No. 12-17808

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GEORGE K. YOUNG, JR.,
Plaintiff-Appellant

vs.

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

On Appeal from the United States District Court
for the District of Hawaii, No. 1:12-cv-00336-HG-BMK
District Judge Helen Gilmore

AMICUS BRIEF OF THE STATES OF LOUISIANA, ALABAMA, ARIZONA, ARKANSAS, GEORGIA, IDAHO, INDIANA, KANSAS, KENTUCKY, MISSISSIPPI, MONTANA, NEBRASKA, NORTH DAKOTA, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS. UTAH, WEST VIRGINIA IN SUPPORT OF PLAINTIFF-APPELLANT ON REHEARING EN BANC

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INTEREST OF AMICI CURIAE

Amici are the States of Louisiana, Alabama, Arizona, Arkansas, Georgia, Idaho, Indiana, Kansas, Kentucky, Mississippi, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, and West Virginia. One the highest responsibilities of a State is to safeguard the rights of its citizens, including the right "to keep and bear arms" under the Second Amendment. Law-abiding citizens keep firearms for self-protection—both inside and outside of their homes. And they use their firearms while engaged in valuable pastimes, including hunting and target shooting. *Amici* seek to ensure that their residents will not be deprived of their Second Amendment freedoms.

Amici also have an interest in the clarity of Second Amendment law. Even after the Supreme Court's landmark decisions in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), lower courts have been inconsistent in the standards they have applied to Second Amendment challenges to state laws. Inconsistent decisions by the lower federal courts have left States uncertain as to the precise boundary between permissible and impermissible restrictions. *Amici* desire to curtail illegal and harmful

gun activity without running afoul of the Second Amendment or burdening lawful gun owners. Clear precedent from this and other courts is necessary to achieve that goal.

ARGUMENT

I. THE SECOND AMENDMENT GUARANTEES THE FUNDAMENTAL RIGHT OF SELF-DEFENSE

After ensuring protection of religious liberty, the freedom of speech, and the freedom of the press in the First Amendment, the Framers next guaranteed that "the right of the people to keep and bear arms, shall not be infringed." U.S. Const. amend. II. The Supreme Court has confirmed that, although the prefatory clause of the Amendment mentions "a well-regulated militia," the Amendment protects "an individual right unconnected with militia service." *Heller*, 554 U.S. at 582. If any doubt remained, two years later the Supreme Court reiterated that the "Second Amendment protects the right to keep and bear arms for the purpose of self-defense," and it incorporated that right against the States under the Fourteenth Amendment. *McDonald*, 561 U.S. 742, 749–50.

Notwithstanding these clear statements, some states—and federal courts—continue to place the Second Amendment on a lower level than the other Amendments in the Bill of Rights. *See, e.g.*, *Mance v. Sessions*,

896 F.3d 390, 398 (5th Cir. 2018) (Ho, J., dissenting from denial of rehearing en banc) ("[T]he Second Amendment continues to be treated as a 'second-class' right—as at least three Justices have noted in recent years." (citing opinions by Justice Thomas, joined by Justices Scalia and Gorsuch)).

The right to bear arms must "be enforced against the States under the Fourteenth Amendment according to the same standards that protect [fundamental] rights against federal encroachment." *McDonald*, 561 U.S. at 765. "Self-defense is a basic right, recognized by many legal systems from ancient times to the present day, and in *Heller*, [the Court] held that individual self-defense is 'the central component' of the Second Amendment right." *Id.* at 767.[1]

II. SECOND AMENDMENT PROTECTIONS EXTEND OUTSIDE THE HOME

A majority of circuits, including the Ninth Circuit, have found that "a two-part approach to Second Amendment claims seems appropriate under *Heller*." *Woollard v. Gallagher*, 712 F.3d 865, 874–75 (4th Cir. 2013) (internal quotation marks omitted); *see Jackson v. City & Cty. of*

[1] Note that *McDonald* speaks of self-defense generally—it does not cabin the right based on whether a person is inside or outside of a home.

San Francisco, 746 F.3d 953, 960 (9th Cir. 2014); *Heller v. District of Columbia*, 670 F.3d 1244, 1252 (D.C. Cir. 2011); *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 194 (5th Cir. 2012); *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012); *Ezell v. City of Chicago*, 651 F.3d 684, 703–04 (7th Cir. 2011); *United States v. Reese*, 627 F.3d 792, 800–01 (10th Cir. 2010). *But see Wrenn v. D.C.*, 864 F.3d 650, 664 (D.C. Cir. 2017) (applying a more categorical approach).

The first prong of the inquiry asks "whether the challenged law burdens conduct protected by the Second Amendment." *See Jackson*, 746 F.3d at 960. Here, the plaintiff seeks to carry a firearm openly for self-defense outside the home.

The need for protection against physical danger applies both inside and outside of the home. "If the fundamental right of self-defense does not protect [citizens outside of their homes], then the safety of all Americans is left to the mercy of state authorities who may be more concerned about disarming the people than about keeping them safe." *Caetano v. Massachusetts*, 136 S. Ct. 1027, 1033 (2016) (Alito, J., concurring). The right to self-defense does not disappear upon stepping

out one's front door.

To the extent the Second Amendment is also designed to allow the populace "to resist and throw off a tyrannical government," such resistance would also require the bearing of arms beyond an individual's home. *See Parker v. D.C.*, 478 F.3d 370, 383 (D.C. Cir. 2007), *aff'd sub nom. D.C. v. Heller*, 554 U.S. 570; *see also Silveira v. Lockyer*, 328 F.3d 567, 569 (9th Cir. 2003) (Kozinski, J., dissenting from denial of rehearing en banc) ("[T]yranny thrives best where government need not fear the wrath of an armed people."); *Nordyke v. King*, 319 F.3d 1185, 1196 (9th Cir. 2003) (Gould, J., specially concurring) ("The Second Amendment serves at least the following two key purposes: (1) to protect against external threats of invasion; and (2) to guard against the internal threat that our republic could degenerate to tyranny.").[2]

The Seventh Circuit, when considering a challenge to an Illinois law banning public carry of loaded guns, noted that the right "to bear" arms is protected on par with the right "to keep" arms. *Moore v. Madigan*,

[2] The majority in *Nordyke* rejected a Second Amendment challenge on the grounds that the Second Amendment created no individual rights, and thus plaintiffs did not have standing. *See* 319 F.3d at 1191. This view has since been overturned by *Heller* and *McDonald*.

702 F.3d 933, 936 (7th Cir. 2012). Storing firearms in one's home is "keeping," but not "bearing" those arms. The words "to bear" are redundant unless the Second Amendment protects some right beyond merely keeping a gun in one's own home. The Seventh Circuit concluded that the right to bear arms "implies a right to carry a loaded gun outside the home." *Id.* That holding makes sense. As the Seventh Circuit noted, people are usually more, not less, likely to face violent threats on the street than inside their homes. *Id.* at 937.[3]

The D.C. Circuit has considered a case remarkably similar to the one before this Court. In *Wrenn v. District of Columbia*, plaintiffs challenged a D.C. law that limited concealed carry permits "to those showing a 'good reason to fear injury to [their] person or property' or 'any

[3] The Seventh Circuit also reviewed historical English laws, going as far back as the Statute of Northampton in 1328, but the court found nothing supporting Illinois' claim that public carry of guns could be banned. It bears emphasis that British attempts to seize American weapons, presumably allowed under English law, were firmly opposed by the colonists and became a key cause of the Revolutionary War. *See Nordyke v. King*, 563 F.3d 439, 453 (9th Cir. 2009), vacated in light of *McDonald*, 611 F.3d 1015 (9th Cir. 2010) ("[T]he attempt by British soldiers to destroy a cache of American ammunition at Concord, Massachusetts, sparked the battles at Lexington and Concord, which began the Revolutionary War. For the colonists, the importance of the right to bear arms 'was not merely speculative theory. It was the lived experience of the age.'" (quoting Akhil Amar, THE BILL OF RIGHTS 47 (1998)).

other proper reason for carrying a pistol.' *Wrenn*, 864 F.3d at 655 (quoting D.C. Code § 22-4506(a)-(b)). In practice, this meant that all but a small minority of D.C. residents were blocked from carrying guns outside the home. The D.C. Circuit found such a restriction unacceptable:

> "[T]he District's good-reason law bars most people from exercising this right [to carry common arms in self-defense] at all. To be sure, the good-reason law leaves each D.C. resident some remote chance of one day carrying in self-defense, but that isn't the question. The Second Amendment doesn't secure a right to have *some chance* at self-defense.

Id. at 665 (emphasis added). A law that prevents the majority of people from exercising their Second Amendment rights may be struck down, even if the law allows a few citizens to assert their rights.

Contrary to the dissenting opinion on the vacated panel decision, three other Circuit courts have not reached "contrary conclusions" about the scope of Second Amendment protections. *See Young v. Hawaii*, 896 F.3d 1044, 1075 (9th Cir. 2018) (Clifton, J., dissenting). Those circuits *assumed without deciding* that the Second Amendment applies outside the home while upholding restrictive local gun laws. *See Drake v. Filko*, 724 F.3d 426, 431 (3d Cir. 2013) ("Assuming that the Second Amendment individual right to bear arms does apply beyond the home . . . ."); *Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013) ("[W]e merely

assume that the *Heller* right exists outside the home . . . ."); *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 89 n.10 (2d Cir. 2012) ("[T]he plain text of the Second Amendment does not limit the right to bear arms to the home.").

This Court should join its sister circuits that have expressly concluded that Second Amendment protections are not limited to the home. *See, e.g.*, *Wrenn*, 864 F.3d at 665; *Madigan*, 702 F.3d at 936–37.

III. RESTRICTIONS ON SECOND AMENDMENT RIGHTS SHOULD BE CAREFULLY SCRUTINIZED

Because Second Amendment protections extend outside the home, and the Hawaii statute burdens those protections, the Court should move to step two of the analysis.

It bears emphasis that, by its text alone, the Second Amendment right is absolute: "the right to keep and bear arms, shall not be infringed." U.S. Const. amend. II. The Supreme Court has observed that the Second Amendment was designed to "take[] certain policy choices off the table" entirely. *McDonald*, 561 U.S. at 790 (quoting *Heller*, 554 U.S. at 636). "As *Heller* made clear, '[a] statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would

be clearly unconstitutional.'" *Jackson*, 746 F.3d 953, 960 (9th Cir. 2014) (quoting *Heller*, 554 U.S. at 629 (quoting *State v. Reid*, 1 Ala. 612, 616–617 (1840))).

While *Heller* and *McDonald* did not specify whether *strict* scrutiny applies to Second Amendment challenges to firearm restrictions, those cases did expressly reject two lesser forms of scrutiny. First, *Heller* rejected rational-basis review in Second Amendment cases, stating that "the [rational basis] test could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right, be it the freedom of speech, the guarantee against double jeopardy, the right to counsel, or the right to keep and bear arms." *Heller*, 554 U.S. at 629 n.27. Adopting a rational basis test would relegate the right to bear arms to the status of a "second tier" right. *See also Mance*, 896 F.3d at 396 (5th Cir. 2018) (Willett, J., dissenting from denial of rehearing en banc, in an 8-8 split vote) ("The Second Amendment is neither second class, nor second rate, nor second tier."). Legislatures are barred from passing irrational laws restricting liberty in general;[4] when an enumerated right is at stake, the

[4] "[R]ational-basis scrutiny is a mode of analysis we have used when evaluating laws under constitutional commands that are themselves prohibitions on irrational laws." *Heller*, 554 U.S. at 629 n.27.

bar must be set higher.

Second, in direct disagreement with a proposal from Justice Breyer's dissent, the *Heller* majority rejected a "freestanding 'interest-balancing' approach." *Heller*, 554 U.S. at 634. The majority noted that neither First Amendment rights nor any other enumerated rights were subject to such a standard. *Id.* "The 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." *Id.* The Second Amendment "reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs." *United States v. Stevens*, 559 U.S. 460, 470 (2010) (discussing the First Amendment). A freestanding balancing test is improper.[5]

This Court has previously adopted the view that "the level of scrutiny in the Second Amendment context should depend on the nature

[5] The Brief of New Jersey, 10 other States, and the District of Columbia filed in support of the petition for rehearing encourages the en banc court to make this error. Although the brief does not explicitly call for a balancing test, it does frame the issue by saying that "not every State has balanced these interests in the same way." *See* 9th Cir. no. 12-17808, dkt. no. 166, at *6.

of the conduct being regulated and the degree to which the challenged law burdens the right." *United States v. Chovan*, 735 F.3d 1127, 1138 (9th Cir. 2013) (cleaned up). In other words, "the level of scrutiny should depend on (1) how close the law comes to the core of the Second Amendment right, and (2) the severity of the law's burden on the right." *Id.* (cleaned up).

Importantly, when then-Judge Kavanaugh sat on the D.C. Circuit, he penned a dissent explaining that, "[i]n [his] view, *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." *See Heller v. Dist. of Columbia*, 670 F.3d 1244, 1271 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

Although the Supreme Court has not yet clarified the applicable standard of review, there is no question Hawaii Rev. Stat. § 134-9 must be subjected to a much stricter test than rational-basis or balance-of-interests review. And, under any appropriate test, § 134-9 fails to pass constitutional muster.

IV. THE HAWAII STATUTE IS UNCONSTITUTIONAL UNDER STRICT SCRUTINY, INTERMEDIATE SCRUTINY, OR A TEST BASED ON TEXT, HISTORY, AND TRADITION

Hawaii's permitting regime functions nearly as an outright ban on carrying firearms outside the home. It is undisputed that "no one other than a security guard—or someone similarly employed—had ever been issued an open carry license" under the scheme. *Young*, 896 F.3d at 1070. But carrying a firearm outside the home is necessary for self-protection, a core right of the Second Amendment. And so "the law's burden on the right" here is severe. *Chovan*, 735 F.3d at 1138. Such a scheme cannot survive any level of judicial review stricter than a rational basis test.

A. The statute fails strict and intermediate scrutiny because it functions as a virtual ban on carrying firearms outside the home.

Even under intermediate scrutiny—which *Amici* contend fails to adequately protect the right to keep and bear arms[6]—§ 134-9 should be struck down. This Court has explained that, under intermediate scrutiny, a law is unconstitutional unless the law's defenders can show "(1) the government's stated objective to be significant, substantial, or

[6] As the right to keep and bear arms is enumerated and fundamental, *Amici* would support either applying strict scrutiny in this case, or else rejecting the "tiers of scrutiny" framework altogether in favor of interpreting the Second Amendment "based on text, history, and tradition," with no balancing test attached. *Heller*, 670 F.3d at 1271 (Kavanaugh, J., dissenting).

important; and (2) a reasonable fit between the challenged regulation and the asserted objective." *Chovan*, 735 F.3d at 1139. Admittedly, Hawaii's objective of securing public safety is "significant, substantial, or important." *Id.* But by adopting what is in effect blanket ban on carrying of firearms outside the home, Hawaii has failed to seek any "reasonable fit" between its regulatory structure and its objective of public safety.

To shore up that weakness, the *Amicus* brief of New Jersey, *et al.*, (9th Cir. no. 12-17808, dkt. no. 166), in support of the petition for rehearing en banc, cites to various academic studies suggesting that bans on carrying guns decrease crime rates. *See, e.g.*, John Donohue, *et al., Right-to-Carry Laws & Violent Crime: A Comprehensive Assessment Using Panel Data, the LASSO, & A State-Level Synthetic Controls Analysis* 63 (Nat'l Bureau of Econ. Research, Working Paper No. 23510, Jan. 2018).

But these studies do not demonstrate that Hawaii's permitting scheme is proper under intermediate scrutiny, for two reasons. First, other studies have come to the opposite conclusion—states that allow carrying a weapon with no permit at all have *lower* rates of violent crime. *See, e.g.*, *Concealed Carry Permit Holders Across the United States* (July

16, 2015), Crime Prevention Research Center, available at https://crimeresearch.org/wp-content/uploads/2015/07/2015-Report-from-the-Crime-Prevention-Research-Center-Final.pdf; *see also* John R. Lott, *Concealed Carry Permit Holders Across the United States* (July 18, 2017), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3004915. Thus, the safety benefits of Hawaii's law are ambiguous or marginal. And second, even if public safety were marginally improved by banning the public carry of weapons (which *Amici* do not concede), a virtual ban would still not qualify as a "reasonable fit" under an intermediate balancing test.

Thus, the benefits of § 134-9 are, at best, marginal or ambiguous. And the costs are high because § 134-9 strikes at the heart of a right the Second Amendment guarantees, self-protection. And so § 134-9 fails intermediate scrutiny. It goes without saying that a law unable to withstand intermediate scrutiny is doomed under a strict scrutiny test.

B. The Hawaii statute cannot survive when examined in light of text, history, and tradition

When on the D.C. Circuit, it was then-Judge Kavanaugh's view 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."

See Heller, 670 F.3d at 1271 (Kavanaugh, J., dissenting); *see also* Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self–Defense: An Analytical Framework and a Research Agenda,* 56 UCLA L. REV. 1443, 1463 (2009). When considered against text, history, and tradition, it is clear Hawaii's statute should fail.

The Seventh Circuit correctly recognized that the text of the Second Amendment "implies a right to carry a loaded gun outside the home." *Madigan*, 702 F.3d at 936. That alone is enough to doom the Hawaii statute, which functions as a virtual ban on carrying a gun outside the home.

The Supreme Court has made "it clear that [the right to bear arms for self-defense] is deeply rooted in this Nation's history and tradition." *McDonald*, 561 U.S. at 768 (internal quotation marks omitted). And so Hawaii's permitting scheme cannot be saved by any tradition or its "historical pedigree." *See Amicus* brief of New Jersey, *et al.*, 9th Cir. no. 12-17808, dkt. no. 166, at *10.

While *Heller* did identify certain "longstanding" firearms restrictions as "presumptively lawful," the examples given—*see* 554 U.S. at 626–27 and n.26 (banning "felons and the mentally ill" from gun

possession, restricting carrying in "schools and government buildings," and "imposing conditions and qualifications on the commercial sale of arms")—do not come close to the level of regulation promulgated under Hawaii's permitting scheme. It is true that the *Heller* Court labelled this list "non-exhaustive," *id.* at 627 n. 26, but that does not mean that *any* "longstanding" firearms restriction is allowed under the Second Amendment. "A longstanding, widespread practice is not immune from constitutional scrutiny." *Payton v. New York*, 445 U.S. 573, 600 (1980).

Many of the nineteenth and twentieth-century cases cited by plaintiffs, involving unsuccessful challenges to various state regulations, are not relevant for a very simple reason: Prior to *McDonald* in 2010, it was not clear that the Second Amendment applied to the States at all. The fact that States restricted—in some cases sharply restricted[7]—the right to bear arms prior to incorporation is not a valid excuse for States to continue doing so now that *McDonald* has conclusively settled the issue of incorporation.

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[7] The panel opinion correctly noted that, after the Fourteenth Amendment was ratified but before it had been used to incorporate much of the Bill of Rights, many Southern states passed harsh gun control measures designed to disarm freed African-Americans, and these laws were generally upheld. *Young*, 896 F.3d at 1059.

At bottom, § 134-9 cannot survive strict or intermediate scrutiny. And its broad restrictions cannot survive in light of a proper understanding of text, history, and tradition. Thus, it is unconstitutional under the Second Amendment.

CONCLUSION

The Court should vacate the district court's dismissal of plaintiff's claims and remand with an explanation that the Second Amendment protects the right to bear arms outside the home.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,478 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word Century Schoolbook 14-point font.

Date: June 4, 2020

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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.

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Date: June 4, 2020

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