ALAN BECK (HI Bar No. 9145)
Attorney at Law
4780 Governor Drive
San Diego, California 92122
Telephone: (619) 971-0414
Email: ngord2000@yahoo.com

Attorney for Plaintiff-Appellant George K. Young

UNITED STATE COURT OF APPEALS
NINTH CIRCUIT

GEORGE K. YOUNG JR., Plaintiff, vs. STATE OF HAWAII ET. AL.; Defendants.	No. 12-17808 Appeal from a Judgment of the United States District Court For the District of Hawaii Civ. No. 12-00336 HG BMK The Honorable Judge Helen Gillmor United States District Court Judge Motion to Hear Case With Other Case

Motion to Align or Expedite Appeal

Come now the Plaintiff-Appellant George K. Jr. brings this motion to be assigned the same panel as *San Francisco v. Jackson* No. 12-17803 ("*Jackson*"). Mr. Young filed his notice of appeal on December 14th, 2012. *San Francisco v. Jackson* No. 12-17803 was appealed on December 21st 2012. Mr. Young's

Opening Brief was filed on February 15[h] 2013. Plaintiffs in *Jackson* filed their Opening Brief on February 7th 2013. This Court has the right to grant this motion and if it does not *Jackson* will be binding on Mr. Young.

> Circuit Advisory Committee Note to Rule 34-1 to 34-3
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> (1) Appeals Raising the Same Issues.
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> When other pending cases raise the same legal issues, the Court may advance or defer the hearing of an appeal so that related issues can be heard at the same time. The first panel to whom the issue is submitted has priority. Normally, other panels will enter orders vacating submission and advise counsel of the other pending case when it appears that the first panel's decision is likely to be dispositive of the issue.

Both cases are still in briefing and have not been assigned panels. The two appeals make incongruent arguments on the same issue. As a preliminary injunction appeal *Jackson* is expedited. Mr. Young will be bound by *Jackson* if this motion is denied. He was unaware it was on appeal at the time he filed either of the aforementioned items. The policy behind expediting a preliminary injunction is to prevent irreparable harm. This is exactly what Mr. Young will suffer if this motion is not granted.

The issue which relates these matters is how this Court should define a class of ammunition. Mr. Young's argument is logically valid and fulfills the mandate of *Heller*. *Heller* ruled a categorical ban on a class of arms fails any level of scrutiny.

Logic dictates a categorical ban on a class of ammunition should leave an arm dependent on ammunition impotent. Defining classes of ammunition based on their real world nomenclature fails the mandate of *Heller*. This precedent would establish many types of ammunition used by protected arms could be banned without any need to show cause. As ammunition is not a class of arm the term cannot be transposed without any attempt to define class or distinguish the subject matter at hand. *Heller* ruled a handgun is a class of arms in furtherance of the proposition that individuals have a right to choose the means they defend their lives. Mr. Young model upholds *Heller's* mandate by promoting a policy which mandates individual liberty.

Mr. Young concedes that the issue of whether the Second Amendment confers a right outside the home has not been established in the Ninth Circuit and affects this appeal. As Mr. Young's appeal is of a 12(b)(6) motion to dismiss, this is not relevant. "When considering the appeal of a Rule 12(b)(6) motion to dismiss, the Court must presume all allegations of material fact to be true and draw all reasonable inferences in favor of the non-moving party." *Pareto v. F.D.I.C.*, 139 F.3d 696, 699 (9th Cir. 1998).

Every Circuit has decided the Second Amendment confers a right outside the home or has declined to rule on the matter. *Baker v. Kealoha* 12-16258 is awaiting a decision from this Court and deals with the same licensing statute at issue in Mr.

Young's appeal. For all the reasons the licensing statutes at issue were found to be constitutional in *Woollard v. Gallagher* (4th Cir. Mar. 21, 2013) and *Kachalsky v. County of Westchester*, (2d Cir. Nov. 27, 2012), H.R.S. § 134-9 should be presumed unconstitutional so no stay will be warranted. *See Baker v. Kealoha* 12-16258 Response to Defendants' Notice of Supplemental Authority March 13th 2013.

<u>The Common Law Supports This Motion</u>

The Heller Court ruled;

We also recognize another important limitation on the right to keep and carry arms. Miller said, as we have explained, that the sorts of weapons protected were those "in common use at the time." *District of Columbia v. Heller*, 554 U.S. 570 (2008).

Jackson position is defies *Heller*. The Common Law's first armament was the arrow. Despite numerous different types of arrows there is no mention of them ever being prohibited a part from restrictions on bows. The first written list of arms in common use is the Assize of Arms (1181) ("Moreover, every free layman who possesses chattels or rents to the value of 16m. shall have a shirt of mail, a helmet, a shield, and a lance; and every free layman possessing chattels or rents to the value of 10m. shall have a hauberk, an iron cap, and a lance "). The Statute of

Winchester (1285) followed ("the that hath less than twenty marks in goods, shall have swords, knives, and other small arms; and all other that may shall have bows and arrows out of the forest, and in the forest bows and pilets."), There were notable crossbow control measures enacted in 1511 to encourage the use of the long bow. However, every single ban on arrows/quarrels was coextensive with bow/crossbows despite the numerous types of arrowheads available. http://www.evado.co.uk/Hector%20Cole/PDFs/MedievalArrowheads.pdf .

Reliance on Boston storage laws also fail to support that armament has ever been put into classes. They dealt with all firearms not just handguns. This supports Mr. Young's position that the Heller Court ruled handguns are a "class" of arms was to facilitate a policy of personal liberty.

> "The preamble to the law explains: "Whereas the depositing of loaded arms in the houses of the town of Boston, is dangerous to the lives of those who are disposed to exert themselves when a fire happens to break out in the said town"8 The text does not prohibit carrying loaded firearms within the city of Boston--only taking them into a building--and one could infer from the preamble, the law only prohibited depositing loaded firearms in buildings. As the preamble makes clear, this law was for the protection of those fighting fires, not to prevent criminal misuse of guns, and certainly not to prevent citizens from defending themselves on the streets." *Gun Safety Regulation in Early America*, Shotgun News, November 1, 2004, pp. 18-19.

There is no mention of round balls, lead shot or buck and ball shot being restricted apart from firearms restrictions. Mr. Young concedes that there can be

regulations on modern armament. Unlike the colonial era there are some forms of ammunition that have intrinsically harmful properties. If a historical analysis is absolutely needed then it should be done via analogs to the incendiary devices. Unlike the bow they were weapons not in common use. Englishmen joined the French King Louis on the Sixth Crusade.

> This was the fashion of the Greek fire: it came on as broad in front as a vinegar cask, and the tail of fire that trailed behind it was as big as a great spear; and it made such a noise as it came, that it sounded like the thunder of heaven. It looked like a dragon flying through the air. Such a bright light did it cast, that one could see all over the camp as though it were day, by reason of the great mass of fire, and the brilliance of the light that it shed.
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> Thrice that night they hurled the Greek fire at us, and four times shot it from the tourniquet cross-bow.
>
> Every time that our holy King heard that they were throwing Greek fire at us, he draped his sheet round him, and stretched out his hands to our Lord, and said weeping: "Oh! fair Lord God, protect my people! "And truly, I think his prayers did us good service in our need. *Jean de Joinville's The Life of St. Louis* (1309).

They were not in common use and caused terror when deployed in a usual manner. Unusual refers to a class of conduct while using a protected arm. Justice Scalia clarified this recently “there was a tort called affrighting, which if you carried around a really horrible weapon just to scare people, like a head ax or something, that was, I believe, a misdemeanor”. *See* http://cnsnews.com/news/article/justice-scalia-2nd-amendment-limitations-it-will-have-be-decided (last visited 4/11/2013).

Justice Scalia's comments stem from A Treatise on the Criminal Law of the United States by Francis Whartson (1874)

> An affray, as has been noticed, is the fighting of two or more persons in some public place, to the terror of the citizens. (footnote omitted) There is a difference between a sudden affray and a sudden attack. An affray means something like a mutual contest, suddenly excited, without any apparent intention to do any great bodily harm. (footnote omitted). … yet it seems certain that in some cases there may be an affray where there is no actual violence; as where a man arms himself with dangerous and unusual weapons, in such a manner as will naturally cause a terror to the people, which is said to have been always an offence at common law, and is strictly prohibited by the statute. *Id* at 527

In this context the Common Law's definition of dangerous was any item that could be used to take human life through physical force. ("[S]howing weapons calculated to take life, such as pistols or dirks, putting [the victim] in fear of his life…is…the use of dangerous weapons" *United States v. Hare*, 26 F. Cas. 148, 163-64 (C.C.D. Md. 1818)"). "Any dangerous weapon, as a pistol, hammer, large stone, &c. which in probability might kill B. or do him some great bodily hurt" *See Baron Snigge v. Shirton* 79 E.R. 173 (1607).

With the exception of nonlethal offensive arms, such as stun guns, all protected arms are dangerous. In this context, unusual meant to use a protected arm in a manner which creates an affray. Timothy Cunningham's 1789 law dictionary defines an affray as "to affright, and it formerly meant no more, as where persons appeared with armour or weapons not usually worn, to the terror". A unusual use

of weapons in common use led to *Baron Snigge v. Shirton* 79 E.R. 173 (1607), this case involved a landlord-lessee dispute. The tenant "kept the possession [of the house] with drum, guns, and halberts". The Court found he used "unusual weapons" to maintain possession of the house. *Id. Rex v. Rowland Phillips* 98 E.R. (1385) holds "if an officer in the impress service, fire in the usual manner at the hallyaras of a boat, in order to bring her to, and happen to kill a. man it is only manslaughter". *Id.* Heller held using a ***weapon*** in a unusual place, time, and manner can be restricted.

At the time of the ratification of the U.S. Constitution *Rex* was still considered binding precedent. *See* The Reports of Cases Adjudged In the Court of King's Bench:From Hilary Term, the 14th of George III. 1774, to Trinity term, the 18th of George III. (1778) Volume 1 at 824. ("When the accused uses a protected arm in a usual but negligent manner he did not have the malice needed for common law murder.)"

Courts around the time of the ratification of the Fourteenth Amendment also agreed with this definition as made clear in *State v. Huntley*, 25 N.C. (3 Ired.) 418, 40 Am. Dec. 416 (1843).

The jurors for the State upon their oath present, that Robert S. Huntly, late of the county aforesaid, laborer, on the first day of September, in the present year, with force and arms, at and in the county aforesaid, did arm himself with pistols, guns, knives, and other dangerous and unusual

weapons, and being so armed, did go forth and exhibit himself openly, both in the daytime and in the night, to the good citizens of Anson aforesaid, and in the said highway and before the citizens aforesaid, did openly and publicly declare a purpose and intent, one James H. Ratcliff and other good citizens of the State, then and there being in the peace of God and of the State, to beat, wound, kill, and murder, which said purpose and intent, the said Robert S. Huntley, so openly armed and exposed and declaring, then (p.419)and there had and entertained, by which said arming, exposure, exhibition, and declarations of the said Robert S. Huntley, divers good citizens of the State were terrified, and the peace of the State endangered, to the evil example of all others in like cases offending, to the terror of the people, and against the peace and dignity of the State. *Id.*

And in *State v. Lanier*, 71 N.C. 288 (1874). "The offence of going armed and dangerous or unusual weapons is a crime against the public peace by terrifying the good people of the land, and this Court has declared the same to be the common law in State v. Huntley 3 Ired. 418…in this case we attach no importance to the fact that the defendant had no arms, for we think it may be conceded that driving or riding without arms through a court house or a crowded street at such a rate or in such a manner as to endanger the safety of the inhabitants amounts to a breach of the peace and is an indictable offence at the common law". *Id* at 289.

Unusual was Middle English for disturbing the peace. The Statute of Northampton 2 Edw. 3, c. 3 (1328) translated into modern English prohibits assault with a deadly weapon. Brandishing a handgun can intimidate the average person regardless of whether it is loaded. The *Heller* Court did not intend for this test to be applied to armament.

Defining armament classes by a test designed for weapon makes as much sense as the Hawaii Legislature imposing absolute liability firearm instructors who

are not approved by D.C. lobbyists. *See* SB248. It would be a misapplication of *Heller* to apply common use to armament. If this motion is denied, Mr. Young will not be given the opportunity make that case to this Court. Irreparable harm is the rationale for expediting *Jackson*. That is what Mr. Young will suffer if this motion is denied.

Respectfully submitted this 22nd day of April, 2013,

s/ Alan Beck
Alan Beck (HI Bar No. 9145)

CERTIFICATE OF SERVICE

I served the foregoing pleading by electronically filing it with the Court's CM/ECF system, which generated a Notice of Filing and effects service upon counsel for all parties in the case.
I declare under penalty of perjury that the foregoing is true and correct.
Executed this the 22nd day of April, 2013

s/ Alan Beck
Alan Beck (HI Bar No. 9145)