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.,

Defendant-Appellee.

On Appeal from the United States District Court
for the District of Hawaii
No. 12-cv-0336 (Hon. Helen W. Gillmor)

NATIONAL RIFLE ASSOCIATION OF AMERICA'S AMICUS CURIAE BREIF IN SUPPORT OF PLAINTIFF-APPELLANT AND AFFRIMING THE PANEL'S DECISION

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CORPORATE DISCLOSURE STATEMENT

In accordance with Fed. R. App. P. 26.1(a), Amicus Curiae National Rifle Association of America, Inc. ("NRA") submits the following Corporate Disclosure Statement:

NRA is a nonprofit membership association, incorporated in the state of New York. NRA is not publicly traded and has no parent corporation. There is no publicly held corporation that owns 10 percent or more of its stock.

Date: June 4, 2020

/s/ Michael T. Jean
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Attorney for Amicus Curiae the National Rifle Association of America

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INTEREST OF AMICUS CURIAE[1]

The National Rifle Association of America, Inc. ("NRA") is America's oldest civil rights organization and is widely recognized as America's foremost defender of Second Amendment rights. The NRA was founded in 1871, by Union generals who, based on their experiences in the Civil War, desired to promote marksmanship and expertise with firearms among the citizenry. Today the NRA has approximately five million members, and its programs reach millions more. The NRA has a significant interest in this case because the NRA does not view the Second Amendment as a homebound right, and the rights of its members are infringed by laws that preclude law-abiding individuals from carrying firearms outside the home for the constitutionally protected purpose of self-defense.

INTRODUCTION

The Second Amendment is not a second-class right. Like all other civil rights, its purpose is to stand in the way of certain government actions. And the judiciary's role is to safeguard our rights when called upon. Yet the Second Amendment has been relegated to second-class status. Time and time again, courts

[1] This brief is properly filed under 9th Cir. R. 29-2(a) and the Court's April 30th Order (DKT 227). All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part. No party or party's counsel made contributions to fund the preparation or submission of this brief. No person, other than the NRA, its members or its counsel, made contributions to fund the preparation or submission of this brief.

have upheld infringements by applying watered-down standards of review. This has to stop. Just like it would do when arbitrating other fundamental rights, the Court should faithfully apply Supreme Court precedent and a meaningful standard of review to resolve this case.

Under any meaningful standard of review, Defendants' practice fails to pass muster. The right to bear arms belongs to the people—ordinary, law-abiding citizens. The people do not have to justify the need to exercise their constitutional right; they did that through ratification. But the state of Hawaii sees things differently. It forbids carrying a firearm outside the home without a license. Licenses are granted at the discretion of the chief of police, only in exceptional cases, after the applicant sufficiently justifies his or her urgent need for the license. For the ordinary citizen residing in the County of Hawaii ("the County"), the ability to exercise their right is illusory. The County has not issued a license to any ordinary, law-abiding citizen in over 20 years, thereby denying the people their right to bear arms. This Court should affirm the panel's decision.

ARGUMENT

I. THIS COURT SHOULD ABANDON THE TWO-STEP APPROACH, AND ADOPT A STANDARD OF REVIEW BASED ON THE SECOND AMENDMENT'S TEXT AND HISTORY.

The panel, as it was bound to do, recited and applied the two-step approach for resolving Second Amendment claims. *Young v. Hawaii*, 896 F.3d 1044, 1051

(9th Cir. 2018) (citations omitted). But this Court, sitting en banc, is not bound by prior panel decisions. Indeed, two judges on the Fifth Circuit recently concurred with the majority's opinion that applied the two-step approach, but they wrote separately to express their support for granting en banc review and replacing the two-step approach with a textual and historical analysis. *United States v. McGinnis*, 956 F.3d 747, 761 (5th Cir. 2020) (Duncan, J. concurring). The Court should do the same here.

A. Supreme Court precedent requires the Court to resolve this matter based on the text and history of the Second Amendment.

Twelve years ago, the Supreme Court invalidated a District of Columbia law that banned possession of an operable firearm in the home because it was inconsistent with the text and history preserved by the Second Amendment. *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008). Two years later, the Court invalidated two similar ordinances, again, for being inconsistent with the text and history preserved by the Second Amendment. *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 767–68 (2010). Despite the Supreme Court's clear guidance, courts have adopted a two-step approach, whereby they ask (1) if the regulated conduct is protected by the Second Amendment and (2) if so, does the regulation survive some form of means-end scrutiny. *Young*, 896 F.3d at 1051 (collecting

authorities). That two-step approach is inconsistent with the Supreme Court's precedent.

The Supreme Court was clear in *Heller*: our Second Amendment "rights are enshrined with the scope they were understood to have when the people adopted them." 554 U.S. at 634–35. This is true "whether or not future legislatures or (yes) even future judges think that scope too broad." *Id*. at 635. The Court was also clear that the scope of Second Amendment is determined by "both text and history," *id*. at 595, not "'interest balancing,'" *id*. at 635. The Second Amendment "is the very *product* of an interest balancing by the people"; its protections are "elevate[d] above all other interests." *Id*. (emphasis in original).

The tiers-of-scrutiny approach is inappropriate because it always devolves to an interest balancing test. Strict scrutiny "requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011) (citations and quotations omitted). Likewise, to survive intermediate scrutiny, a restriction must be "'narrowly tailored to serve a significant governmental interest'" *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (collecting authorities). These tests are irreconcilable with *Heller* and *McDonald*. *Heller v. D.C.* (*Heller II*), 670 F.3d 1244, 1271 (D.C. Cir. 2011) (Kavanaugh, J. dissenting) ("*Heller* and *McDonald* leave little doubt that courts are to assess gun

bans and regulations based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny."); *Mance v. Sessions*, 896 F.3d 390, 394 (5th Cir. 2018) (Elrod, J. dissenting from denial of rehearing en banc) (joined by six other judges) ("[U]nless the Supreme Court instructs us otherwise, we should apply a test rooted in the Second Amendment's text and history—as required under *Heller* and *McDonald*—rather than a balancing test like strict or intermediate scrutiny."). The Court should therefore abandon the two-step approach and faithfully apply *Heller* and *McDonald's* textual and historical approach.

B. Alternatively, the Court should apply the two-step approach in a meaningful way.

If this Court continues to apply the two-step approach, it should do so with as much vigor as it would with other rights. The Second Amendment is not a "second-class right, subject to an entirely different body of rules than the other Bill of Rights." *McDonald*, 561 U.S. at 780. Yet the Second Amendment is often relegated to one. The Second Circuit unabashedly puts its thumb on the scale by asserting that "regulation of the right to bear arms 'has always been more robust' than analogous regulation of other constitutional rights." *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 261 (2d Cir. 2015) (quoting *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 100 (2d Cir. 2012)). And when a Plaintiff made an analogous argument to the First Amendment before an en banc panel of

this court, the court said: "If Teixeira were a bookseller … the fact that there were already ten other booksellers indeed would not matter. But he is a gun seller, and … that *changes the constitutional calculus*." *Teixeira v. County of Alameda*, 873 F.3d 670, 688 (9th Cir. 2017) (emphasis added). This relegation is inappropriate and flies in the face of *McDonald*.

This court's precedent requires it to apply scrutiny on a "sliding scale." *Silvester v. Harris*, 843 F.3d 816, 821 (2016). Destructions of the right are held unconstitutional under any level of scrutiny; laws that severely burden the core of the right are subject to strict scrutiny; and laws that do not place a substantial burden on the right are subject to intermediate scrutiny. *Id*. (citations omitted). While that standard of review sounds just, examining this court's precedent shows that in reality, there is no sliding scale. "There is … 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." *Id*. at 823.; *Bauer v. Becerra*, 858 F.3d 1216, 1222 (9th Cir. 2017) ("[W]e have repeatedly applied intermediate scrutiny in cases where we have reached this step." (citation omitted).[2]

[2] This Court uniformly chooses intermediate scrutiny and upholds the challenged restriction. *United States v. Chovan*, 735 F.3d 1127, 1139 (9th Cir. 2013); *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 965 (9th Cir. 2014); *Fyock v. Sunnyvale*, 779 F.3d 991, 999–1000 (9th Cir. 2015); *Wilson v. Lynch*, 835 F.3d 1083, 1093 (9th Cir. 2016); *Mahoney v. Sessions*, 871 F.3d 873, 881 (9th Cir.

Even worse, when it comes to the Second Amendment, courts abrogate their duty to apply meaningful, heightened scrutiny as they would in the First Amendment context under *Arizona Free Enter. Club's Freedom Club PAC*, 564 U.S. at 734 (strict scrutiny) or *Ward*, 491 U.S. at 791(intermediate scrutiny). Judge Bibas criticized a majority panel for applying a "version [scrutiny that] is watered down—searching in theory but feeble in fact." *Ass'n of New Jersey Rifle & Pistol Clubs, Inc. v. Attorney Gen. New Jersey*, 910 F.3d 106, 130 (3d Cir. 2018) (Bibas, J., dissenting). Likewise, Justice Alito recently criticized the Second Circuit for accepting "with no serious probing" New York City's unsubstantiated "public safety arguments [that] were weak on their face." *New York State Rifle & Pistol Ass'n, Inc. v. City of New York, New York*, 140 S. Ct. 1525, 1544 (2020) (Alito, J. dissenting).

This Court is no exception. In the First Amendment context, to survive intermediate scrutiny, a restriction must be "'narrowly tailored to serve a significant governmental interest'" *Ward*, 491 U.S. at 791 (citations omitted). But when it comes to the Second Amendment, intermediate scrutiny only requires that "(1) the government's stated objective must be significant, substantial, or

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2017); *Pena v. Lindley*, 898 F.3d 969, 977 (9th Cir. 2018); *United States v. Torres*, 911 F.3d 1253, 1263 (9th Cir. 2019); *Mai v. United States*, 952 F.3d 1106, 1115 (9th Cir. 2020).

important; and (2) there must be a 'reasonable fit' between the challenged regulation and the asserted objective." *Sylvester*, 843 F.3d at 822–23 (citing *Chovan*, 735 F.3d at 1139).

And the government frequently gets a pass at step one because all gun-control laws are passed in the name of "public safety" in which the government's interest is '"self-evident."' *Fyock*, 779 F.3d at 1000; *Sylvester*, 843 F.3d at 827 ("California has had the objective of promoting safety and reducing gun violence…. The first step is undisputedly satisfied."); *Pena*, 898 F.3d at 981–82. This happens despite the fact that memorializing the right to keep and bear arms in Constitution "elevate[d it] above all other interests." *Heller*, 554 U.S. at 635; *id*. at 636 (acknowledging "the problem of handgun violence"); *Ezell v. City of Chicago (Ezell II)*, 846 F.3d 888, 895 (7th Cir. 2017) ("[T]he City continues to assume … that it can invoke these interests as a general matter and call it a day.").

Moreover, the government gets this pass even when the record concedes that there is no safety benefit from the challenged regulation. Judge Bea's dissenting opinion in *Teixeira v. Cty. of Alameda*, 873 F.3d 670 (9th Cir. 2017) highlights this. At issue in *Teixeira* was a zoning ordinance that, among other things, required gun shops be "at least five hundred feet away from … schools, day care centers, liquor stores or establishments serving liquor, other gun stores, and residentially zoned districts." *Id.* at 674. Judge Bea questioned what "substantial interest" the

county had in keeping gun shops 500 feet from residences. *Id*. at 696. Judge Bea found that "[t]he majority (albeit perhaps inadvertently) supplie[d] the answer … 'to preserve the health and safety of its residents.'" *Id*. But it was undisputed that the County Planning Department found that granting the gun shop a conditional use permit would *not* '"materially affect adversely the health or safety of persons residing or working in the vicinity, or be materially detrimental to the public welfare…."' *Id*. at 697. The bar, if it can even be called that, is very low at step one.

That leaves the tailoring requirement, which this Court has described as "not a strict one." *Silvester*, 843 F.3d at 827. Indeed, "[t]he State is required to show *only* that the regulation 'promotes a substantial government interest that would be achieved less effectively absent the regulation." *Id.* at 829 (emphasis added) (quoting *Fyock*, 779 F.3d at 1000). The panel correctly criticized this standard as being "incomplete, because a court must *also* determine whether the government action burden[s] substantially more [protected conduct] than is necessary to further that interest." *Young*, 896 F.3d at 1073 (citations and quotations omitted) (emphasis and alterations in original); *see also Ezell II*, 846 F.3d at 893 (requiring '"a close fit between the range ban and the actual public interests it serves, and also that the public's interests are strong enough to justify so

substantial an encumbrance on individual Second Amendment rights"') (quoting *Ezell v. City of Chicago* (*Ezell I*), 651 F.3d 684, 708–09 (7th Cir. 2011)).

The *Jackson* case is a good example of how minimal this requirement is. The ordinance at issue there required all firearms be '"stored in a locked container or disabled with a trigger lock."' *Jackson*, 746 F.3d at 958 (citation omitted).[3] Jackson argued that the ordinance was "over-inclusive" because there is little risk of unauthorized access by children or others when the gun owner lives alone. *Id*. at 966. The court found that San Francisco had interests "broader than preventing children or unauthorized users from using the firearms, including … preventing firearms from being stolen and in reducing the number of handgun-related suicides and deadly domestic violence incidents." *Id*. The first reason, "preventing firearms from being stolen," merely restates the city's interest in preventing unauthorized users from getting access to the firearm: a thief is always an unauthorized user. Moreover, requiring firearms to be secured is an odd tactic to prevent suicide and domestic violence amongst people who live alone—especially since the court conceded in the same paragraph that it would take "only a few seconds" to retrieve the gun. *Id*.; *see also Romer v. Evans*, 517 U.S. 620, 632 (1996) (rejecting a law because its "sheer breadth is so discontinuous with the reasons offered for it").

[3] There was also a second ordinance at that banned the sale of hollow-point ammunition in the city.

The application of this "not strict" test is effectively rational basis review. It is precisely what the Supreme Court rejected in *Heller*: "If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect." 554 U.S. 628 n.27.

This deferential treatment would not, and should not, be tolerated with other constitutional rights. Rights impose limitations on government action. That is precisely why they exist. And although public safety is unquestionably an important objective, it cannot be used to void the rights of the people. The Supreme Court cautioned against this in the Fourth Amendment context: "The needs of law enforcement stand in constant tension with the Constitution's protections of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards." *Almeida-Sanchez v. United States*, 413 U.S. 266, 273 (1973). Thus, justice requires courts to treat the right to keep and bear arms with "resolute loyalty," *id*.—not as a as "second-class right," *McDonald*, 561 U.S. at 780—just as they must with the other rights secured by the Constitution.

This Court should follow *Heller* (and the *Young* majority) and apply meaningful heightened scrutiny to Second Amendment challenges.

II. SECTION 134-9 IS UNCONSTITUTIONAL.

A. The Second Amendment protects the right to carry a firearm for self-defense outside the home.

The Second Amendment provides that "[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 Supreme Court has already held that 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*, to "keep arms" means to "have weapons." *Id*. at 582. To "bear arms" means to "carry" them for "confrontation"—to "wear, bear, or carry" a firearm "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)) (alteration in original).

Heller provided other indicia that the right to keep and bear arms applies outside the home. As Judge Hardiman explained, by categorizing the right for self-defense as "most acute in the home," *Heller* "suggests that some form of the right applies where that need is not 'most acute." *Drake v. Filko*, 724 F.3d 426, 444 (3d Cir. 2013) (Hardiman, J. Dissenting) (internal quotations, citations, and alterations

omitted); *Wrenn v. D.C.*, 864 F.3d 650, 657 (D.C. Cir. 2017) ("[T]he fact that the need for self-defense is most pressing in the home doesn't mean that self-defense at home is the only right at the Amendment's core."). Moreover, the panel correctly noted that if the right to bear arms does not extend beyond the home, there would be no need for the Supreme Court to declare that sensitive places are outside of the Second Amendment's reach. *Young*, 896 F.3d at 1053.

Other circuits have held that the Second Amendment's text protects the right to bear arms outside the home. The Seventh Circuit held that "[t]o speak of 'bearing' arms within one's home would at all times have been an awkward usage." *Moore v. Madigan*, 702 F.3d 933, 936 (7th Cir. 2012). The D.C. Circuit held that it is "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. The First, Second, Third, and Fourth Circuits have all assumed that the Second Amendment applies outside the home. *Gould v. Morgan*, 907 F.3d 659, 670 (1st Cir. 2018); *Kachalsky*, 701 F.3d at 89; *Drake*, 724 F.3d at 431; *Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013).

Standing in their own, these precedents are enough to conclude that the Second Amendment protects the right to carry a firearm outside the home. Moreover, the panel thoroughly examined the other relevant historical sources and

came to the same conclusion. *Young*, 896 F.3d at 1053–68. The NRA agrees with the panel and urges the Court to adopt its well-supported conclusion.

B. Section 134-9 extinguishes the right bear arms outside the home.

The only way for a person to exercise their right to bear arms, either concealed or unconcealed, outside the home in Hawaii is to get a license to carry under HAW. REV. STAT. § 134-9(c); *State v. Jenkins*, 997 P.2d 13, 34 (HAW. 2000) (A license is required to possess a firearm "away from [one's] 'place of business, residence, or sojourn.'" (citation omitted)). But the text of the statute and the Defendants' practices, make it clear that possibility of getting a license is illusory.

The first clause of Section 134-9 sets the tone for who is eligible to receive a license—people with "an exceptional case." HAW. REV. STAT. § 134-9(a). That clause flies in the face of the Second Amendment, which protects "the right of the *people*"—not the exceptional people—"to keep and bear Arms." U.S. CONST. amend. II (emphasis added). The Supreme Court was clear in *Heller*: the Second Amendment's reference to "the people,' … unambiguously refers to all members of the political community, not an unspecified subset." 554 U.S. at 580. The Court further clarified that all "law-abiding, responsible citizens" have the right to bear arms. *Id*. at 635. And finally, *Heller* teaches that there are certain subsets who are the exception to the people, such as "felons and the mentally ill." *Id*. at 626. By

limiting licenses to those with "exceptional cases," Section 134-9 treats the "people" as a subset, which is entirely inconsistent with *Heller*.

The next clause of Section 134-9 fairs no better. It provides guidance of what constitutes "an exceptional case": "when an applicant shows reason to fear injury to the applicant's person or property." HAW. REV. STAT. § 134-9(a). The statute further requires that "the urgency or the need [to carry a firearm must be] sufficiently indicated" to the chief of police before a license can be issued. *Id*. This clause effectively puts the burden on the people to justify their need to exercise an enumerated, fundamental right.

The statute has it backwards. The people do not have to justify the need to exercise their rights. They already did that by memorializing their rights in the Constitution. *Heller*, 554 U.S. at 635 (The Second Amendment "is the very *product* of an interest balancing by the people." (Emphasis in original)). This is true of other rights as well. It would be unthinkable to require one to justify their need to acquire constitutionally protected literature or contraceptive needs. *See, e.g., Griswold v. Connecticut*, 381 U.S. 479, 480 (1965) (striking a law that prohibited using contraceptives for the '"purpose of preventing conception"').[4] The reality is that the government has the burden to "justify invasion of fundamental

[4] The Bill of Rights also protect the people from compelled speech and self-incrimination. Justifying one's needs to exercise those rights would be absurd.

constitutional rights." *Carey v. Population Servs., Int'l*, 431 U.S. 678, 691 (1977); *Arizona Free Enter. Club's Freedom Club PAC*, 564 U.S. at 734 (government bears the burden of proof at strict scrutiny). Section 134-9 turns the principles of constitutional jurisprudence on their head.

Furthermore, even if an exceptional applicant can justify his or her need for a license to carry a firearm, the chief of police does not have to grant it. Section 134-9(a) says that the chief "may grant" the applicant a license: it is discretionary, even if the conditions of the statute are fulfilled. *See, e.g.*, *Sierra Club v. Dep't of Transp.*, 167 P.3d 292, 311 (HAW. 2007) (Statutes that use the word "may" are discretionary.). This, too, is irreconcilable with *Heller*: "The very enumeration of the right takes out of the hands of government … the power to decide on a case-by-case basis whether the right is really worth insisting upon." 554 U.S. at 634. In this case, the County's practice demonstrates that, in its view, the right to bear arms outside the home is not worth insisting upon. Counsel conceded that "to his knowledge, no one other than a security guard—or someone similarly employed—had ever been issued an open carry license." *Young*, 896 F.3d at 1070. Counsel further conceded—and records confirm—that no one in the County had received a concealed carry license since at least the year 2000. *Id*. at 1072. Thus, ordinary "law-abiding, responsible citizens," *Heller*, 554 U.S. at 635, are barred from exercising their rights in the County.

Even worse, there is no procedure to appeal the denial of a license—the chief's decision is both final and unchecked.[5] While the NRA disagrees with the decisions upholding similar regulatory schemes in the First, Second, Third, and Fourth Circuits (*Gould*, 907 F.3d at 677; *Kachalsky*, 701 F.3d at 101; *Drake*, 724 F.3d at 440; and *Woollard*, 712 F.3d at 883), applicants in those jurisdictions at least had methods to appeal the denial of their licenses. *See, e.g.*, *Ruggiero v. Police Com'r of Bos.*, 464 N.E.2d 104 (MASS. APP. CT. 1984); *Williams v. Bratton*, 656 N.Y.S.2d 626 (N.Y. APP. DIV. 1997); *In re Preis*, 573 A.2d 148 (N.J. 1990); *Scherr v. Handgun Permit Review Bd.*, 880 A.2d 1137 (Md. 2005). That process is all the more important here, where no licenses have been issued by the County to law-abiding, ordinary citizens. *Young*, 896 F.3d at 1070, 1072. That was not the case in *Gould, Kachalsky*, *Drake*, or *Woollard. Id*. This case is more on point with the "uniquely sweeping ban" at issue in *Moore*, 702 F.3d at 942, and the "total ban" in *Wrenn*, 864 F.3d at 666.

[5] The NRA could not find a provision in Chapter 134 of Hawaii's Revised Statutes that would allow one to appeal the denial of a license. Nor could it find any case law where the denial of a license was appealed. Indeed, the Hawaii Attorney General issued an opinion interpreting Section 134-9 shortly after the *Young* panel issued its opinion. There is no in-state case law on this point cited in that opinion. OP. ATT'Y GEN NO. 18-1, 2018 WL 4853978, at *5 (HAW. A.G. Sept. 11, 2018) ("Case law from other states is instructive."). Moreover, because issuing the license is discretionary, any review would likely be subject "to the deferential abuse of discretion standard." *Paul's Elec. Serv., Inc. v. Befitel*, 91 P.3d 494, 501 (HAW. 2004). The chances of success on appeal would therefore be low.

C. Section 134-9 is unconstitutional under any standard of review.

To recap, Section 134-9 puts the burden on the citizen to justify an exceptional urgency or need exercise a fundamental right. Then, it gives the chief of police unchecked discretion to determine whether the citizen has met that burden and is worthy of exercising their constitutional rights, a determination that cannot be appealed. And the County has not granted a license to an ordinary law-abiding citizen in the last 20 years. This total ban fails under any standard of review.

First, it fails under *Heller's* mandate that the Second Amendment's true meaning is to be determined by "text and history." 554 U.S. at 595. As explained above, the text of the Second Amendment protects the "right of the people"—the right of all "law-abiding, responsible citizens," *id.* at 635—to bear arms. And the panel's thorough review of the other relevant historical sources confirms that the right to bear arms includes the right to carry a firearm for protection outside the home. *Young*, 896 F.3d at 1053-68. Section 134-9, and the County's practice of not issuing licenses, is entirely inconsistent with the text and the historical understanding of the Second Amendment. It should be voided accordingly.

Next, if the Court chooses to retain the two-step, sliding-scale approach, Section 134-9 should be held invalid, per se. Not issuing any licenses in the last 20 years "amounts to a destruction of the Second Amendment right [and] is

unconstitutional under any level of scrutiny." *Silvester*, 843 F.3d at 821 (citing *Jackson*, 746 F.3d at 961); *Moore*, 702 F.3d at 942; *Wrenn*, 864 F.3d at 666.

Alternatively, strict scrutiny should apply. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973) ("[S]trict judicial scrutiny [is] required" whenever a law "impinges upon a fundamental right explicitly or implicitly protected by the Constitution."). But Section 134-9 is still invalid under intermediate scrutiny. Intermediate scrutiny mandates that the regulation be "'narrowly tailored to serve a significant governmental interest'" *Ward*, 491 U.S. at 791 (citations omitted). "'[T]he essence of narrow tailoring' is 'focus[ing] on the source of the evils the [Government] seeks to eliminate [without] significantly restricting a substantial quantity of speech that does not create the same evils.'" *Turner Broad. Sys., Inc. v. F.C.C.*, 520 U.S. 180, 216 (1997) (citation omitted) (alterations in original). The government cannot "burden substantially more [of the right] than is necessary. *Id.* at 214. (citation omitted).

Here, by not issuing any licenses in the last 20 years, the County eliminated the entire right for law-abiding citizens. That complete ban on the right to bear arms is not narrowly tailored. *Edwards v. City of Coeur d'Alene*, 262 F.3d 856, 863-866 (9th Cir. 2001) (A total ban on protesting with signs that had "any wooden, plastic or other type of support" was not "narrowly tailored to further the

City's interest in public safety."). Section 134-9 fails to pass muster under intermediate scrutiny. The Court should invalidate it.

CONCLUSION

For the foregoing reasons, the panel's decision should be affirmed.

Date: June 4, 2020

Respectfully submitted:

/s/ Michael T. Jean
Michael T. Jean

Attorney for Amicus Curiae the National Rifle Association of America

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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[X] complies with the length limit designated by court order dated 4/30/2020.

[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature /s/ *Michael T. Jean* **Date** June 4, 2020

*(use "*s/[typed name]*" to sign electronically-filed documents)*

CERTIFICATE OF SERVICE

I hereby certify that on June 4, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Date: June 4, 2020

/s/ Michael T. Jean
Michael T. Jean

Attorney for Amicus Curiae the National Rifle Association of America