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.

On Appeal from the United States District Court
for the District of Hawaii, No. 1:12-cv-00336-HG-BMK
District Judge Helen Gillmor

REPLY IN SUPPORT OF PETITION FOR REHEARING *EN BANC*

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INTRODUCTION

Since Defendants filed their petition for rehearing *en banc*, the need for this Court's review has grown only stronger: The First Circuit has issued a decision expressly rejecting the logic of the panel below, and siding with "the weight of circuit court authority" in holding that the "core" of the Second Amendment does not include a right to open carry. *Gould v. Morgan*, -- F.3d --, 2018 WL 5728640, at *8-9 (1st Cir. Nov. 2, 2018). Every county in Hawaii has filed a brief agreeing with the Attorney General that the panel badly misconstrued Hawaii law. Amicus Br. of City and County of Honolulu *et al.* 2-6. And eleven States, including California and Oregon, have urged this Court to grant rehearing *en banc* and correct the panel's "erroneous and far-reaching decision," which gravely threatens the States' ability "to protect their residents from the scourge of gun violence." Amicus Br. of New Jersey *et al.* 2.

Young, in contrast, has offered no valid reason for this Court to leave the panel's erroneous decision intact: Young's claim that Defendants are "estopped" from challenging the panel's misreading of state law is belied by the very filings he cites. His contention that there is no circuit split contradicts the panel's own recognition that it was departing from the views of "several of our sister circuits." Add. 48-49. And his assertion that there is no inconsistency between this decision

and *Peruta v. County of San Diego*, 824 F.3d 919 (9th Cir. 2016) (*en banc*), cannot withstand even causal comparison of the two opinions.

In short, the panel issued a decision at odds with four other circuits, in open defiance of this Court's precedent, on an issue of enormous constitutional importance, based on a blatant misreading of state law. It is difficult to conceive of a more urgent case for *en banc* review. The petition should be granted.

ARGUMENT

I. The Panel Badly Misconstrued Hawaii's Open-Carry Law.

Young contends that the panel did not err by construing Haw. Rev. Stat. § 134-9 as limited to private security officers. Opp. 5. But despite devoting nearly half his brief to this argument, Young does not make even the barest attempt to square the panel's construction with the text, structure, or history of the law. That is because the panel's interpretation is indefensible: Every available indicia of statutory meaning refutes the panel's cramped interpretation, *see* Add. 79-82, and the Attorney General of Hawaii and every county in the State has now explained that it does not interpret or apply Hawaii law the way the panel read it. *Id.*; *see* Amicus Br. of City and County of Honolulu *et al.* 2-6.

Lacking any argument on the merits, Young contends that Defendants are barred from contesting the panel's erroneous reading of state law because "*Defendants themselves* . . . advanced" the same interpretation "throughout this

litigation." Opp. 3. That is false. In the sole sentence from the State's brief that Young cites to support this claim, the State listed "security guards" as *an example* of persons who could obtain open-carry licenses under state law, not the *only* persons who could do so. *See* Amicus Br. of State of Hawaii 3 ("*Unconcealed* carry licenses may be granted only when the applicant 'is engaged in the protection of life and property,' *e.g. security guards*" (emphases in original)). Furthermore, when asked at oral argument whether Section 134-9 limits unconcealed-carry licenses to private security officers, the County's attorney answered—twice—that it does not. *See* Oral Argument Recording at 15:36-16:33. One of the judges in the panel majority then acknowledged that was Defendants' position. *Id.* at 16:34-16:42 (Judge Ikuta: "So you're saying that the statute's susceptible of an interpretation of not being a security guard.").

Young also claims that the County's *regulation* limits unconcealed-carry licenses to security guards. Opp. 3-4. Even if that were true, it would be irrelevant; it is the State's law, not the County's regulation, that the panel struck down in part. *See* Add. 52-53, 59. In any event, that claim, too, is false. The language of the County's regulation mirrors the language of the state statute. *See* Answering Br. of County of Hawaii App. A at 7-8. And at oral argument, the County's attorney clarified that the regulation does not limit open-carry licenses to private security guards. *See* Oral Argument Recording at 16:43-17:02.

Because Defendants have not changed their position, Young's estoppel argument is wholly without merit. Defendants are not estopped from pressing a position consistent with the one they have taken throughout this litigation. Young's remaining arguments about the panel's interpretation of state law are therefore beside the point, *see* Opp. 4-9, but they are also meritless.

First, there is no basis for Young's statement that past practice supports the panel's interpretation. Opp. 4. As Young concedes, some non-security guards have been granted carry licenses even in the short time period during which the Attorney General has collected statistics. *Id.*; *see* Add. 82. Young claims that he can infer from information obtained through discovery in a different case that counties marked carry applications as either "security" or "citizen." Opp. 5. Putting aside the fact that considering such non-record evidence is wholly improper on a motion to dismiss, this evidence actually undermines Young's theory: It suggests that "citizens" were understood to be eligible for carry licenses without regard for "whether the applications were for open or concealed [carry]." *Id.*

Second, Young is wrong to suggest the Hawaii Attorney General acted improperly by issuing an opinion clarifying the meaning of state law. Opp. 8-9. The Attorney General issued that opinion because until the panel decision no court or other authority had ever suggested the law was limited to security guards. *See*

Add. 77, 81. The Attorney General's opinion was warranted to ensure that counties adhered to a correct interpretation of state law. Far from having no practical effect, as Young charges, Opp. 8-9, this opinion has caused every county in the State to clarify that it intends to follow the same interpretation. Amicus Br. of City and County of Honolulu *et al*. 2-6.

The Attorney General was certainly aware—and acknowledged—that Defendants "intend[ed] to seek panel rehearing or rehearing *en banc* of [the panel] decision." Add. 77. Contrary to Young's overheated rhetoric, however, there is nothing inappropriate about issuing a legal opinion in this posture. Courts often vacate and remand opinions in light of formal interpretations rendered by executive agencies while litigation is ongoing. *See, e.g.*, *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 137 S. Ct. 1239 (2017) (vacating and remanding Fourth Circuit opinion "for further consideration in light of the guidance document issued by the Department of Education and Department of Justice" shortly before Supreme Court oral argument). What would be remarkable is for the Court to heed Young's advice, and allow the invalidation of a century-old statute based on a reading at

odds with its text and history and contradicted by the State's own Attorney General.[1]

II. The Panel's Decision Splits From The Decisions Of At Least Four Circuits.

Rehearing *en banc* is also warranted because the panel decision splits from the decisions of four Circuits. Since the rehearing petition was filed, the First Circuit has joined the Second, Third, and Fourth Circuits in holding that the core of the Second Amendment does not include a right to carry firearms outside the home, and upholding reasonable restrictions on carry under intermediate scrutiny. *Gould*, 2018 WL 5728640, at *8, *10; *see* Pet. 11. The panel below, in contrast, sided with the D.C. Circuit in holding that the right to open carry is part of the "core" of the Second Amendment, and that restrictions on open carry should be analyzed under strict scrutiny. Add. 50-51.

Nonetheless, Young dismisses the contention that there is a circuit split, calling the very claim "nonsense." Opp. 9. The panel disagreed. It rejected the

[1] If this Court was unsure whether the Attorney General and *all* of the counties have correctly interpreted the state law, the proper course would be certification to the Hawaii Supreme Court. Young asserts that this suggestion comes too late, but until the panel issued its opinion, it was not clear that it would stray so far from the statute's text. In any event, this Court has previously ordered certification *sua sponte* in the face of a controlling question of state law. *Perry v. Schwarzenegger*, 628 F.3d 1191, 1193 (9th Cir.), *request for certification granted*, No. S189476 (Cal. Feb. 16, 2011), *certified question answered sub nom. Perry v. Brown*, 265 P.3d 1002 (Cal. 2011).

view of "several of our sister circuits" that *District of Columbia v. Heller*, 554 U.S. 570 (2008), "limit[s] the [Second] Amendment's core to the home," explaining that it was "unpersuaded" by their reasoning. Add. 48-49. The dissent likewise observed that "[t]hree other[ ] [Circuits] have reached contrary conclusions." Add. 61. And the First Circuit noted that while "the weight of circuit court authority" holds that the core of the Second Amendment does not include a right to public carry, the Ninth Circuit and the D.C. Circuit "have formulated broader conceptions of the core of the Second Amendment." *Gould*, 2018 WL 5728640, at *8-9.

Young claims that all of these Circuits would strike down a statute that "imposed 'an effective ban on the public carry of firearms.' " Opp. 10. But Hawaii law does not impose such a ban. Section 134-9 authorizes open-carry permits upon a showing of adequate cause, much like the laws upheld by the First, Second, Third, and Fourth Circuits. *See* Add. 83-84. Furthermore, it is undisputed that Hawaii law authorizes private citizens to obtain *concealed*-carry permits. *See* Haw. Rev. Stat. § 134-9. Circuits have upheld other states' laws because they contained comparable authorization for concealed carry, without even considering whether open-carry permits were available (which, in many states, they are not). *See, e.g.*, *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 83-84 (2d Cir. 2012). Young cites *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012), but that case struck down Illinois' law only because it forbade *all* public carry, open or concealed—a

law with no analogue in Hawaii or any other State. *Id.* at 940 ("Illinois is the *only* state that maintains a flat ban on carrying ready-to-use guns outside the home").[2]

In any event, the Ninth Circuit has not just struck down Hawaii's law. It has established a constitutional rule that will impose strict scrutiny on any public-carry law that Hawaii—or California or Oregon or any other State—enacts in the future. That holding will severely hamstring the ability of States to regulate the use of deadly weapons in their borders, and subject them to restrictions that New York, New Jersey, Maryland, and now Massachusetts do not face. Amicus Br. of New Jersey *et al.* 2-3.

III. The Panel Flouted The *En Banc* Court's Decision In *Peruta*.

Young also cannot square the panel's opinion with this Court's *en banc* decision in *Peruta*. At every turn, the panel relied on historical sources that *Peruta* rejected, disclaimed historical sources *Peruta* embraced, and engaged in modes of analysis that *Peruta* foreclosed. *See* Pet. 15-16.

Young claims there is no conflict between *Peruta* and the panel decision because *Peruta* "involved California law" and declined to resolve whether

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[2] Young offers statistics purporting to show that Hawaii does not grant enough open-carry licenses. Opp. 12-13. Again, this extra-record evidence is wholly improper in a motion-to-dismiss posture, particularly given that it is contradicted by Hawaii's own records. *See* Add. 81-82; Amicus Br. of City and County of Honolulu *et al.* 5-6.

restrictions on open carry are constitutional. Opp. 13-14. These distinctions are empty. This Court does not issue decisions that apply to one State only. And panels are bound by the reasoning of *en banc* decisions, not just their precise dispositions.

Young also contends that the panel explained why it was treating "certain historical sources as more persuasive on open carry than *Peruta* found them on concealed carry." Opp. 14. But virtually every reason the panel gave for discounting sources that *Peruta* credited (or crediting sources that *Peruta* discounted) was irreconcilable with *Peruta*'s treatment of those same materials. Pet. 15-16. For instance, the panel deemed *State v. Buzzard*, 4 Ark. 18 (1842), and its progeny of "little instructive value" in interpreting the Second Amendment because they did not recognize "an individual right" to firearms. Add. 24-26. The dissenters and the panel opinion in *Peruta* offered the same reasoning. *See Peruta*, 824 F.3d at 954 n.7 (Callahan, J., dissenting); *Peruta v. Cty. of San Diego*, 742 F.3d 1144, 1156, 1159-60 (9th Cir. 2014). The *en banc* majority, however, disagreed: It cited those cases as evidence of how "an *overwhelming majority* of the states to address the question . . . understood the right to bear arms." *Peruta*, 824 F.3d at 936.

Young himself offers only a single case—*Bliss v. Commonwealth*, 12 Ky. 90 (1822)—that he claims the panel appropriately treated differently than *Peruta*. Yet

Peruta rejected *Bliss* not for reasons specific to concealed-carry laws, but because *Bliss* was quickly "overturn[ed]" by constitutional amendment. *Peruta*, 824 F.3d at 936. Furthermore, it noted that several nineteenth-century courts "specifically discussed, and disagreed with, *Bliss*," *id.*, including *Buzzard*, the decision rejecting an unqualified right to open carry that the panel majority "set aside," Add. 26.

To camouflage these problems, Young ignores *Peruta* and turns to *Heller*, claiming that it "favorably invoked *Bliss*" and "shared the Panel's view" of the Statute of Northampton. Opp. 14-15. But the *Peruta* court expressly considered *Heller*'s treatment of the Statute of Northampton and found that it supported the *en banc* Court's reading. 824 F.3d at 932 (citing *Heller*, 554 U.S. at 593-594). Moreover, *Heller*'s "invo[cation]" of *Bliss* consists of a single mention in a stringcite in a footnote. *See* 554 U.S. at 585 n.9. That cannot justify the panel's open defiance of this Court's recent and closely on-point *en banc* precedent.

IV. This Issue Is Profoundly Important.

Young does not dispute this case's profound importance. The panel struck down a provision of a nearly century-old law and held that restrictions on open-carry must be subjected to strict scrutiny. As multiple *amici* have explained, that holding would "needlessly jeopardize public safety" throughout Hawaii, Amicus Br. of City and County of Honolulu *et al.* 11; "make it more difficult for police officers to protect the public," Amicus Br. of Giffords Center 16; cast into doubt a

"wide-ranging history of regulations similar to Hawaii's," Amicus Br. of Everytown for Gun Safety 8-9; and threaten the ability of numerous States to "protect their residents from gun violence," Amicus Br. of New Jersey *et al.* 1.

Young nonetheless claims that rehearing should be denied so that he can "have his application actually considered, rather than summarily rejected under Hawaii's flat ban." Opp. 15. But Hawaii residents already have that right. The plain text of Hawaii law, an official opinion of the Attorney General, and every county in the State have stated, over and over again, that a law-abiding citizen is eligible to obtain an open-carry permit under Haw. Rev. Stat. § 134-9. The fact that Young doggedly refuses to accept the existence of that right does not provide reason for this Court to leave intact the panel's evisceration of state authority to regulate firearms.

CONCLUSION

For the foregoing reasons, and those set forth in the petition, rehearing *en banc* should be granted, the panel decision should be vacated, and the case should be remanded to the district court so that it can be reassessed based on an accurate understanding of Hawaii law.

Respectfully submitted,

/s/ Neal K. Katyal

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 5(c)(1) and 32(c)(2) because, excluding the parts of the document exempted by Fed. R. App. P. 5(c) and 32(f), it contains 2,586 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman.

/s/ Neal K. Katyal
Neal K. Katyal

CERTIFICATE OF SERVICE

I hereby certify that on November 15, 2018, I filed the foregoing Reply in Support of Petition for Rehearing *En Banc* with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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

/s/ Neal K. Katyal
Neal K. Katyal