

No. 12-17808

In The United States Court of Appeals
For The Ninth Circuit

GEORGE K. YOUNG, JR.,

Plaintiff-Appellant,

v.

STATE OF HAWAI'I, et al.,

Defendants-Appellees.

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

**BRIEF OF AMICUS CURIAE HAWAII FIREARMS COALITION
IN OPPOSITION TO PETITION FOR REHEARING *EN BANC* AND
IN SUPPORT OF APPELLANT AND DENIAL OF REHEARING**

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FRAP Rule 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 26.1 and 29(a) of the Federal Rules of Appellate Procedure, Amicus Curiae Hawaii Firearms Coalition, states that it has no parent corporations, nor has it issued shares or debt securities to the public. The Hawaii Firearms Coalition is a § 501(c)(4) non-profit corporation, and no publicly held corporation holds ten percent or more of its stock.

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I. STATEMENT OF AMICUS CURIAE

Amicus Curiae Hawaii Firearms Coalition (HFC), a non-profit, member driven organization incorporated under the laws of the State of Hawaii with its principal place of business in Honolulu, Hawaii, submits this brief in opposition to the petition for rehearing *en banc* filed on September 14, 2018 (Dkt. No. 155).

HFC has an interest in this case because an erroneous *en banc* reversal of the panel opinion will unconstitutionally deprive Hawaii citizens of the right to adequately defend themselves, their family, and their property. HFC believes that it is widely known in the State of Hawaii and the County of Hawaii, that the State of Hawaii and the County of Hawaii have historically refused to even consider issuing a permit to carry a firearm to an otherwise qualified citizen, except security officers, and that this conduct deprives Hawaii citizens of their right to self-defense pursuant to the Second Amendment.

HFC seeks a rule of law that is uniquely tailored to Hawaii Island's rural circumstances, which are explained below and in the attached declarations of retired Hawaii County Police Lieutenant Don Watson and Retired Hawaii County Police Officer Thomas Fratinardo. *See* HCFAdd-1 and *See* HFCAdd-3, respectively. HFC seeks a rule of law that does not prohibit citizens from defending themselves, and advances legal protections for liberty, free speech, and the bearing of arms. Hawaii Firearms Coalition promotes legislative and legal

action, as well as research, publishing, and advocacy, in support of people's civil liberties. Hawaii Firearms Coalition litigates firearm-regulation cases, and it has consistently advocated for a principled interpretation of the United States Constitution to prevent government from violating the basic civil rights of its citizens.

Members of HFC have provided informed analysis in a variety of firearm-related cases, including *Fisher vs. Louis Kealoha, et al.*, 855 F. 3d 1067 (9th Cir. 2017), *Roberts vs. City and County of Honolulu*, Civ. No. 15-00467 ACK-RLP, and *Roberts vs. Ballard, et al.*, Civ. No. 18-00125. As discussed in the Argument below, the right to armed self-defense and due process are among our basic civil rights.¹

¹ This brief was not authored in whole or in part by any party's counsel. No party, counsel, or other person — other than amicus curiae and its counsel — contributed money intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief. Fed. R. App. Rule 29, 9th Cir. Rule 29-2.

II. SUMMARY OF ARGUMENT

Hawaii County, Hawaii, is a sprawling, rural, 4,028.4 square mile county²; located in the southeast corner of the Hawaiian Archipelago³, the most remote island chain in the world.⁴ Hawaii County is made up entirely of Hawaii Island, also aptly known as the, “Big Island” or just “Hawaii Island”. Hawaii Island is very unique and unlike anywhere else in the world, boasting 10 of the world’s 14 climate zones.⁵ One would have to travel from Alaska to Costa Rica to find the same number of climatic zones found within Hawaii Island. It is located 214 miles by air from the state capital, Honolulu, approximately 2,400 miles by air from the continental United States, and approximately 4,500 by air from North

² This figure is approximate, Hawaii County is the only county in the United States that continues to grow. Recently, a 6.9 magnitude earthquake precipitated the eruption of Kilauea Volcano on Hawaii Island’s east side. Over several months these vents sent molten lava roaring through villages and destroying more than 700 homes in Leilani Estates, Kapoho, and neighboring communities before dumping into the Pacific Ocean. 850 acres, or 1.36 square miles of new land were created along the southeastern coast.

³ The Hawaiian Island archipelago stretches some 1,500 miles from South Point, on Hawaii Island, northwest to Kure Island, which is located just northwest of the most northwest inhabited Hawaiian Island, Midway Island.

⁴ Western Pacific Regional Fishery Management Council, [wpccouncil.org](http://www.wpcouncil.org/managed-fishery-ecosystems/hawaii-archipelago/), (<http://www.wpcouncil.org/managed-fishery-ecosystems/hawaii-archipelago/>) (accessed 11/17/18).

⁵ D. Paiva, “Hawaii has 10 of the world's 14 climate zones: An explorer's guide to each of them,” [hawaiimagazine.com](http://www.hawaiimagazine.com/content/hawaii-has-10-worlds-14-climate-zones-explorers-guide-each-them), Nov. 10, 2015 (<https://www.hawaiimagazine.com/content/hawaii-has-10-worlds-14-climate-zones-explorers-guide-each-them>) (accessed 11/17/18).

Korea.⁶ Hawaii Island has the world's most active volcano, Kilauea; so barren and unforgiving that NASA chose Hawaii Island volcanoes for training to simulate the surface of the moon and the isolation of Mars.⁷ Hawaii has two snow capped mountains, both over 13,500 feet high, and 266 miles of rugged, remote coastline.

Hawaii County's 4,028 square miles are made up of 9 districts; South Kona, North Kona, South Kohala, North Kohala, Hamakua, North Hilo, South Hilo, Puna, and Ka'u.⁸ With its 922 square miles, Ka'u District alone is more than twice the size of Los Angeles County, but with a population of only 8,500.⁹

Hawaii County has no freeways, and relies almost entirely on two lane highways¹⁰. *See* HFCAdd-4, 6. Roads can become blocked and communities isolated by lava flows. A relatively large segment of the population lives "off grid" in remote, rural, sparsely populated areas with very few police officers available. *See* HFCAdd-4. Some areas lack county water and rely on rain water

⁶ "Hilo to ..." timeanddate.com (<https://www.timeanddate.com/worldclock/distances.html?n=1083>) (accessed 11/17/18).

⁷ AP, "Mars mission isolation simulation on Hawaii volcano ending," cbsnews.com, Sept. 15, 2015 (<https://www.cbsnews.com/news/mars-mission-isolation-simulation-hawaii-volcano-ending/>) (accessed 11/17/18).

⁸ "Big Island of Hawaii Districts, (<https://www.to-hawaii.com/big-island/districts.php>) (accessed 11/17/18).

⁹ "Hawaii County, Hawaii," (https://en.wikipedia.org/wiki/Hawaii_County,_Hawaii#Geography) (accessed 11/17/18).

¹⁰ The highway near the airport area in Kona is being widened.

catchment, some lack electricity and rely on solar energy, and some lack telephone service. *See* HFCAdd-4. Many lack all three utilities. Various populated and unpopulated areas of Hawaii Island, including major highways and recreational areas, have spotty or non-existent cellphone coverage. *See* HFCAdd-4.

Frequently, it is impossible for citizens to contact emergency assistance without traveling several miles or more to get cellphone reception. *See* HFCAdd-4.

Once police are contacted, police response times may take over one hour. *See* HFCAdd-5. Because of the unique, volcanic, rural nature of Hawaii Island, the citizen's of Hawaii Island cannot always rely on police protection and must always be prepared to defend themselves and their families.

Hawaii County is a uniquely rural, outlier jurisdiction. Hawaii County citizen's live in a unique environment. Dangerous situations must be addressed quickly, and because the police department frequently cannot give timely assistance, Hawaii County citizens must defend themselves and their families. We agree with the panel and Mr. Young that HRS §134-9 is not properly tailored to the unique needs of the citizens of Hawaii County and cannot pass any type of scrutiny, including intermediate scrutiny. Rehearing *En Banc* should be denied.

III. ARGUMENT

A. The Big Island is Big and Rural

1. The Big Island is Big

Hawaii Island's 4,028 square miles account for two thirds¹¹ of Hawaii State's 6,422.6¹² square miles. This means that Hawaii Island is almost twice the size of all the other Hawaii islands combined. Hawaii Island is the largest island in the United States, even larger than Kodiak Island, Alaska,¹³ and has five active volcanoes¹⁴.

Rising 13,803 feet above sea level, Mauna Kea is slightly taller than Mauna Loa and is the State's highest point.¹⁵ Mauna Kea is dormant. With its remote, high elevation, dry environment, and stable airflow, Mauna Kea's summit is one of

¹¹ "Big Island of Hawaii Travel Guide," to-hawaii.com, (<https://www.to-hawaii.com/big-island/>) (last accessed 11/17/18).

¹² Hawaii State also includes 4,508 square miles of water, for a total area of 10,931 square miles. The land mass of the islands is 6,423 square miles. See "Hawaii," worldatlas.com, (<https://www.worldatlas.com/webimage/countrys/namerica/usstates/hilandst.htm>) (last accessed 11/17/18).

¹³ https://en.wikipedia.org/wiki/List_of_islands_of_the_United_States_by_area, (last accessed 11/17/18).

¹⁴ Kilauea, Mauna Loa, Hualalai, Mauna Kea and Lo'ihi. Between 1912 and 2018, there have been at least 50 Kilauea eruptions, 12 Mauna Loa eruptions, and one Hualalai intrusion of magma. Mauna Kea most recently erupted only about 4,000 years ago. Lo'ihi, the submarine volcano is located off the south coast of Kilauea, erupted twice between 1950 and 1996.

¹⁵ Mauna Kea Visitor Information Center, "Visiting the Summit", ifa.hawaii.edu, (<http://www.ifa.hawaii.edu/info/vis/visiting-mauna-kea/visiting-the-summit.html>) (accessed 11/17/2018).



13,803 foot snow capped Mauna Kea, from Kona¹⁶

Mauna Kea snow and observatories, Kilauea Volcano erupting in background¹⁷

the best sites in the world for astronomical observation.¹⁸ Mauna Loa and Mauna Kea are frequently snow capped in the winter months.

2. Hawaii Island is 98% Rural

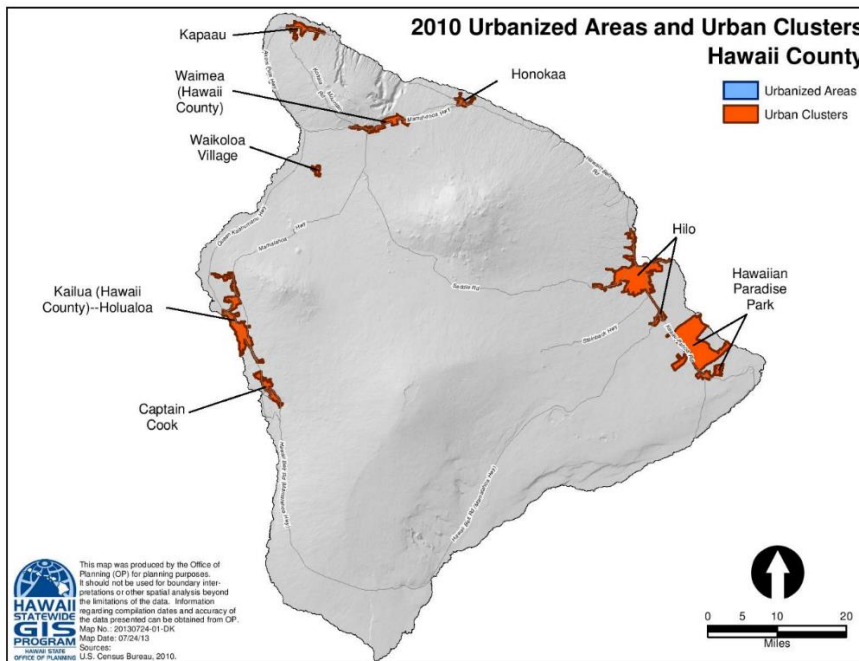
According to the State of Hawaii, Hawaii County has, “3,942 square miles of rural land where 70,300 people reside [with] an average of 18 people ... in every square mile”, and “87 square miles of urban land where 114,800 people reside,

¹⁶ C. Herreria, “Hawaii Had More Snow This Week Than Denver Or Chicago Has Had All Year” huffingtonpost.com, Mar. 4, 2017 (https://www.huffingtonpost.com/entry/hawaii-snow-denver-chicago_us_58bale31e4b05cf0f400c753) (accessed 11/18/18).

¹⁷ D. Rice “Flake news: It's snowing in Hawaii” usatoday.com, Feb. 6, 2018 (<https://www.usatoday.com/story/weather/2018/02/06/snow-hawaii/312741002/>) (accessed 11/18/18).

¹⁸ Mauna Kea Visitor Information Center, “Visiting the Summit”, ifa.hawaii.edu, (<http://www.ifa.hawaii.edu/info/vis/visiting-mauna-kea/visiting-the-summit.html>) (accessed 11/17/2018).

[with] an average of 1,300 people live in every square mile”. See HFCAdd-9, Urban and Rural Areas in the State of Hawaii, by County: 2010, Hawaii State Data Center. Thus, Hawaii County is 98% rural¹⁹. Hawaii County’s rural area has fewer persons per square mile than any state in the 9th Circuit, except Alaska (one person per square mile) and Montana (seven persons per square mile).²⁰ Yet, fifty-nine years after statehood, the State of Hawaii and Hawaii County still refuses to issue permits to carry in Hawaii County.



See HFCAdd-16.

¹⁹ 3,942 square miles divided by 4,028 square miles equals 97.9 %.

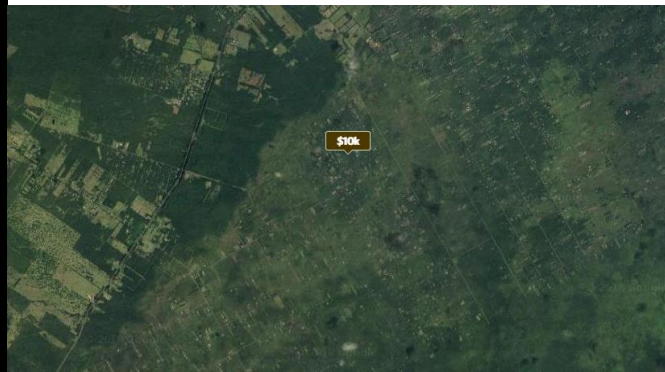
²⁰ “50 States Populations (2010 Census)”, netstate.com, (http://www.netstate.com/states/tables/state_population_2010.htm) (accessed 11/17/18).

Many homes on Hawaii Island are “off grid”. Off grid homes may rely on water catchment, solar electricity, and septic tanks. Some have attachment to the electrical grid, but nothing else. Many have no postal delivery and no telephone service. Cellphone coverage across the entire island can be spotty or non-existent. Homes with no cellphone coverage are completely isolated from the outside world.

A few geographically large neighborhoods consist entirely of poorly maintained dirt or gravel roads narrowly cut through dense ohia²¹ and fern forests, with no street lighting. The rough gravel roads are narrowly cut through dense Ohia and fern forests.



Amakihi Street, Typical Rural Street, Mountain View, Hawaii Island.²²



Satellite view of Amakihi St., with realty sales marker. *See* footnote 17.

²¹ Ohia is a species of flowering evergreen tree in the myrtle family that is endemic to Hawaii. Its height varies, 65 to 80 ft tall in favorable situations, and a much smaller shrub when growing in boggy soils or rocky ground.

²² F. Bertram, HawaiiLife.com

(<https://www.hawaiilife.com/fawnbertram/listings/amakihi-st-mountain-view-hi-96771>) (accessed 11/17/18).

These neighborhoods are sporadically populated with small to medium sized homes, usually on one to twenty acre lots. Most lots in these neighborhoods are unoccupied and have never been cleared or developed and remain in their natural forested state. Others were developed, then abandoned, and are now overgrown with vegetation. Most often, the dense forest has tall, spindly ohia trees that are surrounded by thick, impassable ferns. Many homes are set back in these tropical forests and cannot be seen from the road. The distance between occupied lots may be one half mile or more. There are no mail boxes to mark the location of driveways. Small, unmarked dirt driveways cut into the forest can be very difficult for police officers to find, especially on dark, rainy nights. Citizens living in these neighborhoods and in need of assistance must somehow describe the location of their property to 911 dispatch *See* HFCAdd-4 .

Many recreational areas on Hawaii Island are very remote and accessible only by four-wheel drive. *Id.* These remote areas can be found in the mountains and along the coast. *Id.* It may be impossible for a citizen to obtain police protection in these areas, because there is often no cellphone reception and no means to contact the police. *Id.* Even if there is cellphone coverage, it may take hours for a police officer to get the call, drive to the main station in his District, obtain a four-wheel drive, drive to the general location, find a passable four-wheel

drive road, and then travel slowly on the four-wheel drive road to the location.

Id.

3. Hawaii Island's Active Volcanoes Create Lava Flows That Isolate Communities and Prevent Police Protection

Kilauea Volcano is the world's most active volcano and has been erupting almost continuously since 1983. Kilauea's eruptions and lava flows have physically isolated citizens by surrounding inhabited areas with impassable lava. The 2018 eruption covered 13 square miles of land, destroyed over 700 homes and added 850 acres (1.36 square miles) of new coastal land to the island²³.



²³ J. Magin, "Number of homes destroyed by Kilauea eruption reaches 700, Hawaii County officials say," bizjournals.com, July 9, 2018 (<https://www.bizjournals.com/pacific/news/2018/07/09/number-of-homes-destroyed-by-kilauea-eruption.html>) (accessed 11/17/18); E. Klemmeti, "Kilauea's Summit Collapsed Into Itself" blogs.discovermagazine.com, Oct. 17, 2018 (http://blogs.discovermagazine.com/rockyplanet/2018/10/17/watch-kilaueas-summit-collapse-into-itself/#.W_BfoThKi70) (accessed 11/17/18).

Hawaii Island lava flows are a recurrent problem, blocking roads and isolating communities and residents from emergency assistance. Gas masks can be needed to protect residents from toxic fumes.²⁴

Rising 13,380 feet above sea level, Mauna Loa is the world's largest active volcano.²⁵ By adding another 16,400 feet from the sea bed to sea level²⁶, at 30,085 feet, Mauna Loa is the tallest mountain on earth.²⁷ *Id.* Mauna Loa has erupted 33 times since its first well-documented historical eruption in 1843. *Id.* Mauna Loa produces large, voluminous flows that have reached the ocean eight times since 1868. *Id.* Mauna Loa is certain to erupt again with large, voluminous flows. *Id.* According to media reports, Mauna Loa's 1984 lava flow came within four miles of Hilo, the county seat²⁸.

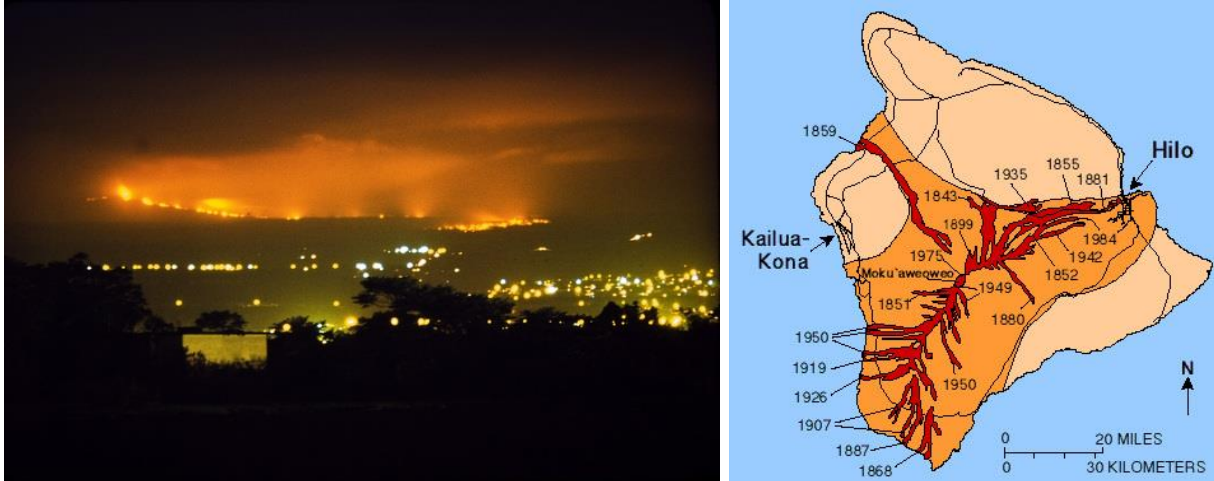
²⁴ CNN, "In pictures: Hawaii's Kilauea volcano erupts," [cnn.com, \(https://www.cnn.com/interactive/2018/05/us/hawaii-kilauea-volcano-eruption-cnnphotos/\)](https://www.cnn.com/interactive/2018/05/us/hawaii-kilauea-volcano-eruption-cnnphotos/) (accessed 11/17/18).

²⁵ United States Geological Survey, "Mauna Loa", [volcanoes.usgs.gov, \(https://volcanoes.usgs.gov/volcanoes/mauna_loa/\)](https://volcanoes.usgs.gov/volcanoes/mauna_loa/).

²⁶ The islands rise directly from deep ocean water. The Pacific Ocean is 16,000 feet deep just 16 miles from the area where Kilauea's lava entered the ocean in 2018.

²⁷ Combining the volcano's extensive submarine flanks 16,400 ft to the sea floor and 13,680 ft subaerial height, Mauna Loa rises 30,085 ft from sub marine base to summit, greater than the 29,029 ft elevation of Mount Everest from sea level to its summit. *Id.*

²⁸ J. Burnett, "Recalling 1984, when lava nearly reached Hilo," [westhawaiiitoday.com, September 18, 2015 \(http://www.westhawaiiitoday.com/2015/09/18/hawaii-news/recalling-1984-when-lava-nearly-reached-hilo/\)](http://www.westhawaiiitoday.com/2015/09/18/hawaii-news/recalling-1984-when-lava-nearly-reached-hilo/) (accessed 11/17/18).



1984 Mauna Kea lava flowing toward Hilo²⁹. Simplified map of historical lava flows at Mauna Loa volcano³⁰.

Over the past 50 years, lava flows have cut off roads and isolated communities. According to the Hawaii Volcanoes National Park website,

“... [T]ens of thousands of [] archeological sites have been buried under lava since 1969.

Since 1986, lava has flowed repeatedly over Chain of Craters Road/Highway 130. The Park's acreage has been increased by hundreds of acres and nearly 9 miles (14.5 km) of road have been inundated by the flows. In June 1989, Waha'ula Visitor Center and associated buildings were burnt and covered by lava. The Waha'ula Heiau was surrounded by lava more than once and finally buried entirely in August 1997. The Kamoamoa village site, heiau, campground, picnic area, and black sand beach were covered by lava in November 1992.”

Hawaii Volcanoes National Park, “Drive Chain of Craters Road,” nps.gov, (https://www.nps.gov/havo/planyourvisit/ccr_tour.htm) (accessed 11/17/18).

²⁹ J. Burnett, “Recalling 1984, when lava nearly reached Hilo,” westhawaii.com, September 18, 2015 (<http://www.westhawaii.com/2015/09/18/hawaii-news/recalling-1984-when-lava-nearly-reached-hilo/>) (accessed 11/17/18).

³⁰ Hawaii Center for Volcanology, “General Info,” (<http://www.soest.hawaii.edu/gg/HCV/mloa-eruptions.html>) (accessed 11/17/18).



Caterpillar high sprocket D-10 bull dozers attempting to clear Chain of Craters Road covered by pre-2018 lava flow, to create escape route for Hawaii Island communities isolated by 2018 lava flow. Built in 1965, Chain of Crater Road has had segments blocked by Kilauea lava flows 41 of the past 53 years³¹. Started in May, 2018, the reinvigorated project to clear Chain of Craters Road and create an emergency escape route for Puna residents is not complete.

4. Police Protection Is Insufficiently Responsive

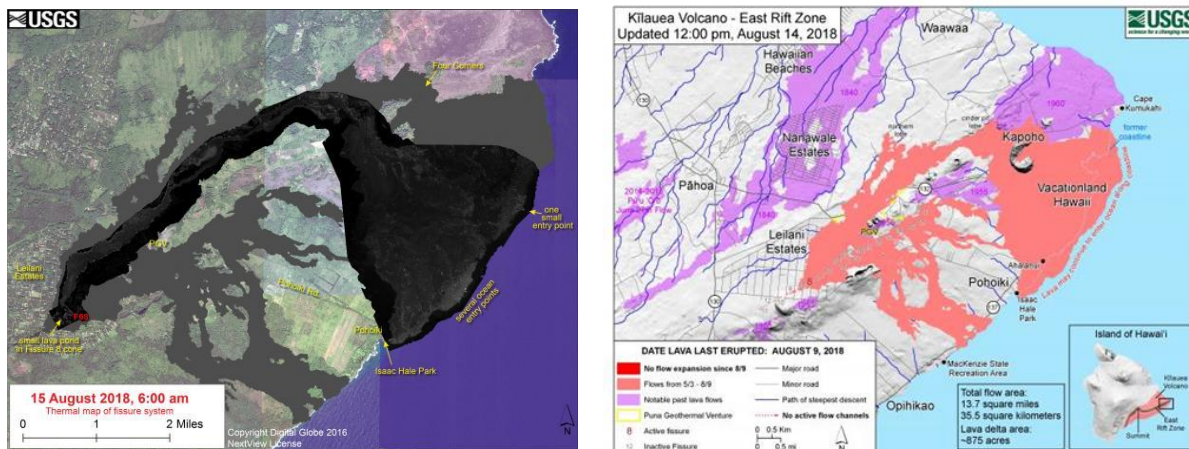
Only 200,381 people live on Hawaii Island's 4,030 square miles, with many in remote, rural areas. The population density is only 46 persons per square mile.³² But, see HFCAdd-10, showing 18 persons per square mile. This compares

³¹ State of Hawaii, Department of Transportation, "WORK BEGINS ON CHAIN OF CRATERS-KALAPANA ROAD EVACUATION ROUTE", [hidot.hawaii.gov](http://hidot.hawaii.gov/blog/2018/05/30/work-begins-on-chain-of-craters-kalapana-road-evacuation-route/), May 30, 2018 (<http://hidot.hawaii.gov/blog/2018/05/30/work-begins-on-chain-of-craters-kalapana-road-evacuation-route/>) (accessed 11/17/18).

³² U.S. Census Bureau QuickFacts: Hawaii County, Hawaii, <https://www.census.gov/quickfacts/hawaiicountyhawaii>.

with 1,586.7 persons per square mile on Oahu³³ and 2,419.9 persons per square mile³⁴ in Los Angeles County. While L.A. is a great big freeway, there are no freeways on Hawaii Island. For the most part, a single two lane highway encircles the island, and a one two lane road bisects the island. See HFCAdd-5, 6.

When a main thoroughfare is blocked by either lava flows, auto accidents, or landslides caused by frequent heavy rains, alternative routes are sometimes not available and police cannot respond to calls for help, leaving citizens unprotected and vulnerable to attack.



Images of Recent Lava Flows on Hawaii Island, showing neighborhoods cutoff by lava 20 feet thick.³⁵

³³ United States Census Bureau, “Quick Facts, Honolulu County” (<https://www.census.gov/quickfacts/honolulucountyhawaii>) (accessed 11/18/19).

³⁴ United States Census Bureau, “Quick Facts, Los Angeles County” (<https://www.census.gov/quickfacts/fact/table/losangelescountycalifornia/PST045217#PST045217>) (accessed 11/18/19).

³⁵ USGS, “Maps,” Aug. 15, 2018. (https://volcanoes.usgs.gov/volcanoes/kilauea/multimedia_maps.html) (accessed 11/17/18).

5. Wild Animals

a. Wild Pigs

Wild pigs are very common in Hawaii and on Hawaii Island and can weigh more than 250 pounds and boar can have tusks more than five inches long. *See* HFCAdd-5 . *Id.* These boar usually live in the forest, but are commonly seen on the road and in urban areas³⁶. *Id.* They can be very dangerous, and deadly when cornered. *Id.* Wild pigs often come into residential property to forage³⁷.



Wild pig sows and piglets in Hilo³⁸. This boar was taken in Hawaii³⁹.

³⁶ T. Unefuku, “Mililani Mauka residents frustrated over influx of wild pigs,” khon2.com, June 4, 2015 (https://www.khon2.com/news/local-news/mililani-mauka-residents-frustrated-over-influx-of-wild-pigs_20180309114435954/1025678944) (accessed 11/17/18).

³⁷ M. BRESTOVANSKY, “The problem of feral pigs,” HawaiiTribune-Herald.Com, Monday, December 25, 2017 (<https://www.hawaiitribune-herald.com/2017/12/25/hawaii-news/the-problem-of-feral-pigs/>) (accessed 11/17/18).

³⁸ M. BRESTOVANSKY, “The problem of feral pigs,” HawaiiTribune-Herald.Com, Monday, December 25, 2017 (<https://www.hawaiitribune-herald.com/2017/12/25/hawaii-news/the-problem-of-feral-pigs/>) (accessed 11/17/18).

³⁹ J. McAdams, “With feral hog populations exploding all over the United States, there are a lot of great places to hunt hogs,” wideopenspaces.com, January 4, 2018

Pig hunters use dog packs to track and corner the pigs. *Id.* The pigs are killed by stabbing the pig in the heart while the dogs harass the pig and hold it down. *Id.* Almost all pig hunters carry permitted handguns for protection from the pigs. *Id.* Hawaii County residents who are not hunting and not a security guard are not permitted to carry firearms for protection against these wild pigs.

Pig hunters and hikers have access to, and often use the same trails. *Id.* Pig hunters cannot hunt in all areas accessible to hikers, but hikers can usually hike in most areas designated as hunting areas. *Id.* When the dogs chase a pig, the pig will sometimes run to a trail in order to run faster. *Id.* Hikers hiking on these trails are in great danger of being attacked by these wild pigs. *Id.* Workers on Mauna Ranch have been attacked and injured by wild pigs. *Id.*

b. Wild Dogs

During the pig hunt, dogs often get lost and are abandoned. *Id.* These lost dogs become feral and can be very dangerous and can form packs. *Id.* Wild and domestic dogs have been known to attack and kill people, older horses, domestic farm sheep, and livestock. *Id.* In 2016 a man was killed by dogs in Kalihi, on Oahu.⁴⁰ A year later, two hunting dogs attacked and nearly killed two dogs on a

(<https://www.wideopenspaces.com/top-10-states-to-hunt-hogs-in-the-us/>) (accessed 11/17/18).

⁴⁰ B. Namata, "Homeless man killed by dogs owned by Kalihi business," khon2.com, August 2, 2016 (<https://www.khon2.com/news/local-news/medical->

hike with their owner.⁴¹ Just one month before that, a Honolulu Airport security officer shot and killed a dog when the dog broke its chain and came after the guard.⁴² If the security guard had not been armed, he could have been seriously injured, or killed.

B. Hawaii County Has Never Issued an Open Carry Permit

California and Hawaii are the only restrictive “may issue” states in the 9th Circuit. However, “may issue” as applied to Hawaii is a misnomer. In Hawaii, “may issue” actually means “will not and has not issued”. The facts support this.

Carry permits have never been issued in Hawaii County to non-security-guard citizens. Notwithstanding numerous opportunities to do so, neither the State of Hawaii nor the County of Hawaii has offered a declaration or documentation that a carry permit has ever been issued in the County of Hawaii to anyone other than a security guard. As the panel opinion pointed out, “[c]ounsel for the County acknowledged as much at oral argument, stating that, to his knowledge, no

[examiner-says-dog-behind-kalihi-homeless-mans-death/1025878566](#)) (accessed 11/17/18).

⁴¹ M. Miyashima, “Two dogs survive vicious attack by hunting dogs on hiking trail,” kitv.com, August 14, 2017, updated: Saturday, October 27th 2018, (<http://www.kitv.com/story/36135809/two-dogs-survive-vicious-mauling-by-hunting-dogs-on-hiking-trail>) (accessed 11/17/18).

⁴² Fox News, “Hawaii woman's dog shot, killed at Honolulu airport,” foxnews.com, Mar. 31, 2017 (<https://www.foxnews.com/us/hawaii-womans-dog-shot-killed-at-honolulu-airport>) (accessed 11/17/18).

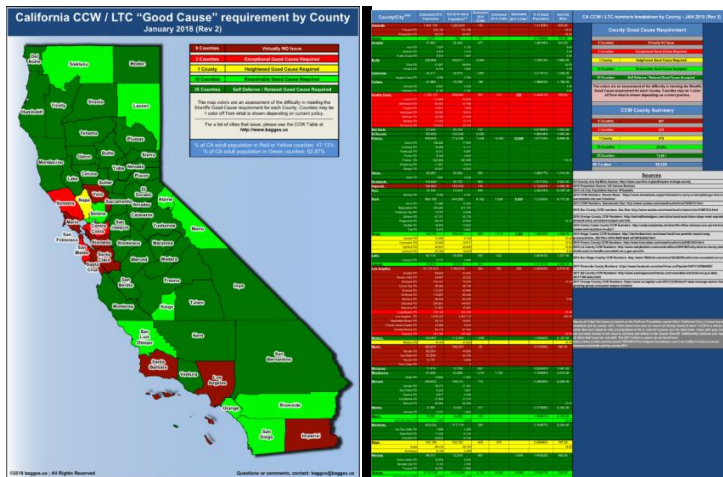
one other than a security guard—or someone similarly employed—had ever been issued an open carry license.” Panel Opinion at 51. See also, Oral Arg. at 13:18-13:29, 16:30-17:28. Hawaii Attorney General’s recently rendered Opinion 18-1 utterly fails to provide any reference to Hawaii County, or any other county, ever actually issuing an open carry permit to a non-security-guard citizen. *See* HFCAdd-19.

With Opinion 18-1 the State of Hawaii and the County of Hawaii, through the State, attempt to convince this Honorable Court that HRS §134-9 and Hawaii County Police Department Rules and Regulations Governing the Issuance of Licenses to Carry Concealed and Unconcealed Weapons currently, and historically, allow the issuance of carry permits to non-security-guard citizens. However, curiously, the State fails to include any reference to open carry permits to non-security-guards that were actually issued over the past 20 years. *See* HFCAdd-19. This secret, undisclosed, undocumented number of open carry permits issued in Hawaii County is apparently zero, or so low that divulgence now would undermine their specious argument that HRS §134-9 is not a total ban on the issuance of carry permits to non-security-guard citizens.

C. Even California Issues Carry Permits in Rural Counties

Even under the California scheme, “may issue” really means “will issue” in most rural counties. California allows its individual counties to draft their own

policies to implement California’s carry statutes⁴³. In California’s rural counties, an otherwise qualified applicant need only state that the purpose of the carry permit is for self-defense. Of California’s 58 counties, 34 counties only require an otherwise qualified applicant to merely “check” “self-defense” on the application form to be issued a carry permit, and nine counties issue carry permits to applicants that show reasonable good cause. *See* HFCAdd-29 - 34. Two counties require an applicant to show heightened good cause, four counties require an applicant to show exceptional good cause, and nine counties do not issue carry permits to regular, otherwise qualified applicants. *See* HFCAdd-29 – 34. All 43 California counties that routinely issue carry permits are rural counties, so is Hawaii County.



See HFCAdd -29 - 30 for larger map; *See* also HFCAdd -31-34 for larger chart.

⁴³ K.Stone, “Sheriff Gore Aims to Issue More Concealed Gun Permits in San Diego County” timesofsandiego.com, Nov. 17, 2017 (<https://timesofsandiego.com/politics/2017/11/17/sheriff-gore-aims-to-issue-more-concealed-gun-permits-in-san-diego-county/>) (accessed 11/17/2018).

Montana, Idaho, Arizona and Alaska are rural and do not require a permit to carry. Washington, Oregon and Nevada are predominately rural and are “shall issue” states. As shown above, most rural California counties, pursuant to county policy, are “shall issue” counties. Hawaii County is also rural; yet, Hawaii County has never issued a carry permit to a non-security-guard. Hawaii County is an outlier and rehearing *en banc* should be denied.

III. Conclusion

The Petition for rehearing en banc should be denied.

Respectfully submitted, this the 18th day of November, 2018.

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the type-volume limitation of Ninth Circuit Rule 29-2(c)(2) because this brief contains 3,868 words, excluding the parts of the brief exempted by Federal rule of Appellate Procedure 32(f).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

DATED: Honolulu, Hawaii, November 18, 2018.

/s/ Donald Wilkerson
Donald L. Wilkerson
Attorney for Amicus Curiae

CERTIFICATE OF SERVICE

On this, 18th day of November, 2018, I served the foregoing Brief 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 declare under penalty of perjury that the foregoing is true and correct.

Executed this the 18th day of November, 2018.

/s/ Donald Wilkerson
Donald L. Wilkerson
Attorney for Amicus Curiae