Appellants

v

SUFFOLK COUNTY, NEW YORK,

Defendant-Appellee.

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

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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I. THE ABSENCE OF A STATE COURT DECISION DOES NOT DIVEST THE FEDERAL COURTS OF JURISDICTION[1]

There is no requirement that the federal court abstain from exercising jurisdiction simply because no New York State court has yet ruled that the CT4-2A Other Firearm is legal to purchase and/or possess under New York law.

Everything is legal unless and until a law is passed criminalizing its possession and/or specifically identified conduct. There is no New York State law criminalizing the purchase or possession of the CT4-2A Other Firearm.

Plaintiffs are not required to seek redress in state court before the federal courts acquire jurisdiction to consider a federal question implicating the United States Constitution. Adjudication of the constitutionality of Suffolk County's policy does not require an interpretation of State statutes, only the application of existing federal and state laws to the specifications of a particular firearm. Plaintiffs are not challenging the constitutionality of, or seeking to invalidate, a

[1] The County's insistence that a state court must first opine on whether the CT4-2A is a banned assault weapon is irrational. The "Other Firearm" is a new category of firearms, as the term itself indicates. The "Other Firearm" is no more a pistol, rifle, or shotgun than it is a motor vehicle. Continuing to argue that no state court has ruled that the CT4-2A is *not illegal* flies in the face of the jurisprudence of criminal statutory interpretation – law enforcement has the burden of demonstrating that their action was taken pursuant to a criminal statute. The plain language of the relevant Penal Law statutes rules out the CT4-2A Other Firearm as being illegal to possess – apart from the sworn fact that the CT4-2A is sold and possessed in every other county in New York State outside of Suffolk County, with no similar prosecutions, threats of arrest, or property confiscations from other law enforcement agencies as set forth in the Declaration of Ryan Gisolfi.

state law. Under the Penal Law as it exists, there is no legal bar to the purchase or possession of the CT4-2A.

Even if the constitutionality of a state statute were under consideration here, which it is not, the Supreme Court has required the federal courts to ***retain jurisdiction*** and decide the federal question presented to it.

"Though never interpreted by a state court, if a state statute is not fairly subject to an interpretation which will avoid or modify the federal constitutional question, it is the duty of a federal court to decide the federal question when presented to it. Any other course would impose expense and long delay upon the litigants without hope of its bearing fruit." *Zwickler v. Koota*, 389 U.S. 241, 251, 88 S. Ct. 391, 397 (1967) ("We hold that a federal district court has the duty to decide the appropriateness and the merits of the declaratory request irrespective of its conclusion as to the propriety of the issuance of the injunction."). *Zwickler*, 389 U.S. at 254.

In *Turner v. City of Memphis*, 369 U.S. 350 (1962) (per curiam), the Supreme Court vacated an abstention order that had been granted on the sole ground that a declaratory judgment action ought to have been brought in the state court before the federal court was called upon to consider the constitutionality of a statute alleged to be violative of the Fourteenth Amendment. In *McNeese v. Board of Education*, 373 U.S. 668, 83 S.Ct. 1433 (1963), the Supreme Court again

emphasized that abstention cannot be ordered simply to give state courts the first opportunity to vindicate the federal claim. After examining the purposes of the Civil Rights Act, under which that action was brought, the Supreme Court concluded, "(w)e would defeat those purposes if we held that assertion of a federal claim in a federal court must await an attempt to vindicate the same claim in a state court." 373 U.S. at 672. The "recognition of the role of state courts as the final expositors of state law implies no disregard for the primacy of the federal judiciary in deciding questions of federal law." *Id.* citing, *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 415 – 416 (1964).

"[T]o force the plaintiff who has commenced a federal action to suffer the delay of state court proceedings might itself effect the impermissible chilling of the very constitutional right he seeks to protect." *Zwickler*, 389 U.S. at 252, citing, *Dombrowski v. Pfister*, 380 U.S. 479, 486—487, 85 S.Ct. 1116, 1120—1121, 14 L.Ed.2d 22; *Baggett v. Bullitt*, supra, 377 U.S. at 378—379, 84 S.Ct., at 1326; *NAACP v. Button*, 371 U.S. 415, 433 (1963); cf. *Garrison v. State of Louisiana*, 379 U.S 64, 74—75, 85 S.Ct. 209, 215—216, 13 L.Ed.2d 125; *Smith v. People of State of California*, 361 U.S. 147 (1960).

Indeed, the *Pullman* doctrine is used sparingly, as "[r]ights delayed, after all, are often rights destroyed. And it is therefore not surprising that *Pullman* abstention has been used only very sparingly." *Tunick v. Safir*, 209 F.3d 67, 78 (2d

Cir. 2000) citing, *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 236 (1984) ("[A]bstention [under *Pullman*] from the exercise of federal jurisdiction is the exception, not the rule."); *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976)) (internal quotation marks omitted)); *Public Serv. Co. v. Patch*, 167 F.3d 15, 24 (1st Cir.1998) (declining to abstain where the timing of proceedings in state court was uncertain and plaintiff faced an immediate threat to its asserted rights); Bad Frog Brewery, 134 F.3d at 94 (declining to abstain in order to safeguard asserted First Amendment rights).

"We have frequently emphasized that abstention is not to be ordered unless the statute is of an uncertain nature, and is obviously susceptible of a limiting construction." *Midkiff*, 467 U.S. 229, 237 quoting, *Zwickler,* 389 U.S. at 251, and n. 14. The applicable Penal Law statutes, which are not being challenged, are not of an uncertain nature and have no reasonable limiting construction. Therefore, *Pullman* abstention is unnecessary.

No state statute is being challenged here ~ the CT4-2A is in compliance with the New York State Penal Law ~ and the statutes at issue are not "uncertain in nature." The County's Policy is contrary to state and federal law and is not being enforced in any other county in New York State. This fact has not been contradicted by Suffolk County nor has Suffolk County presented any sworn

declaration from anyone with actual knowledge of the CT4-2A Other Firearm averring that the CT4-2A is *not* legal to possess or purchase in New York State.

The district court's decision to abstain from consideration of the federal constitutional issued raised below was erroneous and should be reversed.

II. *YOUNGER* ABSTENTION IS INAPPLICABLE

Younger abstention is only required when state court proceedings are initiated "before any proceedings of substance on the merits have taken place in the federal court." *Midkiff*, 467 U.S. at 237 quoting, *Hicks v. Miranda*, 422 U.S. 332, 349 (1975). In other cases, federal courts must normally fulfill their duty to adjudicate federal questions properly brought before them. *Id.*

Younger applies to "state criminal statutes" and, even so, does not preclude a federal court from intervening where an unconstitutional state statute is concerned. No state court proceedings have been initiated or were initiated at the time that the federal complaint was filed below. Since *Younger* is not a bar to federal court action when state judicial proceedings have not themselves commenced, abstention was not required. See, *Midkiff*, 467 U.S. at 238–39 (internal citations omitted); see also, *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 73 (2013) ("Circumstances fitting within the Younger doctrine, we have stressed, are "exceptional"; they include as catalogued in NOPSI, "state criminal prosecutions," "civil enforcement proceedings," and "civil proceedings involving certain orders that are uniquely in

furtherance of the state courts' ability to perform their judicial functions." *Id.*, at 367–368, 109 S.Ct. 2506. Because this case presents none of the circumstances the Court has ranked as "exceptional," the general rule governs: "[T]he pendency of an action in [a] state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976) (quoting *McClellan v. Carland*, 217 U.S. 268, 282, 30 S.Ct. 501, 54 L.Ed. 762 (1910))."

In *Ex parte Young*, 209 U.S. 123 (1908) "the fountainhead of federal injunctions against state prosecutions, the Court characterized the power and its proper exercise in broad terms: it would be justified where state officers threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution." *Dombrowski v. Pfister*, 380 U.S. 479, 483–84 (1965) (internal quotations omitted). Since that decision, however, the Court has recognized that federal interference with a State's good-faith administration of its criminal laws is peculiarly inconsistent with our federal framework."

Here, there is no basis for abstention under *Ex parte Young* because SCPD is acting in bad faith. As set forth in the Complaint, the claimed "investigation" is not being conducted in furtherance of the New York State Penal Law - the CT4-2A does not violate any provision of the Penal Law. The allegations in the Complaint

"depict a situation in which defense of the State's criminal prosecution will not assure adequate vindication of constitutional rights. They suggest that a substantial loss of or impairment of freedoms of expression will occur if appellants must await the state court's disposition and ultimate review in this Court of any adverse determination. These allegations, if true, clearly show irreparable injury." *Younger v. Harris*, 401 U.S. 37, 48–49 (1971) quoting, *Dombrowski*, 380 U.S. at 485-486.

While the courts may not always be authorized to interfere with a bona fide criminal investigation, in *In re Seizure of All Funds in Accts. in Names Registry Pub. Inc.*, 68 F.3d 577, 582 (2d Cir. 1995) cited by the County, the court was involved in reviewing search warrant affidavits/applications, issuing search warrants, and held a probable cause hearing that resulted in the vacatur of the seizure warrant for lack of probable cause. In reversing the district court's injunction against the government's mailing of questionnaires to obtain further evidence of probable cause, the Second Circuit nevertheless remanded the matter to the district court with instructions to remain involved in reassessing its probable cause determination.

First, there is no state criminal proceeding pending against Plaintiffs. But more importantly, the district court in *In re Seizure* was actively involved in assessing the progress of the investigation and the probable cause determination. Here, the district court conducted no inquiry into the merits of Plaintiffs'

application for a temporary restraining order, failed to take the allegations in the Complaint as true, and dismissed the Complaint the day after Suffolk County was served – shielding the County from having to submit sworn evidence to rebut Plaintiffs' sworn allegations and evidence in admissible form conclusively establishing that the CT4-2A does not violate any provision of the New York State Penal Law.

The threat of [false] arrest was made in black and white in the SCPD letter. The SCPD letters sent to Plaintiffs and hundreds of other innocent purchasers threatened arrest and prosecution if the owners of the CT4-2A firearms did not surrender them. Plaintiffs have not surrendered their CT4-2A firearms and, as such, live under the existing threat of [false] arrest.[2] SCPD's policy is implemented and enforced in bad faith and has resulted in the confiscation of hundreds of other CT4-2A firearms, including those belonging to the plaintiff in *Wilson v. Suffolk County, et al.*, 21 Civ. 3716 (E.D.N.Y.).[3]

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[2] The County's representation that a municipal law unconstitutional on its face does not justify federal intervention is misleading. [Appellee Br. at p. 16]. There, there were pending state court actions, there was no indication of bad faith, and there was an acknowledgment that the state courts had twice found similar ordinances to be constitutional. *Gajon Bar & Grill v. Kelly*, 508 F.2d 1317, 1321 (2d Cir. 1974).

[3] There is no bar to this Court taking judicial notice of a pending district court case containing issues similar to those raised herein. See, e.g., *Brown v. Bd. of Ed. of Topeka, Shawnee Cty.*, Kan., 344 U.S. 1, 73 S. Ct. 1, 97 L. Ed. 3 (1952) (Supreme Court taking judicial notice of segregation case pending in the D.C. Court of Appeals); *United States v. Imperial Chem. Indus.*, Ltd., 254 F. Supp. 685, 687 (S.D.N.Y. 1966) (taking judicial notice of pending litigation between defendant corporation and amicus curaie); *City of Amsterdam v. Daniel Goldreyer, Ltd.*, 882 F. Supp. 1273, 1278–79 (E.D.N.Y. 1995) (New York law is clear that a court may take judicial notice of

Apart from the threat of [false] arrest, Plaintiffs' use and enjoyment of their property has been extinguished as they now cannot take their firearms out of their homes, for example to the gun range, for fear of being falsely arrested by Suffolk County law enforcement for the mere possession of the CT4-2A. The district court's abstention from considering the federal constitutional issues raised below was erroneous and should be reversed in its entirety.

III. PLAINTIFFS' CONSTITUTIONAL RIGHTS ARE IMPLICATED

As indicated above, in addition to the written threat of arrest and prosecution,[1] the SPCD written confiscation demand under the threat of arrest violates Plaintiff's recognized and existing rights to their property, which can no longer be used and enjoyed.

[1] How the County proceeds to label the SCPD policy as a "hypothetical policy" [Appellee's Br. at p. 28] is astounding, as the policy itself is in writing and made part of this appellate record. [A76]. There is no ambiguity in the SCPD letter regarding the permanent confiscation of the CT4-2As from their owners. The SCPD letter conclusively states that "the firearm you purchased is **NOT** in compliance with the New York State Penal Law." (emphasis supplied). The letter does not state that the firearm *might be* illegal or that the SCPD is "looking into" the situation. There is no chance under the plain language in this policy, as written in the SCPD letter, that the firearm will be returned to the owner. Indeed, the SCPD letter affirmatively states that if the firearm is not surrendered to the SCPD within 15 days, the owner is "subject to arrest and criminal charges." [A76].

IV. THE "POLICE POWER" IS NOT APPLICABLE TO PLAINTIFFS' FIFTH AMENDMENT TAKING CAUSE OF ACTION

The County argues that the "police power" doctrine to destroy private property that constitutes a nuisance without justifying by what authority it acts to seize Plaintiffs' private property. Nowhere has the CT4-2A been declared a nuisance apart from the County's *ipsi dixit* declaration.

The Takings Clause protects "against a direct appropriation of property—personal or real," *Horne v. Dep't of Agric.*, —— U.S. ——, 135 S. Ct. 2419, 2427 (2015), and such an appropriation "triggers a 'categorical duty to compensate the former owner' under the Takings Clause. *Rodriguez v. City of San Jose*, 773 F. App'x 994, 995 (9th Cir. 2019) citing, *Fowler v. Guerin*, 899 F.3d 1112, 1117 (9th Cir. 2018) (quoting *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 233, 123 S.Ct. 1406, 155 L.Ed.2d 376 (2003)).

Even assuming that SCPD's destruction of Plaintiffs' property interest in their CT4-2A firearms was legally justified, which it is not, the Supreme Court has "never applied the nuisance exception to allow complete extinction of the value of a parcel of property. Though nuisance regulations have been sustained despite a substantial reduction in value, we have not accepted the proposition that the State may completely extinguish a property interest or prohibit all use without providing compensation." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 513 (1987).

The SCPD policy criminalizing the possession of the CT4-2A rendered Plaintiffs' property useless, effecting a permanent taking without just compensation. As such, Plaintiffs' Fifth Amendment claim should not have been dismissed.

V. THE COUNTY IS LIABLE UNDER *MONELL*

The County's argument that the state, and not the County is responsible for the SCPD policy challenged below as violating the Fourth, Fifth, and Fourteenth Amendments is nonsensical. [County Br. at p. 19]. See, *Monell v. Dept. of Social Services of City of New York*, 436 U.S. 658, 98 S.Ct. 2018 (1978).

CONCLUSION

Based on the record before the Court, arguments made herein and in Plaintiffs' original brief, the Memorandum Opinion of the district court appealed from should be reversed in its entirety.

Dated: January 3, 2022

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CERTIFICATE OF COMPLIANCE WITH FRAP 32(a)

1. This reply brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), as it contains 2,872 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the style requirements of Fed. R. App. P. 32(a)(6), as it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

Dated: January 3, 2022

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