No. _____

In the Supreme Court of the United States

CHRISTOPHER L. WILSON,

Petitioner,

v.

STATE OF HAWAIʻI,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI

TO THE HAWAIʻI SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

APPENDICES A-D

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IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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STATE OF HAWAIʻI,
Plaintiff-Appellant,

vs.

CHRISTOPHER L. WILSON,
Defendant-Appellee.

SCAP-22-0000561

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT
(CAAP-22-0000561; CASE NO. 2CPC-17-0000964)

FEBRUARY 7, 2024

RECKTENWALD, C.J., McKENNA, EDDINS, JJ., CIRCUIT JUDGE MORIKAWA AND CIRCUIT JUDGE TOʻOTOʻO, ASSIGNED BY REASON OF VACANCIES

OPINION OF THE COURT BY EDDINS, J.

I.

Article I, section 17 of the Hawaiʻi Constitution mirrors the Second Amendment to the United States Constitution. We read those words differently than the current United States Supreme

Court. We hold that in Hawai‘i there is no state constitutional right to carry a firearm in public.

The State appeals an order dismissing two "place to keep" offenses, Hawai‘i Revised Statutes (HRS) § 134-25 (2011) (pistol or revolver) and § 134-27 (2011) (ammunition) filed against Christopher Wilson. Citing New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1 (2022), the Circuit Court of the Second Circuit dismissed the charges.

The State challenges Wilson's standing. The State says Wilson did not bother to apply for a carry license and thereby satisfy HRS § 134-9 (2011), Hawai‘i's license to carry law. So he can't bring a Bruen-based constitutional challenge to HRS § 134-25 and § 134-27.

Wilson believes otherwise. He says HRS § 134-25(a) and § 134-27(a) subvert his new constitutional right to protect himself in public by carrying a lethal weapon. Hawai‘i's place to keep laws violate the Second Amendment to the United States Constitution and its counterpart, article I, section 17 of the Hawai‘i Constitution.

Because the State charged Wilson with place to keep offenses, we conclude that Wilson has standing to challenge the constitutionality of those laws. A criminal defendant has standing to level a constitutional attack against the charged

crime. See State v. Armitage, 132 Hawai‘i 36, 55, 319 P.3d 1044, 1063 (2014).

Wilson though lacks standing to confront HRS § 134-9 (licenses to carry). The State does not charge him with violating HRS § 134-9 (it's not a crime), and Wilson made no attempt to obtain a carry license.

We reject Wilson's constitutional challenges. Conventional interpretive modalities and Hawai‘i's historical tradition of firearm regulation rule out an individual right to keep and bear arms under the Hawai‘i Constitution. In Hawai‘i, there is no state constitutional right to carry a firearm in public.

Bruen snubs federalism principles. Still, the United States Supreme Court does not strip states of all sovereignty to pass traditional police power laws designed to protect people. Wilson has standing to challenge HRS § 134-25(a) and § 134-27(a). But those laws do not violate his federal constitutional rights.

II.

A. Charges and Alleged Facts

In December 2017, the County of Maui Department of the Prosecuting Attorney charged Christopher Wilson by felony information. He allegedly violated: (1) HRS § 134-25(a) place to keep firearm, (2) HRS § 134-27(a) place to keep ammunition, (3) HRS § 134-2 (2011 & Supp. 2017) permit to acquire ownership

of a firearm, and (4) HRS § 708-813(1)(b) (2014 & Supp. 2015), first degree criminal trespass.

The facts are slim. Declarations and police reports submitted to support the parties' position for the motion to dismiss comprise the factual record.

In December 2017, at about 11:00 p.m., Flyin Hawaiian Zipline owner Duane Ting saw men on his fenced-in property via video surveillance. Ting reported the matter to the Maui Police Department. Officers headed to Ting's property. Meanwhile Ting, driving an all-terrain vehicle, corralled Wilson and his three companions. Armed with an AR-15 assault rifle, he detained them until the police arrived. Then Wilson volunteered to the officers: "I have a weapon in my front waist band." The police lifted his shirt. Wilson had a Phoenix Arms .22 LR caliber pistol, loaded with ten rounds of .22 caliber ammunition. A records check reported that the pistol was unregistered in Hawai‘i, and Wilson had not obtained or applied for a permit to own a handgun. Wilson told the police that he legally bought the gun in Florida in 2013.

B. Wilson's Motions to Dismiss

In May 2021, Wilson moved to dismiss counts 1 and 2. Citing District of Columbia v. Heller, 554 U.S. 570 (2008) and McDonald v. City of Chicago, Ill., 561 U.S. 742 (2010), Wilson argued that prosecuting him for possessing a firearm for self-

defense purposes outside his home violated his right to bear arms under the Second Amendment to the United States Constitution and article I, section 17 of the Hawai‘i Constitution.

The State opposed the motion. It presented records from Florida and the Department of Justice Bureau of Alcohol, Tobacco, Firearms, and Explosives to refute Wilson's remark about when and where he had purchased the gun. The records showed: (1) Wilson had not applied for or been issued a concealed weapon or firearm license pursuant to Florida law, and (2) in April 2011 someone not named Christopher Wilson purchased the pistol from a licensed firearms dealer in Florida.

The circuit court denied Wilson's motion to dismiss in July 2021. It relied on Young v. Hawai‘i. There, the Ninth Circuit Court of Appeals held that the Second Amendment does not provide a right to openly carry a firearm for self-defense. Young v. Hawai‘i, 992 F.3d 765, 821 (9th Cir. 2021), cert. granted, judgment vacated, 142 S. Ct. 2895 (2022), and abrogated by New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1 (2022).

In July 2022, Wilson filed a second motion to dismiss counts 1 and 2. Bruen had just come out.

Wilson again challenged the constitutionality of HRS § 134-25(a) and HRS § 134-27(a). His motion declares he carried the

gun solely for "self-defense purposes." He says the place to keep laws violate his right to carry a handgun for self-defense outside his home. Both the United States and Hawai‘i Constitutions confer that right. Wilson maintains that HRS § 134-25 and HRS § 134-27 - which confine firearms and ammunition to the "possessor's place of business, residence, or sojourn" - had "no exceptions" for carrying firearms outside the home. Wilson describes these "absolute restrictions" as "out of step" with the "Nation's historical tradition of firearm regulation."

The Maui Department of the Prosecuting Attorney (State) countered.

First, the Second Amendment allows for some restrictions per Heller and Bruen. For instance, registration and permitting are constitutional. Second, unlike the Bruen plaintiffs, Wilson illegally possessed a handgun because he never tried to follow Hawai‘i's firearm registration and license to carry law. Because he didn't apply for a permit, he lacks standing to raise a Second Amendment challenge.

Circuit Court Judge Kirstin Hamman granted Wilson's second motion to dismiss in August 2022. HRS § 134-25(a) and § 134-27(a) infringed Wilson's constitutional right to keep and bear a firearm for self-defense.

The court ruled that Wilson had standing to challenge HRS § 134-25(a) and § 134-27(a). Then it concluded that per Bruen, a right to keep and bear firearms for self-defense under the Hawai‘i and United States Constitutions extends "outside the home." The State had failed to meet its burden to show how HRS § 134-25(a) and § 134-27(a) are "consistent with the Nation's historical tradition of firearm regulation." The circuit court also found that HRS § 134-25(a) and § 134-27(a) made "no exceptions for carrying firearms outside the home for self-defense purposes." [There *are* exceptions in those laws - "[e]xcept as provided in sections 134-5 and 134-9." This mistake though is immaterial to our decision.]

The court dismissed counts 1 and 2 with prejudice.

The State moved to reconsider. Then the Department of the Attorney General got involved. The court granted its request to file an amicus brief in support of the Maui Prosecuting Attorney's motion. The Attorney General argued that Bruen does not stop states from requiring a license before bringing a firearm to a public place. The circuit court denied the motion to reconsider.

The State appealed. Then it filed an application for transfer. We granted the transfer.

III.

We hold that the text and purpose of the Hawai‘i Constitution, and Hawai‘i’s historical tradition of firearm regulation, do not support a constitutional right to carry deadly weapons in public.

We conclude that HRS § 134-25 and § 134-27 do not violate Wilson’s right to keep and bear arms under article I, section 17 of the Hawai‘i Constitution and the Second Amendment to the United States Constitution. Since Wilson lacks standing to challenge HRS § 134-9, we do not take up his Second Amendment challenge to that law.

A. Standing

Wilson has standing. His standing though, is confined to challenging HRS § 134-25 and § 134-27, not HRS § 134-9.

1. Wilson has standing to challenge HRS § 134-25 and § 134-27

The State argues Wilson has no standing to challenge Hawai‘i’s place to keep crimes, HRS § 134-25 (pistol or revolver) and § 134-27 (ammunition). He didn’t bother to apply for a carry license and satisfy HRS § 134-9. So he can’t attack the licensing law.

The State relies on California and New York cases where courts denied standing to criminal defendants who did not try to get a license to carry. They could not bring Bruen-based

constitutional challenges. See, e.g., People v. Rodriguez, 171 N.Y.S.3d 802, 806 (N.Y. Sup. Ct. 2022) ("Failing to seek a license before roaming the streets with a loaded firearm is not abiding by the law, and nothing in the Second Amendment requires that it be tolerated."); People v. Velez, 302 Cal. Rptr. 3d 88, 106 (Cal. Ct. App. 2022) ("[U]nlike the petitioners in Bruen, the record does not show, nor does [defendant] claim, that he applied for and was denied a license to possess the gun in question.").

Hawai‘i law offers criminal defendants broad standing to challenge the constitutionality of criminal laws they are charged with violating. State v. Grahovac, 52 Haw. 527, 532, 480 P.2d 148, 152 (1971). It allows challenges "[w]here restraints imposed act directly on an individual or entity and a claim of specific present objective harm is presented." State v. Bloss, 64 Haw. 148, 151, 637 P.2d 1117, 1121 (1981).

Here, the State charges place to keep crimes. Because Wilson faces serious consequences, he has *a claim of specific present objective harm*. And this gives him standing to challenge the constitutionality of HRS § 134-25 and § 134-27. See Armitage, 132 Hawai‘i at 55, 319 P.3d at 1063 (defendants subject to penal liability under a regulation have "a claim of specific present objective harm," and therefore standing to

challenge the constitutionality of that regulation) (citation omitted).

2. Wilson lacks standing to challenge HRS § 134-9

Unlike his challenges to HRS § 134-25 and § 134-27, Wilson does not have standing to challenge HRS § 134-9's constitutionality.

Wilson says HRS § 134-9 "may be unconstitutional" and that it is unreasonable to "[r]equire[] defendants to apply for licenses pursuant [to] a potentially unconstitutional statute as a prerequisite to challenging other statutes[.]" HRS § 134-9 is unconstitutional, Wilson's argument goes, so he should not have to apply for a license to challenge the law.

We disagree. Wilson has no standing to challenge HRS § 134-9 without applying for a license.

First, the State has not charged Wilson with violating HRS § 134-9. Since "a criminal defendant cannot challenge the constitutionality of one subsection of a statute where he was charged under a different subsection," a criminal defendant cannot challenge the constitutionality of an entirely different statute. Armitage, 132 Hawai'i at 55, 319 P.3d at 1063; see also Grahovac, 52 Haw. at 532, 480 P.3d at 152 ("a criminally accused has 'standing' to constitutionally challenge *only the specific penal sanctions*" charged (emphasis added)).

Next, HRS § 134-9 – Licenses to Carry - is not a criminal offense. It reads, in part: "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." Nowhere does HRS chapter 134 identify a criminal penalty for HRS § 134-9. And the reference to HRS § 134-25, the B felony place to keep handgun offense, signals *that* crime covers it.

Last, Wilson did not bother to follow HRS § 134-9's procedure to obtain a license to carry. Because Wilson made no attempt to get a license, he cannot claim the law's application procedures are unconstitutional as applied to him. Armitage, 132 Hawai‘i at 55–56, 319 P.3d at 1063–64 (defendants lacked standing because they did not follow a permit application procedure, and therefore could not "claim that the specifics of the application procedures . . . [were] unconstitutional as applied to them").

Wilson cannot show a specific present objective harm based on HRS § 134-9. Thus, his constitutional challenges are confined to HRS § 134-25 and § 134-27. Had Wilson followed the HRS § 134-9 application process, and been denied, then he might have standing to challenge that law's constitutionality in his criminal case. But those are not his facts. So Wilson's challenge is limited to HRS § 134-25 and § 134-27.

B. HRS § 134-25(a) and § 134-27(a) do not violate Wilson's right to keep and bear arms under article I, section 17

1. Our Sequence of State Constitutional Interpretation

Wilson invokes both the Hawai‘i and United States Constitutions.

This court has yet to explain how we interpret matching state and federal constitutional provisions when both are in play. Do we look at the state constitution first? The federal constitution first? Both? If we interpret our constitution to provide more protection, do we even take up the federal constitution?

We believe that the proper sequence to consider matching constitutional text is to interpret the Hawai‘i Constitution before its federal counterpart. Only if the Hawai‘i Constitution does not reach the minimum protection provided by a parallel federal constitutional right should this court construe the federal analogue.

Thus, we interpret the Hawai‘i Constitution first. And may not get to the United States Constitution. See State v. Kono, 152 A.3d 1, 29 n.29 (Conn. 2016) ("If we address the state constitutional claim first and decide it in favor of the defendant, there is no reason to address the federal constitutional claim; for purposes of that case, the defendant is entitled to prevail under the state constitution, and it

simply does not matter which way the claim would have been decided under the federal constitution."); State v. Moylett, 836 P.2d 1329, 1332 (Or. 1992) ("if no state law, including the state constitution, resolves the issues, courts then should turn for assistance to the Constitution of the United States").

The Hawai'i Constitution often offers "greater protections" than the federal constitution. State v. Santiago, 53 Haw. 254, 265, 492 P.2d 657, 664 (1971). When the two contain look-alike provisions, Hawai'i has chosen not to lockstep with the Supreme Court's interpretation of the federal constitution.

Rather, this court frequently walks another way. Long ago, the Hawai'i Supreme Court announced that an "opinion of the United States Supreme Court . . . is merely another source of authority, admittedly to be afforded respectful consideration, but which we are free to accept or reject in establishing the outer limits of protection afforded by . . . the Hawai'i Constitution." State v. Kaluna, 55 Haw. 361, 369 n.6, 520 P.2d 51, 58 n.6 (1974). Further, "this court has not hesitated to adopt the dissents in U.S. Supreme Court cases when it was believed the dissent was better reasoned than the majority opinion." State v. Mundon, 129 Hawai'i 1, 18 n.25, 292 P.3d 205, 222 n.25 (2012).

Interpreting the Hawai'i Constitution is this court's #1 responsibility. So we reason independently, untethered from the

Supreme Court's analysis of the United States Constitution. State v. Texeira, 50 Haw. 138, 142 n.2, 433 P.2d 593, 597 n.2 (1967). Hawai‘i's people "are entitled to an independent interpretation of State constitutional guarantees." See State v. Ball, 471 A.2d 347, 350 (N.H. 1983). That means this court, not the U.S. Supreme Court, drives interpretation of the Hawai‘i Constitution. "If we ignore this duty, we fail to live up to our oath" to defend Hawai‘i's Constitution. Id.

State constitutions have a distinct role under our nation's system of federalism. Deciding a case first on state constitutional grounds respects state sovereignty and aligns with a key constitutional design feature – subnational governance. As the Oregon Supreme Court put it:

> The proper sequence is to analyze the state's law, including its constitutional law, before reaching a federal constitutional claim. This is required, not for the sake either of parochialism or of style, but because the state does not deny any right claimed under the federal Constitution when the claim before the court in fact is fully met by state law.

Sterling v. Cupp, 625 P.2d 123, 126 (Or. 1981) (en banc).

The state-constitution-first approach recognizes the states as the cradle of rights. State constitutions predated the Constitution as the original sources of constitutional rights. Hans A. Linde, First Things First: Rediscovering the States' Bills of Rights, 9 U. Balt. L. Rev. 379, 380 (1980) ("State bills of rights are first in two senses: first in time and first

in logic."). The Bill of Rights cut and pasted rights first ensconced in pre-1789 state constitutions. Id. at 381. And for more than a century, state constitutional rights were the *only* rights enforceable against state governments. See Gitlow v. New York, 268 U.S. 652, 666 (1925) (incorporating the Bill of Rights against subnational actors).

State constitutions provide a "double security" for the people's liberty. The Federalist No. 51, at 321 (James Madison) (Isaac Kramnick ed., 1987). Per the Constitution's design, the Hawai‘i Constitution supplies an *additional* guarantee of individual rights. See, e.g., State v. Tanaka, 67 Haw. 658, 661, 701 P.2d 1274, 1276 (1985) ("We have not hesitated in the past to extend the protections of the Hawai‘i Bill of Rights beyond those of textually parallel provisions in the Federal Bill of Rights when logic and a sound regard for the purposes of those protections have so warranted.").

But federalism is about more than just the relationship between state and federal governments. "[W]e must not forget that the virtue of federalism lies not in the means of permitting state experimentation but in the ends of expanded liberty, equality, and human dignity." State v. Short, 851 N.W.2d 474, 507 (Iowa 2014) (Cady, C.J., concurring specially).

We honor the Hawai‘i Constitution's freestanding vitality. We interpret the Hawai‘i Constitution first.

2. Wilson's Constitutional Claims

Wilson argues that HRS § 134-25(a) and § 134-27(a) violate his putative right to keep and bear arms under article I, section 17 of the Hawai'i Constitution and the Second Amendment's brand-new right to bear arms in public for self-defense.

HRS § 134-25(a) and § 134-27(a) criminalize the carrying of "a loaded . . . pistol or revolver" and "ammunition" "[e]xcept as provided in sections 134-5 and 134-9[.]" HRS § 134-9 permits the *licensed* carry of firearms outside the home. Thus, HRS § 134-25(a) and § 134-27(a) regulate firearm use by restricting the right to publicly carry a handgun and ammunition for self-defense purposes to those who apply for and receive a carry license.

Wilson possessed an unlicensed, concealed, and loaded handgun to, he says, protect himself. Only certain factual circumstances justify shooting another human in Hawai'i. Per HRS § 703-304(2), "[t]he use of deadly force is justifiable . . . if the actor believes that deadly force is necessary to protect [themself] against death, serious bodily injury, kidnapping, rape, or forcible sodomy." HRS § 703-304(2) (2014).

The State argues Wilson's handgun-toting conduct is not saved by the right to bear arms. He trespassed, a crime. He's not "law abiding." The State's position makes sense in the abstract. Neither Bruen, nor any case, protect a right to

commit a crime while armed. See People v. Gonzalez, 291 Cal. Rptr. 3d 127, 130 (Cal. Ct. App. 2022) ("We are aware of no court decision holding that the United States Constitution protects a right to carry a gun while simultaneously engaging in criminal conduct."); United States v. Perez-Garcia, No. 22-CR-1581-GPC, 2022 WL 17477918, at *3 (S.D. Cal. Dec. 6, 2022) ("[A] reasonable interpretation of Bruen is that it does not obfuscate the requirement that, as a threshold matter, to receive Second Amendment protection, one must first and foremost be law abiding.").

The State's argument about Wilson's alleged criminal conduct does not apply. Wilson's criminal trespass charge (count 4) is not before this court. And it's a trial matter. The parties dispute the facts in declarations attached to their motion to dismiss briefing. These declarations are fair game for now. They comply with Hawai'i Rules of Penal Procedure Rule 47(a) ("If a motion requires the consideration of facts not appearing of record, it shall be supported by affidavit or declaration.").

Wilson denies trespassing. Wilson says that he and his friends "were hiking that night to look at the moon and Native Hawaiian plants." They did not see any "No Trespassing" signs. For purposes of the motion to dismiss, Wilson's alleged criminal

conduct does not prevent him from challenging the charges under the Second Amendment and article I, section 17.

So we go to Wilson's article I, section 17 constitutional challenge.

This court eyed article I, section 17 before. See State v. Mendoza, 82 Hawai'i 143, 920 P.2d 357 (1996). But Mendoza dodged the key question: Does Hawai'i's Constitution afford a personal right or a collective right to keep and bear arms?

Mendoza appealed from his conviction for unlawful firearm possession (then an HRS § 134-4(b) (1993) place to keep charge). The law violated his right to bear arms under the state and federal constitutions, he argued. Id. at 144, 920 P.2d at 358. After some textual and historical analysis, this court chose not to decide: "it is unnecessary for us to decide whether the framers intended to establish an individual or collective right to bear arms under article I, section 17." Id. at 153, 920 P.2d at 367. The Mendoza court upheld the firearms regulation, even "[a]ssuming, without deciding, that article I, section 17 established an individual right to bear arms." Id.

Justice Levinson concurred. He concluded that there was no individual right. Article I, section 17 covers conduct with a "reasonable relationship to the preservation or efficiency of a well regulated militia." Id. at 155, 920 P.2d at 369 (Levinson,

J., concurring) (cleaned up). Here, we decide the constitutional question previously sidestepped.

Because the text of article I, section 17, its purpose, and Hawai‘i’s historical tradition of weapons regulation support a collective, militia meaning, we hold that the Hawai‘i Constitution does not afford a right to carry firearms in public places for self-defense.

3. Article I, section 17’s text

Article I, section 17 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.

Haw. Const. art. I, § 17.

The Second Amendment is nearly identical. Only two commas and three capital letters separate the two. 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.

Since article I, section 17 imitates the Second Amendment, it is helpful to look at what the Second Amendment’s words mean.

A textual approach to constitutional interpretation appreciates that words appear (or do not) for a reason.

Both clauses of article I, section 17 and the Second Amendment use military-tinged language – “well regulated

militia" and "bear arms" - to limit the use of deadly weapons to a military purpose.

In contrast, there are no words that mention a personal right to possess lethal weapons in public places for possible self-defense.

First, we examine the prefatory clause to article I, section 17 and the Second Amendment. The opening words carry a military meaning. The "well regulated militia" clause warms up the rest, defining the text. It "sets forth the object of the Amendment and informs the meaning of the remainder of its text." Heller, 554 U.S. at 643 (Stevens, J., dissenting).

Article I, section 17's first clause offers context and clarity, like preambles do. "It cannot be presumed that any clause in the constitution is intended to be without effect." See Marbury v. Madison, 5 U.S. 137, 174 (1803).

The federal constitution deploys "militia" to mean an irregular state military force that may be called up by the federal government to combat outside invasions or internal insurrections. See Silveira v. Lockyer, 312 F.3d 1052, 1070 (9th Cir. 2002); Paul Finkelman, "A Well Regulated Militia": The Second Amendment in Historical Perspective, 76 Chi.-Kent L. Rev. 195, 209 (2000). Article I, section 8 gives Congress power to "provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions," and to

"provide for organizing, arming, and disciplining, the Militia." U.S. Const. art. I, § 8, cl. 15-16. Article II makes the President of the United States the "Commander in Chief of the Army and Navy" and "of the Militia of the several States, when called into the actual Service of the United States." Id. art. II, § 2, cl. 1.

Founding era dictionaries agree. See Thomas Dyche & William Pardon, A New General English Dictionary (1765) ("Militia: the civil defence of a kingdom, who are cantoned into companies, regiments, &c. that are casually raised out of the inhabitants upon extraordinary occasions of riots, tumults, invasions &c. who, as soon as the disturbance is over, return to their respective habitations and employments"); John Ash, The New and Complete Dictionary of the English Language (1775) ("Militia: the train bands, the standing military force of a nation.").

To English speakers – in 1791, 1868, and now - the first clause narrows the right that the second clause confers. It is "the people" who make up the militia that need to "keep and bear arms" to protect "the free state."

Centuries ago, the right to keep and bear arms was not universal. It wasn't for all. "The people" who had the right to "keep and bear arms" included a discrete subset, one that excluded people based on gender and race. Only able-bodied free

men could join a militia. See, e.g., Militia Act of 1792, ch. 33, 1 Stat. 271, 271 (1792) (repealed 1903) (limiting enrollment in the militia to every "free able-bodied white male citizen" that is over "the age of eighteen years, and under the age of forty-five years").

Article I, section 17's second clause also carries an "obvious purpose." United States v. Miller, 307 U.S. 174, 178 (1939). "The term 'bear arms' is a familiar idiom; when used unadorned by any additional words, its meaning is 'to serve as a soldier, do military service, fight.'" Heller, 554 U.S. at 646 (Stevens, J., dissenting) (citing 1 Oxford English Dictionary 634 (2d ed. 1989). "Bear arms" is "to serve as a soldier." Webster's New International Dictionary (2d ed. 1960).

Before article I, section 17, bear arms had the same meaning, going way back. Some textualists champion corpus linguistics, "an analysis of how particular combinations of words are used in a vast database of English prose." Facebook, Inc. v. Duguid, 592 U.S. 395, 412 (2021) (Alito, J., concurring). They see it as "an important tool . . . in figuring out the meaning of a term." Wilson v. Safelite Grp., Inc., 930 F.3d 429, 442 (6th Cir. 2019) (Thapar, J., concurring).

Like the first clause's "well regulated militia," the second clause's "bear arms" has a collective, military meaning.

Linguistic experts have churned through historical materials, like the Corpus of Founding Era American English and the Corpus of Early Modern English, to get to the bottom of the Second Amendment's key words. "Founding-era sources almost always use *bear arms* in an unambiguously military sense." See Dennis Baron, Corpus Evidence Illuminates the Meaning of Bear Arms, 46 Hastings Const. L.Q. 509, 510 (2019). "Non-military uses of *bear arms* in reference to hunting or personal self-defense are not just rare, they are almost nonexistent." Id. at 510-11; see also James C. Phillips & Josh Blackman, Corpus Linguistics and Heller, 56 Wake Forest L. Rev. 609, 674, (2021) ("The overwhelming majority of *bear arms* was the 'collective/militia' sense.")

Judges interpret words as part of the job. But judges are not language and speech specialists. Before Bruen, linguists informed the Supreme Court about their research: "[C]orpus linguistics researchers have unearthed a wealth of new evidence over the past decade showing that the phrase 'keep and bear arms' overwhelmingly had a collective, militaristic meaning at the Founding." See Brief for Corpus Linguistics Professors and Experts as Amici Curiae Supporting Respondents at 4, N.Y. State Rifle & Pistol Ass'n, Inc. v. City of New York, 590 U.S. ____, 140 S. Ct. 1525 (2020) (No. 18-280).

No words in article I, section 17 and the Second Amendment describe an individual right. No words mention self-defense.

"Bear arms" reads the text. "The *unmodified* use of 'bear arms,' . . . refers most naturally to a military purpose, as evidenced by its use in literally dozens of contemporary texts. The absence of any reference to civilian uses of weapons tailors the text of the Amendment to the purpose identified in its preamble." Heller, 554 U.S. at 647-48 (Stevens, J., dissenting) (footnote omitted).

The Hawai‘i Constitution leaves out an individual right to bear arms. Our framers had options. They could have worded the constitution to plainly secure an individual right to possess deadly weapons for self-defense. But they didn't. The Pennsylvania Constitution of 1776 did: "the people have a right to bear arms for the defence *of themselves* and the state." Pa. Const. of 1776, article XIII (emphasis added). The Vermont Constitution, too: "the people have a right to bear arms for the defence *of themselves* and the State." Vt. Const. ch. 1, art. 16 (enacted 1777, ch. 1, art. 15).

The Hawai‘i Constitution and 44 state constitutions identify a right to bear arms. See Mendoza, 82 Hawai‘i at 146 n.5, 920 P.2d at 360 n.5. (counting forty-two other states' "bear arms" provisions). Two states amended their constitutions post-1996. See Wis. Const. art. I, § 25 enacted in 1998; Iowa Const. art.

I, § 1A, enacted in 2022. 5 states – California, Maryland, Minnesota, New Jersey, and New York - do not have a Second Amendment counterpart in their constitutions. And besides Hawai‘i, only four state constitutions (Alaska, North Carolina, South Carolina, and Virginia) still say "well regulated militia."

Unlike article I, section 17, nearly all state constitutions that recognize a right to keep and bear arms, expressly identify it as a civilian right for personal self-defense. Overwhelmingly, state constitutions use individual-centric language. They recognize a right to bear arms for "any person" or "every citizen." For instance (1) Maine's Constitution: "Every citizen has a right to keep and bear arms and this right shall never be questioned." Me. Const. art. I, § 16 (enacted 1987, after a collective rights interpretation of the original provision, State v. Friel, 508 A.2d 123 (Me. 1986)); (2) Connecticut's Constitution: "Every citizen has a right to bear arms in defense of himself and the state." Conn. Const. art. I, § 15 (enacted 1818, art. I, § 17); and (3) Illinois' Constitution: "Subject only to the police power, the right of the individual citizen to keep and bear arms shall not be infringed." Ill. Const. art I, § 22 (enacted 1970).

We believe that if article I, section 17 meant to provide an individual right to carry deadly weapons in public for self-defense, then it would say so.

Until Heller, the Supreme Court had never ruled that the Second Amendment afforded an *individual* right to keep and bear arms. Because the Second Amendment provided a collective right, most states conferred an individual right through their constitutions. Federalism principles allow states to provide broader constitutional protection to their people than the federal constitution. See, e.g., Texeira, 50 Haw. at 142 n.2, 433 P.2d at 597 n.2.

Hawai‘i chose to use civic-minded language. Article I, section 17 textually cements the right to bear arms to a well regulated militia. Its words confer a right to "keep and bear arms" only in the context of a "well regulated militia."

Article I, section 17 traces the language of the Second Amendment. Those words do not support a right to possess lethal weapons in public for possible self-defense.

4. Article I, section 17's purpose

The original public purpose of article I, section 17 (and the Second Amendment) also supports a collective, military interpretation.

This court construes the Hawai‘i Constitution "with due regard to the intent of the framers and the people adopting it,

and the fundamental principle in interpreting a constitutional provision is to give effect to that intent." Hanabusa v. Lingle, 105 Hawai'i 28, 31, 93 P.3d 670, 673 (2004).

We conclude that the authors and ratifiers of the Hawai'i Constitution imagined a collective right. Our understanding aligns with what the Second Amendment meant in 1950 when Hawai'i copied the federal constitution's language. And in 1968 and 1978 when Hawai'i's people kept those words.

Article I, section 17 originated as Proposal Number 3, section 15 (Section 15) as introduced in the Constitutional Convention of Hawai'i of 1950. Debates in Comm. of the Whole on Bill of Rights (Article I), 2 Proceedings of the Constitutional Convention of Hawai'i of 1950, at 10 (1961). Legislative history shows that the first framers of the Hawai'i Constitution had concerns about the potential impact that a bear arms provision would have on existing firearms registration laws, and the state's ability to pass reasonable laws. The committee reports disclose the framer's intent to allow sensible firearms legislation.

> Section 15 incorporates the 2nd Amendment of the Federal Constitution. In adopting this language, it was the intention of the committee that the language should not be construed as to prevent the state legislature from passing legislation imposing reasonable restrictions upon the right of the people to keep and bear arms.

Stand. Comm. Rep. No. 20, in 1 Proceedings of the Constitutional Convention of Hawai‘i of 1950, at 164 (1960).

The 1950 Constitutional Convention delegates expressed an intent to preserve the Territory's firearms regulations. They had foresight, too, reserving the right to later pass laws to ban "modern and excessively lethal weapons . . . ."

> This section incorporates the 2nd Amendment to the Federal Constitution. Your Committee wishes to make it clear that *this section will not render invalid the existing laws of the Territory*, which will be continued in effect by the State Constitution, relating to the registration, possession and carrying of firearms, *nor will it prevent the legislature from passing other reasonable restrictions on the right to acquire, keep or bear firearms or other weapons, including the power of the legislature to entirely prohibit the possession of such modern and excessively lethal weapons* as machine guns, silencers, bombs, atomic weapons, etc. Upon this understanding, your Committee recommends the adoption of this section.

Comm. of the Whole Rep. No. 5, in 1 Proceedings of the Constitutional Convention of Hawai‘i of 1950, at 303 (emphases added).

The 1968 Constitutional Convention endorsed the Hawai‘i Constitution's text and original purpose. The introduction to a series of Legislative Reference Bureau studies prepared to aid the Convention's delegates explains that article I, section 17 was based on the conventional and traditional interpretation of the Second Amendment. "The historical background of the Second Amendment indicates that the central concern in the right to bear arms was the right of the states to maintain a militia." Hawai‘i Constitutional Convention Studies: Introduction and

Article Summaries (Vol. I), at 7 (1968). The report adds: "The right to bear arms refers explicitly to the militia and is subject to lawful regulation." Stand. Comm. Rep. No. 55 in 1 Proceedings of the Constitutional Convention of Hawai‘i of 1968, at 235 (1973).

The 1968 Constitutional Convention's Standing Committee recommended retaining then-Section 15. The Committee's report clarified:

> The Committee feels that reference must be made to the report of the 1950 Constitutional Convention in order that the people of this State not misconstrue the intent of this section. The right to bear arms refers explicitly to the militia and is subject to lawful regulation.

Id.

Ten years later, the 1978 Constitutional Convention Studies similarly advised the delegates: "[T]he right to keep and bear arms is one enjoyed collectively by members of a state militia" rather than an individual right. Hawai‘i Constitutional Convention Studies 1978: Introduction and Article Summaries, at 6 (1978). The study recounts that the "1968 Constitutional Convention, to clear up any confusion left by its predecessor, stressed that section 15 referred only to the collective right to bear arms as a member of the state militia, but did not amend section 15." Id.

The Hawai‘i Constitution's first framers knew about the United States Supreme Court's decision in Miller, 307 U.S. at

183. In 1950, at the prepare-for-statehood Constitutional Convention, only 11 years had passed since the unanimous decision in Miller. There the Supreme Court concluded that the Second Amendment's purpose was to preserve an effective state militia:

> [i]n the absence of any evidence tending to show that possession or use of a "shotgun having a barrel of less than eighteen inches in length" at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.

Id. at 178.

When the Hawai'i Constitution was first ratified, courts throughout the nation's history had *always* interpreted and applied the Second Amendment with the militia-centric view expressed in Miller. See, e.g., Cases v. United States, 131 F.2d 916, 921 (1st Cir. 1942) ("The right to keep and bear arms is not a right conferred upon the people by the federal constitution."); United States v. Tot, 131 F.2d 261, 266 (3d Cir. 1942) (finding it "abundantly clear" that the Second Amendment, unlike freedom of speech and freedom of religion, "was not adopted with individual rights in mind, but as a protection for the States in the maintenance of their militia organizations against possible encroachments by the federal power").

This was what everyone thought. A 1969 law dictionary explained: the "right to bear arms" refers to the militia, "[n]ot a constitutional right to carry weapons on one's person as a civilian." *Right to bear arms*, Ballentine's Law Dictionary (3d ed. 1969).

State and federal courts had also, with few exceptions, upheld laws regulating firearms use and possession.

Article I, section 17 traces the Second Amendment's language. The introductory militia language reveals article I, section 17's purpose - preserve the militia to safeguard the security of Hawai'i as a free state. See Heller, 554 U.S. at 640 (Stevens, J., dissenting) (noting that the prefatory phrase "identifies the preservation of the militia as the Amendment's purpose").

Like article I, section 17, the Second Amendment's original purpose protects a state's right to have a militia. The framers included the right to keep and bear arms in the federal constitution "in response to their fear that [the] government might disarm the militia, not restrict the common law right of self-defense." Saul Cornell & Nathan DeDino, A Well Regulated Right: The Early American Origins of Gun Control, 73 Fordham L. Rev. 487, 499 (2004). Madison's writings suggest that the Second Amendment originated from fear of a federal government power grab. The Second Amendment quelled alarm that the

national government might disarm and disband state militias. Those militias could "oppose" a federal army, Madison wrote, and "would be able to repel the danger" of the federal government. The Federalist No. 46, at 301 (James Madison) (Isaac Kramnick ed., 1987).

That's what they were thinking about long ago. Not someone packing a musket to the wigmaker just in case.

Until recently, the Second Amendment conferred a collective right to bear arms in service to the militia. See Miller, 307 U.S. at 178; Robertson v. Baldwin, 165 U.S. 275, 281-82 (1897). There was no individual federal constitutional right to carry deadly weapons in public places for self-defense. There were only statutory, common law, or state constitutional rights.

Around Miller's time, the state militia was evolving into the National Guard. A 1903 Act created the National Guard. "[T]he regularly enlisted, organized, and uniformed active militia in the several States and Territories . . . whether known and designated as National Guard, militia, or otherwise, shall constitute the organized militia." Act of January 21, 1903, 32 Stat. 775. Then the National Defense Act of 1916 federalized the National Guard. Act of June 3, 1916, 39 Stat. 166. A 1933 amendment to that act established state National Guard units that would simultaneously enlist in the federal National Guard. Act of June 15, 1933, 48 Stat. 153, 159. While

each state can call upon their unit for emergencies, the federal government also retains power to utilize them for national defense. See Perpich v. Dep't of Def., 496 U.S. 334, 351 (1990).

The authors of the Hawai'i Constitution understood the meaning of militia. "Militia" meant "a body of citizens enrolled as a regular military force for periodical instruction, discipline, and drill, but not called into active service except in emergencies." Webster's New International Dictionary (2d ed. 1960). By then it included the state National Guard. At the 1968 constitutional convention, delegate Leland Larson explained, "Section 15, the so-called 'right to bear arms' provision, does not refer to the individual's right, it refers to the militia, to the national guard." Debates in Comm. of the Whole on Bill of Rights (Article I), 2 Proceedings of the Constitutional Convention of Hawai'i of 1968, at 24 (1972); see also William L. Shaw, The Interrelationship of the United States Army and the National Guard, 31 Mil. L. Rev. 39, 44 (1966) (noting that "modern-day sense" of term "militia" includes "National Guard units").

Soon interest groups advanced an individual rights interpretation of the Second Amendment. See Carl T. Bogus, The History and Politics of Second Amendment Scholarship: A Primer, 76 Chi.-Kent L. Rev. 3 (2000).

Former Chief Justice Burger called out that movement. It was:

> one of the greatest pieces of fraud, I repeat the word 'fraud,' on the American public by special interest groups that I've ever seen in my lifetime. The real purpose of the Second Amendment was to ensure that state armies — the militia — would be maintained for the defense of the state. The very language of the Second Amendment refutes any argument that it was intended to guarantee every citizen an unfettered right to any kind of weapon he or she desires.

Silveira v. Lockyer, 312 F.3d 1052, 1063 (9th Cir. 2002) (quoting Warren E. Burger, The Right to Bear Arms, PARADE MAGAZINE, Jan. 14, 1990, at 4).

Circuit courts agreed. There was no individual right. Same as it ever was. See Love v. Pepersack, 47 F.3d 120, 124 (4th Cir. 1995) ("Since [Miller], the lower federal courts have uniformly held that the Second Amendment preserves a collective, rather than individual, right."); Gillespie v. City of Indianapolis, 185 F.3d 693, 710 (7th Cir. 1999). In 2001 though, the Fifth Circuit took a new tact. See United States v. Emerson, 270 F.3d 203, 260 (5th Cir. 2001) (finding that the Second Amendment "protects individual Americans in their right to keep and bear arms whether or not they are a member of a select militia").

Then, the Supreme Court granted cert in Heller. Heller flipped the nation's textual and historical understanding of the Second Amendment. The majority insisted there was "no doubt, on the basis of both text and history, that the Second Amendment

conferred an individual right to keep and bear arms." 554 U.S. at 595.

History by historians quickly debunked Heller's history. "If history, and history alone, is what matters, why would the Court not now reconsider Heller in light of these more recently published historical views?" McDonald, 561 U.S. at 916 (Breyer, J., dissenting); United States v. Bullock, ___ F. Supp. 3d ___, 2023 WL 4232309, at *4-*5 (S.D. Miss. 2023) (Reeves, J.) ("[A]n overwhelming majority of historians reject the Supreme Court's most fundamental Second Amendment holding – its 2008 conclusion that the Amendment protects an individual right to bear arms, rather than a collective, Militia-based right.") (cleaned up).

History is prone to misuse. In the Second Amendment cases, the Court distorts and cherry-picks historical evidence. It shrinks, alters, and discards historical facts that don't fit. See Heller, 554 U.S. at 639 (Stevens, J., dissenting); Bruen, 597 U.S. at 112 (Breyer, J., dissenting) ("the numerous justifications that the Court finds for rejecting historical evidence give judges ample tools to pick their friends out of history's crowd").

Bruen unravels durable law. No longer are there the levels of scrutiny and public safety balancing tests long-used by our nation's courts to evaluate firearms laws. Instead, the Court ad-libs a "history-only" standard. See id. at 84.

The Supreme Court makes state and federal courts use a fuzzy "history and traditions" test to evaluate laws designed to promote public safety. It scraps the traditional techniques used by federal and state courts to review laws passed by the People to protect people. And by turning the test into history and nothing else, it dismantles workable methods to interpret firearms laws. All to advance a chosen interpretive modality.

Yet only a few years before, the Court had constrained originalism's liberty-reducing tendencies. The history and tradition of the very old days did not control contemporary American life. "History and tradition guide and discipline this inquiry but do not set its outer boundaries." Obergefell v. Hodges, 576 U.S. 644, 664 (2015).

Judges are not historians. Excavating 18th and 19th century experiences to figure out how old times control 21st century life is not a judge's forte. "Judges are not historians. We were not trained as historians. We practiced law, not history." Bullock, 2023 WL 4232309, at *4. Worse, judges may use history to fit their preferred narratives. "[I]n addition to the risk that [judges] will not understand the materials they are charged to consult, there is the additional risk that they will not conduct a dispassionate examination of the historical evidence and will simply marshal historical anecdotes to achieve what they have already decided is the

preferred outcome." Darrell A.H. Miller, Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second, 122 Yale L.J. 852, 935 (2013).

History is messy. It's not straightforward or fair. It's not made by most. See Melissa Murray, Children of Men: The Roberts Court's Jurisprudence of Masculinity, 60 Hous. L. Rev. 799, 800 (2023) (the current Court "frequently relies [on] moments in which women and people of color were expressly excluded from political participation and deliberation").

Bruen, McDonald, Heller, and other cases show how the Court handpicks history to make its own rules. See Allegheny Reprod. Health Ctr. v. Pennsylvania Dep't of Hum. Servs., ___ A.3d ___, 2024 WL 318389, at *135 (Pa. 2024) (Wecht, J., concurring) ("At the same time that it purported to anchor its holding in American common law, the Dobbs majority engaged in historical fiction, disregarding evidence that undermined its view and ignoring the reproductive autonomy that American women originally exercised – autonomy that included matters of pregnancy, childbirth, and abortion."). "A justice's personal values and ideas about the very old days suddenly control the lives of present and future generations." See City & Cnty. of Honolulu v. Sunoco LP, 153 Hawai'i 326, 361, 537 P.3d 1173, 1208 (2023) (Eddins, J., concurring).

Bruen's command to find an old-days "analogue" undercuts the other branches' responsibility – at the federal, state, and local levels - to preserve public order and solve today's problems. And it downplays human beings' aptitude for technological advancement.

Time-traveling to 1791 or 1868 to collar how a state regulates lethal weapons – per the Constitution's democratic design - is a dangerous way to look at the federal constitution. The Constitution is not a "suicide pact." Terminiello v. Chicago, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

We believe it is a misplaced view to think that today's public safety laws must look like laws passed long ago. Smoothbore, muzzle-loaded, and powder-and-ramrod muskets were not exactly useful to colonial era mass murderers. And life is a bit different now, in a nation with a lot more people, stretching to islands in the Pacific Ocean.

Regulations like storing powder safely, reporting with guns for militia "musters" (weapons inspection), and loyalty oaths are hardly helpful to address contemporary gun violence. Yet those odd laws have historical and traditional roots. Democratically-vetted laws, though – measures taken by today's citizens to save lives - are mostly out of bounds.

Lethal weapons share little resemblance to weaponry used centuries ago. A well-trained Revolutionary War soldier could

fire his Brown Bess musket three times a minute. See, e.g., David S. Lux, Brown Bess, Guns in American Society: A-L 84, 86 (Gregg Lee Carter ed., 2002) ("An effectively trained soldier equipped with [a] smooth-bore musket[] could fire at least three rounds per minute on command."). The Civil War's muzzle-loading rifled muskets in the Civil War were an improvement on Revolutionary War weapons, but were still plenty slow and difficult to reload. Earl J. Hess, The Rifle Musket in Civil War Combat: Reality and Myth 4-7 (Univ. of Kansas 2008). Presently, a semi-automatic rifle can fire at least 45 rounds a minute (and up to 300). See Bevis v. City of Naperville, Ill., 85 F.4th 1175, 1197 (7th Cir. 2023); Id. at 1224 (Brennan, J., dissenting). Weapons to maximize death differ from those in the eras Bruen tells us to review.

Gun use has changed, too. A backward-looking approach ignores today's realities. "In 2019 for every justifiable homicide in the United States involving a gun, guns were used in 30 criminal homicides." (316 justifiable homicides and 9,610 criminal homicides.) This ratio does not take into account suicides and fatal unintentional shootings. See Firearm Justifiable Homicides and Non-Fatal Self-Defense Gun Use, Violence Policy Center, 1, March 2023, https://vpc.org/studies/justifiable23.pdf [https://perma.cc/PW6G-J5U8].

The United States Supreme Court disables the states' responsibility to protect public safety, reduce gun violence, and safeguard peaceful public movement. A government by the people works. Hawai‘i's legislative branch has passed sensible firearms laws. And Hawai‘i's executive branch has enforced those laws. The most recent available data from the Centers for Disease Control shows that Hawai‘i has the nation's second-lowest rate of gun deaths per year. Centers for Disease Control and Prevention, National Center for Health Statistics, Firearm Mortality by State (March 1, 2022) (displaying 2021 data) https://www.cdc.gov/nchs/pressroom/sosmap/firearm_mortality/firearm.htm [https://perma.cc/J7HT-7NXH].

As the world turns, it makes no sense for contemporary society to pledge allegiance to the founding era's culture, realities, laws, and understanding of the Constitution. "The thing about the old days, they the old days." *The Wire: Home Rooms* (HBO television broadcast Sept. 24, 2006) (Season Four, Episode Three).

5. History and Tradition in Hawai‘i

To be clear, history, though not the end all, is useful. See Hawai‘i State AFL-CIO v. Yoshina, 84 Hawai‘i 374, 376, 935 P.2d 89, 91 (1997) ("[A] constitutional provision must be construed in connection with other provisions of the instrument, and also in the light of the circumstances under which it was

adopted and the history which preceded it.") (cleaned up). The Hawai‘i Supreme Court values history and tradition to aid statutory and constitutional interpretation. Id. But unlike the United States Supreme Court, we do not subscribe to an interpretive theory that nothing else matters.

Here, we discuss Hawai‘i's historical tradition of regulating weapons. We try our best. Judges are not historians. (Except the rare case of John Papa ‘Ī‘ī, historian and Associate Justice of the Supreme Court of the Kingdom of Hawai‘i from 1848-1864.) Throughout its history as a sovereign nation and as a Territory, Hawai‘i regulated deadly weapons.

History bares article I, section 17's purpose. Never have Hawai‘i's people felt that carrying deadly weapons during daily life is an acceptable or constitutionally protected activity.

In Hawai‘i, a state constitutional right to keep and bear arms does not extend to non-militia purposes.

a. The Kingdom of Hawai‘i's First Law: Ke Kānāwai Māmalahoe and the promotion of public safety

"[A] unified monarchial government of the Hawaiian Islands was established in 1810 under Kamehameha I, the first King of Hawai‘i." S.J. Res. 19, 103d Cong., 107 Stat. 1510 (1993). King Kamehameha I enacted Hawai‘i's first law: Ke Kānāwai Māmalahoe, or "law of the splintered paddle." See Carol Chang, The Law of the Splintered Paddle: Kānāwai Māmalahoe 14 (1994).

The law reflects Kamehameha's personal experience:

> Kamehameha and Ka-haku'i paddled to Papa'i and on to Kea'au in Puna where some men and women were fishing, and a little child sat on the back of one of the men. Seeing them about to go away, Kamehameha leaped from his canoe intending to catch and kill the men, but they all escaped with the women except two men who stayed to protect the man with the child. During the struggle Kamehameha caught his foot in a crevice of the rock and was stuck fast; and the fishermen beat him over the head with a paddle. Had it not been that one of the men was hampered with the child and their ignorance that this was Kamehameha with whom they were struggling, Kamehameha would have been killed that day. This quarrel was named Ka-lele-iki, and from the striking of Kamehameha's head with a paddle came the law of Mamala-hoe (Broken paddle) for Kamehameha.

Samuel M. Kamakau, Ruling Chiefs of Hawai'i 125-26 (1961):

The law of the splintered paddle promotes public safety:

> E nā kānaka,
> E mālama 'oukou i ke akua
> A e mālama ho'i i kānaka nui
> a me kānaka iki;
> E hele ka 'elemakule,
> ka luahine, a me ke kama
> A moe i ke ala
> 'a'ohe mea nāna e ho'opilikia.
> Hewa nō, make.
>
> O my people,
> Honor thy god;
> Respect alike (the rights of)
> men great and humble;
> See to it that our aged,
> our women, and our children
> Lie down to sleep by the roadside
> Without fear of harm.
> Disobey, and die.

Chang, The Law of the Splintered Paddle at 16.

Kamehameha I's law protects all people, "great and humble." Especially the vulnerable - children and the elderly. The law

imagines free movement without fear. Living without need to carry a deadly weapon for self-defense.

Article IX, section 10 of the 1978 Hawai‘i Constitution codifies Ke Kānāwai Māmalahoe:

> The law of the splintered paddle, [kānāwai māmalahoe], decreed by Kamehameha I -- Let every elderly person, woman and child lie by the roadside in safety -- shall be a unique and living symbol of the State's concern for public safety.
>
> The State shall have the power to provide for the safety of the people from crimes against persons and property.

Haw. Const. art. IX, § 10.

Article IX, section 10 provides the people of Hawai‘i a constitutional right to freely and safely travel in peace and tranquility. To animate this constitutional right, the Hawai‘i Constitution empowers the State to provide for the "safety of the people from crimes against persons and property."

b. 1833-1893: Weapons were heavily regulated under Hawaiian Kingdom Law

By the time Kamehameha III became King, foreign nations and their citizens increasingly exposed the islands to deadly weapons. Kamehameha III enacted laws to protect his people from crime. In 1833, the King promulgated a law prohibiting "any person or persons" on shore from possessing a weapon, including any "knife, sword-cane, or any other dangerous weapon." Violators were subject to arrest and punishment by fine or lashings. Translation of the Constitution and Laws of the

Hawaiian Islands, Established in the Rein of Kamehameha III 98 (Lahainaluna, 1842).

Kamehameha III's laws severely punished those who committed crimes with deadly weapons. Chapter XXXVII outlawed burglary. It had a harsh sentencing enhancement: ordinary burglary was punished by exile for a period of 3-10 years, but if a burglar had a deadly weapon, then it was "a great crime, and the man committing it shall be condemned to reside on another land till death." Id. at 93. Chapter XXXVIII, too. Any murder committed by use of a weapon was punishable by death. Id. at 94.

Kamehameha III enacted Hawai'i's first constitution in 1840. Kamakau, Ruling Chiefs of Hawai'i at 370. Kamehameha III and his advisors, including the American William Richards, spent years deliberating what the Kingdom of Hawai'i's Constitution would say. Ralph S. Kuykendall, The Hawaiian Kingdom, 1778-1854 159, 167 (1938). The 1840 Constitution included the United States Constitution's right to freedom of religion. Translation of the Constitution and Laws at 10 (1842). But it left out its "right to bear arms" provision, signaling there was no desire to allow the King's subjects to freely arm themselves. See id. at 9-16.

Kamehameha III's government revised the Constitution twelve years later. The 1852 Constitution was in many ways modeled on the United States Constitution and the Declaration of Independence. Article I declared inalienable rights: life,

liberty, property, and pursuing safety and happiness. Constitution and Laws of His Majesty Kamehameha III, King of the Hawaiian Islands, Passed by the Nobles and Representatives at Their Session, 1852 3 (1852). Article II enshrined freedom of religion. Article III established freedom of the press. And article IV decreed, "[a]ll men shall have the right, in an orderly and peaceable manner to assemble, *without arms*, to consult upon the common good; give instructions to their Representatives; and to petition the King or the Legislature for a redress of grievances." Id. (emphasis added). The 1852 Constitution contained no right to keep and bear arms. See id. And it explicitly conditioned the right of assembly on being unarmed. There was no right to carry weapons in public.

Hawai‘i has a tradition of updating its weapons laws to match changing technology. The Kingdom's 1852 law, "An Act to Prevent the Carrying of Deadly Weapons," expanded the definition of "deadly weapon" to prohibit anyone not authorized by law from carrying "any bowie-knife, sword-cane, pistol, air-gun, slung-shot or other deadly weapon." Id. at 19. The only people allowed to carry arms were Kingdom officials and military officers, but only "when worn for legitimate purposes." Id.

Kamehameha V adopted a new constitution in 1864. Again, the Kingdom of Hawai‘i's Constitution left out a right to bear arms. See Haw. Const. of 1864. And again, it protected the

right to assemble only "without arms." Haw. Const. of 1864, art. 4.

A shift in deadly weapons regulation occurred in 1870. Concerned that hunters were destroying O'ahu's bird population, the Kingdom enacted a firearm licensing law. Laws of His Majesty Kamehameha V., King of the Hawaiian Islands, Passed by the Legislative Assembly, at its Session, 1870 26 (1870) ("An Act to License the Carrying of Fowling Pieces and Other Fire-arms"). The Minister of Interior could issue hunting licenses for the southern part of O'ahu. Without a license, the "use or carry" of hunting guns resulted in fines or imprisonment at hard labor. Id.

The Kingdom of Hawai'i Constitution of 1864 remained in effect until 1887. Then, a subversive group forced King Kalākaua to sign a new constitution. Queen Lili'uokalani recalled that they would have executed her brother, King Kalākaua, had he not signed the "Bayonet Constitution," the Constitution of 1887. Lili'uokalani, Hawai'i's Story by Hawai'i's Queen 181 (1898). The schemers, mostly American men, omitted a right to bear arms. See Haw. Const. of 1887; Lili'uokalani, Hawai'i's Story at 355.

c. 1893-1898: The Provisional Government continued to heavily regulate weapons

In 1893, another armed group forcibly deposed Queen Lili‘uokalani, who was crowned after King Kalākaua’s death in 1891. Lili‘uokalani, Hawai‘i’s Story at 209-10, 387.

“A so-called Committee of Safety, a group of professionals and businessmen, with the active assistance of John Stevens, the United States Minister to Hawai‘i, acting with the United States Armed Forces, replaced the monarchy with a provisional government.” Rice v. Cayetano, 528 U.S. 495, 504–05 (2000). (100 years later, in 1993, “Congress enacted a joint resolution ‘to acknowledge the historic significance of the illegal overthrow of the Kingdom of Hawai‘i’” and apologize to Native Hawaiians. Hawai‘i v. Office of Hawaiian Affairs, 556 U.S. 163, 168-69 (2009)).

After the unlawful overthrow, one of the first things the Provisional Government did was end the importation of firearms, ammunitions, or explosives. See Laws of the Provisional Government of the Hawaiian Islands Passed by the Executive and Advisory Councils Acts 1 to 42 13 (Act 9) (1893).

The next year, the Provisional Government formed the “Republic of Hawai‘i.” Lili‘uokalani, Hawai‘i’s Story at 258. Then, on July 4, 1894, they unveiled a new Constitution. Id. Again, the right to assemble was only “without arms.” Haw.

Const. of 1894, art. IV. Again, there was no analogue to the Second Amendment. See Haw. Const. of 1894.

In 1896, the Republic passed a law that prohibited anyone from carrying or using a firearm in Hawai‘i without a license. Laws of the Republic of Hawai‘i Passed by the Legislature at its Session, 1896 224 (1896). The law also required registration for every firearm in the islands, even those belonging to police or military members. Id. at 224-25. Anyone possessing an unlicensed firearm was subject to a fine and forfeiting the gun. Id. at 226.

d. 1898-1959: The Territorial Government continued to heavily regulate weapons

In 1898, the United States, by joint resolution of Congress, annexed the Republic of Hawai‘i, creating the Territory of Hawai‘i. Newlands Resolution, H.R.J. Res. 259, 55th Cong. (1898), 30 Stat. 750.

Though the Hawaiian Islands were now ruled by a subjugating nation, Hawai‘i continued its historic tradition of strict weapons regulation.

The year before Bruen, the Ninth Circuit Court of Appeals upheld Hawai‘i’s regulatory framework for firearms, HRS chapter 134. Young v. Hawai‘i, 992 F.3d 765, 773–75 (9th Cir. 2021). Young recounts the history of weapons regulation in Hawai‘i through much of the 20th century:

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, 23 S. Ct. 787, 47 L.Ed. 1016 (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 [them], 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 [their] person or to carry one elsewhere than in [their] 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 [their] 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 [their] 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 [their] 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 . . . .").

Id. at 774-75.

No doubt. Hawai‘i's historical tradition excludes an individual right to possess weapons. Hawai‘i prohibited the public carry of lethal weapons – with no exceptions for licensed weapons – from 1833-1896. Unlicensed public carry of firearms has been illegal from 1896 to the present. Hawai‘i has never recognized a right to carry deadly weapons in public; not as a Kingdom, Republic, Territory, or State.

e. The Aloha Spirit

In Hawai‘i, the Aloha Spirit inspires constitutional interpretation. See Sunoco, 153 Hawai‘i at 363, 537 P.3d at 1210 (Eddins, J., concurring). When this court exercises "power on

behalf of the people and in fulfillment of [our] responsibilities, obligations, and service to the people" we "may contemplate and reside with the life force and give consideration to the 'Aloha Spirit.'" HRS § 5-7.5(b) (2009).

The spirit of Aloha clashes with a federally-mandated lifestyle that lets citizens walk around with deadly weapons during day-to-day activities.

The history of the Hawaiian Islands does not include a society where armed people move about the community to possibly combat the deadly aims of others. See Haw. Const. art. IX, § 10 ("The law of the splintered paddle . . . shall be a unique and living symbol of the State's concern for public safety.").

The government's interest in reducing firearms violence through reasonable weapons regulations has preserved peace and tranquility in Hawai‘i. A free-wheeling right to carry guns in public degrades other constitutional rights.

The right to life, liberty, and the pursuit of happiness, encompasses a right to freely and safely move in peace and tranquility. See Haw. Const. art. I, § 2; Haw. Const. art. IX, § 10. Laws regulating firearms in public preserve ordered liberty and advance these rights.

There is no individual right to keep and bear arms under article I, section 17. So there is no constitutional right to carry a firearm in public for possible self-defense.

We hold that HRS § 134-25(a) and § 134-27(a) do not violate Wilson's rights under the Hawai‘i Constitution.

C. HRS § 134-25(a) and § 134-27(a) do not violate Wilson's right to bear arms under the Second Amendment

We also hold that HRS § 134-25(a) and § 134-27(a) do not violate the Second Amendment to the United States Constitution. "[T]he right secured by the Second Amendment is not unlimited. . . . [T]he right [is] not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." Bruen, 597 U.S. at 21. States retain the authority to require that individuals have a license before carrying firearms in public. Id. at 79-80 (Kavanaugh, J., concurring) ("[T]he Court's decision does not prohibit States from imposing licensing requirements for carrying a handgun for self-defense."); Antonyuk v. Chiumento, 89 F.4th 271, 312 (2d Cir. 2023) ("Licensing that includes discretion that is bounded by defined standards, we conclude, is part of this nation's history and tradition of firearm regulation and therefore in compliance with the Second Amendment.").

HRS § 134-25(a) and § 134-27(a) allow a person to carry a handgun for self-defense outside the home if they have a license issued per HRS § 134-9. See HRS § 134-25(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" (emphasis added)); HRS § 134-27(a) (restricting the possession of ammunition based on HRS § 134-5 and § 134-9).

HRS § 134-25(a) and § 134-27(a) do not graze Wilson's Second Amendment right. Because he has no standing, Wilson's constitutional challenge to HRS § 134-9, Hawai‘i's licensing law, fails. See supra section III.A.2.

The circuit court erred by dismissing the place to keep offenses, HRS § 134-25 and § 134-27. Those laws do not violate Wilson's constitutional rights under article I, section 17 or the Second Amendment.

IV.

We vacate the circuit court's Order Granting Defendant's Motion to Dismiss Counts 1 & 2 and remand to the Circuit Court of the Second Circuit.

Richard B. Rost
for appellant

Benjamin E. Lowenthal
for appellee

/s/ Mark E. Recktenwald
/s/ Sabrina S. McKenna
/s/ Todd W. Eddins
/s/ Fa‘auuga L. To‘oto‘o
/s/ Trish K. Morikawa

No. _____

In the Supreme Court of the United States

CHRISTOPHER L. WILSON,

Petitioner,

v.

STATE OF HAWAIʻI,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI

TO THE HAWAIʻI SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

APPENDIX B

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SCAP-22-0000561

IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellant,

vs.

CHRISTOPHER L. WILSON, Defendant-Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT
(CAAP-22-0000561; CASE NO. 2CPC-17-0000964)

JUDGMENT ON APPEAL
(By: Eddins, J., for the court[1])

In accordance with the opinion of the Supreme Court of the State of Hawaiʻi entered on February 7, 2024, the Circuit Court of the Second Circuit's August 30, 2022 Order Granting Defendant's Motion to Dismiss Counts 1 & 2 is vacated and the case is remanded to the circuit court for further proceedings consistent with the opinion.

DATED: Honolulu, Hawaiʻi, March 8, 2024.

FOR THE COURT:
/s/ Todd W. Eddins
Associate Justice

[1] Court: Recktenwald, C.J., McKenna, Eddins, JJ., Circuit Judge Morikawa and Circuit Judge Toʻotoʻo, assigned by reason of vacancies.

No. _____

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APPENDIX C

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article IV, Clause 2. The Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const., Amendment II. 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., Am. XIV, Section 1. 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 and 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.

28 United States Code § 1257. State courts; certiorari. (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the

Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

Hawai'i Revised Statutes § 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.

Haw. Rev. Stat. § 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.

Haw. Rev. Stat. § 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.

Haw. Rev. Stat. § 706-660. Sentence of imprisonment for class B and C felonies; ordinary terms; discretionary terms. (1) Except as provided in subsection (2), a person who has been convicted of a class B or class C felony may be sentenced to an indeterminate term of imprisonment except as provided for in section 706-660.1 relating to the use of firearms in certain felony offenses and section 706-606.5 relating to repeat offenders. When ordering such a sentence, the court shall impose the maximum length of imprisonment which shall be as follows:

(a) For a class B felony—ten years; and
(b) For a class C felony—five years.

The minimum length of imprisonment shall be determined by the Hawai‘i paroling authority in accordance with section 706-669.

(2) A person who has been convicted of a class B or class C felony for any offense under part IV of chapter 712 may be sentenced to an indeterminate term of imprisonment; provided that this subsection shall not apply to sentences imposed under sections 706-606.5, 706-660.1, 712-1240.5, 712-1240.8 as that section was in effect prior to July 1, 2016, 712-1242, 712-1245, 712-1249.6, 712-1249.7, and 712-1257.

When ordering a sentence under this subsection, the court shall impose a term of imprisonment, which shall be as follows:

(a) For a class B felony--ten years or less, but not less than five years; and

(b) For a class C felony--five years or less, but not less than one year.

The minimum length of imprisonment shall be determined by the Hawaii paroling authority in accordance with section 706-669.

No. _____

In the Supreme Court of the United States

CHRISTOPHER L. WILSON,

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STATE OF HAWAI'I,

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ON PETITION FOR A WRIT OF CERTIORARI

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APPENDIX D

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Attorneys for Defendant
Christopher L. Wilson

In the Circuit Court of the Second Circuit

State of Hawai'i

State of Hawai'i vs. **Christopher L. Wilson**	2CPC-17-964(1) Motion to Dismiss Counts 1 & 2; Memorandum in Support; Declaration of Counsel; Notice of Hearing. Hearing Date: August 17, 2022 Hearing Time: 8:15 a.m. Hon. Judge Kirstin Hamman

Motion to Dismiss Counts 1 & 2

The Defendant, Christopher L. Wilson, by and through undersigned counsel, moves this Court for an order dismissing with prejudice Counts 1 and 2 in the Felony Information. This motion is made pursuant to the Hawai'i and United States Constitutions, and Hawai'i Rules of Penal Procedure Rules 12 and 47. It is based on the attached memorandum, declaration, record in this case, and evidence, if any, to be adduced at the hearing on the motion.

Dated: Wailuku, Maui, Hawai'i: July 29, 2022.

/s/ Benjamin Lowenthal .
Benjamin E. Lowenthal
Zach Raidmae
Attorneys for Defendant
Christopher L. Wilson

In the Circuit Court of the Second Circuit

State of Hawai'i

State of Hawai'i vs. **Christopher L. Wilson**	2CPC-17-964(1) Memorandum in Support of Motion to Dismiss Counts 1 & 2. Hon. Judge Kirstin Hamman

Memorandum in Support of Motion to Dismiss Counts 1 & 2

The Supreme Court of the United States has confirmed that the right to bear carry handguns for a person's self-defense extends outside the home. That means Christopher Wilson's alleged conduct—carrying a handgun in places other than his "business, residence, or sojourn"—is constitutionally protected. Counts 1 and 2 must be dismissed.

Background[1]

On the night of December 7, 2017, Duane Ting called the police to report trespassers hiking on a private trail in the West Maui Mountains near Maalaea. Police waited on the roadside while Mr. Ting and his men rounded up three hikers on an off-road vehicle. Mr. Ting was armed with an AR-15 assault rifle. They told the police that they were hiking that night to look at the moon and Native Hawaiian plants. They said they did not see any "NO TRESPASSING" signs. One of the hikers said that others may be on the trail.

[1] The facts here are based on materials and information provided by the prosecution in the discovery process. They are not a concession of fact for purposes of trial.

Mr. Ting went back out onto the trail. He returned approximately ten minutes later with Mr. Wilson. As the police conducted a pat-down search, Mr. Wilson said he was armed with a handgun in his front waistband. The police seized a Phoenix Arms .22 LR pistol and ammunition.

Mr. Wilson was arrested and charged with place to keep a firearm, place to keep ammunition, permit to acquire, and criminal trespass in the first degree. Application of the place-to-keep statutes here must yield to Mr. Wilson's constitutional right to carry a handgun for self-defense purposes. Counts 1 and 2 must be dismissed.

Discussion

Counts 1 and 2 are an unconstitutional infringement on Mr. Wilson's right to "keep and bear arms."

1. The Second Amendment protects Mr. Wilson's right to possess and carry a handgun for self-protection on a mountain trail.

"A well regulated Militia, being necessary to the security of a free State,[2] the right of the people to keep and bear Arms, shall not be infringed." U. S. Const. Am. II; *see also* Haw. Const. Art. I, Sec. 17. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court of the United States struck down a law banning handguns within residences of the District of Columbia. *Id.* at 574-575. The Court held that the Second Amendment is an individual right allowing "the people" to possess and carry firearms with "the inherent right of self-defense" being "central" to that right. *Id.* at 595 & 628. The handgun ban, therefore, was unconstitutional:

> [W]e hold that the District's ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for purposes of immediate self-defense.

---

[2] This preface does not limit Second Amendment to the right to serve in a militia. *District of Columbia v. Heller*, 554 U.S. 570, 577-578 (2008).

Id. at 635. Two years later, in *McDonald v. City of Chicago*, 561 U.S. 742 (2010), the Court held that "the right to possess a handgun in the home for purposes of self-defense[]" applied to the States through the Fourteenth Amendment.[3] *Id.* at 791.

The Court once again revisited this right in *New York State Rifle & Pistol Assn., Inc. v. Bruen*, ___ U.S. ___, 142 S.Ct. 2111 (2022). There, the Court clarified that the right to "bear" and "carry" a handgun for self-defense purposes extends beyond the home. "Nothing in the Second Amendment text draws a home/public distinction with respect to the right to keep and bear arms." *Id.* at 2119. The Court explained that the right to carry guns in public is supported by the text of the Second Amendment:

> The definition of "bear" naturally encompasses public carry. Most gun owners do not wear a holstered pistol at their hip in their bedroom or while sitting at the dinner table. Although individuals often "keep" firearms in their home, at the ready for self-defense, most do not "bear" (*i.e.,* carry) them in the home beyond moments of actual confrontation. To confine the right to "bear" arms to the home would nullify half of the Second Amendment's operative protections.
>
> Moreover, confining the right to "bear" arms to the home would make little sense given that self-defense is the central component of the Second Amendment right itself. After all, the Second Amendment guarantees an individual right to possess and carry weapons in case of confrontation, and confrontation can surely take place outside the home.

Id. at 2134-135 (citations and quotation marks omitted). *Accord. League of Women Voters of Honolulu v. State*, 150 Hawai'i 182, 189, 499 P.3d 382, 389 (2021) ("if the words used in a constitutional provision are clear and unambiguous, they are to be construed as they are written."). Mr. Wilson's

[3] The Hawai'i Constitution also appears to have "adopted" it along with the rest of the national constitution. *See* Haw. Const. Preamble ("The Constitution of the United States of America is adopted on behalf of the people of the State of Hawai'i.").

constitutional right to "bear" a handgun for self-defense purposes, therefore, extends beyond the confines of his home or abode.

2. Applying the place-to-keep statutes to these facts is unconstitutional and Counts 1 and 2 must be dismissed.

When the law infringes on conduct protected by the Second Amendment, the burden is on the prosecution to "justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's unqualified command." *Bruen*, 142 S.Ct. at 2126.[4]

Here, the right to carry and bear arms covers Mr. Wilson's conduct. He was hiking on a trail at night with a firearm to protect himself against unwanted confrontation. *See Heller, supra.* Even when Mr. Ting confronted him with an assault rifle, Mr. Wilson never drew his gun. He was taken back to the road, where he surrendered his gun to the police. Mr. Wilson was doing exactly what the Second Amendment allows him to do: "keep and bear" a handgun for his personal safety and self-defense.

The prosecution cannot meet its burden in justifying this application of the place-to-keep statutes. "[A]ll firearms shall be confined to the possessor's place of business, residence, or sojourn[.]" HRS § 134-25(a); *see also* HRS § 134-27(a) (same restriction for ammunition). Firearms

[4] The test is not entirely foreign to Hawai'i. The Hawai'i Supreme Court recognizes that a criminal prosecution must yield to other kinds of constitutionally protected conduct. *See, e.g., State v. Kam*, 69 Haw. 483, 495-496, 748 P.2d 372, 379-380 (1988) (prosecuting the sale of pornography to people who view it at home violated express right to privacy); *State v. Hanapi*, 89 Hawai'i 177, 183, 970 P.3d 485, 491 (1998) (dismissal warranted for asserting constitutionally recognized Native Hawaiian right); *State v. Chung*, 75 Haw. 398, 416-417, 862 P.2d 1063, 1072-1073 (1993) (defendant may attempt to show conduct protected under First Amendment in terroristic threatening prosecution).

and ammunition carried beyond a place of business, residence, or sojourn are limited to six distinct places: (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. HRS §§ 134-25(a) and 134-27(a). Even then, the firearm must be unloaded and kept in a case. *Id.* There are no exceptions. Violating the firearms statute is a class B felony subjecting a person to ten years imprisonment. HRS § 134-25(b). The ammunition statute is a misdemeanor. HRS § 134-27(b). These absolute restrictions are out of step with the "Nation's historical tradition of firearm regulation." *Bruen*, 142 S.Ct. at 2126.

Mr. Wilson has the "constitutional right to not be arrested for conduct that is authorized by the constitution." *State v. Won*, 137 Hawai'i 330, 347, 372 P.3d 1065, 1082 (2015). The prosecution's application place-to-keep statutes to the facts in this case infringe on Mr. Wilson's right to carry a handgun and ammunition for self-defense. Counts 1 and 2 must be dismissed.

Conclusion

The constitutional right to carry a handgun for self-defense extends beyond the home and allows Mr. Wilson to carry his firearm on a mountain trail. The prosecution cannot apply the place-to-keep statutes in this case. It is respectfully requested that the Court grant the motion and dismiss Counts 1 and 2.

Dated: Wailuku, Maui, Hawai'i: July 29, 2022.

/s/ Benjamin Lowenthal .
Benjamin E. Lowenthal
Zach Raidmae
Attorneys for Defendant
Christopher L. Wilson

Declaration of Counsel

State of Hawai'i)
) ss.
County of Maui)

I, Benjamin E. Lowenthal, declare under penalty of law that the following is true and correct based to the best of my knowledge and belief that the facts in the above memorandum are based on materials and information obtained in the discovery process. They are not a concession of fact at trial.

Dated: Wailuku, Maui, Hawai'i: July 29, 2022.

/s/ Benjamin Lowenthal .
Benjamin E. Lowenthal
Attorney for Defendant
Christopher L. Wilson

In the Circuit Court of the Second Circuit

State of Hawai'i

State of Hawai'i vs. **Christopher L. Wilson**	2CPC-17-964(1) Notice of Hearing. Hearing Date: August 17, 2022 Hearing Time: 8:15 a.m. Hon. Judge Kirstin Hamman

Notice of Hearing

To: Sally A. Tobin, Esq.
Deputy Prosecuting Attorney
150 S. High Street
Wailuku, Maui, Hawaii 96793

Please take notice that the undersigned counsel for Defendant will bring the within motion for hearing before the Circuit Court of the Second Circuit at Hoapili Hale on the above date and time at 2145 Main Street, Wailuku, Maui, Hawai'i.

Dated: Wailuku, Maui, Hawai'i: July 29, 2022.

/s/ Benjamin Lowenthal .
Benjamin E. Lowenthal
Zach Raidmae
Attorneys for Defendant
Christopher L. Wilson

DEPARTMENT OF THE PROSECUTING ATTORNEY 207

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IN THE CIRCUIT COURT OF THE SECOND CIRCUIT

STATE OF HAWAII

STATE OF HAWAI`I v. CHRISTOPHER L. **WILSON**, Defendant.	CASE ID. 2CPC-17-964(1) COUNT ONE: PLACE TO KEEP PISTOL OR REVOLVER COUNT TWO: PLACE TO KEEP AMMUNITION COUNT THREE: PERMIT TO ACQUIRE OWNERSHIP OF A FIREARM COUNT FOUR: CRIMINAL TRESPASS IN THE FIRST DEGREE MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS COUNTS 1 AND 2; DECLARATION OF SALLY A. TOBIN; CERTIFICATE OF SERVICE Hearing Date: 8/17/2022 8:15 a.m. Judge: Kirstin M. Hamman

MEMORANDUM IN OPPOSITION TO
DEFENDANT'S MOTION TO DISMISS COUNTS 1 AND 2

On July 29, 2022, Defendant CHRISTOPHER L. WILSON, by and through attorney BENJAMIN E. LOWENTHAL, ESQ., filed this Motion to Dismiss Counts 1 & 2. This is actually the second such Motion in this matter. Previously, On May 14, 2021, Defendant CHRISTOPHER L. WILSON, (hereinafter, "Defendant WILSON"), by and through his attorney, ZACHARY P. RAIDMAE, ESQ., filed a Motion to Dismiss Counts 1 and 2. The State filed it's Opposition on June 4, 2021, Hearing was had on June 9, 2021, and the Motion was Denied by Judge Kobayashi, with Order Denying issued July 23, 2021.

The State again opposes Defendant WILSON's new motion. Based on the Declaration of Sally A. Tobin and memorandum of law attached hereto, the STATE OF HAWAII opposes the motion and respectfully requests that this court again deny Defendant WILSON's motion.

I. STATEMENT OF CASE.

On December 6, 2017, Duane Ting, the owner of the "Flyin Hawaii Zip Lines", was alerted by his security system that trespassers had entered the property despite a secure perimeter fence and multiple "No Trespass" signs. After the 11:00 p.m. alert, Mr. Ting contacted the Maui Police Department for assistance. Mr. Ting and one of his employees went to the property and began to search for the trespassers. The two men located a few individuals within the property, including

Defendant WILSON. Mr. Ting was able to confront and detain the trespassers, including Defendant, while awaiting Maui Police Department's (hereinafter, "MPD") arrival. When presented to MPD Officers, Defendant WILSON freely admitted that he had a gun in the waist-band of his pants. MPD recovered a .22 caliber handgun from Defendant WILSON that was loaded with a 10 round magazine and had a round "in the chamber." A check of records revealed that the weapon was not registered in the County of Maui nor in the State of Hawaii, and Defendant WILSON had not applied for nor secured a permit to acquire ownership of the firearm, as required by Hawaii statute.

II. CONSTITUTIONAL RIGHT TO KEEP AND BEAR ARMS.

Defendant WILSON is claiming that the State of Hawaii has no ability to regulate or restrict in any way his Federally protected Second Amendment right. That is simply not correct.

The United States Supreme Court in *District of Columbia v. Heller*, 554 US 570 (2008), in *McDonald v. City of Chicago*, 561 US 742 (2010), and just weeks ago in *New York State Rifle & Pistol Association v. Bruen*, 597 US ___, 142 Sc.T. 2111 (2022), has repeatedly recognized the individual State's rights - in fact responsibilities - to regulate the registration of firearms by it's citizenry. The *Bruen* Court, reiterated the holding in *Heller* specifically noting:

> After holding that the Second Amendment protected an individual right to armed self-defense, we also relied on the historical understanding of the Amendment to demark the limits on the exercise of

> that right. We noted that "[l]ike most rights, the right secured by the Second Amendment is not unlimited" *Bruen*, 597 U.S., 142. S.Ct. at 2128. The Court reviewed that throughout history, the public

carrying of arms was almost always subject to conditions prescribed by the legislature, such as a registration or permitting process. The Court recognized that even in states where public carrying is allowed, restrictions are necessary in certain places such as schools or government buildings. These limitations are upheld when the firearm is legally possessed by the individual. That is not the case here. Defendant WILSON simply did not legally possess this firearm.

Defendant WILSON cannot even claim that he was denied the permit after application was made. Defendant WILSON has made no such application. As a result of his failure to even apply for a permit, Defendant lacks standing to raise the Second Amendment challenge in his motion. See, *People v. Rodriguez, --- N.Y.S.3d ----, 2022 WL 2797784, 2022 N.Y. Slip Op. 22217 (2022); Commonwealth v. Powell, 946 N.E.2d 114, 129 459 Mass. 572, 589-90 (Mass. 2011).* In fact, Defendant WILSON has not even made any legitimate attempt to register the firearm in Hawaii as required by statute. Defendant WILSON argues that he lawfully possessed the firearm while residing in Florida and brought it with him when he relocated to Hawaii some years before this instant incident. However, records from the State of Florida show that "Defendant has not applied for or been issued a Concealed Weapon or Firearm Licence pursuant to [Florida law]." This information

was provided to Defendant and Counsel trough the discovery process on April 17, 2018. Further investigation into the firearm in question revealed records from the Department of Justice Bureau of Alcohol, Tobacco, Firearms, and Explosives showing the make, model, and serial number of **this exact firearm was purchased by another** from a licensed gun dealer in Jacksonville, FL in April of 2011. This information was also provided through the discovery process and has not been legitimately contradicted.

III. CONCLUSION.

The Second Amendment to the United States Constitution does indeed grant the right to keep and bear arms. But it must be done in compliance with the reasonable restrictions imposed by the individual States in order to protect their citizens. The recent holding in *Bruen*, does NOT give the right to carry - in any manner - an unregistered firearm.

For the above-stated reasons, the State of Hawaii respectfully urges this Honorable Court to again deny Defendant's Motion to Dismiss Counts 1 and 2.

DECLARATION OF SALLY A. TOBIN

I, SALLY A. TOBIN, hereby declare as follows that:

1. Declarant, is currently assigned to prosecute the above-captioned matter;

2. Declarant has reviewed the records and files in the above-captioned matter;

3. That all the facts asserted to in the memorandum are true and correct to the best of my belief; and

I DECLARE UNDER PENALTY OF LAW THAT THE FOREGOING IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND BELIEF.

DATED: Wailuku, Hawaii, August 12, 2022.

SALLY A. TOBIN
Deputy Prosecuting Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Memorandum in Opposition to Defendant's Motion to Dismiss Counts 1 and 2, was duly served upon BENJAMIN E. LOWENTHAL, ESQ., Attorney for Defendant, by use of the Judiciary Electronic Filing and Service System, on the 12th day of August, 2022.

SALLY A. TOBIN
Deputy Prosecuting Attorney
County of Maui

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In the Circuit Court of the Second Circuit

State of Hawai'i

State of Hawai'i vs. **Christopher L. Wilson**	2CPC-17-964(1) Reply to Memorandum in Opposition to Motion to Dismiss Counts 1 & 2; Declaration of Counsel. Hearing Date: August 17, 2022 Hearing Time: 8:15 a.m. Hon. Judge Kirstin M. Hamman

Reply to Memorandum in Opposition to Motion to Dismiss Counts 1 & 2

The prosecution claims that Christopher Wilson lacks standing to challenge the place-to-keep statutes because he did not have a permit to carry the firearm. Dkt. No. 163 at 4. The prosecution is badly mistaken. Mr. Wilson challenges the place-to-keep statutes because he is accused of violating those statutes. He has standing. Moreover, the prosecution has done nothing to justify its application of the place-to-keep statutes. Counts 1 and 2 must be dismissed.

1. Mr. Wilson has standing to challenge the application of Hawai'i Revised Statutes (HRS) §§ 134-25(a) & 134-27(a) because he is being prosecuted for violating them.

Criminal defendants have standing to challenge the constitutionality of statutes of which they are accused of violating:

> The general rule is that **where restraints imposed act directly on an individual or entity and a claim of specific present objective harm is presented, standing to challenge the constitutionality of an ordinance or statue exists.** This standing requirement is termed the rule against vicarious assertion of constitutional rights. **One must show that as applied to him [or her] the statute is constitutionally invalid.** Thus, for example, a criminal defendant cannot challenge the constitutionality of one subsection of a statute where he [or she] was charged under a different subsection.

State v. Armitage, 132 Hawai'i 36, 55, 319 P.3d 1044, 1063 (2014) (brackets, citations, and quotation marks omitted).

Counts 1 and 2 aver violations of HRS §§ 134-25(a) and 134-27(a)—place to keep a handgun and a firearm. Dkt. No. 1. There is no question that Mr. Wilson has standing to challenge the prosecution's application of those statutes with a motion to dismiss the counts. In fact, "[t]he preferred method for a defendant to raise a constitutional right in a criminal prosecution is by way of a motion to dismiss." *State v. Hanapi*, 89 Hawai'i 177, 184, 970 P.2d 485, 492 (1998). Accordingly, the Court must resolve Mr. Wilson's constitutional challenge prior to trial.

2. The prosecution has not met its burden showing that the gun restrictions here are consistent with our country's historical tradition of firearm regulation.

Mr. Wilson carried a pistol on a mountain trail before being forced at gunpoint to meet with police on the road. He has the right to "keep and bear" the handgun for self-protection. *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008). *See also McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010). When the prosecution's application of a statute infringes upon conduct protected by the Second Amendment, the prosecution must show that the statute "is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's unqualified command." *New York State Rifle & Pistol Assn., Inc. v. Bruen*, ___ U.S. ___, 142 S.Ct. 2111, 2126 (2022).

The prosecution has done nothing to meet its burden. The fact that the firearm was not permitted has no bearing[1] on whether the place-to-keep statutes as applied to Mr. Wilson are constitutional. The regulations at issue here restrict "all firearms"—permitted or otherwise—"to the possessor's place of business, residence, or sojourn[.]" HRS §§ 134-25(a) & 134-27(a). The prosecution cannot show that this sweeping outdoor ban on all firearms and ammunition is consistent "with the Nation's historical tradition of firearm regulation." *Bruen*, 142 S.Ct. at 2126. Having failed to meet its burden, the application of the place-to-keep statutes in this case infringes on Mr. Wilson's right to bear and keep arms. *Id.* Counts 1 and 2 must be dismissed.

Conclusion

Mr. Wilson has standing to challenge the constitutionality of the place-to-keep statutes as they apply to his case. Because the prosecution has failed to meet its burden in justifying the place-to-keep statutes, Counts 1 and 2 must be dismissed.

Dated: Wailuku, Maui, Hawai'i: August 15, 2022.

/s/ Benjamin Lowenthal .
Benjamin E. Lowenthal
Zach Raidmae
Attorneys for Defendant
Christopher L. Wilson

[1] Mr. Wilson does not challenge the constitutionality of the permit-to-acquire statute and has not moved to dismiss Count 3.

Declaration of Counsel

State of Hawai'i)
) ss.
County of Maui)

I, Benjamin E. Lowenthal, declare under penalty of law that the following is true and correct based to the best of my knowledge and belief that the facts in the above memorandum are based on materials and information obtained in the discovery process. They are not a concession of fact at trial.

Dated: Wailuku, Maui, Hawai'i: August 15, 2022.

/s/ Benjamin Lowenthal .
Benjamin E. Lowenthal
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In the Circuit Court of the Second Circuit

State of Hawai'i

State of Hawai'i vs. **Christopher L. Wilson**	2CPC-17-964(1) Order Granting Defendant's Motion to Dismiss Counts 1 & 2 Hon. Judge Kirstin M. Hamman

Order Granting Defendant's Motion to Dismiss Counts 1 & 2

The Court, having considered Defendant's Motion to Dismiss Counts 1 & 2 (Dkt. No. 161) and the relevant pleadings, the record in this case, and the arguments of counsel at the hearing held on August 17, 2022, enters the following:

Findings of Fact

1. On December 8, 2017, the State of Hawai'i filed the Felony Information in this case. In Count 1, the prosecution charged Defendant with the offense of "place to keep a pistol or revolver" in violation of Hawai'i Revised Statutes (HRS) § 134-25(a). In Count 2 Defendant was charged with the offense of "place to keep" ammunition in violation of HRS § 134-27(a). Count 3 averred unlawful permit to acquire and Count 4 avers criminal trespass in the first degree.

2. In support of the Felony Information, Officer Manuel Sorcy declared that on the night of December 6, 2017, Duane Ting located Defendant and other people on his property in the mountains near Maalaea, Hawai'i. They were hiking and gazing at the moon. When the police arrested Defendant, he told them he a weapon in his front waist band. Police retrieved a Phoenix Arms .22 LR caliber pistol with ammunition.
3. On July 29, 2022, Defendant moved to dismiss Counts 1 and 2. Defendant asserted[1] that he was hiking on the mountain trail looking at the moon and Native Hawaiian plants. He was carrying the pistol for self-defense purposes. He also asserted that Ting was armed with an AR-15 assault rifle when he was rounded up with the other hikers.

Conclusions of Law

1. Counts 1 and 2 aver violations of the place-to-keep statutes in HRS §§ 134-25(a) and 134-27(a). Defendant has standing to challenge the constitutionality of the application of these statutes. *State v. Armitage*, 132 Hawai'i 36, 55, 319 P.3d 1044, 1063 (2014).
2. A person's right to carry and bear firearms for self-defense purposes is an individual right protected by the Hawai'i and United States Constitutions. U.S. Am. II; Haw. Const. Art. I, Sec. 17. *District of Columbia v. Heller*, 554 U.S. 570, 595, 628 (2008); *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010). This right extends outside the home. *New York State Rifle & Pistol Assn., Inc. v. Bruen*, __ U.S. ___, 142 S.Ct. 2111, 2199 (2022).

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[1] Defendant's factual assertions are based on the declaration of counsel, which relies on materials and information obtained from the prosecution in the discovery process.

3. Defendant was carrying the firearm on the trail for self-defense purposes—conduct protected by the Second Amendment. *Id. See also District of Columbia v. Heller*, 554 U.S. at 629-630.
4. When statutes infringe upon constitutionally protected conduct, the prosecution must show that the statute "is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's unqualified command." *Bruen*, 142 S.Ct. at 2126.
5. HRS §§ 134-25(a) and 134-27(a) mandate that handguns and ammunition "shall be confined to the possessor's place of business, residence, or sojourn[.]" A person may only transport unloaded firearms and ammunition locked in a case to a place of repair, a target range, a licensed dealer's place of business, firearms show or exhibit, a formal hunter or firearm use training or instruction, or police station. *Id.*
6. The statute makes no exceptions for carrying firearms outside the home for self-defense purposes. *Id.*
7. The prosecution has not met its burden under the *Bruen* test. The application of HRS §§ 134-25(a) and 134-27(a) in this case infringes on Defendant's constitutional right to bear and carry a firearm for self-defense purposes.

Order

It is hereby ordered, adjudged, and decreed that Defendant's Motion to Dismiss Counts 1 and 2 is granted. Counts 1 and 2 are dismissed with prejudice.

Dated: Wailuku, Maui, Hawai'i AUGUST 30, 2022.

Judge in the Above-Entitled Case

CIRCUIT COURT SECOND CIRCUIT SEAL STATE OF HAWAII

Approved as to Form:

Sally A. Tobin, Esq.
Deputy Prosecuting Attorney

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT

STATE OF HAWAII

STATE OF HAWAII,	CAAP-22-0000561
vs.	2CPC-17-964
	TRANSCRIPT OF PROCEEDINGS FOR APPEAL
CHRISTOPHER WILSON	
Defendant.	

TRANSCRIPT OF PROCEEDINGS

before the Honorable KIRSTIN HAMMAN, Circuit Court Judge presiding on Wednesday, August 17, 2022. Motion To Dismiss Counts 1 and 2.

TRANSCRIBED BY:
Beth Kelly, RPR, CSR #235
Court Reporter

APPEARANCES:

SALLY TOBIN, Esq. Attorney for the State
Deputy Prosecuting Attorney
County of Maui
Wailuku, Hawaii

BENJAMIN LOWENTHAL, Esq. Attorney for the Defendant
Deputy Public Defender
State of Hawaii
Wailuku, Hawaii

TRANSCRIPT FOR PROCEEDINGS ON APPEAL

WEDNESDAY, AUGUST 17, 2022

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THE CLERK: All rise, Courtroom One is now reconvened. Please be seated.

Calling 2CPC-17-964, Christopher Wilson for motion to dismiss counts one and count two.

MS. TOBIN: Good morning, Sally Tobin for the State.

THE COURT: Good morning.

MR. LOWENTHAL: Your Honor, Ben Lowenthal on behalf of Mr. Wilson, who is present.

THE COURT: Good morning.

THE DEFENDANT: Morning.

THE COURT: All right. The Court has reviewed the motion, as well as the opposition and the reply that were filed.

Ah, Mr. Lowenthal?

MR. LOWENTHAL: Thank you.

Your Honor, up until 2008 it was understood that the second amendment was, ah, related to state militia.

Then in 2008 the Supreme Court of the United States with Heller, the Heller decision, District Court -- ah, District of Columbia versus Heller clarified

and made it abundantly clear that we are dealing with an individual right to bear and carry arms that's protected under the second amendment is a departure from previous interpretations that, ah, connected it to the preface of a militia.

It is a right that is specifically, ah, designed for an individual to have a firearm for self-protection purposes.

Now, the regulation at issue in Heller was an absolute ban on handguns within the home. Supreme Court said that this sweeping ban was unconstitutional and struck it down.

In June of 2022 we have the Bruen case, which in a lot of ways is dealing with the, kind of the other side of Heller, which is a -- a sweeping outdoor ban. They said that too is unconstitutional and in doing that they have given us the workable standard.

Is the conduct at issue subject -- is the conduct at issue in the regulation conduct that is protected by the second amendment? And that would be bearing or carrying a firearm for self-protection purposes, whether it is indoor or outdoor.

Once that is established the burden shifts to the State to show that the regulation must comport with the nation's tradition of firearm regulation. It is a

high standard, and Bruen demonstrates that, um, the -- the State must show that these kind of firearm regulations are consistent with the understanding of the founders when they, ah, promulgated the second amendment, even gets into discussions about reconstruction when the 14th Amendment incorporated the second amendment.

Now, in addition to the Bruen case you had Young versus Hawaii which was actually, um, considered by the Supreme Court. They did not issue an opinion in that case. However, they did strike down our, um, permit to -- our -- our permitting system for, um, concealed carry on the grounds stated in Bruen and had taken it back to the legislature. The legislature's obviously not in session now.

And that is the status of the law of the second amendment today. We have a place to keep statute, your Honor, which is very similar to the kind of regulation that was struck down in Bruen.

It prohibits the carrying of using -- or using of any fire -- any pistol or revolve -- revolver, any ammunition, unless certain enumerated exceptions are met and there are no exceptions for permitted firearms. There are no exceptions for those who carry firearms for self-protection purposes.

What we have here is Mr. Wilson who is hiking

on a mountain trail. He is outdoors. He has a handgun. And it is for self-protection purposes because what happened in this case was he was apprehended by private agents, not the police, who had firearms themselves and brought them to the road where the police were there. He told the police he had a handgun.

He is being prosecuted with three firearms counts. The first two are place to keep, subject of this motion. Now, State wants to say that there's no standing because of count three, permit to acquire, but the Armitage decision in 2014 makes it really clear that when it comes to criminal cases you want to challenge and con -- you want to challenge the constitutionality of the statute all that is required is being prosecuted for violating that statute, which is exactly what we have here.

So standing, frankly, is a red herring. We are dealing squarely with place to keep.

Place to keep is a separate and apart from permitting regulations. It doesn't matter if there was a permit. You can still be in violation of the place to keep statute.

And so we are dealing with the question as to whether the sweeping outdoor ban violates the second amendment.

Even if we were to entertain the State's argument that there needs to be some sort of a permit to acquire in order to challenge the standing -- in order to have standing to challenge place to keep, State still fails to demonstrate, one, that the place to keep statute is part of the nation's, ah, tradition of firearm regulation, and it has done absolutely nothing to demonstrate that our current still existing permitting system also comports with our nation's tradition of firearm regulations.

So in either event, the State has failed to meet its burden. And so under the second prong of Bruen, it's on the State to show that, ah, the application of place to keep in counts one and two in this case are, in fact, which are laid out in the moving papers, as well in the exhibit in support of felony information, um, whether the application of those statutes can withstand any constitutional challenge.

It is our position, your Honor, that it can not. And that trial should proceed only on counts three and four. Thank you.

THE COURT: Ms. Tobin.

MS. TOBIN: Thank you.

Um, just to address something that was in defense's motion and now brought up again, ah, in this

argument.

Defense keeps referring to that there are no exceptions in the Hawaii statute. To be clear the Hawaii statute for place to keep unloaded firearms, other than pistols and revolvers, Section 134-24, the first few words are, except as provided in Section 134-5. So there's clearly an exception.

So we'll look at 134-5 which is possession it -- it -- it gives the requirements for registration of a firearm.

So to say there's no exceptions is not an accurate statement. There are exceptions in the same statute that the defense is leaning on.

Um, and the State would argue that defense's reading Armitage is a little -- um, the State, that -- defense is reading Armitage is just a little too narrowly focused.

In Armitage the critical language by the -- the Court was to the extent that petitioner's challenge of the Hawaii statute, and in that case it was, um, a permit to enter, ah, protected lands, ah, as unconstitutional. Petitioner's would lack standing to do so inasmuch as they never followed the prescribed procedures and thus were not subject to the statute in question.

Since they never attempted to use the

application procedure, they can not claim that the specific -- specifics of the application procedures under the statute, including review, are unconstitutional as applied to them.

That is the language of Armitage that we need to look at. This defendant did not -- there is no record of this defendant ever making an application for a carrying permit in the State of Hawaii. There is no record of this, ah, defendant ever registering the firearm in the State of Hawaii. In fact, there is no record anywhere of this defendant registering this firearm.

Um, so this defendant -- to argue that that doesn't matter is simply not right.

The holding in Bruen does not give a carte blanche to carry anywhere, any time, any place. They specifically -- the Court specifically focuses on, I believe the -- ah, I want to quote it accurately here.

The State specifically notes that in reiterating what they held in Heller, after holding with the second amendment, protected an individual right to armed self-defense. We also relied on historical understanding of the amendment to demarc the limits of the exercise on their rights.

We noted that, and I quote, quoting in their, ah, section, like most rights the right secured by the

second amendment is not unlimited.

And that follows the historical standard. We've always recognized places that firearms are inappropriate, ah, government agencies, schools. Those sorts of things. So there are limits. And a permitting process is not an undue restriction.

THE COURT: But they're not challenging the permit though, right? I mean that he's been charged with failing to obtain a permit, and defense isn't challenging that charge. It's the -- the two charges of place to keep.

MS. TOBIN: Well, the fact that Bruen does not give an unfettered access to carry a gun in any capacity that is not registered. And the registration status -- or the registration statutes in Hawaii have not been challenged or altered in any way by the holding in Bruen. There is one statute that -- that does need to be reviewed that gives a subjective standard for the issuing.

The -- the simply registering a statute -- or registering a firearm, that statute is not challenged and not changed by the holding in Bruen.

Um, there is -- there's nothing -- the Bruen case holds nothing more than that New York's previous permitting (inaudible) had, ah, (inaudible) burden the right to carry a concealed firearm outside their home.

The Court does not hold that this -- that the Constitution permits the State from requiring citizens to obtain a license in order to do so. The State -- the Bruen court did not limit the State's ability to require registration.

And so this -- it is a standing matter. This defendant is challenging a statute that he never even attempted to comply with in any format.

This defendant does not have a license. He never claims he applied for it and was denied. He does not -- um, denied for any reason, fair or unfair. He simply didn't.

The -- the long history that was summarized by -- by defense, the right to keep and bear arms, the second amendment is -- is and has been hotly contested for 200 years.

And what we've seen in the last decade or so, Heller acknowledged that we have a right to protect our homes. Bruen acknowledged we have a right to protect ourselves when we are outside our home, if we do so within reasonable standards imposed by the states. Simple permitting process. A simple registration of a firearm, those are not undue burdens on the defendant. They are steps that the defendant didn't take and is now claiming, crying foul.

The State would ask this motion be denied

because the defendant lacks the standing to challenge the statute that he is -- that he is challenging.

THE COURT: All right. Thank you.

Mr. Lowenthal.

MR. LOWENTHAL: Just briefly, your Honor.

If I understand the State's position correctly, it is Mr. Wilson is not entitled to challenge the application of place to keep in counts one and two. The two, ah, one being class B felony, two being a misdemeanor, ah, because there was no attempt to comply with a permit to carry, which I believe was the -- the permitting system that was struck down by the Supreme Court maybe days after Bruen in the Young case.

So it is -- it is -- ah, a situation on they're -- they're asking to create a situation in which it is impossible to raise a constitutional challenge. That is why, um, the general rules of standing in a criminal case, when it comes to challenging the constitutionality of a statute, whether it is something as hotly con -- contested as second amendment or whether it is, as I cite in the Hanapi case native Hawaiian rights or any other constitutional right should be raised with the motion to dismiss, ah, when the application of a criminal statute is being applied. That is what we have here.

And so, again, your Honor, we are asking the

Court to look at the application of not the permitting system, the application of place to keep. Which again does not provide an exception for people to carry and bear firearms outside the home for self-protection purposes.

So, your Honor, State has not met its burden under the two -- um, the second prong of the Bruen case. Thank you.

THE COURT: All right. So the Court, having reviewed the pleadings, as well as listening to -- ah, considering the arguments made today, and, um, reviewing the place to keep statute, reviewing the Bruen case, and the Heller case, ah, the Court agrees, um -- well, first, the right to bear arms is not without restriction. The states are still, ah, per -- permitted to restrict, um, the right to bear arms.

However, the place to keep statute does not make any exception for carrying or bearing arms for self-defense. Um, I -- I do believe because this statute is being applied to the defendant he has standing, ah, to challenge the constitutionality of it based on Bruen case.

And, ah, because that statute, um, place to keep, 134-25, as well as 134-27 regarding ammunition re -- restricts, um, possession of firearms to the possessors place of business, residence or sojourn. Um, there is no exception for carrying outdoors in self-defense, and in

this case the allegation is, um -- well, the allegation is -- is trespass on property -- private property, ah, but the defendant had a, um, weapon which, ah, is represented he was carrying for self-defense. And when, ah, confronted by police he did disclose that he had that weapon.

Um, I don't see how, ah, 134-25, 134-27, um, how they comply with -- with Bruen, and, ah, Heller, given the facts of this case.

So the Court is going to grant the motion.

I'll ask, Mr. Lowenthal, that you prepare the order.

MR. LOWENTHAL: I will, your Honor. Thank you, your Honor.

(At which time the above-entitled proceedings were concluded.)

C E R T I F I C A T E

I, BETH KELLY, a Court Reporter do hereby certify that the foregoing pages 1 through 15 inclusive comprise a full, true and correct transcript of the proceedings had in connection with the above-entitled cause.

Dated this 24th day of August, 2022.

/s/ Beth Kelly, RPR, CSR#235

_____
BETH KELLY, RPR, CSR #235
Court Reporter

SCAP No. 22-561

In the Supreme Court of the State of Hawai‘i

State of Hawai‘i Petitioner-Appellant-Plaintiff, vs. **Christopher L. Wilson** Respondent-Appellee-Defendant.	CAAP 22-561 2CPC-17-964 Appeal from Findings of Fact, Conclusions of Law, and Order Granting Defendant's Motion to Dismiss Counts 1 & 2. Hon. Judge Rhonda I. L. Loo Hon. Judge Blaine J. Kobayashi Hon. Judge Kirstin M. Hamman

Answering Brief

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Attorneys for Respondent
Christopher L. Wilson

Subject Index

Table of Authorities

Constitutional Provisions and Statutes

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Answering Brief

Christopher L. Wilson faced eleven years of imprisonment for carrying a loaded pistol. When he asserted that he carried it to protect himself, the prosecution's only response was that he lacked standing to bring a constitutional challenge. The lower court dismissed the charges. Mr. Wilson had standing to challenge statutes he was accused of violating and the prosecution made no effort to rebut his constitutional claim. The dismissal must be affirmed.

Statement of the Case

Petitioner, State of Hawai'i, charged Mr. Wilson with unlawfully carrying or possessing a handgun and ammunition in violation of Hawai'i Revised Statutes (HRS) §§ 134-25 and 134-27. Record on Appeal (ICA Dkt. No. 10 at 4[1] & Cir. Ct. Dkt. No. 1 at 2-3). The charges arose from an incident in the West Maui Mountains on the night of December 6, 2017.

Duane Ting and his men spotted people hiking on a trail cutting through his property. ICA Dkt. No. 10 at 4; Cir. Ct. Dkt. No. 2 at 3-4. Mr. Ting, armed with an AR-15 assault rifle, and his men rounded up three men and brought them to the highway, where the police were waiting. Cir. Ct. Dkt. No. 2 at 3-4 and Cir. Ct. Dkt. No. 161 at 2. One of the men explained that they were hiking to look at the moon and Native Hawaiian plants. *Id.*

About ten minutes later, Mr. Ting went back onto the trail, found Mr. Wilson, and brought him to the police. *Id.* Mr. Wilson told the police he was armed. Cir. Ct. Dkt. No. 2 at 3. The police found a loaded pistol tucked in the waist band of his pants. *Id.*

[1] The page numbers refer to the page numbers as they appear in pdf format.

On May 14, 2021, Mr. Wilson moved to dismiss the charges on the grounds that his conduct—carrying the firearm and ammunition—was protected by the Second Amendment to the United States Constitution and Article I, Section 17 of the Hawai‘i Constitution. ICA Dkt. No. 10 at 12; Cir. Ct. Dkt. No. 132. Relying on *Young v. Hawai‘i*, 992 F.3d 765 (9th Cir. 2021), the Circuit Court of the Second Circuit[2] denied the motion. ICA Dkt. No. 10 at 12; Cir. Ct. Dkt. No. 139.

After that, the Supreme Court of the United States issued its decision in *New York State Rifle & Pistol Assn., Inc. v. Bruen*, ___ U.S. ___, 142 S.Ct. 2111 (2022), and then it vacated *Young v. Hawai‘i. See id.*, 142 S.Ct. 2895 (2022). Mr. Wilson filed a second motion to dismiss. ICA Dkt. No. 10 at 13; Cir. Ct. Dkt. No. 161.

Mr. Wilson again asserted that he carried the pistol for self-defense purposes. *Id.* at 5. He argued that his conduct was protected by the Second Amendment and the prosecution could not meet its burden under *Bruen*. *Id.* The prosecution did not dispute Mr. Wilson's factual and legal claims. ICA Dkt. No. 10 at 13; Cir. Ct. Dkt. No. 163. Instead, it argued that Mr. Wilson did not have standing to bring the constitutional challenge because he did not apply for a license to carry the firearm. Cir. Ct. Dkt. No. 163 at 4.

The circuit court,[3] based on the pleadings and the arguments of counsel, granted the motion to dismiss. *See* Transcript of Proceedings on August 17, 2022 (ICA Dkt. No. 14) at 13-14. Both Mr. Wilson and the prosecution lodged proposed findings of fact and conclusions of law.

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[2] The Honorable Judge Blaine J. Kobayashi heard the first motion to dismiss and issued the order denying the motion.

[3] The Honorable Judge Kirstin M. Hamman presided over the second motion to dismiss and subsequent proceedings below.

ICA Dkt. No. 10 at 15; Cir. Ct. Dkt. No. 168 & 169. The prosecution incorporated Mr. Wilson's undisputed factual assertions. ICA Dkt. No. 10 at 15; Cir. Ct. Dkt. No. 169. The circuit court adopted Mr. Wilson's version. ICA Dkt. No. 10; Cir. Ct. Dkt. No. 179.

The prosecution filed a motion to reconsider the dismissal. ICA Dkt. No. 10 at 15; Cir. Ct. Dkt. No. 175. The prosecution did not challenge the evidentiary basis for the dismissal and did not attempt to justify the application of HRS §§ 134-25 and 134-27 under *Bruen*. It re-raised the standing argument that had been rejected by the circuit court. *Id.* That motion was denied. ICA Dkt. No. 17; Cir. Ct. Dkt. No. 204.

The prosecution timely appealed from the order dismissing counts 1 and 2.[4] ICA Dkt. No. 1. This Court accepted the case on December 21, 2022. Dkt. No. 11.

Standard of Review

Questions about standing are "reviewed *de novo* under the right/wrong standard." *Wells Fargo Bank, N.A. v. Behrendt*, 142 Hawai'i 37, 41, 414 P.3d 89, 93 (2018). Similarly, questions of constitutional law are also reviewed under the "right/wrong" standard. *State v. Jenkins*, 93 Hawai'i 87, 100, 997 P.2d 13, 26 (2000).

Argument

1. The prosecution's attempt to contest the evidentiary basis for the circuit court's ruling must fail because it was never raised below and has no merit.

The prosecution claims for the first time that there was an insufficient factual basis for the circuit court to conclude that Mr. Wilson's conduct—carrying a handgun on a mountain trail for self-defense purposes—was constitutionally protected. Dkt. No. 13 (Opening Brief) at 6-8. The claim has been waived and is meritless.

[4] The prosecution did not appeal from the order denying the motion for reconsideration.

This Court adheres to the well-settled rule that **when "a party fails to raise any argument, evidentiary or otherwise, that argument is generally deemed waived."** *State v. Schnabel*, 127 Hawai'i 432, 459 n. 59, 279 P.3d 1237, 1264 n. 59 (2012) (quoting *State v. Moses*, 102 Hawai'i 449, 456, 77 P.3d 940, 947 (2003)). *See also State v. Kikuta*, 125 Hawai'i 78, 89, 253 P.3d 639, 650 (2011) ("the failure to properly raise an issue at the trial level precludes a party from raising that issue on appeal."). The rule applies with equal force against the prosecution. *See State v. Rodrigues*, 67 Haw. 496, 498, 692 P.2d 1156, 1158 (1985) (prosecution precluded from arguing other exceptions to warrant requirement on appeal when it raised only one issue before the trial court); *State v. Gonzalez*, 128 Hawai'i 314, 317, 288 P.3d 788, 791 (2012) (even when prosecution prevails below it still cannot raise new arguments for the first time on appeal); *State v. Apollonio*, 130 Hawai'i 353, 358 n. 7, 311 P.3d 676, 681 n. 7 (2013) (prosecution's argument not raised before lower court deemed waived).

The prosecution's only response to Mr. Wilson's motion to dismiss was that he lacked standing to bring the constitutional challenge. Cir. Ct. Dkt. No. 163. It did not dispute Mr. Wilson's assertion that he was carrying the pistol for self-defense purposes when he was confronted by Mr. Ting, his AR-15, and his men. ICA Dkt. No. 14 at 7-12.

After the circuit court granted the motion, the prosecution resorted to a motion for reconsideration. Cir. Ct. Dkt. No. 172. The prosecution still failed to challenge the evidentiary basis. *Id.* It even recognized in its proposed findings of fact, conclusions of law, and order that Mr. Wilson asserted "his actions were under a claim of self-defense." Cir. Ct. Dkt. No. 170 at 2.

The prosecution had many chances to raise this argument below and failed to do it every time. The prosecution cannot for the first time on appeal contest Mr. Wilson's assertion that he

carried the pistol for self-defense purposes. The argument is waived. *State v. Rodrigues*, 67 Haw. at 498, 692 P.2d at 1158 (the prosecution's "issues not raised at the trial level will not be considered on appeal").

The argument also lacks merit. According to the prosecution, the declaration of counsel attached to the motion to dismiss is insufficient. Opening Brief at 6-7. Not so. Motions requiring "the consideration of facts not appearing of record" must be accompanied by either an affidavit or declaration. Hawai'i Rules of Penal Procedure (HRPP) Rule 47(a). Declarations may serve in lieu of affidavits. HRPP Rule 47(d). *See also State v. Thompson*, 150 Hawai'i 262, 268, 500 P.3d 447, 453 (2021) ("the only HRPP Rule that describes how a declaration in lieu of an affidavit may be made is HRPP Rule 47(d).").

Here, the declaration of counsel attached to Mr. Wilson's motion asserted that factual assertions in the memorandum were true and correct based on counsel's knowledge and belief, and the materials and information provided in the discovery process. Cir. Ct. Dkt. No. 161 at 7. The declaration complies with HRPP Rule 47(d).

The prosecution does the same thing in its memorandum in opposition. Cir. Ct. Dkt. No. 163. In its memorandum in opposition, the prosecution made several factual assertions found nowhere in the record. The prosecution asserted that Mr. Wilson did not apply for a license to carry the firearm and did not "register the firearm in Hawaii as required by statute." *Id.* at 4. The prosecution made passing references to "records from the State of Florida" and a federal agency's "[f]urther investigation" without attaching exhibits. *Id.* These factual assertions were based on the prosecutor's declaration that they were "true and correct to the best of [her] belief[.]" *Id.* at 6.

Both declarations of counsel comport with the requirements in HRPP Rule 47(d). They formed the factual basis for the circuit court to make its ruling pursuant to HRPP Rule 47(a), reject the prosecution's standing argument, and issue the dismissal order. The prosecution's untimely challenge to the evidentiary basis below has been waived and lacks merit.[5]

2. Mr. Wilson had standing to challenge the constitutionality of the prosecution's application of HRS §§ 134-25 and 134-27 because he was accused of violating them and did not have to apply for a license under HRS § 134-9.

The prosecution charged Mr. Wilson with two place-to-keep offenses thereby exposing him to criminal convictions and eleven years of imprisonment. HRS §§ 134-25(b) & 134-27(b). Mr. Wilson was, therefore, free to challenge the constitutionality of these charges in a motion to dismiss. *See State v. Hanapi*, 89 Hawai'i 177, 184, 970 P.2d 485, 492 (1998) ("The preferred method for a defendant to raise a constitutional right in a criminal prosecution is by way of a motion to dismiss.").

Criminal defendants have standing to challenge the constitutionality of the penal statutes they are accused of violating. *State v. Grahovac*, 52 Haw. 527, 532, 480 P.3d 148, 152 (1971) (the "criminally accused has 'standing' to constitutionally challenge only the specific penal sanctions with which he is charged."). "Where restraints imposed act directly on an individual or entity and a claim of specific present objective harm is presented, standing to challenge the constitutionality of an ordinance or statute exists." *State v. Bloss*, 64 Haw. 148, 151, 637 P.2d 1117, 1121 (1981) (citations omitted).

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[5] If the Court overlooks the prosecution's failure to raise the challenge to undisputed factual assertions below and finds merit in its evidentiary challenge, Mr. Wilson respectfully requests that the dismissal order be vacated and remanded to the circuit court so it can conduct an evidentiary hearing on his constitutional claims.

In other words, "[o]ne who would challenge the constitutional validity of a statute must show that as applied to [that person,] the statute is invalid." *State v. Marley*, 54 Haw. 450, 457, 509 P.2d 1095, 1101 (1973) (citations omitted). On the other hand, "a criminal defendant cannot challenge the constitutionality of one subsection of a statute where [the defendant] was charged under a different subsection." *State v. Armitage*, 132 Hawai'i 36, 55, 319 P.3d 1044, 1064 (2014).

Armitage is instructive. The defendants there challenged the constitutionality of two administrative regulations about Kaho'olawe even though they were charged with violating just one. *Id.* at 41 & 55, 319 P.3d at 1049 & 1063. Accordingly, this Court limited review to the regulation they were accused of violating:

> **Because Petitioners were subject to penal liability pursuant to HAR § 13-261-10, they have a claim of specific present objective harm, and therefore have standing to challenge the constitutionality of that regulation. This much is clear.** On the other hand, Petitioners stipulated at trial that they did not make any written application to the commission for the authorization of entrance into and activity within the reserve. This stipulation establishes that Petitioners did not attempt to follow the procedures set forth in HAR § 13-261-11 to obtain lawful entry into the Reserve; Petitioners thus may not have standing to argue that HAR § 13-261-11 is unconstitutional.

Id. at 55, 319 P.3d at 1063 (citations and quotation marks omitted).

Here, Mr. Wilson challenged the constitutionality of HRS §§ 134-25 and 134-27, as it applied to his case. *See State v. Marley*, *supra*. The "present objective harm" was great and undeniable. *State v. Bloss*, *supra*. He faced a criminal conviction and more than a decade of imprisonment. HRS §§ 134-25(b) & 134-27(b). He had standing to challenge the constitutionality of the prosecution's application of the criminal statutes against him.

The prosecution nevertheless insists that because he did not apply for a license under HRS § 134-9, Mr. Wilson could not move to dismiss alleged violations of HRS §§ 134-25 and 134-27. Opening Brief at 16. This makes little sense. Mr. Wilson asserted that he carried the pistol for ordinary self-defense purposes—conduct protected by the Second Amendment to the United States Constitution—and that criminalizing his conduct is unconstitutional. *See infra.*

A license to carry a firearm under HRS § 134-9, however, requires applicants to claim more than ordinary self-defense. An applicant must show that carrying a concealed firearm is based on a "reason to fear injury" to the applicant's person or property as "an exceptional case[.]" HRS § 134-9(a). A license to carry a firearm in the open may only be granted when "the urgency or the need has been sufficiently indicated[.]" *Id.* Even then, licenses are subject to the discretion of the chief of police.[6]

It is unreasonable and unrealistic to require license applications under HRS § 134-9 before courts can hear constitutional challenges to HRS §§ 134-25 and 134-27. Mr. Wilson should not

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[6] The statute may be unconstitutional. Hawai'i was among the six states giving government officers discretion to deny a concealed-carry license discussed in *New York State Rifle & Pistol Assn., Inc. v. Bruen*, ___ U.S. ___, 142 S.Ct. 2111, 2124 (2022). Justice Kavanaugh pointed out that in light of *Bruen*, HRS § 134-9 may be infirm. *Id.* at 2162 (Kavanaugh, J. concurring). Moreover, in *Young v. Hawai'i*, 992 F.3d 765 (9th Cir. 2021), the plaintiff brought a Second Amendment challenge to HRS § 134-9 after his application to carry a firearm for self-defense purposes was denied by the chief of police. *Id.* at 778. The Ninth Circuit upheld the statute. *Id.* at 828. The Supreme Court, however, accepted certiorari, vacated the judgment, and sent the case back to the Ninth Circuit "for further consideration in light of" *Bruen*. *See Young v. Hawai'i*, 142 S.Ct. 2895 (2022). The Ninth Circuit, in turn, remanded to the United States District Court of Hawai'i without analysis. *See id.*, 45 F.4th 1087 (9th Cir. 2022).

The Hawai'i Attorney General has also recognized that police chiefs "should no longer enforce the requirement that an applicant in an exception case show reason to fear injury to the applicant's person or property to obtain a concealed carry license[.]" Attorney General's Opinion No. 22-02 (ag.hawaii.gov/wp-content/uplodas/2022/07/Attorney-General-Opinion-22-02.pdf) (last viewed February 28, 2023). Requiring defendants to apply for licenses pursuant a potentially unconstitutional statute as a prerequisite to challenging other statutes is unreasonable.

have to present an "urgency," "need," or "reason to fear injury" as an "exceptional case" to the chief of police as a prerequisite to filing his motion to dismiss counts 1 and 2.

Moreover, the prosecution's additional standing requirement is unprecedented. *See, e.g., State v. Mendoza*, 82 Hawai'i 143, 154, 920 P.3d 357, 368 (1996) (examining defendant's constitutional challenge to HRS § 134-4 without requiring compliance with licensing scheme); *State v. Kam*, 69 Haw. 483, 495-496, 748 P.2d 372, 379-380 (1988) (defendant had standing to challenge prosecution for sale of pornography without reference to licensing regulations if any); *State v. Hanapi*, 89 Hawai'i at 183, 970 P.3d at 491 (defendant had standing to assert Native Hawaiian rights in motion to dismiss criminal trespass prosecution). It must be rejected.

The prosecution cannot charge people with criminal offenses, expose them to years of imprisonment, and then expect courts to ignore their constitutional challenges. Standing requirements are not intended to deprive people from raising applicable constitutional claims:

> We have . . . stated on many occasions that **the "touchstone" of this court's notion of standing is the needs of justice, and that standing requirements should not be barriers to justice.** Rather . . . we have endorsed the view that one whose legitimate interest is in fact injured by illegal action . . . should have standing because justice requires that such a party should have a chance to show that the action that hurts [the party's] interest is illegal.

Sierra Club v. Dept. of Transp., 115 Hawai'i 299, 312, 167 P.3d 292, 319 (2007) (citations and quotation marks omitted).

The prosecution wants to reserve standing for the few people who were denied a license to carry and either have the financial means and perseverance to bring a civil action against the State or went ahead and carried a firearm anyway. This is wrong. "**Complexities about standing are barriers to justice; in removing the barriers the emphasis should be on the needs of**

justice." *Life of the Land v. Land Use Commission*, 63 Haw. 166, 174 n. 8, 623 P.2d 431, 439 n. 8 (1981) (quoting *E. Diamond Head Ass'n v. Zoning Bd. of Appeals*, 52 Haw. 518, 523 n. 5, 479 P.2d 796, 799 n. 5 (1971)). Asserting constitutional rights is not a luxury for the privileged few. The circuit court did not err in refusing to adopt the prosecution's radical departure from the law of standing in Hawai'i.

3. The circuit court correctly applied the *Bruen* test and dismissed counts 1 and 2 because the prosecution made no effort to show how its application of HRS §§ 134-25 and 134-27 in this case was consistent with the nation's tradition of firearms regulation.

"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. Am. II; *see also* Haw. Const. Art. I, Sec. 17.

For more than a century, it was understood that the Second Amendment was "a limitation only upon the power of Congress and the National government[.]" *Presser v. Illionis*, 116 U.S. 252, 265 (1886). *See also State v. Mendoza*, 82 Hawai'i at 146, 920 P.2d at 360. It was also understood that the Second Amendment was not a personal right, but a guarantee that states could form militias to suppress insurrection and repel invasion.[7] *United States v. Miller*, 307 U.S. 174, 179 (1939).

These understandings started to change in 2008. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court of the United States struck down a regulation banning the possession of handguns within the home. *Id.* at 574-575 and 635. The Court held for the first time

[7] This Court has not determined if Article I, Section 17 of the Hawai'i Constitution confers an individual right to possess firearms or the collective right for the State to maintain a militia. *See State v. Mendoza*, 82 Hawai'i 143, 154, 920 P.2d 357, 367 (1996).

that the Second Amendment "guarantee[s] the **individual** right to possess and carry weapons in case of confrontation." *Id.* at 594. The Court explained that "the inherent right of self-defense has been central to the Second Amendment right." *Id.* at 628.

Two years later, the Court extended the "right to possess a handgun in the home for purposes of self-defense" to state regulations and statutes through the Fourteenth Amendment. *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010). In doing so, state regulations were now subject to the Supreme Court's new interpretation of the Second Amendment.[8]

The Court reiterated that carrying handguns for self-defense is at the core of the Second Amendment:

> Self-defense is a basic right, recognized by many legal systems from ancient times to the present day, and in *Heller*, we held that **individual self-defense is "the *central component*" of the Second Amendment right.** Explaining that the need for defense of self, family, and property is most acute in the home, we found that this right applies to handguns because they are the most preferred firearm in the nation to keep and use for protection of one's home and family. Thus, we concluded, **citizens must be permitted to use handguns for the core lawful purpose of self-defense.**
>
> *Heller* makes it clear that this right is deeply rooted in this Nation's history and tradition. *Heller* explored the right's origins, noting that the 1689 English Bill of Rights explicitly protected a right to keep arms for self-defense.

Id. at 767-768 (brackets, citations, and quotation marks omitted).

Then came *New York State Rifle & Pistol Assn., Inc. v. Bruen*, ___ U.S. ___, 142 S.Ct. 2111 (2022). The Court clarified that the Second Amendment continues to protect "an individual's right to carry a handgun for self-defense **outside** the home." *Id.* at 2122. The Court reasoned that

[8] The Hawai'i Constitution may have already adopted the Second Amendment along with the rest of the National Constitution. *See* Haw. Const. Preamble ("The Constitution of the United States of America is adopted on behalf of the people of the State of Hawai'i.").

"**the Second Amendment allows individuals to possess and carry weapons in case of confrontation, and confrontation can surely take place outside the home**." *Id.* at 2135 (citations omitted).

The Court also laid out the test courts must use to determine when state or federal regulations infringes upon a person's right to carry firearms:

> In keeping with *Heller*, we hold that when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's unqualified command.

Id. at 2126. The *Bruen* test has impacted jurisdictions throughout the country.[9]

The prosecution nevertheless refuses to recognize that the *Bruen* test is the law of the land. In response to Mr. Wilson's second motion to dismiss, it did not contest his assertion that his conduct was constitutionally protected. ICA Dkt. No. 10 at 13; Cir. Ct. Dkt. No. 163. Even when the circuit court dismissed counts 1 and 2 and the prosecution filed a motion for reconsideration, it still refused to apply the *Bruen* test. ICA Dkt. No. 10 at 15; Cir. Ct. Dkt. No. 175. It still refuses. It does not even cited the test in its opening brief.

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[9] This Court has held that the rational basis test applies to constitutional challenges to state and local firearm regulations pursuant to Article I, Section 17 of the Hawai'i Constitution. *State v. Mendoza*, 82 Hawai'i at 154, 920 P.2d at 368. That test must yield to *Bruen*. Not only has the Hawai'i Constitution adopted the Second Amendment, *supra* at n. 8, but the Second Amendment is incorporated by the Fourteenth Amendment and is "fully binding on the States[.]" *McDonald v. City of Chicago*, 561 U.S. 742, 785 (2010).

According to the prosecution, the *Bruen* test applies to civil challenges to licensing schemes and goes no further. Opening Brief at 9. The prosecution is wrong. The *Bruen* test is "the constitutional standard" for assessing the constitutionality of government regulations. *See id*, 142 S.Ct. at 2134.

Courts in jurisdictions across the country have duly applied the *Bruen* test to statutes outside firearm licensing schemes. *United States v. Rahimi*, 2023 WL 1459240 (5th Cir. 2023) (applying *Bruen* to federal penal statutes); *Range v. Attorney General*, 53 F.4th 262, 269 n. 6 (3d Cir. 2022) (noting the several federal district courts that have applied *Bruen* to penal statutes); *United States v. Tilotta*, 2022 WL 3924282 (S.D. Calif. Slip Op. Aug. 30, 2022) (*Bruen* "laid out a new test to be applied in Second Amendment challenges."); *Fooks v. State*, 255 Md.App. 75, 278 A.3d 208, 223 (Md. App. 2022) (applying *Bruen* to criminal offenses); *State v. Philpotts*, 2023 WL 408984 (Ohio App.) (Slip. Op. Jan. 26, 2023) (recognizing *Bruen* "changed the burden of proof and standard of review when evaluating the constitutionality of a statute regulating firearms."); *Ex parte Isedore*, 2023 WL 142514 (Tex. Crim. App.) (Slip. Op. Jan. 10, 2023) (applying *Bruen* to penal statutes relating to firearms). The prosecution's invitation to ignore *Bruen* must be declined. The circuit court did not err in applying the *Bruen* test.

Mr. Wilson was accused of violating HRS §§ 134-25 and 134-27. These statutes criminalize the carrying and possession of a firearm and ammunition without the defendant's reasons for carrying them outside their business, residence, or sojourn:

> **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 and the following:
>
> (1) A place of repair;
> (2) A targe 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.
>
> . . . .
>
> (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.**

HRS § 134-25.[10]

The conduct element in these offenses is "carrying or possessing" a firearm and ammunition. HRS § 134-25(b); *State v. Slavik*, 150 Hawai'i 343, 354, 501 P.3d 312, 323 (App. 2021) (conduct for place-to-keep ammunition offense is possession). The prosecution's charging document also averred that Mr. Wilson "carr[ied] or possess[ed]" the firearm and ammunition. ICA Dkt. No. 10 at 4; Cir. Ct. Dkt. No. 1 at 2-3.

Mr. Wilson asserted that he carried the pistol for self-defense purposes and to protect himself from people like Mr. Ting and his men. ICA Dkt. No. 10 at 13; Cir. Ct. Dkt. No. 161. HRS §§ 134-25 and 134-27 criminalizes conduct that the constitutional right to bear and carry arms is meant to protect. *Bruen*, 142 S.Ct. 2126 at 2134-2135. *See also District of Columbia v. Heller*, 554 U.S. at 599 (self-defense is "the central component of the right itself."); *McDonald v. City of Chicago*, 561 U.S. at 791. The "Second Amendment's plain text covers [Mr. Wilson's] conduct[.]" *Bruen*, 142 S.Ct. at 2126.

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[10] HRS § 134-27(a) confines ammunition in the same way.

The prosecution did nothing to rebut Mr. Wilson's assertion. It failed to show how its application of HRS §§ 134-25 and 134-27 in this case was "consistent with this Nation's historical tradition of firearm regulation." *Id.* In other words, it did not meet its burden under the *Bruen* test. Accordingly, the circuit court could not "conclude that [Mr. Wilson's] conduct [fell] outside the Second Amendment's unqualified command." *Id.* The circuit court did not err in dismissing counts 1 and 2.

Conclusion

Mr. Wilson had standing to bring the motion to dismiss counts 1 and 2. His assertion that his conduct was constitutionally protected went unchallenged, and the prosecution did not meet its burden under *Bruen*. The circuit court did not err. The dismissal of counts 1 and 2 must be affirmed.[11]

Dated: Wailuku, Maui, Hawai'i: March 1, 2023

/s/ Benjamin Lowenthal .
Benjamin E. Lowenthal
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Christopher L. Wilson

[11] Mr. Wilson requests in the alternative that the case be remanded to the circuit court to conduct an evidentiary hearing that if evidence is needed to support his constitutional claims. *See supra* at note 5.