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.

Appeal from a Judgment of United States District Court
For the District of Hawaii
Civ. No. 12-00336-HG-BMK
United States District Court Judge Helen Gillmor

Appellant's Supplemental Brief

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I. INTRODUCTION

The Supreme Court has squarely addressed, and held, that the Second Amendment bestows an individual right to bear arms, including a handgun. *District of Columbia v. Heller*, 554 U.S. 570 (2008). In *McDonald v. City of Chicago*, 561 U.S. 742 (2010), the Court held that the Second Amendment is fully applicable to the States via the Due Process Clause of the Fourteenth Amendment. *See also Caetano v. Massachusetts*, 136 S.Ct. 1027 (2016) (summarily reversing a decision of the Massachusetts Supreme Judicial Court under *Heller* on grounds that it "contradicts this Court's precedent"). Most recently, in *NYSRPA v. NYC*, 140 S.Ct. 1525 (2020), a majority of the Court vacated as moot a decision upholding a New York City ordinance that restricted the scope of Second Amendment, with four Justices of the Court (three dissenters lead by Justice Alito and Justice Kavanaugh in concurrence), writing separately to explain why lower court's Second Amendment analysis was error.

In *Peruta v. Cty. of San Diego*, 824 F.3d 919 (9th Cir. 2016) (en banc), this Court held that, the Second Amendment does not protect a right to carry a firearm concealed, but did "not reach the question whether the Second Amendment protects some ability to carry firearms in public, such as open carry. That question was left open by the Supreme Court in *Heller*, and we have no need answer it here." *Id.* at 927. That reserved question is squarely presented here. George Young ("Young")

seeks an injunction of the applicable state law and regulations and immediate issuance of a carry permit either openly or concealed. *See* ER 5.

Here, plaintiff contends both that (1) the Hawaii carry permit statute, H.R.S. § 134-9, is facially unconstitutional and (2) that the County of Hawaii, which administers the Hawaii statute for that County, violates Young's Second Amendment rights by applying the Hawaii permit statute to effectively bar all carry for self-defense outside the home, open or concealed. The panel held that section 134-9's limitations on the issuance of open carry licenses violate the Second Amendment. *Young v. Hawaii*, 896 F.3d 1044, 1074 (9th Cir. 2018). That ruling was correct and should be affirmed by this Court *en banc*. Stated simply, section 134-9 is unconstitutional because its heightened need requirement destroys the ordinarily situated citizen's right to bear arms, gives the County Chief of Police unbridled discretion in issuing permits and violates due process. The County of Hawaii's application of state law is unconstitutional because it operates as a *de facto* ban on firearm carry, gives the Chief unbridled discretion in issuing permits, and violates due process. For the reasons discussed below, this Court should find that Young's Second Amendment and due process rights have been violated.

II. STANDARD OF REVIEW

The trial court dismissed Young's complaint on a Rule 12(b)(6) Motion. This Court reviews a 12(b)(6) dismissal by "[c]onstruing the complaint in the light most

favorable to the plaintiff, [to] determine whether it alleges enough facts 'to state a claim to relief that is plausible on its face.'" *See Johnson v. Fed. Home Loan Mortg. Corp*., 793 F.3d 1005, 1007 (9th Cir. 2015) (citations omitted). Young proceeded *pro se* in the trial court and is entitled to a liberal construction of his Complaint "however inartfully pleaded, [and] must be held to less stringent standards than formal pleadings drafted by lawyers." *Erikson v. Pardus*, 551 U.S. 89, 94 (2007) (internal quotation omitted).

III. ARGUMENT

A. Hawaii's Statute Facially Violates the Second Amendment

As detailed by the panel, on its face, section 134-9 imposes a "may issue" system on the issuance of an open carry permit, providing that the county chief of police "may" issue an open carry permit "'[w]here the urgency or the need has been sufficiently indicated" and the applicant "is engaged in the protection of life and property.'" (896 F.3d at 1048). Concealed carry is reserved for those that can show an "exceptional case". *See* H.R.S. § 134-9. This Court should find section 134-9 facially unconstitutional because it necessarily bans the average law-abiding citizen from exercising the Second Amendment's core right to self-defense when outside the home.

First, section 134-9 itself violates the Second Amendment because Young has a right under the Second Amendment that is effectively denied by the "may issue"

facial restrictions imposed by section 134-9. The obvious first premise of this claim is that the Second Amendment extends outside the home, the question left unresolved by *Peruta*. *Heller* makes clear that the Second Amendment applies outside the home because the core right embodied by the Second Amendment is the right of self-defense, which applies inside the home as well as outside the home. The Court in *Heller* thus explained that "self-defense" is "the central component of the right," 554 U.S. at 599; that the "right of self-defense" is "central to the Second Amendment right," *id*. at 628; and that the Second Amendment guarantees a right to use firearms "for the core lawful purpose of self-defense," *id*. at 630. In *McDonald*, the Court reaffirmed that "individual self-defense is 'the central component' of the Second Amendment right" and that the "'inherent right of self-defense [is] central to the Second Amendment right.'" *McDonald*, 561 U.S. at 767 (citations omitted).

In short, the "core" right embodied by the Second Amendment is not restricted to the home. Rather, "[t]he core or central component of the Second Amendment right to keep and bear arms protects individual self-defense … by law-abiding, responsible citizens" regardless of where they may be located in or outside the home. *Wrenn v. District of Columbia*, 864 F.3d 650, 657 (D.C. Cir. 2017) (internal citation and quotation omitted). "At the Second Amendment's core lies the right of responsible citizens to carry firearms for personal self-defense beyond the home..." *Id.* at 667. After all, self-defense is a purpose, not a place; and the plain text of the

Second Amendment shows "that the rights to keep and bear arms are on equal footing." *Id.* at 663. "Thus, the Amendment's core generally covers carrying in public for self-defense." *Id*. at 659.

As the Seventh Circuit has held, "[t]he Supreme Court has decided that the [Second Amendment] confers a right to bear arms for self-defense, which is as important outside the home as inside." *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012). Thus, "[t]o confine the right to be armed to the home is to divorce the Second Amendment from the right of self-defense described in *Heller* and *McDonald*."[1] *Moore*, 702 F.3d at 937. "The Illinois Supreme Court has agreed with the reasoning of *Moore* and subsequently held that the Second Amendment applies outside the home. *See People v. Aguilar*, 2 N.E.3d 321, 327 (Ill. 2013) ('[I]f *Heller* means what it says, and 'individual self-defense' is indeed 'the central component' of the second amendment right to keep and bear arms, then it would make little sense to restrict that right to the home, as 'confrontations are not limited to the home.'" *Young*, 896 F.3d at 1052 n.4. *See also Norman v. State*, 215 So. 3d 18, 37 (Fla. 2017) (upholding Florida's open carry ban, but only because the state provides

[1] "*See Bridgeville Rifle & Pistol Club, Ltd. v. Small*, 176 A.3d 632, 651 n.100 (Del. 2017) ('[T]he *Heller* Court's statement that 'the need for defense of self, family, and property' is '*most* acute' in the home suggests that the need must be *less* acute elsewhere—but nonetheless present.'") (quoting *Heller*, 554 U.S. at 628) (internal citation omitted)." *Young*, 896 F. 3d at 1053 n.5.

concealed carry permits on a "shall issue" basis and thus provides an avenue to exercise the core right of self-defense outside the home).

Since the right extends outside the home, the next question posed is whether the State is free to restrict the exercise of the right by strictly conditioning carry permits to persons in the manner done by section 134-9, *viz.*, providing that carry permits "may issue" only upon a showing of special need. Four circuits have sustained such special need statutory schemes. *See Gould v. Morgan*, 907 F.3d 659 (1st Cir. 2018), pet. for cert. pending sub. nom. *Gould v. Lipson*, No.18-1272, (filed U.S. April 1, 2019) (Massachusetts); *Kachalsky v. Cty. of Westchester*, 701 F.3d 81 (2d Cir. 2012) (N.Y.); *Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013) (N.J.); *Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013) (Maryland). In each of these decisions, the court of appeals employed "intermediate scrutiny" to sustain the facial constitutionality of the statute. Those courts justified their holding on grounds that the "core" of the Second Amendment applied only to the home even as those courts likewise freely concede or assume that the right exists outside the home.

In contrast, the D.C. Circuit in *Wrenn* squarely held that such special need schemes are unconstitutional in striking down D.C's "may issue" statute, explaining that "the legally decisive fact" was that "the good-reason law is necessarily a total ban on most D.C. residents' right to carry a gun in the face of ordinary self-defense needs, where these residents are no more dangerous with a gun than the next law-

abiding citizen." *Wrenn*, 864 F.3d at 655. On that premise, the court found no need to engage in any "tiers of scrutiny" approach, holding that "the Second Amendment must enable armed self-defense by commonly situated citizens: those who possess common levels of need and pose only common levels of risk." *Id*. at 664. As the court explained, "[i]t's appropriate to strike down such 'total ban[s]' without bothering to apply tiers of scrutiny because no such analysis could ever sanction obliterations of an enumerated constitutional right." *Id*. at 665.

This Court should follow *Wrenn* and expressly hold that tiers of scrutiny are not appropriate where the state law at issue effectively acts as a ban on the typical citizen's enjoyment of a constitutional right. As *Wrenn* and *Moore* make clear, that conclusion is compelled not only by *Heller* and *McDonald*, but by the text, history, and tradition of the Second Amendment. *See Heller v. District of Columbia*, 670 F.3d 1244, 1269 (D.C. Cir. 2016) (Kavanaugh, J., dissenting) ("In my 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 also NYSRPA*, 140 S.Ct. at 1540 (Alito, J., dissenting) ("We based this decision [in *Heller*] on the scope of the right to keep and bear arms as it was understood at the time of the adoption of the Second Amendment."); *NYSRPA*, 140 S.Ct. at 1527 (Kavanaugh, J., concurring) ("I also agree with Justice Alito's general analysis of *Heller* and *McDonald*.").

Indeed, text, history, and tradition lead to only one result. The substance of the Second Amendment right reposes in the twin verbs of the operative clause: "the right of the people to **keep** and **bear** Arms, shall not be infringed." U.S. CONST. amend. II (emphasis added). This turn-of-phrase is not, the Supreme Court has held, "some sort of term of art" with a "unitary meaning," but is rather a conjoining of two related guarantees. *Heller*, 554 U.S. at 591. Limiting the Second Amendment to the home would thus be flatly contrary to its text, for it would require either reading "the right to keep and bear arms" as a single, unitary right in the way *Heller* expressly forbids, or striking the word "bear" from the provision altogether, an equally untenable result. As stated by the panel and as *Heller* holds, "[t]o 'bear' … means to 'wear' or to 'carry ... 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.'" *Young*, 896 F.3d at 1052, quoting *Heller*, 554 U.S. at 584. *See also Moore*, 702 F.3d at 936 ("To speak of 'bearing' arms within one's home would at all times have been an awkward usage.").

The text also recognizes that the right is held by "the people." That language includes, as *Heller* states, all "law-abiding, responsible" people, *Heller*, 554 U.S. at 635, not simply a subclass of the "people" who can persuade a law enforcement agency of "the urgency" of a "need" or where "the need has been sufficiently indicated" – the arbitrary prerequisite showings demanded by section 134-9. *See*

Wrenn, 864 F.3d at 664 ("the Second Amendment must enable armed self-defense by commonly situated citizens: those who possess common levels of need and pose only common levels of risk."). Yet under the Attorney General's Opinion, open carry is reserved for those who can show "a need for protection that significantly exceeds that held by an ordinary law-abiding citizen."[2] This Court would not tolerate a statute that limited the right to speak, to vote, to have an abortion, or to exercise any other fundamental right to those who can demonstrate to the police that they have a special "need" to exercise the right. The Second Amendment is not subject to any such "freestanding 'interest-balancing' approach." *Heller*, 554 U.S. at 634. *See also McDonald*, 561 U.S. at 785 ("In *Heller*, however, we expressly rejected the argument that the scope of the Second Amendment right should be determined by judicial interest balancing …."). And, as the panel explained, nothing in the history or tradition of the Second Amendment would permit a state to limit the right only upon a showing of "need." *Young*, 896 F.3d at 1053-57.

Wrenn and the *Young* panel engaged in the historical analysis required by *Heller*. The First, Second, Third, and Fourth Circuits do not disagree with any of that analysis. Instead, each just refused to "engag[e] in a round of full-blown historical analysis," *Wrenn*, at 431, and rather either conceded, *Gould*, 907 F.3d at

[2] State of Haw., Dep't of the Att'y Gen., Opinion Letter No. 18-1, Availability of Unconcealed-Carry Licenses at 2 (Sept. 11, 2018); https://ag.hawaii.gov/wp-content/uploads/2018/09/AG-Opinion-No.-18-1.pdf.

670 ("we view *Heller* as implying that the right to carry a firearm for self-defense is not limited to the home"), or "merely assume[d] that the *Heller* right exists outside the home," *Woollard*, 712 F.3d at 876; *Kachalsky*, 701 F.3d at 89. Each court then proceeded to determine -- through little more than judicial *ipse dixit* -- that the Second Amendment's "core" is limited to "self-defense in the home." *Id*. at 93; *see also Drake*, 724 F.3d at 436; *Gould*, 907 F.3d at 671-72. Yet, as explained, limiting the "core" right to the home is legally and logically indefensible. *Heller* itself defined the "core" of the Second Amendment as being "the core lawful purpose of self-defense" without any "home" qualifier. *Heller*, 554 U.S. at 630. *McDonald* likewise made clear that the right is one of self-defense, standing alone, stating "[t]wo years ago, in [*Heller*], we held that the Second Amendment protects the right to keep **and bear** arms for the purpose of self-defense, **and** we struck down a District of Columbia law that banned the possession of handguns in the home.") (561 U.S. at 749-50) (emphasis added). *Heller* and *McDonald* cannot be fairly read as limiting the right of self-defense to the home.

More fundamentally, in limiting the "core" to the home, none of these courts consulted the text, history and tradition of the Second Amendment as *Heller* demands. Thus, these courts simply had no basis for concluding that the right to carry a handgun outside the home for self-defense is not protected by the Second Amendment in equal measure with the right "to use arms in defense of hearth and

home." *Heller*, 554 U.S. at 592. *See Wrenn*, 864 F.3d at 663 (assuming that the right applies outside the home "excused [these] courts from sifting through sources pointing to the equal importance of the right to bear." The repetition of this error by each of these courts does not transform it into sound legal reasoning.

Had these circuits fairly engaged in the textual and historical analysis required by *Heller*, they would have reached the same conclusion as the panel and the two circuits that have seriously grappled with the Second Amendment's text, history, and tradition. *See Young*, 896 F.3d at 1055-1067*; Wrenn*, 864 F.3d at 661; *Moore*, 702 F.3d at 937, 942. As shown above, these sources of authority leave no doubt that this constitutional guarantee extends outside the home. The right to bear arms "for the core lawful purpose of self-defense," *Heller*, 554 U.S. at 630, can be no further from the "core" of the Second Amendment than the right to keep them.

Section 134-9 is unconstitutional. Even under the Attorney General's attempt to rewrite the law, concealed carry is still limited to those that can show an exceptional case and open carry is still reserved for those who can show "a need for protection that significantly exceeds that held by an ordinary law-abiding citizen".[3] Hawaii law is "necessarily a total ban on most…residents' right to carry a gun in the face of ordinary self-defense needs, where these residents are no more dangerous

[3] State of Haw., Dep't of the Att'y Gen., Opinion Letter No. 18-1, Availability of Unconcealed-Carry Licenses (Sept. 11, 2018); https://ag.hawaii.gov/wp-content/uploads/2018/09/AG-Opinion-No.-18-1.pdf.

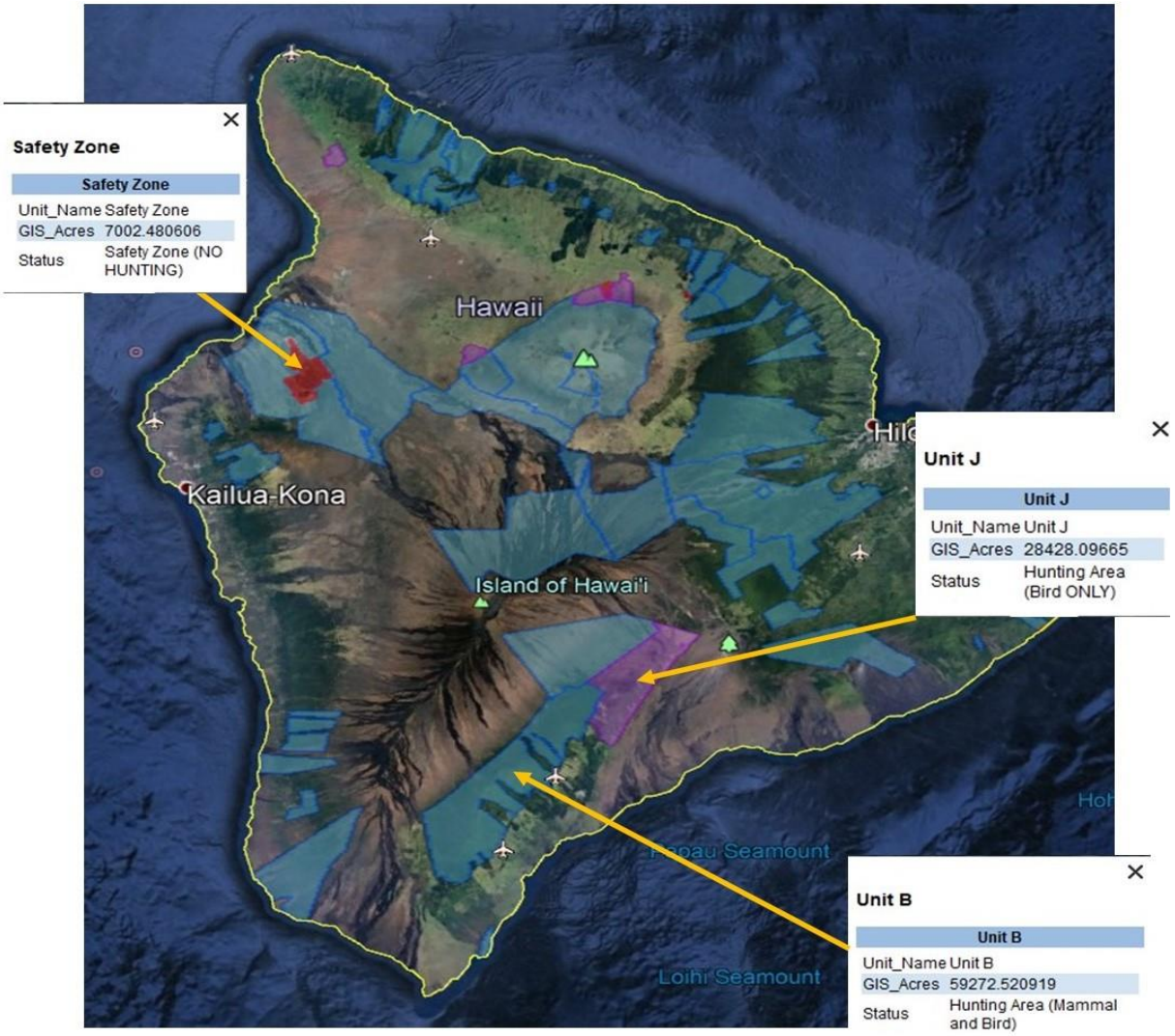
with a gun than the next law-abiding citizen". *Wrenn*, 864 F.3d at 666. This Court should adopt the D.C. Court of Appeals' holding in *Wrenn* and find that Hawaii law which "by design" "destroys the ordinarily situated citizen's right to bear arms" is categorically unconstitutional. *Id.* If this Court does not do so, it should strike the County's application of State law and any other applicable regulations as unconstitutional because they impose a complete ban on carry for self-defense.

B. The County of Hawaii Imposes a Complete Ban

Hawaii County, Hawaii, is a sprawling, rural, 4,028.4 square mile county located in the southeast corner of the Hawaiian Archipelago. According to the State of Hawaii, Hawaii County has, "3,942 square miles of rural land where 70,300 people reside [with] an average of 18 people ... in every square mile"[4], and "87 square miles of urban land where 114,800 people reside, [with] an average of 1,300 people live in every square mile."[5] Thus, Hawaii County is 98% rural. Hunting on public land is allowed on much of the island.

[4] As a comparison, New Jersey has 1,195.5 people per square mile (*Drake*). Maryland (*Woollard*) has 594. New York (*Kachalsky*) has 421. Boston has 14,692 (*Gould*). *See* https://worldpopulationreview.com/ (accessed 5/23/2020).

[5] *See* Urban and Rural Areas in the State of Hawaii, by County: 2010, Hawaii State Data Center: http://files.hawaii.gov/dbedt/census/Census_2010/Other/2010urban_rural_report.pdf (accessed 5/4/2020).



[6]

Due to the rural nature of Hawaii Island, cell coverage in many areas "is spotty or nonexistent." *See* DktEntry 181-2 at 4; Amicus Brief of Hawaii Firearms Coalition; Dec. of Retired County of Hawaii Police Officer Thomas E. Fratinardo.

[6] https://dlnr.hawaii.gov/recreation/files/2016/07/HuntingAreas_Hawaii.kmz (accessed 6/3/2020). The light blue areas allow bird and mammal hunting. The light pink areas allow bird hunting only and the red is a safety zone (no hunting). This is an official map from the State of Hawaii, Division of Forestry and Wildlife and is judicially noticeable as such. *See* Fed. R. Evid. 201.

"Often, citizens in need of police protection are unable to contact the police when help is needed." *Id.* Police manpower is limited compared to urban areas which equates to long response times. *Id* at *1; Dec. of Retired County of Hawaii Police Officer Donald Watson. E.g. "the 700 square miles of Ka'u may have only 4 officers on patrol at any given time." *Id.* North Kohala often only has two officers on patrol for 123 square miles. *Id* at *2. Emergency response times are "well over 30 minutes." *Id.* Some recreation areas are only accessible by four-wheel drive. *Id.* Dec. of Retired Police Officer Thomas E. Fratinardo. Cell phone coverage is often nonexistent. *Id.* Even if there is cellphone coverage it can take police "hours" to respond to a call in these areas. *Id*. The unique rural nature of Hawaii distinguishes it from other jurisdictions that restrict carry.

Other may-issue jurisdictions acknowledge there is a difference between rural and urban areas. "In California, open carry of a loaded handgun is permitted with a license in rural counties, but prohibited elsewhere. *See* Cal. Penal Code §§ 25850, 26150(b)(2)." *Drake*, 724 F.3d at 440-41 (Hardiman, J., dissenting).[7] Similarly, in *Gould*, the focus was on "densely populated urban areas like Boston and Brookline." *Gould*, 907 F.3d at 672. Whatever government interest that may

[7] And in practice California's rural counties permissively issue carry permits like in "shall issue" jurisdictions. *See* DktEntry 181-1 at 27; Amicus Brief of Hawaii Firearms Coalition.

exist in "a geographically small but heavily populated urban area," *Wrenn*, 864 F.3d at 669, (Henderson, J., dissenting), that interest simply does not exist in a rural area such as Hawaii County.

Yet, the County takes none of this into account, but rather imposes a complete ban on all carry (open or concealed) for self-defense. Specifically, the County implements state law by a series of regulations.[8] The "rules and regulations are promulgated by the Chief of Police for the granting of authorization for the carrying of weapons as provided by section 134-9, Hawaii Revised Statutes."[9] It limits open carry permits to "Licensed Employees" which it defines as "any person employed by a private detective or guard agency." *Id.* at *4, *11. Furthermore, open carry is proper only when the license-holder is "in the actual performance of his duties or within the area of his assignment." *Id.* at *10. Thus, open carry is banned for non-security guards by written regulation of the County.

Since 2000, not a single private citizen in the County of Hawaii has been authorized by section 134-9 to carry a handgun. *See Young*, at 1072. ("Besides, official (and thus judicially noticeable) reports from the State's Attorney General

[8] Young also challenges any applicable County regulations related to the carry permit either written or otherwise enforced against applicants for carry permits. Throughout the brief, when Young refers to the application of state law, that includes all applicable regulations that may impact Young's right to carry.

[9] *See* Police Dep't of Cty. Of Haw., Rules and Regulations Governing the Issuance of Licenses 10 (Oct. 22, 1997) at *1.

confirm what the County concedes: at least since 2000, no concealed carry license has been granted by the County"). At oral argument, County Counsel openly conceded that the County has not issued any handgun carry permits, either open or concealed carry, to a private citizen. Oral Arg. at 13:18-13:29, 16:30-17:28. Since the last round of briefing, the State has reported that the County **still** has not issued a single permit.[10]

In light of this ground reality, the State Attorney General's September 2018 Opinion that carry permits are available to victims of stalking and domestic violence, attorneys representing threatening clients, and persons responsible for carrying large amounts of cash (AG Op. at 8-9) simply cannot be taken seriously. Attorney General opinions "are not binding" as a matter of Hawaii law, *Kepo'o v. Watson*, 87 Haw. 91, 99 n.9 (1998), and the Supreme Court has likewise "warn[ed] against accepting as 'authoritative' an Attorney General's interpretation of state law." *Stenberg v. Carhart*, 530 U.S. 914, 940 (2000). That is especially true where, as here, the proffered interpretation was issued for the obvious purpose of influencing the

[10] *See* https://ag.hawaii.gov/cpja/files/2020/03/Firearm-Registrations-in-Hawaii-2019.pdf ("A total of nine private citizens applied for a carry license in 2019 … [and] all nine applicants were denied by the respective county's chief of police" (visited 6/3/2020) and https://ag.hawaii.gov/cpja/files/2019/05/Firearm-Registrations-in-Hawaii-2018.pdf ("A total of 31 private citizens applied for a carry license in 2018 … [and] all applicants were denied by the respective county's police chief") (last visited 6/3/2020).

outcome of this very litigation. *Presidio Historical Ass'n. v. Presidio Trust*, 811 F.3d 1154, 1166 (9th Cir. 2016) (rejecting any "special deference" to "a convenient litigating position" where it was proffered "the first time on appeal").

Indeed, not even the Attorney General can deny (AG Opinion at 9), that section 134-9 provides that the County "*may*" issue a permit and thus confers "discretion." The complaint alleges that the statute "requires as a prerequisite … a person [be] a member of a law enforcement agency or employed by a licensed private security company…" to qualify for a permit. *See* Complaint at 16. And the facts show that the County has used its discretion to deny all permits to non-security guards and the Attorney General points to absolutely nothing in the Hawaii statutory scheme that would prevent or even inhibit that result. There is, for example, no "administrative or judicial review of any license denial." *Young*, 896 F.3d at 1072. The County is thus free to ignore (and has ignored) the Attorney General's 2018 Opinion and the statutory text on which the Attorney General purports to rely. As discussed below, the presence of such unbridled discretion is, itself, reason to strike down this statutory scheme.

The difference between the County's scheme and others is made apparent in a GAO study. In 2011, (the year Young applied for a handgun carry permit) there were 251,000 active permits in Massachusetts (*Gould*), 32,000 in New Jersey (*Drake*) and 12,000 in Maryland (*Woollard*). For example, in Maryland, the statute

provides that the licensing authority (the State Police) "shall issue" a carry permit where the applicant satisfies all the requirements and provides for full judicial review. *See* MD Code Public Safety §5-306. In all of Hawaii, by contrast, the Counties "may" issue such permits in their discretion and there were zero permits issued in 2011 and there have been zero permits issued since that time.[11] For these reasons, this Court should follow the Seventh Circuit's reasoning in *Moore* and strike the County's application of Hawaii law for what it is: a complete ban on handgun carry. That holding in *Moore* was "not based on degrees of scrutiny, but on Illinois's failure to justify the most restrictive gun law of any of the 50 states." *Moore*, 702 F.3d at 941. Similarly, this Court should find the County's application of Hawaii law imposes such a severe restriction that "'it amounts to a destruction of the right," and thus is unconstitutional "'[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights.'" *Jackson v. City & Cty. of S.F.*, 746 F.3d 953, 961 (9th Cir. 2014), quoting *Heller*, 554 U.S. at 629. *See Young*, 896 F.3d at 1068.

As the panel found, "the reasoning of the Second, Third, and Fourth Circuits suggests that they too would invalidate a firearms carry regime as restrictive as Hawaii's." *Young,* 896 F.3d at 1072. Most recently, the First Circuit in *Gould*

[11] *See* States' Laws and Requirements for Concealed Carry Permits Vary across the Nation GAO-12-717; https://www.gao.gov/assets/600/592552.pdf.

distinguished this case, noting that "[n]or do the Boston and Brookline policies result in a total ban on the right to public carriage of firearms" and that the Massachusetts law, unlike the Hawaii law, "did not disguise an effective ban on the public carry of firearms." *Id*. at 674. "The New York gun law upheld in *Kachalsky*, although one of the nation's most restrictive such laws . . . is less restrictive than" Hawaii's law. *Moore*, 702 F.3d at 941 (citation omitted).

C. Hawaii Law and its Application by the County is Unconstitutional Because the Chief Has Unbridled Discretion

This Circuit is "guided by First Amendment principles" to determine Second Amendment challenges. *Jackson*, 746 F.3d at 961. It is well settled that "an ordinance which . . . makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint." *Epona, LLC v. Cty. of Ventura*, 876 F.3d 1214, 1222 (9th Cir. 2017); *See also Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 772 (1988). Here, the Chief has unbridled discretion to issue or deny a handgun carry permit. The Police Dep't of Cty. Of Haw., Rules and Regulations Governing the Issuance of Licenses (Oct. 22, 1997), do not offer any criteria to determine when the Chief should issue a citizen carry permit beyond requiring an applicant not being statutorily disqualified. Beyond that it just states "[n]o license shall be issued unless ***the Chief of Police is satisfied that the applicant***

is a suitable person to be licensed." *Id.* at 6 (emphasis added). That is the epitome of unbridled discretion and Young alleged as much in his complaint.

"H.R.S. 134-9 provides…uncontrolled and unlimited discretionary authority". Complaint at 13. These criteria are without...definitive standards or other controlling guidelines governing the action of the Chief of Police." Complaint at 16. The state has delegated to him "uncontrolled discretion" to evaluate handgun carry applications. Complaint at 17. "[T]he statute is an unlawful delegation of 'judicial authority' to 'Defendant Kubojiri' because it provides him "uncontrolled discretion" to issue a permit." Complaint at 18. "Total and complete, undisciplined, uncontrolled, indefinitive discretionary authority has been unconstitutionally delegated through a state legislative act, to be administered by a non-elected, non-constitutional, non-judicial person." Complaint at 20-21. "[N]o court has held that a standardless policy passes muster." *OSU Student All. v. Ray*, 699 F.3d 1053, 1065 (9th Cir. 2012).

Kaahumanu v. Hawaii involved a First Amendment challenge to a Hawaii licensing scheme regarding weddings on public beaches where officials had unbridled discretion to revoke permits and add to their terms. This Court found that "[a] standardless discretion also makes it difficult to detect, and protect the public from, unconstitutional viewpoint discrimination by the licensing official" and it is thus unconstitutional. *Kaahumanu v. Hawaii*, 682 F.3d 789, 807 (9th Cir. 2012).

"Adequate guiding standards are not provided here, given that DLNR may revoke a permit 'at anytime' 'for any reason,' and 'in the sole and absolute discretion of the Chairperson.'" *Id.*

Similarly, Hawaii's firearm carry licensing scheme provides the Chief with unbridled discretion to evaluate handgun carry permits. The Chief is vested with sole discretion to issue or deny a permit and an applicant, aggrieved by denial of the application, has no recourse. Again, there is no "administrative or judicial review of any license denial." *Young*, 896 F.3d at 1072. Thus, the Chief's decision is final. That is unconstitutional for the same reasoning as *Kaahumanu*.

Using similar reasoning, Rhode Island's Supreme Court "will not countenance any system of permitting under the Firearms Act that would be committed to the unfettered discretion of an executive agency." *Gadomski v. Tavares*, 113 A.3d 387, 390 (R.I. 2015) (quotation omitted). The Court held that "[t]o prevent such an occurrence, we opined that 'certain procedural steps must be employed to allow a meaningful review' of licensing decisions by this Court." *Id*. at 390 (quoting *Mosby v. Devine*, 851 A.2d 1031, 1051 (R.I. 2004)). "One does not need to be an expert in American history to understand the fault inherent in a gun-permitting system that would allow a licensing body carte blanche authority to decide who is worthy of carrying a concealed weapon." *Mosby*, 851 A.2d at 1050.

See also People v. Zerillo, 219 Mich. 635, 642 (1922) (striking down a Michigan statute prohibiting aliens from possessing revolvers without their Sheriff's consent).

The unbridled discretion the Chief possesses distinguishes the licensing scheme from the four "good cause" jurisdictions which have been upheld by other Circuits. "The Third Circuit observed that New Jersey's regime provided 'clear and specific' standards, 'accompanied by specific procedures that provide 'safeguards against arbitrary official action.'" *Drake*, 724 F.3d at 435 (footnote omitted). In New York "there is an established standard for determining whether an applicant has demonstrated proper cause." *Kachalsky*, 701 F.3d at 92. In *Woollard*, the Fourth Circuit agreed with the trial court in "reject[ing] Woollard's assertion that Maryland's permitting scheme vests officials with unbridled discretion as regards its application." *Woollard*, 712 F.3d at 873. Likewise, in *Gould*, the Massachusetts regime "'provided for administrative or judicial review of any license denial … a safeguard conspicuously absent from Hawaii's laws.'" *Gould* 907 F.3d at 674. Unlike all five Circuits that have evaluated good cause licensing schemes, section 134-9 delegates exclusive authority to the County to issue permits exclusively based on unbridled discretion without providing for any right of judicial review. The County, in turn, has exploited that discretion to give the Chief plenary and unbridled sole discretion to determine whether a person may be issued a carry permit. Constitutional rights simply cannot be treated this way.

This discretion alone is unconstitutional and distinguishes the licensing scheme from all the other Circuits. "A right is a check on state power, a check that loses its force when it exists at the mercy of the state. Government whim is the last refuge of a precarious right." *Fisher v. Kealoha*, 855 F.3d 1067, 1072 (9th Cir. 2017) (Kozinski, J., concurring). In *Kaahumanu*, this Court did not apply scrutiny analysis and invalidated DLNR's unbridled discretion as unconstitutional per se. *Kaahumanu*, 682 F.3d at 807. This Court should do the same here and strike the grant of unbridled discretion to the Chief without the need to apply levels of scrutiny.

D. Hawaii Law and its Application by the County is Unconstitutional Under Strict Scrutiny

If this Court doesn't apply a categorical approach, it should apply strict scrutiny. Post-*Heller*, the Ninth Circuit has developed a body of case law which supports the application of strict scrutiny in this matter if heightened scrutiny applies. "Indeed, in *Chovan*, we applied 'intermediate' rather than 'strict' judicial scrutiny in part because section 922(g)(9)'s 'burden' on Second Amendment rights was 'lightened' by those mechanisms." *Fisher*, 855 F.3d at 1071. Similarly, in *Jackson*, this Court only applied intermediate scrutiny because the law at issue did "not substantially prevent law-abiding citizens from using firearms to defend themselves in the home." *Jackson*, 746 F.3d at 964.

Here, by contrast, state law and its application by the County does not "leave open alternative channels for self-defense." *Id.* Young's right to armed self-defense

is completely foreclosed outside the home. Hawaii's licensing scheme is thus more analogous to a content-based speech restriction than the one at issue in *Jackson*. Thus, strict scrutiny applies, and the State of Hawaii must demonstrate a compelling government interest that is narrowly tailored to achieve that interest. *See Thomas v. Review Bd. of Ind.do Employment Sec. Div.*, 450 U.S. 707, 718 (1981) ("The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest.").

The Florida Supreme Court's reasoning in *Norman v. State* 215 So.3d 18 (2017), is instructive. In *Norman*, the Florida Supreme Court evaluated Florida's handgun carry scheme which bans open carry but permissively allows concealed carry via a shall-issue system. The Florida Supreme Court upheld Florida's carry scheme under intermediate scrutiny "[b]ecause section 790.053 regulates only one manner of bearing arms and does not impair the exercise of the fundamental right to bear arms." (215 So.3d at 42). Here, in contrast, Hawaii's scheme completely eliminates firearm carry for the average law-abiding citizen. Such a scheme cannot be upheld under intermediate scrutiny.

In *Ezell*, the Seventh Circuit applied "not quite strict scrutiny" to Chicago's prohibition on live-fire training ranges—in part because Chicago required residents to undergo such training to obtain a license to possess firearms at all. *Ezell v. City of Chicago*, 651 F.3d 684, 689 (7th Cir. 2011). It found "[t]he City must establish 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." *Id*. at 708-709. And in *Ezell v. City of Chicago* ("*Ezell II*"), 846 F.3d 888 (7th Cir. 2017), the Seventh Circuit enjoined Chicago's zoning regulations at issue in that case which so "severely limit[ed] where shooting ranges may locate" that "no publicly accessible shooting range yet exist[ed] in Chicago." *Id*. at 894. As a result, the zoning regulations, "though not on their face an outright prohibition of gun ranges, nonetheless severely restrict the right of Chicagoans to train in firearm use at a range." *Id.*

Hawaii has similarly curtailed Young's Second Amendment rights. This Court should apply true strict scrutiny and find that section 134-9 and the County's application of that scheme is not narrowly tailored to any governmental interest[12] and thus unconstitutional. However, the Chief's application of Hawaii's permitting law is so nonsensical that even if intermediate scrutiny applies, this Court should rule in Young's favor.

E. The Carry Restriction is Unconstitutional Under Intermediate Scrutiny

Even if this Court finds intermediate scrutiny appropriate, both Hawaii law and the County's application of Hawaii law is unconstitutional. Under this Court's

[12] The argument in the intermediate scrutiny section below fully applies here as well.

precedent, the intermediate scrutiny test under the Second Amendment requires that "(1) the government's stated objective . . . be significant, substantial, or important; and (2) there . . . be a 'reasonable fit' between the challenged regulation and the asserted objective." *Silvester v. Harris*, 843 F.3d 816, 821-22 (9th Cir. 2016) (quoting *Chovan*, 735 F.3d at 1139). A complete ban on the carry of firearms for self-defense does not fulfill this test.

Here, there is an utter lack of fit between the state law and its purported objective of public safety. The law is wildly overbroad. Defendants should not be allowed to take rights away from everyone just because a few would misuse them. Yet the law makes no effort to identify who would misuse a firearm, but rather it just assumes anyone without a special need will misuse one. That overbreadth is the incurable problem here. The fact that a person can demonstrate a heightened need for self-defense says nothing about whether he or she is more or less likely to misuse a gun. "This limitation will neither make it less likely that those who meet the justifiable need requirement will accidentally shoot themselves or others, nor make it less likely that they will turn to a life of crime. Put simply, the solution is unrelated to the problem it intends to solve." *Drake*, 724 F.3d at 454 (Hardiman, J., dissenting).

Even if these objections are set aside, the heightened need requirement must still fall. To survive intermediate scrutiny, a restriction must be "substantially related to the achievement" of the government's objective. *United States v. Virginia*, 518

U.S. 515, 533 (1996). "[A] court must determine whether the legislature has 'base[d] its conclusions upon substantial evidence.' *Turner II*, 520 U.S. at 196. Indeed, despite the deference owed, the State bears the burden 'affirmatively [to] establish the reasonable fit we require.'" *Young*, 896 F.3d at 1073.

As Judge Posner concluded after surveying "the empirical literature on the effects of allowing the carriage of guns in public," that data does not provide "more than merely a rational basis for believing that [a ban on public carriage] is justified by an increase in public safety." *Moore*, 702 F.3d at 939, 942. This is confirmed by experience. Forty-two States do not restrict the carrying of firearms to a privileged few.[13] Yet "many years of evidence across different states and time periods overwhelmingly rejects" the claim that "permit holders will use their guns to commit crimes instead of using their guns for self-defense." David B. Mustard, Comment, in EVALUATING GUN POLICY 325, 330 (Jens Ludwig & Philip J. Cook eds., 2003). As social scientists in favor of gun control have acknowledged, there would be "relatively little public safety impact if courts invalidate laws that prohibit gun carrying outside the home, assuming that some sort of permit system for public carry is allowed to stand," since "[t]he available data about permit holders . . . imply that they are at fairly low risk of misusing guns." Philip J. Cook et al., Gun Control After Heller, 56 UCLA L. REV. 1041, 1082 (2009).

[13] *See* Gun Laws, NRA-ILA, https://goo.gl/Nggx50.

Although the number of defensive gun uses is difficult to measure, the leading study on the issue, the National Self-Defense Survey, "indicate[s] that each year in the U.S. there are about 2.2 to 2.5 million [defensive uses of guns] of all types by civilians against humans." Gary Kleck & Marc Gertz, Armed Resistance to Crime: The Prevalence and Nature of Self-Defense With a Gun, 86 J. CRIM. L. & CRIMINOLOGY 150, 164 (1995). "At least 19 other surveys have resulted in [similar] estimated numbers of defensive gun uses." NATIONAL RESEARCH COUNCIL, *supra*, at 103. Many of these defensive gun uses involve carrying firearms in public. The National Self-Defense Survey indicates that "anywhere from 670,000 to 1,570,000 [defensive gun uses] a year occur in connection with gun carrying in a public place." Gary Kleck & Marc Gertz, Carrying Guns for Protection: Results from the National Self-Defense Survey, 35 J. RESEARCH IN CRIME & DELINQUENCY 193, 195 (1998). What is more, "[a]lmost all national survey estimates indicate that defensive gun uses by victims are at least as common as offensive uses by criminals, with estimates of annual uses ranging from about 500,000 to more than 3 million, in the context of about 300,000 violent crimes involving firearms in 2008." INSTITUTE OF MEDICINE AND NATIONAL RESEARCH COUNCIL, PRIORITIES FOR RESEARCH TO REDUCE THE THREAT OF FIREARM-RELATED VIOLENCE 15 (2013), http://goo.gl/oO6oRp (citation omitted).

Further, even if laws that more freely grant permits have not been shown to decrease crime, there is no persuasive evidence that they increase crime—and that is the proposition Defendants would need to support with "substantial evidence," *Turner Broad. Sys., Inc. v. F.C.C.*, 520 U.S. 180, 195 (1997), for their ban to survive intermediate scrutiny. In 2004 the National Academy of Sciences' National Research Council ("NRC") conducted an exhaustive review of the entire body of social-scientific literature on firearms regulation in an effort to determine what inferences could be safely drawn from the current research. The NRC concluded that "with the current evidence it is not possible to determine that there is a causal link between the passage of right-to carry laws and crime rates." NATIONAL RESEARCH COUNCIL, FIREARMS AND VIOLENCE: A CRITICAL REVIEW 150 (Charles F. Wellford, John V. Pepper, & Carol V. Petrie eds., 2005), http://goo.gl/WO1ZNZ. Similarly, in 2003 the Centers for Disease Control ("CDC") convened an independent Task Force to conduct "a systematic review of scientific evidence regarding the effectiveness of firearms laws in preventing violence, including violent crimes, suicide, and unintentional injury." CDC, MORBIDITY & MORTALITY WEEKLY REPORT VOL. 52, FIRST REPORTS EVALUATING THE EFFECTIVENESS OF STRATEGIES FOR PREVENTING VIOLENCE: FIREARMS LAWS 11 (Oct. 3, 2003), http://goo.gl/VqWAVM. The CDC Task Force also concluded that the data were insufficient to support the hypothesis "that

the presence of more firearms" being carried in public by licensed citizens "increases rates of unintended and intended injury in interpersonal confrontations." Robert Hahn et al., Firearms Laws and the Reduction of Violence: A Systematic Review, 28 AM. J. PREVENTATIVE MED. 40, 53 (2005), http://goo.gl/zOpJFL.

Most recently, Hamill ME, Hernandez MC, Bailey KR, Zielinski MD, Matos MA, Schiller HJ. State Level Firearm Concealed-Carry Legislation and Rates of Homicide and Other Violent Crime. *J Am Coll Surg*. 2019;228(1):1-8. doi:10.1016/j.jamcollsurg.2018.08.694 investigated whether liberalization of state concealed carry laws was associated with a change in the rates of homicide and other violent crime.[14] The study found that there is no association with legal concealed carry and violence/homicide at any level regardless of the income of the population.[15]

The Illinois Supreme Court recently struck a law that banned carry within a 1000 feet of a variety of enumerated places failed intermediate scrutiny because,

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[14] *See* DktEntry 197-2.

[15] Defendants rely on studies from Professor John Donohue which purport to show otherwise. *See* e.g. DktEntry 35 at 19. However, his work has been shown to be rife with methodological issues. *See e.g.* The Impact of Right-to-Carry Laws: A Critique of the 2014 Version of Aneja, Donohue, and Zhang by Carlisle E. Moody and Thomas B. Marvell (EJW, January 2018). Available at https://econjwatch.org/File+download/1049/MoodyMarvellJan2018.pdf?mimetype=pdf.

"[t]he lack of a valid explanation for how the law actually achieves its goal of protecting children and vulnerable populations from gun violence amounts to a failure by the" Defendants to justify its carry scheme. *People v. Chairez*, 104 N.E.3d 1158 (2018). The County similarly has failed to do so here. Other courts have used similar rationales to find firearms restrictions unconstitutional applying intermediate scrutiny: *Heller v. District of Columbia*, 801 F.3d 264 (D.C. Cir. 2015) (*Heller III*) struck four registration laws applying intermediate scrutiny; *Binderup v. Att'y Gen*., 836 F.3d 336 (3d Cir. 2016) (en banc) the Third Circuit applied intermediate scrutiny in finding 18 U.S.C. § 922(g)(1) unconstitutional as applied to the litigants; *Tyler v. Hillsdale Cnty. Sheriffs Dep*, 837 F.3d 678 (6th Cir. 2016) (en banc) the Sixth Circuit applied intermediate scrutiny and held that a person who "has been adjudicated intellectually disabled" or "has been committed to a mental institution" is not permanently barred from possessing firearms; In *N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242, 264 (2d Cir. 2015) the Second Circuit struck a seven-round load limit applying intermediate scrutiny. In *State v. DeCiccio*, 105 A.3d 165 (Conn. 2014), the Connecticut Supreme Court overturned the conviction for transport of a dirk knife and a baton applying intermediate scrutiny.

The County's application of State law is even more suspect. "Once it is recognized that the right at issue is a concomitant of the same right recognized in *Heller*, it became incumbent on the City to justify the restrictions its rule imposes".

NYSRPA, 104 S.Ct. at 1541 (Alito, J., dissenting). Effecting a complete ban on firearm carry is not properly tailored to any government interest. And giving the Chief unbridled discretion is "entirely untethered from the stated rationale" of public safety. *See N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d at 264. Giving a single government official complete discretion to determine whether Young can exercise his constitutional rights is not a reasonable fit to fulfill any public safety interest. This Court should find that Hawaii's law is unconstitutional even if it decides to apply intermediate scrutiny.

The case most analogous to this portion of Young's challenge is *Morris v. U.S. Army Corps of Eng'rs*. There, the plaintiffs challenged "regulations promulgated by the Army Corp of Engineers." The regulations governed "the possession of firearms on property administered by the Corps. *Morris v. U.S. Army Corps of Eng'rs*, 990 F. Supp. 2d 1082, 1084 (D. Idaho 2014). The court found "the regulation fails to pass muster even if intermediate scrutiny is applied." In its ruling, the Court observed "those who use firearms for hunting are allowed greater latitude, the regulation grants no such exemption to those carrying firearms solely for purposes of self-defense." *Id*. at 1086. Finally, the Court found "[h]ere, the regulation is designed to protect both critical infrastructure and the public. If the regulation ended there, it would satisfy the 'reasonable fit' test. But it extends to ban firearms entirely from being carried for self-defense." *Id.* at 1087.

It is similarly not a reasonable fit for Defendants to require a heightened need or (in the case of the County) ban firearm carry for self-defense in areas where it is legal to carry firearms for hunting. And it bans carry in remote regions where individuals are isolated. This makes the law both underinclusive and overinclusive. In constitutional law, under inclusivity follows necessarily from the evaluation of a fit between means and ends. S*ee Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 556 (2001); *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 632 (1995); *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989)).

The assessment of fit looks to the relation between the class that comes within the scope of the regulation's stated objective, and the class actually affected by the regulation. *See, e.g.*, Jospeh Tussman and Jacobus tenBroek, *The Equal Protection of the Laws*, 37 Cal. L. Rev. 341 (1949). Under this standard, what matters is not whether a regulation is specifically overinclusive, but rather by how much it is either over- or underinclusive. *See, e.g.*, *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 428 (1993) (holding a city ordinance intended to advance safety and aesthetic interests unconstitutional because it unjustifiably affected only a small fraction of operating news racks, thus constituting an unreasonable fit between ends and means). *See also Parents for Privacy v. Barr*, 2020 U.S. App. LEXIS 4503, *53 ("Underinclusiveness is determined with respect to the burdens on religious and non-religious conduct and the interests sought to be advanced by the policy").

Here, because Hawaii law permissively allows for the carrying of firearms for hunting but imposes a *de facto* complete ban under a heightened need requirement to firearms for self-defense, it is wildly underinclusive. This demonstrates that it is not a reasonable fit to the stated government objective. As such, it fails intermediate scrutiny. The scheme is similarly overinclusive because it bans carry throughout Hawaii, including remote regions of Hawaii County where Defendants' public safety arguments are not applicable and there is virtually no police presence. *See* DktEntry 181-2 at 3-6. The lack of an exception for remote regions demonstrates the over-inclusiveness of the statute.

Just as it is not a reasonable fit to allow people to travel to in-City ranges but not those outside the City, it is not a reasonable fit for any governmental interest for Young to be not be allowed to carry for self-defense where others are allowed to carry while hunting on the same trail. "Furthermore, the statute does not differentiate between residents living in high-density metropolitan areas with large, fast response police forces and residents living in rural areas with natural predators and few sheriff's deputies. Could not the statute offer some degree of tailoring to account for the ammunition needs arising from the vast differences between urban and rural life?" *Rhode v. Becerra*, 2020 U.S. Dist. LEXIS 71893, *61-62.

F. Young's Due Process Rights Were Violated

State law and the County's implementation of State law also violates due process. Section 134-9 bans open carry and concealed carry without a permit. That permitting system, whether for concealed or open carry must comply with due process. Yet, the Chief is vested with sole and unbridled discretion to determine whether a permit is issued. And, the permit may not issue unless the **"the Chief of Police is satisfied that the applicant is a suitable person**" to be licensed.[16] This impermissible exercise of judgment and formation of opinion is exactly why Young's application was denied.

The text of the Due Process Clause – "nor shall any State deprive any person of life, liberty, or property without due process of law" requires procedural safeguards to accompany substantive choices. U.S. Const. amend. XIV. Section 134-9 is the only means by which a law-abiding citizen could exercise his or her Second Amendment rights. It well-settled that an ordinance which ". . . makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms." *Staub v. City*

[16] *See* The Police Dep't of Cty. Of Haw., Rules and Regulations Governing the Issuance of Licenses (Oct. 22, 1997) at 6.

of Baxley, 355 U.S. 313, 322 (1958) (citations omitted); *see also FW/PBS v. City of Dallas*, 493 U.S. 215, 226 (1990) (plurality opinion).

Mathews v. Eldridge, 424 U.S. 319, 335 (1976) provides the balancing test to determine whether government conduct violates due process:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

The Chief has no "definitive standards or other controlling guidelines" governing how to evaluate a private citizen's handgun carry application.[17] Complaint at 16. The requirements for a citizen permit has "yet to be defined" which means applicants do not have fair notice of what they need to provide on a firearms application. Complaint at 13. Thus, the Chief has uncontrolled and unlimited discretionary authority. The state has delegated to him "uncontrolled discretion" to evaluate handgun carry applications. Complaint at 17. "[T]he statute is an unlawful delegation of 'judicial authority' to 'Defendant Kubojiri' because it provides him 'uncontrolled discretion"' to issue a permit and thus violates 'due process'." Complaint at 18. The district court only found the County's scheme did not violate

[17] There doesn't even appear to be an application for a license to carry in the County. *See* https://www.hawaiipolice.com/services/firearm-registration#licenseCarry. The website simply refers back to section 134-9.

Young's due process because it erroneously concluded no liberty interest was at stake. *Young*, 911 F.Supp.2d at 993.

"A fundamental requirement of due process is the opportunity to be heard. [] It is an opportunity which must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552, (1965) (citation and quotation omitted). In this case, there was no (and still is no) opportunity for Young to be heard and there is no appealing any adverse determination by the Chief. *See Novin v. Fong*, No. 5:14-CV-1218-LHK, 2014 U.S. Dist. LEXIS 169671, at *24 (N.D. Cal. Dec. 8, 2014) ("A hearing … would have provided [him] with sufficient process related to the denial of his permit"). But Young wasn't advised that a hearing was available to him because there is no hearing available. The Chief simply denies all civilian permit applications. But "…personal fears and opinions do not trump, and cannot negate, constitutional guarantees." *Ward v. Colom*, 253 So. 3d 265, 270 (Miss. 2018) (upholding the right of enhanced permit holders to carry firearm in courthouse). In the end, it doesn't matter because there is no appeal procedure as a check and balance on the Chief's decision. This violates due process.

After *Heller* and *McDonald* and the multiple cases cited *supra*, the Chief simply doesn't have the authority to arbitrarily ban law abiding citizens from exercising their rights. The Chief must have processes in place to protect those rights and, when he denies a permit application, must have a process in place for the

aggrieved to appeal that denial. But, analogous to the due process issue in *Washington v. Trump*, 847 F.3d 1151, 1164 (9th Cir. 2017), the Defendants simply state "there is no right to carry weapons in public. Since [Young] posses (sic) no fundamental right to carry a firearm, [Young] is not entitled to due process." *See* Appellees' Answering Brief, DktEntry 32-1 at 20. That is a shocking statement when discussing an enumerated constitutional right.

If Defendants rely on the concealed carry permit as an alternative to open carry, then that concealed carry permit process must comply with Young's due process rights. Instead, it fails completely. Hawaii's lack of due process was noted in *Gould* where the First Circuit noted that "the Hawaii law struck down by the Ninth Circuit created a regime under which not a single unrestricted license for public carriage had ever been issued." *Gould*, 907 F.3d at 674 (citing *Young*, 896 F.3d at 1071, n.21). Further, the *Gould* Court stated the concealed carry licensing regime in Massachusetts "provided for administrative or judicial review of any license denial…a safeguard conspicuously absent from Hawaii's laws." *Id.*

"Under the Due Process Clause of the Fourteenth Amendment, no State shall 'deprive any person of life, liberty, or property, without due process of law.' The fundamental liberties protected by this Clause include most of the rights enumerated in the Bill of Rights." *Obergefell v. Hodges*, 135 S.Ct. 2584, 2697 (2015) (citation omitted). The Due Process Clause "imposes procedural constraints on governmental

decisions that deprive individuals of liberty or property interests." *Mathews,* 424 U.S. at 332. Young has a protected liberty interest at stake in the licensing scheme because it directly impacts his right to bear arms.

Here, as established above, the Second Amendment right extends outside the home. Section 134-9 is the only means by which a private citizen can lawfully carry a firearm for self-defense. Thus, Young has a protected liberty interest at stake when he applied and was denied for a firearm carry permit. The risk of an erroneous deprivation of such interest through the procedures used is enormous, and the probable value of additional or substitute procedural safeguards is great. Open carry for private civilians is prohibited. The "exceptional case" requirement for obtaining a concealed carry license is a completely arbitrary decision subject to the whim of the Chief. This renders section 134-9 devoid of due process and unconstitutional. *See Largent v. Texas*, 318 U.S. 418, 422 (1943) (striking ordinance allowing speech permit where mayor "deems it proper").

Amending the application process to comport with due process necessarily requires some type of appeals process and published guidelines to guide the Chief's decision making and give the public fair notice of what is needed to successfully apply for a permit. In deciding this matter, this Court should consider that the policies *sub judice* were put in place before *Heller* and *McDonald. See St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 53 (1936) ("the judicial scrutiny must

of necessity take into account the entire legislative process, including the reasoning and findings upon which the legislative action rests"). The policies predate *Heller* and *McDonald* and may not have been understood as affecting fundamental rights or liberty interests. As described, the laws and application of the laws effects Plaintiff's liberty interests and, therefore, must comport with Plaintiff's due process rights under the Fourteenth Amendment.

This failure to provide due process, resulting in the deprivation of a liberty interest, must be corrected by the Defendants. The deprivation of the People's rights and liberties is not in the government's interest, and compelling the State or County to provide a fair process to apply for, and appeal the denial of, a concealed (or open) carry permit does not substantially burden the Defendants, either fiscally or administratively. A useful comparison can be seen in *Firearms Records Bureau v. Simkin*, 466 Mass. 168 (Mass. 2013) which found the State of Massachusetts cannot arbitrarily and capriciously revoke a carry permit. *Id*. at 182-83. This Court should similarly find that the licensing scheme must have guidelines and an appeal process to comply with due process, and that, as written, the licensing scheme violates Plaintiff's due process rights.

Requiring that there be more defined guidelines and transparency in the process would have a *de minimus* impact on the administrative burden of issuing permits to carry. And, because Second Amendment rights are fundamental rights,

that codified ancient pre-existing basic human rights, made "fully" applicable to the states, the lack of due process safeguards renders the statute and the application of the statute plainly unconstitutional. The statute is outdated and, in its current form, fails to adequately provide procedural due process.

CONCLUSION

This Court should endorse the Panel's well-researched opinion and also find that Young's due process rights were violated.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 5(c)(1) and 32(c)(2) because, excluding the parts of the document exempted by Fed. R. App. P. 5(c) and 32(f), it contains 9,852 words.

2. 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 it has been prepared in a proportionally spaced typeface using Microsoft Word 365 in 14-point Times New Roman.

/s/ Alan Alexander Beck
Alan Alexander Beck

CERTIFICATE OF SERVICE

I hereby certify that on June 4th, 2020, I filed the foregoing Supplemental Brief 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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