UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHRISTOPHER BAKER, *Plaintiff-Appellant*, v. LOUIS KEALOHA, et al., *Defendants-Appellees*.	)	No. 12-16258

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE NATIONAL RIFLE ASSOCIATION OF AMERICA, INC. IN SUPPORT OF PLAINTIFF-APPELLANT AND REMAND

Pursuant to Federal Rule of Appellate Procedure 29 and Circuit Rule 29-2, the National Rifle Association of America, Inc. ("NRA") respectfully moves for leave to file a brief as amicus curiae in support of Plaintiff-Appellant and remand. Plaintiff-Appellant Christopher Baker has consented to the filing of this brief. Counsel for amicus have conferred with Defendants-Appellees, *see* Circuit Rule 29-3, and Defendants-Appellees take no position on the filing of this brief.

1. The NRA is America's oldest civil rights organization and foremost defender of the Second Amendment. The NRA has approximately five million individual members, and its programs reach millions more. Among its many public service and education initiatives, the NRA is the Nation's leading provider of firearms marksmanship and safety training for both civilians and law enforcement.

The NRA has a strong interest in this case because a substantial number of its members reside in Hawaii and seek to carry handguns outside the home for the lawful purpose of self-defense. These members, however, cannot obtain either concealed or open carry licenses because they do not satisfy Hawaii's exceedingly narrow statutory requirements, which allow such licenses to be granted only in "an exceptional case, when an applicant shows reason to fear injury to the applicant's person or property" or when an applicant is "engaged in the protection of life and property" (as is the case with a security guard) and "the urgency or the need has been sufficiently indicated." Haw. Rev. Stat. §134-9(a).

2. Amicus respectfully submits that its experience and expertise in the Second Amendment makes an amicus brief desirable in this case. The NRA has participated actively in litigation to vindicate Second Amendment rights in state and federal courts across the country. It filed briefs in the United States Supreme Court in both *District of Columbia v. Heller*, 554 U.S. 570 (2008) (as an amicus), and *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (as a party), and in this Court at both the panel and en banc rehearing stages of *Peruta v. County of San Diego*, No. 10-56971, which prompted the supplemental briefing order in this case.[1] The NRA has also participated as an amicus in other Second Amendment cases reviewing carry

[1] Counsel of record for amicus in this case argued *Peruta* before the Ninth Circuit at the panel and en banc rehearing stages of that case.

restrictions similar to those at issue in this case, including *Grace v. District of Columbia*, No. 16-7067 (D.C. Cir. argument set for Sept. 20, 2016), *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012), and *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013).

3. The panel has granted leave for the Brady Center to Prevent Gun Violence to file an amicus brief in support of Defendants-Appellees, *see* Dkt. 82, and amicus respectfully asks that it be allowed to do the same in support of Plaintiff-Appellant.[2] This request is timely under Federal Rule of Appellate Procedure 29(e) because it is submitted within 7 days of the parties' supplemental briefs.

Respectfully submitted,

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September 13, 2016

[2] Several government entities have also filed amicus briefs in support of Defendants-Appellees pursuant to Federal Rule of Appellate Procedure 29(a).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), the National Rifle Association of America, Inc. certifies that it does not have a parent corporation and that no publicly held corporation owns more than ten percent of its stock.

CERTIFICATE OF SERVICE

I hereby certify that on September 13, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/Paul D. Clement
Paul D. Clement

No. 12-16258

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 of Hawaii,
No. 11-cv-528-ACK-KSC

BRIEF OF AMICUS CURIAE NATIONAL RIFLE ASSOCIATION OF AMERICA, INC. IN SUPPORT OF PLAINTIFF-APPELLANT AND REMAND IN RESPONSE TO THE PETITION FOR REHEARING

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IDENTITY AND INTEREST OF AMICUS CURIAE

The National Rifle Association of America, Inc. ("NRA") is America's oldest civil rights organization and foremost defender of the Second Amendment. The NRA filed amicus briefs at the panel and en banc rehearing stages in *Peruta v. County of San Diego,* No. 10-56971, which prompted the supplemental briefing order in this case. The NRA has a strong interest in this case because its outcome will affect the ability of NRA members who reside in Hawaii to exercise their fundamental right to carry a firearm for the lawful purpose of self-defense.[1]

[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5), amicus certifies that this brief was not written in whole or in part by counsel for any party, and no person or entity other than amicus, its members, and its counsel has made a monetary contribution to the preparation and submission of this brief.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authority

INTRODUCTION

Hawaii bans typical, law-abiding citizens from carrying a handgun outside the home for any purpose, including the lawful purpose of self-defense. As this panel has already explained in its comprehensive and persuasive *Peruta* decision, such a sweeping restriction plainly implicates (indeed, violates) the Second Amendment. Although the en banc court vacated the *Peruta* panel decision and resolved *that case* as a narrow challenge to the right to *concealed* carry, nothing in the en banc decision undermines this panel's conclusion that a ban on *all* carry by typical, law-abiding citizens at least *burdens* the right to bear arms. Indeed, no federal court of appeals has adopted the extreme position that the Second Amendment does not even apply to a ban on all carry by typical, law-abiding citizens.

Yet that is precisely the position the district court took here. As the panel explained in its initial disposition of this appeal, the district court "made an error of law when it concluded that the Hawaii statutes did not implicate protected Second Amendment activity." *Baker v. Kealoha*, 564 F. App'x 903, 904-05 (9th Cir. 2014). That error persists even after the en banc decision in *Peruta*. By the district court's logic, Hawaii could ban guns outside the home entirely—a position that would squarely contradict decisions of multiple federal courts of appeals and "divorce the Second Amendment from the right of self-defense" described by the Supreme Court in binding precedent. *Moore v. Madigan*, 702 F.3d 933, 937 (7th Cir. 2012). Nothing

in the *Peruta* en banc decision supports that extreme result. If anything, the en banc court's reliance on cases upholding laws that restrict *one manner* of carry only underscores the constitutionally distinct (and verboten) status of laws that restrict *all manner* of carry.

Because this appeal arises from the denial of a preliminary injunction, however, this Court need not fully resolve the constitutionality of Hawaii's law. Instead, as explained in the panel's earlier disposition, the appropriate remedy is a remand with instructions so that the district court may evaluate plaintiff's request for equitable relief under a correct understanding that the Second Amendment does in fact apply outside the home.

ARGUMENT

I. Hawaii's Law Banning All Typical, Law-Abiding Citizens From Carrying Outside The Home Burdens Conduct Protected By The Second Amendment.

A. The Question in This Case Is Whether the Second Amendment Applies Beyond the Home.

Hawaii bans the "concealed or unconcealed" carrying of handguns outside the home without a license. Haw. Rev. Stat. §134-9(c). A concealed carry license may be granted only in "an exceptional case, when an applicant shows reason to fear injury to the applicant's person or property." *Id.* §134-9(a). An open carry license may be granted only to "an applicant ... engaged in the protection of life and property," such as a security guard, when "the urgency or the need has been

sufficiently indicated." *Id.*; *see* Compl. ¶39. A typical, law-abiding Hawaiian thus cannot carry outside the home in any form.

Plaintiff Christopher Baker requested "a license to carry a firearm pursuant to" §134-9—"the only means by which [he] could bear a firearm ... whether *openly or concealed*." Compl. ¶2 (emphasis added). When the Honolulu police chief denied that request, Baker filed a complaint alleging that §134-9 is "unconstitutional as it broadly prohibits the *open and concealed* bearing of firearms." *Id.* ¶37 (emphasis added). As relief, he sought an injunction directing the police chief to "issue a license to carry authorizing [him] to bear a *concealed or openly* displayed firearm." *Id.* Prayer for Relief ¶10 (emphasis added). As the district court recognized, Baker's challenge therefore clearly implicated both the "concealed" and "unconcealed" provisions of §134-9. Dist.Ct.Op.50; *see id.* at 41. This case thus presents the question whether Hawaii's simultaneous ban on both concealed and open carry "implicate[s] protected Second Amendment activity," *id.* at 54—that is, whether the Second Amendment applies beyond the home.

B. As This Panel Has Correctly Held, a Ban on All Carry Beyond the Home at Least Implicates the Second Amendment.

Because the district court resolved this case on the ground that a ban on all carry beyond the home does not implicate the Second Amendment, this panel need

only address that issue.[2] Indeed, it already has. As explained in the *Peruta* panel decision, the "text and history" of the Second Amendment establish that its scope cannot plausibly be confined to the home. *Peruta v. Cty. of San Diego*, 742 F.3d 1144, 1150 (9th Cir. 2014) (*Peruta I*) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008)); *see Peruta v. Cty. of San Diego*, 824 F.3d 919, 946-48 (9th Cir. 2016) (en banc) (*Peruta II*) (Callahan, J., dissenting).

First, the text of the Second Amendment is irreconcilable with the district court's reading. If the right to "bear" arms were limited to the home, it would overlap with the right to "keep" arms, thus contradicting the foundational principle that no "clause in the constitution is intended to be without effect." *Heller*, 554 U.S. at 643. Moreover, a homebound conception of the right is incompatible with the Supreme Court's binding construction of the term "bear arms." As the Court explained in *Heller*, "to 'bear'" means "to 'carry,'" *id.* at 584, and to "bear arms" means to "carry weapons in case of confrontation," *id.* at 592. Restricting the right to bear arms to

[2] The district court also briefly suggested an alternative holding that the statute would likely survive intermediate scrutiny, *see* Dist.Ct.Op.54, but the court did not offer a single word explaining how the law is "appropriately tailored" to the asserted governmental interest, which is a basic requirement of intermediate scrutiny, *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 966 (9th Cir. 2014). Accordingly, this panel correctly recognized when remanding this case after the *Peruta* panel opinion that the only holding in the district court opinion is "that the Hawaii statutes did not implicate protected Second Amendment activity." *Baker*, 564 F. App'x at 904-05. The dissenting opinion did not dispute that reading.

the home would make no sense under that construction, because the need for defense in case of confrontation is equally (if not more) likely to arise outside the home than within. *See Moore*, 702 F.3d at 937.

The district court relied heavily on the fact that *Heller* invalidated a law banning handgun possession in the home. *See* Dist.Ct.Op. 47, 49, 51, 53. But that narrow approach misreads *Heller*. In its nearly 50-page analysis of the scope of the Second Amendment right (as opposed to its application of the right to the challenge at hand), the Court referred to the "home" or "homestead" a grand total of three times, in each instance quoting a historical source that recognized a right to keep and bear arms to defend both one's home and one's person and family. *See* 554 U.S. at 615-16, 625. The Court also explained that its opinion should not "be taken to cast doubt on ... laws forbidding the carrying of firearms in sensitive places such as schools and government buildings," an admonition that would be wholly unnecessary if the Second Amendment did not extend beyond the home. *Id.* at 626.

The district court's rigid, fact-dependent approach is also inconsistent with this Court's own reading of *Heller*. In *Jackson*, for example, this Court held that the Second Amendment applies to the purchase of ammunition, even though *Heller* itself involved only the possession of firearms. 746 F.3d at 967. Similarly, in *Fyock v. Sunnyvale*, 779 F.3d 991, 998 (9th Cir. 2015), this Court held that the Second

Amendment applies to the possession of large-capacity magazines, even though the law challenged in *Heller* banned only the possession of handguns.

Finally, the district court's limitation of the Second Amendment to the home is irreconcilable with the history of the right to bear arms. As this panel concluded after an exhaustive historical review, the vast majority of commentators and courts interpreting the original meaning of the Second Amendment agreed that the right "extended outside the home and included, at minimum, the right to carry an operable weapon in public for the purpose of lawful self-defense." *Peruta I*, 742 F.3d at 1160. Moreover, while "some courts approved limitations *on the manner of carry* outside the home, none approved *a total destruction of the right to carry in public*." *Id.* (emphasis added). The district court's holding, however, would allow precisely that.

C. The *Peruta* En Banc Decision Does Not Undermine This Panel's Analysis of the Question at Issue Here.

Although the en banc court vacated the *Peruta* panel opinion, it did nothing to undermine the reasoning that led the panel to remand this case after the panel opinion in *Peruta* issued—namely, that a ban on all carry by typical, law-abiding citizens at least *implicates* the Second Amendment right. The en banc court disagreed with the panel only on the scope of the claims in *Peruta*, holding that the plaintiffs sought solely to "carry *concealed* firearms" and that the Second Amendment does not protect that freestanding right. *Peruta II*, 824 F.3d at 927 (emphasis added). The en banc court expressly and repeatedly reserved the question

at issue here: whether "the Second Amendment protects *some* ability to carry firearms in public." *Id.* (emphasis added); *see id.* at 939, 942.

If anything, the en banc court's opinion only underscores why the panel's position on this issue is correct. The en banc court relied heavily on *Heller*'s explanation that "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." 554 U.S. at 626. As *Heller* expressly noted, however, many of those courts upheld concealed carry prohibitions only while simultaneously striking down open carry prohibitions. *Id.* at 629 (citing *Nunn v. State*, 1 Ga. 243, 251 (1846)).[3] And when 19th-century courts encountered legislation amounting to a total ban on carry, they struck it down. *Id.* (citing *Andrews v. State*, 50 Tenn. 165, 187 (1871), and *State v. Reid*, 1 Ala. 612, 616-17 (1840)).

Indeed, as this panel noted in *Peruta*, all the authorities that *Heller* cited to support the lawfulness of concealed carry bans upheld those bans on the understanding that they regulated only the *manner* of carry, rather than prohibiting

[3] As explained in detail by one scholar, these 19th-century courts "find almost uniformly, in upholding state concealed weapons bans, that the right to keep and bear arms protects the right to carry weapons only—and only openly." Jonathan Meltzer, *Open Carry for All:* Heller *and Our Nineteenth-Century Second Amendment*, 123 Yale L.J. 1486, 1490 (2014). Accordingly, "the logical outgrowth of *Heller* would be a regime in which the concealed carry of firearms could be banned, but the open carry of the same weapons could not." *Id.*

"the right to carry arms in public altogether." 742 F.3d at 1171 (citing *State v. Chandler*, 5 La. Ann. 489, 490 (1850)). The *Peruta* en banc court relied on the same authorities to support its conclusion that the Second Amendment does not apply to concealed carry bans. *See* 824 F.3d at 933-36. The necessary implication is that the balance of the analysis in those authorities applies as well. Thus, while the Second Amendment may not apply to concealed carry bans, it must apply to concealed-*and-open* carry bans of the kind at issue here.

That is hardly an outlier position. Although several federal courts of appeals have upheld carry restrictions similar to those at issue here, none of those courts has relied on a holding that the Second Amendment *does not even apply* to those restrictions. The Second Circuit, for example, concluded that the Second "Amendment must have ***some*** application in the ... context of the public possession of firearms." *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 89 (2d Cir. 2012). Both the Third and Fourth Circuits assumed that the Second Amendment must reach beyond the home. *See Drake v. Filko*, 724 F.3d 426, 430-31 (3d Cir. 2013); *Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013). And the Seventh Circuit has squarely held that the Second Amendment applies to (and forbids) a ban on all forms of carry beyond the home. *Moore*, 702 F.3d at 937. Indeed, no federal court of appeals to confront the question has concluded that the Second Amendment is limited to the home. This panel should not be the first.

D. Because This Appeal Arises from a Preliminary Injunction Analysis Based on a Legal Error, the Appropriate Remedy Is a Remand.

Having decided that the Second Amendment extends beyond the home, this Court need not decide any more to resolve this appeal. Unlike the appeal in *Peruta*, which arose from a grant of summary judgment, *see* 824 F.3d at 924, the appeal here arises from the denial of a preliminary injunction. This panel accordingly need not determine whether Hawaii's law is ultimately constitutional, but only whether the district court abused its discretion in denying the preliminary injunction. There will be time enough to resolve the question of whether Hawaii's law and others like it violate the Second Amendment in cases where that question has been fully explored below. *See, e.g.*, *Flanagan v. Harris*, No. 16-cv-6164 (C.D. Cal. filed Aug. 17, 2016) (challenging California's restrictions on open and concealed carry).

As for this appeal, as this panel explained in its previous disposition, a "district court abuses its discretion when it makes an error of law." *Baker*, 564 F. App'x at 904. s explained above—and by this panel previously—the district court made such an "error of law when it concluded that the Hawaii statutes did not implicate protected Second Amendment activity." *Id.* at 904-05. The appropriate remedy for that error is to "vacate the district court's decision denying Baker's motion for a preliminary injunction and remand for further proceedings consistent with" a correct understanding of the Second Amendment's scope. *Id.* at 905; *cf. Abercrombie & Fitch Co. v. Moose Creek, Inc.*, 486 F.3d 629, 637-38 (9th Cir. 2007).

Confining the scope of the Second Amendment to the home, moreover, was not the district court's only error. The district court took the remarkable position that plaintiff would not be irreparably harmed by the denial of a handgun license because he could carry pepper spray instead. Dist.Ct.Op.57. But as the D.C. Circuit explained in a related context, it is "frivolous" to suggest that a Second Amendment restriction does not inflict harm simply "because it does not threaten total disarmament." *Parker v. District of Columbia*, 478 F.3d 370, 400 (D.C. Cir. 2007), *aff'd sub nom. Heller*, 554 U.S. 570. And in *Caetano v. Massachusetts*, the Supreme Court unanimously vacated a state court opinion that held the Second Amendment inapplicable to a stun gun possessed by a woman in a public parking lot. 136 S. Ct. 1027-28 (2016); *see also id.* at 1029 (Alito, J., concurring).

On top of that, more than four years have passed since the district court issued its decision. In that time, this court has issued several important Second Amendment precedents, including *Jackson* and *Fyock*, which (as explained above) make clear that *Heller* cannot be confined to its facts. Remand is appropriate to allow the district court to reevaluate the Second Amendment issues in this case in light of these new and binding precedents.

CONCLUSION

For the reasons set forth above, this Court should vacate and remand with instructions.

Respectfully submitted,

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September 13, 2016

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and Circuit Rule 29-2(c)(2) because this brief contains 2,558 words, excluding the parts of the brief exempted 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 it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times New Roman type.

Dated: September 13, 2016

s/Christopher G. Michel
Christopher G. Michel

CERTIFICATE OF SERVICE

I hereby certify that on September 13, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/Paul D. Clement
Paul D. Clement