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.

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

Appellant's Opening Brief

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I. JURISDICTIONAL STATEMENT

Plaintiff-Appellant, George K. Young ("Mr. Young") seeks injunctive relief to have all of Hawaii Revised Statute (HRS) Section 134 ruled unconstitutional. The statutory provisions cited above; violate citizens' rights as guaranteed by the Second and Fourteenth Amendments to the United States Constitution. Accordingly, Mr. Young sought relief pursuant to 42 U.S.C. §§ 1983, 1985, 1986, 28 U.S.C. §§ 1331 and 1343 and the District Court has jurisdiction over this case pursuant to them. On November 29, 2012, the District Court granted Defendants Motion to dismiss. Mr. Young timely filed his Notice of Appeal on December 14th, 2012 and this Court has jurisdiction over this appeal pursuant to 28 U.S.C. §§ 1291 and 1292(a).[1]

II. STATEMENT OF THE ISSUES PRESENTED

Whether the District Court erred in granting Defendants' Motion to Dismisses, when it held: A) all of Mr. Young's claims dealt with prohibition on the carry and transport of arms outside the home when several dealt with Mr. Young's challenge on Hawaii's complete ban on certain weapons inside the home; B) that the rights guaranteed by the Second Amendment extinguish at the threshold of the front door, open carry may be completely banned ,concealed carry may be limited

[1] Counsel would like to thank Deborah Micev, a law student at Thomas Jefferson School of Law for her assistance in preparing this brief.

to "exceptional cases" beyond self-defense; C) that due process protections are not offended where a state vests sole discretion in a government official to arbitrarily determine which citizens may exercise fundamental rights, without providing citizens any meaningful opportunity to be heard, without providing any reasons or justifications for the government official's decision, and without affording aggrieved citizens any opportunity to seek review of that official's decision; D) a complete ban on a class of arms is constitutional; E) not ruling on Mr. Young's challenge to Hawaii's complete ban on electric guns; F) not ruling on Mr. Young's challenge to Hawaii's complete ban on switchblades; G) not ruling on Mr. Young's challenge that Hawaii's complete ban on butterfly knives is unconstitutional.

III. REVIEWABILITY AND STANDARD OF REVIEW

Appellate Courts review de novo a district court's grant of a motion to dismiss under Rule 12(b)(6). *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005). When we review the grant of a motion to dismiss, "we accept all factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party." *Id.*

IV. STATEMENT OF THE CASE

Mr. Young enjoys a fundamental constitutional right to bear arms. This right does not extinguish at the threshold of Mr. Young's front door. Indeed, the Second Amendment guarantees the right to bear firearms for protected purposes, such as self-defense, militia training, and hunting which cannot be accomplished within the confines of a home. Hawaii still cannot ban bearing an entire class of arms outside the home, i.e. rifles and shotguns, even assuming there is a right to bear another. Hawaii's prohibitions on keeping and bearing firearms are unreasonable and unduly restrictive. Hawaii complete ban on switchblades, electric guns and butterfly knives is unconstitutional.

HRS §134-9 should be implemented with policies or ruled unconstitutional on its face and the rest of HRS statutes challenged in this appeal should be ruled unconstitutional on its face. When considering 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).

V. STATEMENT OF FACTS

A. Hawaii Impermissibly Burdens the Ownership and Carrying of Arms.

The only way a qualified law-abiding citizen can bear a handgun is to obtain a permit pursuant to Section 134-9 of the Hawaii Revised Statutes. Applications are made to the chief of police. *Haw. Rev. Stat*. § 134-9. Applicants seeking a permit must somehow satisfy the Chief that theirs is an "exceptional case" and that they have "reason to fear injury to person or property." *Id*. In addition to background checks and fitness and qualification requirements, the applicant must convince the Chief that he or she "appears suitable" to bear arms. *Id.*

The Chief is vested with sole discretion to issue or deny a permit and, an applicant, aggrieved by denial of the application, has no recourse. There is no procedure for administrative, judicial or other review of such denial in the code or otherwise. Thus, absent relief obtained in a separate civil action, such as this one, the Chief's decision is final. Mr. Young is qualified to bear arms and Defendants have never made any allegations to the contrary. The HRS affords no means to keep switchblades, electric gun or butterfly knives inside or outside the home. The HRS has no provision for carrying rifles or shotguns outside the home for self-defense. As this deals with a fundamental right, the burden would be on Defendants to suggest he was not qualified to keep and bear arms.

VI. SUMMARY OF ARGUMENT

When possible, statutes should be read as constitutional. HRS §134-9 is the only means to bear arms in Hawaii. It gives the Chief of Police nearly unbridled discretion to decide who shall be issued a permit. On its own it would be considered unconstitutional due to its complete lack of guidelines on what constitutes an "exceptional case"; however, HRS § 91 gives state and county officials broad authority to enact policy. This was likely done to comport with the unique island culture of each of Hawaii's counties and to allow changes in policy as constitutional guidelines evolve. Accordingly, Chief Kubojiri's failure to adopt policies which comport with constitutional guidelines has resulted in HRS §134-9, as applied to Mr. Young, to be a unconstitutional deprivation of his constitutional rights. In the alternative, if no guidelines could make the statute constitutional then it is unconstitutional on its face. Moreover, the various other challenged statutes should be held facially unconstitutional.

Four years ago, the United States Supreme Court issued the landmark decision styled *District of Columbia v. Heller*, 554 U.S. 570 (2008). In that case, the Court held that "ban[s] on handgun possession in the home violate the Second Amendment as does a prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense." *Heller*, 554 U.S. 570 at 635. The Second Amendment codified a pre-existing right available at Common

Law. *Id*. at 599. Historically, there was a right to bear arms outside the home nevertheless, Hawaii continues to prohibit the bearing of operable handguns.

Furthermore, the *Heller* Court intended that the fundamental right to bear arms extend beyond the threshold of the front door. It is undisputed that states may regulate the right in a number of ways not relevant here, but the *Heller* Court additionally held that "at the time of the founding, as now, to 'bear' meant to 'carry.'" *Id*.at 584. The protected purposes necessitating the right, secured by the Second Amendment and identified by *Heller*, cannot be accomplished within the confines of the home. Defendants have offered no alternative explanation as to the meaning of the term "bear" and there can be little serious dispute as to the definition supplied by the United Supreme Court in *Heller*, *supra*. Defendants have also offered no explanation as to how the activities protected by the Second Amendment could be accomplished within the confines of the home.

Two years after *Heller*, in *McDonald v. City of Chicago*, the Court held that the right to keep and bear arms was a fundamental right, made applicable to the states through the Fourteenth Amendment. 130 S. Ct. 3020 (2010). Thus, as with any other fundamental right, the government must regulate the exercise of Second Amendment rights pursuant to objectives and well-defined standards – standards absent. Recently both the Second Circuit and the Seventh Circuit have ruled there is a right to bear arms outside the home. *Kachalsky v. County of Westchester*, No.

11-3642, 2012 U.S. App. LEXSIS 24363 (2d Cir. Nov.27, 2012; *Moore v. Madigan*, Nos. 12-1269, 12-1788, 2012 U.S. App. LEXIS 25264 (7th Cir. Dec. 11, 2012) . Defendants cannot engage in what is, in practice, a complete prohibition on the open and concealed carry of handguns by private citizens.

To the extent that the discretionary licensing scheme set forth in HRS § 134-9 implicates the procedural due process, the case might well be decided under some level of means-end scrutiny. Here, at least heightened scrutiny would apply as law-abiding citizens may not exercise their fundamental right to bear arms unless their individual circumstances constitute an "exceptional case," an undefined determination left to the sole discretion of the Chief of Police. Thus, the exercise of the right to bear arms constitutes substantial burden on the right to bear arms, heightened scrutiny applies, and permitting citizens to exercise the right only in "exceptional cases" at the whim of the Chief of police cannot overcome such a level of scrutiny.

In deciding the constitutionality of HRS § 134-9, it is enough to rule the only "exceptional case" needed is the desire for self-defense. Further, access to these rights does not turn on the unbridled discretion of a government official regardless of the feelings of the government official as to the propriety of the right. In finding that Hawaii's complete ban on the carrying of rifles outside the home for self-defense is unconstitutional, this Court need only find that an entire class of

arms cannot be banned outside the home. In finding that Hawaii's complete ban on the carrying of shot guns outside the home for self-defense is unconstitutional, this Court need only find that an entire class of arms cannot be banned outside the home. In finding that Hawaii's complete ban on electric guns, switchblades, and butterfly knives is unconstitutional, it need merely adopt the core ruling of *Heller* and hold strict scrutiny on a complete ban on protected arms fails constitutional muster.

VII. ARGUMENT

A. HRS § 134-9 Fails Constitutional Muster.

When possible, statutes should be read as constitutional. HRS §134-9 is the only means to bear arms in Hawaii. It gives the Chief of Police nearly unbridled discretion to decide who shall be issued a permit. On its own it would be considered unconstitutional due to its complete lack of guidelines on what constitutes an "exceptional case". HRS § 134-9 reads as follows:

> **§134-9 Licenses to carry.** (a) In an exceptional case, when an applicant shows reason to fear injury to the applicant's person or property, the chief of police of the appropriate county may grant a license to an applicant who is a citizen of the United States of the age of twenty-one years or more or to a duly accredited official representative of a foreign nation of the age of twenty-one years or more to carry a pistol or revolver and ammunition therefor concealed on the person within the county where the license is granted.
>
> Where the urgency or the need has been sufficiently indicated, the respective chief of police may grant to an applicant of good moral

character who is a citizen of the United States of the age of twenty-one years or more, is engaged in the protection of life and property, and is not prohibited under section 134-7 from the ownership or possession of a firearm, a license to carry a pistol or revolver and ammunition therefor unconcealed on the person within the county where the license is granted.

The chief of police of the appropriate county, or the chief's designated representative, shall perform an inquiry on an applicant by using the National Instant Criminal Background Check System, to include a check of the Immigration and Customs Enforcement databases where the applicant is not a citizen of the United States, before any determination to grant a license is made. Unless renewed, the license shall expire one year from the date of issue.

(b) The chief of police of each county shall adopt procedures to require that any person granted a license to carry a concealed weapon on the person shall:

(1) Be qualified to use the firearm in a safe manner;

(2) Appear to be a suitable person to be so licensed;

(3) Not be prohibited under section 134-7 from the ownership or possession of a firearm; and

(4) Not have been adjudged insane or not appear to be mentally deranged.

(c) No person shall carry concealed or unconcealed on the person a pistol or revolver without being licensed to do so under this section or in compliance with sections 134-5(c) or 134-25.

(d) A fee of $10 shall be charged for each license and shall be deposited in the treasury of the county in which the license is granted. [L 1988, c 275, pt of §2; am L 1994, c 204, §8; am L 1997, c 254, §§2, 4; am L 2000, c 96, §1; am L 2002, c 79, §1; am L 2006, c 27, §3 and c 66, §3; am L 2007, c 9, §8] *See* HRS §134-9.

HRS § 91, however, gives state and county officials broad authority to enact policy, likely to comport with the unique island culture of each of Hawaii's counties and changes in constitutional guidelines without rewriting state law. Accordingly, Chief Kubojiri's failure to adopt policies which comport with constitutional guidelines has resulted in HRS §134-9, as applied to Mr. Young, to be an unconstitutional deprivation of his constitutional rights. In the alternative, if no guidelines could make the statute constitutional then it is unconstitutional on its face.

B. The Right to Bear Arms Exists Outside the Home.

Historically, citizens enjoyed the right to bear arms. According to the *Heller* court, the Second Amendment codified a pre-existing right to bear arms. 554 U.S. at 599. Accordingly, if it can be demonstrated there was a historical right bear arms at CommonLaw, then there is one the modern era.

While the *Heller* Court discussed this issue at length, *Heller*, 554 U.S. at 584 ("in numerous instances from a review of "founding-era sources", 'bear arms' was unambiguously used to refer to the carrying of weapons outside of an organized militia"); within, the Common Law, the earliest written code which asserted the right to bear arms is the Statute of Northampton of 1328. While it did place some minor restrictions on the carrying of arms with evil intent, "the common law

principle of allowing 'Gentlemen to ride armed for their Security'" was preserved. E.g.

> An information was exhibited against him by the Attorney General, upon the statute of 2 Edw. 3, c. 3, which prohibits "all persons from coming with force and arms before the King's Justices, &c., and from going or riding armed in affray of peace, on pain to forfeit his armour, and suffer imprisonment at the King's pleasure." This statute is confirmed by that of 20 Rich. 2, c. 1, with an addition of a further punishment, which is to make a fine to the King. The information sets forth, that the defendant did walk about the streets armed with guns, and that he went into the church of St. Michael, in Bristol, in the time of divine service, with a gun, to terrify the King's subjects, contra formam statute.
>
> This case was tried at the Bar, and the defendant was acquitted. The Chief Justice said, that the meaning of the statute of 2 Edw. 3, c. 3, was to punish people who go armed to terrify the King's subjects. It is likewise a great offence at the common law, as if the King were not able or willing to protect his subjects; and therefore this Act is but an affirmance of that law; and it having appointed a penalty, this Court can inflict no other punishment than what is therein directed. *See Sir John Knight's Case* 87 Eng. Rep. 75 K.B. (1686).
>
> David Caplan, *The Right of the Individual to Bear Arms: A Recent Judicial Trend*, 4 DETC.L.REV 789, 795 (1982) (citing Rex v. Knight, 90 Eng. Rep. 330 (K.B. 1686)); 4 William Case: Blackstone, *Commentaries On The Laws Of England*148 (1769) ("the offence of riding or going armed, with *dangerous or unusual weapons*, is a crime against the public peace, *by terrifying the good people of the land*") (emphases added). The peaceable bearing of commonly used arms was protected: No wearing of Arms is within the meaning of this Statute, unless it be accompanied with such circumstances as are apt to terrify the people; from whence it seems clearly to follow, that persons of quality are in no danger of offending against this statute by wearing common weapons . . . for their ornament or defence, in such places, and upon such occasions, in which it is the common fashion to make use of them, without causing the least suspicion of an intention to commit any act of violence or

> disturbance of the peace. William Hawkins, 1 *Treatise Of The Pleas Of The Crown*, ch. 63, § 9 (1716); *see* Joyce Lee Malcolm, *To Keep And Bear Arms The Origins of An Anglo-American Right* 104-05 (1994).
>
> [T]here may be an affray . . . where persons arm themselves with dangerous and unusual weapons, in such manner as will naturally cause a terror to the people.
>
> * * * *
>
> But it has been holden, that no wearing of arms, is within meaning of Statute of Northampton, unless it be accompanied with such circumstances as are apt to terrify the people; from whence it seems clearly to follow, that persons of quality are in no danger of offending against the statute by wearing common weapons . . . in such places, and upon such occasions, in which it is the common fashion to make use of them, without causing the least suspicion of an intention to commit any act of violence, or disturbance of the peace.
>
> 1 William Oldnall Russell, *A Treatise On Crimes And Indictable Misdemeanors 271* (1826).

Later on the English Bill of Rights of 1689 specifically guaranteed "no royal interference in the freedom of the people to have arms for their own defence as suitable to their class and as allowed by law." Indeed, the same document describes the injustices committed by King James II, resulting in the ratification of that Bill of rights, including that he had "caused several good subjects being Protestants to be disarmed at the same time when papists were both armed and employed contrary to law." English Bill of Rights (1689). Thus, the document restored rights to Protestants that were abrogated by King James II. *Id.*

The historical record of the United States at the time of the Second Amendment's ratification shows the right to carry arms outside the home

increased. Revolutionary War-era Americans, heavily influenced by the tyranny of the British in adopting the Bill of Rights "held the individual right to have and use arms against tyranny to be fundamental." Stephen p. Halbrook, *That Every Man Be Armed: The Evolution of a Constitutional Right* 55 (1984). Similarly, the Federalist papers also speak of the right to bear arms. Alexander Hamilton wrote "[when] representatives of the people betray their constituents, there is then no resource left but in the exertion of that original right of self-defense, which is paramount to all positive forms of government." Alexander Hamilton, *The Federalist No. 28* (1787).

While those historical references speak most acutely to the right in defending against a tyrannical government, they also recognize an inherent right to have arms for other purposes. *Halbrook*, *supra*. at 69, n. 141 ("[T]he right to have weapons for nonpolitical purposes, such as . . . hunting . . . appeared so obvious to be the heritage of free people as never to be questioned."). Furthermore, while several urban municipalities restricted the discharge of firearms within the city bounds or during certain days, Act of May 28, 1746, ch. 10, 1778 Mass. Sess. Laws, ch.5, 193, 194; 5 N.Y. Colonial Laws, ch. 1501at 244–46 (1894); Act of Aug. 26, 1721, ch. 245, Acts of Pennsylvania 157–58, no early American law entirely prohibited the ownership, possession, or use of firearms for self-defense, hunting, or recreation. Patrick J. Charles, *The Second Amendment: The Intent and*

Its Interpretation by the States and the Supreme Court, 77 (2009). Accordingly, at the time of the Second Amendment's ratification there was an understood and unquestioned right to carry arms outside the home.

Even the most restrictive laws at the time of the ratification of the 14th Amendment acknowledged a clear right to carry outside the home.in either concealed or openly ("1876 Wyo.Comp. Laws ch. 52, § 1 (forbidding '*open* bearing . . .') (1894); 1871, ch. 34 (prohibiting . . . except, in part, *for militia service*); *accord Aymette v. State*, 1840 WL 1554, *4 (Tenn. 1840) ("The Legislature, therefore, have a right to prohibit the wearing or keeping weapons dangerous to the peace and safety of the citizens, *and which are not usual in civilized warfare, or would not contribute to the common defence*.") (emphases added)). Notably, the *Aymette* Court's interpretation of the Second Amendment was specifically rejected in *Heller*. *Heller*, U.S. 554 at 613 (noting that the court concluded that concealed carry could be prohibited where open carry was permitted). In *Reid*, which upheld a ban on the carrying of concealed weapons, Alabama's high court explained:

> We do not desire to be understood as maintaining, that in regulating the manner of bearing arms, the authority of the Legislature has no other limit than its own discretion. A statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defense, would be clearly unconstitutional. *State v. Reid*, 1 Ala. 612, 616-17 (1840).

The *Nunn* court followed *Reid*, and quashed an indictment for publicly carrying a pistol where the indictment failed to specify how the weapon was carried. *Nunn*, 1 Ga. at 251. Likewise, in *State v. Chandler*, 5 La. Ann. 489, 490 (1850), the Louisiana Supreme Court held that citizens had a right to carry arms openly:

> This is the right guaranteed by the Constitution of the United States, and which is calculated to incite men to a manly and noble defence of themselves, if necessary, and of their country, without any tendency to secret advantages and unmanly assassinations. The act only . . . seeks to suppress the practice of carrying certain weapons *secretly*, that it is valid, inasmuch as it does not deprive the citizen of his *natural* right of self-defense, or of his constitutional right to keep and bear arms. But that so much of it, as contains a prohibition against bearing arms *openly*, is in conflict with the Constitution, and *void*. *Id*. at 251. *Heller*, 554 U.S. at 613 (citing *Chandler*, *supra*.).

"The Tennessee Supreme Court recognized . . . 'this right was intended ... and was guaranteed to, and to be exercised and enjoyed by the citizen as such, and not by him as a soldier, or in defense solely of his political rights.'" *Id*. at 608 (quoting *Andrews v. State*, 50 Tenn. 165, 183 (1871)). Mr. Young observes that the *Heller* Court has already undertaken an appropriate historical analysis, specifically addressing the right to *bear* arms as opposed to *keep*. The Court concluded that "[a]t the time of the founding, as now, to 'bear' meant to 'carry.'" *Heller*, 554 U.S. at 570, 584 (citations omitted). Surveying the history of concealed carry prohibitions, courts consistently upheld mere regulations of the manner in

which arms are carried – with understanding that a complete ban on the carrying of handguns is unconstitutional.

Indeed, aside from modern day prohibitions that are increasingly being overturned in the courts, the only actual historical bans on the ownership or bearing of arms in the United States are those targeting African-Americans, particularly before ratification of the Fourteenth Amendment. *See Heller*, 554 U.S. at 611-12 (citing *Aldridge v. Commonwealth*, 4 Va. 447, 2 Va. Cas. 447, 449 (Gen.Ct. 1824) ("[w]e will only instance the restriction upon the migration of free blacks into this State, and upon their right to bear arms."); *Waters v. State*, 1 Gill 302, 309 (Md.1843) (because free blacks were treated as a "dangerous population," "laws have been passed to prevent their migration into this State; to make it unlawful for them to bear arms; to guard even their religious assemblages with peculiar watchfulness"); s*ee also* L. Kennett & J. Anderson, *The Gun In America*, p. 50 n. 14 (1975) (discussing first recorded legislation restricting gun ownership by free blacks in Virginia in 1640); Robert H. Churchill, *Gun Regulation, the Police Power, and the Right To Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 Law & Hist., p. 148 n. 7 (2007); Thomas N. Ingersoll, *Free Blacks in a Slave Society: New Orleans, 1718–1812*, 48 Wm. & Mary Q. 173, 178–79 (1991) (recounting Louisiana's 1751 adoption of provisions from the Royal Black Code of 1724 requiring non-slaveholders to stop any black person

carrying potential weapons). Mr. Young's rights should not be defined pursuant to these arcane and racist laws.

In sum, a fair and complete historical analysis, such as that conducted in *Heller, supra*, supports a right to bear arms outside the home existed pre-*Heller*. The law is definite: the state may reasonably regulate the carrying of arms but cannot completely abrogate the right established by the plain language of the Second Amendment. There is an overwhelming weight of tradition and precedent that confirm Americans' enjoyment of the fundamental right to bear arms.

C. Modern Jurisprudence Supports the Right to Bear Arms Outside the Home.

The right to bear arms was addressed in 2008, *Heller, supra,* for the first time since 1939 in *United States v. Miller*, 307 U.S. 174 (1939). The right was applied to the States only two years ago in *McDonald v. Chicago*. A growing number of federal appellate courts have acknowledged there is a fundamental right to carry an arm outside the home. Despite ruling against the plaintiffs in *Kachalsky v. County of Westchester*, No. 11-3642, 2012 U.S. App. LEXIS 24363 (2d Cir. Nov. 27, 2012) "[t]he plain text of the Second Amendment does not limit the right to bear arms to the home," *5 n.10, "the Amendment must have some application in the . . . context of public possession," *5. The "proper cause" requirement is not nearly as restrictive as Hawaii's "exceptional case" requirement." "New York State courts have defined the term [proper cause] to include carrying a handgun for

target practice, hunting, or self-defense." *Id.* A licensing scheme that allows self-defense as cause for a concealed carry license is clearly constitutional unlike HRS 134-9's unattainable and nebulous unusual circumstances requirement.

New York also has a licensing scheme which complies with the Procedural Due Process Clause of the 14th Amendment unlike Hawaii. In Hawaii, the police chief has unbridled discretion to determine whether the applicant is qualified and the existence of an exceptional case. Defendant's sister county has already admitted to this. *See Baker v. Kealoha* Response to Defendant's Notice of Supplemental Authority No. 12-16258 (Nov. 29. 2012) ("the procedures adopted by HPD in accordance with HRS 134-9 are not set forth in a written document, nor are City Defendants aware of any relevant…documents concerning the same... Other than the statute itself City Defendants are unaware of any specific documents setting forth the procedures or protocol followed in determining whether a license should be issued.") Aggrieved applicants in New York can seek judicial review after denial of an application. *Id*. at 12. In contrast, applicants in Hawaii have no means of appeal outside of pursuing a lawsuit like Mr. Young.

Moore v. Madigan, Nos. 12-1269, 12-1788, 2012 U.S. App. LEXIS 25264 (7 Cir. Dec. 11, 2012), recently struck down the near complete ban on carry outside the home in ruling, in an opinion authored by Judge Posner, the Seventh Circuit concluded that "[t]o confine the right to be armed to the home is to divorce

the Second Amendment from the right of self-defense described in Heller and McDonald." *.8. It further concluded that "[t]he Supreme Court has decided that the amendment confers a right to bear arms for self-defense, which is as important outside the home as inside," and that lower courts "are bound by the … historical analysis" that led the Court to that conclusion "because it was central to the Court's holding in Heller." *.7, 20. The Seventh Circuit also questioned the Second Circuit's recent decision in *Kachalsky v. County of Westchester*, No. 11-3642, 2012 U.S. App. LEXIS 24363 (2d Cir. Nov. 27, 2012), upholding public carry restrictions and its "suggestion that the Second Amendment should have much greater scope inside the home than outside." *.18. As the Seventh Circuit concluded, "the interest in self-protection is as great outside as inside the home." *.18. In determining that no remand for summary judgment proceedings was necessary to conclude that Illinois' near-total ban was unconstitutional, the Seventh Circuit also rejected Illinois' scant evidence attempting to justify its total near ban as potentially furthering public safety interests. The Court explained, "[i]f the possibility that allowing guns to be carried in public would increase the crime or death rates sufficed to justify a ban, *Heller* would have been decided the other way." *.13. In light of Illinois' total failure to make the "strong showing" necessary to uphold its ban, the Court emphasized that its "analysis [wa]s not based on degrees of scrutiny, but on Illinois's failure to justify" its scheme. *.14,

19. Hawaii's complete ban on handgun carry likewise can be invalidated without need for remand or consideration of "degrees of scrutiny" because it eliminates the only available avenue for public carry and is antithetical to the right recognized in *Heller*. The Court of Pureto Rico *Asoc de Duenos de Armerias de PR Inc. v. Policia de Puerto Rico* (P.R. Ct. App. June 28, 2012) has ruled the Second Amendment confers a right to carry outside the home. The Michigan Courts in *People v. Yanna*, 297 Mich. App. 137 (2012) held the Second Amendment to open carrying of Tasers and possibly other protected arms such as handguns outside the home. Accordingly, modern jurisprudence supports a right to carry outside the home.

D. HRS 134-9 Violates the Procedural Due Process Clause

As the lower court correctly stated;

> The Fourteenth Amendment protects against the deprivation of property or liberty without due process. See *Carey v. Piphus*, 435 U.S. 247, 259 (1978); *Brady v. Gebbie*, 859 F.2d 1543, 1547 (9th Cir. 1988). Courts employ a two-step test to determine whether due process rights have been violated by the actions of a government official. First, a court must determine whether a liberty or property interest exists entitling a plaintiff to due process protections. If a constitutionally protected interest is established, courts employ a three-part balancing test to determine what process is due. *Hewitt v. Grabicki*, 794 F.2d 1373, 1380 (9th Cir. 1986). The three-part balancing test set forth in *Mathews v. Eldridge* examines (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value,

> if any, of additional or substitute procedural safeguards; and (3) the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). ER 38, 39.

Post-*McDonald*, Mr. Young has a liberty interest in his right to bear arms outside the home. As this right is a fundamental right the private interest at issue in 134-9's failure to afford *any* procedural due process

Accordingly, Mr. Young maintains that the exceptional case completely arbitrary decision subject to the whim of the Chief (as noted above this is the case in County of Hawaii's sister County Honolulu. It is, therefore, unconstitutional. *See Largent v. Texas*, 318 U.S. 418, 422 (1943) (striking ordinance allowing speech permit where mayor "deems it proper".)

The risk of continued deprivation of the interest is great. Pursuant to Section 134-9 of the Hawai'i Revised Statutes, the chief's decision is absolute and final. And, the Chief is not required to disclose the reasons for denying the application. Because, as discussed above, Section 134-9 allows the exercise of a fundamental constitutional right, i.e., the right to bear arms, only in "exceptional cases," which is determined solely by the Chief of Police without any guidance or restraint in the decision-making process whatsoever, an undue and, therefore, unconstitutional burden is imposed. Further, despite the clear deprivation of liberty and property resulting this policy, an applicant has no opportunity to seek judicial, appellate or

even administrative review of the chief's decision. The chief's decision, no matter how seemingly unfair or unfounded, is final. Regardless of the considerations offered, some policy decisions are off the table.

> But the enshrinement of constitutional rights necessarily takes certain policy choices off the table. These include the absolute prohibition of [the right to bear arms]. Undoubtedly some think that the Second Amendment is outmoded in a society where our standing army is the pride of our Nation, where well-trained police forces provide personal security, and where gun violence is a serious problem. That is perhaps debatable, but what is not debatable is that it is not the role of this Court to pronounce the Second Amendment extinct.
> *Heller*, 554 U.S. at 636.

On the other hand, amending the application process to comport with due process would impose only the imposition of some appellate process and guidelines. In deciding this matter, this Court should consider that the policies *sub judice* were put in place before *Heller* and *McDonald*. *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38 (1936) ("the judicial scrutiny must of necessity take into account the entire legislative process, including the reasoning and findings upon which the legislative action rests"). Thus, the Chief was under the erroneous assumption that these policies were not affecting fundamental rights. While these policies may have passed constitutional muster pre-*Heller*, the legal landscape has changed dramatically. .

Since *Heller* and *McDonald*, however, clearly these laws do affect fundamental rights and, therefore, must comport with due process and the

Second Amendment to the United States Constitution. And, because Second Amendment rights are now recognized as fundamental rights, that codified ancient pre-existing basic human rights, made incorporated to the states, the lack of due process must be amended by the Chief.

E. The "Exceptional Case" and "Appearance of Suitability" Requirements Fail Second Amendment Means End Scrutiny

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The "exceptional case" and "appearance of suitability" requirements fail any level of scrutiny as currently applied. Without guidelines and policies put in place to define an exceptional circumstance as simply a desire to defend oneself and the suitability requirement to be defend as simply being a law abiding citizen the current standards are unconstitutional under any form of scrutiny. Although the level of "heightened scrutiny" to be applied was never clarified, where fundamental rights are at stake, strict scrutiny should generally be applied. *See Hussey v. City of Portland*, 64 F.3d 1260, 1265 (9th Cir. 1995) (quoting *Harper v. Virginia Board of Elections*, 383 U.S. 663, 670 (1966).) This level of scrutiny may not apply in every Second Amendment case. Instead, "the rigor of this judicial review will depend on how close the law comes to the core of the Second Amendment right and the severity of the law's burden on the right." *Ezell*, 651 F.3d at 702; *United States v. Masciandaro*, 638 F.3d at 470. Thus, where a violent

abuser's Second Amendment rights were asserted, the Fourth Circuit applied intermediate as opposed to strict scrutiny. *Chester*, 628 F.3d at 683. In contrast, when Chicago banned gun ranges and gun ownership depended upon the applicant being qualified to safely use a firearm, the Seventh Circuit applied a level of scrutiny practically identical to strict scrutiny:

> Labels aside, we can distill this First Amendment doctrine and extrapolate a few general principles to the Second Amendment context. First, a severe burden on the core Second Amendment right of armed self-defense will require an extremely strong public interest justification and a close fit between the government's means and its end. Second, laws restricting activity lying closer to the margins of the Second Amendment right, laws that merely regulate rather than restrict, and modest burdens on the right may be more easily justified. How much more easily depends on the relative severity of the burden and its proximity to the core of the right.
> *Ezell*, 651 F.3d at 708.

This case deserves strict scrutiny. As shown above, there is a fundamental right at stake. However, regardless of what it may be called, as in *Heller*, *supra*., these prohibitions and/or licensing scheme could pass no level of judicial scrutiny. There is little dispute as to whether Mr. Young's right to bear arms is substantially burdened. The only exception to this prohibition operates solely at the unbridled discretion of the chief – and then only in "exceptional cases" and when the applicant "appears suitable" to the chief. *Haw. Rev. Stat.* § 134-9.

There simply is no governmental interest for permitting the exercise of a citizen's rights to hinge solely on his or her ability to gain the favor of the chief.

Certainly, the government has no interest in prohibiting ordinary law-abiding citizens from exercising a right until such time as they may satisfy the chief that theirs is an "exceptional case" and that their need is greater than that of the remaining law-abiding populous. While the government has a compelling interest in regulating arms for public safety purposes, the government may not swallow the entire exercise of the right to bear arms based on some officials' belief that it might be too dangerous. The very existence of any right means that, without more, the state lacks an interest in preventing citizens from enjoying it. Further, the licensing scheme is not tailored to any interest in public safety. Applicants, burdened with showing that theirs are "exceptional cases" are unable to predict crime as are Defendants. Crime is largely unforeseeable. By the time that a victim knows that they are to be victimized, confrontation has already commenced. The only predictable factor is that the violent crime may lead to death or serious injury to innocent victims. And it is from such injury that citizen victims are entitled to defend themselves and their neighbors.

If crime could be predicted, victims could and would take preventive measures. But since it cannot, Mr. Young wishes to take the only preventive measure available to him – to prepare for the worst. Individuals enjoy a right to carry arms "for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person." *Heller*, 554 U.S. at 584.

This right is not extended only to previously victimized or "exceptionally" threatened individuals.

F. The Heller Court Established a Three Part Test to Determine Whether an Arm is Protected by the Second Amendment

In *Heller* the Court ruled "Second Amendment extends prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of founding." *Heller*, 128 S. Ct. at 2817. In order to strike down the ban on hand guns it ruled a complete ban on a protected arm cannot withstand any level of scrutiny. *Id.* It has articulated a three part test to determine whether an arm is protected by the Second Amendment. In order for a device to be protected under by the Constitution it must meet three criteria: The "Second Amendment extends prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of founding." *Heller*, 554 U.S. at 582. Thus, while "dangerous and unusual weapons" may likely be regulated, "the sorts of weapons protected [a]re those 'in common use at this time.'" *Id*. at 627 (refusing to diminish the Second Amendment because advances in technology may require effective militias to utilize sophisticated and unusual arms). Many state courts have likewise concluded that the right to keep and bear arms extends beyond hand guns. *See State v Griffin*, 2011 WL 2083893, *7 n62, 2011 Del Super LEXIS 193, *26 n62 (Del Super Ct, May 16, 2011) (holding that the "right to keep and bear arms" under

the Delaware Constitution extends to knives, and concluding that the Second Amendment right does the same); *City of Akron v Rasdan*, 105 Ohio App 3d 164, 171-172; 663 NE2d 947 (Ct App, 1995) (concluding that the "right to keep and bear arms" under the Ohio Constitution extends to knives); *State v Delgado*, 298 Or 395, 397-404; 692 P2d 610 (1984) (holding that the "right to keep and bear arms" under the Oregon Constitution extends to switchblades as a form of knife). *State v Blocker*, 291 Or 255, 257-258; 630 P2d 824 (1981) (same as to billy clubs), citing *State v Kessler*, 289 Or 359; 614 P2d 94 (1980); also *Barnett v State*, 72 Or App 585, 586; 695 P2d 991 (Ct App, 1985) (same as to blackjacks).

The D.C. Appeals court has already observed that long arms are protected arms. "All the requirements as applied to long guns, also affect the Second Amendment right". *Heller v. District of Columbia*, 670 F.3d 1244, 1255 (2011). The DC Appeals Court later observed that the *Heller* Court in dicta has already noted shotguns and rifles are two independent classes of arms protected by the second amendment. While the Court in Heller observed that the handgun is "the quintessential self-defense weapon," 554 U.S. at 629, a rifle or shotgun is the firearm of choice for hunting, which activity Heller recognized as providing one basis for the right to keep and bear arms, albeit not the central one, *Id*. at 599.

i. Rifles Are A Protected Class of Arms

Rifles are defined as "a shoulder firearm with spiral grooves cut in the inner surface of the gun barrel to give the bullet a rotatory motion and thus a more precise trajectory". *See* Dictionary.com, http://dictionary.reference.com/browse/rifle (accessed Jan. 5, 2012.) They are distinguishable from "shotguns which are defined as a smoothbore gun for firing small shot to kill birds and small quadrupeds, though often used with buckshot to kill larger animals". *See* Dictionary.com, http://dictionary.reference.com/browse/shotgun?s=t (accessed Jan. 5, 2012.) A class is defined as "a number of persons or things regarded as forming a group by reason of common attributes, characteristics, qualities, or traits; kind; sort: a class of objects used in daily living". As a rifle is distinguishable from a shotgun in both form and function they operate as an independent class of arms. They are bearable upon the person, as a judicially noticeable fact they are in common use, and there can be no serious argument that they are unusually dangerous.

In *United States v. Henry*, 688 F. 3d 637 (9th Cir. 2012) this Court held "a modern machine gun can fire more than 1,000 rounds per minute, allowing a shooter to kill dozens of people within a matter of seconds. *See* George C. Wilson, Visible Violence, 12 NAT'L J. 886, 887 (2003)." Short of bombs, missiles, and

biochemical agents, we can conceive of few weapons that are more dangerous than machine guns. A machine gun is "unusual" because private possession of all new machine guns, as well as all existing machine guns that were not lawfully possessed before the enactment of§ 922(o), has been unlawful since 1986. Outside of a few government-related uses, machine guns largely exist on the black market." *Id.* at 640. Rifles are neither unusual as they are commonly possessed throughout the United States and do not have anywhere near the devastating power of a machine gun. Accordingly, they are protected arms under the Second Amendment of the United States.

ii. The HRS Maintain a Complete Ban on Rifles For Self-Defense Outside the Home

HRS §§ 134-23 and HRS 134-25 ban the carrying of rifles outside the home for purposes of lawful self-defense. It reads as follows:

§134-23 Place to keep loaded firearms other than pistols and revolvers; penalty. (a) Except as provided in section 134-5, all firearms shall be confined to the possessor's place of business, residence, or sojourn; provided that it shall be lawful to carry unloaded firearms in an enclosed container from the place of purchase to the purchaser's place of business, residence, or sojourn, or between these places upon change of place of business, residence, or sojourn, or between these places and the following:

(1) A place of repair;

(2) A target range;

(3) A licensed dealer's place of business;

(4) An organized, scheduled firearms show or exhibit;

(5) A place of formal hunter or firearm use training or instruction; or

(6) A police station.

"Enclosed container" means a rigidly constructed receptacle, or a commercially manufactured gun case, or the equivalent thereof that completely encloses the firearm.

(b) Any person violating this section by carrying or possessing a loaded firearm other than a pistol or revolver shall be guilty of a class B felony. [L 2006, c 66, pt of §1].

It bans the carrying of rifles except as provided by HRS §134-25 which reads;

> **§134-25 Possession by licensed hunters and minors; target shooting; game hunting.** (a) Any person of the age of sixteen years, or over or any person under the age of sixteen years while accompanied by an adult, may carry and use any lawfully acquired rifle or shotgun and suitable ammunition while actually engaged in hunting or target shooting or while going to and from the place of hunting or target shooting; provided that the person has procured a hunting license under chapter 183D, part II. A hunting license shall not be required for persons engaged in target shooting.
>
> (b) A permit shall not be required when any lawfully acquired firearm is lent to a person, including a minor, upon a target range or similar facility for purposes of target shooting; provided that the period of the loan does not exceed the time in which the person actually engages in target shooting upon the premises.
>
> (c) A person may carry unconcealed and use a lawfully acquired pistol or revolver while actually engaged in hunting game mammals, if that pistol or revolver and its suitable ammunition are acceptable for hunting by rules adopted pursuant to section 183D-3 and if that person is licensed pursuant to part II of chapter 183D. The pistol or revolver may be transported in an enclosed container, as defined in section 134-25 in the course of going to and from the place of the hunt, notwithstanding section 134-26. [L 1988, c 275, pt of §2; am L 1997,

> c 254, §§1, 4; am L 2000, c 96, §1; am L 2002, c 79, §1; am L 2006, c 66, §2].

As HRS §134-9 only provides for handguns, there is no means to carry a rifle for lawful self-defense. Accordingly, the HRS bans the carrying of rifles for self-defense. The core right of *Heller* is that of self-defense. *Heller*, 554 U.S. 570 at 592. Allowance for carrying rifles for hunting and target shooting are inadequate. The ban on long arms is analytically identical to the ban on handguns in *McDonald*, except that here it applies to carrying long arms outside the home. In *McDonald*, the City argued that a ban on handguns inside the home is permissible since people could own long guns inside their home the Court ruled that this was unconstitutional. "The question in this case is not whether a "right to handguns" is incorporated, as Chicago suggests, but rather whether the Second Amendment in its entirety—securing the individual right to keep and bear any weapon in common use—applies to state and local governments." Brief of the State of Texas et al. as Amici Curiae in Support of Petitioners at 25, *McDonald v. City of Chicago*, No. 08-1521 (U.S. Nov. 2009) (Tex. McDonald Br.) The Second Amendment protects an individual right to keep and bear any weapons that are in common use by Americans. As the right to bear arms extends beyond the home, per *Heller* any level of scrutiny Hawaii's complete ban on carrying long arms outside the home fails constitutional muster.

As a practical matter there are many reasons why a person might prefer rifles over handguns. He might simply be more proficient with another type of firearms or the environment he is in makes another type of firearm more practical. Imagine the maintenance worker who needs to travel into the wilderness to make repairs. He would fear attack by wild dogs or boar. A rifle or shotgun is a much more practical choice for self-defense. The complete prohibition on carrying firearms other than handguns in HRS § 134-24 triggers a heightened level of scrutiny that Defendants cannot meet. Mr. Young concedes that the state can regulate the carrying of rifles outside the home; however a complete ban fails any level of scrutiny.

G. Shotguns Are a Protected class of Arms and the HRS Maintains a Complete Ban on Their Use for Lawful Self-Defense Outside the Home

Under the same analysis as above, shotguns are an independent class of arms protected under the Second Amendment. They are bearable upon the person, as a judicially noticeable fact they are in common use, and they are not unusually dangerous. *United States v. Miller*, 307 U.S. 174 (1939) offers broad support for the proposition that shotguns are an independent class of arms. In the absence of any evidence tending to show that possession or use of a "shotgun having a barrel of less than eighteen inches in length" at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia." *Id.* at 178. It by

implication acknowledges that shotguns are a separate class of arms and shotguns having barrels greater than eighteen inches are protected arms. By the Court explicitly delineating between rifles and shotguns despite the criminal statute at question referring to both as "firearms" it is clear within the constitutional law context the two are two separate classes of arms. *See* Act of June 26, 1934, c. 757, 48 Stat. 1236-1240, 26 U.S.C. § 1132 (applying the term firearm to both shotguns and rifles.)

Further support is found in *Printz v. United States*, 521 U.S. 898 (1997) "the Second Amendment did not guarantee a citizen's right to possess a sawed off shotgun because that weapon had not been shown to be "ordinary military equipment" that could "contribute to the common defense." *Id*. at 178 ((concurring opinion of J.Thomas). Again we must accept that the Supreme Court means what they say and intentionally delineates between shotguns and rifles within the constitutional law context. As they do not state shotguns as a class are not protected arm but instead only sawed off shotguns, we must accept that shotguns are a class are protected arms. Accordingly shotguns independent of rifles are arms protected by the Second Amendment. Under the same provisions as cited above, the HRS maintains a complete ban on carrying shotguns for purposes of lawful self-defense. Accordingly this ban fails any level of scrutiny.

H. Modern Jurisprudence Supports the Right to Bear Arms Other Than Handguns Outside the Home

To Mr. Young's knowledge only two cases have ruled on whether the right to bear arms other than hand guns extends outside the home. In *People v. Mitchell*, 209 Cal. App. 4th 1364 (2012), the court held "the dirk or dagger concealed-carrying restriction does not entirely prohibit the carrying of a sharp instrument for self-defense; rather, it limits the manner of exercising that right by proscribing concealed carrying of a dirk or dagger unless the bearer uses a visible knife sheath or nonswitchblade folding or pocketknife." *Id.* at 1374. Because the statute regulates but does not completely ban the carrying of a sharp instrument, we subject it to intermediate scrutiny.

While it upheld the statute, the *Mitchell* court nevertheless affirmed the Second Amendment protects a right to publicly carry arms other than hand guns for self-defense, and that restrictions thereof demand heightened scrutiny. And, while intermediate scrutiny was applied, *Mitchell* implies that a ban on publicly carrying knives rather than a regulation of the manner in which one may do so – would demand higher scrutiny. *Id* at 1374. Moreover, the *Mitchell* court found that the same alternative ways for publicly carrying knives under California law that made intermediate scrutiny appropriate are what also makes the challenged statute

sufficiently tailored to survive such scrutiny. *Id* at 1375. Accordingly, it supports the notion that there is a right to carry arms other than handguns outside the home.

In *People v. Yanna*, the Court held the "Second Amendment explicitly protects the right to "carry" as well as the right to "keep" arms. Likewise, the Michigan Constitution specifically allows citizens to "bear" arms for self-defense. We therefore conclude that a total prohibition on the open carrying of a protected arm such as a taser or stun gun is unconstitutional." 297 Mich. App. 137 (2012). Accordingly, both cases which have ruled on whether the Second Amendment confers a right to carry arm other than firearms outside the home have affirmed

I. Mr. Young's Challenges Against §§134-16, 134-52 and 134-53 Require Strict Scrutiny

As the lower Court noted:

> The Third, Fourth, Seventh, Tenth, and District of Columbia Circuits have adopted a two-step approach for evaluating Second Amendment challenges. First, a court must determine whether the challenged law regulates activity that falls within the Second Amendment's scope. If the challenged law does not regulate protected activity, the inquiry is complete. If the challenged law does regulate activity within the scope of the Second Amendment, a court must then determine whether it imposes an unconstitutional burden by applying a level of scrutiny higher than rational review. *See United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010), cert. denied, 131 S.Ct. 958 (2011); *Heller v. District of Columbia*, 670 F.3d 1244, 1256-58 (D.C.Cir. 2011); Ezell, 651 F.3d at 702–04; *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010); *United States v. Reese*, 627 F.3d 792, 800–01 (10th Cir. 2010). (See ER 27-28.)

While this Court has yet had the opportunity to adopt this test, Mr. Young ask this Court to apply this test to determine a prohibition on a protected arm inside the home must meet strict scrutiny. *See Thomas v. Review Bd. of Ind. Employment Sec. Div*., 450 U.S. 707, 718 (1981) ("The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest."). The burden is on the defendants to show they have a compelling state interest and the current restrictions are the least restrictive means available. Mr. Young fails to see the compelling government interest in banning these protected arms and asks the Defendants to provide one.

While acting as a pro se plaintiff, Mr. Young stated in his Prayer for Relief he sought "a permanent injunction of H.R.S. 134". (*See* ER 5.) On the same page he sought relief in the form of a "weapons permit" and defined a weapon as "all arms for personal offensive and defensive use, including...stun guns, tasers...switchblade[s] etc." (*See* ER 5.) Mr. Young clearly stated the relief he sought and the HRS 134's complete bans even within the home on the ownership of electric guns, switchblades and butterfly knives should be ruled unconstitutional.

i. HRS §134-16 Is a Complete Ban on Electric Guns

The State of Hawaii completely bans the ownership of electric guns which include stun guns and Tasers. HRS §134-16 in pertinent part states:

> **§134-16 Restriction on possession, sale, gift, or delivery of electric guns**. (a) It shall be unlawful for any person, including a licensed manufacturer, licensed importer, or licensed dealer, to possess, offer for sale, hold for sale, sell, give, lend, or deliver any electric gun.

Electric guns are obviously bearable upon the person and as the *Yanna* court held when overturning Michigan's stun gun ban"[o]wning a stun gun is legal in 43 states and nearly 198,000 civilians exercise the right to own a stun gun as a viable means of less than lethal self-defense." *People v. Dean Scott Yanna*, Case No. 10-10536-FH, Order (Bay County, Mich., April 21, 2011); Ron F. Wright, *Shocking The Second Amendment: Invalidating States Prohibitions on Taser with the District of Columbia v. Heller*, 20 Alb. L.J. Sci. & Tech. 159, 178, (2010) (internal quotation marks omitted); Eugene Volokh, *Nonlethal Self-Defense, (Almost Entirely) Nonlethal Weapons, And the Rights to Keep and Bear Arms and Defend Life*, 62 Stanford Law Review, 199, 207-208(2009). The use of this less-than-lethal weapon is even less dangerous than the use of bare hands. *Caldwell v Moore*, 968 F2d 595, 601 (6th Cir. 1992) ("use of a stun gun is less dangerous for all involved than a hand to hand confrontation").

This decision was later upheld in by the Michigan Appellate Court which also held the Second Amendment applies not just to firearms but to other weapons as well; even weapons that are far less prevalent than handguns may still be protected by the Second Amendment; the Second Amendment extends to open carrying of electric guns and possibly other protected arms such as handguns outside the home. *People v. Yanna*, 297 Mich. App. at 137. Like Michigan, Hawaii has a complete ban on electric guns. As electric guns fulfill the *Heller* test for a protected arm, Hawaii's complete ban on electric guns fail constitutional muster.

ii. Knives Are Protected Arms

Under the three part *Heller* test, knives are protected arms. They are bearable upon the person, in common use and are not unusually dangerous. Moreover, The U.S. Supreme Court has specifically stated knives are an arm. See *Heller*, 554 U.S. at 590 ("[i]n such circumstances the temptation [facing Quaker frontiersmen] to seize a hunting rifle or knife in self-defense ... must sometimes have been almost overwhelming."). Both switchblades and butterfly knives are types of knives. Accordingly they are protected arms and their complete ban even inside the home fail strict scrutiny.

iii. Hawaii's Complete Ban on Switchblades Fail Strict Scrutiny

Hawaii via HRS §134-52 maintains a complete ban on switchblades. HRS §134-52 in pertinent part states:

> **§134-52 Switchblade knives; prohibitions; penalty.** (a) Whoever knowingly manufactures, sells, transfers, possesses, or transports in the State any switchblade knife, being any knife having a blade which opens automatically (1) by hand pressure applied to a button or other device in the handle of the knife, or (2) by operation of inertia, gravity, or both, shall be guilty of a misdemeanor.

The first American switchblade was made in 1850. *See* Mark Erickson, *Antique American Switchblades*, Krause Publications (2004). During WWII, the switch blade was issued to U.S. servicemen, primarily to paratrooper for the purpose of removing their parachutes if they became injured. *See* Ragnar Benson, *Switchblade: The Ace of Blades*, Paladin Press (1989), pp. 1-14. Switchblades remain in use by both civilians and the military.[2] Per *Heller*, as a form of knife they

[2] Upon a search of the online Federal Logistics System located at http://www.dlis.dla.mil/WebFlis/pub/pub_search.aspx Counsel was able to determine switchblades are still commonly issued to military personnel. One example is the Benchmade 5000 Its description is located at http://www.dlis.dla.mil/WebFlis/pub/pub_search.aspx?niin=4220015460478&newpage=1. These forms of switchblade knives are in common use by the military as fighting knives. Others such as the BK 3300 NSN 1095-01-598-4471 are primarily used as rescue switchblade knife. The M-724 Auto Knife National NSN: 5110-00-526-8740 to this day retains its original purpose and is used to cut parachute shrouds during self-rescue. An article on the M-series storied history and service to America is available at http://www.colonialknifecorp.com/Military_Series/M-

are clearly protected by the Second Amendment. Compared to a handgun they are clearly not dangerous. Besides being referenced as a protected arm, knives are obviously less dangerous than hand guns and are in common use. The Oregon Supreme Court has already ruled switchblades as a form of knife are protected arm under its State Constitution.

> A switch-blade is defined as a "pocketknife having the blade spring-operated so that pressure on a release catch causes it to fly open." Webster's Third International Dictionary 2314 (1971) … This court recognizes the seriousness with which the legislature views the possession of certain weapons, especially switch-blades.[7] The problem here is that ORS 166.510(1) absolutely proscribes the mere possession or carrying of such arms. This the constitution does not permit.

State v. Delgado, 692 P. 2d 610, 613-614 (1984) (distinguishable from *Lacy v. State*, 903 N.E.2d 486 (Ind. App. 2009), which relied on the unsubstantiated proposition that switchblades are used almost exclusively by criminals and was an as applied ruling.) The Plaintiff in *Delgado*, like Mr. Young, made a facial challenge to the switchblade ban. There is no compelling government interest in

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724_Military_Auto_Knife/M724_History/m724_history.html National Stock Numbers are only assigned to items procured by the Department of Defense. Counsel was unable to compile a complete list because switchblades are listed by a variety of titles based on their use by the military making a complete list infeasible.

banning these protected arms. Hawaii's complete ban on switchblades fails strict scrutiny.

J. Hawaii's Complete Ban on Butterfly Knives fails Strict Scrutiny

Hawaii via HRS §134-53 maintains a complete ban on butterfly knives. HRS §134-53 in pertinent part states:

> **§134-53 Butterfly knives; prohibitions; penalty.** (a) Whoever knowingly manufactures, sells, transfers, possesses, or transports in the State any butterfly knife, being a knife having a blade encased in a split handle that manually unfolds with hand or wrist action with the assistance of inertia, gravity or both, shall be guilty of a misdemeanor.

Through the same analysis used for switchblades, butterfly knives, as a form of knife are protected arms. There is no compelling government interest in banning these protected arms. Therefore, Hawaii's complete ban on them even inside the home is fails strict scrutiny.

CONCLUSION

Mr. Young respectfully requests this Court issue a directed judgment to the lower Court requiring it to issue a judgment requiring the following: Chapter 134 of Hawaii Revised Statutes be revised to allow for a means to carry a rifle outside the home for self-defense; a shotgun outside the home for self-defense; and an injunction on the laws prohibiting the in the home prohibitions of electric guns,

switchblades, and butterfly knives. Finally an order either enjoining HRS 134-9 or compelling City Defendants to adopt policies to allow it to survive constitutional muster.

Respectfully Submitted,

/s/ Alan Beck
Alan Alexander Beck
Counsel for Appellant

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Plaintiff-Appellant identify the following cases as related:

David Mehl, et al. v. Lou Blanas, et al., No. 08-15773

James Rothery, et al. v. County of Sacramento, et al., No. 09-16852

Peruta v. San Diego, No. 10-56971

Richards, et. al. v. Prieto et. al., No. 11-16255

Baker v. Kealoha et. al.. No. 12-16258

Dated: San Diego, California, February 15, 2013.

CERTIFICATE OF COMPLIANCE

TYPE-VOLUME LIMITATIONS, TYPEFACE REQUIREMENTS,

AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Circuit Rule 32-3(3) because this brief contains 10, 413 words, excluding the parts of the brief excluded by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in proportionately spaced typeface using Microsoft Word 2007 in 14 point Times New Roman font.

/s/ Alan Beck

Alan Beck

Counsel for Appellant

CERTIFICATE OF SERVICE

On this, the 15th day of February 2013, I served the foregoing Brief 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.

/s/Alan Beck

Alan Beck