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 Reply Brief

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INTRODUCTION

After over seven years on appeal, voluminous briefing, dueling *amici*, and an Appellant with the patience of Job, we are rapidly approaching the point where there is nothing meaningful left to say. Hawaii's statute *and* the County's application of that statute effectuate a complete ban on carry in Hawaii.

If there wasn't a complete ban, then one would assume carry permits to private citizens would have been issued. Indeed, one would assume that Young himself would have a permit. But they haven't, and he doesn't. That is because Hawaii law provides the Chief unbridled discretion, which he exercises by not issuing permits at all. The Attorney General confirms that discretion in his curiously timed opinion.[1] Any argument to the contrary is disingenuous. So is Defendants' attempt to justify that severe restriction on Second Amendment rights, for as shown below, Defendants radically misconstrue the relevant history.

[1] The Chief may "exercise reasonable discretion to deny licenses to otherwise-qualified applicants". *See* 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.

ARGUMENT

A. Hawaii's Law Is Not a Good Cause Scheme and Even If It Were, It Would Still Be Unconstitutional

The statute effects a complete ban on open carry. As already extensively briefed, Hawaii has historically interpreted its statute to ban open carry permits for citizens. DktEntry Nos. 171-1 at 3-9; 193 at 1-5. This is supported by past practice. For example, in 2017 the monthly reports submitted by the Counties to the State show 14 citizen applications were received. DktEntry 193-3, YoungAdd-127 to 221. The State took this figure to create their annual report. It states a " total of 14 private citizens applied for a concealed carry license in 2017…all applicants were denied by the respective county's police chief."[2] The State's past practice of treating "citizen" applications as interchangeable with concealed carry applications demonstrates open carry permits have always been reserved for security guards.

It was not until the issuance of the *Young* panel opinion that the AG's Office began to claim Hawaii's law allowed for the issuance of open carry permits. Other than catalyzing the City and County of Honolulu to create an open carry license form, the AG's opinion has had no practical effect as no permits have been issued in

[2] *See* "Firearm Registrations in Hawaii, 2017", https://ag.hawaii.gov/cpja/files/2018/05/Firearm-Registrations-in-Hawaii2017.pdf at *9.

two years and none were issued prior to that time.[3] The County of Hawaii, Young's county of residence, has not issued any new regulations or even created an application form for private citizens. It has not issued any new carry permits, open or concealed. The artifice created by the AG's opinion is little more than smoke and mirrors.

Defendants' arguments are premised on Hawaii law being a good cause jurisdiction. If this Court accepts that Hawaii maintains a *de facto* ban on carry, then the argument ends there and the Court should follow *Moore v. Madigan*, 702 F.3d 933, 941 (7th Cir. 2012), and hold that such total bans are per se unconstitutional. But even if this Court accepts Hawaii's position that its licensing scheme is a good cause law, such good cause laws are still unconstitutional for all the reasons set out in *Wrenn v. District of Columbia*, 864 F.3d 650, 658 (D.C. Cir. 2017), where the court applied *District of Columbia v. Heller*, 554 U.S. 570, 549 (2008) to strike down D.C's "good cause" statute. Tellingly, defendants' en banc brief does not cite *Wrenn* or *Moore*, the two circuit decisions that expressly hold that the right applies outside the home. Ignoring *Wrenn* and *Moore* speaks volumes.

As Justice Thomas' recent dissent from the denial of certiorari in *Roger v. Grewal*, No. 18-824, 2020 WL 3146706 (U.S. June 15, 2020), demonstrates nothing

[3] *See* https://ag.hawaii.gov/cpja/files/2020/03/Firearm-Registrations-in-Hawaii2019.pdf; https://ag.hawaii.gov/cpja/files/2019/05/Firearm-Registrations-in-Hawaii-2018.pdf.

in defendants' analysis withstands scrutiny. Justice Thomas is correct that "[t]he Second Amendment provides no hierarchy of 'core' and peripheral rights" (slip op. at *3), and is not subject to "means-ends scrutiny" or "'a tripartite binary test with a sliding scale and a reasonable fit.'" (*Id.*) (citation omitted). As explained (3rd Supp. Br. at 7), the correct standard is the text, history and tradition, the test actually used in *Heller*, not tiers of scrutiny. Defendants' resort to intermediate scrutiny (Br. at 36-41), is thus simply wrong. Justice Thomas is correct in his conclusion that "the text of the Second Amendment and the history from England, the founding era, the antebellum period, and Reconstruction leave no doubt that the right to 'bear Arms' includes the individual right to carry in public in some manner." (*Id*. at *9). Young endorses Justice Thomas' analysis and urges the Court to follow it here.

B. Defendants' Historical Analysis is Flawed

1. English History

Defendants' attempt (Br. at 16) at a historical analysis begins with the Statute of Northhampton, 2 Edw. 3 Stat. Northampt. c. 3 (1328). "The offence of riding or going armed with dangerous or unusual weapons, is a crime against the public peace, by terrifying the good people of the land; and is particularly prohibited by the statute of Northampton..." 2 St. George Tucker Blackstone's Commentaries with of Reference to the Constitution and Laws of the Government of the United States and of Virginia 145 1803.

The best explication of the scope of the Statute of Northampton is the 1686 case of *Sir John's Knight*. There, King James II attempted to use that ancient statute to disarm his Protestant detractors—in particular, one Sir John's Knight. Joyce Lee Malcolm, TO KEEP AND BEAR ARMS 104 (1994). The jury acquitted Knight, and, in affirming, Chief Justice Holt interpreted Northampton as merely declaring the common law rule against "go[ing] armed to terrify the King's subjects." *Sir John Knight's Case*, 87 Eng. Rep. 75, 76 (K.B. 1686). "[T]ho' this statute be almost gone in desuetudinem," Holt added, "yet where the crime shall appear to be malo animo"—that is, with a specific, evil intent—"it will come within the Act (tho' now there be a general connivance to gentlemen to ride armed for their security)." *Rex v. Knight*, 90 Eng. Rep. 330 (K.B. 1686) (different reporter). Thus, Knight was acquitted because merely carrying arms was a crime only if done with ill-intent. Defendants' hypothesis (Br. at 17) that Sir John Knight was acquitted because he was a government official is flatly inconsistent with the primary source evidence: all the reported accounts of the decision refer to Northampton's intent requirement, *see* 87 Eng. Rep. at 76; 90 Eng. Rep. at 330; none mention whether Knight was a government official.

And it is inconsistent with several other, undisputed features of the case. For instance, the court never explains why Knight would have been "bound to good behaviour" after acquittal, 90 Eng. Rep. at 331—or, indeed, how the case could have

gone to a jury at all—had Knight been outside the scope of the statute entirely because of his status as a government official. The understanding of Northampton actually adopted by *Knight* is also reflected by numerous other cases of the era, e.g., *Queen v. Soley*, 88 Eng. Rep. 935, 936-37 (Q.B. 1701); *Chune v. Piott*, 80 Eng. Rep. 1161, 1162 (K.B. 1615); *King v. Dewhurst*, 1 St. Tr. 529, 601- 02 (Lancaster Assize 1820), as well as by the leading contemporary legal commentators. As Michael Dalton's influential treatise explained, if men suspected of going armed for an illicit purpose, upon being warned by a Justice of the Peace that such conduct is prohibited by Northampton, "do depart in peaceable Manner, then hath the Justice no Authority . . . to commit them to Prison, nor to take away their Armour." Michael Dalton, THE COUNTRY JUSTICE 129 (1727).

A survey of English treatises also demolishes defendants' reading. Blackstone interpreted the statute as proscribing "[t]he offence of riding or going armed, with dangerous or unusual weapons," since such conduct "terrif[ied] the good people of the land." 4 WILLIAM BLACKSTONE, COMMENTARIES *148-49 (St. George Tucker ed., 1803) (third emphasis added). And William Hawkins expressly notes that "no wearing of arms is within the meaning of [Northampton] unless it be accompanied with such circumstances as are apt to terrify the people" and that as a consequence, persons armed "to the intent to defend themselves, against their

adversaries, are not within the meaning of this statute, because they do nothing in *terrorem populi*." 1 HAWKINS, supra, at 136.

2. Colonial History

A 1619 statute from Virginia appears to be the first "gun control" statute in the colonies. But it only forbids giving "armes offensive or defensive" to *Indians*.[4] And then it mandates that "All persons whatsoever upon Sabbath days shall frequent divine service & sermons both forenoon and afternoon; & all such as bear arms, shall bring their pieces, Swords, powder, & shot."[5] (Current spelling adopted). Far from banning carry, this statute requires it.[6]

Defendants cite to six colonial statutes to support their argument that the carrying of arms is unprotected by the Second Amendment. However, most of the statutes cited resemble the Statute of Northampton in that they deal with prohibiting

[4] Virginia. General Assembly. House of Burgesses., Kennedy, J. Pendleton., McIlwaine, H. R. (Henry Read), Virginia State Library. (190515). *Journals of the House of burgesses of Virginia, 1619-[1776]*. Richmond, Va.: [Colonial press, E. Waddey co.]; https://babel.hathitrust.org/cgi/pt?id=uc2.ark:/13960/t4th8sj3p&view=1up&seq=69

[5] *Id*. at 70.

[6] *See Grace v. District of Columbia*, 187 F. Supp. 3d 124, 136-38 (D.D.C. 2016), *affirmed in relevant part*, *Wrenn v. District of Columbia*, 864 F.3d 650 (D.C. Cir. 2017).

carrying of firearms for prohibited purposes, such as engaging in an affray.[7] "An affray is the fighting of two or more persons in some public place to the terror of the people."[8]

An affray had nothing to do with peaceful carry. The laws cited simply are inapplicable to the carrying of weapons in a peaceful manner. "Throughout the colonial and founding eras, only one colony enacted a broad statutory restriction on bearing arms by law-abiding citizens. In 1686, New Jersey outlawed the concealed carry of 'any Pocket Pistol, Skeines [Irish-Scottish dagger], Stilladoes, Daggers or Dirks, or other unusual or unlawful Weapons.'" DktEntry 265 at 15. But that statute did not ban carrying ordinary pistols or long arms and thus provided for a method for self-defense.[9] "The most severe—by far—pre-Second Amendment restriction

[7] Mass. Prov. Laws ch. XI, § 6 (1692); 1696 N.H. Laws 15; 1759 N.H. Laws 1; 1786 Va. Laws 33, ch. 21.

[8] John Dunlap, The New-York Justice; or, a Digest of the Law Relative to Justices of the Peace in the State of New-York 8 Isaac Riley 1815. *See* 3 James Wilson, Works of the Honourable James Wilson 79 (1804); F. Wharton, A Treatise on the Criminal Law of the United States 726 (1852).

[9] 1686 N.J. Laws 289-290, ch. 9.

thus allowed all colonists to carry long guns in any manner, openly or concealed. Further, all colonists except frontiersmen could carry pistols openly." *Id*.[10, 11, 12]

3. History After the Founding

Post-Colonial America strongly embraced the right to arms. Young incorporates the historical analysis of *amici* San Diego County Gun Owners, Hawaii Rifle Association et al., and Professors of Second Amendment Law et al. DktEntry Nos. 175, 265 & 266. Much of defendants' history cited is inapplicable to Young's challenge because they all allowed for some form of firearm carry. Early American judicial authorities, including many *Heller* relied on, make clear that the Second Amendment was understood to include the right to bear arms in public in some manner.

The panel analyzed many of these nineteenth century cases in comprehensive detail, *Young*, 896 F.3d 1055-57, correctly concluding that they "persuasively"

[10] 1741 N.C. Sess. Laws 131 is the last law cited to and deals with appointing constables.

[11] The Md. Declaration of Rights art. 3 (1776) actually supports a colonial right to arms since, as shown above, there was one in England.

[12] Defendants' criticism (Br. at 22 n.5) of the panel's citation to William Hawkins is puzzling because, as defendants point out, the exception was that "Persons of Quality" could open carry. Defendants have not suggested that Young is not a "Person of Quality." After all, the text of Second Amendment applies to the "people" which includes all "law-abiding, responsible" people. *Heller*, 554 U.S. at 635.

reveal "that the Second Amendment must encompass a right to carry a firearm openly outside the home." *Id*. at 1054. "American courts applying the individual right to bear arms for the purpose of self-defense have held with near uniformity that this right includes the carrying of handguns and other common defensive weapons outside the home."[13] The critical point, reiterated in each of these cases, is that "the right to bear arms must guarantee some right to self-defense in public." *Young*, 896 F.3d at 1068.

As the panel correctly noted, neither the ancient Statute of Northampton nor the various Northampton-style and "surety" laws of the nineteenth century undermine that conclusion. *Young*, 170 F.3d at 1065-68. British and American courts alike consistently followed the holding in *Sir John Knight's Case* that the Statute of Northampton did not prohibit carrying firearms, but only "punish[ed] people who go armed to terrify the King's subjects." *Sir John Knight's Case*, 87 Eng. Rep. 75, 76, 3 Mod. 117 (K.B. 1686).[14] For example, in *State v. Huntly*, 25 N.C.

[13] Michael P. O'Shea, Modeling the Second Amendment Right to Carry Arms (I): Judicial Tradition and the Scope of "Bearing Arms" for Self-Defense, 61 Am. U. L. Rev. 585, 590 (2012).

[14] Defendants cite (Br. at 34) Hawkins for the proposition that self-defense was not a "valid justification," but Hawkins states clearly that "And from the same ground it follows, that person armed with privy coats of mail, to the intent to defend themselves against their adversaries are not in the meaning of this statute because they do nothing in *terrorem populi*." *See* William Hawkins A Treatise of Pleas of the Crown Volume One (1824) at 489.

418, 422-23 (1843), the court applied the statute of Northampton and stressed that "it is to be remembered that the carrying of a gun, per se, constitutes no offense" and that "[f]or any lawful purpose — either of business or amusement — the citizen is at perfect liberty to carry his gun," explaining that "[i]t is the wicked purpose, and the mischievous result, which essentially constitute the crime." It was on that basis the conviction was affirmed in *Huntly* because the defendant there had openly armed himself and declared publicly his intent "to beat, wound, kill, and murder" such that "good citizens of the State were terrified, and the peace of the State endangered." (*Id*. at 418-19). While defendants oddly purport to rely on *Huntly* (Br. at 27, 34), they ignore its actual holding.

Certainly, the early "surety" laws did not confine the right to carry to those with "reasonable cause" to do so, but instead imposed a requirement to pay a surety to *continue* carrying arms "only upon a well-founded complaint that the carrier threatened 'injury or a breach of the peace.'" *Young*, 170 F.3d at 1061-62. Surety laws thus operated to curtail abuse of the right to bear arms, not its exercise. Such laws would not have existed if it was not presumptively *lawful* to carry firearms unless and until someone levied a "well-founded complaint" of suspected intent to abuse that right. Even then, all one had to do to *continue* carrying arms was pay a surety—not convince a government official that they had a particularly good reason

to need to carry them. In sum, under *Heller*, "history matters, and here it favors the [Appellant]." *Wrenn*, 864 F.3d at 658.

4. Post-Civil War Legislation

Post-Civil War legislation is irrelevant to the scope of the "people's" right to keep and bear arms as of the time of ratification of the Second Amendment. In any event, all these statutes cited by defendants are far less broad than Hawaii's. 1865/2 Ill. Priv. Laws 515, § 6 is law allowing the incorporated town to prevent the carrying of weapons within its limits. 1867 Kan. Sess. Laws 25, § 1 CHAPTER XII excludes those "who [are] not engaged in any legitimate business" or drunk from carrying a pistol. 1871 Tex. Gen. Laws 25, §§ 1-2, CHAPTER XXXIV forbid the carry of a pistol unless he had "reasonable grounds for freeing an unlawful attack on his person." 1875 Ark. Acts 156-157 banned carry of pistols, but not rifles or shotguns. 1876 Wyo. Comp. Laws 352, § 1 prevented residents of a "city, town or village" from carrying firearms. 1877 Mo. Laws 166, § 23 *authorized* the council to prohibit carry, but *didn't* prohibit carry. 1882 W. Va. Acts 421, sec. 1, § 7 is a good cause statute and does not list whether it is open or concealed. 1889 Ariz. Laws 30, §§ 1-2 bans carry in any "settlement, town, village or city" unless one has "reasonable ground for fearing an unlawful attack…" 1889 Idaho Gen. Laws 23, § 1 makes it unlawful to carry a pistol within the limits of "any city, town or village…" 1895 N.J. Gen. Pub. Laws 235, 237, § 47 provides towns the authority to "regulate or

prohibit the use of firearms and the carrying of weapons of any kind." 1901 S.C. Acts 748-749, §§ 1, 3 prohibited carry of a "pistol less than 20 inches long and 3 pounds in weight."

Most of the remaining citations Defendants rely on include licensing schemes where multiple government officials were tasked with issuing licenses if there were "good reason" instead of *one* official at issue here. 1909 N.H. Laws 451-452, §§ 1, 3 states it was unlawful to carry a "loaded" pistol or revolver but did not have a good cause requirement. 1910 Md. Laws 614-615 CHAPTER 669 allows for a city to issue license to carry upon "good reason." 1911 N.Y. Laws 442-443, §§ 1897, 1899 forbids carry without a license in any "city, village or town." 1917 Conn. Pub. Acts 2314, ch. 129 appears to allow for carry if a "written permit issued." 1917 Or. Gen. Laws 804, § 1 CHAPTER 377 forbids carry in "any city, town or municipal corporation" without a license, but does not deal with long guns. 1919 N.C. Pub. Local Laws 373-374, §§ 1-3 CHAPTER 317 allows carry upon permit issued by a court for a time, place and manner restriction and conditioned on a bond.

C. Twentieth Century Laws Are Not Longstanding

Defendants' "longstanding" analysis is fundamentally flawed in other ways. Defendants incorrectly argue that laws from the early 20th century can be dispositive evidence that a modern law is outside the scope of the Second Amendment. Yet, "[c]onstitutional rights are enshrined with the scope they were understood to have

when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad." *Heller*, 554 U.S. at 634-35. Thus, "the Supreme Court has taught in *Heller I* that legal regulations of possession or carrying that are 'longstanding'…reflect limits to the preexisting right protected by the Amendment." *Wrenn*, 864 F.3d at 659. That means we look to the "historical background of the Second Amendment." *Heller*, 554 U.S. at 592. *Heller* cites to prohibitions on "felons and the mentally ill" as examples of longstanding prohibitions because colonial and early English societies prohibited them from owning firearms. *Id*. at 626.

At common law, there were there were three classes of crime: treason, felony and misdemeanor. Felonies were those offenses which occasioned forfeiture of the lands and goods of the offender and to which might be added death or other punishment according to the degree of guilt. 4. Bl. Comm. 94; *Fasset v. Smith*, 23 N.Y. 257(1891); *Bannon v. U.S.*, 156 U.S. 464 (1895). The felonies were murder, manslaughter, rape, sodomy, robbery, larceny, arson, burglary, and arguably mayhem. *See* William Lawrence Clark, William Lawrence Marshal New York, Fred B Rothman & Co., A Treatise on the Law of Crime (1905) at 12. All other crimes, excepting treason, were misdemeanors.

"[A]t the time of the founding, 'the right to arms was inextricably and multifariously linked to that of civic virtu (i.e., the virtuous citizenry),' and that '[o]ne implication of this emphasis on the virtuous citizen is that the right to arms

does not preclude laws disarming the unvirtuous citizens (i.e., criminals) or those who, like children or the mentally imbalanced, are deemed incapable of virtue.'" *NRA v. BATF*, 700 F.3d 185, 201 (5th Cir. 2012), quoting Kates & Cramer, 60 Hastings L.J. at 1359-60. Historically, the State disarmed non-virtuous citizens and those like children or the mentally unbalanced, who were deemed incapable of virtue. *See, e.g.* Robert Dowlut, The Right to Arms: Does the Constitution or the Predilection of Judges Reign? 36 OKLA. L. REV. 65, 96 (1983) ("Colonial and English societies of the eighteenth century, as well as their modern counterparts, have excluded infants, idiots, lunatics, and felons [from possessing firearms]."). *Heller* cites to these colonial prohibitions on felons and the mentally ill as part of its historical analysis to explain the scope of the Second Amendment right at 1791.

Even the cases Defendants cite do not support their longstanding analysis. In *Heller II*, the D.C. Circuit merely "presume[d]" that "the District's basic registration requirement…does not impinge upon the right protected by the Second Amendment." *Heller v. District of Columbia*, 670 F.3d 1244, 1254 (D.C. Cir. 2011). It only upheld that presumption because it "[found] no basis in either the historical record or the record of this case to rebut that presumption" and because the "basic registration requirements are self-evidently de minimis." *Id.* at 1255. The D.C. Circuit's opinion in *Wrenn*, which struck down D.C.'s "good cause" handgun carry law, postdates *Heller II* and rejected the suggestion that the good cause requirement

was supported by any longstanding prohibition. *Wrenn*, 864 F.3d at 665 ("the class of citizens who can wield them [arms] must include those with common levels of competence and responsibility—and need").

Similarly, and contrary to defendants' argument (Br. at 36), the Fifth Circuit did not find restrictions on 18-to-20-year olds longstanding based on laws from 1923. The Fifth Circuit's extensive historical analysis of the founding era determined "the term 'minor' or 'infant'—as those terms were historically understood—applied to persons under the age of 21." *NRA*, 700 F.3d at 201. It concluded that if "a representative citizen of the founding era conceived of a 'minor' as an individual who was unworthy of the Second Amendment guarantee, and conceived of 18-to-20-year-olds as 'minors,' then it stands to reason that the citizen would have supported restricting an 18-to-20-year-old's right to keep and bear arms." *Id*. at 202. Even then, "in an abundance of caution", the Fifth Circuit assumed intermediate scrutiny applied to the restriction before upholding it. *Id*. at 204.

D. Defendants Minimize *Heller*

The Defendants both add to, and subtract from, *Heller*. For instance, (Br. at 1), they claim that the *Heller* Court "emphasized that the Second Amendment does not 'cast doubt on the longstanding prohibitions on the possession' and carrying of firearms." But Defendants left out the remaining qualifier: "in sensitive places such and schools and government buildings…" *Heller*, at 626. That language would

have been pointless if states could ban carry *everywhere*. Young hasn't asked to carry in sensitive places and he is neither a felon nor mentally ill. *Heller* states that the right "was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id*. Young requests to carry a handgun which *Heller* held is the "quintessential self-defense weapon." *Id*. at 629. The *Heller* Court flatly rejected "Justice Breyer's assertion that individual self-defense is merely a 'subsidiary interest' of the right to keep and bear arms…" as "profoundly mistaken." *Id*. at 599. *Heller* leaves little to the imagination: "At the time of the founding, as now, to 'bear' meant to 'carry.' … When used with 'arms,' however, the term has a meaning that refers to carrying for a particular purpose--confrontation." *Id*. at 584; "…we find that they guarantee the individual right to possess and carry weapons in case of confrontation." *Id*. at 592. Confrontations are not limited to the home.

E. Young Requests Damages and Makes Both a Facial and an As-Applied Challenge

Defendants submitted the County of Hawaii's regulations as part of their answering brief, DktEntry 32-3, and the panel properly took notice of these regulations in stating that "open carry is proper only when the license-holder is 'in the actual performance of his duties or within the area of his assignment'" and that "no one other than a security guard—or someone similarly employed—had ever been issued an open carry license." *Young*, 896 F.3d at 1048, 1071. Yet, defendants

ignore these regulations. Instead, defendants cite to the amicus brief of **three** of Hawaii's counties and make the manifestly false statement that "all four of the State's counties have expressly stated that they enforce the law in a manner consistent with" the Hawaii AG's opinion. (Br. at 10). Nothing in that amicus brief even mentions the County of *Hawaii* and none of the declarations attached to that amicus brief is from that County.

More fundamentally, it is grossly improper for defendants to rely on (Br. at 2-3, 10) extra-record declarations, *especially* on an appeal from a Rule 12(b)(6) dismissal, where plaintiff's allegations must be taken as true. The Court must disregard all such "evidence." *See United States v. Walker*, 601 F.2d 1051, 1054-55 (9th Cir. 1979) (affidavits that "were not part of the evidence presented to the district court" would not be considered on appeal because this Court is "concerned only with the record before the trial judge when his decision was made"); *United States v. Mageno*, 786 F.3d 768, 775 n.6 (9th Cir. 2015) ("parties may not seek rehearing based on evidence that was not previously presented to the district court and the panel").

Here, Young challenged the law and regulations both facially and as-applied "to the facts of" his case. *See Citizens United v. FEC*, 558 U.S. 310, 331 (2010) ("the distinction between facial and as-applied challenges * * * goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint.").

Accordingly, this Court must, at a minimum, decide whether the statute and regulations are constitutional as the County applied them to Young. Additionally, Young seeks damages against the County for his permit denial. *See* ER 5.

F. California's Licensing Scheme is Different Than Hawaii's

Defendants (Br. at 38) want to frame Hawaii law as a good cause law like those upheld by other circuits. It is not. Unlike those other jurisdictions, Hawaii law and the County's regulations confer on the Chief unbridled discretion which he has used to deny all carry permits. While it is true "seven of the eleven Judges in *Peruta* concluded that California's restrictions on concealed carry would survive intermediate scrutiny," the Court did not address whether California could ban both concealed *and open* carry, and here, Young has challenged Hawaii's regime in its entirety.

California law is much different than Hawaii's. Unlike Hawaiians, Californians may at least carry guns without any special license and openly in many less-populated areas of the State. *See generally Peruta v. Cty. of San Diego*, 824 F.3d 919, 925-926 (9th Cir. 2016) (en banc). They may carry in emergencies, if they reasonably believe that doing so is necessary to protect persons or property from immediate and grave danger while, if possible, summoning public assistance. *See* Cal. Penal Code § 26045.

California issues permits and Hawaii does not. For example, California currently has approximately 123,446 active permits. DktEntry 267-2 at 35 (HFCADD-35).[15] If Hawaii had the same number of permits per capita, it would have roughly 4,530 active permits, instead of none. In California, rural counties typically permissively issue permits like in shall issue jurisdictions and applicants "need only state that the purpose of the carry permit is for self-defense." DktEntry 267-1 at 23. The County of Hawaii is extremely rural, but it has *zero* active permits.[16] San Diego alone currently has 4,046 active permits[17] and has well-defined guidelines as to how to apply.[18]

Cal. Penal Code § 26160 requires the licensing authority to establish and make available a summary of its licensing standards.[19] Thus, there are well-defined

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[15] *See* https://www.fresnobee.com/news/local/article232198382.html.

[16] *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)

[17] https://sdsheriff.net/licensing/ccw.html?fbclid=IwAR10P6zlBISnDpcCEGSQIVyzItPibCqqd4f1pe28bOtykGKMKpIUGUyKCFA (last accessed 6/8/2020).

[18] https://sdsheriff.net/licensing/ccw.html?fbclid=IwAR10P6zlBISnDpcCEGSQIVyzItPibCqqd4f1pe28bOtykGKMKpIUGUyKCFA

[19] San Diego's Policy Statement: https://permitium-downloads.s3.amazonaws.com/SDCSD_POLICY_STATEMENT.pdf

guidelines and criteria as to what constitutes good cause. Appeals are generally allowed.[20] In contrast, section 134-9 confers complete discretion on the Chief. A permit may not issue unless the "the Chief of Police is satisfied that the applicant is a suitable person" to be licensed.[21] The AG's opinion states that the Chief may "exercise reasonable discretion to deny licenses to otherwise-qualified applicants," but there is no set criteria that actually limits the Chief's discretion.[22] The AG suggests that the Chief "*should* document the reasons and provide them to the Attorney General" (at 10) (emphasis added), but neither section 134-9 nor the regulations requires the Chief to give *any* reason for denying a permit and he did not meaningfully do so here or in other cases.[23] The reporting requirement imposed by HRS §134-14, cited by the AG Opinion (*id*.), applies **only** to decisions "to issue or revoke permits and licenses" – not to permit denials. Nothing even provides for judicial review. Any statutory scheme that accords this sort of unfettered discretion is facially unconstitutional. *See Lakewood v. Plain Dealer Pub. Co*., 486 U.S. 750,

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[20] *See* California State Auditor Report 2017-10 at p.37 (Sacramento's practice allows appeals of denials); https://www.auditor.ca.gov/pdfs/reports/2017-101.pdf.

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

[22] *See* AG's Opinion No. 18-1.

[23] *See* DktEntry 193-3, YoungADD 127-221.

770-771 (1988); *Seattle Affiliate of Oct. 22nd Coalition v. Seattle*, 550 F.3d 788, 794 (9th Cir. 2008).

CONCLUSION

This Court should endorse the Panel's well-researched opinion and find that Young's 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 4,999 words.

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I hereby certify that on June 29th, 2020, I filed the foregoing Reply 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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