No. 20-1639

In the Supreme Court of the United States

GEORGE K. YOUNG, JR.
Petitioner,

v.

STATE OF HAWAII, ET AL.,
Respondents.

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

REPLY BRIEF FOR PETITIONER

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In *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008), this Court held that the Second Amendment enshrines an "individual right to possess and carry weapons in case of confrontation" stating further that a handgun is "the quintessential self-defense weapon." *Heller*, 554 U.S. at 629. Yet, the decision below holds that there is no Second Amendment right to carry a firearm outside the home. That very question is before this Court in *New York State Rifle & Pistol Association, Inc., v. Bruen*, No. 20-843 ("*NYSRPA*") and has created an express circuit split with multiple circuits. Pet.14-17. Respondents try to deny that this case will be controlled by a decision in *NYSRPA* and vainly obfuscate the circuit split. Young's petition for certiorari should be granted or, alternatively, the Court should hold this case pending a decision in *NYSRPA*.

I. Young Challenges Both Hawaii's Concealed and Open Carry Laws

"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." *Young v. Hawaii*, 992 F.3d 765, 777 (9th Cir. 2021). App.22. "He twice in 2011 applied for a license to carry a handgun, either concealed or openly." *Young v. Hawaii*, 896 F.3d 1044, 1048 (9th Cir. 2018). App.221. In his lawsuit, Young requested "among other things, injunctive and declaratory relief from the enforcement of section 134-9's licensing requirements". *Young*, 896 F.3d at 1049. App.222. *See also* Respondents' App.64a (Petitioner requesting "[i]mmediate issuance of a Concealed Carry Weapons Permit or an Unconcealed Carry Weapons Permit"). "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' and on the concealed carry of firearms to those who can demonstrate an 'exceptional case.'" *Id.* at 1049-50. App.224.

Hawaii's claim that Young's lawsuit deals only with the open carry of handguns is patently false. In *Peruta v. County of San Diego* 824 F.3d 919 (2016) (en banc), *cert. denied*, 137 S.Ct. 1995 (2017), the Ninth Circuit 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." *Peruta,* 824 F.3d at 939. The en banc court thus focused on open carry because it had previously held that concealed carry was not protected by the Second Amendment in *Peruta*. Notably, Hawaii does not claim that Young waived his claim to concealed carry despite acknowledging that he was denied a permit for both concealed and open carry. Opp. at 6 ("The chief of police denied the applications because Young did not identify an "exceptional case[] or a demonstrated urgency").

Respondents' argument that Young's challenge is a poor vehicle for review because it only deals with handguns is specious. Long gun carry is prohibited for self-defense in Hawaii (*see* H.R.S. § 134-5) and Young must show special need to either open carry or concealed carry. Therefore, Young is foreclosed from carrying *any* firearm outside his home for self-defense. Indeed, petitioners in *NYSRPA* also sought to carry *handguns*. Since Young challenges both Hawaii's concealed and open carry

laws, his petition is an excellent vehicle for this Court to decide the issue of public carry.

II. The Ninth Circuit Holds That There Is No Right to Armed Self-Defense Outside the Home

The Ninth Circuit's en banc ruling in *Young* must be read in tandem with the Ninth Circuit's prior holding in *Peruta v. Cty. of San Diego*, 824 F.3d 919 (9th Cir. 2016) (en banc), *cert. denied*, 137 S.Ct. 1995 (2017). As the en banc court acknowledged, *Peruta* held that "the Second Amendment does not protect the right of a member of the general public to carry concealed firearms in public." *Young*, 992 F.3d at 784, citing *Peruta*, 824 F.3d at 939. In *Young*, the court extended that holding by stating that "[t]here is no right to carry arms openly in public; nor is any such right within the scope of the Second Amendment." *Id.* at 821. Thus, the Ninth Circuit has expressly held, in two en banc decisions, that the Second Amendment protects neither concealed carry (*Peruta*) nor open carry (*Young*).

Respondents nonetheless claim that the en banc opinion does not extinguish the Second Amendment right outside the home (*see* Opp. 17-18), but their contention is plainly belied by the en banc's holding that "[t]here is no right to carry arms openly in public; nor is any such right within the scope of the Second Amendment." *Young*, 992 F.3d at 821. Read in tandem with *Peruta*, there is no Second Amendment right to carry outside the home in any form.

III. The Ninth Circuit's Historical Analysis is Deeply Flawed

Since the *Young* en banc opinion, multiple scholars have published research demonstrating the Ninth Circuit misconstrued many of its sources in its historical

analysis. "The Ninth Circuit's en banc decision in [*Young*] holding that no 'right of the people to . . . bear arms' exists under the Second Amendment could perhaps win a contest for the most faux histoire of any judicial decision on a Bill of Rights guarantee." Halbrook, Stephen P., FAUX HISTOIRE OF THE RIGHT TO BEAR ARMS: YOUNG v. HAWAII at 2 (9th Cir. 2021) (July 13, 2021) ("Halbrook") (available at SSRN: https://bit.ly/3gppqFe. Halbrook then proceeds to eviscerate the en banc majority's reading of the Statute of Northampton, the majority's profound misreading of English case law and treatises and the majority's misreading of early statutes in colonial times and post-ratification law. *Id*. at 10-22.

Halbrook equally thoroughly refutes the majority's reliance on surety laws, noting correctly that these laws came into play only if there was a prior complaint that the person bearing arms had threatened another and even then, he could continue to carry arms upon posting of the surety. *Id*. at 22-24. *See also* App. 161-62 (O'Scannlain, J., dissenting) ("individuals were *generally free* to carry weapons without having to pay a surety, unless they had been the subject of a specific complaint") (emphasis in original).

Other scholars are in accord with Halbrook. *See* Lund, Nelson "Fake Originalism and the Right to Bear Arms," Law & Liberty, April 12, 2021. (Available at https://bit.ly/3DbZEyc). As Halbrook notes, "Professor Nelson Lund focuses on the general 'fake originalism' of the decision, which the court apparently saw as necessary to clothe the Amendment with its supposed original understanding." Halbrook at 2. Lund notes in the article that "[t]he *Young* majority seems to think that American

citizens are properly viewed as subjects who can and must rely on a beneficent Leviathan."

That charge is well founded as a major premise of the en banc panel majority's opinion is that allowing the "people" to carry arms would imply an "open challenge to the king's peace" and a "vote of no confidence in the king's ability to maintain it." App.102. Yet, as the dissent notes, "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." App. 178 (O'Scannlain, J., dissenting).

The article by Professors David B. Kopel and George A. Mocsary lists instance after instance where the en banc majority omitted key phrases or context from quotations on which it purported to rely. The en banc majority even relied on a North Carolina "statute" that, in fact, was never enacted by the North Carolina legislature and never part of North Carolina law. *See* Kopel, David B. and Mocsary, George A., Errors of Omission: Words Missing from the Ninth Circuit's Young v. State of Hawaii (March 31, 2021). 2021 U. Ill. L. Rev. Online at n.81, Available at https://bit.ly/3bd9jrE. *See also* Cramer, Clayton E., Doesn't Anyone Check Citations? (August 12, 2021). Available at SSRN: https://bit.ly/3z3ajsx or https://bit.ly/3mpsu82 (noting other elementary mistakes and erroneous citations in *Young*). The en banc majority's profoundly flawed reading of history cannot be permitted to stand.

IV. Young's Challenge Presents Purely Legal Questions

Whether the Second Amendment applies outside the home is a pure question of law which is the same regardless of whether the case is viewed as facial challenge or as an as-applied challenge. *See Bucklew v. Precythe*, 139 S. Ct. 1112, 1127 (2019) ("classifying a lawsuit as facial or as-applied affects the extent to which the invalidity of the challenged law must be demonstrated and the corresponding 'breadth of the remedy,' but it does not speak at all to the substantive rule of law necessary to establish a constitutional violation."), quoting *Citizens United v. FEC,* 558 U.S. 310, 331 (2010). Here, the substantive question of law is whether the Second Amendment applies outside the home at all.

The en banc panel's refusal to view the case as also presenting an "as-applied" challenge wrongly elevates the two types of challenges into mutually exclusive categories. In *Citizens United*, this Court explained that the distinction between an "as-applied" challenge and a "facial challenge" "goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint." (558 U.S. at 331). Thus, in *Citizens United*, this Court allowed the petitioner to argue a facial challenge even though petitioner had previously *stipulated* to the dismissal of that very claim. *Id.* at 329. The Court stressed 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." *Id.* at 331. A facial claim subsumes within it an "as-applied" claim in cases, such as this case, where the challenged statute has actually been applied to

the complainant. Indeed, "as-applied challenges are generally favored as a matter of judicial restraint because they result in a narrow remedy." *Justice v. Hosemann*, 771 F.3d 285, 292 (5th Cir. 2014), *cert. denied,* 136 S.Ct. 1514 (2016).

These points were stressed by the dissents in this case. As Judge O'Scannlain explained, Young's "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." App. 189, (O'Scannlain, J., dissenting). *See* App. 200 ("Young's pro se complaint alleges both a facial and an as applied challenge."); App. 196 (Nelson, J., dissenting) (Young "sought general relief—asking to strike down the statute—but also personal relief—requesting to be granted a firearm permit"). The en banc majority ignored the fact that Hawaii's statutory scheme was actually enforced against Young in a way that is "brazenly unconstitutional." App.195 (Nelson, J., dissenting).

That approach was error. *See also United States v. Perez*, --- F.4th --- 2021 WL 3197013 at *2 n.1 (2d Cir. July 29, 2021) (rejecting government's argument that the plaintiff has waived an "as-applied" Second Amendment challenge to the constitutionality of 18 U.S.C. § 922(g)(5), because he raised solely a facial challenge in the district court). *See also United States v. Jimenez*, 895 F.3d 228, 232 (2d Cir. 2018) (entertaining an as-applied challenge to 18 U.S.C. § 922(g)(6) even though the defendant raised arguments only as to the provision's facial invalidity in district court and on appeal). The Ninth Circuit has likewise broadly considered both facial and as-applied claims in cases where the allegations are unclear, especially in *pro se* cases.

App. 197-98 (Nelson, J., dissenting). The en banc majority's disregard of *Citizens United*, *Bucklew* and its own precedent is inexplicable.

Hawaii's argument that the petition should be denied because Young's complaint was filed *pro se* is meritless. This Court has long recognized that *pro se* litigants' pleadings should be given special consideration to protect their access to justice. "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), quoting *Estelle v. Gamble*, 429 U.S. 97, 99 (1976) (granting of the "handwritten" complaint of a *pro se* litigant). Both the trial court and Ninth Circuit had no difficulty navigating Young's complaint.

V. This Case Will Be Controlled By a Decision in *NYSRPA*

Hawaii claims that Young's case is a poor vehicle to decide this question because it arises at this court on a "motion to dismiss posture." Opp. 28. However, *NYSRPA* came to the Court on a "motion to dismiss posture." *N.Y. State Rifle & Pistol Ass'n v. Beach*, 354 F. Supp. 3d 143, 147 (N.D.N.Y. 2018). That merely highlights the reality that the claims presented here and in *NYSRPA* involve pure questions of law.

Hawaii falsely claims that *Young* is the first to deal with an open carry law. In *Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013), *cert. denied*, 572 U.S. 1100 (2014), the Third Circuit sustained the constitutionality of N.J.S.A. § 2C:58-4, and "[t]he "justifiable need" imposed by that statute applied to both to carry "openly *or* concealed" *Drake,* 724 F.3d at 433. The same was true of the Maryland

statutory scheme at issue in *Woollard v. Gallagher*, 712 F.3d 865, 879-80 (4th Cir.), *cert. denied,* 571 U.S. 952 (2013), where Maryland law, Md. Code, Criminal Law, 4-203(a)(1)(i), expressly imposed a strict ban (with a few listed exceptions) on *all* carry, "concealed or open, on or about the person," without a state-issued carry permit. *See Lawrence v. State*, --- A.3d ----2021 WL 3502925 (Aug. 10, 2021). A permit was available only to applicants who could demonstrate a "good and substantial reason," a requirement the Fourth Circuit sustained. Either type of carry is legally permissible with a permit. Md. Code, Criminal Law, 4-203(b)(2).

Similarly, in *Wrenn v. District of Columbia*, 864 F.3d 650, 655-56 (D.C. Cir. 2017), the D.C. Circuit struck down the District of Columbia's requirement of a special need for the issuance of a concealed carry permit. The D.C. Circuit invalidated that "special need" precisely *because* open carry was banned, and D.C. thus left no "alternative channels" through which the Second Amendment right could be exercised. *Wrenn*, 864 F.3d at 662-63. *See also Norman v. State,* 215 So. 3d 18, 41 (Fla. 2017) (upholding a Florida ban on open carry because the law allowed concealed carry with a permit available to all otherwise eligible persons on a "shall issue" basis).

This Court's long-standing practice is to hold a case where it presents the same or similar issue and thus may be affected by another case in which certiorari has already been granted. *See* S. Shapiro, *et al., Supreme Court Practice,* §4.16 at 4-49-4-50, §6.31(e) at 6-126 (11th ed. 2019). This Court has applied this general rule to Second Amendment cases. *See Maloney v. Rice*, 561 U.S. 1040 (2010) (holding a

petition pending a decision in *McDonald v. Chicago*, 561 U.S. 742 (2010), and then vacating and remanding in light of the decision in *McDonald*).

Respondents argue that a hold is inappropriate here because *NYSRPA* supposedly addresses only concealed carry while *Young* supposedly addresses only open carry. As noted above, that point is false because *Young* held that here was no Second Amendment right to carry in public *at all*. In any event, the Second Circuit's decision in *NYSRPA* was expressly controlled by *Kachalsky v. Cty. of Westchester*, 701 F.3d 81 (2d Cir. 2012), *cert. denied,* 569 U.S. 918 (2013). In *Kachalsky,* the Second Circuit sustained New York's special need requirement for permit because it concluded "New York's licensing scheme affects the ability to carry handguns only *in public*, while the District of Columbia ban applied *in the home* 'where the need for defense of self, family, and property is most acute.' *Heller*, 554 U.S. at 628. This is a critical difference." *Kachalsky*, 701 F.3d at 94 (emphasis in original).

That same distinction is the basis of the Ninth Circuit's holding that there is no right at all to carry openly in public. *See*, e.g., *Young*, App.36 ("our first task is to determine whether the right to carry a firearm openly in public is protected by the Second Amendment"). That is reason enough to hold this case. *See* Shapiro, § 6.31(e) at 6-126 ("While an issue is pending before the Court in a case to be decided on the merits, the Court will typically 'hold' petitions presenting questions that will be – or might be – affected by its ruling in that case, deferring further consideration of such petitions until the related issue is decided.").

CONCLUSION

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

Respectfully submitted,

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