

APPENDIX

APPENDIX

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FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

GEORGE K. YOUNG, JR.,
Plaintiff-Appellant,

v.

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,

Defendants-Appellees.

No. 12-17808

D.C. No.
1:12-cv-00336-
HG-BMK

OPINION

Appeal from the United States District Court
for the District of Hawaii
Helen W. Gillmor, District Judge, Presiding

Argued and Submitted En Banc September 24, 2020
San Francisco, California

Filed March 24, 2021

Before: Sidney R. Thomas, Chief Judge, and Diarmuid F.
O'Scannlain, M. Margaret McKeown, Kim McLane
Wardlaw, William A. Fletcher, Richard R. Clifton, Jay S.
Bybee, Consuelo M. Callahan, Sandra S. Ikuta, Michelle T.
Friedland and Ryan D. Nelson, Circuit Judges.

Opinion by Judge Bybee;
Dissent by Judge O'Scannlain;
Dissent by Judge R. Nelson

SUMMARY*

Civil Rights

The en banc court affirmed the district court's dismissal of an action challenging Hawai'i's firearm licensing law, Hawai'i Revised Statutes § 134-9(a), which requires that residents seeking a license to openly carry a firearm in public must demonstrate "the urgency or the need" to carry a firearm, must be of good moral character, and must be "engaged in the protection of life and property."

Appellant George Young applied for a firearm-carry license twice in 2011, but failed to identify "the urgency or the need" to openly carry a firearm in public. Instead, Young relied upon his general desire to carry a firearm for self-defense. Both of Young's applications were denied. Young brought a challenge to Hawai'i's firearm-licensing law under the Second Amendment and the Due Process Clause of the Fourteenth Amendment. The district court upheld Hawai'i's statute.

The en banc court first held that the scope of its review would be limited to Young's facial challenge to HRS § 134-9. There was no need to determine whether Hawai'i County properly applied § 134-9, because Young did not bring an as-applied challenge.

The en banc court noted that this Court has previously held that individuals do not have a Second Amendment right

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

to carry concealed weapons in public. *Peruta v. County of San Diego*, 824 F.3d 919 (9th Cir. 2016) (en banc). The question presented in this case, accordingly, was limited to whether individuals have a right to carry weapons openly in public. To answer that question, and consistent with the Supreme 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), the en banc court first considered whether Hawai'i's law affects conduct protected by the Second Amendment.

After careful review of the history of early English and American regulation of carrying arms openly in the public square, the en banc court concluded that Hawai'i's restrictions on the open carrying of firearms reflect longstanding prohibitions, and therefore, the conduct they regulate is outside the historical scope of the Second Amendment. The en banc court held that the Second Amendment does not guarantee an unfettered, general right to openly carry arms in public for individual self-defense. Accordingly, Hawai'i's firearms-carry scheme is lawful.

The en banc court rejected Young's argument that HRS § 134-9 is invalid as a prior restraint because it vests chiefs of police with unbridled discretion to determine whether a permit is issued. Joining its sister circuits, the en banc court held that the prior restraint doctrine does not apply to Second Amendment challenges to firearm-licensing laws.

The en banc court also rejected, as premature, Young's due process argument that HRS § 134-9 does not provide adequate process to challenge the denial of a carry-permit application. The en banc court noted that Young did not seek review under HRS § 91-9 before bringing suit. So,

Hawai‘i has not yet denied him the opportunity for appellate review. Because Young has not actually been denied a hearing, his procedural due process claim was speculative, and there was no need to reach it.

Dissenting, Judge O’Scannlain, joined by Judges Callahan, Ikuta, and R. Nelson, would hold that both HRS § 134-9 and the 1997 County regulation destroy the core right to carry a gun for self-defense outside the home and are unconstitutional under any level of scrutiny. Judge O’Scannlain stated that the majority holds 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. In his view, the majority’s decision undermines not only the Constitution’s text, but also half a millennium of Anglo-American legal history, the Supreme 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 the foundational principles of American popular sovereignty itself.

Dissenting, Judge R. Nelson, joined by Judges Callahan and Ikuta, concurred with Judge O’Scannlain’s dissent concluding that Hawaii Revised Statute 134-9 violates the Second Amendment. Judge R. Nelson wrote that the majority erred not only in holding the statute facially constitutional, but also in rejecting Young’s as-applied challenge. He also wrote separately to highlight the brazenly unconstitutional County of Hawaii Regulations applying HRS § 134-9, stating that there should be no dispute that any law or regulation that restricts gun ownership only to security guards violates the Second Amendment.

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OPINION

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BYBEE, Circuit Judge:

The State of Hawai‘i requires its residents to obtain a license to carry a firearm in public. To satisfy the statutory requirements for an open-carry license, residents must demonstrate “the urgency or the need” to carry a firearm, must be of good moral character, and must be “engaged in the protection of life and property.” Appellant George Young applied for a firearm-carry license twice in 2011, but failed to identify “the urgency or the need” to openly carry a firearm in public. Instead, Young relied upon his general desire to carry a firearm for self-defense. Both of Young’s applications were denied. Young brought a facial challenge to Hawai‘i’s firearm-licensing law under the Second Amendment and the Due Process Clause of the Fourteenth Amendment. The district court upheld Hawai‘i’s statute.

We have previously held that individuals do not have a Second Amendment right to carry *concealed* weapons in public. *Peruta v. County of San Diego*, 824 F.3d 919 (9th Cir. 2016) (en banc). The question presented in this case is whether individuals have a right to carry weapons *openly* in public. In order to answer that question, and consistent with the Supreme 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), we ask, first, whether Hawai‘i’s law affects conduct protected by the Second Amendment. If so, we then determine if the law can survive the appropriate level of scrutiny. After careful review of the history of early English and American regulation of carrying arms openly in the public square, we conclude 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. Accordingly, Hawai‘i’s firearms-carry scheme is lawful. We affirm the judgment of the district court.

I. BACKGROUND AND PROCEEDINGS

A. *Hawai‘i’s Licensing Scheme*

1. History of Firearm Regulation in Hawai‘i

Hawai‘i law began limiting public carriage of dangerous weapons, including firearms, more than 150 years ago—nearly fifty years before it became a U.S. territory and more than a century before it became a state. Hawai‘i enacted its first statutory regulation of public carry in 1852. The aptly named “Act To Prevent the Carrying of Deadly Weapons” recognized that “the habit of carrying deadly weapons is dangerous to life and the public peace.” Act of May 25, 1852, 1852 Haw. Sess. Laws 19. To combat those risks, Hawai‘i’s pre-territorial legislative council prescribed fines and imprisonment for “[a]ny person not authorized by law, who shall carry, or be found armed with, any bowie-knife, sword-cane, pistol, air-gun, slung-shot or other deadly weapon.” *Id.* § 1. The Act of May 25, 1852 categorically exempted certain professionals “authorized to bear arms,” such as those “holding official, military, or naval rank . . . when [the firearm was] worn for legitimate purposes.” *Id.* § 2.

Hawai‘i’s regulation of dangerous weapons remained in effect after Hawai‘i consented to annexation as a U.S. territory in 1898. Under the Newlands Resolution, “[t]he municipal legislation of the Hawaiian Islands . . . not inconsistent with this joint resolution nor contrary to the Constitution of the United States nor to any existing treaty of

the United States, shall remain in force until the Congress of the United States shall otherwise determine.” Resolution of July 7, 1898, 30 Stat. 750. *See Territory of Hawai‘i v. Mankichi*, 190 U.S. 197, 209 (1903). Hawai‘i’s territorial legislature renewed its 1852 limitations on the carrying of dangerous weapons in a 1905 Act, as amended in 1913. Haw. Rev. Laws, ch. 209, § 3089 (1905), *as amended* 1913 Haw. Sess. Laws 25, act 22, § 1. Like its predecessors, the 1913 statute made it unlawful to carry deadly weapons unless “authorized by law.” *Id.* The statute imposed civil and criminal penalties on anyone who carried a “deadly weapon” without prior authorization “unless good cause be shown for having such dangerous weapon.” *Id.*

In 1927, Hawai‘i implemented its first restriction on firearms specifically, as opposed to restrictions on the broader class of “deadly weapons.” In a section entitled “Carrying or keeping small arms by unlicensed person,” the law provided:

Except as otherwise provided in Sections 7 and 11 hereof in respect of certain licensees, no person shall carry, keep, possess or have under his control a pistol or revolver; provided, however, that any person who shall have lawfully acquired the ownership or possession of a pistol or revolver may, for purposes of protection and with or without a license, keep the same in the dwelling house or business office personally occupied by him, and, in the case of an unlawful attack upon any person or property in said house or office, said pistol or revolver may be carried in any lawful, hot pursuit of the assailant.

Act 206, § 5, 1927 Haw. Sess. Laws 209, 209–211. The 1927 Act, which was modeled in part on the Uniform Firearms Act, required a person to obtain a license to carry a “pistol or revolver concealed upon his person or to carry one elsewhere than in his home or office.” *Id.* § 7. Carry licenses could be issued by the sheriff or a sitting judge after either had determined that applicant was “suitable . . . to be so licensed.” *Id.* An applicant was deemed “suitable” to carry a firearm upon meeting a citizenship and age requirement and showing a “good reason to fear an injury to his person or property, or . . . other proper reason for carrying a pistol or revolver.” *Id.*

In 1933, the Hawai‘i legislature further refined its concealed-carry licensing scheme. Act 26, § 8, 1933–1934 Haw. Sess. Laws Spec. Sess. 35, 39. To carry a concealed weapon, the applicant had to demonstrate an “exceptional case” and a “good reason to fear injury to his person or property.” *Id.*

The “exceptional case” and “good reason to fear injury” requirements included in the 1933 Act became staples of Hawai‘i’s future firearm regulations. The Hawai‘i legislature included those requirements in its 1961 Act “Relating to Permits to Carry Firearms.” Act 163, 1961 Haw. Sess. Laws 215. The 1961 regulations mirrored those in the 1933 statute and required an applicant to demonstrate an “exceptional case” and a “good reason [for the applicant] to fear injury to his person or property” before publicly carrying a firearm. *Id.* § 1. Whereas the 1933 Act only applied to *concealed* carry, however, the 1961 Act announced a new regulatory scheme for *open* carry. An individual seeking to carry a firearm openly in public was required to demonstrate “the urgency of the need” to carry and must be “engaged in the protection of life and property.” *Id.* If the applicant made such a showing

and was not otherwise prohibited from possessing a firearm, the chief of police had discretion to grant the carry application. *Id.* (“[T]he respective chiefs of police may grant a license . . .”).

2. Hawai‘i’s Current Scheme

a. The statute. Hawai‘i’s current scheme allows individuals to possess firearms under a variety of circumstances. First, individuals who are not members of law enforcement, the armed forces, or certain federal agencies and wish to carry firearms in places outside of their homes, places of business or sojourns must obtain a license from the county chief of police. Hawai‘i Revised Statutes (HRS) § 134-9(a). Second, individuals may possess firearms in their homes, places of business, and sojourns. *Id.* § 134-23. Third, persons who are authorized by their public employers, including law enforcement, the armed forces, and certain federal agencies, are exempt from other restrictions and may carry in public. *Id.* § 134-11(a). Fourth, any person, sixteen years or older “may carry and use any lawfully acquired rifle or shotgun and suitable ammunition while actually engaged in hunting or target shooting.” *Id.* § 134-5(a). Additionally, “[a] person may carry unconcealed and use a lawfully acquired pistol or revolver while actually engaged in hunting game mammals.” *Id.* § 134-5(c).

Hawai‘i’s public carry licensing scheme is substantially the same today as it was in 1961. Hawai‘i continues to distinguish between concealed carry and open carry, although it is not clear that the difference is particularly significant. To obtain a concealed carry license from a county chief of police, a person must first show “an exceptional case” and a “reason to fear injury to [his or her] person or property.”

HRS § 134-9(a). As to open carry, the statute states in relevant part:

Where the urgency or the need has been sufficiently indicated, the respective chief of police may grant to an applicant of good moral character who is a citizen of the United States of the age of twenty-one years or more, is engaged in the protection of life and property, and is not prohibited under section 134-7 from the ownership or possession of a firearm, a license to carry a pistol or revolver and ammunition therefor unconcealed on the person within the county where the license is granted.

Id. Many of the statute’s requirements are objective. For instance, whether the applicant meets the citizenship, age, or legal-ownership requirements may be determined by the reviewing chief of police by a simple review of the application and law enforcement databases. On the other hand, “the urgency or the need” for the license and the applicant’s participation in “the protection of life and property” appear to be subjective requirements not discoverable by reference to a law enforcement database.

b. The County of Hawai‘i’s regulations. In October 1997, the County of Hawai‘i—where Young lives and where he applied for several carry permits—promulgated county-wide rules to evaluate permit applications under § 134-9. *See* HRS § 91-3 (detailing the rule-making process for county boards, county commissions, and other agencies authorized by law to make rules). These “Rules and Regulations Governing the Issuance of Licenses to Carry Concealed and

Unconcealed Weapons” outline the process the chief of police would follow in reviewing carry applications under § 134-9.

The county regulation imposed different rules for concealed arms and for unconcealed arms consistent with § 134-9’s bifurcation, but a brief review of the regulations reveals several inconsistencies between the state statute and the county’s administration. At the outset, it is clear that Hawai‘i County’s regulations are more demanding than § 134-9. For instance, the regulations seem to consider open-carry permit applications to be available only to “private detectives and security guards.” In fact, the first subheading reads “Rules and Regulations Governing the Carrying of Concealed Weapons and the Carrying of Weapons *by Private Detectives and Security Guards*.” The regulation also provides the chief of police a mechanism by which to cancel a previously issued carry permit upon termination of the applicant’s employment. Meanwhile, § 134-9 does not impose a professional requirement on the applicant, nor does it distinguish between applications by security guards and applications by other citizens.

The county regulation also applies to a broader class of weapons than does § 134-9. Whereas § 134-9 applies only to the public carry of “a pistol or revolver and ammunition therefor,” the county regulation defines “firearm” to include “rifles, shotguns, automatic firearms, noxious gas projectors, mortars, bombs, and cannon[s].” Section 134-9 did not contemplate any of those classes of arms. Similarly, the county regulation also applies to non-firearm “weapons” that could be concealed on the person, including “knives, blackjacks, batons, night sticks, and chemical agents designed to temporarily subdue or incapacitate a person.” Again, § 134-9 is silent on such weapons.

c. Hawai‘i Attorney General Opinion Letter. After this litigation began, the Hawai‘i Attorney General issued a formal opinion interpreting § 134-9’s requirements and clarified that § 134-9 does not reserve open-carry permits to security guards. *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>) (Att’y Gen. Letter). The Attorney General unequivocally rejected Hawai‘i County’s interpretation that an open-carry permit applicant must demonstrate a professional need to carry, such as being a private investigator or security guard. *Id.* at 3–4. The Attorney General concluded that such a showing would be inconsistent with § 134-9, which “does not limit unconcealed-carry licenses to individuals employed as private security officers.” *Id.* at 6. All that the statute requires is that the applicant (1) meet the objective qualifications; (2) be of good moral character; (3) demonstrate “sufficient need”; and (4) present no other reason to be disqualified. *Id.* at 6–7.

According to the Attorney General’s Opinion Letter, an applicant’s need is “sufficient” if it is urgent and is related to “engage[ment] in the protection of life and property.” *Id.* at 7 (citing HRS § 134-9). The urgency requirement “connote[s] an immediate, pressing, and heightened interest in carrying a firearm.” *Id.* at 8. 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.*; *see also id.* at 7 (noting 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”) (citing *Drake v. Filko*, 724 F.3d 426, 428 & n.2 (3d Cir. 2013)). The Attorney General provided several examples of applicants who would

plausibly qualify for an open-carry license regardless of their profession.¹

The Attorney General’s Opinion Letter did not repeal Hawai‘i County’s regulations, but its interpretation of state law is considered “highly instructive.” *See Kepo’o v. Watson*, 952 P.2d 379, 387 n.9 (Haw. 1998). And even without the Attorney General’s clarification, the statute—not the county’s regulation—would control. *See Ruggles v. Yagong*, 353 P.3d 953, 964 (Haw. 2015) (citing HRS § 46-1.5(13)) (Hawai‘i law “authorizes county ordinances ‘to protect health, life, and property . . .’ as long as they are ‘not inconsistent with’” state law.). Further, each of Hawai‘i’s other counties agree that § 134-9 does not require consideration of an applicant’s profession when evaluating a carry-permit application. *See* Brief of City and County of Honolulu, *et. al.*, as Amici Curiae 4–6 (“The Attorney General’s interpretation of section 134-9, HRS, comports with [Honolulu, Kaua‘i, and Maui] Counties’ past and current practice[s].”).

B. *Facts and Proceedings*

George Young wishes to carry a firearm in public—concealed or unconcealed—but does not fall into one of Hawai‘i’s categorical exceptions for law enforcement and military personnel. In 2011, Young applied twice for a license in the County of Hawai‘i. In both applications, Young cited a general need for “personal security, self-preservation and defense, and protection of personal family

¹ This non-exhaustive list included: (1) a victim of domestic abuse whose former spouse has violated protective orders; (2) a victim of stalking with credible threats of bodily harm; and (3) a witness to a crime who has received credible threats to her safety. Att’y Gen. Letter at 8.

members and property.” Hawai‘i County police chief, Henry Kubojiri, denied both of Young’s applications. Chief Kubojiri determined that Young had neither shown an “exceptional case[] or demonstrated urgency.”

In 2012 Young filed a pro se complaint under 42 U.S.C. § 1983 against the State of Hawai‘i, the governor, the attorney general, the County of Hawai‘i, the mayor of the County of Hawai‘i, the Hilo County Police Department, the County of Hawai‘i chief of police, and unnamed persons and corporations.² He brought separate counts under the Bill of Attainder Clause, the Contracts Clause, the Second Amendment, the Ninth Amendment, and the Privileges or Immunities and Due Process Clauses of the Fourteenth Amendment. Young asked for the permanent enjoining of HRS § 134, the issuance of a permit, and compensatory and punitive damages.

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). Although the district court dismissed Young’s claims on various grounds, the only grounds relevant here relate to his Second Amendment and Due Process claims; his other claims have been abandoned on appeal. With respect to the Second Amendment, the district court first determined that Hawai‘i’s firearm licensing scheme did not implicate conduct that is protected by the Second Amendment. *Young*, 911 F. Supp. 2d at 987–91. Looking to “[t]he weight of authority in the Ninth Circuit, other Circuits, and state courts,” the district court concluded

² Young has filed two prior actions. See *Young v. Hawai‘i*, 73 Fed. R. Serv. 3d 1635 (D. Haw. 2009); *Young v. Hawai‘i*, 548 F. Supp. 2d 1151 (D. Haw. 2008). Both actions were dismissed.

that “*Heller* and *McDonald* establish[] only a narrow individual right to keep an operable handgun at home for self-defense.” *Id.* at 989. Because Hawai‘i’s law permits individuals to possess firearms in the home and in a place of business, HRS § 134-9 did not impose on a right protected by the Second Amendment. *Id.* at 989–90.

Alternatively, the district court found that even if Hawai‘i’s statute implicated conduct protected by the Second Amendment, the statute would survive intermediate constitutional scrutiny. *Id.* at 991–92. The district court determined that Hawai‘i’s law “protects an important and substantial interest in safeguarding the public from the inherent dangers of firearms.” *Id.* at 991. And because Hawai‘i’s law did not burden in-home possession of firearms and was not an outright ban on the firearms, the district court concluded that Hawai‘i’s restrictions reasonably fit its substantial interest in protecting the public from gun violence. *Id.* The court rejected Young’s related argument that Hawai‘i’s statute vested in the chief of police unbridled discretion as to whether to grant a carry permit, reasoning that the “prior restraint doctrine is applicable only in the First Amendment context.” *Id.*

The district court also dismissed Young’s due process claim on the ground that he had no liberty or property interest in carrying a firearm in public. *Id.* at 993. The district court dismissed Young’s complaint, *id.* at 995–96, and issued a final judgment.

Young timely appealed, and a divided panel of our court reversed in part and dismissed in part the district court’s judgment. *Young v. Hawai‘i*, 896 F.3d 1044 (9th Cir. 2018). We granted rehearing en banc to determine whether

Hawai‘i’s regulation of open carry violates the Second Amendment right to keep and bear arms. *Young v. Hawai‘i*, 915 F.3d 681 (9th Cir. 2019).

II. THE STANDARDS FOR OUR REVIEW

A. *Standards of Review of Law and Fact*

The district court had jurisdiction under 28 U.S.C. § 1331, and we have jurisdiction under 28 U.S.C. § 1291. We review de novo a district court’s dismissal under Rule 12(b)(6). *Curtis v. Irwin Indus., Inc.*, 913 F.3d 1146, 1151 (9th Cir. 2019). We accept the allegations in Young’s complaint as true and construe the pleadings in the light most favorable to him. *See Rowe v. Educ. Credit Mgmt. Corp.*, 559 F.3d 1028, 1029–30 (9th Cir. 2009).

B. *Scope of Our Review*

Having identified the applicable standard of review, we must now consider the scope of our review. During the supplemental briefing that we allowed after granting en banc review, the parties disputed what claims Young actually raised before the district court.³ Young argued that his claims

³ In the district court, Young argued that § 134-9 violated the Bill of Attainder Clause, the Contracts Clause, the Ninth Amendment, and the Privileges or Immunities Clause. He has abandoned those claims on appeal.

Young’s lengthy and rambling complaint focused on firearms. Nevertheless, in the relief section, Young referred to other arms, “e.g., stun gun, tasers, mace spray, switch blade etc.” He did not raise these in any briefing before the district court. In his panel briefing, Young, for the first time, referred to Hawai‘i’s prohibitions on the possession of electric

before the district court included both a facial challenge and an as-applied challenge to HRS § 134-9. Young pointed to several instances where, he claimed, he preserved an as-applied challenge both before the district court and at his panel-stage briefing. Hawai‘i⁴ countered that Young raised only a facial challenge to the statute below and, to the extent that Young brought an as-applied challenge, he had forfeited that claim.

The difference between the two claims is potentially important for Young. It is no secret that a facial challenge to a statute is more difficult to prove than an as-applied challenge. *See United States v. Salerno*, 481 U.S. 739, 745 (1987). A facial challenge is a claim that the legislature has violated the Constitution, while an as-applied challenge is a claim directed at the execution of the law. *See* Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 Stan. L. Rev. 1209, 1235–42 (2010); *see also* Henry Paul Monaghan, *Overbreadth*, 1981 Sup. Ct. Rev. 1, 5, 32 n.134 (“[I]f a federal statute is found facially defective it ‘is void in

guns, HRS § 134-16; switchblades, *id.* § 134-52; and butterfly knives, *id.* § 134-53. He also argued that Hawai‘i prohibits the carrying of rifles and shotguns publicly, *id.* § 134-23, § 134-24, in violation of the Second Amendment. He did not raise these arguments in his supplemental briefing after we granted en banc review. Because Young did not raise these arguments properly before the district court, we deem them forfeited.

⁴ The district court dismissed the State of Hawai‘i, the governor, and the attorney general as defendants. *Young*, 911 F. Supp. 2d at 983. Young does not challenge that ruling, but has pressed his claims against the County of Hawai‘i, the mayor and the chief of police. The State has appeared as amicus, not as a party to the appeal. For convenience, because this is a facial challenge to a Hawai‘i statute, we will refer to the State as the party; in fact the remaining defendants are the County of Hawai‘i and its officials charged with following state law.

toto, barring all further actions under it, in this, and every other case,” but an as-applied challenge is “wholly fact dependent: Do the determinative facts shown by the evidence fall on the protected side of the applicable rule of constitutional privilege?” (footnote and citation omitted). Because a facial challenge is directed to the legislature, the plaintiff must show that “no set of circumstances exists under which the [statute] would be valid,” *Hotel & Motel Ass’n of Oakland v. City of Oakland*, 344 F.3d 959, 971 (9th Cir. 2003) (citing *Salerno*, 481 U.S. at 745) (alteration in original), and our review of the Hawai‘i statute would be limited to the text of the statute itself. *Calvary Chapel Bible Fellowship v. County of Riverside*, 948 F.3d 1172, 1177 (9th Cir. 2020). On the other hand, if Young raised and preserved an as-applied challenge to the Hawai‘i law, our review would include the circumstances surrounding the chief of police’s decision to deny Young a license. *See id.*

We need not determine whether Hawai‘i County properly applied § 134-9, because Young did not bring an as-applied challenge. Our review of the record demonstrates that, although Young peppered his pleadings with the words “application” and “enforcement,” he never pleaded facts to support an as-applied challenge. He did not brief such a question to the district court. When the district court dismissed his complaint and treated it as exclusively a facial challenge, *Young*, 911 F. Supp. 2d at 991, Young did not request reconsideration by the district court to address an as-applied claim.⁵ To be sure, the district court acknowledged

⁵ We agree with Judge Nelson that Young was not required to seek reconsideration to preserve his claims for appeal. *See* R. Nelson Dissent at 205. We merely note that Young did not raise the issue of his allegedly

that Young was denied a license, *id.* at 979–80, but referred to the fact as relevant to Young’s standing, *id.* at 987, not to his causes of action. As we explain in greater detail below, Young did not set out such a claim as an issue before our court in his panel appeal, in which he was represented by counsel. Those briefs were filed in 2013. He did not raise the issue in supplemental briefs lodged with the court in 2016, and ordered filed in 2018, also submitted by counsel. The panel’s 2018 opinion noted the various arguments Young raised in his complaint that he abandoned on appeal and “several new arguments on appeal.” Because “Young failed properly to raise these arguments before the district court,” the panel deemed them forfeited. *Young*, 896 F.3d at 1050 n.3. Like the district court before it, the panel did not recognize any as-applied challenge in Young’s complaint or briefings. Young’s as-applied argument appears for the first time in his supplemental briefing to the en banc court, which was filed in June 2020—more than seven years after his opening brief was filed.

We will not consider the claim. At best, Young’s putative as-applied challenge was buried in his complaint and not well pleaded. At worst, even assuming he pleaded it, Young has long forfeited the challenge.⁶ The relaxed pleading standard

mischaracterized as-applied challenge to the district court below or to the panel on appeal.

⁶ If we were to take seriously a claim that Young properly pleaded, and preserved, an as-applied challenge, then the district court should not have issued a final judgment. In that case, Young’s appeal was premature, and we should have dismissed his appeal for lack of jurisdiction. *See Galaza v. Wolf*, 954 F.3d 1267, 1272 (9th Cir. 2020) (dismissing appeal for lack of subject matter jurisdiction where a claim remained before the district court); *Chacon v. Babcock*, 640 F.2d 221, 222 (9th Cir. 1981) (an

we afford pro se litigants does not apply to counseled filings. *See Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (Pro se filings “must be held to less stringent standards than formal pleadings drafted by lawyers.”) (citation omitted); *Mann v. Boatright*, 477 F.3d 1140, 1148 n.4 (10th Cir. 2007) (“While we generally construe pro se pleadings liberally, the same courtesy need not be extended to licensed attorneys.”) (internal citation omitted). Young’s counsel never raised or argued an as-applied challenge even when he was permitted a supplemental brief. We do “not ordinarily consider matters on appeal that are not specifically and distinctly raised and argued in appellant’s opening brief.” *See Hayes v. Idaho Corr. Ctr.*, 849 F.3d 1204, 1213 (9th Cir. 2017) (quoting *Officers for Just. v. Civ. Serv. Comm’n of City & Cnty. of San Francisco*, 979 F.2d 721, 726 (9th Cir. 1992)).

If, as our dissenting colleagues claim, Young raised an as-applied challenge that the district court mischaracterized or ignored, *see* O’Scannlain Dissent at 188; R. Nelson Dissent at 196, the point appears nowhere in his panel-stage briefing. Young’s opening brief mentions the application of HRS § 134-9 twice in passing but presents no further argument to support an as-applied challenge. Instead, Young challenges HRS § 134-9 exclusively on its face, arguing, for example, that HRS § 134-9’s “exceptional case” requirement renders the statute unconstitutional, that HRS § 134-9 violates the broad right to carry firearms in public, and that HRS § 134-9 impermissibly vests a chief of police with discretion to deny

order is not appealable unless it disposes of each of the parties’ claims or is appropriate under Fed. R. Civ. P. 54(b)). No one has raised the argument that Young’s appeal was premature or that the district court’s judgment was anything but a final decision on the merits. We decline to manufacture jurisdictional issues.

carry permits. At one point, Young even compares his challenge to HRS § 134-9 to *State v. Delgado*, 692 P.2d 610 (Or. 1984), where “[t]he Plaintiff . . . like Mr. Young, made a *facial challenge*” to an Oregon switchblade ban. None of Young’s counseled arguments in his opening brief suggest that he had brought an as-applied challenge. Nor did Young’s panel-stage reply brief argue that the district court mischaracterized or ignored an as-applied challenge.

We think it is more likely that Young brought no as-applied challenge at all, and thus he may pursue whatever remedies remain to him. In either case, we are under no obligation to consider arguments unless they are “specifically and distinctly argued.” *Miller v. Fairchild Indus., Inc.*, 797 F.2d 727, 738 (9th Cir. 1986); *Hayes*, 849 F.3d at 1213. Young did not meet that standard. Even affording Young’s arguments the deference we typically give to pro se pleadings, *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000), a party’s “bare assertion[s],” without more, will not preserve an argument for review, especially where “a host of other issues are presented for review,” *Greenwood v. F.A.A.*, 28 F.3d 971, 977 (9th Cir. 1994) (citation omitted).

We are cognizant of our dissenting colleagues’ reservations about our holding that Young did not raise an as-applied challenge and what that might mean for future pro se litigants. R. Nelson Dissent at 197–98; *see also* O’Scannlain Dissent at 188. Today’s opinion, however, does not alter in any way the relaxed pleading standard we regularly afford pro se litigants. We merely hold that in this case, Young has not met that standard.

The scope of our review will be limited to Young’s facial challenge to HRS § 134-9. Young brought a Second

Amendment claim, which he supported in part with arguments based on the First Amendment's prior restraint doctrine, and a claim under the Due Process Clause of the Fourteenth Amendment. We address his primary Second Amendment claim in Part III and his other claims in Part IV.

C. Substantive Standards for the Second Amendment

The Second Amendment reads: "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. Our review of Hawai'i's firearm regulation is guided by the Supreme Court's landmark decisions in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010). Both parties contend that *Heller* supports its view of the Second Amendment. According to Young, *Heller* identified a broad right to possess and carry firearms in public because the Second Amendment protects one's right to self-defense, wherever that need arises. On the State of Hawai'i's reading, *Heller* said no such thing. According to the State, *Heller* narrowly defined the right to keep and bear arms to self-defense in the home and, accordingly, prohibitions on firearms that do not interfere with self-defense in the home are valid. We will begin with a discussion of *Heller* and then review the two-step approach we developed after *Heller*.

1. *Heller*

The Court in *Heller* considered a District of Columbia statute prohibiting the possession of loaded firearms inside the home. The statute required residents to keep their firearms unloaded and secured with a trigger lock unless

being used for approved recreational activities or held in a place of business. *Heller*, 554 U.S. at 574–75 (citing D.C. Code § 7-2507.02). The requirement that a firearm be unloaded and bound by trigger lock rendered a lawfully possessed firearm inoperable. *Id.* at 628. Dick Heller, a resident of the District of Columbia and special police officer, sought to enjoin enforcement of the D.C. statute insofar as it prohibited the lawful possession of firearms within his own home. *Id.* at 576.

Heller’s challenge to the D.C. statute presented the Court with its “first in-depth examination of the Second Amendment.” *Id.* at 635. In an extensive opinion, the Court determined that the right to keep and bear arms is an individual right held by the people, and not limited by the prefatory clause—“a well regulated Militia”—only to “the right to possess and carry a firearm in connection with militia service.” *Id.* at 596, 577, 599. The Court also concluded that the “right to keep and bear Arms” was not a new right created by the Second Amendment but “codified a right ‘inherited from our English ancestors.’” *Id.* at 599 (quoting *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897)). The right to keep and bear arms was thus recognized, but not granted, in the Constitution, “for it had always existed.” *Id.* at 619 (citing John Ordronaux, *Constitutional Legislation in the United States* 241–42 (1891)). Since the right to keep and bear arms is an ancient one, the Court evaluated the history of the Second Amendment starting with English history, and continuing with American legal materials through the ratification of the Fourteenth Amendment. *Id.* at 581–92, 606–19.

Although it was clear to the Court that the history of the Second Amendment supported an individual right to bear

arms that did not depend on militia service, the Court did not undertake to explain how far the protection to bear arms extended. That is, *Heller* was not an “exhaustive historical analysis . . . of the full scope of the Second Amendment.” *Id.* at 626. The Court acknowledged that the right to keep and bear arms, “[l]ike most rights, . . . [is] not unlimited,” and that it is not a right to “carry any weapon whatsoever in any manner whatsoever and for whatever purpose.” *Id.* *Heller* recognized that the Second Amendment necessarily accepted certain “longstanding prohibitions” on the possession of firearms; such restrictions are “presumptively lawful.” *Id.* at 626–27, 627 n.26. Although the Court declined to create an exhaustive list of such longstanding prohibitions, it identified three classes of lawful prohibitions: bans on possession by felons and the mentally ill; bans on possession in sensitive places; and regulations on the commercial sale of firearms. *Id.* at 626–27. The Court also determined that the Second Amendment only protected weapons in “common use,” *id.* at 627, including the handgun, which *Heller* called the “quintessential self-defense weapon.” *Id.* at 629.

Heller held that an outright ban of firearms in the home violates the Second Amendment. *Id.* at 628–29 (“The handgun ban amounts to a prohibition of an entire class of ‘arms’ that is overwhelmingly chosen by American society for that lawful purpose. . . . Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home ‘the most preferred firearm in the nation to keep and use for protection of one’s home and family,’ would fail constitutional muster.” (citation and footnote omitted)). The extent to which the Second Amendment protects the right to keep and bear arms outside the home is less clear. To that issue, *Heller* posed more questions than it answered. By tying the Second Amendment

to the need to defend one's self, *Heller* implied that some right to bear arms may exist outside the home. *See id.* at 599 (the right to self-defense is a “*central component* of the right itself”). But the Court's caveats left open questions concerning state restraints on persons, weapons, and other restrictions for possessing arms outside the home. *Id.* at 626–27.

Two years after *Heller*, the Supreme Court reaffirmed that “[s]elf-defense is a basic right [and] . . . ‘the *central component*’ of the Second Amendment right,” whose exercise was “‘most acute’ in the home.” *McDonald*, 561 U.S. at 767 (quoting *Heller*, 554 U.S. at 599, 628). *McDonald* answered a different question than *Heller*, namely, whether the Second Amendment applies to the states. The Court held that the Second Amendment was incorporated through the Due Process Clause of the Fourteenth Amendment and, thus, applies to the states. *Id.* In reaching that conclusion, the Court once again looked to history, but this time to the post-ratification history of the Second Amendment and the place of the Second Amendment in the debates over the Fourteenth Amendment. *Id.* at 767–80.

2. Our Post-*Heller* Framework

Following *Heller* and *McDonald*, we have created a two-step framework to review Second Amendment challenges. *See Silvester v. Harris*, 843 F.3d 816, 820–21 (9th Cir. 2016); *Peruta*, 824 F.3d at 939; *Jackson v. City and County of San Francisco*, 746 F.3d 953, 960–61 (9th Cir. 2014); *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013). Our two-step test is similar to tests adopted by other circuits. *Chovan*, 735 F.3d at 1134–37; *Drake*, 724 F.3d at 429; *Woollard v. Gallagher*, 712 F.3d 865, 874–75 (4th Cir. 2013);

Nat'l Rifle Ass'n of Am., Inc. v. Bureau of ATFE (NRA), 700 F.3d 185, 194 (5th Cir. 2012); *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012); *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1252 (D.C. Cir. 2011); *Ezell v. City of Chicago*, 651 F.3d 684, 701–04 (7th Cir. 2011); *United States v. Reese*, 627 F.3d 792, 800–01 (10th Cir. 2010). First, we ask if the challenged law affects conduct that is protected by the Second Amendment. *Silvester*, 843 F.3d at 821. We base that determination on the “historical understanding of the scope of the right.” *Id.* (quoting *Heller*, 554 U.S. at 625). We are to inquire

whether there is persuasive historical evidence showing that the regulation does not impinge on the Second Amendment right as it was historically understood. Laws restricting conduct that can be traced to the founding era and are historically understood to fall outside of the Second Amendment’s scope may be upheld without further analysis.

Id. (internal citations omitted); *see also Jackson*, 746 F.3d at 960. Accordingly, a regulation “does not burden conduct protected by the Second Amendment if the record contain[s] evidence that [the subjects of the regulations] have been the subject of longstanding, accepted regulation.” *Fyock v. Sunnyvale*, 779 F.3d 991, 997 (9th Cir. 2015). We are looking for “historical prevalence.” *Id.* Similarly, we may uphold a law without further analysis if it falls within the “presumptively lawful regulatory measures” that *Heller* identified. *Silvester*, 843 F.3d at 821; *see Heller*, 554 U.S. at 626–27, 627 n.26.

If the challenged restriction burdens conduct protected by the Second Amendment—either because “the regulation is neither outside the historical scope of the Second Amendment, nor presumptively lawful”—we move to the second step of the analysis and determine the appropriate level of scrutiny. *Silvester*, 843 F.3d at 821. We have understood *Heller* to require one of three levels of scrutiny: If a regulation “amounts to a destruction of the Second Amendment right,” it is unconstitutional under any level of scrutiny; a law that “implicates the core of the Second Amendment right and severely burdens that right” receives strict scrutiny; and in other cases in which Second Amendment rights are affected in some lesser way, we apply intermediate scrutiny. *Id.*

III. PUBLIC CARRY OF FIREARMS AND THE SCOPE OF THE SECOND AMENDMENT

Consistent with this scheme, our first task is to determine whether the right to carry a firearm openly in public is protected by the Second Amendment. We have been down a similar road before. In *Peruta*, we addressed the question of whether the Second Amendment protected the right of individuals to carry concealed arms. After canvassing the historical record, we concluded that “the Second Amendment does not protect the right of a member of the general public to carry concealed firearms in public.” *Peruta*, 824 F.3d at 939. The question we address here is a variation on that theme: whether the Second Amendment guarantees individuals the right to carry arms openly in public. It is a question we specifically reserved in *Peruta*. *Id.* (“There may or may not be a Second Amendment right for a member of the general public to carry a firearm openly in public. The Supreme Court has not answered that question, and we do not

answer it here.”). And it is a question that has divided the circuits. *Compare Gould v. Morgan*, 907 F.3d 659 (1st Cir. 2018) (upholding Massachusetts licensing scheme restricting open carry); *Kachalsky v. County of Westchester*, 701 F.3d 81 (2d Cir. 2012) (same; New York licensing scheme); *Drake*, 724 F.3d 426 (same; New Jersey licensing scheme); *Woollard*, 712 F.3d 865 (same; Maryland licensing scheme), with *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012) (holding Illinois licensing scheme for open carry unconstitutional); *Wrenn v. District of Columbia*, 864 F.3d 650 (D.C. Cir. 2017) (same; District of Columbia licensing scheme).

Our sister circuits have, in large part, avoided extensive historical analysis. The Second Circuit skimmed a handful of American statutes and cases and decided against looking solely “to this highly ambiguous history and tradition.” *Kachalsky*, 701 F.3d at 91. The Third Circuit likewise was “not inclined to . . . engag[e] in a round of full-blown historical analysis.” *Drake*, 724 F.3d at 431; *see Gould*, 907 F.3d at 670 (concluding, without citation to historical sources, that “the national historical inquiry does not dictate an answer”); *Woollard*, 712 F.3d at 876. Each of these circuits instead assumed that there was some Second Amendment right to carry firearms in public and applied intermediate scrutiny to the regulations at issue. *Gould*, 907 F.3d at 670–72; *Drake*, 724 F.3d at 435; *Woollard*, 712 F.3d at 876; *Kachalsky*, 701 F.3d at 93. The two circuits that struck down state or D.C. licensing rules also largely avoided the historical record. The D.C. Circuit thought that *Heller* resolved the question so it could “sidestep the historical debate.” *Wrenn*, 864 F.3d at 660. With little review of historical materials, the Seventh Circuit announced that “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.” *Moore*, 702 F.3d at 936. Both courts concluded that *Heller* protected a broad right to self-defense that extended beyond the home. *Wrenn*, 864 F.3d at 659; *Moore*, 702 F.3d at 937. To be clear, most of these courts cited some historical materials, but no court undertook a systematic review of the historical right to carry weapons in public. *See, e.g., Wrenn*, 864 F.3d at 659–61; *Drake*, 724 F.3d at 432–34; *Moore*, 702 F.3d at 936–37; *Kachalsky*, 701 F.3d at 90–91, 94–96.

We do not think we can avoid the historical record. *Heller* relied heavily on history, and we do not think that it exhausted all subsequent need to confront our history in resolving challenges to other firearm regulations. *See Peruta*, 824 F.3d at 929–39 (reviewing the historical materials related to concealed-carry restrictions). Indeed, the Court was explicit on this point:

Justice Breyer chides us for leaving so many applications of the right to keep and bear arms in doubt, and for not providing extensive historical justification for those regulations of the right that we describe as permissible. *But since this case represents this Court’s first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field, any more than Reynolds v. United States*, 98 U.S. 145 (1879), our first in-depth Free Exercise Clause case, left that area in a state of utter certainty. *And there will be time enough to expound upon the historical justifications for the exceptions we have*

mentioned if and when those exceptions come before us.

Heller, 554 U.S. at 635 (internal citation omitted) (emphasis added).

We begin with a review of the historical record, starting with the English tradition, and then review the Colonial era and the post-Second Amendment era. Our focus on the American sources will be on state laws and cases. As the Court explained in *Heller*, “[f]or most of our history, the Bill of Rights was not thought applicable to the States, and the Federal Government did not significantly regulate the possession of firearms by law-abiding citizens.” 554 U.S. at 625. As we review these records, we are well aware that we are jurists and not historians. That creates the risk that we are engaged in Professor Kelly’s “law office history.”⁷ That is not only a risk we must assume; after *Heller*, it is our duty to confront such history. In an effort to get the history right, we have also honored the history of common law advocacy: We have looked to the parties to shape the arguments and call to the court’s attention the appropriate precedents. We have also relied on the parties and amici to direct our focus to the principal historical sources and any important secondary sources they would like us to consider. We have tried to be as complete as possible in recounting this history, but this is a legal opinion, not a dissertation, so we are likely to fall short in some way.

⁷ Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 Sup. Ct. Rev. 119, 122 n.13 (“By ‘law-office history,’ I mean the selection of data favorable to the position being advanced without regard to or concern for contradictory data or proper evaluation of the relevance of the data proffered.”).

As we might expect in this area, fraught with strong opinions and emotions, history is complicated, and the record is far from uniform. Nevertheless, we can discern the principal themes of the historical record. Our review of that history demonstrates that restrictions on carrying arms openly have long been a part of our legal tradition.

A. The English Right to Bear Arms in Public

We start, as did the Court in *Heller*, with the English concept of the right to bear arms. Our purpose in exploring the English tradition is not to import its law wholesale to our modern jurisprudence. Indeed, the evolution of the right to keep and bear arms is a valuable tool for discerning the Second Amendment’s meaning. But as *Heller* made clear, the Second Amendment did not create a new right; it codified a pre-existing one that we “inherited from our English ancestors.” 554 U.S. at 599 (quoting *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897)).

1. The Royal Decrees

As we recognized in *Peruta*, English law restricted public firearm possession as early as the thirteenth century. 824 F.3d at 929. King Edward I and his successor, King Edward II, issued a series of orders to local sheriffs that prohibited “going armed” without the king’s permission. In 1299, Edward I ordered the sheriffs of Salop and Stafford to prohibit any one “from tourneying, tilting . . . or jousting, or making assemblies, or otherwise going armed within the realm without the king’s special licen[s]e.” 4 Calendar Of The Close Rolls, Edward I, 1296–1302, at 318 (Sept. 15, 1299, Canterbury) (H.C. Maxwell-Lyte ed., 1906) (emphasis added). The punishment for violating the order included

“forfeiture of life and limb, lands,” and any other holdings in the king’s realm. *Id.* Although the 1299 order was only addressed to the sheriffs of Salop and Stafford, the king intended the order to apply to “to all the sheriffs of England.” *Id.*

Three years later, Edward I similarly instructed the sheriff of York to prohibit “any knight, esquire or any other person from . . . going armed without the king’s special licen[s]e.” *Id.* at 588 (July 16, 1302, Westminster). Any person “found thus going with arms after the proclamation” should have his “horses and armour” arrested. *Id.* In 1304, Edward I ordered the sheriffs of Leicester and York to issue a proclamation prohibiting any person from “going armed in any way without the king’s licen[s]e.” 5 Calendar Of The Close Rolls, Edward I, 1302–1307, at 210 (June 10, 1304, Stirling) (H.C. Maxwell-Lyte ed., 1908).

Edward II issued several similar orders. In the months leading up to Edward II’s coronation in 1308, he issued an order prohibiting any “knight, esquire, or other” from going “armed at Croydon or elsewhere before the king’s coronation.” 1 Calendar Of The Close Rolls, Edward II, 1307–1313, at 52 (Feb. 9, 1308, Dover) (H.C. Maxwell-Lyte ed., 1892). Two years later Edward II issued an order to the sheriff of York, and to all the sheriffs of England, prohibiting any “earl, baron, knight, or other” from “go[ing] armed, under pain of forfeiture.” *Id.* at 257 (Apr. 9, 1310, Windsor). Two years after that, the king ordered the sheriffs in Warwick and Leicester to proclaim that “no one shall, under pain of forfeiture, . . . go armed . . . without the king’s special licen[s]e.” *Id.* at 553 (Oct. 12, 1312, Windsor). He also ordered “[t]he like to all the sheriffs of England.” *Id.*

The frequency and consistency of the royal orders and their subsequent local proclamations demonstrated a regulated approach to going armed in public. There was some ability to do so, but it was subject to first obtaining the “king’s special license.” 4 Calendar Of The Close Rolls, Edward I, 1296–1302, at 588 (July 16, 1302, Westminster) (H.C. Maxwell-Lyte ed., 1906). Absent the king’s permission, any person going armed in public was subject to punishment.

In 1326 Edward II again ordered the sheriff of Huntington to arrest anyone going armed without the king’s license. The king commanded:

Whereas the king lately caused proclamation to be made throughout his realm prohibiting any one going armed without his licence, except the keepers of his peace, sheriffs, and other ministers, willing that any one doing the contrary should be taken by the sheriff or bailiffs or the keepers of his peace and delivered to the nearest gaols, to remain therein until the king ordered his will concerning them.

4 Calendar Of The Close Rolls, Edward II, 1323–1327, at 560 (April 28, 1326, Kenilworth) (H.C. Maxwell-Lyte ed., 1898). The 1326 edict reinforced that no person could carry arms publicly unless he fell within a certain group of peace keepers (“sheriffs, and other ministers”) or unless he obtained the king’s permission. *Id.*

Other orders from 1326 enforced a ban on publicly carrying arms unless engaged in law enforcement or with

permission. In a November 1326 order, Edward II prohibited any person in London from “go[ing] armed by night or day, save officers and other good men of the City assigned by the Mayor and Aldermen in their wards to keep watch and preserve the peace” 1 Calendar of Plea & Memoranda Rolls of the City of London, 1323–1364, at 15 (November 1326) (A.H. Thomas ed., 1926). The purpose of the restriction on arms was to maintain the king’s peace and allow “all manner of men . . . [to] come and go in safety.” *Id.* Three months later, public arms carrying was more forcefully banned in London. A proclamation from January of 1327 stated that “[t]he bearing of arms is forbidden, except to the officers of the City assigned by the Mayor and Aldermen to keep watch in the Wards, and to the Hainaulters of the Queen, who are accustomed to go armed in the manner of their country.” *Id.* (emphasis added). Although the king regularly granted the sheriffs authority to disarm the people while in public, it is unclear from these royal orders whether that authority was absolute or if it was tied to times of potential upheaval and possible affray. See Patrick J. Charles, *The Faces of the Second Amendment Outside the Home: History Versus Ahistorical Standards of Review*, 60 Clev. St. L. Rev. 1, 12 (2012).

2. The Statute of Northampton

a. The statute. Any doubt as to the scope of government’s authority to disarm the people in public was dispelled with Parliament’s 1328 enactment of the Statute of Northampton, which effectively codified the firearms restrictions that preceded it. The statute provided:

That no Man great nor small, of what
Condition soever he be, except the King’s

Servants in his presence, and his Ministers in executing of the King's Precepts, or of their Office, and such as be in their Company assisting them, and also [upon a Cry made for Arms to keep the Peace, and the same in such places where such Acts happen,] be so hardy to come before the King's Justices, or other of the King's Ministers doing their office, with force and arms, nor bring no force in affray of the peace, *nor to go nor ride armed by night nor by day, in Fairs, Markets, nor in the presence of the Justices or other Ministers, nor in no part elsewhere, upon pain to forfeit their Armour to the King, and their Bodies to Prison at the King's pleasure.*

2 Edw. 3, 258, ch. 3 (1328) (emphasis added). The Statute of Northampton prohibited all people ("great [or] small") from going armed in places people were likely to gather ("Fairs, Markets, [and] in the presence of the Justices or other Ministers"). *Id.* The prohibition was not limited to those enumerated places, but extended to other public places ("[any] part elsewhere"). *Id.* Like the royal orders preceding the statute, Parliament excepted certain people (the "king's Servants") from the ban on being armed in public while on the king's business ("in [his] presence" and "executing of the King's Precepts"). *Id.*

To the majority of fourteenth-century Englishmen, the Statute of Northampton was generally understood to be "a complete prohibition on carrying weapons in public, at least in populated areas." Mark Anthony Frassetto, *To the Terror of the People: Public Disorder Crimes and the Original Public Understanding of the Second Amendment*, 43 S. Ill. U.

L.J. 61, 67 (2018). But its effects were more wide ranging than a mere public-arms prohibition. The Statute of Northampton “was to have long-term importance for the maintenance of law and order” in the realm, by helping keep the king’s peace. *See* Anthony Verduyn, *The Politics of Law and Order During the Early Years of Edward III*, 108 Eng. Hist. Rev. 842, 850 (1993).⁸ The statute applied to anyone

⁸ We have referred generally to the “king’s peace” as a shorthand for the king’s responsibility to maintain the peace in his domain. But the notion of the king’s peace evolved in England over time. Originally the king’s peace covered only those within the king’s castle or household. *See* David Feldman, *The King’s Peace, the Royal Prerogative and Public Order: The Roots and Early Development of Binding Over Powers*, 47 Cambridge L.J. 101, 105 (1988). Just as the king had his “peace,” so did others: “the peace of the king was one thing, [but] the peace of the lord of the manor, the peace of the churches, the peace of the sheriff, [and] the peace of the homestead, were all quite other things.” A.H.F. Lefroy, *Anglo-Saxon Period of English Law*, 26 Yale L.J. 388, 388 (1917). Each head of household had a “duty to protect his household, and an attack on any member of the household wronged him.” Feldman, 47 Cambridge L.J. at 105.

The expansion of the king’s peace began in the eleventh century. At first, the king extended his peace to the three-mile radius surrounding his court. *Id.* That expansion continued through the fourteenth century and was especially strong in areas of special importance to the king. *Id.* at 106. The king could also extend his peace to any individuals who were on his errand or otherwise needed the king’s blessing, and “[a]ny assault on them in their travels would be regarded as a direct affront to the king’s own personal peace, as if it had happened in his residence.” *Id.*

Over time, the king’s peace expanded so significantly that it became the general peace. This “movement of absorption” has “long since practically concluded in England.” Lefroy, 26 Yale L.J. at 389. As the king’s peace extended to a larger portion of the kingdom, it increased both the king’s responsibility to protect his subjects and his jurisdiction to punish wrongdoers. *Id.* (“The violation of the king’s peace was the original offence from which the jurisdiction of the sovereign in criminal

carrying arms, without specifying whether the arms were carried openly or secretly. In 1350, Parliament specifically banned the carrying of concealed arms. *See* 25 Edw. 3, 320, st. 5, c. 2, § 13 (1350) (“[I]f percase any Man of this Realm ride armed [covertly] or secretly with Men of Arms against any other . . . it shall be judged . . . Felony or Trespass, according to the Laws of the Land.” (alteration in original)).

The Statute of Northampton was amended in 1396. The amended statute retained all the prohibitions on public carriage of arms found in the original version and also expanded the types of armor that could not be carried in public. As amended, the statute provided “[t]hat no Man shall ride armed within the Realm, against the Form of the Statute of Northampton” and that “no Lord, Knight nor other, little nor great, shall go nor ride by Night nor by Day armed, nor bear [Sallet] nor Skull of Iron, nor [of] other Armour, upon the pain aforesaid; save and except the King’s Officers and Ministers in doing their Office.” 20 Ric. 2, 92–93, ch. 1 (1396) (internal footnotes omitted).

matters arose.”). “Slowly the idea of a ‘general peace’ embracing the ‘peace’ of the various customary jurisdictions was evolved.” *Id.*; *see* Feldman, 47 Cambridge L.J. at 107 (“It was the Norman kings who used the idea of the king’s peace as a means of extending their jurisdiction at the expense of local courts.”).

When the king’s justices of the peace tried criminal matters, those matters were tried as an offense against the king. “In modern pleading [in the United States], the phrase ‘against the peace of the commonwealth’ or ‘of the people’ is used.” *Contra pacem*, *Black’s Law Dictionary* (rev. 4th ed., 1968). Hence, our cases are charged as an offense against the “United States” or the “State.”

b. Enforcement. We have record of few indictments under the Statute of Northampton, but there is evidence that Edward III and his successors regularly instructed sheriffs to enforce the statute.⁹ For instance, in 1328, Edward III ordered the sheriff of Southampton to “cause the statute [of Northampton] prohibiting men coming armed before justices or other ministers of the king, or going armed, etc., to be observed in all its articles throughout the whole of his bailiwick.” 1 Calendar Of The Close Rolls, Edward III, 1327–1330, at 420 (November 10, 1328 Walingford) (H.C. Maxwell-Lyte ed., 1896). The sheriff was further ordered to “take and imprison all found contravening” the statute. *Id.* The king similarly ordered sheriffs to enforce the Statute of Northampton if he learned that the people were not compliant with its restrictions on arms. For example, when the king discovered that the people of Surrey and Sussex were “going about armed in the sheriff’s bailiwick, contrary to the form of the statute made in the late parliament of Northampton,” he instructed the sheriffs to imprison “all those whom he shall find going armed, with their horses and armor.” 2 Calendar Of The Close Rolls, Edward III, 1330–1333, at 131 (April 3,

⁹ There is some dispute among historians over the extent to which the Statute of Northampton was enforced as a broad ban on public carry of arms. For example, historian Joyce Lee Malcolm argues that the statute, and other firearms prohibitions, were rarely enforced. She claims that “[a]lthough men were occasionally indicted for carrying arms to terrorize their neighbours, the strict prohibition against going armed ‘by Night nor by Day . . . in Fairs, Markets . . . nor in no part elsewhere’ had never been enforced.” Joyce Lee Malcolm, *To Keep and Bear Arms* 104 (1994). Other historians argue that the lack of indictments under the statute is not probative of its overall enforcement in fourteenth-century England. *See, e.g.,* Charles, 60 Clev. St. L. Rev. at 13–16 (identifying several royal edicts that instructed sheriffs to enforce the Statute of Northampton and noting that Richard II amended the statute in 1396 but retained the prohibition on going armed in public).

1330, Woodstock) (H.C. Maxwell-Lyte ed., 1898). Four years later, the king issued another order consistent with the Statute of Northampton, which reinforced the statute’s exceptions for those on the king’s errand. 3 Calendar Of The Close Rolls, Edward III, 1333–1337, at 294 (January 30, 1334, Woodstock) (H.C. Maxwell-Lyte ed., 1926) (“[I]n the statute of Northampton . . . it was ordained that no one except a minister of the king should use armed force or go armed in fairs, markets, etc. . . .”).

The Statute of Northampton’s restrictions on carrying also permeated public life. For example, in preparation for the Feast of St. Thomas in 1343, Edward III ordered London hostelries to warn their guests “against going armed in the City.” 1 Calendar of Plea & Memoranda Rolls of the City of London, 1323–1364, at 156 (December 19, 1343) (A.H. Thomas ed., 1898). The guests’ violation of the arms prohibition would have subjected them to arrest and forfeiture of their arms. *Id.*

The Statute of Northampton continued in force after Edward III was succeeded by King Richard II in 1377. Like his predecessor, Richard II issued orders to county sheriffs to enforce the Statute of Northampton and keep the king’s peace. Months after Richard II’s coronation, he reminded the mayor and bailiffs of Newcastle upon Tyne that the Statute of Northampton provided the vehicle to keep the peace by prohibiting the public carry of arms. The king’s order stated that the “statute published at Norhampton [*sic*] in 2 Edward III . . . contained that . . . no man of whatsoever estate or condition shall go with armed force, lead any force to the disturbance of the peace, *ride or go armed by day or night in fairs, markets or in presence of justices or other the king’s ministers*” without risking arrest and forfeiture of their arms.

1 Calendar Of The Close Rolls, Richard II, 1377–1381, at 34 (December 1, 1377, Westminster) (H.C. Maxwell-Lyte ed., 1914) (emphasis added).

c. Cases. We have been pointed to two cases that may shed light on the restrictions in the Statute of Northampton. The first is *Chune v. Piott* (1615), 80 Eng. Rep. 1161 (K.B.), in which the Statute of Northampton is not mentioned. *Chune* was a false-arrest case that challenged the sheriff's authority to arrest people who had not actually breached the peace. The King's Bench concluded that sheriffs had authority "without all question" to arrest anyone carrying a weapon "in the high-way, in terrorem populi Regis." *Id.* The phrase *in terrorem populi Regis*—"to the terror of the king's people"—might suggest one of two things: First, that there must be some proof of the carrier's *intent* to terrorize the people or, second, that there must be some proof of the *effect* (whether intended or not) on the people. But the court ultimately concluded that neither was an element of the crime of unlawful carrying. The sheriff could arrest a person carrying arms in public "notwithstanding he doth not break the peace." *Id.*

The second is *Sir John Knight's Case*, which is important because it was one of the few prosecutions under the Statute of Northampton for which we have some record, even if there are some disputes about what that record signifies. Sir John Knight was accused of "going armed, to the terror of the public" and charged under the Statute of Northampton and the common law crime of "affray." *Sir John Knight's Case* (1686), 87 Eng. Rep. 75–76 (K.B.).¹⁰ According to one

¹⁰ An "affray" was a "noisy fight . . . in some public place, to the terror of onlookers." Affray, *Black's Law Dictionary* (10th ed. 2014).

report, the crown alleged that Knight went armed in public, and more specifically, that he “went into the church of St. Michael . . . in the time of divine service, with a gun, to terrify the King’s subjects.” *Id.* at 76. A second report states that he went into a church “with pistols,” *Rex v. Sir John Knight* (1686), 90 Eng. Rep. 330, 330 (K.B.), while an unofficial report states that he was “goeing with a blunderbus in the streets, to the terrifyeing his majesties subjects,” 1 Narcissus Luttrell, *A Brief Historical Relation of State Affairs, September 1678 to April 1714*, at 380 (Oxford Univ. Press 1857).

Whatever Knight was doing, the sources agree that Knight was acquitted, but they disagree on what grounds. According to one report, the Statute of Northampton was “almost gone in [desuetude],” but Knight could still be punished if he carried arms with mal-intent to terrify the people. Presumably, his acquittal was due to this lack of such intent. *Knight’s Case*, 90 Eng. Rep. at 330. Similarly, the unofficial report claimed that Knight was “tried by a jury of his own citty [*sic*], that knew him well, [and] he was acquitted, not thinking he did it with any ill design, to the great disappointment of some persons.” Luttrell, *A Brief Historical Relation* at 389. According to another reporter, the Chief Justice of the King’s Bench opined that the meaning of the Statute of Northampton was to punish those who go armed. *Knight’s Case*, 87 Eng. Rep. at 76. The Chief Justice explained that publicly carrying arms was not just an act that could terrify the people but was also an affront to the king’s peace because the act of carrying arms in public suggested that “the King [was] not able or willing to protect his subjects,” *id.*—indicating perhaps that Knight was acquitted because he had not intended criticism of the king’s authority or ability to keep the peace. See Frassetto, 43 S. Ill. U. L.J.

at 70 (“Notably, Knight defended himself on the grounds of his ‘active loyalty’ to the crown rather than by denying that he had created a public terror.”). We cannot resolve this dispute in the original sources, much less in the academic literature.¹¹ What is curious is that according to two reporters, Knight was “acquitted, yet bound to good behaviour.” *Knight’s Case*, 90 Eng. Rep. at 331; see *Knight’s Case*, 87 Eng. Rep. at 76 n.(a) (“But on the motion of the Attorney General he was bound to his good behaviour.”). It thus seems that Knight was required to pay a surety for good behavior—making Knight’s “acquittal” more of a conditional pardon.¹²

¹¹ Scholars continue to disagree about the reasons underlying Knight’s acquittal. There seem to be two current schools of thought. Either the Statute of Northampton required the prosecution to show that Knight intended to terrorize others by publicly carrying arms, or Knight was acquitted by virtue of his aristocratic status. Compare David B. Kopel, *The First Century of Right to Arms Litigation*, 14 Geo. J. L. & Pub. Pol’y 127, 135–37 (2016) (“[O]nly malicious, terrifying carry was illegal” under the statute.), with Saul Cornell, *The Right to Keep and Carry Arms in Anglo-American Law: Preserving Liberty and Keeping the Peace*, 80 Law & Contemp. Probs. 11, 26–27 (2017) (positing that aristocrats were “the one group expressly exempted from the Statute of Northampton”). Relying on the former explanation, some scholars have argued that *Sir John Knight’s Case* shifted English jurisprudence towards a more permissive open-carry regime. See Eugene Volokh, *The First and Second Amendments*, 109 Colum. L. Rev. Sidebar 97, 101–02 (2009); Kopel, 14 Geo. J. L. & Pub. Pol’y at 137–38. Other scholars are unsurprised by Knight’s acquittal as he was of the class of Englishman that the Statute of Northampton would not have reached anyway. See Frassetto, 43 S. Ill. U. L.J. at 64 & n.15.

¹² The development of a system of “surety” was closely related to the development of the “king’s peace.” There were two types of sureties: sureties for good behavior and sureties of the peace. Feldman, 47 Cambridge L.J. at 102–03. They had different goals. The surety of good behavior was “a form of conditional pardon given by the king to

d. Treatises. English treatises also recognized the prohibition on publicly carrying arms in England. In one of England’s first treatises, John Carpenter observed that public carriage of arms was dependent upon first obtaining the king’s license. In the aptly titled section “That no one go armed,” Carpenter stated:

that no one, of whatever condition he be, go armed in the said city or in the suburbs, or carry arms, by day or by night, except the vadlets of the great lords of the land, carrying the swords of their masters in their presence, and the serjeants-at-arms of his lordship the King, of my lady the Queen, the Prince, and the other children of his lordship the King,

malefactors,” similar to posting bail as a condition of probation. *Id.* at 103. So, for a surety of good behavior, there had to be some sort of charge of wrongdoing that preceded the surety. The surety for good behavior essentially allowed those accused of crimes—who could afford it—to avoid punishment while allowing the crown to “rehabilitate and make use of military men who were urgently needed . . .” *Id.* at 121.

The surety of the peace was administered by the Keepers (Justices) of the Peace and was employed to keep the king’s peace in areas where a centralized police force did not exist. The surety of the peace followed an accusation by someone that an individual would likely violate the law in the future. It was either a money payment or pledge by others “in support of his future good conduct.” *Id.* at 104. *See* Kopel, 14 Geo. J. L. & Pub. Pol’y at 131 n.14 (citing Y.B. Trin. 14 Hen. 7 (1499), *reported in* Y.B. 21 Henry 7, fol. 39, Mich., pl. 50 (1506) (“Anonymous.” No case name) (“[A] man’s house is his castle and defense,” but “if one were threatened that if he should come to such a market . . . he should there be beaten, in that case he could not assemble persons to help him go there in personal safety, for he need not go there, and he may have a remedy by surety of the peace.”)). The money payment (or the pledge by others) was released after a period of time in which the person did not violate the law.

and the officers of the City, and such persons as shall come in their company in aid of them, at their command, for saving and maintaining the said peace; under the penalty aforesaid, and the loss of their arms and armour.

John Carpenter, *Liber Albus: The White Book of the City of London* 335 (Henry Thomas Riley ed., 1862) (footnote omitted) (emphasis added).

Other English treatises weigh in on whether prosecution under the Statute of Northampton required proof that carrying arms caused terror. William Hawkins, a seventeenth century barrister and jurist, stated that a person may commit 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 cause a terror to the people.” 1 William Hawkins, *A Treatise of the Pleas of the Crown* 488 (John Curwood ed., 1824). On the other hand, Hawkins also stated that wearing arms—perhaps those that were not “dangerous and unusual”—alone was not enough to warrant prosecution. “[N]o wearing of arms is within the meaning of this statute [of Northampton], unless it be accompanied with such circumstances as are apt to terrify the people . . .” *Id.* at 489. Hawkins continued that “persons of quality” did not risk violating the statute by wearing “common weapons . . . for their ornament or defence.” *Id.* Some have interpreted Hawkins’s reference to “persons of quality” as an indication that certain classes of people could carry arms consistent with their status because that would be neither uncommon nor overtly terrifying to the people. *See* Frassetto, 43 S. Ill. U. L.J. at 67–69 (describing Hawkins’s statement that public carry was not threatening when it was done by the wealthy whose carrying of arms would not be out of the ordinary).

Hawkins, however, also recognized that the lawful public carry of arms required some particular need. The desire for proactive self-defense was not a good enough reason to go armed openly. “[A] man cannot excuse the wearing [of] such armour in public, by alleging that such a one threatened him, and [that] he wears it for the safety of his person from his assault.”¹ Hawkins, *A Treatise of the Pleas of the Crown* at 489.

Joseph Keble, another seventeenth-century English barrister, recognized that public terror resulted from witnessing arms unexpectedly. While examining the crime of affray in a 1683 treatise, Keble noted “if a man shall shew himself furnished with Armour or Weapon which is not usually worn, it will strike a fear upon others that be not armed.” Joseph Keble, *An Assistance to the Justices of the Peace, for the Easier Performance of their Duty* 147 (1689). Keble’s reference to weapons “not usually worn” could refer either to “unusual weapons” or to common weapons worn when one would not expect it.

Sir William Blackstone and Lord Edward Coke strongly suggested that carrying arms openly was a status offense and that the law did not require proof of intent or effect. Blackstone clarified the principle, stating that the mere act of going armed in and of itself terrified the people. He stated 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 prohibited by the Statute of Northampton.”⁴ William Blackstone, *Commentaries* *148–49 (1769). According to Blackstone, going armed with dangerous or unusual weapons was all that was required to terrify the people of the land, and thus the law required neither proof of intent to terrify nor

proof that actual terror resulted from the carrying of arms.¹³ Lord Coke observed that the Statute of Northampton meant that no one could “goe nor ride armed by night nor by day . . . in any place what[s]soever.” Edward Coke, *The Third Part of the Institutes of the Laws of England* 160 (E. and R. Brooke ed., 1797). Coke continued that “he cannot assemble force, *though he be extremely threatened*, to go with him to church, or market, or any other place, but that is prohibited by this [a]ct.” *Id.* at 161 (emphasis added). He also noted that the Statute did not apply to a man who must “assemble force to defend his house.” *Id.* at 161.

3. The English Bill of Rights

Following the Glorious Revolution, the English right to bear arms changed with the enactment of the English Bill of Rights in 1689.¹⁴ The English Bill of Rights created, for the first time, a right for certain people to possess arms, but it was a conditional right. It provided “[t]hat the [s]ubjects which are Protestants may have [a]rms for their [d]efence suitable to their [c]onditions and as allowed by [l]aw.” 1 W. & M., ch. 2, § 7, in 3 Eng. Stat. at Large 441 (1689). The new provision was important, for several reasons. First, for the first time, English law explicitly tied the carrying of arms

¹³ Subsequent royal edicts suggest that merely carrying firearms caused terror even absent an intent to cause terror. *See* By the Queene Elizabeth I: *A Proclamation Against the Carriage of Dags, and for Reformation of Some Other Great Disorders* (London, Christopher Barker, 1594) (the public carry of arms caused “terroure [to] all people professing to travel and live peaceably”).

¹⁴ The Glorious Revolution overthrew James II, who was Catholic. In his place William and Mary took the throne. Mary, also known as Queen Mary II, was James’s daughter, but she was Protestant.

to a right of self-defense. Second, it recognized that even the right of self-defense could be curtailed by government action “as allowed by law.” Third, the right was not guaranteed to the people generally, and the full exercise of the right was occasionally contingent upon the religion of the monarch in power. *See* Diarmuid F. O’Scaannlain, *Glorious Revolution to American Revolution: The English Origin of the Right to Keep and Bear Arms*, 95 Notre Dame L. Rev. 397, 404–06 (2019).

Blackstone characterized the new right as one to bear arms in the interest of self-defense, but he acknowledged that the right was not absolute. The right to carry arms was subject to government regulation, and thus the right of the people to “hav[e] arms for their defense” only extended as far as the right was “*allowed by law*.” 1 William Blackstone, *Commentaries* *130 (emphasis added). Blackstone continued that “these rights and liberties [are] our birthright to enjoy . . . unless where the laws of our country have laid them under necessary restraints.” *Id.* at *131 (language modernized). Indeed, the right to carry arms was a “public allowance under due restrictions.” *Id.* at *130. Blackstone’s example of such a “due restriction[,]” was the prohibition on publicly carrying weapons, codified in the Statute of Northampton. *See* 4 William Blackstone, *Commentaries* *148–49.

B. *Colonial Restrictions on the Right to Bear Arms in Public*

Early American colonists brought to the New World the English sensibilities over the carrying of arms in public. A number of colonies implemented restrictions on the carrying of arms similar to those found in the Statute of Northampton. Indeed, some colonies adopted the Statute of Northampton almost verbatim. The colonists shared the English concern

that the mere presence of firearms in the public square presented a danger to the community.

New Jersey acted first. In 1686 (three years prior to the English Bill of Rights), the colony passed “An Act against wearing Swords, &c.” in response to the “great complaint by the inhabitants of [the] Province, that several persons [were] wearing swords, daggers, pistols, dirks, stilladoes, skeines, or any other unusual or unlawful weapons.” An Act against Swords, &c., 1686 N.J. Laws 289, 289, ch. IX.¹⁵ Accordingly, the statute provided that “no person or persons after publication hereof, shall presume privately to wear any pocket pistol, skeines, stilladers, daggers or dirks, or other unusual or unlawful weapons within [the] Province.” *Id.* at 290. The law further provided that “no planter shall ride or go armed with sword, pistol, or dagger, upon the penalty of five pounds.” *Id.* The law exempted two groups: “all officers, civil and military, and soldiers while in actual service” and “all strangers, travelling upon their lawful occasion thro’ this Province, behaving themselves peaceably.” *Id.*

¹⁵ We have not been pointed to any English counterpart for the New Jersey statute. The closest was a proclamation of King James I that banned the sale, wearing, or carrying of “Steelets, pocket Daggers, pocket Dags and Pistols, which are weapons utterly unserviceable for defence, Militarie practise, or other lawfull use, but odious, and noted Instruments of murther, and mischief.” *By the King James I: A Proclamation Against Steelets, Pocket Daggers, Pocket Dagges and Pistols*, reprinted in 1 *Stuart Royal Proclamations* 359–60 (James F. Larkin & Paul L. Hughes eds., 1973). The weapons listed in the proclamation were of particular concern because they were so easily concealed. *See Peruta*, 824 F.3d at 931. Nothing in the proclamation or the New Jersey statute, however, limited the prohibition to concealed carry.

Six years after New Jersey enacted its restriction on arms, Massachusetts Bay enacted its own restrictions. The Massachusetts law was patterned after the Statute of Northampton. It outlawed affray, rioting, and disturbing or breaching the peace. An Act for the Punishing of Criminal Offenders, 1692 Mass. Laws No. 6, at 11–12. In addition, the statute authorized justices of the peace to arrest those that “ride or go armed Offensively before any of Their Majesties Justices . . . by Night or by Day” *Id.* (spelling modernized). The punishment for such action varied, but the offender could be fined, have his or her armor and weapons seized, be imprisoned until paying a surety, or even be bound over to answer the charge before a justice of the peace. *Id.* at 12.

New Hampshire enacted a similar restriction in 1699, which punished any person who went “armed offensively” or “put his Majesty’s subjects in fear” and outlawed affray, rioting, and disturbing the peace. 1699 N.H. Laws. 1. Punishment ranged from imprisonment to payment of a surety. *Id.* at 1–2. The offender also risked forfeiture of the arms or weapons, to be “sold for his Majesty’s use.” *Id.*

To the examples of prohibitions on public carry, we must add examples of colonial laws that not only permitted public carry, but mandated it. Some colonies required men to carry arms while attending church or other public gatherings. They also protected travelers passing through the several colonies and those assembled as a militia. For example, Virginia required colonists to carry arms to church. In a 1619 statute, it instructed “[a]ll persons whatsoever upon the Sabaoth daye [who] frequente divine service and sermons . . . [to] beare armes [and] bring their pieces swordes, poulder and shotte.” *Proceedings of the Virginia Assembly, 1619*, in *Narratives of*

Early Virginia, 1606–25, at 273 (Lyon Gardiner Tyler ed., 1907). Any colonist refusing to carry arms to church was subject to a fine of three shillings, paid to the church. *Id.*

Virginia’s mandate was a model for several other colonies. Connecticut, Maryland, South Carolina, and Georgia all required men to carry arms at church. *See* 1 *The Public Records of the Colony of Connecticut* 95 (1850) (“[O]ne person in every several house wherein is any soldier or soldiers, shall bring a musket, pistol or some piece, with powder and shot, to each meeting” (spelling modernized)); *Proceedings of the Council of Maryland, 1636–1667, reprinted in 3 Archives of Maryland* 103 (1885) (“No man able to bear arms to go to church or Chappell . . . without fixed gun and 1 Charge at least of powder and shot.” (spelling modernized)); 7 *The Statutes at Large of South Carolina* 418 (1840) (requiring any person able to do so to bear arms to “places of public worship” to secure against slave insurrections); 19 *The Colonial Records of the State of Georgia* (pt. 1) 137–38 (1911) (requiring every male, white militiaman to carry firearms “on any Sunday or other times, to any church, or other place of divine worship”). Plymouth Colony, prior to its merger with Massachusetts Bay, had also enacted a church-based firearm requirement in 1636, but its mandate was seasonal. *See The Compact with the Charter and Laws of the Colony of New Plymouth* 102 (1836) (requiring arms at churches between April and November annually).

At least two colonies required carrying arms to other public gatherings. *See* 1 *Records of the Governor and Company of the Massachusetts Bay in New England* 190 (1853) (All eligible persons “shall come to the public assemblies with their muskets, or other pieces fit for service.”

(spelling modernized)); 1 *Records of the Colony of Rhode Island and Providence Plantations in New England* 94 (1856) (“It is ordered, that no man . . . shall come to any public Meeting without his weapon.” (spelling modernized)).

Several colonies also required persons traveling outside of the public square to arm themselves. Virginia, Massachusetts, Rhode Island, and Maryland all enacted some requirements for travelers to carry arms. See 1 *The Statutes at Large; Being a Collection of all the Laws of Virginia* 127 (1823) (“That no man go or send abroad without sufficient partie will armed.”); 1 *Records of the Governor and Company of the Massachusetts Bay in New England* 85 (1853) (“[I]t is ordered, that no person shall travel single betwixt [Massachusetts] and Plymouth, nor without some arms . . .” (spelling modernized)); 1 *Records of the Colony of Rhode Island and Providence Plantations in New England* 94 (1856) (“It is ordered, that no man shall go two miles from the Town unarmed.” (spelling modernized)); *Proceedings of the Council of Maryland, 1636–1667, reprinted in* 3 *Archives of Maryland* 103 (1885) (“No man able to bear arms to go . . . any considerable distance from home without fixed gun and 1 Charge at least of powder and Shot.” (spelling modernized)).¹⁶

¹⁶ Historical context offers some possible explanations for the tension. Some colonies’ issuance of carry requirements—especially to church, public gatherings, and other travel—reflects “adaptation to the realities of colonial life, especially [considering] the ongoing hostile relationship with Native Americans.” Cornell, 80 *Law & Contemp. Probs.* at 28. In addition to tense relations with Native Americans, southern colonies also feared the possibility of slave uprisings. *Id.* South Carolina’s church-carry mandate expressly acknowledged that risk. 7 *Statutes at Large of South Carolina* 418 (requiring parishioners to carry arms to church so that

The overall effect that these various carry mandates had on the right to bear arms is unclear, and there is some tension between the various ordinances. What is clear is that the colonies assumed that they had the power to *regulate*—whether through *mandates* or *prohibitions*—the public carrying of arms. This history may also evince a general acceptance by local governments of some firearms in the public square. *See* Brief of Professors of Second Amendment Law *et al.*, as Amici Curiae 17. But the public carrying of arms was always subject to conditions prescribed by the legislature.

The Statute of Northampton continued to influence state law in the interregnum between the Revolutionary War and the adoption of the Constitution. Three years after the Treaty of Paris, Virginia enacted prohibitions on public carriage of firearms that tracked the Statute of Northampton. Virginia’s statute provided that “no man, great nor small, . . . [shall] go nor ride armed by night nor by day, in fairs or markets, or in other places, in terror of the Country.” 1786 Va. Laws 33, ch. 21.

Early American history thus strongly suggests that colonists brought with them the English acquiescence to firearm limitations outlined in the Statute of Northampton. The colonies and early American states enacted facsimiles of the Statute of Northampton’s broad prohibitions on the public carriage of firearms. And where the colonies did allow public carry—or even mandated it—those laws were tied to the overarching duty to bear arms in defense of the community, and it was the role of local government, not individuals, to

South Carolinians “may be the better secured and provided against the insurrections and other wicked attempts of negroes and other slaves”).

decide when that duty justified or mandated public carry. At bottom, restrictions on firearms in public were prevalent in colonial law.

C. Post Second Amendment Restrictions on the Right to Bear Arms

The Constitution was ratified in 1789. Almost immediately, Congress began work on a bill of rights, a promise the Federalists had made as a condition for ratification. As the Court observed in *Heller*, “[d]uring the 1788 ratification debates, the fear that the Federal Government would disarm the people in order to impose rule through a standing army or select militia was pervasive in Antifederalist rhetoric.” 554 U.S. at 598. The amendments that became our Bill of Rights were proposed in 1789 and ratified by 1791.

At the time of its adoption, the Bill of Rights did not apply to the states. *Barron v. Mayor & City Council of Baltimore*, 32 U.S. (7 Pet.) 243 (1833); see *United States v. Cruikshank*, 92 U.S. 542, 553 (1875) (“The second amendment . . . means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the national government, leaving the people to look for their protection [to state law].”). Prior to the adoption of the Constitution, the states—at the urging of the Continental Congress in anticipation of a declaration of independence—had adopted their own constitutions, some of which expressly provided some protection for the right to keep and bear arms. See *Heller*, 554 U.S. at 585–86, 585 n.8, 600–03 (discussing state constitutional provisions); Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 Tex. Rev.

L. & Pol. 191 (2006) (compiling provisions by state and by date).¹⁷ Accordingly, we have few relevant federal materials. As the Court explained in *Heller*, “[f]or most of our history the Bill of Rights was not thought applicable to the states, and the Federal Government did not significantly regulate the possession of firearms by law-abiding citizens.” *Heller*, 554 U.S. at 625. Therefore, the majority of the nineteenth-century cases we discuss in this section feature challenges to firearms regulations that were made under state constitutional analogues to the Second Amendment, not the Second Amendment itself, although some decisions refer to the Second Amendment.¹⁸ As we discuss state regulation of

¹⁷ Not all the states adopted such a measure. California, Iowa, Maryland, Minnesota, New Jersey, and New York have never adopted a constitutional guarantee to keep and bear arms. And some of the states did not adopt a guarantee until the twentieth century. Volokh, *State Constitutional Rights*, 11 Tex. Rev. L. & Pol. at 193–204. Although Maryland did not adopt a formal guarantee, the Maryland Declaration of Rights stated that “the inhabitants of Maryland are entitled to the common law of England, . . . and to the benefit of such of the English statutes, as existed at the time of their first emigration.” Md. Decl. of Rights, art. III (1776).

¹⁸ In some respects, the Second Amendment is less important than state constitutions and laws in helping us determine the scope of any pre-existing right to keep and bear arms. Congress had no general power over crime, except in federal enclaves or territories. The Constitution gave Congress authority over three enumerated crimes: counterfeiting, piracy and felonies on the high seas, and treason. U.S. Const. art. I, § 8, cls. 6, 10; *id.* art. III, § 3, cl. 2. Any other authority over crime that Congress asserts must be tied to an enumerated power—such as the Commerce Clause—through the Necessary and Proper Clause. *Id.* art. I, § 8, cl. 18. See *United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995) (“Under our federal system, the States possess primary authority for defining and enforcing the criminal law.”) (quotation marks and citations omitted); *Screws v. United States*, 325 U.S. 91, 109 (1945) (plurality opinion) (“[T]he administration of criminal justice rests with the States except as

firearms, we will note where the state had an applicable guarantee in its own constitution.

1. Post-Ratification Restrictions

After ratification of the U.S. Constitution, and subject to their own state constitutions, the states continued to adopt laws that restricted the public carrying of arms. *See* Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 *Fordham L. Rev.* 487, 505 (2004) (examining “[a] variety of laws regulating firearms . . . already in place during the Founding Era”). Many of these laws were influenced by the Statute of Northampton. North Carolina provides us with a prime example. Just a year after the ratification of the Bill of Rights, North Carolina adopted, nearly verbatim, the Statute of Northampton. Indeed, the statute had a heading that recited that these were “Statutes made at Northampton . . . in the Second Year of the Reign of Edward the Third, and in the Year of our Lord 1328.” *See* 1792 N.C. Laws 60, ch. 3. Ironically, notwithstanding its recent independence, North Carolina did not even remove the references to the king:

It is enacted, that no man great nor small, or
what condition soever he be, except the
King’s servants in his presence . . . go nor ride
armed by night nor by day, in fairs, markets,

Congress, acting within the scope of those delegated powers, has created offenses against the United States.”). Given that relationship between the federal government and the states, early state constitutions, laws, and practices may be a more reliable indicator of what we thought the states could and could not do under the “pre-existing [right]” that we “inherited from our English ancestors.” *Heller*, 554 U.S. at 599 (quoting *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897)).

nor in the presence of the King's Justices, or other ministers, nor in no part elsewhere.

Id. at 60–61.¹⁹ As we have noted, Massachusetts had first enacted a law based on the Statute of Northampton in 1692. In 1795, it repealed a portion of the 1692 Act but kept the firearms restrictions. 1795 Mass. Acts 436, ch. 2. The 1795 version had strong echoes of the Statute of Northampton and authorized its justices of the peace to arrest “all affrayers, rioters, disturbers, or breakers of the peace, and such as shall ride or go armed offensively, to the fear or terror of the good citizens of this Commonwealth.” *Id.*²⁰

2. Nineteenth-Century Restrictions

a. The statutes. Early American versions of the Statute of Northampton continued into the nineteenth century. In

¹⁹ North Carolina's Declaration of Rights, adopted in 1776, provided: “That the people have a right to bear arms, for the defence of the State” N.C. Decl. of Rights § XVII (1776).

North Carolina's reliance upon English law would prove to be controversial over the next century. In 1836, the North Carolina legislature explicitly repealed “all the statutes of England or Great Britain” in use in the state, 1 N.C. Rev. Stat. 52–53, ch. 1, § 2 (1837), which prompted a challenge to its Northampton analogue. The Supreme Court of North Carolina upheld the statute, however, finding that the Statute of Northampton did not create the substantive prohibitions therein. *State v. Huntly*, 25 N.C. 418, 420–21 (1843). Citing Blackstone and Hawkins, the court concluded that the statute's prohibitions “[had] been always an offen[s]e at common law.” *Id.* at 421 (citation and emphasis omitted).

²⁰ The Massachusetts Constitution of 1780 provided: “The people have a right to keep and to bear arms for the common defence.” Mass. Const. of 1780, pt. 1, art. 17.

1801, Tennessee prohibited any person from “go[ing] armed to the terror of the people, or privately carry[ing] any dirk, large knife, pistol, or any other dangerous weapon, to the fear or terror of any person.” 1801 Tenn. Pub. Acts 260, ch. 22 § 6.²¹ Anyone carrying a firearm in violation of the statute was subject to a fine and potential imprisonment. *Id.* at 261. Repeat offenders could be indicted and prosecuted for breaching the peace. *Id.* Other states followed. Louisiana punished “any person who shall be found with any concealed weapon, such as a dirk, dagger, knife, pistol or any other deadly weapon concealed in his bosom, coat or in any other place about him that do not appear in full open view.” La. Acts, 1st Legis., 2d Sess. 172 (1813). Maine also enacted a version of the Statute of Northampton in the early nineteenth century, outlawing “affrayers, rioters, disturbers or breakers of the peace, and such as shall ride or go armed offensively, to the fear or terror of the good citizens of this State.” 1821 Me. Laws 285, ch. 73 § 1.²² It also imposed a surety system whereby potential offenders would pay a fine to ensure their future good behavior. *Id.*

The early nineteenth century saw new restrictions on firearms that incorporated broader prohibitions than the one found in the Statute of Northampton. These restrictions more forcefully prohibited the mere act of carrying a firearm instead of coupling going armed with affray, rioting, or

²¹ The Tennessee Constitution of 1796 provided: “That the freemen of this State have a right to keep and to bear [a]rms for their common defence.” Tenn. Const. of 1796, art. XI, § 26.

²² Maine had adopted a constitution only two years earlier. It provided: “Every citizen has a right to keep and bear arms for the common defence; and this right shall never be questioned.” Me. Const. of 1819, art. I, § 16.

disturbing the peace. The major changes began with Tennessee and Massachusetts. Recall that Tennessee had enacted a firearm restriction in 1801 that prohibited going armed “to the terror of the people.” 1801 Tenn. Pub. Acts 260, ch. 22, § 6. It revised that restriction in 1821, stating that “every person so degrading himself, by carrying . . . belt or pocket pistols, either in public or in private” was subject to a fine for each offense. 1821 Tenn. Pub. Acts 15, ch. 13. There was no question of whether proof of terror or intent was required. The statute simply outlawed such carry. It did exempt the carrying of “a knife of any size in a conspicuous manner on the strop of a shot pouch.” *Id.* at 16.

Massachusetts adopted a more generous change and became a template for other states. As we have observed, in 1795 Massachusetts renewed its colonial firearms restrictions, enacting a firearms regulation that resembled the Statute of Northampton. *See* 1795 Mass. Acts 436, ch. 2 (allowing every justice of the peace to arrest all that “ride or go armed offensively, to the fear or terror of the good citizens of [the] Commonwealth”). In 1836 Massachusetts broadly revamped its criminal law; in the process it abandoned the Northampton framework in favor of a good-cause restriction. In Chapter 134, entitled “Of Proceedings to Prevent the Commission of Crimes,” Massachusetts added eighteen sections dealing with complaints, arrests, trials, appeals, penalties and sureties.²³ Section 16 provided:

If any person shall go armed with a dirk,
dagger, sword, pistol, or other offensive and

²³ We discuss the details of the Massachusetts surety law in greater detail, *infra* at note 40 and accompanying text. We covered the English practice of requiring a surety of the peace *supra* at note 12.

dangerous weapon, without reasonable cause to fear an assault [sic] or other injury, or violence to his person, or to his family or property, he may, on complaint of any person having reasonable cause to fear an injury, or breach of the peace, be required to find sureties for keeping the peace, for a term not exceeding six months, with the right of appealing as before provided.

1836 Mass. Acts 750, ch. 134, § 16. The 1836 Massachusetts statute permitted public carry, but limited it to persons who could demonstrate their need to carry for the protection of themselves, their families, or their property. In effect, the Massachusetts law provided that such weapons could not be carried in public *unless* the person so armed could show “reasonable cause.”

A number of states followed Massachusetts and adopted some version of Chapter 134, including Section 16. Many of those states adopted Section 16 verbatim. For example, in 1839 Wisconsin adopted “An Act to prevent the commission of crimes.” Section 16 was a word-for-word (with minor changes in punctuation) replication of Section 16 of the 1836 Massachusetts statute. 1838 Wis. Sess. Laws 381, § 16. Other states and territories followed. If they did not adopt Section 16 verbatim, the changes were minor, but the references to the 1836 Massachusetts law were unmistakable. *See* 1841 Me. Laws 709, ch. 169, § 16; 1846 Mich. Laws 692, ch. 162, § 16;²⁴ 1847 Va. Laws 129, ch. XIV, § 16; 1851

²⁴ The Michigan Constitution of 1835 provided: “Every person has a right to bear arms for the defense of himself and the State.” Mich. Const. of 1835, art. I, § 13.

Minn. Pub. Acts 528, ch. 112, § 18; 1854 Or. Laws 220, ch. XVI, § 17; 1870 W. Va. Acts 703, ch. CLIII, § 8. The giveaway was Massachusetts’ distinctive phrase “dirk, dagger, sword, pistol, or other offensive and dangerous weapon.” Of these states, only Virginia and West Virginia did not use the phrase. Instead they simply prohibited the carrying of “any dangerous or offensive weapon” or of a “deadly and dangerous weapon,” respectively.

Other states followed Massachusetts’ formulation but qualified the right in some other way. Pennsylvania, for example, provided an introductory exemption: “*If any person, not being an officer on duty in the military or naval service of the state or of the United States, shall go armed with dirk, dagger, sword or pistol . . .*” 1862 Pa. Laws 250, § 6 (emphasis added).²⁵ Texas expanded the list of prohibited items. In a statute entitled “An Act to Regulate the Keeping and Bearing of Deadly Weapons,” Texas regulated the carrying of “any pistol, dirk, dagger, slung-shot, sword-cane, spear, brass-knuckles, bowie-knife, or any other kind of knife.” 1874 Tex. Gen. Laws 1322, art. 6512; *see also id.* art. 6511 (entitled “An Act Regulating the Right to Keep and Bear Arms;” prohibiting anyone carrying “a bowie-knife, dirk, or butcher-knife, or firearms, whether known as a six-shooter, gun, or pistol of any kind” from entering “any church or religious assembly, any school-room or other place where persons are assembled for educational, literary, or scientific purposes, or into a ballroom, social party, or other social gathering . . . or to any election precinct . . . or to any other place where people may be assembled . . . , or any other

²⁵ The Pennsylvania Constitution of 1790 provided: “The right of citizens to bear arms in defence of themselves and the State shall not be questioned.” Pa. Const. of 1790, art. IX, § XXI.

public assembly”).²⁶ The Territories of Arizona and Idaho each enacted some version of the expanded Texas list. 1889 Ariz. Sess. Laws 16–17, No. 13, §§ 1, 3; 1889 Idaho Laws 23, § 1.²⁷

A number of other states regulated the carrying of arms, even though they did not follow the Massachusetts model. Delaware, for example, continued to follow the outline of the Statute of Northampton. 1852 Del. Stat. 333, ch. 97, § 13 (making subject to arrest “all affrayers, rioters, breakers and disturbers of the peace, and all who go armed offensively to the terror of the people”). Kansas and the Territory of Wyoming also prohibited both the concealed and open carrying of weapons, although with more modern language. 1881 Kan. Sess. Laws 80, ch. XXXVII, § 23 (“The [city] council shall prohibit and punish the carrying of firearms, or other dangerous or deadly weapons, concealed or otherwise”),²⁸ 1876 Wyo. Sess. Laws 352, ch. 52, § 1 (prohibiting the “bear[ing] upon his person, concealed or openly, any fire arm or other deadly weapon, within the limits of any city, town or village”).

²⁶ The Texas Constitution of 1869 provided: “Every person shall have the right to keep and bear arms, in the lawful defence of himself or the State, under such regulations as the legislature may prescribe.” Tex. Const. of 1869, art. I, § 13.

²⁷ Idaho was admitted to the Union in 1890. The Idaho Constitution of 1889 provided: “The people have the right to bear arms for their security and defence; but the legislature shall regulate the exercise of this right by law.” Idaho Const. of 1889, art. I, § 11.

²⁸ The Kansas Bill of Rights, adopted in 1859, provided: “The people have the right to bear arms for their defense and security” Kan. Const. of 1859, Bill of Rights § 4.

Most, but not all, of the weapons enumerated in these statutes were capable of being concealed. The statutes we have discussed thus far, however, did not prohibit only the *concealed* carrying of such weapons. Some states, however, did so limit their laws. Alabama, for example, punished “any one who carrie[d] concealed about his person a pistol, or any other description of fire arms, not being threatened with, or having good reason to apprehend an attack, or travelling” 1852 Ala. Laws 588, art. VI, § 3274.²⁹ Georgia prohibited “[a]ny person having or carrying about his person, unless in an open manner and fully exposed to view, any pistol, (except horseman’s pistols,) dirk, sword in a cane, spear, bowie-knife, or any other kind of knives” 1861 Ga. Laws 859, div. 9, § 4413.

On the other hand, two territories had nominal concealed weapons prohibitions that also applied to open carry. New Mexico made it “unlawful for any person to carry *concealed* weapons on their persons, of any class of pistols whatever, bowie knife . . . Arkansas toothpick, Spanish dagger, slung-shot, or any other deadly weapon.” 1860 N.M. Laws 94, § 1 (emphasis added). However, in the following section, it prescribed the punishment for any person who “carr[ies] about his person, either *concealed or otherwise*, any deadly weapon of the class and description mentioned in the preceding section” *Id.* § 2 (emphasis added). The Territory of Oklahoma had a complex series of prohibitions in an article entitled “Concealed Weapons,” but some of the prohibitions applied to open carry. For instance, one provision made it “unlawful for any person in the Territory of

²⁹ The Alabama Constitution of 1819 provided: “Every citizen has a right to bear arms in defence of himself and the State.” Ala. Const. of 1819, art. I, § 23.

Oklahoma to carry concealed . . . any pistol, revolver, bowie knife, dirk, dagger, slung-shot, sword cane, spear, metal knuckles, or any other kind of knife . . .” 1891 Okla. Sess. Laws 495, art. 47, § 1. But the next section prohibited “any person . . . to carry upon or about his person any pistol, revolver, bowie knife, dirk knife, loaded cane, billy, metal knuckles, or any other offensive or defensive weapon, *except as in this article provided.*” *Id.* § 2 (emphasis added). The article then made exceptions for “[P]ublic officers while in the discharge of their duties,” *id.* § 4, and persons carrying “shot-guns or rifles for the purpose of hunting,” *id.* § 5. Additionally, the statute made it “unlawful for any person, except a peace officer, to carry into any church or religious assembly, any school room . . . or into any circus, show or public exhibition of any kind, or into any ball room, or to any social party or social gathering, or to any election, or to any place where intoxicating liquors are sold, or to any political convention, or to any other public assembly, any of the weapons designated in sections one and two of this article.” *Id.* § 7. In the end, section 7 was a broad prohibition on carrying arms into public places.

Before we discuss the state cases, we have several observations on the statutes. First, the states broadly agreed that small, concealable weapons, including firearms, could be banned from the public square. Although the record is not uniform, the vast majority of the states did not distinguish between regulation of concealed carry and regulation of open carry of weapons that were *capable* of being concealed. None of the statutes we have discussed in this section makes any mention of long-barreled guns, such as muskets, rifles, or shotguns. Second, although many of the states had constitutional provisions that guaranteed some kind of right to keep and bear arms, state legislatures evidently did not

believe that the restrictions we have discussed here were inconsistent with their state constitutions. At the same time, the territories enacted similar restrictions, and the territories—unlike the states—would have been subject to the Second Amendment. U.S. Const. art. IV, § 3, cl. 2.

The Territory of Hawai‘i’s enumerated restrictions on carrying weapons were well within this tradition. Hawai‘i’s 1852 law punished “[a]ny person not authorized by law, who shall carry, or be found armed with, any bowie-knife, sword-cane, pistol, air-gun, slung-shot or other deadly weapon.” 1852 Haw. Sess. Laws 19, § 1. Like many states, Hawai‘i exempted persons “authorized to bear arms,” including persons “holding official, military, or naval rank” so long as the weapon was “worn for legitimate purposes.” *Id.* § 2.

b. The cases. The parties have directed our attention to a number of reported state cases that address the right to keep and bear firearms. They are largely from Southern states; even then, they are far from uniform in their reasoning and conclusions. We will start with the cases in which the state courts adopted the most generous protections for those bearing arms. Our first such case is *Bliss v. Commonwealth*, 12 Ky. (2 Litt.) 90 (1822). Like many statutes we have seen, Kentucky law banned the carrying of concealed weapons, including pocket pistols, dirks, large knives and sword-canes. *Id.* at 90. Bliss was charged with carrying a sword in a cane and contended that the Kentucky Constitution prohibited such restrictions.³⁰ *Id.* A divided Kentucky Court of Appeals, Kentucky’s highest court, held the statute unconstitutional.

³⁰ The Kentucky Constitution provided: “That the right of the citizens to bear arms in defence of themselves and the State shall not be questioned.” Ky. Const. of 1799, art. X, § 23.

The court determined that the right to bears arms “existed at the adoption of the constitution . . . [and] consisted in nothing else but in the liberty of the citizens to bear arms.” *Id.* at 92. The court took a bright-line position on any difference between the state regulating and prohibiting the carrying of arms: “in principle, there is no difference between a law prohibiting the wearing concealed arms, and a law forbidding the wearing such as are exposed; and if the former be unconstitutional, the latter must be so likewise.” *Id.* The court held the act “unconstitutional and void.” *Id.* at 93. One judge dissented, but did not file an opinion. *Id.* at 94.

Bliss’s expansive view of the right to carry firearms was short lived. Following the Kentucky Court of Appeals’ opinion, the legislature amended the constitution to allow the type of restriction the court had struck down. Ky. Const. of 1850, art. XIII, § 25 (“That the rights of the citizens to bear arms in defence of themselves and the State shall not be questioned; but the general assembly may pass laws to prevent persons from carrying concealed arms.”). *See Peruta*, 824 F.3d at 935–36 (citing Robert M. Ireland, *The Problem of Concealed Weapons in Nineteenth-Century Kentucky*, 91 Reg. Ky. Hist. Soc’y 370, 373 (1993) (discussing the aftermath of the decision; noting that the Governor criticized the court for reading the state constitution so literally)). *Bliss* appears to be an isolated decision. The decision was not followed by any other court, and it was considered and rejected by state courts in Alabama, Arkansas, Georgia, and Tennessee. *See Peruta*, 824 F.3d at 936; *Strickland v. State*, 72 S.E. 260, 261 (Ga. 1911) (“[*Bliss*] has

not been followed, but severely criticised. The decisions are practically unanimous to the contrary.”); *id.* (citing cases).³¹

No other court went as far as the Kentucky court in *Bliss*; indeed, courts in Georgia, Alabama, and Louisiana deviated from *Bliss* by holding that restrictions on concealed weapons were permissible. Georgia drew its line between open and concealed carry in reversing a conviction for carrying firearms. In *Nunn v. State*, 1 Ga. 243 (1846), Nunn was charged with carrying pistols, but the indictment failed to state whether he carried them in secret. Discussing *Bliss*, the Georgia Supreme Court relied largely on the Second Amendment of the U.S. Constitution, denying that “because the people withheld this arbitrary power of disfranchisement from Congress [in the Second Amendment], they ever intended to confer it on the local legislatures.” *Id.* at 250. The court concluded that

so far as the [challenged state] act . . . 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-defence, 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*.

³¹ The decision, however, is notable for another reason. Prompted by the decision, Kentucky became the first state to write into its constitution what had long been implicit: that “the general assembly may pass laws to prevent persons from carrying concealed arms.” Ky. Const. of 1850, art. XIII, § 25.

Id. at 251. Because Nunn had not been charged with carrying his pistol in secret, the judgment of conviction was reversed.³² See also *In re Brickey*, 70 P. 609, 609 (Idaho 1902) (holding unconstitutional under both the state and federal constitutions a statute prohibiting the carrying of deadly weapons in the city; suggesting that a statute prohibiting concealed carry would be constitutional).

³² When *Nunn* was decided, there was no Georgia provision concerning the right to keep and bear arms. Following the Civil War, the Georgia Constitution was revised to read: “A well regulated Militia being necessary to the security of a free people, the right of the people to keep and bear arms shall not be infringed; but the General Assembly shall have power to prescribe by law the manner in which arms may be borne.” Ga. Const. of 1868, art. I, § XIV. In *Hill v. State*, 53 Ga. 472 (1874), the Georgia Supreme Court upheld against a state constitutional challenge a statute prohibiting the carrying of a pistol or revolver, among other “deadly weapon[s],” in courts, places of worship, and public gatherings. *Id.* at 480–81 (“The manner of bearing arms includes not only the particular way they may be carried upon the person, that is openly or secretly, on the shoulder or in the hand, loaded or unloaded, cocked or uncocked, capped or uncapped, but it includes, also, the time when, and the place where, they may be borne.”).

In 1877, the Georgia Constitution was revised again, and the right to bear arms lost its prefatory clause. Ga. Const. of 1877, art. I, § 1, para. XXII (“The right of the people to keep and bear arms shall not be infringed, but the General Assembly shall have power to prescribe, the manner in which arms may be borne.”). In *Strickland*, the Georgia Supreme Court upheld against a state constitutional challenge a law requiring a license for any person to “carry[] about his person” a pistol or revolver. 72 S.E. at 260. The court cited the Statute of Northampton and other English sources. The court observed that “no one will contend that children have a constitutional right to go to school with revolvers strapped around them, or that men and women have a right to go to church, or sit in the courtrooms, or crowd around election precincts, armed like desperadoes, and that this is beyond the power of the Legislature to prevent.” *Id.* at 264.

The Alabama Supreme Court changed its views over time on the state's power to regulate open carry. Like Georgia, Alabama first upheld the power of the state legislature to prohibit carrying concealed weapons. In *State v. Reid*, 1 Ala. 612 (1840), the Alabama Supreme Court affirmed Reid's conviction for carrying a concealed pistol.³³ The court considered *Bliss*, but refused to go so far. Instead, it was "incline[d] to the opinion that the Legislature cannot inhibit the citizen from bearing arms openly, because [the Constitution] authorizes him to bear them for the purposes of defending himself and the State, and it is only when carried openly, that they can be efficiently used for defence." *Id.* at 619. But the court also understood the right to bear arms openly to be subject to some degree of regulation. The Alabama Constitution had not "denied to the Legislature, the right to enact laws in regard to the manner in which arms shall be borne. The right guarantied to the citizen, is not to bear arms upon all occasions and in all places, but merely 'in defence of himself and the State.'" *Id.* at 616. As a result, the legislature retained "the authority to adopt such regulations of police, as may be dictated by the safety of the people and advancement of public morals." *Id.*

An early twentieth-century case from Alabama, although outside our current historical discussion, shows that this limiting principle first articulated in *Reid* had teeth. In *Isaiah v. State*, 176 Ala. 27 (1911), the Alabama Supreme Court upheld, under the same provision of the Alabama Constitution, a statute prohibiting the carrying of a pistol "about his person on premises not his own or under his

³³ The Alabama Constitution stated that "[e]very citizen has a right to bear arms in defence of himself and the State." Ala. Const. of 1819, art. I, § 23.

control.” *Id.* at 28. The court concluded that the statute properly restricted the manner and places in which arms could be carried. *Id.*; *see also id.* at 34 (McClellan, J., concurring) (stating that the legislature could prohibit a person “to carry a pistol off one’s premises”). In his concurrence, and citing *Reid*, Justice McClellan made clear what is unstated in the majority: that the legislature retained the authority to regulate where and how a person could legally carry a firearm in Alabama. *Id.* at 37–38 (McClellan, J., concurring) (“To deny the validity of [the regulation] would, without doubt, restrict the legislative right to regulate . . . to the *manner* only of bearing arms; and this would clothe the constitutional right to bear arms with an effect to deny to legislative function the power to determine . . . what are *arms* proper to be borne . . . [or] at what *places* arms of a defined character should not be borne.”). *Isaiah* tells us that Alabama’s right to carry openly, even if constitutionally protected, was nevertheless amenable to even severe restrictions by the state legislature.

The Louisiana Supreme Court also marked the difference between concealed carry and open carry, albeit in dicta. An 1813 statute prohibited concealed carriage of enumerated dangerous weapons. Chandler was charged with murder using a Bowie knife; he claimed it was in self defense. In the course of describing the statute, the Louisiana Supreme Court observed that the prohibition on concealed weapons was “absolutely necessary to counteract a vicious state of society . . . and to prevent bloodshed and assassinations committed upon unsuspecting persons. It interfered with no man’s right to carry arms . . . ‘in full open view,’ which places men upon an equality.” *State v. Chandler*, 5 La. Ann. 489, 489–90 (1850). In *State v. Smith*, 11 La. Ann. 633 (1856), Smith was charged with carrying a concealed weapon. The statute

specified that a weapon was concealed when it did not appear “in full open view.” *Id.* at 634. Smith contended that the weapon was partially exposed and, therefore, not concealed. The Louisiana Supreme Court disagreed. Citing the Second Amendment, the court commented that the amendment was “never intended to prevent the individual States from adopting such measures of police as might be necessary, in order to protect the orderly and well disposed citizens from the treacherous use of weapons not even designed for any purpose of public defence” *Id.* at 633. As to the question before it, the court held that partial concealment was a violation of the statute. It appeared to exempt from the statute “the extremely unusual case of the carrying of such weapon in full open view, and partially covered by the pocket or clothes,” but not “where the partial exposure is the result of accident or want of capacity in the pocket to contain, or clothes fully to cover the weapon.” *Id.* at 634. Finally, in *State v. Jumel*, 13 La. Ann. 399 (1858), the Louisiana Supreme Court upheld a conviction for carrying a concealed weapon and commented that the statute “does not infringe the right of the people to keep or bear arms. It is a measure of police, prohibiting only a particular mode of bearing arms which is found dangerous to the peace of society.” *Id.* at 399–400.

In contrast to these states, other states—also from the South—upheld good-cause restrictions on the open carry of certain dangerous firearms. The Texas Supreme Court did so in a pair of cases. In *English v. State*, 35 Tex. 473 (1871), English had been charged under the Act of April 12, 1871, which prohibited the carrying of deadly weapons, including “pistols, dirks, daggers, slungshots, swordcanes, spears, brass-knuckles and bowie knives,” unless the carrier could show an “exceptional case[]” of self-defense. *Id.* at 474, 477.

At trial, English proved that the pistol was not loaded and was inoperable. *Id.* at 473. The court took note of various state decisions, including the Alabama and Georgia decisions. It also referred to the Statute of Northampton, *Sir John Knight's Case*, and Blackstone. *Id.* at 476. Analyzing the Second Amendment, the court concluded that its intended scope was limited to arms that were “useful and proper to an armed militia.” *Id.* at 474 (“Can it be understood that these [deadly weapons named in the statute] were contemplated by the framers of our bill of rights? Most of them are the wicked devices of modern craft.”). The Texas Supreme Court rejected as “simply ridiculous” the idea that the specific weapons banned in the statute were “proper or necessary arms of a ‘well-regulated militia.’” *Id.* at 476; *see id.* (“The word ‘arms’ . . . refers to the arms of a militiaman or soldier, and the word is used in its military sense.”). Turning next to English’s challenge under the state constitution, the court determined that the Texas Constitution “confers upon the legislature the power to regulate the privilege [to bear arms]” so long as it does not “tak[e] it away.” *Id.* at 478.³⁴ The court concluded that Texas law restricted, but did not deprive, its residents of the right to bear arms. No one “should claim the right to carry upon his person any of the mischievous devices inhibited by the statute, into a peaceable public assembly, as, for instance into a church, a lecture room, a ball room, or any other place where ladies and gentlemen are congregated together.” *Id.* at 478–79.

³⁴ The Texas Constitution provided: “Every person shall have the right to keep and bear arms, in the lawful defence of himself or the State, under such regulations as the legislature may prescribe.” Tex. Const. of 1869, art. I, § 13.

In a later case, the Texas Supreme Court clarified that the use of “arms” in the Texas Constitution does not refer “only to the arms of a militiaman or soldier.” Rather, the weapons “secured [in] the right to keep and bear” arms “must be such arms as are commonly kept, according to the customs of the people, and are appropriate for open . . . use in self-defense.” *State v. Duke*, 42 Tex. 455, 458 (1875) (upholding the same good-cause restriction challenged in *English*). The court counted among such defensive weapons “the double-barreled shot-gun, the huntsman’s rifle, and such pistols at least as are not adapted to being carried concealed,” such as “the dragoon or holster pistol.” *Id.* at 458–59.

Other, more extensive firearms regulations were held constitutional, including restrictions on open carry that were tailored to small and concealable weapons. In *Andrews v. State*, 50 Tenn. 165 (1871), Andrews was charged with carrying a pistol in violation of state law. The Tennessee statute in question made it unlawful “for any person to publicly or privately carry a dirk, swordcane, Spanish stiletto, belt or pocket pistol or revolver.” *Id.* at 171 (quoting Act of June 11, 1870, § 1).³⁵ Andrews argued that the weapon he was charged with carrying was not one encompassed by the statute. The Tennessee Supreme Court agreed and overturned his conviction. The court reasoned that the right to bear arms was “the right to use such arms for all the ordinary purposes, and in all the ordinary modes usual in the country.” *Id.* at 178. Keeping in mind “a knowledge of the habits of our people, and of the arms in the use of which a soldier should

³⁵ Tennessee’s Constitution of 1870 provided: “That the citizens of this State have a right to keep and to bear arms for their common defense; but the [L]egislature shall have power by law, to regulate the wearing of arms with a view to prevent crime.” Tenn. Const. of 1870, art. I, § 26.

be trained,” the court held that “the rifle of all descriptions, the shot gun, the musket, and repeater,” were “the usual arms of the citizen of the county.” *Id.* at 179. Although the court concluded that “the right to keep such arms, can not be infringed or forbidden by the Legislature,” it acknowledged that their use could “be subordinated to such regulations and limitations as are or may be authorized by the law of the land.” *Id.* at 179–80. The court declared the statute constitutional, at least insofar as it prohibited “belt or pocket pistol[s].” It reserved judgment on the statute’s prohibition against “revolvers” because the evidence was unsettled as to whether the term referred to a “repeater[,which] is a soldier’s weapon,” the carrying of which could not be constitutionally prohibited. *Id.* at 186–87. The court acknowledged that even the weapons lawfully prohibited by the statute might be used in one’s self-defense. Nevertheless, the court found that

[t]he law allows ample means of self-defense, without the use of the weapons which we have held may be rightfully prescribed by this statute. The object being to banish these weapons from the community by an absolute prohibition for the prevention of crime, no man’s particular safety, if such case could exist, ought to be allowed to defeat this end.

Id. at 189; *see also Aymette v. State*, 21 Tenn. 154, 160–61 (1840) (suggesting, in dicta, that “swords, muskets, rifles, etc., must necessarily be borne openly . . . to bear arms in defence of themselves [and the state]”). For the court in *Andrews*, the right of individual self-defense did not trump the legislature’s ability to regulate—or even “banish”—certain types of firearms from the public square. In a companion case, *Page v. State*, 50 Tenn. 198 (1871), the

court upheld Page’s conviction for carrying a revolver. The “revolver” was only about eight inches long, and the court concluded it was not a “an arm for war purposes” and thus could be constitutionally prohibited by the state legislature under *Andrews*. *Id.* at 198. In a subsequent case, the court upheld an indictment for carrying an army pistol that was not displayed in hand. *State v. Wilburn*, 66 Tenn. 57 (1872).

Like Tennessee, Arkansas upheld a ban on open carry of certain dangerous weapons. In *Fife v. State*, 31 Ark. 455 (1876), the Arkansas Supreme Court upheld Fife’s conviction for carrying a pistol in hand. The court looked at “the prohibited list of weapons,” under the relevant state law—including the pistol, dirk, Bowie knife, swordcane and brass knuckles—and found that the state legislature intended to prevent “known public mischief,” the pistol being “usually carried in the pocket, or of a size to be concealed about the person, and used in private quarrels and brawls.” *Id.* at 461. It upheld the law under Arkansas’s Constitution, which guaranteed that “[t]he citizens of this State shall have the right to keep and bear arms for their common defense.” Ark. Const. of 1874, art. II, § 5. In a later case, *Haile v. State*, 38 Ark. 564 (1882), the court confirmed the legislature’s power to prescribe the permissible manner of carrying a weapon in public, including weapons used in war. Haile was carrying a pistol at his waist. An Arkansas law, adopted in 1881, prohibited the carrying of “such pistol as is used in the army or navy of the United States, in any manner, except uncovered, and in the hand.” *Id.* at 565. The court rejected the claim that the right to keep and bear arms guaranteed “protection to the citizen, in going, with convenience to himself, and after his own fashion, prepared at all times to inflict death upon his fellow-citizens, upon the occasion of any real or imaginary wrong.” *Id.* at 566. Although the

Arkansas Constitution did not expressly reserve to the legislature the right to regulate arms, the court thought it followed “from the undefined police powers, inherent in all governments.” *Id.* at 567.³⁶

The cases, much more so than the statutes, are divided. As the Supreme Court of Georgia so eloquently put it “‘*tot homines, quot sententiae*’—so many men, so many opinions!” *Nunn*, 1 Ga. at 248. *Cf. Isaiah*, 176 Ala. at 35 (McClellan, J., concurring) (“There is wide and fundamental divergence of opinion upon the scope and effect of constitutional provisions [concerning the right to bear arms].”); *City of Salina v. Blaksley*, 83 P. 619, 620 (Kan. 1905) (“[T]he carrying of deadly weapons has been the subject of much dispute in the courts. The views expressed in the decisions are not uniform, and the reasonings of the different courts vary.”). In a trenchant decision summarizing

³⁶ *Fife* and *Haile* were not the only cases from the Arkansas Supreme Court to evaluate the constitutionality of a firearms restrictions under the state constitution. Both cases built on an 1842 concealed-carry decision, which concluded that the “[l]egislature possesses competent powers to prescribe, by law, that any and all arms, kept or borne by individuals, shall be so kept and borne as not to injure or endanger the private rights of others” *State v. Buzzard*, 4 Ark. 18, 27 (1842) (op. of Ringo, C.J.). *See* Ark. Const. of 1836, art. II, § 21 (“That the free white men of this State shall have a right to keep and to bear arms for their common defence.”).

Though *Buzzard* did not involve open carry, the court’s reasons for upholding the statute reveal an expansive understanding of the legislature’s authority to regulate public-arms carriage. In the court’s view, “if the right to keep and bear arms be subject to no legal control or regulation whatever, it might, and in time to come doubtless will, be so exercised as to produce in the community disorder and anarchy.” *Id.* at 21 (op. of Ringo, C.J.).

the debates, the Supreme Court of Georgia commented that there were

two general lines of reasoning [that] have been employed in upholding [statutes regulating the carrying of certain weapons]: First, that such provisions are to be construed in the light of the origin of the constitutional declarations . . . ; and[] second, that the right to bear arms, like other rights of person and property, is to be construed in connection with the general police power of the state, and as subject to legitimate regulation thereunder.

Strickland, 72 S.E. at 262. The court noted that some states expressly reserved to the legislature the power to regulate arms, but the court thought that “even where such expressions do not occur,” the state retains some general police power “unless the language of the instrument itself should exclude such a construction.” *Id.* Critically, the court observed that “if the right to bear arms includes deadly weapons of every character, . . . [then] the citizen [is] guaranteed the right to carry weapons or arms, in the broadest meaning of that term, whenever, wherever, and however he please[s]”—a possibility that the court dismissed by holding that the licensing regulation at issue was “legitimate and reasonably within the police power.” *Id.* at 262–63. The court also rejected the contention that the right to bear arms was uniquely immune from reasonable regulation. *See id.* at 264 (“Many persons are required to obtain a license before engaging in certain businesses or performing certain acts; where a legitimate exercise of the police power of the state, it has never been thought that this was a violation of any constitutional right as to person or property.”).

The cases that we have just discussed largely confirm *Strickland*'s understanding of the historical scope of the right to bear arms openly in public. There are divisions between state courts and even some disagreements within state courts. Moreover, we should repeat here that the cases represent a limited cross-section of the courts of the United States. Here is what we can say. Only one state court (Kentucky, *Bliss*) has held that there is a constitutional right to carry arms publicly, whether concealed or openly. Outside of that one case, the state courts generally agree that the legislature can prohibit the carrying of concealed weapons.³⁷ Beyond concealed carry, the courts diverge in their views. At least three state courts (Georgia, *Nunn*; Idaho, *Brickey*; Louisiana, *Chandler*, *Jumel*, *Smith*) have stated that the legislature can prohibit concealed carry, but suggested, in dicta, that it cannot prohibit open carry. At least five state courts have said that the legislature can prohibit the open carrying of firearms at least to the extent that the regulations forbid open carrying in certain places (Alabama, *Reid*, *Isaiah*; Georgia, *Hill*); forbid most open carrying of certain types of firearms or weapons (Arkansas, *Fife*, *Haile*; Tennessee, *Andrews*, *Page*; Texas, *English*, *Duke*), or forbid open carrying without a license on conditions set forth by the legislature (Georgia, *Strickland*). Our survey has yielded no firm consensus in American courts.

³⁷ There are a number of cases we have not reviewed here that discuss only the question of concealed carry, without addressing, in a holding or dicta, the question of open carry. See, e.g., *State v. Mitchell*, 3 Blackf. 229 (Ind. 1833); *Wright v. Commonwealth*, 77 Pa. 470 (1875); *State v. Wilforth*, 74 Mo. 528 (1881); *State v. Speller*, 86 N.C. 697 (1882); *State v. Workman*, 35 W. Va. 367 (1891).

c. Treatises. Nineteenth-century American legal treatises provide some insight into the scope of the right to carry arms in public. Like the English commentators, American commentators drew a distinction between the carrying of concealable arms and military arms suitable for militia service. St. George Tucker discussed the English concept of treason, which was levying war against the king. Quoting Matthew Hale, Tucker observed that an assembly, armed with weapons suitable for military service and ““without the king’s licen[s]e, unless in some lawful and special cases, carries a terror with it, and a *presumption of warlike force*[.]’ The bare circumstance of having arms, therefore, of itself, creates a *presumption* of warlike force.” 5 St. George Tucker, *Blackstone’s Commentaries* app’x 19 (William Young Birch & Abraham Small eds. 1803) (quoting 1 Matthew Hale, *The History of the Pleas of the Crown* 150 (1736)) (emphasis added). Tucker then commented,

But ought that circumstance of itself, to create any such presumption in America, where the right to bear arms is recognized and secured in the constitution itself? In many parts of the United States, a man no more thinks, of going out of his house on any occasion, without his rifle or musket in his hand, than an European fine gentleman without his sword by his side.

Id. Where St. George Tucker addressed the Second Amendment specifically, and stated that “[t]he right of self defence is the first law of nature,” it is clear from context that he is principally concerned with the regulation of military arms, such as muskets, rifles, or shotguns, which were prohibited for a time in England “under the specious pretext of preserving the game.” 1 St. George Tucker, *Blackstone’s*

Commentaries, at app’x 300. Joseph Story’s comments on the Second Amendment bear a similar concern with depriving the people of arms, on the logic that bearing arms acted as “a strong moral check against the usurpation and arbitrary power of rulers.”³ Joseph Story, *Commentaries on the Constitution of the United States* 746 (1833); see also William Rawle, *A View of the Constitution of the United States of America* at 125 (1829) (“No clause in the Constitution could by any rule of construction be conceived to give to congress a power to disarm the people.”).

Most nineteenth-century American authors assumed that the state had the right to regulate arms in the public square. William Rawle, for example, agreed with Blackstone’s criticism of governmental attempts to disarm the people in the guise of forest and game regulations. But he then drew a line between the use of firearms for hunting and their possession in other public places:

This right ought not, however, in any government, to be abused to the disturbance of the public peace. . . . [E]ven the carrying of arms abroad by a single individual, attended with circumstances giving just reason to fear that he purposes to make an unlawful use of them, would be sufficient cause to require him to give surety of the peace. If he refused he would be liable to imprisonment.

Id. at 126. Francis Wharton in his criminal law treatise quotes the Statute of Northampton and then comments:

A man cannot excuse wearing such armour in public, by alleging that such a one threatened

him, and that he wears it for the safety of his person against his assault; but it is clear that no one incurs the penalty of the statute for assembling his neighbours and friends in his own house, against those who threaten to do him any violence therein, because a man's house is his castle.

Francis Wharton, *A Treatise on the Criminal Law of the United States* 932, § 2497 (1857) (citing 1 Hawkins, *A Treatise of the Pleas of the Crown* at 489). He adds “that the public and open exhibition of dangerous weapons by an armed man, to the terror of good citizens, is a misdemeanor at common law.” *Id.* at 933 (footnote omitted). In his discussion of the Second Amendment, Dean Pomeroy observed that

a militia would be useless unless the citizens were enabled to exercise themselves in the use of warlike weapons. . . . But all such provisions, all such guaranties, must be construed with reference to their intent and design. This constitutional inhibition is certainly not violated by laws forbidding persons to carry dangerous or concealed weapons

John Norton Pomeroy, *An Introduction to the Constitutional Law of the United States* 152–53 (1868). One of the most influential commentators of the nineteenth century, Thomas Cooley opined that “[t]he meaning of the provision undoubtedly is, that the people, from whom the militia must be taken, shall have the right to keep and bear arms; and they need no permission or regulation of law for the purpose.”

Thomas M. Cooley, *The General Principles of Constitutional Law in the United States of America* 271 (1880). At the same time, Cooley suggested that “[t]he arms intended by the Constitution are such as are suitable for the general defence of the community against invasion or oppression, and the secret carrying of those suited merely to deadly individual encounters may be prohibited.” *Id.* at 271–72 (footnote omitted). And one of the principal reporters of New York’s penal code and a prolific author, Benjamin Vaughan Abbott, offered this practical guide to the Second Amendment:

The Constitution secures the right of the people to keep and bear arms. No doubt, a citizen who keeps a gun or pistol under judicious precautions, practises in safe places the use of it . . . exercises his individual right. No doubt, a person whose residence or duties involve peculiar peril may keep a pistol for prudent self-defence. But . . . carrying them carelessly in the pocket; toying with them at picnics, on board steamers, and in saloons These are practices upon which every good citizen will frown, and which the law of the land is every year more explicitly discouraging.

Benjamin Vaughan Abbott, *Judge and Jury* 333 (1880). Abbott concludes: “Carrying [pistols] for defence, in the more settled parts of the land, savors of cowardice rather than of prudence; a well-behaved man has less to fear from violence than from the blunders of himself and friends in managing the pistol he might carry as a protection.” *Id.* at 333–34.

One commentator distinguished between what the Second Amendment prohibits Congress from doing and more general constitutional principles applicable to the states, and in the course of his discussion offered perhaps the strongest endorsement for the right to carry firearms openly in public. Distilling principles from some of the early Southern cases that distinguished between concealed carry and open carry, Professor Ordranoux wrote:

[I]t was not necessary that the right to bear arms should be granted in the Constitution, for it had always existed. It is not in consequence dependent upon that instrument, and is only mentioned therein as a restriction upon the power of the national government against any attempt to infringe it. In other words, it is a right secured and not created. But this prohibition is not upon the States, whose citizens are left free in respect to the extent of their enjoyment or limitation of the right. The word “arms” being used in its military sense alone, and as part of the equipment of a citizen in the public service, the provision does not prevent a State from enacting laws regulating the manner in which arms may be carried. Thus, the carrying of *concealed* weapons may be absolutely prohibited without the infringement of any constitutional right, while a statute forbidding the bearing of arms openly would be such an infringement. In order to prevent breaches of the peace . . . a State may, as part of its police regulations require that . . . a private citizen shall obtain a

license in order to be permitted to carry a concealed weapon.

John Ordronaux, *Constitutional Legislation in the United States* 242–43 (1891) (footnotes omitted). Ordronaux did not explain his reasoning, other than to drop a footnote with citations to five cases we have discussed: a Georgia case, *Nunn*; three Louisiana cases, *Chandler*, *Smith*, and *Jumel*; and a Tennessee case, *Andrews*. At least *Andrews* is contrary to Ordronaux’s statement, because the Tennessee Supreme Court upheld Andrew’s conviction for openly carrying. *See Andrews*, 50 Tenn. at 171, 186–87.

None of these commentaries, with the possible exception of Ordronaux, seriously questions the power of the government to regulate the open carrying of arms in public. And several of them reinforce the Court’s holding in *Heller*, that there is a general right of self-defense in the home. No one suggested that those two conclusions are inconsistent with each other.

3. Twentieth-Century Restrictions

We are not inclined to review twentieth-century developments in detail, in part because they may be less reliable as evidence of the original meaning of the American right to keep and bear arms. We will review some early developments to place Hawai‘i’s statutes in context.

The first part of the twentieth century saw a change in approach in some states, as they adopted more detailed regulations, including licensing requirements. In 1906 Massachusetts adopted “An Act to Regulate by License the Carrying of Concealed Weapons.” Although the title referred

to “concealed weapons,” the legislation in fact prohibited carrying “a loaded pistol or revolver, without authority or permission, . . . or . . . any stiletto, dagger, dirk-knife, slung-shot or metallic knuckles.” 1906 Mass. Acts 150, ch. 172, § 2. A license “to carry a loaded pistol or revolver” could be issued to an applicant who had “good reason to fear an injury to his person or property” and was otherwise “suitable.” *Id.* at 150, § 1. Alabama prohibited persons from carrying a “pistol concealed,” but it also made it “unlawful for any person to carry a pistol about his person on premises not his own or under his control.” 1909 Ala. Laws 258 No. 215, §§ 1–2. Hawai‘i adopted a similar provision: the territory’s 1913 Act prohibited any person “not authorized by law” to “carry, or be found armed with any bowie-knife, sword-cane, pistol, air-gun, slung-shot, or other deadly weapon.” 1913 Haw. Laws 25, § 3089.

Most of the laws we have examined lumped firearms into the same category as knives, brass knuckles and similar weapons that could be concealed. In the early to mid-twentieth century, however, a number of states began to distinguish between firearms and other dangerous weapons that could be concealed. In 1911, New York adopted the Sullivan Law, which made it unlawful to possess without a license any pistol, revolver, or other firearm capable of being concealed. *See Kachalsky*, 701 F.3d at 84–85 (providing background). In 1913, New York amended the Sullivan Law “in relation to the carrying, use and sale of dangerous weapons.” 1913 N.Y. Laws 1627–30, vol. III, ch. 608, § 1. The legislature made it a felony to carry or possess “any instrument or weapon of the kind commonly known as a blackjack, slungshot, billy, sandclub, sandbag, metal knuckles, bludgeon, bomb or bombshell” and to carry or possess “with intent to use the same unlawfully against

another . . . a dagger, dirk, dangerous knife, razor, stiletto, or any other dangerous or deadly instrument or weapon.” *Id.* at 1627–28. The legislature, however, separately prohibited “possession in any city, village or town of this state, any pistol, revolver or other firearm of a size which may be concealed upon the person, without a written license therefor.” *Id.* at 1628. Openly carrying a concealable weapon was a misdemeanor; concealed carry was a felony. *Id.* New York’s judges were authorized to issue a license to “any householder, merchant, storekeeper or messenger of any banking institution or express company” so long as the judge was “satisfied of the good moral character of the applicant” and that the householder intended “to have such weapon in his dwelling”; the “merchant, or storekeeper, to have such weapon in his place of business”; and the banking messenger intended “to have and carry such weapon concealed while in [his] employ.” *Id.* at 1629. The law exempted law enforcement officials and “duly authorized military or civil organizations, when parading [and] . . . when going to and from the place of meeting of their respective organizations.” *Id.*

A number of other states followed New York’s model. In 1923 California adopted “An act to control and regulate the possession, sale and use of pistols, revolvers and other firearms capable of being concealed upon the person” 1923 Cal. Stat. 695, ch. 339. Like New York, and states before it, California banned possession of dangerous weapons, including “the kind commonly known as a blackjack, slungshot, billy, sandclub, sandbag, or metal knuckles” and concealed dirks and daggers. *Id.* at 696, § 1. Separately, it banned felons and aliens from possessing “any pistol, revolver or other firearm capable of being concealed upon the person.” *Id.* at 696, § 2. Other persons were

prohibited from “carry[ing] concealed upon his person or within any vehicle . . . any pistol, revolver or other firearm capable of being concealed” without a license. *Id.* at 697, § 5. The licensing requirement, however, did not apply to persons “owning, possessing or keeping within his place of residence or place of business any pistol, revolver or other firearm capable of being concealed upon the person.” *Id.* The act did not apply to law enforcement officials, members of the military, persons at target ranges, and licensed hunters.

Other states followed New York and California, although a number of them banned only concealed firearms. A standard provision would prohibit any person from carrying “a pistol or revolver concealed in any vehicle or upon his person, except in his dwelling house or place of business, without a permit.” 1925 Ind. Acts 496, ch. 207, § 5. *See* 1923 N.D. Laws 380 ch. 266, § 6. In 1926 the National Conference of Commissioners on Uniform State Laws issued the Uniform Firearms Act, and a number of states adopted the UFA. *See* Note, *The Uniform Firearms Act*, 18 Va. L. Rev. 887, 904 (1932). The UFA proposed licensing concealed firearms. *See, e.g.*, 1931 Pa. Laws 498, No. 158, § 5; 1935 S.D. Sess. Laws 355, ch. 208, § 5; 1935 Wash. Sess. Laws 599–60, ch. 172, § 5. The note in the *Virginia Law Review* praised the UFA, while noting that “[t]he provisions of the Act contain little that is startling in the way of new legislation. . . . [The Act] jealously guards the right of the honest citizen to bear arms.” 18 Va. L. Rev. at 906.

Hawai‘i’s 1927 revisions tracked the UFA and became the basis for its current licensing scheme. In the 1927 Act, Hawai‘i provided that

no person shall carry, keep, possess or have under his control a pistol or revolver; provided, however, that any person who shall lawfully acquire the ownership or possession of a pistol or revolver may, for purposes of protection and with or without a license, keep the same in the dwelling house or business office personally occupied by him, and in case of an unlawful attack upon any person or property in said house or office, said pistol or revolver may be carried in any lawful, hot pursuit of the assailant.

Act 206, 1927 Haw. Sess. Laws 209–10, § 5. A license “to carry a pistol or revolver concealed upon his person or to carry one elsewhere than in his home or office” could be issued if “the applicant has good reason to fear an injury to his person or property . . . and . . . is a suitable person to be so licensed.” *Id.* at 210, § 7.

D. The Power to Regulate Arms in the Public Square

1. The Basic Rule

Our 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. History is messy and, as we anticipated, the record is not uniform, but the overwhelming evidence from the states’ constitutions and statutes, the cases, and the commentaries confirms that we have never assumed that individuals have an unfettered right to carry weapons in public spaces. Indeed, we can find no general right to carry arms into the public square for self-defense. *See Kachalsky*, 701 F.3d at 96 (“[O]ur tradition . . .

clearly indicates a substantial role for state regulation of the carrying of firearms in public.”). To be sure, any one-sentence declaration that we might make will be subject to qualifications and exceptions (which we will address in the next section), but in the main, we have long distinguished between an individual’s right of defense of his household and his business and his right to carry a weapon in public for his own defense, absent exceptional circumstances. “Like . . . the right secured by the Second Amendment,” the government’s right to regulate the carriage of weapons in public places “is not unlimited.” *Heller*, 554 U.S. at 626. But we are persuaded that government regulations on open carry are “[l]aws restricting conduct that can be traced back to the founding era and are historically understood to fall outside of the Second Amendment’s scope,” and thus “may be upheld without further analysis.” *Silvester*, 843 F.3d at 821.

The contours of the government’s power to regulate arms in the public square is at least this: the government may regulate, and even prohibit, in public places—including government buildings, churches, schools, and markets—the open carrying of small arms capable of being concealed, whether they are carried concealed or openly. We need go no further than this, because the Hawai‘i firearms licensing scheme Young challenges only applies to “a pistol or revolver and ammunition therefor.” HRS § 134-9(a). This power to regulate is fully consonant with the Second Amendment right recognized in *Heller*. *Heller* found that the pre-existing right to keep and bear arms is not a right to “carry any weapon whatsoever in any manner whatsoever and for whatever purpose.” 554 U.S. at 626. “[T]he *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). The

heart of the Second Amendment is “defense of hearth and home.” *Heller*, 554 U.S. at 635.

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. In the English legal tradition, “every man’s house is looked upon by the law to be his castle.” 3 William Blackstone, *Commentaries* *288; see *Semayne’s Case* (1604), 77 Eng. Rep. 194, 194 (K.B.). See also *Carpenter v. United States*, 138 S. Ct. 2206, 2239 (2018) (Thomas, J., dissenting). The principle was colorfully expressed by William Pitt in Parliament:

The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail, its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement!

See *Miller v. United States*, 357 U.S. 301, 307 (1958) (quoting William Pitt) (citation omitted). The principle was further reinforced in the Bill of Rights, particularly by the Third and Fourth Amendments. See U.S. Const. amends. III (“No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner”), IV (“The right of the people to be secure in their . . . houses . . . against unreasonable searches and seizures, shall not be violated”); *United States v. Craighead*, 539 F.3d 1073, 1077 (9th Cir. 2008) (“The home occupies a special place in the pantheon of constitutional rights.” (citing the First, Second, Third, and Fourth Amendments.)).

Defense of the public square stands on entirely different footing. “One of the first duties of government is to afford [] protection.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). Indeed, among the fundamental privileges of citizenship in the United States is “[p]rotection by the government.” *Corfield v. Coryell*, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823) (No. 3230). Protection is the *quid pro quo* for our allegiance to the government. As Blackstone explained, “the community should guard the rights of each individual member, and . . . (in return for this protection) each individual should submit to the laws of the community; without which submission of all it was impossible that protection could be certainly extended to any.” 1 William Blackstone, *Commentaries* at *47–48; *see also Calvin’s Case* (1609), 77 Eng. Rep. 377, 382 (K.B.) (Coke, J.) (stating that “the Sovereign is to govern and protect his subjects” and “the subject oweth to the King his true and faithful ligeance”); *English*, 35 Tex. at 477 (“It is useless to talk about personal liberty being infringed by laws such as that under consideration. The world has seen too much licentiousness cloaked under the name of natural or personal liberty; natural and personal liberty are exchanged, under the . . . social compact of states, for civil liberty.”). The king who cannot guarantee the security of his subjects—from threats internal or external—will not likely remain sovereign for long.

The distinction between hearth and home and the public square is reinforced in the U.S. Constitution in another way: it is peculiarly the duty of the states to defend the public square. We should observe at this juncture that the American legal experience differed from the English tradition in two very important respects—written constitutions and federalism. Americans departed from their English forebears by creating written constitutions. “English colonists in

America became used to writing their own documents to flesh out the particulars of their governments.” Donald S. Lutz, *Colonial Origins of the American Constitution* xx, xxi (1998). As a consequence, “[l]ocal government in colonial America was the seedbed of American constitutionalism.” *Id.* Thus, Chief Justice Marshall wrote, “in America, . . . written constitutions have been viewed with so much reverence;” they were our “greatest improvement on political institutions.” *Marbury*, 5 U.S. (1 Cranch) at 178. The U.S. Constitution was written against a background of existing state constitutions, charters, and laws; indeed, it borrowed generously from those constitutions. The U.S. Constitution did not displace such laws, U.S. Const. amend. X, except where it did so expressly, *see, e.g., id.* art. I, § 8, cls. 1–3; art. VI, cl. 2. Thus, as we are looking for the meaning of “the right of the people to keep and bear Arms”—which owed its phrasing to the Massachusetts Constitution, Mass. Const. of 1780, pt. 1, art. 17 (“The people have a right to keep and to bear arms . . .”)—we should be looking to state constitutions and practices for the best evidence of how Americans viewed their inherited right to bear arms.

That brings us to the other American innovation: American federalism contemplated distinct roles for the federal government and the states, and it was the states that had responsibility for maintaining the public peace. The U.S. Constitution declared at the outset that the federal government would bear responsibility to “*provide* for the *common* defence.” U.S. Const. pmbl. (emphasis added). To effect that, the Constitution conferred on the United States the power to raise and support armies and navies and imposed a duty to “protect [the states] against Invasion.” *Id.* art. I, § 8, cls. 12–13; art. IV, § 4. Correspondingly, the states were forbidden to “keep Troops, or Ships of War,” or to “engage

in War unless actually invaded, or in such imminent Danger as will not admit of delay.” *Id.* art. I, § 10, cl. 3. On the other hand, the United States shared responsibility with the states for “*promot[ing]* the general Welfare,” and thus was granted the power to “lay and collect Taxes . . . to provide . . . for the general Welfare of the United States.” *Id.* pmbl.; art. I, § 8, cl. 1. By contrast, the United States was not enjoined to *secure* or *provide* “domestic Tranquility,” but only to “*insure*” it. *Id.* pmbl. Accordingly, the United States was made the “guarant[or] . . . against domestic Violence,” but only “on Application of the Legislature, or of the Executive (when the Legislature cannot be convened).” *Id.* art. IV, § 4. That meant that the states had the primary responsibility for securing what was formerly known as “the king’s peace.” See 1 St. George Tucker, *Blackstone’s Commentaries*, at app’x 367 (“[E]very pretext for intermeddling with the domestic concerns of any state, under colour of protecting it against domestic violence is taken away, by that part of the provision which renders an application from the legislative, or executive authority of the state endangered, necessary to be made to the federal government, before it[]s interference can be at all proper.”).

The states, in place of the king, assumed primary responsibility for maintaining the “king’s peace,”³⁸ consistent

³⁸ St. George Tucker explained that “[u]pon dissolution of the regal government, all public offences became offences against that particular state in which they were committed.” Accordingly, crimes in Virginia were “alleged to be committed against the peace and dignity of this commonwealth.” 5 St. George Tucker, *Blackstone’s Commentaries*, at app’x 20.

with their constitutions, laws, and traditions. As we have seen, maintaining the “king’s peace” was the king’s duty and, in the English view, the carrying of weapons in public areas was an affront to the king’s authority, for two reasons. First, public carry threatened the king’s peace because the mere presence of the weapons terrorized the people. Second, it suggested that the king was unable or unwilling to protect the people. Carrying arms in the public square infringes on states’ police powers for similar reasons. Thus, whether a man carried arms publicly as an open challenge to the king’s peace, or did so as a vote of no confidence in the king’s ability to maintain it, the Statute of Northampton was among the earliest efforts to assert formal authority over the public square. And, in the English view, the Statute of Northampton did not infringe any right to defend one’s castle, what the Supreme Court colloquially referred to in *Heller* as “hearth and home.” As Lord Coke explained, the Statute did not apply to the man who “assemble[s] force to defend his

The Supreme Court has further explained:

[W]hen the Constitution was written the term ‘breach of the peace’ did not mean, as it came to mean later, a misdemeanor such as disorderly conduct but had a different 18th century usage, since it derived from breaching the King’s peace and thus embraced the whole range of crimes at common law.

United States v. Brewster, 408 U.S. 501, 521 (1972). See U.S. Const. art. I, § 6, cl. 1 (granting Senators and Representatives privilege against arrest during and traveling to and from legislative sessions “except [for] Treason, Felony and Breach of the Peace”); *Williamson v. United States*, 207 U.S. 425, 446 (1908) (“[T]he term treason, felony and breach of the peace, as used in the constitutional provision relied upon, excepts from the operation of the privilege all criminal offenses” (internal quotation marks omitted)).

house.” Coke, *The Third Part of the Institutes of the Laws of England* 161. Hearth and home and the public square were separate domains.

Even as the colonists broadly adopted the Statute of Northampton, they also adapted it, by enumerating the kinds of weapons that were banned. The lists vary from jurisdiction to jurisdiction, but what commonly appears on the lists are small, hand-held weapons, capable of being concealed, including pistols, revolvers, dirks, daggers, brass knuckles, and slung shots—which were, at the time of the colonies and early statehood, considered deadly and dangerous weapons. Throughout the nineteenth century, American courts continued to question the usefulness of such weapons, *see Andrews*, 50 Tenn. at 178; *Page*, 50 Tenn. at 201; *Hill*, 53 Ga. at 474–75; *English*, 35 Tex. at 476–77; *Duke*, 42 Tex. at 458–59; *Haile*, 38 Ark. at 565–66, characterizing them as given to “known public mischief,” *Fife*, 31 Ark. at 461. Although some states only prohibited concealed carry, many more states banned the carrying of concealable weapons whether actually concealed or not.

The states broadly adopted restrictions on possessing arms in the public square, and they did so even in the face of the states’ own constitutional provisions protecting the right to keep and bear arms. Four states had constitutional protections for arms-bearing that pre-date the U.S. Constitution. N.C. Decl. of Rights of 1776, § 17; Pa. Decl. of Rights of 1776, cl. XIII; Vt. Const. of 1777, ch. I, art. 15; Mass. Const. of 1780, part. 1, art. 17. North Carolina, Pennsylvania and Vermont characterized it as the “right to bear arms” to defend themselves and the state. Massachusetts called it the “right to keep and to bear arms for the common defence.” Following independence and continuing to today,

forty-four of the fifty states have some kind of Second Amendment analogue. Most of those provisions have some kind of clause referring to the militia or the need to keep the militia under civilian control. Most of the provisions refer to the right to defend self and state. A number of states spelled out that the right to keep and bear arms extended to defense of self, family, and property. The Montana provision is typical: “The right of any person to keep or bear arms in defense of his own home, person, and property, or in aid of the civil power when thereto legally summoned, shall not be called in question” Mont. Const. of 1889, art. III, § 13; *see also* Neb. Const. of 1988, art. I, § 1; N.H. Const. of 1982, pt. 1, art. 2-a; N.D. Const. of 1984, art. I, § 1; Okla. Const. of 1907, art. II, § 26; Utah Const. of 1984, art. I, § 6; W. Va. Const. of 1986, art. III, § 22. Others added that the right to bear arms included a right to engage in hunting or other recreational use. *See* Neb. Const. of 1988, art. I, § 1; Nev. Const. of 1982, art. I, § 11(1); N.M. Const. of 1986, art. II, § 6; N.D. Const. of 1984, art. I, § 1; W. Va. Const. of 1986, art. III, § 22. The states divided over the line between the legislature’s power to regulate concealed carry and its power to regulate the carrying of arms, concealed or open. A number of constitutions did not explain one way or the other, but nine state constitutions expressly referred to the legislature’s power to regulate concealed carry. For example, the Louisiana Constitution provided that the right to keep and bear arms did “not prevent the passage of laws to punish those who carry weapons concealed.” La. Const. of 1879, art. III, § 3; *see also* Colo. Const. of 1876, art. I, § 13; Idaho Const. of 1978, art. I, § 11; Ky. Const. of 1850, art. XIII, § 25; Ky. Const. of 1891, art. II, § 1; Miss. Const. of 1890, art. III, § 12; Mo. Const. of 1875, art. II, § 17; Mont. Const. of 1889, art. III, § 13; N.M. Const. of 1911, art. II, § 6; N.M. Const. of 1971, art. II, § 6; N.C. Const. of 1876, art. I, § 24;

N.C. Const. of 1971, art. I, § 30; *cf.* La. Const. of 1974, art. I, § 11 (removing any reference to the state’s authority to regulate concealed carry); Mo. Const. of 1945, art. I, § 23 (same). Eight states recognized the legislature’s power to regulate the carrying of arms, without limiting the express power to concealed carry. Perhaps the most explicit of these is the Oklahoma Constitution, which provides: “The right of a citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power, when thereunto legally summoned, shall never be prohibited; but nothing herein contained shall prevent the Legislature from regulating the carrying of weapons.” Okla. Const. of 1907, art. II, § 26; *see also* Fla. Const. of 1885, art. I, § 20; Fla. Const. of 1968, art. I, § 8; Ga. Const. of 1868, art. I, § 14; Ga. Const. of 1877, art. I, § 1, para. XXII; Idaho Const. of 1889, art. I, § 11; Ill. Const. of 1970, art. I, § 22; Tenn. Const. of 1870, art. I, § 26; Tex. Const. of 1869, art. I, § 13; Tex. Const. of 1876, art. I, § 23; Utah Const. of 1895, art. I, § 6; Utah Const. of 1984, art. I, § 6.³⁹

Although “the [Second] Amendment did not originally apply to the States, . . . that does not make state practice

³⁹ Even when a state constitution was silent on the power of the legislature to regulate the carrying of weapons (openly or concealed), state courts upheld the power of the legislature to regulate carrying. *See, e.g., Mitchell*, 3 Blackf. at 229; *Aymette*, 21 Tenn. at 161–62; *Buzzard*, 4 Ark. at 28 (op. of Ringo, C.J.), 33 (op. of Dickinson, J.); *Wright*, 77 Pa. at 471; *Blaksley*, 83 P. at 620–21; *Isaiah*, 176 Ala. at 28. The Supreme Court of Arkansas, reviewing the cases and acknowledging that the Arkansas Constitution lacked an express conferral of legislative power, referred to an express provision in the Tennessee Constitution as “a matter of superabundant caution, inserted to prevent a doubt, and that, unexpressed, it would result from the undefined police powers, inherent in all governments, and as essential to their existence as any of the muniments of the bill of rights.” *Haile*, 38 Ark. at 567.

irrelevant in unearthing the Amendment’s original meaning.” *Atwater v. City of Lago Vista*, 532 U.S. 318, 338–39 (2001) (discussing the Fourth Amendment). We can, and should, look to “early state practice,” particularly where “[a] number of state constitutional . . . provisions served as models for the . . . Amendment.” *Id.* at 339. Even after the adoption of the Second Amendment, states continued to adopt constitutional provisions protecting the right to keep and bear arms, precisely because it was not clear that the Second Amendment did bind them. And even as the states enshrined a right to bear arms in their fundamental documents, they continued to regulate the presence and use of arms in the public square. The states themselves saw no inconsistency between their citizens’ right to keep and bear arms and the states’ duty to protect those citizens. When we look to those early state practices, we must conclude that “history, if not unequivocal, has expressed a decided, majority view,” *id.* at 345, and it is one that comes with “an impressive historical pedigree,” *United States v. Villamonte-Marquez*, 462 U.S. 579, 585 (1983), and that is sufficient.

It would be anomalous in the extreme if, having gone to the trouble of spelling out the respective responsibilities of the new federal government and the states in 1789, the framers of the Bill of Rights undid that relationship with the Second Amendment (adopted in 1791) by overruling existing state constitutions and statutes. And the Court has assured us that the Second Amendment did no such thing, but merely codified a pre-existing right to keep and bear arms. *Heller*, 554 U.S. at 599. For us, this powerfully suggests that the Second Amendment should be read in light of state constitutions and laws roughly contemporaneous with the adoption of the Constitution; it should be seen as consistent with pre-existing laws regarding the king’s peace, and not as

a novel federal check on those laws. *Cf. Atwater*, 532 U.S. at 336–37 (finding that the petitioner “has cited no particular evidence that those who framed and ratified the Fourth Amendment sought to limit peace officers’ warrantless misdemeanor arrest authority” and citing “[t]he evidence of actual practice . . . [d]uring the period leading up to and surrounding the framing of the Bill of Rights [by] colonial and state legislatures”).

2. The Exceptions

The American record is clear enough, but as we have said, it is not uniform. States adapted the Statute of Northampton to fit their own needs. Although they did not agree on all the particulars, they did agree that the state legislatures had power to regulate the carrying of arms in public. In this section, we consider some of the general exceptions the states made to the no public carry rule to understand how it might affect any right to bear arms in the public square.

a. Classes of persons. The statutes exempted certain classes of persons from the restrictions. For example, the statutes are nearly unanimous in stating, so that there would be no misunderstanding, that the restrictions on public carry did not apply to law enforcement officials. As a nod to our federalism, the states generously made clear that their statutes also did not regulate *federal* law enforcement officials from carrying. And the statutes exempt military personnel when on duty and required by the military to be armed. Many of the statutes also took into account people who were travelling through the locale and, of necessity, were carrying their belongings, including firearms. More recent statutes make clear that hunters and target shooters may carry their weapons

to and from the places where they may be lawfully discharged.

b. Places. The statutes generally regulate carrying arms in public places such as fairs, markets, churches, and in places where the king's ministers or agents might be found, which we accept as a primitive reference to government buildings. We do have a couple of colonial examples where, by statute, persons were required to carry their weapons to such public places, most notably churches. We have explained that these early statutes were for the perceived need for protection from outside groups, such as slaves and Native Americans. Although it might be argued that this demonstrates that early Americans had a *right* to carry their firearms, the statutes impose a *duty* to carry, which is quite different. When the government imposes such a duty it assumes that it has the power to regulate the public carrying of weapons; whether it forbids them or commands them, the government is *regulating* the practice of public carrying.

So far as we can tell from the historical record, none of the early statutes forbade the possession of such weapons in the home. And more modern statutes sometimes allow individuals to keep weapons in a place of business as well.

c. Licensing and good-cause requirements. Some of the first English provisions forbade the carrying of arms unless licensed by the king. We do not have much information on what criteria were used or how frequently such licenses were issued. By the nineteenth century, some states authorized a form of licensure as an alternative to a ban on public carriage, although it was not a formal process such as we think of today. The 1836 Massachusetts statute, which served as a model for many states, provided that any person who went

“armed with a dirk, dagger, sword, pistol, or other offensive and dangerous weapon, *without reasonable cause to fear an assault or other injury, or violence to his person, or to his family or property*,” was subject to surety (which we discuss below). 1836 Mass. Acts 750, ch. 134, § 16 (emphasis added). One way of reading this statute is that it gave permission to people to carry concealable arms if they had “reasonable cause,” which the statute defined as fear of assault, injury, or violence to themselves, their families, or their property. Unlike the modern practice, no advance permission needed to be obtained.

The modern practice of formal licensing of firearms appears to be a twentieth-century innovation. A number of the twentieth-century statutes granted a license to carry in public if the applicant had good cause, such as fear of injury to himself or his property. Some states generally authorized the carrying of firearms in the home or at a place of employment but forbade persons to carry elsewhere unless they could demonstrate good cause. The influential 1913 New York law allowed persons to carry a pistol, revolver, or other firearm to protect their home or business, but it required advance application to a magistrate. 1913 N.Y. Laws 1629, vol. III, ch. 608, § 1.

d. Surety. Both English and American law allowed the practice of surety as an alternative to a broad ban on open carry. Massachusetts provides a typical example. The surety was a form of “security to keep the peace, or . . . good behavior, or both.” 1836 Mass. Acts 750, ch. 134, § 1. It was a form of prior restraint where “there [was] just cause to fear that any such offence may be committed.” *Id.* § 3. If a person was found with one of the enumerated weapons, or any other “offensive and dangerous weapon,” then “any

person having reasonable cause to fear an injury, or breach of the peace” could file a complaint. *Id.* § 16. Upon complaint, a magistrate could issue a warrant for the apprehension of the person accused of threatening the peace. The accused would be brought before the court where he could present his defense. If the person carrying the weapon did not have “reasonable cause” to fear for himself, his family, or his property, then the magistrate could require the accused to post “sufficient sureties . . . to keep the peace towards all the people of this Commonwealth, and especially towards the person requiring such security.” The surety was known as a “recognizance.” *Id.* §§ 3–4. Effectively, posting surety was similar to posting bail against one’s future conduct. If surety was not posted, the person was imprisoned for the term for which the surety was to be posted, a term not to exceed six months. *Id.* § 4. If the person violated his recognizance, the surety was forfeited. *Id.* § 17.⁴⁰

The surety provision allowed people against whom a complaint had been made to carry in public, but only if they could demonstrate good cause. The penalties for failing to show good cause were severe—including fines and imprisonment. Moreover, the law allowed “any person” who feared “injury, or breach of the peace” to file a complaint. *Id.* § 16 (emphasis added). Filing a complaint did not require proof that the person carrying was a threat to the complainant; it was sufficient for the complainant to show that there was a

⁴⁰ The Massachusetts law contemplated both sureties of the peace and sureties for good behavior, a practice with deep roots in English law. *See supra* note 12 (explaining the forms of surety). Section 16 required that a person accused of being a threat to the peace in the future “find sureties for keeping the peace.” Section 18 referenced “[a]ny surety in a recognizance to keep the peace, or for good behavior . . .” 1836 Mass. Acts 750, ch. 134, §§ 16, 18 (emphasis added).

threat to the peace—a standard that harkened to the Statute of Northampton. The possibility of having to respond to such a complaint, much less having to post surety, appears to have been a severe constraint on anyone thinking of carrying a weapon in public.

We thus vigorously disagree with the D.C. Circuit’s conclusion that “[u]nder surety laws, put simply, everyone started out with robust carrying rights.” *Wrenn*, 864 F.3d at 661. This conclusion simply ignores the plainest of readings of English and American laws. The English practice of surety of the peace, which carried over to the states, was a substantive restraint on anyone who was the subject of a complaint for openly carrying arms or other dangerous weapons. The surety laws permitted courts to impose a bond requirement on people who had not actually violated any laws, but might do so in the future. Surety was a means of keeping the peace in areas lacking a centralized police force. *See supra* note 12. No one would describe such regulations as “‘akin to modern penalties for minor public-safety infractions like speeding or jaywalking,’ which makes them . . . poor evidence of limits on the [Second] Amendment’s scope.” *Id.* (quoting *Heller*, 554 U.S. at 633).⁴¹ The history of sureties shows that carrying arms in public was not treated as a fundamental right.

* * *

None of the longstanding exceptions for certain types of public carry diminishes in any significant way the

⁴¹ We note that the Court in *Heller* was not referring to surety provisions, but to provisions dealing with discharging weapons. 554 U.S. at 632–34.

government's power to regulate the carrying of arms in public places. The fact that we have recognized the need for law enforcement officials and military personnel to carry weapons; that we have understood the right of self-defense in our businesses; that we have made accommodations to reality by allowing persons in transit to cross public areas with their arms; that we have granted limited license to people to carry in the public square; and that we have, at times, employed sureties as an alternative to an outright ban on open carry does not detract in any way from the fundamental point that for centuries we have accepted that, in order to maintain the public peace, the government must have the power to determine whether and how arms may be carried in public places. There is no right to carry arms openly in public; nor is any such right within the scope of the Second Amendment. *Cf. Kachalsky*, 701 F.3d at 96 (“[S]tate regulation of the use of firearms in public was ‘enshrined with[in] the scope’ of the Second Amendment when it was adopted.” (alteration in original) (quoting *Heller*, 554 U.S. at 634)).

We recognize that, although there have been few technological advances in the last centuries in dirks, daggers, slung shots, and brass knuckles, there clearly have been advances in the manufacture of pistols and revolvers. *Heller* observed that today the handgun is “an entire class of ‘arms’ that is overwhelmingly chosen by American society for . . . [a] lawful purpose.” *Heller*, 554 U.S. at 628. Notwithstanding the advances in handgun technology, and their increasing popularity, pistols and revolvers remain among the class of deadly weapons that are easily transported and concealed. That they may be used for defense does not change their threat to the “king’s peace.” It remains as true today as it was centuries ago, that the mere presence of such weapons presents a terror to the public and that widespread

carrying of handguns would strongly suggest that state and local governments have lost control of our public areas. Technology has not altered those very human understandings.⁴²

We may, of course, change our conception of what we need to do to protect ourselves. The Constitution does not impose the Statute of Northampton on the states. But the Second Amendment did not contradict the fundamental principle that the government assumes primary responsibility for defending persons who enter our public spaces. The states do not violate the Second Amendment by asserting their longstanding English and American rights to prohibit certain weapons from entering those public spaces as means of providing “domestic Tranquility” and forestalling “domestic Violence.” U.S. Const. pmbl.; U.S. Const. art. IV, § 4. Any change we wish to make in our allocation of responsibility between ourselves and our governments may be had through ordinary legislation, amendment to state constitutions, or amendment to the U.S. Constitution.

E. Response to the Dissent

Before we apply our conclusion to the Hawai‘i statute, we have several general observations to make on the views of our dissenting colleagues. We have tried to address all relevant materials—statutes, cases, and treatises—and we have labored to make sense of the whole record. We have

⁴² Even if we were disposed to declare pistols and revolvers necessary for our own self-defense in public places, we see no reasonable stopping point at firearms. *See Strickland*, 72 S.E. at 263. If pistols and revolvers are useful for self-defense, so are dirks and daggers and “other dangerous and unusual weapons” such as Samurai swords or a trident and net.

recognized that the materials do not always agree in all the particulars, but we have worked to distill the central meaning from the record. The dissent, however, reviews a much more limited historical record. Where we referred to state constitutions as evidence of the meaning of the Second Amendment, the dissent finds them “entirely irrelevant” to the question presented in this case. O’Scannlain Dissent at 147. Where we worked through the history of legislation in the colonies, states, and territories—covering a variety of regulations from some thirty-one separate jurisdictions—the dissent dismisses the legislation as “regulation at its edges,” *id.* at 132, from a “smattering of nineteenth-century gun regulations,” *id.* at 160.⁴³ When we point out that three U.S.

⁴³ The history of legislation the dissent does cite is the post-Civil War history of the Black Codes. *See* O’Scannlain Dissent at 150–53. We do not disagree with the history the dissent recounts, but it is not clear how that history informs the issue before us. The Black Codes, for example, forbade black Americans (and others) from keeping arms. *See id.* at 150 n.8 (citing examples). The congressional reaction to these codes was the Civil Rights Act of 1866. That Act provided that all citizens, without regard to prior condition of slavery, would have “the same right . . . to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens” Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27. Concerned that the Act might be beyond Congress’s powers, Congress proposed a new amendment, which became our Fourteenth Amendment. As he introduced the proposed amendment, Representative Thaddeus Stevens explained that it would guarantee that

whatever law punishes a white man for a crime shall punish the black man precisely in the same way and to the same degree. Whatever law protects the white man shall afford “equal” protection to the black man. Whatever means of redress is afforded to one shall be afforded to all. Whatever law allows the white man to

territories, which were bound by the Second Amendment and whose own constitutions had to be approved by Congress, had firearms restrictions similar to those of the states, the dissent answers that they are “isolated, territorial statutes,” *id.* at 169, from Western regions where “life on the frontier might have motivated territorial legislatures to undertake more severe measures against the use of weapons” than in other states, *id.* at 165–66. Where we carefully analyzed the full range of views expressed in the nineteenth-century state cases, the dissent begins with the cases that favor its view, *id.* at 138–44, and discards the remaining cases as “carry[ing] no interpretive weight after *Heller*,” *id.* at 144. *See id.* at 144–49 (discussing and dismissing other state cases). Where we cited to all the treatises that were relevant to the parties, the dissent only relies on the treatises that agree with its bottom line. *Id.* at 135–38, 155–56, 164–65. Having dispensed with most of the resources available to us, it is of no surprise that the dissent concludes that “[t]he *important* Founding-era treatises, the *probative* nineteenth-century case law, and the *post-Civil War* legislative scene all reveal a single American voice.” *Id.* at 153 (emphasis added).

testify in court shall allow the man of color to do the same.

Cong. Globe, 39th Cong., 1st Sess. 2459 (1866).

As equality provisions, the Privileges or Immunities Clause and the Equal Protection Clause of the Fourteenth Amendment guaranteed that all citizens would enjoy the same rights as “white citizens,” including Second Amendment rights. But those provisions do not tell us anything about the substance of the Second Amendment, any more than an equal right to enter into contracts or inherit property tells us whether the state may alter the Statute of Frauds or the Rule Against Perpetuities, so long as it does so for all citizens.

The dissent’s conclusion is, with respect, a modest thesis. And, more importantly, it is not history. We acknowledged from the very beginning that the historical record was mixed and that we were going to have to work through it—all of it—to discern the long-term trends. The dissent has picked its friends and come to a fore-ordained conclusion that its friends have spoken with a “single American voice.” We deal below with some of the dissent’s reasons for dismissing the evidence laid out before us, but one important point needs to be made here. The dissent dismisses out of hand many nineteenth-century sources as irrelevant because they “carr[y] no interpretive weight after *Heller*.” *Id.* at 144. *See also id.* at 145–47, 163–65. Indeed, in the end, examining any evidence beyond that supporting the dissent “is foreclosed by *Heller*.” *Id.* at 174. We do not believe that *Heller* has decided the issue presented to us in this case, nor do we believe that *Heller* has foreclosed our examination of the historical record. But we, and the dissent, should be clear: If *Heller* has answered these questions then there is no reason to review the historical record. In the end the dissent’s view is not that our understanding of the history is wrong, but that history is now beside the point because *Heller* has reached a different conclusion. But that is an argument based on *Heller*, not an argument based on the historical evidence, and we ought not to pretend that selective citation of historical sources is itself good history.

We are thus content, in the main, to rest on our review of the historical record. There are a couple of points we should address. We will start with the relevance of legislation as evidence of the scope of a constitutional right. The dissent simply elides the substantial history of colonial, state, and territorial restrictions on the possession of firearms in the public square, most of it derived from the Statute of

Northampton and related English practices. For the dissent, “the existence of historical regulations” is of little value, for two reasons: (1) “the majority offers no enforcement history” and (2) those regulations “largely evaded constitutional scrutiny.” *Id.* at 160; *see also id.* at 166 (“[O]ne can learn little about the general understanding of the Second Amendment from such isolated statutes, which were enacted so distant from the Founding and for which we have no record of enforcement.”). The question of whether these statutes were actually enforced is a fair one. There are many statutes on the books of American jurisdictions that have never been enforced or, having once been enforced, have fallen into desuetude. There are several things in the record that make us think that these statutes were not merely symbolic. The statutes adopted by the states owed much to their English antecedents. Whatever deference the colonists thought they owed to England was severed in the Revolution. Yet, shortly after the adoption of the Second Amendment, the states adopted statutes similar to the Statute of Northampton. And the states, acting independently, copied statutes from each other. And such statutes were updated and altered as necessary. That strongly suggests that the states felt the need for such legislation. How tightly each state or jurisdiction within a state decided to enforce the statute is beyond the materials that we have seen. But even if a statute was not enforced, or was loosely enforced, the fact of the statute alone is some evidence that the state legislature believed that it was within its power to adopt the legislation. The sheer breadth of firearms legislation in the United States suggests that its constitutionality was broadly accepted. Moreover, the handful of cases we do have from various courts, based on fairly mundane facts, proves that the statutes *were* enforced.

Nevertheless, the dissent correctly points out that there are a relatively small number of state cases—largely from the South—testing the constitutionality of such statutes. There are several things that may explain this. Since *Marbury v. Madison*, we have come to accept the primacy of the judiciary in deciding the constitutionality of legislative acts. As twenty-first century Americans we believe that all constitutional questions not only will, but must, be resolved in the courts. Thus, we may be forgiven for believing that, if these statutes were enforced, there would be more reported appellate decisions. From this the dissent would have us conclude that the statutes were simply not enforced. But, on the other hand, our twenty-first century assumptions may not have been true of the nineteenth century. At least in the U.S. Supreme Court, the routine exercise of the *Marbury* power is largely a post-Civil War development. Until 1865, the Court struck down exactly two federal statutes, one in *Marbury* and one in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857). Whether there was a similar reluctance on the part of state supreme courts to address such questions, whether state courts routinely accepted the constitutionality of the statutes, or whether the statutes were sparingly enforced and challenged in court is not apparent, but it is clear that as a nation we became much more constitutionally litigious after the Civil War. See *Heller*, 554 U.S. at 625–26 (commenting on a number of “significant matter[s]” that have “been for so long judicially unresolved”). Without some basis for rejecting the extensive history of legislation, we are not free to ignore it. It is the best evidence we have of the American understanding of the interface between the right to keep and bear arms and the police power over the public square.

The scholarly commentary offers additional explanation. Military historian Patrick Charles points out that prior to the

Civil War, the states divided along sectional lines over how to regulate arms, with Northern and Western states following what has been called the “Massachusetts Model.” He observes, consistent with the dissent’s point, that “the constitutionality of the Massachusetts Model was never sufficiently called into question.” Patrick J. Charles, *Armed in America: A History of Gun Rights from Colonial Militias to Concealed Carry* 143 (2018) (footnote omitted). He suggests three reasons why that is so. First, “Northerners, by and large, detested the practice of going habitually armed,” and therefore accepted the legitimacy of this exercise of police power. *Id.* Second, even under the Massachusetts Model, individuals could “carry weapons for self-defense so long as they could show a pressing or imminent threat.” *Id.* at 144. And third, “Northerners viewed the right to self-defense as a right of the last resort”; they simply did not feel the need to carry as often as their Southern counterparts, who “embrace[d] notions of vengeance and honor.” *Id.* at 145. In the South, the states “differentiate[d] between the open and concealed carriage of arms. While open carriage was more often than not legally condoned, concealed carriage was prohibited.” *Id.*

Even accepting the relatively small number of reported cases, we have an additional concern with the dissent’s rejection of roughly half of the state cases that did address the constitutionality of firearms regulations. *Compare* O’Scannlain Dissent at 138–43 (citing with approval cases from Kentucky, Tennessee, Alabama, Georgia, and Louisiana), *with id.* at 144–49 (rejecting cases from Arkansas, Georgia, Texas, West Virginia, and Oklahoma).⁴⁴ Once the

⁴⁴ We have addressed all of these cases in Part III.C.2.b and will not repeat our discussion here.

dissent dismisses all the state cases that disagreed with its conclusion, it confidently concludes that “the majority has not cited a *single* apposite case in which any nineteenth-century court held to the contrary.” *Id.* at 149. The trick, of course, is the word “apposite.” The dissent rejects decisions from four states, Arkansas, Georgia, Texas, and West Virginia because “each decision was explicitly premised on a militia-focused view of the right to bear arms.” *Id.* at 145. According to the dissent, *Heller* rejected a militia-based reading of the Second Amendment, and each of these cases “rests on the untenable militia-based view of the right.” *Id.* at 144. The dissent has overstated its case. In *Heller*, the Court rejected the view that the Second Amendment’s prefatory clause—“A well regulated Militia, being necessary to the security of a free State”—was “the central component of the right,” that is, that one might possess arms only in defense of the state. *Heller*, 554 U.S. at 599 (emphasis omitted); *see id.* at 577 (“Petitioners and today’s dissenting Justices believe that [the Second Amendment] protects only the right to possess and carry a firearm in connection with militia service.”). Rather, the Court held that the “entirely sensible” reading was that the Second Amendment prevented “the threat that the new Federal Government would destroy the citizens’ militia by taking away their arms.” *Id.* at 599; *see id.* at 598 (“During the 1788 ratification debates, the fear that the Federal Government would disarm the people in order to impose rule through a standing army or select militia was pervasive in Antifederalist rhetoric.”).

There is nothing in the state cases that the dissent rejects and, therefore, ignores that is inconsistent with *Heller*’s conclusion that the Second Amendment protects an individual right. None of those state decisions took the position disapproved by the Supreme Court in *Heller*. What they did

was refer to arms useful in service in the militia as way of distinguishing between constitutional regulations (small weapons traditionally prohibited under English and American law and not useful in military service) and a right to keep and bear arms that could be exercised in defense of self and state. *See id.* at 602 (referring to state constitutions that “referred to the right of the people to ‘bear arms in defence of themselves and the State’”). The dissent’s own quotations from the cases it rejects demonstrates the state courts’ concerns. *See* O’Scannlain Dissent at 144–47. None of those cases could reasonably be read to support the ban of all weapons except when actually used in militia service, which was the theory *Heller* rejected. The militia clause helps us understand the contours of the Second Amendment. After *Heller*, the prefatory clause may not dictate the content of Second Amendment rights, but neither is it irrelevant to it.

Finally, the dissent’s treatment of the state cases that do not agree with its conclusion reinforces the dissent’s *Heller* problem. If the Second Amendment codifies an “existing right,” we have to look to some source for the right. And unless we are willing to say that it is a natural right *without reference to English or American practice*, we have to look at all of the materials. The dissent can only get to its conclusion by rejecting the English practice, the entire history of American legislation, half of the state cases, and at least half of the scholarly commentary. That is not much of a “pre-existing right” if all the state legislatures and half of state supreme courts got it wrong. The dissent’s argument thus contains the seeds of its own destruction, because if the dissent is correct that much of our history is, at best, irrelevant, but more likely just wrong, then perhaps there is no such pre-existing right. In which case, under the dissent’s own reasoning, *Heller* is wrong. We are not willing to follow

the dissent down that road. Either *Heller* has decided this question, in which case there is no need for further historical inquiry, or we need to examine the entire historical record with care.

F. *Application to HRS § 134-9*

Hawai‘i’s licensing scheme stands well within our traditions. Section 134-9 requires a license to carry a pistol or revolver, concealed or unconcealed. Consistent with English and American legal history, Hawai‘i exempts from its firearms regulation scheme police officers, certain persons employed by the state, and members of the armed forces “while in the performance of their respective duties.” HRS § 134-11(a). It permits hunters and target shooters to carry openly and to transport their arms. *Id.* § 134-5. It recognizes the right of persons to arm themselves in their “place of business, residence, or sojourn” and transport unloaded arms between those locales. *Id.* § 134-23. Persons who have “reason to fear injury to . . . person or property” may apply for a license to carry a pistol or revolver concealed and, “[w]here the urgency or the need has been sufficiently indicated” and the applicant is “engaged in the protection of life and property,” to carry a pistol or revolver openly. *Id.* § 134-9(a).⁴⁵

Hawai‘i’s restrictions have deep roots in the Statute of Northampton and subsequent English and American

⁴⁵ Subject to the permissions outlined in § 134-5 and to other enumerated exceptions, Hawai‘i also prohibits the public carry of loaded or unloaded firearms other than a pistol or revolver. HRS §§ 134-23, 134-24. The state further prohibits the possession of automatic firearms, certain types of rifles and shotguns, and most assault pistols. *Id.* § 134-8.

emendations, and do not infringe what the Court called the “historical understanding of the scope of the right.” *Heller*, 554 U.S. at 625. Those restrictions are within the state’s legitimate police powers and are not within the scope of the right protected by Second Amendment. That means that Young’s challenge to Hawai‘i’s restrictions fails at step one of our framework and “may be upheld without further analysis.” *Silvester*, 843 F.3d at 821. We easily conclude that HRS § 134-9 is facially consistent with the Second Amendment.

IV. OTHER CLAIMS

In addition to Young’s primary Second Amendment claim, he brings two other claims against HRS § 134-9. First, borrowing the doctrine of prior restraint from the First Amendment, Young argues that the chief of police’s discretionary authority to deny carry-permit applications violated his Second Amendment right. He argues that § 134-9 is invalid because it vests chiefs of police “with unbridled discretion to determine whether a permit is issued,” which imposes on his right to carry a firearm in public. The application of the prior restraint doctrine to a Second Amendment challenge hinges on Young’s assumption that the right to keep and bear arms is similar enough to the right to free speech that preemptive firearm-licensing requirements are also presumptively invalid. Second, Young brings a due process challenge to the Hawai‘i statute. He claims that § 134-9 lacks a mechanism for appealing a chief of police’s denial of a carry application, and that due process requires some form of hearing. *See Mathews v. Eldridge*, 424 U.S. 319 (1976). Assuming that Young has a liberty or property interest in obtaining a license to carry a firearm, it is not clear that Hawai‘i does not provide him with the process he seeks.

Young did not attempt to exhaust his remedies before bringing this suit. We do not find either of these arguments persuasive.

A. *Prior Restraint*

We start with Young’s prior restraint claim. A “prior restraint” is any law or judicial order that preemptively forbids certain speech before the speech occurs. *Alexander v. United States*, 509 U.S. 544, 550 (1993); *In re Nat’l Sec. Letter*, 863 F.3d 1110, 1127 (9th Cir. 2017). These restrictions generally break down into two classes: “censorship schemes and licensing schemes.” *In re Nat’l Sec. Letter*, 863 F.3d at 1127. In the First Amendment context, the threat of preemptive censorship by a governing body is apparent enough in prior restraints to render such restrictions presumptively invalid. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). So, although a prior restraint is not unconstitutional per se, it “bear[s] a heavy presumption against its constitutional validity.” *Id.* This makes sense in the speech context, given that “a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand,” which is “a theory deeply etched in our law.” *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975).

On the surface, it is easy to see why Second Amendment challenges to licensing schemes so often invoke First Amendment jurisprudence. *See, e.g., Heller*, 554 U.S. at 582 (finding that the Second Amendment extends to modern firearms just as the First Amendment extends to “modern forms of communication”); *Jackson*, 746 F.3d at 961 (concluding that in the context of step two of *Heller*, “we are likewise guided by First Amendment principles”); *see also*

Binderup v. Att’y Gen., 836 F.3d 336, 344 (3d Cir. 2016) (en banc) (finding that restrictions on Second Amendment rights are “subject to scrutiny in much the way that burdens on First Amendment rights are”); *Ezell v. City of Chicago*, 651 F.3d 684, 706–07 (7th Cir. 2011) (recognizing that courts have adopted First Amendment principles of scrutiny in Second Amendment cases). After all, the Bill of Rights explicitly protects both the freedom of speech and the right to keep and bear arms.

But when we look beneath the surface, the analogy to the prior restraint doctrine quickly falls apart. *See Pena v. Lindley*, 898 F.3d 969, 1008–09 (9th Cir. 2018) (Bybee, J., concurring in part and dissenting in part) (“The analogy to the First Amendment begins to break down, however, once we move beyond rules of general applicability.”); *United States v. Marzzarella*, 614 F.3d 85, 96 n.15 (3d Cir. 2010) (“While we recognize the First Amendment is a useful tool in interpreting the Second Amendment, we are also cognizant that the precise standards of scrutiny and how they apply may differ under the Second Amendment.”). To start, although the Bill of Rights protects both speech and the right to keep and bear arms, there are “salient differences between the state’s ability to regulate” First and Second Amendment rights. *Kachalsky*, 701 F.3d at 92. Most notably, the inherent risk that firearms pose to the public distinguishes their regulation from that of other fundamental rights. *See Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1126 (10th Cir. 2015). Additionally, while everyone enjoys the right to speak, even under the most generous reading of the Second Amendment, not everyone enjoys the right to carry a firearm in public. *See Heller*, 554 U.S. at 626–27; *Berron v. Ill. Concealed Carry Licensing Rev. Bd.*, 825 F.3d 843, 847 (7th Cir. 2016). Where the public square is concerned, states have always

enjoyed broader authority to regulate firearms than speech. For these reasons, we think it “imprudent to assume that the principles and doctrines developed in connection with the First Amendment apply equally to the Second” *Kachalsky*, 701 F.3d at 92.

We are not alone in concluding that the prior restraint doctrine does not apply in the Second Amendment context. So far as we can tell, every court to address the question has declined to apply the prior restraint doctrine to firearm-licensing laws. *See id.* at 91–92; *Hightower v. City of Boston*, 693 F.3d 61, 80–81 (1st Cir. 2012); *Drake*, 724 F.3d at 435; *Woollard*, 712 F.3d at 883 n.11; *United States v. Focia*, 869 F.3d 1269, 1283–84 (11th Cir. 2017). We, therefore, join our sister circuits in holding that the prior restraint doctrine does not apply to Second Amendment challenges involving firearm-licensing laws.

B. *Procedural Challenge*

Young’s due process argument fares no better. He claims that HRS § 134-9 does not provide adequate process to challenge the denial of his carry-permit application.

Young’s procedural challenge is premature. Young claims that he was deprived of due process because HRS § 134-9 does not provide a mechanism for review of a chief of police’s denial of a permit application. It is not clear that Young is correct. Hawai‘i’s administrative procedure act affords “all parties . . . an opportunity for hearing” in any “contested case.” HRS § 91-9. A “contested case” is any “proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for agency hearing.” HRS § 91-1. Following

such a hearing, “[a]ny person aggrieved by a final decision and order in a contested case . . . is entitled to judicial review.” HRS § 91-14(a). It is not clear to us whether the denial of an open-carry application would fall under § 91-9’s umbrella. But it is clear that Young did not pursue a hearing under § 91-9 and did not seek judicial review as provided by § 91-14 prior to bringing suit in federal court. Young’s claim that § 134-9 lacks an opportunity for appellate review is based on his own speculation.

A claim that “rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all” is not ripe for review. *Texas v. United States*, 523 U.S. 296, 300 (1998) (internal quotation marks omitted); *Wolfson v. Brammer*, 616 F.3d 1045, 1064 (9th Cir. 2010). Young did not seek review under § 91-9 before bringing suit. So, Hawai‘i has not yet denied him the opportunity for appellate review. Because Young has not actually been denied a hearing, his procedural due process claim is speculative, and we need not reach it. *Ass’n of Am. Med. Colls. v. United States*, 217 F.3d 770, 779 (9th Cir. 2000) (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977)).

V. CONCLUSION

The judgment of the district court is **AFFIRMED**.

O’SANNLAIN, Circuit Judge, with whom CALLAHAN, IKUTA, and R. NELSON, Circuit Judges, join, dissenting:

The Second Amendment to the United States Constitution guarantees “the right of the people to keep *and bear* Arms.” U.S. Const. amend. II (emphasis added). Today, a majority of our court has decided that the Second Amendment does not mean what it says. Instead, the majority holds 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*.

This holding is as unprecedented as it is extreme. While our sister circuits have grappled with—and disagreed over—the question of whether public firearms carry falls within the inner “core” of the Second Amendment, 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 so holding, the majority reduces the right to “bear Arms” to a mere inkblot. The majority’s decision undermines not only the Constitution’s text, but also half a millennium of Anglo-American legal history, the Supreme 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 the foundational principles of American popular sovereignty itself.

I respectfully dissent.

I

A

George Young wishes to carry a handgun publicly for self-defense in the State of Hawaii. Twice in 2011, he applied for a license to carry a handgun, either openly or concealed. His application was denied each time by the County of Hawaii's Chief of Police because Young failed to satisfy the requirements set forth in section 134-9 of the Hawaii Revised Statutes ("H.R.S.").

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.*

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. The County of Hawaii, where Young lives, has done just that. When it promulgated regulations implementing section 134-9, Hawaii County created an open-carry licensing regime that is

available only to “private detectives and security guards.” Police Dep’t of Cnty. of Haw., *Rules and Regulations Governing the Issuance of Licenses to Carry Concealed and Unconcealed Weapons* 1 (Oct. 22, 1997). Moreover, the county regulation allows open carry “only” when the license holder is “in the actual performance of his duties or within the area of his assignment.” *Id.* at 10. Thus, for any person who is not an on-duty security guard, the only opportunity to carry a firearm for self-defense is via concealed carry. And even then, a citizen must demonstrate “an exceptional case” just to be *considered eligible* for a concealed-carry permit. H.R.S. § 134-9(a).

Absent 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, and may use those firearms only while “actually engaged” in hunting or target shooting, *id.* § 134-5(a), (c).

B

On June 12, 2012, Young filed this *pro se* civil-rights action against the State of Hawaii, its Governor, and its Attorney General (collectively, “the State”), as well as the County of Hawaii and its Mayor, Chief of Police, and Police Department (collectively, “the County”), under 42 U.S.C. § 1983. Young alleged, primarily, that the denial of his application for a handgun license violated his Second Amendment right to carry a loaded handgun in public for self-defense.

The State filed a motion to dismiss Young’s claims under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), and the County filed a motion to dismiss the claims under Rule 12(b)(6). The district court granted both motions. As to the State, the district court found that Young’s claims (for both monetary and injunctive relief) were barred by sovereign immunity. Dismissing Young’s claims against the County on the merits, the district court found that section 134-9 “does not implicate activity protected by the Second Amendment” because that Amendment “establishes only a narrow individual right to keep an operable handgun at home for self-defense.” *Young v. Hawaii*, 911 F. Supp. 2d 972, 989–90 (D. Haw. 2012). In the alternative, the district court indicated that it would uphold section 134-9’s open- and concealed-carry limitations under intermediate scrutiny. *Id.* at 990–91. Young timely appealed.

In 2018, a three-judge panel of our court reversed the district court’s dismissal of Young’s Second Amendment claim against the County, holding that he “has indeed stated a claim that section 134-9’s limitations on the issuance of open carry licenses violate the Second Amendment.” *Young v. Hawaii*, 896 F.3d 1044, 1074 (9th Cir. 2018). The panel dismissed Young’s appeal as to the State. *Id.*

We then granted rehearing en banc, thus vacating the three-judge panel’s decision. *Young v. Hawaii*, 915 F.3d 681 (9th Cir. 2019).

II

At the heart of this case is a straightforward question: Does the Second Amendment, as originally understood,

protect the right of an ordinary, law-abiding citizen to carry a handgun openly for self-defense outside the home?

The majority holds that it does not—and that a total ban on carrying a handgun outside the home does not implicate the Second Amendment right to bear arms *whatsoever*. The majority reaches this startling conclusion not because it finds that the text of the Second Amendment supports it, that early American cases interpreted the Amendment in this way, nor even that open public carry was regularly and uncritically subject to legislative prohibitions across our country’s early history. Instead, the majority has declared that a state may constitutionally *forbid* all public carry of firearms, based on the utterly inconsequential fact that the lawful *manner* of open public carry has historically been subject to modest regulation (but never to outright prohibition).

Respectfully, the majority’s opinion—and in particular, its extreme and bizarre reliance on the mere fact of *some* historical regulation of firearms—represents a gross misapplication of the textual and historical inquiries that *Heller* demands. Under appropriate inspection, the critical sources on the meaning of the Second Amendment—its text, its historical interpretations by the commentators and courts most proximate to the Founding, and its treatment by early legislatures—unequivocally demonstrate that the Amendment does indeed protect the right to carry a gun outside the home for self-defense, even if that right might be subject to some regulation at its edges.

A

To begin, as we must, with the text: The Second Amendment guarantees that “the right of the people to keep

and bear Arms, shall not be infringed.” U.S. Const. amend. II. Critically, the Amendment protects not only the right to “keep” arms, but also the right to “bear” arms. Central to Young’s challenge is the latter of these two verbs.

It is hornbook constitutional law that “to bear arms implies something more than mere keeping.” Thomas M. Cooley, *The General Principles of Constitutional Law in the United States of America* 271 (1880). Indeed, the Supreme Court in *Heller* was clear about what it means to “bear” arms: “At the time of the founding, as now, to ‘bear’ meant to ‘carry.’” 554 U.S. at 584. That the Constitution delineates a specific right to *carry* a firearm—as distinguished from the right simply to *keep* a firearm—strongly implies the right to take one’s firearm *outside* the home in which it is kept.

The Founding-era dictionaries relied upon by the Court in *Heller* confirm this intuition, making clear that one would typically “bear” a firearm when carrying it in garments worn outside the home. *See* 1 Samuel Johnson, *Dictionary of the English Language* 161 (4th ed. 1773) (reprinted 1978) (defining “Bear” as “To *carry* as a mark of distinction. . . . So we say, to *bear* arms in a coat” (first emphasis added)), *cited in Heller*, 554 U.S. at 584; Noah Webster, *American Dictionary of the English Language* (1828) (unpaginated) (defining “Bear” as “To wear; to *bear* as a mark of authority or distinction; as, to *bear* a sword, a badge, a name; to *bear* arms in a coat”), *cited in Heller*, 554 U.S. at 584. Wearing one’s firearm in a coat or carrying it in one’s pocket are strong indicia of activity that would be expected to take place *outside* the home.

Moreover, to deny that the right to “bear Arms” protects at least some degree of public carry would render it mere

surplusage, coextensive with the separately enumerated right to “keep” a gun in the home. *Cf. Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803) (“It cannot be presumed that any clause in the constitution is intended to be without effect . . .”); *see also Drake v. Filko*, 724 F.3d 426, 444 (3d Cir. 2013) (Hardiman, J., dissenting) (“[Such a reading] would conflate ‘bearing’ with ‘keeping,’ in derogation of [*Heller*’s] holding that the verbs codified distinct rights . . .”).

The evidence that the Second Amendment’s Framers and ratifiers understood the right to bear arms to encompass public carry is not only lexical, but *logical*. The Court in *Heller* observed that the right to “bear arms” historically referred to a right to “wear, bear, or 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*.” 554 U.S. at 584 (quoting *Muscarello v. United States*, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting)) (alterations omitted and emphasis added). Such “conflict” or “confrontation” with another person is at least as apt to arise outside the home as it is inside the home—and perhaps even more so. *See Wrenn v. District of Columbia*, 864 F.3d 650, 657 (D.C. Cir. 2017) (“[T]he Amendment’s core lawful purpose is self-defense, and the need for that might arise beyond as well as within the home.” (internal quotation marks and citation omitted)); *Moore v. Madigan*, 702 F.3d 933, 941 (7th Cir. 2012) (“[T]he interest in self-protection is as great outside as inside the home.”). Indeed, it would require a highly unnatural reading of the text to infer “that the Framers understood the Second Amendment to protect little more than carrying a gun from the bedroom to the kitchen” in case a conflict arose along the way. *Peruta v. California*, 137 S. Ct. 1995, 1998 (2017) (Thomas, J., dissenting from denial of certiorari).

The opinions in *Heller* and *McDonald* underscore this straightforward understanding of “bear.” *Heller* described the “inherent right of self-defense” as “*most acute*” within the home, implying that the right *does* extend elsewhere, even if less “*acutely*.” 554 U.S. at 628 (emphasis added). *McDonald* similarly described the right as “*most notabl[e]*” within the home, implying the right *does* extend elsewhere, even if less “*notably*.” 561 U.S. at 780 (emphasis added). *Heller* also took pains to avoid “cast[ing] doubt” on “laws forbidding the carrying of firearms in sensitive places such as schools and government buildings.” 554 U.S. at 626. But why bother clarifying the Second Amendment’s application in *particularly sensitive* public places if it does not apply, at all, in *any* public place?

In short, the Second Amendment’s text—understood by reference to the historical sources relied upon by *Heller* and *McDonald*—points toward the conclusion that public carry lies within the scope of the Amendment’s protections. That the majority altogether declines to engage with textual analysis is telling.

B

Next, the history of the Second Amendment confirms what the text so strongly suggests: that the Amendment encompasses a general right to carry firearms openly in public.

1

As guided by *Heller*, the historical inquiry begins with the writings of “important founding-era legal scholars”—the

evidence most probative of how the Framers understood the right to bear arms. 554 U.S. at 605.

The plain textual understanding of “bear arms” finds unequivocal support in the most prominent, widely circulated legal treatises from throughout the Founding era. In an early American edition of Blackstone’s *Commentaries on the Laws of England*—indeed, the “most important” edition, as *Heller* points out, *see* 554 U.S. at 594—St. George Tucker, a law professor at the College of William & Mary and an influential Antifederalist, insisted that the right to armed self-defense is the “first law of nature” and that “the right of the people to keep and bear arms” is the “true palladium of liberty.”¹ 1 St. George Tucker, *Blackstone’s Commentaries: With Notes of Reference to the Constitution and Laws of the Federal Government of the United States; and of the Commonwealth of Virginia* app. n.D, at 300 (Phil., William Young Birch & Abraham Small 1803); *see also McDonald*, 561 U.S. at 769 (treating Tucker’s notes on Blackstone as heavily instructive in interpreting the Second Amendment); *Heller*, 554 U.S. at 606 (same). Even more explicitly, Tucker wrote that “[i]f . . . congress were to pass a law prohibiting any person from bearing arms, as a means of preventing insurrections, the judicial courts . . . would be able to pronounce decidedly upon the constitutionality of these means.” 1 Tucker, *supra*, at app. n.D, at 289; *see also* Michael P. O’Shea, *Modeling the Second Amendment Right to Carry Arms (I): Judicial Tradition and the Scope of “Bearing Arms” for Self-Defense*,

¹ Hawaii bizarrely suggests that we should not focus too heavily on Tucker, whom Hawaii discounts as “a single nineteenth-century commentator.” This is a strange attack, indeed, given the Supreme Court’s direct reliance on Tucker’s notes in both *McDonald*, 561 U.S. at 769, and *Heller*, 554 U.S. at 606. Tucker’s notes deserve similar weight here.

61 Am. U. L. Rev. 585, 637–38 & n.262 (2012). Indeed, as Tucker explained, “[i]n many parts of the United States, a man no more thinks, of going out of his house on any occasion, without his rifle or musket in his hand, than an European fine gentleman without his sword by his side.” 5 Tucker, *supra*, at app. n.B, at 14.

Blackstone himself espoused a similar view of the inviolability of an Englishman’s right to bear arms, which was most notably codified in the 1689 English Declaration of Rights as the right of Protestants to “have Arms for their Defence suitable to their Conditions, and as allowed by Law.” Bill of Rights 1689, 1 W. & M., ch. 2, § 7 (Eng.); *see also Alden v. Maine*, 527 U.S. 706, 715 (1999) (noting that Blackstone’s works “constituted the preeminent authority on English law for the founding generation”). As Blackstone explained, the 1689 Declaration enshrined “the natural right of resistance and self-preservation” and “the right of having and using arms for self-preservation and defence.” 1 William Blackstone, *Commentaries* *144.² It followed from Blackstone’s premise that such a right—the predecessor to our Second Amendment—“was by the time of the founding

² Blackstone was far from alone in recognizing a natural right to self-defense “belong[ing] to [all] persons merely in a state of nature, and which every man is intitled to enjoy whether out of society or in it.” 1 William Blackstone, *Commentaries* *123. Quite a few commentators of that era likewise championed such a right. *See* Leonard W. Levy, *Origins of the Bill of Rights* 140–41 (2001) (referencing a 1769 article in the prominent colonial newspaper *A Journal of the Times*, which described the English right as “a natural right which the people have reserved to themselves, confirmed by the Bill of Rights, to keep arms for their own defence”); David B. Kopel, *The Natural Right of Self-Defense: Heller’s Lesson for the World*, 59 Syracuse L. Rev. 235, 242 (2008) (“The Anglo-Americans learned the language of natural rights, including the natural right of self-defense . . .”).

understood to be an individual right protecting against both *public* and private violence.” *Heller*, 554 U.S. at 594 (emphasis added); *see also* 2 William Blackstone, *Commentaries* *441 (Edward Christian ed. 1795) (“[E]veryone is at liberty to keep *or carry* a gun, if he does not use it for the [unlawful] destruction of game.” (emphasis added)).

2

Following *Heller*’s historical imperative, the inquiry turns to nineteenth-century judicial interpretation of the right to bear arms, whether as part of the Second Amendment or analogous state constitutional provisions. *See* 554 U.S. at 610–14. For by analyzing “how the Second Amendment was interpreted . . . immediately after its ratification,” we can “determine *the [original] public understanding* of [its] text.” *Id.* at 605. Many of the same nineteenth-century cases marshaled in *Heller*, to prove that the Second Amendment secures an individual right to self-defense, reveal just as persuasively that the Amendment encompasses a right to carry a firearm openly outside the home.

a

The first of these is *Bliss v. Commonwealth*, 12 Ky. (2 Litt.) 90 (1822), *cited in Heller*, 554 U.S. at 585 n. 9, a decision “especially significant both because it is nearest in time to the founding era and because the state court assumed (just as [*Heller*] does) that the constitutional provision at issue codified a preexisting right,” Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 UCLA L. Rev. 1343, 1360 (2009) (footnote omitted). Interpreting Kentucky’s Second Amendment analogue—which provided

that “the right of the citizens to bear arms in defense of themselves and the state, shall not be questioned”—the state’s highest court had no doubt that any law restricting the public carry of firearms would “import a restraint on the right of the citizens to bear arms.” *Bliss*, 12 Ky. (2 Litt.) at 90, 92. The court then invalidated a restriction on the concealed carry of weapons, despite the availability of open carry, reasoning that “whatever restrains the full and complete exercise of [the right to bear arms], though not an entire destruction of it, is forbidden by the explicit language of the constitution.” *Id.* at 91–92. Kentucky later amended its constitution to allow the legislature to “pass laws to prevent persons from carrying *concealed* arms,” Ky. Const. art. XIII, § 25 (1850) (emphasis added), but left untouched the premise in *Bliss* that the right to bear arms protects *open* carry.

Tennessee’s highest court offered its own, similar interpretation of the right to bear arms in *Simpson v. State*, 13 Tenn. (5 Yer.) 356 (1833), *cited in Heller*, 554 U.S. at 585 n.9, 603, 614. There, after Simpson was convicted of disturbing the peace by appearing armed in public, he faulted the indictment for failing to require clear proof of actual violence. *Id.* at 357–58. The high court agreed. *Id.* at 357–60. First, the court cast doubt on the State’s argument that English law would have allowed conviction without proof of actual “fighting of two or more persons.” *Id.* at 357–58 (quoting 4 William Blackstone, *Commentaries* *145). Second, the court explained that *even assuming* English law had criminalized the carrying of weapons without proof of actual violence, the Tennessee “constitution ha[d] completely abrogated it.” *Id.* at 360. No such prohibition could survive the state constitution’s grant of “an express power . . . secured to all the free citizens of the state to keep and bear arms for

their defence, without any qualification whatever as to their kind or nature.” *Id.*

In 1840, the Alabama Supreme Court offered a similar interpretation of its own state’s constitution. *See State v. Reid*, 1 Ala. 612 (1840), *cited in Heller*, 554 U.S. at 585 n.9, 629. Construing the Alabama “right to bear arms, in defence of [self and the State,” the court declared that an Alabamian must be permitted *some* means of carrying a weapon in public for self-defense. *Id.* at 616–17. The court ultimately upheld a restriction on “the evil practice of carrying weapons secretly,” citing the legislature’s power “to enact laws in regard to the *manner* in which arms shall be borne. . . . as may be dictated by the safety of the people and the advancement of public morals.” *Id.* at 616 (emphasis added). But the court made clear where that legislative power ran dry:

We do not desire to be understood as maintaining, that in regulating the manner of bearing arms, the authority of the Legislature has no other limit than its own discretion. A statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would be clearly unconstitutional.

Id. at 616–17.³

³ The majority curiously (and erroneously) suggests that, many decades later, the Alabama Supreme Court recognized a state power to impose “severe restrictions” on open public carry in a case that upheld a prohibition against carrying certain arms on private property owned by another. *See* Maj. Op. 77–78 (citing *Isaiah v. State*, 58 So. 53 (Ala.

The Georgia Supreme Court embraced precisely the same position in an opinion central to the Supreme Court’s historical analysis in *Heller*. See *Nunn v. State*, 1 Ga. 243 (1846), cited in *Heller*, 554 U.S. at 585 n.9, 612–13, 626, 629; O’Shea, *supra*, at 627 (“No case, historic or recent, is discussed more prominently or positively in *Heller* than the Georgia Supreme Court’s 1846 decision in *Nunn v. State*.”). There, the court considered a Second Amendment challenge to a statute that criminalized carrying a pistol, either openly or concealed. *Nunn*, 1 Ga. at 245–46. Starting off with a clear statement of the constitutional guarantee, the court explained: “The right of the whole people, old and young, men, women and boys, and not militia only, to keep and bear arms of every description, and not such merely as are used by the militia, shall not be infringed, curtailed, or broken in upon, in the smallest degree” *Id.* at 251 (emphasis omitted). With those Second Amendment lines properly set, the court held that Georgia’s statute had gone too far:

[S]o far as the act of 1837 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-defence, or of his constitutional right to keep and bear arms. But that so much of it, as contains a prohibition against bearing arms

1911)). Aside from relying on a *concurrence* rather than the majority opinion in that case, the majority fails to point out that the law specifically allowed open carry on public highways “or elsewhere other than upon the premises of another.” *Isaiah*, 58 So. at 54. Accordingly, the court held that such a restriction was constitutional specifically because it “merely prevents the carrying of arms for offensive purposes, and does not deprive a person of the right to bear arms in defense of himself or the state.” *Id.*

openly, is in conflict with the Constitution,
and *void*

Id. We should afford *Nunn*’s understanding of the Second Amendment significant weight because, as *Heller* explains, “[i]ts opinion perfectly captured the way in which the operative clause of the Second Amendment furthers the purpose announced in the prefatory clause.” 554 U.S. at 612.

The Louisiana Supreme Court soon followed the course set by Alabama and Georgia. *See State v. Chandler*, 5 La. Ann. 489 (1850), *cited in Heller*, 554 U.S. at 585 n.9, 613, 626. The high court first rejected *Chandler*’s Second Amendment challenge to a Louisiana law prohibiting concealed carry, reasoning that the law was “absolutely necessary to counteract a vicious state of society, growing out of the habit of carrying concealed weapons, and to prevent bloodshed and assassinations committed upon unsuspecting persons.” *Id.* at 489–90. But, in precisely the same manner as the *Nunn* and *Reid* courts, the *Chandler* court drew the line which the legislature could not cross. The court explained that a prohibition on *concealed* carry could be held constitutional because it “interfered with no man’s right to carry arms . . . ‘in full open view,’ which places men upon an equality. *This* is the right guaranteed by the Constitution of the United States” *Id.* at 490 (emphasis added); *see also Heller*, 554 U.S. at 613 (citing favorably *Chandler*’s holding that “citizens had a right to carry arms openly”).

The majority largely rejects the lessons of these cases by first suggesting that only *Bliss* could support the view that open public carry was historically understood to be within the scope of the Second Amendment, then characterizing *Bliss* as an “isolated decision.” *See* Maj. Op. 74–75, 86. While *Bliss*

may have gone farther than other nineteenth-century cases in holding that *any* restraint on “the full and complete exercise of th[e] right [to bear arms] . . . is forbidden by the . . . constitution,” 12 Ky. (2 Litt.) at 91–92, it could hardly be described as an outlier for purposes of the issue before us here. Our question is not whether the Second Amendment was historically understood to foreclose *any and all* regulation of public carry. Rather, the question is and must be whether the right to “keep and bear Arms” was originally understood to *limit* states’ power to restrict the freedom to carry a firearm in public for self-defense. And *Bliss* is far from the only nineteenth-century case to hold that extensive prohibitions on open carry would indeed infringe on a constitutionally protected right—even if the *manner* of open public carry could be regulated at its margins. *Simpson, Reid, Nunn*, and *Chandler* all stand for precisely that proposition.⁴

In short, the same nineteenth-century cases found instructive by the Supreme Court in *Heller* underscore what nineteenth-century legal commentator John Ordronaux (also cited in *Heller*) aptly summarized: Though “a State [might] enact[] laws regulating the manner in which arms may be carried,” including “the carrying of *concealed* weapons,” any “statute forbidding the bearing of arms openly would . . . infringe[]” the Second Amendment. John Ordronaux, *Constitutional Legislation in the United States: Its Origin, and Application to the Relative Powers of Congress, and of*

⁴ And, just after the turn of the twentieth century, the Supreme Court of Idaho likewise struck down a robust territorial prohibition against the public carry of firearms, holding that it violated the Second Amendment because “the legislature has no power to prohibit a citizen from bearing arms in any portion of the state of Idaho, whether within or without the corporate limits of cities, towns, and villages.” *In re Brickey*, 70 P. 609, 609 (Idaho 1902).

State Legislatures 242–43 (1891), cited in *Heller*, 554 U.S. at 619.

b

The majority observes that there were some judicial proponents of a more limited right to bear arms during the nineteenth century. *See* Maj. Op. 79–84. But their reasoning rests on the untenable militia-based view of the right, which carries no interpretive weight after *Heller*.

Most prominent is the Arkansas Supreme Court’s 1842 interpretation of the right in *State v. Buzzard*, 4 Ark. 18 (1842). There, a divided court upheld a prohibition on the concealed carry of “any pistol, dirk, butcher or large knife, or a sword in a cane,” *id.* at 18, but each judge in the splintered majority appeared poised to go further. Chief Justice Ringo advocated the view that the Second Amendment did not bar the Arkansas legislature from prohibiting *any* carrying of firearms: “[N]o enactment on this subject, which neither directly nor indirectly so operates as to impair or render inefficient the means provided by the Constitution for the defense of the State, can be adjudged invalid on the ground that it is repugnant to the Constitution.” *Id.* at 27 (opinion of Ringo, C.J.). Chief Justice Ringo believed this to be so specifically because such restrictions would not “detract anything from the power of the people to defend their free state and the established institutions of the country.” *Id.* Justice Dickinson echoed this view, writing that the Second Amendment was nothing “but an assertion of that general right of sovereignty belonging to independent nations to regulate their military force,” thus finding *no* individual right within its guarantee. *Id.* at 32 (opinion of Dickinson, J.); *but*

see id. at 34–36 (Lacy, J., dissenting) (viewing the Second Amendment as an individual right to self-defense).

Several other nineteenth-century courts hewed to *Buzzard*’s approach and upheld laws restricting public carry without emphasizing, as did courts in *Nunn*’s camp, the limits of legislative authority. *See Hill v. State*, 53 Ga. 472, 474–77 (1874) (upholding prohibition on carrying weapons “to any court of justice . . . or any place of public worship, or any other public gathering . . . except militia muster grounds”); *English v. State*, 35 Tex. 473, 474, 480 (1871) (upholding prohibition on carrying “pistols, dirks, daggers, slungshots, swordcanes, spears, brass-knuckles and bowie knives”); *State v. Workman*, 14 S.E. 9, 10–12 (W. Va. 1891) (upholding presumption of criminality “when a man is found going around with a revolver, razor, billy, or brass knuckles upon his person”). Like *Buzzard*, each decision was explicitly premised on a militia-focused view of the right to bear arms. *See Hill*, 53 Ga. at 475 (“In what manner the right to keep and bear these pests of society [dirks, bowie knives, and the like], can encourage or secure the existence of a militia, and especially of a well regulated militia, I am not able to divine.”); *English*, 35 Tex. at 477 (“The terms dirks, daggers, slungshots, sword-canes, brass-knuckles and bowie knives, belong to no military vocabulary.”); *Workman*, 14 S.E. at 11 (“So, also, in regard to the kind of arms referred to in the amendment, it must be held to refer to the weapons of warfare to be used by the militia . . .”).⁵

⁵ Moreover, not even all the cases with militia-focused views of the right to bear arms took *Buzzard*’s approach to open public carry. Several such cases protected the right to bear arms in a way that supports, or is at least consistent with, a right to such carry. *See, e.g., Andrews v. State*, 50 Tenn. (3 Heisk.) 165, 186–87 (1871) (holding that, if a pistol “is

With *Heller* on the books, cases in *Buzzard*'s flock offer little instructive value. That is because *Heller* made clear that the Second Amendment is, *and always has been*, an individual right centered on self-defense; it has never been a right to be exercised only in connection with a militia. *See* 554 U.S. at 592, 599, 616; *see also Wrenn*, 864 F.3d at 658 (reasoning that such cases are “sapped of authority by *Heller*”); *Moore*, 702 F.3d at 941 (treating “the historical issues as settled by *Heller*”); O’Shea, *supra*, at 653 (“Decisions like *English* . . . have little relevance to determining the scope of Second Amendment carry rights today . . . [because] the question presented by current carry litigation is whether firearms that are constitutionally protected, as *Heller* holds handguns to be, may be carried outside the home pursuant to a constitutional right to bear arms that is not a hybrid individual right [or] a fictive ‘collective right’ . . . , but instead is centrally concerned with self-defense.”). Contrary to the majority’s suggestion, Maj. Op. 116, recognition of this reality does not require one to believe that *Heller* directly *answered* the historical question before us. But *Heller* undeniably dictates *which* historical question we must now endeavor to answer: Was the right to bear arms for the purpose of *individual self-defense* historically understood to protect a person’s right to carry common arms in public? Cases like *Buzzard* offer historical answers to a different question altogether—namely, whether open public carry of handguns was protected by a right to

adapted to the usual equipment of the soldier,” then a statute that “forbids by its terms the carrying of the weapon publicly or privately, without regard to time or place, or circumstances . . . violates the constitutional right to keep arms”); *Aymette v. State*, 21 Tenn. (2 Hum.) 154, 160 (1840) (“In the nature of things, if they were not allowed to bear arms openly, they could not bear them in their defence of the State at all.”).

bear arms for the specific purpose of facilitating the militia’s “defen[se] [of the] free state and the established institutions of the country.” *Buzzard*, 4 Ark. at 27 (opinion of Ringo, C.J.).⁶

Although ours is an historical inquiry, we are judges, not historians. And, 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. Rather, we may only assess whether the right to bear arms extends outside the home *on the understanding*—dictated by *Heller*—that the right is an individual one centered on self-defense. On such an understanding, cases like *Buzzard* only bear upon the entirely irrelevant question of whether open public carry was embraced by *state* constitutions’ *militia-focused* provisions for keeping and bearing arms (or by erroneously militia-focused views of the Second Amendment). We, by contrast, are interested in whether open public carry is embraced by the U.S. Constitution’s *individual* right to “keep and bear Arms.”

⁶ The majority dismisses *Heller*’s relevance on this point only by grossly understating its holding. The majority suggests that *Heller* left open the possibility that the Second Amendment protects gun rights only to the extent that such rights are relevant to a functional militia. See Maj. Op. 120–22. Nothing could be further from the truth. To be sure, *Heller* observed that “the threat that the new Federal Government would destroy the citizens’ militia by taking away their arms was the *reason* that right [to keep and bear arms]—unlike some other English rights—was codified in a written Constitution.” *Heller*, 554 U.S. at 599 (emphasis added). But the Court made abundantly clear that the *substance* of the right that was so codified was *not* limited to militia-relevant firearms practices. Rather, even if it might be shown that individual “self-defense had little to do with the right’s *codification*[,] it was the *central component* of the right itself.” *Id.*

c

Setting aside those cases that rest on a militia-focused view of the right to bear arms, there remain only two nineteenth-century cases that might be read to allow severe deprivations of the right to open carry. Upon closer examination, neither is instructive on the meaning of the Second Amendment.

The first, *State v. Duke*, is an 1874 decision from the Supreme Court of Texas, which concluded that the legislature could confine the carry of pistols to specified places (at least if the bearer did not have reasonable grounds to fear an attack). 42 Tex. 455, 456–59 (1875). Why the departure from the *Nunn* line of cases? One need only peek at the Texas constitutional provision under which *Duke* was decided, which provided that “[e]very person shall have the right to keep and bear arms in the lawful defense of himself or the State, *under such regulations as the Legislature may prescribe.*” *Id.* at 458 (emphasis added). While the Second Amendment surely tolerates some degree of regulation, its very text conspicuously omits any such regulatory caveat. We shouldn’t pencil one in.⁷

The second case, *Walburn v. Territory*, is an 1899 decision from the Supreme Court of the Territory of Oklahoma, decided at the very end of the nineteenth century.

⁷ And “even *Duke*, an outlier which marks perhaps the most restrictive interpretation that any nineteenth-century court gave to the defense-based right to bear arms, implicitly rejected no-carry laws as unconstitutional” when it reasoned that the Texas provision “was constitutional because it ‘respected the right to carry a pistol openly when needed for self-defense.’” O’Shea, *supra*, at 655 (quoting *Duke*, 42 Tex. at 459).

See 59 P. 972 (Okla. 1899). Convicted of carrying a revolver on his person, Walburn challenged his conviction on several grounds, one being that Oklahoma’s carrying prohibition was “in conflict with the constitution of the United States.” *Id.* at 973. Beyond such a general assertion, however, “[n]o authorities [were] cited in support of this position, nor [was] the proposition very earnestly urged.” *Id.* Accordingly, the court rejected the challenge: “*As at present advised*, we are of the opinion that the statute violates none of the inhibitions of the constitution of the United States, and that its provisions are within the police power of the territory.” *Id.* (emphasis added). There is little reason to credit a decision that explicitly acknowledged a lack of due consideration. *Cf. Heller*, 554 U.S. at 623–24 (rejecting the dissent’s reliance on *United States v. Miller*, 307 U.S. 174 (1939), in part because of the incomplete briefing in *Miller* and its lack of a thorough consideration of the history of the Second Amendment).

d

In sum, there are at least five nineteenth-century cases (plus another that came two years into the twentieth century) in which state supreme courts held that the individual right to bear arms for self-defense—*i.e.*, the right guaranteed by the Second Amendment—must encompass a right to open public carry. And the majority has not cited a *single* apposite case in which any nineteenth-century court held to the contrary.

3

Finally, *Heller*’s historical methodology leads us to the legislative scene following the Civil War. *See* 554 U.S. at 614–16.

Particularly relevant in this period are the efforts of many Southern states to disarm freedmen by adopting Black Codes.⁸ For it was universally understood—by these odious laws’ proponents and opponents alike—that the debates over the Black Codes were debates over freedmen’s fundamental constitutional rights.

On the one side, “[t]hose who opposed these injustices frequently stated that they infringed blacks’ constitutional

⁸ Those freedmen who had fought for the Union Army during the war frequently returned home “to the States of the old Confederacy, where systematic efforts were made to disarm them and other blacks.” *McDonald*, 561 U.S. at 771; *see also The Freedmen’s Bureau Bill*, N.Y. Evening Post, May 30, 1866, at 2 (“In South Carolina and Florida the freedmen are forbidden to wear or keep arms.”). These were part and parcel with the broader efforts of “those who sought to retain the institution of slavery . . . to eliminate more and more of the basic liberties of slaves, free blacks, and white abolitionists.” *See McDonald*, 561 U.S. at 843–44 (Thomas, J., concurring in part and concurring in the judgment).

Emblematic of these efforts was an 1865 law in Mississippi that declared, “no freedman, free negro or mulatto . . . shall keep or carry fire-arms of any kind, or any ammunition, dirk or bowie knife.” *Id.* at 771 (majority opinion) (quoting Certain Offenses of Freedmen, 1865 Miss. Laws 165, § 1, in 1 *Documentary History of Reconstruction* 289 (W. Fleming ed. 1950)). The law was vigorously enforced. As an 1866 letter from Rodney, Mississippi, to *Harper’s Weekly* lamented, “[t]he militia of this county have seized every gun and pistol found in the hands of the (so called) freedmen. . . . They claim that the statute laws of Mississippi do not recognize the negro as having any right to carry arms.” *The Labor Question at the South*, *Harper’s Weekly*, Jan. 13, 1866, at 19. Seeking help from outside of the state, the letter emphasized that such Mississippi laws did “not protect, but insist[ed] upon infringing on their liberties.” *Id.* Worse still, “[w]ithout federal enforcement of the inalienable right to keep and bear arms, . . . militias and mobs were tragically successful in waging a campaign of terror against [newly free slaves].” *McDonald*, 561 U.S. at 856 (Thomas, J., concurring in part and concurring in the judgment).

right to keep and bear arms.” *Heller*, 554 U.S. at 614; *see also* Clayton E. Cramer, *The Racist Roots of Gun Control*, 4 Kan. J.L. & Pub. Pol’y 17, 20 (Winter 1995) (“The various Black Codes adopted after the Civil War required blacks to obtain a license before carrying or possessing firearms These restrictive gun laws played a part in provoking Republican efforts to get the Fourteenth Amendment passed.”).

As they witnessed the state governments of the former Confederacy turning a blind eye to mob violence against newly freed slaves, the Reconstruction Republicans came to recognize that “when guns were outlawed, only the Klan would have guns.” Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 266 (1998) [hereinafter *Bill of Rights*]. Yet such blatant injustices did not continue unnoticed by Congress, which established the Freedmen’s Bureau to vindicate the constitutional rights of freedmen still suffering in the Reconstruction South. Working to fulfill its mandate, an 1866 report by the Bureau targeted a Kentucky law that sought to deprive freedmen of their Second Amendment rights: “[T]he civil law [of Kentucky] prohibits the colored man from bearing arms Their arms are taken from them by the civil authorities Thus, the right of the people to keep and bear arms as provided in the Constitution is *infringed*.” H.R. Exec. Doc. No. 70, at 233, 236 (1866), *quoted in Heller*, 554 U.S. at 614–15. And Kentucky was far from the only state subject to scrutiny; a joint congressional report decried a South Carolina practice of “seizing all firearms found in the hands of the freedmen.” J. Comm. on Reconstruction, H.R. Rep. No. 30, pt. 2, at 229 (1866) (Proposed Circular of Brigadier General R. Saxton), *quoted in Heller*, 554 U.S. at 615.

On the other side, even those congressmen who *opposed* federal action to protect the rights of freedmen understood the fundamental constitutional rights at stake. Senator Davis of Kentucky acknowledged, on equal footing with the writ of habeas corpus, the right “for every man bearing his arms about him *and* keeping them in his house, his castle, for his own defense,” but argued that congressional action on the matter would usurp the role of Kentucky in caring for its citizens. Cong. Globe, 39th Cong., 1st Sess. 370–71 (1866) (Sen. Davis) (emphasis added), *cited in Heller*, 554 U.S. at 616.

Indeed, even *before* the Civil War, those who had sought to dispossess black Americans of the right to carry arms for self-defense understood that they were really seeking to dispossess black Americans of *fundamental constitutional rights*. This was made all-too-painfully clear by the Supreme Court’s infamous decision in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), rendered four years before the first shots were fired at Fort Sumter. *See McDonald*, 561 U.S. at 807–08, 822–23, 849 (Thomas, J., concurring in part and concurring in the judgment) (looking to *Dred Scott* as necessary context for Reconstruction-era historical analysis). Writing for the Court, Chief Justice Taney—disgracefully—dismissed Dred Scott’s suit for freedom after concluding that black men and women had never been a part of the sovereign “people” of the United States and therefore could find no recourse in an Article III court. *See Dred Scott*, 60 U.S. (19 How.) at 407. To hold otherwise, Chief Justice Taney wrote, would have “entitled [black Americans] to the privileges and immunities [*i.e.*, fundamental rights] of citizens” and thus granted them the rights he felt only whites could enjoy: “[I]t would give them the full liberty of speech in public and in private upon all subjects upon which [white] citizens might

speaking; to hold public meetings upon political affairs, and *to keep and carry arms wherever they went.*” *Id.* at 416–17 (emphasis added).

C

To summarize the history canvassed thus far: The important Founding-era treatises, the probative nineteenth-century case law, and the post–Civil War legislative scene all reveal a single American voice. The right to bear arms must include, at the least, the right to carry a firearm openly for self-defense. Perhaps surprisingly, the majority does not seriously dispute either the linguistic or historical evidence recounted above.

Instead—and in lieu of any apposite cases that actually *upheld* the constitutionality of severe restrictions on the open carry of firearms—the majority suggests that the clear lessons of this evidence are undermined by the mere fact that the public carry of firearms has historically been subject to *some* manner of regulation. While this is undoubtedly true, the evidence of such lesser restrictions on firearms carry does not come close to supporting the majority’s view that *any* restriction upon public carry—even a *complete ban*—was understood to be immune to constitutional scrutiny.

1

For one, the majority argues that the *English* right to carry weapons openly was severely limited for centuries by the 1328 Statute of Northampton and suggests, in turn, that we should incorporate such an understanding of English rights into our Constitution’s Second Amendment. Exploring

fourteenth-century English law books (after a thorough dusting) reveals no such thing.

a

The Statute of Northampton made it unlawful for an ordinary Englishman to “bring . . . force in affray of the peace, nor to go nor ride armed by night nor by day, in Fairs, Markets, nor in the presence of the Justices or other Ministers, nor in no part elsewhere.” Statute of Northampton 1328, 2 Edw. 3, c. 3 (Eng.).⁹ By its terms, the Statute appears to proscribe the mere act of riding armed, and in the immediate period after Parliament enacted the statute, it appears that some English constables indeed were ordered to enforce the statute literally. *See* Letter to the Mayor and Bailiffs of York (Jan. 30, 1334), in 3 *Calendar of the Close Rolls, Edward III*, at 294 (H.C. Maxwell-Lyte ed. 1898) [hereinafter *Close Rolls*]; *see also* John Carpenter & Richard Whittington, *Liber Albus: The White Book of the City of London* 335 (Henry Thomas Riley ed. & trans., 1862) (1419) (“[N]o one, of whatever condition he be, [may] go armed in the said city [of London] or in [its] suburbs . . . except the vadlets of the great lords of the land, . . . the serjeants-at-arms of his lordship the King, . . . and such persons as shall come in their company in aid of them . . . for saving and maintaining the said peace . . .”). But not all English constables faced similar orders. Indeed, officers in Northumberland and at least twelve other counties or “ridings” (sub-counties) were ordered to arrest only “persons riding or going armed *to disturb the peace*.” Letter to Keepers

⁹ An “affray,” derived from the French word “effraier” (meaning “to terrify”), is an act that disturbs the peace. *See* 1 William Hawkins, *A Treatise of the Pleas of the Crown* 134 § 1 (1716).

and Justices of Northumberland (Oct. 28, 1332), in 2 *Close Rolls*, *supra*, at 610 (emphasis added).

And in any event, looking only to Chaucer’s fourteenth-century England provides little instructive force, particularly because “[c]ommon-law rights developed over time.” *Wrenn*, 864 F.3d at 660. And over the next few centuries, a narrow interpretation of the statute—like that given to Northumberland constables in 1332—began to dominate the English legal landscape. Writing almost 300 years after the statute was enacted, Serjeant William Hawkins, an English legal commentator praised by Blackstone, explained that “no wearing of Arms is within the meaning of this Statute, 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 this Statute by wearing common Weapons.” 1 Hawkins, *supra*, at 136 § 9. Hawkins’s narrow interpretation of the statute was in accord with that of the Court of King’s Bench, which clarified that “the meaning of the [Statute of Northampton] was to punish people who go armed *to terrify the King’s subjects*.” *Sir John Knight’s Case* (K.B. 1686), 87 Eng. Rep. 75, 76; 3 Mod. 117, 118 (emphasis added).¹⁰

¹⁰ The majority erroneously asserts that *Chune v. Piott* (K.B. 1615), 80 Eng. Rep. 1161, eliminated from “the crime of unlawful carrying” the “element” of “*in terrorem populi Regis*” (i.e., carrying “to the terror of the king’s people”). See Maj. Op. 49. In actuality, *Chune* merely held that a valid arrest for “unlawful carrying” did not require the arresting sheriff to have *personally witnessed* the accused causing *terrorem populi Regis*. 80 Eng. Rep. at 1162. That is to say, King’s Bench loosened the evidentiary standards by which the element of *in terrorem populi Regis* could be proven; it did not abandon the element itself.

To be sure, an untoward *intent* to terrorize the local townsfolk was not always needed to face arrest and imprisonment. But without malicious intentions or violent behavior, the carrying of weapons *alone* was prohibited only for such weapons that were specifically known to have a terrorizing effect. As Blackstone interpreted the statute—an interpretation credited by *Heller*, 554 U.S. at 627—“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* *149 (emphasis added); accord Joseph Keble, *An Assistance to Justices of the Peace, for the Easier Performance of their Duty* 147 (1689); Francis Wharton, *A Treatise on the Criminal Law of the United States* 932 § 2497 (4th ed. 1857). Similarly, Hawkins wrote that “a Man cannot excuse the wearing [of] such Armour” even “by alledging that such a one threatened him.” 1 Hawkins, *supra*, at 136 § 8; accord Wharton, *supra*, at 932 § 2497. But clearly not *all* weapons can be characterized as “dangerous or unusual.” Indeed, *Heller* itself recognized that the Second Amendment might not preclude restrictions on weapons of that kind. 554 U.S. at 627. Such an exception would—inexplicably—swallow up the whole of the Amendment’s protections if all firearms were defined as “dangerous or usual” *per se*. See *Moore*, 702 F.3d at 936 (“[T]he Court cannot have thought *all* guns are ‘dangerous or unusual’ and can be banned, as otherwise there would be no right to keep a handgun in one’s home for self-defense.”).

Consequently, there is little in the Statute of Northampton to suggest that it supports a ban on carrying common (not unusual) arms for defense (not terror).

b

More fundamentally, it would be misguided to accept Hawaii's invitation to import medieval English law wholesale into our Second Amendment jurisprudence.

While English law is certainly relevant to our historical inquiry insofar as the Second Amendment “codified a *pre-existing* right,” *Heller*, 554 U.S. at 592, our aim here is not merely to discover the rights of the English. There is a scholarly consensus that the 1689 English right to have arms was *less protective* than its American counterpart. See Jonathan Meltzer, Note, *Open Carry for All: Heller and Our Nineteenth-Century Second Amendment*, 123 Yale L.J. 1486, 1500 (2014); Joyce Lee Malcolm, *To Keep and Bear Arms: The Origins of an Anglo-American Right* 120–22 (1994). Illustratively, the English right was “not available to the whole population, given that it was restricted to Protestants, and like all written English rights it was held only against the Crown, not Parliament.” *Heller*, 554 U.S. at 593. In keeping with that limited scope, it included a regulatory caveat of the type consciously spurned by the Framers of the Second Amendment, only guaranteeing the right of Protestants to have arms “as allowed by law.” See Malcolm, *supra*, at 121, 162.

Unsurprisingly, then, not all laws that restricted Englishmen's right to have arms found a place across the Atlantic. For example, as St. George Tucker observed, it would have been strange to apply in the United States an English law that presumed any gathering of armed men was treasonous, because “the right to bear arms is recognized and secured in the [American] constitution itself.” 5 Tucker, *supra*, at app. n.B, at 19; see also Cooley, *supra*, at 270

(noting that the Second Amendment “was adopted with some modification and enlargement from the English Bill of Rights”); William Rawle, *A View of the Constitution of the United States of America* 126 (2d ed. 1829) (writing that the English right, unlike the Second Amendment, “is allowed more or less sparingly, according to circumstances”). Thus, instead of stitching into the Second Amendment every odd law that hemmed in the rights of fourteenth-century Englishmen, we are to consider English laws only insofar as they inform the original public understanding of the Second Amendment.

To the extent that the Framers did consider the Statute of Northampton instructive of the preexisting right to bear arms, they took a narrow view of its prohibitions. *See* Eugene Volokh, *The First and Second Amendments*, 109 Colum. L. Rev. Sidebar 97, 101 (2009). For example, Justice James Wilson, a leading drafter of the Constitution, credited Serjeant Hawkins and construed the statute to prohibit arming oneself “with dangerous and unusual weapons, in such a manner, as will naturally diffuse a terrour among the people.” 2 James Wilson, *Collected Works of James Wilson* 1138 (Kermit L. Hall & Mark D. Hall eds. 1967); *see also* Volokh, *supra*, at 101 (“American benchbooks for justices of the peace echoed [Wilson’s observation], citing Hawkins . . .”). William Rawle, a prominent member of the Pennsylvania Assembly that ratified the Constitution, likewise cited Hawkins and wrote that the right to bear arms would not rule out a law prohibiting “the carrying of arms abroad by a single individual” *if* such carry was “attended with circumstances giving [observers] just reason to fear that he purposes to make an unlawful use of them.” Rawle, *supra*, at 126.

Justice Wilson and William Rawle’s reading of the statute is confirmed by the various state regulations, adopted throughout the Founding era and beyond, that were expressly modelled after the Statute of Northampton. *See* Eric M. Ruben & Saul Cornell, *Firearm Regionalism and Public Carry: Placing Southern Antebellum Case Law in Context*, 125 Yale L.J.F. 121, 129 (2015) (“[S]everal early American states expressly incorporated versions of the Statute of Northampton into their laws.”). The state-enacted Northampton analogues sought to regulate particularly disruptive—more specifically, *terrifying*—arms carrying. For example, Massachusetts in 1794 enacted a law authorizing justices of the peace to arrest “all affrayers, rioters, disturbers, or breakers of the peace, and such as shall ride or go armed offensively, *to the fear or terror of the good citizens*.” 1794 Mass. Acts 66, ch. 26 (emphasis added); *see also* 1786 Va. Acts 35, ch. XLIX (prohibiting going “armed by night [] or by day, in fairs or markets, or in other places, in terror of the county”).

The North Carolina Supreme Court offered a definitive interpretation of that state’s Northampton analogue in 1843, providing us with the benefit of a more thorough discussion of its elements. *See State v. Huntly*, 25 N.C. (3 Ired.) 418 (1843). The court clarified:

[T]he carrying of a gun *per se* constitutes no offence. For any lawful purpose—either of business or amusement—the citizen is at perfect liberty to carry his gun. *It is the wicked purpose—and the mischievous result—which essentially constitute the crime.* He shall not carry about this or any other weapon of death to terrify and alarm, and in

such manner as naturally will terrify and alarm, a peaceful people.

Id. at 422–23 (emphasis added).

2

Next, the majority refers to a smattering of nineteenth-century gun regulations, most of which appear to have gone unchallenged in the courts. *See* Maj. Op. 65–73.

As a threshold matter, one should be wary of divining constitutional meaning from the existence of historical regulations that largely evaded constitutional scrutiny and for which the majority offers no enforcement history. This is especially true where, as here, as “[f]or most of our history[,] the question” of their constitutionality simply “did not present itself”—not least because for more than a century, “the Bill of Rights was not thought applicable to the States, and the Federal Government did not significantly regulate the possession of firearms by law-abiding citizens.” *Heller*, 554 U.S. at 625–26.

In any event, the nineteenth-century statutes relied upon by the majority simply do not say what the majority claims they say—much less what it *needs* them to say—which is that the Constitution was generally understood to allow states to “forcefully prohibit[] the mere act of carrying a firearm.” Maj. Op. 66–67.

a

Principally, the majority refers to various “surety” laws, as pioneered by Massachusetts and then adopted in

Wisconsin, Maine, Michigan, Virginia, Minnesota, Oregon, and West Virginia. The majority characterizes such laws as “a form of prior restraint,” an ostensibly interchangeable “alternative to a broad ban on open carry,” and asserts that they allowed individuals to carry weapons in public “only if they could demonstrate good cause.” *Id.* at 109–10.

Not so.

Many states during the nineteenth century required people who carried weapons in a disruptive fashion to post a bond (or a “surety”) to ensure their good behavior. *See, e.g.*, Mass. Rev. Stat. ch. 134, § 16 (1836). To enforce the surety requirement, such states commonly relied on a citizen-complaint mechanism. That is, if an arms carrier gave any observer “reasonable cause to fear an injury, or breach of the peace,” the observer could complain to his local magistrate, who might then require the disruptive carrier “to find sureties for keeping the peace,” generally “for a term not exceeding six months.” *Id.* But if the disruptive carrier *also* had “reasonable cause to fear an assault or other injury,” such person would be excused from posting sureties despite the complaint. *Id.* As an example of the pieces put together, Michigan’s 1846 surety law provided that if any person went armed with an “offensive and dangerous weapon, without reasonable cause to fear an assault or other injury . . . he may, on complaint of any person having reasonable cause to fear an injury or breach of the peace, be required to find sureties for keeping the peace.” Mich. Rev. Stat. tit. XXXI, ch. 163, § 16 (1846).

The majority erroneously characterizes surety laws as imposing a severe restriction on the public carry of weapons absent good cause to fear injury. But the majority focuses on

an *exception* to the surety requirement (for carriers with a specialized need for self-defense), while overlooking the clearly limited scope of the requirement in the first place: Only upon a well-founded complaint that the carrier had threatened “injury or a breach of the peace” did the burden to pay sureties even apply. Thus, individuals were *generally free* to carry weapons without having to pay a surety, unless they had been the subject of a specific complaint. Only then did the “good cause” exception come into play, “exempting even the accused” from the burden of paying sureties. *Wrenn*, 864 F.3d at 661. In short, “[a] showing of special need did not expand carrying for the responsible; it shrank burdens on carrying by the (allegedly) reckless.” *Id.*

Even if these laws had required all arms carriers without good cause to post sureties (and they did not), they would not add much to the relevant historical analysis. *Heller* saw little weight in historical penalties that imposed only “a small fine and forfeiture of the weapon (or in a few cases a very brief stay in the local jail).” 554 U.S. at 633. Certainly, an obligation to post a surety fits that mold. Like a small fine, sureties are “‘akin to modern penalties for minor public-safety infractions like speeding or jaywalking,’ which makes them (in the Court’s view) poor evidence of limits on the [Second] Amendment’s scope.” *Wrenn*, 864 F.3d at 661 (quoting *Heller*, 554 U.S. at 633–34). In fact, sureties seem even less noteworthy than small fines, since a disruptive carrier—once he posted a surety—“could go on carrying without criminal penalty.” *Id.* And if he refrained from breaching the peace, of course, the money he posted as a surety would be returned in a matter of months. The majority’s (unsupported) assertion that such sureties would “have been a severe constraint on anyone thinking of carrying a weapon in public” is therefore unconvincing. Maj. Op. 111.

b

Next, the majority observes that some states and federal territories restricted the particular places in which one could legally carry a gun. *See id.* at 69–70, 72. But that is hardly more helpful to the majority than the Statute of Northampton or the American surety statutes.

While these statutes (unlike surety laws) did impose some actual prohibitions on carrying firearms, they focused narrowly on restricting carry in specifically enumerated, particularly sensitive public places. *See, e.g.*, 1870 Tex. Gen. Laws 63, ch. XLVI, § 1 (prohibiting carry in “any church or religious assembly, any school room or other place where persons are assembled for educational, literary or scientific purposes, or in[] a ball room, social party or other social gathering composed of ladies and gentlemen, or to any election precinct . . . or any other public assembly”); 1889 Ariz. Laws 30, No. 13 §§ 1, 3 (adopting a version of the Texas statute). Such statutes establish nothing beyond the anodyne proposition—acknowledged in *Heller* and not disputed here—that the Second Amendment might have historically tolerated “laws forbidding the carrying of firearms in sensitive places such as schools and government buildings.” 554 U.S. at 626.

The fact that such laws existed hardly shows that *general* prohibitions on public carry would have been understood to be constitutional at the time. On the contrary, the only reason to enact laws specifically prohibiting firearm carry in

sensitive places would be that carry was presumptively lawful everywhere else.¹¹

c

Next, the majority identifies three U.S. territories—New Mexico, Oklahoma, and Wyoming—that enacted broad prohibitions against the public carrying of all manner of weapons toward the end of the nineteenth century. *See* Maj. Op. 70–72; 1860 N.M. Laws 94, §§ 1–2 (prohibiting the carry, “concealed or otherwise,” of “any class of pistols whatever, bowie knife . . . Arkansas toothpick, Spanish dagger, slung-shot, or any other deadly weapon”); Okla. Stat. ch. 25, art. 47, § 2 (1890) (prohibiting “any person . . . to carry upon or about his person any pistol, revolver, bowie knife, dirk knife loaded cane, billy, metal knuckles, or any other offensive or defensive weapon”); 1876 Wyo. Laws 352,

¹¹ In a similar (though somewhat more colorful) vein, the majority cites in passing an 1880 treatise in which Benjamin Vaughan Abbott approved of regulations that would address the *particular* danger posed by careless individuals mishandling firearms as “fireworks” in public. *See* Maj. Op. 90 (citing Benjamin Vaughan Abbott, *Judge and Jury* 333 (1880)). First, Abbott recognized that the “Constitution secures the right of the people to keep and bear arms,” including the right of a citizen to “keep[] a gun or pistol under judicious precautions” and to “practise[] in safe places the use of it.” Abbott, *supra*, at 333. But, Abbott contended, a state could nonetheless enact restrictions against “keeping pistols for playthings; carrying them carelessly in the pocket; toying with them at picnics, on board steamers, and in saloons; exhibiting them to curious girls; lending them to boys; firing at random with them upon city sidewalks.” *Id.*

As with restrictions against the carrying of firearms in particular *places*, Abbott’s approval of restrictions against using firearms in a particularly careless *manner* suggests that one would indeed have a right to carry them in ordinary and responsible ways.

ch. 52, § 1 (prohibiting “bear[ing] upon [one’s] person, concealed or openly, any fire arm or other deadly weapon, within the limits of any city, town or village”). There are several reasons to be cautious about ascribing much interpretive significance to these laws.

First, it would be exceedingly difficult to discern whether such laws were enacted with a proper understanding of the *individual* right to armed self-defense secured by the Second Amendment, as opposed to the militia-oriented view of the right that was common at the time. *See* O’Shea, *supra*, at 642–53; *see also, e.g.,* Cooley, *supra*, at 271 (“The arms intended by the Constitution are such as are suitable for the general defence of the community against invasion or oppression”); John Norton Pomeroy, *An Introduction to the Constitutional Law of the United States* 152–53 § 239 (1868) (“[A] militia would be useless unless the citizens were enabled to exercise themselves in the use of warlike weapons. . . . [But] [t]his constitutional inhibition is certainly not violated by laws forbidding persons to carry dangerous or concealed weapons”). Indeed, the Oklahoma statute included an exception that allowed the public carry of rifles or shotguns for use “in public muster or military drills,” suggesting that it might have been enacted with a mistaken understanding of the nature of the right. Okla. Stat. ch. 25, art. 47, § 5 (1890).

Second, one should be hesitant to assume too much about the constitutional validity of laws that sought to disarm inhabitants of these Western territories, where the unique circumstances of life on the frontier might have motivated territorial legislatures to undertake more severe measures against the use of weapons than we have seen reflected in the

many state laws recounted above.¹² Indeed, just after the turn of the twentieth century, the Idaho Supreme Court struck down as unconstitutional a similarly restrictive measure that had been put in place by the territorial legislature there. *See Brickey*, 70 P. at 609. And, as with the Black Codes which sought to suppress the ability of freedmen to own guns following the Civil War, there may be reason to question whether similarly illicit goals may have inspired arms restrictions in these heavily Indian territories. *See generally* Angela R. Riley, *Indians and Guns*, 100 Geo. L.J. 1675, 1680 (2012) (“[T]he relationship of Indians and guns [in early America] developed in parallel to African-Americans and guns, with both groups situated at the bottom of a racial hierarchy that facilitated oppression, noncitizen status, and subjugation.”).

Third, and most fundamentally, one can learn little about the general understanding of the Second Amendment from such isolated statutes, which were enacted so distant from the Founding and for which we have no record of enforcement. *Cf. Heller*, 554 U.S. at 632 (“[W]e would not stake our interpretation of the Second Amendment upon a single law

¹² The majority cites only one *state* (as opposed to territorial) law that purportedly imposed such a broad prohibition. *See* 1881 Kan. Sess. Laws 80, 92, ch. 37, § 23 (“The [city] council shall prohibit and punish the carrying of firearms, or other dangerous or deadly weapons, concealed or otherwise”). But this provision did not actually impose a direct, statewide prohibition on carry. Rather, it was contained in the organic statute incorporating certain *cities* within the State of Kansas, which in turn directed their city councils to pass ordinances generally regulate potential nuisances ranging from “the carrying of firearms” to the mischief caused by “vagrants, tramps, [and] confidence men.” *Id.* The majority presents no evidence of the nature of any municipal firearms regulations that were actually enacted pursuant to the Kansas statute.

. . . that contradicts the overwhelming weight of other evidence . . .”). Three statutes of this kind certainly do not undermine the far more extensive historical evidence in support of a more robust view of public-carry rights at the time of our Founding and beyond.

d

Finally, the majority suggests the overall effect of this hodgepodge of state and territorial statutes is to show that the government may prohibit the public “carrying of *small arms capable of being concealed*, whether they are carried concealed or openly.” Maj. Op. 97 (emphasis added). More specifically, the majority attempts to justify this conclusion by observing that many of the statutes in question imposed their restrictions on specifically “enumerated” weapons that “were capable of being concealed.” *Id.* at 71. But this line of reasoning falters on three distinct levels:

First, the category of “weapons capable of being concealed” appears to be an invention of the majority’s own creation or, at the very least, an historical anachronism. The oldest usage of that phrase the majority can conjure is from a 1923 California statute. *Id.* at 94 (citing 1923 Cal. Stat. 695, ch. 339). The nineteenth-century statutes themselves were certainly not written in terms of “concealability.” And as the majority concedes, “[m]ost, *but not all*, of the weapons enumerated in these statutes were capable of being concealed.” *Id.* at 71 (emphasis added). Rather—as often recognized by the very courts interpreting such statutes—the common thread seems to be that the enumerated weapons were more apt for use in person-to-person confrontation than in hunting or militia activity. *See, e.g., English*, 35 Tex. at 474 (distinguishing a statute regulating “pistols, dirks,

daggers, slungshots, swordcanes, spears, brass-knuckles and bowie knives” from the regulation of arms “useful and proper to an armed militia”); *Hill*, 53 Ga. at 474 (same); *Workman*, 14 S.E. at 11 (same).

That leads right into the second flaw in the majority’s reliance upon such enumerated lists: They again betray a view of the Second Amendment as being focused on militias or hunting—for which rifles and shotguns were most commonly used—rather than individual self-defense. For example, as discussed above, the Oklahoma statute expressly excepted from its list of prohibited weapons the public carry of rifles or shotguns for use “in public muster or military drills.” Okla. Stat. ch. 25, art. 47, § 5 (1890). As already explained at length, *Heller* foreclosed any reliance on historical sources animated by such an erroneous view that would limit the right to “keep and bear Arms” to only its militaristic applications. Moreover, *Heller* made clear that restrictions on handguns are *especially* repugnant to the Second Amendment because handguns are the “quintessential self-defense weapon.” 554 U.S. at 629. Indeed, to paraphrase *Heller*, “[i]t is no answer to say . . . that it is permissible to ban the [carry] of handguns so long as the [carry] of other firearms (*i.e.*, long guns) is allowed.” *Id.*

Third, most of the statutes that included versions of the enumerated list of regulated weapons were not *prohibitions* on open carry at all. Most were surety statutes. *See* Mass. Rev. Stat. ch. 134, § 16 (1836); 1838 Wis. Laws 379, 381, § 16; Me. Rev. Stat. tit. XII, ch. 169, § 16 (1841); Mich. Rev. Stat. tit. XXXI, ch. 163, § 16 (1846); Minn. Rev. Stat. ch. 112, § 18 (1851); 1854 Or. Laws 218, 220, ch. XVI, § 17. Several others were focused on restricting carry in particularly sensitive places. *See* 1870 Tex. Gen. Laws 63;

1889 Ariz. Laws 30, No. 13, §§ 1, 3. The Georgia statute prohibiting *concealed* carry of the enumerated weapons expressly allowed for their open carry. *See* Ga. Code pt. 4, tit. 1, div. 9, § 4413 (1861). That leaves only two statutes containing versions of the enumerated weapons list: those adopted by the territories of New Mexico and Oklahoma. *See* 1860 N.M. Laws 94, § 1; Okla. Stat. ch. 25, art. 47, § 2 (1890). And—for reasons already discussed in the above analysis of those two, isolated, territorial statutes—they are incapable of bearing the analytical load required to establish that “the states broadly agreed that small, concealable weapons, including firearms, could be banned from the public square.” Maj. Op. 72.

D

In sum, the history extensively canvassed above leads to a straightforward conclusion: Beginning in England and throughout the development of the early American Republic, individuals maintained the general right to carry common firearms openly for their own self-defense in public, provided that they did not do so in a way that would “terrorize” their fellow citizens or intrude upon particularly sensitive places like churches or schools.

Of course, the majority arrives at a starkly different conclusion. Namely, the majority reads the history as showing that “the government”—above and beyond its ability to regulate which arms were legal to carry and which places they could be carried—“may . . . *even prohibit*, in public places[,] . . . the open carrying of small arms capable of being concealed, whether they are carried concealed or openly.” *Id.* at 97 (emphasis added). Indeed, the majority denies that such an extensive prohibition would implicate “conduct [within]

the historical scope of the Second Amendment” *altogether*. *Id.* at 14–15. In the majority’s words, there is simply “*no right* to carry arms openly in public.” *Id.* at 112 (emphasis added).

This must seem strange, given that we are looking at the same historical record, and that—with the exception of certain points at the margins—we appear not to disagree significantly on the substance of what the historical sources actually *say*. (Indeed, the majority concedes that the “history is complicated, and the record . . . far from uniform[ly]” supports its conclusion. *Id.* at 40.)¹³ Our disagreement, it seems, is not so much over what the history *says*, as it is over what the history would *need* to say in order to sustain the majority’s atextual conclusion that the scope of the right to

¹³ On this point, one should not be misled by the majority’s baseless suggestion that the preceding historical review has cherry-picked favorable evidence or somehow been an exercise in something that is “not history.” *See* Maj. Op. 116. That is flatly wrong. Once one pierces through the majority’s theatrical language, the inescapable fact remains that the majority has identified *no* historical evidence that has been “discard[ed],” *see id.* at 115—let alone any that would undermine the conclusions articulated above.

The majority’s fundamental gripe seems to be that the preceding analysis does not (as the majority has largely done) indiscriminately round up the sources cited in the parties’ briefs, decline to consider whether some might merit greater weight than others, and then uncritically accept them all as equally instructive on the present question. It is precisely such an oversimplified view of “history” that ought to be avoided. Otherwise, we would risk falling into exactly the habit the majority wishes to avoid: practicing “law-office history,” controlled by the parties’ self-interested selection of historical evidence and analyzed without “proper evaluation of the relevance of the data proffered.” Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 Sup. Ct. Rev. 119, 122 n.13, *cited in* Maj. Op. 39 n.7.

“keep and bear Arms” extends no further than the right to “keep” arms inside the home. In other words, our disagreement is not one of historical *exegesis*, but one of historical *synthesis*.

In order to establish its startling conclusion that the carrying of common arms for self-defense lies completely outside the Second Amendment, the majority surely must show that complete prohibitions on open public carry were historically understood to be lawful. Perhaps, one would think, the majority might have done so through evidence that the Founding generation had regular experience with such prohibitions and understood them to pose no problem to the new Constitution they were creating. Perhaps the majority might have marshaled evidence that such prohibitions had been commonly upheld against relevant legal challenges in early America. Or perhaps, at least, the majority might have found evidence that such prohibitions, where not subjected to judicial scrutiny, were historically widespread and uncontroversial.

But the majority has found none of the above. All the majority has managed to demonstrate is that the *manner* of open public carry has at times been regulated (by laws criminalizing the carry of especially dangerous or unusual weapons with the intent or effect of “terrorizing the people,” surety laws, laws restricting carry in particularly sensitive public places, and the like), and that such narrow regulations have at times been upheld or otherwise left unchallenged. When all is said and done, there is a vast and undeniable chasm between these (largely uncontroverted) propositions about the historical presence of *some* firearms regulation and the far more troubling proposition that the majority today

pronounces: that public carrying of common arms could *generally* be banned.¹⁴

The majority is left to bridge this chasm by making logical leaps and critically shifting the goalposts in ways it fails to justify. It is utterly baffling for the majority to contend that, merely because the lawful *manner* of open public carry has historically been regulated in certain respects, we may conclude that the practice of public carry itself is not entitled to constitutional protection. What right enshrined in our Constitution has *not* historically been regulated to some degree? Surely, we would never hold (for example) that the right to speak publicly on political matters lies wholly outside the First Amendment merely because such speech has been subject to “longstanding, accepted regulation,” *cf.* Maj. Op. 35, in the form of libel laws, defamation laws, and time-place-and-manner restrictions. Yet this is exactly how the majority appears to believe we must interpret the Second Amendment. The majority’s invitation to interpret the right to bear arms “as a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees,” must be rejected. *McDonald*, 561 U.S. at 780 (plurality op.).

¹⁴ The majority might object that it has sometimes “qualified” its analysis as to apply to prohibitions on the public carry of *handguns* specifically (though, sometimes, it has not, *see, e.g.*, Maj. Op. 112). As discussed above, any such qualification is of no moment, given that *Heller* made clear that protections for handguns are *especially* central to the Second Amendment because the handgun is the “quintessential self-defense weapon.” 554 U.S. at 629. If, as the majority says, public carry of the “quintessential self-defense weapon” can be prohibited, what cannot?

E

One last line of argument to rebut: The majority, unavailed by text and history, relies on two ostensible—but in reality, untenable—principles of constitutional construction to buttress its assertion that an individual right to armed self-defense in public would somehow contradict the nature of our constitutional framework. Neither argument holds water.

1

First, the majority asserts that constitutional rights—across the board—inhere more strongly within the home than outside the home. *See* Maj. Op. 98–99. The majority cannot identify any case that actually establishes such a “principle.” Instead, it opines that this lurking (and heretofore unidentified) notion is “reinforced . . . by the Third and Fourth Amendments,” which guarantee, respectively, Americans’ rights to be free from the quartering of soldiers and from unreasonable searches and seizures in their homes. *Id.* at 98.

To the extent they are even relevant to our question here, the lessons of the Third and Fourth Amendments cut in exactly the *opposite* direction of the majority’s novel approach. The text of both the Third and the Fourth Amendments *explicitly* announces a focus on “houses.” *See* U.S. Const. amends. III (“in any house”), IV (“in their . . . houses”). The Second Amendment, by contrast, does not mention *any* spatial limitations on the right to keep and bear arms whatsoever. *See* U.S. Const. amend. II. Our inference, then, should be that *unlike* the Third and Fourth Amendments, the Second Amendment’s lack of any reference

to the home means its protections *are not* specifically focused there. *See, e.g., Russello v. United States*, 464 U.S. 16, 23 (1983) (“[Where a legal text] includes particular language in one section of [the document] but omits it in another section of the same . . . , it is generally presumed that [its drafters] act[ed] intentionally and purposely in the disparate inclusion or exclusion.” (internal quotation marks omitted)). It would be odd, indeed, to infer (as the majority apparently does) that the express limitation of two constitutional rights to “houses” means that every other constitutional right is spatially limited by implication. We certainly would never assume as much about any other enumerated right in the Constitution.

In short, it is unnecessary to reach for the Third or Fourth Amendments when the Second Amendment’s own text supplies a clear answer.

2

Second, the majority raises the structural argument that “the Second Amendment did not contradict the fundamental principle that the government assumes primary responsibility for defending persons who enter our public spaces.” *See* Maj. Op. 99–107, 111–13. But this argument is foreclosed by *Heller* and, more fundamentally, is premised on deep misapprehensions of the first principles of American popular sovereignty.

a

At the outset, the majority’s structural argument suggests that even if “keep[ing]” arms is an individual right, “bear[ing]” arms is a corporate right that belongs to the government alone, which has sole authority to ensure security

in public. Such a suggestion directly contradicts *Heller*, which emphatically rejected the argument that the right to “keep and bear Arms” was limited to the “militia.” See 554 U.S. at 579–83, 585–86. This contradiction alone would be a sufficient reason to reject the majority’s assertion that the Second Amendment encompasses no individual right to self-defense in public.

b

But the flaws of the majority’s structural argument run deeper than its incompatibility with *Heller*.

The heart of the majority’s argument is the proposition that “[t]he states, in place of the king, assumed primary responsibility” for “securing what was formerly known as ‘the king’s peace.’” Maj. Op. 101. The majority reasons that “maintaining the ‘king’s peace’ was the king’s duty and, in the English view, the carrying of weapons in public areas was an affront to the king’s authority.” *Id.* at 102. This entire line of reasoning overlooks our Constitution’s profound departure from English ideas about the nature and locus of sovereignty. The great and enduring conceit of our Founders’ political theory was their insistence on *breaking* any analogy between the king’s sovereignty and that of the states.

What the majority overlooks is that our Constitution relocated the king’s sovereignty not in American State *or* federal governments, but in “We the People of the United States.” U.S. Const. pmbl. Indeed, copious volumes of scholarly ink have been spilled in showing that the Constitution’s text, history, and structure converge on this

conclusion.¹⁵ And it has been a bedrock principle of constitutional construction since the dawn of American constitutional jurisprudence. *See, e.g., Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 472 (1793) (opinion of Jay, C.J.) (“In Europe the sovereignty is generally ascribed to the Prince; here it rests with the people; there, the sovereign actually administers the Government; here, never in a single instance; our Governors are the agents of the people . . .”); *id.* at 461 (opinion of Wilson, J.) (criticizing England’s “haughty notions of . . . state sovereignty and state supremacy” as allowing “the state [to] assum[e] a supercilious preeminence above the people, who have formed it”).

With a proper conception of American popular sovereignty, it should be easy to see the irrelevance of “the English view” that “the carrying of weapons in public areas was an affront to the king’s authority” insofar as it “suggested that the king was unwilling or unable to protect the people.” Maj. Op. 102. For an English *subject* to “carr[y] arms publicly . . . as a vote of no confidence in the king’s ability to maintain [the public peace]” would be an affront to his sovereign. *Id.* But for an American *citizen* to carry arms publicly could be no such thing. The American citizen, in contrast with the English subject, is a constituent part of a free and sovereign people, whom state governments serve as agents. Indeed, the “principal object” of our Constitution was not to *grant* “new rights” from government to the people, but

¹⁵ *See, e.g.,* Gordon S. Wood, *The Creation of the American Republic: 1776–1787*, at 344–89 (1998); Edmund S. Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America* 235–306 (1988); Bernard Bailyn, *The Ideological Origins of the American Revolution* 55–93 (1967); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1429–66 (1987).

rather to “secur[e]” *against* the government “those rights” we already possess by nature. 1 Wilson, *supra*, at 1053–54. It is thus emphatically the prerogative of the American citizen to give a “vote of no confidence” in state governments’ exercise of those powers delegated from the sovereign people themselves. *See, e.g., Chisholm*, 2 U.S. (2 Dall.) at 472; 4 Jonathan Elliot, *The Debates of the Several State Conventions on the Adoption of the Federal Constitution* 9 (1888) (“The people are known with certainty to have originated [our government] themselves. Those in power are their servants and agents; and the people, without their consent, may new-model their government whenever they think proper” (statement of James Iredell)).

For the same reason, the majority’s suggestion that the values of *federalism* somehow preclude the Second Amendment from guaranteeing an individual right to carry arms for self-defense in the public square is fundamentally misguided. The majority’s argument is essentially this: *As between the federal government and the states*, the Constitution gave the states “primary responsibility” for “maintaining the public peace.” Maj. Op. 100–01. And in turn, “[i]t would be anomalous in the extreme if, having gone to the trouble of spelling out the respective responsibilities of the new federal government and the states in 1789, the framers of the Bill of Rights undid that relationship with the Second Amendment (adopted in 1791).” *Id.* at 106. By “that relationship,” the majority appears to refer to the ostensible principle that “it is peculiarly the duty of the states to defend the public square.” *Id.* at 99.

The majority’s argument begs the very question which must be answered. To be sure, the “general police power” is “retained by the States,” to the exclusion of any *federal*

general police power. *United States v. Lopez*, 514 U.S. 549, 567 (1995). So we know that states generally have primacy *over the national government* for protecting the public peace. But the question here is whether the State governments were understood to exercise a “duty to protect [their] citizens,” Maj. Op. 106, that *also* excludes the citizens’ fundamental right *to protect themselves*. The relative division of governmental powers between the federal and State governments provides no answer to this question at all. And 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*; is desperately ahistorical, for reasons already discussed at length; and cannot be squared with the first principles of American popular sovereignty.

III

Accordingly, the majority is wrong to conclude that H.R.S. § 134-9 does not implicate the right to bear arms whatsoever. Because the statute clearly *does* tread upon conduct protected by the Second Amendment, the next step must be to analyze it under an “appropriate level of scrutiny.” *Jackson v. City & County of San Francisco*, 746 F.3d 953, 960 (9th Cir. 2014). In the framework developed by our court following *Heller*, the first question in determining the appropriate level of scrutiny is this: Does the right of an ordinary citizen to bear arms openly in public for purposes of self-defense fall within the “core” of the Second Amendment—or does it lie somewhere else, at the periphery of the Amendment’s guarantees? *See id.* at 960–61.

The Second Amendment’s text, history, and structure, and the Supreme Court’s reasoning in *Heller*, all point squarely to the same conclusion: Armed self-defense in public is at the very core of the Second Amendment right. At the risk of repeating myself (though it does, apparently, bear repeating), the Second Amendment safeguards both the right *to keep* a firearm and the right *to bear*—or to carry—that firearm. Neither the text of the Amendment nor its historical interpretations suggests that either right has priority over the other. The obvious inference one should draw is that *there is no pecking order* between the “core” status of the Amendment’s expressly enumerated guarantees.¹⁶ The right to armed self-defense—*both* by keeping a gun at home *and* by carrying one elsewhere—lies at the heart of the Second Amendment.

Indeed, *Heller* made clear that the “central” purpose undergirding the Second Amendment is “the inherent right of self-defense.” 554 U.S. at 628; *see also id.* at 599 (describing self-defense as “the *central component* of the right itself”). This is why, for instance, it was particularly troubling to the Court in *Heller* that the District of Columbia had banned handguns—“an entire class of ‘arms’ that is overwhelmingly chosen by American society for that lawful purpose [of self-defense].” *Id.* at 628. To be sure, *Heller* addressed the application of this right to the home—and necessarily so, given that the case involved specifically a challenge to a ban

¹⁶ By way of (illustrative) comparison, courts have been more willing to consider the non-“core” status of gun rights *other* than the expressly enumerated rights to “keep” (*i.e.*, to possess) and to “bear” (*i.e.*, to carry) arms, such as the rights to *sell* certain firearms, or to *manufacture* firearms with or without certain features. *See, e.g., Pena v. Lindley*, 898 F.3d 969, 1009 (9th Cir. 2018) (Bybee, J., concurring in part and dissenting in part); *United States v. Marzzarella*, 614 F.3d 85, 92 n.8 (3d Cir. 2010).

on handgun possession *in the home*. See *id.* at 575–76; see also *Drake*, 724 F.3d at 445 (Hardiman, J., dissenting). But nothing in *Heller* remotely suggests that the core “inherent right of self-defense” was understood to *stop* at the walls of one’s home. Rather, *Heller*’s (and subsequently *McDonald*’s) language suggests exactly the opposite, as it addresses the application of the right of self-defense to the home in *comparative* terms. In these cases, the Court described the “need for defense of self, family, and property” as “*most acute*” within the home, *Heller*, 554 U.S. at 628 (emphasis added), or “*most notabl[e]*” there, *McDonald*, 561 U.S. at 780 (plurality op.) (emphasis added)—suggesting of course that this same core right was felt (even if perhaps less “*acutely*”) elsewhere.

More fundamentally, a great deal of *Heller*’s analysis reflects an abiding concern for the inherent right to defend one’s *person*, not just one’s *home*. For example, the Court cited (without reference to the home) “at least seven [state constitutional provisions that] unequivocally protected an individual citizen’s right to self-defense,” which is “strong evidence that that is how the founding generation conceived of the right.” 554 U.S. at 603. Also without any reference to the home, *Heller* noted that “[a]ntislavery advocates routinely invoked the right to bear arms for self-defense.” *Id.* at 609. Charles Sumner’s famous “Bleeding Kansas” speech, quoted at length in *Heller*, can hardly be read without sensing its vociferous declaration that the Second Amendment’s core reaches self-defense on the wide open spaces of the American frontier: “Never was this efficient weapon [the rifle] more needed in just self-defense, than now in Kansas, and at least one article in our National Constitution must be blotted out, before the complete right to it can in any way be impeached.” *Id.* (quoting Charles Sumner, *The Crime Against Kansas*,

May 19–20, 1856, in *American Speeches: Political Oratory from the Revolution to the Civil War* 553, 606–07 (T. Widmer ed. 2006)); see also *McDonald*, 561 U.S. at 775 (“[O]ne of the ‘core purposes of the Civil Rights Act of 1866 and of the Fourteenth Amendment was to . . . affirm the full and equal right of every citizen to self-defense.’” (quoting Amar, *Bill of Rights*, *supra*, at 264–65))).

Perhaps most tellingly, the Court in *Heller* ultimately likened the *constitutional repugnance* of restrictions on keeping arms inside the home with that of restrictions on bearing arms outside the home. In striking down the District of Columbia’s ban on handgun possession in the home, *Heller* observed that the only restrictions that had historically “come close” to such a “severe” measure were laws that unconstitutionally restricted the open carry of firearms *outside the home* in some states. 554 U.S. at 629 (citing *Nunn*, 1 Ga. at 251; *Andrews*, 50 Tenn. (3 Heisk.) at 187; *Reid*, 1 Ala. at 616–17).

Thus, there can be no avoiding *Heller*’s—and *McDonald*’s—admonition that the Second Amendment guarantees the individual right “to use handguns for the core lawful purpose of self-defense.” *McDonald*, 561 U.S. at 768 (quoting *Heller*, 554 U.S. at 630 (alteration omitted)); see also *Wrenn*, 864 F.3d at 659 (“Whatever motivated the Amendment, at its core was the right to self-defense.”). In turn, there can be no support for a cramped reading of the Second Amendment that renders to “keep” and to “bear” unequal guarantees. As recounted at length above, both the text of the Amendment and the relevant historical sources confirm this understanding. The right to carry a firearm openly for self-defense falls within the core of the Second Amendment.

IV

Because the right to carry a handgun openly for self-defense lies within the “core” of the Second Amendment, Hawaii faces a steep burden in its attempt to justify the constitutionality of section 134-9. Under our court’s framework, if Hawaii’s law “amounts to a destruction” of the core right, it must be held “unconstitutional under any level of scrutiny.” *Silvester v. Harris*, 843 F.3d 816, 821 (9th Cir. 2016). And if it severely burdens (but does not destroy) the core right, it still “warrants strict scrutiny.” *Id.*

Though it is doubtful whether Hawaii could prevail under *either* standard, the unavoidable reality is that Hawaii’s severe deprivation of the core right to carry a firearm in public can only be understood as amounting to a total destruction of such right. It is thus *necessarily* unconstitutional.

A

Section 134-9 limits the open carry of firearms to people “engaged in the protection of life and property,” H.R.S. § 134-9(a), *i.e.*, “private detectives and security guards,” as defined by the County of Hawaii’s implementing regulations, *see* Police Dep’t of Cnty. of Haw., *Rules and Regulations Governing the Issuance of Licenses to Carry Concealed and Unconcealed Weapons* 1 (Oct. 22, 1997). Even those lucky few may carry firearms only when “in the actual performance of [their] duties.” *Id.* at 10. There can be little question that the core Second Amendment rights of Hawaii residents are effectively destroyed by such severe restrictions on who may openly carry a firearm.

Because the Second Amendment protects the right of *individuals*, not *groups* of individuals, to keep and to bear arms, *Heller*, 554 U.S. at 595, the relevant question is the extent to which a law restrains the rights of a typical, law-abiding citizen. *Wrenn*, 864 F.3d at 665 (“[I]f the Amendment is for law-abiding *citizens as a rule*, then it must secure gun access at least for each *typical* member of that class.”). And section 134-9 all but eliminates the right to open carry for such citizens. To restrict open carry to those whose job entails protecting life or property is, necessarily, to restrict open carry to a small and insulated subset of law-abiding citizens. Just as the Second Amendment does not protect a right to bear arms only as an on-duty militia member, it surely does not protect a right to bear arms only as an on-duty security guard. The typical, law-abiding citizen in the State of Hawaii is therefore all but foreclosed from exercising the core Second Amendment right to bear unconcealed arms for self-defense.

It follows that section 134-9, by its own terms, “amounts to a destruction” of a core right and is therefore infirm “[u]nder any of the standards of scrutiny.” *See Heller*, 554 U.S. at 628–29. The County may not constitutionally enforce section 134-9’s limitation on the open carry of firearms to those “engaged in the protection of life and property.”

Hawaii resists this conclusion by arguing that section 134-9 does *not* in fact limit open carry to security guards and those similarly employed. Rather, Hawaii insists that “a private individual may be ‘engaged in the protection of life and property,’ even when it is not part of her job”—and thus the statute is open to everyone, at least in appropriate circumstances. In a vacuum, that might be a perfectly plausible—even natural—way to read the words in the

statute. But in the real world, it is not how the State of Hawaii or its constituent counties have actually interpreted and applied section 134-9.

Counsel for the County acknowledged as much at oral argument before the three-judge panel in this case, stating that, to his knowledge, no one other than a security guard—or someone similarly employed—had ever been issued an open-carry license. Hawaii’s Attorney General, in a September 2018 Opinion Letter on this very subject, likewise failed to provide evidence that any of Hawaii’s counties had ever issued an open-carry permit to even a single person not employed in the security profession. *See generally* State of Haw., Dep’t of Att’y Gen., Opinion Letter No. 18-1, Availability of Unconcealed-Carry Licenses (Sept. 11, 2018) [hereinafter Opinion Letter 18-1]. And the State has not shown that it has taken any action to remedy the putatively “incorrect” interpretation of section 134-9 that continues to be enforced in Hawaii County and throughout the state. Indeed, 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 Opinion Letter. *See* State of Haw., Dep’t of Att’y Gen., *Firearm Registrations in Hawaii, 2019*, at 9 (Mar. 2020), <https://ag.hawaii.gov/cpja/files/2020/03/Firearm-Registrations-in-Hawaii-2019.pdf>; State of Haw., Dep’t of Att’y Gen., *Firearm Registrations in Hawaii, 2018*, at 9 (May 2019), <https://ag.hawaii.gov/cpja/files/2019/05/Firearm-Registrations-in-Hawaii-2018.pdf>.

In the County of Hawaii, the historical dearth of open-carry permits for private citizens is no mere “pattern or practice.” It is a matter of official *policy*. Again, in its 1997 regulations implementing section 134-9’s open-carry

permitting regime, the County created an application process that is open only to “private detectives and security guards.” Police Dep’t of Cnty. of Haw., *Rules and Regulations Governing the Issuance of Licenses to Carry Concealed and Unconcealed Weapons* 1 (Oct. 22, 1997).¹⁷ Although the County now asserts that it does not “understand” the regulation to limit carry permits to such individuals, its 1997 Police Department regulation remains on the books. Further, as Young rightly notes, “[t]he County of Hawaii . . . has not [since] issued any new regulations or even created an application form for private citizens.”

B

In the face of this damning factual record, both Hawaii and the majority urge that we should simply look the other way.

No thanks!

1

For its part, Hawaii argues that its actual enforcement of the statute is irrelevant because “the meaning of a state statute is determined by its text, not by how a local government supposedly applies it.” The case Hawaii cites for that contention, however, is wholly inapposite. In the cited passage, the Hawaii Supreme Court simply recited the

¹⁷ Whereas the State now seeks to create ambiguity about whether its statute limits open carry to security guards and those similarly employed, there can be no such ambiguity that the County’s 1997 regulation does exactly that. Accordingly, such a regulation is unconstitutional in its own right.

anodyne administrative-law maxim that when a court conducts *de novo* review of an agency's statutory construction, "the fundamental starting point for statutory interpretation is the language of the statute itself." *Del Monte Fresh Produce (Haw.), Inc. v. Int'l Longshore & Warehouse Union, Local 142*, 146 P.3d 1066, 1076 (Haw. 2006) (internal quotation marks omitted). But ours is not an administrative-law case; it is a challenge to the constitutionality of Hawaii's severe restrictions on the right of individuals to carry firearms in public. The pertinent question is not whether the County's interpretation of H.R.S. § 134-9 is adequately faithful to the statutory text. Rather, the question is whether Hawaii's restrictions on open public carry are adequately faithful to the Second Amendment. And enforcement history illuminates whether the State's statute and the County's regulation are laws "which, under the pretence of regulating, amount[] to a destruction of the right." *Jackson*, 746 F.3d at 960 (quoting *Heller*, 554 U.S. at 629).

2

Similarly, the majority contends that we may not consider the enforcement history of H.R.S. § 134-9 because Young has supposedly forfeited any as-applied challenge to the statute, limiting our review "to the text of the statute itself." *See* Maj. Op. 25–31. This is simply wrong—and for several reasons.

For starters, the majority's premise that Young's complaint outlined only a "facial" challenge to the statute is dubious. Young's complaint challenged far more than the theoretical facial validity of section 134-9. Unlike in many facial challenges, here section 134-9 has actually been enforced against Young, and he claims that such enforcement—*i.e.*, the denial of his applications for an open-

carry permit—violated the Second Amendment. Indeed, Young alleged that his Second Amendment rights had been violated by the “[c]ombined” statutes, regulations, and actions of “the State of Hawaii, County of Hawaii[,] and the Hawaii County Police Department and its Chief of Police.” More specifically, he alleged that the County had unconstitutionally denied his permit applications even though they “stat[ed] the purpose being for personal security, self-preservation and defense,” and he contended that carry permits had been made available only to those who were “employed by a licensed private security company.”¹⁸ Thus, unlike a stereotypical facial challenge, Young’s claim does not “rest on speculation” about how the statute *might* be enforced, nor does it ask our court to “short circuit” the State’s “opportunity to implement [the statute] . . . [and] to construe the law in the context of actual disputes.” *See Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450–51 (2008). Young’s very point is that the State and County *have* construed and implemented the statute—against him—in a way that is unconstitutional.

¹⁸ The majority’s assertion that “Young did not set out [an as-applied] claim as an issue before our court in his panel appeal,” Maj. Op. 28, is even more inaccurate. Young’s opening brief, filed in 2013, plainly states: “[Hawaii County Police] Chief Kubojiri’s failure to adopt policies which comport with constitutional guidelines has resulted in HRS § 134-9, *as applied to Mr. Young*, to be an unconstitutional deprivation of his constitutional rights. *In the alternative*, if no guidelines could make the statute constitutional then it is unconstitutional on its face.” And it is of no moment that the panel opinion referred to “several . . . arguments” that Young had abandoned or waived on appeal. *Id.* (quoting *Young*, 896 F.3d at 1050 n.3). The panel expressly listed those claims that Young had forfeited; Young’s as-applied challenge to Hawaii’s restrictions on his ability to carry a handgun openly was not one of them. *See Young*, 896 F.3d at 1050 n.3.

Further, we cannot lose sight of the fact that Young filed his complaint *pro se*—and, as the Supreme Court has instructed, “[a] document filed *pro se* is ‘to be liberally construed,’ and ‘a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers.’” *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam) (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)) (citations omitted). Here, Young’s *pro se* complaint stated clearly, if inartfully, his theory that his Second Amendment rights were violated by the combined effects of H.R.S. § 134-9 and the County’s actual enforcement thereof. Such a claim is clearly sufficient to put the State and County’s record of enforcement of section 134-9 at issue.

More fundamentally, the majority’s contrary conclusion relies on the erroneous notion that there is a bright-line categorical distinction between facial and as-applied challenges. The Supreme Court has cautioned that “the distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge. The distinction . . . goes to the *breadth of the remedy* employed by the Court, not what must be pleaded in a complaint.” *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 331 (2010) (emphasis added); see also *Bucklew v. Precythe*, 139 S. Ct. 1112, 1128 (2019) (“The line between facial and as-applied challenges can sometimes prove ‘amorphous’ and ‘not so well defined.’” (citations omitted)); Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321, 1324 (2000) (“[T]here is no single distinctive category of facial, as opposed to as-applied, litigation. Rather, all challenges to statutes arise when a particular litigant

claims that a statute cannot be enforced against her. . . . [I]t is more misleading than informative to suggest that ‘facial challenges’ constitute a distinct category of constitutional litigation.”). Indeed, whether a constitutional challenge is described as “facial” or “as-applied” “*does not speak at all* to the substantive rule of law necessary to establish a constitutional violation.” *Bucklew*, 139 S. Ct. at 1127 (emphasis added). And, at least in the First Amendment context—which guides our analysis of “the extent to which a challenged prohibition burdens the Second Amendment right,” *Jackson*, 746 F.3d at 961—even where the bare text of a statute is theoretically capable of competing constructions, we analyze a “facial” attack to the statute in light of how it has actually been interpreted and applied. *See, e.g., Forsyth County v. Nationalist Movement*, 505 U.S. 123, 131 (1992) (“In evaluating [a] facial challenge, we must consider the county’s authoritative constructions of the ordinance, including its own implementation and interpretation of it.”); *Gooding v. Wilson*, 405 U.S. 518, 524 (1972).

Regardless of its particular phrasing, the essence of Young’s claim is unquestioned: He contends that the State and County of Hawaii have enacted and enforced against him sweeping prohibitions on ordinary, non-security-guard citizens’ right to carry a firearm openly in public, in violation of the Second Amendment. That claim necessarily questions not only the nature of the statute that Hawaii enacted but moreover how that statute has been interpreted and enforced by the responsible government officials. And our analysis of such a claim surely does not turn on which ill-defined label one might now attach to it. *Cf. Bucklew*, 139 S. Ct. at 1128 (“To hold now, for the first time, that choosing a label changes the meaning of the Constitution would only guarantee a good deal of litigation over labels, with lawyers

on each side seeking to classify cases to maximize their tactical advantage.”).

C

So, at least as informed by the draconian enforcement history of section 134-9, such law unquestionably destroys ordinary Hawaiians’ freedom to carry a handgun for self-defense in public. But that understates the point. For *even if* we chose to ignore the enforcement history showing that the County has never issued an open-carry permit to a non-security-guard citizen, section 134-9 would still be unconstitutional on its terms.

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. U.S. Const. amend. II (emphasis added). And in *Heller*, the Court left no doubt that “the people” refers to “all Americans.” 554 U.S. at 580–81. “[I]f the Amendment is for law-abiding citizens *as a rule*, then it must secure gun access at least for each *typical* member of that class.” *Wrenn*, 864 F.3d at 665. Indeed, although “certain weapons or activities [may] fall outside the scope of the” Second Amendment, “certain *people*” do not. *Kanter v. Barr*, 919 F.3d 437, 452 (7th Cir. 2019) (Barrett, J., dissenting).

Thus, for Hawaii’s measure to be constitutional, at the very least, it must not destroy the right of the typical, law abiding citizen to carry a gun in public for self-defense. By its very terms, section 134-9 plainly does just that—and does so even if we set aside its requirement that firearms carriers be “engaged in the protection of life and property.” The language of the statute allows only those individuals who can

show “an exceptional case” or special “urgency” to be eligible to carry a gun. H.R.S. § 134-9(a).¹⁹ The Hawaii Attorney General’s 2018 Opinion Letter only exacerbated this

¹⁹ To be sure, Hawaii argues—and the majority intimates—that history countenances such an approach. Young’s interest in self-defense, they say, is merely “generalized,” whereas the Second Amendment and its English forbearers protected a right to open carry only in service of a “particularized” need for self-defense. *See* Maj. Op. 54–55. This putative distinction, however, proves specious.

For example, the majority accepts the invitation of Hawaii’s en banc brief to read Lord Coke as advocating the proposition “that the law did not allow public carry merely ‘for doubt of danger.’” *See id.* at 54–55; Edward Coke, *The Third Part of the Institutes of the Laws of England* 161 (London, R. Brooke 1797). But what Hawaii would pass off as a *general* maxim of English law is in fact a comment on the very particular and unusual case of Sir Thomas Figett. There, “doubt of danger” was held an insufficient defense for Figett’s going armed “*in the palace*,” and “*before the justice[s] of the kings bench*.” Coke, *supra*, at 161–62 (emphasis added). Ironically enough, Figett *did* assert a “particularized” threat in seeking to justify his carrying of a weapon, stating that he had concrete reason to fear an attack from one “Sir John Trevet knight.” *Id.* The failure of Figett’s defense, then, had nothing to do with how “generalized” or “particularized” his interests in self-defense were, and everything to do with the fact that he had gone armed in uniquely “sensitive places” where carry was *categorically* prohibited. *Cf. Heller*, 554 U.S. at 626.

Similarly, the majority reads Serjeant Hawkins as “recogniz[ing] that the . . . desire for proactive self-defense was not a good enough reason to go armed openly.” Maj. Op. 54. Yet this contradicts what Hawkins actually wrote. In the treatise relied upon by Hawaii and the majority, he expressly clarified that “no wearing of Arms is within the meaning of th[e] Statute [of Northampton],” *even if* “it be accompanied with such Circumstances as are apt to terrify the People,” so long as one had “arm[ed] himself to suppress Rioters, Rebels, or Enemies” or “upon a Cry made for Arms to keep the Peace.” Hawkins, *supra*, at 136 §§ 9–10. That is to say, Hawkins placed “generalized” and “particularized” interests in self-defense on equal footing.

problem by offering “illustrative examples” of *classes of persons* whom the Attorney General “believe[s] . . . could present a sufficient urgency or need for protection under the statute,” such as political activists, state’s witnesses, private security guards, psychiatrists, physicians, attorneys, business owners, entertainers, and bank employees. *See* Opinion Letter 18-1, *supra*, at 8–9. But no matter the particular categories of people who fall in or out of the State and County’s favor, Hawaii’s statute necessarily destroys the right to carry a firearm for self-defense for all “typical . . . law-abiding citizens” who are not deemed to be “exceptional.” *Wrenn*, 864 F.3d at 665. That would be no less true if we were to set aside the ample factual record showing that Hawaii has *also further extinguished* the public-carry rights of those who are not security guards.

In short, no matter how much one cares to look to H.R.S. § 134-9’s troubling and well-documented enforcement history, we cannot escape the conclusion that it is “unconstitutional under any level of scrutiny.” *Jackson*, 746 F.3d at 961.

V

The Second Amendment’s text, history, and structure—as interpreted in light of the Supreme Court’s binding precedents—all converge on an unequivocal conclusion: At its core, the Second Amendment protects the ordinary, law-abiding citizen’s right to carry a handgun openly for purposes of self-defense outside the home.

Despite an exhaustive historical account, the majority has unearthed nothing to disturb this conclusion. At 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 (for example, by prescribing particularly dangerous guns that may not be carried or particularly sensitive places into which guns may not be carried). But nothing in the history—both by my own read and as reported by the majority itself—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. The majority cites nothing that could justify such an extravagant interpretation of the record of gun regulation in this country, and I do not share the majority’s eagerness to impart one by *ipse dixit*.

Most alarming is the conjunction of today’s holding and our court’s earlier holding that the *concealed* carry of firearms in public is not protected by the Second Amendment “in any degree.” See *Peruta v. County of San Diego*, 824 F.3d 919, 939 (9th Cir. 2016) (en banc). For the more than 60 million people within the nine western states of this circuit, the combined effect of these two opinions is to remove *all* forms of public carry—whether open *or* concealed—from the protections of the Second Amendment. In so doing, our circuit has not merely demoted “the right of the people to . . . bear Arms,” U.S. Const. amend. II, to the status of “a second-class right” but has extinguished its status as a right altogether. See *McDonald*, 561 U.S. at 780 (plurality op.). It is no badge of honor that we now become the first and only court of appeals to do so.

Accordingly, and for the reasons expressed above, I would hold that both H.R.S. § 134-9 and the 1997 County regulation destroy the core right to carry a gun for self-

defense outside the home and are “unconstitutional under any level of scrutiny.” *Jackson*, 746 F.3d at 961.²⁰

To be sure, I do not reach this conclusion without appreciation for the real and serious problem of gun violence—a problem which I do not take lightly, and which the State of Hawaii “has understandably sought to fight . . . with every legal tool at its disposal.” *Wrenn*, 864 F.3d at 667. And nothing in my analysis would prevent the State from *regulating* the right to bear arms, for the Second Amendment leaves the State with “a variety of tools for combatting [the problem of gun violence], including some measures regulating handguns.” *Heller*, 554 U.S. at 636. Yet, for better or for worse, the Second Amendment *does* protect a right to carry a firearm openly for self-defense in public—and Hawaii’s near complete ban on the open carry of handguns cannot stand.

I cannot join an opinion that would flout the Constitution by holding, in effect, that “in regulating the manner of bearing arms, the authority of [the State] has no other limit than its own discretion.” *Reid*, 1 Ala. at 616. While many respectable scholars and activists might find virtue in a firearms-carry regime that restricts the right to a privileged few, “the enshrinement of constitutional rights necessarily takes certain policy choices off the table.” *Heller*, 554 U.S. at 636.

I most respectfully dissent.

²⁰ Because I would reverse the district court on Second Amendment grounds, I would decline to reach Young’s prior-restraint and due-process claims.

R. NELSON, Circuit Judge, with whom CALLAHAN and IKUTA, Circuit Judges, join, dissenting:

I concur with Judge O’Scannlain’s dissent concluding that Hawaii Revised Statute 134-9 violates the Second Amendment. If the statute is facially unconstitutional, it is also unconstitutional as-applied. *See, e.g., Powell’s Books, Inc. v. Kroger*, 622 F.3d 1202, 1207 n.1 (9th Cir. 2010). The majority, however, errs not only in holding the statute facially constitutional, but also in rejecting Young’s as-applied challenge. *See Hargis v. Foster*, 312 F.3d 404, 410, 412 (9th Cir. 2002) (noting the “inquiry does not end with [a] facial analysis” and reversing and remanding on the as-applied challenge).

The majority summarily dismisses Young’s Second Amendment as-applied claim with far less respect than we have given other constitutional claims. *See McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010) (plurality opinion) (recognizing the Second Amendment is not a “second-class” constitutional right). Indeed, the majority’s holding that Young failed to plead an as-applied challenge may be its longest lasting legacy, as it effectively reverses several of our prior cases. It will preclude a host of future as-applied constitutional challenges under the First, Fourth, Fifth, and Eighth Amendments previously recognized by this court—especially for *pro se* civil rights plaintiffs. The majority should have at least remanded for the district court to address Young’s as-applied challenge or allow him to amend his complaint.

I also write separately to highlight the brazenly unconstitutional County of Hawaii (“County”) Regulations applying H.R.S. § 134-9. There should be no dispute that any

law or regulation that restricts gun ownership only to security guards violates the Second Amendment. The County Regulations squarely present this issue. But the majority sidesteps it relying on a theory never briefed by the parties and not supported by Hawaii precedent. Because the County Regulations were the operative basis for denying Young a permit and remain legally enforceable, Young should be allowed on remand to challenge his denial under H.R.S. § 134-9. Accordingly, I respectfully dissent.

I

Young brought both a facial and an as-applied challenge to H.R.S. § 134-9 and the County Regulations. He sought general relief—asking to strike down the statute—but also personal relief—requesting to be granted a firearm permit. Moreover, he explicitly preserved his as-applied challenge in his complaint, opposition to the motion to dismiss, and on appeal.

The district court erred by dismissing Young’s complaint with prejudice while mischaracterizing his separate as-applied claim and not allowing him to amend his complaint. And the majority errs in concluding Young failed to plead an as-applied challenge. Young’s complaint pleaded that under H.R.S. § 134-9 and the County Regulations he was denied a firearm permit because he was not a security guard. The majority should have, at a minimum, vacated the district court’s order and remanded for the district court to address the as-applied challenge in the first instance or to allow Young to amend his complaint.

As a threshold matter, Young was *pro se* when he litigated the motion to dismiss before the district court;¹ thus, this court liberally construes his filings. *Ross v. Williams*, 950 F.3d 1160, 1173 n.19 (9th Cir. 2020) (en banc). “The obligation to construe *pro se* filings liberally means courts must frequently look to the contents of a *pro se* filing rather than its form.” *Id.*; see also *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam). This obligation to give the *pro se* complainant “the benefit of any doubt” is heightened “particularly in civil rights cases,” such as this one. *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010) (quoting *Bretz v. Kelman*, 773 F.2d 1026, 1027 n.1 (9th Cir. 1985) (en banc)).

This benefit of the doubt applies with even greater force when considering whether a claim raises a facial challenge, an as-applied challenge, or both. See *Real v. City of Long Beach*, 852 F.3d 929, 934 (9th Cir. 2017) (considering both facial and as-applied challenges even where appellant “did not clearly state to the district court whether his challenge was as-applied or facial”);² *Read v. Haley*, 650 F. App’x 492, 494 n.1 (9th Cir. 2016) (“Mindful that we construe *pro se* pleadings liberally, we view [plaintiff’s] claims as facial attacks that are not barred” even though plaintiff’s “prolix”

¹ Young’s counsel appeared on December 21, 2012, after the notice of appeal was filed.

² Indeed, we held the plaintiff in *Real*, represented by counsel, brought an as-applied challenge though he had never applied for a permit and his complaint never mentioned the words “as-applied.” 852 F.3d at 934 (holding *Real* had standing to bring an as-applied challenge since he “alleged an intention” to undertake constitutionally protected activity but “ordinances proscribe[d] his intended conduct”). Just like Young, *Real* stated in his response opposing the motion to dismiss that he brought an as-applied challenge.

made it “understand[able] why the district court considered his Complaint to assert ‘as applied’ challenges” (emphasis added) (citation omitted)); *Morrison v. Peterson*, 809 F.3d 1059, 1062 (9th Cir. 2015) (considering both facial and as-applied challenges, though *pro se* litigant characterized his challenge as only as-applied);³ *United States v. Kaczynski*, 551 F.3d 1120, 1124 (9th Cir. 2009) (recognizing an as-applied claim even though *pro se* appellant “characterize[d] his claim as a purely facial legal challenge”); *United States v. Kafka*, 222 F.3d 1129, 1130 (9th Cir. 2000) (considering an as-applied challenge even where “it [was] unclear whether Kafka [was] making only a facial challenge . . . or whether he [was] also asserting an ‘as applied’ challenge”);⁴ *Asselin v. Santa Clara Cnty.*, 185 F.3d 865 (9th Cir. 1999) (unpublished) (holding that the “complaint, charitably read, also allege[d] that the County’s policy was unconstitutional as applied” where it asserted that the plaintiff had “merely discussed religion with the minor” and thus the “as-applied challenge [was] entitled to proceed past the pleading stage”).

This benefit of the doubt has greater force because “[t]he line between facial and as-applied challenges can sometimes prove ‘amorphous.’” *Bucklew v. Precythe*, 139 S. Ct. 1112,

³ Morrison’s complaint never used the words “as-applied” or “facial” and included only two sentences that could have raised a facial challenge. In his opposition to the motion to dismiss, Morrison only stated he was challenging the statute as-applied.

⁴ The government’s brief argued that Kafka brought only a facial challenge because “[t]he district court specifically inquired into the Defendant’s wish to present a case purely as a matter of law, or if he wished to make a factual record” and Kafka had “declined to present any facts.” Neither Kafka’s Opening Brief or Reply Brief ever used the words “as-applied.”

1128 (2019) (quoting *Elgin v. Dep't of Treasury*, 567 U.S. 1, 15 (2012)). “The label is not what matters.” *John Doe No. 1 v. Reed*, 561 U.S. 186, 194 (2010) (noting whether the words “as-applied” were used in a complaint is not determinative). A claim can “obviously ha[ve] characteristics of both” types of challenges. *Id.* And “[a]s-applied challenges . . . may be coupled with facial challenges.”⁵ *Foti v. City of Menlo Park*, 146 F.3d 629, 635 (9th Cir. 1998). Accordingly, “the distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge.” *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 331 (2010).

Rather, the “distinction . . . goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint.” *Id.* (citation omitted). A court should look at the “claim and the relief that would follow” to determine the type of claim brought. *See John Doe No. 1*, 561 U.S. at 194. And a court should consider different types of challenges as the “exercise of its judicial responsibility” demands. *See Citizens United*, 558 U.S. at 333. Thus, this court must look to the substance of the complaint and the remedy to identify what type of claims are brought. *See Isaacson v. Horne*, 716 F.3d 1213, 1230 (9th Cir. 2013). The majority effectively overturns our precedents and ignores Supreme Court direction to establish a new vague standard for pleading an as-applied challenge. *See Maj. Op.* at 27, 28–30.

⁵ It is far different when a party, represented by counsel, specifically pleads only a facial challenge and affirmatively disclaims any as-applied challenge. *See Calvary Chapel Bible Fellowship v. Cnty. of Riverside*, 948 F.3d 1172, 1177 (9th Cir. 2020).

Under long-standing precedent, there is ample support that Young’s *pro se* complaint alleges *both* a facial and an as-applied challenge. Young argues he was denied a permit and that this denial violated his constitutional rights. Crucially, he seeks multiple forms of relief: first, to strike down the statute as part of his facial challenge; and second, to be personally granted a firearm permit as part of his as-applied challenge. *See Citizens United*, 558 U.S. at 331. Furthermore, he refers to himself and his efforts to gain a firearm permit numerous times throughout the complaint. *See Foti*, 146 F.3d at 635 (“An as-applied challenge contends that the law is unconstitutional as applied to the litigant’s particular . . . activity.”).

As just a few examples, Young alleges:

- “Plaintiff, recently, on two occasions . . . applied for a personal permit On both occasions Plaintiff was denied a permit, by the Defendant Kubojiri, pursuant to H.R.S. 134-9, citing that ‘...only in exceptional cases or a demonstrated urgency...’, which is yet to be defined, the Chief of Police ‘...may grant...’ a permit, subject to his personal opinion.”
- “Within the jurisdiction of Hilo County and according to its police administrator, it is a matter of routine procedure that a Concealed Carry Weapons (CCW) permit is not to be issued, but only upon demonstration of an actual menace and subjected to the discretion of the local county Chief of Police.”

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- “Plaintiff is denied and prohibited from exercising his individual second amendment right.”
 - He suffered “irreparable emotional and physical distress” as a result of the “present enforcement of H.R.S. 134-9 and H.R.S. 134-6.”
 - “Plaintiff has a clear and unambiguous claim of right to property in the Second Amendment of the Constitution of the United States.”

And in his opposition to the motion to dismiss, Young explicitly challenged H.R.S. § 134-9 both “on its face and or the application thereof,” showing his intent to bring both a facial and an as-applied challenge. Young also argues on appeal:

- In his 2013 Opening Brief, “Chief Kubojiri’s failure to adopt policies which comport with constitutional guidelines has resulted in HRS §134-9, as applied to Young, to be an unconstitutional deprivation of his constitutional rights.”⁶

⁶ As Judge O’Scannlain notes, the three-judge panel did not find Young forfeited his as-applied challenge. O’Scannlain Dissent at 187 n.18. To the extent that the majority believes otherwise, Maj. Op. at 29–30, “a party does not necessarily forfeit an issue by first raising it” in en banc proceedings. *United States v. Hernandez-Estrada*, 749 F.3d 1154, 1160 (9th Cir. 2014) (en banc). Indeed, the “exercise” of our “judicial responsibility” dictates considering the as-applied challenge. *See*

- “Young challenged the law and regulations both facially and as-applied ‘to the facts of’ his case,” citing *Citizens United*, 558 U.S. at 331.
- “At every stage of the proceedings,” Young, proceeding *pro se*, raised an as-applied challenge, which has been preserved on appeal.
- “Mr. Young’s claim that H.R.S. § 134-9 is unconstitutional both facially and as-applied by the County to Mr. Young.”

Young thus “brings a paradigmatic as-applied challenge, arguing that it is unconstitutional to apply the [Hawaii statute and County Regulations] to him because, given all the circumstances, his ability to” exert his Second Amendment rights is “unduly constricted.” *Hoye v. City of Oakland*, 653 F.3d 835, 857 (9th Cir. 2011).

Citizens United, 558 U.S. at 333. Particularly here, since “these arguments are intertwined with the validity of the claim.” *Engquist v. Or. Dep’t of Agric.*, 478 F.3d 985, 996 n.5 (9th Cir. 2007), *aff’d*, 553 U.S. 591 (2008).

Moreover, the majority makes much of the fact that the three-judge panel did not address Young’s as-applied challenge. Maj. Op. at 28. But as the majority acknowledges, since the three-judge panel (rightfully) held the statute to be facially unconstitutional, the statute was “void *in toto*” and unconstitutional as-applied; thus, there was no need for the three-judge panel to address the as-applied challenge separately. See Maj. Op. at 26–27; *Powell’s Books*, 622 F.3d at 1207 n.1.

Despite these plain and consistently detailed allegations and arguments, the majority asserts Young's as-applied challenge is "[a]t best . . . buried in his complaint and not well pleaded." Maj. Op. at 28. It holds that Young's arguments, presented repeatedly throughout Young's complaint, opposition to the motion to dismiss, and on appeal, are not "specific[] and distinct[]" enough to permit review.⁷ Maj. Op. at 29–30. The majority's summary conclusion is belied by a plain reading of Young's complaint and his subsequent filings, as detailed above. And we have in numerous cases addressed as-applied challenges in much thinner vehicles. *See, e.g., Real*, 852 F.3d at 934; *Kaczynski*, 551 F.3d at 1124. If nothing else, the fact that Young asked for a specific as-applied remedy in a firearm permit means he more than adequately alleged an as-applied challenge. *See Citizens United*, 558 U.S. at 331. The majority's contrary conclusion impermissibly "invites pleading games." *Bucklew*, 139 S. Ct. at 1128 (noting it "would only guarantee a good deal of litigation over labels, with lawyers on each side seeking to classify cases to maximize their tactical advantage").

The majority thus offhandedly establishes a new heightened pleading standard for *pro se* civil rights litigants that is both legally unfounded and practically concerning. Maj. Op. at 29–30. The 35-year old case it cites to support this proposition, *Miller v. Fairchild Industries, Inc.*, involved a *represented* party's appellate brief, not a *pro se* litigant's

⁷ The majority also characterizes Young's *pro se* civil rights complaint as "lengthy and rambling." Maj. Op. at 25 n.3. On the one hand, the majority thus criticizes Young's *pro se* complaint for his verbose diction, and on the other, the majority faults Young for not alleging enough. Even besides this contradiction, such uncharitable characterizations are unhelpful to resolving this case.

first un-amended civil rights complaint. 797 F.2d 727, 738 (9th Cir. 1986). Whether this heightened standard might be expected of seasoned counsel, we have never applied it to *pro se* citizens seeking to vindicate their constitutional rights.⁸ *Erickson*, 551 U.S. at 94 (“[A] *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers.” (internal quotation marks and citations omitted)). In any event, Young’s voluminous as-applied pleadings are far more than the “bare assertion[s]” the majority characterizes them to be. *See* Maj. Op. at 30.

Consider what this holding of the en banc court means: any time a government agency hides behind an opaque policy to deny someone a constitutional right, a *pro se* litigant is held to some rigorous yet herein undefined pleading standard to even have his challenge considered in the first place. The majority holding thus overrules many prior panel opinions and ignores Supreme Court precedent. If Young’s pleadings here are insufficient even to warrant consideration in deciding a motion to dismiss, then a host of pleadings in our prior cases are now no longer sufficient either. *See, e.g., Real*,

⁸ Though the majority pays lip service to the relaxed *pro se* pleading standard, the majority nevertheless applies *Miller*’s stringent “specific[] and distinct[]” standard—dealing with a represented party’s appellate brief—to Young’s *pro se* complaint. Maj. Op. at 28–30. And the majority exacerbates its error by inappositely relying on *Greenwood v. F.A.A.*, where the represented appellant raised an issue “for the first time on appeal.” 28 F.3d 971, 977 (9th Cir. 1994). The majority ignores the consistently detailed allegations in Young’s complaint. Moreover, it also ignores our duty to look at “the breadth of the remedy employed by the Court” as the “exercise of its judicial responsibility” demands. *Citizens United*, 558 U.S. at 331, 333; *see also Isaacson*, 716 F.3d at 1230.

852 F.3d at 934; *Kaczynski*, 551 F.3d at 1124; *supra* at 197–98.

Indeed, the district court itself recognized that Young challenged the statute as-applied, noting “Plaintiff requests an injunction against the enforcement of HRS Chapter 134.” *Young v. Hawaii*, 911 F. Supp. 2d 972, 984 (D. Haw. 2012). But the district court “erroneously treated the as-applied challenge brought in this case as a facial challenge,” *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1140 (9th Cir. 2009), concluding Young “is actually challenging the constitutional validity of Hawaii’s Firearm Carrying Laws” *Young*, 911 F. Supp. 2d at 984. In reality, Young properly pleaded both an as-applied and a facial challenge.

The district court erred by dismissing Young’s claim without considering whether he pleaded sufficient facts to support his as-applied challenge. *See La. Mun. Police Emps.’ Ret. Sys. v. Wynn*, 829 F.3d 1048, 1063 (9th Cir. 2016) (“[C]ourts ruling on a motion to dismiss ‘must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss’” (quoting *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007))). “To the extent that the district court considered [Young’s] complaint to rest on a facial, rather than an as-applied challenge, . . . it erred.” *See Hoehne v. Cnty. of San Benito*, 870 F.2d 529, 534 (9th Cir. 1989).

Moreover, the majority faults Young, a *pro se* litigant, for not pursuing reconsideration instead of appeal. Maj. Op. at 27. Yet we have never required even a *represented* party, let alone a *pro se* party, to seek reconsideration to preserve an argument for appeal. The majority acknowledges that Young was not required to seek reconsideration, but nonetheless

faults him for choosing to immediately appeal. Maj. Op. at 27 & n.5.

The majority punishes Young for asking us to review *de novo* the district court’s order viewing all allegations in the light most favorable to him, instead of first attempting to convince the district court his case fell under the “highly unusual circumstances” warranting reconsideration. *See Guenther v. Lockheed Martin Corp.*, 972 F.3d 1043, 1058 (9th Cir. 2020) (citation omitted). The majority thus suggests Young should have “relitigate[d] old matters” before appealing, or else risk forfeiting his as-applied challenge. *See Exxon Shipping Co. v. Baker*, 554 U.S. 471, 485 n.5 (2008) (citation omitted).

Again, consider what this holding means. A *pro se* plaintiff repeatedly raises an as-applied challenge in his complaint and opposition to a motion to dismiss; it is recognized by the district court, but then erroneously categorized only as a facial challenge upon final judgment. And we fault the *pro se* civil rights litigant for immediately appealing the final judgment instead of pursuing reconsideration. The majority’s conclusion lacks both legal authority and equitable justification.

Additionally, it is not sensible here to affirm the dismissal of an as-applied challenge that the district court did not address in the first instance.⁹ This court need only decide that

⁹ The majority suggests it would “manufacture jurisdictional issues” to remand for the district court to consider the as-applied challenge erroneously labeled as a facial challenge. Maj. Op. at 28 n.6. Not so. Our court has appellate jurisdiction over final judgments of the district court, including ones that “erroneously treated the as-applied challenge brought

an as-applied challenge was properly raised and should not address whether Young’s complaint met the 12(b)(6) standard in the first instance. *See, e.g., CPR for Skid Row v. City of Los Angeles*, 779 F.3d 1098, 1111 (9th Cir. 2015); *Planned Parenthood of Greater Wash. & N. Idaho v. U.S. Dep’t of Health & Hum. Servs.*, 946 F.3d 1100, 1111 (9th Cir. 2020) (“An appellate court should usually wait for the district court to decide in the first instance.”); *Puente Arizona v. Arpaio*, 821 F.3d 1098, 1110 (9th Cir. 2016) (remanding for consideration of a pending as-applied challenge which “should be addressed in the first instance by the district court”); *Henry v. Cnty. of Shasta*, 132 F.3d 512, 522 (9th Cir. 1997), *opinion amended on denial of reh’g*, 137 F.3d 1372 (9th Cir. 1998) (remanding an as-applied challenge erroneously dismissed by the district court because the challenge “depend[ed] on questions of fact and law . . . that the district court did not address, [and thus] we prefer not to decide it initially on appeal” (citation omitted)).

But the majority apparently did reach the issue, holding that Young “never pleaded facts to support an as-applied challenge.” Maj. Op. at 27. The majority’s holding again disregards Supreme Court precedent.

Young’s complaint alleged “sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)

. . . as a facial challenge.” *See Stormans, Inc.*, 586 F.3d at 1140; *CPR for Skid Row v. City of Los Angeles*, 779 F.3d 1098, 1111 (9th Cir. 2015) (remanding where district court did not address crucial part of as-applied challenge); *Foti*, 146 F.3d at 635, 640–42 (recognizing plaintiffs’ as-applied challenge even though the district court considered only the facial challenge and expressly declined to consider the as-applied challenge).

(quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Young challenged how the County applied the statute to deny his permit application in June 2012. His allegations were plausible based on the County Regulations and legal grounds as reasonably understood at the time he filed his complaint—alleging he had applied but was not granted a permit because he was not a security guard, as required by the County Regulations. For example, Young:

- Challenged the denial of his permit due to the “engaged in the protection of life and property” clause because “as used, [it] implies a person must currently be a member of a law enforcement agency or employed by a private security company, licensed to do business in the State of Hawaii, and engaged in the employment of protecting a paying third party’s life and property.”
- Stated that county police have “unbridle[d] discretionary authority to decide whether an applicant possesses an ‘exceptional case’ or ‘sufficient urgency’ to qualify for a permit to carry a concealed or unconcealed firearm, without further identifying the parameters of the additional requirement to the point where Plaintiff knows whether or not he is within the boundaries of the law.”
- Argued “since Defendants collectively enforce H.R.S. 134 and 134-9 the irreparable injury claimed was both

threatened at time of Plaintiff’s filing of complaint and continues to occur in the present instance.”

- Questioned “[h]ow does the Hawaii County Chief of Police Harry Kubojiri apply and enforce H.R.S. 134-9?”

Young pleaded he met the requirements of H.R.S. § 134-9 in all other respects, including the provision of being “engaged in protection of life and property,” 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.”¹⁰

Even under the majority’s view, we should have—at a minimum—remanded to allow Young to amend his complaint. *See* Fed. R. Civ. P. 15 (courts “should freely give leave [to amend] when justice so requires”). Indeed, Hawaii specifically suggested this court remand to allow Young to amend his complaint. “Rule 15’s policy of favoring amendments to pleadings should be applied with extreme liberality,” *Price v. Kramer*, 200 F.3d 1237, 1250 (9th Cir. 2000) (internal quotation marks and citation omitted),

¹⁰ This court should not decide in the first instance to dismiss Young’s complaint based on a failure to plead according to the non-binding Hawaii Attorney General’s Opinion (“AG Opinion”) issued over six years after his complaint was filed—in response to the panel opinion upholding his facial challenge. Such positions taken purely for the sake of litigation are entitled to little, if any, weight. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2417 & n.6 (2019).

“guided by the underlying purpose of Rule 15—to facilitate decision on the merits rather than on the pleadings or technicalities,” *Eldridge v. Block*, 832 F.2d 1132, 1135 (9th Cir. 1987) (internal quotation marks and citation omitted).

Thus, “a district court should grant leave to amend *even if* no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts.” *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc) (emphasis added) (internal quotation marks and citations omitted). Indeed, a “*pro se* litigant [is] entitled to procedural protections, including [the] right to amend [a] complaint unless futile.” *Eldridge*, 832 F.2d at 1136 (emphasis added) (citation omitted); *see also Houghton v. South*, 865 F.2d 264 (9th Cir. 1988) (unpublished) (holding that the “policy of liberality under Rule 15 for *pro se* plaintiffs” means “the district court should have allowed Houghton to supplement his complaint . . . on remand from the first appeal” to “allege[] an ‘as applied’ challenge”). Remand is particularly warranted here since Young has challenged the operative County Regulations. Given the changed legal circumstances, including Hawaii’s recent AG Opinion, Young is more than entitled to amend his complaint.

Young’s as-applied challenge should not have been ignored by the district court or the majority to “foreclose a future as applied challenge.”¹¹ *See Nordyke v. King*, 319 F.3d

¹¹ Without remand, Young could suffer claim or issue preclusion if this court affirms the dismissal of his complaint with prejudice. *See Littlejohn v. United States*, 321 F.3d 915, 919–20 (9th Cir. 2003) (“Claim preclusion prevents the relitigation of claims previously tried and decided.” (citation omitted)); *Scafidi v. Las Vegas Metro. Police Dep’t*,

1185, 1190 n.3 (9th Cir. 2003). Indeed, the First, Third, Fourth, Seventh, Eighth, and D.C. Circuits have held that a litigant may be able to raise an as-applied challenge even to presumptively lawful firearms prohibitions. *Binderup v. Att’y Gen. U.S.*, 836 F.3d 336, 343–48 (3d Cir. 2016) (en banc); *Schrader v. Holder*, 704 F.3d 980, 988–89 (D.C. Cir. 2013); *United States v. Moore*, 666 F.3d 313, 316–17 (4th Cir. 2012); *United States v. Torres-Rosario*, 658 F.3d 110, 113 (1st Cir. 2011); *United States v. Williams*, 616 F.3d 685, 691–92 (7th Cir. 2010); *see also United States v. Woolsey*, 759 F.3d 905, 909 (8th Cir. 2014) (hearing as-applied challenge to § 922(g)(1) but not mentioning *Heller*).

The district court’s failure to consider the as-applied challenge separately, even after dismissing the facial challenge, was error. The majority compounds this error by refusing to remand the case to allow consideration—or amendment—of an as-applied challenge. *See Norse v. City of Santa Cruz*, 629 F.3d 966, 970 (9th Cir. 2010) (en banc) (noting we have rejected a facial challenge but remanded the as-applied challenge); *Menotti v. City of Seattle*, 409 F.3d 1113, 1156 (9th Cir. 2005) (rejecting the facial challenges but reversing and remanding the as-applied challenge). In doing so, the majority errs by not “exercis[ing] . . . its judicial

966 F.3d 960, 963 (9th Cir. 2020) (“Issue preclusion, or collateral estoppel, bars successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment.” (internal quotation marks and citations omitted)). Thus, it is unclear whether he could bring his complaint anew given the current disposition of the case. *See Outdoor Media Dimensions Inc. v. Crunican*, 202 F.3d 278 (9th Cir. 1999) (unpublished) (affirming a facial challenge but “remand[ing] so that the judgment can be amended to state that it is without prejudice as to an ‘as applied challenge’”).

responsibility” and considering the as-applied challenge. *See Citizens United*, 558 U.S. at 333.

II

Though consideration of the as-applied challenge is better left to the district court, the plain unconstitutionality of the County Regulations governing Young’s application for a firearm permit warrants mention. In 1997, the County promulgated its Regulations governing its issuance of firearm licenses under H.R.S. § 134-9. Police Dep’t of Cnty. of Haw., *Rules and Regulations Governing the Issuance of Licenses* 10 (Oct. 22, 1997). Hawaii does not dispute that the County Regulations remain on the books. The County may choose to enforce them at any time.

Hawaii’s counsel at en banc oral argument argued the AG Opinion (issued six years after Young filed his complaint) controls to the extent the County Regulations are inconsistent with the AG Opinion. And Hawaii asserts that this court should defer to the County’s interpretation of its own Regulations.

There has been no preemption under Hawaii state law here and the non-binding AG Opinion does not control, despite the majority’s suggestion to the contrary. *Contra* Maj. Op. at 19–22. “[A] municipal ordinance may be preempted pursuant to HRS § 46–1.5(13) if (1) it covers the same subject matter embraced within a comprehensive state statutory scheme disclosing an express or implied intent to be exclusive and uniform throughout the state or (2) it conflicts with state law.” *Richardson v. City & Cnty. of Honolulu*, 868 P.2d 1193, 1209 (Haw. 1994). There is no express preemption clause in the state statute at issue here, nor any

clear intent to preempt regulations such as the County's. *See generally* H.R.S. § 134 *et seq.*; *see also Syngenta Seeds, Inc. v. Cnty. of Kauai*, 842 F.3d 669, 675 (9th Cir. 2016) (“[T]he Hawaii Supreme Court has presumed that a county’s exercise of police power is within its delegated authority so long as the legislature did not ‘clearly intend[] to preempt the field of regulation.’” (quoting *Haw. Gov’t Employees’ Ass’n v. Maui*, 576 P.2d 1029, 1038 (Haw. 1978))).

The parties do not argue such preemption exists either.¹² And because the AG Opinion is legally non-binding, it cannot preempt the County Regulations as “state law.” *See Cedar Shake & Shingle Bureau v. City of Los Angeles*, 997 F.2d 620, 625–26 (9th Cir. 1993).

Furthermore, deferring to the County’s interpretation of its own Regulations advanced in its amicus brief is not warranted under the “limits inherent” in administrative law doctrine. *See Kisor*, 139 S. Ct. at 2415. Deference is proper only when an agency’s interpretation of its own regulations survives a gauntlet of conditions. First, the regulations must be “genuinely ambiguous.” *Id.* (citations omitted). Second,

¹² Hawaii did not address this position in any of its briefs; it merely stated in response to questioning at oral argument that the County Regulations are inconsistent with the AG Opinion’s reading of the statute. It did not specify whether or how supposed inconsistency with a non-binding legal opinion meets the preemption requirements under H.R.S. § 46–1.5(13). In any event, arguments regarding statutory questions “raised for the first time at oral argument” are waived. *Perez-Guzman v. Lynch*, 835 F.3d 1066, 1075 n.4 (9th Cir. 2016). “That course seems doubly wise because, based on oral argument, it appears that the government knew of this potential argument, but may have deliberately chosen not to raise it.” *Ctr. for Investigative Reporting v. United States Dep’t of Justice*, 982 F.3d 668, 686 (9th Cir. 2020).

the agency’s interpretation must be “reasonable.” *Id.* (citation omitted). Third, “a court must make an independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight.” *Id.* at 2416 (citations omitted). Fourth, “the agency’s interpretation must in some way implicate its substantive expertise.” *Id.* at 2417. “Finally, an agency’s reading of a rule must reflect fair and considered judgment” *Id.* (internal quotation marks and citations omitted). An interpretation that is a “convenient litigating position” or a “*post hoc* rationalizatio[n]” does not merit deference. *Id.* (internal quotation marks and citation omitted). “The general rule, then, is not to give deference to agency interpretations advanced for the first time in legal briefs.” *Id.* at 2417 n.6 (citation omitted). The County’s interpretation does not meet any of these requirements. Thus, the County’s interpretation, “advanced for the first time” in its amicus brief, is not worthy of any deference. *See id.*; *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155–56 (2012).

An independent review of how the County Regulations have “been interpreted and applied by local officials” demonstrates the County unconstitutionally enforces H.R.S. § 134-9 through its Regulations. *See Calvary Chapel*, 948 F.3d at 1177. The County Regulations were promulgated to govern “the granting of authorization for the carrying of weapons as provided by section 134-9, Hawaii Revised Statutes.” And the County Regulations’ title, “Rules and Regulations Governing the Carrying of Concealed Weapons and the Carrying of Weapons by Private Detectives and Security Guards,” explicitly applies H.R.S. § 134-9 only to certain occupations. Under the County Regulations, then, open carry is proper only when the license-holder is “in the actual performance of his duties or within the area of his

assignment.”¹³ The Second Amendment “surely does not protect a right to bear arms only as a security guard.” *Young v. Hawaii*, 896 F.3d 1044, 1071 (9th Cir. 2018), *reh’g en banc granted*, 915 F.3d 681 (9th Cir. 2019). Thus, the County Regulations are “infirm [u]nder any of the standards of scrutiny.” *Id.* (internal quotation marks and citation omitted). The County Regulations are facially unconstitutional, and Young alleges they have been unconstitutionally applied to deny him a permit under H.R.S. § 134-9. The majority’s failure to grapple with the County Regulations in any meaningful way suggests an unwillingness to apply the Second Amendment with the respect it deserves.

III

Even if the Hawaii statute were facially constitutional as the majority holds, Young’s challenge should be remanded to address or develop the as-applied challenge. Therefore, I respectfully dissent.

¹³ Hawaii defends the County Regulations only with a conclusory assertion that the “regulation does not limit open-carry licenses to security guards,” because “[t]he language of the County’s regulation mirrors the language of the state statute.” This interpretation is flatly contradicted by the plain language of the County Regulations. The statute does not include the regulatory language cited here, nor is the phrase “security guards” included in the statute’s title, as it is in the County Regulations’ title.

FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

GEORGE K. YOUNG, JR.,
Plaintiff-Appellant,

v.

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,

Defendants-Appellees.

No. 12-17808

D.C. No.
1:12-cv-00336-
HG-BMK

OPINION

Appeal from the United States District Court
for the District of Hawaii
Helen W. Gillmor, Senior District Judge, Presiding

2

YOUNG V. STATE OF HAWAII

Argued and Submitted February 12, 2018
Honolulu, Hawaii

Filed July 24, 2018

Before: Diarmuid F. O'Scannlain, Richard R. Clifton,
and Sandra S. Ikuta, Circuit Judges.

Opinion by Judge O'Scannlain;
Dissent by Judge Clifton

SUMMARY*

Civil Rights

The panel reversed the district court's dismissal of claims brought against the County of Hawaii, dismissed plaintiff's appeal as to the State of Hawaii, and remanded, in plaintiff's 42 U.S.C. § 1983 action alleging that the denial of his application for a handgun license violated his Second Amendment right to carry a loaded firearm in public for self-defense.

The County of Hawaii's Chief of Police denied plaintiff's application to carry a handgun because he failed to satisfy Hawaii's licensing requirements, as set forth in section 134-9 of the Hawaii Revised Statutes. 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, 134-24, 134-25. The exception allows citizens to obtain a license to carry a loaded handgun in public, either concealed or openly, under certain circumstances. Plaintiff alleged that the County violated the Second Amendment by enforcing against him the State's limitations in section 134-9 on the open carry of firearms to those "engaged in the protection of life and property" and on the concealed carry of firearms to those who can demonstrate an "exceptional case."

The panel acknowledged that while the concealed carry of firearms categorically falls outside Second Amendment

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

protection, *see Peruta v. County of San Diego*, 824 F.3d 919, 939 (2016) (en banc), it was satisfied that the Second Amendment encompasses a right to carry a firearm openly in public for self-defense. Analyzing the text of the Second Amendment and reviewing the relevant history, including founding-era treatises and nineteenth century case law, the panel stated that it was unpersuaded by the County's and the State's argument that the Second Amendment only has force within the home. The panel stated that once identified as an individual right focused on self-defense, the right to bear arms must guarantee *some* right to self-defense in public. The panel held that because Hawaii law restricted plaintiff in exercising the right to carry a firearm openly, it burdened conduct protected by the Second Amendment.

In determining the appropriate level of scrutiny to apply to section 134-9, the panel first held that the right to carry a firearm openly for self-defense falls within the core of the Second Amendment. The panel stated that restricting open carry to those whose job entails protecting life or property necessarily restricts open carry to a small and insulated subset of law-abiding citizens. The panel reasoned that the typical, law-abiding citizen in the State of Hawaii was entirely foreclosed from exercising the core Second Amendment right to bear arms for self-defense. The panel concluded that Hawaii's limitation on the open carry of firearms to those "engaged in the protection of life and property" violated the core of the Second Amendment and was void under any level of scrutiny.

Dissenting, Judge Clifton stated the majority opinion disregarded the fact that states and territories in a variety of regions have long allowed for extensive regulations of and limitations on the public carry of firearms. Judge Clifton wrote that such regulations are presumptively lawful under

District of Columbia v. Heller, 554 U.S. 570 (2008), and do not undercut the core of the Second Amendment. In addition, Judge Clifton stated that the majority opinion misconceived the intermediate scrutiny test, assumed without support in the record that Hawaii's statute operates as a complete ban, and substituted its own judgment about the efficacy of less restrictive regulatory schemes.

COUNSEL

Alan A. Beck (argued), Law Offices of Alan Beck, San Diego, California; Stephen D. Stamboulieh, Stamboulieh Law PLL, Madison, Mississippi; for Plaintiff-Appellant.

D. Kaena Horowitz (argued), County of Hawaii Deputy Corporation Counsel; Laureen L. Martin, County of Hawaii Assistant Corporation Counsel; Office of the Corporation Counsel, Hilo, Hawaii; for Defendants-Appellees County of Hawaii, William P. Kenoi, and Harry S. Kubojiri.

Kimberly Tsumoto Guidry, First Deputy Solicitor General; Robert Tadao Nakatsuji, Deputy Solicitor General; Department of the Attorney General, Honolulu, Hawaii; for Defendant-Appellee and Amicus Curiae State of Hawaii.

No appearance for Defendants-Appellees Neil Abercrombie and David Mark Louie I.

OPINION

O'SCANNLAIN, Circuit Judge:

We must decide whether the Second Amendment encompasses the right of a responsible law-abiding citizen to carry a firearm openly for self-defense outside of the home.

I

A

George Young wishes to carry a firearm publicly for personal self-defense in the State of Hawaii. He twice in 2011 applied for a license to carry a handgun, either concealed or openly. His application was denied each time by the County of Hawaii's Chief of Police, Harry Kubojiri, because Young failed to satisfy the requirements set forth in section 134-9 of the Hawaii Revised Statutes ("H.R.S.").

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, 134-24, 134-25. The exception allows citizens to obtain a license to carry a loaded handgun in public, either concealed or openly, under certain circumstances. H.R.S. § 134-9. Respecting 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 . . . may grant a license to an applicant . . . to carry a pistol or revolver and ammunition therefor concealed on the person." The chief of police may, under section 134-9, grant a license for the open carry of a loaded handgun only "[w]here the urgency or the need has been sufficiently

indicated” and the applicant “is engaged in the protection of life and property.” The County of Hawaii has promulgated regulations to clarify 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.” Police Dep’t of Cty. of Haw., *Rules and Regulations Governing the Issuance of Licenses* 10 (Oct. 22, 1997).

Absent 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, H.R.S. §§ 134-23, 134-24, 134-25, 134-26, 134-27, and may only use those firearms while “actually engaged” in hunting or target shooting, H.R.S. § 134-5.

B

On June 12, 2012, Young filed this suit *pro se* under 42 U.S.C. § 1983 against the State of Hawaii, its then-Governor, Neil Abercrombie, and its then-Attorney General, David Louie (collectively “the State”), as well as the County of Hawaii, its then-Mayor, William Kenoi, the Hilo County Police Department, and its then-Chief of Police, Harry Kubojiri (collectively “the County”). Primarily alleging that denying his application for a handgun license violates his Second Amendment right to carry a loaded firearm in public for self-defense, Young requested, among other things, injunctive and declaratory relief from the enforcement of section 134-9’s licensing requirements.

The State filed a motion to dismiss Young’s claims under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), and the County filed a motion to dismiss the claims under Rule 12(b)(6). The district court granted both. As for the State of Hawaii, the district court found Young’s action to be barred

by sovereign immunity. Young’s action against the State officials—while not barred by sovereign immunity under *Ex Parte Young*, 209 U.S. 123 (1908)—was dismissed because the district court found their general oversight of the enforcement of Hawaii’s laws “insufficient to establish a nexus between [such] officials and the alleged violation of [Young’s] civil rights.”

Dismissing Young’s action against the County on the merits, the district court found that section 134-9 “does not implicate activity protected by the Second Amendment,” because that Amendment “establishes only a narrow individual right to keep an operable handgun at home for self-defense.” In the alternative, the district court indicated that it would uphold section 134-9’s open and concealed carry limitations under intermediate scrutiny. As the court reasoned, the State’s “substantial interest in safeguarding the public from the inherent dangers of firearms” was reasonably furthered by policies that “enable[] officials to effectively differentiate between individuals who need to carry a gun for self-defense and those who do not.”

Young timely appealed.¹

¹ Young filed a notice of appeal with respect to the dismissal of his claims against *both* the State and County, but on appeal he makes no arguments to contest the district court’s reasons for dismissing his claims against the State. Believing itself no longer a party to the case, the State has neither filed a response brief nor sought to participate in oral argument. We thus do not review the district court’s judgment in its favor and Young’s appeal against the State accordingly must be dismissed.

The State has, however, filed several briefs as *amicus curiae*. At oral argument, the County explicitly endorsed the arguments of the State

YOUNG V. STATE OF HAWAII

9

II

A

Young's argument is straightforward: he asserts that the County has violated the Second Amendment by enforcing against him the State's limitations in section 134-9 on the open carry of firearms to those "engaged in the protection of life and property"² and on the concealed carry of firearms to those who can demonstrate an "exceptional case."³

made as amicus curiae. Thus, when we refer to arguments made by the State they are to be found in its amicus briefs as adopted by the County.

² Young does not address the additional limitation in section 134-9 providing that an open carry license may only be granted "[w]here the urgency or the need has been sufficiently indicated." Nor could we evaluate such a requirement at the motion to dismiss stage, absent evidence showing the stringency of the requirement. Thus, we do not decide whether such requirement violates the Second Amendment.

³ In the district court, Young also argued that section 134-9 violates the Ninth Amendment, the Privileges or Immunities Clause, the Bill of Attainder Clause, and the Contracts Clause. Young has abandoned such claims on appeal.

But Young does raise several new arguments on appeal. He argues that the State of Hawaii's prohibitions on the possession of electric guns (H.R.S. § 134-16), switchblades (H.R.S. § 134-52), and butterfly knives (H.R.S. § 134-53) violate the Second Amendment. He also argues that the prohibition on carrying rifles and shotguns publicly, arising out of section 134-24, violates the Second Amendment. Because Young failed properly to raise these arguments before the district court, we deem such arguments forfeited. *See United States v. Greger*, 716 F.2d 1275, 1277 (9th Cir. 1983).

The County and the State respond that Young’s claim is foreclosed by our en banc decision in *Peruta v. County of San Diego* (*Peruta II*), 824 F.3d 919 (2016) (en banc), which overturned a three-judge panel’s decision striking down a concealed carry licensing regime, *see Peruta v. County of San Diego* (*Peruta I*), 742 F.3d 1144 (9th Cir. 2014).

In *Peruta II*, we considered a challenge to San Diego’s limitations on the concealed carry of handguns outside of the home. 824 F.3d at 924. California law generally prohibits carrying firearms in public, whether concealed or openly. *See* Cal. Penal Code §§ 25400, 25850, 26350. But San Diego County leaves open the opportunity to carry a concealed firearm upon the demonstration of “good cause.” *See Peruta II*, 824 F.3d at 926. Rejecting *Peruta*’s challenge, our en banc court held that “the Second Amendment right to keep and bear arms does not include, *in any degree*, the right of a member of the general public to carry concealed firearms in public.” *Id.* at 939 (emphasis added). But, as even the dissent acknowledges, our court explicitly left unresolved the question of whether the Second Amendment encompasses a right to open carry. *See id.* (“There may or may not be a Second Amendment right for a member of the general public to carry a firearm openly in public. The Supreme Court has not answered that question, and we do not answer it here.”). Young’s claim therefore picks up where *Peruta*’s left off and presents an issue of first impression for this circuit: whether the Second Amendment encompasses a right to carry firearms openly in public for self-defense.

Our interpretation of the Second Amendment is guided by the Supreme 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). In *Heller*, the Court invalidated a District of Columbia ban on handgun possession in the home, holding that the Second Amendment guarantees an individual right to keep a handgun in one’s home for self-defense, and rejecting a collective view of the right. *See* 554 U.S. at 635. Because the District of Columbia law had completely banned “the quintessential self-defense weapon” within the home, the Court saw no need to clarify further the scope of the right or the level of scrutiny it demands. *See id.* at 629. “Under any of the standards of scrutiny that [the Court has] applied to enumerated constitutional rights,” such a severe deprivation must fail. *Id.* at 628–29.

In *McDonald*, the Court incorporated the Second Amendment against the States through the Fourteenth Amendment, invalidating a Chicago law that effectively banned handgun possession by residents of the city. 561 U.S. at 750. In determining whether the pre-existing right codified by the Second Amendment was “fundamental to our scheme of ordered liberty,” the Court stressed the centrality of self-defense: “Self-defense is a basic right, recognized by many legal systems from ancient times to the present day” *Id.* at 767. Consequently, the Court held it “clear that this right is ‘deeply rooted in this Nation’s history and tradition,’” thus binding the States alongside the federal government. *Id.* at 768 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)); *see also id.* at 805–06 (Thomas, J., concurring in part and concurring in the judgment) (agreeing that the Second Amendment is “fully applicable to

the States,” but via the Fourteenth Amendment’s Privileges or Immunities Clause).

As was the case in *Peruta II*, we find ourselves navigating waters uncharted by *Heller* and *McDonald*: the degree to which the Second Amendment protects, or does not protect, the carrying of firearms outside of the home.

B

Our circuit, like others, employs a two-step approach to Second Amendment challenges. *See Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 960 (9th Cir. 2014); *see also United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010); *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010). We first ask “whether the challenged law burdens conduct protected by the Second Amendment.” *Jackson*, 746 F.3d at 960 (quoting *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013)). If so, we must “apply an appropriate level of scrutiny.” *Id.* And because *Heller* makes clear that evaluating restrictions of Second Amendment rights under rational basis review is inappropriate, *see* 554 U.S. at 628 n.27, any means-end scrutiny applied must be some form of heightened scrutiny, such as intermediate or strict scrutiny. Of course, we remain ever mindful not to treat the Second Amendment any differently from other individual constitutional rights. It is not “a second-class right,” *McDonald*, 561 U.S. at 780, nor a “constitutional orphan,” *Silvester v. Becerra*, No. 17-342, 2018 WL 943032, at *8 (U.S. Feb. 20, 2018) (Thomas, J., dissenting from denial of certiorari).

Heller and *McDonald* set the goalposts for our inquiry, which requires determining the scope of the Second Amendment with respect to public carry. We must discern the scope of the Amendment not as it appears to us now, but

“with the scope [it was] understood to have when the people adopted [it].” *Heller*, 554 U.S. at 634–35. Our lodestars are “text and history,” *id.* at 595, because they bear most strongly on what the right was understood to mean, at the time of enactment, to the public. Because “words and phrases were used in their normal and ordinary as distinguished from technical meaning,” *id.* at 576 (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931)), our approach is not just a textual one, but also a contextual one. See Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, at xxv (2012) (“Words don’t have intrinsic meanings; the significance of an expression depends on how the interpretive community alive at the time of the text’s adoption understood those words.”). History and convention, therefore, illuminate our understanding of the text.

We are not the first circuit to grapple with how far, and to what extent, the Second Amendment applies outside the home. Two circuits, looking closely at the text and history of the Amendment, have held that the Second Amendment indeed protects a general right to carry firearms in public for self-defense. See *Wrenn v. District of Columbia*, 864 F.3d 650, 665 (D.C. Cir. 2017); *Moore v. Madigan*, 702 F.3d 933, 936–37 (7th Cir. 2012).⁴ Three others have simply assumed the Second Amendment applies outside the home, without

⁴ The Illinois Supreme Court has agreed with the reasoning of *Moore* and subsequently held that the Second Amendment applies outside the home. See *People v. Aguilar*, 2 N.E.3d 321, 327 (Ill. 2013) (“[I]f *Heller* means what it says, and ‘individual self-defense’ is indeed ‘the central component’ of the second amendment right to keep and bear arms, then it would make little sense to restrict that right to the home, as ‘confrontations are not limited to the home.’” (internal citations and brackets omitted) (quoting *Heller*, 554 U.S. at 599 and *Moore*, 702 F.3d at 935–36)).

delving into the historical nature of the right. *See Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013); *Drake v. Filko*, 724 F.3d 426, 431 (3d Cir. 2013); *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 89 (2d Cir. 2012).

III

A

We start, as we must, with the text. The Second Amendment provides: “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. It is apparent from the face of the text that the Amendment protects the right not only to “keep” but also to “bear” arms. The latter verb is central to Young’s challenge.

Heller provides useful guidance. To “bear,” the Court explained, 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.” *Heller*, 554 U.S. at 584 (quoting *Muscarello v. United States*, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting)). And *Heller* explained that “bear arms” did not solely refer to carrying a weapon as part of a militia. *Id.* at 585. Rather, to “bear” an object means to carry it, and “[w]hen used with ‘arms,’ . . . the term has a meaning that refers to carrying for a particular purpose—confrontation.” *Id.* at 584.

The prospect of confrontation is, of course, not limited to one’s dwelling. *See Wrenn*, 864 F.3d at 657 (“After all, the Amendment’s core lawful purpose is self-defense, and the need for that might arise beyond as well as within the home.” (internal quotations and citations omitted)); *Moore*,

702 F.3d at 941 (“[T]he interest in self-protection is as great outside as inside the home.”). Thus, carrying firearms outside the home fits comfortably within *Heller*’s definition of “bear.”

Indeed, the fact that the Second Amendment protects bearing *as well as* keeping arms implies some level of public carry in case of confrontation. A right to “keep” arms, on its own, necessarily implies a right to carry those arms to some extent. For instance, in order to “keep” arms, one would have to carry them home from the place of purchase and occasionally move them from storage place to storage place. *Cf. Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011) (holding that the right to possess firearms “implies a corresponding right to acquire and maintain proficiency in their use”). The addition of a separate right to “bear” arms, beyond keeping them, should therefore protect something more than mere carrying incidental to keeping arms. *See* Thomas M. Cooley, *The General Principles of Constitutional Law in the United States of America* 271 (1880) (“[T]o bear arms implies something more than mere keeping.”). Understanding “bear” to protect at least some level of carrying in anticipation of conflict outside of the home provides the necessary gap between “keep” and “bear” to avoid rendering the latter guarantee as mere surplusage. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803) (“[I]t cannot be presumed that any clause in the constitution is intended to be without effect . . .”).

Heller and *McDonald* suggest a similar understanding of “bear.” *Heller* described the “inherent right of self-defense” as “most acute” within the home, implying that the right exists, perhaps less acutely, outside the home. 554 U.S. at

628.⁵ *McDonald* similarly described the right as “most notabl[e]” within the home, implying the right exists, perhaps less notably, outside the home. 561 U.S. at 780. *Heller* also identified “laws forbidding the carrying of firearms in sensitive places such as schools and government buildings” as presumptively lawful. 554 U.S. at 626. Why bother clarifying the definition of sensitive public places if the Second Amendment did not apply, at all, to *any* public place?⁶

In short, the text of the Amendment, as interpreted by *Heller* and *McDonald*, points toward the conclusion that “bear” implies a right to carry firearms publicly for self-defense.⁷

B

We next consider the writings of “important founding-era legal scholars” to discern the original public

⁵ The Delaware Supreme Court recently adopted this interpretation of *Heller*’s “most acute” language. See *Bridgeville Rifle & Pistol Club, Ltd. v. Small*, 176 A.3d 632, 651 n.100 (Del. 2017) (“[T]he *Heller* Court’s statement that ‘the need for defense of self, family, and property’ is ‘most acute’ in the home suggests that the need must be *less* acute elsewhere—but nonetheless present.” (quoting *Heller*, 554 U.S. at 628) (internal citation omitted)).

⁶ The State’s amicus brief asks us to stretch this list of presumptively lawful measures to allow all laws “preserving public safety.” This argument borders on the absurd. Surely not all areas of the public are as sensitive as schools or government buildings, nor is it, as the State suggests, a “very small and reasonable step to view virtually the entire public sphere as a ‘sensitive place.’”

⁷ Strangely, the dissent is content to reach a contrary conclusion and effectively to limit the Second Amendment’s protections to within the home without even bothering to grapple with the text of the Amendment.

understanding of the Second Amendment right, because, as *Heller* explains, “[t]hat sort of inquiry is a critical tool of constitutional interpretation.” 554 U.S. at 605; *see also Jackson*, 746 F.3d at 960, 962–63.

Several legal treatises that were in wide circulation throughout the founding era support our textual understanding of “bear arms.” In an early American edition of Blackstone’s *Commentaries on the Laws of England*—indeed, the “most important” edition, as *Heller* points out, *see* 554 U.S. at 594—St. George Tucker, a law professor at the College of William & Mary and former influential Antifederalist, insisted that the right to armed self-defense is the “first law of nature” and that “the right of the people to keep and bear arms” is the “true palladium of liberty.” 1 St. George Tucker, *Blackstone’s Commentaries: With Notes of Reference to the Constitution and Laws of the Federal Government of the United States; and of the Commonwealth of Virginia* app. n.D. at 300 (Phil., William Young Birch & Abraham Small 1803); *see also McDonald*, 561 U.S. at 769 (treating Tucker’s notes on Blackstone as heavily instructive in interpreting the Second Amendment); *Heller*, 554 U.S. at 606 (same). And in advocating for the prerogative of the Judiciary to strike down unconstitutional statutes, Tucker wrote: “If, for example, congress were to pass a law prohibiting any person from bearing arms, as a means of preventing insurrections, the judicial courts, . . . would be able to pronounce decidedly upon the constitutionality of these means.” Tucker, *supra*, at 289; *see also* 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, 637–38 (2012). Indeed, as Tucker explained, “[i]n many parts of the United States, a man no more thinks, of going out of his house on any occasion, without his rifle or musket in his

hand, than a European fine gentleman without his sword by his side.” Tucker, *supra*, vol. 5, app., n.B, at 19.

Blackstone himself espoused a similarly sacred view on the right to bear arms for Englishmen, which was most notably codified in the 1689 English Declaration of Rights as the right of Protestants to “have Arms for their Defense suitable to their Conditions and as allowed by Law.” Bill of Rights 1689, 1 W. & M., c. 2 (Eng.); *see also Alden v. Maine*, 527 U.S. 706, 715 (1999) (noting that Blackstone’s works “constituted the preeminent authority on English law for the founding generation”). As Blackstone explained, the 1689 Declaration enshrined “the natural right of resistance and self-preservation” and “the right of having and using arms for self-preservation and defence.” 1 William Blackstone, *Commentaries* *144.⁸ It followed from Blackstone’s premise that such a right, the predecessor to our Second Amendment, “was by the time of the founding understood to be an individual right protecting against both *public* and private violence.” *Heller*, 554 U.S. at 594 (emphasis added); *see also* 2 William Blackstone, *Commentaries on the Laws of England* 441 (Edward Christian ed., 1795) (“[E]veryone

⁸ Blackstone was far from alone in viewing the right to self-defense as a natural right, thus “belong[ing] to [all] persons merely in a state of nature, and which every man is intitled to enjoy whether out of society or in it.” 1 WILLIAM BLACKSTONE, *COMMENTARIES* *119. Quite a few scholars and commentators of that era on either side of the Atlantic likewise championed a natural right to defend oneself. *See* Leonard W. Levy, *Origins of the Bill of Rights* 140–41 (2001) (referencing a 1768 article in the prominent colonial newspaper *A Journal of the Times* that described the English right as “a natural right which the people have reserved to themselves, confirmed by the Bill of Rights, to keep arms for their own defence”); *see also* David B. Kopel, *The Natural Right of Self-Defense: Heller’s Lesson for the World*, 59 *Syracuse L. Rev.* 235, 242 (2008) (“The Anglo-Americans learned the language of natural rights, including the natural right of self-defense . . .”).

is at liberty to keep or carry a gun, if he does not use it for the [unlawful] destruction of game.”).

C

Following *Heller*’s historical imperative, we next move to nineteenth century judicial interpretations of the right to bear arms, whether as part of the Second Amendment or analogous state constitutional provisions. *See* 554 U.S. at 605 (“We now address how the Second Amendment was interpreted from immediately after its ratification through the end of the 19th century.”). As we will soon discover, many of the same nineteenth century cases marshalled in *Heller* to prove that the Second Amendment secures an individual right to self-defense reveal just as persuasively that the Second Amendment must encompass a right to carry a firearm openly outside the home.

1

We begin with *Bliss v. Commonwealth*, 12 Ky. (2 Litt.) 90 (1822), *cited in Heller*, 554 U.S. at 585 n. 9, a decision “especially significant both because it is nearest in time to the founding era and because the state court assumed (just as [*Heller*] does) that the constitutional provision at issue codified a preexisting right.” Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 UCLA L. Rev. 1343, 1360 (2009). Interpreting Kentucky’s Second Amendment analogue—providing that “the right of the citizens to bear arms in defense of themselves and the state, shall not be questioned”—the state’s highest court had no doubt that any law restricting the public carry of firearms would “import a restraint on the right of the citizens to bear arms.” *Bliss*, 12 Ky. at 90–92. The court then invalidated a restriction on the concealed carry of weapons, despite the availability of open carry,

reasoning that “whatever restrains the full and complete exercise of [the right to bear arms], though not an entire destruction of it, is forbidden by the explicit language of the constitution.” *See id.* The *Bliss* court’s strict approach to restraints on the *concealed* carry of firearms was an outlier in the Nineteenth Century, *see Peruta II*, 824 F.3d at 935–36, and Kentucky did later amend its constitution to allow the legislature to “pass laws to prevent persons from carrying concealed arms,” Ky. Const. art. XIII, § 25. Nonetheless, the Kentucky constitutional convention left untouched the premise in *Bliss* that the right to bear arms protects *open* carry.

In Tennessee, the state’s highest court offered its interpretation of the right to bear arms eleven years after *Bliss*. *See Simpson v. State*, 13 Tenn. (5 Yer.) 356 (1833), *cited in Heller*, 554 U.S. at 585 n.9. After he was convicted of disturbing the peace by appearing armed in public, Simpson faulted the indictment for failing clearly to require proof of actual violence. *Id.* at 357–58. The high court agreed, because—even assuming that colonial law did not require proof of actual violence to punish colonists for walking with weapons—the Tennessee “constitution ha[d] completely abrogated it.” *Id.* at 360. No such prohibition could survive the state constitution’s grant of “an express power . . . secured to all the free citizens of the state to keep and bear arms for their defence, without any qualification whatever as to their kind or nature.” *Id.* Absent an act of violence, then, Simpson’s indictment for merely carrying firearms could allege no crime tolerable to the constitution of Tennessee. *See id.* at 360–62.

The Alabama Supreme Court joined the chorus seven years later. *See State v. Reid*, 1 Ala. 612 (1840), *cited in Heller*, 554 U.S. at 629. Interpreting the Alabama “right to

bear arms, in defense of []self and the State,” the high court declared that an Alabamian must be permitted *some* means of carrying a weapon in public for self-defense. *Id.* at 615–16. The court ultimately upheld a restriction on “the evil practice of carrying weapons secretly,” citing the legislature’s power “to enact laws in regard to the manner in which arms shall be borne. . . . as may be dictated by the safety of the people and the advancement of public morals.” *Id.* at 616. But the court made clear where that power of the legislature ran dry:

We do not desire to be understood as maintaining, that in regulating the manner of bearing arms, the authority of the Legislature has no other limit than its own discretion. A statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would be clearly unconstitutional.

See id. at 616–17.

The Georgia Supreme Court embraced precisely that position six years later, making explicit what *Reid* intimated. *See Nunn v. State*, 1 Ga. 243 (1846), *cited in Heller*, 554 U.S. at 612, 626, 629. There, the Georgia high court considered a Second Amendment challenge to a statute creating a misdemeanor for carrying a pistol, either openly or concealed. *Id.* at 246. Starting off with a clear statement of the constitutional guarantee, the court explained: “The right of the whole people, old and young, men, women and boys, and not militia only, to keep and bear arms of every description, and not such merely as are used by the militia,

shall not be infringed, curtailed, or broken in upon, in the smallest degree” *Id.* at 251 (emphasis omitted). And with those Second Amendment lines properly set, the court held that Georgia’s statute went too far:

We are of the opinion, then, that so far as the act of 1837 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-defence, 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. (emphasis added). Critically, we must afford *Nunn*’s understanding of the Second Amendment a good deal of weight, because, as *Heller* explains, “[i]ts opinion perfectly captured the way in which the operative clause of the Second Amendment furthers the purpose announced in the prefatory clause.” 554 U.S. at 612; *see also* O’Shea, *supra*, at 627 (“No case, historic or recent, is discussed more prominently or positively in *Heller* than the Georgia Supreme Court’s 1846 decision in *Nunn v. State*.”).

The Louisiana Supreme Court soon followed the course set by Alabama and Georgia. *See State v. Chandler*, 5 La. Ann. 489 (1850), *cited in Heller*, 554 U.S. at 613, 626. The high court first rejected Chandler’s Second Amendment challenge to a Louisiana law prohibiting concealed carry, reasoning that the law was “absolutely necessary to counteract a vicious state of society, growing out of the habit of carrying concealed weapons, and to prevent bloodshed and assassinations committed upon unsuspecting persons.” *Id.* at 489–90. But, in precisely the same manner as the *Nunn*

and *Reid* courts, the *Chandler* court drew the line which the legislature could not cross. As the court explained: “[The prohibition on concealed carry] interfered with no man’s right to carry arms . . . ‘in full open view,’ which places men upon an equality. This is the right guaranteed by the Constitution of the United States” *Id.* at 490; *see also Heller*, 554 U.S. at 613 (citing favorably *Chandler*’s holding that “citizens had a right to carry arms openly”).

Thus, each of these nineteenth century cases found instructive by *Heller* when settling the Second Amendment as an individual right to self-defense is just as instructive when evaluating the application of that right outside the home. While nineteenth century legislatures enjoyed latitude to regulate the “manner in which arms shall be borne,” no legislature in these states could, “under the pretence of regulating,” destroy the right to carry firearms in public altogether. *See Reid*, 1 Ala. at 616–17. Accordingly, even though our court has read these cases to exclude *concealed* carry from the Second Amendment’s protections, *see Peruta II*, 824 F.3d at 933–36, the same cases command that the Second Amendment must encompass a right to *open* carry.⁹

⁹ The dissent faults our reliance on decisions from the South, implying that the thorough analysis found in such opinions must have been the product of a “culture where slavery, honor, violence, and the public carrying of weapons were intertwined.” Dissent at 6 (citations and quotations omitted). To say the least, we are puzzled. The dissent overlooks the fact that the Southern cases on which we rely *only arose* because the legislatures in those states had enacted restrictions on the public carry of firearms. Indeed, were it the case that the Southern culture of slavery animated concerns to protect the right to open carry, why would the Georgia legislature have sought to ban open carry in the first place?

We are well aware that there were judicial proponents of a more limited right to bear arms during the nineteenth century.

Most prominent is the Arkansas Supreme Court’s 1842 interpretation of the right in *State v. Buzzard*, 4 Ark. 18 (1842). There, a divided court upheld an Arkansas prohibition on the concealed carry of “any pistol, dirk, butcher or large knife, or a sword in a cane,” but each judge in the splintered majority appeared poised to go much further. Chief Justice Ringo advocated his view that the Second Amendment served as no bar to the Arkansas legislature’s authority to restrict *any* carrying of firearms: “[N]o enactment on this subject, which neither directly nor indirectly so operates as to impair or render inefficient the means provided by the Constitution for the defense of the State, can be adjudged invalid on the ground that it is repugnant to the Constitution.” *Id.* at 27. But Justice Dickinson went even further, writing that the Second Amendment was nothing “but an assertion of that general right of sovereignty belonging to independent nations to regulate their military force,” thus finding *no* individual right within its guarantee. *Id.* at 32; *but see id.* at 34–35 (Lacy, J., dissenting) (viewing the Second Amendment as an individual right to self-defense).

As a more fundamental matter, too, we cannot agree with the dissent’s choice to cast aside Southern cases. *Heller* placed great emphasis on cases from the South, and *Nunn* in particular. We are an inferior court. Can we really, while keeping a straight face, now say that such cases have little persuasive effect in analyzing the contours of the Second Amendment? We think not.

Several nineteenth century courts hewed to *Buzzard*'s approach and upheld restrictions on the public carry of weapons without emphasizing, as did courts in *Nunn*'s camp, the limits of legislative authority. *See Hill v. State*, 53 Ga. 472, 474–75 (1874) (upholding prohibition on carrying weapons “to any court of justice . . . or any place of public worship, or any other public gathering . . . except militia muster grounds”); *English v. State*, 35 Tex. 473, 474 (1871) (upholding prohibition on carrying “pistols, dirks, daggers, slungshots, swordcanes, spears, brass-knuckles and bowie knives”); *State v. Workman*, 14 S.E. 9, 10–12 (W. Va. 1891) (upholding presumption of criminality “when a man is found going around with a revolver, razor, billy, or brass knuckles upon his person”).

Yet, with *Heller* on the books, cases in *Buzzard*'s flock furnish us with little instructive value. That's because *Heller* made clear that the Second Amendment is, and always has been, an individual right centered on self-defense; it has never been a right only to be exercised in connection with a militia. *See, e.g.*, 554 U.S. at 592, 599, 616, 628. And bound as the inferior court that we are, we may only assess whether the right to bear arms extends outside the home *on the understanding* that the right is an individual one centered on self-defense. Thus, *Heller* knocks out the load-bearing bricks in the foundation of cases like *Buzzard*, for those courts only approved broad limitations on the public carry of weapons *because* such limitations in no way detracted from the common defense of the state. *See, e.g., Buzzard*, 4 Ark. at 27 (opinion of Ringo, C.J.) (“The act in question does not, in my judgment, detract anything from the power of the people to defend their free state and the established institutions of the country.”); *Hill*, 53 Ga. at 475 (“In what manner the right to keep and bear these pests of society [dirks, bowie knives, and the like], can encourage or secure

the existence of a militia, and especially of a well regulated militia, I am not able to divine.”); *English*, 35 Tex. at 477 (“The terms dirks, daggers, slungshots, sword-canes, brass-knuckles and bowie knives, belong to no military vocabulary.”); *Workman*, 14 S.E. at 11 (“So, also, in regard to the kind of arms referred to in the amendment, it must be held to refer to the weapons of warfare to be used by the militia”); *see also Wrenn*, 864 F.3d at 658 (reasoning that such cases are “sapped of authority by *Heller*”); *Moore*, 702 F.3d at 941 (regarding “the historical issues as settled by *Heller*”); O’Shea, *supra*, at 653 (same).¹⁰

3

Once we set aside each of those cases that rest on a militia-focused view of the right to bear arms, we find only two cases from the nineteenth century that might be read to allow severe deprivations on open carry.

¹⁰ Not *all* cases with views of the Second Amendment contrary to *Heller* took the *Buzzard* approach, however. Several of such cases protected the right to bear arms in a way that supports, or is at least consistent with, the right to open carry. *See Andrews v. State*, 50 Tenn. (3 Heisk.) 165, 186–87 (1871) (holding that, if a pistol “is adapted to the usual equipment of the soldier,” then a statute that “forbids by its terms the carrying of the weapon publicly or privately, without regard to time or place, or circumstances . . . violates the constitutional right to keep arms.”); *Aymette v. State*, 21 Tenn. (2 Hum.) 154, 160 (1840) (“In the nature of things, if they were not allowed to bear arms openly, they could not bear them in their defence of the State at all.”); *Cockrum v. State*, 24 Tex. 394, 401–03 (1859) (construing the Second Amendment purely as a tyranny-deterring measure, but nevertheless barring the complete prohibition of carrying a bowie-knife, “an exceeding[ly] destructive weapon”).

The first, *State v. Duke*, is an 1874 decision from the Supreme Court of Texas, where the court concluded that the legislature could confine the carry of firearms to certain places, and only when the bearer had reasonable grounds to fear an attack. 42 Tex. 455, 456–59 (1874). Why the departure from the *Nunn* line of cases? One need only take a peek at the Texas constitutional provision that served as the basis for the court’s decision, which provided that “[e]very person shall have the right to keep and bear arms in the lawful defense of himself or the State, *under such regulations as the Legislature may prescribe.*” *See id.* at 458 (emphasis added). While the Second Amendment surely tolerates some degree of regulation, its very substance is not so explicitly limited by such a regulatory caveat. We shouldn’t pencil one in.¹¹

The second case, *Walburn v. Territory*, is a decision from the Supreme Court of the Territory of Oklahoma, coming at the very end of the nineteenth century in 1899. 59 P. 972 (Okla. Terr. 1899) (Mem). Convicted of carrying a revolver on his person, Walburn challenged his conviction on several grounds, one of which being an argument that Oklahoma’s carrying prohibition was “in conflict with the constitution of the United States.” *Id.* at 973. Beyond such a general assertion, however, “[n]o authorities [were] cited in support of this position, nor [was] the proposition very earnestly urged.” *Id.* Accordingly, the court rejected the challenge: “*As at present advised, we are of the opinion that the statute*

¹¹ But “even *Duke*, an outlier which marks perhaps the most restrictive interpretation that any nineteenth-century court gave to the defense-based right to bear arms, implicitly rejected no-carry laws as unconstitutional” when it reasoned that the Texas law “respected the right to carry a pistol openly when needed for self-defense.” O’Shea, *supra*, at 655 (quoting *Duke*, 42 Tex. at 459).

violates none of the inhibitions of the constitution of the United States, and that its provisions are within the police power of the territory.” *Id.* (emphasis added). We see little reason to credit much a decision that explicitly acknowledged a lack of due consideration. *Cf. Heller*, 554 U.S. at 623–24 (rejecting dissent’s reliance on *United States v. Miller*, 307 U.S. 174 (1939), in part because of the incomplete briefing in *Miller* and its lack of a thorough consideration of the history of the Second Amendment).

D

Finally, as did the Court in *Heller*, we turn to the legislative scene following the Civil War. *See* 554 U.S. at 614–16. While considering materials that post-date the Bill of Rights by at least 75 years might stretch the term “*original* public meaning,” *Heller* explains that, “[i]n the aftermath of the Civil War, there was an outpouring of discussion of the Second Amendment in Congress and in public discourse, as people debated whether and how to secure constitutional rights for newly free slaves.” *Id.* at 614. So, although such evidence “do[es] not provide as much insight into [the Second Amendment’s] original meaning as earlier sources,” we nevertheless consider such evidence somewhat instructive on its meaning.¹² *See id.*

¹² This evidence is not more probative when applying the right to state and local governments. While *McDonald* relied extensively on history from the post–Civil War period when deciding whether the right to bear arms is “among those fundamental rights necessary to our system of ordered liberty,” thus *incorporating* it against the States, 561 U.S. at 770–78, *McDonald* also made clear that the *substantive* restrictions the right imposes on states are precisely the same as those imposed on the federal government, *id.* at 785–86; *id.* at 805 (Thomas, J., concurring in part and concurring in the judgment) (agreeing that “the right to keep and

Particularly relevant in this period are the efforts of many Southern states to disarm free blacks after the Civil War by adopting Black Codes, because “[t]hose who opposed these injustices frequently stated that they infringed blacks’ constitutional right to keep and bear arms.” *Heller*, 554 U.S. at 614–16; *see also* Clayton E. Cramer, *The Racist Roots of Gun Control*, 4 Kan. J.L. & Pub. Pol’y 17, 20 (1995) (“The various Black Codes adopted after the Civil War required blacks to obtain a license before carrying or possessing firearms or bowie knives These restrictive gun laws played a part in provoking Republican efforts to get the Fourteenth Amendment passed.”).

The Supreme Court’s infamous decision in *Dred Scott v. Sanford*, 60 U.S. 393 (1857), rendered four years before the first shots were fired at Fort Sumter, would pave the way for such Black Codes to proliferate after the war. *See McDonald*, 561 U.S. at 807–08, 822, 849 (Thomas, J., concurring in part and concurring in the judgment) (looking to *Dred Scott* as necessary context in Civil War era historical analysis). Writing for the Court, Chief Justice Taney—disgracefully—dismissed Dred Scott’s suit for freedom after concluding that blacks had never been a part of the sovereign “people” of the United States and therefore could find no recourse in an Article III court. *See* 60 U.S. at 407. To hold otherwise, Chief Justice Taney wrote, would have “entitled [blacks] to the privileges and immunities of citizens” and thus granted them the rights he felt only whites could enjoy:

bear arms set forth in the Second Amendment [is] ‘fully applicable to the States’” (emphasis added)). Because *Heller* ascribed less weight to evidence from the post-Civil War period when interpreting the Second Amendment’s restrictions on the federal government, 554 U.S. at 614, it necessarily follows that the evidence is less probative when interpreting the Amendment’s restrictions on state and local governments.

“[I]t would give them the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, and to keep and carry arms wherever they went.” *Id.* at 416–17.

Perhaps emboldened by Chief Justice Taney’s opinion, “those who sought to retain the institution of slavery . . . [began] to eliminate more and more of the basic liberties of slaves, free blacks, and white abolitionists.” *See McDonald*, 561 U.S. at 843–44 (Thomas, J., concurring in part and concurring in the judgment). And the pervasive fear of slave rebellions “led Southern legislatures to take particularly vicious aim at the rights of free blacks and slaves to speak or to keep and bear arms for their defense.” *Id.* at 845; *see also* Act of Dec. 23, 1833, § 7, 1833 Ga. Acts 226, 228 (“[I]t shall not be lawful for any free person of colour in this state, to own, use, or carry fire arms of any description whatever.”).

The subsequent Civil War was far from a perfect fix to these problems. Those freedmen who had fought for the Union Army during the war frequently returned home “to the States of the old Confederacy, where systematic efforts were made to disarm them and other blacks.” *McDonald*, 561 U.S. at 771; *see also The Freedmen’s Bureau Bill*, N.Y. Evening Post, May 30, 1866, at 2 (“In South Carolina and Florida the freedmen are forbidden to wear or keep arms.”). Emblematic of these efforts was an 1865 law in Mississippi that declared “no freedman, free negro or mulatto . . . shall keep or carry fire-arms of any kind, or any ammunition, dirk or bowie knife.” *McDonald*, 561 U.S. at 771 (quoting Certain Offenses of Freedmen, 1865 Miss. Laws p. 165, § 1, in 1 *Documentary History of Reconstruction* 289 (W. Fleming ed. 1950)). The law was vigorously enforced. As an 1866 letter from Rodney, Mississippi to the Harper’s Weekly

magazine lamented, “[t]he militia of this county have seized every gun and pistol found in the hands of the (so called) freedmen. . . . They claim that the statute laws of Mississippi do not recognize the negro as having any right to carry arms.” *The Labor Question at the South*, Harper’s Weekly, Jan. 13, 1866, at 19. Seeking help from outside of the state, the letter emphasized that such Mississippi laws did “not protect, but insist[ed] upon infringing on their liberties.” *Id.* Worse still, “[w]ithout federal enforcement of the inalienable right to keep and bear arms, . . . militias and mobs were tragically successful in waging a campaign of terror against [newly free slaves].” *McDonald*, 561 U.S. at 856 (Thomas, J., concurring in part and concurring in the judgment).

Such blatant injustices did not continue unnoticed by Congress, which established the Freedmen’s Bureau to aid newly freed blacks still suffering in the Reconstruction South. Working to fulfill its mandate, an 1866 report by the Bureau targeted a Kentucky law that sought to deprive freedmen of their Second Amendment rights: “[T]he civil law [of Kentucky] prohibits the colored man from bearing arms Their arms are taken from them by the civil authorities Thus, the right of the people to keep and bear arms as provided in the Constitution is *infringed*.” *Heller*, 554 U.S. at 614–15 (quoting H.R. Exec. Doc. No. 70, 39th Cong., 1st Sess., 233, 236). But Kentucky was far from the only state subject to scrutiny; a joint congressional report decried a South Carolina practice of “seizing all fire-arms found in the hands of the freedmen.” *Id.* at 615 (quoting Joint Comm. on Reconstruction, H.R. Rep. No. 30, 39th Cong., 1st Sess., pt. 2, p. 229 (1866) (Proposed Circular of Brigadier General R. Saxton)). The joint report plainly envisioned a right to bear arms outside the home, emphasizing that

freedmen in South Carolina “need [firearms] to kill game for subsistence.” *Id.*

Indeed, even those congressmen who *opposed* federal action to protect the rights of freedmen understood the fundamental constitutional rights at stake. Senator Davis of Kentucky acknowledged, alongside the writ of *habeas corpus*, the right “for every man bearing his arms about him *and* keeping them in his house, his castle, for his own defense,” but argued that congressional action on the matter would usurp the role of Kentucky in caring for its citizens. *See* Cong. Globe, 39th Cong., 1st Sess. 370–71 (1866) (emphasis added), *cited in Heller*, 554 U.S. at 616.

To summarize the history canvassed thus far: the important founding-era treatises, the probative nineteenth century case law, and the post-civil war legislative scene each reveal a single American voice. The right to bear arms must include, at the least, the right to carry a firearm openly for self-defense.

E

But wait! The dissent says we have yet to consider the impact of historical “good cause” restrictions on the scope of the Second Amendment right to carry a firearm in public. According to the dissent, many states heavily restricted the public carry of weapons absent good cause to fear injury to person or property. Dissent at 65–67. A review of the dissent’s evidence compels us to disagree.

Many states during the nineteenth century required people who carried weapons in a disruptive fashion to post a bond (or a “surety”) to ensure their good behavior. *See, e.g., The Revised Statutes of the Commonwealth of Massachusetts* 750 § 16 (Boston, Theron Metcalf & Horace Mann 1836)

(hereinafter Mass. Acts). And to enforce the surety requirement, such states commonly relied on a citizen-complaint mechanism. That is, if an arms carrier gave any observer “reasonable cause to fear an injury, or breach of the peace,” the observer could complain to his local magistrate, who might then require the disruptive carrier “to find sureties for keeping the peace,” generally “for a term not exceeding six months.” *See id.* But if the disruptive carrier *also* had “reasonable cause to fear an assault or other injury,” such person could be excused from posting sureties despite the complaint. *Id.* As an example of the pieces put together, Michigan’s 1846 surety law provided that if any person went armed with an “offensive and dangerous weapon, without reasonable cause to fear an assault or other injury . . . he may, on complaint of any person having reasonable cause to fear an injury or breach of the peace, be required to find sureties for keeping the peace.” *The Revised Statutes of the State of Michigan* 692 § 16 (Detroit, Sanford M. Green 1846).

The dissent erroneously characterizes surety laws as imposing a severe restriction on the public carry of weapons absent good cause to fear injury. And its analysis of the actual historical evidence is, in a word, cursory. While the dissent focuses on the exception to the surety requirement for carriers with a specialized need for self-defense, it ignores the clearly limited scope of the requirement in the first place: only upon a well-founded complaint that the carrier threatened “injury or a breach of the peace” did the good cause exception come into play, “by exempting even the accused” from the burden of paying sureties. *Wrenn*, 864 F.3d at 661. Thus, “[a] showing of special need did not expand carrying for the responsible; it shrank burdens on carrying by the (allegedly) reckless.” *Id.*

Indeed, what is most troubling about the dissent's historical "analysis" is that it reliably quotes the good cause exception to the surety requirements but hardly mentions the limiting citizen-complaint mechanism present in *virtually every single* one of its quoted sources. *See The Statutes of Oregon* 220 § 17 (Oregon, Asahel Bush 1854) (complainant must possess "reasonable cause to fear an injury, or breach of the peace"); *The Revised Statutes of the Territory of Minnesota* 528 § 18 (Saint Paul, James M. Goodhue 1851) (complainant must possess "reasonable cause to fear an injury or breach of the peace"); *The Revised Statutes of the State of Maine* 709 § 16 (Hallowell, Glazier, Masters & Smith 1847) (complainant must possess "cause to fear an injury or breach of the peace"); *Statutes of the Territory of Wisconsin* 381 § 16 (Albany, Packard, Van Benthuyssen & Co. 1839) (complainant must possess "reasonable cause to fear an injury or breach of the peace"); 1836 Mass. Acts 750 § 16 (complainant must possess "reasonable cause to fear an injury, or breach of the peace"). The dissent might wish to set aside the requirements to complain under surety laws, but we suspect those who actually did complain under such laws would hesitate before treating the requirements so lightly. Were a complainant to bring an "unfounded, frivolous or malicious" claim that an arms carrier threatened the public peace, the magistrate would not only dismiss the complaint, but also hold the complainant "answerable to the magistrate and the officer for their fees." *See, e.g.,* 1836 Mass. Acts 749 § 7.¹³

¹³ Only one of the surety laws cited by the dissent lacks explicit reference to the citizen-complaint mechanism. An 1847 Virginia law provided that if any person went armed with "any offensive or dangerous weapon, without reasonable cause to fear an assault or other injury . . . he may be required to find sureties for keeping the peace." *Acts of the*

In any event, even if all arms carriers without good cause had to post sureties (they did not), the laws would not add much to our analysis. *Heller* saw little weight in historical prohibitions that promised only “a small fine and forfeiture of the weapon (or in a few cases a very brief stay in the local jail).” 554 U.S. at 633. Certainly, an obligation to post a surety fits that mold. Like a small fine, sureties are “‘akin to modern penalties for minor public-safety infractions like speeding or jaywalking,’ which makes them (in the Court’s view) poor evidence of limits on the [Second] Amendment’s scope.” *Wrenn*, 864 F.3d at 661 (quoting *Heller*, 554 U.S. at 633–34). In fact, sureties seem to us even less noteworthy than small fines, since a disruptive carrier—once he posted a surety—“could go on carrying without criminal penalty.” *Id.* And if he refrained from breaching the peace, of course, his money posted as a surety would be returned in a matter of months.

All in all, we are unmoved by the dissent’s misguided interpretation of history. While surety laws used the language “reasonable cause,” they bear no resemblance to modern-day good cause requirements to carry a firearm.¹⁴

General Assembly of Virginia 129 § 16 (Richmond, Samuel Shepherd 1848). But the Virginia law doesn’t tell us much about the right of Virginians to carry weapons in public, since it only provided that the arms carrier “may” be required to find sureties, with no clarification. What we do know, however, is that “may” certainly does not mean “shall,” neither today nor in 1847.

¹⁴ Nor are we much persuaded by the remainder of the dissent’s historical evidence. Dissent at 10–12. The dissent is correct, of course, that near the close of the nineteenth century and the beginning of the twentieth century some states began enacting stricter limitations on the public carry of weapons. *See, e.g.*, 1888 Idaho Sess. Laws 23 (prohibiting public carry of weapons within the “confines of any city, town or

F

One more historical misconception to dispel.

The County and the State, apparently seeing little room to quarrel with American history, argue that the English right to carry weapons openly was limited for centuries by the 1328 Statute of Northampton, and that we should incorporate wholesale that understanding of English rights into our Constitution's Second Amendment. Exploring fourteenth century English law books (after a thorough dusting) reveals that the statute allowed no ordinary Englishman to "bring . . . force in affray of the peace, nor to go nor ride armed by night nor by day, in Fairs, Markets, nor in the presence of the Justices or other Ministers, nor in no part elsewhere." Statute of Northampton 1328, 2 Edw. 3, c. 3 (Eng.).¹⁵ But the statute's effects did not remain in the fourteenth century, as it "would become the foundation for firearms regulation in England for the next several centuries." *Peruta II*, 824 F.3d at 930. Our court has

village"). But it is difficult to ascribe much weight to isolated statutes, with no record of enforcement, that were enacted so distant from the founding. *Cf. Heller*, 554 U.S. at 632 ("[W]e would not stake our interpretation of the Second Amendment upon a single law . . . that contradicts the overwhelming weight of other evidence . . ."). And we are particularly reluctant to rely on such statutes given that it is impossible to discern whether they were enacted with a militia or a self-defense oriented view of the right to bear arms in mind. *See O'Shea, supra*, at 642–43 (noting the popularity of a "hybrid view" of the Second Amendment during the post-Civil War period, where the right was individual but "the chief function of the right . . . was to support civic purposes such as military readiness").

¹⁵ An "affray," derived from the French word "effraier" meaning "to terrify," is an act that disturbs the peace. *See* 1 William Hawkins, *A Treatise of the Pleas of the Crown* 136, ch. 63, § 1 (1716).

interpreted the statute and its enforcement history as consistently prohibiting concealed carry, *see id.* at 932, but we have not until now considered whether it also prohibited open carry.

1

As one would expect, delineating the precise lines within which a fourteenth century English statute was enforced is a difficult task. *See, e.g.,* See Patrick J. Charles, *The Faces of the Second Amendment Outside the Home: History Versus Ahistorical Standards of Review*, 60 Clev. St. L. Rev. 1, 12 (2012). In the immediate period after Parliament enacted the statute, it appears that some English constables were ordered to enforce the statute literally and to arrest all those who dared to “go armed,” without regard for the bearer’s apparent peacefulness. *See* Letter to the Mayor and Bailiffs of York (Jan. 30, 1334), in *Calendar of the Close Rolls*, Edward III, 1333–1337 294 (H.C. Maxwell-Lyte ed. 1898). But not all English constables faced similar orders; for example, Northumberland officers were ordered in 1332 to arrest only “persons riding or going armed *to disturb the peace*.” Letter to the Keeper and Justices of Northumberland (Oct. 28, 1332), in *Calendar of the Close Rolls*, Edward III, 1330–1333 610 (H.C. Maxwell-Lyte ed. 1898) (emphasis added).

Nevertheless, looking only to Chaucer’s fourteenth century England provides little instructive force, particularly because “[c]ommon-law rights developed over time.” *See Wrenn*, 864 F.3d at 660. And over the next few centuries, a narrow interpretation of the statute—like that given to Northumberland constables in 1332—began to dominate the English legal landscape. Writing almost 300 years after the statute was enacted, Serjeant William Hawkins, an English legal commentator praised by Blackstone, explained that “no wearing of Arms is within the meaning of this Statute, 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 this Statute by wearing common Weapons.” 1 William Hawkins, *A Treatise of the Pleas of the Crown* 136 § 9 (1716).¹⁶ Hawkins’s narrow interpretation of the statute was in accord with that of the Court of King’s Bench, which clarified that “the meaning of the [Statute of Northampton] was to punish 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) (emphasis added).¹⁷

¹⁶ Indeed, even some wearing of arms that might have been “apt to terrify the People” fell outside of the statutes prohibitions, as Hawkins explained that one who “arm[ed] himself to suppress Rioters, Rebels, or Enemies” or “upon a Cry made for Arms to keep the Peace” would face no punishment under the statute. *See id.* at § 10.

¹⁷ We disagree with the view that *Sir John Knight’s Case* should only be read for the proposition that government agents were exempt from the statute. *See Charles, supra*, at 28–30. The case reports leave not so much as a hint that Knight’s loyalty to the Crown was the critical issue before the Court of King’s Bench. Indeed, Knight was charged with “goeing with a blunderbus in the streets, *to the terrifyeing his majesties subjects*.” 1 Narcissus Luttrell, *A Brief Historical Relation of State Affairs from September 1678 to April 1714* 380 (Oxford Univ. Press 1857) (emphasis added). And contemporaneous reports of his acquittal reported that “sir John Knight, the loyall, was tried at the court of kings bench for a high misdemeanor, in goeing armed up and down with a gun att Bristoll; who being tried by a jury of his own citty, that knew him well, he was acquitted, *not thinking he did it with any ill design*.” *Id.* at 389 (emphasis added); *see also Moore*, 702 F.3d at 936 (interpreting the case in the same manner). After his acquittal, Sir Knight was required to post a bond for good behavior, *Rex v. Knight*, 90 Eng. Rep. 331, Comberbach 41 (1686), a peculiar measure for one supposedly cloaked in government authority.

Of course, an untoward intent to terrorize the local townsfolk was not always needed to face arrest and imprisonment; as Blackstone interpreted the statute—an interpretation credited by *Heller*, 554 U.S. at 627—“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 *148–*149 (emphasis added). Indeed, Hawkins wrote that “a Man cannot excuse the wearing such Armour” even “by alledging that such a one threatened him.” Hawkins, *supra*, at 136 § 8. But clearly not *all* weapons can be characterized as “dangerous or unusual,” else *Heller*’s exemption of Second Amendment protection for weapons of that kind would swallow the Amendment’s protections as a whole. See 554 U.S. at 627; *Moore*, 702 F.3d at 936 (“[T]he Court cannot have thought *all* guns are ‘dangerous or unusual’ and can be banned, as otherwise there would be no right to keep a handgun in one’s home for self-defense.”).

Consequently, we see little in the more recent historical record to suggest that the Statute of Northampton barred Englishmen from carrying common (not unusual) arms for defense (not terror).

2

More fundamentally, however, we respectfully decline the County’s and the State’s invitation to import English law wholesale into our Second Amendment jurisprudence. While English law is certainly relevant to our historical inquiry because the Second Amendment “codified a *pre-existing* right,” *Heller*, 554 U.S. at 592, our aim here is not merely to discover the rights of the English. Indeed, there is a scholarly consensus that the 1689 English right to have arms was *less protective* than its American counterpart. See Jonathan Meltzer, Note, *Open Carry for All: Heller and Our*

Nineteenth-Century Second Amendment, 123 Yale L.J. 1486, 1500 (2014); Joyce Lee Malcolm, *To Keep and Bear Arms: The Origins of an Anglo-American Right* 120–21 (1994). That is because the English right was “not available to the whole population, given that it was restricted to Protestants, and like all written English rights it was held only against the Crown, not Parliament.” *Heller*, 554 U.S. at 593. Accordingly, it only guaranteed the right of Protestants to have arms “as allowed by law.” See Malcom, *supra*, at 121, 162. But not all laws that restricted the right of Englishmen to have arms found a place across the Atlantic. As St. George Tucker observed, it would have been strange to apply in the United States an English law that presumed any gathering of armed men was treasonous, because “the right to bear arms is recognized and secured in the [American] constitution itself.” See Tucker, *supra*, vol. 5, app., n.B, at 19; see also Cooley, *supra*, at 270 (noting that the Second Amendment “was adopted with some modification and enlargement from the English Bill of Rights”); William Rawle, *A View of the Constitution of the United States of America* 126 (2d ed. 1829) (writing that the English right, unlike the Second Amendment, “is allowed more or less sparingly, according to circumstances”).

Thus, instead of stitching into the Second Amendment every odd law that hemmed in the rights of fourteenth century Englishmen, we consider those English laws only to the extent they inform the original public understanding of the Second Amendment. See *Heller*, 554 U.S. at 594 (“By the time of the founding, the right to have arms had become fundamental for English subjects.” (emphasis added)). With our historical inquiry properly framed, the fog encircling the Statute of Northampton’s “true” meaning clears away, for the American understanding and implementation of the

statute was unambiguously consistent with a robust Second Amendment right to open carry.

To the extent the Framers considered the Statute of Northampton as instructive of the pre-existing right to bear arms, they took a narrow view of its prohibitions. *See* Eugene Volokh, *The First and Second Amendments*, 109 Colum. L.Rev. Sidebar 97, 101 (2009). In that vein, Justice James Wilson, a leading drafter of the Constitution, credited Serjeant Hawkins and construed the statute to prohibit arming oneself “with dangerous and unusual weapons, in such a manner, as will naturally diffuse a terroure among the people.” 2 James Wilson, *Collected Works of James Wilson* 654 (Kermit L. Hall & Mark D. Hall eds. 1967); *see also* Volokh, *The First and Second Amendments*, *supra*, at 101 (“American benchbooks for justices of the peace echoed [Wilson’s observation], citing Hawkins . . .”). William Rawle, a prominent member of the Pennsylvania Assembly that ratified the Constitution, likewise cited Hawkins and wrote that the right to bear arms would not rule out a law prohibiting “the carrying of arms abroad by a single individual, attended with circumstances giving [observers] just reason to fear that he purposes to make an unlawful use of them.” Rawle, *supra*, at 126.¹⁸

¹⁸ To the extent that one could read Hawkins as having thought the Statute of Northampton would permit *only* “Persons of Quality” (nobility) to carry weapons, *see* Hawkins, *supra*, at 136 § 9, such a class-based limitation clearly found no place in the United States. Volokh, *The First and Second Amendments*, *supra*, at 101–02. Indeed, neither Justice Wilson nor William Rawle makes any mention of such a limitation when citing Hawkins, nor do any other American sources that we have read. *See* William W. Hening, *The New Virginia Justice, Comprising the Office and Authority of a Justice of the Peace, in the Commonwealth of*

Justice Wilson and William Rawle’s reading of the statute is confirmed by the various state weapons carry regulations throughout the founding era and beyond that were expressly modelled after the Statute of Northampton (“Northampton analogues”). See Eric M. Ruben & Saul Cornell, *Firearm Regionalism and Public Carry: Placing Southern Antebellum Case Law in Context*, 125 Yale L.J. Forum 121, 128–29 (2015) (“[S]everal early American states expressly incorporated versions of the Statute of Northampton into their laws.”). Like the surety laws relied on by the dissent, the state-enacted Northampton analogues only sought to regulate disruptive—or more specifically, terrifying—arms carrying. For example, Massachusetts in 1795 enacted a law authorizing justices of the peace to arrest “all affrayers, rioters, disturbers, or breakers of the peace, and such as shall ride or go armed offensively, *to the fear or terror of the good citizens*.” 1795 Mass. Acts 436 (emphasis added); see also 1786 Va. Acts 33 (prohibiting going “armed by night [] or by day, in fairs or markets, or in other places, in terror of the Country”).

The North Carolina Supreme Court offered a definitive interpretation of its Northampton analogue in 1843, providing us with the benefit of a more thorough discussion of its elements. *State v. Huntly*, 25 N.C. (3 Ired.) 418 (1843). After holding that firearms fell within the reach of the crime, the court clarified:

[I]t is to be remembered that the carrying of a gun *per se* constitutes no offence. For any lawful purpose—either of business or amusement—the citizen is at perfect liberty

Virginia 18 (1795) (discussing Hawkins’s explanation of the Statute of Northampton without any reference to “Persons of Quality”).

to carry his gun. It is the wicked purpose—and the mischievous result—which essentially constitute the crime. He shall not carry about this or any other weapon of death to terrify and alarm, and in such manner as naturally will terrify and alarm, a peaceful people.

Id. at 422–23. True, the court cited “business or amusement,” instead of self-defense, as examples of lawful purposes, but a moment’s thought refutes the notion that such a list was exhaustive; surely a North Carolinian wasn’t at liberty to carry his rifle only so long as he twirled it in amusement. Rather, it was the “wicked purpose” that “constitute[d] the crime.” *Id.* at 423.

3

We thus disagree with the dissent’s view that carrying a weapon was itself sufficient to face punishment under a state-enacted Northampton analogue. Dissent at 65 n.1. As that argument goes, when the drafters of virtually every single state Northampton analogue criminalized going armed “to the terror” or “in affray” of others, the terror or affray language was just purposive; that is, “terrorizing the public was the consequence of going armed,” so such language was incorporated into the statutes merely to clarify *why* going armed was itself unlawful. *See* Ruben & Cornell, *supra*, at 129–30; Charles, *supra*, at 33.

What an odd way it would be to write a criminal statute! To interpret such language as merely purposive is to remove its operative effect, for if going armed was itself unlawful then clarifying the consequences of going armed adds not an iota of substance to the crime. Of course, “where the text of a clause itself indicates that it does not have operative effect,

such as ‘whereas’ clauses in federal legislation or the Constitution’s preamble, a court has no license to make it do what it was not designed to do.” *Heller*, 554 U.S. at 578 n.3. But it is entirely another endeavor to read language mixed in among operative elements in a criminal statute as merely purposive. *See id.* (“[O]perative provisions should be given effect as operative provisions, and prologues as prologues.”); *Ratzlaf v. United States*, 510 U.S. 135, 140–41 (1994) (counseling “heightened” resistance before treating statutory terms as “words of no consequence . . . when the words describe an element of a criminal offense”). For instance, Maine’s 1821 Northampton analogue authorized the arrest of “all affrayers, rioters, disturbers or breakers of the peace, and such as shall ride or go armed offensively, to the fear or terror of the good citizens of this State, or such others as may utter any menaces or threatening speeches.” 1821 Me. Laws 285. If riding armed were itself unlawful *because* it terrorized the good citizens of Maine, it strains credulity to suggest that Maine drafters would have felt the need to clarify such reasoning right in the middle of the statute’s operative provisions. Indeed, why only clarify the consequences of riding armed, and no other prohibited conduct?

More troubling, reading the “to the terror” language as merely purposive frequently places a Northampton analogue in conflict with its neighboring criminal provisions. Take a closer look at the Northampton analogue in chapter 97 section 13 of Delaware’s 1852 Revised Statutes, which—in familiar fashion—authorized the arrest of “all who go armed offensively to the terror of the people, or are otherwise disorderly and dangerous.” *Revised Statutes of the State of Delaware, to the Year of Our Lord One Thousand Eight Hundred and Fifty-Two, Inclusive* 333 § 13 (Dover, W.B. Keen 1852). With that provision in mind, turn to Section 30,

where the Delaware Code authorized justices of the peace to “punish any slave . . . who shall, without the special permission of his master, go armed with any dangerous weapon.” *Id.* at 336 § 30. How might one grant another permission to “go armed with any dangerous weapon” if one had no lawful authority to go armed in the first place? Or consider Tennessee’s 1831 Revised Statutes, which, immediately after providing its standard-form Northampton analogue, authorized sheriffs to arrest any person “armed with the intention of committing a riot or affray.” 1 *The Statute Laws of the State of Tennessee, of a Public and General Nature* 10 (Knoxville, John Haywood & Robert L. Cobbs 1831). Why on earth would Tennessee have so limited a sheriff’s authorization to arrest if going armed was itself unlawful?

Thus, utterly confused by how we might read a Northampton analogue to prohibit all arms carry, we feel the better approach with these statutes is to take them at their word: an American, just like an Englishman, could not go armed offensively to the terror of the people. Such a reasonable restriction on public carry is perfectly consistent with a robust right peacefully to carry a firearm in public. In all, then, the various Northampton analogues found in states across the United States confirm that, “whatever Northampton banned on the shores of England,” the American right to carry common weapons openly for self-defense “was not hemmed in by longstanding bans on carrying.” *Wrenn*, 864 F.3d at 660–61.

G

Concluding our analysis of text and review of history, we remain unpersuaded by the County’s and the State’s argument that the Second Amendment only has force within the home. Once identified as an individual right focused on

self-defense, the right to bear arms must guarantee *some* right to self-defense in public. While the concealed carry of firearms categorically falls outside such protection, *see Peruta II*, 824 F.3d at 939, we are satisfied that the Second Amendment encompasses a right to carry a firearm openly in public for self-defense. Because section 134-9 restricts Young in exercising such right to carry a firearm openly, it burdens conduct protected by the Second Amendment.

IV

Accordingly, we must evaluate section 134-9 under “an appropriate level of scrutiny.” *Jackson*, 746 F.3d at 962. In doing so, we consider “(1) how close the law comes to the core of the Second Amendment right, and (2) the severity of the law’s burden on the right.” *Id.* at 963 (internal quotations omitted).

We treat this approach as a “sliding scale.” *Silvester v. Harris*, 843 F.3d 816, 821 (9th Cir. 2016). On one end, “[a] law that imposes such a severe restriction on [a] core right [of the Amendment] that it ‘amounts to a destruction of the . . . right,’ is unconstitutional under any level of scrutiny.” *Jackson*, 746 F.3d at 961 (quoting *Heller*, 554 U.S. at 629). On the other end of the spectrum, intermediate scrutiny is appropriate if the challenged law “does not implicate a core Second Amendment right, or does not place a substantial burden on the Second Amendment right.” *Id.*

A

So, what constitutes the core of the Second Amendment? As we know, the Second Amendment protects the right “to keep and bear arms.” U.S. Const. amend. II. The key inquiry is whether the core of the right encompasses *both* verbs, or only one: keeping *and bearing* arms for self-defense, or,

more narrowly, only keeping arms for self-defense within the home.¹⁹

Heller aids our inquiry but provides no definitive answer. On the one hand, in rejecting the collective view of the right, *Heller* made clear that “self-defense had little to do with the right’s *codification*; it was the *central component* of the right itself.” 554 U.S. at 599 (emphasis in original); *see also id.* at 628 (“[T]he inherent right of self-defense has been central to the Second Amendment right.”). On the other hand, *Heller* noted that “whatever else [the Amendment] leaves to future evaluation, it surely elevates above all other

¹⁹ We disagree with the dissent that our circuit has already determined whether the Second Amendment’s core applies outside the home. Dissent at 14. As underscored by our recent en banc decision in *Teixeira v. County of Alameda*, 873 F.3d 670 (9th Cir. 2017) (en banc), our circuit has not yet decided the extent to which Second Amendment rights—let alone core rights—exist outside of the home. *See id.* at 686 n.19 (“We have not decided the degree to which the Second Amendment protects the right to bear arms outside the home.”).

To the extent that other cases in our circuit might have, in passing, indicated that publicly carrying firearms falls outside the right’s core, the question was not squarely presented in those cases because each dealt with restrictions on keeping arms *within the home*. *See, e.g., Chovan*, 735 F.3d at 1129–30 (evaluating 18 U.S.C. § 922(g)’s prohibition on domestic violence misdemeanants from “possessing firearms for life”). Naturally, then, no such case seriously grappled with the existence of core rights outside the home. Indeed, we doubt our court would have resolved in a sentence or two an issue that the *Wrenn* majority and dissent debated extensively. *See Wrenn*, 864 F.3d at 657–64, 668–69; *see also United States v. Johnson*, 256 F.3d 895, 915 (9th Cir. 2001) (en banc) (Kozinski, J., concurring) (“Of course, not every statement of law in every opinion is binding on later panels. Where it is clear that a statement is made casually and without analysis, where the statement is uttered in passing without due consideration of the alternatives, or where it is merely a prelude to another legal issue that commands the panel’s full attention, it may be appropriate to re-visit the issue in a later case.”).

interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.” 554 U.S. at 635. We recognize that several of our sister circuits have interpreted this language to limit the Amendment’s core to the home. *See Drake*, 724 F.3d at 431; *Woollard*, 712 F.3d at 874; *Kachalsky*, 701 F.3d at 93. But we afford little weight to *Heller*’s emphasis on the application of the Second Amendment to the home specifically, for the challenge there exclusively concerned handgun possession in the home. 554 U.S. at 575–76; *see also Drake*, 724 F.3d at 445 (Hardiman, J., dissenting). And in any event, it may very well be the case that within the core of the Amendment, self-defense at home is “most acute.” *Heller*, 554 U.S. at 628.

But much of *Heller*’s reasoning implied a core purpose of self-defense *not* limited to the home. The Court cited “at least seven [state constitutional provisions that] unequivocally protected an individual citizen’s right to self-defense,” which is “strong evidence that that is how the founding generation conceived of the right.” *Id.* at 603. Also without any reference to the home, *Heller* noted that “[a]ntislavery advocates routinely invoked the right to bear arms for self-defense,” *id.* at 609, including Joel Tiffany, who wrote “the right to keep and bear arms, also implies the right to use them if necessary in self defence; without this right to use the guaranty would have hardly been worth the paper it consumed.” *Id.* (quoting Joel Tiffany, *A Treatise on the Unconstitutionality of American Slavery* 117–18 (1849)). Charles Sumner’s famous “Bleeding Kansas” speech, quoted at length in *Heller*, can hardly be read without sensing its vociferous declaration that the Second Amendment’s core reaches self-defense on the American frontier: “Never was this efficient weapon [the rifle] more needed in just self-defense, than now in Kansas, and at least one article in our National Constitution must be blotted out,

before the complete right to it can in any way be impeached.” *Id.* (quoting *The Crime Against Kansas*, May 19–20, 1856, in *American Speeches: Political Oratory From the Revolution to the Civil War* 553, 606–07 (T. Widmer ed. 2006)); *see also McDonald*, 561 U.S. at 775 (“[O]ne of the ‘core purposes of the Civil Rights Act of 1866 and of the Fourteenth Amendment was . . . to ‘affirm the full and equal right of every citizen to self-defense.’” (quoting Akhil Amar, *The Bill of Rights: Creation and Reconstruction* 264–65 (1998))).

Hence, we heed *Heller*’s—and *McDonald*’s—admonition that citizens be allowed to use firearms “for the core lawful purpose of self-defense.” *Heller*, 554 U.S. at 630, *quoted in McDonald*, 561 U.S. at 768; *see also Wrenn*, 864 F.3d at 659 (“Whatever motivated the Amendment, at its core was the right to self-defense.”). While the Amendment’s guarantee of a right to “keep” arms effectuates the core purpose of self-defense within the home, the separate right to “bear” arms protects that core purpose outside the home. Indeed, *Heller* tied together the core rights of keeping and bearing firearms in precisely the same manner. When describing the “[f]ew laws in the history of our Nation [that] have *come close* to the severe restriction of the District’s handgun ban [within the home],” *Heller* pointed to several state statutes that severely restricted the open carrying of firearms *outside the home*. 554 U.S. at 629 (emphasis added) (citing *Reid*, 1 Ala. at 612; *Nunn*, 1 Ga. at 251; *Andrews*, 50 Tenn. at 187).

We are unpersuaded that historical regulation of public carry requires us to remove the right to bear arms from the Second Amendment’s core protection. *See, e.g., Kachalsky*, 701 F.3d at 94; *United States v. Masciandaro*, 638 F.3d 458, 470–71 (4th Cir. 2011). As the D.C. Circuit has explained,

“[t]he rights to keep and to bear, to possess and to carry, are equally important inasmuch as regulations on each must leave alternative channels for both.” *Wrenn*, 864 F.3d at 662. Regulations on public carry tend to “leave alternative channels” for self-defense outside the home, *id.*, because “[w]hen a state bans guns merely in particular places, such as public schools, a person can preserve an undiminished right of self-defense by not entering those places,” *Moore*, 702 F.3d at 940.²⁰ The prevalence of modest regulations on bearing arms, such as a restriction on carrying firearms in a school-zone, does not itself indicate that *bearing* arms is any less protected than *keeping* arms, because the Second Amendment tolerates equally modest restrictions on keeping firearms, such as open surface restrictions in the home. *Wrenn*, 864 F.3d at 663. Thus, historical restrictions on public carry “go to show the scope of the right, not its lack of fundamental character.” *See McDonald*, 561 U.S. at 802.

In sum, we reject a cramped reading of the Second Amendment that renders to “keep” and to “bear” unequal guarantees. *Heller* and *McDonald* describe the core purpose of the Second Amendment as self-defense, *see Heller*, 554 U.S. at 599; *McDonald*, 561 U.S. at 787, and “bear”

²⁰ The dissent mischaracterizes the Seventh Circuit’s decision in *Moore*. According to the dissent, *Moore* did not address whether the “core” of the Second Amendment includes the right to bear arms outside the home. Dissent at 3. That is incorrect. While not discussing the core as explicitly as we do here, *Moore* did make clear that the Second Amendment “confers a right to bear arms for self-defense, *which is as important outside the home as inside.*” 702 F.3d at 942 (emphasis added); *see also id.* at 941 (“[T]he interest in self-protection is as great outside as inside the home.”). And at the very least, *Moore* rejected our dissenting colleague’s attempt “[t]o confine the right to be armed to the home [and thereby] to divorce the Second Amendment from the right of self-defense described in *Heller* and *McDonald*.” *Id.* at 937.

effectuates such core purpose of self-defense in public. We are persuaded, therefore, that the right to carry a firearm openly for self-defense falls within the core of the Second Amendment.

B

We next ask whether section 134-9 “amounts to a destruction” of the core Second Amendment right to carry a firearm openly for self-defense. *Silvester*, 843 F.3d at 821. If so, the law is “unconstitutional under any level of scrutiny.” *Id.*

As previously explained, section 134-9 limits the open carry of firearms to people engaged in the protection of life and property, and even those lucky few may carry firearms only when in the actual course of their duties. Counsel for the County acknowledged as much at oral argument, stating that, to his knowledge, no one other than a security guard—or someone similarly employed—had ever been issued an open carry license.

Restrictions challenged under the Second Amendment must be analyzed with regard to their effect on the typical, law-abiding citizen. *Wrenn*, 864 F.3d at 665 (“[I]f the Amendment is for law-abiding citizens as a rule, then it must secure gun access at least for each typical member of that class.” (emphasis omitted)). That’s because the Second Amendment protects the right of *individuals* to keep and to bear arms, not *groups* of individuals. *See Heller*, 554 U.S. at 595. An individual right that does not apply to the ordinary citizen would be a contradiction in terms; its existence instead would wax and wane with the whims of the ruling majority.

Restricting open carry to those whose job entails protecting life or property necessarily restricts open carry to a small and insulated subset of law-abiding citizens. Just as the Second Amendment does not protect a right to bear arms only in connection with a militia, it surely does not protect a right to bear arms only as a security guard. The typical, law-abiding citizen in the State of Hawaii is therefore entirely foreclosed from exercising the core Second Amendment right to bear arms for self-defense.²¹ It follows that section 134-9 “amounts to a destruction” of a core right, and as such, it is infirm “[u]nder any of the standards of scrutiny.” *See id.* at 628. Thus, we hold that section 134-9’s limitation on the open carry of firearms to those “engaged in the protection of

²¹ We do not address whether, after *Peruta II*, a concealed carry regime could provide a sufficient channel for typical, law-abiding citizens to exercise their right to bear arms for self-defense. *See* 824 F.3d at 927. While the County’s police chief purportedly awaits an “exceptional case” to grant a concealed carry license, section 134-9 is effectively a ban on the concealed carry of firearms. As 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. *See* 2000 Haw. Att’y Gen. Reps., *Firearm Registrations in Hawaii, 2000 et seq*; *see also City of Sausalito v. O’Neill*, 386 F.3d 1186, 1223 n.2 (9th Cir. 2004) (“We may take judicial notice of a record of a state agency not subject to reasonable dispute.”). And there is no dearth of applicants. *See, e.g.,* 2016 Haw. Att’y Gen. Rep., *Firearm Registrations in Hawaii, 2016* at 9 (noting all 27 applicants for concealed licenses in the State were denied); 2015 Haw. Att’y Gen. Rep., *Firearm Registrations in Hawaii, 2015* at 9 (noting all 44 applicants for concealed licenses in the State were denied); 2014 Haw. Att’y Gen. Rep., *Firearm Registrations in Hawaii, 2014* at 9 (noting all 21 applicants for concealed licenses in the State were denied). Thus, even if the State and County remain free to accommodate the right to bear arms with concealed carry after *Peruta II*, an issue we do not decide, section 134-9 does not offer a realistic opportunity for a concealed carry license.

life and property” violates the core of the Second Amendment and is void; the County may not constitutionally enforce such a limitation on applicants for open carry licenses.

V

Notwithstanding the fact that section 134-9 eviscerates a core Second Amendment right—and must therefore be unconstitutional—the dissent would uphold the law under intermediate scrutiny. We do not wish to dive into the weeds of intermediate scrutiny, but we feel obligated to note a few aspects of the dissent’s analysis that are patently inconsistent not only with intermediate scrutiny, but with the judicial role itself.

A

As an initial mistake, the dissent chooses to analyze section 134-9 as a “good cause” requirement to carry a firearm in public, similar to those upheld by the Second, Third, and Fourth Circuits. Dissent at 72–73; *see Kachalsky*, 701 F.3d at 101; *Drake*, 724 F.3d at 434; *Woollard*, 712 F.3d at 876. The dissent emphasizes the language of section 134-9 that purportedly authorizes the issuance of a concealed carry license in an “exceptional case.” Yet, to analyze section 134-9 as such, the dissent must shut its eyes to the inconvenient fact that no concealed carry license has ever been granted by the County.

The dissent claims that we lack a factual basis to acknowledge that reality, but the dissent is clearly wrong. The County’s attorney *conceded* at oral argument that no concealed carry license has ever been granted by the County. The dissent gives short shrift to such concession, but it is nothing more than elementary that a party “is bound by

concessions made in its brief or at oral argument.” *Hilao v. Estate of Marcos*, 393 F.3d 987, 993 (9th Cir. 2004). Besides, official (and thus judicially noticeable) reports from the State’s Attorney General confirm what the County concedes: at least since 2000, no concealed carry license has been granted by the County. *See supra*, note 21. And even if some truly “exceptional” person in the County might one day receive a concealed carry license, it would be extraordinary to hold such a purely hypothetical stroke of luck to be sufficient in safeguarding a constitutional right.

The Second, Third, and Fourth Circuits certainly did not make such a leap. Those circuits, quite unlike the dissent, confirmed that the good cause requirements at issue did not disguise an effective ban on the public carry of firearms. As the Second Circuit flatly insisted, “New York’s proper cause requirement does not operate as a complete ban on the possession of handguns in public.” *Kachalsky*, 701 F.3d at 91. Likewise, the Third Circuit observed that New Jersey’s regime provided “clear and specific” standards, “accompanied by specific procedures that provide ‘safeguards against arbitrary official action.’” *Drake*, 724 F.3d at 435 (footnote omitted) (quoting *Siccardi v. State*, 59 N.J. 545, 555 (1971)); *see also Woollard*, 712 F.3d at 869, 881 & n.10 (distinguishing Maryland’s law, which allowed for licenses on a showing of a “good and substantial reason,” from the outright ban invalidated by *Moore*, 702 F.3d at 940). And each of the good cause regimes that were upheld provided for administrative or judicial review of any license denial, *Kachalsky*, 701 F.3d at 87; *Drake*, 724 F.3d at 429; *Woollard*, 712 F.3d at 870, a safeguard conspicuously absent from Hawaii’s laws. Far from supporting the dissent’s argument, then, the reasoning of the Second, Third, and Fourth Circuits suggests that they too

would invalidate a firearms carry regime as restrictive as Hawaii's.

We should also note the perplexing nature of the dissent's reasoning on this point. Suppose the dissent were correct that "[n]o record has been developed in this case" sufficient to discount section 134-9's "exceptional case" avenue. Dissent at 73. Utilizing the lack of such evidence to uphold section 134-9 as a good cause requirement—thus rejecting Young's claim—would plainly be inappropriate at this juncture. Young's action sits at the motion to dismiss stage. Are we now to dismiss claims under Rule 12(b) for a *lack of record evidence*? Of course not!

B

Beyond the dissent's misconception about how section 134-9 operates, its analysis under intermediate scrutiny is utterly unpersuasive.

1

First, and foremost, the dissent chooses to omit one-half of the inquiry. According to the dissent, the only question a court must answer under intermediate scrutiny is whether the government action "promotes a substantial government interest that would be achieved less effectively absent the regulation." Dissent at 74 (quoting *Fyock v. Sunnyvale*, 779 F.3d 991, 1000 (9th Cir. 2015)). That is incomplete, because a court must *also* determine whether the government action "'burden[s] substantially more [protected conduct] than is necessary to further' that interest." *Turner Broad. Sys., Inc. v. F.C.C. (Turner II)*, 520 U.S. 180, 213–14 (1997) (quoting *Turner Broad. Sys., Inc. v. F.C.C. (Turner I)*, 512 U.S. 622, 662 (1994)); *see also Shapero v. Ky. Bar Ass'n*, 486 U.S. 466, 476 (1988) (invalidating a flat ban on

direct-mail solicitation by lawyers because the government could regulate “abuses . . . through far less restrictive and more precise means”). Thus, while intermediate scrutiny surely does not require the government to pursue the *least* restrictive means of achieving an important interest, the substantial overbreadth or impreciseness of a government action must be considered.

Here, however, the dissent simply points out Hawaii’s low firearm death rate and claims victory, at no point seriously analyzing whether the State could reduce gun violence through means considerably more targeted than section 134-9.

2

Confounding the dissent’s erroneous understanding of intermediate scrutiny is its willingness to defer entirely to the State regarding the constitutionality of section 134-9. Dissent at 74–75. The dissent relies on the Supreme Court’s decision in *Turner Broadcasting* to justify its analysis, but in reality the decision undermines the level of deference the dissent would offer.

“Although we do ‘accord substantial deference to the predictive judgments’ of the legislature” when conducting intermediate scrutiny, “the [State] is not thereby ‘insulated from meaningful judicial review.’” *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1259 (D.C. Cir. 2011) (quoting *Turner II*, 520 U.S. at 195 & *Turner I*, 512 U.S. at 666). Quite the contrary, a court must determine whether the legislature has “base[d] its conclusions upon substantial evidence.” *Turner II*, 520 U.S. at 196. Indeed, despite the deference owed, the State bears the burden “affirmatively [to] establish the reasonable fit we require.” *See Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989).

The State and County here offer some empirical studies in support of their argument that section 134-9 is a reasonable means of reducing gun violence, but where does the dissent actually engage with such evidence? It doesn't. Its analysis of the evidence is nothing more than the conclusory assertion that "Hawaii has met its burden by *citing* to significant empirical evidence [apparently two or so pages in its brief is "significant"] and by explaining the logical inferences behind its policy choices." Dissent at 75 (emphasis added).

Mere citation is an inadequate application of intermediate scrutiny, even according deference to the predictive judgment of a legislature, and *Turner Broadcasting* itself shows why. There, the Supreme Court extensively analyzed over the course of *twenty pages* the empirical evidence cited by the government, and only then concluded that the government's "policy [was] grounded on reasonable factual findings supported by evidence that is substantial for a legislative determination." *See Turner II*, 520 U.S. at 196–224. To say that the dissent's treatment of the State's evidence is in any way comparable to the analysis of *Turner Broadcasting* is to omit nearly the entirety of the Court's opinion; the Court did much more than cite-check the government's brief.

The dissent is comfortable letting the State perform its intermediate scrutiny analysis because "[i]t is the legislature's job, not ours, to weigh conflicting evidence and make policy judgments." Dissent at 74 (quoting *Kachalsky*, 701 F.3d at 99). No statement could more clearly indicate where the dissent goes wrong: we are certainly *not* evaluating a mere "policy judgment" but rather determining the scope and application of a *constitutional right*. At bottom, the dissent would have us fundamentally reject

Heller and construe the Second Amendment as nothing more than an illusory promise. While the dissent might think *Heller* was wrongly decided, it is far beyond our power to overrule it.

VI

We do not take lightly the problem of gun violence, which the State of Hawaii “has understandably sought to fight . . . with every legal tool at its disposal.” *Wrenn*, 864 F.3d at 667. We see nothing in our opinion that would prevent the State from *regulating* the right to bear arms, for the Second Amendment leaves the State “a variety of tools for combatting [the problem of gun violence], including some measures regulating handguns.” *Heller*, 554 U.S. at 636.

But, for better or for worse, the Second Amendment does protect a right to carry a firearm in public for self-defense. We would thus flout the Constitution if we were to hold that, “in regulating the manner of bearing arms, the authority of [the State] has no other limit than its own discretion.” *Reid*, 1 Ala. at 616. While many respectable scholars and activists might find virtue in a firearms-carry regime that restricts the right to a privileged few, “the enshrinement of constitutional rights necessarily takes certain policy choices off the table.” *Heller*, 554 U.S. at 636.

Young has indeed stated a claim that section 134-9's limitations on the issuance of open carry licenses violate the Second Amendment.²²

REVERSED as to the County, **DISMISSED** as to the State,²³ and **REMANDED** for further proceedings consistent with this opinion.²⁴

CLIFTON, Circuit Judge, dissenting:

Morris Udall once observed at a congressional committee hearing that “everything has been said but not everyone has said it.” After decades of relative inattention, the Second Amendment has sparked substantial comment in the last forty years. Others have said things that reflect my view. I do not feel the need to repeat them.

²² Because we reverse the district court on Second Amendment grounds, we need not reach Young's due process claim.

²³ The appeal as to the State is dismissed for the reasons discussed in footnote 1.

²⁴ We deal with the pending motions as follows: (1) The County's motion to strike Young's 28(j) letters, ECF No. 20, is **DENIED**; (2) Young's motion to file a supplemental brief, ECF No. 24, is **GRANTED**; (3) Young's motion to strike the State's amicus brief, ECF No. 36, is **DENIED**; (4) Young's motion to take judicial notice, ECF No. 80, is **GRANTED IN PART**, and we take judicial notice of the Hawaii Attorney General's 2014 Firearms Registration Report; (5) Young's second motion to file a supplemental brief, ECF No. 84, is **GRANTED**; (6) The State's motion to file a supplemental amicus brief, ECF No. 92, is **GRANTED**.

Following the Supreme 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), our court has spoken more than once regarding the reach of the Second Amendment. This case requires us to do so again. One notable decision by our court was *Peruta v. County of San Diego*, 742 F.3d 1144 (9th Cir. 2014) (*Peruta I*). It expressed an interpretation of the Second Amendment and an explanation for that understanding very similar to the majority opinion in this case. This court voted to rehear *Peruta I* en banc, however, and effectively overturned that decision in *Peruta v. County of San Diego*, 824 F.3d 919 (9th Cir. 2016) (en banc) (*Peruta II*). Our opinion in *Peruta II* contained a lengthy discussion of history relevant to the Second Amendment, including the right to bear arms in old England, colonial America, and in the United States following adoption of the Fourteenth Amendment. It is sufficient for now to say that its assessment was different from that contained in *Peruta I* and in the opinion of the majority here.

The *Peruta II* en banc panel did not opine on the precise question presented in this case, limiting its holding to the conclusion that “the Second Amendment does not preserve or protect a right of a member of the general public to carry concealed firearms in public.” *Id.* at 924. As the majority opinion notes, at 10, that decision left unresolved the question of whether the Second Amendment supports the right of a member of the general public to carry a firearm openly in public.

A majority of the members of the *Peruta II* en banc panel expressed additional views relevant to our current case in a non-precedential fashion, however. In a separate concurring opinion. Judge Graber, joined by two other members of the

panel, fully concurred in the en banc panel's majority opinion but went on to express the view that even if it was assumed that the Second Amendment applied to the carrying of concealed weapons, the restrictions at issue in that case struck "a permissible balance between granting handgun permits to those persons known to be in need of self-protection and precluding a dangerous proliferation of handguns on the streets." *Id.* at 942 (internal quotation omitted). The other four judges on the panel who made up the majority stated that "if we were to reach that question, we would entirely agree with the answer the concurrence provides." *Id.* In sum, seven of the eleven members of that en banc panel expressed views that are inconsistent with the majority opinion in this case.

Other circuit courts have weighed in as well. One other circuit has expressed an opinion that aligns with the majority opinion here: *Wrenn v. District of Columbia*, 864 F.3d 650, 665 (D.C. Cir. 2017). One has decided that the Second Amendment protects the right to carry firearms in public, generally agreeing with the conclusion of the majority here, but it did not describe that right as part of the "core" of the Second Amendment, as the majority has here: *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012). Three others have reached contrary conclusions: *Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013), *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013), and *Kachalsky v. County of Westchester*, 701 F.3d 81 (2d Cir. 2012).

In light of the already existing circuit split, I assume that the Supreme Court will find it appropriate at some point to revisit the reach of the Second Amendment and to speak more precisely to the limits on the authority of state and local governments to impose restrictions on carrying guns in public. In the meantime, this court and our counterparts

elsewhere will do the best we can to sort out the conflicting arguments. I respect the opinion of the majority, but my conclusion is different.

H.R.S. § 134-9 regulates both open carry and concealed carry. Open carry licenses are available to those who are “engaged in the protection of life and property” and “[w]here the urgency or the need has been sufficiently indicated.” Concealed carry licenses are available “[i]n an exceptional case, when an applicant shows reason to fear injury to the applicant’s person or property.” H.R.S. § 134-9.

In my view, this statutory scheme is the same type of “good cause” public carry regulation that the Second, Third, and Fourth Circuits upheld in *Kachalsky*, *Drake*, and *Woollard*, respectively. Good cause licensing schemes, and extensive state regulation of public carry more generally, have a long history in the United States. While explicitly declining to elaborate on specific regulations, the Supreme Court in *Heller* expressly noted that the right secured by the Second Amendment is “not unlimited” and that there were “longstanding prohibitions” that were “presumptively lawful.” *Heller*, 554 U.S. at 626–27 & n. 26. I would hold that Hawaii’s statute is a longstanding, presumptively lawful regulation under *Heller*. At a minimum, the statute survives intermediate scrutiny, as the core of the Second Amendment does not include a general right to publicly carry firearms and there is a reasonable fit between the licensing scheme and Hawaii’s legitimate interest in promoting public safety.

As a result, I respectfully dissent. As promised, I will try not to repeat all that has already been said by other judges. I will limit my comments to a few additional thoughts about the historical record and the application of intermediate scrutiny to the statute at hand.

I. History

The majority opinion's conclusions rest heavily on historical analysis in the vein of the Supreme Court's decisions in *Heller* and *McDonald*. The premise of that approach is that the history of firearms regulations prior to the adoption of the Second Amendment and in the decades that followed that adoption shed light on the right that the founders intended to provide. Much of the analysis offered in the majority opinion repeats what was said in *Peruta I*, despite the en banc rejection of that opinion in *Peruta II*.

The discussion in the majority opinion is incomplete, at best. Throughout our history, states and their predecessor colonies and territories have taken divergent approaches to the regulation of firearms. While some, like the states that the majority cites, have historically allowed for a general right to publicly carry firearms, many others have not. "History and tradition do not speak with one voice here. What history demonstrates is that states often disagreed as to the scope of the right to bear arms, whether the right was embodied in a state constitution or the Second Amendment." *Kachalsky*, 701 F.3d at 91.

The majority opinion supports its conclusion by focusing solely on the laws and decisions from one region, the antebellum South. Take a look at the jurisdictions relied upon by the majority opinion, at 19–23: Kentucky, Tennessee, Alabama, Georgia, and Louisiana. What jumps out is that those were all slave states, and the decisions relied upon by the majority opinion all date from before the Civil War. The majority opinion affirmatively acknowledges, at 28–32, the peculiar pattern of southern states following the Civil War, during the era of Black Codes and efforts to keep firearms out of the hands of former slaves, but it fails to appreciate that the peculiarity did not start in 1865. To

suggest that the approach of the antebellum South reflected a national consensus about the Second Amendment's implications for public carry of firearms is misguided. The cases from the antebellum South relied upon by the majority "did not emerge in a vacuum and do not reflect the full range of American legal history. Rather, they come from a time, place, and culture where slavery, honor, violence, and the public carrying of weapons were intertwined." Eric M. Ruben & Saul Cornell, *Firearm Regionalism and Public Carry*, 125 Yale L.J. F. 121, 125 (2015), <http://www.yalelawjournal.org/forum/firearm-regionalism-and-public-carry>.

A more balanced historical analysis reveals that states have long regulated and limited public carry of firearms and, indeed, have frequently limited public carry to individuals with specific self-defense needs. Hawaii's regulatory framework fits squarely into that long tradition.

There are two legal conclusions to be drawn from a more thorough historical analysis. First, good cause licensing schemes are longstanding and, therefore, are presumptively lawful limitations on public carry of firearms under *Heller*. Second, even if they are not presumptively lawful, the widespread and longstanding nature of such schemes supports the conclusion that a general right to publicly carry firearms is not part of the core of the Second Amendment.

A. An Overview of State Regulation of Public Carry

Other decisions have detailed much of the history of regulations and limitations on public carry, so I need not fully reiterate that history here. I will instead provide only a brief overview of the tradition of regulation of public carry, with reference to the analysis performed by our court and other circuits where appropriate.

As we recognized in our en banc *Peruta II* decision, regulation of public carry has its roots in English law. Dating back to the thirteenth century, England regulated public carry of firearms, including both concealed and concealable weapons. See *Peruta II*, 824 F.3d at 929–32 (citing, *inter alia*, the Statute of Northampton, which prohibited men “to go nor ride armed by night nor by day, in Fairs, Markets, nor in the presence of the Justices or other Ministers, nor in no part elsewhere” and subsequent laws emphasizing that the Statute prohibited the carrying of concealable weapons).¹ In the colonial period, several colonies “adopted verbatim, or almost verbatim, English law” that limited or banned public carry. *Id.* at 933.

In the late 18th and 19th centuries, states began to develop good cause limitations or otherwise continued to limit public carry. The Second Circuit detailed much of the 19th century history in *Kachalsky*, 701 F.3d at 90–93.

¹ The majority’s analysis of English law and the colonies’ treatment of English law, at 36–45, is also flawed. For example, the majority assumes that historical regulations authorizing the arrest of or criminalizing going armed “to the fear or terror” of the public mean that the person who goes armed must have had the *intent* to terrify the public. See, e.g., Maj. Op. at 42–45. But the majority opinion does not cite adequate authority for that proposition, and there is no consensus that supports such an interpretation. Another equally reasonable interpretation is that these statutes meant that a member of the general public could not go armed because to do so would terrify the people, and the statutes included this language to “highlight[] the importance of the police power in preventing the dangers imposed by public carrying The terminology did not legally require circumstances where carrying of arms was unusual and therefore terrifying. Instead, the act of riding or going armed among the people was deemed terrifying itself and considered a breach against the public peace.” Patrick J. Charles, *The Faces of the Second Amendment Outside the Home*, 60 Clev. St. L. Rev. 1, 33 (2012).

Massachusetts, for example, first adopted a good cause statute in 1836. Its law provided an exception to its limitation on public carry for those with “reasonable cause to fear an assault or other injury, or violence to his person, or to his family or property.” 1836 Mass. Laws 748, 750, ch. 134, § 16. Under this law, any person who went armed without such good cause “may, on complaint of any person having reasonable cause to fear an injury or breach of the peace, be required to find sureties for keeping the peace.” *Id.* Wisconsin, Oregon, Minnesota, Michigan, Virginia, and Maine adopted similar laws. *See* Act to Prevent the Commission of Crimes, § 16, reprinted in *The Statutes of the Territory of Wisconsin* 379, 381 (1839) (restricting “go[ing] armed with a . . . pistol or pistols, or other offensive and dangerous weapon, without reasonable cause to fear an assault or other injury.”); Proceedings to Prevent Commission of Crimes, ch. 16, § 17, 1853 Or. Laws 220 (restricting any person from going armed with “pistol, or other offensive and dangerous weapon, without reasonable cause to fear an assault, injury, or other violence to his person, or to his family or property.”); Of Proceedings to Prevent the Commission of Crime, ch. 193, § 16, reprinted in Thomas M. Cooley, *Compiled Laws of the State of Michigan* 1572 (1857) (restricting any person from going armed with a “pistol, or other offensive and dangerous weapon, without reasonable cause to fear an assault or other injury”); Of Proceedings to Prevent the Commission of Crimes, 1847 Va. Laws 129, ch. 14, § 16 (restricting “go[ing] armed with any offensive or dangerous weapon without reasonable cause to fear an assault or other injury”); Of Proceedings to Prevent the Commission of Crimes, ch. 112, § 18, Rev. Stat. Minn. 528 (1851) (restricting “go[ing] armed with a . . . pistol or pistols, or other offensive and dangerous weapon, without reasonable cause to fear an assault or other injury.”); Of Proceedings for Prevention of

Crimes, ch. 169, § 16, Rev. Stat. Me. 709 (October 22, 1840) (“Any person, going armed with any dirk, dagger, sword, pistol, or other offensive and dangerous weapon, without a reasonable cause to fear an assault on himself, or any of his family or property, may . . . be required to find sureties for keeping the peace.”).²

After the Civil War, additional states adopted laws similar to the Massachusetts good cause model. Texas, for example, prohibited “[a]ny person [from] carrying on or about his person” certain weapons, including pistols, but provided an affirmative defense if the defendant could show that he was “in danger of an attack on his person” that was “immediate and pressing.” An Act to Regulate the Keeping and Bearing of Deadly Weapons, ch. 35, §§ 1–2, 1871 Tex. Laws 25 (discussed in *State v. Duke*, 42 Tex. 455 (1874)). Several other states and territories also adopted full open carry bans during this time. *See* An Act Defining and Punishing Certain Offenses Against the Public Peace, § 1, 1889 Ariz. Sess. Laws 16 (prohibiting any person within any settlement from “carry[ing] on or about his person, saddle, or in his saddlebags, any pistol.”); An Act to Prevent the Carrying of Fire Arms and Other Deadly Weapons, ch. 52, § 1, Wyo. Comp. Laws 352 (1876) (declaring that it is unlawful for any resident of or visitor to a city or village to “bear upon his person, concealed or openly, any fire arm or other deadly weapon.”); An Act Regulating the Use and

² The majority considers these types of regulations unpersuasive because of the citizen-complaint mechanism used to enforce some of these laws. *See* Maj. Op. at 33–34. But the point here is that states have long regulated public carry and specifically provided exceptions to their regulations for those with specific self-defense needs. The fact that the public carry regulations may have been triggered by citizen-complaint mechanisms does not change the states’ recognition that public carry may be limited.

Carrying of Deadly Weapons in Idaho Territory, § 1, 1888 Idaho Sess. Laws 23 (declaring that it is unlawful for anyone who is not a state or federal employee on duty “to carry, exhibit or flourish any . . . pistol, gun or other deadly weapons, within the limits or confines of any city, town or village.”); 1881 Kan. Sess. Laws 92, ch. 37, § 23 (“The council shall prohibit and punish the carrying of firearms, or other dangerous or deadly weapons, concealed or otherwise.”).

Numerous states adopted good cause limitations on public carry in the early 20th century. Laws from this time period may also be considered “longstanding” under *Heller*. See *Heller v. District of Columbia*, 670 F.3d 1244, 1253 (D.C. Cir. 2011) (noting that the Supreme Court “considered prohibitions on the possession of firearms by felons to be longstanding although states did not start to enact them until the early 20th century.” (internal quotation marks omitted)). Indeed, Hawaii’s law dates to this time. 1927 Haw. Laws 209, act 206, § 7; see also 1913 N.Y. Laws 1629 (requiring a showing of “proper cause”); *Drake*, 724 F.3d at 432 (explaining that New Jersey’s “justifiable need” standard based on “special danger” for public carry licenses has existed in some form for nearly 90 years, beginning in 1924). Other states imposed other public carry restrictions. Oklahoma, for example, established strict limits on public carry. See Will T. Little et al., *The Statutes of Oklahoma*, 495–96, § 2 (1890) (“It shall be unlawful for any person in this territory of Oklahoma, to carry upon or about his person any pistol, revolver . . . or any other offensive or defensive weapon.”). A more comprehensive review demonstrates that state regulation of public carry has existed throughout United States history, and that there is a long history of regulations similar to Hawaii’s statute.

B. Good Cause Regulations Are Longstanding and Presumptively Lawful

The longstanding and widespread nature of these regulations is determinative as we decide on the constitutionality of Hawaii's regulatory framework. As noted above, the Supreme Court emphasized in *Heller* that nothing in its opinion "should be taken to cast doubt" on the legitimacy of various longstanding limitations on the carry of firearms and that the list of "presumptively lawful regulatory measures" it specifically mentioned did not "purport to be exhaustive." *Heller*, 554 U.S. at 626–27 n. 26.

In *Drake*, the Third Circuit concluded that New Jersey's limitations on public carry to those with a justifiable need to carry a handgun due to "special danger to the applicant's life that cannot be avoided by [other] means" are such longstanding regulations that they join this presumptively lawful list. 724 F.3d at 428, 431–34. Hawaii's limitation on public carry to those with a fear of injury is very similar to New Jersey's regime. Based on the analysis in that decision and the history discussed above, I conclude that Hawaii's scheme should likewise be presumptively lawful under *Heller*.³

³ The majority opinion elects to disregard these enactments because it says it does not know the level of enforcement and cannot discern whether they were enacted "with a militia or a self-defense oriented view of the right to bear arms in mind." Maj. Op. at 35 n. 13. Those explanations do not speak to the point, though. States did in fact adopt these limitations on the carry of firearms, presuming the limitations to be lawful and consistent with the Second Amendment, and they did so long ago, making the restrictions long-established regulatory measures that are presumptively lawful.

C. Public Carry Is Not the Core of the Second Amendment

Even if Hawaii’s regulations were not presumptively lawful, it is plain from the long history of state regulation that a general right to publicly carry firearms is not part of the “core” of the Second Amendment. As the Second Circuit held in *Kachalsky*, “[t]he historical prevalence of the regulation of firearms in public demonstrates that while the Second Amendment’s core concerns are strongest inside hearth and home, states have long recognized a countervailing and competing set of concerns with regard to handgun ownership and use in public. . . . Because our tradition so clearly indicates a substantial role for state regulation of the carrying of firearms in public, we conclude that intermediate scrutiny is appropriate in this case.” *Kachalsky*, 701 F.3d at 96.

The majority opinion is simply incorrect when it concludes, at 32, that “the important founding-era treatises, the probative nineteenth century case law, and the post-civil war legislative scene each reveal a single American voice.” As demonstrated by the discussion above, there was no single voice on this question, as there is not today.

The majority’s assertion that our court has not yet concluded that the core of the Second Amendment is focused on self-defense in protection of hearth and home is also incorrect. We have repeatedly made statements to that effect. *See Jackson v. Cty. of San Francisco*, 746 F.3d 953, 963–64 (9th Cir. 2014) (“On its face, section 4512 implicates the core because it applies to law-abiding citizens, and imposes restrictions on the use of handguns within the home. . . . Having to retrieve handguns from locked containers or removing trigger locks makes it more difficult ‘for citizens to use them for the core lawful purpose of self-defense’ in

the home.” (quoting *Heller*, 554 U.S. at 630)); *United States v. Chovan*, 735 F.3d 1127, 1138 (9th Cir. 2013) (“*Heller* tells us that the core of the Second Amendment is ‘the right of law-abiding, responsible citizens to use arms in defense of hearth and home.’” (quoting *Heller*, 554 U.S. at 635)); *Bauer v. Becerra*, 858 F.3d 1216, 1222 (9th Cir. 2017) (“*Heller* identified the core of the Second Amendment as the right of law-abiding, responsible citizens to use arms in defense of hearth and home.” (internal quotation marks omitted)). It is true that “[w]e have not decided the degree to which the Second Amendment protects the right to bear arms outside the home.” See *Teixeira v. Cty. of Alameda*, 873 F.3d 670, 686 n. 19 (9th Cir. 2017) (en banc). But despite the majority opinion’s assertion, Maj. Op. at 47 n. 19, *Teixeira* did not say that we have not mapped the “core” of the Second Amendment. The cases cited above have spoken to that subject.

Many of the other circuits have defined the core of the Second Amendment as our prior cases have. See *Drake*, 724 F.3d at 431 (stating that “the individual right to bear arms for the purpose of self-defense” in the home is “the ‘core’ of the right as identified by *Heller*.”); *Kachalsky*, 701 F.3d at 89, 94 (“*Heller* explains that the ‘core’ protection of the Second Amendment is the ‘right of law-abiding, responsible citizens to use arms in defense of hearth and home.’” (quoting *Heller*, 554 U.S. at 634–35)); *United States v. Masciandaro*, 638 F.3d 458, 467 (4th Cir. 2011) (“[T]here now exists a clearly-defined fundamental right to possess firearms for self-defense within the home.”); *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1126 (10th Cir. 2015) (“If Second Amendment rights apply outside the home, we believe they would be measured by the traditional test of intermediate scrutiny.”); *Nat’l Rifle Ass’n of America, Inc. v. ATFE*, 700 F.3d 185, 193 (5th Cir. 2012) (“The [*Heller*]

Court invalidated the laws because they violated the central right that the Second Amendment was intended to protect—that is, the ‘right of law-abiding, *responsible* citizens to use arms in defense of hearth and home.’” (quoting *Heller*, 554 U.S. at 635) (emphasis in original)). I am thus joined by most of the other circuits that have spoken to the question in defining the core of the Second Amendment as defense of hearth and home. My understanding is firmly grounded in the long history of allowing substantial state regulation of public carry.

II. Intermediate Scrutiny

Because I conclude that Hawaii’s regulatory framework does not “impose[] such a severe restriction on the fundamental right of self defense of the home that it amounts to a destruction of the Second Amendment right,” the most demanding level of review that can be applied to Hawaii’s regulatory framework is intermediate scrutiny. *Silvester v. Harris*, 843 F.3d 816, 821 (9th Cir. 2016). It appears to me that there is a reasonable fit between Hawaii’s public carry regulations and its unquestionably legitimate goal of promoting public safety so that Hawaii’s statute would pass constitutional muster. Given the stage of the case and the direction of the majority, it does not seem worthwhile to try to launch a complete intermediate scrutiny analysis at this point. I note, however, that the majority opinion makes some critical errors in declining to consider that analysis.

First, Hawaii does provide an alternative mode of access to publicly carry firearms for self-defense. As we stated in *Jackson*, “firearm regulations which leave open alternative channels for self-defense are less likely to place a severe burden on the Second Amendment right than those which do not.” 746 F.3d at 961. Under Hawaii’s law, citizens may obtain a concealed carry permit if they can show reason to

fear injury. They thus are not “entirely foreclosed” from obtaining a permit to bear arms in public for self-defense, as asserted in the majority opinion, at 52. Moreover, the majority opinion’s assessment, at 52 n. 21, that “section 134-9 does not offer a realistic opportunity for a concealed carry license” lacks support in the record. No record has been developed in this case, so a conclusion that the regulation acts as a total ban is unsupported. It may be, as stated at oral argument, that no concealed carry permit has been issued by the County, but we have no information whatsoever about the applicants for concealed carry permits, let alone enough information to support a finding that those applicants would have been eligible for a permit even if Hawaii had a “shall-issue” regime. Under our precedent, the fact that Hawaii may provide an alternative channel for public carry should weigh in favor of finding that the law withstands constitutional scrutiny.⁴

⁴ This point speaks to a broader problem with the majority’s analysis. Throughout its opinion, the majority attempts to focus only on whether the Second Amendment protects a right to open carry, based on an erroneous assumption that any other analysis is foreclosed by our decision in *Peruta II*. I do not agree with this approach, and its artificiality becomes clear when we move to the intermediate scrutiny analysis. *Peruta II* specifically declined to decide not only whether the Second Amendment protects open carry, but also whether it protects “a right of a member of the general public to carry firearms in public.” *Peruta II*, 824 F.3d at 927. In applying intermediate scrutiny, the majority opinion specifically states, at 49 n. 16, that it does not address whether “a concealed carry regime could provide a sufficient channel for typical, law-abiding citizens to exercise their right to bear arms for self-defense.” But this is illogical. The existence of alternative access to public carry for self-defense in the form of concealed carry is unquestionably relevant in an intermediate scrutiny analysis. Nothing in *Peruta II* said otherwise. If we apply intermediate scrutiny, we must consider the statute as a whole, rather than pretending that Hawaii has instituted a complete ban on public carry, both open and concealed.

Second, the majority’s decision to pick apart the various studies cited by the state ignores the Supreme Court’s dictate to “accord substantial deference to the predictive judgments” of the state legislature. *Turner Broadcasting Sys., Inc. v. F.C.C.*, 520 U.S. 180, 195 (1997) (internal quotation marks omitted). As the Second Circuit stated in *Kachalsky*, “[i]t is the legislature’s job, not ours, to weigh conflicting evidence and make policy judgments.” *Kachalsky*, 701 F.3d at 99; *see also Drake*, 724 F.3d at 439 (noting that “conflicting empirical evidence . . . does not suggest, let alone compel, a conclusion that the ‘fit’ between [a state’s] individualized, tailored approach and public safety is not ‘reasonable.’”). The test is not whether the state has provided flawless empirical analysis that is immune to dispute to support its reasonable conclusion that the regulatory measures promote public safety. That limiting public carry of firearms may have a positive effect on public safety is hardly a illogical proposition. Many other states appear to have reached similar conclusions, and so have most other nations.

Although the majority may not like the outcomes of those studies, and may even disagree with their approaches, intermediate scrutiny does not allow us to dismiss statutes based on our own policy views or disagreements with aspects of the analyses cited. In an intermediate scrutiny analysis, Hawaii is not required to show that its regulatory scheme “is the least restrictive means of achieving its interest” in public safety, but rather need only show that the scheme “promotes a substantial government interest that would be achieved less effectively absent the regulation.” *Fyock v. Sunnyvale*, 779 F.3d 991, 1000 (9th Cir. 2015) (internal quotation marks omitted).

Hawaii has met its burden by citing to significant empirical evidence and by explaining the logical inferences behind its policy choices. *See IMS Health Inc. v. Ayotte*, 550 F.3d 42, 55 (1st Cir. 2008) (abrogated on other grounds by *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011) (explaining that under intermediate scrutiny states are “allowed to justify speech restrictions by reference to studies and anecdotes” and “history, consensus, and simple common sense” (internal quotation marks omitted)). As other circuits have held in *Kachalsky*, *Drake*, and *Woollard*, and as a majority of the judges on our en banc panel indicated in *Peruta II*, there is a reasonable fit between good cause limitations on public carry licenses and public safety. *See Kachalsky*, 701 F.3d at 96–100; *Drake*, 724 F.3d at 439–40; *Woollard*, 712 F.3d at 878–82; *Peruta II*, 824 F.3d at 942.

Hawaii has a very low firearm death rate as compared to other states: 4.5 deaths per 100,000 total population. *See* National Center for Health Statistics, Firearm Mortality by State, https://www.cdc.gov/nchs/pressroom/sosmap/firearm_mortality/firearm.htm. There are undoubtedly many factors that lead to that result, but we should not ignore the evidence that Hawaii has been highly successful in limiting firearm deaths and promoting public safety. Hawaii has shown that there is a reasonable fit between its statutory scheme and public safety, and the state’s decision is owed deference. Any conclusion otherwise disregards our proper role in an intermediate scrutiny analysis.

III. Conclusion

The majority opinion goes astray in several respects. Most obviously, the majority opinion has disregarded the fact that states and territories in a variety of regions have long allowed for extensive regulations of and limitations on

the public carry of firearms. Many have taken the approach that Hawaii has taken for almost a century. Such regulations are presumptively lawful under *Heller* and do not undercut the core of the Second Amendment. In addition, the majority opinion misconceives the intermediate scrutiny test, assumes without support in the record that Hawaii's statute operates as a complete ban, and substitutes its own judgment about the efficacy of less restrictive regulatory schemes. This approach is in conflict with Supreme Court precedent, our own decisions, and decisions by other circuits.

I respectfully dissent.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

GEORGE K. YOUNG, JR.,

Plaintiff,

vs.

Civ. No. 12-00336 HG BMK

STATE OF HAWAII and NEIL
ABERCROMBIE in his capacity
as Governor of the State of
Hawaii; DAVID M. LOUIE in his
capacity as State Attorney
General; COUNTY OF HAWAII, as
a sub-agency of the State of
Hawaii and WILLIAM P. KENOI
in his capacity as Mayor of
the County of Hawaii; and the
HILO COUNTY POLICE
DEPARTMENT, as a sub-agency
of the County of Hawaii and
HARRY S. KUBOJIRI in his
capacity as Chief of Police;
JOHN DOES 1-25; JANE DOES 1-
25; CORPORATIONS 1-5, and DOE
ENTITIES 1-5,

Defendants.

**ORDER GRANTING COUNTY OF HAWAII OFFICIAL DEFENDANTS' MOTION TO
DISMISS (DOC. 23) AND STATE OF HAWAII DEFENDANTS' MOTION TO
DISMISS (DOC. 25)**

Plaintiff George K. Young, Jr. sues County and State
Officials alleging violations of 42 U.S.C. §§ 1983, 1985 and 1986
in the denial of his application for a license to carry a weapon
in public, pursuant to Hawaii Revised Statute § 134-9. Plaintiff
asserts that the enforcement of Hawaii Revised Statutes §§ 134-6
and 134-9 violate the rights guaranteed him by Article I of the
United States Constitution, and by the Second, Ninth, and

Fourteenth Amendments. To remedy the alleged violations, Plaintiff seeks damages, an order enjoining the enforcement of Chapter 134 of Hawaii Revised Statutes, and a three-year permit for carrying a weapon in public.

Defendants move to dismiss the Complaint.

Plaintiff's claims against the State and State Officials are barred by the doctrine of sovereign immunity. Plaintiff's claims against the County and County Officials fail because Plaintiff has not alleged a Constitutional violation.

The Court **GRANTS** Defendants' Motions to Dismiss Plaintiff's Complaint.

PROCEDURAL HISTORY

On June 12, 2012, Plaintiff filed a Complaint. (Doc. 1.)

On August 10, 2012, the County Official Defendants filed a Motion to Dismiss Plaintiff's Complaint. (Doc. 23.) The County of Hawaii and Hilo County Police Department were never served.

On August 16, 2012, the State of Hawaii Defendants filed a Motion to Dismiss Plaintiff's Complaint. (Doc. 25.)

On September 6, 2012, Plaintiff filed an Opposition to the Motions to Dismiss. (Doc. 29.)

On October 1, 2012, the County of Hawaii Officials Defendants filed a Reply. (Doc. 33.)

On October 1, 2012, the State of Hawaii Defendants filed a Reply. (Doc. 34.)

The Court elected to decide the matter without a hearing pursuant to Local Rule 7.2(d).

BACKGROUND

A. Factual Allegations Set Forth In The Complaint

The Complaint alleges that Defendants violated Plaintiff George K. Young, Jr.'s rights under the United States Constitution by denying his applications for a license to carry a firearm, pursuant to Hawaii Revised Statute ("HRS") § 134-9. Plaintiff also alleges that HRS § 134-6, which was repealed in 2006, is unconstitutional.

B. Legal Allegations Set Forth In The Complaint

The Complaint sets out claims asserting that HRS §§ 134-6 and 134-9 ("Hawaii's Firearm Carrying Laws") violate Plaintiff's rights guaranteed by Article I of the United States Constitution, and by the Second, Ninth, and Fourteenth Amendments.

Plaintiff's primary contention involves HRS § 134-9, Hawaii's License to Carry Law. The law conditions the ability to carry a pistol or revolver and ammunition in public. Haw. Rev. Stat. § 134-9.

The other challenged provision, HRS § 134-6, was repealed in 2006 and replaced by HRS §§ 134-21 through 134-27. See Act 66, § 6, of the 2006 Haw. Sess. Laws; State v. Ancheta, 220 P.3d 1052 (Haw.Ct.App. 2009) (noting the similarity between HRS § 134-6 and the replacement statutes). The statutes at issue regulate the transportation of weapons outside of a person's private property.

People who hold a License to Carry, pursuant to HRS § 134-9, are exempt from the provisions.

Counts One through Five allege the following claims against all Defendants:

COUNT ONE - "(42 U.S.C. § 1983, 1985, 1986) Violation of U.S. Constitution, Article I, Section 10, Cls. 1: 'No State shall . . . pass . . . any Bill of Attainder. . .'"

COUNT TWO - "(42 U.S.C. 1983, 1985, 1986) Violation of U.S. Constitution, Article I, Section 10: 'No State shall . . . pass any . . . law impairing the Obligations of Contract . . .'"

COUNT THREE - "Violation of U.S. Constitution, Amendment II"

COUNT FOUR - "Violation of U.S. Constitution, Amendment IX"

COUNT FIVE - "Violation of U.S. Constitution, Amendment XIV
' . . . No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States . . . '"

The Complaint also alleges a cause of action under the Due Process Clause of the Fourteenth Amendment. (Complaint at pg. 6.) Plaintiff requests a permanent injunction preventing the enforcement of HRS Chapter 134, damages, and punitive damages. He also requests that he be immediately issued a permit to carry an unconcealed or concealed weapon for three years.

C. Plaintiff's Previous Cases

Plaintiff has previously filed two similar Complaints in the Federal District of Hawaii. In the first case, Young v. Hawaii, 548 F.Supp.2d 1151 (D. Haw. 2008) ("Young I"), Plaintiff sued State and County Officials based on the denial of his application to carry a weapon in public. The factual and legal basis are

nearly identical to the case before the Court. On March 12, 2008, the District Court dismissed the Complaint with prejudice. The Court held that sovereign immunity barred suit against the State and State officials. As to the County, the Court held that Plaintiff lacked standing to sue for a Second Amendment violation, reflecting the state of the law at the time of the decision.

In the second case, Young v Hawaii, No. 08-00540, 73 Fed.R. Serv.3d 1635 (D. Haw. Jul. 2, 2009) ("Young II"), Plaintiff alleged the same violations as in Young I after he was again denied a permit after reapplying. Three differences existed between Young I and Young II. First, in Young II, Plaintiff brought causes of action against County Officials in their individual capacities, as well as official capacities. Second, after Young I, the Supreme Court of the United States decided Heller v. District of Columbia, 540 U.S. 570 (2008), holding that the Second Amendment of the United States Constitution conferred a limited right to individuals to keep and bear arms. Third, at the time of the District Court's Order, the Ninth Circuit Court of Appeals held that the Second Amendment applied to the states, not just to the federal government. Nordyke v. King, 563 F.3d 439 (9th Cir. 2009), *vacated*, 611.F.3d 1015 (9th Cir. 2010) (remanding back to panel after McDonald v. City of Chicago), *rehearing en banc*, 681 F.3d 1041 (9th Cir. 2012). While Heller and King did confer standing on Plaintiff to challenge an alleged infringement

of his Second Amendment right, Plaintiff was estopped from bringing the claims a second time due to the preclusive effect of Young I.

STANDARD OF REVIEW

Defendants move to dismiss the alleged causes of action in Counts I through V, pursuant to Federal Rule of Civil Procedure 12(b)(6). The Court may dismiss a complaint as a matter of law pursuant to Rule 12(b)(6) where it fails "to state a claim upon which relief can be granted." Rule 8(a)(2) of the Federal Rules of Civil Procedure requires "a short and plain statement of the claim showing that the pleader is entitled to relief." When considering a Rule 12(b)(6) motion to dismiss, the Court must presume all allegations of material fact to be true and draw all reasonable inferences in favor of the non-moving party. Pareto v. F.D.I.C., 139 F.3d 696, 699 (9th Cir. 1998). Conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss. Id. at 699. The Court need not accept as true allegations that contradict matters properly subject to judicial notice or allegations contradicting the exhibits attached to the complaint. Spewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001).

In Bell Atl. Corp. v. Twombly, the United States Supreme Court addressed the pleading standards under the Federal Rules of Civil Procedure in the anti-trust context. 550 U.S. 544 (2007). The Supreme Court stated that Rule 8 of the Federal Rules of Civil

Procedure "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action," and that "[f]actual allegations must be enough to raise a right to relief above the speculative level." Id. at 555.

Most recently, in Ashcroft v. Iqbal, the Supreme Court clarified that the principles announced in Twombly are applicable in all civil cases. 556 U.S. 662 (2009). The Court stated that "the pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me-accusation." Id. at 678 (citing Twombly, 550 U.S. at 555). To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. Id. (quoting Twombly, 550 U.S. at 570). A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. Id. (quoting Twombly, 550 U.S. at 556). Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'" Id. (quoting Twombly, 550 U.S. at 557). The complaint "must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to

defend itself effectively” and must “plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation.” AE ex rel Hernandez v. Cnty. of Tulare, 666 F.3d 631, 637 (9th Cir. 2012) (internal quotations omitted).

A plaintiff should be given leave to amend the complaint, unless it could not be saved by any amendment. Harris v. Amgen, Inc., 573 F.3d 728, 737 (9th Cir. 2009) (internal quotations omitted). A court may deny leave to amend a complaint if a plaintiff could not possibly cure the deficiency by alleging “other facts consistent with the challenged pleading.” Telesaurus VPC, LLC v. Power, 623 F.3d 998, 1003 (9th Cir. 2010), *cert. denied*, 132 S.Ct. 95 (Oct. 03 2011). A court may also deny leave to amend if it would be futile, such as when a claim will inevitably be defeated on summary judgment. Johnson v. Am. Airlines, Inc., 834 F.2d 721, 724 (9th Cir. 1987).

ANALYSIS

Plaintiff’s allegations arise from being denied a permit to carry a firearm, pursuant to HRS § 134-9. County Officials and all State Defendants move to dismiss Plaintiff’s causes of action. State Defendants claim that Plaintiff’s suit against them is barred by the Eleventh Amendment to the United States Constitution. County Official Defendants claim that Plaintiff lacks standing and that the Complaint does not allege a United

States Constitutional violation. The County of Hawaii and Hilo County Police Department were not served and have not entered an appearance in the action.

I. PLAINTIFF'S FEDERAL CONSTITUTIONAL CLAIMS AGAINST THE STATE OF HAWAII DEFENDANTS ARE BARRED BY ELEVENTH AMENDMENT IMMUNITY

Plaintiff sues the State of Hawaii, Neil Abercrombie in his official capacity as the Governor of Hawaii, and David M. Louie in his official capacity as the Attorney General of Hawaii.

The doctrine of sovereign immunity applies when civil rights claims are brought against the State of Hawaii. The State of Hawaii has not waived its Eleventh Amendment immunity, and Congress did not abrogate the States' sovereign immunity when enacting 42 U.S.C. § 1983. Plaintiff's claims against the State of Hawaii and Defendants Abercrombie and Louie under 42 U.S.C. §§ 1983, 1985, and 1986 for violation of the prohibition on Bills of Attainders in the United States Constitution, the Contract Clause, and the Second, Ninth, and Fourteenth Amendments are barred by Eleventh Amendment Immunity.

A. The Doctrine of Sovereign Immunity

The doctrine of sovereign immunity is set out in the Eleventh Amendment of the United States Constitution:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI. The United States Supreme Court has held that Eleventh Amendment immunity extends to suits against a State or its agencies by citizens of that same State. Hans v. Louisiana, 134 U.S. 1 (1890).

Sovereign immunity generally bars the federal courts from entertaining suits brought against a State or its agencies, unless a State waives immunity or Congress abrogates immunity pursuant to § 5 of the Fourteenth Amendment to the United States Constitution. L.A. Cnty. Bar Ass'n v. Eu, 979 F.2d 697, 704 (9th Cir. 1992); Wilbur v. Locke, 423 F.3d 1101, 1111 (9th Cir. 2005), *cert. denied* 546 U.S. 1173 (2006).

Sovereign immunity also bars federal statutory and constitutional claims for money damages against state officials sued in their official capacities, absent a waiver or abrogation of immunity. See Dittman v. State of California, 191 F.3d 1020, 1025-26 (9th Cir. 1999). State officials may be subject to suit for prospective injunctive relief under the doctrine established in Ex parte Young, 209 U.S. 123 (1908).

B. Hawaii Has Not Waived Sovereign Immunity

In order to waive sovereign immunity, a State's consent must be expressed unequivocally. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 99 (1984). The State of Hawaii has not waived its sovereign immunity from suit in federal court for civil rights actions. See Linville v. State of Hawaii, 874 F.Supp. 1095,

1103 (D.Haw. 1994). Here, the State of Hawaii Defendants have invoked the doctrine of sovereign immunity.

C. 42 U.S.C. §§ 1983, 1985, and 1986 Do Not Abrogate Sovereign Immunity

Congress has the power to abrogate the sovereign immunity of the States, pursuant to Section 5 of Amendment XIV of the United States Constitution: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." Congress must do so by enacting a statute which "explicitly and by clear language indicate[s] on its face an intent to sweep away the immunity of the States." Quern v. Jordon, 440 U.S. 332, 332 (1979); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 73 (2000) (Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute).

Plaintiff's claims are brought pursuant to 42 U.S.C. § 1983. Section 1983 states, in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage . . . subjects or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress

42 U.S.C. § 1983. Congress did not abrogate the States' Eleventh Amendment immunity when enacting 42 U.S.C. § 1983. Will v. Mich. Dep't of State Police, 491 U.S. 58, at 65-66 (1989). States and State officials acting in their official capacities, except where

sued for prospective injunctive relief, are not considered "persons" for purposes of Section 1983 liability. Id. at 71; Sherez v. Hawaii Dep't of Educ., 396 F.Supp.2d 1138, 1142-43 (D. Haw. 2005) (dismissing claims against the Department of Education and against State official in their official capacity on Eleventh Amendment immunity grounds). The same rule applies to Plaintiff's other Eleventh Amendment claims, as Congress did not abrogate the States' Eleventh Amendment immunity when enacting 42 U.S.C. §§ 1985 and 1986.

The State of Hawaii has not waived sovereign immunity, and Congress, in passing 42 U.S.C. §§ 1983, 1985, and 1986, did not abrogate Eleventh Amendment immunity of state governments. The Court lacks jurisdiction over all of Plaintiff's federal constitutional claims against the State of Hawaii, and over Plaintiff's claims for money damages against the Governor of Hawaii and the Attorney General of Hawaii. The claims are **DISMISSED WITH PREJUDICE**.

D. Plaintiff's Claims Against The Governor Of Hawaii and The Attorney General Of Hawaii In Their Official Capacities

Plaintiff's claims under 42 U.S.C. §§ 1983, 1985, and 1986 for prospective injunctive relief against the Governor of Hawaii and the State Attorney General, in their official capacities, are not barred by sovereign immunity. Under the doctrine established in Ex parte Young, 209 U.S. 123 (1908), Eleventh Amendment immunity does not apply to a suit "for prospective declaratory and injunctive

relief against state officers, sued in their official capacities, to enjoin an alleged ongoing violation of federal law." Wilbur, 423 F.3d at 1111 (quoting Agua Caliente Band of Cahuilla Indians v. Hardin, 223 F.3d 1041, 1045 (9th Cir. 2000)). Such actions are not considered actions against the State. Will, 491 U.S. at 71 n.10.

The United States Supreme Court ruled in 1908, in Ex Parte Young that a claim against a state official is appropriate when the complaint (1) alleges an ongoing violation of federal law and (2) seeks relief properly characterized as prospective. Verizon Md., Inc. v. Public Serv. Comm'n, 535 U.S. 635, 645 (2002); ACS of Fairbanks, Inc. v. GCI Commc'n Corp., 321 F.3d 1215, 1216-17 (9th Cir. 2003). The holding by the United States Supreme Court in Ex Parte Young does not allow claims for retroactive relief. Eleventh Amendment immunity bars a federal court from awarding compensation for past injuries from state treasury funds. Edelman v. Jordan, 415 U.S. 651 (1974). The suit must be brought against a state officer with a sufficient connection to a law's enforcement. Pennington Seed, Inc. v. Produce Exch. No. 299, 457 F.3d 1334, 1342 (Fed. Cir. 2006). The named state official must actually violate federal law. Broad generalizations, such as a governor or state attorney general's obligation to enforce all state laws, do not have a sufficient nexus for an Ex Parte Young claim.

While Plaintiff requests an injunction against the enforcement of HRS Chapter 134, he is actually challenging the constitutional validity of Hawaii's Firearm Carrying Laws, HRS §§ 134-9 and 134-23

through 134-27. Plaintiff's primary contention involves the licensing scheme in HRS § 134-9. Plaintiff argues that because the Second Amendment guarantees the fundamental individual right to bear arms, HRS Chapter 134's restrictions are unconstitutional. The analysis of Hawaii's Firearm Carrying Laws *infra* finds them to be constitutional.

Additionally, Plaintiff's claims against Governor Abercrombie and Attorney General Louie are based on their general oversight of Hawaii laws. These allegations are insufficient to establish a nexus between the named State officials and the alleged violation of Plaintiff's civil rights. See Pennington, 457 F.3d at 1342-43; L.A. Cnty. Bar Ass'n v. Eu, 979 F.2d 697, 704 (9th Cir. 1992). Governor Abercrombie and Attorney General Louie do not have a sufficient nexus to the enforcement of Hawaii's Firearm Carrying Laws. See Young I, 548 F.Supp.2d at 1164.

Plaintiff does not sufficiently allege claims against the Governor of Hawaii and the State Attorney General of Hawaii in their official capacities. The claims against Defendants Abercrombie and Louie are **DISMISSED WITH PREJUDICE**.

II. PLAINTIFF'S FEDERAL CONSTITUTIONAL CLAIMS AGAINST THE COUNTY OF HAWAII, THE HILO COUNTY POLICE DEPARTMENT, AND WILLIAM P. KENOI AND HARRY S. KUBOJIRI IN THEIR OFFICIAL CAPACITIES

The Complaint names the County of Hawaii, the Hilo County Police Department, Mayor William P. Kenoi, and Police Chief Harry S. Kibojiri as Defendants. Mayor Kenoi and Police Chief Kibojiri are sued only in their official capacities. Plaintiff has not

served the County of Hawaii or the Hilo County Police Department. Mayor Kenoi and Police Chief Kibojiri move to dismiss all claims.

A. Plaintiff's Claims Against Defendants Mayor Kenoi and Police Chief Kubojiri Are Analyzed in the Same Manner as If They Were Directly Brought Against the County of Hawaii

A Section 1983 claim against a county official in his or her official capacity is the same as bringing a direct action against the government. See Wong v. City & Cnty. of Honolulu, 333 F.Supp.2d 942, 947 (D. Haw. 2004) (citing Kentucky v. Graham, 473 U.S. 159, 166-67 n. 14 (1985)).

The claims asserted against Defendants Mayor Kenoi and Police Chief Kubojiri, in their official capacities, are analyzed as a municipal liability claim against the County of Hawaii.

B. Municipal Liability Under § 1983

Plaintiff's municipal liability claims against Defendants Mayor Kenoi and Police Chief Kibojiri ("County Official Defendants"), in their official capacities, are based on 42 U.S.C. § 1983. Section 1983 provides a mechanism for plaintiffs to challenge allegedly unconstitutional actions by governmental officials. Cholla Ready Mix, Inc. v. Civish, 382 F.3d 969, 978 (9th Cir. 2004). The statute does not create any substantive rights. Id. To state a cause of action under § 1983, a "plaintiff must demonstrate a deprivation of a right secured by the Constitution or laws of the United States, and that the defendant acted under color of state law." Kirtley v. Rianey, 326 F.3d 1088,

1092 (9th Cir. 2003); Leer v. Murphy, 844 F.2d 628, 632 (9th Cir. 1988).

A municipality may be liable in a Section 1983 action under two theories. In the first instance, a municipality is liable in a Section 1983 action for injuries caused by a municipality's unconstitutional policy or custom. See Monell v. Dep't of Social Servs., 436 U.S. 658, 694 (1978); Webb v. Sloan, 330 F.3d 1158, 1164 (9th Cir. 2003), *cert. denied*, 540 U.S. 1141 (2004). The official policy or custom requirement limits municipal liability to actions in which the municipality is actually responsible for the unconstitutional act. Gausvik v. Perez, 239 F.Supp.2d 1047, 1053 (E.D. Wash. 2002) (*citing* Pembaur v. City of Cincinnati, 475 U.S. 469, 479-80 (1986)). Even if the unconstitutional practice is not authorized by written law, the municipality may still be liable when the practices are "so permanent and well-settled as to constitute a 'custom or usage' with the force of law." Monell, 436 U.S. at 691.

The second action for which a municipality may be held liable under Section 1983 is for failure to train, supervise, or discipline its employees. City of Canton v. Harris, 489 U.S. 378, 387 (1989).

C. Plaintiff Fails To State A Federal Constitutional Claim Against the County Official Defendants Under Section 1983

It is not disputed that County Official Defendants acted under color of State law. Plaintiff's claims against the County Official Defendants are that the County's policy of enforcing Hawaii's

Firearm Carrying Laws results in a deprivation of Plaintiff's civil rights under Article I of the United States Constitution, and the Second, Ninth, and Fourteenth Amendments to the United States Constitution. Plaintiff's claims primarily concern the licensing scheme for pistols and revolvers in HRS § 134-9.

The statute provides:

(a) In 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 who is a citizen of the United States of the age of twenty-one years or more or to a duly accredited official representative of a foreign nation of the age of twenty-one years or more to carry a pistol or revolver and ammunition therefor concealed on the person within the county where the license is granted. Where the urgency or the need has been sufficiently indicated, the respective chief of police may grant to an applicant of good moral character who is a citizen of the United States of the age of twenty-one years or more, is engaged in the protection of life and property, and is not prohibited under section 134-7 from the ownership or possession of a firearm, a license to carry a pistol or revolver and ammunition therefor unconcealed on the person within the county where the license is granted. The chief of police of the appropriate county, or the chief's designated representative, shall perform an inquiry on an applicant by using the National Instant Criminal Background Check System, to include a check of the Immigration and Customs Enforcement databases where the applicant is not a citizen of the United States, before any determination to grant a license is made. Unless renewed, the license shall expire one year from the date of issue.

(b) The chief of police of each county shall adopt procedures to require that any person granted a license to carry a concealed weapon on the person shall:

- (1) Be qualified to use the firearm in a safe manner;
- (2) Appear to be a suitable person to be so licensed;
- (3) Not be prohibited under section 134-7 from the

ownership or possession of a firearm; and

(4) Not have been adjudged insane or not appear to be mentally deranged.

(c) No person shall carry concealed or unconcealed on the person a pistol or revolver without being licensed to do so under this section or in compliance with sections 134-5(c) or 134-25.

(d) A fee of \$10 shall be charged for each license and shall be deposited in the treasury of the county in which the license is granted.

Haw. Rev. Stat. § 134-9.

Hawaii's Places to Keep Statutes require firearms to "be confined to the possessor's place of business, residence or sojourn," but allowing lawful transport between those places and repair shops, target ranges, licensed dealerships, firearms shows, firearm training, and police stations. See Haw. Rev. Stat. §§ 134-23, 134-24; 134-25; 134-27. Section 134-26 prohibits carrying or possessing a loaded firearm on a public highway. Holders of a valid license to carry, pursuant to HRS § 134-9, are exempt from the provisions.

County Official Defendants seek dismissal of Plaintiff's Section 1983 claims on the grounds that Plaintiff has failed to allege a deprivation of a constitutional right and lacks standing.

1. Plaintiff Has Standing To Raise a Second Amendment Challenge to HRS Chapter 134

Article III of the United States Constitution limits the jurisdiction of the federal courts to adjudicating actual cases or controversies. Allen v. Wright, 468 U.S. 737, 750 (1984). Standing

includes constitutional and jurisprudential considerations. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).

Plaintiff has the burden to establish standing to sue. Id., 504 U.S. at 560-61. To establish standing, Plaintiff first must show that he suffers from an "injury in fact" that is "concrete and particularized" and either "actual or imminent." Plaintiff must then show that the injury can be traced to some wrongful or illegal conduct by the Defendants that is likely to be redressed by a favorable decision by the court. Id. Plaintiff must demonstrate standing for each form of relief he seeks. Clark v. City of Lakewood, 259 F.3d 996, 1006 (9th Cir. 2001) (citing Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., 528 U.S. 167, 191-92 (2000)).

A plaintiff's claims that his rights have been violated are assumed to be valid for the purpose of his standing inquiry. See Lujan, 504 U.S. at 561; Kachalsky v. Cacace, 817 F.Supp.2d 235, 249 n.12 (S.D.N.Y. 2011). A plaintiff seeking injunctive relief must show that he is suffering from ongoing injury or faces threat of immediate injury. Los Angeles v. Lyons, 461 U.S. 95, 105 (1983).

Plaintiff claims that Hawaii's Firearm Carrying laws in HRS Chapter 134 violate his rights protected by the Second Amendment to the United States Constitution.

The Second Amendment provides:

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.

It is possible that a license or permit denial pursuant to a state administrative scheme regulating firearms may constitute an actual and ongoing injury for infringing upon an alleged Second Amendment violation. See Kachalsky, 817 F.Supp.2d at 248-49; Dearth v. Holder, 641 F.3d 499, 501-02 (D.C.Cir. 2011). In Parker v. District of Columbia, 478 F.3d 370 (D.C. Cir. 2007), the District of Columbia Circuit Court of Appeals held that the denial of a gun license constituted an injury independent of the prospective enforcement of criminal laws related to gun possession. The denial of the license conferred standing on the plaintiff to challenge the statute regulating the issuance of permits and the statutes criminalizing possession without a license. Id. at 375-76 (D.C. Cir. 2007), *aff'd sub nom. District of Columbia v. Heller*, 554 U.S. 570 (2008); see also Ezell v. City of Chicago, 651 F.3d 684, 695 (7th Cir. 2011) (plaintiff had standing to bring a pre-enforcement constitutional challenge to city ordinance governing prerequisites for gun ownership because forcing him to keep his firearm outside the city was an ongoing injury to his claimed right to possess firearms for self defense).

Plaintiff alleges that the enforcement of Hawaii's Firearm Carrying Laws deprive him of his Second Amendment right to carry a firearm in public. If we assume that Hawaii's Firearm Carrying Laws violate Plaintiff's federal constitutional rights, Plaintiff sufficiently alleges an injury and causation to establish standing for injunctive relief. A decision enjoining the enforcement of the

Hawaii statutes would redress Plaintiff's injury. See Moore v. Madigan, 842 F.Supp.2d 1092, 1098 (C.D. Ill. 2012) (plaintiffs have standing to seek relief enjoining the enforcement of statutes that allegedly infringe upon their claimed right to carry firearms in public).

The Complaint does not set forth a basis for Plaintiff's claims for monetary relief, including compensatory damages of at least one-million dollars. Plaintiff does not have standing to support his claims for damages.

2. Plaintiff Fails to State a Second Amendment Claim

After the Court dismissed Plaintiff's first constitutional challenge to HRS chapter 134 in Young v. Hawaii, 548 F.Supp.2d 1151 (D. Haw. 2008) ("Young I"), two significant developments occurred in Second Amendment law. First, in District of Columbia v. Heller, the United States Supreme Court explicitly recognized that the Second Amendment confers an individual right to keep and bear arms. 554 U.S. 570 (2008) (overturning Hickman v. Block, 81 F.3d 98, 101-102 (9th Cir. 1996)). Second, in McDonald v. City of Chicago, the Supreme Court determined that the Second Amendment applies to the actions of the States through the Fourteenth Amendment to the United States Constitution. 130 S.Ct. 3020 (2010). After McDonald, it is clear that neither state nor federal governments may pass laws that violate the Second Amendment right to bear arms. Id.

Both Supreme Court decisions, Heller and McDonald, focused on the right to bear arms for self-defense within the home. In Heller,

the Supreme Court held that the Second Amendment confers the right for "law-abiding responsible citizens to use arms in defense of hearth and home." Heller, 554 U.S. at 635; see also McDonald, 130 S.Ct. at 3044 ("[O]ur central holding in Heller [is] that the Second Amendment protects the personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home.").

The Supreme Court Heller decision stated that the Second Amendment does not confer "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." Id. at 626. Heller did not, however, foreclose the possibility that the core right to possess and carry a weapon at home may extend outside the home.

The Supreme Court decisions in Heller and McDonald created uncertainty surrounding (1) the extent to which the Second Amendment rights apply outside the home and (2) the level of scrutiny necessary in evaluating Second Amendment restrictions. Heller, 554 U.S. at 634; United States v. Masciandaro, 638 F.3d 458, 466-67 (4th Cir.), *cert. denied*, 132 S.Ct. 756 (2011).

The Third, Fourth, Seventh, Tenth, and District of Columbia Circuits have adopted a two-step approach for evaluating Second Amendment challenges. First, a court must determine whether the challenged law regulates activity that falls within the Second Amendment's scope. If the challenged law does not regulate protected activity, the inquiry is complete. If the challenged law

does regulate activity within the scope of the Second Amendment, a court must then determine whether it imposes an unconstitutional burden by applying a level of scrutiny higher than rational review. See United States v. Marzzarella, 614 F.3d 85, 89 (3d Cir. 2010), *cert. denied*, 131 S.Ct. 958 (2011); Heller v. District of Columbia, 670 F.3d 1244, 1256-58 (D.C.Cir. 2011); Ezell, 651 F.3d at 702-04; United States v. Chester, 628 F.3d 673, 680 (4th Cir. 2010); United States v. Reese, 627 F.3d 792, 800-01 (10th Cir. 2010).

a. The Second Amendment Does Not Provide an Unlimited Right to Carry a Weapon in Public

The holding in Heller is that the “core” Second Amendment right is that of “law-abiding, responsible citizens to use arms in defense of hearth and home.” 554 U.S. at 635-36. At the same time, the Supreme Court recognized that the Second Amendment does not convey the “right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.” Id. at 626.

The Supreme Court held that the Second Amendment does not protect a right to possess “weapons not typically possessed by law-abiding citizens for lawful purposes.” The Supreme Court also identified a “non-exhaustive” list of regulations that do not infringe on Second Amendment rights:

Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing

conditions and qualifications on the commercial sale of arms.

Id. at 625-27. The Supreme Court added a footnote, calling the enumerated measures “presumptively lawful.” Id. at 626 n.26. Lower courts have struggled with how to interpret the text. It is unclear whether such conduct would fall outside the scope of the Second Amendment or if regulations on such conduct are presumptively lawful because they pass constitutional muster under the applicable standard of scrutiny. See Masciandaro, 638 F.3d at 473; Marzzarella, 614 F.3d at 91.

The weight of authority in the Ninth Circuit, other Circuits, and state courts favors the position that the Second Amendment right articulated by the Supreme Court in Heller and McDonald establishes only a narrow individual right to keep an operable handgun at home for self-defense. United States v. Skoien, 614 F.3d 638, 640 (7th Cir.2010) (en banc), *cert. denied*, 131 S.Ct. 1674, 179 L.Ed.2d 645 (2011). The right to carry a gun outside the home is not part of the core Second Amendment right. See id.; Masciandaro, 638 F.3d at 470-71. In Masciandaro, the Fourth Circuit Court of Appeals held that the right to carry a firearm in public is more limited than at home because public safety interests outweigh the individual interest in self defense. Id. (noting Heller’s examination of 19th-century decisions which upheld statutes prohibiting carrying concealed weapons).

Most federal district courts have upheld statutes similar to Hawaii's Firearm Carrying Laws, holding that such regulatory schemes do not infringe upon rights protected by the Second Amendment. See Piszczatoski v. Filko, 840 F.Supp.2d 813 (D.N.J. 2012); Kachalsky v. Cacace, 817 F.Supp.2d 235, 258 (S.D.N.Y. 2011); Moore v. Madigan, 842 F.Supp.2d 1092, 1101-06 (C.D. Ill. 2012).

A District Court in the District of New Jersey upheld a carrying law similar to Hawaii's in Piszczatoski, 840 F.Supp.2d 813. The District Court in Piszczatoski held that the carrying law did not burden protected conduct because the Second Amendment did not provide an absolute right to carry a gun for self-defense outside the home. 840 F.Supp.2d at 821-831; see also Moore, 842 F.Supp.2d at 1101-06 (focusing on language in the Supreme Court's opinions in Heller and McDonald limiting the scope of the Second Amendment).

A District Court in the Southern District of New York upheld a carrying law more restrictive than Hawaii's in Kachalsky v. Cacace, 817 F.Supp.2d 235, 258 (S.D.N.Y. 2011). The New York law required a permit to carry a concealed gun at home or in public. To receive a permit, an applicant had to show "a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession." Id. at 239-40 (internal citations omitted). The District Court held that the carrying law did not infringe upon a constitutional right because (1) the statute did not operate as a complete ban on carrying

concealed firearms and (2) the Second Amendment does not protect the right to carry a weapon concealed or openly outside the home. Id. at 263-65.

Hawaii Federal District Court decisions have held that Hawaii's carrying laws do not infringe upon protected rights. In Young II, the Hawaii District Court held that Hawaii's firearm licensing scheme in HRS § 134-9 did not implicate activity protected by the Second Amendment because Heller did not establish possession of an unconcealed firearm in public as a fundamental right. No. 08-00540, 2009 WL 1955749, at *8-9; see also Baker v. Kealoha, Civ. No. No. 11-00528 ACK-KSC, Order Granting Defendants State of Hawaii and Governor Abercrombie's Motion for Judgment on the Pleadings, Granting in Part and Denying in Part Defendants City and County of Honolulu, Honolulu Police Department and Louis Kealoha's Motion to Dismiss, and Denying Plaintiff's Motion for Preliminary Injunction (Doc. 51) (Hawaii's Firearm Carrying Laws do not implicate protected Second Amendment activity).

Plaintiff alleges that Defendants violated his civil rights by denying his applications, dated August 29, 2011 and September 16, 2011, for a license to carry a concealed and unconcealed firearm. He alleges that Hawaii's Firearm Carrying Laws are unconstitutional.

HRS § 134-9 empowers a county police chief to grant a permit to carry a concealed pistol or revolver and ammunition in "an exceptional case, when an applicant shows reason to fear injury to

the applicant's person or property." Haw. Rev. Stat. § 134-9(a). The chief of police may grant a license to carry an unconcealed firearm "[w]here the urgency or the need has been sufficiently indicated." Id.

The Places to Keep Statutes require that firearms be confined to "the possessor's place of business, residence or sojourn" but allow lawful transport between those places and repair shops, target ranges, licensed dealerships, firearms shows, firearms training, and police stations. Haw. Rev. Stat. §§ 134-23, 134-24, 134-25, and 134-27. Section 134-26 prohibits carrying or possessing a loaded firearm on a public highway. People with a license to carry, pursuant to Section 134-9, are exempt from the provisions.

Hawaii's Firearm Carrying Laws do not violate Plaintiff's Second Amendment rights. The Carrying Laws do not restrict the core protection afforded by the Second Amendment. See Kachalsky, 817 F.Supp.2d at 264. They only apply to carrying a weapon in public. They do not operate as a ban on all firearms. The challenged licensing scheme in HRS § 134-9 only applies to pistols and revolvers. See State v. Modica, 567 P.2d 420 (Haw. 1977).

Unlike the law held unconstitutional in McDonald, 130 S.Ct. 3020, which operated as a complete ban, or Ezell, 651 F.3d 684, which burdened gun ownership for self-defense in the home, Hawaii's Firearm Carrying Laws allow firearms to be carried in public between specified locations or with a showing of special need. Plaintiff does not allege a constitutional violation because the

right to bear arms does not include the right "to carry any weapon whatsoever in any manner whatsoever and for whatever purpose." Heller, 554 U.S. at 626. HRS Chapter 134's limitations on carrying weapons in public does not implicate activity protected by the Second Amendment.

b. Hawaii's Carrying Restrictions Pass Constitutional Scrutiny

In the wake of Heller and McDonald, federal appellate courts have advised lower courts to await direction from the Supreme Court regarding the Second Amendment's scope outside the home environment. See e.g. Masciandaro, 638 F.3d at 475. Even if the Second Amendment extended a right to carry handguns outside the home, it would still be permissible to regulate the conduct, so long as it did not unconstitutionally burden it.

The Ninth Circuit Court of Appeals has not issued a binding decision as to the appropriate level of scrutiny. Many courts have applied intermediate scrutiny to laws burdening protected conduct that falls outside the core Second Amendment right of a law-abiding citizen to possess weapons for self defense in the home. See Masciandaro, 538 F.3d at 470-71; Piszczaatoski, 840 F.Supp.2d at 834 (importing the intermediate scrutiny standard used in First Amendment speech cases).

Federal district courts in the Ninth Circuit have applied the intermediate scrutiny standard for the Second Amendment context crafted by the Third Circuit Court of Appeals. See Peruta v. Cnty. of San Diego, 758 F.Supp.2d 1106, 1117 (S.D.Cal.2010). Under the

standard set forth by the Third Circuit Court of Appeals, intermediate scrutiny requires that the governmental interest be significant, substantial, or important. Marzzarella, 614 F.3d at 98. The challenged regulation must reasonably fit the asserted objective. Id.

Hawaii's licensing scheme in HRS § 134-9 requires that a plaintiff provide a sufficient showing of urgency or need or fear of injury to receive a license to carry a concealed or unconcealed pistol or revolver in public. Haw. Rev. Stat. § 134-9. The other Firearm Carrying laws, HRS §§ 134-23 through 134-27, limit the situations in which a person may carry a weapon in public without a license. In enacting and enforcing the Firearm Carrying Laws, the government protects an important and substantial interest in safeguarding the public from the inherent dangers of firearms. See Masciandaro, 638 F.3d at 473 (substantial interest in regulating loaded firearms) (citing United States v. Salerno, 481 U.S. 739, 745 (1987)); Kachalsky, 817 F.Supp.2d at 270 (substantial interest in regulated concealed and open carry). The policy behind the statutory limitations reasonably relates to the government's interest by enabling officials to effectively differentiate between individuals who need to carry a gun for self-defense and those who do not. See Peruta, 758 F.Supp.2d at 1117. The Firearm Carrying Laws do not operate as an outright ban on firearms. Additionally, HRS § 134-9 regulates only pistols and revolvers.

Other federal district courts have held that comparable licensing schemes survive intermediate scrutiny, in the event that the Second Amendment right to carry a weapon for self-defense extends outside the home. See Kachalsky, 817 F.Supp.2d at 270-71 (upholding licensing law requiring a showing of "articulable need for self-defense" to openly carry and completely prohibiting concealed carry); Peruta, 758 F.Supp.2d at 1110, 1117 (upholding concealed carry licensing scheme requiring a showing of good cause based on personal circumstances and not generalized fear for one's safety); Piszczechoski, 840 F. Supp. 2d at 836-37 (upholding licensing scheme for open and concealed carry).

Hawaii's Firearm Carrying Laws do not unconstitutionally burden rights protected by the Second Amendment.

c. Plaintiff's Facial Challenge Fails

The prior restraint doctrine allows a plaintiff to raise a facial challenge to a licensing statute that "allegedly vests unbridled discretion in a government official over whether to permit or deny expressive activity." City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 755-56 (1988); World Wide Rush, LLC v. City of Los Angeles, 606 F.3d 676, 687 (9th Cir. 2010).

The prior restraint doctrine is applicable only in the First Amendment context. Its rationale is rooted in preventing risks specific to the First Amendment: self-censorship and the difficulty of detecting, reviewing, or correcting content-based censorship on an as-applied challenge. These rationales do not apply in the

Second Amendment context. See e.g. Hightower v. City of Boston, 693 F.3d 61, 80 (1st Cir. 2012) ("The prior restraint doctrine is not a label that may be attached to allow any facial challenge, whatever the constitutional ground."); Piszcztoski, 840 F.Supp.2d at 831-32; Kachalsky, 817 F.Supp.2d at 267 n.32 (although some Second Amendment cases borrow an analytical framework from the First Amendment, they do not apply substantive First Amendment rules). Plaintiff's attempt to import the prior restraint doctrine from the First Amendment of the United States Constitution to Hawaii's Carrying Law fails. (Complaint at pgs. 17-20.)

Plaintiff's claims alleging a violation of the Second Amendment to the United States Constitution, in Count Three, fail to state a cause of action. The Second Amendment cause of action is **DISMISSED WITH PREJUDICE.**

3. Plaintiff Lacks Standing To Challenge HRS Chapter 134 On The Basis Of An Alleged Deprivation Of Ninth Amendment Rights

The Ninth Amendment to the United States Constitution provides that:

The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

U.S. Const. amend. IX.

The Ninth Amendment does not "independently secur[e] any constitutional rights for purposes of making out a constitutional violation." San Diego Cnty. Gun Rights Comm. v. Reno, 98 F.3d 1121, 1125 (9th Cir. 1996) (internal citations omitted). The Ninth

Amendment does not guarantee an individual right to bear arms. See id.; Young I, 548 F.Supp.2d at 1168; Ross v. Fed. Bureau of Alcohol, Tobacco, & Firearms, 807 F.Supp.2d 362, 372 (D. Md. 2011).

Plaintiff does not have standing to challenge HRS Chapter 134 on the basis of an alleged deprivation of Ninth Amendment rights. Plaintiff's claims alleging a violation of his Ninth Amendment rights, Count Four, are **DISMISSED WITH PREJUDICE**.

4. HRS Chapter 134 Does Not Violate the Privileges or Immunities Clause of the Fourteenth Amendment

In Count Five of the Complaint Plaintiff asserts the claim that the enforcement of HRS Chapter 134 violates the Privileges and Immunities clause of the Fourteenth Amendment to the United States Constitution.

The Privileges and Immunities Clause of the Fourteenth Amendment provides that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." The Privileges and Immunities Clause protects fundamental rights, but even that protection is extremely limited, extending only to the right to travel or right to privacy. See Saenz v. Roe, 526 U.S. 489 (1999). In McDonald v. City of Chicago, the plurality of Justices of the Supreme Court rejected using the Privileges and Immunities Clause to apply the Second Amendment to the States. 130 S. Ct. at 3031.

There is no basis for Plaintiff's assertion that the licensing scheme in HRS Chapter 134 interferes with his fundamental right to bear arms. The cause of action for a violation of the Privileges

and Immunities Clause of the Fourteenth Amendment to United States Constitution in Count V is **DISMISSED WITH PREJUDICE**.

5. The Complaint Fails To State A Claim For Violation of the Fourteenth Amendment Due Process Clause

Plaintiff contends that the enforcement of Hawaii's licensing scheme in HRS Chapter 134 violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution.¹

The Fourteenth Amendment protects against the deprivation of property or liberty without due process. See Carey v. Piphus, 435 U.S. 247, 259 (1978); Brady v. Gebbie, 859 F.2d 1543, 1547 (9th Cir. 1988). Courts employ a two-step test to determine whether due process rights have been violated by the actions of a government official. First, a court must determine whether a liberty or property interest exists entitling a plaintiff to due process protections. If a constitutionally protected interest is established, courts employ a three-part balancing test to determine what process is due. Hewitt v. Grabicki, 794 F.2d 1373, 1380 (9th Cir. 1986). The three-part balancing test set forth in Mathews v. Eldridge examines (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and

¹ Plaintiff also cites the Due Process Clause of the Fifth Amendment on one page of the Complaint. (Complaint at pg. 24). Plaintiff's due process challenge to a state law is properly brought pursuant to the Fourteenth Amendment Due Process Clause. See Castillo v. McFadden, 399 F.3d 933, 1002 n.5 (9th Cir. 2005).

(3) the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

If a liberty or property interest does not exist, no process is due. Plaintiff must prove that Hawaii's Firearm Carrying Laws adversely affect a protected interest to carry a weapon in public under the facts of the case. In Erdelyi v. O'Brien, 680 F.2d 61, 63 (9th Cir. 1982), the Ninth Circuit Court of Appeals held that California's comparable licensing scheme did not create a property interest or liberty interest in obtaining a concealed weapon. Post-Heller federal district court decisions confirm the holding that there is no unlimited right to carry a gun in public. See Peruta, 758 F.Supp.2d 1106, 1121 (S.D.Cal. 2010) (concealed carry); cf. Fisher v. Kealoha, No. 11-00589, 2012 WL 2526923, at *11 (D. Haw. June 29, 2012) (due process rights attach to requiring a license for carrying a firearm at home, as opposed to carrying a weapon in public) .

The Complaint alleges Plaintiff was twice denied a license to carry a pistol or revolver. HRS Chapter 134 does not implicate Plaintiff's liberty or property interests because there is no right to carry weapons in public. Having no fundamental interest in carrying a weapon, Plaintiff is not entitled to due process.

The Complaint fails to state a claim on which relief may be granted for violation of Plaintiff's due process rights guaranteed

by the Fourteenth Amendment to the United States Constitution. The cause of action for violation of the Procedural Due Process Clause of the Fourteenth Amendment is **DISMISSED WITH PREJUDICE**.

6. HRS Chapter 134 Does Not Constitute a Bill of Attainder in Violation of Article I, Section 10 Of the United States Constitution

Plaintiff asserts that HRS Chapter 134 constitutes an unconstitutional bill of attainder under Article I, section 10, clause 1 of the United States Constitution: "No State shall ... pass any Bill of Attainder"

A statute is an unconstitutional bill of attainder when it "legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 468 (1977). Burdensome consequences to legislation do not create a bill of attainder, so long as they do not rise to the level of inflicting punishment. See id. at 472 (quoting United States v. Lovett, 328 U.S. 303, 315 (1946)).

A legislative act is not a bill of attainder merely because it burdens some persons or groups, but not others. Id. at 471. If a statute sets forth a rule that is generally applicable to all persons with a certain characteristic and is reasonably calculated to achieve a non-punitive purpose, the law is not an unconstitutional bill of attainder. See United States v. Munsterman, 177 F.3d 1139, 1142 (9th Cir. 1999).

HRS Chapter 134 applies to all applicants for a permit to

carry a revolver or firearm. It furthers the non-punitive legislative purpose of controlling when and where certain types of weapons are carried in the community to ensure public safety.

HRS Chapter 134 is not an impermissible bill of attainder. Young I, 548 F.Supp.2d at 1172-73.

The claim that HRS Chapter 134 constitutes an unconstitutional bill of attainder is **DISMISSED WITH PREJUDICE**.

7. The Complaint Fails To State a Claim of Impairment of the Obligation Of Contracts

Count Two of the Complaint asserts that HRS Chapter 134 violates the Contract Clause of the United States Constitution

The Contract Clause of the United States Constitution prohibits any state from passing a law "impairing the Obligation of Contracts." U.S. Const. Art. I, § 10. To bring a claim for a violation of the Contract Clause, a plaintiff must allege facts demonstrating that he possesses contractual rights that have been substantially impaired by the challenged law. Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co., 470 U.S. 451 (1985). If the threshold inquiry is met, the court must determine if the state has a significant or legitimate purpose behind the regulation. RUI One Corp. v. City of Berkeley, 371 F.3d 1137, 1147 (9th Cir. 2004).

It is not possible to determine what contract Plaintiff is referring to in his challenge to HRS Chapter 134. A statute itself may be treated as a contract when its "language and circumstances evince a legislative intent to create private rights of a

contractual nature enforceable against the State.” U.S. Trust Co. of New York v. New Jersey, 431 U.S. 1, 17 n.14 (1977). HRS Chapter 134 does not evince such an intent. It does not bestow any contractual rights upon Plaintiff. See Young I, 548 F.Supp.2d at 1174; see also Martinkovich v. Or. Legis. Body, CIV. 11-3065-CL, 2011 WL 7693036, at *5 (D. Or. Aug. 24, 2011) report and recommendation adopted, 2012 WL 1245663 (D. Or. Apr. 12, 2012) (rejecting a Contract Clause challenge to Oregon’s concealed gun licensing law).

Plaintiff’s claim for the violation of the Article I, Section 10 prohibition of the impairment of the obligation of contracts, in Count Two of the Complaint, is **DISMISSED WITH PREJUDICE**.

D. Plaintiff’s §§ 1985 and 1986 Claims Are Precluded By Plaintiff’s Failure To Allege a § 1983 Violation

Plaintiff sues pursuant to 42 U.S.C. §§ 1985 and 1986, as well as § 1983.

Under § 1985, claims may be brought for conspiracy to violate a citizen’s § 1983 civil rights. Section 1986 allows claims for neglecting to prevent conspiratorial acts set forth in § 1985.

If a plaintiff fails to establish a constitutional deprivation to support a § 1983 claim, the same allegations necessarily cannot establish claims brought pursuant to §§ 1985 and 1986. Cassettari v. Nevada Cnty., Cal., 824 F.2d 735, 739 (9th Cir. 1987); White v. Pac. Media Grp., Inc., 322 F.Supp.2d 1101, 1112 (D. Haw. 2004) (insufficiency of a § 1985 cause of action precludes an actionable § 1986 claim).

Plaintiff's § 1985 conspiracy claim is based solely upon allegations which fail to state a claim for deprivation of a federal right under § 1983.

Plaintiff's §§ 1985 and 1986 causes of action are **DISMISSED WITH PREJUDICE.**

E. Plaintiff's Claims Against Defendants County of Hawaii and Hilo County Police Department

Plaintiff still has not served Defendants County of Hawaii and Hilo County Police Department. Pursuant to Federal Rule of Civil Procedure 4(m), the 120-day time limit for service of the Complaint, which was filed on June 20, 2012, expired over one month ago.

Pursuant to Federal Rule of Civil Procedure 12(b)(6), a court may properly dismiss an action sua sponte, without giving a plaintiff notice of its intention to dismiss and an opportunity to respond if a plaintiff "cannot possibly win relief." See Sparling v. Hoffman Construction Co., 8654 F.2d 635, 638 (9th Cir. 1981); Omar v. Sea-Land Serv., Inc., 813 F.2d 986, 991 (9th Cir. 1987). If a plaintiff cannot possibly win relief, the court may dismiss an action sua sponte without notice in favor of a party that has not been served, answered, or appeared. Columbia Steel Fabricators, Inc. V. Ahistrom Recovery, 44 F.3d 800, 802 (9th Cir. 1995); Arreola v. Wells Fargo Home Mortg., No. 10-3272, 2011 WL 1205249 (E.D. Cal. Mar. 29, 2011). It is appropriate to do so when the party that has not appeared is in a position similar to the moving

defendants. Abagnin v. AMVAC Chemical Corp., 545 F.3d 733, 742-43 (9th Cir. 2008).

The Hilo County Police Department and County of Hawaii, which have not been served or appeared, are in positions similar to the County Officials who moved to dismiss. Hilo County Police Department is considered the same legal entity as the County of Hawaii. See Pourny v. Maui Police Department, 127 F.Supp.2d 1129, 1143 (D. Haw. 2000) (treating the Maui Police Department and the County of Maui as one party); see also Headwaters Forest Defense v. County of Humboldt, 276 F.3d 1125, 1127 (9th Cir. 2002) (treating police departments as part of their respective county or city). Plaintiff's claims against the County of Hawaii and the Hilo County Police Department are analyzed under the same standard used for the claims against the County Officials sued in their official capacities. See Wong v. City & County of Honolulu, 333 F.Supp.2d 942, 947 (D. Haw. 2004) (citing Kentucky v. Graham, 473 U.S. 159, 166-67 n.14 (1985)).

For the reasons set forth for dismissal of the claims against the County Officials, Plaintiff "cannot possibly win relief" against the County of Hawaii or the Hilo County Police Department.

The causes of action against Defendants County of Hawaii and Hilo County Police Department are **DISMISSED WITH PREJUDICE**.

CONCLUSION

The Complaint fails to state a claim for deprivation of a federal right, which is a necessary prerequisite for actions

brought pursuant to 42 U.S.C. §§ 1983, 1985, and 1986. Additionally, the State Defendants are protected by sovereign immunity.

State Defendants' Motion to Dismiss (Doc. 25) is **GRANTED**. All causes of action against State Defendants are **DISMISSED WITH PREJUDICE**.

County Officials Defendants' Motion to Dismiss (Doc. 23) is **GRANTED**. The Court dismisses the causes of action against the County and the County Police Department. All causes of action against the County Officials, the County, and the County Police Department are **DISMISSED WITH PREJUDICE**.

The Clerk of Court is directed to close the case.

IT IS SO ORDERED.

DATED: November 28, 2012, Honolulu, Hawaii.



/s/ Helen Gillmor
Helen Gillmor
Senior United States District Judge

GEORGE K. YOUNG, JR. vs. STATE OF HAWAII and NEIL ABERCROMBIE in his capacity as Governor of the State of Hawaii; DAVID M. LOUIE in his capacity as State Attorney General; COUNTY OF HAWAII, as a sub-agency of the State of Hawaii and WILLIAM P. KENOI in his capacity as Mayor of the County of Hawaii; and the HILO COUNTY POLICE DEPARTMENT, as a sub-agency of the County of Hawaii and HARRY S. KUBOJIRI in his capacity as Chief of Police; JOHN DOES 1-25; JANE DOES 1-25; CORPORATIONS 1-5, and DOE ENTITIES 1-5, Civ. No. 12-00336 HG BMK; ORDER GRANTING COUNTY OF HAWAII OFFICIAL DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S COMPLAINT (DOC. 23) AND STATE OF HAWAII DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S COMPLAINT (Doc. 25).

UNITED STATES DISTRICT COURT

DISTRICT OF HAWAII

GEORGE K. YOUNG, JR.,

JUDGMENT IN A CIVIL CASE

Plaintiff(s),

Case: CIV. NO. 12-00336 HG BMK

V.

FILED IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

November 29, 2012

At 4 o'clock and 00 min p.m.
SUE BEITIA, CLERK

STATE OF HAWAII and NEIL
ABERCROMBIE in his capacity
as Governor of the State of
Hawaii; DAVID M. LOUIE in his
capacity as State Attorney
General; COUNTY OF HAWAII, as
a sub-agency of the State of
Hawaii and WILLIAM P. KENOI
in his capacity as Mayor of
the County of Hawaii; and the
HILO COUNTY POLICE
DEPARTMENT, as a sub-agency
of the County of Hawaii and
HARRY S. KUBOJIRI in his
capacity as Chief of Police;
JOHN DOES 1-25; JANE DOES 1-
25; CORPORATIONS 1-5, and DOE
ENTITIES 1-5,

Defendant(s).

[✓] **Decision by Court.** This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that all causes of action against the State Defendants, County Officials, the County, and the County Police Department are DISMISSED WITH PREJUDICE pursuant to the "Order Granting County of Hawaii Official Defendants' Motion to Dismiss and State of Hawaii Defendants' Motion to Dismiss" filed on November 29, 2012.

November 29, 2012

Date

SUE BEITIA

Clerk

/s/ Sue Beitia by ES

(By) Deputy Clerk

FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

FEB 8 2019

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

GEORGE K. YOUNG, Jr.,

Plaintiff-Appellant,

v.

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,

Defendants-Appellees.

No. 12-17808

D.C. No.

1:12-cv-00336-HG-BMK

District of Hawaii,
Honolulu

ORDER

THOMAS, Chief Judge:

Upon the vote of a majority of nonrecused active judges, it is ordered that this case be reheard en banc pursuant to Federal Rule of Appellate Procedure 35(a) and Circuit Rule 35-3. The three-judge panel disposition in this case shall not be cited as precedent by or to any court of the Ninth Circuit.

Judges Bennett did not participate in the deliberations or vote in this case.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

APR 15 2021

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

GEORGE K. YOUNG, Jr.,

Plaintiff - Appellant,

v.

STATE OF HAWAII; et al.,

Defendants - Appellees.

No. 12-17808

D.C. No. 1:12-cv-00336-HG-BMK
U.S. District Court for Hawaii,
Honolulu

MANDATE

The judgment of this Court, entered March 24, 2021, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule
41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: David J. Vignol
Deputy Clerk
Ninth Circuit Rule 27-7

USCS Const. Amend. 2

Current through the ratification of the 27th Amendment on May 7, 1992.

United States Code Service > Amendments > Amendment 2 Right to bear arms.

Amendment 2 Right to bear arms.

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.

United States Code Service
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USCS Const. Amend. 14, Part 1 of 15

Current through the ratification of the 27th Amendment on May 7, 1992.

United States Code Service > Amendments > Amendment 14

Amendment 14

Sec. 1. [Citizens of the United States.] All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Sec. 2. [Representatives—Power to reduce apportionment.] Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Sec. 3. [Disqualification to hold office.] No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Sec. 4. [Public debt not to be questioned—Debts of the Confederacy and claims not to be paid.] The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Sec. 5. [Power to enforce amendment.] The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

HRS § 134-5

This document is current through Ch. 1 of 2021 Legislative Session. Subject to changes by Revisor pursuant to HRS 23G-15.

Michie's™ Hawaii Revised Statutes Annotated > Division 1. Government (Titles 1 — 21) > Title 10 Public Safety and Internal Security (Chs. 121 — 138) > Chapter 134 Firearms, Ammunition and Dangerous Weapons (Pts. I — IV) > Part I. General Regulations (§§ 134-1 — 134-29)

§ 134-5. Possession by licensed hunters and minors; target shooting; game hunting.

(a) Any person of the age of sixteen years, or over or any person under the age of sixteen years while accompanied by an adult, may carry and use any lawfully acquired rifle or shotgun and suitable ammunition while actually engaged in hunting or target shooting or while going to and from the place of hunting or target shooting; provided that the person has procured a hunting license under chapter 183D, part II. A hunting license shall not be required for persons engaged in target shooting.

(b) A permit shall not be required when any lawfully acquired firearm is lent to a person, including a minor, upon a target range or similar facility for purposes of target shooting; provided that the period of the loan does not exceed the time in which the person actually engages in target shooting upon the premises.

(c) A person may carry unconcealed and use a lawfully acquired pistol or revolver while actually engaged in hunting game mammals, if that pistol or revolver and its suitable ammunition are acceptable for hunting by rules adopted pursuant to section 183D-3 and if that person is licensed pursuant to part II of chapter 183D. The pistol or revolver may be transported in an enclosed container, as defined in section 134-25 in the course of going to and from the place of the hunt, notwithstanding section 134-26.

History

L 1988, c 275, § 2; am [L 1997, c 254](#), § 1; am [L 2002, c 79](#), § 1; am [L 2006, c 66](#), § 2.

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HRS § 134-9

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§ 134-9. Licenses to carry.

(a) In 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 who is a citizen of the United States of the age of twenty-one years or more or to a duly accredited official representative of a foreign nation of the age of twenty-one years or more to carry a pistol or revolver and ammunition therefor concealed on the person within the county where the license is granted. Where the urgency or the need has been sufficiently indicated, the respective chief of police may grant to an applicant of good moral character who is a citizen of the United States of the age of twenty-one years or more, is engaged in the protection of life and property, and is not prohibited under section 134-7 from the ownership or possession of a firearm, a license to carry a pistol or revolver and ammunition therefor unconcealed on the person within the county where the license is granted. The chief of police of the appropriate county, or the chief's designated representative, shall perform an inquiry on an applicant by using the National Instant Criminal Background Check System, to include a check of the Immigration and Customs Enforcement databases where the applicant is not a citizen of the United States, before any determination to grant a license is made. Unless renewed, the license shall expire one year from the date of issue.

(b) The chief of police of each county shall adopt procedures to require that any person granted a license to carry a concealed weapon on the person shall:

- (1) Be qualified to use the firearm in a safe manner;
- (2) Appear to be a suitable person to be so licensed;
- (3) Not be prohibited under section 134-7 from the ownership or possession of a firearm; and
- (4) Not have been adjudged insane or not appear to be mentally deranged.

(c) No person shall carry concealed or unconcealed on the person a pistol or revolver without being licensed to do so under this section or in compliance with sections 134-5(c) or 134-25.

(d) A fee of \$10 shall be charged for each license and shall be deposited in the treasury of the county in which the license is granted.

History

L 1988, c 275, § 2; am [L 1994, c 204](#), § 8; am [L 1997, c 254](#), § 2; am [L 2002, c 79](#), § 1; am [L 2006, c 27](#), § 3; am [L 2006, c 66](#), § 3; am L 2007, c 9, § 8.

HRS § 134-9

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HRS § 134-23

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[§ 134-23.] Place to keep loaded firearms other than pistols and revolvers; penalty.

(a) Except as provided in section 134-5, all firearms shall be confined to the possessor's place of business, residence, or sojourn; provided that it shall be lawful to carry unloaded firearms in an enclosed container from the place of purchase to the purchaser's place of business, residence, or sojourn, or between these places upon change of place of business, residence, or sojourn, or between these places and the following:

- (1) A place of repair;
- (2) A target range;
- (3) A licensed dealer's place of business;
- (4) An organized, scheduled firearms show or exhibit;
- (5) A place of formal hunter or firearm use training or instruction; or
- (6) A police station.

“Enclosed container” means a rigidly constructed receptacle, or a commercially manufactured gun case, or the equivalent thereof that completely encloses the firearm.

(b) Any person violating this section by carrying or possessing a loaded firearm other than a pistol or revolver shall be guilty of a class B felony.

History

[L 2006, c 66](#), § 1.

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HRS § 134-24

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[§ 134-24.] Place to keep unloaded firearms other than pistols and revolvers; penalty.

(a) Except as provided in section 134-5, all firearms shall be confined to the possessor's place of business, residence, or sojourn; provided that it shall be lawful to carry unloaded firearms in an enclosed container from the place of purchase to the purchaser's place of business, residence, or sojourn, or between these places upon change of place of business, residence, or sojourn, or between these places and the following:

- (1) A place of repair;
- (2) A target range;
- (3) A licensed dealer's place of business;
- (4) An organized, scheduled firearms show or exhibit;
- (5) A place of formal hunter or firearm use training or instruction; or
- (6) A police station.

“Enclosed container” means a rigidly constructed receptacle, or a commercially manufactured gun case, or the equivalent thereof that completely encloses the firearm.

(b) Any person violating this section by carrying or possessing an unloaded firearm other than a pistol or revolver shall be guilty of a class C felony.

History

[L 2006, c 66](#), § 1.

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HRS § 134-25

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[§ 134-25.] Place to keep pistol or revolver; penalty.

(a) Except as provided in sections 134-5 and 134-9, all firearms shall be confined to the possessor's place of business, residence, or sojourn; provided that it shall be lawful to carry unloaded firearms in an enclosed container from the place of purchase to the purchaser's place of business, residence, or sojourn, or between these places upon change of place of business, residence, or sojourn, or between these places and the following:

- (1) A place of repair;
- (2) A target range;
- (3) A licensed dealer's place of business;
- (4) An organized, scheduled firearms show or exhibit;
- (5) A place of formal hunter or firearm use training or instruction; or
- (6) A police station.

“Enclosed container” means a rigidly constructed receptacle, or a commercially manufactured gun case, or the equivalent thereof that completely encloses the firearm.

(b) Any person violating this section by carrying or possessing a loaded or unloaded pistol or revolver shall be guilty of a class B felony.

History

[L 2006, c 66](#), § 1.

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HRS § 134-26

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[§ 134-26.] Carrying or possessing a loaded firearm on a public highway; penalty.

- (a) It shall be unlawful for any person on any public highway to carry on the person, or to have in the person's possession, or to carry in a vehicle any firearm loaded with ammunition; provided that this section shall not apply to any person who has in the person's possession or carries a pistol or revolver in accordance with a license issued as provided in section 134-9.
- (b) Any vehicle used in the commission of an offense under this section shall be forfeited to the State, subject to the notice and hearing requirements of chapter 712A.
- (c) Any person violating this section shall be guilty of a class B felony.

History

[L 2006, c 66](#), § 1.

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HRS § 134-27

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Michie's™ Hawaii Revised Statutes Annotated > Division 1. Government (Titles 1 — 21) > Title 10 Public Safety and Internal Security (Chs. 121 — 138) > Chapter 134 Firearms, Ammunition and Dangerous Weapons (Pts. I — IV) > Part I. General Regulations (§§ 134-1 — 134-29)

[§ 134-27.] Place to keep ammunition; penalty.

(a) Except as provided in sections 134-5 and 134-9, all ammunition shall be confined to the possessor's place of business, residence, or sojourn; provided that it shall be lawful to carry ammunition in an enclosed container from the place of purchase to the purchaser's place of business, residence, or sojourn, or between these places upon change of place of business, residence, or sojourn, or between these places and the following:

- (1) A place of repair;
- (2) A target range;
- (3) A licensed dealer's place of business;
- (4) An organized, scheduled firearms show or exhibit;
- (5) A place of formal hunter or firearm use training or instruction; or
- (6) A police station.

“Enclosed container” means a rigidly constructed receptacle, or a commercially manufactured gun case, or the equivalent thereof that completely encloses the ammunition.

(b) Any person violating this section shall be guilty of a misdemeanor.

History

[L 2006, c 66](#), § 1.

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