No. 12-17808

In the United States Court of Appeals for the Ninth Circuit

George K. Young, Jr.

Plaintiff-Appellant,

v.

State of Hawaii, et al.

Defendants-Appellees.

Appeal from a Judgment of United States District Court
For the District of Hawaii
Civ. No. 12-00336-HG-BMK
United States District Court Judge Helen Gillmor

Appellant's Opposition to Appellees' Petition for Rehearing *En Banc*

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Introduction

The Panel Opinion in this case correctly concluded that "the right to bear arms must guarantee *some* right to self-defense in public," and "that section 134-9 eviscerates [this] core Second Amendment right." Panel Opinion at 46, 53. As the Panel thoroughly explained, that conclusion is compelled by the constitutional text, the history surrounding it, and centuries of precedent—including the Supreme Court's decisions in *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. Chicago*, 130 S.Ct. 3020 (2010), neither of which Defendants' petition even mention. The Panel Opinion is also consistent with this Court's decision in *Peruta v. County of San Diego*, 824 F.3d 919 (9th Cir. 2016) (*en banc*) ("*Peruta II*"), which explicitly refused to address whether the Second Amendment protects a right to carry a handgun openly—a reservation that undoubtedly factored into the Supreme Court's decision not to review that case.

Contrary to Defendants' contentions, the Panel Opinion does not "establish[] a circuit split," Petition at 13, as the only case to consider the kind of flat ban on public carry held it to be unconstitutional. Indeed, the only holding that would create a circuit split would be the one that that sustains Hawaii's complete ban on carrying outside the home as the D.C. Circuit, First Circuit and the Seventh Circuit have expressly held that the Second Amendment applies outside the home and every other circuit to consider the issue has assumed that to be the case. No circuit has ever held

that the right does not apply outside the home. The Panel's decision is consistent with all these decisions.

Rather than try to reconcile their position with *Heller* or the text and history of the Second Amendment, Defendants insist that the Panel misinterpreted section 134-9 and the statute does not actually flatly ban public carry. That argument is both legally wrong and is, in any event, far too little and far too late. It is far too late because Defendants are the ones who repeatedly told the courts in this case that section 134-9 as implemented by the County of Hawaii precludes anyone but security guards from obtaining a carry permit. That is not just an inference that the Panel drew from stray remarks at oral argument, let alone a novel interpretation that the Panel embraced over the objections of Defendants. Both the County and the State have repeatedly taken that position all the way up until their *en banc* petition. And with good reason, as records published by the Attorney General himself confirm that the County has not granted a single permit to anyone other than a private security guard for (at least) the past eighteen years.

Moreover, the Attorney General's belated change of heart has nothing to do with the standards for *en banc* review. At best, this new position would provide a basis for Panel rehearing. More realistically, if Defendants wish to revise Hawaii law in a manner that actually allows Mr. Young to carry a handgun, he would wholeheartedly welcome that change in the law. The Attorney General's opinion is

not such a law or even binding on Hawaii's courts. Until Hawaii provides a real world means for an ordinary, law-abiding citizen like Mr. Young to carry a handgun for self-defense, there is no basis to disturb the Panel's eminently correct conclusion that section 134-9 "violates the core of the Second Amendment and is void." Panel Opinion at 53.

I. Defendants Are Judicially Estopped Regarding Their New Position on Open Carry, Which at any Rate Only Undermines Their Case for *En Banc* Review

Defendants begin by insisting that *en banc* review is warranted because the Panel "[t]ravel[ed] far beyond the appropriate role of a federal court" when it interpreted section 134-9 as "authoriz[ing] open-carry licenses only for 'security guards' and other individuals whose job duties entail the protection of life and property." Petition at 8. That accusation is extraordinarily unfounded. The Panel did not adopt some novel interpretation of section 134-9; it just accepted the view of the statute that *Defendants themselves* have advanced throughout this litigation.

In its first amicus brief before this Court supporting the County, the State told the Court: "**Unconcealed** carry licenses may be granted only when the applicant 'is engaged in the protection of life and property,' **e.g. security guards**, and where the 'urgency or need' is so indicated." State of Hawaii's Amicus Brief at 3. [Docket #35]. The County likewise represented in its Answering Brief that carry applications are governed by rules and regulations that it attached as an appendix to its answering

brief—rules and regulations that, by their terms, allow open carry permits to be issued *only* to employees of a security guard or private detective company. *See* Answering Brief Exhibit A. [Docket #32-3]. Indeed, those regulations are even more restrictive than that, clarifying that open carry even by security guards is permissible only when the license-holder is "in the actual performance of his duties or within the area of his assignment." YoungAdd-001 to 021. At oral argument, County Counsel openly conceded that this is indeed the County's policy, that he was unaware of any regulation or guidance document that interprets H.R.S. §134-9 to allow a private citizens obtain a carry permit, and that he was unaware of instance in which a handgun carry permit, either open or concealed carry, had ever been issued to a private citizen. *See* Oral Arg. at 13:18-13:29, 16:30-17:28.

Those concessions were appropriate, as the Attorney General has released records on the grant rates for applications for a license to carry a firearm (whether openly or concealed) in Hawaii since at least 2000—records that expressly separate applicants into two categories: "private security firms" and "private citizens." While the records report that the vast majority of applications by private security guards are granted, only *one* "private citizen" in the entirety of the State of Hawaii has been granted a carry license *in the past seven years* and the County has issued none.

The AG's opinion falsely claims that these figures "state only the number of private individuals who applied for (and were granted or denied) a concealed carry

license; they do not state the number of private individuals who applied for (and were granted or denied) an unconcealed carry license.[1]" In fact, issuing counties in Hawaii are required to "make a report to the department of the attorney general of ***all*** permits and licenses issued or revoked by the authority as of the last day of the preceding month." H.R.S. §134-14 (emphasis added). And discovery in *Baker v. Kealoha,* 679 F. App'x 625 (9th Cir. 2017), another recent case challenging Hawaii's carry laws, demonstrated that applications are marked in monthly reports as either security or citizen without any mention of whether the applications were for open or concealed. *See* YoungAdd-025 to 036 (showing all permits issued were "security" related and none were issued for "citizens")[2].

The notion that the Panel "rewr[o]te state law," Petition at 8, is thus hogwash. Rather, the Attorney General is attempting to rewrite state law through an opinion (issued a mere three days before Defendants' *en banc* petition was due) and taking a position that is contrary to how Section 134-9 has always been applied.[3] In such

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[1] *See* AG's opinion at 6.

[2] This discovery also revealed that the City and County of Honolulu has no written procedure as to how to issue a permit. *See* YoungAdd-22.

[3] Notably, the California Attorney General's office will not issue opinions on pending litigation because "the issuance of an Attorney General's opinion while litigation is pending on the issue might be considered as an attempt to interfere with or influence the litigation". *See* http://ag.ca.gov/opinions/faqs.php (last visited 11/5/2018). Apparently, the Hawaii Attorney General does not share that concern.

circumstances, Defendants are judicially estopped from their eleventh-hour attempt to rewrite H.R.S. §134-9 in this case. In *New Hampshire v. Maine*, 532 U.S. 742 (2001), the Supreme Court established a test for judicial estoppel, asking (1) whether a party's later position is "clearly inconsistent" with its earlier position; (2) whether the party succeeded in persuading a court to accept its earlier position, such that judicial acceptance of an inconsistent position in a later proceeding would create "the perception that either the first or the second court was misled[]"; (3) and whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. *Id.* at 743. All three factors are satisfied here.

First, the Hawaii Attorney General's current position is flatly "inconsistent" with prior arguments presented to this Court and to the district court. Defendants convinced the district court that "*Heller* and *McDonald* establishes only a narrow individual right to keep an operable handgun at home for self-defense." *Young v. Hawaii*, 911 F. Supp.2d 972, 988 (D. Haw. 2012).[4] Defendants (including the State of Hawaii) defended that ruling in this Court.[5] The inconsistency is self-apparent.

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[4] The district court also held that Mr. Young' due process rights were not violated because he had "no fundamental interest in carrying a weapon." *Young*, 911 F. Supp. 2d at 992. The Panel did not reach this question. Panel Opinion at 59, n 22.

[5] *See* Brief of County of Hawaii at 5 (filed May 24, 2013) ("*Heller* was not intended to extend the protections found in the Second Amendment to any area outside the

Second, it is equally clear that acceptance of the Attorney General's position would necessarily mean that both this Court and the district court were seriously "misled" by Hawaii. Both the district court and the Panel expressly relied on Defendants' own representations about constraints imposed by section 134-9. The Panel relied on those representations in holding that section 134-9's limitations on the issuance of open carry licenses violate the Second Amendment. Panel Opinion at 59.

Third, acceptance of the Attorney General's new position would be seriously unfair and result in prejudice to Mr. Young who has litigated this case for many years contesting Hawaii's longstanding insistence that the Second Amendment right is limited to the home. Indeed, the Defendants' *Alice In Wonderland* approach to litigation makes a mockery of these proceedings. It would set a terrible precedent to allow any litigant, let alone a state, to swing for the fences, and then avoid an adverse decision by belatedly suggesting, on rehearing, a less restrictive interpretation it had never advanced before. Defendants are playing games with the Court and with Mr. Young and that cannot be accepted.

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home."); Amicus Brief of State of Hawaii at 4 (filed May 31, 2013) ("*Heller* thus did not extend the Second Amendment to the carrying of handguns outside the home, **in public**.") (emphasis as in original).

Moreover, Defendants ask this Court to accept the Attorney General's latest interpretation at face value. Yet, the case on which they rely actually makes clear that Attorney General opinions "are not binding" as a matter of Hawaii law, *Kepo'o v. Watson*, 87 Haw. 91, 99 n.9 (1998). Defendants skip over that holding in their petition. The Supreme Court likewise has "warn[ed] against accepting as 'authoritative' an Attorney General's interpretation of state law." *Stenberg v. Carhart*, 530 U.S. 914, 940 (2000). Indeed, this Court has refused to accord deference to more limited "litigation positions" in other contexts. *Alaska v. Federal Subsistence Bd.*, 544 F.3d 1089, 1095 (9th Cir. 2008) (holding that the court owed "no deference" to an agency's non-binding "litigation position" interpretation that was "developed during the course of the present case."); *Presidio Historical Ass'n. v. Presidio Trust*, 811 F.3d 1154, 1166 (9th Cir. 2016) (rejecting any "special deference" to "a convenient litigating position" where it was proffered "the first time on appeal").

The Attorney General's non-binding opinion is, if anything, even less entitled to deference here as it was transparently issued solely for the purpose of seeking rehearing in this case. For all the reasons courts are skeptical of voluntary cessation of illegal government conduct, *see*, e.g., *Bell v. City of Boise*, 709 F.3d 890, 898 (9th Cir. 2013), courts should be even more skeptical of an announced change of position that not only is contrary to prior representations, but does not actually stop the illegal

conduct, much less result in the issuance of new licenses. It is, rather, simply an illegitimate effort to wipe off the books an unfavorable precedent addressing the state's actual conduct and actual litigation position. Hawaii is free to respond to the Panel's decision by amending or clarifying section 134-9 legislatively, just as the District of Columbia responded to the Supreme Court's decision in *Heller* with new legislation. *See Heller v. DC*, 670 F.3d 1244 (D.C. Cir. 2011). Only then will there be an actual statute that may (or may not) actually present the issues raised by Hawaii in its Petition.[6] Until then, this Court may not issue an advisory opinion on a statutory scheme not before it. *Flast v. Cohen*, 392 U.S. 83, 96 (1968).

II. The Panel's Opinion Does Not Create a Circuit Split

Defendants next insist that *en banc* is warranted because the Panel Opinion is an "outlier" decision that "establishes a circuit split." Petition at 13. That assertion is nonsense. To be sure, the Second, Third, and Fourth Circuits in *Kachalsky v. County of Westchester*, 701 F.3d 81 (2d Cir. 2012); *Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013); and *Woollard v. Gallagher,* 712 F.3d 865 (4th Cir. 2013), have all sustained the "good cause" carry statutes at issue in those cases. Yet, in sustaining

[6] The Panel is better suited to address Defendants' half-hearted suggestion (in a footnote) that certification to the Hawaii Supreme Court may be warranted—a suggestion that Defendants notably have never before made during the six years that this case has been pending. That suggestion should be deemed waived by the State's failure to raise it until now.

a "good cause" requirement, each of these decisions *also* expressly "assumed … that the Amendment covered *some* carrying." *Wrenn v. District of Columbia*, 864 F.3d 650, 663 (D.C. Cir. 2017) (emphasis in original).

Similarly, and most recently, the First Circuit in *Gould v. Morgan*, 2018 U.S. App. LEXIS 31129 (1st Cir. 2018) sustained a "good cause" requirement under Massachusetts law, but in so holding, stated that "we view *Heller* as implying that the right to carry a firearm for self-defense guaranteed by the Second Amendment is not limited to the home." (Slip op. at *22).[7] That holding in *Gould* and the assumption that the right extended outside the home made in *Kachalsky*, *Drake* and *Woollard* are at war with Hawaii's position that the right is confined to the home. This Court is not confronted with such a "good cause" regime here.

Rather, the Panel decided this case on the well-founded premise that Hawaii imposed "an effective ban on the public carry of firearms." Panel Opinion at 54. To date, the *only* other circuit to have considered such a complete ban is the Seventh Circuit in *Moore v. Madigan*, 702 F.3d 933, 935-37 (7th Cir. 2012), where the court struck down such general ban under the Second Amendment. That decision was followed in *People v. Aguilar*, 2 N.E.3d 321, 327 (Ill. 2013). The Panel's decision

[7] In so holding, the court in *Gould* distinguished that case from this case, noting that "[n]or do the Boston and Brookline policies result in a total ban on the right to public carriage of firearms" and that the Massachusetts law, unlike the Hawaii law, "did not disguise an effective ban on the public carry of firearms." (Slip op. at *33).

in this case is in full accord with *Moor*e and *Aguilar*, a point the Panel took pains to stress. Panel Opinion at 13 n.4, 54. Since all the other circuit decisions concern "good cause" requirements that allowed *some* carry, there is no split *at all* among the circuits on the question of whether states may impose a complete ban on carry outside the home. *See* Panel Opinion at 54-55 ("the reasoning of the Second, Third, and Fourth Circuits suggests that they too would invalidate a firearms carry regime as restrictive as Hawaii's"). *See also Gould*, slip op. at *33 (noting that "'[t]hose regimes' —like the regime at issue here—'provided for administrative or judicial review of any license denial, ... a safeguard conspicuously absent from Hawaii's laws'" (quoting *Young* Panel Opinion at 54).

In contrast, if Hawaii's "effective ban" is sustained *en banc*, such a decision *would* create a direct inter-circuit conflict with the actual holding in *Moore* that a flat ban on carrying outside the home is facially unconstitutional. Such a holding would also directly conflict with the threshold holdings in *Gould* and *Wrenn* that the Second Amendment applies outside the home (a flat ban can only be constitutional if the right is limited to the home). It has long been the rule in this Circuit, as well as in sister circuits, that such conflicts should be *avoided,* not unnecessarily created.

See Hale v. Arizona, 993 F.2d 1387, 1393 (9th Cir. 1993) (*en banc*) ("For prudential reasons, we avoid unnecessary conflicts with other circuits....").[8]

Specifically, in 2011 (which is the year Mr. Young applied for a handgun carry permit) there were 251,000 active permits in Massachusetts (*Gould*), 32,000 in New Jersey (*Drake*) and 12,000 in Maryland (*Woollard*). *See* YoungAdd-116.[9] In Hawaii, by contrast, there were *zero* permits issued in 2011 and there have been *zero* permits issued since that time. As the Panel noted:

> [T]he Second Circuit flatly insisted, "New York's proper cause requirement does not operate as a complete ban on the possession of handguns in public. *Kachalsky*, 701 F.3d at 91. Likewise, the Third Circuit observed that New Jersey's regime provided "clear and specific" standards, "accompanied by specific procedures that provide 'safeguards against arbitrary official action.'" *Drake*, 724 F.3d at 435 (footnote omitted) (quoting *Siccardi v. State*, 59 N.J. 545, 555 (1971)); see also *Woollard*, 712 F.3d at 869, 881 & n.10 (distinguishing

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[8] To be sure, there is a conflict between the holding in *Wrenn* that a "good cause" requirement is facially unconstitutional, and the holdings in *Gould*, *Woollard, Kachalsky* and *Drake*, that a "good cause" requirement facially comports with the Second Amendment. But as the Panel explained (Panel Opinion at 53), that conflict is not presented here by a Hawaii statute that imposes a complete ban, regardless of "good cause." *See also* Panel Opinion at 52 n.21 (noting that "not a single concealed carry license has ever been granted by the County"). *See also Gould*, slip op. at *33 ("the Hawaii law struck down by the Ninth Circuit created a regime under which not a single unrestricted license for public carriage had ever been issued").

[9] The GAO Study did not list a number for New York (*Kachalsky*) because the only data available in New York is likely inaccurate since "New York has no mechanism to purge inactive files." *See* YoungAdd-118, footnote d.

> Maryland's law, which allowed for licenses on a showing of a "good and substantial reason," from the outright ban invalidated by *Moore*, 702 F.3d at 940). And each of the good cause regimes that were upheld provided for administrative or judicial review of any license denial, *Kachalsky*, 701 F.3d at 87; *Drake,* 724 F.3d at 429; *Woollard*, 712 F.3d at 870, a safeguard conspicuously absent from Hawaii's laws. Panel Opinion at 54.

In fact, "[c]ounsel for the County acknowledged as much at oral argument, stating that, to his knowledge, no one other than a security guard—or someone similarly employed—had ever been issued an open carry license." Panel Opinion at 51. Thus, even assuming the "good cause" laws at issue in other Circuits comport with the Second Amendment, County of Hawaii's carry policies are not based on "good cause" rather, as the *zero*-issue rate illustrates, reflect a *complete* ban on carry. In short, if there is any "outlier" here, it is Defendants, who have advanced a position that *no* circuit has embraced and which three circuits (*Wrenn*, *Gould* and *Moore*) have expressly rejected at the threshold.

III. <u>The Panel's Opinion is Consistent with *Peruta II*</u>

Defendants next argue that *en banc* is warranted because the Panel Opinion "openly defies the *en banc* Court's decision in *Peruta*." Petition at 13. That is wrong because, as even Defendants admit, *Peruta* expressly disclaimed resolution of the very question presented this case: "In light of our holding, we need not, and do not, answer the question of whether or to what degree the Second Amendment might or might not protect a right of a member of the general public to carry firearms openly

in public." *Peruta II*, 824 F.3d at 971. And *Peruta* certainly could not have resolved the constitutionality of section 134-9, as *Peruta* involved California law.

Defendants wrongly claim that the Panel Opinion "openly defies" *Peruta* because it treats certain historical sources as more persuasive on open carry than *Peruta* found them on concealed carry. Petition at 15. The Panel ably explained why the different question in this case warranted a different analysis. For instance, while Defendants protest that *Peruta* found *Bliss v. Commonwealth*, 12 Ky. 90 (1822), "of limited probative value because it was later overturned by constitutional amendment," Petition at 14, the Panel explained that this constitutional amendment overturned *Bliss* only with respect to its "strict approach to restraints on the *concealed* carry of firearms," and "left untouched the premise in *Bliss* that the right to bear arms protects *open* carry." Panel Opinion at 20; *see also* Ky. Const. art. XIII, § 25 (amending state constitution to allow the legislature to "pass laws to prevent persons from carrying *concealed* arms" (emphasis added)). The Panel can hardly be faulted for finding *Bliss* persuasive authority with respect to a question that *Peruta* expressly declined to answer.

Indeed, Defendants' view that *Peruta* declares *Bliss* and whole host of other Nineteenth Century cases irrelevant "outliers" is impossible to square with *Heller*, which favorably invoked *Bliss* and many of the other carry cases that Defendants would prefer the Panel had ignored. *See, e.g.*, *Heller*, 554 U.S. at 585 n.9. The

Supreme Court also shared the Panel's view (Panel Opinion at 38-39, 65-66) that the Statute of Northampton and other "bedrock English law[s]," Petition at 14, narrowly prohibited only "terrorizing people with dangerous or unusual weapons," not all manner of public carry. *Heller,* 554 U.S. at 623; *see also id.* at 627 (noting "historical tradition of prohibiting the carrying of dangerous and unusual weapons").

Yet remarkably, Defendants do not even mention *Heller* in their Petition, much less *Heller*'s treatment of these points. *Heller* cannot be so blithely ignored. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 67 (1996) ("When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound."); *See also Caetano v. Massachusetts*, 136 S.Ct. 1027 (2016) (summarily vacating lower court decision for failure to follow *Heller's* reasoning).

IV. This Case is of Tremendous Importance to Mr. Young

Defendants are right about one thing: this case is tremendously important to Mr. Young. After three federal cases, against all odds, with the assistance of pro bono counsel[10], and after more than 10 years of litigation, Mr. Young is entitled to have his application actually considered, rather than summarily rejected under Hawaii's flat ban. He has not sought to invalidate section 134 in its entirety or any

[10] https://www.reuters.com/article/us-usa-guns-hawaii/unlikely-pair-could-usher-gun-rights-case-to-u-s-supreme-court-idUSKBN1KT13B (last visited 11/05/2018).

of its other conditions on obtaining a carry permit, but rather seeks only to invalidate Hawaii's reservation of the right to openly carry a handgun to those "engaged in the protection of life and property," a term which Hawaii has always restricted to security guards. Panel Opinion at 51. It should not take more than a decade to get a definitive answer to a question as straightforward as whether a flat ban on carrying outside the home is constitutional. Enough is enough.

Conclusion

The Petition for rehearing and rehearing *en banc* should be denied.

Respectfully submitted, this the 8th day of November, 2018.

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CERTIFICATE OF SERVICE

On this, the 8th day of November 2018, I served the foregoing pleading by electronically filing it with the Court's CM/ECF system which generated a Notice of Filing and effects service upon counsel for all parties in the case.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this the 8th day of November 2018.

s/ Alan Alexander Beck