Nos. 12-16258

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHRISTOPHER BAKER,

Plaintiff-Appellant,

vs.

LOUIS KEALOHA, ET AL.,

Defendants-Appellees.

APPEAL
In the United States District Court for the District of Hawai`i
Civil No. CV11-00528 ACK/KSC

DEFENDANT-APPELLEES' ANSWERING BRIEF

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DEFENDANT–APPELLEES LOUIS M KEALOHA AND THE CITY AND COUNTY OF HONOLULU'S OPENING BRIEF

I. ISSUES PRESENTED FOR REVIEW

The issue presented by this appeal is simply:

Whether the District Court's denial of Plaintiff-Appellant CHRISTOPHER BAKER's Motion for a Preliminary Injunction constituted an abuse of discretion?

II. STATEMENT OF THE CASE

On August 30, 2011, Plaintiff-Appellant CHRISTOPHER BAKER (hereinafter "Baker") initiated the instant case by filing a civil Complaint at the U.S. District Court for the District of Hawaii. Baker's complaint contained thirteen counts and named the STATE OF HAWAII and Governor NEIL ABERCROMBIE (collectively hereinafter the "State Defendants"), as well as the CITY AND COUNTY OF HONOLULU, the HONOLULU POLICE DEPARTMENT and Chief of Police LOUIS KEALOHA (collectively hereinafter the City Defendants"), as party-defendants. *See* Complaint at Dkt # 1. Plaintiff's Complaint concerns the breadth of the right to keep and bear arms recently recognized by the United States Supreme Court in District of Columbia v. Heller, 554 U.S. 570, 128 S.Ct. 2783 (2008), and McDonald v. City of Chicago, ___ U.S. ___, 130 S.Ct. 3020 (2010), and, as part of its prayer for relief, seeks from the District Court declaratory judgment striking down various Hawaii laws concerning

the transportation and usage of firearms, taser guns and other weapons.

Specifically, it asks that the following sections of Chapter 134 of the Hawaii Revised Statutes, entitled "Firearms, Ammunition and Dangerous Weapons", be stricken as unconstitutional:

- H.R.S. § 134-5 (allowing possession, usage and transportation of firearms for target shooting and game hunting)
- H.R.S. § 134-9(c) (requiring a license to carry (concealed or openly) firearms in public)
- H.R.S. § 134-16 (limiting possession of electric guns to law enforcement and certain military members)
- H.R.S. § 134-23 (limiting areas where firearms can be kept to places of business, residence or sojourn, regulating manner of transportation and places to which firearms can be transported and penalizing unlawful carrying or possession of a loaded firearm other than a pistol or revolver)
- H.R.S. § 134-24 (limiting areas where firearms can be kept to places of business, residence or sojourn, regulating manner of transportation and places to which firearms can be transported and penalizing unlawful carrying or possession of an unloaded firearm other than a pistol or revolver)
- H.R.S. § 134-25 (limiting areas where pistol or revolver can be kept to places of business, residence or sojourn, regulating manner of transportation and places to which pistol or revolver can be transported and penalizing unlawful carrying or possession of pistol or revolver)
- H.R.S. § 134-26 (penalizing the carrying of a loaded firearm on a public highway absent possession of a carry license)
- H.R.S. § 134-27 (limiting areas where ammunition can be kept to places of business, residence or sojourn, regulating manner of transportation and places to which ammunition can be transported and penalizing unlawful carrying or possession of ammunition)

- H.R.S. § 134-51 (penalizing the carrying of a concealed deadly weapon)

See Dkt # 1, p. 43, ¶ 1.

Concurrently with his Complaint, Baker filed the Motion for Preliminary Injunction which is the subject of the instant appeal. The motion sought a preliminary injunction prohibiting City and State Defendants from enforcing and maintaining the aforementioned Hawaii laws, or, alternatively, requiring that Baker be issued a "license to carry authorizing Mr. Baker to bear a concealed or openly displayed firearm".[1]

On September 21, 2011, the City Defendants filed a Motion to Dismiss. That same day, the State Defendants filed their answer to the complaint and one week later, on September 28, 2011, filed a Motion for Judgment on the Pleadings. Thereafter, Plaintiff filed oppositions to the motions filed by the State and City Defendants and the State and City Defendants each filed oppositions to Plaintiff's Motion for Preliminary Injunction. Each movant later filed a reply concerning their respective motion.

On March 21, 2012, the District Court heard oral argument concerning the three motions brought by the three respective groups of parties. At the end of the hearing, the Court issued an oral order denying Baker's Motion for Preliminary

[1] Baker's Memorandum in Support of Motion for Preliminary Injunction included as part of City Defendants' Supplemental Excerpts of Record ("SER") at pp. 3-4.

Injunction, granting the State Defendants' Motion for Judgment on the Pleadings in its entirety and granting, in part, and denying, in part, the City Defendants' Motion to Dismiss. ER, pp. 190-91.

The Court's oral order was later reduced to writing, and its rationale described fully, in a sixty-four (64) paged written order, issued April 30th, entitled "Order Granting Defendants State of Hawaii and Governor Abercrombie's Motion for Judgment on the Pleadings, Granting in Part and Denying in Part Defendants City and County of Honolulu, Honolulu Police Department and Louis Kealoha's Motion to Dismiss, and Denying Plaintiff's Motion for a Preliminary Injunction" (hereinafter the "Order"). *See* ER, pp. 193-256. Thereafter, on May 29, 2012, Baker filed a Notice of Appeal and a Motion to Stay Proceedings at the District Court level. *See* ER, pp. 266-67, p. 287 (Docket Entry No. 52). Subsequently, Baker filed his Opening Brief and corrected Opening Briefs on June 26th and 27th.

IV. STATEMENTS OF RELEVANT FACTS

Chapter 134 of the Hawaii Revised Statutes regulates, in large measure,[2] the ownership and usage of firearms in the State of Hawaii. Section nine of that Chapter deals specifically with "Licenses to Carry". Pursuant to section nine, two

[2] Hawaii's laws are obviously not exclusive. For example, with certain exceptions, federal law provides that qualified law enforcement officers and retired law enforcement officers are allowed to carry concealed firearms in any jurisdiction in the United States, regardless of any state or local law to the contrary. *See* Law Enforcement Officers Safety Act (LEOSA) codified at 18 U.S.C. §§ 926B, 926C.

types of carry licenses are allowed: (1) concealed carry; and (2) open carry. With respect to the concealed carrying permit, an applicant must meet the following qualifications:

> (1) be of the age of 21 years or older;
> (2) be a citizen of the United States or a duly accredited official representative of a foreign nation;
> (3) demonstrate a reason to fear injury to his/her person or property that constitutes an exceptional case;
> (4) be qualified to use the firearm in a safe manner;
> (5) appear to be a suitable person to be so licensed;
> (6) not be prohibited from owning or possessing a firearm under H.R.S. § 134-7; and
> (7) not have been adjudged insane or appear mentally deranged.

H.R.S. § 134-9.

On August 31, 2010, Baker, a self-professed gun rights proponent, submitted an application for a Concealed Carry License to the Honolulu Police Department. ER, p. 72. As part of his application, Baker was asked a series of questions related to his fitness to carry firearms including questions related to his criminal history, drug dependency and psychiatric disorders. ER, p. 75.

At the time of his application, Baker was a full time member of the United States Navy. ER, p. 69, ¶ 2; p. 72. However, Baker also "contracted" to do work as a process server. ER, p. 69, ¶ 2; p. 72. In documents considered as part of Baker's application, Baker asserted that his work as a process server "consistently put [him] into positions that ha[d] varying scales of danger and harm, many of which could escalate quickly and become life threatening" and implied that he had

been threatened with bodily harm on several occasions. ER, p. 70, ¶¶ 1-2.

There are approximately 75 licensed process servers within the City and County of Honolulu. ER, p. 12, ¶ 6. However, Mr. Baker is the only known one of those 75 people to have applied for a concealed carry license.

In processing Baker's application, the Honolulu Police Department conducted a background check on Baker and attempted to corroborate Baker's claims that he had repeatedly been threatened while performing his process server job. ER, p. 13, ¶ 10. However, it could only find one such documented incident. ER, p. 13, ¶ 10. On that particular occasion, Baker had called out to a residence on two separate evenings, once at 9:30 p.m., in an effort to serve documents. ER, p. 13, ¶ 10. The individual who responded, a 63 year old male, after confronting Baker, called 9-1-1. ER, p. 13, ¶ 11, 13. Moreover, although Baker claimed that the male had threatened him, he ultimately chose not to pursue charges against him. ER, p. 13, ¶ 14.

On or about September 16, 2010, Baker's application was denied by the Chief of Police, Defendant LOUIS KEALOHA (hereinafter "Chief Kealoha"), who explained that Plaintiff had provided insufficient justification for a concealed carry permit. ER, p. 71. Plaintiff was entitled to re-apply for the concealed carry license, at no additional charge, to submit further information justifying his need for a concealed carry license or to submit an inquiry seeking clarification of his

denial. ER, p. 14, ¶ 23. However, Baker did none of those things. ER, p. 198 fn. 3. Instead, after nearly a year had elapsed, he brought the instant action.

V. STANDARDS OF REVIEW

The denial of a motion for preliminary injunction is reviewed for abuse of discretion. N.D. ex rel. parents acting as guardians ad litem v. Hawaii Dept. 600 F.3d 1104 (9th Cir. 2010) (*citing* Earth Island Institute v. United States Forest Service, 351 F.3d 1291, 1298 (9th Cir.2003)).

The abuse of discretion standard requires the reviewing court to, "determine *de novo* whether the trial court identified the correct legal rule to apply to the relief requested." N.D. at 1111 (*quoting* United States v. Hinkson, 585 F.3d 1247, 1262 (9th Cir.2009) (*en banc*)). "A district court that applied the incorrect legal standard necessarily abused its discretion." Id. at 1262. However, "[a]s long as the district court got the law right, it will not be reversed simply because the appellate court would have arrived at a different result if it had applied the law to the facts of the case." Farris v. Seabrook, 677 F.3d 858, 864 (9th Cir. 2012) (*quoting* Thalheimer v. City of San Diego, 645 F.3d 1109, 1115 (9th Cir.2011); *and* Dominguez v. Schwarzenegger, 596 F.3d 1087, 1092 (9th Cir.2010)). "This review is limited and deferential, and it does not extend to the underlying merits of the case." Farris at 864 (*quoting* Thalheimer at 1115 and Johnson v. Couturier, 572 F.3d 1067, 1078 (9th Cir.2009)).

VI. SUMMARY OF THE ARGUMENT

At the Preliminary Hearing Motion, Baker argued that the cases of District of Columbia v. Heller, 554 U.S. 570, 128 S.Ct. 2783 (2008) and McDonald v. City of Chicago, ___ U.S. ___, 130 S.Ct. 3020 (2010) established a fundamental, individual right to "possess and carry guns"[3], that said right includes "a general right to carry guns in public"[4] and that said right is only subject to one "presumptively lawful"[5] restriction with respect to law-abiding, able citizens—the prohibition against carrying guns in "sensitive places".[6] Consequently, Baker reasoned, the denial of his application for a concealed carry license was unconstitutional, as is the statute that mandates it (H.R.S. § 134-9(c)).

The District Court applied the four factor test set forth in Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 129 S.Ct. 365, 374, 172 L.Ed.2d 249 (2008), which requires that plaintiffs seeking a preliminary injunction, "establish that (1) they are likely to succeed on the merits; (2) they are likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in their favor; and (4) a preliminary injunction is in the public interest." The Court denied Plaintiff's motion, finding that he was unlikely to succeed on any prong of the Winter four-part test. *See* ER, p. 190, lns. 12-20; pp. 42-63. In the process it

[3] SER, p. 4, ¶ 2.
[4] SER, p. 5, ¶ 2.
[5] SER, p. 4, ¶ 2.
[6] SER, p. 4, ¶ 2.

determined that The Court also analyzed his motion under the alternative test set forth in Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127 (9th Cir. 2011) and likewise concluded that Baker had "demonstrated neither serious questions going to the merits nore a balance or hardships that tips sharply toward his favor." ER, p. 63, ¶ 4.

Baker nevertheless argues that the District Court erred, contending among other things that the District Court applied an erroneous legal standard. O.B., pp. 34-39. However, as was shown below, it is Baker's arguments that are erroneous in numerous respects. They misstate facts and Hawaii law and ignore widely-recognized limits on the individual right to bear arms. Consequently, the District Court's order was proper and should be upheld.

VII. ARGUMENT

A. The District Court Applied the Correct Legal Standards

As noted by all parties to this case, the correct legal standard to be applied in analyzing Baker's Motion for Preliminary Injunction is the four-part test set forth by the U.S. Supreme Court in Winter v. Natural Resources Defense Council, 555 U.S. 7, 9, 129 S.Ct. 365, 367 (2008). *See* O.B., p. 35, ¶ 2. The District Court properly applied the Winter test. *See* discussion in Order at ER, pp. 42-63. Moreover, it also applied the alternative test set forth in Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127 (9th Cir. 2011). ER, p. 255.

As discussed more fully below, it also applied the two-pronged analysis with regard to Second Amendment claims, see Ezell v. City of Chicago, 651 F.3d 684, 701-02 (7th Cir. 2011), *et al*, and, thereafter, the Intermediate Scrutiny test althought it rightly concluded that it did not need to. All of these tests were appropriate and correct. Consequently, the District Court's ruling on Baker's Motion for a Preliminary Injunction should not be disturbed.

B. Baker Was Not Entitled to a Preliminary Injunction

As the District Court correctly recognized, "[a] preliminary injunction is an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." Order at ER, p. 234, ¶ 2 (*quoting* Winter, 555 U.S. at 22). "Under Winter, plaintiffs must establish that irreparable harm is likely, not just possible, in order to obtain a preliminary injunction." Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1131 (9th Cir. 2011) (*citing* Winter, 129 S.Ct. at 375-76). For the reasons set forth below, the District Court properly concluded that the instant case did not constitute that sort of exceptional case that meets the four-part Winter test.

(1) Baker Cannot Demonstrate a Likelihood of Success on the Merits Because the Statute Does Not Prohibit Activity Clearly Established as Protected By the Second Amendment

In an effort to prove that H.R.S. § 134-9 is unconstitutional, and that he will therefore succeed on the merits, Baker continuously repeats the ill-founded

arguments, made below, that the subject statutes prohibit the bearing of arms within one's own home, at target ranges and elsewhere.[7] *See* Brief of Plaintiff-Appellant Christopher Baker (hereinafter "O.B."), p. 6, ¶ 2; p. 11, ¶ 1; pp. 24-27; p. 41, ¶ 4; p. 43, ¶ 3. These arguments were specifically debunked by the District Court. *See* Order at ER 243 (*quoting* State v Rabago, 67 Haw. 332, 686 P.3d 824 (1984) *and* Young v. Hawaii, Civ. No. 08-00540 DAE-KSC, 2009 WL 874517, at * 5 (D. Haw. Apr. 1, 2009)); and at ER 245 (*quoting* State v. Ancheta, 220 P.3d 1052, 2001 WL 3776408, at *7; *and* Rabago, 686 P.3d at 826). Baker's brie

Baker's strained reading is not from the statute's "plain language" as he suggests, nor is its meaning "beyond dispute", as Baker contends. O.B., p. 26, ¶ 2. Rather, City Defendants assert that a reasonable reading of the statutes lends itself to a conclusion opposite that of Baker's—that these activities (bearing arms in one's home, firing handguns at target ranges, etc.) are in fact permitted under Hawaii law. For example, H.R.S. § 134-24[8] states:

> (a) Except as provided in section 134-5, all firearms shall be confined to the possessor's place of business, residence, or sojourn; provided

[7] Baker states that he "faces severe criminal punishment if he so much as … possesses or exercises control of a loaded firearm." O.B., p. 25. Baker ignores the fact that he can possess, exercise control of, and actually use a loaded firearm if he is hunting with a valid hunting license or target shooting. *See* H.R.S. § 134-5(a).

[8] Baker cites both H.R.S. § 134-24 and 134-25 for the proposition that bearing a firearm in one's home is prohibited. *See* O.B., p. 25. H.R.S. § 134-25 is virtually identical to 134-24, with the exception that it applies to handguns and in that it carves out an added exception from subsection (a) for those with carrying permits under H.R.S. § 134-9.

> that it shall be lawful to carry unloaded firearms in an enclosed container from the place of purchase to the purchaser's place of business, residence, or sojourn, or between these places upon change of place of business, residence, or sojourn, or between these places and the following:
>
> (1) A place of repair;
>
> (2) A target range;
>
> (3) A licensed dealer's place of business;
>
> (4) An organized, scheduled firearms show or exhibit;
>
> (5) A place of formal hunter or firearm use training or instruction; or
>
> (6) A police station.
>
> "Enclosed container" means a rigidly constructed receptacle, or a commercially manufactured gun case, or the equivalent thereof that completely encloses the firearm.
>
> (b) Any person violating this section by carrying or possessing an unloaded firearm other than a pistol or revolver shall be guilty of a class C felony.

Baker attempts to construe the "confined to" language set forth in subsection (a) to mean "confined in" or "confined within", so that the weapon must be stationary within the location. However, the statute does not say that. It says "confined to", meaning the parameters of the "place of business, residence, or sojourn". Moreover, Baker fails to explain why, if his interpretation is correct, the legislature did not require the weapon to be circumscribed to the "enclosed container" that it requires when such weapons are transported to target ranges, etc. Baker's reading also misconstrues subsection (b)'s language as a separate, all-encompassing

prohibition. However, it is use of the phrase, "[a]ny person violating this section by" makes clear that it is contingent upon the mandatory language of subsection (a); to wit, "all firearms shall be confined…". In other words, Baker believes that H.R.S. § 134-9(b) creates a flat out ban on carrying or possessing with certain exceptions carved out by subsection (a). Whereas, subsection (a) actually sets the limits of what is and is not permitted and subsection (b) only comes into play when a given lawbreaker fails to comply with subsection (a). There is nothing in H.R.S. § 134-24 which would prohibit and individual from bearing arms in his own home.

Similarly, Baker argues that because H.R.S. § 134-5 authorizes the use of rifles and shotguns at target ranges, and does not mention handguns, their use at target ranges must be prohibited. O.B., p. 25. However, a criminal statute, in order to withstand a vagueness attack, must "convey[ ] sufficient[ ] definite warning as to the *proscribed conduct* when measured by common understanding and practices." Panther v. Hames, 991 F.2d 576, 578 (9th Cir. 1993) (*quoting* Turf Center, Inc. v. United States, 325 F.2d 793, 795 (9th Cir.1963) [emphasis supplied]. A statute stating that shotguns and rifles may be used at target ranges does not proscribe anything. Moreover, statutes that deal with the same general subject matter should be read *in pari materia*. *See* Wilson v. U.S., 250 F.2d 312, 320 (9th Cir.1958). In his analysis, Baker conveniently ignores the fact that H.R.S. § 134-23(a)(2) allows carrying unloaded pistols and revolvers to a "target range".

These activities are clearly not prohibited and Baker's flawed reasoning is fully exposed.

Furthermore, Baker's contention that, "if a citizen, including Mr. Baker, chooses to exercise his rights, there is also no dispute that the Defendants threaten to enforce those provisions, exposing Mr. Baker and any other law-abiding Hawaii citizen who wishes to exercise his or her Second Amendment Rights to felony charges and presumably convictions"[9] is without any factual basis with regard to bearing a handgun in his own home. *See* O.B., *generally*. To the contrary, the evidence specifically suggests that, in approximately thirty-five (35) years, H.P.D. has never enforced H.R.S. § 134-24 as to prohibit an individual from bearing a firearm in his or her own home. ER, p. 14, ¶ 18; p. 13, ¶ 1.[10] *See also* Order at ER, p. 245 (remarking that the Ancheta court 'dismissed a count that alleged only that defendant "did carry or possess" a firearm and "did fail to confine" the firearm because it "did not allege that the firearm at issue was away from [defendant's] place of business, residence or sojourn."') [brackets in original]. "When plaintiffs 'do not claim that they have ever been threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible,' they do not

[9] O.B., p. 26, ¶ 2.

[10] To the extent that firing handguns at target ranges is also a fundamental right, Baker's also misstates the threat of being arrested, as "Hawaii citizenry, residents and tourists are able to fire handguns at target ranges" for several years. ER, p. 14, ¶ 18; p. 13, ¶ 1. In addition to a **municipal range**, there are three (3) private indoor ranges where such target shooting currently takes place. ER, p. 14, ¶ 19.

allege a dispute susceptible to resolution by a federal court." Carrico v. City and County of San Francisco, 656 F.3d 1002, 1005-06 (9th Cir. 2011). Consequently, Baker's argument is specious and without standing.

(2) Baker Mischaracterizes the District Court's Order as Holding that Baker Has "No Right to Bear Arms Outside of His Home"

Baker exaggerates the District Court's holding, contending that it, "erroneously held that [he] had no right to bear arms outside of his home." O.B., p. 8, ¶ 5. However, his citations to the record belie this contention. *See* ER 239, 246. What, in fact, the District Court held was that the Baker was "unlikely to succeed in demonstrating that any of the Hawaii Revised Statutes at issue … implicate[d] protected Second Amendment Activity." ER 246, ¶ 2. As has been discussed, the central issue before the court is whether H.R.S. § 134-9, which limits carrying concealed handguns to specific qualified individuals when the same are able to demonstrate "reason to fear injury to the applicant's person or property" constituting an "exceptional case", unconstitutionally infringes Baker's right to keep and bear arms. While Baker contends the ability to carry firearms, anywhere outside of sensitive places, is his fundamental right, the Supreme Court has yet to agree. Indeed, Heller specifically invoked the specter of concealed carry prohibitions without striking down the same. *See* Heller at 626.

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Moreover, like courts that have held speech directed to inciting, and likely to incite, imminent lawless action is not protected by the First Amendment[11], so too have other courts, including Heller, considered certain activity involving firearms to fall outside the "core" fundamental right protected by the Second Amendment. In Ezell v. City of Chicago, the Seventh Circuit Court of Appeals picked up on this point and advised district courts to first determine whether the activity at issue falls within this "scope" of the Second Amendment before applying a means-ends approach. 651 F.3d 684, 701-02 (7th Cir. 2011). *See also* United States v. Marzzarella, 614 F.3d 85, 89 (3d Cir.2010); United States v. Chester, 628 F.3d 673, 680 (4th Cir.2010); and United States v. Reese, 627 F.3d 792, 800–01 (10th Cir.2010) (all following the same two-pronged approach).

Consequently, it was important for the District Court here to determine, without jumping to the conclusion that Baker reached, whether the law at issue concerned activity within the core of the Second Amendment's protections or whether it did not. The Court made such determination that the activity at issue was not likely to be held within the Second Amendment's "scope". *See* Order at ER, p. 246.

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[11] Brandenburg v. Ohio, 395 U.S. 444, 447, 89 S.Ct. 1827, 1829 (1969). *See also* Ezell v. City of Chicago, 651 F.3d 684, 702 (7th Cir. 2011) (*quoting* United States v. Stevens, ___ U.S. ___, 130 S.Ct. 1577, 1586, 176 L.Ed.2d 435 (2010) for the proposition that, "some categories of speech are unprotected as a matter of history and legal tradition.")

(3) Carrying a Concealed Handgun in Public Has Not Been Established as Protected by the Second Amendment[12]

As noted above, the application of this two-pronged test is supported by ample precedent, and this Court is not free to second-guess the decision that Judge Kay reached, should it concur that the two-pronged test is applicable. *See* Farris v. Seabrook, 677 F.3d 858, 864. However, even if it chose to do so, the trial court's decision is sound.

Ezell suggests that courts conduct "a textual and historical inquiry into original meaning" to determine whether the restricted activity is "protected by the Second Amendment". Id. "[I]f the government can establish that a challenged firearms law regulates activity falling outside the scope of the Second Amendment right as it was understood at the relevant historical moment — 1791 [for federal regulations] or 1868 [for State regulations] — then the analysis can stop there; the regulated activity is categorically unprotected, and the law is not subject to further Second Amendment review." Id. "If the government cannot establish this" because "the historical evidence is inconclusive or suggests that the regulated activity is *not* categorically unprotected," then the court moves to the second step in the analysis: applying means-ends scrutiny. Id. at 703. Here, historical

[12] This section of City Defendants' argument was prepared with the consent and assistance of the Attorney General's Office of the State of Illinois. Specifically, portions of arguments prepared by Assistant Attorney General Terrence Corrigan in the case of Moore v. Madigan, slip copy, 2012 WL 344760 (C.D.Ill. Feb 3, 2012) are incorporated, verbatim, herein.

evidence shows there is no "core" Second Amendment right to carry weapons in public for personal self-defense.

At the time of the Fourteenth Amendment's ratification, State and local governments frequently restricted citizens from carrying firearms in public. *See, e.g.*, Act of Nov. 18, 1858, Corp. Laws of the City of Washington D.C., at 114 ("it shall not hereafter be lawful for any person or persons, to carry or have concealed about their persons any deadly or dangerous weapons, such as a dagger, pistol, bowie-knife, dirk-knife or dirk, colt, slung-shot, or brass or other metal knuckles, within the city of Washington") (Robert A. Waters 1853 & 1860); 1876 Wyo. Comp. Laws ch. 52, § 1 (forbidding "ope[n]" bearing of "any fire arm or other deadly weapon, within the limits of any city, town or village"); Tex. Act of Apr. 12, 1871, ch. 34 (prohibiting carrying of pistols without "immediate and pressing" reasonable grounds to fear "immediate and pressing" attack or 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."); State v. Buzzard, 1842 WL 331, *5 (Ark. 1842). Such laws would have been unthinkable if there were a broadly recognized, inalienable right to carry firearms in public at the time.

The history at the time of the Second Amendment's ratification is even clearer on the point. "[T]he Second Amendment was not intended to lay down a novel principle, but rather codified a right inherited from our English ancestors," Heller, 554 U.S. at 599 (internal quotations omitted), and "it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right" at English law. Heller at 592 [Emphasis in original]. Thus, if history indicates that English law did not consider an activity to be a "core" right, then that activity cannot be within the Second Amendment's core protections. History demonstrates that neither English statutory nor common law provided any right to carry weapons in public. For nearly seven hundred years, England criminalized the practice. The Statute of Northampton, one of the earliest laws regulating weapons possession, provided that, unless he was on the King's business, no man was permitted to "go nor ride armed by night nor by day, in fairs, markets, nor in the presence of the justices or other ministers, nor in no part elsewhere, upon pain to forfeit their armour to the King, and their bodies to prison at the King's pleasure." Statute of Northampton, 2 Edw. 3, c. 3 (1328) (Eng.).

English courts upheld the continuing vitality of this law, even hundreds of years later. In Sir John Knight's Case, 87 Eng. Rep. 75 (1686), for example, the Chief Justice noted that carrying arms in public was not merely banned by the

Statute of Northampton, but was "likewise a great offence at the common law." Id. The reason was not just that carrying arms in public was dangerous, but also that it was an insult to the sovereign and the social compact: "as if the King were not able or willing to protect his subjects." Id. In this way, the Statue of Northampton was "but an affirmance" of the longstanding common law rule that there is no right to carry weapons in public. Id. The Statute remained the law of Massachusetts, North Carolina, and Virginia, nearly verbatim, even after the ratification of the Constitution, *see* Patrick J. Charles, *Scribble Scrabble, The Second Amendment, & Historical Guideposts: A Short Reply to Lawrence Rosenthal & Joyce Lee Malcolm*, 105 Nw. U. L. Rev. Colloquy 227, 237 (2011), laws that could not exist if there were a widely understood right to carry arms for self-defense in public at the time.

The most prominent common law scholars agreed that there was no right to carry arms outside the home. Lord Edward Coke, who was "widely recognized by the American colonists as the greatest authority of his time on the laws of England," Payton v. New York, 445 U.S. 573, 593-94 (1980) (internal markings omitted), confirmed — in a chapter entitled "Against going or riding armed," *see* 3 Coke, Institutes of the Laws of England 160 (1797 ed.) — that English law forbade carrying weapons in public. Under the Statute of Northampton, Coke explained, one could possess weapons in the home "to keep his house against those that come

to rob, or kill him, or to offer him violence in it." Id. "But he cannot assemble force, though he be extreamly threatned, to goe with him to church, or market, or any other place." Id. at 162. That the weapons were carried for self-defense was no excuse under the Statute. Id.

Indeed, even an immediate threat of harm did not permit one to go armed in public spaces. Id. William Blackstone, whose works "constituted the preeminent authority on English law for the founding generation," Heller, 554 U.S. at 593-94 (internal quotations omitted), confirmed there was no right to carry weapons in public for personal defense. "The offence of riding or going armed with dangerous or unusual weapons," he wrote, "is a crime against the public peace, by terrifying the good people of the land, and is particularly prohibited by the [Statute of Northampton], upon pain of forfeiture of the arms and imprisonment during the king's pleasure: in like manner as, by the laws of Solon, every Athenian was finable who walked about the city in armour." Commentaries *149. In short, English law acknowledged a right to use arms to defend one's home — the "core" right recognized in Heller. *See* 3 Coke, Institutes at 160. It did not recognize any right to carry weapons in public for personal self-defense. On the contrary, English statutes and common law forbade the practice. Accordingly, given the history of the pre-existing right to keep and bear arms, it is clear that carrying a concealed handgun in public cannot be a "core" Second Amendment right.

(4) The Overwhelming Majority of Decisions Rendered Since Heller Agree with the District Court that the Second Amendment Does Not Include a Right to Carry Concealed Firearms Outside of the Home

In Heller, the Supreme Court held that the Second Amendment protects the right to possess a handgun for self-defense in the home. 554 U.S. at 635. The Court limited this holding, cautioning that the Second Amendment does not "protect the right of citizens to carry arms for *any sort* of confrontation," Heller, 554 U.S. at 595, and recognized that the Supreme Court has never held that the Second Amendment guarantees a right to carry weapons for self-defense outside the home. On the contrary, the Heller Court noted:

> Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. …. For example, the majority of the 19th-century courts to consider the question held that **prohibitions on carrying concealed weapons were lawful** under the Second Amendment or state analogues.

Heller at 626, 128 S.Ct. 2816 [emphasis added].

Previously, in dicta, the Supreme Court had specifically stated that, "the right of the people to keep and bear arms [under the Second Amendment] is not infringed by laws prohibiting the carrying of concealed weapons." Robertson v. Baldwin, 165 U.S. 275, 281-82 (1897).

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A similar issue was already addressed by the Hawaii District Court. Shortly after the Supreme Court decided Heller, it had the opportunity to decide whether the Second Amendment included a fundamental right to openly possess a firearm in public. The Honorable Judge David Ezra concluded:

> Although this Court accepts that Heller and Nordyke expanded the scope of the Second Amendment to embody an individual right to possess firearms for the purpose of self-defense, **this Court cannot identify any language that establishes the possession of an unconcealed firearm in public as a fundamental right**. Heller held as unconstitutional a law that effectively banned the possession of a useable handgun *in one's home*. Nordyke followed Heller, but upheld an ordinance banning firearms on government property because the property was considered a "sensitive" place where firearm possession could be regulated. Neither case stands for Plaintiff's proposition of a fundamental right to possess an unconcealed firearm in public. **If Plaintiff does have right to possess a firearm in public, it is at most a non-fundamental right**.

Young v. Hawaii, slip copy, 2009 WL 1955749, *9 (D.Hawai'i 2009).

Other jurisdictions are in accord and have declined to extend the Second Amendment's protections beyond the home. *See, e.g.*, Masciandaro, 638 F.3d 458, 475 (4th Cir. 2011) ("On the question of Heller's applicability outside the home environment, we think it prudent to await direction from the Court itself."); Williams v. State, 10 A.3d 1167, 1177 (Md. 2011) ("If the Supreme Court . . . meant its holding to extend beyond home possession, it will need to say so more plainly."); People v. Dawson, 934 N.E.2d 598, 605-07 (Ill. App. Ct. 2010) (declining to extend Second Amendment outside of home because Supreme Court

"deliberately and expressly maintained a controlled pace of essentially beginning to define this constitutional right"); *cf.* People v. Yarbrough, 169 Cal.App.4th 303, 312-14 (2008) (upholding California's concealed weapons law because it did not implicate Heller's core holding regarding weapons in the home); Sims v. United States, 963 A.2d 147, 150 (D.C. 2008) (rejecting Second Amendment claim, under plain error review, because Supreme Court has not held that Second Amendment extends outside the home). For these reasons alone, this Court's decision was proper.

(5) The District Court Properly Determined that H.R.S. § 134-9 Satisfies Intermediate Scrutiny

Although the District Court properly determined that H.R.S. § 134-9's provisions concerning the regulation of concealed carry permits failed to implicate protected second amendment activity, it nevertheless undertook the appropriate analysis as if it had—applying the intermediate scrutiny means-ends test—and concluded that the law would have met said test.

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). The limitations that Hawaii laws place on carrying loaded — and readily loadable — firearms in public places easily satisfies this standard. The State's interest in protecting the public health and safety has long been recognized as a compelling objective for purposes of constitutional scrutiny, *see* Salerno, 481 U.S.

at 750, 754-55, and "no one doubts" that "preventing armed mayhem . . . is an important governmental objective," Skoien, 614 F.3d at 642. See also Order at ER, p. 246, ¶ 2 (*citing* Kachalsky v. Cacace, 817 F.Supp.2d 235, 269-71 (S.D.N.Y.2011) for the proposition that, "[t]he government has a significant interest in empowering local law enforcement to exercise control over both concealed and open-carry firearm permits.")

The provisions challenged by Baker below are substantially related to this compelling interest in public safety. The "benefits" of firearm regulations need not be "established with admissible evidence," for a court may also look to "logic" in deciding whether a "substantial relation" exists between the regulation and its objective. Skoien, 614 F.3d at 641-42; *see also* Florida Bar v. Went for It, Inc., 515 U.S. 618, 628 (1995) (speech regulations may be upheld against First Amendment challenges "based solely on history, consensus, and 'simply common sense'"). Logic supports the notion that the provisions that Baker challenges will make it more difficult to discharge firearms in public, thereby reducing the risk that guns will fire to deadly effect, purposefully, or accidently. Even if empirical evidence were necessary (which it is not), it, too, supports the statutes' common-sense goals. Preliminary studies indicate that the passage of so-called "right to carry" laws in other states corresponds with a measurable increase in crime. *See* John J. Donohue, *Guns, Crime, and the Impact of State Right-to-Carry Laws*, 73 Fordham

L. Rev. 623, 630-39 (2004). Evidence from other states also suggests that liberal licensing systems consistently fail to keep guns out of the hands of dangerous people. *See, e.g.*, Violence Policy Center, *Concealed Carry Killers* (2009), *available at* http://www.vpc.org/ccwkillers.htm (concealed carry permit-holders have killed 309 people, including 11 police officers, since May 2007).

In sum, the challenged statutes serve a legitimate government interest in ensuring public safety, and they further that interest by reasonable means supported by common sense and empirical evidence. Accordingly, the qualifications that Hawaii places on open and concealed-carry license holders satisfy intermediate scrutiny. Baker's motion therefore, was properly denied.

(6) Recent Cases Have Upheld Similar Laws Regulating Conceal Carry Licenses

Since Heller was decided, a number of courts have heard cases involving challenges to state and municipal conceal carry laws. In Piszczatoski v. Filko, the plaintiff encountered New Jersey laws which, like here, made it extremely difficult to obtain a handgun carrying permit. 840 F.Supp.2d 813, 816-17 (D.N.J. 2012). There, to qualify to carry a handgun outside his or her "home, property, or place of business" the individual had to show, among other things, a "justifiable need to carry a handgun". Ibid. New Jersey courts interpreted this language from the New Jersey Handgun Permit Law to require an applicant to prove "an urgent necessity for self-protection" based on "specific threats or previous attacks demonstrating a

special danger to the applicant's life that cannot be avoided by other means." Moreover, the courts stated that 'neither "generalized fears for personal safety" nor the "need to protect property alone" satisf[ied] the standard.' Id. The District Court of New Jersey, on review, drew a distinction between Heller's recognized right and conduct outside of the home. Piszczatoski at 11-14. It then applied intermediate scrutiny, id. at 19-20, and concluded that its "Handgun Permit Law", including the required showing of a "justifiable need", as interpreted, met the test. Id. at 20-23. *See also* Kachalsky at 817 F.Supp.2d at 272 (holding that New York's full carry licensing scheme did not implicate the Second Amendment).

Courts within the Ninth Circuit, specifically California, have come to the same conclusion where their state's laws[13] required an applicant to prove "good cause" in order to be granted a concealed carry permit. In Birdt v. Beck, the Los Angeles Police Department had defined "good cause" in the following terms:

> [G]ood cause exists if there is convincing evidence of a clear and present danger to life or of great bodily injury to the applicant, his (or her) spouse, or dependent child, which cannot be adequately dealt with by existing law enforcement resources, and which danger cannot be reasonably avoided by alternative measures, and which danger would be significantly mitigated by the applicant's carrying of a concealed firearm . . .
>
> Good cause is deemed to exist, and a license will issue in the absence of strong countervailing factors, upon a showing of any of the following circumstances: (a) The applicant is able to establish that there is an immediate or continuing threat, express or implied, to the

[13] Specifically, California Penal Code § 12050(a)(1)(A).

> applicant's, or the applicant's family, safety and that no other reasonable means exist which would suffice to neutralize the threat.

No. 2:10-cv-08377-JAK-JEM (C.D.Cal. Jan. 13, 2012).[14] Like the Piszczatoski Court, the District Court for the Central District of California applied an intermediate level of scrutiny and concluded that such high standard for issuance of a concealed weapons permit did not violate the Second Amendment. SER 18-20; *see also* Richards v. County of Yolo, slip copy, 2011 WL 1885641 (E.D.Cal. May 16, 2011).

These cases are significant because they, like Hawaii, involved a statute requiring applicant to show specific facts calling for a need to defend his or herself. Consequently, Hawaii's statutory requirement that an applicant demonstrate a "reason to fear injury to the applicant's person or property" that constitutes an "exceptional case" is appropriate and passes constitutional muster.

C. Baker Did Not Demonstrate That He Would Suffer Irreparable Harm

Baker presents two theories with regard to the requirement that he prove irreparable harm if the instant motion is not granted: (1) he would continue to suffer loss of income by not working as a process server; and (2) the privilege to carry a firearm outside of his home is a fundamental right and, consequently, he

[14] This case is included as part of City Defendants' Supplemental Excerpts of Record ("SER") at pp. 14-23.

does not need to show irreparable harm where such a fundamental right is infringed.

With regard to Baker's claim that he was "forced" to stop earning income as a process server because he "did not have an adequate means of self-defense", City Defendants maintain that Baker did so voluntarily and that any harm Baker suffered was self-inflicted. *See* ER, pp. 12-14, ¶¶ 6-16 (noting that of approximately 75 process servers in the City and County of Honolulu, Baker is the only known one to have applied for a concealed carry license).

Baker's other contention below was that he did not need to prove irreparable harm, because such harm is presumed. *See* SER, p. 18 (*citing* Ezell, *inter alia*). In Ezell, however, the court was dealing with an ordinance that impinged upon the right to possess firearms in defense of the home, a constitutional right recognized by the Supreme Court in Heller. Ezell at 691. Thus, while a question might remain as to whether the right at issue there had been infringed, the right itself had been recognized. In contrast, here, Baker is claiming that irreparable harm should be presumed from the "violation" of a constitutional right which has never been recognized outside of one or two isolated decisions in other circuits. Furthermore, in Ezell, the court was faced with a facial challenge to the statute and individual harm was, therefore, irrelevant. Id. at 9-10. Here, however, Baker has sought injunctive relief, at least in part, based upon an "as applied" challenge.

Individual harm is not, therefore, irrelevant. The only individual harm asserted is that Baker cannot continue working as a process server. As discussed above, such contention is highly questionable. Moreover, to the extent that Baker implies the possibility exists that he could be attacked in the future and successfully defend himself with a firearm, if legally permitted, the claimed harm is speculative and cannot, therefore, form the basis of a claim for irreparable harm. Managо v. Williams, unreported, 2008 WL 2388652 (E.D.Cal. 2008)[15] (*citing* Caribbean Marine Servs. Co. v. Baldrige, 844 F.2d 668, 674 (9th Cir.1988) *and* Goldie's Bookstore, Inc. v. Superior Court, 739 F.2d 466, 472 (9th Cir.1984)). Consequently, the Court's conclusion that Baker failed to prove irreparable harm was proper.

D. The Injunctive Relief Sought Will Harm the Public Interest

Baker asks that this Court enjoin enforcement of public safety measures determined by the legislature of the State of Hawaii to be in the public interest as a means of protecting the safety and welfare of the people of the State of Hawaii. Indeed, Baker asked the District Court to impose a vague injunction that allows, "all Hawai`i citizens[ ] who are not otherwise specifically adjudicated to be … dangerous" to carry firearms in public. *See* S.E.R., p. 2, ¶ 2. Bakers' requested injunction would permit the carrying of any firearm by any person without regard

to their training or intent to use the weapon for crimes of violence, without regard to whether the person was intoxicated, and without limitation as to the nature of the public place. Thus, the State would be compelled to allow weapons to be carried into courthouses; government offices; churches; schools; and public businesses, including bars and banks. In short, the requested injunctive relief would extend into areas the Heller court specifically acknowledged are constitutionally subject to state regulation.

Baker contended that "[s]tudies … show that the carrying and bearing of firearms in public do[es] not increase crime", and cites two studies and a dissenting opinion in a third. SER, pp. 10-11. Admittedly, there have been numerous attempts to quantify the impacts of gun legislation.[16] However, Baker's argument

[16] One camp of researchers has argued that arming citizens will reduce crime, *see, e.g.*, John R. Lott Jr., *More Guns, Less Crime: Understanding Crime and Gun Control Laws* (Univ. Chicago Pr. 2000), while another camp suggests that Lott's research was flawed and that concealed carry laws either have no impact or make violence more likely, *see, e.g.*, Robert Ehrlich, *Nine Crazy Ideas in Science (A Few May Even Be True*) (Princeton Univ. Pr. 2001). Ehrlich and Lott debated their competing research and conclusions in *The Great Gun Fight*, Reason 53 (Aug. 2001). In response to Baker's cited research from the National Research Council, a study at the American Journal of Public Health more recently concluded that "guns did not protect those who possessed them from being shot in an assault." Branas, et al., *Investigating the Link Between Gun Possession and Gun Assault*, 99 Am. J. Pub. Health 2034. The research demonstrated that "gun possession by urban adults was associated with a significantly increased risk of being shot in an assault." Id. at 2037. In a more holistic approach, another group of researchers identified a significant decrease in the number of gun-related deaths in jurisdictions that have comprehensive gun control legislation. Ik-Whan Kwon & Daniel Baack, *The Effectiveness of Legislation Controlling Gun Usage*, 64 Am. J. Econ. & Soc.

here only proves that there is a lack of consensus on the issue itself and that gun control is best left to legislators, who are best positioned to make such policy decisions.

With specific regard to conditions in Hawaii, Baker attempted to show a correlation between increased gun ownership and decreased crime, noting that "[gun] ownership has set unprecedented records for four consecutive years",[17] while pointing out that, "[o]ver the last five years, Hawai`i has experienced an eleven percent decrease in crime."[18] However, Baker's numbers were misleading. Looking at the actual numbers that Baker cited, "Part 1" offenses—including those which one would anticipate being perpetrated with a firearm, such as murder, forcible rape, robbery, aggravated assault, burglary, and motor vehicle theft—actually rose, albeit marginally, over the past three years from 35,462 to 36,166 offenses. ER, p. 13.

Moreover, Baker purported to seek relief on behalf of "[e]very law abiding citizen in the State of Hawaii." SER, p. 22, ¶ 1. However, any workable definition

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533. The competing nature of these studies demonstrates that plaintiffs have not, and cannot, meet their burden of showing that a preliminary injunction will not harm the public interest. Additionally, given Hawaii's isolated geography, local efforts at gun control are less susceptible to outside influences and therefore more likely to be effective than in other jurisdictions studied.

[17] SER, pp. 8-9 (citing the Criminal Justice Data Brief for 2010, 2009, 2008 and 2007).

[18] SER, p. 9, ¶ 1 (*citing* the City and County of Honolulu's "Service Efforts and Accomplishment Report for FY 2010").

of that term includes all who have not yet been convicted of a crime. Every murderer, robber, and rapist fell within that definition at some point in their lives. It is because dangerous weapons are at issue and the public interest is at risk that the Fourth Circuit noted it did not want to be responsible "for some unspeakably tragic act of mayhem because in the peace of our judicial chambers we miscalculated as to Second Amendment rights" Masciandaro, 638 F.3d at 475 (noting that the "danger would rise exponentially" if the right to carry weapons moved from the home to the public square). The public interest is not served by subjecting the public to such increased risks.

Alternatively, Baker asked the lower Court to simply grant him a license to carry a firearm during the pendency of this suit. Not only would such relief encouraged a multitude of similar lawsuits, and their respective claims for licenses during the pendency of those actions, but such could certainly place members of the public who come in contact with Baker, as well as their pets,[19] at greater risk of harm.

E. Hawaii's Licensing Procedure Does Not Violate Due Process

As with many of the other facets of this case, Baker mischaracterizes Hawaii's procedure for granting/denying concealed carry licenses. He continuously repeats the mantra that the Chief of Police possesses "unbridled

[19] *See* ER 70, ¶ 3.

discretion", that he makes his decision with "no guidance"[20] from the statute, that applicants are not provided a meaningful that his decision is "absolute and final".[21] Such contentions are simply not true.

(1) The Chief Does Not Possess Unbridled Discretion to Grant Concealed Carry Licenses

Baker asserts that Defendant-Appellee LOUIS KEALOHA ("Chief Kealoha"), the Chief of Police of the Honolulu Police Department, has "sole discretion with little statutory guidance as to when to issue a firearm permit." [sic][22] O.B., p. 28, ¶ 2; *see also* O.B., p. 2, ¶ 2 ("sole discretion"), p. 4, ¶¶ 3, 4 ("unbridled discretion"), and p. 7, ¶ 2 ("sole discretion"). Indeed, Baker asserts that this decision is "at [his] whim". O.B., p. 24, ¶ 1; p. 12, ¶ 2. As noted above, however, Hawaii law[23] does not allow the arbitrary granting of carry licenses. In fact, in order to be eligible for a concealed carry license, an applicant must meet the following qualifications:

(1) be of the age of 21 years or older;
(2) be a citizen of the United States or a duly accredited official representative of a foreign nation;
(3) demonstrate a reason to fear injury to his/her person or property that constitutes an exceptional case;
(4) be qualified to use the firearm in a safe manner;
(5) appear to be a suitable person to be so licensed;

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[20] O.B., p. 29, ¶ 2.
[21] O.B., p. 31, ¶¶ 2, 3
[22] As with his motion heard below, on appeal Baker continues to confuse firearm "permits" with "licenses".
[23] Specifically, H.R.S. § 134-9.

(6) not be prohibited from owning or possessing a firearm under H.R.S. § 134-7; and
(7) not have been adjudged insane or appear mentally deranged.

H.R.S. § 134-9. Baker is aware of that fact because he completed a "Firearm Application Questionnaire" which asked him questions concerning many of these factors. ER, p. 75. Consequently, this decision is not "arbitrary" or at Chief Kealoha's whim.

(2) Baker Was Provided a Meaningful Opportunity to Prove His Entitlement to a Concealed Carry License

Baker similarly complains that, "[t]here is no opportunity to participate, be heard, or advocate his position during the decision-making process." O.B., p. 28, ¶ 2. However, Plaintiff submitted an application and two-paged letter setting forth his qualifications and why he believed he met the statutory eligibility for a concealed carry license. ER, pp. 69-70, 72-75. Such was investigated and considered in the decision denying his application. ER, pp. 12-13, ¶¶ 8-14. Plaintiff could have reapplied, submitted additional information in support of his application or sought clarification from HPD with regard to the reasons for the Chief's denial at no additional cost to him. ER, p. 14, ¶ 23. He did not do so. ER, p. 198 fn. 3. Consequently, if Baker neglected to put forth all favorable facts in support of his application, it is not a failure in the system. It is a failure in his own efforts.

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(3) The Chief's Decision Is Not Absolute and Final

Finally, Baker asserts that the Chief's decision is "absolute and final" and that he is afforded "no opportunity to seek judicial, appellate or administrative review of the chief's decision." O.B., p. 31, ¶¶ 2, 3. However, as noted above, Plaintiff could have reapplied to HPD with additional information, or first sought clarification as to the reasons why he had been denied. Consequently, a procedure for administrative review exists. Moreover, Bakers complains that no judicial review exists is undercut by his statement that, "[s]ince MacDonald, …, any aggrieved applicant could file a civil rights lawsuit in state or federal court." Indeed, the District Court here has already reviewed the Chief's actions and found them sufficient.

(4) Baker's Interest Does Not Involve a Fundamental Right

As acknowledged by Baker, the nature of the private interest affected influences the amount of procedure required. As noted above, and correctly observed by the District Court, Baker's due process argument is "based on his assertion that he has a fundamental Second Amendment right to a fun license". ER, p. 55 fn. 31. Because the interest asserted here does involve Baker's Second Amendment rights, his due process claim fails.

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F. Baker Lack's Standing to Challenge the Statutory Provisions Concerning Other Weapons

Plaintiff devotes little argument in the instant appeal to his contentions that Hawaii laws prohibiting the possession of other weapons, such as taser guns, are unconstitutional. In fact, such argument is relegated, almost entirely, to a footnote. *See* O.B., p. 26, ¶ 3. In Carrico, *supra*, the Ninth described the requirements for standing:

> To establish "the irreducible constitutional minimum of standing," a plaintiff invoking federal jurisdiction must establish "injury in fact, causation, and a likelihood that a favorable decision will redress the plaintiff's alleged injury." Lopez v. Candaele, 630 F.3d 775, 785 (9th Cir.2010) (*citing* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). An injury in fact is "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." Lujan, 504 U.S. at 560, 112 S.Ct. 2130 (internal citations and quotations omitted)

656 F.3d 1002, 1005 (9th Cir. 2011). Below, the closest Baker came to satisfying his standing requirement was his statement, in his supporting declaration:

> I would like to exercise my right to keep and bear arms. I believe I am unable to do so without the permit. Although not an attorney, I have read the various criminal offenses associated with possession or carriage of firearms and the various circumstances and locations described in said statutes, referenced in the lawsuit to which this declaration pertains. I fear criminal prosecution and thus cannot and do not carry or bear arms in order to protect myself, my family my property, and my community because of the aforementioned statutes.

ER, p. 9, ¶ 25. Baker's declaration is clearly insufficient. It concerns firearms, not the other weapons he claims are unconstitutionally forbidden. Nor does it touch

upon a real threat of prosecution, but only mentions a general "fear". "When plaintiffs 'do not claim that they have ever been threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible,' they do not allege a dispute susceptible to resolution by a federal court." Carrico at 1005-06 (*quoting* Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289-299, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979); *and* Younger v. Harris, 401 U.S. 37, 42, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971)). Consequently, any argument that a preliminary injunction nonetheless should have been granted with regard to these laws is undercut by Baker's lack of standing.

VII. CONCLUSION

For the reasons set forth above, Defendant-Appellees LOUIS KEALOHA and the CITY AND COUNTY OF HONOLULU respectfully request that this Court affirm the District Court's "Order Granting Defendants State of Hawaii and Governor Abercrombie's Motion for Judgment on the Pleadings, Granting in Part and Denying in Part Defendants City and County of Honolulu, Honolulu Police Department and Louis Kealoha's Motion to Dismiss, and Denying Plaintiff's Motion for a Preliminary Injunction", dated April 30, 2012, with respect to its ruling on the Motion for a Preliminary Injunction.

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Dated: Honolulu, Hawaii, August 7, 2012.

ROBERT CARSON GODBEY
Corporation Counsel

By: /s/ Curtis E. Sherwood
CURTIS E. SHERWOOD
Deputy Corporation Counsel

Attorneys for Defendant-Appellees
LOUIS KEALOHA and the CITY AND COUNTY OF HONOLULU

VIII. STATEMENT OF RELATED CASES

Defendant-Appellees are aware of no specific, related cases pending in this Court.

Dated: Honolulu, Hawaii, August 7, 2012.

ROBERT CARSON GODBEY
Corporation Counsel

By: /s/ Curtis E. Sherwood
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IX. CERTIFICATE OF COMPLIANCE

I certify that pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached Opening Brief is proportionately space, has a typeface of 14 points or more and contains 9615 words.

Dated: Honolulu, Hawaii, August 7, 2012.

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Corporation Counsel

By: /s/ Curtis E. Sherwood
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was duly served upon the following party on this date, by electronic service through the Court's ECM/CF system, by facsimile, by hand delivery or by depositing said copy, postage prepaid, first class, in the United States Post Office, at Honolulu, Hawai'i, as indicated and addressed as set forth below:

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Dated: Honolulu, Hawaii, August 7, 2012.

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