No. 12-17808

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

v.

STATE OF HAWAI'I and NEIL ABERCROMBIE in his capacity as Governor of the State of Hawai'i; DAVID M. LOUIE in his capacity as State Attorney General; COUNTY OF HAWAI'I, as a sub-agency of the State of Hawai'i and WILLIAM P. KENOI in his capacity as Mayor of the County of Hawai'i; and the Hilo County Police Department, as a sub-agency of the County of Hawai'i and HARRY S. KUBOJIRI in his capacity as Chief of Police; JOHN DOES 1-25; JANE DOES 1-25; CORPORATIONS 1-5, AND DOE ENTITIES 1-5, Defendants-Appellees.

APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAI'I
THE HONORABLE HELEN GILLMOR
CASE NUMBER: CV12-00336 HG BMK

# DEFENDANTS-APPELLEES COUNTY OF HAWAI'I, WILLIAM P. KENOI, HILO COUNTY POLICE DEPARTMENT, AND HARRY S. KUBOJIRI'S **RESPONSE** TO PLAINTIFF-APPELLANT'S SUPPLEMENTAL BRIEF [#87] FILED JUNE 23, 2016; CERTIFICATE OF COMPLIANCE; CERTIFICATE OF SERVICE

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| GEORGE K. YOUNG, JR.,<br>Plaintiff-Appellant,<br>vs.<br>STATE OF HAWAI'I; NEIL ABERCROMBIE, in his capacity as Governor of the State of Hawai'i; DAVID M. LOUIE, in his capacity as State Attorney General; COUNTY OF HAWAI'I, as a sub-agency of the State of Hawai'i; WILLIAM P. KENOI, in his capacity as Mayor of the County of Hawai'i; HILO COUNTY POLICE DEPARTMENT, as a sub-agency of the County of Hawai'i; HARRY S. KUBOJIRI, in his capacity as Chief of Police; JOHN DOES 1-25; JANE DOES 1-25; DOE CORPORATIONS 1-5; DOE ENTITIES 1-5,<br>Defendants-Appellees. | No. 12-17808<br>D.C. No. 1:12-cv-00336-HG-BMK<br><br>APPEAL FROM THE UNITED STATES DISTRICT COURT OF THE DISTRICT OF HAWAI'I<br><br>HONORABLE HELEN GILLMOR |

**DEFENDANTS-APPELLEES COUNTY OF HAWAI'I, WILLIAM P. KENOI, HILO COUNTY POLICE DEPARTMENT, AND HARRY S. KUBOJIRI'S RESPONSE TO PLAINTIFF-APPELLANT'S SUPPLEMENTAL BRIEF [#87] FILED JUNE 23, 2016**

**CERTIFICATE OF SERVICE**

Defendants-Appellees COUNTY OF HAWAI'I, as a sub-agency of the State of Hawai'i, WILLIAM P. KENOI, in his capacity as Mayor of the County of Hawai'i, HILO COUNTY POLICE DEPARTMENT, as a sub-agency of the County of Hawai'i, and HARRY S. KUBOJIRI, in his capacity as Chief of Police (collectively "County"), by and through their attorneys, respectfully submit this Response to Plaintiff-Appellant GEORGE K. YOUNG, JR.'s ("Appellant") Supplemental Brief [87], filed June 23, 2016 ("Supp. Brief").

## I. INTRODUCTION

As anticipated, Appellant has made no effort to distinguish *Peruta* in his Supp. Brief. Instead, Appellant requests this Court go beyond the precedent of *Peruta, Heller and McDonald* and establish that the Second Amendment protects any individual, in any circumstance, to open carry firearms in public. This is a position that the U.S. Supreme Court has not established, *Peruta* refused to adopt and which has been rejected by other Circuits.

## II. ARGUMENT

### A. County's Reasonable Regulation of Firearms is Constitutional

In *District of Columbia v. Heller*, 554 U.S.570 at 595 (2008), the Supreme Court found that the "core" Second Amendment right to bear arms in one's home is protected. In *McDonald v. City of Chicago*, 561 U.S. 742, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010), the Supreme Court held that the Due Process Clause of the

Fourteenth Amendment incorporates the "core" of Second Amendment rights making the Second Amendment applicable to both the Federal and State governments. Appellant does not dispute that he is able to have a handgun in his home. Rather, Appellant argues he has a constitutional right to carry a handgun in public, outside of his home.

However, the Supreme Court observed that the right to bear arms is not unlimited. *Heller* at 595 (2008). Stating that the "right [is] not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id* at 626 . The Court explained that its list of "presumptively lawful regulatory measures" is illustrative and not exhaustive. *Id.* at 627 n. 26.

*McDonald* reiterates that "the right to keep and bear arms is not 'a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose' " and neither *Heller* nor *McDonald* "cast[s] doubt on such longstanding regulatory measures as 'prohibitions on the possession of firearms by felons and the mentally ill.'" *McDonald*, 561 U.S. at 786, 130 S.Ct. at 3047 (quoting *Heller,* 554 U.S. at 626, 128 S.Ct. 2783). The Court indicated its list was not an exhaustive analysis, but merely examples of "presumptively lawful regulatory measures." *Heller*, 554 U.S. at 627, fn. 26. As a result, Appellant's attempt to limit *Heller* to time, place and manner restrictions alone is misleading since the Court was merely pointing out a few examples that included conditions

relating to status or mental health clearly not limited time, place or manner restrictions.

Hawai‘i allows for the use and carry of handguns and long arms and is far from a complete ban. HRS Chapter 134 sets forth a comprehensive system of registration and legally recognized restrictions for the ownership and possession of firearms.

Hawai‘i law allows for firearms to be kept in one's place of business, residence or sojourn. HRS § 134-23. Gun owners are also permitted to carry firearms, including handguns, to and from one's home to a target range, from the place of purchase to one's home, to designated hunting grounds, to a place of repair, to a licensed dealer, to firearms shows, to hunter or firearm training and to the police station. HRS § 134-23.

A person may carry a handgun to and from additional places if they meet the requirements of HRS§134-9. The controlling considerations for the issuance of a permit to carry are age, results of background checks, a "reason to fear injury", good moral character, as well as where "the urgency or the need has been sufficiently indicated". [1] HRS § 134-9.

The Ninth Circuit noted in *Peruta* the following regarding the Supreme Court's decision in *Heller:*

[1]Appellant has never alleged that he satisfied the requirements of HRS § 134-9. Rather, he alleges that the requirements of HRS § 134-9 are unconstitutional.

> The Court again emphasized the limited scope of its holding, and underscored the tools that remained available to the District of Columbia to regulate firearms. Referring the reader back to the passage just quoted, the Court wrote: The Constitution leaves the District of Columbia a variety of tools for combating th[e] problem [of handgun violence], including some measures regulating handguns.
>
> *Peruta v. Cty. of San Diego*, No. 10-56971, 2016 WL 3194315, at *6 (9th Cir. June 9, 2016)(quoting *Heller,* 554 U.S. at 626-627, and n. 26, 128 S.Ct. 2783)

Therefore, *Heller* does not mandate unrestricted access to handguns or the right to carry handguns in public places. Restrictions, such as the ones imposed by Hawai‘i’s laws, are often found constitutional. The most common level of scrutiny applied to Second Amendment analysis is the intermediate level, unless a complete ban exist. *Jackson v. City &Cty. of San Francisco,* 746 F.3d 953, 964 (2014).

When considering whether good-cause or special-need restrictions on carrying firearms in public are constitutional, Courts have found the government has a substantial interest in public safety which generally outweighs an individual’s need for self-defense. *See Woollard v. Gallagher*, 712 F.3d 865, 878-879 (4th Cir. 2013), *cert. denied*, 134 S.Ct. 422 (2013) (upholding similar restrictions on obtaining carry permit finding protecting public safety and preventing crime constituted a significant governmental interest); *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 96-97 (2nd Cir. 2012), *cert. denied*, 133 S.Ct. 1806 (2013)(upholding New York’s gun law on the carrying of firearms in public because of governmental interests in public safety and crime prevention); *Drake v. Filko*, 724 F.3d 426, 439

(3rd Cir. 2013), *cert. denied*, 134 S.Ct. 2134 (2014)(upholding New Jersey law because challenged law and the interest in public safety was reasonable).

Hawai‘i’s restrictions on carrying firearms in public serve the important and substantial governmental interests of public safety and crime prevention. As a result, Hawai‘i’s law does not violate the Second Amendment.

### B. Appellant’s Arguments Regarding Long Gun Carry Are Without Merit

Appellant lazily cites and misquotes *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010) to support a confusing argument that County have somehow waived any argument in support of long arm carry restrictions. However, it is Appellant who has waived these arguments, not County.

First, Appellant never raised these arguments before the Hawai‘i District Court. In fact, Appellant’s Complaint only alleges he was denied a license to carry ***a pistol or revolver,*** it is silent as to any challenge to the long arm carry law. As a result, Appellant is raising a new issue on appeal; however, the general rule is that this Court will not consider issues raised for the first time on appeal. *United States v. Carlson*, 900 F.2d 1346, 1349 (9th Cir. 1990).

Second, Appellant falsely concludes that long arm carry is banned in the County of Hawai‘i. HRS §§134-23 &134-24 place limitations on where firearms shall be confined and requires unloaded firearms to be carried in enclosed containers. HRS §§134-5 and 134-25 allow the carrying and use of lawfully

acquired rifles and shotguns outside the home for purposes of hunting and target shooting, negating the argument by Appellant that a "complete ban on long arm carry" exists.

Finally, Appellant's arguments regarding long arm carry are completely unrelated to *Peruta*. As a result, *Peruta* does not provide a basis for Appellant to submit supplemental arguments on this issue and therefore, these arguments should be disregarded.

### C. A Ruling Against Plaintiff Will Not Create A Circuit Split. Rather, It Will Provide Consistency Among The Circuits

Appellant argues that if this Court rules against him, there will be split in the Circuits. However, the opposite is true. A ruling in favor of the County which upholds HRS §134-9, will be consistent with the Second, Third and Fourth Circuits.

Appellant relies upon *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81 (2nd Cir. 2012), *cert. denied*, 133 S.Ct. 1806 (2013); *Drake v. Filko*, 724 F.3d 426 (3rd Cir. 2013), *cert. denied*, 134 S.Ct. 2134 (2014); *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013), *cert. denied*, 134 S.Ct. 422 (2013). However, in all of these cases, the Courts upheld the applicable statute finding the restriction on carrying

handguns outside of the home was constitutional.[2] Importantly, all of these cases involved restrictions similar to Hawai‘i’s.

Strangely, despite the holdings in *Drake, Kachalsky* and *Woollard*, Appellant argues these decisions support his position that HRS §134-9 is unconstitutional. In doing so, Appellant flagrantly ignores the holdings by these Courts, preferring instead to make the false or misleading argument that these Courts found the Second Amendment includes the right to carry a handgun outside of the home.

Although it is true that Courts have often assumed there is some right to carry handguns in public, this was done only because it was deemed wise not to decide this complicated and unsettled area of constitutional law, particularly because it was unnecessary to do so. *See Woollard v. Gallagher*, 712 F.3d 865, 874-76 (4th Cir. 2013)(noting “other courts of appeals have sometimes deemed it prudent” not to address whether challenge constitutes a burden on conduct protected by the Second Amendment and instead, address second step of analysis “means-end scrutiny”).

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[2]In *Drake,* New Jersey’s statute required an applicant demonstrate “justifiable need” to carry a handgun in public. *Id* at. 428. In *Kachalsky*, New York required an applicant to demonstrate “proper cause”, *Id.* at 83-84, and in *Woollard,* the Maryland law required an applicant demonstrate “good and substantial reason”. *Id.* at 869-870.

As the Fourth Circuit noted when it chose this cautious approach:

> We hew to a judicious course today, refraining from any assessment of whether Maryland's good-and-substantial-reason requirement for obtaining a handgun permit implicates Second Amendment protections. That is, we merely assume that the *Heller* right exists outside the home and that such right of Appellee Woollard has been infringed. We are free to make that assumption because the good-and-substantial-reason requirement passes constitutional muster under what we have deemed to be the applicable standard—intermediate scrutiny. *Id*. at 875-76.

The Fourth Circuit proceeded to find that Maryland's interests in protecting public safety and preventing crime constituted a significant governmental interest. *Id.* at 878. It also found the State restrictions on handgun permits advanced those interests because it reduced the number of handguns carried in public, thus protecting citizens and inhibiting crime.[3] *Id.* at 879.

Similarly, in *Drake v. Filko*, 724 F.3d 426 (3rd Cir. 2013), *cert. denied*, 134 S.Ct. 2134 (2014), the Third Circuit stated:

> For these reasons, we decline to definitively declare that the individual right to bear arms for the purpose of self-defense extends beyond the home, the "core" of the right as identified by *Heller*. We do, however, recognize that the Second Amendment's individual right to bear arms *may* have some application beyond the home. Ultimately… we refrain from answering this question definitively because it is not necessary to our conclusion (emphasis in original). *Id*. at 431.

[3]In upholding Maryland's restriction on handgun permits, the Fourth Circuit noted its agreement with the Second Circuit's decision in *Kachalsk*, which emphasized that it was the legislature's job to weigh conflicting evidence and make policy judgments. *Woollard v. Gallagher*, 712 F.3d at 881-882.

As a result, it is clear the Court did not reach any conclusion regarding this issue. Rather, the Court found it was unnecessary to do so because the "justifiable need" requirement was reasonable in light of the interest in public safety. *Id*. at 439-440.

In *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81 (2nd Cir. 2012), *cert. denied*, 133 S.Ct. 1806 (2013), the Court assumed there was some application in the public possession of firearms, but similar to the Courts in *Drake* and *Woollard,* declined to define that right. Rather, in upholding New York's requirement that an applicant demonstrate a special need for self-protection, the Court stated:

> …extensive state regulation of handguns has never been considered incompatible with the Second Amendment or, for that matter, the common-law right to self-defense. This includes significant restrictions on how handguns are carried, complete prohibitions on carrying the weapon in public, and even in some instances, prohibitions on purchasing handguns. In this vein, handguns have been subject to a level of state regulation that is stricter than any other enumerated right.
>
> *Kachalsky v. Cnty. of Westchester*, 701 F.3d at 100.

Therefore, contrary to Appellant's argument, *Kachalsky, Drake,* and *Woollard* do not stand for the proposition that an individual has a Second Amendment right to carry handguns in public. Rather, these cases stand for the proposition that the government may place significant restrictions on which individuals, if any, may obtain a permit to carry in public. As a result, there can be

little doubt that upholding Hawai‘i’s law would result in consistency among the Circuits, not a split, as erroneously argued by Appellant.

## III. CONCLUSION

Appellant’s Supp. Brief fails to focus on the impact of *Peruta* as promised. Instead, Appellant makes new and meritless arguments which must be rejected.

DATED: Hilo, Hawai‘i, July 12, 2016.

COUNTY OF HAWAI‘I, WILLIAM P. KENOI, HILO COUNTY POLICE DEPARTMENT, and HARRY S. KUBOJIRI, Defendants-Appellees

By /s/ Melody Parker
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**Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 29-2(c)(2) and (3), 32-2 or 32-4[1] for Case Number** 12-17808

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I certify that (check appropriate option):

☐ This brief complies with the length limits permitted by Ninth Circuit Rule 32-2(b). The brief is _____ words or _____ pages, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii), if applicable, and is filed by (1) ☐ separately represented parties; (2) ☐ a party or parties filing a single brief in response to multiple briefs; or (3) ☐ a party or parties filing a single brief in response to a longer joint brief filed under Rule 32-2(b). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

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Signature of Attorney or Unrepresented Litigant: /s/ Melody Parker

Date: July 12, 2016

("s/" plus typed name is acceptable for electronically-filed documents)

[1] If filing a brief that falls within the length limitations set forth at Fed. R. App. P. 32(a)(7)(B), use Form 6, Federal Rules of Appellate Procedure.

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**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 12, 2016.

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DATED: Hilo, Hawai‘i, July 12, 2016.

COUNTY OF HAWAI‘I, WILLIAM P. KENOI,
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By /s/ Melody Parker
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