No. 18-280

In the
Supreme Court of the United States

NEW YORK STATE RIFLE & PISTOL ASSOCIATION, INC., *et al.*,
Petitioners,

v.

CITY OF NEW YORK, NEW YORK, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICUS CURIAE* GEORGE K. YOUNG IN SUPPORT OF PETITIONERS

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INTERESTS OF THE AMICUS CURIAE[1]

George K. Young is a native of the State of Hawaii, a United States citizen, and a Vietnam veteran[2]. For more than ten years, he has been repeatedly denied his Second Amendment right to keep and bear arms in his home state of Hawaii. After being summarily dismissed three times in the district court, Mr. Young obtained pro bono counsel and prevailed in the Ninth Circuit. The Ninth Circuit then agreed to hear the case *en banc* upon Hawaii's request, vacated the panel decision and has now stayed his case pending the resolution of this case. Mr. Young writes this Court to ask that it once and for all instruct the lower courts to cease treating the Second Amendment as a disfavored right.

SUMMARY OF THE ARGUMENT

There is no question that the right to keep and bear arms extends outside the home. To argue otherwise is to render the phrase "bear arms" superfluous within the Second Amendment. State and local governments, refusing to acknowledge the simple text, pass laws and ordinances which wholesale deny the law abiding and

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[1] Pursuant to Supreme Court Rules 37.3 and 37.6, *amicus curiae* states that all parties have consented in writing to the filing of this brief, no counsel for a party authored this brief in whole or in part, and no person or entity, other than *amicus curiae* and his counsel, made a monetary contribution intended to fund the preparation and submission of this brief.

[2] *See* https://www.reuters.com/article/us-usa-guns-hawaii/unlikely-pair-could-usher-gun-rights-case-to-u-s-supreme-court-idUSKBN1KT13B (last visited (5/9/2019).

virtuous citizenry the means with which to protect themselves outside of their home.

Worse, the courts are all too content to defer to the legislature by applying a form of judicial deference typically found only in nations which lack an entrenched constitution. And this deference is unheard of within American courts when dealing with any other constitutional right[3]. Because the right to armed self-defense is a fundamental right, this Court should insist that the lower courts faithfully evaluate Second Amendment challenges as this Court instructed in *Heller* or the governments (and the lowers courts) will continue to run roughshod over the rights of the People. And the corollary to this request, is that when the lower courts diverge from this Court's precedent in the Second Amendment realm, this Court should not hesitate to step in and resolve the disagreement.

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[3] "It is wrong to use some constitutional provisions as springboards for major social change while treating others like senile relatives to be cooped up in a nursing home until they quit annoying us. As guardians of the Constitution, we must be consistent in interpreting its provisions. If we adopt a jurisprudence sympathetic to individual rights, we must give broad compass to all constitutional provisions that protect individuals from tyranny. If we take a more statist approach, we must give all such provisions narrow scope. Expanding some to gargantuan proportions while discarding others like a crumpled gum wrapper is not faithfully applying the Constitution; it's using our power as federal judges to constitutionalize our personal preferences." *Silveira v. Lockyer*, 328 F. 3d 567, 569 (9th Cir. 2003).

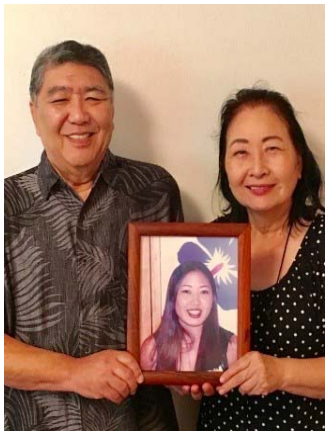
ARGUMENT

In Mr. Young's case, *Young v. Hawaii,* 896 F.3d 1044 (9th Cir. 2018), a Ninth Circuit panel correctly concluded that "the right to bear arms must guarantee some right to self-defense in public," and "that section 134-9 eviscerates [this] core Second Amendment right." *Id*. at 1068, 1071. However, in an unsurprising move, the Ninth Circuit ordered that the case be reheard *en banc*. *Young v. Hawaii*, 915 F.3d 681 (9th Cir. 2019). Then, the Ninth Circuit stayed Mr. Young's case pending the resolution of this matter. *Young v. Hawaii*, No. 12-17808, 2019 U.S. App. LEXIS 4527 (9th Cir. Feb. 14, 2019).

Mr. Young has now been on appeal in the Ninth Circuit since December 24, 2012 (six years, four months and twenty days) and there is still no end in sight. Mr. Young will be seventy years old this year in September. He is a native Hawaiian and a Vietnam veteran.

It is apparently just fine for him to be taken from his home country to fight in Vietnam with high powered weaponry but then to forbid him to carry a handgun outside his home for self-defense in Hawaii. Mr. Young served his country with honor only to return and be treated as a second-class citizen by Hawaii, and unable to fully exercise his Second Amendment rights.

[4]



[5]

Hawaii does not issue carry permits to non-security guards. This is uncontroverted.[6] And because Hawaii does not issue permits to non-security guards, Hawaii will not issue one to Mr. Young. Now, Mr. Young is left in Ninth Circuit appeal limbo until and after this Court decides the instant matter, further delaying Mr.

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[4] Mr. Young in uniform.

[5] Mr. Young today.

[6] "As counsel for the County openly admitted at oral argument, *not a single concealed carry license* has ever been granted by the County." *Young v. Hawaii*, 896 F.3d 1044, 1071 n.21 (9th Cir. 2018).

Young's day in court. How much longer must Mr. Young wait to have his rights vindicated by the courts? As former Chief Justice Warren E. Burger wrote:

> [a] sense of confidence in the courts is essential to maintain the fabric of ordered liberty for a free people and three things could destroy that confidence and do incalculable damage to society: that people come to believe that inefficiency and delay will drain even a just judgment of its value; that people who have long been exploited in the smaller transactions of daily life come to believe that courts cannot vindicate their legal rights from fraud and over-reaching; that people come to believe the law – in the larger sense – cannot fulfill its primary function to protect them and their families in their homes, at their work, and on the public streets.

Burger, "What's Wrong With the Courts: The Chief Justice Speaks Out", *U.S. News & World Report* (vol. 69, No. 8, Aug. 24, 1970) 68, 71 (address to ABA meeting, Aug. 10, 1970). When the courts evince extreme disfavor of an enumerated right and develop their own policy choices allegedly already taken off the table per *Heller*, and then delay adjudication, confidence in the courts is diminished if not destroyed.

I. The Second Amendment is Not a Disfavored Right and Should Not be Treated as Such.

As Justice Thomas stated in *Silvester v. Becerra*, 138 S. Ct. 945 (2018), the "Second Amendment is a disfavored right in this Court." But just because the Second Amendment comes after the First does not relegate it to second class status. Justice Thomas has recognized that trend in the courts to treat the Second Amendment unfavorably and has filed several dissenting opinions urging this Court to action, but to little avail. *See Friedman v. City of Highland Park*, 136 S. Ct. 447, 447 (2015) ("Because noncompliance with our Second Amendment precedents warrants this Court's attention as much as any of our precedents, I would grant certiorari in this case."). *See also Jackson v. City & Cty. of S.F.*, 135 S. Ct. 2799, 2799-800 (2015) ("Because Second Amendment rights are no less protected by our Constitution than other rights enumerated in that document, I would have granted this petition.").

Because of inaction, this Court has allowed the lower courts all the latitude they need to render the Second Amendment a paper tiger. For instance, the Second Circuit's "adequate alternatives" test downplays a burden on an enumerated right if "adequate alternatives remain for law-abiding citizens to acquire a firearm for self-defense." *United States v. Decastro*, 682 F.3d 160, 168 (2d Cir. 2012). No where in the Second Amendment does one read about an adequate alternative to protected "arms", but the lower courts routinely read these additional qualifications

into the right, and then state that there has been no substantial burden.

Extrapolating that argument, one could say that adoption is an adequate alternative to an abortion, or that civil unions are adequate alternatives to homosexual marriage. But this Court (and the lower courts) would never tolerate that. So why is it tolerated in the context of the Second Amendment?

A similar trend by the lower courts is found in Mr. Young's case. Mr. Young is not a prohibited person and has no disqualifying factors which would preclude him from carrying a firearm outside of his home for the lawful purpose of self-defense. Hawaii, however, does not believe its residents deserve to exercise an enumerated constitutional right. The district court, in Mr. Young's case, even held that "[t]he right to carry a gun outside the home is not part of the core Second Amendment right." *Young v. Hawaii*, 911 F. Supp. 2d 972, 989 (D. Haw. 2012). But, according to the Hawaii district court, even if the Second Amendment did apply outside the home, too bad for Mr. Young, because "Hawaii's limitations on carrying weapons in public does not implicate activity protected by the Second Amendment." *Id*. at 990 (D. Haw. 2012). Ignoring that no non-security guard receives permits to carry firearms in Hawaii, Mr. Young not receiving a permit to carry "does not implicate activity protected by the Second Amendment." This statement is flat wrong, contradicts the Second Amendment's unambiguous text, and demonstrates that the lower courts treat the Second Amendment as a disfavored right.

Justice Thomas' dissent in *Silvester* clearly identifies the problem with continued inaction in this realm and Mr. Young prays that this Court would instruct the lower courts to treat the Second Amendment as an *enumerated* and **not** disfavored right. It is evident that the lower courts will continue their treatment of the Second Amendment as a second class right unless and until this Court, once and for all, instructs them to do otherwise.

II. The Second Amendment Right Extends Outside the Home.

The implication of the arguments made in Respondents' opposition is that the right of armed self-defense does not apply outside the home. This is incorrect. The text, history and tradition of the Second Amendment, as well as *Heller*, strongly supports that the right to armed self-defense applies outside the home.

The lower courts have misapplied *Heller*'s dangerous and unusual language. Almost every lower court to interpret this phrase has failed to conduct a historical analysis of this phrase[7]. Instead, the lower

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[7] "in a very real sense, the Constitution is our compact with history . . . [but] the Constitution can maintain that compact and serve as the lodestar of our political system only if its terms are binding on us. To the extent we depart from the document's language and rely instead on generalities that we see written between the lines, we rob the Constitution of its binding force and give free reign to the fashions and passions of the day."
A. Kozinski & J.D. Williams, It Is a Constitution We Are Expounding: A Debate, 1989 Utah L. Rev. 978, at 980

courts have almost universally held that this phrase applies to bearable arms, and then by judicial fiat, the court finds them too deadly for private citizen ownership. *See e.g. United States v. Henry*, 688 F. 3d 637 (9th Cir. 2012) (finding that an automatic firearm not protected by the Second Amendment because it is a dangerous and unusual weapon). *People v. Zondorak*, 220 Cal. App. 4th 829, 163 Cal. Rptr. 3d 491, 2013 Cal. App. LEXIS 838, 2013 WL 5692886 (applying the term to a semiautomatic firearm). *Kolbe v. Hogan*, 849 F.3d 114, 2017 U.S. App. LEXIS 2930, 2017 WL 679687 (same as to AR-15 semiautomatic rifles). The misuse of this historical term has even been applied to baseball bats. *People v. Liscotti*, 219 Cal. App. 4th Supp. 1, 162 Cal. Rptr. 3d 225, 2013 Cal. App. LEXIS 706, 2013 WL 4778660. If the Second Amendment does not apply to a baseball bat because it is too dangerous then the Second Amendment has no meaning.

The phrase dangerous and unusual is first found in the Statute of Northampton 2 Edw. 3, c. 3 (1328) and the lower courts misinterpretation of this phrase might be understandable if they were required to interpret 14th Century case law. However, even a cursory search of the phrase reveals that Courts in the 20th century have already analyzed this phrase correctly.

The Supreme Court of North Carolina correctly interpreted the dangerous and unusual language in the historical context as to how it was originally understood. *See e.g. State v. Dawson*, 272 N.C. 535, 159 S.E.2d 1, 1968 N.C. LEXIS 699. *Heller*'s reliance on this phrase means that it explicitly holds that the Second Amendment right extends to armed self-defense

outside the home. In *District of Columbia v. Heller*, Justice Scalia wrote:

> [w]e also recognize another important limitation on the right to keep and carry arms. *Miller* said, as we have explained, that the sorts of weapons protected were those "in common use at the time." 307 U.S., at 179, 59 S.Ct. 816. We think that limitation is fairly supported by the historical tradition of prohibiting the carrying of "dangerous and unusual weapons."

Dist. of Columbia v. Heller, 554 U.S. 570, 627, 128 S. Ct. 2783, 2817, 171 L. Ed. 2d 637 (2008). The dangerous and unusual doctrine applies to the *manner* in which the right is exercised. In this context, the Common Law's definition of "dangerous" was any item that could be used to take human life through physical force. ("[S]howing weapons calculated to take life, such as pistols or dirks, putting [the victim] in fear of his life … is … the use of dangerous weapons" *United States v. Hare*, 26 F. Cas. 148, 163-64 (C.C.D. Md.1818)). "Any dangerous weapon, as a pistol, hammer, large stone, &c. which in probability might kill B. or do him some great bodily hurt" *See Baron Snigge v. Shirton*, 79 E.R. 173 (1607). In this context, "unusual" meant to use a protected arm in a manner which creates an affray. Timothy Cunningham's 1789 law dictionary defines an affray as "to affright, and it formerly meant no more, as where persons appeared with armour or weapons not usually worn, to the terror."

The longstanding prohibition on the carrying of "dangerous and unusual weapons" refers to types of

conduct with weapons. A necessary element of this common law crime of affray, to which the "dangerous and unusual" prohibition refers, had always required that the arms be used or carried in such manner as to terrorize the population, rather than in the manner suitable for ordinary self-defense.

Heller's first source on the topic, Blackstone, offered that "[t]he 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*." 4 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 148-49 (1769) (emphasis added). Blackstone referenced the 1328 Statute of Northampton, which, by the time of the American Revolution, English courts had long limited to prohibit the carrying of arms only with evil intent, "in order to preserve the common law principle of allowing 'Gentlemen to ride armed for their Security.'" David Caplan, *The Right of the Individual to Bear Arms: A Recent Judicial Trend*, DET. L. C. REV. 789, 795 (1982) (citing *Rex v. Knight*, 90 Eng. Rep. 330 (K.B. 1686)). "[N]o wearing of arms is within the meaning of this statute, unless it be accompanied with such circumstances as are apt to terrify the people," by causing "suspicion of an intention to commit an[ ] act of violence or disturbance of the peace." TREATISE ON THE PLEAS OF THE CROWN, ch. 63, § 9 (Leach ed., 6th ed. 1788); *see* Joyce Lee Malcolm, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT 104-05 (1994).

Heller's additional citations regarding the "dangerous and unusual" doctrine are in accord.

"[T]here may be an affray, where there is no actual violence; as where a man arms himself with dangerous and unusual weapons, *in such a manner, as will naturally diffuse a terrour among the people*." James Wilson, WORKS OF THE HONOURABLE JAMES WILSON (Bird Wilson ed., 1804) (footnote omitted) (emphasis added). "It is likewise said to be an affray, at common law, for a man to arm himself with dangerous and unusual weapons, *in such manner as will naturally cause terror to the people*." John A. Dunlap, THE NEW-YORK JUSTICE 8 (1815) (emphasis added).

> Riding or going armed with dangerous or unusual weapons, is a crime against the public peace, by terrifying the people of the land … But here it should be remembered, that in this country the constitution guar[]anties to all persons the right to bear arms; then it can only be a crime to exercise this right in such a manner, as to terrify the people unnecessarily.

Charles Humphreys, A COMPENDIUM OF THE COMMON LAW IN FORCE IN KENTUCKY 482 (1822); *see also Heller*, at 588 n.10 (quoting same). It is the *manner* of how the right is exercised, not the type of weapon that is carried, that constitutes the crime. Said another way, just because a firearm or other weapon is in common usage at the time does not make the *manner* in which the right is exercised excused or excusable simply due to the type of firearm or weapon carried.

"[T]here may be an affray … where persons arm themselves with dangerous and unusual weapons, in such manner as will naturally cause a terror to the

people." William Oldnall Russell, A TREATISE ON CRIMES AND INDICTABLE MISDEMEANORS 271 (1826). But:

> it has been holden, that no wearing of arms is within [meaning of Statute of Northampton] unless it be accompanied with such circumstances as are apt to terrify the people; from whence it seems clearly to follow, that persons of quality are in no danger of offending against the statute by wearing common weapons … in such places, and upon such occasions, in which it is the common fashion to make use of them, without causing the least suspicion of an intention to commit any act of violence, or disturbance of the peace.

Id. at 272.

The other treatises *Heller* cites in support of the "dangerous and unusual" doctrine are in accord, as are the cases *Heller* cites. *See O'Neill v. State*, 16 Ala. 65, 67 (1849) (affray "probable" "if persons arm themselves with deadly or unusual weapons for the purpose of an affray, *and in such manner as to strike terror to the people*") (emphasis added); *State v. Langford*, 10 N.C. (3 Hawks) 381, 383-384 (1824) (affray "when a man arms himself with dangerous and unusual weapons, *in such a manner as will naturally cause a terror to the people*") (emphasis added); *English v. State*, 35 Tex. 473, 476 (1871) (affray "by terrifying the good people of the land"). In fact, one does not even need to be armed with a firearm to commit the crime of affray under the dangerous and unusual doctrine. *See State v. Lanier*, 71 N.C. 288, 290 (1874) (riding horse through

courthouse, unarmed, is "very bad behavior" but "may be criminal or innocent" depending on whether people alarmed). The traditional right to arms "was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Heller* at 626.

At Common Law one had a right to carry protected arms. Protected arms are those that survive the *Miller* test. Those arms are considered in "common use". The government cannot strip the right to carry protected arms without demonstrating that carrying within an area is unusual.

This Court should correct the lower courts' erroneous historical analysis regarding the phrase dangerous and unusual to give the lower courts the guidance they clearly need on this issue. It would be a preposterous notion to conclude that the Second Amendment does not extend outside the home. If that were the case, the First Amendment's protections would only be available inside the home and likewise, there would be no Fourth Amendment right outside the home. A preposterous notion indeed.

CONCLUSION

This Court should reverse the Second Circuit and instruct the lower courts to treat the Second Amendment with the reverence it deserves.

Respectfully submitted,

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