IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| CHRISTOPHER BAKER,<br>Plaintiff/Appellant,<br>vs.<br>LOUIS KEALOHA, ET AL.,<br>Defendants/Appellees. | No. 12-16258<br>U.S. District Court No. 1:11-cv-00528-ACK –KSC<br>District of Hawaii, Honolulu |

# APPELLEES' SUPPLEMENTAL BRIEF

On Appeal from the United States District Court
District of Hawaii [Honolulu]

The Honorable Alan C. Kay
United States Senior District Court Judge

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## INTRODUCTION

Hawaii law allows local officials to grant licenses to carry concealed handguns in exceptional cases where the applicant has reason to fear injury to person or property, but requires a lesser showing for licenses to carry handguns openly. Here, the limited record before this Court shows that plaintiff Christopher Baker applied only for a license to carry a handgun concealed, and never sought a license to openly carry a handgun. For purposes of this appeal from the denial of a preliminary injunction, Baker has not demonstrated that he has standing to challenge Hawaii's open-carry law or Chief Louis Kealoha's open-carry license policies. The only claim he has standing to make, a challenge to Hawaii's concealed-carry regime, is foreclosed by *Peruta v. County of San Diego*, 824 F.3d 919 (9th Cir. 2016) (en banc), and was correctly rejected by the district court. The panel should grant rehearing and affirm the district court's order denying a preliminary injunction on this record.

## STATEMENT OF THE CASE

In keeping with long tradition in this country and in England, *see infra* Argument Sections II & III, the State of Hawaii restricts the carrying of firearms in public. Haw. Rev. Stats. §§ 134-9, 134-23, 134-24. A person who makes a sufficient showing of need may obtain a license to carry a handgun in public. *Id.* § 134-9(a). Those who do not possess a license under § 134-9, however, may nonetheless carry handguns and long guns in public to and from target ranges, hunting sites, gun dealerships, etc., and may keep handguns and long guns in their homes and places of business for personal protection. *Id.* §§ 134-23, 134-24.

Section 134-9 creates two classes of licensees: those who can carry handguns concealed and those who can carry openly. Haw. Rev. Stat. § 134-9(a). The chief of police of each county in Hawaii may grant concealed carry licenses "[i]n an exceptional case, when an applicant shows reason to fear injury of the

applicant's person or property." *Id.* He or she may grant open-carry licenses "[w]here the urgency or need has been sufficiently established" to an applicant "engaged in the protection of life and property." *Id.*

Plaintiff Christopher Baker completed an "Application for a License to Carry a Concealed Firearm" on August 30, 2010. D.Ct. Dkt. No. 48-4 at 12.[1] Baker also wrote a letter to Chief of Police Louis Kealoha stating his desire to obtain a "permit to carry," but he never requested in the letter that he be considered for a license to carry a handgun openly. *Id.* at 10. Nor did Kealoha evaluate Baker's suitability for an open-carry license under § 134-9. Instead, Kealoha's officers investigated Baker's suitability for "a license to carry a concealed firearm[]," D.Ct. Dkt. No. 48-4 at 7, ER 12, and Kealoha's letter to Baker denying Baker's application referenced only Baker's "request for a license to carry a concealed firearm." D.Ct. Dkt. No. 48-4 at 11.

Baker filed a complaint on August 30, 2011 challenging a number of Hawaii statutes, including § 134-9. D.Ct. Dkt. No. 1 at 12. Baker's complaint contended that vesting the discretion to issue open or concealed carry licenses in a local official violated his due process and Second Amendment rights. *Id.* at 13-14 ¶¶ 36-37. Baker also alleged that Kealoha's practice is to issue open carry licenses only to applicants who are licensed guards. *Id.* at 14 ¶ 39. He also challenged a host of other Hawaii statutes, including its prohibitions on electric guns and extendable batons. *Id.* at 42-43.

Baker sought a preliminary injunction. ER 2. His motion requested an injunction prohibiting enforcement of those Hawaii statutes that regulate the possession and transport of firearms and electric guns. ER 3. Baker's motion

[1] All references to page numbers of documents filed via the ECF system are to the document's ECF pagination, not to the document's internal pagination.

presented declaration evidence that he applied for a "license to carry" on August 31, 2010, ER 9, the date of his concealed-carry license application. Baker's motion did not provide evidence that he applied for an open-carry license, nor did it substantiate his complaint's allegation that Kealoha issues open-carry licenses only to applicants who are licensed guards.

The district court denied Baker's motion on April 30, 2012. Characterizing Baker's motion as a bid to enjoin those Hawaii statutes that prohibited him from carrying a firearm in public, or alternatively to compel Kealoha to issue him a license to carry openly or concealed, ER 233, the district court held he was unlikely to succeed on the merits of his claims, ER 246. Because the Hawaii statutes offered the opportunity to publicly carry firearms to those who showed sufficient need, the court concluded, that even assuming Baker showed that his Second Amendment rights were implicated, the State had sufficiently compelling public justifications to restrict Baker's ability to carry a firearm in public. ER 246-47. The district court did not state whether its analysis depended in any respect on whether Baker sought an open-carry or a concealed-carry license.

Baker appealed. In *Peruta v. County of San Diego*, No. 10-56971, a panel of this Court considered California's firearms laws, which generally prohibit open carry but allow local officials to issue concealed-carry permits upon a showing of sufficient need. *See* Cal. Penal Code §§ 25400, 25850, 26350, 26150, 26155. The Court concluded that the Second Amendment requires the States to permit some form of public carrying of firearms and that, having prohibited open carry, California could not condition concealed carry permits upon a showing of need. *Peruta v. County of San Diego*, 742 F.3d 1144, 1170, 1172 (9th Cir. 2014). Following the panel *Peruta* decision, this Court vacated and remanded the district court's denial of a preliminary injunction in this case for further consideration. *Baker v. Kealoha*, 564 Fed. Appx. 903, 905 (9th Cir. 2014).

Kealoha and the City and County of Honolulu sought panel rehearing or rehearing en banc. Dkt. No. 59-1. This Court deferred consideration of their petition until after the disposition of the pending rehearing petition in *Peruta*. Dkt. No. 78. The Court granted petitions for rehearing en banc in *Peruta v. County of San Diego*, No. 10-56971, and *Richards v. Prieto*, No. 11-16255. The en banc Court held that the Second Amendment does not protect any right to carry firearms concealed in public, and it did not expressly decide whether the Second Amendment protects a right to carry firearms openly in public. 824 F.3d at 939.

## ARGUMENT

The question left open by *Peruta*—whether and to what extent the Second Amendment protects a right to carry firearms outside the home—is not presented here because Baker has failed to establish his standing to raise it. In his preliminary injunction moving papers, Baker has not shown either that he sought an open-carry license from the Honolulu Chief of Police or that it would have been futile for him to seek one. Accordingly, this Court should grant panel rehearing or rehearing en banc and affirm the district court's denial of a preliminary injunction to Baker, with directions to determine on remand whether the open-carry challenge should be dismissed for lack of standing.

In the event the Court concludes that Baker has established his standing, then this Court's prior disposition is apposite, although its reasoning is not: the district court should, in the first instance, apply the guidance of the en banc *Peruta* decision to the remaining questions whether, in light of historical restrictions on carrying firearms and in particular carrying concealable firearms, there is a Second Amendment right to carry concealable firearms outside the home, and what level of scrutiny applies to restrictions of that right. However, in the event this Court takes up that question in the first instance, then in light of *Peruta*'s historical reasoning and guidance, it should grant rehearing or rehearing en banc and hold

that there is no such right.

## I. Baker Has Not Established His Standing To Challenge Hawaii's Open-Carry Law.

"It is a long-established rule 'that a plaintiff lacks standing to challenge a rule or policy to which he has not submitted himself by actually applying for the desired benefit.'" *Friery v. L.A. Unified Sch. Dist.*, 448 F.3d 1146 (9th Cir. 2006) (per curiam) (quoting *Madsen v. Boise State Univ.*, 976 F.2d 1219, 1220-1221 (9th Cir. 1992) (per curiam)). "[A] long line of cases" stand behind this rule, *Madsen*, 976 F.2d at 1220 (citing cases), which rests on Article III's requirement that there be a "well-defined controversy between the parties" before the federal courts intervene. *Id.* at 1221. The rule finds further support in Article III's causation requirement: At a minimum, the plaintiff must demonstrate that his injury is "fairly traceable to the challenged action of the defendant." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotation marks omitted). Where a plaintiff has not actually applied for a license under a law or policy that he challenges, then his injury is traceable not to the law or policy but instead to his failure to apply for it. Accordingly, courts have declined to entertain challenges to policies by applicants who have not sought licenses. *See United States v. DeCastro*, 682 F.3d 160, 164 (2d Cir. 2012); *Pizzo v. City & County of San Francisco*, No. C 09-4493 CW, 2012 WL 6044837, at *14-*15 (N.D. Cal. Dec. 5, 2012). Moreover, additional pause is warranted where, as here, the plaintiff seeks to strike down a statute, as such "is the gravest and most delicate duty" that a court performs, and it does not do so lightly. *See Shelby County v. Holder*, 133 S. Ct. 2612, 2631 (2013) (citation omitted). In light of the high stakes, the "standard practice is to refrain from addressing constitutional questions except when necessary to rule on particular claims." *See Citizens United v. Federal Election Commission*, 558 U.S. 310, 373 (2010) (Roberts, C.J. and Alito, J. concurring).

Here, there is no evidence in the present record that Baker actually applied for an open carry license, or that Kealoha or his staff actually considered his fitness for an open carry license by applying the "urgency or sufficient need" standard that is unique to that kind of license under Hawaii law. And while Baker may claim that it would have been futile for him to apply for an open-carry license in light of his allegation that Kealoha grants these licenses only to licensed guards, D.Ct. Dkt. No. 1 at 14 ¶ 39, Baker submitted no evidence that this was the case.

Accordingly, Baker has not met his burden of establishing his standing to challenge Hawaii's open-carry law, a fundamental prerequisite to the entry of any order in Baker's favor concerning that law. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998) ("On every writ of error or appeal, the first and fundamental question is that of jurisdiction") (internal quotation marks omitted); *Lopez v. Candaele*, 630 F.3d 775, 794 (9th Cir. 2010) (reversing district court's grant of preliminary injunction where plaintiff did not show injury in fact).[2] Nor is it sufficient that Baker applied for and was denied a concealed-carry license; "a plaintiff must demonstrate standing separately for each form of relief sought." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc*., 528 U.S. 167, 185 (2000).

The district court's order denying Baker injunctive relief was correct. Baker cannot succeed on the merits of his motion for an order striking down Hawaii's concealed-carry license law because there is no Second Amendment right to carry a firearm concealed, as *Peruta* holds, and at this preliminary phase of the litigation

[2] Baker may argue that appellees have not previously raised the issue of his standing. The potential importance of the distinction between the right to carry openly and the right to carry concealed was not apparent at the outset of this case. But in any event, because standing is jurisdictional, this Court is obliged to consider it no matter when it is raised. *See, e.g.*, *Friery*, 448 F.3d at 1148; Fed. R. Civ. P. 12(h)(3).

he has not established his standing to challenge Hawaii's open-carry license law. "Taking the record and [plaintiff's] arguments as [the Court] find[s] them," preliminary injunctive relief is unwarranted on this record. *Lopez*, 630 F.3d at 794. This Court should therefore grant panel rehearing and enter an order affirming the district court's denial of preliminary injunctive relief, with directions to dismiss the case in the event Plaintiff is unable to demonstrate he has standing to proceed to the merits of his case.

## II. If Baker Has Established Standing, Then The Panel's Remand Order Is Appropriate.

In the event this Court finds that Baker's failure to apply for an open-carry license can be excused, then there is no reason for reconsideration of the Court's prior disposition of Baker's appeal. This Court previously vacated the district court's decision and remanded for further proceedings in light of the holding in *Peruta*. If Baker has standing, that disposition remains appropriate. While the *Peruta* en banc decision does not reach the question whether the Second Amendment protects the right of members of the general public to carry firearms openly in public, 824 F.3d at 939, its historical reasoning provides important guidance on that question, which the district court can take up in the first instance.

As did *District of Columbia v. Heller*, 554 U.S. 570 (2008), *Peruta* teaches that historical analysis determines the scope of the Second Amendment right to keep and bear arms. 824 F.3d at 929. According to the en banc opinion, restrictions on the ability to bear arms in public can be traced back to at least 1299, when English law forbade the public carrying of arms without a special license from the king. *Id.* The historical restrictions that *Peruta* traced did not distinguish between concealed arms and openly carried arms until 1613, when James I forbade concealed weapons. *Id.* at 929-931. Yet James I also restricted ***concealable*** arms such as pistols three years later, *id.* at 931, and English legal history continues to

reflect restrictions on any public carrying, not merely concealed carrying, and in particular on the public carrying of concealable arms, *see id.* (describing *Sir John Knight's Case*, 87 Eng. Rep. 75 (K.B. 1686), involving public carry); *id.* (Lord Coke's description of Statute of Northampton as prohibiting any wearing of arms in public); *id.* at 932 (Granville Sharp's description of pre-existing restrictions on gun rights as exceptions to English Bill of Rights includes arms that " 'were liable to be concealed,' " such as " 'little short hand-guns' " and " 'all guns under certain lengths' " (quoting *Tracts, Concerning the Ancient and Only True Legal Means of National Defence, by a Free Militia* 17-18 (3d ed. 1782))).

*Peruta* also reviewed firearms restrictions in colonial America and decisions from shortly before and after the adoption of the Fourteenth Amendment. 824 F.3d at 933-39. While the focus of the en banc decision is on historical antecedents for the prohibition of concealed firearms, a number of the laws and cases it notes are prohibitions not merely on concealed firearms but also on concealable firearms. *Id.* at 933 (New Jersey Legislature prohibited wearing " 'pocket pistol[s]' " in public in 1686 (quoting *An Act Against Wearing Swords, &c.*, N.J. Laws Chap. IX (1689)); *id.* (Massachusetts Legislature adopted Statute of Northampton's prohibition on bearing arms in public in 1692 (citing *An Act for the Punishing of Criminal Offenders*, Mass Laws Chap. XI § 6 (1692)); *id.* at 937 (Texas statute in effect in 1871 forbade carrying concealable weapons like pistols (citing *English v. State*, 35 Tex. 473 (1871)); *id.* at 938 (West Virginia statute in effect in 1891 forbade carrying " 'any revolver or other pistol' " in public (citing *State v. Workman*, 35 W. Va. 367 (1891)).

The authorities cited by *Peruta* indicate that not only were concealed carry restrictions common in the relevant history, but restrictions on the public carry of concealable weapons, such as the handguns at issue here, were also common. But because *Peruta* did not purport to survey these authorities, the issue remains for

further exploration, and in light of the preliminary posture of this case, remand is appropriate for the district court to consider these questions in the first instance. *See, e.g.*, *Shirk v. U.S. ex rel. Dep't of Interior*, 773 F.3d 999, 1007 (9th Cir. 2014) ("Where an argument has been briefed only cursorily before this Court and [was] not ruled on by the district court, it is normally inappropriate for us to evaluate the argument in the first instance.") (internal quotation marks omitted; brackets in original).

## III. If The Court Is Inclined To Consider The Open-Carry Question In The First Instance, It Should Grant Rehearing or Rehearing En Banc and Affirm.

As just discussed, English and American authorities from the Colonial era through the adoption of the Fourteenth Amendment demonstrate that restrictions on any public carrying of firearms, and on the public carrying of concealable firearms, are common in our history. That conclusion is confirmed by the encyclopedic historical material mustered by Everytown for Gun Safety in its amicus brief in support of affirmance in *Peruta*. Dkt. No. 257. As the Everytown brief demonstrates, Massachusetts, New Jersey, Virginia, and North Carolina enacted versions of the Statute of Northampton's public carry prohibition during the Framing era or shortly after; and Tennessee, Maine, and Delaware did so in the 19th century. *Id.* at 23-25. Later, Massachusetts amended its public-carry prohibition to allow an exception where a person had reasonable cause to fear injury, and eight states followed suit shortly after. *Id.* at 26-28. During the period shortly before and after the Civil War and adoption of the Fourteenth Amendment, New Mexico, West Virginia, Texas, Tennessee and Arkansas also adopted public-carry prohibitions with limited self-defense exceptions. *Id.* at 30-31. Subsequently, a number of Western States enacted or amended gun laws to permit carrying firearms in rural areas but not in populated areas. *Id.* at 31-33. Laws

allowing open carry anywhere, without a showing of a specific self-defense need, were prevalent only in the antebellum South, where historians attribute permissive gun laws to concerns about slave revolts. *Id.* at 29-30.

In analyzing the scope of the Second Amendment, "historical analysis [is] determinative." *Peruta*, 824 F.3d 919. The historical analysis engaged in by the Everytown brief demonstrates beyond doubt that our tradition tolerates prohibitions on the public carrying of guns, whether openly or concealed, especially where the prohibition at issue has an exception for self-defense, as Hawaii's open-carry prohibition does. Accordingly, in the event this Court believes that the open-carry issue is properly presented and is ripe for resolution now, it should grant rehearing or rehearing en banc and rely on historical antecedents, just as *Peruta* did, to hold that the Second Amendment does not protect a right to carry a firearm openly in public absent a specific self-defense need.

## CONCLUSION

This Court should grant panel rehearing or rehearing en banc and affirm the district court's denial of the preliminary injunction, with directions to determine on remand whether the open-carry challenge should be dismissed for lack of standing.

Dated: Honolulu, Hawaii, September 6, 2016

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## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 14 point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains 3311 words up to and including the signature lines that follow the brief's conclusion and is ten (10) pages in length.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on September 6, 2016.

Dated: Honolulu, Hawaii, September 6, 2016

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