No. 14-16514

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KIRK C. FISHER,
Plaintiff-Appellant

vs.

LOUIS KEALOHA, as an individual and in his official capacity as Honolulu Chief of Police, and CITY AND COUNTY OF HONOLULU
Defendants-Appellees.

APPEAL
From the United States District Court for the District of Hawaii
The Honorable Alan C. Kay, Presiding
Civ. No. 11-00589 ACK-BMK

DEFENDANTS-APPELLEES' ANSWERING BRIEF

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DEFENDANTS-APPELLEES LOUIS KEALOHA AND THE CITY AND COUNTY OF HONOLULU'S ANSWERING BRIEF

Defendants-Appellees LOUIS KEALOHA (hereinafter "Kealoha") and the CITY AND COUNTY OF HONOLULU (hereinafter "the City") (collectively "Honolulu Parties"), by and through their attorneys, Donna Y.L. Leong, Corporation Counsel, and Curtis E. Sherwood and Sarah T. Casken, Deputies Corporation Counsel, respectfully submit this answering brief.

I. INTRODUCTION

The instant matter presents a question concerning the federal right to keep and bear arms. In response to a motion for summary judgment brought by Honolulu Parties, the United States District Court for the District of Hawaii (hereinafter "District Court") held that Plaintiff-Appellant KIRK C. FISHER (hereinafter "Fisher") was barred from firearm possession under both federal and state statutory law[1] due to his conviction for harassment, a misdemeanor crime of domestic violence, and that such bar did not violate his Second Amendment rights. Honolulu Parties believe the District Court's ruling to be correct and request that this Honorable Court affirm the order below.

II. JURISDICTIONAL STATEMENT

In his Amended Complaint, Fisher asserted two federal question claims, arguing that Honolulu Parties were liable for 42 U.S.C. § 1983 violations of his

[1] *See* 18 U.S.C. § 921, *et seq.*; *and* Hawaii Revised Statutes ("HRS") § 134-7.

Second and Fourteenth Amendment rights. The District Court had original subject matter jurisdiction over these claims pursuant to 28 U.S.C. §§ 1331 and 1343. On July 18, 2014, the District Court entered its "Order Granting [Honolulu Parties'] Motion for Summary Judgment or, in the Alternative, Motion for Reconsideration" (hereinafter "Order Granting Honolulu Parties' MSJ"). *See* Supplemental Excerpts of Record (hereinafter "SER") at 003-55. On August 5, 2014, Fisher timely filed his "Notice of Appeal of [Order Granting Honolulu Parties' MSJ]." SER at 001-02. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.[2] *See* Nat'l Distrib. Agency v. Nationwide Mut. Ins. Co., 117 F.3d 432, 433 (9th Cir. 1997).

III. COUNTERSTATEMENT OF ISSUE PRESENTED FOR REVIEW

Honolulu Parties assert that the two issues presented for review are:

- Whether the District Court erred when it applied 18 U.S.C. § 922(g)(9) (hereinafter "the Lautenberg Amendment")[3] and HRS

[2] We note that although the District Court has yet to enter judgment pursuant to Federal Rules of Civil Procedure (FED. R. CIV. PROC.) Rule 58(b), this court has jurisdiction because the Order Granting Honolulu Parties' MSJ is a "final decision" that "ends the litigation on its merits and leaves nothing for the court to do but execute the judgment." *See* Caitlin v. United States, 324 U.S. 229, 233 (1945).

[3] 18 U.S.C. § 922(g)(9) provides, in relevant part:

> "It shall be unlawful for any person . . . *who has been convicted in any court of a misdemeanor crime of domestic violence*, to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." (Emphasis added.)

§ 134-7[4] to Fisher and held that he was disqualified from possessing firearms?

- Whether the District Court erred when it held that such disqualification was consistent with the Second Amendment?

IV. COUNTERSTATEMENT OF THE CASE

This case arises out of the denial by the Honolulu Chief of Police[5] of Fisher's application for a permit to acquire firearms, as well as the revocation of Fisher's existing firearms permits, because Fisher was disqualified from firearms ownership or possession under HRS § 134-7.

Fisher's disqualification is based on his December 3, 1997 conviction for two (2) counts of harassment in violation of HRS § 711-1106(1)(a),[6] stemming

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[4] HRS § 134-7 provides, in relevant part:

> (a) No person who is … a person *prohibited from possessing firearms or ammunition under federal law* shall own, possess, or control any firearm or ammunition therefore.
> (b) No person who is under indictment for, or has waived indictment for, or has been bound over to the circuit court for, or has been convicted in this State or elsewhere of having committed a felony, or *any crime of violence*, or an illegal sale of any drug shall own, possess, or control any firearm or ammunition therefore. (Emphasis added.)

[5] Paul Putzulu ("Putzulu") was Acting Chief of Police when he signed the October 1, 2009 letter informing Fisher that he was "disqualified from firearms ownership or possession under the provisions of the Hawaii Revised Statutes (HRS), section 134-7." The present Chief of Police, Louis Kealoha, signed a subsequent letter, dated September 29, 2010, affirming Putzulu's "revocation of the firearms permits."

[6] HRS § 711-1106(1)(a) provides, in relevant part:

from an incident of domestic violence against his wife and daughter. SER at 189-91. Fisher pled guilty to both counts in the Family Court of the First Circuit, State of Hawai'i (hereinafter "Family Court").[7] SER at 189. The Family Court placed Fisher on probation for a period of six (6) months and ordered him to surrender any firearms, ammunition, permits, and licenses to the Honolulu Police Department (hereinafter "HPD"). SER at 186-88.

On November 4, 1998, the Family Court issued an "Order Permitting Return of Firearms, Ammunition, Permits and Licenses, With Conditions" (hereinafter "Return Order"). SER at 183-85. The Return Order stated that HPD should return Fisher's firearms and ammunition

> *provided that the provisions of HRS Chapter 134 are satisfied* and that there are no outstanding state of [sic] federal restraining orders, prohibitions under H.R.S. Section 134-7 or the Violence Against Women Act of 1994 (18 U.S.C. Section 2265 et. seq. and section 922(g)(8), or a *conviction of a misdemeanor crime of violence under 18 U.S.C. section 922(g)(9)* . . . which would prohibit [Fisher's] possession or control of firearms and ammunition.

> **§711-1106 Harassment.** (1) A person commits the offense of harassment if, with intent to harass, annoy, or alarm any other person, that person:
>
> (a) Strikes, shoves, kicks, or otherwise touches another person in an offensive manner or subjects the other person to offensive physical contact . . . .

[7] Nothing in the record indicates that Fisher attempted to enter a Deferred Acceptance of Guilty Plea, which, if granted, would have nullified his conviction upon successful completion of the requirements of the plea. *See* HRS § 853-1. Indeed, Fisher could have expunged his arrest pursuant to this procedure. *See* HRS § 831-3.2(5).

(Emphasis added.) In response to the Family Court's Return Order, HPD erroneously returned Fisher's firearms and ammunition. The return was erroneous because, under HRS § 134-7(a), Fisher was "a person prohibited from possessing firearms or ammunition under federal law" due to his "conviction of a misdemeanor crime of violence under 18 U.S.C. section 922(g)(9) … which would prohibit [Fisher's] possession or control of firearms and ammunition." Moreover, Fisher was prohibited under HRS § 134-7(b) from owning, possessing, or controlling any firearm or ammunition because his harassment conviction was for a "crime of violence."

At an unspecified point in time, but several years subsequent to the Return Order, Fisher submitted an Application for Permit to Acquire Firearms (hereinafter "Application for Firearms Permit") to HPD. On October 1, 2009, Putzulu—then Acting Chief of Police—informed Fisher that: (1) his application was denied, and (2) pursuant to HRS § 134-7, he was disqualified from owning and possessing *any* firearms (hereinafter the "2009 Letter"). SER at 182. Accordingly, Putzulu ordered Fisher to surrender his firearms and ammunitions to HPD, or to otherwise dispose of them within thirty (30) days of receipt of the 2009 Letter.

On August 31, 2010, Fisher requested that Kealoha—the then and present Chief of Police—(1) grant Fisher's Application for Firearms Permit and (2) rescind Putzulu's order contained in the 2009 Letter. SER at 177-81. On September 29,

2010, Kealoha responded, stating that "the Honolulu Police Department still stands by the revocation of the firearms permits." SER at 176.

Thereafter, Fisher initiated this action by filing a Complaint in U.S. District Court on September 28, 2011, and an Amended Complaint on June 14, 2012. On March 19, 2012, Fisher filed a Motion for Preliminary Injunction.

On June 29, 2012, the District Court granted Fisher's Motion for Preliminary Injunction and directed Kealoha to "rescind the prior denial of [Fisher's] permit to acquire firearms and to issue a permit authorizing [Fisher] to acquire arms." SER at 173. The District Court applied the holding in United States v. Belless, 338 F.3d 1063 (9th Cir. 2003) to conclude that Fisher would likely succeed in establishing that harassment is *not* a misdemeanor crime of violence,[8] and as such, Fisher would not be disqualified from firearms possession under the Lautenberg Amendment. SER at 156-60. The Belless court held that the term "physical force" meant "the violent use of force against the body of another individual" and did not include "de minimis" touching. Belless, 338 F.3d at 1068. The District Court agreed with Fisher that, under HRS § 711-1106, it was possible to be convicted for behavior that did not meet the definition of physical force as defined by the Belless

[8] 18 U.S.C. § 921(a)(33)(A) provides, in relevant part,

> "[T]he term 'misdemeanor crime of domestic violence' means an offense that . . . (i) is a misdemeanor under Federal, State, or Tribal law; and (ii) has, as an element, the use or attempted use of physical force . . . committed by a current or former spouse [or] parent."

court, and therefore, his harassment conviction was not for a "misdemeanor crime of domestic violence." SER at 159-60.

On February 25, 2013, Fisher filed a Motion for Summary Judgment and a Motion for Permanent Injunction.

On September 30, 2013, the District Court entered its "Order: (1) Granting in Part and Denying in Part [Fisher's] Motion for Summary Judgment and (2) Denying [Fisher's] Motion for Permanent Injunction". SER at 075-137. The District Court concluded that HRS § 134-7(b) did not disqualify Fisher from exercising his Second Amendment rights because a conviction for harassment which was not a conviction for a "crime of violence" under HRS § 134-7(b). SER at 128.

On March 26, 2014, the United States Supreme Court decided United States v. Castleman, 134 S.Ct. 1405, 188 L.Ed.2d 42 (2014), abrogating Belless and resolving a split among the circuit courts regarding the definition of a misdemeanor crime of violence under the Lautenberg Amendment. The Castleman court held that "Congress incorporated the common-law meaning of 'force'—namely, offensive touching—in § 921(a)(33)(A)'s definition of a 'misdemeanor crime of domestic violence." Castleman, 134 S. Ct. at 1410. This holding, which mirrors the Commentary to HRS § 711-1106,[9] makes

[9] The Commentary on §711-1106 provides, in relevant part:

clear that Fisher's harassment conviction was for a "misdemeanor crime of domestic violence." *See* fn. 6, *supra*.

In response to Castleman, the City filed a "Motion for Summary Judgment, or In The Alternative, Motion for Reconsideration" (hereinafter "Honolulu Parties' MSJ"), which the District Court heard on June 16, 2014. At that hearing, the District Court considered an *amicus curiae* brief for Fisher, even though the *amicus* was not present. In the brief, the *amicus curiae* argued, for the first time, that the Lautenberg Amendment requires states to provide certain, specific mechanisms for misdemeanants to restore their Second Amendment rights. SER at 059-74. The *amicus* further argued that because HRS § 134-7 did not provide these mechanisms, the statute had "no federal mandate" and was unconstitutional as applied to Fisher. SER at 61. *Sua sponte*, the court considered these arguments and allowed the Honolulu Parties to file a brief in response to the new arguments, which the Honolulu Parties did. SER at 056-58.

On July 18, 2014, the court issued its Order Granting Honolulu Parties' MSJ. SER at 003-055. The court concluded that

> [b]ecause [Fisher] was convicted under H.R.S. § 711-1106(1)(a) which has "as an element, the use . . . of physical force" and committed this offense against his wife, [Fisher's] convictions qualify as "misdemeanor crime[s] of domestic violence" and, therefore, he is

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> Subsection (1)(a) is a restatement of the common-law crime of battery, which was committed by any slight touching of another person in a manner which is known to be offensive to that person.

> precluded from possessing firearms under federal law. . . . Now, in light of Castleman, the Lautenberg Amendment statutorily disqualifies [Fisher] from obtaining a firearms permit. Accordingly, [Fisher] cannot establish that his Second Amendment rights were violated.

SER at 032-33.

Furthermore, given Fisher's *federal* Lautenberg Amendment disqualification, the District Court also held that HRS §134-7(a)—which bars a person "prohibited from possessing firearms or ammunition under *federal law*" from owning, possessing, or controlling any firearm or ammunition—also bars Fisher from possessing firearms. SER at 053 [emphasis supplied].

On August 5, 2014, Fisher timely filed his appeal.

V. SUMMARY OF THE ARGUMENT

Fisher seeks to have this Court declare HRS § 134-7 unconstitutional as applied to him because the only option available to him to restore his right to possess firearms is via a gubernatorial pardon. This option is provided for in Article 5, Section 5 of the Hawai‘i State Constitution, which states, in relevant part, that “[t]he governor may grant reprieves, commutations and pardons, *after conviction, for all offenses,* subject to regulation by law as to the manner of applying for the same.” (Emphasis added.)

Fisher asserts that the Lautenberg Amendment represents a mandate to states to provide certain, specific mechanisms by which a person convicted of a crime can restore his or her Second Amendment right to bear arms. Fisher argues that

Hawaii law must include four (4) specific mechanisms[10] in order to be constitutional. Opening Brief ("OB") at 10. He contends, without citing to supporting authority, that HRS § 134-7 is unconstitutional as applied because only one restorative mechanism, the gubernatorial pardon, is available to him.[11]

Contrary to Fisher's argument, there is no federal mandate to states to provide certain, specific mechanisms for a person convicted of a misdemeanor crime of domestic violence to restore the right to possess firearms. Consequently, the District Court correctly held that Fisher is prohibited from possessing firearms, whether or not he has access to various restorative options. Because this Court in United States v. Chovan, 735 F.3d 1127 (9th Cir. 2013), held the Lautenberg Amendment to not violate the Second Amendment, and HRS §134-7(a) as applied here simply duplicates that ban, HRS § 134-7(a) is necessarily constitutional as well.

Moreover, because the District Court correctly determined that Fisher failed to establish a violation of his Second Amendment rights, the District Court correctly held that the claims against Kealoha and the City lacked merit. Also, the

[10] Fisher asserts that "Congress intended for there to be some state sanctioned means of restoring the Second Amendment rights that are suspended by the Lautenberg Amendment. He argues that those means are left to the various states, but *must include: (1) set-aside of the conviction, (2) expungement of the conviction, (3) pardon and (4) restoration of rights.*" OB at 10 (emphasis added).

[11] Fisher expressly asserts that he is only challenging the constitutionality of HRS § 134-7, not the Lautenberg Amendment. OB at 21.

court properly held, in the alternative, that Kealoha was entitled to qualified immunity and the City was not subject to municipal liability, based upon the lack of a Second Amendment violation.

VI. ARGUMENT

A. Standard of Review

> This Court reviews the district court's grant of summary judgment *de novo*. Universal Health Servs., Inc. v. Thompson, 363 F.3d 1013, 1019 (9th Cir.2004). "[R]eview is governed by the same standard used by the trial court under Federal Civil Rule 56(c)." Adcock v. Chrysler Corp., 166 F.3d 1290, 1292 (9th Cir.1999). This Court "must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law." Universal Health Servs., 363 F.3d at 1019 (internal quotation marks omitted). When the underlying facts are not in dispute, the court's only function is to determine whether the district court correctly applied the law. Id.

Szajer v. City of Los Angeles, 632 F.3d 607, 610 (9th Cir. 2011).

B. The Lautenberg Amendment Does Not Require States to Provide a Certain Number of Specific, Restorative Mechanisms for a Misdemeanant Domestic Violence Offender to Regain His Right to Possess Firearms.

Fisher erroneously argues that the "plain language of the Lautenberg Amendment contemplates some mechanism for reinstating Second Amendment rights after a misdemeanor conviction for domestic violence by having the conviction set aside or expunged." OB at 18. Furthermore, he misconstrues the caselaw he cites in support of his proposition.

The Lautenberg Amendment is a broad statute that, but for a few limited exceptions, imposes a lifetime ban on firearm possession for a person convicted of a misdemeanor crime of domestic violence. *See* Chovan, 735 F.3d 1127; Enos v. Holder, 855 F.Supp.2d 1088, 1098-99 (E.D.Cal. 2012) (statute presumptively lawful even if it imposes a lifetime ban); United States v. Smith, 742 F.Supp.2d 855, 862 (S.D.W. Va. 2010) (amendment presumptively lawful by analogy to § 922(g)(1)).

Under certain circumstances, Hawai‘i law also establishes severe restrictions on the right to possess firearms, prohibiting a person who has been convicted of *any crime of violence* from owning, possessing, or controlling any firearm or ammunition. HRS § 134-7(b). However, the District Court did not address, because it did not have to, HRS § 134-7(b) in its Order Granting Honolulu Parties' MSJ, because it ruled that both the Lautenberg Amendment, and HRS § 134-7**(a)**—barring ownership or possession of firearms by those prohibited from possessing firearms under *federal law* (e.g., the Lautenberg Amendment)— barred Fisher from possessing firearms. SER at 053-54.

The Lautenberg Amendment provides a few narrow exceptions to the lifetime ban related to the possession of firearms:

> A person shall not be considered to have been convicted of [a misdemeanor crime of domestic violence] for purposes of this chapter if the conviction *has been expunged or set aside,* or is an offense for which the person *has been pardoned or has had civil rights restored*

> (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense) unless the pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

18 U.S.C. § 921(a)(33)(B)(ii) (emphasis added). Notably, even if a person receives a pardon, expungement, or restoration of civil rights, the person can still expressly be prohibited from shipping, transporting, possessing or receiving firearms.

Fisher's argument that the Lautenberg Amendment imposes a mandate on states to provide for expungement, set aside, pardon, or restoration of civil rights as mechanisms by which an offender can qualify for an exception to the Lautenberg Amendment's bar to firearms possession is contrary to the plain language of that Amendment, caselaw, and the intent of Congress.

First of all, there is nothing in the Lautenberg Amendment that even remotely suggests that its ban on domestic violence misdemeanants is contingent upon states providing any or all of the restorative measures. The Amendment merely provides that *if* a person's conviction has been expunged, set aside, pardoned, or civil rights restored, the ban may no longer apply. It does not mandate that such restorative options exist. The plain language of the Amendment controls.

Most jurisdictions lack at least one, and often more, of the four mechanisms listed. *See* Beecham v. United States, 511 U.S. 368, 373 (1994) (people in some

jurisdictions have exemption procedures available that people in other jurisdictions do not have). Furthermore, although federal law may recognize the restoration of a person's right to possess firearms under the Lautenberg Amendment, "[i]t is clear from the federal law that the majority of domestic violence offenders will not regain their firearms possession right. . . . It is up to state legislatures to constrict or expand the ease with which convicted misdemeanants may apply for and receive relief under [the Lautenberg Amendment]." Smith, 742 F. Supp. 2d at 869.

Congress fully realized and accepted the anomalies that resulted from differing state laws in terms of mechanisms available for the restoration of rights:

> [Congress'] decision to have restoration triggered by events governed by state law insured anomalous results. *The several states have considerably different laws governing pardon, expungement, and forfeiture and restoration of civil rights.* Furthermore, states have drastically different policies as to when and under what circumstances such discretionary acts of grace should be extended. . . . [Anomalies generated by § 921(a)(20)] are the inevitable consequence of making access to the exemption depend on the differing laws and policies of the several states.

Logan v. United States, 552 U.S. 23, 34 (2007) (*quoting* McGrath v. United States, 60 F.3d 1005, 1009 (2nd Cir. 1995)) [emphasis added]; *see also* United States v. Jennings, 323 F.3d 263, 272-73 (4th Cir. 2003) (*quoting* United States v. Smith, 171 F.3d 617, 625 (8th Cir. 1999) ("Congress knew that the states had widely divergent laws regarding pardon, expungement, and restoration of civil rights[,]"

but "continued to look to state law to define the restoration exception, noting that the exception in § 921(a)(33) was modeled after that contained in § 921(a)(20).").

Fisher misstates the reasoning set forth in Chovan when he asserts that the court found that the Lautenberg Amendment was constitutional in California "largely because California has an expungement process which allows domestic violence offenders to regain their firearms rights." OB at 18. Rather, the Chovan court, *without reference to California's expungement provisions*, held that the Lautenberg Amendment was constitutional on its face and as-applied to Chovan. Chovan, 735 F.3d at 1130. There is nothing in Chovan to support Fisher's interpretation that generous expungement procedures must be available as a matter of law.[12]

Moreover, California's expungement/set-aside process is *not* actually generous with respect to *restoration of firearms rights*. The set-aside provision "does *not* permit a person to own, possess, or have in his or her custody or control any firearm." Cal. Pen. Code § 1203.4a(c)(2).

Fisher similarly suggests that United States v. Skoien, 614 F.3d 638 (7th Cir. 2010) stands for the proposition that a state must provide certain, specific procedures for an offender to restore his Second Amendment rights. OB at 17.

[12] Only the solo opinion of Judge Bea, concurring in the result, attached weight to California's particular expungement/set-aside process. The two-judge *majority* opinion, in contrast, did *not* base its ruling on California's expungement process at all.

However, that is not the proposition for which this case stands. *See* Skoien, *generally*. Moreover, the Skoien court expressly recognized that the Lautenberg Amendment "tolerates different outcomes for persons convicted in different states, but this is true of all situations in which a firearms disability (or any other adverse consequence) depends on state law." Skoien, 614 F.3d at 645. As the court noted, "this variability [in outcome] does not call into question federal firearms limits based on state convictions that have been left in place under the states' widely disparate approaches to restoring civil rights." Skoien, 614 F.3d at 645 (*citing* Logan, 552 U.S. 23). Finally, nowhere in the opinion does the court suggest what Fisher purports to impute to it—that states must provide the exceptions mentioned under federal law. Rather, this proposition is his own invention.[13]

In Enos, the plaintiffs argued "that without a means to restore their rights or have their convictions set aside or otherwise pardoned or expunged, § 922(g)(9)

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[13] Fisher inaccurately attributes the following quotation to Skoien:

> Restoration procedures that address the potential for recidivism and insure that reinstatement of the 'right to keep and bear arms' does [sic] not endanger victims or the public, is [sic] essential to upholding its constitutionality.

OB at 17. Aside from the fact that this quotation does not technically support Fisher's argument, **the statement is not even found in Skoien**, but instead is a modification of an argument made by the appellants' in the Enos case. *See* Opening Brief of Plaintiffs-Appellants at 36, Richard Enos v. Eric Holder, No. 12-15498 (9th Cir. July 9, 2012). Indeed, Skoien specifically stated that whether restoration of gun rights for a long-time law abiding misdemeanant is constitutionally required "is a question *not* presented today." 614 F.3d at 645.

cannot pass constitutional muster." Enos, 855 F.Supp.2d at 1098. The district court disagreed with such contention, however, and instead adopted the defendants' argument there—that the Lautenberg Amendment is presumptively lawful as applied to convicted domestic violence misdemeanants, even if the result is a lifetime ban on firearm possession. Enos, 855 F.Supp.2d at 1098-99.

Because Congress clearly left it to the states to establish the procedures for the restoration of the right to possess firearms, the District Court did not err when it held that, "[the Lautenberg Amendment] is constitutional as applied to [Fisher] and statutorily disqualifies him from possessing firearms under federal law." SER at 048-49. Moreover, as the District Court noted, "the plain language of Article Five, Section Five of the Hawai'i Constitution indicates that [Fisher] could receive a pardon for his harassment conviction under HRS § 711–1106(1)(a) and, therefore, statutorily qualify under federal law to possess firearms." SER at 40.

Fisher misleads this Court when he contends, on the one hand, that he has *no* recourse under Hawai'i law to reinstate his right to possess firearms and then admits, on the other, that he has access to the gubernatorial pardon option. He first describes a gubernatorial pardon as "the sole inapplicable exception" to the Lautenberg Amendment, without providing any explanation or case law to support his claim that a gubernatorial pardon is an "inapplicable exception," OB at 3, unless by "inapplicable" he means only that he has not actually received such a

pardon.[14] He then changes course by arguing that Hawai‘i provides no means to restore one's Second Amendment rights. OB at 9. But he soon reverses his stance by stating that his "only avenue to restoring rights is via a gubernatorial pardon," and then alleging, without explanation, that the pardon process violates procedural due process. OB at 11.

Still later, Fisher changes his argument again, asserting that Hawaii law "is unconstitutional to the extent that it fails to provide a procedure for restoration of his Second amendment rights." OB at 17 Sticking with this theory, he claims that "Hawaii gives no means for its citizens to prove that they have been rehabilitated." OB at 22. But in the same paragraph, he changes his position yet again, acknowledging the existence of the pardon when he states that he "has no means to establish he is no longer a person that should not possess firearms *other than by pardon*." OB at 22 (emphasis added). He goes on to assert that "[i]n Hawaii the only mechanism to restore rights is via gubernatorial pardon," but argues that "any suggestion that this is sufficient to fulfill Congressional intent is outrageous as a pardon can be given for any crime," without explaining why a pardon is valid only if it is not widely available. OB at 23.

Fisher's complete lack of consistency as to the existence or non-existence of a gubernatorial pardon under Hawaii law undermines his credibility and further

[14] There is no evidence that Fisher has applied for, or been denied, a gubernatorial pardon.

weakens his argument. Furthermore, as mentioned earlier (see footnote 7, *supra*), the pardon procedure may be the only means which is currently available to Fisher to restore his right to possess firearms, but other procedures existed whereby he could have avoided his criminal conviction, had he taken advantage of them at an earlier point in time. *See* HRS § 853-1.

(1) Because the Lautenberg Amendment is Constitutional, HRS § 134-7(a), as Applied Here, Is Constitutional as Well

Because HRS § 134-7(a), as a matter of *state* law, bars persons subject to a firearms prohibition under *federal* law (including the Lautenberg Amendment) from possessing firearms, Fisher is also barred by that *state* statute from possessing firearms. As applied to this case, HRS § 134-7(a) essentially duplicates, as a matter of state law, the Lautenberg Amendment's ban. Because Chovan upheld the Lautenberg Amendment from Second Amendment attack, that necessarily means that HRS §134-7(a), as applied to this case, is also consistent with the Second Amendment.

C. Fisher Has Waived His Right to Argue that His Harassment Conviction Does Not Satisfy the Definition of a Misdemeanor Crime of Domestic Violence

Fisher no longer argues, as he did before the District Court, that his harassment conviction does not satisfy the definition of "misdemeanor crime of domestic violence." Fisher's argument on appeal rests entirely on the contention that HRS § 134-7 is unconstitutional because he is provided insufficient process

under Hawaii law to restore his Second Amendment rights. This court "will not ordinarily consider matters on appeal that are not specifically and distinctly argued in appellant's opening brief." In re Riverside-Linden Inv. Co., 945 F.2d 320, 324 (9th Cir. 1991) (*quoting* Miller v. Fairchild Industries, Inc., 797 F.2d 727, 738 (9th Cir. 1986); *see also* FED.R.APP.P. 28(a)(5) (appellant's brief shall contain a "statement of the issues presented for review"). Because Fisher fails to argue this point in his opening brief, he has waived his right to argue it on appeal.

D. Fisher Has Also Waived His Right to Argue that Kealoha Was Not Entitled to Qualified Immunity and, Consequently, Has Waived That Issue as Well

Fisher fails to raise the issue of whether Kealoha is entitled to qualified immunity with respect to Fisher's claims for monetary damages. When the District Court dismissed the claims against Kealoha for lack of merit because Fisher had failed to establish a constitutional right to acquire a firearms permit or possess firearms, it found, as an alternative basis for its ruling, that Kealoha was entitled to qualified immunity. SER at 54. Fisher makes no mention of qualified immunity in his opening brief and therefore, has also waived that issue.

VII. CONCLUSION

While federal law recognizes the right of law-abiding responsible citizens to possess firearms within one's home as a fundamental right, said law also recognizes that the right is not without exception. *See* District of Columbia v.

Heller, 554 U.S. 570, 571 fn. 2, 128 S.Ct. 2783, 2786 fn. 2 (2008) ("Like most rights, the Second Amendment right is not unlimited."); *and* McDonald v. City of Chicago, Ill., 561 U.S. 742, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010) ("We made it clear in Heller that our holding did not cast doubt on [certain] longstanding regulatory measures…").

Moreover, federal constitutional law does not require states to provide certain, specific restorative mechanisms for misdemeanant domestic violence offenders to regain Second Amendment rights. Consequently, HRS § 134-7 is constitutional on its face and as applied to Fisher. The U.S. District Court's July 18, 2014 Order Granting [Honolulu Parties'] Motion for Summary Judgment, or In The Alternative, Motion for Reconsideration should be affirmed.

DATED: Honolulu, Hawaii, Wednesday, January 14, 2015.

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Attorneys for Defendant-Appellees
LOUIS KEALOHA and the
CITY AND COUNTY OF HONOLULU

VIII. STATEMENT OF RELATED CASES

Honolulu Parties are aware of no pending cases which are related to the instant matter.

DATED: Honolulu, Hawaii, Wednesday, January 14, 2015.

DONNA Y.L. LEONG
Corporation Counsel

By: /s/ Curtis E. Sherwood
CURTIS E. SHERWOOD
SARAH T. CASKEN
Deputies Corporation Counsel
Attorneys for Defendant-Appellees
LOUIS KEALOHA and the
CITY AND COUNTY OF HONOLULU

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that Defendants-Appellees' Answering Brief is proportionally spaced, has a typeface of 14 points or more and contains 5,136 words according the word count conducted by the Microsoft Word word-processing program.

DATED: Honolulu, Hawai'i, Wednesday, January 14, 2015.

DONNA Y. L. LEONG
Corporation Counsel

By: /s/ Curtis E. Sherwood
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Attorneys for Defendants-Appellees
LOUIS KEALOHA and the
CITY AND COUNTY OF HONOLULU

9th Circuit Case Number(s) 14-16514

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) Jan 14, 2015 .

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Signature (use "s/" format) /s/ Curtis E. Sherwood

****

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I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

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