Case No. 12-17808

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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

v.

STATE OF HAWAI‘I, ET AL.,
Defendants-Appellees

On Appeal from the United States District Court
for the District of Hawai‘i, Case No. 1:12-cv-00336-HG-BMK
Honorable District Judge Helen Gillmor

BRIEF OF *AMICI CURIAE* CITY AND COUNTY OF HONOLULU, COUNTY OF KAUA‘I, AND COUNTY OF MAUI IN SUPPORT OF PETITION FOR REHEARING *EN BANC*

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I. STATEMENT OF *AMICI CURIAE* PER RULE 29(a)(4)(D)-(E)

Amici curiae are the City and County of Honolulu, the County of Kaua‘i, and the County of Maui ("the Counties"), which submit this brief in support of the petition for rehearing *en banc* filed on September 14, 2018 (Dkt. No. 155).

The Counties have an interest in this case because, if the erroneous panel majority opinion stands, the result will be the deadly proliferation of guns on the Counties' streets and in other public places. The Counties also have an interest in explaining how they interpret and apply Hawai‘i laws regulating licenses to carry firearms, including open-carry licenses. The panel majority misunderstood and misstated County practices and procedures, which are explained below and in the accompanying declarations of Susan Ballard, the Chief of the Honolulu Police Department ("Ballard Decl."); Michael M. Contrades, the Acting Chief of the Kaua‘i Police Department ("Contrades Decl."); and Tivoli Faaumu, the Chief of the Maui Police Department ("Faaumu Decl.").[1]

Increasing the number of people carrying guns in public without any particular reason for doing so will needlessly endanger the lives of the Counties' citizens, especially their police officers. The panel majority's insistence that the

[1] This brief was not authored, in whole or in part, by any party's counsel. No party, counsel, or other person—other than *amici curiae* and their counsel—contributed money intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

Second Amendment somehow *requires* this deadly result—regardless of public safety, the will of the people of Hawai‘i, the separation of powers, and principles of federalism—calls to mind Justice Jackson's warning against the rigid assumption that "all local attempts to maintain order are impairments of the liberty of the citizen." *Terminiello v. City of Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting). "The choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact." *Id.*

II. ARGUMENT

A. The Counties do not limit open (or concealed) carry to security guards.

Setting aside, for the moment, the first part of the panel majority's opinion—in which it picks cherries from the orchards of history to feed spurious notions this Court already rejected, *en banc*, in *Peruta v. County of San Diego*, 824 F.3d 919 (9th Cir. 2016) (*Peruta II*)[2]—an essential premise of the majority opinion is that

[2] As the dissent in this case noted, this Court's *en banc* "opinion in *Peruta II* contained a lengthy discussion of history relevant to the Second Amendment, including the right to bear arms in old England, colonial America, and in the United States following adoption of the Fourteenth Amendment. It is sufficient for now to say that its assessment was different from that contained in" Judge O'Scannlain's opinion for the majority in *Peruta v. County of San Diego*, 742 F.3d 1144 (9th Cir. 2016) (*Peruta I*), which he largely repeated—despite *Peruta II*—in his opinion for "the majority here." *Young v. Hawaii*, 896 F.3d 1044, 1075 (9th Cir. 2018) (Clifton, J., dissenting).

section 134-9 of the Hawai‘i Revised Statutes (HRS) restricts "open carry to those whose job entails protecting life or property," such as security guards. 896 F.3d at 1071. The majority's premise is wrong, both as a matter of law, and of fact.

The Hawai‘i Attorney General has explained that, as a matter of law, HRS section 134-9 does ***not*** "limit the issuance of unconcealed-carry licenses to private security officers and other individuals whose jobs entail protecting life and property." State of Haw., Dep't of the Att'y Gen., Opinion Letter No. 18-1, *Availability of Unconcealed-Carry Licenses* (Sept. 11, 2018), *available at* https://ag.hawaii.gov/wp-content/uploads/2018/09/AG-Opinion-No.-18-1.pdf, *and at* Pet. Add. 77-86 (hereinafter Op. No. 18-1) at 2. On the contrary, HRS section 134-9 "authorizes the issuance of unconcealed-carry licenses to any qualified individual who demonstrates a sufficient 'urgency' or 'need' to carry a firearm and is 'engaged in the protection of life and property.'" *Id.* Regardless of occupation, an applicant may obtain an open-carry license if he or she (1) meets the objective qualifications for possessing and carrying a firearm; (2) demonstrates a sufficient need to carry a firearm for the purpose of protecting life and property; (3) is of good moral character; and (4) presents no other reason justifying the discretionary denial of a license. *Id.* "To satisfy these requirements, an applicant must demonstrate, among other things, that he or she has a need for protection that

substantially exceeds that held by ordinary law-abiding citizens." *Id.*; *see generally id.* at 1-10.

As a matter of fact, the Attorney General's interpretation of HRS section 134-9 comports with the Counties' past and current practice. *See* Ballard Decl. ¶¶ 5-6; Contrades Decl. ¶¶ 3-10; Faaumu Decl. ¶ 8. As Chief Contrades of the Kaua'i Police Department explains, "law-abiding citizens with a legitimate need to carry a handgun have been able to obtain a permit under the current system, which strikes a proper balance between ensuring access to handgun permits for those who need them while preventing a greater-than-necessary proliferation of handguns in public places—which," as discussed below, and as Chief Contrades further explains, "increases risks to public safety." Contrades Decl. ¶ 10; *see also id.* ¶¶ 11-17; Section B, *infra*. "If an applicant meets the express statutory requirements set forth in section 134-9, the Department will issue a carry permit, regardless of the applicant's occupation, provided that no case-specific reason warrants the exercise of discretion to deny a permit." Contrades Decl. ¶ 8.

For example, in 2006 and 2013, the Kaua'i Police Department issued concealed-carry permits to citizens who were not security guards and whose jobs did not entail protecting life or property. *Id.* ¶ 9. Those citizens "demonstrated, through their applications, that they had an immediate, pressing and heightened interest in carrying a firearm, and were accordingly issued concealed-carry

permits." *Id.* Thus, the majority's unfounded assertion that citizens of Hawai'i are "entirely foreclosed" from bearing arms for self-defense, 896 F.3d at 1071, is factually incorrect. People other than security guards have been able to demonstrate the need for, and thus obtain, permits to carry guns. Although those permits were for concealed rather than open carry, the dissent rightly observed that "firearm regulations which leave open alternative channels for self-defense are less likely to place a severe burden on the Second Amendment right than those which do not." *Id.* at 1081 (Clifton, J., dissenting) (quoting *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 961 (9th Cir. 2014)).

In any event, if an applicant were to request a permit for open rather than concealed carry, and if that applicant were to satisfy the statutory requirements for an open-carry permit as discussed above and in the Attorney General's opinion, "such a permit would be issued" by the Kaua'i Police Department, "regardless of the applicant's occupation, provided that no case-specific reason warrants the exercise of discretion to deny a permit." Contrades Decl. ¶ 9. Likewise, the Honolulu Police Department "does not deny open carry permits solely on the basis that the applicant is not a security guard or similarly employed in a job that entails protecting life and property." Ballard Decl. ¶ 5. On the contrary, as Chief Ballard explains, the Honolulu Police Department "reviews each application individually to determine whether, given the circumstances, a permit is warranted under Section

134-9 of the Hawaii Revised Statutes." *Id.* In making that determination, the Honolulu Police Department applies the same interpretation of the statute as set forth in the Attorney General's opinion. *Id.* ¶ 6; *see also* Op. No. 18-1. The same is true of the Maui Police Department. *See* Faaumu Decl. ¶ 8.

B. The panel majority opinion, if it stands, will jeopardize public safety.

As the Chiefs of Police of Honolulu, Kaua'i, and Maui explain in their declarations, the panel majority's decision "is of great concern" to Hawai'i law enforcement officials. Faaumu Decl. ¶ 9; *see also* Ballard Decl. ¶¶ 3, 7-11; Contrades Decl. ¶¶ 3, 10-17. Hawai'i's gun-control measures have been highly effective, whereas if Hawai'i can no longer limit open-carry permits to individuals with a good and substantial reason to have them, gun violence in Hawai'i will increase, and police officers' jobs will harder to perform and more dangerous. *See* Contrades Decl. ¶¶ 3, 10-17; Faaumu Decl. ¶¶ 9-12; Ballard Decl. ¶¶ 3, 7-11.

In 2016, the Centers for Disease Control and Prevention ("CDC") ranked Hawai'i fourth lowest in the United States for firearm-related deaths, with a total of 66 firearm-related deaths in that year, for a firearm death rate of 4.5 deaths per 100,000 total population. *See* Contrades Decl. ¶ 11; https://www.cdc.gov/nchs/pressroom/sosmap/firearm_mortality/firearm.htm. Massachusetts had the lowest firearm death rate (3.4 deaths per 100,000, 242 total), followed by Rhode Island (4.1, 49) and New York (4.4, 900). *See id.* The

states with the highest firearm death rates were Alaska (23.3, 177), Alabama (21.5, 1,046), Louisiana (21.3, 987), and Mississippi (19.9, 587). *See id.*; *see also* Faaumu Decl. ¶ 10 ("Statistical information shows that Hawaii has one of the lowest rates for deaths related to firearms in the country. This is especially true in Maui County, where firearm related violence is uncommon.").

Honolulu, in particular, "has a low rate of violent crime compared to other big cities." Ballard Decl. ¶ 7. As Chief Ballard notes, moreover, the "community as a whole is satisfied with the current gun legislation and the way applications are scrutinized, which strikes an appropriate balance between citizens' Second Amendment rights," which Chief Ballard recognizes and respects, "and protecting public safety by minimizing the proliferation of guns in public places." *Id.* If, on the other hand, the Honolulu Police Department were required to "issue open carry permits to applicants who have no special need for such protection, police officers will be likely to face greater danger because they will encounter more armed individuals. An officer trying to issue a traffic citation, for example, has far more to fear if the driver is armed." *Id.* ¶ 8. In fact, "any time guns are a factor in an interaction between officers and citizens, the risk of fatalities tends to increase." *Id.* ¶ 9. And the same is true of interactions between citizens. *Id.* The "presence of one or more guns in any dispute increases the chances that dispute will become deadly. Even when an armed individual is attempting to aid police, that fact may

not be immediately obvious to or verifiable by the officer, with potentially tragic consequences." *Id.* As Chief Ballard concludes, a "requirement to issue open carry permits to people who have no special need for them is likely to make citizens and police officers less safe and, at the very least, will make it much more difficult for the HPD to carry out its mission of serving and protecting with aloha." *Id.* ¶ 11.[3]

Indeed, statistical analysis indicates that issuing carry permits to people who have no special need for them results in "substantial increases in violent crime." John J. Donohue, Abhay Aneja & Kyle D. Weber, *Right-to-Carry Laws and Violent Crime: A Comprehensive Assessment Using Panel Data, the LASSO, and a State-Level Synthetic Controls Analysis* 4 (Nat'l Bureau of Econ. Research, Working Paper No. 23510, 2018), http://www.nber.org/papers/w23510. And, statistics aside, decades of experience in law enforcement tells Chief Contrades, for example, that if the Kaua'i Police Department could no longer limit open and concealed-carry permits to individuals with a good and substantial reason to have

[3] The official mission of the Honolulu Police Department is "[s]erving and protecting with aloha." http://www.honolulupd.org/department/index.php; *see also* Ballard Decl. ¶ 3. As the Hawai'i Legislature has explained, "aloha" is "more than a word of greeting or farewell or a salutation," but also "means mutual regard and affection and extends warmth in caring with no obligation in return," expressing "the essence of relationships in which each person is important to every other person for collective existence." HRS § 5-7.5. Hawai'i officials are statutorily required to act with aloha in "exercising their power on behalf of the people and in fulfillment of their responsibilities, obligations and service to the people." *Id.*

them, gun violence would increase, and his "officers' jobs would become harder and more dangerous." Contrades Decl. ¶ 12; *see also* Faaumu Decl. ¶¶ 9-12; Ballard Decl. ¶¶ 8-11.

As Chief Contrades explains, increasing the number of handguns carried publicly "would increase the availability of guns to criminals," particularly because the police "know from experience that these criminals often target people they know have handguns *precisely because* they possess handguns, which criminals cannot lawfully obtain." Contrades Decl. ¶ 13. The police often investigate homicides and robberies in which "one, if not the primary, goal of the attacker was to deprive the victim of his handgun or other weapons. Obtaining handguns and ammunition is also one of the main reasons why police officers' homes and vehicles have sometimes been targeted for robberies and break-ins." *Id.*; *see also* Ballard Decl. ¶ 10 ("[A]n increase in the number of guns that may be lawfully carried in public is likely to result in an increase in the number of gun thefts, and thus an increase in the number of guns in the hands of criminals.").

Although many people believe that they will be able to maintain possession of their handgun in a confrontation with a criminal attacker, "that is often not the case, especially in instances of surprise attacks." Contrades Decl. ¶ 14. Police officers are trained "in maintaining possession and control of their firearms during a confrontation," and are also issued "specially designed holsters with latches that

prevent an attacker from removing the firearm from its holster." *Id.* This "training and special equipment is essential to the safe handling of guns," whereas civilian training "cannot adequately prepare most people to use and protect handguns in tense situations such as being under attack by criminals. In surprise attacks, it is highly unlikely that less-well-trained individuals would be able to successfully use a handgun to defend themselves." *Id.*

Furthermore, allowing guns "on the streets in the hands of people without good and substantial reason to carry them would increase significantly the likelihood that basic confrontations between individuals would turn deadly." *Id.* ¶ 15. Most assaults in the County of Kaua'i, for example, arise from "petty disputes between otherwise law-abiding citizens. In the midst of these petty disputes, tempers flare and violence can erupt even in the absence of lethal weapons. The presence of a handgun in an altercation, however petty, greatly increases the likelihood that it will escalate into potentially lethal violence." *Id.*; *see also* Faaumu Decl. ¶ 11; Ballard Decl. ¶ 9.

Even law-abiding citizens who intend to help police may, if armed, "hamper police efforts in confrontations with criminals with potentially tragic consequences." Contrades Decl. ¶ 16. As Chief Contrades explains, in a confrontation between a police officer and a criminal, "an additional person bearing a gun might cause confusion as to which side of the confrontation the

person is on, which could lead to hesitation by the police officer and the potential for innocent victims, including the permit holder, innocent bystanders, and police officers." *Id.* This kind of problem "already occurs with existing permit holders, and would become far more common if permits were not limited to people with good and substantial reason to carry a handgun in public." *Id.* And "police officers who spot someone carrying a handgun [must] choose between creating a potential disturbance by unholstering their own weapon or potentially putting their safety at risk by approaching the carrier without drawing their weapon." *Id.* ¶ 17. Finally, police officers "would also have a harder time identifying potential security risks if more people without good and substantial reason to carry a handgun were able to do so, making it more difficult to respond when necessary." *Id.*; *see also* Faaumu Decl. ¶ 12 ("In addition to creating a safety concern for the public, additional firearms on the streets for people who have no special need for that protection will also create a greater danger to our officers.").

In short, the panel majority opinion, if allowed to stand, will needlessly jeopardize public safety. This, standing alone, should compel *en banc* review.

C. The panel majority erred in applying strict scrutiny.

In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court recognized that longstanding restrictions on carrying firearms may be "presumptively lawful," and certainly are not subject to strict scrutiny. *Id.* at 627

n.26. As the dissent in this case rightly concluded, HRS section 134-9 is "a longstanding, presumptively lawful regulation under *Heller*. At a minimum, the statute survives intermediate scrutiny, as the core of the Second Amendment does not include a general right to publicly carry firearms and there is a reasonable fit between the licensing scheme and Hawaii's legitimate interest in promoting public safety." 896 F.3d at 1076 (Clifton, J., dissenting). That conclusion is further supported by the declarations of Chiefs Ballard, Contrades, and Faaumu, which, as discussed above, demonstrate in detail the reasonable fit between HRS section 134-9, as interpreted and applied by the Counties, and the Counties' indisputably valid interest in public safety. *See* Ballard Decl. ¶¶ 1-11; Contrades Decl. ¶¶ 1-17; Faaumu Decl. ¶¶ 1-12.

The panel majority, however, insisted on strict scrutiny in its zeal to impose its will on Hawai‘i without regard for the reasonableness of Hawai‘i's proven methods for promoting and preserving public safety. *See* 896 F.3d at 1068-71. But the panel majority's application of strict scrutiny cannot be reconciled with this Court's *en banc* opinion in *Peruta II*, which recognized that "[e]ven if we assume that the Second Amendment applies" to restrictions on carrying firearms in public, such restrictions are subject to "***intermediate scrutiny***," and survive such scrutiny if they promote "'a substantial government interest that would be achieved less effectively absent the regulation.'" 824 F.3d at 942 (emphasis added)

(quoting, and explicitly agreeing with, Judge Graber's concurrence, which, in turn, agreed with "[t]hree of our sister circuits [that] have upheld similar restrictions under intermediate scrutiny," *id.* (Graber, J., concurring)); *see also*, *e.g.*, *Silvester v. Harris*, 843 F.3d 816, 823 (9th Cir. 2016) (finding "near unanimity in the post-*Heller* case law that when considering regulations that fall within the scope of the Second Amendment, intermediate scrutiny is appropriate"); *Drake v. Filko*, 724 F.3d 426, 436 (3d Cir. 2013) (applying intermediate scrutiny because, if the Second Amendment "protects the right to carry a handgun outside the home for self-defense at all, that right is not part of the core of the Amendment") (citation omitted); *Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013) (holding that "intermediate scrutiny applies 'to laws that burden [any] right to keep and bear arms outside of the home'") (quoting *United States v. Masciandaro*, 638 F.3d 458, 471 (4th Cir. 2011)); *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 96 (2d Cir. 2012) ("Because our tradition so clearly indicates a substantial role for state regulation of the carrying of firearms in public, we conclude that intermediate scrutiny is appropriate in this case.").

It is also worth noting that the panel majority only arrived at its decision to apply strict scrutiny by presuming to "afford little weight to *Heller*'s emphasis on the application of the Second Amendment to the home specifically." 896 F.3d at 1069. There is no excuse, however, for affording such little weight to something

the *Heller* Court clearly assigned great weight. Under *Heller*, the Second Amendment "surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." 554 U.S. at 635. The principle that the right of self-defense is far stronger inside the home than out on the streets is ancient. Blackstone, for example, commented that "every man's home is looked upon by the law to be his castle of defense and asylum, wherein he should suffer no violence." 3 William Blackstone, Commentaries *288. That is still true. In Hawai'i, for example, a person under attack is "not obliged to retreat from his dwelling or place of work, unless he was the initial aggressor or is assailed in his place of work by another person whose place of work the actor knows it to be." HRS § 703-304(5)(b). In public, however, the use of deadly force is not justifiable if the person "knows that he can avoid the necessity of using such force with complete safety by retreating." *Id.*

Consistent with this ancient principle that the right of self-defense is at its zenith in the home—and consistent with other authorities too numerous to discuss here—the dissent rightly concluded that "the core of the Second Amendment is focused on self-defense in protection of hearth and home," not on "a general right to publicly carry firearms." 896 F.3d at 1080 (Clifton, J., dissenting). Because the majority's decision necessarily relies on its erroneous conclusion to the contrary, the Court should review that decision *en banc*, as it did in *Peruta II*.

III. CONCLUSION

Thus, the Court should grant the petition for rehearing *en banc*.

CERTIFICATE OF COMPLIANCE

This brief complies with the length limit of Ninth Circuit Rule 29-2(c)(2) because it contains 3,807 words.

Dated: September 24, 2018

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing brief and accompanying declarations 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 September 24, 2018.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Dan Jackson
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