No. 20-1639

In the Supreme Court of the United States

GEORGE K. YOUNG, JR.,

Petitioner,

v.

STATE OF HAWAII, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* MOUNTAIN STATES LEGAL FOUNDATION'S CENTER TO KEEP AND BEAR ARMS IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

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

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS

STATUTES

RULES

HISTORICAL SOURCES (CHRONOLOGICAL)

OTHER AUTHORITIES

IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

The **Center to Keep and Bear Arms ("CKBA")** is a project of **Mountain States Legal Foundation ("MSLF")**, a Colorado-based nonprofit, public interest legal foundation. MSLF was founded in 1977 to defend the Constitution, protect private property rights, and advance economic liberty. CKBA was established in 2020 to advance MSLF's litigation in protection of Americans' natural and fundamental right to self-defense. CKBA represents individuals and organizations challenging infringements on the constitutionally protected right to keep and bear arms. *See, e.g.*, *Caldara v. City of Boulder*, No. 20-416 (U.S., petition for writ of *certiorari* denied Nov. 16, 2020). MSLF's history of involvement includes filing *amicus curiae* briefs with this Court. *See, e.g.*, *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (representing *amici* Rocky Mountain Gun Owners and National Association for Gun Rights); *District of Columbia v. Heller*, 554 U.S. 570 (2008) (representing MSLF). MSLF's *amici curiae* brief was cited in this Court's *McDonald* opinion. 561 U.S. 742, 777 n.27 (2010). The Court's decision in this case will directly impact CKBA's current clients and litigation.

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[1] The parties were timely notified and have consented to the filing of this *amicus curiae* brief. *See* Supreme Court Rule 37.2(a). Pursuant to Supreme Court Rule 37.6, the undersigned affirms that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae* or its counsel, made a monetary contribution specifically for the preparation or submission of this brief.

STATEMENT OF THE CASE

I. HISTORICAL BACKGROUND

"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.

The Second Amendment owes its existence to the Founders and Framers' respect for natural rights, and their intent to preserve the rights of the individual against the expansive government they were establishing. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("WE hold these truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."); 1 ANNALS OF CONG. 451 (1789) (Joseph Gales ed., 1834) (Madison began the process of proposing the first constitutional amendments with: "First, That there be prefixed to the constitution a declaration, that all power is originally vested in, and consequently derived from, the people.").

The Founders and Framers drew on their knowledge of history, particularly the longstanding tradition, and even requirement, for private persons to keep and bear arms, as well as their need for the exercise of such a right in successfully fighting the American Revolution. *See* 13 Edw. 1, st. 2, c. 5 (1285)

("It is likewise commanded that every man have in his house arms for keeping the peace in accordance with the ancient assize . . . ."); 1 W. & M., 2d sess., c. 2 (1689) ("That the subjects . . . , may have arms for their defence suitable to their conditions, and as allowed by law."); THE FEDERALIST NO. 46 (James Madison) ("It may well be doubted, whether a militia thus circumstanced could ever be conquered by such a proportion of regular troops. Those who are best acquainted with the last successful resistance of this country against the British arms, will be most inclined to deny the possibility of it."); James Lindgren & Justin L. Heather, *Counting Guns in Early America*, 43 WM. & MARY L. REV. 1777, 1780 (2002) ("[I]n 1774, we can estimate that at least 50% of all wealth owners (both males and females) owned guns.").

George Washington and James Madison, among other Framers, "firmly believed that the character and spirit of the republic rested on the freeman's possession of arms as well as his ability and willingness to defend himself and his society." Robert E. Shalhope, *The Ideological Origins of the Second Amendment*, 69 J. AM. HIST. 599, 612 (1982). The colonial experience and American Revolution strengthened the notion that an armed populace is essential to liberty. Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 327 (1991).

In 2008, this Court decided the landmark case of *District of Columbia v. Heller*, 554 U.S. 570 (2008),

and, shortly thereafter, *McDonald v. City of Chicago*, 561 U.S. 742 (2010). *Heller* was this Court's first in-depth analysis of the Second Amendment, the rights it protects, and how courts must examine challenges brought thereunder. *Heller*, 554 U.S. at 635 ("[S]ince this case represents the Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field . . . ."). *McDonald* reinforced and expanded *Heller*, incorporating the Second Amendment against the states via the Fourteenth Amendment. *McDonald*, 561 U.S. at 791.

The *Heller* and *McDonald* Courts relied on the text of the Second Amendment, and the history and tradition of regulation of the right, to reject infringements imposed on Americans' right to keep and bear arms.

II. LEGAL BACKGROUND

Hawaii first passed a law prohibiting the concealed carriage of a firearm without a license in 1927. 1927 Haw. Sess. Laws 209, 209–11. This law required an individual to obtain a permit from a sheriff or judge to carry a firearm concealed. *Id.*

It was not until 1961 that Hawaii amended its law to require its residents to receive a permit to carry a firearm openly. 1961 Haw. Sess. Laws 215, 215.

Currently, to carry a firearm openly in the state of Hawaii, residents must prove "the urgency or the need" to do so and must be "engaged in the protection

of life and property" as well as meet a standard of "good moral character." Pet.App.18–19, 340; HAW. REV. STAT. § 134-9(a). Under these circumstances, a local chief of police "may grant" a permit for open carriage. *Id.* The record demonstrates that Hawaii counties granted only four such permits between 2000 and 2018. Pet.App.267 n.21. No permits were issued from 2018 to 2020. Pet. at 6.

> Absent a license under section 134-9, a person may only transport an unloaded firearm, in an enclosed container, to and from a place of repair, a target range, a licensed dealer, a firearms exhibit, a hunting ground, or a police station, H.R.S. §§ 134-23, 134-24, 134-25, 134-26, 134-27, and may only use those firearms while "actually engaged" in hunting or target shooting, H.R.S. § 134-5.

Pet.App.222.

III. FACTUAL AND PROCEDURAL BACKGROUND

In 2011, George Young twice applied for an open carry license, citing his need for self-defense—both of which were denied. Pet.App.22–23. In response, Young brought suit in the United States District Court for the District of Hawaii, initially *pro se*, alleging that Hawaii's licensing statute, which effectively prohibits him from carrying a firearm in public, violates, *inter alia*, the Second Amendment. Pet.App.23.

The district court dismissed Young's claims. Pet.App.23. Regarding his Second Amendment claims, the district court cited the purported "weight of authority in the Ninth Circuit" and "other Circuits," in favor of the view that "the Second Amendment right articulated by the Supreme Court in *Heller* and *McDonald* establishes only a narrow individual right to keep an operable handgun at home for self-defense" and that "the right to carry a gun outside the home is not part of the core Second Amendment right." Pet.App.315. Further, the district court determined that even if the Second Amendment does protect a right outside the home, Hawaii's licensing scheme would survive intermediate scrutiny. Pet.App.24, 319–21.

Young appealed to the United States Court of Appeals for the Ninth Circuit, which reversed in part and dismissed in part. Pet.App.24. The Ninth Circuit Panel took up the question of "whether the Second Amendment encompasses the right of a responsible law-abiding citizen to carry a firearm openly for self-defense outside of the home." Pet.App.221.

The Ninth Circuit Panel noted that two other circuits "have held that the Second Amendment indeed protects a general right to carry firearms in public for self-defense," Pet.App.228 (citing *Wrenn v. District of Columbia*, 864 F.3d 650, 665 (D.C. Cir. 2017); *Moore v. Madigan*, 702 F.3d 933, 936–37 (7th Cir. 2012)); and that "[t]hree others have simply assumed the Second Amendment applies outside the home, without delving into the historical nature of the right," *id.* (citing *Woolard v. Gallagher*, 712 F.3d 865,

876 (4th Cir. 2013); *Drake v. Filko* 724 F.3d 426, 431 (3d Cir. 2013); *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 89 (2d Cir. 2012)).

After engaging in an analysis of historical and traditional regulation of the right to bear arms, the Ninth Circuit Panel determined that "the Second Amendment does protect a right to carry a firearm in public for self-defense." Pet.App.229–61, 273. The Panel "reject[ed] a cramped reading of the Second Amendment that renders to 'keep' and 'bear' unequal guarantees," and determined that "*Heller* and *McDonald* describe the core purpose of the Second Amendment as self-defense . . . and 'bear' effectuates such a core purpose of self-defense in public." Pet.App.265–66 (citations omitted). The Panel concluded that Hawaii's effective prohibition on carriage could not withstand any form of scrutiny—even intermediate—and found Hawaii's law unconstitutional. Pet.App.267–73.

Hawaii moved for *en banc* review, which the Ninth Circuit granted. Pet.App.24–25. The *en banc* Ninth Circuit vacated the Ninth Circuit Panel's opinion and affirmed the judgment of the district court, finding that "Hawai'i's licensing scheme stands well within our traditions." Pet.App.122, 127. The Ninth Circuit concluded that "Hawai'i's restrictions have deep roots in the Statute of Northampton and subsequent English and American emendations, and do not infringe what the Court called the 'historical understanding of the scope of the right.'" Pet.App.122–23 (citing *Heller*, 554 U.S. at 625).

Four judges dissented, accusing the majority of deciding "that the Second Amendment does not mean what it says." Pet.App.128 (O'Scannlain, J., dissenting).

> Instead, the majority holds that while the Second Amendment may guarantee the right to *keep* a firearm for self-defense within one's home, it provides no right whatsoever to *bear*—i.e., to carry—that same firearm for self-defense *in any other place*."

Pet.App.128. The dissent also called into question the majority's historical analysis: "Respectfully, the majority's opinion—and in particular, its extreme and bizarre reliance on the mere fact of some historical regulation of firearms—represents a gross misapplication of the textual and historical inquiries that Heller demands." Pet.App.132. Based upon these same concerns, Young now seeks *certiorari*.

SUMMARY OF THE ARGUMENT

This Court should hold this case over until it has opportunity to decide *New York State Rifle & Pistol Association v. Corlett* ("*NYSRPA*"), No. 20-843 (U.S., petition for writ of *certiorari* granted Apr. 26, 2021), and then grant *certiorari*, vacate the Ninth Circuit's

en banc opinion, and remand this matter to the lower court for consideration in light of *NYSRPA*.[2]

This Court, in *Heller*, affirmatively established the text, history, and tradition test as the appropriate means to review Second Amendment challenges, and both *Heller* and *McDonald* operate as guides on how to navigate that analysis. First, a court must examine the text of the Second Amendment through the lens of its historical meaning at the time it was enacted and ratified. Once the court has thus established the scope of the right, it must then look to historical and traditional regulations to determine what regulation of arms was considered appropriate. Finally, the court must parse the challenged statute or regulation to determine if it is consistent with, or the modern analogue of, historical and traditional regulations.

Instead, the Ninth Circuit employed a two-step, interest-balancing test to assess Hawaii's effectual ban on the carriage of firearms in public. Worse, in employing that two-step test, the Ninth Circuit fundamentally misconstrued the historical and traditional framework surrounding the public carriage of arms. In so doing, the Ninth Circuit established binding precedent for millions of Americans based on a deeply flawed historical analysis.

The question of the scope of the Second Amendment's protections outside the home, however, is already before this Court in *NYSRPA*. As

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[2] This grant, vacate, and remand practice is commonly referred to as a "GVR."

acknowledged by Petitioner, this case "presents the same issue presented in" *NYSRPA*. Pet. at 1. This Court need not fully address the issue here. Instead, this Court should hold this case over and employ its oft-used GVR power. Doing so would conserve this Court's resources but would allow the Court to vacate the Ninth Circuit's historically flawed opinion while having this case re-evaluated under the precedent elucidated or established in *NYSRPA*. This approach carries very little risk for the Court, given this Court could simply deny *certiorari* in this matter should its final opinion in *NYSRPA* resemble the Ninth Circuit's opinion or, if it does not, this Court could GVR this matter or grant plenary review at that time.

ARGUMENT

I. *HELLER* AND *MCDONALD* SET FORTH THE APPROPRIATE TEST TO ANALYZE SECOND AMENDMENT CHALLENGES

Courts must analyze the text, history, and tradition of the Second Amendment when determining whether a modern firearm regulation is constitutional.

Employing this Court's precedent, courts must first look to the text and history of the Second Amendment to determine the "scope of the right." *Heller*, 554 U.S. at 625. While the pure textual analysis allows the court to partially determine the scope, looking to the historical landscape is necessary

because "the Second Amendment was not intended to lay down a 'novel principl[e]' but rather codified a right 'inherited from our English ancestors.'" *Id.* at 599 (alterations in original) (citation omitted). Once the scope is established, the court then looks to traditional regulation, which clarifies "the public understanding of [the] legal text in the period after its enactment or ratification." *Id.* at 605. Finally, the court must parse the challenged regulation to determine if it fits within the history and tradition of arms regulation. *Id.* at 631–35.

Restrictions that comport with early historical and traditional regulation of arms are presumed constitutionally sound. A court may draw analogues between modern arms and traditional regulations, just as courts regularly do when evaluating First Amendment protections for electronic speech. *See Heller v. District of Columbia*, 670 F.3d 1244, 1275 (D.C. Cir. 2011) ("*Heller II*") (Kavanaugh, J., dissenting) ("Nor does it mean that the government is powerless to address those new weapons or modern circumstances. Rather, in such cases, the proper interpretive approach is to reason by analogy from history and tradition.") (citations omitted).

Sections II and III of the *Heller* opinion operate as a roadmap of how to undertake this analysis. 554 U.S. at 576–628. First, the *Heller* Court analyzed the text of the Second Amendment "guided by the principle that '[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.'" *Id.* at 576 (citations

omitted). After analyzing the text, the Court then looked to contemporaneous and analogous state constitutional provisions. *Id.* at 600–03. The Court next turned to the historical and traditional interpretation of the Second Amendment, specifically the period "immediately after its ratification through the end of the 19th century." *Id.* at 605. Finally, the Court noted that certain longstanding limitations on the right to keep and bear arms are presumptively lawful. *Id.* at 626 ("Like most rights, the right secured by the Second Amendment is not unlimited."). The Court did not elaborate on the extent of those "longstanding prohibitions." *Id.* at 626–27.

The *McDonald* Court engaged in a similar examination: first, looking to *Heller*'s textual analysis, 561 U.S. at 767–68; then to the historical scope, *id.* at 768–69; and eventually to traditional treatment and regulation, *id.* at 769–78.[3]

"*Heller* and *McDonald* leave little doubt that courts are to assess gun bans and regulations based on text, history, and tradition . . . ." *Heller II*, 670 F.3d at 1271 (Kavanaugh, J., dissenting).

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[3] Given this Court was considering incorporation under the Fourteenth Amendment, the Court also looked to historical and traditional regulation surrounding the ratification of that Amendment. *McDonald*, 561 U.S. at 770–78.

II. THE NINTH CIRCUIT'S ANALYSIS OF THE HISTORICAL AND TRADITIONAL REGULATION OF THE RIGHT TO BEAR ARMS IS FUNDAMENTALLY FLAWED

After *Heller* and *McDonald*, circuits across the nation have eschewed the text, history, and tradition analysis and instead apply a two-step test to review Second Amendment challenges. Pet.App.34–36; *see, e.g.*, *Gould v. Morgan*, 907 F.3d 659, 669 (1st Cir. 2018) ("Although we have not yet explicitly adopted this two-step approach, we do so today."); *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 254 (2d Cir. 2015) ("Lacking more detailed guidance from the Supreme Court, this Circuit has begun to develop a framework for determining the constitutionality of firearm restrictions. It requires a two-step inquiry."). While this improper, but now widely adopted, test suffers many problems, *Amicus* sets those aside to focus specifically on the flaws in the Ninth Circuit's analysis of history and tradition.

The Ninth Circuit reasons that the right to bear arms outside the home falls outside of the Second Amendment's historical and traditional scope. But in so determining, the Ninth Circuit relies on a deeply flawed analysis of history and tradition. While it is impossible to address all of the flaws in the Ninth Circuit's analysis, *Amicus* presents this Court with

numerous examples that evidence the gravity of the Ninth Circuit's errors.[4]

A. Early English Regulation of the Right to Bear Arms

The Ninth Circuit's analysis of the English regulation of the right to bear arms selectively quotes English sources and ignores other sources that weigh against the *en banc* court's conclusion finding no protected right to bear arms in public.

For example, the Ninth Circuit cites to the now-famous Statute of Northampton. Pet.App.46.

> [N]o man great nor small, of what condition soever he be, . . . be so hardy to come before the King's justices, or other of the King's ministers doing their office, with force and arms, nor bring no force in affray of the peace, nor to go nor ride armed by night nor by day, in fairs, markets, nor in the presence of the justices or other ministers, nor in no part elsewhere, upon pain to forfeit their armour to the King, and their bodies to prison at the King's pleasure.

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[4] The Ninth Circuit also commits numerous errors in its analysis of the post-ratification tradition of the right to bear arms, but *Amicus* omits analysis of those issues due to length limitations. That period will certainly be covered by *amici curiae* during briefing in *NYSRPA* or could be addressed in this matter should this Court grant *certiorari*.

2 Edw. 3, c. 3 (1328). But the Ninth Circuit ignores that, based on its text and the weight of historical evidence, the Statute of Northampton did not prohibit the *peaceable* bearing of arms in public. Two English common law opinions elucidate this understanding.

In *Chune v. Piott*, an English court held that "without all question, the sheriffe hath power to commit . . . , if contrary to the Statute of Northampton, he sees any one to carry weapons in the high-way, *in terrorem populi Regis*; he out to take him, and arrest him, notwithstanding he doth not break the peace *in his presence*." 80 Eng. Rep. 1161, 1162 (K.B. 1615) (emphasis added); *see* Pet.App.49. The Ninth Circuit quotes *Chune* but omits "in his presence" from that court's holding, and thus concludes that there was a legal offence notwithstanding the intent to and effect of terrorizing the public. Pet.App.49. In actuality, the *Chune* court held that the intent and terror need not have occurred in front of the sheriff, who could arrest someone based "upon suspition [*sic*]." *Chune*, 80 Eng. Rep. at 1162. The *Chune* Court did not, in any way, undermine the requirement that the carriage must be to the terror of the public to be illegal.

Further, the Ninth Circuit misconstrues the holding of the now-equally famous *Sir John Knight's Case*. Pet.App.49. Sir John Knight "was accused of 'going armed, to the terror of the public' and charged under the Statute of Northampton and common law crime of 'affray.'" *Id.* (citing *Rex v. Sir John Knight*, 87 Eng. Rep. 75, 75–76 (K.B. 1685)). But the Ninth Circuit incorrectly argues there is some conflict as to

the basis of the court's opinion that acquitted Sir John Knight of this charge.

When *Sir John Knight's Case* was decided, "English courts did not deliver written opinions." David B. Kopel & George A. Mocsary, *Errors of Omission: Words Missing from the Ninth Circuit's* Young v. Hawaii, 2021 U. ILL. L. REV. ONLINE 172, 177 (2021). In their place, judges ruled orally from the bench, which was then relayed to the public by reporters. *Id.* These reports have been collected into a series of case reporters called the *English Reports*. *Id.* *Sir John Knight's Case* appears in two such reports, Volumes 87 and 90. *Id.*

Volume 90 contains a quote from the Chief Justice of the King's bench, noting that "the Statute of Northampton had 'almost gone in desuetudinem, yet where the crime shall appear to be malo animo, it will come within the Act.'" *Id.* (citing *Rex v. Sir John Knight*, 90 Eng. Rep. 330, 330 (K.B. 1685)). In other words, the Chief Justice highlighted that the Statute of Northampton was rarely (if ever) enforced and was relevant only where there was ill intent.

The Ninth Circuit then selectively cites to Volume 87 to create conflict where it does not exist: "According to another reporter, the Chief Justice of the King's Bench opined that the meaning of the Statute of Northampton was to punish those who go armed." Pet.App.50 (citing *Sir John Knight's Case*, 87 Eng. Rep. at 76). The Ninth Circuit, however, misconstrues the court's holding, via the Chief Justice's statement on page 76, which reads:

> [T]he meaning of the statute of 2 Edw. 3, c. 3, was to punish people who *go armed to terrify the King's subjects*. It is likewise a great offence at the common law, as if the King were not able or willing to protect his subjects; and therefore this Act is but an affirmance of that law.

Sir John Knight's Case, 87 Eng. Rep. at 76 (emphasis added). The Ninth Circuit entirely omits a necessary element of the crime—to the terror of the public.

Finally, the Ninth Circuit cites to a 1350 Act of Parliament that purportedly "banned the carrying of concealed arms." Pet.App.46. The Ninth Circuit's altered quotation of the statute reads: "[I]f percase any Man of this Realm ride armed [covertly] or secretly with Men of Arms against any other . . . it shall be judged . . . Felony or Trespass, according to the Laws of the Land." Pet.App.46 (quoting 25 Edw. 3, 320, st. 5, c. 2, § 13 (1350)) (alteration in original). But, the Circuit's omissions are significant. The full text of the statute provides:

> And if percase any Man of this Realm ride armed [covertly] or secretly with Men of Arms against any other, *to slay him, or rob him, or take him, or retain him till he hath made Fine or Ransom for to have his Deliverance*, it is not the Mind of the King nor his Council, that in such case it shall be judged Trespass, but shall be judged . . . . Felony or Trespass, according to the Laws of

> the Land of old Times used, and according as the case rquireth [*sic*].

25 Edw. 3, 320, st. 5, c. 2 (1350) (emphasis added).

While this review of the English treatment of the right to bear arms is far from exhaustive, it is apparent that the Ninth Circuit fails to appropriately and accurately analyze that historical evidence.

B. Colonial Regulation of the Right to Bear Arms

The Ninth Circuit's examination of colonial firearm carry regulations is equally flawed.

First, the Ninth Circuit details multiple colonial regulations that *required* individuals to bear arms when traveling or attending church, but then draws a spurious conclusion therefrom: "What is clear is that the colonies assumed that they had the power to *regulate*—whether through *mandates* or *prohibitions*—the public carrying of arms." Pet.App.61 (emphasis in original).

The mandates the Circuit refers to existed in ten colonies and were aimed at ensuring the colony was adequately protected from external and/or internal threats. Pet.App.58–61, 60 n.16. The idea that because the colonies believed they could require residents to go armed in order to effectuate self- and community defense also means that the colonies could prohibit carriage in public—because both are forms of regulation—strains credulity.

Further, two of the statutes the Ninth Circuit relies on that purportedly prohibited public carry actually mimic the Statute of Northampton. Both "Massachusetts Bay and New Hampshire enacted statutes that banned carrying 'offensively.'" Kopel & Mocsary, *Errors of Omission*, 2021 U. ILL. L. REV. ONLINE at 180 (citing Pet.App.58). Again, the Ninth Circuit fails to recognize these laws did not broadly prohibit the carriage of firearms in public, but rather prohibited individuals from going "armed Offensively" and putting "his Majesty's subjects in fear." Pet.App.58 (citing An Act for the Punishing of Criminal Offenders, 1692 Mass. Laws No. 6, at 11–12 and 1699 N.H. Laws. 1).

The only statute in our colonial history that truly prohibited individuals from bearing arms in public hails from New Jersey. Pet.App.57. The New Jersey law, however, only prohibited the *concealed* carriage of *specific* arms: "[N]o person . . . shall presume privately to wear any pocket pistol, skeines, stilettoes, daggers or dirks, or other unusual or unlawful weapons within this Province . . . ." 1686 N.J. Laws 289, 289, ch. IX. Planters (or frontiersmen) were also specifically prohibited from openly carrying swords, pistols, or daggers. *Id.*

In other words, the only complete prohibition on bearing arms in our colonial history applied specifically to Planters who wished to carry a sword, pistol, or dagger in the province of New Jersey—a far cry from the Ninth Circuit's insistence that colonies recognized they had the broad power to prohibit public carriage of arms.

Contrary to the Ninth Circuit's characterization, the colonists did not share any English concern "that the mere presence of firearms in the public square presented a danger to the community." *See* Pet.App.56–57. First, because there was no concern to share, given the English were only generally concerned about carriage that caused an affray, disturbed the peace, or was to the terror of the public. Second, because even if the English held that concern, the colonists clearly did not. Not only were there only three colonies that restricted the right to bear arms in public at all (none of which acted as a complete prohibition, except as to Planters), but ten separate colonies required colonists to bear arms in public in certain instances. Any insistence that the colonies did not overwhelmingly understand the right to bear arms to extend to outside of the home is utterly unsupported by the historical record.

This brief cannot address each instance where the Ninth Circuit's 57-page opinion misconstrues or misapplies history and tradition. This Court could grant *certiorari* in this matter to allow for a fuller elucidation of the historical record by the parties and additional *amici*, or this Court could hold this matter over and rely on the extensive briefing set to be provided to this Court in the matter of *NYSRPA* to decide the issue of public carriage.

III. THIS COURT SHOULD GRANT *CERTIORARI*, VACATE THE NINTH CIRCUIT'S *EN BANC* OPINION, AND REMAND THIS MATTER AFTER DECIDING *NEW YORK STATE RIFLE & PISTOL ASSOCIATION V. CORLETT*

This case presents the Court with a clear opportunity—grant, vacate, and remand. This Court's GVR power has been hailed by some and maligned by others but can be appropriately employed here.

The practice of GVR did not arise until the early to mid-Twentieth Century and while then focused predominately on intervening state law or judicial opinions, the GVR, as today, was an entirely discretionary and prudential practice. Shaun P. Martin, *Gaming the GVR*, 36 ARIZ. STATE L.J. 551, 553 (2004). Since that point, "the GVR order has, over the past 50 years, become an integral part of this Court's practice, accepted and employed by all sitting and recent Justices." *Lawrence on Behalf of Lawrence v. Chater*, 516 U.S. 163, 166 (1996) (*per curiam*).

While there remains debate as to when a GVR is appropriate, it is well-settled that a GVR is, at minimum, appropriate when an intervening event that the lower court did not have the opportunity to consider—including this Court's own decisions—would fundamentally affect the lower court's decision. *See Lawrence*, 516 U.S. at 166–67 (*per curiam*) ("We have GVR'd in light of a wide range of developments, including our own decisions . . . .") (citations omitted);

Stutson v. United States, 516 U.S. 163, 180 (1996) (Scalia, J., dissenting) ("The 'intervening event' branch of our [GVR] practice has been extended to the seemingly analogous situation . . . in which an intervening event (ordinarily a postjudgment decision of this Court) has cast doubt on the judgment rendered by a lower federal court or a state court concerning a *federal* question.") (emphasis in original) (citations omitted).

This Court now regularly GVRs cases that are pending on petition for writ of *certiorari* in light of a newly decided case when this Court establishes new legal precedent or vindicates previously unfollowed precedent. *See, e.g.*, *Graham v. Barnette*, No. 20-896, 2021 WL 2301963 (U.S. 2021) (GVR'd in light of *Caniglia v. Strom*, 141 S. Ct. 1596 (2021) because both cases involved attempted application of the community caretaking exception to the Fourth Amendment to warrantless searches and seizures within the home); *McCoy v. Alamu*, 141 S. Ct. 1364 (2021) (GVR'd in light of *Taylor v. Riojas*, 141 S. Ct. 52 (2020) where both cases addressed question of whether correctional officers had qualified immunity for seemingly blatant Eighth Amendment violations); *Klein v. Or. Bureau of Lab. & Indus.*, 139 S. Ct. 2713 (2019) (GVR'd in light of *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rights Comm'n*, 138 S. Ct. 1719 (2018) where both cases addressed bakers that refused to bake a wedding cake for a gay couple and were subsequently fined by a state regulatory agency).

Issuing a GVR in pending cases allows this Court to conserve its "scarce resources . . . that might

otherwise be expended on plenary consideration," while assisting "the court below by flagging a particular issue that it does not appear to have fully considered." *Lawrence*, 516 U.S. at 167. Additionally, this Court can benefit from the full development of the record below based on the newly elucidated or established precedent. *Id.*

In an analysis conducted by Dr. Feldman, in just over two terms (between September 2014, and November 2016), this Court GVR'd 223 cases. Dr. Adam Feldman, *Under the Radar with GVRs*, EMPIRICAL SCOTUS (November 6, 2016), https://www.empiricalscotus.com/gvrs/. At the time of filing this brief, this Court has issued 66 GVRs this term.[5]

Furthermore, this Court "regularly hold[s] cases that involve the same issue as a case on which certiorari has been granted and plenary review is being conducted *in order that* (if appropriate) they may be 'GVR'd' when the case is decided." *Stutson*, 516 U.S. at 181 (Scalia, J., dissenting) (emphasis in original).

This would not be the first time this Court held and GVR'd a case related to a (potentially) landmark

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[5] The number of GVRs (not including GVRs for mootness or lack of jurisdiction) in the relevant Orders of this Court are as follows: Oct. 5, 2020, 6 GVRs; Nov. 16, 2020, 2 GVRs; Dec. 3, 2020, 1 GVR; Dec. 15, 2020, 1 GVR; Jan. 11, 2021, 5 GVRs; Feb. 8, 2021, 1 GVR; Feb. 22, 2021, 2 GVRs; Mar. 8, 2021, 1 GVR; Apr. 19, 2021, 2 GVRs; Apr. 26, 2021, 1 GVR; May 3, 2021, 16 GVRs; May 24, 2021, 3 GVRs; June 7, 2021, 1 GVR; June 14, 2021, 2 GVRs; June 21, 2021, 22 GVRs.

Second Amendment decision. In *Maloney v. Rice*, 561 U.S. 1040 (2010), this Court held the petition for writ of *certiorari* while it underwent plenary review in *McDonald v. City of Chicago*. The question at issue in both cases—whether the Second Amendment applies to the various states. When this Court issued its landmark opinion in *McDonald*, it also GVR'd *Maloney* in light of the Court's decision in *McDonald*. 561 U.S. 1040.

The matter before this Court is a perfect vehicle for this Court's practice of holding a case and then GVR'ing that case (if appropriate) in light of an upcoming, intervening decision. Both this matter and *NYSRPA* involve the issue of firearm carry permits. The question presented to this Court in *NYSRPA* is "[w]hether the state's denial of Petitioners' applications for concealed-carry licenses for self-defense violated the Second Amendment." *NYSRPA*, No. 20-843. Petitioner here acknowledges that "[t]his petition presents the same issue accepted for review in *NYSRPA*." Pet. at 1 ("Thus, the threshold question necessarily presented in NYSRPA is the first question presented here, *viz.*, whether the Second Amendment right extends outside the home at all.").

While the ultimate resolution of *NYSRPA* remains to be determined, it is highly likely this Court will resolve the question of whether the protections of the Second Amendment extend outside the home—a question this Court has yet to affirmatively address. If this Court resolves that question in the affirmative, then this Court will inevitably review the extent of carriage licensing systems, including their historical

antecedents, in coming to its decision. Such guidance would be a relevant and beneficial consideration for the lower courts here.

Even if this Court does not address the question of whether the Second Amendment's protections extend outside the home, but determines New York violated the petitioners' rights in *NYSRPA*, that analysis will still be helpful guidance for the lower courts. *See, e.g.*, *Klein*, 139 S. Ct. 2713 (GVR'd in light of *Masterpiece Cakeshop*, even though *Masterpiece* did not resolve the extent of the First Amendment question at issue, just that the state agency's decision could not itself be the product of discrimination).

Holding this case over until *NYSRPA* is resolved presents little downside. If, because of some intervening event, *NYSRPA* is deemed moot, this Court could grant plenary review here to resolve the same question presented. Alternatively, if this Court upholds the Second Circuit's holding in *NYSRPA*, this Court could deny *certiorari* at that point. While holding this matter over will consume resources for docket management purposes, those resources are minimal in light of the potential judicial resources that would be expended if the constitutionality of Hawaii's carry licensing system were to be entirely relitigated after this Court decides *NYSRPA*.

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This Court has established that Second Amendment challenges must be analyzed based on the text of the Second Amendment, as well as the

historical and traditional limitations on the right. While engaging in its history and tradition analysis, however, the Ninth Circuit fundamentally misconstrues and misinterprets the historical and traditional regulations at issue, thereby depriving millions of Americans of their right to bear arms outside the home in error. But given this Court's limited resources, and the pending review of *NYSRPA*, this Court should hold this matter over until that case is decided, and then GVR this matter, if appropriate at that time, in line with this Court's common practice.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of *Certiorari*, vacate the Ninth Circuit's opinion, and remand this matter to the lower court.

Respectfully submitted,

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