No. __-_____

IN THE
Supreme Court of the United States

GEORGE K. YOUNG, JR.
Petitioner,

v.

STATE OF HAWAII, ET AL.,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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DATED: MAY 11TH, 2021

QUESTIONS PRESENTED

On April 26, 2021, this Court granted review in *New York State Rifle & Pistol Association, Inc., v. Corlett,* No. 20-843, 593 U.S. ___ ("*NYSRPA*"). As modified by the Court in its order granting certiorari, the issue presented in *NYSRPA* is "[w]hether the State's denial of petitioners' applications for concealed-carry licenses for self-defense violated the Second Amendment."

This petition raises the same issue. Like the New York statute at issue in *NYSRPA*, Hawaii will not issue a permit to carry a firearm to an ordinary citizen for purposes of self-defense. Like the petitioners in *NYSRPA*, petitioner's application for a carry permit (open or concealed) was denied because self-defense is categorically an insufficient reason. Indeed, in sustaining the denial of petitioner's application, the en banc Ninth Circuit majority held that the Second Amendment does not apply outside the home *at all*, a holding in direct conflict with the holdings of the D.C., First and Seventh Circuits and inconsistent with the approaches followed by all other circuits to have reached the issue. The questions presented are:

1. Whether the Ninth Circuit erred in holding, in direct conflict with the holdings of the First, Seventh and D.C. Circuits, that the Second Amendment does not apply outside the home at all.

2. Whether the denial of petitioner's application for a handgun carry license for self-defense violated the Second Amendment.

PARTIES TO THE PROCEEDING

Petitioner is George K. Young, Jr. Petitioner was the plaintiff in the district court and the plaintiff-appellant in the court of appeals.

Respondents are the County of Hawaii, Chief Harry S. Kubojiri, sued in his official capacity as the Chief of Police of Hawaii County, State of Hawaii; Neil Abercrombie, in his capacity as Governor of the State of Hawaii, David Mark Louie I, Esquire, in his capacity as State Attorney General; County of Hawaii, as a sub-agency of the State of Hawaii; William P. Kenoi, in his capacity as Mayor of the County of Hawaii, Hilo County Police Department, as a sub-agency of the County of Hawaii, Harry S. Kubojiri, in his capacity as Chief of Police; John Does, 1–25, Jane Does, 1–25, Doe Corporations, 1–5, Doe Entities, 1–5.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, petitioner states as follows:

Petitioner George K. Young, Jr. is not a corporation. Thus, this rule is not applicable.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- *Young v. Hawaii*, 992 F.3d 765 (9th Cir. 2021), (en banc);
- *Young v. Hawaii*, 896 F.3d 1044 (9th Cir. 2018), *reh'g en banc granted*, 915 F.3d 681 (9th Cir. 2019); and
- *Young v. Hawaii*, 911 F. Supp. 2d 972 (D. Haw. 2012), (order granting motion to dismiss, filed November 29, 2012).

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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PETITION FOR WRIT OF CERTIORARI

This petition presents the same issue presented in *New York State Rifle & Pistol Association, Inc., v. Corlett,* No. 20-843 ("*NYSRPA*"). Like the New York statutory scheme at issue in *NYSRPA*, Hawaii maintains a statutory scheme that denies permits to ordinary law-abiding persons who seek to carry a firearm (openly or concealed) outside the home for self-defense. Indeed, unlike the New York scheme, where some permits actually have been issued, Hawaii's scheme is a permitting system in name only, because the statute has been used to deny all permit applications during the nine years this case has been in litigation.

As detailed in the *NYSRPA* petition for certiorari, two circuits, the D.C. Circuit and the Seventh Circuit, have followed this Court's decisions in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), and struck down state carry statutes that imposed a ban on carrying outside the home for self-defense by ordinary law-abiding citizens. The D.C. Circuit called these restrictive regimes for what they are—"necessarily a total ban on most D.C. residents' right to carry a gun"—and joined the Seventh Circuit in concluding that the government may not prohibit ordinary law-abiding citizens from carrying handguns for self-defense. *Wrenn v. District of Columbia*, 864 F.3d 650, 666 (D.C. Cir. 2017); *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012).

The Ninth Circuit majority held that the Second Amendment simply does not apply outside the home at all, and thus affirmed the district court's holding on that point. That holding is at war not only with *Wrenn* and *Moore*, but also with the

approaches followed by the First, Second, Third, and Fourth Circuits, which all have either held or assumed that the Second Amendment right extends outside the home in at least some manner.

However, those circuits hold that self-defense is not at the "core" of the Second Amendment and thus employ watered-down versions of so-called "heightened scrutiny" to sustain licensing statutes that limit carry permits to applicants who can demonstrate "good cause" and thus, like Hawaii, deny permits to ordinary citizens who seek a license for self-defense. Cf. *N.Y. State Rifle & Pistol Ass'n v. City of N.Y.*, 140 S. Ct. 1525, 1541 (2020) (Alito, J., dissenting from a finding of mootness) (discussing the "heightened scrutiny" and noting that "there was nothing heightened about what [the lower courts] did"). *See also Id.*, 140 S.Ct. at 1527 (Kavanaugh, J., concurring in the finding mootness) ("I share Justice Alito's concern that some federal and state courts may not be properly applying *Heller* and *McDonald*.").

The need for armed self-defense is not confined to the interior of a home. The text, history, and tradition of the Second Amendment confirm that the Second Amendment right includes a right that extends outside the home. In holding that the right does not extend outside the home at all, the Ninth Circuit's decision has abrogated an essential component of the Second Amendment right. This Court should grant certiorari in order to resolve these multifaceted circuit splits.

OPINIONS BELOW

The court of appeals' en banc opinion affirming the district court's dismissal of the case is reported at 992 F.3d 765 (9th Cir. 2021), and reproduced at App.1. The panel

opinion is reported at 896 F.3d 1044 (9th Cir. 2018), and reproduced at App.216. The district court's opinion is reported at 911 F. Supp. 2d 972 (D. Haw. 2012), and reproduced at App.292.

JURISDICTION

The jurisdiction of the district court was founded on 28 U.S.C. § 1331 and § 1343. The jurisdiction of court of appeals reviewing the final judgment of dismissal was based on 28 U.S.C. § 1291. App.25. The decision of the three-judge panel of the court of appeals issued on July 24, 2018. App.216. Defendants-appellees filed a timely petition for rehearing and the Ninth Circuit's order granting rehearing en banc was entered February 8, 2019. App.334. The en banc Ninth Circuit issued its opinion on March 24, 2021. App.1. The judgment of the court of appeals issued on April 15, 2021. App.336. By order issued March 19, 2020, this Court extended the deadline to file any petition for a writ of certiorari due on or after that date to 150 days. This petition is timely under that order. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Second and Fourteenth Amendments to the United States Constitution and relevant portions of the Hawaii law are reproduced at App.337-346.

STATEMENT OF THE CASE

A. Hawaii's Statutory Scheme

Under Hawaii's licensing framework, "[a]bsent a license under section 134-9, a person may only transport an unloaded firearm, in an enclosed container, to and from

a place of repair, a target range, a licensed dealer, a firearms exhibit, a hunting ground, or a police station, *id*. §§ 134-23 to -27. Persons may use those firearms only while 'actually engaged' in hunting or target shooting, *id*. § 134-5(a), (c)." *Young v. State of Hawaii* 992 F.3d 765, 830 (9th Cir. 2021). App.130. Licenses are issued by the chief of police of the county where the applicant resides. H.R.S. § 134-9(a). App.18.

Section 134-9 acts as a limited exception to the State of Hawaii's "Place[s] to Keep" statutes, which generally require that gun owners keep their firearms at their "place of business, residence, or sojourn." H.R.S. §§ 134-23 to -27. The exception allows citizens to obtain a license to carry a loaded handgun in public under certain circumstances. *Id*. § 134-9(a). For concealed carry, section 134-9 provides that "[i]n an exceptional case, when an applicant shows reason to fear injury to the applicant's person or property, the chief of police of the appropriate county may grant a license to an applicant . . . to carry a pistol or revolver and ammunition therefor concealed on the person." *Id*. For open carry, the chief of police may grant a license only "[w]here the urgency or the need has been sufficiently indicated" and the applicant "is engaged in the protection of life and property." *Id*.

Hawaii law does not define either "exceptional case" or "urgency or the need." Before the panel decision was issued, the State had never defined "exceptional case." The first time that the State made any attempt to define the urgency or need requirement was through an Attorney General Opinion, issued six years after the onset of this litigation, coincidentally after a three-judge panel of the Ninth Circuit

had overturned H.R.S. § 134-9. That opinion was issued just days before the filing of defendants' en banc petition. *Young,* 992 F.3d at 776. App.21.

According to the Hawaii Attorney General's Opinion, an applicant's need is "sufficient" if it is urgent and is related to "engage[ment] in the protection of life and property." *Id*. (citing H.R.S. § 134-9). The urgency requirement "connote[s] an immediate, pressing, and heightened interest in carrying a firearm." *Id*. at 776-7. Coupled with the requirement that the applicant be "engaged in the protection of life and property," an applicant must demonstrate more than a "generalized concern for safety." *Id*. It also noted that the "statute only requires an applicant to show a need for armed self-defense 'that substantially exceeds the need possessed by ordinary law-abiding citizens.'" *Id*.

"These baseline requirements limit who 'may' be eligible to obtain a public-carry license but leave each county with discretion to impose even tighter restrictions. When [the County] promulgated regulations implementing section 134-9, [it] created an open-carry licensing regime that is available only to 'private detectives and security guards.'" *Young,* 992 F.3d at 829 (O'Scannlain, J., dissenting). App.129-30. But under those regulations, open carry is only allowed when the licensee is "in the actual performance of his duties or within the area of his assignment." *Id*. Again, an ordinary citizen must have "'an exceptional case' just to be considered eligible for a concealed-carry permit. H.R.S. § 134-9(a)." *Id*. at 829-30. App.130.

B. Factual Background

On two occasions, petitioner applied for a license to carry a handgun, either openly or concealed, in public for self-defense. App.22. Young pleaded he met the requirements of H.R.S. § 134-9 because he "applied for a personal permit, in accordance with Hawaii Revised Statute (H.R.S.) 134-9(a)(c), . . . stating the purpose being for personal security, self-preservation and defense, and protection of personal family members and property." App.209. *Young,* 992 F.3d at 868 (R. Nelson, J., dissenting). On both occasions, petitioner was denied because he had not "shown an 'exceptional[] case or demonstrated urgency.'" App.23.

In Hawaii, permits to carry firearms are almost never granted. Judge O'Scannlain observed in the panel opinion that, "[a]s counsel for the County openly admitted at oral argument, *not a single concealed carry license* has ever been granted by the County. Nor have concealed carry applicants in other counties fared much better: Hawaii counties appear to have issued only *four* concealed carry licenses in the past *eighteen years*." (App.267, n.21, citing 2000 Haw. Att'y Gen. Reps., Firearm Registrations in Hawaii, 2000 et seq.) (emphasis in original). Starting in 2018, the State removed the term "concealed" from the reports, and the 2018-2020 reports represent zero permits have been issued to civilians for either concealed or open carry.[1]

[1] *See* State of Haw., Dep't of Att'y Gen., Firearm Registrations in Hawaii, 2020, at 10 (Mar. 2021), https://bit.ly/3vTNIwp; State of Haw., Dep't of Att'y Gen., Firearm Registrations in Hawaii, 2019, at 9 (Mar. 2020), https://bit.ly/3vZfKqx; and State of Haw., Dep't of Att'y Gen., Firearm Registrations in Hawaii, 2018, at 9 (May 2019), https://bit.ly/3ya71DQ.

C. Procedural History

Petitioner filed a *pro se* suit to challenge the constitutionality of Hawaii's restrictions on carrying handguns outside the home without a special showing of an "exceptional case" or a demonstrated "urgency or need." App.23. In 2012, The defendants, *inter alia*, were the State of Hawai'i, the attorney general, the County of Hawai'i, the mayor of the County of Hawai'i, the Hilo County Police Department, and the County of Hawai'i chief of police. Young asked for a permanent injunction of H.R.S. § 134, the issuance of a permit, and compensatory and punitive damages. App.23.

The district court dismissed all of Young's claims in a published order. *Young v. Hawai'i*, 911 F. Supp. 2d 972 (D. Haw. 2012). App.292. Petitioner appealed the dismissal of his Second Amendment and Due Process claims. But, prior to hearing petitioner's appeal, the Ninth Circuit decided *Peruta v. County of San Diego*, 824 F.3d 919 (9th Cir. 2016) (en banc) and held that individuals do not have a Second Amendment right to carry concealed weapons in public. After *Peruta*, a panel of the Ninth Circuit addressed petitioner's claim for an open carry permit and reversed the district court's judgment. *Young v. Hawai'i*, 896 F.3d 1044 (9th Cir. 2018). App.216. The jurisdiction of court of appeals reviewing the final judgment of dismissal was based on 28 U.S.C. § 1291.

On February 8, 2019, the Ninth Circuit granted rehearing en banc to determine whether individuals have a Second Amendment right to carry weapons openly in public. *Young v. Hawaii*, 915 F.3d 681 (2019). App.334. On March 24, 2021, in a split

en banc decision, the court held that "Hawai'i's restrictions on the open carrying of firearms reflect longstanding prohibitions and that the conduct they regulate is therefore outside the historical scope of the Second Amendment." *Young,* 992 F.3d at 772. App.14-15. In so holding, the majority addressed only the facial validity of the State statute and refused to consider petitioner's challenge to the facial validity of the County's ordinance. The en banc court likewise refused to consider the manner in which the County has actually implemented the Hawaii statute and the County ordinance in rejecting petitioner's applications for a permit. The majority deemed that such matters were "as applied" challenges that were not sufficiently preserved in petitioner's *pro se* complaint and in subsequent briefing. The majority affirmed the dismissal of the complaint without leave to amend.

Judge O'Scannlain filed a lengthy and vigorous dissenting opinion, joined by Judges Callahan, Ikuta, and R. Nelson. Judge O'Scannlain concluded that both H.R.S. § 134-9 and the County's regulations destroyed the "core" right to carry a gun for self-defense outside the home and thus were unconstitutional under any level of scrutiny. App.182. Judge O'Scannlain found "unprecedented as it is extreme" the majority's holding that, "while the Second Amendment may guarantee the right to *keep* a firearm for self-defense within one's home, it provides no right whatsoever to *bear*—i.e., to carry—that same firearm for self-defense *in any other place*." App.128, (emphasis in original).

Judge R. Nelson also wrote a lengthy, separate dissent, joined by Judges Callahan and Ikuta. Judge Nelson concurred with Judge O'Scannlain's dissent and added

further that the majority erred in rejecting petitioner's as-applied challenges, which Judge Nelson found to be preserved. Judge Nelson's dissent concluded that the County of Hawaii Regulations applying H.R.S. § 134-9 were "brazenly unconstitutional" (App.195), reasoning that "[t]here should be no dispute that any law or regulation that restricts gun ownership only to security guards violated the Second Amendment." App.195-96.

REASONS FOR GRANTING THE PETITION

This Court has squarely addressed, and held, that the Second Amendment bestows an individual right to bear arms, including a handgun, for self-defense. *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 *N.Y. State Rifle & Pistol Ass'n v. City of N.Y.*, 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 the lower court's Second Amendment analysis was error. *N.Y. State Rifle*, 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."); *N.Y. State Rifle,* 140 S.Ct. at 1527

(Kavanaugh, J., concurring) ("I also agree with Justice Alito's general analysis of *Heller* and *McDonald*.").

Justice Thomas' dissent from the denial of certiorari in *Rogers v. Grewal*, 140 S. Ct. 1865, 1867 (2020), is on point. In his view, "[t]he Second Amendment provides no hierarchy of 'core' and peripheral rights" 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 Justice Thomas stated, "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 1874. *See also 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.").

The Ninth Circuit stands alone in holding that the Second Amendment does not apply outside the home at all. With notable exception of well-reasoned decisions by the D.C. Circuit and the Seventh Circuit, other circuits eschew the Ninth Circuit's extreme conclusion, but have, by judicial *ipse dixit*, effectively abrogated the Second Amendment right of self-defense by relegating the right to a few favored persons who can manage to meet a State's "good cause" requirement. These decisions, and the laws they sustain, prohibit ordinary law-abiding citizens from carrying handguns beyond the home and are thus incompatible with the individual and fundamental right to

keep and bear arms for self-defense. The Ninth Circuit is patently wrong in its application of *Heller* and so are these other circuits that sustain "good cause" requirements. This Court's intervention is necessary to protect the Second Amendment.

I. YOUNG'S PETITION PRESENTS ISSUES IDENTICAL TO THOSE PRESENTED IN *NYSRPA*.

This petition presents the same issue accepted for review in *NYSRPA*. The question there, as reformulated by the Court, is "[w]hether the State's denial of petitioners' applications for concealed-carry licenses for self-defense violated the Second Amendment." The question, if answered affirmatively, would necessarily include a holding that the Second Amendment extends outside the home. That is so because if the right did not extend outside the home, then the self-defense needs of the petitioners who applied for a concealed carry license in *NYSRPA* would be legally irrelevant.

Mr. Young likewise was denied a permit to carry for self-defense, either openly or concealed, and he challenges that denial on Second Amendment grounds. Indeed, the holding from which he appeals is much more extreme than that in *NYSRPA* because the Ninth Circuit concluded there is no Second Amendment right whatsoever outside the home. App.14-15. *See also* App.128. Thus, the threshold question necessarily presented in *NYSRPA* is the first question presented here, *viz.,* whether the Second Amendment right extends outside the home at all. For the reasons set forth by the dissents authored by Judge O'Scannlain and Judge Nelson, and further set forth

below, the majority's holding that the right is confined to the home is wrong under the text, history and tradition of the Second Amendment.

The second question presented here is substantively identical to the question reformulated by the Court in *NYSRPA*. Like the petitioners in *NYSRPA*, petitioner here applied for a carry permit under a State licensing scheme. Like the New York statutory scheme, the Hawaii scheme, as construed by the Ninth Circuit, effectively imposes Hawaii's version of "proper cause" in order to obtain a permit to carry outside the home.

Specifically, in Hawaii, an applicant for a *concealed* carry permit must apply to a county chief of police and "must first show 'an exceptional case' and a 'reason to fear injury to [his or her] person or property.'" App.18, quoting H.R.S. § 134-9(a). Similarly, to obtain an *open* carry permit, the applicant must apply to a county chief of police and demonstrate "urgency or the need has been sufficiently indicated." App.19, quoting H.R.S. § 134-9(a). These requirements are indistinguishable from the New York "proper cause" requirement at issue in *NYSRPA*. There is no dispute that the Hawaii provisions, like the New York statute, do not allow the issuance of any permit (open carry or concealed carry) for purposes of self-defense by an ordinary law-abiding citizen. In short, if the *NYSRPA* petitioners prevail, then, *a fortiorari*, Young would be entitled to prevail as well.

There are only two differences between Petitioner's claims and those presented in *NYSRPA*. First, petitioner here seeks to carry either openly or concealed. In contrast, New York bans open carry completely and limits its carry permit scheme to

concealed carry. *See Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 86 (2d Cir. 2012). Mr. Young has no preference between the two modes of carry. The fact remains that Hawaii regulates open carry permits and concealed carry permits in such a way as to require for both the same sort of "proper cause" required by New York for concealed carry permits.

Second, while the majority refused to consider it (deeming it irrelevant to a facial challenge to the statute), Judge O'Scannlain demonstrates in his dissenting opinion that the State of Hawaii and its Counties do not issue hardly *any* permits to applicants who are not security guards. App.182-85. That reality was judicially noticed by the panel below (App. 267, n.21) and cannot simply be ignored. As the First Circuit noted, the Hawaii law "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). New York restricts the issuance of permits to person showing "proper cause," but at least issues a few permits in some counties. In short Hawaii's statutory scheme, as implemented, is far more *extreme* than New York's practice.

That the majority refused to face the reality that Hawaii denies all permits to ordinary citizens ultimately does not change the issue before this Court. The majority's exegesis (App.26-30) on the differences between facial challenges and "as applied" challenges, and its misguided refusal to entertain petitioner's "as applied" challenge is, as Judge O'Scannlain (App 182-89) and Judge Nelson (App.195-212) demonstrate, utterly wrong. But even an "as applied" challenge would fail under the

majority's ruling that the Second Amendment does not apply outside the home at all. Under that ruling, the County and State are free, without regard to the Second Amendment, to deny a permit no matter how compelling the need for self-defense demonstrated by a particular applicant. The County is likewise free to issue regulations that limit carry to security guards at their place of employment. That is a complete ban on the right regardless of the type of challenge presented. App.172-85, (O'Scannlain, J., dissenting); App.195-96, (R. Nelson, J., dissenting).

II. THIS COURT SHOULD RESOLVE THE CIRCUIT SPLIT AS TO WHETHER THE SECOND AMENDMENT PROTECTS A RIGHT TO CARRY A HANDGUN OUTSIDE THE HOME.

A. The Ninth Circuit's Decision Creates an Irreconcilable Circuit Split.

This Court should grant this petition because the Ninth Circuit has created an irreconcilable circuit split on whether the Second Amendment right extends outside the home at all. The lower circuit courts are likewise patently divided over whether the Second Amendment allows the government to prohibit ordinary law-abiding citizens from carrying handguns outside the home for self-defense.

The en banc majority held that the Second Amendment does not embody the right of self-defense outside the home. *See* Judge O'Scannlain's dissent, App. 128 ("we now become the first and only court of appeals to hold that public carry falls entirely outside the scope of the Amendment's protections"). In contrast, the D.C. Circuit, the Seventh Circuit and the First Circuit have all expressly found that the Second

Amendment protects a right to armed self-defense outside the home. *See Gould v. Morgan*, 907 F.3d 659, 670 (1st Cir. 2018) ("we view *Heller* as implying that the right to carry a firearm for self-defense is not limited to the home"); *Moore v. Madigan*, 702 F.3d 933, 937, 942 (7th Cir. 2012) ("[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" and that "[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*"); *Wrenn v. District of Columbia*, 864 F.3d 650, 657-63 (D.C. Cir. 2017) (the plain text of the Second Amendment shows "that the rights to keep and bear arms are on equal footing" and that "the Amendment's core generally covers carrying in public for self-defense"). The Illinois Supreme Court has followed suit, holding that the Second Amendment applies outside the home. *See People v. Aguilar*, 2 N.E.3d 321, 327 (Ill. 2013).

Consistent with that understanding, forty-two states protect the right of law-abiding citizens to carry handguns outside the home for self-defense, including 20 states that impose no licensing requirement at all on law-abiding State residents. *See* https://www.handgunlaw.us/ (collecting State laws). The D.C. Circuit's decision in *Wrenn* added the District of Columbia to those states that issue carry permits without any "good cause" requirement. Only eight states require some version of a "good cause" showing before issuing a permit, consisting of California, Hawaii and a cluster of states concentrated in northeastern and mid-Atlantic. *Id.*

Other Circuits have applied disparate approaches to the scope of the Second Amendment. As noted, the First Circuit in *Gould* read *Heller* as "implying" that the right is not limited to the home. (907 F.3d at 670). Yet, notwithstanding that recognition, the *Gould* court, *ipse dixit*, ruled "that the core Second Amendment right is limited to self-defense in the home." *Id.* at 671. The court consequently upheld a restrictive "good cause" licensing scheme under its version of the interest-balancing, "intermediate scrutiny" test. *See Gould*, 907 F.3d at 671 (applying a Massachusetts statute).

Three courts of appeals—the Second, Third, and Fourth Circuits—have assumed without deciding that the Second Amendment right extends outside the home, yet upheld highly restrictive "good cause" licensing schemes. *Kachalsky v. Cty. of Westchester*, 701 F.3d 81 (2d Cir. 2012) (N.Y. statute); *Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013) (N.J. statute); *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013) (Maryland statute). Each of these courts applied a balancing test, mislabeled as "intermediate scrutiny," to sustain the "good cause" statutes at issue in those cases. None of these courts seriously attempted to apply the text, history and tradition of the Second Amendment in their analysis. *See Wrenn*, 864 F.3d at 661-62 ("But each of these courts has also dispensed with the historical digging that would have exposed that inference as faulty — digging that *Heller* [] makes essential to locating the Amendment's edge, or at least its core."); App.228-29, (O'Scannlain, J., dissenting (noting that these courts "have simply assumed the Second Amendment applies outside the home, without delving into the historical nature of the right").

Heller holds, at a minimum, that a "tiers of scrutiny" analysis is never apposite where the state law at issue effectively acts as a total ban on the typical citizen's enjoyment of a constitutional right. *Heller*, 554 U.S. at 628 (holding that "[u]nder any of the standards of scrutiny," D.C.'s ban on possession of a handgun would "fail constitutional muster"). As the panel decision states, "[t]he right to carry a firearm openly for self-defense falls within the core of the Second Amendment." App.266. Judge O'Scannlain thus correctly concluded that the Hawaii statutory scheme amounts "to a total destruction of such right. It is thus *necessarily* unconstitutional." App.182.

Finally, the circuit decisions sustaining "good cause" requirements sacrifice the right of self-defense on the altar of "public safety." But these "good cause" requirements actually do nothing to protect the public. The most recent study (January 2019) published by the American College of Surgeons (hardly a "pro-gun group") demonstrated, for example, "no statistically significant association between the liberalization of state level firearm carry legislation over the last 30 years and the rates of homicides or other violent crime." *See* Mark E. Hamill, Matthew C. Hernandez, Kent R. Bailey, Martin D. Zielinski, Miguel A. Matos, Henry J. Schiller, State Level Firearm Concealed-Carry Legislation and Rates of Homicide and Other Violent Crime, Journal of the American College of Surgeons, Volume 228, Issue 1, 2019 (available at: https://bit.ly/3f5iQCh). No one disputes that firearm permit holders are among the most law-biding individuals on the planet, with crime rates a fraction even of those of commissioned police officers. *See* Lott, John R., Concealed

Carry Permit Holders Across the United States: 2018 (August 14, 2018) (available at: https://bit.ly/3ttzyQX). *See also* Don B. Kates and Clayton E. Cramer, *Second Amendment Limitations and Criminological Considerations*, 60 Hastings L.J. 1339 (2009) (available at: https://bit.ly/3hc3cI5).

Self-defense by armed citizens also contributes substantially to the public safety. The FBI has found that out of the 50 mass shooting incidents studied, "[a]rmed and unarmed citizens engaged the shooter in 10 incidents. They safely and successfully ended the shootings in eight of those incidents. Their selfless actions likely saved many lives." FBI, Active Shooter Incidents in the United States in 2016 and 2017 at 8. (available at: https://bit.ly/3hdiWdK). Another report states that "a range of credible data suggest that civilian use guns to stop violence more than 100,000 times per year." *See* James Agresti, Defensive Gun Use is More Than Shooting Bad Guys (available at: https://bit.ly/2PZKaJK).

In 1994, a CDC study found that Americans use guns to frighten away intruders breaking into their homes about 498,000 times per year. *See* Ikeda RM, Dahlberg LL, Sacks JJ, Mercy JA, Powell KE. Estimating intruder-related firearm retrievals in U.S. households, 1994 (available at: https://bit.ly/3vJCTx0). In 2013, the CDC ordered a study conducted by The National Academies' Institute of Medicine on the incidence of armed self-defense. That study reported that "[d]efensive use of guns by crime victims is a common occurrence," stating further that "almost 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." *See* Paul Hsieh, That Time the CDC Asked About Defensive Gun Uses (available at: https://bit.ly/3y0npqb). Armed self-defense is real and important.

More fundamentally, this Court would not tolerate a statute that limits 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 very concept of "need" is antithetical to the existence of a "right." Certainly, 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 below explained, nothing in the history or tradition of the Second Amendment would permit a state to limit the right to only those who can show "need." App.247-50.

This case presents the most extreme version of those circuit decisions that resist this Court's *Heller* decision. Those restrictive states, like New York, that require "good cause", still issue at least *some* permits to a favored few who manage to meet the good cause requirements. In contrast, Hawaii stands as a stark outlier to the rest of the United States. For years, it has issued zero permits, either open or concealed, to ordinary citizens. *See* App.184, (O'Scannlain, J., dissenting) ("it appears that no carry licenses have been issued to private, non-security guard citizens anywhere in

the State since the issuance of the State's 2018 [Attorney General's] Opinion Letter."); App.267, n.21 (panel opinion). By any measure, Hawaii's denial of the right is extreme. Equally extreme is the Ninth Circuit's holding that the right does not apply outside the home.

B. The Text, Structure, and Purpose of the Second Amendment Confirm That the Right to Bear Arms Extends Beyond the Home.

The Second Amendment states: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. App.337. Dissenting from the denial of certiorari in *Rogers v. Grewal*, 140 S. Ct. 1865, 1869 (2020), Justice Thomas stated that "it would take serious linguistic gymnastics—and a repudiation of this Court's decision in *Heller*—to claim that the phrase 'bear Arms' does not extend the Second Amendment beyond the home." In a move that surprised no one, the Ninth Circuit accepted that challenge and proclaimed the Second Amendment does not apply outside the home. *See Mai v. United States*, 974 F.3d 1082, 1105 (9th Cir. 2020) (Vandyke, J., dissenting) ("Even when our panels have struck down laws that violate the Second Amendment, our court rushes in en banc to reverse course.")

The Ninth Circuit's en banc majority below did not bother to examine the text of the Second Amendment. Rather, the majority claimed that its "review of Hawai'i's firearm regulation is guided by the Supreme Court's landmark decisions in [*Heller*] and [*McDonald*]. App.31. But those decisions require the court to have begun with the text of the Second Amendment, and yet the majority studiously avoided the text.

See Heller, 554 U.S. at 576. Rather, the majority moved directly into a "review of the historical record, stating its "review of more than 700 years of English and American legal history reveals a strong theme: government has the power to regulate arms in the public square[]." App.96. The court found that, because such carry was regulated, it was "historically understood to fall outside of the Second Amendment's scope, and thus may be upheld without further analysis." App.97, (punctuation and citation omitted).

The Ninth Circuit then turned *Heller* on its head. The court recognized that the "*central component* of the Second Amendment is the basic right of self-defense, whose exercise is most acute in the home. *McDonald*, 561 U.S. at 767 (quoting *Heller*, 554 U.S. at 599, 628)." App.97, (punctuation omitted). But the court then took that language as a limitation on the right, holding that the "power of the government to regulate carrying arms in the public square does not infringe in any way on the right of an individual to defend his home or business." App.98. If anything, that language from *Heller* suggests the opposite. App.180, (O'Scannlain, dissenting); *Gould*, 907 F.3d at 670.

That the government has *regulated* carry in the public realm does not mean that the government historically *banned* the practice of carrying outside one's home. As Judge O'Scannlain observes, "[a]t most, and after great length, the majority arrives at the unexceptional observation that the lawful *manner* of open carry has historically been regulated in varying and limited ways … [b]ut nothing in the history … suggests that the mere presence of *some* regulation of open carry was understood to negate the

underlying status of the *right* to open carry, or to mean that such right could be altogether *extinguished* for the typical law-abiding citizen." App.193, (emphasis in original).

Judge O'Scannlain is correct. A plain reading of the Second Amendment shows that it protects a right to keep *and bear* arms. And, as this Court said in *Heller,* that right is to keep and bear arms for armed self-defense. The Ninth Circuit effectively has removed the term "bear" from the Second Amendment entirely. First, in *Peruta v. Cty. of San Diego*, 824 F.3d 919 (9th Cir. 2016) (en banc), the Ninth Circuit held that the Second Amendment does not protect a right to carry a concealed firearm, but did "not reach the question whether the Second Amendment protects some ability to carry firearms in public, such as open carry." Then, in this case, the majority held that "Hawai'i's restrictions on the open carrying of firearms reflect longstanding prohibitions and that the conduct they regulate is therefore outside the historical scope of the Second Amendment." *Young,* 992 F.3d at 772. App.14-15. Taken together, the Ninth Circuit's holdings in *Peruta* and *Young* have effectively removed "bear" from the Second Amendment by finding the Second Amendment right does not extend to armed self-defense outside the home at all.

The majority's opinion "reduces the right to 'bear Arms' to a mere inkblot." App.128, (O'Scannlain, J., dissenting). 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, as this 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 is 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 in Judge O'Scannlain's dissent 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*.'" App.134, 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."). *See also* App.190, (O'Scannlain, J., dissenting) ("The Second Amendment protects 'the right of *the people* to keep and bear arms' – not the right of a select group of '*exceptional' people* to keep and bear arms.") Yet, under Hawaii's statute, as construed by the Hawaii's Attorney General's Opinion, open carry permits are

reserved for those who can show a need "that substantially exceeds the need possessed by ordinary law-abiding citizens." App.21.

C. The History of the Second Amendment Confirms That the Right to Bear Arms Extends Beyond the Home.

This Court has already conducted a historical analysis in *Heller* and, as the dissent below suggests, the majority's approach is little more than a thinly veiled attempt to dispute *Heller's* reading of the relevant history. *See* App.147, (O'Scannlain, J., dissenting) ("bound as the inferior court that we are, we may not revisit questions of historical interpretation already decided in binding decisions of the Supreme Court, as the majority seems so keen to do"). *See also Moore*, 702 F.3d at 935 ("appellees ask us to repudiate the Court's historical analysis. That we can't do."); *Wrenn*, 864 F.3d at 659-61 (relying on *Heller's* historical analysis). Indeed, as one commentator has noted, the "[m]ost revealing about *Young*'s lengthy majority opinion is how it selectively cites the sources on which it relies."[2]

Judge O'Scannlain ably eviscerates the majority's historical analysis, App.135 *et seq*., including the majority's misplaced reliance on the Statute of Northampton, 2 Edw. 3 Stat. Northampton. c. 3 (1328). App.153-56. That 1328 statute appears to have been the first law that regulated the carry of arms. It provides, in relevant part, 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; and is particularly

[2] Kopel, David B. and Mocsary, George A., Errors of Omission: Words Missing from the Ninth Circuit's Young v. State of Hawaii (March 31, 2021). 2021 U. Ill. L. Rev. Online (forthcoming 2021), Available at https://bit.ly/3bd9jrE ("Words Missing from the Ninth Circuit's Young v State of Hawaii").

prohibited by the statute of Northampton..." 2 St. George Tucker *Blackstone's Commentaries: With Notes of Reference to the Constitution and Laws, of the Federal Government of the United States; and the Commonwealth of Virginia* 145 (1803). The statute appears to have only restricted carry with ill intent.

The best explication of the scope of the Statute of Northampton is the 1686 case of Sir John's Knight. *See* App.155, (O'Scannlain, J., dissenting). 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).

"The case reports are plain, but the *Young* majority muddles them to reach the conclusion that the case provides no clear precedent." *See* Kopel, David B. and Mocsary, George A., Errors of Omission: Words Missing from the Ninth Circuit's Young v. State of Hawaii (March 31, 2021), 2021 U. Ill. L. Rev. Online (forthcoming 2021) at *5. Knight was acquitted because merely carrying arms was a crime only if done with ill-intent. This is consistent with all the reported accounts of the decision

which 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.

The understanding of the Statute of Northampton 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)[3]; *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 the Statute 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 supports petitioner's 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). 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

[3] The majority's analysis of *Chune* only uses a partial quote in its analysis: "[b]y omitting 'in his presence,' *Young* converts *Chune*'s actual rule (sheriffs can arrest even if they did not witness the peace breached) into a completely different rule (sheriffs can arrest when there is no breach)." *See* Kopel, David B. and Mocsary, George A., Errors of Omission: Words Missing from the Ninth Circuit's Young v. State of Hawaii (March 31, 2021), 2021 U. Ill. L. Rev. Online (forthcoming 2021) at *5.

to defend themselves, against their adversaries, are not within the meaning of this statute, because they do nothing in terrorem populi." 1 William Hawkins, A Treatise of the Pleas of the Crown ch. 63, § 9, p. 136 (London, Elizabeth Nutt 1716).

Founding Era Americans expanded on the English tradition. While several urban municipalities restricted the discharge of firearms within the city bounds or during certain days, Act of May 28, 1746, ch. 10, 1778 Mass. Sess. Laws 193, 194; 5 N.Y. Colonial Laws, ch. 1501at 244–46 (1894); Act of Aug. 26, 1721, ch. 245, Acts of Pennsylvania 157–58, no early American law entirely prohibited the ownership, possession, or use of firearms for self-defense, hunting, or recreation. Patrick J. Charles, The Second Amendment: The Intent and Its Interpretation by the States and the Supreme Court, 77 (2009).

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." 1686 N.J. Laws 289-290, ch. 9. The 1686 New Jersey law did not ban carrying long arms or non-pocket pistols and thus provided for a method for self-defense. The most severe—by far—pre-Second Amendment restriction thus allowed all colonists to carry long guns and non-pocket pistols in any manner, openly or concealed. *See Moore*, 702 F.3d at 936 ("And one doesn't have to be a historian to realize that a right to keep and bear arms for personal self-defense in the eighteenth century could not rationally have been limited to the home.").

Heller likewise disposes of the majority's attempt to reread relevant state court decisions. The four separate state Supreme Court decisions cited with approval by the *Heller* majority are much more insightful as to the state of the law at the time of the ratification of the Fourteenth Amendment. *Id.* at 611-14 (discussing *Nunn v. State*, 1 Ga. 243 (1846); *Andrews v. State*, 50 Tenn. 165 (1871); and *State v. Reid*, 1 Ala. 612, 616-17 (1840); *State v. Chandler*, 5 La. Ann. 489, 490 (1850)). *See* App.141 *et seq*. (O'Scannlain, J., dissenting). The majority's analysis contravenes that analysis. In *Reid*, upholding a ban on the carrying of concealed weapons, Alabama's high court explained, "[a] statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defense, would be clearly unconstitutional." *Reid*, 1 Ala. at 616-17.

The *Nunn* court followed *Reid* and quashed an indictment for publicly carrying a pistol where the indictment failed to specify how the weapon was carried. *Nunn*, 1 Ga. at 251. "[T]he act [only] . . . seeks to suppress the practice of carrying certain weapons secretly, that it is valid, inasmuch as it does not deprive the citizen of his natural right of self-defense, or of his constitutional right to keep and bear arms. But that so much of it, as contains a prohibition against bearing arms openly, is in conflict with the Constitution, and void." *Id.* at 251.

Likewise, in *State v. Chandler*, 5 La. Ann. 489, 490 (1850), the Louisiana Supreme Court held that citizens had a right to carry arms openly: "This is the right guaranteed by the Constitution of the United States, and which is calculated to incite

men to a manly and noble defence of themselves, if necessary, and of their country, without any tendency to secret advantages and unmanly assassinations." *Heller*, 554 U.S. at 613 (citing *Chandler*, supra.). And "the Tennessee Supreme Court recognized . . . 'this right was intended ... and was guaranteed to, and to be exercised and enjoyed by the citizen as such, and not by him as a soldier, or in defense solely of his political rights.'" *Id*. at 608 (quoting *Andrews v. State*, 50 Tenn. 165, 183 (1871)).

The majority's opinion deems the individual right of self-defense in public to be unnecessary because the government exists to protect the people. App.113 ("Protection is the quid pro quo for our allegiance to the government" (App.99) and stating that right to carry cannot be allowed because it would suggest that the government "was unable or unwilling to protect the people"). App.102. The majority thus declares that "[c]arrying arms in the public square infringes on states' police powers for similar reasons." *Id*.

Balderdash. A State does not owe to "the people" (who possess the rights safeguarded by the Second Amendment) the English king's duty to protect its subjects, either in the "public square" or anywhere else. *See Deshaney v. Winnebago Cty. Dep't of Soc. Servs*., 489 U.S. 189, 193-94 (1989) (no requirement for "a state or local governmental entity to protect its citizens from 'private violence, or other mishaps not attributable to the conduct of its employees.'") *See also Town of Castle Rock v. Gonzales*, 545 U.S. 748, 767 (2005). Under the Constitution, "the people" are sovereign; they are not mere subjects who must bend a knee to the State. App.175 (O'Scannlain, J., dissenting).

As Judge O'Scannlain explains, "the majority's premise – that the states' constitutional power to protect the public was conferred to the exclusion of citizens' own right to self-defense is unmoored from the text and structure of the Constitution; contravenes the lessons of *Heller*, [and] is desperately ahistorical…" App.178.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted or, alternatively, the Court should hold this case pending a decision in *NYSRPA*.

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