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.*

**On 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**

## REPLY BRIEF

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## A. The right to bear arms exists outside the home.

*Historically, citizens enjoyed the right to bear arms.*

According to the Defendants, because the Second Amendment codified a pre-existing right, *District of Columbia v. Heller* 554 U.S. 570, 599 (2008), if it could be demonstrated that no right to bear arms existed in England, no means-end scrutiny should be applied. Brief of Appellees, pp. 18-19. Even assuming the *Heller* Court had not already decided this issue, which it has, *Heller*, 554 U.S. at 584 ("[i]n numerous instances [from a review of "founding-era sources"], 'bear arms' was unambiguously used to refer to the carrying of weapons outside of an organized militia"); Brief of Appellant, pp. 13-23, Defendants inaccurately portray the right to bear arms both in pre-colonial England and at the time of our founding.

First, Defendants rely heavily, as they did in the District Court, on the prohibitions of the Statute of Northampton of 1328. Brief of Appellees, pp. 19-21. However, contrary to Defendants' assertion, by the time of the American Revolution those prohibitions had long been limited to prohibit the carrying of arms only with *evil intent*, and "the common law principle of allowing 'Gentlemen to ride armed for their Security'" was preserved. David Caplan, *The Right of the Individual to Bear Arms: A Recent Judicial Trend*, 4 DETC.L.REV 789, 795 (1982) (*citing Rex v. Knight*, 90 Eng. Rep. 330 (K.B. 1686)); 4 William

Blackstone, *Commentaries On The Laws Of England* 148 (1769) ("[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*") (emphases added). The peaceable bearing of commonly used arms was protected:

> [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; from whence it seems clearly to follow, that persons of quality are in no danger of offending against this statute by wearing common weapons . . . for their ornament or defence, 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.

William Hawkins, 1 *Treatise Of The Pleas Of The Crown*, ch. 63, § 9 (1716); *see* Joyce Lee Malcolm, *To Keep And Bear Arms The Origins of An Anglo-American Right* 104-05 (1994).

> [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.
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> * * * *
>
> 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.

1 William Oldnall Russell, *A Treatise On Crimes And Indictable Misdemeanors* 271 (1826).

The most telling rebuttal to the Defendants' misplaced reliance on the 1328 Act is that the English Bill of Rights of 1689 specifically guarantees "no royal interference in the freedom of the people to have arms for their own defence as suitable to their class and as allowed by law." Indeed, the same document describes the injustices committed by King James II, resulting in the ratification of that Bill of rights, including that he had "caus[ed] several good subjects being Protestants to be disarmed at the same time when papists were both armed and employed contrary to law." English Bill of Rights (1689). Thus, the document restored rights to Protestants that were abrogated by King James II. *See Id.*

Accordingly, despite the Defendants' contention, there was a historical right to bear arms outside the home in England (for both Catholics and Protestants). Reasonable restrictions were permitted as *Heller*, *supra.*, now also contemplates.

Moreover, Defendants misunderstand the historical record of the United States at the time of the Second Amendment's ratification. Revolutionary War-era Americans, heavily influenced by the tyranny of the British in adopting the Bill of Rights, "held the individual right to have and use arms against tyranny to be fundamental." Stephen p. Halbrook, *That Every Man Be Armed: The Evolution of a Constitutional Right* 55 (1984). Similarly, the Federalist papers also speak of the

right to bear arms. Alexander Hamilton wrote "[when] representatives of the people betray their constituents, there is then no resource left but in the exertion of that original right of self-defense, which is paramount to all positive forms of government." Alexander Hamilton, THE FEDERALIST NO. 28.

While those historical references speak most acutely to the right in defending against a tyrannical government, they also recognize an inherent right to have arms for other purposes. Halbrook, *supra*. at 69, n. 141 ("[T]he right to have weapons for nonpolitical purposes, such as . . . hunting . . . appeared so obvious to be the heritage of free people as never to be questioned."). And, while several urban municipalities restricted the discharge of firearms within the city bounds or during certain days, Act of May 28, 1746, ch. 10, 1778 Mass. Sess. Laws 193, 194; 5 N.Y. Colonial Laws, ch. 1501at 244–46 (1894); Act of Aug. 26, 1721, ch. 245, Acts of Pennsylvania 157–58, no early American law entirely prohibited the ownership, possession, or use of firearms for self-defense, hunting, or recreation. Patrick J. Charles, *The Second Amendment: The Intent and Its Interpretation by the States and the Supreme Court*, 77 (2009). Accordingly, at the time of the Second Amendment's ratification there was an understood and unquestioned right to carry arms outside the home.

Equally misplaced is Defendants' reliance on the purported state of the law at the time of the ratification of the Fourteenth Amendment. Brief of Appellees,

page 18. Notably, even the Defendants' citations contain, to some extent, the exceptions to prohibitions that are advocated by Mr. Baker. *Id.* ("1876 Wyo.Comp. Laws ch. 52, § 1 (forbidding '*ope[n]* bearing . . .'); Tex. Act of Apr.12, 1871, ch. 34 (prohibiting . . . [except, in part] *for militia service*); *accord Aymette v. State*, 1840 WL 1554, *4 (Tenn. 1840) ("The Legislature, therefore, have a right to prohibit the wearing or keeping weapons dangerous to the peace and safety of the citizens, *and which are not usual in civilized warfare, or would not contribute to the common defence*.") (emphases added)).[1] These laws, although much less restrictive than Hawaii's, may indeed have been "unthinkable." However, there is no indication that the laws were ever challenged. And, insofar as those laws were incompatible with the laws at the time of the Second Amendment's ratification, means-end scrutiny should have applied to test their constitutionality. Brief of Appellees, pp. 18-19 (citing *Heller*, 554 U.S. at 599).

The four separate state Supreme Court decisions cited with approval by the *Heller* majority are much more insightful as to the state of the law at the time of the ratification of the Fourteenth Amendment. *Id.* at 611-14 (discussing *Nunn v. State, 1 Ga. 243 (1846)*; *Andrews v. State, 50 Tenn. 165 (1871)*; and *State* v. *Reid*, 1 Ala. 612, 616-17 (1840); *State* v. *Chandler*, 5 La. Ann. 489, 490 (1850)). In

[1] Notably, the *Aymette* Court's interpretation of the Second Amendment was specifically rejected in *Heller*. *Heller*, 554 at 613 (noting that the court concluded that concealed carry could be prohibited where open carry was permitted).

*Reid*, upholding a ban on the carrying of concealed weapons, Alabama's high court explained:

> We do not desire to be understood as maintaining, that in regulating the manner of bearing arms, the authority of the Legislature has no other limit than its own discretion. A statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defense, would be clearly unconstitutional. But a law which is merely intended to promote personal security, and to put down lawless aggression and violence, and to this end prohibits the wearing of certain weapons in such a manner as is calculated to exert an unhappy influence upon the moral feelings of the wearer, by making him less regardful of the personal security of others, does not come in collision with the Constitution.

*Reid*, 1 Ala. at 616-17.

The *Nunn* court followed *Reid*, and quashed an indictment for publicly carrying a pistol where the indictment failed to specify how the weapon was carried. *Nunn*, 1 Ga. At 251.

> [T]he act [only] . . . seeks to suppress the practice of carrying certain weapons *secretly*, that it is valid, inasmuch as it does not deprive the citizen of his *natural* right of self-defense, or of his constitutional right to keep and bear arms. But that so much of it, as contains a prohibition against bearing arms *openly*, is in conflict with the Constitution, and *void*."

*Id*. at 251 (emphasis in original).

Likewise, in *State v. Chandler,* 5 La. Ann. 489, 490 (1850), the Louisiana Supreme Court held that citizens had a right to carry arms openly:

> This is the right guaranteed by the Constitution of the United States, and which is calculated to incite men to a manly and noble defence of

> themselves, if necessary, and of their country, without any tendency to secret advantages and unmanly assassinations.

*Heller*, 554 U.S. at 613 (*citing Chandler*, *supra*.). And, "the Tennessee Supreme Court recognized . . . 'this right was intended ... and was guaranteed to, and to be exercised and enjoyed by the citizen as such, and not by him as a soldier, or in defense solely of his political rights.'" *Id*. at 608 (*quoting Andrews v. State*, 50 Tenn. 165, 183 (1871)).

Again, Mr. Baker observes that the *Heller* Court has already undertaken an appropriate historical analysis, specifically addressing the right to *bear* arms as opposed to *keep*. The Court concluded that "[a]t the time of the founding, as now, to 'bear' meant to 'carry.'" *Heller*, 554 U.S. 570, 584 (2008) (citations omitted). Surveying the history of concealed carry prohibitions, courts consistently upheld mere regulations of the manner in which arms are carried – with clear understanding that a complete ban on the carrying of handguns is unconstitutional.

Indeed, aside from modern day prohibitions that are increasingly being challenged in the courts, the only actual historical bans on the ownership or bearing of arms in the United States are those targeting African-Americans, particularly before ratification of the Fourteenth Amendment. *See Heller*, 554 U.S. at 611-12 (*citing Aldridge v. Commonwealth*, 4 Va. 447, 2 Va. Cas. 447, 449 (Gen.Ct.) ("[w]e will only instance the restriction upon the migration of free blacks into this State, and upon their right to bear arms."); *Waters v. State*, 1 Gill 302, 309

(Md.1843) (because free blacks were treated as a "dangerous population," "laws have been passed to prevent their migration into this State; to make it unlawful for them to bear arms; to guard even their religious assemblages with peculiar watchfulness")); s*ee also* L. Kennett & J. Anderson, *The Gun In America*, p. 50 n. 14 (1975) (discussing first recorded legislation restricting gun ownership by free blacks in Virginia in 1640); Robert H. Churchill, *Gun Regulation, the Police Power, and the Right To Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 Law & Hist., p. 148 n. 7 (2007); Thomas N. Ingersoll, *Free Blacks in a Slave Society: New Orleans, 1718–1812*, 48 Wm. & Mary Q. 173, 178–79 (1991) (recounting Louisiana's 1751 adoption of provisions from the Royal Black Code of 1724 requiring non-slaveholders to stop any black person carrying potential weapons). Clearly, Mr. Baker's rights should not be defined pursuant to these arcane and racist laws.

In sum, a fair and complete historical analysis, such as that conducted in *Heller, supra.*, does not support the Defendants' insistence that no right to bear arms existed pre-*Heller*. The law is clear: the state may reasonably regulate the carrying of arms but cannot completely abrogate the right. Defendants cannot offer a serious alternative definition for the plain language of the Second Amendment, nor can they rebut the overwhelming weight of tradition and

precedent that confirm Americans' enjoyment of the fundamental right to bear arms.

*Statistics fail to support Defendants' position.*

Defendants, as they did in the court below, also heavily rely on statistics in support of their position. Mr. Baker must again observe that, ultimately, it matters not what the statistics may show. As the *Heller* Court observed, "the enshrinement of constitutional rights necessarily takes certain policy choices off the table." *Heller*, 554 U.S. at 636. Moreover, the Court rejected the weighing of a citizen's exercise of the right against some perception of public danger (which could only be shown – as Defendants have unsuccessfully attempted – through statistical analysis):

> We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing' approach. The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad. We would not apply an "interest-balancing" approach to the prohibition of a peaceful neo-Nazi march through *Skokie*. See *National Socialist Party of America v. Skokie,* 432 U.S. 43, 97 S.Ct. 2205, 53 L.Ed.2d 96 (1977) *(per curiam)*. The First Amendment contains the freedom-of-speech guarantee that the people ratified, which included exceptions for obscenity, libel, and disclosure of state secrets, but not for the expression of extremely unpopular and wrong-headed views. The Second Amendment is no different. Like the First,

> it is the very *product* of an interest-balancing by the people—which Justice BREYER would now conduct for them anew. And whatever else it leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.

*Heller*, 554 U.S. at 634-35.

Although inappropriate for this analysis, statistics nonetheless support Mr. Baker's position. Defendants assert that there is a lack of consensus in the social science and that many researchers find that concealed carry laws have no impact on crime. Brief of Appellees, p. 31. Even accepting that position as true, the public interest is served by allowing the exercise of fundamental rights where there is no showing of any impact on crime.

Further, relevant data from some of the 44 states that generally license the carrying of handguns for self-defense belie Defendants' assertion that law-abiding citizens' exercise of the right would endanger Hawaii's citizens. Florida, for example, has issued 2,145,632 handgun carry licenses since 1987.[2] Yet, to date, only 168 licenses – .0078% – were revoked for crimes utilizing firearms.[3] Michigan issued 87,637 permits for the year ending June 30, 2011. In that time frame, it revoked only 466 permits and only a nominal fraction of those

[2] http://licgweb.doacs.state.fl.us/stats/cw_monthly.pdf (last visited Aug. 16, 2012).

[3] *Id.*

revocations were because of gun-related or violent crimes.[4] Texas also compiles detailed information tracking the proclivity of handgun carry license permit holders to commit crimes. In 2009, of 65,561 serious criminal convictions (including crimes that did not involve guns at all) only 101— 0.1541%—could be attributed to individuals licensed to carry handguns.[5] These statistics are astounding when considering that, according to the FBI, 1,246,248 violent crimes were committed in 2010.[6] Compared with the population of the United States at the time, 308,745,536,[7] and relying on a similar statistical analysis, approximately .40% of the population could be expected to commit a violent crime. Thus, law-abiding permit holders were less than half as likely as the general population to commit serious or violent crimes.[8]

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[4] See http://www.michigan.gov/documents/msp/2011_CPL_Report_376632_7.pdf (last visited Aug. 16, 2012).

[5]http://www.txdps.state.tx.us/administration/crime_records/chl/ConvictionRatesReport2009.pdf (last visited August, 16 2012).

[6]http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/violent-crime/violent-crime.

[7]http://2010.census.gov/news/releases/operations/cb10-cn93.html.

[8] As do all, this analysis invites some criticism. For example, there is no accounting for an individual that commits a series of violent crimes. It appears this is also true in the data compiled by the states. Further, the available data only allows a comparison of general categories of crimes. However, the permit holders' analyses purposely included "serious crimes" which may include non-violent serious crimes. Thus, the actual numbers of permit holders who commit violent crimes may be even lower.

Indeed, "there seems little legitimate scholarly reason to doubt that defensive gun use is very common in the U.S., and that it probably is substantially more common than criminal gun use." Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun*, 86 J. Crim. L. & Criminology 150, 180 (1995). In fact, one recent study reveals that states that permit carrying of weapons reaped an average $2-$3 billion crime *reduction* benefit within the first five years of constitutional compliance. Florenz Plassman & John Whitley, *Comment: Confirming* "*More Guns, Less Crime*," 55 Stanford L. Rev. 1313, 1365 (2003).

Other countries have experienced dramatic increases in crime following the passage of strict gun control measures:

> In 1997 Britain banned handguns, and between 1998 and 2003 gun crimes doubled. According the British Home Office, between 1997 and 2001 homicides increased by 19% and violent crime increased by 26%, while in the U.S. those same crimes fell by 12%. Between 2000 and 2001, robbery increased by 28% in Britain but only 4% in the U.S. Domestic burglary increased by 7% in Britain, but only 3% in the U.S.
>
> In 1996 Australia enacted sweeping gun control laws. In the six years following, violent crime rates rose by 32%. Canada isn't faring well under its stringent gun control laws. Today Canada's violent crime rate is more than double that of the U.S.[9]

[9] John Barnes, Legal Gun Ownership Saves Lives, Washington Policy Center (May 2006) (http://www.washingtonpolicy.org/publications/opinion/legal-gun-ownership-saves-lives); http://www.aic.gov.au/en/statistics/violent%20crime/victims.aspx; http://www.saf.org/journal/16/guncontrolinengland.htm.

There is simply no factual basis to support the violent fantasies, imagined by Defendants and their *amici*, of law-abiding, responsible individuals spontaneously engaging in Wild West shootouts from the mere exercise of the right to bear arms. That is simply not the American experience. And if it were, the solution would be to repeal the Second Amendment – not ignore it.

*Modern jurisprudence supports the right to bear arms.*

Defendants also argue that the right to bear arms is a "constitutional right which has never been recognized outside of one or two isolated decisions in other circuits." Brief of Appellees at 47. While this statement is incorrect, it should be expected that this law is less developed than other rights as the right was addressed in 2008, *Heller*, *supra.*, for the first since 1939, *United States v. Miller*, 307 U.S. 174 (1939). The right was applied to the States only two years ago in *McDonald v. Chicago*, 130 S. Ct. 3020 (2010).

In fact, the first (and thus far *only*) federal appellate court to address this specific issue was the Fourth Circuit. *United States v. Masciandaro*, 638 F.3d 458 (4th Cir. 2011). That Court declined to specifically state that the right to bear arms extends beyond the home because it may not extend to a national park where the right, in that case, was asserted. *Id*. It in no way rejected the proposition that the right to bear arms extends beyond the threshold of the front door, nor could it following *Heller*. Instead, that Court stated "[t]here may or may not be a Second

Amendment right in some places beyond the home," courts should consider the issue "only upon necessity and only then by small degree." *Masciandaro*, 638 F.3d at 475. The overwhelming majority of the cases cited by the Defendants mirror the Fourth Circuit's sentiment.

Indeed, the various courts cited by Defendants simply did not need to rule on the right to carry outside the home and, accordingly, did not. For example, Defendants cite the case styled *Piszcatoski v. Filko*, 804 F.Supp.2d 813 (D. N. J. 2012). That Court merely held only that "[h]andgun possession outside the home is not the Second Amendment's *core protection as defined in Heller*." *Id*. at 833. It, like all courts cited by the Defendants, relied on the *Masciandaro* admonition to allow the United Supreme Court to define the right. *Id*.

Additionally, Defendants rely on an intermediate-level Illinois criminal case, which declined to hold specifically that the right applied outside the home because the United States Supreme Court has controlled the pace of defining this right; and a criminal District of Columbia case reviewing the issue under the plain error standard. *People v. Dawson*, 934 N.E.2d 598 (Ill. App. Ct. 2010); *Sims v. United States*, 963 A.2d 147 (D.C. 2008). Both of these jurisdictions have had their respective prohibitions struck in *McDonald* and *Heller*, *supra*. Nevertheless, these are simply further examples of observance of the *Masciandaro* admonition.

Moreover, Defendants misread this district court's decision. The district court joined the previously cited courts in refusing to find that the right extends beyond the threshold of the front door – at least until the United States Supreme Court specifically forces the decision to be made:

> In his Motion for a Preliminary Injunction, Plaintiff emphasizes that the Supreme Court dedicated eight pages to analyzing the meaning of the phrase 'bear arms,' concluding that it 'is the right to carry weapons in case of confrontation.' Accordingly, Plaintiff contends that the Supreme Court understood the Second Amendment right "to keep and bear Arms" to include a general right to carry guns in public. The Court acknowledges Plaintiff's argument, however in light of the uncertainty surrounding *Heller*, the Court joins other courts in awaiting direction from the Supreme Court with respect to the outer bounds of the Second Amendment. The Court notes that the Supreme Court again left some room for argument as to the operative scope of the Second Amendment in utilizing such words as 'central holding' and 'most notably.'

*See* ER 237 (citations omitted).

Despite the courts' unwillingness to specifically hold that the right to bear arms applies outside the home, Defendants are simply incorrect in asserting that the overwhelming majority of courts have ruled that a right to carry outside the home does not exist. Indeed, most courts, known to counsel, squarely confronted with the issue following *McDonald*, *supra*. and disposing of the issue at all, have ruled that the right to bear arms exists outside the home.[10] *Bateman v. Perdue*, __

[10] Defendants also rely on *Young v. Hawaii*, slip copy, 2009 WL 1955749, *9 (D.Hawai'i 2009) to assert that the right does not exist outside the home. This

F. Supp. 2d __, 2012 wl 3068580 (D.N.C. March 29, 2012) ("holding "although considerable uncertainty exists regarding the scope of the Second Amendment right to keep and bear arms, it undoubtedly is not limited to the confines of the home."); *Raymond Woollard, et. al. v. Terrence Sheridan, et. al.,* Civil Case No. L-10-2068, Memorandum at *23 (D. Md. March 2, 2012) (unpublished) (attached as ER 38-60) ("In addition to self-defense, the right was also understood to allow for militia membership and hunting. To secure these rights, the Second Amendment's protections must extend beyond the home: neither hunting nor militia training is a household activity, and 'self-defense has to take place wherever [a] person happens to be."). One of these courts refreshingly recognized that courts should apply the right to bear arms when confronted with the issue instead of continuing to deprive citizens of their rights:

> *The fact that courts may be reluctant to recognize the protection of the Second Amendment outside the home says more about the courts than the Second Amendment*. Limiting this fundamental right to the home would be akin to limiting the protection of First Amendment freedom of speech to political speech or college campuses. Maryland's requirement of a 'good and substantial reason' for issuance of a handgun permit is insufficiently tailored to the State's interest in public safety and crime prevention. The law impermissibly infringes the right to keep and bear arms, guaranteed by the Second Amendment.

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decision was made prior to the *McDonald*, *supra.*, and cannot seriously support their contention.

*United States v. Richard Timothy Weaver, et. al.*, No. 2:09-cr-00222, Memorandum Opinion and Order, pages *8-9 n. 7 (S.D. W. Va. March 7, 2012) (unpublished) (attached as ER 16-37).

Finally, Defendants claim that *Birdt v. Beck*, No. 2:10-cv-08377-JAK-JEM (C.D.Cal. Jan. 13, 2012) and *Richards v. County of Yolo*, slip copy, 2011 WL 1885641 (E.D.Cal. May 16, 2011) "are significant because they, like Hawaii [sic], involved a statute requiring applicant to show specific facts calling for a need to defend his or herself." Brief of Appellees at pages 27-28. Those cases were decided at a time when open carry was allowed in California. Accordingly, the right to bear arms outside the home was not implicated in those decisions.[11] But, in Hawaii, there is no option to openly carry a firearm. These cases are simply not relevant to the instant case.

Neither historical review, statistical analysis, nor current jurisprudence justify the deprivation of Mr. Baker's right to bear arms. The injunction should be granted.

[11] California has since passed Assembly Bill 144, criminalizing the unloaded open carrying of handguns. Thus, if decided today, the courts would confront this issue.

B. Hawaii's prohibitions are prior restraints and fail even intermediate scrutiny.

In general, in order to satisfy intermediate scrutiny, a law must be "substantially related to an important government objective." See, e.g., *Clark v. Jeter*, 486 U.S. 456, 461(1988). However, Hawaii's prohibitions on bearing arms and the limitations of Section 134-9 of the Hawaii Revised Statutes operate as a prior restraint on the fundamental right to bear arms. In order to bear arms at all, applicants must satisfy the chief that theirs is an "exceptional case," thus distinguishing their need to exercise the right as greater than that of other law-abiding citizens.

Standards governing prior restraints must be "narrow, objective and definite." *Shuttlesworth v. Birmingham*, 394 U.S. 147, 151 (1969). Standards involving "appraisal of facts, the exercise of judgment, [or] the formation of an opinion" are unacceptable. *Forsyth County v. Nationalist Movemen*t, 505 U.S. 123, 131 (1992). Authorizing the exercise of a fundamental right only in "exceptional cases" and leaving one person, in this case Defendant Kealoha, to determine whether a citizen's case is "exceptional" is neither narrow, objective, nor definite. Instead, Hawaii's statutory scheme leaves the entire decision to the exercise of the chief's judgment and the formation of his opinions. This standard should be held to pass no level of means-end scrutiny.

Interestingly, a similar scheme was reviewed in *Heller*:

> The District of Columbia generally prohibits the possession of handguns. It is a crime to carry an unregistered firearm, and the registration of handguns is prohibited. . . . Wholly apart from that prohibition, no person may carry a handgun without a license, but the chief of police may issue licenses for 1–year periods. . . . District of Columbia law also requires residents to keep their lawfully owned firearms, such as registered long guns, "unloaded and disassembled or bound by a trigger lock or similar device" unless they are located in a place of business or are being used for lawful recreational activities.

*Heller*, 554 at 574-75. Finding that such a scheme would satisfy no level of means-end scrutiny, the Court held "[a]ssuming that Heller is not disqualified from the exercise of Second Amendment rights, the District must permit him to register his handgun and must issue him a license to carry it in the home." *Id*. at 629-30, 635.

As in *Heller*, the requirement that Mr. Baker demonstrate that his is an exceptional case creates an effective absolute ban and fails constitutional scrutiny as an impermissible prior restraint. Accordingly, the government should bear the burden of proving that the applicant may not have a permit. Yet, instead of a narrowly tailored restriction, Hawaii employs a standard that is entirely arbitrary, subjective, and boundless. According to Defendants, Mr. Baker's desire to exercise the right does not constitute an "exceptional case." That desire should be all that is required of a qualified applicant. Accordingly, while Mr. Baker believes that strict or at least heightened scrutiny should apply, Hawaii's prohibitions fail intermediate scrutiny.

C. Hawaii's licensing scheme violates due process.

Defendants insist that pursuant to Hawaii's licensing scheme, Defendant Kealoha does not possess unbridled discretion in deciding whether applicants may exercise the right to bear arms. Brief of Appellees at 34. The sole support for such insistence is that the application requests information pertaining to fitness and qualifications of the applicant. Brief of Appellees at 34-35. Defendants necessarily ignore the complete lack of any standards pertaining to Section 134-9's requirement that the applicant present an "exceptional case." Haw. Rev. Stat. § 134-9. The chief is vested with sole and unbridled discretion to determine whether that prerequisite is met. Haw. Rev. Stat. § 134-9. And, regardless of the applicant's answers on the fitness and qualifications portion of the application, cited by the Defendants, the application may not issue unless the chief "apprais[es] [the] facts, exercise[s] judgment, [or] form[s] an opinion" that the applicants' is an exceptional case. *Nationalist Movemen*t, 505 U.S. at 131 (1992).

This impermissible exercise of judgment and formation of opinion is exactly why Mr. Baker's application was denied. Defendant Kealoha simply wrote "[w]e do not believe that the reasons you provided constitute sufficient justification to issue you a permit." ER 71, 198. Apparently, no citizen who is not engaged "in the protection of life or property" has satisfied the chief's judgment. ER 94-105.

And, there has never been a question as to Mr. Baker's fitness or qualifications. ER 5-10, 67-68, 72-82.

Neither here nor in the court below have Defendants have offered any explanation as to what would be necessary for an applicant to satisfy the chief that the applicant's is an "exceptional case." Indeed, Defendants have admitted, in discovery, that there are no standards governing the chief's decision. ER 65 ("the procedures adopted by HPD in accordance with H.R.S. 134-9 are not set forth in a written document, nor are City Defendants aware of any relevant…documents concerning the same... Other than the statute itself City Defendants are unaware of any specific documents setting forth the procedures or protocol followed in determining whether a license should be issued."). Accordingly, Mr. Baker maintains that this is a completely arbitrary decision subject to the whim of the chief. It is, therefore, unconstitutional. *See Largent v. Texas*, 318 U.S. 418, 422 (1943) (striking ordinance allowing speech permit where mayor "deems it proper or advisable"); *Louisiana v. United States*, 380 U.S. 145, 153 (1965) ("The cherished right of people in a country like ours to vote cannot be obliterated by the use of laws . . . which leave the voting fate of a citizen to the passing whim or impulse of an individual registrar); *Berger v. City of Seattle*, 569 F.3d 1029, 1042 n. 9 (9th Cir. 2009) (*en banc*) ("Rules that grant licensing officials undue discretion are not constitutional.").

Mr. Baker has also challenged the complete lack of any opportunity to be heard and/or the complete lack of review (judicial or otherwise) of the chief's decision. Brief of Appellant, pp. 28-30. Without citing a single case in support of their argument, Defendants disingenuously argue that because Mr. Baker could reapply (presumably *ad infinitum*) due process is satisfied. Mr. Baker can find no support for this contrived and incredulous definition of administrative review. Administrative review is necessarily performed by a separate entity objectively reviewing the lower body's decision much in the manner that this Court is reviewing the lower Court's decisions. And, thereafter, judicial review should be available to aggrieved citizens. Even if the instant dispute did not involve the deprivation of a fundamental right, it is doubtful that this procedure would survive any serious constitutional scrutiny where procedural due process is challenged.

Indeed, requiring applicants, seeking to exercise any right or obtain any entitlement, to continually reapply to the same entity that rejected the application in the first place erects an insurmountable obstacle in the path of citizens who seek the redress of wrongs, whether judicially or administratively. In other words, such would completely swallow due process by strangling citizens' access to justice.

D. Hawaii law prohibits the exercise
of clearly established core Second Amendment rights.

Defendants argue that the District Court "debunked" Mr. Baker's argument that the Hawaii Revised Statutes prohibit the exercise of core Second Amendment protections. Brief of Appellees, pp. 10-11. They urge this Court to adopt a "reasonable reading" of the statutes rather than an interpretation of the plain language of the relevant provisions. *Id.* In other words, Defendants request that this Court ignore the plain statutory language and effectively replace it with language that is more convenient for the Defendants.

> In interpreting statutes, we begin with the language of the statute itself. *Almero v. INS*, 18 F.3d 757, 760 (9th Cir.1994). 'Where the plain meaning of a provision is unambiguous that meaning is controlling, except in the 'rare case [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of the drafters.' ' *Id.*

*Coronado-Durazo v. I.N.S.*, 123 F.3d 1322, 1324 (9th Cir. 1997) (internal citations omitted). Here there is no ambiguity. And, this Court should not rewrite the statutes to appease the Defendants. The prohibitions are an absolute ban to at least three core protections guaranteed by the Second Amendment.

First, sections 134-24 and 25 of the Hawaii Revised Statutes require that all firearms be *confined* to a possessor's residence. Nowhere in the code is the term "confined" defined. These same provisions absolutely prohibit the bearing of firearms and permit only the transporting of firearms to specifically designated

areas and then in an enclosed container. Haw. Rev. Stat. §§ 134-24, 25. The provisions make no exception for bearing in the home no more than they permit the bearing of arms at the police station. *Id*. Thus, the core protection announced in *Heller* (which even Defendants cannot dispute), *i.e.*, self-defense, is rendered ineffectual.

Second, the use of handguns for proficiency training (such as target practice) are prohibited in Hawaii. The use of shotguns and long guns for proficiency training is permitted by Section 134-5 of the Hawaii Revised Statutes. And, Defendants correctly argue that "[a] statute stating that shotguns and rifles may be used at target ranges does not proscribe anything." Brief of Appellees, p. 13. However, it is not Section 134-5 that proscribes the use of handguns at target ranges. It is instead the sweeping prohibitions of Section 134-25. There simply is no exception to this requirement that the handgun be confined to a closed container even when transported to the target range. Haw. Rev. Stat. § 134-25.[12]

Defendants do not contend that such prohibition is unconstitutional. *See* Brief of Appellees at p. 13. Defendants simply argue that, if prosecuted, Mr. Baker could assert a vagueness challenge or otherwise argue that the prosecutors' interpretation of the statute is overly broad. Clearly, Mr. Baker, having been

[12] Defendants promise not to enforce these prohibitions. However, a statute is unconstitutional when it is *enacted* not when or if it is enforced. See 16 Am.Jur.2d 178.

unlawfully denied a permit which is the only means under the current law of alleviating that threat of prosecution, should not be required to first be prosecuted and test the judicial interpretation of the statute. In effect, Defendants are arguing that Mr. Baker should violate the plain language of the law.

Third, Mr. Baker is prohibited from keeping protected arms even in his home. The "Second Amendment extends prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of founding." *Heller*, 554 U.S. at 582. Thus, while "dangerous and unusual weapons" may likely be regulated, "the sorts of weapons protected [a]re those 'in common use at th[is] time.'" *Id*. at 627 (refusing to diminish the Second Amendment because advances in technology may require effective militias to utilize sophisticated and unusual arms). Nevertheless, Sections 134-16 and 51 proscribe the keeping (and bearing) of knives, clubs (or batons), and tasers

Each of these types of arms are in legal common use. Knives have been commonly used since colonial times. *See Heller*, 554 U.S. at 590 ("[i]n such circumstances the temptation [facing Quaker frontiersmen] to seize a hunting rifle or *knife* in self-defense ... must sometimes have been almost overwhelming."). The club or baton dates even further back and "is considered the first personal weapon fashioned by humans." O. Hogg, *Clubs to Cannon* 19 (1968). The club is still used today as a personal weapon, commonly carried by the police. *State v.*

*Kessler*, 289 Or. 359 (1980). And, "[o]wning a stun gun is legal in 43 states and nearly 198,000 civilians exercise the right to own a stun gun as a viable means of less than lethal self-defense." *People v. Dean Scott Yanna*, Case No. 10-10536-FH, Order (Bay County, Mich., April 21, 2011) (tasers) (attached as ER 162-70); Ron F. Wright, *Shocking The Second Amendment: Invalidating States Prohibitions on Taser with the District of Columbia v. Heller*, 20 Alb. L.J. Sci. & Tech. 159, 178, (2010) (internal quotation marks omitted); Eugene Volokh, *Nonlethal Self-Defense, (Almost Entirely) Nonlethal Weapons, And the Rights to Keep and Bear Arms and Defend Life*, 62 Stanford Law Review, 199, 207-208(2009). The use of this less-than-lethal weapon is even less dangerous than the use of bare hands. *Caldwell v Moore*, 968 F2d 595, 601 (6th Cir. 1992) ("use of a stun gun is less dangerous for all involved than a hand to hand confrontation").

The prohibitions on these protected less-than-lethal arms are clearly unconstitutional, even if this Court adopts the most narrow reading of *Heller*, *supra*., advocated by Defendants. Accordingly, Defendants largely ignore this argument, instead arguing (for the first time) that Mr. Baker somehow has no standing to challenge this clear infringement on his right to defend himself. Answering Brief at 45. Here, Mr. Baker has suffered an injury in fact, caused by Hawaii's prohibition and a favorable decision in this case will redress his injury. Thus, Mr. Baker has standing. *Lopez v. Candaele*, 630 F.3d 775, 785 (9th

Cir.2010). Further, as to fundamental rights, such as those at stake here, the mere presence of an unconstitutional statutory regime has a chilling effect on those rights, which alone satisfies standing. *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988).

The plain language of Hawaii's prohibitions violate the narrowest holding of *Heller*. The injunction should issue.

## CONCLUSION

The District Court was wrong to conclude that the right of self defense does not extend beyond the threshold of the front door or, alternatively, to refuse to acknowledge that right until the United States Supreme Court specifically so holds in another case. Once this erroneous legal standard is corrected, the remainder of Mr. Baker's argument falls into place. Citizens should never be required to show that theirs is an "exceptional case" before being permitted to exercise fundamental rights. A government official should never be vested with the power to determine what qualified citizen may exercise those rights. And, the government should not rely on debatable notions of public policy to abrogate those rights. The decision of the lower court should be reversed or, alternatively, this case remanded with instructions to the lower court to apply the correct legal standard.

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

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Circuit Rule 32-3(3) because this brief contains 6,884 words, excluding the parts of the brief excluded by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of 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 2007 in 14 point Times New Roman font.

s/ Richard L. Holcomb
Richard L. Holcomb
Counsel for Appellant

Dated: August 21, 2012

## CERTIFICATE OF SERVICE

On this, the 21st day of August 2012, 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 21st day of August, 2012

s/ Richard L. Holcomb____
Richard L. Holcomb