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
Civ. No. 12-00336-HG-BMK
United States District Court Judge Helen Gillmor

BRIEF OF *AMICI CURIAE* HAWAII RIFLE ASSOCIATION; CALIFORNIA RIFLE & PISTOL ASSOCIATION, INC.; AND GUN OWNERS OF CALIFORNIA IN SUPPORT OF APPELLANT

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June 4, 2020

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), Amicus Curiae Hawaii Rifle Association, California Rifle & Pistol Association, Inc., and Gun Owners of California certify that they are nonprofit organizations and thus have no parent corporation and no stock.

Dated: June 4, 2020

MICHEL & ASSOCIATES, P.C.

/s/ C. D. Michel
C.D. MICHEL

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INTEREST OF AMICI CURIAE

Hawaii Rifle Association ("HRA") is a 501(c)(7) non-profit organization dedicated to defending Hawaiians' Second Amendment rights. HRA is a plaintiff in *Livingston v. Ballard*, U.S. Dist. Haw. Case No. 19-cv-00157, which, like this matter, challenges Hawaii's restrictions on the issuance of licenses to carry a firearm as violating the Second Amendment.

California Rifle & Pistol Association, Incorporated ("CRPA") is a 501(c)(4) nonprofit organization that defends Second Amendment rights. CRPA is a plaintiff in the related matter of *Flanagan v. Becerra*, Case No. 18-55717, challenging on Second Amendment grounds California's open and concealed carry restrictions, in response to this Court's ruling in *Peruta v. San Diego*, 824 F.3d 919 (9th Cir. 2016) that concealed carry is not protected, in which CRPA Foundation was a plaintiff.

Gun Owners of California ("GOC"), is a 501(c)(4) non-profit organization dedicated to defending Californians' Second Amendment rights. GOC filed an amicus curiae brief in a matter currently pending decision on a petition for writ of certiorari to the Supreme Court that could ultimately decide the issue before this Court, *Rogers v. Grewal*, Case No. 18-824, which challenges on Second Amendment grounds New Jersey's requirement that one demonstrate a "justifiable need" as a condition of being issued a license to carry a firearm.

All parties have consented to the filing of this brief.

INTRODUCTION

Under Hawaii law, the ability to lawfully carry a handgun is confined to those who can, to the satisfaction of their local police chief, prove an "exceptional" need for self-defense, or who are "engaged in the protection of life and property" and have "sufficiently indicated" an "urgency" or special "need" to carry a firearm. Haw. Rev. Stat. § 134-9 ("section 134-9"). Individuals who meet those subjective criteria can be issued a license to carry, either openly or concealed. *Id.*

The three-judge panel in this matter held that "section 134-9's limitation on the open carry of firearms to those 'engaged in the protection of life and property' violates the core of the Second Amendment and is void." *Young v. Hawaii*, 896 F.3d 1044, 1071 (9th Cir. 2018). In so holding, the panel interpreted section 134-9 as only authorizing "security guard[s]" and those "similarly employed" to obtain open carry licenses and found that a "typical, law-abiding citizen in the State of Hawaii is . . . entirely foreclosed from exercising the right to bear arms." *Id.* Ultimately, the panel concluded that because the Second Amendment "does not protect a right to bear arms only as a security guard," section 134-9 " 'amounts to a destruction' of the core Second Amendment right to carry openly for self-defense." *Id.*

In response, then Hawaii Attorney General Russel Suzuki authored a formal legal opinion disputing the panel's interpretation of section 134-9, opining that 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.' "[1] In petitioning this Court for en banc review, the State of Hawaii primarily pointed to what it contends was the panel's "fundamental misunderstanding of Hawaii law" by construing section 134-9 as authorizing "open-carry licenses only for 'security guards' and other individuals whose job duties entail the protection of life and property." Pet. Reh'g En Banc at 8-9, Sept. 14, 2018, ECF No. 154. Hawaii argues that section 134-9 is not so limited and that this Court's interpretation is erroneous. *Id.* at 9. It also points to the dissent's claim that "[n]o record has been developed in this case, so a conclusion that the regulation acts as a total ban is unsupported," suggesting that an open carry license may be available to people like Mr. Young and HRA members. *Id.* at 7-8. Because of those perceived errors, and disputes over the Second Amendment's scope, Hawaii's petition asked this Court to "vacate the panel's decision, and remand the case to the District Court so that it can be reassessed based on an accurate understanding of Hawaii law." *Id.* at 3. This Court should reject Hawaii's request.

HRA's members have shown that Hawaii's interpretation of section 134-9 as allowing average people to qualify for an open carry license is illusory. Acting on Hawaii's representations, several HRA members, in addition to applying for concealed carry licenses, also applied for open carry ones. They were each denied those licenses and on their and similarly situated individuals' behalf, amicus HRA sued,

[1] 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 (attached hereto as Exhibit A).

alleging those denials violate their Second Amendment right to bear arms. Complaint for Declaratory & Injunctive Relief at 18-20, *Livingston*, No. 19-cv-00157, ECF No. 1.[2]. The district court stayed their case pending resolution of this en banc proceeding. Order Granting Motion to Stay Proceedings at 6, *Livingston*, 2019 WL 2419455 (No. 19-cv-00157), ECF No. 40.

HRA now brings its members' experiences before this Court to dispute Hawaii's disingenuous assertion that open carry licenses are available to the general public. In any event, that some people might theoretically qualify for an open carry license under Hawaii law does not change that Mr. Young and HRA members have been denied such a license—the only lawful means to openly carry in Hawaii. Because they were also denied concealed carry licenses, they are completely barred from lawfully bearing arms. This is a violation of the Second Amendment, regardless of section 134-9's interpretation.

While government can *regulate* the public bearing of arms, it cannot *ban* it. *District of Columbia v. Heller*, 554 U.S. 570, 628-29 (2008). States must provide some outlet for average citizens to exercise the right to publicly bear arms, whether openly or concealed. Because Hawaii and California do not, amici urge this Court to leave be the panel's ruling upholding the right to publicly bear arms.

[2] They also alleged that section 134-9 on its face violates the Second Amendment by limiting open carry licenses only to applicants "[w]here the urgency or the need has been sufficiently indicated." *Id.* at 3 (quoting Haw. Rev. Stat. § 134-9(a)); a claim Mr. Young does not raise. *Young*, 896 F.3d 1044, n.2.

BACKGROUND

Following the panel's ruling, several law-abiding Hawaii residents who are HRA members completed Hawaii's designated "Application for a License to Carry a Concealed Firearm" form, per section 134-9, and submitted it to Chief of Honolulu Police Susan Ballard. Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction at 8, *Livingston v. Ballard*, No. 19-cv-00157 (D. Haw. April 11, 2019), ECF No. 19-1 (citing Livingston Decl. ¶ 10; Botello Decl. ¶ 11; Shiroma Decl. ¶ 11; Stewart Decl. ¶ 11). In light of Mr. Suzuki's opinion letter, each of them also inquired with the Honolulu Police Department as to what application form, if any, should be used when applying for an *open* carry license. *Id.* at 8-9 (citing Livingston Decl. ¶ 9; Botello Decl. ¶ 10; Shiroma Decl. ¶ 10; Stewart Decl. ¶ 10). With one exception, they were informed that no application forms for open carry licenses existed. *Id.* at 9 (citing Livingston Decl. ¶ 9; Botello Decl. ¶ 10; Shiroma Decl. ¶ 10; Stewart Decl. ¶ 10. They therefore prepared a cover letter to accompany their application form asking that their applications be treated as requesting *either* a concealed or open carry license, referencing Hawaii laws regarding open carry licenses and Mr. Suzuki's opinion letter. *Id.* (citing Livingston Decl. ¶¶ 9-10; Botello Decl. ¶¶ 10-11; Shiroma Decl. ¶¶ 10-11; Stewart Decl. ¶¶ 10-11).

Chief Ballard formally denied each of their requests for a carry license—open or concealed—solely because, in her view, their desire to carry a firearm for general self-defense "does not sufficiently meet the immediacy, urgency, or need necessary for protection of life and

property" per section 134-9. *Id.* (citing Livingston Decl. ¶¶ 11-12; Botello Decl. ¶¶ 12-13; Shiroma Decl. ¶¶ 12-13; Stewart Decl. ¶¶ 12-13; Exs. B-E (denial letters to each plaintiff); Haw. Rev. Stat. § 134-9. They, like Mr. Young and members of amici CRPA and GOC, have thus been denied the only lawful means to lawfully bear arms in public.

ARGUMENT

Hawaii law permits the arbitrary denial of carry licenses, the only lawful means for Hawaiians to bear arms publicly, to law-abiding adults. It thus constitutes a ban on the exercise of rights protected by the Second Amendment and is per se unconstitutional because, like the ban struck down in *Heller*, it "fail[s] constitutional muster" under "any of the standards of scrutiny." *Heller*, 554 U.S. at 628-29.

The Supreme Court concluded after an exhaustive textual and historical analysis that the Second Amendment protects an "individual right to possess and carry weapons" for self-defense. *Heller*, 554 U.S. at 592. It then held that the law before it, an ordinance banning possession of operable handguns in the home, violated the Second Amendment under "any of the standards of scrutiny that we have applied to enumerated constitutional rights"—that is, any standard more demanding than rational basis review. *Id.* at 628 & n.27.

In *McDonald v. City of Chicago*, 561 U.S. 742 (2010), the Supreme Court held that the "right to keep and bear arms for the purpose of self-defense" recognized in *Heller* is "fully applicable to the States" because it is "among those fundamental rights necessary to our system of ordered liberty," *id.* at 750, 778; *see also id.* at 806 (Thomas, J.,

concurring). This means that states and municipalities may not simply "enact any gun control law that they deem to be reasonable." *Id.* at 783 (plurality opinion); *see also Caetano v. Massachusetts*, 136 S. Ct. 1027.

The Ninth Circuit has developed a two-step framework for adjudicating Second Amendment claims. *United States v. Chovan*, 735 F.3d 1127 (9th Cir. 2013). Courts need not determine the level of scrutiny, however, if, as in *Heller*, the law being challenged "amounts to a destruction of the Second Amendment right," because such a law "is unconstitutional under any level of scrutiny." *Jackson*, 746 F.3d at 961. After all, "[t]he very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." *Heller*, 554 U.S. at 634. As the Supreme Court has admonished, the Second Amendment is not "a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees." *McDonald*, 561 U.S. at 780 (plurality opinion). In short, it is "a real constitutional right. It's here to stay." *Fisher v. Kealoha*, 855 F.3d 1067, 1072 (9th Cir. 2017) (Kozinski, J., separate opinion).

I. THE SECOND AMENDMENT PROTECTS THE RIGHT TO CARRY FIREARMS OUTSIDE THE HOME

Hawaii law generally bars law-abiding adult citizens from carrying a handgun outside the home for self-defense. The critical question in determining whether that prohibition "burdens conduct protected by the Second Amendment" is thus whether the Second Amendment right to self-defense extends into public. *Silvester*, 843 F.3d at 821. The panel correctly concluded that the text, structure, purpose,

and history of the Second Amendment all confirm that it does. *Young v. Hawaii*, 896 F.3d 1044 (9th Cir. 2018)

A. The Text, Structure, and Purpose of the Second Amendment Confirm that the Right to Bear Arms Extends Beyond the Home.

Any inquiry into the scope of the Second Amendment must begin with its text. *See Heller*, 554 U.S. at 576. That text provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. The text protects two separate rights: the right to "keep" arms, and the right to "bear" them. *See Heller*, 554 U.S. at 591 ("keep and bear arms" is *not* a "term of art" with a "unitary meaning"). Under *Heller*'s binding construction, to "keep arms" means to "have weapons." *Id.* at 582. And to "bear arms" means to "carry" weapons for "confrontation"—to " 'wear, bear, or carry'" firearms "'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 584 (quoting *Muscarello v. United States*, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting)).

As the panel thus correctly concluded, "carrying firearms outside the home fits comfortably within *Heller*'s definition of 'bear.' " *Young*, 896 F.3d at 1052. To say otherwise—to confine the right to the home—would be irreconcilable with the right's "*central component*": individual self-defense. *Id.* at 1069 (citing *Heller*, 554 U.S. at 599); *see Wrenn v. District of Columbia*, 864 F.3d 650, 657 (D.C. Cir. 2017), ("After all, the Amendment's core lawful purpose is self-defense, and the need for that might arise beyond as well as within the home."); *Moore v. Madigan*,

702 F.3d 933, 936 (7th Cir. 2012) ("[T]he interest in self-protection is as great outside as inside the home."); *accord Heller*, 554 U.S. at 679 (Stevens, J., dissenting) ("[T]he need to defend oneself may suddenly arise in a host of locations outside the home.").

The panel opinion and the cases on which it relied thus were merely stating the obvious: The threat of violence is not exclusively a domestic concern. If anything, the need to carry a firearm for self-defense is *more likely* to arise outside the home than within. One's home provides a measure of protection that a person lacks when walking through a dangerous neighborhood or traveling on a deserted street. In America's early days, for example, "[o]ne would need from time to time to leave one's home to obtain supplies from the nearest trading post, and en route one would be as much (probably more) at risk if unarmed as one would be in one's home unarmed." *Moore*, 702 F.3d at 936. The "right to keep and bear arms for personal self-defense in the eighteenth century" therefore "could not rationally have been limited to the home." *Id.*

The same is true today. Statistics show that a greater percentage of violent crimes "occur on the street or in a parking lot or garage" than "in the victim's home." *Grace v. District of Columbia*, 187 F. Supp. 3d 124, 135 (D.D.C. 2016). Likewise, a substantial majority of violent crimes occur outside the home. *See* Michael P. O'Shea, *Modeling the Second Amendment Right to Carry Arms (I): Judicial Tradition and the Scope of "Bearing Arms" for Self-Defense*, 61 Am. U. L. Rev. 585, 610-11 (2012) (citing Bureau of Justice Statistics, U.S. Dep't of Justice, *Criminal Victimization in the United States, 2007 Statistical Tables*

tbl.62 (2010), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/cvus07.pdf). As the Seventh Circuit explained, "a Chicagoan is a good deal more likely to be attacked on a sidewalk in a rough neighborhood than in his apartment on the 35th floor of the Park Tower." *Moore*, 702 F.3d at 937. Likewise, a "woman who is being stalked or has obtained a protective order against a violent ex-husband is more vulnerable to being attacked while walking to or from her home than when inside." *Id.* "To confine the right to be armed to the home is [thus] to divorce the Second Amendment from the right of self-defense described in *Heller* and *McDonald*." *Id.*

What is more, confining the right to bear arms to within the home simply does not make sense. "To speak of 'bearing' arms within one's home would at all times have been an awkward usage." *Moore*, 702 F.3d at 936; *see Grace*, 187 F. Supp. at 135, *vacated on other grounds*, *Wrenn*, 864 F.3d at 663-64 ("[R]eading the Second Amendment right to 'bear' arms as applying only in the home is forced or awkward at best, and more likely is counter-textual."). It is far "more natural to view the Amendment's core as including a law-abiding citizen's right to carry common firearms for self-defense beyond the home." *Wrenn*, 864 F.3d at 657. After all, "the idea of carrying a gun 'in the clothing or in a pocket, for the purpose . . . of being armed and ready,' does not exactly conjure up images of father stuffing a six-shooter in his pajama's pocket before heading downstairs to start the morning's coffee, or mother concealing a handgun in her coat before stepping outside to retrieve the mail." *Peruta v. County of San Diego*, 742 F.3d 1144, 1152 (9th Cir. 2014). To

the contrary, bearing arms "brings to mind scenes such as a woman toting a small handgun in her purse as she walks through a dangerous neighborhood, or a night-shift worker carrying a handgun in his coat as he travels to and from his job site"—much like what Mr. Young and amici's members seek to do here. *Id.*

Finally, confining the right to "bear arms" to the home would also render the right largely duplicative of the separately protected right to "keep" arms. That would contradict the basic principle that no "clause in the constitution is intended to be without effect." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174, 2 L. Ed. 60 (1803). In short, as the panel correctly concluded, the most natural reading of the right to bear arms includes public carry.

The very structure of the Second Amendment reinforces that conclusion. As *Heller* explained, the Second Amendment's prefatory clause—"[a] well regulated Militia, being necessary to the security of a free State"—performs a "clarifying function" for the meaning of the operative clause. 554 U.S. at 577-78. Here, the prefatory clause's reference to "the Militia" clarifies that the operative clause's protection of the right to "bear Arms" encompasses a right that extends beyond the home. Militia service necessarily includes bearing arms in public. The Revolutionary War was not won with muskets left at home. All the Justices in *Heller* agreed that the right to bear arms was codified at least in part to ensure the viability of the militia. *See id.* at 599; *id.* at 637 (Stevens, J., dissenting). The Court thus *unanimously* agreed that one critical aspect of the right to bear arms extends beyond the home.

B. The History of the Second Amendment Confirms that the Right to Bear Arms Extends Beyond the Home.

The "historical background" of the Second Amendment "strongly confirm[s]" that the right to bear arms extends beyond the home. *Heller*, 554 U.S. at 592; *see Silvester*, 843 F.3d at 820 ("determining the scope of the Second Amendment's protections requires a textual and historical analysis"). The panel correctly construed the relevant historical sources in concluding that "[t]he right to bear arms must include, *at the least*, the right to carry a firearm openly for self-defense." *Young*, 896 F.3d at 1061; *see also Wrenn*, 864 F.3d at 658 (explaining that many of the "same sources" *Heller* consulted in determining that the Second Amendment protects an individual right to keep arms also "attest that the Second Amendment squarely covers carrying beyond the home for self-defense").

1. Founding-era Treatises

As the panel correctly explains, legal treatises from the founding era support the view that the right to bear arms protects public carry, including an early American edition of Blackstone's *Commentaries on the Laws of England*, which *Heller* calls the "most important" edition and *McDonald* treated as "heavily instructive in interpreting the Second Amendment." *Young*, 896 F.3d at 1053-54 (citing *Heller*, 554 U.S. at 594; *McDonald*, 561 U.S. at 769). As the historical record reveals, "it is unquestionable that the public carrying of firearms was widespread during the Colonial and Founding Eras." *Grace*, 187 F. Supp. 3d at 136. Accounts from prominent figures of the time confirm Tucker's observation about the ubiquity of publicly borne arms. Many

Founding Fathers, including George Washington, Thomas Jefferson, and John Adams, carried firearms in public and spoke in favor of the right to do so. *Id.* at 136-37. In many parts of early America, "carrying arms publicly was not only permitted—it was often *required*." *Id.* at 136; *see also* Nicholas J. Johnson, et al., *Firearms Law and the Second Amendment* 106 (2012) ("[A]bout half the colonies had laws requiring arms-carrying in certain circumstances."). All of these facts strongly suggest that the right to bear arms was not limited to the home.

The British authorities largely shared those views. Blackstone described " 'the right of having and using arms for self-preservation and defence' " as " 'one of the fundamental rights of Englishmen.' " *Heller*, 554 U.S. at 594 (quoting 1 Blackstone 136, 139-40 (1765)). English authorities assumed the fundamental right to use arms for "self-preservation and defense" necessarily includes the right to carry firearms outside the home, as is apparent in renowned barrister William Hawkins's observation that "the killing of a Wrong-doer . . . may be justified . . . where a Man kills one who assaults him *in the Highway* to rob or murder him." 1 William Hawkins, *A Treatise of the Pleas of the Crown* 71 (1762) (emphasis added); *see also* 1 Matthew Hale, *Historia Pacitorum Coronae* 481 (Sollum Emlyn ed. 1736) ("If a thief assault a true man *either abroad* or in his house to rob or kill him, the true man . . . may kill the assailant, and it is not felony.") (emphasis added). Indeed, that right "was by the time of the founding understood to be an individual right protecting against both *public* and private violence." *Heller*, 554 U.S. at 594 (emphasis added)).

2. Nineteenth Century Case Law

Early American judicial authorities, including many *Heller* relied on, likewise make clear that the Second Amendment was understood to include the right to bear arms in public in some manner. The panel analyzed many of these nineteenth century cases in comprehensive detail, *Young*, 896 F.3d 1055-57, correctly concluding that they "persuasively" reveal "that the Second Amendment must encompass a right to carry a firearm openly outside the home." *Id.* at 1054; *see also* O'Shea, *supra*, at 590 ("American courts applying the individual right to bear arms for the purpose of self-defense have held with near-uniformity that this right includes the carrying of handguns and other common defensive weapons outside the home.").

The critical point, reiterated in each of these cases, is that "the right to bear arms must guarantee *some* right to self-defense in public." *Young*, 896 F.3d at 1068. The Georgia Supreme Court's decision in *Nunn v. State*, 1 Ga. 243 (1846), lauded for its analysis by *Heller*, 554 U.S. at 612, is illustrative. There, the court held a state statute "valid" so far as it "seeks to suppress the practice of carrying certain weapons *secretly*," because banning concealed carry alone would not "deprive the citizen of his *natural* right of self-defence, or of his constitutional right to keep and bear arms." 1 Ga. at 251. But to the extent the law "contains a prohibition against bearing arms *openly*," the court explained, it "is in conflict with the Constitution, and *void*." *Id.* Many other cases relied on by *Heller* followed the same approach. 554 U.S. at 613, 629 (citing *Andrews v. State*, 50 Tenn. 165, 187 (1871); *State v. Chandler*, 5 La. Ann. 489 (1850); *State v. Reid*, 1 Ala. 612 (1840)). The

few cases that reached a different result have been "sapped of authority by *Heller* . . . because each of them assumed that the [Second] Amendment was only about militias and not personal self-defense." *Wrenn*, 864 F.3d at 658.

As the panel correctly noted, neither the ancient Statute of Northampton nor the various Northampton-style and "surety" laws of the nineteenth century undermine that conclusion. *Young*, 170 F.3d at 1065-68. British and American courts alike consistently concluded that the Statute of Northampton did not prohibit carrying firearms, but only "punish[ed] people who go armed *to terrify the King's subjects*." *Sir John Knight's Case*, 87 Eng. Rep. 75, 76, 3 Mod. 117 (K.B. 1686) (emphasis added); see also *State v. Huntly*, 25 N.C. 418, 422-23 (1843) (concluding that "the carrying of a gun *per se* constitutes no offence" under a Northampton-style law; instead carrying was prohibited only with "the wicked purpose" "to terrify and alarm, and in such manner as naturally will terrify and alarm, a peaceful people"). And early "surety" laws did not confine the right to carry to those with "reasonable cause" to do so, but instead imposed a requirement to pay a surety "only upon a well-founded complaint that the carrier threatened 'injury or a breach of the peace.' " *Young*, 170 F.3d at 1061-62. Surety laws thus operated to curtail *abuse* of the right to bear arms, not its exercise. In sum, under *Heller*, "history matters, and here it favors the [Appellant]." *Wrenn*, 864 F.3d at 658.

C. Precedent Shows that the Right to Bear Arms Extends Beyond the Home.

Heller strongly suggests that the Second Amendment applies outside the home. For instance, when the Court searched in vain for historical restrictions as severe as the District's handgun ban, it considered restrictions on carrying firearms *outside* the home most analogous and noted with approval that "some of those [restrictions] have been struck down." *Heller*, 554 U.S. at 629 (citing *Nunn*, 1 Ga. at 251 (striking down prohibition on carrying pistols openly) & *Andrews*, 50 Tenn. at 187 (same)). Such laws could hardly represent "severe" restrictions on the right to keep and bear arms for self-defense, *id.*, if the Second Amendment's protection were limited to the home. Further, when the *Heller* Court identified certain "presumptively lawful" regulatory measures, it included "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings." *Id.* at 626-27 & n.26. As the panel correctly observed, the *Heller* Court need not have singled out those public places as sites of permissible restrictions if there was no right to carry outside the home at all. *See Young*, 896 F.3d at 1053.

To be sure, *Heller* did observe that "the need for defense of self, family, and property is most acute" in "the home." 554 U.S. at 628. But the Court did so only in the section of its opinion devoted to applying the constitutional principles it recognized to the specific restriction at hand—a ban on possession *in the home*. *Id.* at 628-36. By contrast, in the entirety of its 50-page explication of the text and historical understanding of the Second Amendment, the *Heller* Court referred to

the "home" or "homestead" a grand total of three times and never once to suggest that the right is confined to the home. *Id.* at 576-626. That hardly compels the conclusion that the Supreme Court somehow intended to recognize "only a narrow individual right to keep an operable handgun at home for self-defense," *Young v. Hawaii*, 911 F. Supp. 2d 972, 989 (D. Haw. 2012), or even that the "core" of the Second Amendment is limited to in-home defense. E.R.I 8-9.

Moreover, that the need for self-defense may be "most acute" in the home certainly "doesn't mean it is not acute"—let alone nonexistent—"outside the home." *Moore*, 702 F.3d at 935; *accord Wrenn*, 864 F.3d at 657. To the contrary, it "impl[ies] that the right exists, perhaps less acutely, outside the home." *Young*, 896 F.3d at 1083, n.5. That is hardly anomalous. Many constitutional rights are particularly important within the home but also extend with full force beyond the home. The privacy protection of the Fourth Amendment, for example, is "at its zenith" in the home, *United States v. Scott*, 450 F.3d 863, 871 (9th Cir. 2006), but undeniably extends beyond the home as well, *see Riley v. California*, __ U.S. __, 134 S. Ct. 2473 (2014); *United States v. Jones*, 565 U.S. 400 (2012). There is no reason the Second Amendment should be treated any differently. *See McDonald*, 561 U.S. at 780 (plurality opinion) (rejecting notion that Second Amendment is a "second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees"). Indeed, the Supreme Court at least implicitly rejected the suggestion that the Second Amendment is confined to the home when it unanimously vacated an opinion of the

Massachusetts Supreme Judicial Court holding the Second Amendment inapplicable to the possession of a stun gun by a woman *in a public parking lot*. *Caetano*, 136 S. Ct. at 1027-28; *see also id.* at 1029 (Alito, J., concurring).

Other circuits have analyzed the scope of the Second Amendment and concluded, like the panel, that it extends beyond the home. *See, e.g.*, *Wrenn*, 864 F.3d at 657-64; *Moore*, 702 F.3d at 935-36. Even circuits that upheld strict carry restrictions did not hold that the Second Amendment *does not even apply* to those restrictions. Instead, they (wrongly) determined those restrictions survived heightened scrutiny. *See, e.g.*, *Kachalsky v. County of Westchester*, 701 F.3d 81, 89 (2d Cir. 2012) (concluding that the Second "Amendment must have ***some*** application in the . . . context of the public possession of firearms," despite upholding a New York carry restriction).

* * *

This Court previously left open the question of "whether the Second Amendment protects some ability to carry firearms in public." *Peruta*, 824 F.3d at 927. For the reasons explained above, and in its opinion, the panel correctly answered that question in the affirmative. To be sure, the panel was bound by this Court's precedent in confining the right's scope to open carry. This en banc Panel is not so bound. It need only assure that Hawaii cannot prohibit *all* forms of carry, as it currently does.

CONCLUSION

For the foregoing reasons, this Court should affirm the panel's decision that the Second Amendment protects a right to publicly bear arms and declare that barring all forms of lawful carry, as Hawaii does, is a policy choice that is not on the table—law-abiding, adult citizens like Mr. Young and amici's members must be allowed to bear arms in *some* manner, whether openly or concealed.

Dated: June 4, 2020

Respectfully submitted,

MICHEL & ASSOCIATES, P.C.

/s/ C.D. Michel
C.D. MICHEL

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s) 12-17808

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EXHIBIT A

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September 11, 2018

The Honorable Douglas S. Chin
Lieutenant Governor
State of Hawai'i
State Capitol, Executive Chambers
415 South Beretania Street
Honolulu, Hawai'i 96813

Dear Lieutenant Governor Chin:

Re: Availability of Unconcealed-Carry Licenses

This letter responds to your request for a formal legal opinion clarifying the authority of chiefs of police to issue licenses permitting the unconcealed carry of firearms.

Your inquiry arises from ongoing litigation challenging the constitutionality of a portion of section 134-9, Hawai'i Revised Statutes (HRS), which provides that "[w]here the urgency or the need has been sufficiently indicated, the respective chief of police" may issue a license authorizing an otherwise-qualified applicant who "is engaged in the protection of life and property" to carry an unconcealed firearm within the county. In *Young v. Hawaii*, a divided panel of the Ninth Circuit construed this provision as "[r]estricting open carry to those whose job entails protecting life or property," such as "security guard[s]." 896 F.3d 1044, 1071 (9th Cir. 2018). The panel held that, so construed, the unconcealed-carry provision violates the Second Amendment. *Id.* Both the County of Hawai'i and the State of Hawai'i have announced that they intend to seek panel rehearing or rehearing en banc of that decision.

For the reasons set forth below, we advise that the *Young* panel's construction of section 134-9, HRS, is overly restrictive. By its plain text, section 134-9 does not limit unconcealed-carry

licenses to persons whose job entails the protection of life and property, but authorizes the issuance of such licenses to anyone "engaged in the protection of life and property" who demonstrates a sufficient "urgency" or "need" to carry a weapon. Furthermore, without attempting to set forth a comprehensive list of eligible recipients, we advise that a private individual would likely satisfy the statutory criteria for an unconcealed-carry license where he or she identifies a need for protection that significantly exceeds that held by an ordinary law-abiding citizen, and otherwise satisfies the statutory requirements for possessing and carrying a firearm.

I. QUESTIONS PRESENTED AND SHORT ANSWERS.

1. Does section 134-9, HRS, limit the issuance of unconcealed-carry licenses to private security officers and other individuals whose jobs entail protecting life and property?

SHORT ANSWER: No. Section 134-9, HRS, 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."

2. What standards should chiefs of police apply in adjudicating applications for unconcealed-carry licenses?

SHORT ANSWER: An applicant must satisfy four criteria to obtain an unconcealed-carry license: 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 license. 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.

II. BACKGROUND.

Hawai'i has imposed limits on the public carry of firearms for over 150 years. In 1852, the Legislative Council enacted a statute making it a criminal offense for "[a]ny person not authorized by law" to "carry, or be found armed with, any . . . pistol . . . or other deadly weapon . . . unless good cause be shown for having such dangerous weapons." 1852 Haw. Sess. Laws Act of May 25, 1852, § 1 at 19; *see Republic of Hawaii v. Clark*, 10 Haw. 585, 587-88 (1897). In 1927, the territorial legislature enacted a statute, modeled on the Uniform Firearms Act, that required individuals to obtain a license in order to "carry a

pistol or revolver," and provided that individuals could obtain such a license upon showing "good reason to fear an injury to his person or property" or "other proper reason for carrying" a firearm. 1927 Haw. Sess. Laws Act 206, §§ 5, 7 at 209; *see* S. Stand. Comm. Rep. No. 322, in 1927 Senate Journal, at 1023. In 1934 and 1961, the Legislature amended the statute to substantially its present form. *See* 1933 (Special Sess.) Haw. Sess. Laws Act 26, § 8 at 39 (Jan. 9, 1934); 1961 Haw. Sess. Laws Act 163, § 1 at 215 (July 8, 1961).

Today, Hawai'i law provides that, subject to a number of exceptions, "[a]ll firearms shall be confined to the possessor's place of business, residence, or sojourn." HRS §§ 134-23, 134-24, 134-25. It is generally unlawful "for any person on any public highway to carry on the person, or to have in the person's possession, or to carry in a vehicle any firearm loaded with ammunition." HRS § 134-26; *see* HRS § 134-9(c). Members of the armed forces, mail carriers, and persons employed by the State or its subdivisions are exempt from this limit "while in the performance of their respective duties." HRS § 134-11(a). Individuals may also carry lawfully acquired firearms "while actually engaged in hunting or target shooting." HRS § 134-5(a); *see* HRS § 134-5(c).

In addition, individuals may lawfully carry a pistol or revolver within a county if they obtain a license from the county's chief of police. HRS § 134-9. Section 134-9, HRS, authorizes police chiefs to issue two types of carry licenses. A chief of police may issue a *concealed*-carry license "[i]n an exceptional case, when an applicant shows reason to fear injury to the applicant's person or property" and satisfies certain age, citizenship, and other statutory requirements. HRS § 134-9(a)-(b). A chief of police may also grant a *unconcealed*-carry license to a qualified applicant "[w]here the urgency or the need has been sufficiently indicated," the applicant "is engaged in the protection of life and property," and the applicant is "of good moral character." HRS § 134-9(a).

III. ANALYSIS.

A. Section 134-9, HRS, Does Not Limit Unconcealed-Carry Licenses To Private Security Officers.

We advise that section 134-9, HRS, does not limit the issuance of unconcealed-carry licenses to individuals whose jobs entail protecting life and property. The plain text of the statute, the legislative history, and the applicable case law all support this conclusion.

Our analysis begins with the statute's text. *See Del Monte Fresh Produce (Hawaii), Inc. v. Int'l Longshore & Warehouse Union, Local 142, AFL-CIO*, 112 Hawai'i 489, 499, 146 P.3d 1066, 1076 (2006). As relevant, section 134-9, HRS, imposes two requirements that an otherwise qualified applicant must satisfy in order to obtain an unconcealed-carry license: the applicant must (1) "sufficiently indicate[]" "the urgency or the need" to carry an unconcealed firearm, and (2) be "engaged in the protection of life and property." HRS § 134-9(a).

It is plain that the first of these requirements does not limit unconcealed-carry licenses to private security officers. A private individual, no less than a security guard, may identify an "urgen[t]" or compelling "need" to carry an unconcealed firearm. Indeed, the statute's use of the disjunctive phrase "the urgency *or* the need" indicates that the Legislature intended to permit the issuance of unconcealed-carry licenses for multiple reasons. Construing the statute to authorize such licenses for one reason only -- that the applicant's job duties require a firearm -- would contravene that textual choice.

Nor does the requirement that an applicant be "engaged in the protection of life and property" limit unconcealed-carry licenses to private security officers. The words "engage in" mean simply "to do or take part in something." Merriam Webster's Dictionary (2018). In ordinary usage, an individual may "take part in" an activity even though his job duties do not require it. *See Sierra Club v. Castle & Cooke Homes Hawai'i, Inc.*, 132 Hawai'i 184, 191-92, 320 P.3d 849, 856-57 (2013) ("Under general principles of statutory construction, courts give words their ordinary meaning unless something in the statute requires a different interpretation." (citation omitted)). And other provisions of the statute use the words "engaged in" to refer to non-professional activities in this way. Section 134-5(c), HRS, authorizes a person to "carry unconcealed and use a lawfully acquired pistol or revolver while actually *engaged in* hunting game mammals." HRS § 134-5(c) (emphasis added). Likewise, sections 134-3 and 134-5(a), HRS, authorize the use or carrying of firearms while "engage[d] in" hunting or target shooting. HRS §§ 134-3(a)(3), 134-5(a).

Furthermore, when the Legislature wished to limit firearms to individuals engaged in the performance of their professional duties, it expressly said so. Section 134-11(a), HRS, authorizes a variety of officers to carry firearms "while in the performance of their respective duties." HRS § 134-11(a)(2), (4)-(5). Similarly, section 134-31, HRS, requires individuals to obtain a license in order to "engage in *the business* to sell and manufacture firearms." HRS § 134-31 (emphasis added). The

Legislature notably did not include similar language in section 134-9, HRS, and it would be improper in our view to read such limits implicitly into the statute's text.

The legislative history of section 134-9, HRS, reinforces this interpretation. For several decades prior to 1961, section 134-9 only authorized chiefs of police to issue *concealed*-carry licenses. *See* 1933 (Special Sess.) Haw. Sess. Laws Act 26, §8 at 39. In 1961, the Legislature amended the statute to authorize the issuance of unconcealed-carry licenses, as well. 1961 Haw. Sess. Laws Act 163, § 1 at 215. In the committee report accompanying that amendment, the Senate Judiciary Committee explained that this change was "designed to extend the permit provisions to those employed as guards or watchman *and/or to persons engaged in the protection of life and property* and to further authorize such licensees to carry the described firearms unconcealed on their persons." S. Stand. Comm. Rep. No. 558, in 1961 Senate Journal, at 874 (emphasis added). This report thus makes clear that the drafters intended to reach not only "those employed as guards or watchman" but, more broadly, any "persons engaged in the protection of life and property." Although "guards" and "watchm[e]n" may have been the principal persons the Legislature had in mind, legislation is not limited to the principal mischief it is designed to address, and that is particularly so where the drafters expressly contemplated it would extend more broadly.

The limited case law discussing section 134-9, HRS, and analogous statutes is also consistent with our understanding. To our knowledge, prior to the Ninth Circuit panel decision in *Young*, no court suggested that section 134-9 limits open-carry licenses to private security officers. To the contrary, in *Baker v. Kealoha*, the District Court for the District of Hawai'i observed that section 134-9 "provides for exceptions in cases where an individual demonstrates an urgency or need for protection in public places." 2012 WL 12886818, at *18 (D. Haw. Apr. 30, 2012), *vacated and remanded on other grounds*, 679 F. App'x 625 (9th Cir. 2017). Moreover, courts and agencies in other states have construed comparable statutes -- which likewise permit issuance of carry licenses upon a showing of adequate "need" or "cause" -- to authorize licenses for private individuals, and not just professional security guards and the like. *See, e.g., Woollard v. Gallagher*, 712 F.3d 865, 870 (4th Cir. 2013) (Maryland); *Drake v. Filko*, 724 F.3d 426, 428 (3d Cir. 2013) (New Jersey); *Kachalsky v. County of Westchester*, 701 F.3d 81, 86-87 (2d Cir. 2012) (New York).

Nor does past practice justify a different conclusion. The *Young* panel placed substantial weight on the premise that, to its knowledge, "no one other than a security guard -- or someone

similarly employed -- ha[s] ever been issued an open carry license." 896 F.3d at 1070. But even if that premise were correct, a practice of that kind would not justify adopting a reading that the statute's text cannot bear. Moreover, there is little evidence in the court record to back up the panel's assertion. Although the Department of the Attorney General has published statistics on firearm license applications, those reports date back only to the year 2000 -- 39 years after the statute was enacted, and nearly 150 years after the first restriction on public carry was imposed. *See* Dep't of Attorney Gen., Crime Prevention & Justice Assistance Div., *Research & Statistics Branch*, http://ag.hawaii.gov/cpja/rs/ (last visited Sept. 10, 2018) (collecting reports). And those reports, starting in 2004, state only the number of private individuals who applied for (and were granted or denied) a *concealed*-carry license; they do not state the number of private individuals who applied for (and were granted or denied) an unconcealed-carry license. What is more, out of the handful of instances before 2004 in which the reports state simply that private individuals applied for "carry license[s]," without specifying that the license was for concealed- or unconcealed-carry, individuals were *granted* such licenses in two cases. *See* Dep't of Attorney Gen., *Firearm Registrations in Hawaii, 2001*, at 7, http://ag.hawaii.gov/cpja/files/2013/01/Firearms-Registration-2001.pdf (last visited Sept. 10, 2018).

In short, the plain text of the statute does not limit unconcealed-carry licenses to individuals employed as private security officers. And other indicia of statutory meaning support that straightforward reading. Accordingly, we advise that private individuals as well as security officers are eligible to obtain licenses to carry unconcealed firearms under section 134-9, HRS.

B. Standards For Adjudicating Unconcealed-Carry Applications.

You have also asked us to clarify the standards that police chiefs should apply in adjudicating applications for unconcealed-carry licenses. By its text, section 134-9, HRS, establishes four basic criteria that an applicant must satisfy to obtain an unconcealed-carry license: An applicant must (1) meet the objective qualifications for possessing and carrying a firearm; (2) demonstrate a sufficient need to carry a firearm in order to protect life and property; (3) be of good moral character; and

(4) present no other reason that justifies the exercise of discretion to deny a license. We consider each of these criteria in turn below.

1. Objective Qualifications.

As an initial matter, section 134-9, HRS, requires every applicant for an unconcealed-carry license to meet three objective qualifications. Every applicant must (1) be "a citizen of the United States," (2) be "of the age of twenty-one years or more," and (3) not be "prohibited under section 134-7 from the ownership or possession of a firearm." HRS § 134-9(a). Section 134-7, HRS, further provides that an individual may not own, possess, or control a firearm if he is barred from possessing a firearm by federal law, is a fugitive from justice, or fails to satisfy the statute's other prerequisites. HRS § 134-7; *see* 18 U.S.C. § 922(g)(1)-(9), (n) (listing federal requirements).

An application for an unconcealed-carry license must therefore be denied if the applicant fails to satisfy any of these objective criteria. And the statute specifies, in part, the procedures a police chief or his designated representative must follow prior to making that determination. It states that such officials "shall perform an inquiry on [the] applicant by using the National Instant Criminal Background Check System, to include a check of the Immigration and Customs Enforcement databases where the applicant is not a citizen of the United States, before any determination to grant a license is made." HRS § 134-9(a).

2. Sufficient Need To Carry A Firearm.

Section 134-9, HRS, further requires that each applicant must "sufficiently indicate[]" that he or she has an "urgency" or "need" to carry a firearm and is "engaged in the protection of life and property." *Id.* As we have explained, this language does not limit carry licenses to private security officers. *See supra* section III.A. Case law from other states is instructive, however, in discerning what it does require. Courts interpreting virtually identical laws have held that "a simple desire to carry a weapon is not enough" to satisfy their substantive requirements. *Kachalsky*, 701 F.3d at 86-87. "Nor is living or being employed in a 'high crime area[].'" *Id.* at 87. Rather, an applicant typically must demonstrate that he or she has a need to carry a firearm for protection that substantially exceeds the need possessed by ordinary law-abiding citizens. *See Drake*, 724 F.3d at 428 & n.2; *Woollard*, 712 F.3d at 870; *Kachalsky*, 701 F.3d at 86-87.

In our view, a similar standard is appropriate in interpreting section 134-9, HRS. Section 134-9 requires that an applicant "sufficiently" demonstrate an "urgency" or "need" to carry a firearm -- all words that connote an immediate, pressing, and heightened interest in carrying a firearm. Furthermore, the applicant must be "*engaged in* the protection of life and property," language that requires that the individual be actively "tak[ing] part in" such protection, not merely exhibit a generalized concern for safety. Particularly given that Hawaii's modern firearm laws were designed to mirror the uniform firearm laws adopted by many other states, *see* S. Stand. Comm. Rep. No. 322, in 1927 Senate Journal, at 1023, we therefore believe that much the same standard adopted by those states is appropriate in interpreting section 134-9. This provision, we conclude, requires applicants for an unconcealed-carry license to demonstrate that they have a need to carry a firearm for protection that substantially exceeds the need possessed by ordinary law-abiding citizens.

Without attempting to offer an exhaustive list of applicants who could satisfy this standard, we believe that the following illustrative examples could present a sufficient urgency or need for protection under the statute:

(a) A person who has suffered serious domestic abuse from a former partner who has violated previous protective orders;

(b) A victim of stalking who has received credible threats of death or serious bodily harm from his or her stalker;

(c) A political activist who has received credible threats of death or serious bodily harm due to his or her political activity;

(d) A witness to a crime who has received credible threats, or is testifying against an organization known to use violence to intimidate witnesses;

(e) A person who faces heightened risk of attack or violence due to his or her profession, such as a private security officer, a psychiatrist or physician with an obsessive or threatening patient, an attorney with a former client or opposing party who has made credible threats of death or serious bodily harm, a business owner with a violent former employee who has made credible threats of death or serious bodily harm,

an entertainer with an obsessive fan who has made credible threats of death or serious bodily harm and engaged in stalking; or a person who faces a high risk of armed robbery because his or her job requires stocking ATMs or otherwise transporting large quantities of cash.

3. Good Moral Character.

An applicant for an unconcealed-carry license must also be a person "of good moral character." HRS § 134-9. As courts in other jurisdictions have concluded, we think it plain that a person does not demonstrate "good moral character" where there is reliable and credible evidence that, if issued a license, the applicant may create a risk to public safety. *See Caputo v. Kelly*, 117 A.D.3d 644, 644 (N.Y. App. Div. 2014); *Hider v. Chief of Police, City of Portland*, 628 A.2d 158, 161 (Maine 1993). That is, we advise that a chief of police should deny an application when the applicant exhibits specific and articulable indicia that the applicant poses a heightened risk to public safety. Such indicia could include, but are not limited to:

(a) Recent incidents of alleged domestic violence, even if not leading to charges or the issuance of a protective order;

(b) Recent incidents of careless handling or storage of a firearm, especially if involving children;

(c) Recent incidents of alcohol or drug abuse, especially involving violence, even when not leading to criminal charges or mental health treatment;

(d) Other recent violent conduct, even if not resulting in criminal charges or serious injury.

4. No Other Reasons That Justify The Exercise Of Discretion To Deny A License.

Finally, section 134-9, HRS, provides that where an applicant satisfies the statute's express requirements, "the respective chief of police *may* grant" an unconcealed-carry license. HRS § 134-9(a) (emphasis added). Accordingly, we advise that chiefs of police may exercise reasonable discretion to deny licenses to otherwise-qualified applicants, but that discretion may not be exercised in an arbitrary or capricious manner. Chiefs of police should exercise their discretion to

deny unconcealed-carry licenses to qualified applicants only where an applicant's characteristics or circumstances render the applicant unsuitable to carry an unconcealed firearm for reasons not captured by the express statutory requirements. Discretion may not be used to effectively nullify the authorization for unconcealed-carry licenses contained in section 134-9. Nor may discretion be used to impose categorical restrictions on unconcealed-carry licenses -- such as limiting them to private security officers -- that the Legislature did not enact. When a chief of police denies a firearm for discretionary reasons, he or she should document the reasons and report them to the Attorney General as provided in section 134-14, HRS.

IV. CONCLUSION.

We advise that section 134-9, HRS, does not limit unconcealed-carry licenses to private security officers. Furthermore, we advise police chiefs to administer the statute's requirements in accordance with the standards set forth in this Opinion.

Very truly yours,

Russell A. Suzuki

Russell A. Suzuki
Attorney General