

Case No. 12-17808

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 Hawai‘i, Case No. 1:12-cv-00336-HG-BMK
Honorable District Judge Helen Gillmor

**BRIEF OF *AMICI CURIAE* CITY AND COUNTY OF
HONOLULU, COUNTY OF KAUA‘I, AND COUNTY OF
MAUI IN SUPPORT OF DEFENDANTS-APPELLEES**

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I. IDENTITY, INTEREST, AND AUTHORITY OF *AMICI CURIAE*

Amici curiae are the City and County of Honolulu, the County of Kaua‘i, and the County of Maui (“the Counties”), which submit this brief in support of Defendants-Appellees, the State of Hawai‘i, et al. All parties have consented to the filing of this brief, thereby giving the Counties the authority to file. *See* Ninth Circuit Rule 29-2; Circuit Advisory Committee Note to Rule 29-2 (noting that Rule 29-2 “permits such a filing with the consent of all parties, as permitted in FRAP 29(a) for merits briefing. Obtaining such consent relieves the Court of the need to consider a motion.”).¹

The Counties have an interest in this case because, if this Court were to overturn section 134-9 of the Hawai‘i Revised Statutes (HRS), as interpreted by the Hawai‘i Attorney General, the result would be the deadly proliferation of guns on the Counties’ streets and in other public places. The Counties also have an interest in explaining how they interpret and apply Hawai‘i laws regulating licenses to carry firearms, including open-carry licenses. The Counties previously explained their practices and procedures to this Court in their papers in support of the petition for rehearing *en banc*. *See* Docket Entry Nos. 157-1–3. The Counties

¹ This brief was not authored, in whole or in part, by any party’s counsel. No party, counsel, or any other person, other than *pro bono* counsel for *amici curiae*, contributed money intended to fund the preparation or submission of this brief.

now submit, along with this brief, the Updated Declaration of Chief Susan Ballard (Updated Ballard Decl.), which includes discussion of more recent developments.

In the time that has passed since the Counties filed their papers in support of rehearing *en banc* (Docket Entry Nos. 157-1–3), they have continued to respect and uphold citizens’ Second Amendment rights while also protecting public safety. *See, e.g.*, Updated Ballard Decl. ¶ 12. Furthermore, in early 2020, the Honolulu Police Department decided to expand its hours for accepting permit applications, and will be emailing permits to acquire firearms to applicants to minimize the number of times they are required to visit the police department. *Id.* Even during the COVID-19 pandemic, when other government permitting operations were halted—including, for example, the processing of drivers’ license applications—the Honolulu Police Department has kept firearms permitting open and available to the public, implementing an appointment system and accommodating social-distancing requirements. *Id.* This further illustrates the Counties’ abiding commitment to upholding Second Amendment rights while protecting the public.

Allowing more people to carry guns in public *without any particular reason for doing so* would needlessly endanger the lives of the Counties’ citizens, especially their police officers. Appellant’s insistence that the Second Amendment somehow *requires* this deadly result—regardless of public safety, the will of the people of Hawai‘i, the separation of powers, and principles of federalism—calls to

mind Justice Jackson’s warning against the rigid assumption that “all local attempts to maintain order are impairments of the liberty of the citizen.”

Terminiello v. City of Chicago, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

“The choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.” *Id.*

II. ARGUMENT

A. The Counties do not limit open (or concealed) carry to security guards.

Setting aside, for the moment, the first part of the opinion for the panel majority in this case—which picked cherries from the orchards of history to feed spurious notions this Court already rejected, *en banc*, in *Peruta v. County of San Diego*, 824 F.3d 919 (9th Cir. 2016) (*Peruta II*)²—an essential premise of the panel majority opinion was that section 134-9, HRS, restricts “open carry to those whose

² As the dissent in the panel opinion noted, this Court’s *en banc* “opinion in *Peruta II* contained a lengthy discussion of history relevant to the Second Amendment, including the right to bear arms in old England, colonial America, and in the United States following adoption of the Fourteenth Amendment. It is sufficient for now to say that its assessment was different from that contained in” *Peruta v. County of San Diego*, 742 F.3d 1144 (9th Cir. 2016) (*Peruta I*), which was largely repeated—despite *Peruta II*—in the opinion for the panel majority here. *Young v. Hawaii*, 896 F.3d 1044, 1075 (9th Cir. 2018) (Clifton, J., dissenting).

job entails protecting life or property,” such as security guards. *Young*, 896 F.3d at 1071. That premise is incorrect.

The Hawai‘i Attorney General has explained that section 134-9 does *not* “limit the issuance of unconcealed-carry licenses to private security officers and other individuals whose jobs entail protecting life and property.” State of Haw., Dep’t of the Att’y Gen., Opinion Letter No. 18-1, *Availability of Unconcealed-Carry Licenses* (Sept. 11, 2018), available at <https://ag.hawaii.gov/wp-content/uploads/2018/09/AG-Opinion-No.-18-1.pdf>. On the contrary, section 134-9 “authorizes the issuance of unconcealed-carry licenses to any qualified individual who demonstrates a sufficient ‘urgency’ or ‘need’ to carry a firearm and is ‘engaged in the protection of life and property.’” *Id.* Regardless of occupation, an applicant may obtain an open-carry license if he or she (1) meets the objective qualifications for possessing and carrying a firearm; (2) demonstrates a sufficient need to carry a firearm for the purpose of protecting life and property; (3) is of good moral character; and (4) presents no other reason justifying the discretionary denial of a license. *Id.* “To satisfy these requirements, an applicant must demonstrate, among other things, that he or she has a need for protection that substantially exceeds that held by ordinary law-abiding citizens.” *Id.*

The Attorney General’s interpretation of section 134-9, HRS, comports with the Counties’ past and current practice. In Honolulu, for example, the Firearms

Section of the Honolulu Police Department's Records and Identification Division is responsible for processing applications for open-carry permits. Permit applications are forwarded to Chief Ballard, through her Deputy Chief of Administrative Operations, for consideration and approval. Updated Ballard Decl. ¶ 4. The Honolulu Police Department does not deny open-carry permits solely on the basis that the applicant is not a security guard or similarly employed in a job that entails protecting life and property. *Id.* ¶ 5. On the contrary, the Honolulu Police Department reviews each application individually to determine whether, given the circumstances, a permit is warranted under section 134-9. *Id.*

Again, an applicant may obtain an open-carry permit if he or she (1) meets the objective qualifications for possessing and carrying a firearm; (2) demonstrates a sufficient need to carry a firearm for the purpose of protecting life and property; (3) is of good moral character; and (4) presents no other reason justifying the discretionary denial of a permit. *See id.* ¶ 6. Thus, the contention that the citizens of Hawai'i are entirely foreclosed from bearing arms for self-defense is incorrect. Although an applicant must demonstrate a need for protection that substantially exceeds that held by ordinary law-abiding citizens, being a security guard is not a requirement. *See id.* ¶¶ 4–6.

Furthermore, even during the global COVID-19 pandemic, when other government permits (such as drivers' licenses) were no longer being processed, the

Honolulu Police Department has kept firearms permitting open and available to the public, implementing an appointment system and accommodating social-distancing requirements. *Id.* ¶ 12. The Honolulu Police Department also decided, in early 2020, to expand its hours for accepting permit applications, and will be emailing permits to acquire firearms to applicants to minimize the number of times they are required to visit the police department. *Id.* All of the Counties likewise remain committed to upholding Second Amendment rights while protecting the public.

B. Overturning Hawai‘i’s gun-control measures would jeopardize public safety, including the safety of the Counties’ police officers.

The potential that this Court might overturn Hawai‘i’s gun-control measures “is of great concern” to Hawai‘i law-enforcement officials. Docket Entry No. 157-4 (Faaumu Decl.) ¶ 9. Hawai‘i’s gun-control measures have been highly effective, whereas if the Counties can no longer limit open-carry permits to individuals with a good and substantial reason to have them, gun violence will increase, and police officers’ jobs will harder to perform and more dangerous. *Id.* “Statistical information shows that Hawaii has one of the lowest rates for deaths related to firearms in the country. This is especially true in Maui County, where firearm related violence is uncommon,” *id.* ¶ 10, and in Honolulu, which “has a low rate of violent crime compared to other big cities,” Updated Ballard Decl. ¶ 7.

As Chief Ballard notes, moreover, the “community as a whole is satisfied with the current gun legislation and the way applications are scrutinized, which

strikes an appropriate balance between citizens' Second Amendment rights," which Chief Ballard recognizes and respects, "and protecting public safety by minimizing the proliferation of guns in public places." *Id.* If, on the other hand, police departments in Hawai'i were required to issue open-carry permits to applicants who have no special need for such protection, "police officers will be likely to face greater danger because they will encounter more armed individuals. An officer trying to issue a traffic citation, for example, has far more to fear if the driver is armed." *Id.* ¶ 8. In fact, "any time guns are a factor in an interaction between officers and citizens, the risk of fatalities tends to increase." *Id.* ¶ 9.

The "same is true," moreover, "of interactions between citizens: the presence of one or more guns in any dispute increases the chances that the dispute will become deadly." *Id.* Even if a citizen is attempting to *help* the police using a gun, "that fact may not be immediately obvious to, or verifiable by, the officer, with potentially tragic consequences." *Id.* And "an increase in the number of guns that may be lawfully carried in public" is also "likely to result in an increase in the number of gun thefts, and thus an increase in the number of guns in the hands of criminals." *Id.* ¶ 10.

Thus, a requirement to issue open-carry permits to people who have "no special need for them is likely to make citizens and police officers less safe and, at the very least, will make it much more difficult" for police officers in Hawai'i to

fulfill their “mission of serving and protecting with aloha.” *Id.* ¶ 11;³ *see also, e.g.*, Docket Entry No. 157-4 (Faaumu Decl.) ¶ 11 (“If [the Maui Police Department] is required to place more handguns on the streets in the hands of people without good and substantial reason to carry them, it would significantly increase the likelihood of more deadly encounters. The presence of a handgun in an altercation, however petty, greatly increases the likelihood that it will escalate into potentially lethal violence.”); *id.* ¶ 12 (“In addition to creating a safety concern for the public, additional firearms on the streets for people who have no special need for that protection will also create a greater danger to our officers.”).

This Court should not interfere with Hawai‘i’s highly-effective and carefully-crafted gun-control measures, which protect police officers and the public while also respecting citizens’ rights under the Second Amendment.

³ The official mission of the Honolulu Police Department is: “Serving and protecting with aloha.” <http://www.honolulu.org/departments/index.php>; *see also* Updated Ballard Decl. ¶ 3. As the Hawai‘i Legislature has explained, “aloha” is “more than a word of greeting or farewell or a salutation,” but also “means mutual regard and affection and extends warmth in caring with no obligation in return,” expressing “the essence of relationships in which each person is important to every other person for collective existence.” HRS § 5-7.5. Hawai‘i officials are statutorily required to act with aloha in “exercising their power on behalf of the people and in fulfillment of their responsibilities, obligations and service to the people.” *Id.*

C. The panel majority erred in applying strict scrutiny, and Hawai‘i’s gun-control measures satisfy strict scrutiny in any event.

In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court recognized that longstanding restrictions on carrying firearms may be “presumptively lawful,” and are not subject to strict scrutiny. *Id.* at 627 n.26. As the dissent in this case rightly concluded, section 134-9 is “a longstanding, presumptively lawful regulation under *Heller*. At a minimum, the statute survives intermediate scrutiny, as the core of the Second Amendment does not include a general right to publicly carry firearms and there is a reasonable fit between the licensing scheme and Hawaii’s legitimate interest in promoting public safety.” *Young*, 896 F.3d at 1076 (Clifton, J., dissenting). That conclusion is further supported by the facts discussed above and in Chief Ballard’s updated declaration, in addition to the Counties’ prior submissions in support of rehearing *en banc*. *See, e.g.*, Updated Ballard Decl. ¶¶ 3–12.

Appellant, instead of respecting the will of the citizens of Hawai‘i and the Counties, and their proven methods for promoting and preserving public safety, asks this Court to overturn those methods by judicial fiat in the name of strict scrutiny. But the application of strict scrutiny in this case cannot be reconciled with this Court’s *en banc* opinion in *Peruta II*, which recognized that “[e]ven if we assume that the Second Amendment applies” to restrictions on carrying firearms in public, such restrictions are subject to “*intermediate scrutiny*,” and survive such

scrutiny if they promote ““a substantial government interest that would be achieved less effectively absent the regulation.”” *Peruta II*, 824 F.3d at 942 (emphasis added) (quoting, and explicitly agreeing with, Judge Graber’s concurrence, which, in turn, agreed with “[t]hree of our sister circuits [that] have upheld similar restrictions under intermediate scrutiny,” *id.* (Graber, J., concurring)); *see also*, *e.g.*, *Silvester v. Harris*, 843 F.3d 816, 823 (9th Cir. 2016) (finding “near unanimity in the post-*Heller* case law that when considering regulations that fall within the scope of the Second Amendment, intermediate scrutiny is appropriate”); *Drake v. Filko*, 724 F.3d 426, 436 (3d Cir. 2013) (applying intermediate scrutiny because, if the Second Amendment “protects the right to carry a handgun outside the home for self-defense at all, that right is not part of the core of the Amendment”) (citation omitted); *Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013) (holding that “intermediate scrutiny applies ‘to laws that burden [any] right to keep and bear arms outside of the home’”) (quoting *United States v. Masciandaro*, 638 F.3d 458, 471 (4th Cir. 2011)); *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 96 (2d Cir. 2012) (“Because our tradition so clearly indicates a substantial role for state regulation of the carrying of firearms in public, we conclude that intermediate scrutiny is appropriate in this case.”).

It is also worth noting that the panel majority only arrived at its decision to apply strict scrutiny by presuming to “afford little weight to *Heller*’s emphasis on

the application of the Second Amendment to the home specifically.” *Young*, 896 F.3d at 1069. There is no excuse, however, for affording such little weight to something the *Heller* Court clearly assigned great weight. The Second Amendment “surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.” *Heller*, 554 U.S. at 635. The principle that the right of self-defense is far stronger inside the home than out on the streets is ancient. Blackstone, for example, commented that “every man’s house is looked upon by the law to be his castle of defense and asylum, wherein he should suffer no violence.” 3 William Blackstone, Commentaries on the Laws of England 288 (1768). That is still true. In Hawai‘i, a person under attack is “not obliged to retreat from his dwelling or place of work, unless he was the initial aggressor or is assailed in his place of work by another person whose place of work the actor knows it to be.” HRS § 703-304(5)(b). In public, however, the use of deadly force is not justifiable if the person “knows that he can avoid the necessity of using such force with complete safety by retreating.” *Id.*

Consistent with the ancient principle that the right of self-defense is at its zenith in the home—and consistent with other authorities too numerous to discuss here—the dissent rightly concluded that “the core of the Second Amendment is focused on self-defense in protection of hearth and home,” not on “a general right

to publicly carry firearms.” *Young*, 896 F.3d at 1080 (Clifton, J., dissenting). In any event, even applying strict scrutiny, this Court should uphold section 134-9.

III. CONCLUSION

Thus, this Court should not overturn Hawai‘i’s highly-effective and carefully-crafted gun-control measures, which protect the Counties’ police officers and their citizens, while also honoring the Second Amendment.

Dated: June 4, 2020

Respectfully submitted,

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/s/ Dan Jackson

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CERTIFICATE OF COMPLIANCE

This brief complies with the length limit because it contains 2,790 words.

Dated: June 4, 2020

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/s/ Dan Jackson

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Honorable District Judge Helen Gillmor

**UPDATED DECLARATION OF CHIEF SUSAN BALLARD
IN SUPPORT OF BRIEF OF *AMICI CURIAE* CITY AND
COUNTY OF HONOLULU, COUNTY OF KAUA‘I, AND
COUNTY OF MAUI IN SUPPORT OF DEFENDANTS-
APPELLEES**

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I, SUSAN BALLARD, declare under penalty of perjury that:

1. I am the Chief of Police of the Honolulu Police Department (HPD), and have been since November 2017. I have personal knowledge of, and am competent to testify to, the matters set forth below.
2. I joined the HPD in 1985, and have held every position within the HPD with the exception of the ranks of Assistant Chief and Deputy Chief. I have worked in a wide range of field and administrative assignments, including the Narcotics/Vice and the Downtown-Chinatown patrol district. As a commander, I have led the Kaneohe and Kalihi patrol districts and the Finance, Training, and Central Receiving divisions.
3. The HPD's Mission Statement provides that the HPD's official goal is to serve and protect with "aloha," which—as stated in the Hawaii Revised Statutes—"is more than a word of greeting or farewell or a salutation," but also "means mutual regard and affection and extends warmth in caring with no obligation in return," expressing "the essence of relationships in which each person is important to every other person for collective existence." HRS § 5-7.5. Accordingly, the HPD works together with the community to make Oahu safe for its nearly one million residents, and five times as many visitors.
4. The Firearms Section of the HPD's Records and Identification Division is responsible for processing applications for open carry permits. Permit

applications are forwarded to me through my Deputy Chief of Administrative Operations for consideration and approval.

5. The HPD does not deny open carry permits solely on the basis that the applicant is not a security guard or similarly employed in a job that entails protecting life and property. On the contrary, the HPD reviews each application individually to determine whether, given the circumstances, a permit is warranted under Section 134-9 of the Hawaii Revised Statutes.

6. I have reviewed Opinion Letter No. 18-1 of the Department of the Attorney General of the State of Hawaii, and I agree with its interpretation of Section 134-9. Indeed, the Attorney General's opinion comports with the HPD's past and current practice. An applicant must satisfy four criteria to obtain an open carry permit. He or she must (1) meet the objective qualifications for possessing and carrying a firearm; (2) demonstrate a sufficient need to carry a firearm for the purpose of protecting life and property; (3) be of good moral character; and (4) present no other reason justifying the discretionary denial of a permit. To satisfy these requirements, an applicant must demonstrate, among other things, that he or she has a need for protection that substantially exceeds that held by ordinary law-abiding citizens.

7. The City and County of Honolulu has a low rate of violent crime compared to other big cities, and our community as a whole is satisfied with the current gun legislation and the way applications are scrutinized, which strikes an

appropriate balance between citizens' Second Amendment rights—which I recognize and respect—and protecting public safety by minimizing the proliferation of guns in public places. This is evidenced by the laws passed by the State legislature in the last several years—including, for example, statewide implementation of Rap Back; authorization for immediate confiscation of firearms for those diagnosed with mental health issues; and, most recently, the ban of trigger-modification devices, including bump fire stocks, multi-burst trigger activators, and trigger cranks.

8. If the HPD were required to issue open carry permits to applicants who have no special need for such protection, police officers would be likely to face greater danger because they would encounter more armed individuals. An officer trying to issue a traffic citation, for example, has far more to fear if the driver is armed.

9. Indeed, any time guns are a factor in an interaction between officers and citizens, the risk of fatalities tends to increase. The same is true of interactions between citizens: the presence of one or more guns in any dispute increases the chances that the dispute will become deadly. Even when an armed individual is attempting to aid police, that fact may not be immediately obvious to, or verifiable by, the officer, with potentially tragic consequences.

10. Moreover, an increase in the number of guns that may be lawfully carried in public is likely to result in an increase in the number of gun thefts, and thus an increase in the number of guns in the hands of criminals.

11. In sum, a requirement to issue open carry permits to people who have no special need for them is likely to make citizens and police officers less safe and, at the very least, will make it much more difficult for the HPD to carry out its mission of serving and protecting with aloha.

12. In the time that has passed since I submitted a similar declaration to this Court in support of the petition for rehearing *en banc* (Docket Entry No. 157-2), the HPD has continued to comply with Section 134-9, as interpreted by the Attorney General and as discussed above, and has continued to respect and uphold citizens' Second Amendment rights while also protecting public safety. Furthermore, in early 2020, the HPD began plans to expand its hours for accepting permit applications, and will be emailing permits to acquire firearms to applicants to minimize the number of times they are required to visit the police department. Even during the COVID-19 pandemic, when other government permitting operations were halted—including, for example, the processing of drivers' license applications—the HPD has kept firearms permitting open and available to the public, implementing an appointment system and accommodating social-distancing requirements. This further illustrates the HPD's commitment to upholding Second Amendment rights while protecting the public.

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

Executed on 5/28/2020, in Honolulu, Hawaii.


SUSAN BALLARD