No. 12-17808 [DC# 12-00336-HG-BMK]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GEORGE K. YOUNG, Jr.,
Plaintiff - Appellant,

vs.

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

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII
Helen Gillmor, District Judge, Presiding

BRIEF *AMICI CURIAE* OF THE MADISON SOCIETY, INC., CALGUNS FOUNDATION, FIREARMS POLICY COALITION, INC., AND FIREARMS POLICY FOUNDATION, IN OPPOSITION TO APPELLEES' PETITION FOR REHEARING EN BANC

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November 19, 2018

CORPORATE DISCLOSURE STATEMENT

The Madison Society, Inc., has no parent corporations. No publicly traded company owns more than 10% *amicus* corporation's stock.

The Calguns Foundation, Inc., has no parent corporations. No publicly traded company owns more than 10% *amicus* corporation's stock.

The Firearms Policy Coalition, Inc., has no parent corporations. No publicly traded company owns more than 10% *amicus* corporation's stock.

The Firearms Policy Foundation, has no parent corporations. No publicly traded company owns more than 10% *amicus* corporation's stock.

Dated: November 19, 2018

/s/ Donald Kilmer
Counsel for *Amici Curiae*

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Statement of *Amici Curiae*

The Madison Society Foundation, Inc., (MSF) is a not-for-profit 501(c)(3) corporation based in California. It promotes and preserves the purposes of the Constitution of the United States, in particular the right to keep and bear arms. MSF provides the general public and its members with education and training on this important right. MSF contends that this right includes the right to carry firearms in public (subject only to constitutionally valid regulation) for self-defense.

The Calguns Foundation (CGF) is a 501(c)(3) non-profit organization incorporated under the laws of California with its principal place of business in Sacramento, California. CGF is dedicated to promoting education for all stakeholders about California and federal firearm laws, rights and privileges, and defending and advancing the rights of California gun owners.

Firearms Policy Coalition, Inc. (FPC) is a 501(c)(4) non-profit organization incorporated under the laws of Delaware with its principal place of business in Sacramento, California, with members throughout the United States, including the State of Hawaii. FPC serves its members and the public through direct legislative advocacy, grassroots advocacy, legal efforts, research, education, and other programs. The

purposes of FPC include defending the United States Constitution and the People's rights, privileges, and immunities deeply rooted in the Nation's history and tradition, especially the fundamental right to keep and bear arms.

Firearms Policy Foundation (FPF) is a 501(c)(3) non-profit organization incorporated under the laws of Delaware with its principal place of business in Sacramento, California, with members residing throughout the United States, including in the State of Hawaii. FPF serves to defend and advance constitutional rights through charitable purposes, with a focus on the fundamental, individual right to keep and bear arms.

Amicus Relationship to Parties

No counsel for any party in this matter has authored this brief in whole or in part. No party or counsel for any party has contributed money intended to fund the preparation of this brief. No person(s), other than *amici curiae* and its members have funded the preparation of the brief.

Consent to File

All parties have consented to the filing of this brief.

Introduction

For good or ill, the Second and Fourteenth Amendment share more than just an enumerated status in our Constitutional order. They share a similar treatment by the factions that debate our constitutional philosophy, including factions within our Courts.

Statement of the Case

Appellant Young's claim is that Hawaii's virtual ban on any mode of carrying firearms outside the home, violates his Second Amendment right to bear (carry) arms for self-defense.

This circuit issued a prior en banc decision relating to the public bearing of arms. *Peruta v. County of San Diego (Peruta II)*, 824 F.3d 919 (2016) (en banc). *Peruta II* overturned a three-judge panel's decision striking down a concealed carry licensing regime, see *Peruta v. County of San Diego (Peruta I)*, 742 F.3d 1144 (9th Cir. 2014).

In *Peruta II*, the Court took up a challenge to San Diego's regulations related to the concealed carrying of handguns outside of the home. 824 F.3d *at* 924. At the time of the decision, California law generally prohibited the carrying firearms in public, whether concealed or openly. See Cal. Penal Code §§ 25400, 25850, 26350. But San Diego County purported to license the carrying of a concealed firearm **only**

upon the demonstration of "good cause" – while rejecting self-defense without a showing of particularized need, as "good cause." See *Peruta II*, 824 F.3d *at* 926. In upholding San Diego's policies, the en banc court held that "the Second Amendment right to keep and bear arms does not include, in any degree, the right of a member of the general public to carry concealed firearms in public." *Id. at* 939.

The en banc panel explicitly left unresolved the question of whether the Second Amendment encompasses a right to open carry. *See id.* ["There may or may not be a Second Amendment right for a member of the general public to carry a firearm openly in public. The Supreme Court has not answered that question, and we do not answer it here."]

This case takes up where the prior decisions left off. *Young v. Hawaii* presents the issue of whether the Second Amendment encompasses a right to carry firearms openly, in public, for the purpose of self-defense.

Second and Fourteenth Amendment - Analysis

The Second and Fourteenth Amendments have more in common than the latter's incorporation of the former as explained in *McDonald v. City of Chicago*, 561 U.S. 742 (2010). They both have gone through periods of dormancy, misunderstanding, resistance, and resurrection.

The Fourteenth Amendment, ratified after the conflagration of our civil war, promised due process, equal protection, and a universal participation in the privileges and/or immunities for all who live in our republic. Though almost a century late to the constitutional lexicon, it purported to enshrine already existing natural rights that enure to the benefit of all Americans. *See*: Blackman, SYMPOSIUM: LIBERTARIAN LEGAL THOUGHT: Back to the Future of Originalism, 16 Chap. L. Rev. 325, Winter, 2013. *Cf.,* Hamburger, Natural Rights, Natural Law, and American Constitutions, 102 Yale L. J. 907, 918-919 (1993).

Dr. Martin Luther King, Jr., echoed this sentiment of inherent natural rights, even as he criticized this government's breach of those promises. "When the architects of our republic wrote the magnificent words of the Constitution and the Declaration of Independence, they were signing a promissory note to which every American was to fall heir. This note was a promise that all men - yes, black men as well as white men - would be guaranteed the unalienable rights of life, liberty and the pursuit of happiness..." MLK Speech, Civil Rights March, Washington, D.C., 28 August 1963.

Dr. King could have been lamenting the dormancy of these pre-existing natural rights that were betrayed in *Dred Scott v. Sandford*, 60

U.S. (19 How.) 393 (1857), with its finding that decedents of African Slaves lack standing in federal courts to adjudicate rights: "to go where they pleased at every hour of the day or night [...], the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, and to keep and carry arms wherever they went." *Id., at* 417.

Or, he could have been calling foul at the way fundamental rights appeared to be almost purposefully misunderstood in *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872), *United States v. Cruikshank,* 92 U.S. 542 (1875), and *Presser v. Illinois*, 116 U.S. 252 (1886).

MLK, Jr., might have also been referring to the final passive-aggressive resistance of the Courts in *The Civil Rights Cases*, 109 U.S. 3 (1883). And then came the final abandonment of any pretext of a coherent interpretive theory of the Fourteenth Amendment that came with sophistry of *Plessy v. Ferguson*, 163 U.S. 537 (1896).

The Fourteenth Amendment would only begin its resuscitation and rescurrection from its *Plessy-Phase* dormancy 58 years later in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954). Whether that resurrection is complete (or ongoing) is still an open question more

than 60 years after *Brown* overturned *Plessy's* "Separate But Equal" doctrine. *See Obergefell v. Hodges*, __ U.S. __, 135 S. Ct. 2584 (2015).

The Second Amendment shares much with its constitutional cousin the Fourteenth Amendment.

In the case that woke up the Second Amendment, *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court found that the text guaranteed an "[I]ndividual right to possess and carry weapons in case of confrontation. This meaning is strongly confirmed by the historical background of the Second Amendment. We look to this because it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a pre-existing right. The very text of the Second Amendment implicitly recognizes the pre-existence of the right and declares only that it "shall not be infringed." As we said in *United States v. Cruikshank*, 92 U.S. 542, 553, 23 L. Ed. 588 (1876), "[t]his is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The second amendment declares that it shall not be infringed . . . ." (underline added.) *Id., at* 592.[1]

[1] Part of the strange journey that both the Fourteenth and Second Amendment share is their explication by cases [like *Cruikshank*, *Dred*

In other words, the substantive right to be armed in the Second Amendment, and the substantive/procedural rights of due process and equal protection set forth in the Fourteenth are *a priori* rights. They are metaphysically independent of our Declaration of Independence or The Constitution and its Amendments.

Of course, some of the reasons for the Second Amendment's constitutional dormancy in our courts until 2008 (and 2010) are somewhat different from the slumber, betrayal, revival, betrayal, and current revival of the rights protected by the Fourteenth Amendment – at least when cataloguing the life-cycle of those rights for the white population. But in the case of minorities seeking to exercise these rights, they are mirror images of each other that march lock-step through history. See Justice Thomas' concurring opinion in *McDonald v. City of Chicago*, 561 U.S. 742, 805 (2010).

The Second Amendment even has its own rogues' gallery of cases that misinterpreted the underlying right of self-defense. In addition to the cases cited above, *e.g., Dred Scott, Cruikshank,* and *Presser,* that

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Scott Slaughterhouse, etc.] that leap back and forth between canon and anti-canon, depending on whether the particular commentator is trying to a particular theory of constitutional interpretation.

overlap with the Fourteenth Amendment, it would be neglectful to exclude *United States v. Miller*, 307 U.S. 174 (1939). *Miller* was the only U.S. Supreme Court case that even came close to (mis)interpreting the Second Amendment until 2008's *Heller* decision. *Miller* (a poorly written and poorly reasoned decision) had come to stand for the proposition that the Second Amendment was a collective right that could only be exercised by members of a state-sanctioned militia. The *Heller* Court was dubious of even this claim.

> *Miller* did not hold that and cannot possibly be read to have held that. The judgment in the case upheld against a Second Amendment challenge two men's federal indictment for transporting an unregistered short-barreled shotgun in interstate commerce, in violation of the National Firearms Act, 48 Stat. 1236. It is entirely clear that the Court's basis for saying that the Second Amendment did not apply was not that the defendants were "bear[ing] arms" not "for . . . military purposes" but for "nonmilitary use," post, *at* 637, 171 L. Ed. 2d, at 685. Rather, it was that the type of weapon at issue was not eligible for Second Amendment protection: "In the absence of any evidence tending to show that the possession or use of a [short-barreled shotgun] at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument." 307 U.S., at 178, 59 S. Ct. 816, 83 L. Ed. 1206 (emphasis added). "Certainly," the Court continued, "it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common

> defense." *Ibid.* Beyond that, the opinion provided no explanation of the content of the right.
>
> *District of Columbia v Heller*, 554 *at* 621

The *Miller* Court went on:

> This holding is not only consistent with, but positively suggests, that the Second Amendment confers an individual right to keep and bear arms (though only arms that "have some reasonable relationship to the preservation or efficiency of a well regulated militia"). Had the Court believed that the Second Amendment protects only those serving in the militia, it would have been odd to examine the character of the weapon rather than simply note that the two crooks were not militiamen.
>
> *District of Columbia v Heller*, 554 *at* 622

This mode of analysis by the *Heller* Court, so clear to all of us now in 2018, did not prevent this Circuit from misunderstanding the Second Amendment's DNA as a fundamental individual right in the cases of *Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir. 2002); *Hickman v. Block*, 81 F.3d 98 (9th Cir.1996); and *Fresno Rifle & Pistol Club, Inc. v. Van De Kamp*, 965 F.2d 723 (9th Cir. 1992).

Even after the Supreme Court issued its *Heller* decision, this circuit vacated a 3-judge panel's opinion finding the Second Amendment was incorporated against state actors through the

Fourteenth Amendment. And it did so in a rare – *sua sponte* – call for an en banc rehearing. *Nordyke v. King,* 575 F.3d 890 (9th Cir. 2009)(en banc). That particular case languished until *McDonald v. City of Chicago*, 561 U.S. 742, was published in 2010. The *McDonald* Court went on to hold that the original 3-judge panel had gotten incorporation essentially correct.

Since then, several other circuit courts (with a cluster of cases from this circuit) have issued Second Amendment decisions that have drawn rebukes from various Justices of the Supreme Court. These recalcitrant circuits have been called out for their lack of conformity in dissents from denial of certiorari. *See: Jackson v. City & Cnty. of San Francisco*, ___ U.S. ___, 135 S. Ct. 2799 (2015); *Friedman v. City of Highland Park*, ___ U.S. ___, 136 S. Ct. 447 (2015); *Peruta v. California*, ___ U.S. ___, 137 S. Ct. 1995 (2017), *Silvester v. Becerra*, ___ U.S. ___, 138 S. Ct. 945 (2018).

It is an open question whether the Circuit Courts are limping along as best they can (mis)interpreting the Second Amendment out of an inertia, borne of some brand of judicial conservatism – or whether they are staging an open rebellion against the plain text of Supreme Court precedent. Either possibility is still preventable.

The Second Amendment need not succumb to the *Plessy-Phase* of dormancy that was visited on the Fourteenth Amendment by *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872), *United States v. Cruikshank,* 92 U.S. 542 (1875), *Presser v. Illinois*, 116 U.S. 252 (1886), *The Civil Rights Cases*, 109 U.S. 3 (1883), and *Plessy v. Ferguson*, 163 U.S. 537 (1896).

Argument

Background Checks [*Silvester*], Assault Weapon Possession [*Friedman*], and Safe Storage and Ammo Laws [*Jackson*], have the virtue of being novel and of having not been mentioned in *Heller* or *McDonald*. That is not the case with regard to the singular issue of "bearing arms."

The *Heller* Court unequivocally found that "[a]t the time of the founding, as now, to "bear" meant to "carry." See Johnson 161; Webster; T. Sheridan, A Complete Dictionary of the English Language (1796); 2 Oxford English Dictionary 20 (2d ed. 1989) (hereinafter Oxford). When used with "arms," however, the term has a meaning that refers to carrying for a particular purpose – confrontation. In *Muscarello v. United States*, 524 U.S. 125, 118 S. Ct. 1911, 141 L. Ed.

2d 111 (1998), in the course of analyzing the meaning of "carries a firearm" in a federal criminal statute, Justice Ginsburg wrote that "[s]urely a most familiar meaning is, as the Constitution's Second Amendment . . . indicate[s]: 'wear, bear, or carry . . . 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 143, 118 S. Ct. 1911, 141 L. Ed. 2d 111 (dissenting opinion) (quoting Black's Law Dictionary 214 (6th ed. 1990)). We think that Justice Ginsburg accurately captured the natural meaning of "bear arms." *Heller at* 583.

After dispelling the notion that "bear arms" had an exclusively military connotation, the *Heller* Court went on to state: "Putting all of these textual elements together, we find that they guarantee the individual right to possess and carry weapons in case of confrontation. This meaning is strongly confirmed by the historical background of the Second Amendment. We look to this because it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a pre-existing right." *Id.*, *at* 592.

Finally: "There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms." *Id., at* 595. (Emphasis added.)

Based on the text and history of the Second Amendment, controlling Supreme Court precedent, and the result obtained in *Peruta v. County of San Diego (Peruta II)*, 824 F.3d 919 (2016) (en banc) [concealed carry may be banned in lieu of open carry], the original 3-judge panel issued a presumptively correct, well-reasoned opinion. "An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." Fed. R. App. P. 35(a).

Neither *Heller* nor *McDonald* suggested that the Second Amendment should evolve into a vain and idle parchment. This Circuit's binding precedent compels adjudication of Second Amendment claims in *pari materia* with First Amendment claims. *U.S. v. Chovan*, 735 F.3d 1127 (9th Cir. 2013); *Jackson v. City and County of San Francisco*, 746 F.3d 953 (9th Cir. 2014). The Supreme Court having found that some form of carry for self-defense purposes is baked into the Second Amendment, coupled with this Circuit having previously

foreclosed a constitutional challenge to concealed carry, the only remaining available mode of bearing arms consistent with the Second Amendment is in the manner prayed for by Mr. Young.

Conclusion

Appellees petition for en banc rehearing should be denied.

November 19, 2018

/s/ *Donald Kilmer*
For Amicus Curiae

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of this Circuit because it consists of 2533 words and because this brief has been prepared in proportionally spaced typeface using WordPerfect Version X8 in Century Schoolbook 14 point font.

Dated: November 19, 2018

/s/ Donald Kilmer
Attorney for Amicus Curiae

CERTIFICATE OF SERVICE

On November 19, 2018, I served the foregoing BRIEF *AMICI CURIAE* OF THE MADISON SOCIETY, INC., CALGUNS FOUNDATION, FIREARMS POLICY COALITION, INC., AND FIREARMS POLICY FOUNDATION, IN OPPOSITION TO APPELLEES' PETITION FOR REHEARING EN BANC by electronically filing it with the Court's ECF/CM 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 November 19, 2018.

/s/ Donald Kilmer
Attorney for Amicus Curiae