No. 12-17808

In the United States Court of Appeals for the Ninth Circuit

GEORGE YOUNG
Plaintiff-Appellant,

v.

STATE OF HAWAII, et al.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII NO. 1:12-CV-00336-HG-BMK
DISTRICT JUDGE HELEN GILLMOR

BRIEF OF *AMICUS CURIAE* EVERYTOWN FOR GUN SAFETY IN SUPPORT OF REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Amicus Everytown for Gun Safety has no parent corporations. It has no stock, and hence, no publicly held company owns 10% or more of its stock.

/s/ Deepak Gupta
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INTRODUCTION AND INTEREST OF *AMICUS CURIAE*[1]

The importance of this appeal is hard to overstate. By a two-to-one vote, a panel of this Court has called into question the ability of state and local officials to protect their communities against gun violence. In so doing, the panel majority has openly defied this Court's en banc decision in *Peruta v. County of San Diego*, 824 F.3d 919 (9th Cir. 2016), and pulled this Circuit into disagreement with the Second, Third, and Fourth Circuits on an important question of constitutional law and a vital matter of public safety. And the panel did all this based on an improperly cramped interpretation of the state law at issue—one that is at odds with the State's own authoritative interpretation. For all these reasons, as the State and County of Hawaii's petition compellingly explains, the panel's decision cries out for en banc review.

Amicus curiae Everytown for Gun Safety—the nation's largest gun-violence-prevention organization—files this brief to emphasize one of the ways in which the panel went astray: its erroneous account of the seven-century Anglo-American history of public-carry regulations recognized by the en banc Court in *Peruta*.

The panel's historical analysis cannot be reconciled with this Court's decision in *Peruta* and diverges from the historical methodology mandated by the

[1] All parties consent to the filing of this brief, and no counsel for any party authored it in whole or part. Apart from *amicus curiae*, no person contributed money intended to fund the brief's preparation and submission.

Supreme Court's decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008). In finding that the Constitution protects an expansive right to carry firearms in public, the panel minimized the importance of the centuries-old English tradition of broadly restricting public carry relied on by *Peruta*. Instead, the panel placed great weight on 19th-century state-court decisions from the slaveholding South that *Peruta* found to be outliers. That defiance is reason enough to grant rehearing en banc. In contrast to the panel's telling, what the history actually shows is that, from our nation's founding to its reconstruction, many states and cities enacted laws that carried forward the English tradition of broadly prohibiting carrying or requiring good cause to carry a firearm in public.

For this reason, as well as those set forth in the petition, this Court should grant rehearing en banc and remand this case to the district court for further adjudication in light of the Hawaii Attorney General's recent guidance on the proper interpretation of Hawaii's nearly century-old public-carry law.[2]

[2] If this Court decides instead to consider this case en banc on the merits, Everytown agrees with the position taken by the State of California, in its petition for initial hearing en banc in *Flanagan v. Becerra*, 18-55717 (9th Cir. Sept. 21, 2018), that this Court should hear both *Young* and *Flanagan* together.

ARGUMENT

THE PANEL'S HISTORICAL ANALYSIS OPENLY DEFIES THIS COURT'S EN BANC PRECEDENT, DIVERGES FROM SUPREME COURT PRECEDENT, AND IS MANIFESTLY WRONG.

The question in these cases is not whether the Second Amendment—which, under *Heller*, protects "the right of law-abiding, responsible citizens to use arms in defense of hearth and home," 554 U.S. at 635—applies outside the home. Rather, it is whether Hawaii's nearly century-old public-carry regime—as properly interpreted, and with due deference to the Attorney General's recent opinion letter—is consistent with the Amendment's historical protections. To answer that question, this Court uses "a two-step approach," first asking whether the law "burdens conduct protected by the Second Amendment" and then, if it does, "apply[ing] an appropriate level of scrutiny." *Jackson v. City & Cnty. of San Francisco*, 746 F.3d 953, 960 (9th Cir. 2014).

A. The panel's wayward historical methodology.

In conducting its inquiry under the first of these two steps, the panel's historical methodology diverged sharply from the Supreme Court's decision in *Heller* and openly defied this Court's en banc precedent in *Peruta*. As an initial matter, the panel did so by minimizing the value of the English historical tradition on the theory that the American right applied more broadly than the traditional English right. *See* Panel Op. 1065 ("[W]e respectfully decline [ ] to import English

law wholesale into our Second Amendment jurisprudence."). This approach is inconsistent with the Supreme Court's reliance on English history in *Heller*, which concluded that "the Second Amendment was not intended to lay down a 'novel principl[e]' but rather codified a right 'inherited from our English ancestors." *Heller*, 557 U.S. at 599 (citing *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897)). More specifically, the panel's rejection of the English history with respect to the regulation of public carry is inconsistent with the importance that this Court's en banc decision placed on the English history in *Peruta*, which devoted over 2,000 words to the subject—from the thirteenth-century proclamations of Edward I to the English Bill of Rights in the leadup to the American Revolution. *Peruta*, 824 F.3d at 929–32. Rather than squarely address this history, the panel instead looked primarily to early American Southern case law to assess the scope of the Second Amendment. Panel Op. 1055–57.

The panel also differed markedly from *Peruta* and *Heller* in its assessment of several important nineteenth-century cases that reject a broad right to carry firearms in public. The panel simply deemed these cases irrelevant because they rested in part on a connection between the right to bear arms and "the common defense of the state," whereas *Heller* held that the right "always has been an individual right centered on self-defense." Panel Op. 1058 ("[W]ith *Heller* on the books", they "furnish us with little instructive value."). But that approach is directly

inconsistent with both *Peruta* and *Heller*, each of which cited these cases as evidence of the original public understanding of the right. *Compare Heller*, 557 U.S. at 627 (citing *English v. State*, 35 Tex. 473 (1871)) *with* Panel Opp. 1057–58 (rejecting *English* as irrelevant); *compare Peruta*, 824 F.3d at 934, 938 (citing *State v. Buzzard*, 4 Ark. 18 (1842), *English v. State*, 35 Tex. 473 (1871); and *State v. Workman*, 35 W.Va. 367 (1891)) *with* Panel Opp. 1057–58 (rejecting each of these cases as irrelevant). Only by taking this important line of cases off the table was the panel able to clear a path to its preferred reading of the history.

More broadly, the panel's decision to ignore each of these decisions is inconsistent with the historical methodology compelled by *Heller*. *See Heller*, 557 U.S. at 576 (holding that the Second Amendment, which is interpreted as "known to ordinary citizens in the founding generation," codified a "pre-existing right."). If the panel had been engaged in mere weighing of precedent, its disregard of certain traditions inconsistent with *Heller* might have been an appropriate exercise. But the historical analysis compelled by *Heller*, and adopted by this Court in *Peruta*, is not a search for the line of case law that best predicted *Heller*. Rather, it is a search for how the public—"ordinary citizens in the founding generation"—understood the right at the time that the Bill of Rights was ratified. Dismissing the relevance of this line of cases in assessing the public understanding of the Second Amendment—

based on inconsistencies with a case decided 150 years afterwards—is anachronistic and inconsistent with any sensible search for original public understanding.

Indeed, the nineteenth-century cases dismissed by the panel are at least as relevant as the cases on which the panel actually relied—cases directly inconsistent with the Supreme Court's modern Second Amendment jurisprudence. *See* Panel Op. 1055–56 (citing *Bliss v. State,* 12 Ky. (2 Litt.) 90 (1822)). In *Bliss*, for example, the Kentucky Supreme Court struck down the state's concealed-carry ban on the broad theory that any law that "restrains the full and complete exercise" of the right is unconstitutional. *See Bliss*, 12 Ky. (2 Litt.) at 91. But this view of the right was directly contradicted by *Heller*'s recognition that the "majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues." *Heller*, 554 U.S. at 626; *see also Peruta*, 824 F.3d at 935–36 (discussing the limited value of the *Bliss* decision given its inconsistency with *Heller*, the case law of other states, and its quick reversal by the people of Kentucky via a constitutional amendment).

B. The panel's erroneous historical conclusions.

Even apart from its divergences from precedent on historical methodology, the panel decision warrants en banc review because it simply got the history wrong. As the en banc Court recognized in *Peruta*, history actually shows a widespread and

longstanding tradition of stringent regulation of the use and possession of firearms in public. *Peruta*, 824 F.3d at 929–39. *Amicus* Everytown exhaustively surveyed this history in its brief to the en banc Court in that case. *See* Br. of Everytown for Gun Safety as *Amicus Curiae* in *Peruta* (filed Apr. 30, 2015), *available at* https://every.tw/2xBKYXU (describing the seven-century Anglo-American tradition of public-carry regulations). Given the limited space available here, we offer a brief summary.

Going back at least as far as the thirteenth century, English law broadly limited the carrying of weapons in public. This culminated with the Statute of Northampton, first enacted in 1328, which trained its prohibition on "fairs," "markets," and other populous places, 2 Edw. 3, 258, ch. 3 (1328), while a royal declaration from a century later specifically directed "the mayor and sheriffs of London" to enforce the prohibition against "any man of whatsoever estate or condition [who] go[es] armed within the city and suburbs." 3 *Calendar of the Close Rolls*, *Henry IV* 485 (Jan. 30, 1409). One century later, Queen Elizabeth spoke of the need to focus enforcement in the areas where the "great multitude of people do live, reside, and trav[el]." Charles, *The Faces of the Second Amendment Outside the Home*, 60 Clev. St. L. Rev. 1, 21 (2012); *see Peruta*, 824 F.3d at 929–32 (recounting history of English public-carry prohibitions).

By the late 17th century, William and Mary enshrined the right to have arms in the Declaration of Rights, later codified in the English Bill of Rights in 1689. This right—which "has long been understood to be the predecessor to our Second Amendment," *Heller*, 554 U.S. at 593—ensured that subjects "may have arms for their defence suitable to their conditions, and as allowed by law." 1 W. & M. st. 2. ch. 2. As Blackstone later wrote, this right was understood to be subject to "due restrictions," one of which was Northampton's prohibition on public carry, which remained in effect *after* the right to bear arms was codified in 1689. *See* 4 Blackstone, *Commentaries on the Laws of England* 144, 148–49 (1769); *Rex v. Edward Mullins*, (K.B. 1751), https://goo.gl/oeSAhR (reporting a conviction under the statute in 1751).

Around the same time that the English Bill of Rights was adopted, America began its own long history of regulation. The first step was a 1686 New Jersey law that prohibited carrying arms in public in order to prevent to prevent the "great fear and quarrels" induced by "several persons wearing swords, daggers, pistols," and "other unusual or unlawful weapons." 1686 N.J. Laws 289, 289-90, ch. 9. Massachusetts and New Hampshire followed suit before the end of the century. 1694 Mass. Laws 12, no. 6; 1699 N.H. Laws 1.

From 1795 to 1870, at least twelve states and the District of Columbia incorporated a broad Northampton-style public-carry prohibition into their laws at some point. *See* Everytown Br. in *Peruta*, at 18–21. By 1890, New Mexico,

Wyoming, Idaho, Kansas, and Arizona had all enacted laws broadly prohibiting public carry in cities, towns, and villages. *Id.* at 19–20. And numerous local governments imposed similar restrictions around the same time—from New Haven to Nashville, Dallas to Los Angeles, and even in Wild West towns like Dodge City and Tombstone. *Id.* at 20–21.[3]

This wide-ranging history of regulations similar to Hawaii's further supports the constitutionality of Hawaii's law, as properly interpreted, and the need for en banc review by this Court.

CONCLUSION

The petition for rehearing en banc should be granted.

Respectfully submitted,

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[3] Much of the latest historical scholarship on this history of public-carry regulation occurred after the briefing in this case was completed. *See* Repository of Historical Gun Laws, Duke University School of Law, https://law.duke.edu/gunlaws (online database or historical firearms regulations published in 2017). En banc review would give this Court—or the district court, in the event of vacatur and remand—the opportunity to consider the scope of the right with the benefit of the latest scholarship.

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CERTIFICATE OF COMPLIANCE WITH RULE 29-2(c)(2)

I hereby certify that my word processing program, Microsoft Word, counted 2,109 words in the foregoing amicus brief, exclusive of the portions excluded by Rule 32(f). This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word in 14 point Baskerville font.

/s/ Deepak Gupta
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CERTIFICATE OF SERVICE

I hereby certify that on September 24, 2018, I electronically filed the foregoing Brief of *Amicus Curiae* Everytown for Gun Safety in Support of Rehearing En Banc with the Clerk of the Court of the U.S. Court of Appeals for the Ninth Circuit by using the Appellate CM/ECF system. All participants are registered CM/ECF users, and will be served by the Appellate CM/ECF system.

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