

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, No. 12-CV-0336 (Gillmore, J.)

**BRIEF OF *AMICI CURIAE* SOCIAL SCIENTISTS
AND PUBLIC HEALTH RESEARCHERS IN
SUPPORT OF APPELLEES**

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INTERESTS OF *AMICI CURIAE*¹

Amici curiae Ian Ayres, Charles Branas, John Donohue, David Hemenway, and Michael Siegel² are social scientists and public health experts from leading research institutions who have studied gun violence and the public safety impact of laws regulating firearm carry. As scholars who have dedicated significant portions of their careers to studying the causes and patterns of American gun violence and identifying the public policies most effective in combatting it, *amici* have a strong interest in ensuring that the Court appropriately considers social science evidence in its constitutional analysis.

BACKGROUND AND SUMMARY OF ARGUMENT

Current events have made more Americans fearful that openly displayed, loaded firearms enable lethal violence,³ threaten public participation in our

¹ *Amici* affirm that no counsel for a party authored this brief in whole or in part and no person other than *amici* and its counsel made a monetary contribution to its preparation or submission. Fed. R. App. P. 29. All parties to this action have granted consent to file this brief. Ninth Cir. R. 29-2(a).

² A description of *amici*'s expertise and relevant experience is included in an addendum to this brief.

³ Richard Fausset, *What We Know About the Shooting Death of Ahmaud Arbery*, New York Times (May 11, 2020), <https://www.nytimes.com/article/ahmaud-arbery-shooting-georgia.html>.

democracy,⁴ and hinder police responses during mass shootings.⁵ In fact, these concerns, and others, are backed up by empirical evidence. Laws that enable the near-unrestricted carrying of loaded firearms in public are associated with higher rates of homicide and violent crime, a trend that persists over time.⁶ Such laws have also been associated with increased workplace homicides and unintentional injuries.⁷ Conversely, there is evidence that firearms are relatively rarely used in self-defense and, when used, do not reduce the defender's risk of injury—whereas other protective actions do.⁸ Indeed, guns likely do not protect those who possess

⁴ Sarah Rahal & Craig Mauher, *Armed Protestors in Michigan Capitol Have Lawmakers Questioning Policy*, Detroit News (May 2, 2020), <https://www.detroitnews.com/story/news/local/michigan/2020/05/02/armed-protesters-michigan-capitol-have-lawmakers-questioning-policy/3071928001/>.

⁵ At a 2016 shooting in Dallas, crowds legally carrying long guns interfered with the law enforcement response. Five police officers were shot and killed. Molly Hennessy-Fiske, *Dallas Police Chief: Open Carry Makes Things Confusing During Mass Shootings*, L.A. Times (July 11, 2016), <http://www.latimes.com/nation/la-na-dallas-chief-20160711-snap-story.html>.

⁶ See, e.g., John Donohue et al., *Right-to-Carry Laws and Violent Crime: A Comprehensive Assessment Using Panel Data and a State-Level Synthetic Control Analysis*, 16 J. Empirical Legal Stud. 198, 200 (2019); Michael Siegel et al., *Easiness of Legal Access to Concealed Firearm Permits and Homicide Rates in the United States*, 107 Am. J. Pub. Health 1923, 1923–24 (2017); Mark Gius, *Using the Synthetic Control Method to Determine the Effects of Concealed Carry Laws on State-Level Murder Rates*, 57 Int'l Rev. L. & Econ. 1, 6 (2019); Cassandra Crifasi et al., *Association between Firearm Laws and Homicide in Urban Counties*, 95 J. Urb. Health 383, 386–87 (2018) (as modified by *Correction to: Association Between Firearm Laws and Homicide in Urban Counties*, 95 J. Urb. Health 773, 773–74 (2018)).

⁷ See *infra* notes 40 & 42.

⁸ See David Hemenway & Sara Solnick, *The Epidemiology of Self-Defense Gun Use: Evidence from the National Crime Victimization Surveys 2007–2011*, 79 Preventive Med. 22, 23 (2015).

them from assault, and people in possession of a gun may be more than four times more likely to be shot in an assault than those not in possession.⁹

All other developed nations around the world impose the type of restrictions on gun carrying that Hawaii does. Today, these nations enjoy vastly lower levels of gun violence¹⁰ and see fewer shootings by or of police officers¹¹ than the United States as a whole, where many states have trended in the opposite direction by loosening gun laws. The Second Amendment is no explanation for this trend, because following the Supreme Court's 2008 decision in *Heller*, nearly every court to consider the question had approved public carry restrictions like Hawaii's as constitutional. And until the panel decision in this case, virtually every court had approved legislation restricting the *open* carry of firearms in particular. *See, e.g.*, *Norman v. State*, 215 So. 3d 18, 28 (Fla. 2017).

The panel's decision disrupted this consensus by holding that the right to carry a loaded, visible firearm in public is a "core" Second Amendment right that

⁹ Charles Branas et al., *Investigating the Link Between Gun Possession and Gun Assault*, 99 Am. J. Pub. Health 2034, 2037 (2009).

¹⁰ Erin Grinshteyn & David Hemenway, *Violent Death Rates in the US Compared to Those of the Other High-Income Countries*, 2015, 123 J. Preventative Med. 20, 22 (2019) (Americans are about 10 times more likely than citizens in peer high-income countries to die by gun suicide, and nearly 25 times more likely to die by gun homicide.).

¹¹ Franklin Zimring, *Firearms and Violence in American Law*, in *Bridging the Gap: A Report on Scholarship and Criminal Justice Reform* (Erik Luna ed., 2017) (U.S. police kill civilians at 42 times the rate of German police and more than 100 times that of police in England and Wales, and die from assaults on duty at a substantially higher rate than these countries.).

cannot be regulated as Hawaii does. Panel Op. at 49–50. By a two-to-one vote, the panel found that the right to openly carry loaded firearms in public is as central to our Constitution as the right to keep a handgun in one’s private home. The panel’s classification of public carry as a “core” right led it to conclude Hawaii’s licensing scheme was unconstitutional without applying heightened constitutional scrutiny, the stage at which the Court would normally consider social science evidence. *See id.* at 52–53. In this case, that includes significant evidence that public carry is a risky activity unlikely to protect gun carriers, and conversely, that strong licensing laws confer public safety benefits.

The Second Amendment does not support this mode of analysis. As with all constitutional rights, governments may restrict gun rights based on compelling interests in protecting human life, and they may use research to inform such policy choices. The panel’s invalidation of Hawaii’s public carry law without considering evidence of the lives that hang in the balance ignores real-world consequences and turns the Second Amendment into an unlimited right divorced from public safety concerns.

Amici urge this Court to reaffirm the Ninth Circuit’s two-step analytical framework for Second Amendment cases, and correct the panel’s errors by giving appropriate consideration and deference to social science evidence. The Court

should uphold Hawaii’s open carry license law because it is well-grounded in public health and other evidence the legislature appropriately considered.

ARGUMENT

I. The Court Should Reverse the Panel and Reaffirm Proper Application of the Two-Step Test.

Hawaii generally prohibits carrying loaded guns in public without a license.¹² Like 20 other states, it restricts the public practice of open carry: carrying a visible, loaded firearm.¹³ Hawaii issues public open-carry licenses to adults who are of good moral character, not prohibited from gun possession, and are “engaged in the protection of life and property.”¹⁴

As Hawaii has explained, reversal is warranted because the panel incorrectly interpreted this statute to limit eligibility to security guards who must carry a firearm at their jobs, but in actuality licenses are not so restricted. *See Appellees’ Pet. for Reh’g En Banc* at 8–11. Yet reversal is also appropriate here in light of the panel’s methodological errors. The panel majority concluded that because the public carry of loaded firearms is a “core” right, Hawaii’s law fails any standard of heightened constitutional scrutiny. Panel Op. 49–50. The panel read *Heller* as providing an analytical shortcut under which it could strike down Hawaii’s law

¹² See Haw. Rev. Stat. § 134-9.

¹³ Open Carry, GIFFORDS LAW CTR. TO PREVENT GUN VIOLENCE, <http://lawcenter.giffords.org/gun-laws/policy-areas/guns-in-public/open-carry/>.

¹⁴ Haw. Rev. Stat. § 134-9(a).

without applying the second step of the Ninth Circuit’s two-step approach for Second Amendment cases. *Id.* at 52.

This was error. *Heller* did not endorse a shortcut under which restrictions preventing the exercise of anything deemed to be a “core right” are invalid without a more searching review. Instead, *Heller* determined that a law prohibiting home handgun possession would be unconstitutional under any level of heightened scrutiny based on unique characteristics of home handgun possession. *District of Columbia v. Heller*, 554 U.S. 570, 628–29 (2008) (“banning *from the home* ‘the most *preferred firearm in the nation* to ‘keep’ and use for protection of one’s home and family’” would flunk “any of the standards of scrutiny that we have applied to enumerated constitutional rights”) (citation omitted; emphases added).

By its terms, the Court’s reasoning about home handgun bans does not apply to laws restricting or prohibiting the public open carry of loaded guns, including handguns. *Heller* relied on the fact that “handguns are the most popular weapon chosen by Americans for self-defense *in the home*”—having already said home defense is “elevate[d] above *all* other interests”—to support its conclusion that “a complete prohibition of their use is invalid.” *Id.* at 629, 635 (emphases added). But open carry takes place outside the home, and evidence and experience suggest that public open carry of handguns is a deeply unpopular mode of self-defense. Estimates from surveys suggest only 1.2% of the American adult population has

ever openly carried a handgun even one time, but that includes people who report preferring to carry concealed.¹⁵ More regular open carriers—people who have only open carried in the last month when they carried firearms—only represent roughly 0.2% of the U.S. population and 1.5% of handgun owners.¹⁶

With these distinctions, *Heller*'s conclusion about how a ban on the “most popular weapon chosen by Americans for self-defense in the home” fares under heightened scrutiny has no bearing on Hawaii’s open carry law. Even if the panel were correct that open carry is somehow “core” to the Second Amendment, it should have applied heightened scrutiny as part of the second step of the Second Amendment test.

In contrast to the panel’s shortcut approach, this Court’s usual two-step test flows from *Heller*. In order to implement *Heller*’s protections for individual rights as well as its endorsement of numerous gun safety laws,¹⁷ the Ninth Circuit and nearly every other federal appellate court has adopted a two-step analytical

¹⁵ See Ali Rowhani-Rahbar, et al., *Loaded Handgun Carrying Among US Adults*, 2015, 107 Am. J. Public Health 1930–36 (2017) (calculated from data supplement, available at <https://ajph.aphapublications.org/doi/suppl/10.2105/AJPH.2017.304072>, and 2015 U.S. adult population of 247,122,998).

¹⁶ *Id.*

¹⁷ *Heller*, 554 U.S. at 635 (referencing “exceptions” to the Second Amendment, or “regulations of the right that we describe as permissible”); *see also McDonald v. City of Chi.*, 561 U.S. 742, 786 (2010) (“We repeat [*Heller*]’s assurances here. Despite municipal respondents’ doomsday proclamations, incorporation does not imperil every law regulating firearms.”) (plurality opinion).

framework. *Gould v. Morgan*, 907 F.3d 659, 668 (1st Cir. 2018) (collecting cases). At the first step, courts ask if a challenged law burdens the Second Amendment. If it does, the analysis is not over: courts then select and apply a form of heightened scrutiny to decide whether a law is constitutional, taking into account how close the regulation comes to the core of the Second Amendment right. This is the step where courts often consider empirical evidence about the likely effects of challenged gun policies. *E.g., Jackson v. City & Cty. of S.F.*, 746 F.3d 953, 966, 964 (9th Cir. 2014) (upholding safe-storage law based on evidence “that storing handguns in a locked container reduces the risk of both accidental and intentional handgun-related deaths” and that “gun safe[s] may be opened quickly” enough to enable lawful self-defense).

The two-step approach makes sense in Second Amendment cases because other constitutional rights that are “not unlimited” (*Heller*, 554 U.S. at 595) are analyzed this way. Tiered scrutiny is used in cases involving voting rights (*Burdick v. Takushi*, 504 U.S. 428, 434 (1992)), the Fourteenth Amendment’s protection for bodily integrity (*Washington v. Harper*, 494 U.S. 210, 223 (1990)), and the First Amendment. *See, e.g., Jackson*, 746 F.3d at 960 (two-step “inquiry bears strong analogies to the Supreme Court’s free-speech caselaw”). But in this case, the panel treated the Second Amendment differently than other rights. It short-circuited the

two-step inquiry by assuming that no evidence could justify Hawaii’s restrictions while refusing to consider any such evidence at all.

The Court should reject the panel’s version of the two-step framework. Proper application of the test shows that the Hawaii law at issue is consistent with the Second Amendment.

II. Hawaii’s Open-Carry Law is Constitutional Under the Two-Step Test.

A. Social Science Evidence Confirms That Open Carry is Not a “Core” Self-Defense Right.

The Hawaii appellees and historian *amici* offer strong reasons to reject the panel majority’s conclusion—whether as part of “step one” or a truncated “step two” analysis—that the core of the Second Amendment protects a right to open carry that cannot be regulated through a licensing law like Hawaii’s. In addition to being in tension with the Court’s survey of historical evidence in *Peruta v. County of San Diego*, 824 F.3d 919 (9th Cir. 2016) (en banc), a key part of the panel’s threshold conclusion is also suspect from a social science perspective. Research on armed self-defense shows that guns have little value for law-abiding gun carriers because any protective effect is slim at best, and works against gun carriers at worst. Thus, even if open carry has sufficient support in American history (which appears far from clear), “open carry for *self-defense*” is a questionable starting point for a “core” constitutional right.

As an initial matter, crime victims rarely use firearms in self-defense.

According to data provided by the federal Bureau of Justice Statistics (analyzed in 2015 by researchers from Harvard and the University of Vermont), victims of violent crimes use guns to threaten or attack the perpetrator in less than one percent of all criminal incidents.¹⁸ Careful evaluation of the rare instances when victims used a gun defensively found no statistical support that doing so reduced the risk of harm. As the 2015 analysis notes, although some responses to criminal encounters—like “[r]unning away and calling the police”—are associated with a reduced likelihood of injury, use of a firearm in self-defense is not.¹⁹

In fact, carrying a gun may increase a victim’s risk of injury during a crime. A 2009 study published in the American Journal of Public Health analyzed 677 shootings and a population random sample comparison group of 684 control individuals in Philadelphia over a two-and-a-half-year period. After adjusting for confounding factors, the researchers determined that individuals carrying a gun were 4.46 times more likely to be shot in an assault than those not carrying a gun,

¹⁸ Hemenway & Solnick, *supra* note 8, at 22, 23. While another estimate claims there are up to 2.5 million defensive gun uses each year, that speculative figure is an “extreme overestimate.” David Hemenway, *Survey Research and Self-Defense Gun Use: An Explanation of Extreme Overestimates*, 87 J. Crim. L. & Criminology 1430, 1430–31 (1997).

¹⁹ Hemenway & Solnick, *supra* note 8, at 23-24.

and 4.23 times more likely to be fatally shot.²⁰ The figures were even higher for assaults where the victim had some opportunity to resist.²¹ The researchers posited several potential explanations, including that “[a] gun may falsely empower its possessor to overreact, instigating and losing otherwise tractable conflicts with similarly armed persons.”²² Another explanation is that criminals arm themselves heavily and act more aggressively when they expect to encounter gun possessors, which is consistent with data showing that robberies and aggravated assaults rise disproportionately in states with laws authorizing expanded firearm carry.²³

This research suggests it makes little sense to define the Second Amendment’s “core” to encompass open carry. That activity does not advance the core principle of individual self-defense the Second Amendment is thought to protect. *Heller*, 554 U.S. at 630 (describing the Amendment’s “core lawful purpose of self-defense”). The dearth of evidence that open carry is useful for self-defense should have led the Court to treat this constitutional lawsuit more skeptically—not motivated the panel to conduct a freeform historical inquiry and conclude that open carry enjoys near-absolute protections.

²⁰ See Branas *et al.*, *supra* note 9, at 2037.

²¹ *Id.*

²² *Id.*

²³ Donohue *et al.*, *infra* note 25, at 213 & n.34.

At the very least, this social science context undermines the panel’s certainty that its analysis should end after finding open carry to be a central Second Amendment right. Recognizing a core right to openly carry loaded guns, a move that implicitly endorses the *use* of guns in public for self-defense, creates grave safety concerns not only for gun carriers but for others who encounter them. *See* studies cited *infra* pp. 13–18.

To be sure, the *Heller* Court did not itself fully engage with the second step of the two-step test; it referenced but did not apply the “traditionally expressed levels” of scrutiny. *See* 554 U.S. at 634. But as discussed above, the *Heller* decision was confined to the home, and grounded in the Court’s apparent conclusion that *home* handgun possession is so “popular” and “quintessential” to self-defense, 554 U.S. at 629, that it cannot be prohibited no matter the public safety cost. But because evidence and experience suggest public open carry is unpopular²⁴ and its harms uniquely public, the same conclusion cannot be drawn here.

In this case, unlike *Heller*, evidence shows carrying a gun in public is neither popular nor useful for self-defense. This undermines the idea that open carry is—or has ever been—a “core” self-defense right. At minimum, it counsels in favor of

²⁴ Rowhani-Rahbar, *supra* note 15.

applying heightened scrutiny at the second step of the Second Amendment analysis.

B. Social Science Evidence Confirms Open Carry Licensing Survives Constitutional Scrutiny.

Omitting any scrutiny of Hawaii's law meant the panel allowed speculation about what is hypothetically useful for self-defense to supplant public health evidence that the widespread carrying of loaded guns in fact jeopardizes public safety. Reviewing that evidence confirms that Hawaii's open carry licensing law is constitutional under any form of heightened scrutiny. *See, e.g., Fyock v. City of Sunnyvale*, 779 F.3d 991, 1000 (9th Cir. 2015) (explaining intermediate scrutiny standard); *Mance v. Sessions*, 896 F.3d 699, 705 (5th Cir. 2018) (explaining strict scrutiny standard).

Hawaii's law satisfies such scrutiny because there is a growing body of social science research corroborating the inference that strong public carry licensing laws are likely to reduce violent crime, gun thefts, and other gun injuries. Among that research is a 2019 study led by Stanford professor John Donohue that showed persistent increases in rates of violent assaults and violent crimes in states with the most lenient licensing laws,²⁵ known as "right to carry" laws.²⁶ The study

²⁵ Donohue et al., *supra* note 6, at 200.

²⁶ "Right-to-carry" or "shall-issue" licensing laws require officials to grant handgun carry permits if applicants satisfy basic criteria (*e.g.*, no felony

examines 33 states that adopted right-to-carry laws between 1981 and 2007 using a state-level synthetic control analysis, a leading method for evaluating policy choices that cannot be evaluated in a randomized trial.²⁷ The model controlled for numerous factors that influence crime—such as policing, incarceration, income and unemployment, and the influence of the crack cocaine epidemic—to gauge whether the results are likely to be a true causal effect of the right-to-carry law.²⁸

The synthetic control model revealed that “the net effect of state adoption of [right-to-carry] laws is a substantial increase in violent crime.”²⁹ The researchers found that passage of lax public carry laws increased violent crime rates by 13 to 15 percent compared to what the rates otherwise would have been. This pernicious effect increased over time: “the longer the [right-to-carry] law is in effect,” the study notes, “the greater the cost in terms of increased violent crime.”³⁰

convictions). “May-issue” regimes like Hawaii’s give officials greater discretion. While this research focuses on concealed carry licensing laws, its findings are relevant to open carry. *See discussion infra* pp. 17-18.

²⁷ Susan Athey & Guido Imbens, *The State of Applied Econometrics: Causality and Policy Evaluation*, 31 J. Econ. Perspectives 3, 9 (2017) (synthetic control method “arguably the most important innovation in the policy evaluation literature in the last 15 years”).

²⁸ Donohue et al., *supra* note 25, at 215–16.

²⁹ *Id.* at 240. Professor Donohue’s study also evaluated the impact of right-to-carry laws using a panel data analysis, another traditional approach, and reached the same conclusion: violent crime was elevated in states allowing guns to be more freely carried in public. *Id.* at 222.

³⁰ *Id.* at 232.

Conversely, “[t]here is not even the slightest hint in the data” that right-to-carry laws “reduce violent crime.”³¹ While there was a nationwide decline in violent crime over the nearly forty-year period analyzed, states that never adopted right-to-carry laws, including Hawaii, experienced a decline in violent crime that was nearly *ten times greater* than states that did adopt such laws.³²

Other researchers have focused on the impact public carry policies have on homicides, and they too observed increases in states with relaxed standards for granting gun carry permits. A 2017 study from Boston University and Duke, led by Dr. Michael Siegel, found that between 1991 and 2015, right-to-carry laws were significantly associated with 6.5% higher total homicide rates, 8.5% higher firearm homicide rates, and 10.6% higher handgun homicide rates.³³ The increases in homicides were driven entirely by firearm homicides; non-gun homicide rates did not increase.³⁴ This result was corroborated by Dr. Siegel and co-authors in two subsequent papers using different methodologies and research designs.³⁵ Separate

³¹ *Id.* at 240.

³² *Id.* at 213–14 & fig. 1.

³³ Siegel et al., *supra* note 6, at 1923–24.

³⁴ *Id.*

³⁵ Michael Siegel et al., *The Impact of State Firearm Laws on Homicide and Suicide Deaths in the USA, 1991–2016: A Panel Study*, 34 J. Gen. Intern. Med. 2021, 2021–28 (2019); Anita Knopov et al., *The Impact of State Firearm Laws on Homicide Rates among Black and White Populations in the United States, 1991–2016*, 44 Health & Social Work 232, 232–40 (2019).

studies by researchers at Quinnipiac and Johns Hopkins also found associations between increased homicides and state laws providing minimal oversight over who may carry firearms in public.³⁶

These are only a handful of the most recent studies. Other research has documented an association between lax public carry licensing laws and increased crime and gun violence;³⁷ linked even occasional gun carrying to a threefold increased risk of gun theft;³⁸ and identified fatal methodological errors in older research incorrectly claiming “more guns” in public lead to “less crime.”³⁹ Still other

³⁶ Gius, *supra* note 6, at 6; Crifasi et al., *supra* note 6, at 773–74.

³⁷ E.g., Marjorie McElroy & Peichun Wang, *Seemingly Inextricable Dynamic Differences: The Case of Concealed Gun Permit, Violent Crime and State Panel Data* 1, 31–32 (June 24, 2017) (violent crime rates would be about one-third lower if states with “shall-issue” public carry laws had not implemented such laws); Paul Zimmerman, *The Deterrence of Crime through Private Security Efforts: Theory and Evidence*, 37 Int’l. Rev. L. & Econ. 66, 66–75 (2014) (finding statistically significant increase in murder, robbery, assault, burglary, and larceny in states that enacted shall-issue carry laws from 1999 to 2008); Rashna Ginwalla et al., *Repeal of the Concealed Weapons Law and Its Impact on Gun-Related Injuries and Deaths*, 76 J. Trauma Acute Care Surg. 569, 569 (2014) (repeal of Arizona’s carry permitting law associated with 27% increase in gun-related homicides).

³⁸ David Hemenway et al., *Whose Guns are Stolen? The Epidemiology of Gun Theft Victims*, 4 Injury Epidemiology 1, 3 (2017) (people who carried firearms at least once in the past month were three times more likely to have a firearm stolen than other gun owners).

³⁹ National Research Council, *Firearms & Violence: A Critical Review* 120–51 (Charles Wellford et al. eds., 2005); see also Ian Ayres & John Donohue, *More Guns, Less Crime Fails Again: The Latest Evidence from 1977 – 2006*, 6 Econ. J. Watch 218 (2009); Ian Ayres & John J. Donohue, *Shooting Down the ‘More Guns, Less Crime’ Hypothesis*, 55 Stan. L. Rev. 1193, 1270–71 (2003); Mark Duggan, *More Guns, More Crime*, 109 J. Pol. Econ. 1086, 1109–10 (2001). These studies documented serious econometric shortcomings in claims of net benefits from gun carrying. Donohue et al., *supra* note 25, provides an extended discussion of flaws in the models used in the “more guns, less crime” studies.

research connects lax concealed carry laws to increased workplace homicides,⁴⁰ a greater share of homicides on warmer days (when homicides are known to increase),⁴¹ and increases in unintentional gun injuries.⁴² Many of these studies focus on the impact of concealed firearm licensing laws, but research also suggests that the presence of *visible* firearms, in particular, can increase aggressive and violent behaviors.⁴³ Because displayed weapons are known to fuel aggression and violence, and because the practice of open carry eliminates any uncertainty about who is carrying firearms,⁴⁴ it is reasonable to assume that open carry would create similar or even enhanced risks over concealed carry. In sum, a robust body of empirical evidence on public carry or public concealed carry (which can be extrapolated to

⁴⁰ Mitchell Doucette et al., *Right-to-Carry Laws and Firearm Workplace Homicides: A Longitudinal Analysis (1992–2017)*, 109 Am. J. Pub. Health 1747, 1751 (2019).

⁴¹ Jonathan Colmer & Jennifer Doleac, *Do Right-To-Carry Laws Mitigate or Exacerbate the Temperature-Homicide Relationship?* (June 2019) (unpublished draft on file with authors) (in states with right-to-carry laws “homicides are over two times more responsive to temperature increases”).

⁴² Jeffrey DeSimone et al., *Child Access Prevention Laws and Nonfatal Gun Injuries*, 80 S. Econ. J. 5, 5–25 (unintentional firearm injuries may occur more frequently after states weaken licensing standards).

⁴³ Arlin Benjamin Jr. et al., *Effects of Weapons on Aggressive Thoughts, Angry Feelings, Hostile Appraisals, and Aggressive Behavior: A Meta-Analytic Review of the Weapons Effect Literature*, 22 Personality and Social Psychol. Rev. 347, 347–77 (2017); Arlin Benjamin Jr. & Brad Bushman, *The Weapons Priming Effect*, 12 Current Opinion in Psychol. 45, 45–48 (2016); see also David Hemenway et al., *Is an Armed Society a Polite Society? Guns and Road Rage*, 38 Accident Analysis & Prevention 687, 687–95 (2006).

⁴⁴ Eliminating any uncertainty about who is carrying a gun can be expected to exacerbate the tendency of criminals (described above) to arm themselves more aggressively when they encounter gun possessors. See *supra* p. 11.

open carry) confirms that the Hawaii law at issue helps protect its residents from gun death and injury. The evidence shows laws like Hawaii's are well-tailored to achieving compelling public safety goals.

III. Hawaii's Legislative Judgments are Substantiated by Peer-Reviewed Research and Other Qualifying Evidence.

The lead studies described above have been submitted to “scrutiny of the scientific community” through peer review, a “component of ‘good science’” that helps ensure “substantive flaws in methodology will be detected.” *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 593–94 (1993). But even if peer review left more uncertainty about the research, when states regulate “in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation.” *Marshall v. United States*, 414 U.S. 417, 427 (1974); *Kansas v. Hendricks*, 521 U.S. 346, 360 n.3 (1997) (disagreements among researchers “do not tie the State’s hands” in its policy choices).

Respect for legislative judgments is particularly justified in this case, because the government’s interest in stemming harms that flow from firearms cannot always be reduced to a scientific study. *Accord Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 60 (1973) (“We do not demand of legislatures ‘scientifically certain criteria of legislation.’”) (citation omitted). In addition to harms that can be measured or estimated—like a 13% to 15% increase in violent crime (*see supra*

p. 15)—exposure to the risk of gun violence causes intangible harm by leaving people traumatized or unable to participate in daily life. One study found that 27% of children living in violent urban areas currently meet the diagnostic requirements for post-traumatic stress disorder.⁴⁵ Researchers note similar rates of PTSD among those who have witnessed a public mass shooting, such as the massacres that have taken place in schools, churches, office buildings, and music venues.⁴⁶ Other types of trauma from repeated exposure to openly carried firearms—like intimidation and the chilling effect on our democracy⁴⁷—may be less capable of measure.

It was appropriate for Hawaii to consider all these interests and more when regulating the open carry of firearms in public. *See, e.g., Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 447 (2015) (in First Amendment challenge, crediting government’s interest in “public confidence in judicial integrity” although it “does not easily reduce to precise definition, nor does it lend itself to proof by documentary record”). This means the panel’s truncated version of the two-step approach is incorrect for the additional reason that it afforded no respect for Hawaii’s legislative judgments. The panel deprived Hawaii of the ability to address

⁴⁵ Erica Gollub et al., *Indirect Violence Exposure and Mental Health Symptoms Among An Urban Public-School Population: Prevalence and Correlates*, 14 PLOS ONE e0224499, e0224499 (2019).

⁴⁶ Amy Novotney, *What Happens to the Survivors*, 49 Monitor on Psychol. 36, 36 (Sept. 2018).

⁴⁷ See Rahal & Mauher, *supra* note 4.

grave public safety concerns with solutions supported either by peer-reviewed research or by less easily quantified public interests. Should the panel's approach carry the day, it would dramatically circumscribe "state and local experimentation with reasonable firearms regulations" in ways *Heller* and *McDonald* promised would not happen. See *McDonald*, 561 U.S. at 784–85 (plurality opinion).

CONCLUSION

The panel decision jeopardizes the progress Hawaii has made toward reducing gun deaths. It also threatens the democratic process that enables citizens to support and lawmakers to pass gun laws supported by public health evidence. The panel majority presented its approach as necessary to protect an open carry right it determined was "core" to the Second Amendment, but failed to consider evidence that open carry is an ineffective and unpopular mode of self-defense. *Amici* urge the Court to reverse the panel's decision.

Dated: June 4, 2020

Respectfully submitted,

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ADDENDUM

LIST OF AMICI CURIAE

Ian Ayres, PhD, is an economist and lawyer. He is the William K. Townsend Professor at Yale Law School, the Anne Urowsky Professorial Fellow in Law, and a Professor at Yale's School of Management. Professor Ayres has published over 100 articles and has taught and written extensively about gun policy. See *Weapon of Choice: Fighting Gun Violence While Respecting Gun Rights*, Harvard University Press (forthcoming 2020) (with Fredrick Vars); *Libertarian Gun Control*, 167 U. Pa. L. Rev. 921 (2019) (with Fredrick Vars); *Shooting Down the ‘More Guns, Less Crime’ Hypothesis*, 55 Stan. L. Rev. 1193 (2003) (with John J. Donohue); *The Latest Misfires in Support of the More Guns, Less Crime Hypothesis*, 55 Stan. L. Rev. 1371 (2003) (with John J. Donohue); *Yet Another Refutation of the More Guns, Less Crime Hypothesis – With Some Help From Moody and Marvell*, 6 Econ. J. Watch 35 (2009) (with John J. Donohue); *More Guns, Less Crime Fails Again: The Latest Evidence from 1977–2006*, 6 Econ. J. Watch 218 (2009) (with John J. Donohue); *Nondiscretionary Concealed Weapons Laws: A Case Study of Statistics, Standards of Proof and Public Policy*, 1 Am. L. Econ. Rev. 436 (1999) (with John J. Donohue).

Education:

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JD, 1986, Harvard Law School

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Charles Branas, PhD, is the Gelman Endowed Professor and Chair of the Department of Epidemiology at the Columbia University Mailman School of Public Health, and an Adjunct Professor of Epidemiology at the University of Pennsylvania Perelman School of Medicine. Dr. Branas has conducted research that extends from urban and rural areas in the US to communities across the globe, incorporating place-based interventions and human geography. He has led win-win science that generates new knowledge while simultaneously creating positive, real-world changes and providing health-enhancing resources for local communities. His research on the geography and factors underpinning gun violence has been cited by landmark Supreme Court decisions, Congress, and the NIH Director. Dr. Branas has also led large-scale scientific work to transform thousands of vacant lots, abandoned buildings and other blighted spaces in improving the health and safety of entire communities. These are the first citywide randomized controlled trials of urban blight remediation and have shown this intervention to be a cost-effective solution to persistent urban health problems like gun violence.

Education:

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MS, 1993, Drexel University

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John J. Donohue III, PhD, is C. Wendell and Edith M. Carlsmith Professor of Law at Stanford Law School. Professor Donohue has been one of the leading empirical researchers in the legal academy over the past 25 years. Professor Donohue is an economist as well as a lawyer and is well known for using empirical analysis to determine the impact of law and public policy in a wide range of areas, including civil rights and antidiscrimination law, employment discrimination, crime and criminal justice, and school funding. Professor Donohue previously was a member of the law school faculty from 1995–2004. Before rejoining the Stanford Law School faculty in 2010, Professor Donohue was the Leighton Homer Surbeck Professor of Law at Yale Law School. Earlier in his career, he was a law professor at Northwestern University as well as a research fellow with the American Bar Foundation. Additionally, he clerked with Chief Justice T. Emmet Clarie, of the U.S. District Court of Hartford, Connecticut. He is a member of the American Academy of Arts and Sciences, and the former editor of the American Law and Economics Review and president of the American Law and Economics Association.

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PhD (Economics), 1986, Yale

JD, 1977, Harvard Law School

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David Hemenway, PhD, Professor of Health Policy, is Director of the Harvard Injury Control Research Center. He formerly spent a week each year at the University of Vermont as a James Marsh Visiting Professor-at-Large. Dr. Hemenway teaches classes on injury and on economics. At the Harvard T.H. Chan School of Public Health he has won ten teaching awards as well as the inaugural community engagement award. Dr. Hemenway has written widely on injury prevention, including articles on firearms, violence, suicide, child abuse, motor vehicle crashes, fires, falls and fractures. He headed the pilot for the National Violent Death Reporting System, which provides detailed and comparable information on suicide and homicide. In 2012 he was recognized by the Centers for Disease Control & Prevention as one of the “twenty most influential injury and violence professionals over the past twenty years.”

Education:

PhD, 1974, Harvard University

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Michael Siegel, MD, MPH, is an epidemiologist and Professor in the Department of Community Health Sciences, Boston University School of Public Health. Dr. Siegel is an author of more than 160 manuscripts published in peer-

reviewed journals, including 29 papers on gun violence, published in top journals including the American Journal of Public Health, JAMA Pediatrics, BMJ, Annals of Internal Medicine, the Journal of General Internal Medicine, and the Boston University Law Review. He has been Principal Investigator or co-Principal Investigator on 10 grants funded by the National Institutes of Health (NIH), National Institute of Justice (NIJ), state agencies, and private foundations. He is author of a public health textbook entitled *Marketing Public Health: Strategies to Promote Social Change*. He has won 18 teaching awards, including an award for the top teacher at the Boston University School of Public Health. He was recently given a lifetime achievement award by the Alcohol, Tobacco, & Other Drugs section of the American Public Health Association.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 29(a)(5) and the Court's order dated April 30, 2020, the undersigned certifies that the attached brief is proportionally spaced, using a proportionally-spaced typeface of 14 points and—exclusive of the exempted portions of the brief—contains 4,996 words. As permitted by Federal Rule of Appellate Procedure 32(a)(7)(C), in making this declaration, the undersigned has relied upon the word count of the word-processing system used to prepare the attached brief.

Dated: June 4, 2020

Respectfully submitted,

By: *s/Matthew J. Silveira*
Matthew J. Silveira

CERTIFICATE OF SERVICE

I hereby certify that 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 on June 4, 2020.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/Matthew J. Silveira

Matthew J. Silveira