U.S. Department of Justice

Office of the Solicitor General

Washington, D.C. 20530

November 15, 2019

Honorable Scott S. Harris
Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: NY State Rifle & Pistol Assn., Inc., et al. v. City of New York, et al., No. 18-280

Dear Mr. Harris:

On November 15, 2019, this Court ordered the United States to file a letter brief addressing whether this case is moot. In the United States' view, respondents have not established that this case is moot.

1. The prospect that petitioners may seek damages suffices to keep this case alive. This Court has held that a case becomes moot only if intervening events mean that a court can no longer "grant any effectual relief" to the plaintiff. *Mission Prod. Holdings, Inc.* v. *Tempnology, LLC*, 139 S. Ct. 1652, 1660 (2019) (citation omitted). The Court has further held that "money damages" for past injuries qualify as effectual relief, and that, as a result, a claim for such damages, "if at all plausible, ensure[s] a live controversy." *Ibid.*; see 13C Charles Alan Wright et al., *Federal Practice & Procedure* § 3533.6, at 301-302 (3d ed. 2008) (Wright & Miller) ("[M]ootness is defeated so long as damages or other monetary relief may be claimed on account of the former provisions."). Most courts have held that even a claim for nominal damages prevents a challenge to a repealed statute from becoming moot. See 13C Wright & Miller § 3533.3 n.47, at 31-34. Although one court of appeals has held that a claim for nominal damages does not suffice, even that court agrees that a claim for actual damages ensures a live controversy. See *Flanigan's Enters., Inc.* v. *City of Sandy Springs*, 868 F.3d 1248, 1263-1270 (11th Cir. 2017) (en banc), cert. denied, 138 S. Ct. 1326 (2018); *Granite State Outdoor Adver., Inc.* v. *City of Clearwater*, 351 F.3d 1112, 1119 (11th Cir. 2003), cert. denied, 543 U.S. 813 (2004).

Under those principles, this case remains live, because petitioners could still seek and a court could still award actual or nominal damages on account of the transport ban's alleged violation of their Second Amendment rights. Petitioners have brought their lawsuit under 42 U.S.C. 1983, a statute that authorizes courts to award "damages * * * to compensate persons for injuries that are caused by the deprivation of [their] constitutional rights." *Carey* v. *Piphus*, 435 U.S. 247, 254 (1978). The entities they have named as defendants—the City of New York and the License Division of the Police Department—are municipal bodies, which enjoy neither sovereign immunity nor official immunity from claims for damages. See *Northern Insurance Co.* v. *Chatham Cnty.*, 547 U.S. 189, 193 (2006); *Monell* v. *Department of Soc. Servs.*, 436 U.S. 658, 695-701 (1978); cf. *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 69 (1997) (holding

that a claim for nominal damages against a State was not sufficient to avoid mootness because "Section 1983 creates no remedy against a State"). Moreover, the complaint includes allegations, and the summary-judgment affidavits include evidence, that the application of the transport ban to petitioners caused them injury in the past. J.A. 32-33, 52-54, 56-57, 59-61. And petitioners have never forsworn or waived damages in any of their pleadings or filings.

Although petitioners' complaint does not specifically request damages, see J.A. 47-48, any omission in the complaint would not, by itself, be conclusive as to mootness if petitioners were now to assert a claim for damages. See *Holt Civic Club* v. *City of Tuscaloosa*, 439 U.S. 60, 66 (1978) ("omissions [in a prayer for relief] are not in and of themselves a barrier to redress of a meritorious claim"); see also Fed. R. Civ. P. 15(a)(2) (providing that a court should "freely" grant leave to amend a complaint where "justice so requires"); Fed. R. Civ. P. 54(c) (providing that a party's failure to demand particular relief "in its pleadings" does not automatically preclude the party from seeking that relief later in the litigation); 10 Wright & Miller § 2662, at 168 (4th ed. 2014) (explaining that the "liberal amendment policy of Rule 15, combined with Rule 54(c)," mean that a party can in some circumstances still "secur[e] a remedy other than that demanded in the pleadings"). The critical question on the merits would be whether the party's "tard[iness]" in requesting relief not specified in the complaint is "excusable" under the circumstances. *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 424 (1975). And in the unusual circumstances of this case—where the City waited until after the grant of a writ of certiorari to amend the challenged law, and where the City waited until after the completion of briefing on mootness to make additional representations about the future consequences of past regulatory violations, see *infra*—it may well be excusable for petitioners to make an express request for damages at this stage, even if they have not already done so.

In all events, questions about whether it is too late for petitioners to seek damages go to the merits, not to jurisdiction. Under Article III, the relevant inquiry is whether it is still possible for a court to grant "effectual relief," not whether "[u]ltimate recovery" is certain or even likely. *Mission Prod. Holdings*, 139 S. Ct. at 1660. It is still possible to grant damages for the past violations of petitioners' constitutional rights. To the extent petitioners seek such damages, the case remains live.

2. Petitioners propose several alternative theories under which this case remains live.

a. Petitioners first contend that this case remains live because they could still suffer future consequences as a result of their past violations of the repealed law. See Pets. Resp. to Suggestion of Mootness 16-18. We agree that, in principle, the possibility of future consequences for past violations of a repealed law can be sufficient to keep a case from becoming moot. We further agree with petitioners that, on the record before this Court, the possibility of such future consequences does keep this case from becoming moot. Under state law, a licensing officer enjoys "considerable discretion" in evaluating applications for handgun licenses. Pet. App. 3 (citation omitted). On the current record, there is a real possibility that licensing officers in the City would exercise that discretion to hold past violations of the transport ban against petitioners when considering future applications for handgun licenses.

The City, however, has informed the United States that, in exercising its discretion, the City will not give adverse effect to past violations of the former transport ban in future licensing

decisions. If the City makes such a representation to the Court, then the possibility of future enforcement by the City would be too "remote" to keep this case alive. *Decker* v. *Northwest Envtl. Def. Ctr.*, 568 U.S. 597, 610 (2013); see 13C Wright & Miller § 3533.6, at 299-301; see also *DeFunis* v. *Odegaard*, 416 U.S. 312, 317 (1974) (per curiam) ("[I]t has been the settled practice of the Court * * * fully to accept [such] representations" from governmental parties when evaluating mootness.). Likewise, the possibility that other unspecified, third-party jurisdictions could impose future consequences does not satisfy Article III, both because it is too remote and because it would not be redressed by the binding force of the judgment entered against the entities that are actually parties to this case. See *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 562 (1992); *id.* at 569 & n.5 (opinion of Scalia, J.).

b. Petitioners also contend that this case remains live because they still object to restrictions contained in the new provisions enacted by the Police Commissioner and the State. Pets. Resp. to Suggestion of Mootness 13-16. Although petitioners' objections to the new provisions would establish a live controversy regarding those provisions, they do not establish a live controversy regarding the City's original transport ban. See, *e.g.*, *Allee* v. *Medrano*, 416 U.S. 802, 818 (1974).

c. Finally, petitioners invoke the principle that a defendant's voluntary cessation of a challenged practice moots a case only if it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *City of Mesquite* v. *Aladdin's Castle, Inc.*, 455 U.S. 283, 289 n.10 (1982) (citation omitted); see Pets. Resp. to Suggestion of Mootness 22-33. But that principle does not apply to the new statute enacted by the State of New York. First, the voluntary-cessation doctrine applies only to "a *defendant's* voluntary cessation of a challenged practice." *Aladdin's Castle*, 455 U.S. at 289 (emphasis added). The State of New York is not a defendant; it is a third party. Second, this Court has never applied the voluntary-cessation doctrine to a statute enacted by a state legislature or Congress. The Court has instead "consistently and summarily held that a new state [or federal] statute moots a case." *Town of Portsmouth* v. *Lewis*, 813 F.3d 54, 59 (1st Cir. 2016); see, *e.g.*, *Massachusetts* v. *Oakes*, 491 U.S. 576, 582-584 (1989) (opinion of O'Connor, J.); *United States Dep't of the Treasury* v. *Galioto*, 477 U.S. 556, 559-560 (1986).

Sincerely,

Noel J. Francisco
Solicitor General

cc: See Attached Service List

18-0280
NEW YORK STATE RIFLE & PISTOL, ET AL.
NEW YORK, NY, ET AL.

PAUL D. CLEMENT
KIRKLAND & ELLIS LLP
1301 PENNSYLVANIA AVE., NW
WASHINGTON, DC 20004
202-389-5000
PAUL.CLEMENT@KIRKLAND.COM

RICHARD DEARING
100 CHURCH STREET
NEW YORK, NY 10007
212-356-2500
RDEARING@LAW.NYC.GOV

IRA M. FEINBERG
HOGAN LOVELLS US LLP
390 MADISON AVENUE
NEW YORK , NY 10017
212-918-3509
IRA.FEINBERG@HOGANLOVELLS.COM

ROBERTO J. GANZALEZ
PAUL, WEISS, RIFKIND, WHARTON &
GARRISON LLP
2001 K STREET NW
WASHINGTON, DC 20006
202-223-7300
RGONZALEZ@PAULWEISS.COM

FRED J. HIESTAND
3418 THIRD AVENUE
SUITE 1
SACRAMENTO, CA 95817

VINCENT LEVY
HOLWELL SHUSTER & GOLDBERG LLP
425 LEXINGTON AVENUE
14TH FLOOR
NEW YORK, NY 10017
646-837-5151
VLEVY@HSGLLP.COM

BRIAN R. MATSUI
MORRISON & FOERSTER LLP
2000 PENNSYLVANIA AVENUE, NW
WASHINGTON, DC 20006
202-887-8784
BMATSUI@MOFO.COM

ELIZABETH B. MURRILL
LOUISIANA DEPARTMENT OF JUSTICE
1855 NORTH THIRD STREET
BATON ROUGE, LA 70802
225-326-6766
MURRILLE@AG.LOUISIANA.GOV

WILLIAM J. OLSON
WILLIAM J. OLSON, P.C.
370 MAPLE AVENUE WEST
SUITE 4
VIENNA, VA 22180-5615
703-356-5070
WJO@MINDSPRING.COM

DAN M. PETERSON
DAN E. PETERSON PLLC
3925 CHAIN BRIDGE ROAD
SUITE 403
FAIRFAX, VA 22030
703-352-7276
DAN@DANPETERSONLAW.COM

LAWRENCE ROSENTHAL
CHAPMAN UNIVERSITY FLOWER SCHOOL OF
LAW
ONE UNIVERSITY DRIVE
ORANGE , CA 92866
714-628-2650

BRIAN T. STAPLETON
75 SOUTH BROADWAY
4TH FLOOR
WHITE PLAINS, NY 10601

SHELDON WHITEHOUSE
HART SENATE OFFICE BLDG.
RM 530
WASHINGTON, DC 20510
202-224-2921
COUNSEL@WHITEHOUSE.SENATE.GOV