No. 12-16258

In The United States Court of Appeals

For The Ninth Circuit

CHRISTOPHER BAKER,

Plaintiff-Appellant,

v.

LOUIS KEALOHA, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
For Hawaii, Honolulu
No. 1:11-cv-00528-ACK-KSC
The Honorable Alan C. Kay
United States Senior District Court Judge

Appellant's Supplemental Brief

ALAN BECK
Attorney at Law
2692 Harcourt Drive
San Diego, California 92123
Telephone: (619) 905-9105
alan.alexander.beck@gmail.com

RICHARD LOREN HOLCOMB, JR.
Holcomb Law, LLC
1136 Union Mall
Suite 808
Honolulu, HI 96813
(808) 545-4040

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Introduction

Mr. Baker seeks to bear a "concealed or openly displayed firearm, including a handgun or pistol, in public for all protected purposes". *See* Complaint at 48. Mr. Baker's claim to concealed carry was foreclosed by this Court's en banc opinion in *Peruta v. County of San Diego,* 824 F.3d 919 (9th Cir. 2016). There, this Court held that "… the Second Amendment does not preserve or protect a right of a member of the general public to carry concealed firearms in public." *Id*. at *2. For the reasons explained by the dissent, Mr. Baker believes that holding was in error. Mr. Baker therefore respectfully preserves the point for further review.

However, whatever the scope of the Second Amendment with respect to concealed carry, *Peruta* does not address and thus does not foreclose Mr. Baker's claim that the Second Amendment extends to open carry outside the home. While the panel decision in Peruta was vacated by the Court's order granting en banc, the original panel decision in *Peruta* sets forth the correct analysis on the broad question, not addressed en banc, on whether the Second Amendment right extends outside the home. In this regard, while the original *Peruta* panel decision may not be cited "as precedent" to this Court,[1] it's analysis nonetheless retains persuasive force on questions not addressed by the en banc panel decision of the Court. See *United*

[1] *See Peruta v. County of San Diego,* 781 F.3d 1106 (2015) (order granting en banc).

States v. Barona, 56 F.3d 1087, 1092 n.1 (1995), *cert. denied*, 116 S.Ct. 813 (1996) ("the reasoning of a vacated opinion may be looked to as persuasive authority if its reasoning is unaffected by the decision to vacate"). Cf. *United States v. Adewani*, 467 F.3d 1340, 1342 (D.C.Cir. 2006) ("[w]hen the Supreme Court vacates a judgment of this court without addressing the merits of a particular holding in the panel opinion, that holding 'continue[s] to have precedential weight, and in the absence of contrary authority, we do not disturb' it." (quoting *Action Alliance of Senior Citizens of Greater Philadelphia v. Sullivan*, 930 F.2d 77, 83 (D.C.Cir.1991)). For reasons set forth below, and in the original panel decision in *Peruta*, this Court should hold that the Second Amendment right does extend outside the home and thus reverse the district court's holding to the contrary. *See Baker v. Kealoha*, Civ. No. 11-00528 ACK-KSC (D. Haw. Jun. 19, 2012) at 54. The Court should then remand the case to the district court for the exercise of that court's equitable discretion under the correct legal standard.

In *Peruta* this Court held en banc that concealed carry of a firearm was not covered by the Second Amendment, and expressly did "not reach the question whether the Second Amendment protects some ability to carry firearms in public, such as open carry. That question was left open by the Supreme Court in *Heller*, and we have no need answer it here." *Peruta*, 824 F.3d at 927. That reserved question is presented here. In practice, Defendants completely ban the carry of

firearms, open or concealed. The lower court erred by finding that this ban did not implicate Second Amendment conduct. This Court should find that the lower court applied an erroneous legal standard in reviewing Mr. Baker's preliminary injunction. And for the reasons set forth below it should remand this matter for the trial court to conduct the analysis required by *Winter v. Natural Res. Def. Council*, Inc., 55 U.S. 7, 19 (2008) when evaluating preliminary injunctions under the proper legal standard. *See, e.g, Arc of California v. Douglas*, 757 F.3d 975, 983 (2014) ("A district court abuses its discretion when its decision relies "'on an erroneous legal standard or clearly erroneous finding of fact.'" quoting *Alliance for the Wild Rockies v. Cottrell,* 632 F.3d 1127, 1131 (9th Cir.2011)). That was the course of action followed by this Court in its original decision in this case and that remains the appropriate course to follow even after the en banc decision in *Peruta*.

I. Defendants Completely Ban the Open Carry of Firearms

The Hawaii Revised Statutes completely ban the open carrying of firearms for self-defense for private citizens. Specifically, Haw. Rev. Stat. §134-9 only allows for issuance of open carry handgun permits when one "is engaged in the protection of life and property." "Upon information and belief, the current practice of Defendant Kealoha is to issue licenses to carry unconcealed weapons ('open carry") only to applicants who are licensed guards." *See* Complaint at ¶ 39; ER 94-105. Thus, only private security, armored truck drivers and others employed to protect

property are issued open carry permits. *Id*. Under no circumstances are open handgun carry permits issued to private citizens. ER 94-105. Hawaii also maintains a complete ban on the carry of long arms for self-defense. *See* Haw. Rev. Stat. §134-5. Therefore, Hawaii completely bans the open carry of firearms outside the home.

Furthermore, Hawaii unlike California does not have a self-defense exception to its law. California's firearm carry ban also does not apply to a person "who reasonably believes that any person or the property of any person is in immediate, grave danger and that the carrying of the weapon is necessary for the preservation of that person or property ." Cal. Penal Code § 26045. Therefore, during times of civil unrest or other emergencies, Californians may lawfully carry firearms for purposes of self-defense. Unlike California, Hawaii bans the carrying of firearms for self-defense at all times. This ban is unconstitutional because the Second Amendment right extends outside the home for lawful self-defense.

II. **The Second Amendment Right Extends Outside the Home**

In the original panel decision in *Peruta*, this Court held that while the Second Amendment did not necessarily require the states to permit concealed carry, "the Second Amendment does require that the states permit *some form* of carry for self-defense outside the home." *Peruta*, 742 F.3d at 1172 (emphasis the Court's). That ruling was not disturbed by the *Peruta* en banc Court and should be reaffirmed by this Court. The scope of the right is the same, viz., the Second Amendment

"includes the right to carry in case of public confrontation, not just after a confrontation has occurred." (742 F.23d at 1169). Indeed, the historical analysis of Court in the original panel decision in Peruta is left entirely undisturbed by the en banc decision on this question. The Court should not disturb that analysis here.

Mr. Baker enjoys a fundamental constitutional right to bear arms. This right does not extinguish at the threshold of his front door. The Second Amendment guarantees the right to bear firearms for protected purposes, such as self-defense, militia training, and hunting which cannot be accomplished within the confines of a home. This was all previously decided in *District of Columbia v. Heller,* 554 U.S. 570, 584 (2008) ("we conclude that this natural meaning [of the term 'bear' in the Second Amendment] was also the meaning that 'bear arms' had in the 18th century. In numerous instances, 'bear arms' was unambiguously used to refer to the carrying of weapons outside of an organized militia"). Indeed, *Heller* plainly held that "bear arms" means 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*. at 584. The Court justified its conclusion through extensive historical analysis, *Id.* at 584-87, and then specifically rejected each of the dissent's reasons for urging the term "bear" to be interpreted as limited to military service. *Id*. at 584-90. Accordingly, the core of the Second Amendment is not to possess a firearm solely within the home as urged by the

Defendant-Appellees, but rather to possess a firearm for the purpose of self-defense. *Id.* at 571. This right is applicable to the states. *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010).

Heller emphasizes the Second Amendment gives a dual guarantee, *i.e.*, that citizens may keep and bear arms. Accordingly, three separate times Heller specifically defined the "core" or "central component" of the Second Amendment as the right of self-defense. *Heller*, 554 U.S. at 599, 628, 630 (emphasis added). In order to find the Second Amendment right does not extend outside the home, one would need to ignore eight pages of analysis and instead find that Heller's admonition that the right to defend oneself is "most acute" in the home somehow undermines the Second Amendment's dual guarantee that citizens may keep and bear firearms.

If *Heller* could conceivably be read to condone the extinguishment of Second Amendment rights at the threshold of the front door, which it cannot, why would the Court possibly clarify that prohibitions "forbidding the carrying of firearms in sensitive places such as schools and government buildings" are likely reasonable? *See Heller*, 554 U.S. at 626. Clearly, sensitive places cannot encompass all public places without abrogating the right altogether. And, if the Court had intended to abrogate the right in all public places, there is no feasible explanation for why the Court would have distinguished "sensitive" from "non-sensitive" places and even

less explanation as to why it would have devoted eight pages of the opinion to the conclusion that "bear" means to carry. *See Peruta*, 742 F.3d at 1153.

Just this term, the Supreme Court, in its per curium decision styled *Caetano v. Massachusetts*, 577 U.S. __, slip op. (March 21, 2016), again implied that the Second Amendment right extends outside the home. *Caetano* involves whether a woman's conviction for possession of a stun gun in a grocery store parking lot violated the Second Amendment. *Caetano*, slip op. at 1 (concurring opinion of Alito, J.). If there was no right to carry the arm outside the home, the case could have been disposed of on that basis. Instead, a unanimous Court found that the lower court's findings (that stun guns are not protected by the Second Amendment) "contradicts this Court's precedent." *Id*. at 2.

Moreover, a historical analysis of *Heller's* text explicitly finds that the Second Amendment right extends to the open carry of firearms subject to reasonable time, place, and manner restrictions. In *Heller*, the majority states:

> We also recognize another important limitation on the right to keep and carry arms. *Miller* said, as we have explained, that the sorts of weapons protected were those 'in common use at the time.' 307 U.S., at 179, 59 S.Ct. 816. We think that limitation is fairly supported by the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'

Heller, 554 U.S. at 570.

Here, the dangerous and unusual doctrine does not apply. Mr. Baker seeks to carry a handgun. There is nothing "unusual" about handguns and handguns are

plainly "in common use" now. Thus, a handgun should be protected under the Second Amendment. *Id*.

Moreover, the dangerous and unusual doctrine historically applies to the *manner* in which the right is exercised.[2] In this context, the Common Law's definition of "dangerous" was any item that could be used to take human life through physical force. ("[S]howing weapons calculated to take life, such as pistols or dirks, putting [the victim] in fear of his life … is … the use of dangerous weapons" *United States v. Hare*, 26 F. Cas. 148, 163 - 64 (C.C.D. Md.1818)). "Any dangerous weapon, as a pistol, hammer, large stone, &c. which in probability might kill B. or do him some great bodily hurt" *See Baron Snigge v. Shirton* 79 E.R. 173 (1607). In this context, "unusual" meant to use a protected arm in a manner which creates an affray. Timothy Cunningham's 1789 law dictionary defines an affray as "to affright, and it formerly meant no more, as where persons appeared with armour or weapons not usually worn, to the terror."

The longstanding prohibition on the carrying of "dangerous and unusual weapons" refers to types of conduct with weapons. A necessary element of this common law crime of affray, to which the "dangerous and unusual" prohibition

[2] Mr. Baker concedes that this interpretation of dangerous and unusual conflicts with this Court's holding in *United States v. Henry*, 688 F. 3d 637 (9th Cir. 2012). However, in *Henry* this Court did not conduct an analysis of the phrase and simply assumed that the term referred to unusually dangerous forms of weapons.

refers, had always required that the arms be used or carried in such manner as to terrorize the population, rather than in the manner suitable for ordinary self-defense.

Heller's first source on the topic, Blackstone, offered that "[t]he offence of riding or going armed, with dangerous or unusual weapons, is a crime against the public peace, *by terrifying the good people of the land*." 4 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 148-49 (1769) (emphasis added). Blackstone referenced the 1328 Statute of Northampton, which, by the time of the American Revolution, English courts had long limited to prohibit the carrying of arms only with evil intent, "in order to preserve the common law principle of allowing 'Gentlemen to ride armed for their Security.'" David Caplan, *The Right of the Individual to Bear Arms: A Recent Judicial Trend*, DET. L. C. REV. 789, 795 (1982) (citing *Rex v. Knight*, 90 Eng. Rep. 330 (K.B. 1686)). "[N]o wearing of arms is within the meaning of this statute, unless it be accompanied with such circumstances as are apt to terrify the people," by causing "suspicion of an intention to commit an[ ] act of violence or disturbance of the peace." TREATISE ON THE PLEAS OF THE CROWN, ch. 63, § 9 (Leach ed., 6th ed. 1788); *see* Joyce Lee Malcolm, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT 104-05 (1994).

Heller's additional citations regarding the "dangerous and unusual" doctrine are in accord. "[T]here may be an affray, where there is no actual violence; as where

a man arms himself with dangerous and unusual weapons, *in such a manner, as will naturally diffuse a terrour among the people*." James Wilson, WORKS OF THE HONOURABLE JAMES WILSON (Bird Wilson ed., 1804) (footnote omitted) (emphasis added). "It is likewise said to be an affray, at common law, for a man to arm himself with dangerous and unusual weapons, *in such manner as will naturally cause terror to the people*." John A. Dunlap, THE NEW-YORK JUSTICE 8 (1815) (emphasis added).

> Riding or going armed with dangerous or unusual weapons, is a crime against the public peace, by terrifying the people of the land … But here it should be remembered, that in this country the constitution guar[]anties to all persons the right to bear arms; then it can only be a crime to exercise this right in such a manner, as to terrify the people unnecessarily.

Charles Humphreys, A COMPENDIUM OF THE COMMON LAW IN FORCE IN KENTUCKY 482 (1822); *see also Heller*, at 588 n.10 (quoting same). It is the *manner* of how the right is exercised, not the type of weapon that is carried, that constitutes the crime. Said another way, just because a firearm or other weapon is in common usage at the time does not make the *manner* in which the right is exercised excused or excusable simply due to the type of firearm or weapon carried.

"[T]here may be an affray … where persons arm themselves with dangerous and unusual weapons, in such manner as will naturally cause a terror to the people." William Oldnall Russell, A TREATISE ON CRIMES AND INDICTABLE MISDEMEANORS 271 (1826). But:

> it has been holden, that no wearing of arms is within [meaning of Statute of Northampton] unless it be accompanied with such circumstances as are apt to terrify the people; from whence it seems clearly to follow, that persons of quality are in no danger of offending against the statute by wearing common weapons … in such places, and upon such occasions, in which it is the common fashion to make use of them, without causing the least suspicion of an intention to commit any act of violence, or disturbance of the peace.

Id. at 272.

The other treatises *Heller* cites in support of the "dangerous and unusual" doctrine are in accord, as are the cases *Heller* cites. *See O'Neill v. State*, 16 Ala. 65, 67 (1849) (affray "probable … if persons arm themselves with deadly or unusual weapons for the purpose of an affray, *and in such manner as to strike terror to the people*") (emphasis added); *State v. Langford*, 10 N.C. (3 Hawks) 381, 383-384 (1824) (affray "when a man arms himself with dangerous and unusual weapons, *in such a manner as will naturally cause a terror to the people*") (emphasis added); *English v. State*, 35 Tex. 473, 476 (1871) (affray "by terrifying the good people of the land"). In fact, one does not even need to be armed with a firearm to commit the crime of affray under the dangerous and unusual doctrine. *See State v. Lanier*, 71 N.C. 288, 290 (1874) (riding horse through courthouse, unarmed, is "very bad behavior" but "may be criminal or innocent" depending on whether people alarmed). The traditional right to arms "was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Heller* at 626.

The carrying of dangerous and unusual weapons doctrine refers to a time, place, and manner restriction on the carrying of protected arms.

The common use language is supported by the tradition of carrying dangerous and unusual weapons. At Common Law one had a right to carry protected arms. The government cannot strip the right to carry protected arms without demonstrating that carrying within an area is unusual. *Heller* expressly holds that there is a right to carry outside the home subject to reasonable time, place, and manner restrictions.

III. **Defendants Ban on the Open Carry of Firearms is Unconstitutional**

As shown above, the Second Amendment right extends to the carry of firearms for lawful self-defense. Thus, Mr. Baker's claim to handgun carry burdens conduct falling within the scope of the Second Amendment. When a law burdens conduct falling within the scope of the Second Amendment's guarantee this Court conducts a two-step inquiry. *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 963 (9th Cir. 2014). "The two-step inquiry we have adopted '(1) asks whether the challenged law burdens conduct protected by the Second Amendment and (2) if so, directs courts to apply an appropriate level of scrutiny.'" *Id*. at 960 (quoting *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013)).

Hawaii's complete ban on handgun carry cannot fulfill any level of heightened scrutiny per this Court's precedent. Even under intermediate scrutiny this Court looks to see whether regulations "leave open alternative channels for self-defense".

Jackson v. City & Cty. of San Francisco, 746 F.3d 953, 961 (9th Cir. 2014). Here, Hawaii provides no alternative channel for self-defense. Hawaii law prohibits the bearing of all firearms and virtually all nonlethal arms for self-defense outside the home. *See* Haw. Rev. Stat. §§ 134-2, 134-5, 134-9(c), 134-23, 134-24, 134-25, 134-26.

The only conceivable mechanism available for self-defense is to obtain a concealed carry handgun permit via Haw. Rev. Stat. §134-9. However, this Court in *Peruta* already determined that concealed carry is outside the scope of the Second Amendment right. It may be that a permissive shall issue concealed carry system might be deemed a reasonable open alternative for self-defense. However, if this is the case, such a system does not exist in Hawaii.

In Hawaii, the applicable licensing scheme contemplates the issuance of carry permits only when an applicant shows that his or hers is an "exceptional case" and when the applicant can show "reason to fear injury to [his or her] person or property." Haw. Rev. Stat. §134-9(a). Unbridled discretion is vested in the Chief of Police to determine whether a permit should issue without providing any judicial or even administrative review to aggrieved applicants. *Id.* The statutory scheme fails to define what constitutes an "exceptional case" or what proof an applicant must present to satisfy the Chief that the applicant has reason to fear such injury. *See Id.*

Thus, the Chief is left to arbitrarily choose those applicants that may exercise their rights and those that may not. In practice, this is an easy decision as all applications submitted by those who are not "engaged in the protection of life and property," i.e., security guards or armored truck attendants, are routinely denied without explanation as was Mr. Baker's. ER 94-105 (showing all permits issued were "security" related and none were issued for "citizens"). Thus, concealed carry is effectively banned in Hawaii and does not exist as an alternative for self-defense.

Hawaii completely bans the open carry of firearms. Hawaii allows for no alternative channels for self-defense because it effectively bans the carrying of concealed firearms. Therefore, Hawaii's ban on the open carry of handguns cannot fulfill any level of scrutiny because it does not allow for any alternative outlet for self-defense. Per this Court's precedent, Hawaii's ban on the open carry of handguns for self-defense is unconstitutional.

IV. This Court Should Not Create a Circuit Split

In the past, this Court warned against creating circuit splits and is "hesitant to create such a split, and we do so only after the most painstaking inquiry…" *Zimmerman v. Oregon Dept. of J.*, 170 F.3d 1169, 1184 (9th Cir. 1999). Ruling against Mr. Baker would create an explicit circuit split with the Seventh Circuit.

The case styled *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012), is the only Circuit decision to deal with a complete ban on the carry of firearms. There, the

Seventh Circuit found that the Second Amendment right extends to carrying firearms for self-defense outside the home and ruled the Illinois complete ban on the carrying of handguns violated the Second Amendment. If this Court were to find that the Second Amendment is not violated here, the ruling would create an explicit split with the Seventh Circuit. This Court should not create a Circuit split. Instead, in line with the Seventh Circuit, this Court should find that the Second Amendment right extends outside the home and remand this matter to the lower court with instructions to apply the correct legal standard.

V. This Court Should Remand this Preliminary Injunction to Allow the Lower Court to Apply the Correct Legal Standard.

The lower court clearly erred by holding the Second Amendment right does not extend outside the home at all. This Court need not decide the propriety of each facet of the statute in this case. This appeal was an interlocutory appeal of an application for preliminary injunction. On appeal, Mr. Baker framed the dispositive issue as the lower court having both abused its discretion and/or "based its decision on an erroneous legal standard," *see Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc*., 109 F.3d 1394, 1397, n. 2 (9th Cir. 1997), Brief of Appellant, p. 2,

This panel has already correctly found that: "the district court made an error of law when it concluded that the Hawaii statutes did not implicate protected Second Amendment activity". *Christopher Baker v. Louis Kealoha,* et. al., No. 12-16258, __ Fed.Appx. __, 2014 WL 1087765 at *1 (9th Cir. Mar. 20, 2014) (unpublished).

This Court's en banc opinion in *Peruta* does not contradict that holding. Thus, this case should be remanded to the lower court, to allow that court to apply the correct law, i.e., that Second Amendment rights are not extinguished at the threshold of the front door. Remand is clearly proper to permit the lower court to make the appropriate findings, should Mr. Baker further pursue such relief. *See Miss Universe, Inc. v. Flesher*, 605 F.2d 1130, 1133 (9th Cir. 1979) ("[t]he Court of Appeals does review factual findings; however, we do not generally serve as fact-finders of first instance. . . . [Because parties have not had an opportunity to develop a complete record at the granting or denial of a preliminary injunction,] [t]hat is one reason why this court generally limits its review to the more general determination as to whether the court below abused its discretion.").

Despite Mr. Baker's belief that irreparable harm should be presumed as his fundamental rights are at stake, *Elrod v. Burns*, 427 U.S. 347 (1976); 11A Charles Alan Wright et. al., Federal Practice and Procedure § 2948.1 (2d ed. 1995), the lower court is the proper forum in which that determination should be made. If either party is aggrieved by such finding, that party may seek further relief from this Court.

Conclusion

This Court's en banc opinion in *Peruta* does not meaningfully impact Mr. Baker's appeal. Unlike the litigants in *Peruta*. Mr. Baker has from the onset of litigation invoked his right to openly carry a handgun. The lower court erred by

finding the Second Amendment right does not apply outside the home. Once the lower court is instructed with the correct application of law it will find Hawaii's complete ban on handgun carry is unconstitutional. And the trial court is the proper venue for that determination to be made.

Mr. Baker respectfully request that this Court find the lower court applied an erroneous legal standard in evaluating Mr. Baker's preliminary injunction by holding the Second Amendment right does not extend outside the home. And. remand this matter with instructions for the lower court to apply the correct legal standard in evaluating this matter. In the alternative, he requests that this Court order Defendants to issue him a permit to openly carry a handgun for the pendency of litigation.

DATED: San Diego, California and Honolulu, Hawai'i; September 6, 2016.

s/ Alan Beck
ALAN BECK (HI Bar No. 9145)
Attorney at Law
2692 Harcourt Drive
San Diego, California 92123
Telephone: (619) 905-9105
Email:
alan.alexander.beck@gmail.com

s/ Richard Loren Holcomb, Jr.
RICHARD LOREN HOLCOMB, JR.
Holcomb Law, LLC
1136 Union Mall
Suite 808
Honolulu, HI 96813
(808) 545-4040
rholcomblaw@live.com

CERTIFICATE OF COMPLIANCE
TYPE-VOLUME LIMITATIONS, TYPEFACE REQUIREMENTS,
AND TYPE STYLE REQUIREMENTS

1. This supplemental brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Circuit Rule 32-3(3) because this supplemental brief contains 4,250 words, as calculated by Microsoft Word 2016, excluding the parts of the brief excluded by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This supplemental brief complies with the typeface Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in proportionately spaced typeface using Microsoft Word 2016 in 14 point Times New Roman font.

s/ Alan Beck
ALAN BECK (HI Bar No. 9145)

CERTIFICATE OF SERVICE

On this, the 6th day of September 2016, I served the foregoing Brief by electronically filing it with the Court's CM/ECF system, which generated a Notice of Filing and effects service upon counsel for all parties in the case.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this the 6th day of September, 2016

s/Alan Beck

Alan Beck