JAMES HOCHBERG (HI Bar No. 3686)
ATTORNEY AT LAW, LLLC
700 Bishop St., Ste. 2100
Honolulu, HI 96813
Telephone: (808) 256-7382
E-mail: jim@jameshochberglaw.com

C.D. MICHEL *
SEAN A. BRADY*
MATTHEW D. CUBEIRO*
MICHEL & ASSOCIATES, P.C.
180 E. Ocean Blvd., Ste. 200
Long Beach, CA 90802
Telephone: (562) 216-4444
E-mail: cmichel@michellawyers.com
*(ADMITTED *pro hac vice*)

Counsel for Plaintiffs

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

RONALD LIVINGSTON; MICHAEL J. BOTELLO; KITIYA M. SHIROMA; JACOB STEWART; and HAWAII RIFLE ASSOCIATION, *Plaintiffs*, v. SUSAN BALLARD, in her official capacity as the Police Chief of the City & County of Honolulu; CITY & COUNTY OF HONOLULU; CLARE E. CONNORS, in her official capacity as the Attorney General of Hawaii, *Defendants*.	CV NO. 1:19-cv-00157JMS-RT MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION Hearing: Date & Time: _____ Judge: _____

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

Plaintiffs are responsible, law-abiding Hawaii residents, and a Hawaii non-profit corporation representing its law-abiding Hawaii resident members, who seek to protect themselves from violent crime by carrying a handgun outside their homes. They applied for both open and concealed carry licenses, but defendants denied their applications. Under Hawaii law, the ability to lawfully carry a handgun is confined to those who can demonstrate an "exceptional" need for self-defense, or who are "engaged in the protection of life and property" and have "sufficiently indicated" an "urgency" or special "need" to carry a firearm. H.R.S. §134-9(a). In practice, a license to carry is confined to law enforcement and security guards, and denied altogether to ordinary private citizens, like plaintiffs. Although plaintiffs meet all other qualifications for obtaining a license, in defendants' view, their desire to carry a firearm for general self-defense is insufficient to satisfy the "exceptional" need or "urgency" showing necessary to obtain a license to carry, either openly or concealed.

Plaintiffs accordingly have no lawful means to carry a handgun outside their home "for the core lawful purpose of self-defense." *District of Columbia v. Heller*, 554 U.S. 570, 630 (2008). And they are not alone. The Honolulu Police Department has not granted a single carry license to an ordinary private citizen *in the past six years*. Indeed, according to the Attorney General, since 2012, only *one* carry license has been granted to an ordinary private citizen *statewide*.

This case presents two questions: Does the Second Amendment protect a right to carry a firearm outside the home in some manner? And, if so, can a state deny that right to all ordinary citizens? Although firearm regulation cases can be complex, this one is not. As the text, history, and purpose of the Second Amendment make clear—and as every federal court of appeals to decide the question has agreed—the right to bear arms is not confined to the home. Nor can that right, which the Second Amendment grants to "the people," be limited to the tiny fragment of the people who have an "exceptional" need to exercise it, let alone denied entirely in practice to all private citizens. In short, given the Framers' decision to extend the Second Amendment to "the people," a "law-abiding citizen's right to bear common arms must enable the typical citizen," and certainly at least some private citizens, "to carry a gun." *Wrenn v. District of Columbia*, 864 F.3d 650, 668 (D.C. Cir. 2017). Hawaii's complete denial of that constitutional right is a paradigmatic basis for a preliminary injunction.

To be clear, the relief plaintiffs request is narrow. They do not challenge Hawaii's myriad restrictions on the purchase, sale, and possession of firearms. They do not seek to carry in sensitive places, such as government buildings. They do not seek to carry dangerous and unusual weapons. They seek only to carry handguns, the "quintessential self-defense weapon," *Heller*, 554 U.S. at 629, beyond their homes *in some manner*, *either* concealed *or* openly. Defendants may accommodate

that right in many different ways, but they must accommodate it. Denying all manner of carry to all ordinary law-abiding citizens is one policy choice the Constitution takes "off the table." *Id.* at 636.

BACKGROUND

A. Constitutional Background

The Second Amendment provides that "the right of the people to keep and bear Arms … shall not be infringed." For decades, there was uncertainty among lower courts about whether those words protect an individual right or only a collective right. *Compare, e.g.*, *Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir. 2002) (collective right), *with Silveira v. Lockyer*, 328 F.3d 567, 568 (9th Cir. 2003) (Kozinski, J., dissenting from denial of rehearing en banc) (individual right); *id.* at 570 (Kleinfeld, J., dissenting from denial of rehearing en banc) (same). The Supreme Court resolved that uncertainty in *Heller*, concluding after an exhaustive textual and historical analysis that the Second Amendment protects an "individual right to possess and carry weapons" for self-defense. 554 U.S. at 592. The Court then held that the law at issue in the case, a District of Columbia ordinance banning the possession of operable handguns in the home, violated the Second Amendment under "any of the standards of scrutiny that we have applied to enumerated constitutional rights"—that is, any standard of scrutiny stricter than rational basis review. *Id.* at 628 & n.27.

In *McDonald v. City of Chicago*, 561 U.S. 742 (2010), the Court held that the "right to keep and bear arms for the purpose of self-defense" recognized in *Heller* is "fully applicable to the States" because it is "among those fundamental rights necessary to our system of ordered liberty." *Id.* at 750, 778. Accordingly, the Court explained, states and municipalities must comply with the individual right protected by the Second Amendment and may not simply "enact any gun control law that they deem to be reasonable." *Id.* at 783 (plurality opinion); *see also Caetano v. Massachusetts*, 136 S. Ct. 1027 (2016) (vacating state court decision on Second Amendment grounds).

In the years since *Heller* and *McDonald*, the Ninth Circuit has developed a two-step framework for adjudicating Second Amendment claims. First, a court "asks if the challenged law burdens conduct protected by the Second Amendment, based on a historical understanding of the scope of the right." *Silvester v. Harris*, 843 F.3d 816, 821 (9th Cir. 2016). If so, the court analyzes the law under heightened scrutiny, with the degree of scrutiny varying depending on "how close the challenged law comes to the core of the Second Amendment right, and … the severity of the law's burden on that right." *Id.*; *see Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 960-61 (9th Cir. 2014).

The court need not determine the level of scrutiny, however, if a law "amounts to a destruction of the Second Amendment right," as such a law "is unconstitutional

under any level of scrutiny." *Jackson*, 746 F.3d at 961. After all, "[t]he very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." *Heller*, 554 U.S. at 634. And as the Supreme Court has admonished, the Second Amendment is not "a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees." *McDonald*, 561 U.S. at 780 (plurality opinion). In short, the Second Amendment is "a real constitutional right. It's here to stay." *Fisher v. Kealoha*, 855 F.3d 1067, 1072 (9th Cir. 2017) (separate opinion of Kozinski, J.).

B. The Challenged Provisions of Hawaii Law

This case involves a challenge to a narrow aspect of Hawaii's extensive regulation of firearms. The state's comprehensive regulatory scheme begins even before a citizen acquires a firearm, as the scheme first requires that an applicant complete safety and training courses, obtain a permit, and agree to release mental health records. H.R.S. §134-2. Multiple categories of people are barred from possessing firearms under Hawaii law, including those with substance abuse problems, mental health issues, or certain kinds of criminal records. *Id.* §134-7. Multiple categories of firearms are also prohibited, including automatic weapons, short-barreled shotguns, and firearms with other specified features. *Id.* §134-8. Once

a gun owner acquires a firearm, the owner must promptly register the firearm and be fingerprinted. *Id.* §134-3.

None of those restrictions are challenged here. This case challenges only the provisions of Hawaii law that prevent plaintiffs and other ordinary law-abiding Hawaii residents from carrying handguns outside their homes or places of business for the lawful purpose of self-defense. Between H.R.S. §134-9(c) and H.R.S. §134-26, carrying a handgun outside a person's home or place of business, either openly or concealed, generally requires a license issued by a county chief of police. Certain individuals are exempted from the license requirement, including specified state and county law enforcement officers, members of the military while performing their duties, and state employees with particular duties. *Id.* §134-11. Ordinary law-abiding citizens, however, must obtain a carry license.

County police chiefs may issue two kinds of carry licenses: concealed-carry licenses and open-carry licenses. *Id.* §134-9(a). As relevant here, a police chief "may" issue a *concealed-carry* license to an applicant who meets certain age and background requirements only in "*an exceptional case*, when an applicant shows reason to fear injury to the applicant's person or property." *Id.* (emphasis added). A police chief "may" also grant an *open-carry* license only to an otherwise-qualified applicant "engaged in the protection of life and property," and only "[w]here the urgency or the need has been sufficiently indicated." *Id.* An individual who carries

unlawfully in public is guilty of a Class B felony, which is punishable by a prison term of up to 10 years. *Id.* §§134-25(b), 706-660(1)(a).

As far as plaintiffs are aware, neither Hawaii law nor county police chiefs elaborate on the meaning of either the "exceptional case" requirement to obtain a concealed-carry license or the showing of "urgency or need" by a person "engaged in the protection of life and property" required to obtain an open-carry license. As a practical matter, however, it is clear how Hawaii police chiefs implement these requirements. Annual reports by the Hawaii Attorney General's Office show that police chiefs grant the vast majority of carry license applications from "employees of private security firms," while denying essentially all carry license applications from "private citizens"—*i.e.*, everybody else. See Request for Judicial Notice ("RJN") Ex. G-L at ¶¶ 2-7.

In 2016, for example, police chiefs granted 225 of 229 carry license applications from "employees of private security firms," while denying all applications from "private citizens." *Id.* In 2015, police chiefs granted 221 of 229 carry license applications from "employees of private security firms," while denying all applications from "private citizens." RJN Ex. J at ¶ 5. The numbers are similar for 2014, 2013, and 2012. RJN Ex. I at ¶ 4; RJN Ex. H at ¶ 3; RJN Ex. G at ¶ 2. All told, a grand total of *one* carry license was granted to a "private citizen" in Hawaii

over the past six years—a license granted by the Kauai police chief in 2013 that has since expired. Ex. H at ¶ 3; *see* H.R.S. §134-9(a) (license expires after one year).

As shown by the near-absolute record of denials, it is functionally impossible for an ordinary law-abiding citizen in Hawaii to obtain a carry license. Thus, under current law, ordinary law-abiding citizens in Hawaii are effectively banned from carrying handguns outside their homes or places of business for self-defense in any manner, whether openly or concealed.

C. The Challenged Provisions Applied to Plaintiffs

The individual Plaintiffs Livingston, Botello, Shiroma, and Stewart are all residents of the City & County of Honolulu, Hawaii and United States citizens who presently seek to carry—and if authorized, immediately would carry—a handgun for self-defense. Plaintiffs satisfy all applicable age, citizenship, safety, training, mental health, criminal record, and other background requirements to possess a handgun and obtain a carry license. Each plaintiff applied to the City and County of Honolulu Police Department seeking both an open and/or concealed carry license.

Plaintiffs Botello, Shiroma, and Stewart completed Hawaii's designated "Application for a License to Carry a Concealed Firearm" form, while Plaintiff Livingston completed Hawaii's subsequently designated "Application for a License to Carry an Open/Concealed Firearm" form. Livingston Decl. ¶ 10, Botello Decl. ¶ 11, Shiroma Decl. ¶ 11, Stewart Decl. ¶ 11. In addition, in light of former Attorney

General Suzuki's opinion letter, each plaintiff inquired with the Honolulu Police Department as to what application form, if any, should be used when applying for an open carry license. Livingston Decl. ¶ 9, Botello Decl. ¶ 10, Shiroma Decl. ¶ 10, Stewart Decl. ¶ 10. All individual plaintiffs, with the exception of Plaintiff Livingston, were informed by the Honolulu Police Department that no form existed for applications for open carry licenses. Livingston Decl. ¶, Botello Decl. ¶, Shiroma Decl. ¶, Stewart Decl. ¶. Each individual plaintiff therefore prepared a cover letter to accompany their form application. Livingston Decl. ¶ 9, Botello Decl. ¶ 10, Shiroma Decl. ¶ 10, Stewart Decl. ¶ 10. These cover letters asked the Honolulu Police Department to treat the application as requesting either a concealed or open carry license. Livingston Decl. ¶ 10, Botello Decl. ¶ 11, Shiroma Decl. ¶ 11, Stewart Decl. ¶ 11. The cover letters specifically referenced Hawaii laws regarding open carry licenses and former Attorney General Suzuki's opinion letter clarifying the requirements for such licenses. *Id*. Defendants denied plaintiffs' applications, as Hawaii police chiefs have with every other such application for a carry license over the past six years (except one). Plaintiffs received identical letters indicating that their applications had been denied because they did not "sufficiently meet the immediacy, urgency, or need necessary for protection of life and property" for the issuance of a license to carry. Livingston Decl. ¶ 11-12, Botello Decl. ¶ 12-13, Shiroma Decl. ¶ 12-13, Stewart Decl. ¶ 12-13; See also Ex. B-E. The letter also states

that should Plaintiffs be "placed in danger of bodily injury by word or deed, the police department should be contacted immediately so that proper action may be initiated." Ex. B-E.

Members of Plaintiff Hawaii Rifle Association have experienced the same fate. Numerous members who meet all applicable age, citizenship, safety, training, mental health, criminal record, and other background requirements to possess a handgun and obtain a carry license—and who would carry for self-defense if authorized to do so—cannot obtain carry licenses because they lack "exceptional" cases according to Hawaii officials tasked with processing carry license applications. Ex. A (Gerwig Decl.) ¶¶8-12.

LEGAL STANDARD

To obtain a preliminary injunction, plaintiffs must establish that (1) they are "likely to succeed on the merits," (2) they are "likely to suffer irreparable harm in the absence of preliminary relief," (3) "the balance of equities tips in [their] favor," and (4) "an injunction is in the public interest." *Jackson*, 746 F.3d at 958; *accord Fyock v. Sunnyvale*, 779 F.3d 991, 995-96 (9th Cir. 2015) (citing *Winter v. Nat. Res. Defense Ctr.*, 555 U.S. 7, 20 (2008)). "The elements … must be balanced, so that a stronger showing of one element may offset a weaker showing of another." *Taylor-Failor v. Cty. of Hawaii*, 90 F. Supp. 3d 1095, 1099 (D. Haw. 2015).

ARGUMENT

I. Plaintiffs Are Likely to Succeed on The Merits.

To succeed on the merits, plaintiffs must show that prohibiting them from carrying handguns for self-defense outside their homes "burdens conduct protected by the Second Amendment," and that defendants will not be able to justify that burden under "the appropriate level of scrutiny." *Silvester*, 843 F.3d at 821. Plaintiffs are highly likely to succeed on both showings.

A. The Law Burdens Conduct Protected by the Second Amendment Because the Second Amendment Extends Beyond the Home.

Hawaii law prevents plaintiffs and all other ordinary law-abiding citizens from carrying a handgun beyond the home. The critical question in determining whether that law "burdens conduct protected by the Second Amendment" is thus whether the Second Amendment protects a right to carry handguns outside the home. *Silvester*, 843 F.3d at 821. The text, structure, purpose, and history of the Second Amendment all confirm that the right to bear arms extends beyond the home. Precedent reinforces that conclusion. Indeed, *Heller* itself suggested that the Second Amendment protects the right to carry firearms in public in some fashion. And *no* federal court (at least without provoking reversal) has rejected a Second Amendment claim on the theory that the right to bear arms is confined to the home.

1. The text, structure, and purpose of the Second Amendment confirm that the right to bear arms extends beyond the home.

1. Any inquiry into the scope of the Second Amendment must begin with its text. *See Heller*, 554 U.S. at 576. That text provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." Critically, the Supreme Court has already held that the text protects two separate rights: the right to "keep" arms, and the right to "bear" arms. *See id.* at 591 ("keep and bear arms" is *not* a "term of art" with a "unitary meaning"). Under *Heller*'s binding construction, to "keep arms" means to "have weapons." *Id.* at 582. To "bear arms" means to "carry" a weapon for the purpose of "confrontation"—to "wear, bear, or carry" a firearm "upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person." *Id.* at 584 (quoting *Muscarello v. United States*, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting)).

The right to bear arms cannot plausibly be confined to the home. "To speak of 'bearing' arms within one's home would at all times have been an awkward usage." *Moore v. Madigan*, 702 F.3d 933, 936 (7th Cir. 2012); *see Grace v. District of Columbia*, 187 F. Supp. 3d 124, 135 (D.D.C. 2016) ("reading the Second Amendment right to 'bear' arms as applying only in the home is forced or awkward at best, and more likely is counter-textual"), *aff'd* 864 F.3d 650 (D.C. Cir. 2017). It

is far "more natural to view the Amendment's core as including a law-abiding citizen's right to carry common firearms for self-defense beyond the home." *Wrenn*, 864 F.3d at 657. After all, "the idea of carrying a gun 'in the clothing or in a pocket, for the purpose . . . of being armed and ready,' does not exactly conjure up images of father stuffing a six-shooter in his pajama's pocket before heading downstairs to start the morning's coffee, or mother concealing a handgun in her coat before stepping outside to retrieve the mail." *Peruta v. Cty. of San Diego*, 742 F.3d 1144, 1152 (9th Cir. 2014) (*Peruta II*), *vacated on other grounds*, 824 F.3d 919 (2016) (en banc). To the contrary, bearing arms "brings to mind scenes such as a woman toting a small handgun in her purse as she walks through a dangerous neighborhood, or a night-shift worker carrying a handgun in his coat as he travels to and from his job site"—much like what plaintiffs seek to do here. *Peruta*, 742 F.3d at 1152.

Accordingly, as every federal court that has analyzed the text has concluded, it is not plausible that the Framers understood the Second Amendment to protect little more than carrying a gun from the bedroom to the kitchen. Indeed, this much is clear from the very opinion *Heller* cited to define the meaning of "bear arms." Justice Ginsburg's opinion in *Muscarello*—on which *Heller* expressly relied, *see* 554 U.S. at 584—explained that "one could carry his gun to a car, transport it to the shooting competition, and use it to shoot targets," 524 U.S. at 147.

Finally, confining the right to "bear arms" to the home not only would be nonsensical, but would render the right largely duplicative of the separately protected right to "keep" arms. That would contradict the foundational principle that no "clause in the constitution is intended to be without effect." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803). In short, the most natural reading of the right to bear arms encompasses public carry.

That natural reading of the Second Amendment's text is reinforced by the Second Amendment's structure. As *Heller* explained, the Second Amendment's prefatory clause—"[a] well regulated Militia, being necessary to the security of a free State"—performs a "clarifying function" with respect to the meaning of the operative clause. 554 U.S. at 577-78. Here, the prefatory clause's reference to "the Militia" clarifies that the operative clause's protection of the right to "bear Arms" encompasses a right that extends beyond the home. Militia service, of course, necessarily includes bearing arms in public. The Revolutionary War was not won with muskets left at home; nor were the Minutemen notorious for their need to return home first before being ready for action. And all the Justices in *Heller* agreed that the right to bear arms was codified at least in part to ensure the viability of the militia. *See id.* at 599; *id.* at 637 (Stevens, J., dissenting). The Court thus *unanimously* agreed that one critical aspect of the right to bear arms extends beyond the home.

Confining the right to bear arms to the home is also irreconcilable with the "*central component*" of that right: individual self-defense. *Id.* at 599; *see id.* at 594 ("right to enable individuals to defend themselves"); *id.* at 616 ("individual right to use arms for self-defense"); *id.* at 628 ("inherent right of self-defense"). The need for self-defense, of course, is "not limited to the home." *Moore*, 702 F.3d at 936. To the contrary, "the need for [self-defense] might arise beyond as well as within the home." *Wrenn*, 864 F.3d at 657; *accord Heller*, 554 U.S. at 679 (Stevens, J., dissenting) ("the need to defend oneself may suddenly arise in a host of locations outside the home").

If anything, the need to carry a firearm for self-defense is *more likely* to arise outside the home than within. Even if one's home is not literally a castle, it provides a measure of protection that a person lacks when walking through a dangerous neighborhood or traveling on a deserted street. In America's early days, for example, "[o]ne would need from time to time to leave one's home to obtain supplies from the nearest trading post, and en route one would be as much (probably more) at risk if unarmed as one would be in one's home unarmed." *Moore*, 702 F.3d at 936. The "right to keep and bear arms for personal self-defense in the eighteenth century" therefore "could not rationally have been limited to the home." *Id.*

The same is true today. Statistics compiled by the federal government show that a greater percentage of violent crimes "occur on the street or in a parking lot or

garage" than "in the victim's home." *Grace*, 187 F. Supp. 3d at 135. Likewise, a substantial majority of rapes, armed robberies, and other serious assaults occur outside the home. *See* Michael P. O'Shea, *Modeling the Second Amendment Right to Carry Arms*, 61 Am. U. L. Rev. 585, 610-11 (2012). As the Seventh Circuit explained, "a Chicagoan is a good deal more likely to be attacked on a sidewalk in a rough neighborhood than in his apartment on the 35th floor of the Park Tower." *Moore*, 702 F.3d at 937. Likewise, a "woman who is being stalked or has obtained a protective order against a violent ex-husband is more vulnerable to being attacked while walking to or from her home than when inside." *Id.* To "confine the right to be armed to the home" is thus "to divorce the Second Amendment from the right of self-defense described in *Heller* and *McDonald*." *Id.*

2. The history of the Second Amendment confirms that the right to bear arms extends beyond the home.

The "historical background" of the Second Amendment "strongly confirm[s]" that the right to bear arms extends beyond the home. *Heller*, 554 U.S. at 592; *see Silvester*, 843 F.3d at 820 ("determining the scope of the Second Amendment's protections requires a textual and historical analysis"). Indeed, many of the "same sources" that *Heller* consulted to determine that the Second Amendment protects an individual right also show that the right is not confined to the home. *Wrenn*, 864 F.3d at 658.

The Second Amendment traces its roots back to England, where Blackstone described "the right of having and using arms for self-preservation and defence" as "one of the fundamental rights of Englishmen." *Heller*, 554 U.S. at 594. The fundamental right to use arms for "self-preservation and defence" necessarily includes the right to carry firearms outside the home because, as explained above, the need for self-defense necessarily arises outside the home. Indeed, English authorities made clear that "the killing of a Wrong-doer … may be justified … where a Man kills one who assaults him *in the Highway* to rob or murder him." 1 William Hawkins, *A Treatise of the Pleas of the Crown* 71 (1762) (emphasis added); *see also* 1 Matthew Hale, *Historia Pacitorum Coronae* 481 (Sollum Emlyn ed. 1736) ("If a thief assault a true man *either abroad or in his house* to rob or kill him, the true man … may kill the assailant, and it is not felony." (emphasis added)).

The need to carry for self-defense beyond the home was even greater in early America, which was dominated by "wilderness" and threats from "hostile Indians," among other dangers. *Moore*, 702 F.3d at 936. As St. George Tucker explained in his American version of Blackstone's Commentaries, "[i]n many parts of the United States, a man no more thinks[] of going out of his house on any occasion, without his rifle or musket in his hand, than a European fine gentleman without his sword by his side." *Grace*, 187 F. Supp. 3d at 137. Indeed, "it is unquestionable that the public carrying of firearms was widespread during the Colonial and Founding Eras."

Id. at 136. Many of the Founding Fathers, including George Washington, Thomas Jefferson, and John Adams carried firearms in public and spoke in favor of the right to do so—a strong indication that the right to bear arms was not limited to the home. *Id.* at 136-37. And in many rural and isolated parts of early America, "carrying arms publicly was not only permitted—it was often *required*." *Id.* at 136.

Early American judicial authorities, including many relied upon in *Heller*, likewise make clear that the Second Amendment was understood to include the right to bear arms in public in some manner. The 19th century cases are analyzed in comprehensive detail by *Peruta II*, 742 F.3d at 1153-66, which concluded that "the majority of nineteenth century courts agreed that the Second Amendment right extended outside the home and included, at minimum, the right to carry an operable weapon in public for the purpose of lawful self-defense," *id.* at 1160; *see also* O'Shea, *supra*, at 590 ("American courts applying the individual right to bear arms for the purpose of self-defense have held with near-uniformity that this right includes the carrying of handguns and other common defensive weapons outside the home.").

To be sure, many of those decisions reflect the 19th-century preference for open carry, rather than concealed carry, which was then viewed as an "evil" and dishonorable practice. *Peruta II*, 742 F.3d at 1172. But the critical point, reiterated in case after case, is that the Second Amendment requires "*some form* of carry for self-defense outside the home." *Id.* The Georgia Supreme Court's decision in *Nunn*

v. State, 1 Ga. 243 (1846), lauded by *Heller* for its analysis, 554 U.S. at 612, is illustrative. The court held a state statute "valid" so far as it "seeks to suppress the practice of carrying certain weapons *secretly*," because banning concealed-carry alone would not "deprive the citizen of his *natural* right of self-defence, or of his constitutional right to keep and bear arms." 1 Ga. at 251. But to the extent the law "contains a prohibition against bearing arms *openly*," the court explained, it "is in conflict with the Constitution, and *void*." *Id.*

Numerous other cases relied upon by *Heller* followed the same approach. *See, e.g.*, *Andrews v. State*, 50 Tenn. 165, 187 (1871); *State v. Chandler*, 5 La. Ann. 489 (1850); *State v. Reid*, 1 Ala. 612 (1840). And the few cases that reached a different result have been "sapped of authority by *Heller* … because each of them assumed that the [Second] Amendment was only about militias and not personal self-defense." *Wrenn*, 864 F.3d at 658. In sum, under *Heller*, "history matters, and here it favors the plaintiffs." *Id.*

3. Precedent confirms that the right to bear arms extends beyond the home.

Precedent too favors the plaintiffs on this question. Numerous federal courts have analyzed the scope of the Second Amendment in depth and concluded that it extends beyond the home. *See id.* at 657-64.; *Moore*, 702 F.3d at 935-36; *Grace*, 187 F. Supp. 3d at 135-38; *Palmer v. District of Columbia*, 59 F. Supp. 3d 173, 181-82 (D.D.C. 2014). Notably, even courts of appeals that ultimately upheld carry

restrictions similar to those at issue here did not hold that the Second Amendment *does not even apply* to those restrictions. The Second Circuit, for example, concluded that the Second "Amendment must have ***some*** application in the ... context of the public possession of firearms." *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 89 (2d Cir. 2012).

That consensus should come as little surprise, as *Heller* itself strongly suggests that the Second Amendment applies outside the home. For instance, when the Court searched in vain for past restrictions as severe as the District's handgun ban, it deemed restrictions on carrying firearms *outside* the home most analogous, and noted with approval that "some of those [restrictions] have been struck down." *Heller*, 554 U.S. at 629 (citing *Nunn*, 1 Ga. at 251 (striking down prohibition on carrying pistols openly), and *Andrews*, 50 Tenn. at 187 (same)). Such laws could hardly represent "severe" restrictions on the right to keep and bear arms for self-defense, *id.*, if the Second Amendment's protection were limited to the home. And when the Court identified certain "presumptively lawful" regulatory measures, it included on that list "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings." *Id.* at 626-27 & n.26. The Court would not have needed to single out those public places as sites of permissible restrictions if there was no right to carry outside the home at all.

To be sure, *Heller* did observe that "the need for defense of self, family, and property is most acute" in "the home." 554 U.S. at 628. But the Court did so only in the section of its opinion devoted to applying the constitutional principles it recognized to the specific restriction at hand—namely, a ban on possession *in the home*. By contrast, in the entirety of its 50-page explication of the text and historical understanding of the Second Amendment, the Court referred to the "home" or "homestead" a grand total of three times, and never once to suggest that the right is confined to the home. 554 U.S. at 576-626. That hardly suffices to compel the conclusion that the Court somehow intended to recognize "only a narrow individual right to keep an operable handgun at home for self-defense." *Young v. Hawaii*, 911 F. Supp. 2d 972, 989 (D. Haw. 2012).

Moreover, that the need for self-defense may be "most acute" in the home certainly "doesn't mean it is not acute"—let alone nonexistent—"outside the home." *Moore*, 702 F.3d at 935; *accord Wrenn*, 864 F.3d at 657. Many constitutional rights are particularly important within the home but also extend beyond the home. The privacy protection of the Fourth Amendment, for example, is "at its zenith" in the home, *United States v. Scott*, 450 F.3d 863, 871 (9th Cir. 2006), but undeniably extends beyond the home as well, *see Riley v. California*, 134 S. Ct. 2473 (2014); *United States v. Jones*, 565 U.S. 400 (2012). There is no reason why the Second Amendment should be treated any differently. *See McDonald*, 561 U.S. at 780

(plurality opinion) (rejecting notion that Second Amendment is a "second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees"). Indeed, the Supreme Court has at least implicitly rejected the suggestion that the Second Amendment is confined to the home by unanimously vacating a state court opinion that held the Second Amendment inapplicable to a stun gun possessed by a woman *in a public parking lot*. *Caetano*, 136 S. Ct. at 1027-28; *see also id.* at 1029 (Alito, J., concurring).

Nor can anything be gleaned from the fact that *Heller* (like most judicial decisions) struck down only the law before it. Federal courts, particularly the Supreme Court, decide cases according to "general principles" that apply beyond the fact patterns at hand. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2026 (2017) (Gorsuch, J., concurring). The Court's conclusion that the Equal Protection Clause bars racial segregation in public schools, *Brown v. Bd. of Ed. of Topeka, Kan.*, 347 U.S. 483 (1954), for example, applies equally to public buses and beaches, *see Gayle v. Browder*, 352 U.S. 903 (1956) (per curiam). *Cf. Pavan v. Smith*, 137 S. Ct. 2075 (2017). Nothing in *Heller* suggests that the Court's decision is uniquely confined to the facts at hand, or that lower courts are excused from the obligation to apply the principles the Court enunciated to other Second Amendment cases—an obligation that the Ninth Circuit has acknowledged in applying *Heller* to fact patterns beyond handgun possession in the home. *See Fyock*,

779 F.3d at 998 (possession of large-capacity magazines); *Jackson*, 746 F.3d at 967 (purchase of ammunition). Simply put, the suggestion that *Heller*, while recognizing the individual right to keep and bear arms, simultaneously imposed a silent restriction preventing the exercise of that right anywhere but inside the home is fanciful.

Ninth Circuit precedent is not to the contrary. Indeed, the only two Ninth Circuit opinions to squarely discuss the question concluded that the right to bear arms requires states to allow law-abiding people some outlet to carry firearms in public for self-defense. *See Young v. Hawaii*, 896 F.3d 1044, 1068 (9th Cir. 2018) (holding that the text, history, and purpose of the Second Amendment confirm that "the right to bear arms must guarantee some right to self-defense in public"); and *Peruta II*, 742 F.3d at 1172 (government must "permit *some form* of carry for self-defense outside the home," whether concealed or open). The Ninth Circuit vacated a decision upholding the very concealed carry license restriction at issue in this matter— H.R.S. §134-9(c)—that relied on contrary reasoning to those cases, *Baker v. Kealoha*, 679 F. App'x 625 (9th Cir. 2017). To be sure, both of those panel decisions were subsequently vacated—*Young* because an en banc panel has accepted it for review, 915 F.3d 681 (9th Cir. 2019), and *Peruta II* because it was superseded by a decision of an en banc panel, *see Peruta v. Cty. of San Diego*, 824 F.3d 919, 927 (9th Cir. 2016) (en banc) (*Peruta III*). But the en banc panel in *Peruta III* concluded

only that the Second Amendment does not protect a freestanding right to *concealed* carry; the court expressly reserved the question of "whether the Second Amendment protects *some ability* to carry firearms in public." *Id.* (emphasis added); *see also id.* at 939, 942.[1] *Peruta II* has thus been cited as persuasive authority that the right to bear arms extends beyond the home. *See, e.g.*, *Wrenn*, 864 F.3d at 658, 663-64; *Grace*, 187 F. Supp. 3d at 130 n.2. Indeed, California itself conceded in *Peruta III* that the Second Amendment must have "some purchase" outside the home, and that a state may not be able to "categorically" ban carry beyond the home. Oral Arg. Rec. 41:05-50, 44:06-16, *Peruta III*, 824 F.3d 919 (9th Cir. 2016) (en banc) (No. 10-56971).

While the district court decisions in two earlier challenges to Hawaii carry laws suggested that the Second Amendment does not extend beyond the home, *see Baker v. Kealoha*, No. 11-cv-528, 2012 WL 12886818, at *1 (D. Haw. Apr. 30, 2012); *Young*, 911 F. Supp. 2d at 989, the Ninth Circuit has since vacated one of them, *see Baker*, 679 F. App'x 625, and has not yet reviewed the other, *Young v. Hawaii*, No. 12-17808 (9th Cir.).[2] Moreover, the analysis in those cases not only is

[1] Plaintiffs accept *Peruta III* as binding precedent on the question it addressed at this stage of the proceedings but preserve their right to challenge its holding in an appropriate forum. *Cf. Wrenn*, 864 F.3d at 663 n.5 (disagreeing "with the Ninth Circuit" position in *Peruta III*).

[2] The parties in *Baker* have since stipulated to dismissal. *See* No. 11-cv-528, Dkt. 92 (D. Haw. June 22, 2017).

inconsistent with the text, purpose, and history of the Second Amendment, but is further undermined by reliance on district court decisions that have since been reversed or modified on appeal—for example, the district court decision that the Seventh Circuit later reversed in *Moore*. *See Young*, 911 F. Supp. 2d at 989 (citing *Moore v. Madigan*, 842 F. Supp. 2d 1092 (C.D. Ill. 2012), *rev'd*, 702 F.3d 933).

In short, *no federal court* to confront the question has concluded (at least without provoking appellate reversal) that the Second Amendment has no application beyond the home. This Court should not be the first.

B. Banning All Manner of Carry Beyond the Home Fails Under Any Applicable Level of Scrutiny.

Concluding that the right to bear arms extends beyond the home all but resolves this case, as the total denial of a right protected by the Second Amendment "fail[s] constitutional muster" under "any of the standards of scrutiny." *Heller*, 554 U.S. at 628-29. Accordingly, whether this Court applies the categorical approach that *Heller* demands or applies one of the levels of heightened scrutiny, the result is the same: Hawaii's refusal to grant carry licenses to ordinary law-abiding citizens—the very "people" the Second Amendment protects—is unconstitutional.

1. Hawaii's total ban on carry by ordinary law-abiding citizens is categorically invalid.

Because Hawaii completely denies ordinary law-abiding Hawaii residents any outlet to carry outside the home, there is no need to determine the applicable level

of scrutiny, as a law that completely denies a constitutionally protected right to those entitled to exercise it "fail[s] constitutional muster" under "any of the standards of scrutiny." *Id.* That is the approach *Heller* took in striking down a total denial of the ordinary citizen's right to *keep* arms, *id.*, and it is the approach numerous courts have taken in striking down bans on the right to *bear* arms, *see Wrenn*, 864 F.3d at 664-66; *Peruta II*, 742 F.3d at 1175; *Moore,* 702 F.3d at 941-42; *Palmer*, 59 F. Supp. 3d at 182-83. It is also an approach that a unanimous Ninth Circuit panel endorsed in *Jackson*, noting that a law that "amounts to a destruction of the Second Amendment right, is unconstitutional under any level of scrutiny." 746 F.3d at 961. Because defendants' refusal to grant carry permits to virtually *any* private citizens "amounts to a destruction" of the ordinary citizen's right to bear arms, it is "unconstitutional under any level of scrutiny." *Id.*

Defendants may argue that Hawaii's law is not a total ban on carry because it allows Hawaii residents to carry if they can demonstrate an "exceptional case" or are "engaged in the protection of life and property." H.R.S. §134-9(a). But that argument fails on multiple levels. First, the Second Amendment guarantees the right to keep and bear Arms to "the people," not to some subset of the people who can demonstrate an "exceptional" need to exercise it. Second, as a practical matter, defendants have reduced the "exceptional case" to the non-existent case and withheld carry permits from ordinary citizens altogether. Even if a reasonably

administered exceptional-case regime could survive constitutional scrutiny, a regime that produces one (long-expired) permit in several years plainly flunks any level of scrutiny. After all, the right to bear arms can no more be limited to private security guards—the only ones to whom Hawaii has actually issued a license in several years, with that one exception—than the right to free speech can be limited to paid newspaper columnists. *See, e.g.*, *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978) (speech protection "does not depend upon the identity" of the speaker).

Indeed, the possession ban at issue in *Heller* had "minor exceptions" for certain people, such as retired police officers, *see* 554 U.S. at 575 n.1, but that did not stop the Court from characterizing it as a "complete prohibition" on the right of "the people" to keep arms or from categorically invalidating it, *id.* at 629. The same result should follow here. Because a ban "on the ability of most citizens to exercise an enumerated right would have to flunk any judicial test that was appropriately written and applied," this Court should "strike down [Hawaii's] law here apart from any particular balancing test." *Wrenn*, 864 F.3d at 666.

If anything, Hawaii's recognition that carrying handguns outside the home is useful for self-defense for those with "exceptional cases" makes its refusal to grant carry licenses to ordinary law-abiding citizens like plaintiffs *more* constitutionally problematic, not less. Unlike an effort to restrict a particular type of firearm or manner of carry that the government deems either unrelated to the constitutionally

valid goal of self-defense or peculiarly dangerous, Hawaii's law recognizes that carrying handguns directly furthers the constitutionally valid end of self-defense. But having acknowledged as much, Hawaii cannot limit the carrying of handguns to a subset of "the people" protected by the Second Amendment. Wholly apart from any levels-of-scrutiny approach, the state's effort to limit the pursuit of a constitutionally protected end by a constitutionally protected means to only a subset of those protected by the Constitution is invalid. It is no different—and no more constitutional—than limiting the First Amendment to those with an exceptionally good reason to criticize the government (as judged by the censor), or to restricting the Sixth Amendment right to counsel or a criminal trial to those with an exceptional need to prove their innocence (as judged by the prosecutor).

2. The total ban on carry by ordinary citizens is invalid under either strict or intermediate scrutiny.

If the Court applies one of the traditional levels of scrutiny, it should apply strict scrutiny. Under Ninth Circuit law, a "law that implicates the core of the Second Amendment right and severely burdens that right warrants strict scrutiny." *Silvester*, 843 F.3d at 821. The "core Second Amendment right" is the "right of self-defense," *Jackson*, 746 F.3d at 968; *see Heller*, 554 U.S. at 599, and restrictions on bearing arms beyond the home clearly "implicate[]" that core right, *Silvester*, 843 F.3d at 821. *See supra* Part I. By any measure, moreover, a complete ban "severely burdens"

the right to bear arms for self-defense. *Silvester*, 843 F.3d at 821. Strict scrutiny accordingly applies.

Ultimately, however, this Court need not resolve whether strict or intermediate scrutiny applies because Hawaii's total carry ban cannot survive even intermediate scrutiny. *Cf. McCutcheon v. FEC*, 134 S. Ct. 1434, 1446 (2014) (plurality opinion). Intermediate scrutiny requires a "reasonable fit between the challenged regulation" and a "significant, substantial, or important" government objective. *Silvester*, 843 F.3d at 821-22; *Jackson*, 746 F.3d at 965. This means that the law must be "narrowly tailored" to serve the government's interest. *See McCullen v. Coakley*, 134 S. Ct. 2518, 2534 (2014). The government "bears the burden of justifying its restrictions" and "must affirmatively establish the reasonable fit" required. *Jackson*, 746 F.3d at 965. While a reasonable fit "is not necessarily perfect" and "not necessarily the least restrictive means," it must be "a means narrowly tailored to achieve the desired objective." *McCutcheon*, 134 S. Ct. at 1456-57.

Completely prohibiting ordinary law-abiding citizens from carrying handguns is not a remotely, let alone reasonably, tailored means of furthering the state's important objective of public safety. To the contrary, that flat ban is the paradigmatic *opposite* of tailoring. In applying intermediate scrutiny under the Second Amendment, the Ninth Circuit has stressed the distinction between laws that completely prohibit protected conduct and those that leave open "alternative

channels" for that conduct. *Jackson*, 746 F.3d at 968. Unlike laws the Ninth Circuit has upheld under intermediate scrutiny, Hawaii's carry ban does *not* leave open alternative channels to bear arms for self-defense outside the home. Instead, the law flatly denies the right to all but those who can demonstrate an "exceptional need" for self-defense—a criterion that "says nothing about whether he or she is more or less likely to misuse a gun." *Grace*, 187 F. Supp. 3d at 149.

Hawaii's carry ban thus can be justified only on the theory that allowing law-abiding citizens to carry handguns for self-defense creates an intolerable public safety risk. Not only is that theory lacking in empirical support, *see, e.g.*, *Moore*, 702 F.3d at 937-42, and contrary to the statute's creation of an exception for exceptional circumstances, it is a theory that the Second Amendment takes "off the table," *Heller*, 554 U.S. at 635-36. The drafters and ratifiers of the right to bear arms were well aware that carrying firearms poses safety risks, but they chose to protect the right anyway. Defendants may disagree with that determination, and they may do so with the best of intentions. But they have no more authority to second-guess the people's decision to protect the right to bear arms than they do to override the protection against unreasonable searches and seizures, the inadmissibility of coerced confessions, the criminal defendant's right to confront adverse witnesses, or any other provision of the Bill of Rights with "disputed public safety implications." *McDonald*, 561 U.S. at 783 (plurality opinion). Put simply, the Second Amendment

"is the very *product* of an interest balancing by the people," and defendants many not "conduct [it] for them anew." *Heller*, 554 U.S. at 635; *cf. United States v. Stevens*, 559 U.S. 460, 470 (2010) ("The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it.").

In short, Hawaii's desire to ban ordinary citizens from carrying handguns might be understandable, but it is nevertheless unconstitutional. The "enumeration of the right takes out of the hands of government … the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." *Heller*, 554 U.S. at 634-65.

II. The Remaining Preliminary Injunction Factors Are Readily Satisfied.

If the Court concludes that plaintiffs are likely to succeed on the merits of their Second Amendment claim, then the three remaining preliminary injunction factors—irreparable harm, the balance of the equities, and the public interest—strongly counsel in favor of preliminary relief. *See Duncan v. Becerra*, 742 Fed. Appx. 218 (9th Cir. 2018); and *Jackson*, 746 F.3d at 958.

A. Plaintiffs Will Suffer Irreparable Harm Absent a Preliminary Injunction.

The "deprivation of constitutional rights unquestionably constitutes irreparable injury." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012). That

deep-rooted principle arises from First Amendment jurisprudence, *see Elrod v. Burns*, 427 U.S. 347, 373 (1976), which the Ninth Circuit has expressly treated as a guide in shaping Second Amendment doctrine, *see Duncan*, 742 Fed. Appx. at 221, *Jackson*, 746 F.3d at 960-61. Moreover, the Ninth Circuit has applied the *per se* irreparable injury rule to violations of numerous other constitutional rights. *See, e.g.*, *Planned Parenthood Ariz., Inc. v. Humble*, 753 F.3d 905, 911 (9th Cir. 2014) (abortion); *Rodriguez v. Robbins*, 715 F.3d 1127, 1144-45 (9th Cir. 2013) (due process); *Melendres*, 695 F.3d at 1002 (Fourth Amendment). Because the Second Amendment is not a "second-class right, subject to an entirely different body of rules" than other constitutional rights, the violation of a Second Amendment right too constitutes irreparable injury. *McDonald*, 561 U.S. at 780. Multiple courts have expressly held as much. *See Ezell v. City of Chicago,* 651 F.3d 684, 699 (7th Cir. 2011); *Duncan v. Becerra*, 265 F. Supp. 3d 1106, 1135 (S.D. Cal. 2017); *Grace*, 187 F. Supp. 3d at 150.

Although the constitutional violation alone suffices, the irreparable harm inflicted on plaintiffs in this case is particularly apparent. Without an injunction, plaintiffs will remain vulnerable to violent attack without an effective means to defend themselves. The irreparable harm caused by the denial of that right could hardly be clearer. And, here, plaintiffs suffer the additional and distinct injury of not even having their applications for permits seriously considered. Any application

process that promises a permit upon a showing of exceptional circumstances, but in fact issues no permits to ordinary citizens is both Kafkaesque and a source of a distinct irreparable injury.

B. The Balance of Equities Tips in Plaintiffs' Favor.

The balance of equities similarly favors an injunction. While denying an injunction would severely harm plaintiffs by violating their rights and leaving them without adequate means of self-defense, granting an injunction would simply require defendants to comply with the Constitution. The government "cannot reasonably assert that it is harmed in any legally cognizable sense by being enjoined from constitutional violations." *Zepeda v. INS*, 753 F.2d 719, 727 (9th Cir. 1983).

Nor can defendants reasonably assert that an injunction would threaten public safety. First, defendants may continue to enforce the vast majority of Hawaii's broad firearms restrictions, which plaintiffs do not challenge. *See supra* at pp. 2. Moreover, defendants may decide what manner (concealed or open) they prefer to allow plaintiffs to carry, and may continue to require plaintiffs to obtain a license to do so. Where there is reason to believe that an applicant for a carry license poses a particularized public safety threat, defendants may deny the license. But any suggestion that allowing ordinary law-abiding citizens like plaintiffs to carry for self-defense would jeopardize public safety could rest only on impermissibly

"speculative" assumptions. *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1139 (9th Cir. 2009).

C. A Preliminary Injunction Will Serve the Public Interest.

A preliminary injunction serves the public interest for many of the reasons described above. *See Nken v. Holder*, 556 U.S. 418, 435 (2009) (the balance-of-equities and public-interest factors "merge when the Government is the opposing party"). Put simply, "it is *always* in the public interest to prevent the violation of a party's constitutional rights." *Melendres*, 695 F.3d at 1002 (emphasis added). That is as true for the Second Amendment as for any other constitutional right. *See McDonald*, 561 U.S. at 783. Because the "public interest favors the exercise of Second Amendment rights by law-abiding responsible citizens," the public interest is furthered as a matter of law in this case. *Duncan*, 265 F. Supp. 3d at 1136.

CONCLUSION

For the foregoing reasons, the Court should grant a preliminary injunction.

Dated: April 11, 2019

Respectfully submitted,

s/James Hochberg

JAMES HOCHBERG (HI Bar No. 3686)
ATTORNEY AT LAW, LLLC
E-mail: jim@jameshochberglaw.com

C.D. MICHEL (pro hac vice)
SEAN A. BRADY (pro hac vice)
MATTHEW D. CUBEIRO (pro hac vice)
MICHEL & ASSOCIATES, P.C.
E-mail: cmichel@michellawyers.com

CERTIFICATE OF WORD COUNT

Pursuant to Local Rule 7.5(e), I hereby certify that the foregoing Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction is in Times New Roman, 14-point font and contains 8,385 words, exclusive of case caption, table of contents, table of authorities, and identifications of counsel, as reported by the word processing system used to produce the document. This word count is in compliance with the limitation set forth in Local Rule 7.5(b).

Dated: April 11, 2019

s/James Hochberg
James Hochberg