APPEAL NO. 12-17808

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GEORGE K. YOUNG, JR.,

Plaintiff-Appellant,

v.

STATE OF HAWAII and NEIL ABERCROMBIE in his capacity as Governor of the State of Hawaii; DAVID M. LOUIE in his capacity as State Attorney General; COUNTY OF

(caption continued)

D.C. No. 1:12-cv-00336-HG-BMK

APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

THE HONORABLE HELEN GILLMOR, DISTRICT JUDGE

STATE OF HAWAI‘I'S MOTION FOR LEAVE TO FILE ATTACHED 2,384 WORD SUPPLEMENTAL AMICUS CURIAE BRIEF OF THE STATE OF HAWAI‘I

EXHIBIT 1

CERTIFICATE OF SERVICE

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HAWAII, as a sub-agency of the State of Hawaii and WILLIAM P. KENOI in his capacity as Mayor of the County of Hawaii; and the Hilo County Police Department, as a sub-agency of the County of Hawaii 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.

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Pursuant to FRAP 29(a), a "**state** may file an amicus-curiae brief without the consent of the parties or leave of court."[1] However, "[e]xcept by the court's permission, an amicus brief may be no more than one-half the maximum length authorized by these rules for a party's principal brief." FRAP 29(d). Because this Court's order filed June 15, 2016, provides that the parties' supplemental briefs are not to exceed 2,400 words, and the State of Hawai‘i believes its amicus brief needs to be more than one-half of 2,400 words to adequately address the impact of the

[1] The State of Hawaii (along with its Governor and Attorney General) was dismissed below as a **party** defendant on immunity grounds. Clerk's Record 42 at 9-14. **And**, Plaintiff Young did **not** challenge that immunity dismissal of the State of Hawaii (or of its Governor and Attorney General) **on appeal**. Thus, the State of Hawaii, after its dismissal below on immunity grounds, and Young's failure to appeal that dismissal, was and is **no longer** a **party** to this appeal. Hawai‘i thus seeks instead to file an **amicus** brief to defend the constitutionality of its laws.

Peruta decision, en banc, the State of Hawai‘i hereby respectfully moves for leave to file a 2,384 word supplemental amicus curiae brief.

The State of Hawai‘i has a tremendous stake in the outcome of this case, to the extent that plaintiffs challenge the constitutionality of, inter alia, HRS §134-9, which sets forth Hawai‘i's restrictions on the public carry of firearms, both concealed and open carry. Hawai‘i has determined that its significant interest in public safety is best served by limiting **concealed** carry to those exceptional cases where an applicant "shows reason to fear injury to the applicant's person or property," and limiting **open** carry to those "engaged in the protection of life and property." Id. Hawai‘i has the lowest gun death rate of any state in the nation.[2] Hawai‘i thus has a vital stake in ensuring that its gun laws, including its public carry restrictions, which date back nearly a century, be enforceable so as to continue to maintain the safety of its residents.

Given the complexity of the constitutional analysis, Hawai‘i discovered it needed more than one-half of the 2,400 word limit provided to the parties to adequately address the Peruta decision's impact upon this case. It thus seeks leave to file the supplemental amicus brief, attached as Exhibit 1 hereto, that is 2,384 words, which turns out to be **less than 10 full pages**, double-spaced, with 14-point

[2] Violence Policy Center, *States with Weak Gun Laws and Higher Gun Ownership Lead Nation in Gun Deaths, New Data for 2014 Confirms* (2016), *available at:* http://www.vpc.org/press/states-with-weak-gun-laws-and-higher-gun-ownership-lead-nation-in-gun-deaths-new-data-for-2014-confirms/

font. The supplemental amicus brief will argue that although the en banc Peruta opinions ostensibly do not resolve the constitutionality of good-cause type restrictions on **open** carry (or on public carry of **some kind**, open or concealed), the **reasoning** of the en banc Peruta opinions **does** in fact resolve that question in favor of upholding such good-cause restrictions, even as to **open** carry (or **some form** of public carry, **open or concealed**).

The supplemental amicus brief will demonstrate that the majority and the concurrence (each of which fully adopts the other's reasoning, thereby providing a majority for both opinions) **provide two independent, yet each individually sufficient, reasons** to uphold the constitutionality of good-cause restrictions (like Hawai‘i's "reason to fear injury" prerequisite) on **open** carry or on **some form of public carry, open or concealed**, as well. First, the brief demonstrates that the historical analysis provided in the majority opinion applies equally well to reject Second Amendment protection not just for concealed carry, but for open carry or some form of public carry, open or concealed, too. Second, the brief separately explains why the concurring opinion (with reasoning the majority opinion expressly agrees with) supports the validity, under intermediate scrutiny, of good-cause-type restrictions not only on concealed carry, but on open carry or on some form of public carry (open or concealed), as well.

For the foregoing reasons, Hawai‘i respectfully requests leave to file the 2,384 word (less than 10 full pages) Supplemental Amicus Brief of the State of Hawai‘i, attached as Exhibit 1. Hawai‘i's ability to enforce the gun-safety laws it reasonably believes are necessary to protect the safety of its people is at stake.

DATED: Honolulu, Hawai‘i, July 12, 2016.

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SUPPLEMENTAL AMICUS CURIAE BRIEF OF THE STATE OF HAWAI‘I IN SUPPORT OF COUNTY OF HAWAI‘I DEFENDANTS-APPELLEES, IN SUPPORT OF AFFIRMANCE

CERTIFICATE OF COMPLIANCE

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The State of Hawai‘i files this amicus brief[1] under FRAP 29(a), in support of affirmance to defend the constitutionality of its statutes, including HRS §134-9, restricting both concealed and open public carry.[2]

A. The majority's historical analysis precludes any viable claim to a Second Amendment right to some form of public carry, concealed **or open**.

It is true that the Peruta en banc majority ("majority") specifically stated that it was not deciding whether the Second Amendment provides the general public a right to carry a firearm openly in public. However, the history-based reasoning provided by the majority strongly indicates that there is no such right. The majority stated that "the Supreme Court in *Heller* and *McDonald* treated its **historical** analysis as **determinative**," and decided that it, too, would "engage in the same historical inquiry" to answer the precise question before it. Peruta v. County of San Diego, No. 10-56971, slip op. at 22-23 (9th Cir. June 9, 2016). The question, therefore, of whether the Second Amendment protects open carry, or

[1] The State of Hawaii (and Governor and Attorney General), **as party** defendants, were dismissed below on immunity grounds, Clerk's Record (CR) 42 at 9-14, and plaintiff does not appeal that dismissal. Hawai‘i thus appears here as an **amicus**.

[2] Plaintiff's attack on Hawai‘i's restrictions on **long** guns should be disregarded because he never mentioned, much less challenged, those statutory restrictions in his pleadings below, and no factual record underpins such claims. Bolder v. C.I.R., 760 F.2d 1039, 1042 (9th Cir. 1985) (disregarding issues raised for the first time on appeal). Furthermore, plaintiff has no standing to challenge such restrictions as he never alleged an imminent desire to carry a **long** gun in public.

some means of public carry (open or concealed),[3] thus turns on a similar historical analysis.

But that historical analysis has largely **already** been provided by the majority, and it overwhelming answers that question with a resounding "no." The majority first focused on the right to bear arms in England, finding that beginning in 1299, Edward I directed the prohibition of anyone "**going armed** within the realm" without the king's license, and ordered in 1304 the enforcement of the prohibition on "**going armed** in any way" without the king's license. Id. at 23. The language of these prohibitions obviously cover **all** forms of public carry, **whether open or concealed**. Similarly, Edward II ordered in 1308 that no one "**shall … go armed**" before the king's coronation, in 1310 that the sheriff of York prohibit persons from "**going armed**," in 1312 that certain sheriffs seize weapons of anyone that "**go armed**" without permission of the king, and issued in 1326 a general proclamation prohibiting "throughout [the King's] realm" "any one **going armed** without [the King's] licence." Id. at 24. By their express terms, those orders prohibited **all** public carry, **open or concealed**.

Then, in 1328, under Edward III, Parliament enacted the Statute of Northampton, directing no man "to go nor ride **armed** by night nor by day." Id. at

[3] Of course, Peruta has already ruled that **concealed** carry is not protected, but that leaves the question of the Second Amendment protecting **some form** of public carry, including open carry alone, or open OR concealed carry. See footnote 5, infra.

24-25. This Statute, which the majority deemed "the foundation for firearms regulation in England for the next several centuries," id. at 25, unequivocally bans "armed" public carry, regardless of whether the arms be **open or concealed**. Richard II in 1388 and Henry VI in 1444 ordered the Statute enforced against those who "ride or go **armed**," or who "shall go **armed**," respectively, and England's first common law treatise by John Carpenter said that the statute mandated that "no one … **go armed** in the said city or in the suburbs, or **carry arms**, by day or by night." Id. at 25-26. Again, by their express terms, all public carry, not just concealed carry, was prohibited.

In 1541, Parliament under Henry VIII passed a statute "expressly forb[idding] everyone … from owning or **carrying** concealable (**not merely concealed**) weapons …." Id. at 26-27. Again, carrying small concealable firearms, **even if not concealed**, was strictly prohibited. In 1594, Elizabeth I issued a proclamation that the Statute of Northampton prohibited "**not just the 'open carrying' of weapons**," but also the carrying of concealed weapons. Id. at 27.

Although James I issued a proclamation in 1613 forbidding **concealed** weapons, id. at 27-28, that was only because it was a given that **openly** carried weapons were prohibited. See Id. at 28 (James I issued proclamation in 1616 banning the "carrying of … 'Pistols'" -- whether open or concealed -- and the Chief Justice in 1686 clarified that the Statute of Northampton punishes all those "who

go **armed** to **terrify** the King's subjects."). Indeed, it is only logical that a ban on open carry was a given, as the Statute of Northampton was "a crime against the public peace, by **terrifying** the good people of the land." 4 William Blackstone, *Commentaries* 148-49 (1769). Open carry, after all, by its visibility to everyone, is sure to inflict at least as much, and likely more, terror, than concealed carry, which the public is essentially unaware of due to the weapon's concealment. Thus, it is not surprising that some bans specifically targeted concealed carry, not because open carry was permitted, but because it was recognized that the danger of public carry extended beyond open carry to concealed carry as well. After all, it is having the weapon while in public, not its visibility, that poses the grave danger to all. See discussion, infra at 7-9.

Lord Coke's interpretation in 1694 of the Statute of Northampton as providing that a man may neither "goe nor ride **armed** by night nor by day … in any place whatsoever," slip op. at 28, again confirms that prohibition extends to open as well as concealed carry.

Finally, the English Bill of Rights, enacted in 1689, which Heller considered the predecessor to our Second Amendment, provided that the "subjects … may have arms for their defence suitable to their conditions and ***as allowed by law***." Id. at 29. The Peruta majority viewed the bolded phrase as the "critical" issue, and then stated:

> The history just recounted demonstrates that carrying concealed firearms in public was "not allowed by law." Not only was it generally prohibited by the *Statute of Northampton*, but it was specifically forbidden by the *statute enacted under Henry VIII*, and by the later *proclamations of Elizabeth I and James I*.

Id. at 30 (italics added). Because, as already demonstrated above, those very same italicized provisions prohibited not just concealed carry but open carry as well, all public carry, including open carry, was "not allowed by law." Thus, the English Bill of Rights did **not** protect **either** concealed **or open** public carry.

The majority's subsequent citation to Granville Sharp further confirms this view, as he, too, construed "as allowed by law" to exclude small or short weapons that "were **liable to be** *concealed*," even if not actually concealed. Id. at 30. Under the majority's analysis, therefore, English history unambiguously supports excluding all forms of public carry -- open and concealed -- from Second Amendment protection.

The majority's citations regarding Colonial America, too, extend prohibitions generally to all forms of public carry. Id. at 31 ("Other colonies **adopted** verbatim, or almost verbatim, **English law**," including, e.g., Massachusetts Bay, authorizing arrest of "those who 'shall ride or go **armed** Offensively.'").

State court decisions in America, cited by the majority, while more mixed, do not require interpreting the Second Amendment as protecting some form of

public carry. First of all, many of the cited state decisions upheld prohibitions on public carry that extended to both open and concealed carry. See Id. at 42-44 (characterizing English ("**carrying** of deadly weapons"), Workman ("carrying, whether **openly or concealed**"), and Walburn ("**carrying** a revolver") cases as having "upheld prohibitions against carrying **concealable (not just concealed)** weapons"); id. at 33-34 (Aymette case ruled "**concealable** weapons did not come within the scope of either the English Bill of Rights or the state constitution").

Second, even those few state court interpretations that did protect open carry or some form of public carry either 1) interpreted only the state's own **state** constitution, or 2) if purporting to interpret the Second Amendment, do not bind this **federal** court's interpretation of the Second Amendment.

In sum, the Peruta majority's historical analysis (which it deemed "determinative"), although ostensibly directed at **concealed** carry only, in fact overwhelmingly supports the conclusion that the Second Amendment also does not protect **open** carry either, nor **some form** of public carry (**open or concealed**).[4] Accordingly, HRS §134-9 is constitutional.

[4] Moreover, the majority, despite saying it was not resolving the open carry issue, nevertheless stated that it was "**join[ing]** several of our sister circuits that have **upheld** the authority of states to prohibit entirely or to limit substantially the carrying of concealed **or concealable** firearms," id. at 45-46, a conclusion that extends **beyond concealed carry**.

B. Hawai‘i's restrictions on public carry, as a whole, would survive intermediate scrutiny in any event; a 7-to-4 majority in *Peruta* effectively already so ruled.

But even if this Court were to assume, *arguendo*, and contrary to the above, that the Second Amendment provides some protection of open carry (or some form of public carry, open or concealed), good-cause type restrictions on public carry -- like Hawai‘i's -- easily survive intermediate scrutiny. The three federal circuits mentioned below (besides this circuit) to address similar restrictions that do not involve outright **bans**, have unanimously already so held. Even if one construes HRS §134-9 as a "flat ban" on **open** carry for those not "engaged in the protection of life and property," Hawai‘i does allow **concealed** carry for applicants in the "exceptional case" who "show[] reason to fear injury to the applicant's person or property." Plaintiff is thus clearly wrong to claim Hawai‘i "completely ban[s] the carry of firearms, open or concealed." Instead, Hawai‘i allows public carry (via concealed carry)[5] for those establishing a concrete self-defense need.

Significantly, the concurring opinion of Judge Graber expressly ruled that public carry restrictions similar to Hawai‘i's (i.e., California's good-cause prerequisite) satisfy intermediate scrutiny. **And it did so in a manner that did not limit its reasoning to only concealed carry restrictions.** Instead, the

[5] There can be no serious claim that the Second Amendment requires that any public carry right -- if there is one -- must be exercisable through **open** carry, and not concealed carry. After all, a concealed firearm would provide the holder with the same ability to defend oneself as an openly carried weapon.

concurrence, applying intermediate scrutiny,[6] ruled flatly that "[s]uch restrictions strike a permissible balance between 'granting handgun permits to those persons known to be in need of self-protection and **precluding a dangerous proliferation of handguns on the streets.**'" Id. at 52-53 (quoting and citing Woollard v. Gallagher, 712 F.3d 865 (4th Cir. 2013) ("good and substantial reason" requirement upheld), Drake v. Filko, 724 F.3d 426 (3d Cir. 2013) ("justifiable need" prerequisite upheld), and Kachalsky v. County of Westchester, 701 F.3d 81 (2d Cir. 2012) ("proper cause" standard upheld)). Nothing in that safety logic -- emphasizing the "dangerous proliferation of handguns on the streets" -- turns on dangers unique to concealed carry that do not exist with open carry. It is **having** the gun while in public, period, that creates the danger, and tips the balance.

Road rage shootings, and the tragic examples the concurrence cited (movie theatre texting shooting, gas-station shooting, etc.), happen because the perpetrator had a gun while in public, not because the gun was concealed. As the Peruta concurrence quoted from Kachalsky:

[6] Intermediate scrutiny is the highest level of scrutiny that can justifiably be applied here because public carry is not at the "core" of the Second Amendment right. United States v. Chovan, 735 F.3d 1127, 1138 (9th Cir. 2013) (core right is self-defense **in the home**). Morover, Hawai‘i's regulation of public carry also does not severely burden, see id., any purported right to publicly carry firearms for self-defense, because those with a special need to carry for self-defense -- i.e., those who can show "reason to fear injury;" see HRS §134-9 -- have access to concealed carry licenses.

> **widespread access to handguns in public** increases the likelihood that felonies will result in death and fundamentally alters the safety and character of public spaces.

Id. at 57; see also Woollard, 712 F.3d at 879 ("limiting … public carrying of handguns …[l]essen[s] 'the likelihood that basic confrontations between individuals would turn deadly.'"). That access-to-handguns-in-public danger -- which provided the concurrence's justification for restricting public carry -- applies just as strongly to **openly** carried handguns as it does to concealed handguns. Thus, the Peruta concurrence has **already *de facto*** ruled that good-cause type restrictions on public carry, **open or** concealed -- which would include Hawai'i's "reason to fear injury" prerequisite -- satisfy intermediate scrutiny.[7]

Importantly, that 3-judge concurring position is controlling as it is supported by a 7-4 majority, because the other 4 judges in the majority expressly stated that if they "were to reach that question, [they] would entirely agree with the … concurrence." Id. at 51-52. Thus, a controlling majority in Peruta en banc has **already** effectively upheld good-cause type restrictions for public carry (**concealed or open**), like Hawai'i's "reason to fear injury" prerequisite, under intermediate scrutiny.

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[7] Moreover, the most **recent** comprehensive study on right-to-carry laws (i.e., where no special showing of need is required to publicly carry) buttresses the concurrence by suggesting that such laws increase gun aggravated assaults by nearly 33 percent, and also increase rapes, robberies, and murders. Aneja, Donohue & Zhang, *The Impact of Right to Carry Laws and the NRC Report […]* (Dec. 2014) Abstract, *avail. at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2443681.

CONCLUSION

In sum, despite ostensibly declining to rule on anything but **concealed** carry restrictions, the **reasoning** of a 7-to-4 majority in Peruta both 1) rejects Second Amendment protection for **open** carry or some form of public carry (open or concealed), **and**, alternatively, 2) supports the validity of good-cause-type restrictions on open carry, or on some form of public carry (open or concealed) -- like Hawai‘i's restrictions -- under intermediate scrutiny. **Either one** of these conclusions, **both** of which are compelled by the reasoning in Peruta, dictates affirmance here.

DATED: Honolulu, Hawaii, July 12, 2016.

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I certify that the foregoing brief is proportionately spaced, has a typeface of 14 points or more and contains 2,384 words.

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I certify that on _____, I electronically filed the Supplemental Amicus Curiae Brief of the State of Hawai‘i in Support of County of Hawai‘i Defendants-Appellees, in Support of Affirmance, with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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