No. 12-17808

In the
United States Court of Appeals for the Ninth Circuit

GEORGE K. YOUNG, JR.,
Plaintiff-Appellant,
v.
STATE OF HAWAII, *ET AL.*,
Defendants-Appellees.

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

Brief *Amicus Curiae* of Gun Owners of America, Gun Owners Foundation, The Heller Foundation, Virginia Citizens Defense League, Conservative Legal Defense and Education Fund, and Restoring Liberty Action Committee in Opposition to Petition for Rehearing *En Banc*

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DISCLOSURE STATEMENT

The *amici curiae* herein, Gun Owners of America, Gun Owners Foundation, The Heller Foundation, Virginia Citizens Defense League, Conservative Legal Defense and Education Fund, and Restoring Liberty Action Committee, through their undersigned counsel, submit this Disclosure Statement pursuant to Federal Rules of Appellate Procedure 26.1, 29(a)(4)(A).

With the exception of Restoring Liberty Action Committee, which is an educational organization, all of these *amici curiae* are non-stock, nonprofit corporations, none of which has any parent company, and no person or entity owns them or any part of them. The *amici curiae* are represented herein by Herbert W. Titus, who is counsel of record, Robert J. Olson, William J. Olson, and Jeremiah L. Morgan of William J. Olson, P.C., 370 Maple Avenue West, Suite 4, Vienna, Virginia 22180-5615. *Amicus curiae* Restoring Liberty Action Committee is also represented herein by Joseph W. Miller, P.O. Box 83440, Fairbanks, Alaska 99708.

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INTEREST OF *AMICI CURIAE*

Gun Owners of America, Gun Owners Foundation, The Heller Foundation, Virginia Citizens Defense League, and Conservative Legal Defense and Education Fund are nonprofit organizations, exempt from federal income tax under either section 501(c)(3) or 501(c)(4) of the Internal Revenue Code ("IRC"). Restoring Liberty Action Committee is an educational organization. Each entity is dedicated, *inter alia*, to the correct construction, interpretation, and application of the law.[1]

ARGUMENT

I. HAWAII'S CARRY BAN IS, INDEED, "LONGSTANDING," DATING TO THE ISLANDS' TIME AS A MONARCHY, WHEN SOVEREIGN KINGS AND QUEENS DENIED THEIR SUBJECTS ACCESS TO ARMS.

Hawaii's Petition for Rehearing triumphantly declares that "Hawaii has regulated the public carry of firearms for over 150 years," pointing to various enactments in 1852, 1927, and 1934. Pet. at 3-4. The Petition alleges that "[r]estrictions on the open carry of firearms have been widespread for more than

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[1] Counsel for both parties have consented to the filing of this brief *amicus curiae*, pursuant to Rule 29(a), Federal Rules of Appellate Procedure. No party's counsel authored the brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief. No person other than these *amici curiae*, their members, or their counsel contributed money that was intended to fund preparing or submitting this brief.

a century," and then cites the Third Circuit's decision in Drake v. Filko, 724 F.3d 426 (3rd Cir. 2013) (Pet. at 16), which addressed New Jersey law, for the proposition that Hawaii's restrictions therefore must be considered "longstanding" and thus "presumptively lawful." *See* Drake at 433.

This is quite an assertion. Although New Jersey has been a state for 231 years and was a colony for over a century before that, for most of Hawaii's history, the island nation had no republican form of government — rather, it was a monarchy, ruled by kings and queens. Even after later transitioning to a constitutional monarchy, the Kingdom of Hawaii Constitution of 1840[2] did not recognize a right of the people to bear arms. Quite to the contrary, it declared unequivocally that the "four Governors over these Hawaiian Islands … shall have charge of … the arms and all the implements of war." Kingdom of Hawaii Constitution of 1840, "Governors." Consistent with an exclusive claim to arms, the 1840 Constitution declared that the king "is the sovereign of all the people and all the chiefs." *Id.*, "Prerogatives of the King."

The Hawaii stranglehold on arms was easy to accomplish, since native Hawaiians had no experience with firearms prior to the arrival of Europeans in

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[2] *See* http://www.hawaii-nation.org/constitution-1840.html.

the late 1700s. Indeed, traders and settlers selectively doled out firearms in order to "unite[] Hawaii's eight main islands into a single kingdom [under] Kamehameha I...."[3] Thereafter, native Hawaiians continued to be disarmed, as more and more settlers arrived, with generally only the European-installed government (and select Caucasian inhabitants) being permitted to possess arms.[4] The monopoly on arms was later used to solidify American control over the Hawaiian Islands through the "Bayonet Constitution" of 1887.[5]

This is hardly a noble pedigree to apply when determining the right of a sovereign people to keep and bear arms as a bulwark against tyranny. *See* District of Columbia v. Heller, 554 U.S. 570, 598 (2008). Rather, Hawaii's monarchial history undermines its claims, making it an extreme outlier among

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[3] J. Greenspan, "Hawaii's Monarchy Overthrown with U.S. Support, 120 Years Ago," History.com (Jan. 17, 2013).

[4] *See, e.g.*, "Odd Fighting Units: The Honolulu Rifles during the Hawaii Rebellions, 1887-1895," Warfare History Blog (Aug. 13, 2012) ("The downfall of both the Kingdom of Hawaii and the independent Hawaiian republic in 1893 & 1895 respectively were both directly linked to actions of the Honolulu Rifles brigade.")

[5] "1887: Bayonet Constitution," *National Geographic* ("The new constitution was written by a group of white businessmen and lawyers who wanted the kingdom to be part of the United States. This group, called the Hawaiian League, was supported by an armed militia called the Honolulu Rifles.").

the states — embracing a view of its rulers and people that was utterly rejected by our Declaration of Independence and the Constitution of 1787.

It was (i) not until 1898 that the United States annexed Hawaii as a territory, (ii) not until 1950 that the current state constitution was adopted (including language mirroring the Second Amendment),[6] and (iii) not until 1959 that Hawaii was granted statehood — more than a century after California, whose laws the Court examined in Peruta v. Cnty. of San Diego, 824 F.3d 919 (9th Cir. 2016). In short, Hawaii's history on firearm regulation is utterly irrelevant here. Rather than being embraced as "longstanding" and/or "presumptively lawful," Hawaii's antiquated firearms regulatory scheme should be rejected out of hand — a relic of history, not unlike the sovereign prerogatives of King George, against which this country's Second Amendment was designed to protect. This Court should decline the government of Hawaii's invitation to embrace its racist history of disarmament of persons like Plaintiff, "who is part native Hawaiian and part descendant of Japanese plantation workers…."[7]

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[6] *See* HRS Const. Art. I, § 17; *see also* State v. Mendoza, 920 P.2d 357, 362 (Ha. 1996).

[7] D. Trotta, "Unlikely pair could usher gun rights case to U.S. Supreme Court," *Reuters* (Aug. 8, 2018).

II. THE PANEL'S DECISION IS BY NO MEANS IN "OPEN DEFIANCE OF" PERUTA.

A. Peruta's Historical Analysis Was Limited to Concealed Carry.

The Petition asserts that the panel decision "engag[ed] in what can only be called open defiance of *Peruta*." Pet. at 15. Specifically, the Petition claims that the panel decision rejected the reasoning from Peruta, relying on virtually the same historical sources rejected there and rejecting those relied on in Peruta, and cherry picked from state precedents to suit its fancy, arriving at a conclusion insupportable from this Court's prior decision. *Id.* at 15-16. For example, the Petition notes that the panel "found … that the Statute of Northampton was of little use in construing the Second Amendment…." *Id.* at 15.

To be sure, the panel did reject the government's invitation to "incorporate wholesale [the] understanding … that the English right to carry weapons openly was limited for centuries by the 1328 Statute of Northampton … into our Constitution's Second Amendment." Young v. Hawaii, 896 F.3d 1044, 1063 (9th Cir. 2018). Instead, the panel noted that "our aim here is not merely to discover the rights of the English," concluding that "the 1689 English right to have arms was *less protective* than its American counterpart." *Id.* at 1065 (emphasis original). However, contrary to what the Petition argues, the panel's

historical analysis is perfectly consistent with Peruta. As Appellant's Opposition brief notes, "*Peruta* expressly disclaimed resolution of the very question presented in this case," and it was perfectly reasonable for the panel to "treat[] certain historical sources as more persuasive on open carry than *Peruta* found them on concealed carry." *Id.* at 13-14.

Indeed, in chronicling the English application of the Statute of Northampton, Peruta cited numerous royal orders and proclamations spanning several centuries, noting how "Elizabeth I continued her father's prohibition against **concealed** weapons," explaining how various restrictions focused on weapons that could be "easily **concealed**," discussing the story of a man arrested after he "'went armed **under his garments**,'" and citing various regulations that prohibited the "'bearing of Weapons **covertly**'" and weapons that "'were liable to be **concealed**….'" Peruta at 930-32 (emphasis added). Summarizing its analysis of English history, the Court concluded that, "when our Second Amendment was adopted, English law had for centuries prohibited carrying concealed … arms in public," while noting that prohibitions on open carry were, at best, only "**occasional**[]." *Id.* at 932 (emphasis added). Thus, as the English sources focused mainly on concealed rather than open carry, it was only natural

for the panel to find them less instructive in this open carry case than they were in Peruta.

B. The English Tradition Does Not Inform the Boundaries of the Second Amendment.

The Petition for Rehearing would have this Court believe that a proper understanding of the Second Amendment begins and ends with the English historical tradition. Apparently Petitioners see no difference between the English Bill of Rights' double qualification "suitable to their conditions and as allowed by law," and the Second Amendment's categorical prohibition found in the words "shall not be infringed." Yet the significance of this difference in protections reflects the English tradition where the king had been sovereign, contrasted with the American system premised on the sovereignty of the people — and the necessity of an armed citizenry in order to keep it that way. As Thomas Cooley explained, "The [Second] amendment … was adopted with some **modification and enlargement** from the English Bill of Rights of 168[9]…." T.Cooley, The General Principles of Constitutional Law in the United States of America at 298 (Little Brown & Company, Boston: 1898) (emphasis added).

Peruta correctly noted that McDonald v. City of Chicago, 561 U.S. 742 (2010), described the Second Amendment as a "'pre-existing right.'" *Id.* at 929.

Likewise, Heller rejected the idea that the right "is … in any manner dependent upon that instrument [the Bill of Rights] for its existence." *Id.* at 592. But just as Second Amendment rights do not rely on this nation's founding documents for their existence, neither do they rely on the Statute of Northampton. Rather, the right of self-defense is "endowed by [our] Creator." *See* Declaration of Independence. Indeed, Heller noted that the English Bill of Rights was "the **predecessor** to our Second Amendment" (*id.* at 593, emphasis added) — but not its **source**. McDonald characterized the right to keep and bear arms as "an **inalienable** right that **pre-existed** the Constitution's adoption" (*id.* at 3060 (emphasis added)). That certainly is no authority to use the English tradition as the starting and ending point when examining the scope of the uniquely American right.

Rather, an inalienable right is "pre-existing" precisely because it exists independent of **any** government, document, or written guarantee. As Heller noted, Blackstone called it "'the **natural right** of resistance and self-preservation.'" *Id.* at 594. And, putting it perhaps even more specifically, McDonald "understood the Bill of Rights to declare inalienable rights that **pre-existed all government** … it declared rights that no legitimate government could

abridge." *Id.* at 3079. It would be simply wrong, as the Petition demands, to limit the scope of the Second Amendment by reference to English history.

Finally, the Petition faults the panel for failing to find the same "strong historical consensus" against open carry that this Court did against concealed carry in Peruta, arguing that alone resolves this case. Pet. at 14. *See* Peruta at 927. Of course, as the panel correctly noted, "[o]ur lodestars are 'text and history.'" Young, 896 F.3d at 1051 (*citing* Heller, 554 U.S. at 595). But whereas the Petition would have this Court jump straight to the history, arguing that it is conclusive, the panel "start[ed], as we must, with the text." *Id.* at 1052.

As the Second Amendment protects not only the right to "keep arms" but also to "bear arms," the panel obviously recognized that second guarantee **must mean something**. Thus, the panel looked to Heller which, although addressing a ban on "keeping" arms, nevertheless stated unequivocally that "[a]t the time of the founding, as now, to 'bear' meant to 'carry,'" and "[w]hen used with 'arms' … the term has a meaning that refers to carrying for a particular purpose — confrontation." Heller at 584. The Heller Court concluded that the Second Amendment right to "bear arms" protects the ability to "'"wear, bear, or carry

… upon the person or in the clothing or in a pocket, for the purpose … of being armed and ready for offensive or defensive action in a case of conflict with another person."'" *Id.* Thus, noting that "[t]he prospect of confrontation is, of course, not limited to one's dwelling," the panel concluded that there must be some right to bear arms outside the home. *Id.* at 1052. Since Peruta concluded the right to "bear arms" does not encompass a right to bear them concealed, the panel looked to historical sources (*id.* at 1052-61) that demonstrated "[t]he right to bear arms must include, at the least, the right to carry a firearm openly for self-defense." *Id.* at 1061. That is an eminently correct conclusion, hardly a surprising one, and certainly presents no reason for *en banc* review.

CONCLUSION

For the foregoing reasons, the Petition for Rehearing *En Banc* should be denied.

Respectfully submitted,
/s/ Herbert W. Titus

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Brief *Amicus Curiae* of Gun Owners of America, *et al.*, in Opposition to Petition for Rehearing *En Banc*, was made, this 19th day of November, 2018, by the Court's Case Management/ Electronic Case Files system upon the attorneys for the parties.

/s/ Herbert W. Titus

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