APPEAL NOS. 10-56971 & 11-16255

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EDWARD PERUTA, MICHELLE LAXSON; JAMES DODD; LESLIE BUNCHER, Dr.; MARK CLEARY; CALIFORNIA RIFLE AND PISTOL ASSOCIATION FOUNDATION, Plaintiffs-Appellants, STATE OF CALIFORNIA, Intervenor- Pending, vs. COUNTY OF SAN DIEGO; WILLIAM D. GORE, individually and in his capacity as Sheriff, Defendants-Appellees.	Appeal from the United States District Court for the Southern District of California The Honorable Irma E. Gonzalez, Chief District Judge, Presiding D.C. No. 3:09-cv-02371-IEG-BGS REHEARING EN BANC
ADAM RICHARDS; SECOND AMENDMENT FOUNDATION; CALGUNS FOUNDATION, INC.; BRETT STEWART, Plaintiffs-Appellants, vs. ED PRIETO; COUNTY OF YOLO, Defendants-Appellees.	Appeal from the United States District Court for the Eastern District of California The Honorable Morrison C. England, Chief District Judge, Presiding D.C. No. 2:09-cv-01235-MCE-DAD REHEARING EN BANC

AMICUS CURIAE BRIEF OF THE STATE OF HAWAII
IN SUPPORT OF DEFENDANTS-APPELLEES

ADDENDA 1-2

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AMICUS CURIAE BRIEF OF THE STATE OF HAWAII IN SUPPORT OF DEFENDANTS-APPELLEES

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Amicus Curiae is the State of Hawaii, whose interest is in preserving the constitutionality of **Hawaii's similar gun laws restricting public carry** (laws that were challenged in Baker v. Kealoha, see Ninth Circuit appeal No. 12-16258[1]), and in preserving its residents' safety**.** This brief respectfully urges this Court, sitting *en banc*, to overturn the three-judge panel ruling in Peruta v. County of San Diego. This brief is filed pursuant to Ninth Cir. R. 29-2(a), allowing any **State** to file an amicus brief without leave, and pursuant to Ninth Cir. R. 29-2(e)(2), and this Court's Order filed April 6, 2015, authorizing amicus entities to file amicus briefs on the merits of the case within 35 days of the entry of the order granting rehearing

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[1] Hawaii Revised Statutes §134-9 provides that **concealed** carry licenses may be granted only "[i]n an **exceptional** case, when the **applicant shows reason to fear injury to the applicant's person or property**[.]" (see Addendum 1, attached). **Unconcealed** or **open** carry licenses are generally limited to applicants "engaged in the protection of life and property," and where the "urgency or need" to so carry is indicated. Id.

Thus, the Baker challenge to *Hawaii*'s law is very similar to the challenge in this case. Indeed, the panel ruling in Peruta was the sole basis for the Baker panel's unpublished disposition. Baker v. Kealoha, 564 Fed.Appx. 903, 904-05 (9th Cir. 2014) ("In light of our holding in *Peruta*, the district court made an error of law when it concluded that the Hawaii statutes did not implicate protected Second Amendment activity. Accordingly, we vacate the district court's decision denying Baker's motion for a preliminary injunction and remand for further proceedings consistent with *Peruta*."). Therefore, the outcome of this rehearing en banc in Peruta will impact the pending rehearing petition filed in Baker by the City and County of Honolulu, et al.

Accordingly, disposition of the pending petition for rehearing or rehearing *en banc* in Baker has been "deferred pending this Court's resolution of pending post-opinion matters in *Peruta v. County of San Diego*, No. 10-56971." Baker Order, filed May 1, 2014.

en banc.

The panel majority in this case ruled that a "good cause" restriction on concealed carry, as interpreted by San Diego County, coupled with a ban on open carry, violates the Second Amendment. Hawaii believes strongly the panel majority was wrong, and urges this *en banc* Court to reject the Second Amendment challenge, and thereby ensure the ability of states to restrict public carry for the protection of the health and safety of the public. The panel opinion directly conflicts with three other circuit courts' rulings -- Kachalsky v. County of Westchester, 701 F.3d 81 (2d Cir. 2012), Drake v. Filko, 724 F.3d 426 (3d Cir. 2013), and Woollard v. Gallagher, 712 F.3d 865 (4th Cir. 2013). The United States Supreme Court denied certiorari in all three cases.

I. The Second Amendment Does Not Protect a Right to Carry Guns in Public, **Openly or Concealed**.

The Supreme Court has held only that the Second Amendment protects the right to possess a handgun **in the home** for the purpose of self-defense. D.C. v. Heller, 554 U.S. 570, 626-35 (2008) ("ban on handgun possession **in the home** violates the Second Amendment"); McDonald v. City of Chicago, 130 S.Ct. 3020, 3050 (2010) ("Heller … protects the right to possess a handgun **in the home** for … self-defense."). Heller expressly limited the right recognized:

> Like most rights, the right secured by the Second Amendment is not unlimited. … **[T]he right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose**. . . .

> **For example, the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues**. . . . **[N]othing in our opinion should be taken to cast doubt on longstanding** prohibitions on [possession by felons and the mentally ill,] **laws forbidding the carrying of firearms in sensitive places** such as schools and government buildings, or laws [limiting] commercial sale[s]. [footnote 26: We identify these **presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive**.].
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> ***
>
> [Government may not] absolute[ly] prohibit[] handguns held and used for self-defense **in the home**.

Heller, 554 U.S. at 626-27, 636.

Heller thus did not extend the Second Amendment to the carrying of handguns outside the home, **in public**. And Heller's explicit reference to the majority of courts holding **concealed** carry laws to be constitutional as an "example" of the Second Amendment right not being a right to "keep and carry any weapon … in any manner whatsoever," makes clear that even the Heller majority believes the Second Amendment does not protect a person's right to publicly carry a concealed weapon. See also Robertson v. Baldwin, 165 U.S. 275, 281-82 (1897) ("the right … to keep and bear arms … is not infringed by laws prohibiting the carrying of concealed weapons"). Crucially, and as explained below, this proposition should remain true even if **open carry** is **simultaneously** banned.

A. The Second Amendment Does Not Protect Activity Involving Firearms that Substantially Threatens Public Safety.

In addition to concealed carry bans, Heller made clear that the Second

Amendment did not limit certain other "presumptively lawful regulatory measures," including prohibitions on the possession of firearms by felons and the mentally ill, laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms. 554 U.S. at 626-27 & n.26. Heller accepted these exclusions from the Second Amendment as a given, without even questioning them. Why? Because such laws are, on their face, crucial to preserving **public safety**. There is no other plausible rationale given the list of measures the Supreme Court excluded without so much as a word of explanation. Kachalsky v. County of Westchester, 701 F.3d 81, 99 (2d Cir. 2012) (stating that Heller accepted "sensitive places" ban, for example, "presumably on the ground that [firearms are] too **dangerous** … in those locations"). Therefore, outside the "core" area of the home, if a firearms measure is reasonably designed to preserve public safety, then that would be a strong and sufficient reason to exempt it from Second Amendment protection. Id. at 94-95 ("'**outside the home**, firearm rights have always been more limited, because **public safety** interests often outweigh individual interests in self-defense.'[] There is a **longstanding tradition of states** regulating firearm possession and use **in public** because of the dangers posed to **public safety**."). As the Fourth Circuit commented regarding guns outside the home, "This is serious business. We do not wish to be even minutely responsible for some unspeakably

tragic act of mayhem because … we miscalculated as to Second Amendment rights." United States v. Masciandaro, 638 F.3d 458, 475 (4th Cir. 2011).

Therefore, if carrying firearms in public, openly or concealed, presents a serious public safety risk, public carry should be deemed outside the scope of the Second Amendment.

B. The Public Carry of Firearms, **Openly or Concealed**, Poses a Severe Threat to Public Safety.

The safety risk presented by the **concealed** carry of firearms in public -- activity even Heller exempts from Second Amendment protection -- is very clear. Importantly, the **open** public carrying of **unconcealed** firearms poses the same dangers to public safety, and poses additional risks as well. Concealed or unconcealed, firearms are lethal weapons, and are all too often used to kill and hurt people, both intentionally and by accident. The statistics are genuinely staggering. See Centers for Disease Control and Prevention (CDC), *National Vital Statistics Reports*, Vol. 61, No. 6, at 18-19 (2012) (showing for 2010: **31,328 total U.S. deaths related to firearms**, including **11,078** firearms related **homicides**, **19,392 suicides** by firearm, and **606 accidental** firearms deaths). In addition, there were an additional **73,505 nonfatal** gunshot **injuries** in 2010. CDC, *Nonfatal Injury Reports*, available at http://webappa.cdc.gov/sasweb/ncipc/nfirates2001.html. Thus, there were a stunning **104,833** firearms related deaths or injuries in 2010 alone. The U.S. (with 15 times the civilian firearms *per capita* as the U.K.) had a

2010 firearms **homicide *rate*** not double, but **72 times**, that of the U.K. Compare http://www.gunpolicy.org/firearms/region/united-states with http://www.gunpolicy.org/firearms/region/united-kingdom.

As for the specific act of carrying firearms **in public**, it is obvious that any strong anger or conflict between people that arises in the public sphere is made inherently more dangerous when one or more of the parties is carrying a firearm, **concealed or unconcealed**. And incidents of public anger or conflict are frequent and widespread.[2] When a conflict breaks out, or someone becomes extremely upset or angry while in public, common sense indicates that the danger increases dramatically if a person is armed. See Woollard v. Gallagher, 712 F.3d 865, 879 (4th Cir. 2013) ("limiting … public carrying of handguns … [l]essen[s] 'the likelihood that basic confrontations between individuals would turn deadly.'"). This is true regardless of whether a person is armed openly or concealed. It is having the firearm that heightens the danger. Road rage is only the most obvious example of where being armed magnifies the risk.[3] The recent Florida theatre

[2] If only 1% of the U.S. population of 310 million gets very angry or into conflicts each day, that would be **3.1 million people daily**.

[3] Indeed, the heightened risk posed by guns routinely carried in public is illustrated by the two concealed carry licensees who shot and killed **each other** after a tailgating incident. See http://www.dailykos.com/story/2013/09/19/1239955/-Two-concealed-carry-permit-holders-shoot-and-kill-each-other-in-Michigan#.

killing of a fellow moviegoer because he was texting on his cell-phone,[4] and the routine Alabama traffic stop turned capital murder case (concealed carry licensee shot and killed police officer),[5] are other too frequent examples. How many persons in a verbal confrontation in public would hope their opponents are armed with a loaded gun, and how many police officers conducting hundreds of traffic stops each year would hope more of their pulled-over motorists are carrying loaded firearms? It is simply common sense that the routine carrying of firearms in public (by non-law-enforcement personnel) poses serious risks to the general public, and to police officers in particular.

Moreover, having a weapon on oneself (openly or concealed) not only heightens the danger from anger or conflict, but could even increase the **number** of incidents of conflict in the public sphere, because a person who would ordinarily avoid conflict out of fear for one's safety might be emboldened because of a sense of invulnerability provided by the firearm.

Although an **unconcealed** weapon could theoretically deter a fight on occasion, such open carry could increase the likelihood of starting many fights. As just noted, a weapon generally may embolden one to welcome conflict (and even more so knowing one's potential adversary sees it). Also, **open** carry may

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[4] See http://www.cbsnews.com/news/report-fla-texting-shooter-also-sent-a-text-from-theater/.

[5] See http://blog.al.com/spotnews/2009/12/pharmacist_charged_in_officers.html.

encourage criminals to carry firearms themselves, either by the example set, or for parity. Philip Cook et al., *Gun Control After Heller,* 56 U.C.L.A. L. Rev. 1041, 1081 (2009) (Two-thirds of gun offense prisoners report choosing to use a gun because of possible armed victims). Police officers faced with a civilian **openly** carrying will be quicker to draw their own firearms out of self-preservation, which could lead to more shootings. Or, a gang member suddenly encountering an **openly** armed rival gang member might fear for his safety and attack preemptively.

There is also strong historical reason to view **open (unconcealed)** carrying of firearms as being especially outside the scope of the Second Amendment. Blackstone, upon whom the Heller majority relies, explained that the Statute of Northampton prohibited the "offense of riding or going armed with dangerous or unusual weapons" as "a crime against the public peace, **by terrifying the good people** of the land." 4 William Blackstone, *Commentaries* 148-49 (1769). The **open** carrying of firearms can directly "terrify" members of the public, while a **concealed** firearm might do so only when displayed or through the public's awareness that people around them may have concealed firearms. Thus, there is no reason to limit Heller's exclusion of public carry to **concealed** carry; the exclusion should extend to **open** carry as well. See Piszczatoski v. Filko, 840 F.Supp.2d 813, 836 (D.N.J. 2012) (upholding restrictions on **both concealed and open carry** and rejecting distinguishing restrictions on concealed carry **only**, because "the same

rationales apply … almost equally" to both), *aff'd sub nom.* Drake v. Filko, 724 F.3d 426, 433 (3d Cir. 2013) ("justifiable need" standard for both **concealed** and **open** carry qualifies as a "presumptively lawful" "longstanding" "exception to the Second Amendment"); Kachalsky v. Cacace, 817 F.Supp.2d at 270 (S.D.N.Y. 2011) (same public safety rationales justify restrictions on both concealed **and** open carry).

Some may argue that a civilian's being armed in public allows that person to stop a crime (e.g., a mass shooting). Even if one makes the highly questionable assumption that such a civilian -- who is not trained in law enforcement, much less how to expertly deal with life and death shooting incidents -- would be able to successfully use the firearm to stop a crime (and not get innocent bystanders, or oneself, killed or injured in the process), a critical countervailing point is often overlooked. These armed civilians will not be armed **only on that one day**, when the once in a lifetime crime (that they might thwart with their firearm) occurs, but they will be armed **every other day** of their lives, when no such incident occurs. On all of those other **thousands** of days, their carrying the firearm simply increases the risk of death or injury to themselves and others. Therefore, for nearly all non-law-enforcement members of the public, their carrying firearms on a daily basis overall greatly jeopardizes, not enhances, public safety.

Public carry also poses a risk of harm to a potentially unlimited number of victims (including children and innocent bystanders), whereas in the home the risk of harm is limited to those who live with or visit a gun owner (or his/her family) at home. Carrying firearms in public, on the other hand, exposes potentially **dozens of unrelated** people to serious injury or death. Moreover, unlike firearms in the **home**, where people at least have a choice to avoid interacting with armed persons by not visiting homes with guns, public carry forces virtually everyone to interact with potentially dozens of usually untrained non-law-enforcement people carrying loaded guns every day.

In sum, the public carrying of firearms -- **openly or concealed** -- poses a clear threat to public safety, and thus should fall outside the Second Amendment. The danger from public carry proven above was based on **common sense** analysis alone, which should be sufficient to exclude public carry from Second Amendment protection. Cf. Drake, 724 F.3d at 438 (noting that public carry is "**obviously** dangerous," and citing First Circuit's IMS Health case saying that even intermediate scrutiny can be satisfied by "simple **common sense**").

Furthermore, **empirical research**, too, supports the obvious danger posed by public carry. See, e.g., Ian Ayres & John J. Donohue III, *More Guns, Less Crime Fails Again: The Latest Evidence from 1977 – 2006*, 6 Econ J. Watch 218, 229 (May 2009), *available at PDF link* http://econjwatch.org/articles/more-guns-less-

crime-fails-again-the-latest-evidence-from-1977-2006 (evidence demonstrates that **right to carry laws increase aggravated assaults**); Ian Ayres & John J. Donohue III, *Shooting Down the "More Guns, Less Crime" Hypothesis*, 55 Stan. L. Rev. 1193, 1202 (April, 2003) (rejecting Lott & Mustard view that more guns leads to less crime; statistical analysis suggests **"shall-issue" laws** (defined at n.1 as allowing all adults without serious criminal records or mental illness to carry concealed firearms in public) **increase crime**); Jens Ludwig, *Concealed-Gun-Carrying Laws and Violent Crime*, 18 Int'l Rev. L. & Econ. 239, 252 (1998) (refuting Lott & Mustard and concluding that **"shall-issue laws … increase … adult homicide rates."**); Violence Policy Center, *License to Kill IV: More Guns, More Crime*, at 5 (June 2002), *available at* http://www.vpc.org/graphics/ltk4.pdf (**concealed handgun license holders were arrested for weapon-related offenses at an 81 percent higher rate than the general population**).

Significantly, in the most recent comprehensive study on right to carry (RTC) laws released just a few months ago, which has the important advantage of analyzing a longer period of time, including very recent crime data, the Stanford and Johns Hopkins authors concluded that the "strongest evidence of a statistically significant effect [of RTC laws was] for aggravated assault." Abhay Aneja, John J. Donohue III & Alexandria Zhang, *The Impact of Right to Carry Laws and the NRC*

Report: The Latest Lessons for the Empirical Evaluation of Law and Policy (December 1, 2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2443681.[6] That evidence demonstrated an "estimated **8 percent increase in aggravated assaults from RTC laws**," which the authors concluded "may understate the true harmful impact of RTC laws on aggravated assault." Id. The study also stated that "RTC laws may be associated with large increases" in **gun** aggravated assaults, "perhaps **increasing such gun assaults by almost 33 percent**." Id. Finally, the study found that "the most plausible state models conducted over the entire 1979-2010 period provide evidence that **RTC laws increase rape and robbery**," and that from 1999-2010, "the preferred state model … yields statistically significant evidence … suggesting that **RTC laws *increase* the rate of murder**." Id.

Even if some may dispute that restrictions on public carry promote public safety -- or even claim an inverse correlation, despite the above evidence -- it "is the legislature's job, not [courts'], to weigh conflicting evidence and make policy judgments." Kachalsky, 701 F.3d at 99; see also Woollard, 712 F.3d at 881 ("we cannot substitute [opposing] views for the considered judgment of the [legislature]"); cf. Turner Broadcasting System v. FCC, 520 U.S. 180, 211 (1997) ("question is not whether [the legislature] … was correct[;] the question [under

[6] Click on "Download This Paper" link, and see PDF at 2 (Abstract).

intermediate scrutiny] is whether the legislative conclusion was reasonable and supported by substantial evidence. … [T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent … [a] finding from being supported by substantial evidence.'"). There is, of course, not only common sense, but strong empirical evidence, see supra at 10-12, to support restrictions on public carry. At minimum, states must be free to individually make these public safety firearms policy judgments for themselves, without judicial interference, absent a clear-cut constitutional entitlement, which simply does not exist outside the home.

In sum, limiting the Second Amendment's scope to self-defense **in the home** (Heller and McDonald went no further) and not extending it to the **public** sphere follows logically from the states' need to protect public safety, given the common sense **and** empirically supported serious danger posed by guns (carried concealed **or** openly) in the public sphere.

C. History and Logic Further Support Exclusion of Public Carry from Second Amendment Protection.

Importantly, because Heller excludes public carrying in "**sensitive places**," including "schools and government buildings," from the Second Amendment, it is reasonable to view the **entire public sphere** as a "sensitive place" where guns may be prohibited. For if guns may be banned in schools because children are vulnerable there, guns should be permissibly banned anywhere significant numbers

of children might be, which is the majority of public places. Government buildings, too, cover a vast array of places from post offices, libraries, city hall and court houses, to buildings servicing unemployment claims, driver's licensing, and camping permits. And if guns may be banned in liquor-serving establishments because of the risk posed by inebriated patrons with firearms, logic would dictate that guns may be banned anywhere in public that such an inebriated person is likely to end up, which is virtually anywhere. See Moore v. Madigan, 702 F.3d 933, 948 (7th Cir. 2012) (Williams, J., dissenting) ("The resulting patchwork of places where loaded guns could and could not be carried … could not guarantee meaningful self-defense, which suggests that the constitutional right to carry … firearms in public for self-defense may well not exist.").

Furthermore, other states' laws imposing similar "good-cause"-type restrictions on public carry date back to **1927 and earlier**.[7] Thus, public carry is an "activit[y] covered by a **longstanding** regulation [and is thus] presumptively not protected from regulation by the Second Amendment." Heller v. D.C., 670 F.3d 1244, 1253 (D.C. Cir. 2011); NRA v. Bureau of ATF, 700 F.3d 185, 196 (5th Cir. 2012) ("**longstanding** [including "**mid-20th century vintage**"] presumptively

[7] See, e.g., **1927** Hawaii Sess. Laws Act 206, Section 7 (see Addendum 2); Drake, 724 F.3d at 433-34 (New York and New Jersey imposed their special "need" restrictions on public carry in, respectively, **1913 and 1924**); cf. Kachalsky, 701 F.3d at 90 (noting that 3 southern states, and Wyoming, in the **19th century** outright banned all public carry, open or concealed).

lawful regulatory measure -- **whether or not [on] *Heller*'s illustrative list** -- would likely **fall outside … the Second Amendment**"); Drake v. Filko, 724 F.3d at 434 (3d Cir. 2013) (the "justifiable need" standard for public carry "is a longstanding regulation that enjoys presumptive constitutionality").

This circuit, in United States v. Chovan, 735 F.3d 1127, 1137 (9th Cir. 2013), also suggests that where a claimed right has been "proved" to "have **historically** been restricted," it is wholly outside "rights protected by the Second Amendment." Public carry has historically been restricted not only in many states since 1927 and earlier, but in England for over six centuries.

English legal history pre-dating the Second Amendment, which the Heller majority emphasized because it construed the Second Amendment as "**codify[ing] a pre-existing right**," 554 U.S. at 592, supports excluding public carry from the scope of the Second Amendment. The 1328 Statute of Northampton essentially prohibited the carrying of arms in public. See Patrick J. Charles, *The Faces of the Second Amendment Outside the Home*, 60 Clev. St. L. Rev. 1, 20 (2012) ("the Statute of Northampton was not regulating dangerous conduct with arms, but the act of carrying arms **by itself**"); Moore, 702 F.3d at 944-45 (Williams, J., dissenting) (the Statute "prohibited **going armed in public**" "**seen or not**").

Notably, this understanding of the Statute -- barring ordinary people from carrying arms in public -- remained in effect in England, even after the right to

bear arms was codified in the 1689 *Declaration of Rights*, see Charles, *supra* at 23-28, and in **America** through the passage of the Second Amendment in 1791. Id. at 31-36 (also methodically undermining evidence for opposing view). Thus, any pre-existing right to bear arms did not extend to carrying firearms in public. Peruta, 742 F.3d at 1182-84 (Thomas, J., dissenting).

In sum, English and American history strongly supports public carry being excluded entirely from the Second Amendment. See Don Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 Mich. L. Rev. 204, 267 (1983) [an article cited by the Heller majority] ("the only carrying … the [Second] amendment … protect[s] is such transportation … implicit in … a right to possess -- *e.g.*, transporting them between the … owner's premises and a shooting range, or a gun store [etc.]").

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For the above reasons, the carrying of firearms in public, **whether openly or concealed**, does not fall within the scope of the Second Amendment.[8] Piszczatoski v. Filko, 840 F.Supp.2d at 816, 831 (D. N.J. 2012) ("the Second Amendment does not include a general right to carry handguns outside the home;" restrictions on public carry "fall outside the … Second Amendment"), *aff'd sub nom.* Drake v.

[8] "'[P]resumptively lawful' could [mean] the identified restrictions … regulate conduct outside the scope of the Second Amendment [**or**] … pass muster under any standard of scrutiny. … [T]he better reading, based on … *Heller*, is the former." U.S. v. Marzzarella, 614 F.3d 85, 91 (3d Cir. 2010).

Filko, 724 F.3d at 431 ("declin[ing] to definitively declare [the] right to bear arms for … self-defense extends beyond the home"); Williams v. State, 10 A.3d 1167, 1178 (Md. 2011) (carrying in public, as opposed to in one's home, "is outside the scope of the Second Amendment"); cf. Peterson, 707 F.3d 1197, 1211 (10th Cir. 2013) ("the Second Amendment does not confer a right to carry concealed weapons."); People v. Yarbrough, 86 Cal.Rptr.3d 674, 682-83 (2008) ("Unlike possession … within a residence, carrying a concealed firearm … threat[ens] public order [and is not] protected by the Second Amendment").

But even if, contrary to the above, the Second Amendment encompassed public carry to some extent, California's "good cause" requirement for public carry, as interpreted by San Diego County, does not burden any Second Amendment right.

> [T]he requirement that applicants demonstrate a 'justifiable need' to publicly carry a handgun for self-defense qualifies as a 'presumptively lawful,' 'longstanding' regulation and therefore does not burden conduct within the scope of the Second Amendment's guarantee.

Drake v. Filko, 724 F.3d at 429, 434, 440 (3d Cir. 2013).

II. Even if the Second Amendment has Some Applicability Outside the Home, California's Restrictions Easily Survive Intermediate Scrutiny.

Even if, contrary to the above, the Second Amendment **does** apply to some carrying of firearms in public for self-defense, because **public** carry is not at the **"core"** of the Second Amendment right, Chovan, 735 F.3d at 1138 (core right is

self-defense **in the home**), Chovan establishes that **at most** intermediate scrutiny is appropriate. Id. Heller itself recognized that "the **home**," not the public, is "where the need for defense of self, family, and property is most acute." 554 U.S. at 628.

Moreover, unlike the **ban** in Chovan which **substantially** burdened Second Amendment rights, "good cause" requirements do not **substantially** burden any right to publicly carry firearms **for self-defense**. For those who demonstrate a special need to carry for self-defense will satisfy "good cause" requirements, and may receive concealed carry licenses. Thus, "good cause" requirements surely do not **substantially** burden any purported right to self-defense-motivated public carry, as those with a real and demonstrable need to carry for self-defense may do so. This is true even if **open** carry is simultaneously **flatly banned**, as the person with a genuine and proven need to carry publicly for self-defense may do so via **concealed** carry.

Because good cause requirements, therefore, both affect **no core right**, and impose **no substantial burden** on any claimed right to carry for self-defense, Chovan's two-part scrutiny test suggests that something **less than** intermediate scrutiny is appropriate. But, as shown below, "good cause" requirements easily satisfy even intermediate scrutiny.

The panel, however, rather than apply intermediate scrutiny, went beyond even strict scrutiny by wrongly applying stricter than strict scrutiny, by not

allowing consideration of the State's public safety interests at all. Other federal courts apply **at most** intermediate, not strict, scrutiny because restrictions on carrying firearms **in public** do not burden the "**core**" protections of the Second Amendment. See Kachalsky, 701 F.3d at 93 (2nd Cir.); Drake, 724 F.3d at 435-36 (3d Cir.); Masciandaro, 638 F.3d at 469-71 (4th Cir.); cf. Hightower v. City of Boston, 693 F.3d 61, 73 (1st Cir. 2012) ("the government may regulate the carrying of concealed weapons **outside the home**.").

To survive intermediate scrutiny, public carry restrictions must only have a "**reasonable**," not perfect, fit to a "**substantial, or important**" asserted governmental objective. See Chovan, 735 F.3d at 1139. Because, as explained earlier, public carry endangers public safety, California's granting licenses to only those establishing "good cause" (as interpreted by San Diego) is "reasonably" -- indeed strongly -- related to California's "substantial" and "important" public safety interest. And other federal appellate courts have uniformly agreed (except for the three-judge panel below) -- upholding under intermediate scrutiny similar restrictions[9] on **concealed** carry, **in conjunction with** similar restrictions (or even bans) on **open** carry. See Kachalsky, 701 F.3d at 98 ("Restricting handgun possession **in public** … is substantially related to New York's interests in public

[9] New York ("special need for self-protection"); New Jersey ("justifiable need"); Maryland ("good and substantial reason").

safety and crime prevention."); Drake v. Filko, 724 F.3d at 438 ("given the obviously dangerous and deadly nature of handguns, requiring a showing of particularized need for a permit to carry one publicly serves the State's interests in public safety"); Woollard, 712 F.3d at 879, 882 ("limiting … public carrying … [l]essens 'the likelihood that basic confrontations between individuals would turn deadly;'" "the good-and-substantial-reason requirement is reasonably adapted to … protecting public safety and preventing crime.").[10]

Restricting public carry, as explained earlier, significantly reduces the risk of thousands of daily routine conflicts turning deadly. And, it particularly improves the safety of law enforcement officers. Woollard, 712 F.3d at 879-80 (restricting public carry "curtail[s] the presence of handguns during routine police-citizen encounters … [that may turn] routine [encounters into] high-risk stops"). Limiting public carry also enhances public safety by decreasing "the availability of handguns to criminals via theft," and "[a]verting the confusion [and] potentially tragic consequences … that can result from the presence of a third person with a handgun during a [police-criminal-suspect] confrontation [because of] confusion as to which side … the [third] person is on." Id. Public carry also increases the risk of **accidental** injury or death, as most recently exemplified by the tragic killing of a mother by her 2-year-old son who pulled the gun from his mother's purse inside a

[10] Moore is distinguishable because it struck down a **complete ban** on public carry. 702 F.3d at 940-41. Even that provoked a strong dissent.

Wal-Mart. See http://www.cbsnews.com/news/mom-killed-in-wal-mart-accidental-shooting-kept-gun-in-special-pocket/.

The panel majority erroneously attacked San Diego's "good cause" requirement as no better than randomly issuing 1 out of 10 permits. But like the dissent and other circuits have concluded, "[r]estricting … public [carry] to those with ["a special need for self-protection distinguishable from … the general community"] **is** substantially related to … public safety," Kachalsky, 701 F.3d at 86, 98, because an extraordinary special need for self-defense may offset the serious safety risks from public carrying. Unlike a random reduction in number of permits issued, the "good cause" requirement ensures that the serious risks inherent in public carry are incurred only when the carrier's need for self-defense is particularly substantial.

Indeed, in light of Heller's emphasis on **self-defense** as the motivating force behind any constitutional right to possess a firearm, tying the statutory authorization to carry publicly to **a special high need for self-defense** not only has a substantial relationship to overall public safety, but also best respects the self-defense concern underlying Heller.

CONCLUSION

Hawaii respectfully urges this *en banc* Court to overturn the panel ruling below, and uphold California's restricting concealed carry to only those establishing "good cause," as interpreted by San Diego so as not to include literally everyone. Such a restriction on concealed carry must be upheld even with a **simultaneous** ban on **open** carry, as **public** carry is simply outside the scope of the Second Amendment, given the obvious and empirically supported dangers public carry poses to public safety. But even if public carry fell within the Second Amendment, good cause type restrictions easily satisfy intermediate scrutiny because of their reasonable relationship to protecting public safety. Otherwise, the entire Ninth Circuit will become a de facto shall-issue region leading to a massive, and dangerous, proliferation of guns on the streets of America. At minimum, that would turn millions of ordinary daily conflicts in the public arena into potentially life-ending tragedies. Only this Court, by overturning the panel decision below, can prevent that.

Although some states may be willing to accept these dangers in favor of right to carry gun laws for their citizens -- which is their prerogative -- the Constitution surely does not compel other states (justifiably concerned for their citizens' safety, based on both common sense and empirical studies) to make the

same decision (putting their citizenry in danger), when no core right to bear arms is at stake, and the right is not substantially burdened.

DATED: Honolulu, Hawaii, April 16, 2015.

s/ Girard D. Lau

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CERTIFICATE OF COMPLIANCE

I certify that the brief is proportionately spaced, has a typeface of 14 points or more and contains 5,284 words. See Ninth Cir. R. 29-2(c)(3) (7000 word limit).

DATED: Honolulu, Hawaii, April 16, 2015.

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INDEX TO ADDENDA

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§ 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.

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LAWS

OF THE

TERRITORY OF HAWAII

PASSED BY THE

FOURTEENTH LEGISLATURE

REGULAR SESSION
1927

COMMENCED ON WEDNESDAY, THE SIXTEENTH DAY OF FEBRUARY, AND ENDED ON TUESDAY, THE THIRD DAY OF MAY.

PUBLISHED BY AUTHORITY

HONOLULU, HAWAII
ADVERTISER PUBLISHING CO., LTD.
1927

B

ACT 206

[H. B. No. 322]

AN ACT REGULATING THE SALE, TRANSFER AND POSSESSION OF CERTAIN FIREARMS AND AMMUNITIONS, AND AMENDING SECTIONS 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2146 AND 2147 OF THE REVISED LAWS OF HAWAII 1925.

Be it Enacted by the Legislature of the Territory of Hawaii:

SECTION 5. Carrying or keeping small arms by unlicensed persons. 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 him, and, in 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.

SECTION 6. Exceptions. The provisions of the preceding section shall not apply to marshals, sheriffs, prison or jail wardens or their deputies, policemen, mail carriers, or other duly appointed law enforcement officers, or to members of the Army, Navy, or Marine Corps of the United States, or of the National Guard, when on duty, or of organizations by law authorized to purchase or receive such weapons from the United States or this territory, or to officers or employees of the United States authorized by law to carry a concealed pistol or revolver, or to duly authorized military organizations when on duty, or to the members thereof when at or going to or from their customary places of assembly, or to the regular and ordinary transportation of pistols or revolvers as merchandise, or to any person while carrying a pistol or revolver unloaded in a wrapper from the place of purchase to his home or place of business, or to a place of repair or back to his home or place of business or in moving goods from one place of abode or business to another.

SECTION 7. Issuse of licenses to carry. The judge of a court of record or the sheriff of a county, or city and county, shall, upon the application of any person having a bona fide residence or place of business within the jurisdiction of said licensing authority, or of any person having a bona fide residence or place of business within the United States and a license to carry a pistol or revolver concealed upon his person or to carry one elsewhere than in his home or office, said license being issued by the authorities of any state or political subdivision of the United States, issue a license to such person to carry a pistol or revolver within this territory elsewhere than in his home or office, for not more than one year from date of issue, if it appears that the applicant has good reason to fear an injury to his person or property, or has any other proper reason for carrying a pistol or revolver, and that he is a suitable person to be so licensed. The license shall be in triplicate, in form to be prescribed by the treasurer of the territory, and shall bear the name, address, description and signature of the licensee and the reason given for desiring a license. The original thereof shall be delivered to the licensee; the duplicate shall, within seven days, be sent by registered mail, to the treasurer of the territory and the triplicate shall be preserved for six years by the authority issuing said license.

9th Circuit Case Number: 10-56971

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CERTIFICATE OF SERVICE

When All Case Participants are Registered for the Appellate CM/ECF System

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 (date): April 16, 2015.

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.

Signature (use "s/" format): s/Girard D. Lau

****

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When Not All Case Participants are Registered for the Appellate CM/ECF System

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 (date): Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Signature (use "s/" format):