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YOUNG V. HAWAII AND THE FIGHT FOR THE SECOND AMENDMENT

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I. INTRODUCTION

"A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[2] These words, penned by America's Founding Fathers, have withstood the test of time, but not without great controversy. Since the founding of the United States, arms have played a vital and diverse role in American history, from defending America in times of war to defending oneself and their property. The controversy

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[2] U.S. CONST. amend. II.

surrounding the Second Amendment often lies in how far the right to bear arms extends. Do American citizens have the right to carry arms in public? If so, can those arms be concealed, open, or both? This paper will specifically focus on open carry, which was at issue in *Young v. Hawaii*. This debated topic will be answered by analyzing the reasoning from the Ninth Circuit decision in *Young*. Additionally, this paper will analyze the history of the Second Amendment and will suggest that one police chief should not have the unilateral power to determine whether a citizen has the right to carry a firearm, as decided in *Young*. The Supreme Court should grant certiorari in *Young*, reverse the Ninth Circuit, and find that every mentally competent, law-abiding, adult American citizen has a Second Amendment right to openly carry a firearm.

II. BACKGROUND:

A. FACTS:

Young involved a Hawai'i resident by the name of George Young who wished to carry a firearm in public.[3] This desire led Young to apply for a firearm carry license twice,

[3] Young v. Hawaii, 992 F.3d 765, 773 (9th Cir. 2021) (en banc).

with both applications being based on the general need "for personal security, selfpreservation and defense, and protection of personal family members and property."[4] However, the Chief of Police in Hawai'i County denied both applications, citing Young had "neither shown an exceptional case or demonstrated urgency."[5] The Chief of Police is granted authority to make such a decision under Hawai'i Revised Statutes section 134-9.[6]

Hawai'i Revised Statutes section 134-9 states that "[i]n an exceptional case, when an applicant shows reason to fear injury to the applicant's person or property, the chief of police. . . may grant a license. . . to carry a pistol or revolver and ammunition therefor concealed on the person."[7] The statute also gives the chief of police the authority to grant a license for unconcealed carry upon a finding that the "urgency or need has been sufficiently indicated."[8] Under this statute, the chief of police has sole discretion in determining whether the citizen is deemed to have

[4] *Id.* at 777.
[5] *Id.*
[6] *Id.*
[7] HAWAI'I REV. STAT. ANN. § 134-9 (LexisNexis 2021).
[8] *Id.*

"sufficiently indicated" an "exceptional case."[9] Without the grant of this license, a citizen in Hawai'i is severely restricted in the carry and discharge of a firearm. Moreover, this statute acts as a narrow exception to Hawai'i's Place to Keep statutes, which require gun owners to keep firearms "at their 'place of business, residence, or sojourn'" and may only use a firearm while engaging in hunting or target shooting.[10]

B. PROCEDURAL HISTORY:

The denial of a carry license by the Chief of Police and subsequent restrictive gun statutes prompted Young to sue, alleging an infringement upon his right to carry a firearm guaranteed by the Second Amendment to the United States Constitution.[11] Upon hearing the case, the United States District Court for the District of Hawai'i granted Hawai'i's motion to dismiss, holding Hawai'i Revised Statute section 134-9 to be a constitutionally protected restriction upon Young's Second Amendment rights.[12] More specifically, the District Court found "[t]he weight of authority in the Ninth Circuit, other Circuits, and state courts favors the position that the Second Amendment right articulated by the Supreme Court in [*District of Columbia v.*] *Heller* and *McDonald* [*v. City of Chicago*] establishes only a narrow individual right to keep an operable handgun at home for self-defense."[13]

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[9] *Id.*
[10] Young v. Hawaii, 896 F.3d 1044, 1048 (9th Cir. 2018) (quoting HAWAI'I REV. STAT. ANN. § 134-23-25 (LexisNexis 2021)).
[11] Young, 896 F.3d at 1048.
[12] Young v. Hawaii, 911 F. Supp. 2d 972 (D. Haw. 2012).
[13] *Id.* at 987.

Following the district court's ruling, the case was appealed to the Ninth Circuit which first conducted a three-judge-panel hearing on the issue before the full Ninth Circuit heard the case *en banc*. The divided panel reversed the district court opinion, holding that the Second Amendment protects a citizens' right to openly carry a firearm in public for self defense.[14] The panel focused on two key issues. First, it determined that while Old English law placed "reasonable restrictions" on the public carry of firearms, and in some cases, even banned the right to open carry, those restrictions do not affect, or determine, whether an American citizen has the right to open carry under the Second Amendment.[15] Second, it was determined that the usage of the word "bear" in the Second Amendment protects a citizens' right to openly carry a firearm "outside the home" for self defense.[16] This reasoning led the panel to conclude that Hawai'i Revised Statutes section 134-9 places an unconstitutional restriction upon Young's Second Amendment right to openly carry a firearm in public for self defense.[17]

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[14] Young, 896 F.3d at 1074.
[15] *Id.* at 1067.
[16] *Id.* at 1069.
[17] *Id.* at 1074.

After the full Ninth Circuit heard the case, they reversed the panel's decision and reinstated the judgment of the district court in favor of Hawai'i. In reaching this conclusion, the Ninth Circuit presented a lengthy analysis that included various questionable interpretations of the Second Amendment,[18] the history of the Second Amendment, and even rationalized that the Court was "not inclined to review twentieth-century developments in detail[.]"[19] The Ninth Circuit also presented an interesting argument by contending that since the states have the right to defend and maintain the "public square[,]" then states also have the right to restrict or even ban citizens from carrying weapons in public for self defense.[20] Because of this flawed analysis, the Supreme Court should grant certiorari and reverse the

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[18] Young v. Hawaii, 992 F.3d 765 (9th Cir. 2021) (en banc). The Ninth Circuit presented the unprecedented holding that, outside of the home, there is no right to carry a firearm in any other place. *Id.* at 829. Additionally, the Ninth Circuit's flawed historical analysis led to the misguided conclusion that evidence of historical regulations means they can completely ban the public carry of firearms. *Id.* at 821. Finally, the Ninth Circuit reached a similar, regulations equal ban, conclusion due to the language used in *District of Columbia v. Heller*. *Id.* at 781-83. That language suggested the Second Amendment was most closely related to the home and that the Second Amendment doesn't guarantee unlimited rights, therefore, the Ninth Circuit believed that they had the right to ban the public carry of weapons. *Id.*

[19] *Id.* at 811.

[20] *Id.* at 814-18.

Ninth Circuit, establishing a constitutional right for law-abiding, mentally competent, adult American citizens to openly carry a firearm.

III. HAWAI'I'S CARRY LICENSE LAWS VIOLATE A HAWAI'I CITIZEN'S SECOND AMENDMENT RIGHT TO THE UNCONCEALED CARRY OF A FIREARM BY GRANTING THE POLICE CHIEF THE UNILATERAL POWER TO DETERMINE WHETHER A CITIZEN HAS SHOWN A SUFFICIENT NEED FOR A CARRY LICENSE.

A. MAY-ISSUE CARRY LAWS:

The type of gun law implemented by Hawai'i is considered a "may-issue" law and is currently implemented in nine states: California, Connecticut, Delaware, Hawai'i, Maryland, Massachusetts, New Jersey, New York, and Rhode Island.[21] May-issue laws are restrictive to individual citizens by providing respective state governments with complete discretion of whether to grant a carry permit to a citizen of that jurisdiction.[22] These laws, which also exist in Hawai'i, are typically "used to deny the issuance of

[21] *May Issue*, USCCA, https://www.usconcealedcarry.com/resources/terminology/types-of-concealed-carry-licensure permitting-policies/may-issue/ (last visited Oct. 6, 2021).
[22] *Gun Laws*, NRA-ILA INSTITUTE FOR LEGISLATIVE ACTION, https://www.nraila.org/gun-laws/ (last visited Oct. 6 2021).

permits."[23] The immensely restrictive nature of "may-issue" gun laws are an infringement upon the Second Amendment rights of the citizens of those respective states, and it is no different for the citizens of Hawai'i.

B. HAWAI'I'S CARRY STATUTE GRANTS THE POLICE CHIEF TOO MUCH POWER, WITH NO GUIDANCE.

Under Hawai'i Revised Statutes section 134-9, the chief of police may grant "a license to carry" an unconcealed firearm "where the urgency or the need has been sufficiently indicated."[24] This gives the police chief the unilateral authority to determine whether a citizen should be considered to have shown an "exceptional circumstance" and therefore, can lawfully carry a weapon unconcealed. While it is reasonable that the local police force should have a say in who gets to carry a weapon within their jurisdiction to prevent felons, incompetent, or under-age individuals from possessing a firearm, the key issue is that the statute does not make clear the circumstances surrounding when a license to carry should be granted or denied.

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[23] *Id.*
[24] HAWAI'I REV. STAT. ANN. § 134-9 (LexisNexis 2021).

The language of this statute, on its face, is vague and leaves up to debate what is urgent and what must occur for the urgency to be "sufficiently indicated."[25] None of these keywords, which determine whether an individual is allowed to exercise their Second Amendment rights, are defined within the statute itself. The only certainty provided by the statute is that the chief of police "shall perform an inquiry on an applicant" to determine if they "appear to be a suitable person to be so licensed."[26] While the statute directs the police chief to use the National Instant Criminal Background Check System and to check the Immigration and Customs Enforcement databases, these directives are not sufficient to overcome the lack of guidance and subjective language used in the remainder of the statute.

There are several examples of vague and subjective language in the statute that open the door to inconsistent and unlawful restrictions on a Hawai'i citizen's constitutional right to carry a weapon. First, under the statute, an applicant must be of "good moral character."[27]

[25] *Id.*
[26] *Id.*
[27] *Id.*

This language raises the question of what is moral. While there are some universal rules regarding what is moral, such as the inherently wrongful act of murder, many moral viewpoints are subjective and vary from individual to individual.[28] Due to the subjectivity that morality presents, a Hawai'i citizen's right to carry a firearm will not be based on constitutional principles, but rather the subjective moral beliefs held by the police chief. Not only is this an inconsistent standard to rest such a vital and historical principle upon, but also an unconstitutional one.

Other examples of vagueness in Hawai'i's statute include how an individual should "appear to be a suitable person" and "not appear to be mentally deranged."[29] Much like the morality issue presented above, what one individual considers to be suitable may be entirely different from how another individual sees suitability being obtained. This language, again, will lead to a subjective and unilateral decision on behalf of the chief of police.

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[28] *See* Wendy Boring-Bray, *What is Objective Morality & What Can It Teach Us?*, BETTERHELP, https://www.betterhelp.com/advice/morality/what-is-objective-morality-what-can-it-teach-us/ (last visited Oct. 17, 2021).
[29] HAWAI'I REV. STAT. ANN. § 134-9 (LexisNexis 2021).

Furthermore, what does it mean to not be mentally deranged? While the statute does reference Hawai'i Revised Statutes section 134-7, which provides some guidance as to what it means to be mentally deranged,[30] the section at issue still leaves open the opportunity for a police chief to deny a carry permit based upon their subjective beliefs. This is due to the conditional language that states "*or* not appear to be mentally deranged."[31] While the statute indicates that an applicant cannot "have been adjudged insane[,]" the usage of "or" signifies that mental derangement is not limited to the adjudication of one as being insane.[32] "Or" removes any requirement for a hearing of determination of insanity, but instead leaves this decision to the unilateral and subjective beliefs of the police chief who bears the burden of making the decision.

The language of the Hawai'i statute is not based on constitutional principles, but instead leaves the decision of whether to allow a citizen to exercise their right to bear arms in the hands of a police chief. The police chief has the

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[30] HAWAI'I REV. STAT. ANN. § 134-7(C)(1)-(3) (LexisNexis 2021).
[31] HAWAI'I REV. STAT. ANN. § 134-9 (LexisNexis 2021) (emphasis added).
[32] *Id.*

unilateral power to make a subjective determination of whether an individual is considered suitable and their personal situation considered sufficient to allow for the unconcealed carrying of a weapon. This statutory format is unacceptable, but this pales in comparison to the overall unconstitutionality of the statute. More precisely, it seems as though the statute is purposely left open and vague as a means to 'lawfully' prohibit any Hawai'ian from being granted a license for the unconcealed carry of a firearm.

a. HAW. REV. STAT. § 134-9 IS WORDED SO EVERY HAWAI'I CITIZEN CAN AND POTENTIALLY WILL BE DENIED THE ISSUANCE OF AN UNCONCEALED FIREARM CARRY LICENSE.

The vague language of the statute severely infringes upon a Hawai'ian's right as an American citizen to carry a weapon because it allows police officers to deny any citizen the right to carry, whether it be open or concealed. As of December 31, 2016, there were zero active concealed carry permits in the entire state of Hawai'i.[33] Furthermore, in

[33] *Concealed Carry Statistics*, GUNS TO CARRY, https://www.gunstocarry.com/concealed-carry-statistics/#numbers (last visited Oct. 17, 2021).

2018, thirty-one private citizens applied for a carry license,[34] and nine private citizens applied in 2019.[35] All of the forty applications submitted were denied by the police chief of the county in which the respective applicant resides.[36] In fact, data provided by the Hawai'i Department of the Attorney General revealed that only the employees of private security firms were issued carry licenses, while no private citizen was issued a license.[37]

Worse still, specifically for the citizens of the County of Hawai'i, Judge O'Scannlain's dissent exposes that the County of Hawai'i has yet to create a concealed carry application for private citizens.[38] Judge O'Scannlain describes how the 1997 regulations that implemented Hawai'i Revised Statutes section 134-9 created an application that was only open to private detectives and security guards.[39] Since adopting the 1997 regulations, the

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[34] STATE OF HAW., DEP'T OF ATT'Y GEN., *Firearm Registrations in Hawai'i, 2018*, at 9 (May 2019).
[35] STATE OF HAW., DEP'T OF ATT'Y GEN., *Firearm Registrations in Hawai'i, 2019*, at 9 (Mar. 2020).
[36] *Firearm Registrations in Hawai'i, 2018*, *supra* note 34 at 9; *Id.*
[37] *See supra* notes 34, 35.
[38] Young v. Hawaii, 992 F.3d 765, 856 (9th Cir. 2021) (en banc) (O'Scannlain, J. dissenting).
[39] *Id.*

County of Hawai'i has yet to even create "an application for private citizens."[40] This action and lack of action by the state of Hawai'i is an infringement upon the constitutional rights of the citizens of Hawai'i to open carry a firearm. Although the state of Hawai'i claims that the statute is "open to everyone" and is not limited by the type of job the individual holds,[41] the information above proves otherwise. Consistent statewide denial of applications submitted by private citizens, along with some counties' lack of application forms, indicates that the state of Hawai'i is purposely restricting the constitutional rights of their citizens.

b. UPON GRANT OF CERTIORARI, THE SUPREME COURT SHOULD ADDRESS THE ISSUES OF THE HAWAI'I STATUTE BEING VAGUE AND PLACING COMPLETE DISCRETION IN THE HANDS OF THE POLICE CHIEF BY REFERENCING FIRST AMENDMENT JURISPRUDENCE.

The Supreme Court once described First Amendment freedoms as "delicate and vulnerable, as well as supremely precious in our society."[42] The Supreme Court should view the Second Amendment equally as important as the First,

[40] *Id.*
[41] *Id.*
[42] NAACP v. Button, 371 U.S. 415, 433 (1963).

and therefore apply similar standards as they have applied to First Amendment issues.

i. THE DOCTRINES OF PRIOR RESTRAINT AND VOID FOR VAGUENESS SHOULD BE APPLIED TO THE SECOND AMENDMENT TO PREVENT THE POLICE CHIEF FROM BEING GRANTED UNILATERAL DISCRETION OVER WHO IS PERMITTED TO CARRY A FIREARM.

1. PRIOR RESTRAINT:

Prior restraint is a form of government restriction on free speech through the usage of permits which are granted by the government prior to the speech occurring.[43] The Supreme Court has declared that "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity."[44] Under this doctrine, clear standards must be provided to ensure the government, or other licensing authorities, are not left with the discretion to grant licenses as they see fit.[45]

An example of this is seen in *Forsyth County v. Nationalist Movement*, where the Supreme Court found a

[43] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 1291 (Wolter Kluwer, 5th ed. 2017).
[44] N.Y. Times v. United States, 403 U.S. 713, 714 (1971).
[45] CHEMERINSKY, *supra* note 43, at 1317.

permit requirement for parades or other demonstrations to be unconstitutional because of no "articulated standards" or "objective factors" that the licensing authorities must rely on in making a decision.[46] The Court concluded that the First Amendment does not allow for such "unbridled discretion" where the government can make "arbitrary" decisions based on their own subjective beliefs.[47] The Supreme Court should apply this same standard when addressing Second Amendment issues because it is also a supremely precious constitutional right. The Hawai'i statute, in this case, presents no objective factors for the police chief to follow, allowing the police chief to have unbridled discretion to grant carry permits based solely on their subjective beliefs and agenda. Like First Amendment jurisprudence, there should be a heavy presumption against the constitutionality of Second Amendment laws of this nature.

2. VOID FOR VAGUENESS:

Another First Amendment principle that should also be applied to Second Amendment issues is the doctrine of

[46] Forsyth County v. Nationalist Movement, 505 U.S. 123, 133 (1992).
[47] *Id.*

void for vagueness. This doctrine states that a law is unconstitutionally vague if a reasonable, ordinary person cannot discern what is prohibited and if the law allows for arbitrary and discriminatory enforcement.[48] In the case of *Kolender v. Lawson*, where a law was found unconstitutional under the void for vagueness doctrine, the Court stated that a "principal element" of the doctrine is the requirement for legislatures to provide guidelines that govern the enforcement of laws.[49] This requirement is implemented to avoid "a standardless sweep [that] allows policeman . . . to pursue their personal predilections."[50] The Supreme Court should find the void for vagueness doctrine to be persuasive in Second Amendment cases in order to further prevent the government, or in the case of *Young*, the police chief, from pursuing their own preferences.

As discussed above, the Hawai'i statute is both vague and leaves the decision of whether to grant a carry permit to the subjective discretion of the police chief. If this would not be allowed under First Amendment jurisprudence, then it

[48] CHEMERINSKY, *supra* note 43, at 1283.
[49] Kolender v. Lawson, 461 U.S. 352, 358 (1983).
[50] *Id.* (quoting Smith v. Goguen, 415 U.S. 566, 575 (1974)).

should not be allowed under the Second Amendment either. The right to bear arms is equally as vulnerable and precious as the First Amendment. Therefore, the Supreme Court should find First Amendment doctrines to be persuasive when conducting hearings on Second Amendment issues and ultimately find the Hawai'i statute to be unconstitutional.

c. LIMITING THE RIGHT TO OPEN CARRY OF A FIREARM EXCLUSIVELY TO WHEN THE CITIZEN CAN SUFFICIENTLY SHOW THE URGENCY OR NEED PUTS THE CITIZENRY OF HAWAI'I AT AN ELEVATED RISK OF HARM.

When citizens are required to show a sufficient urgency in order to carry a firearm, they are left unable to defend themselves, or others, at a moment's notice. In *District of Columbia v. Heller,* the Supreme Court stated that the "core lawful purpose" of the Second Amendment is self defense,[51] while also guaranteeing the "right to possess and carry weapons in case of confrontation."[52] This language implies a right to carry firearms not only for self defense but also for the defense of others. Confrontations have the potential to arise at any time because crime is unpredictable.

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[51] District of Columbia v. Heller, 554 U.S. 570, 630 (2008).
[52] *Id.* at 592.

When a citizen must show an urgency or the need to carry a weapon, rather than for the general purpose of self defense, the citizen will not be capable of adequately defending themselves when an unpredicted confrontation arises. While a letter penned by Russell Suzuki, Attorney General for the state of Hawai'i, provides examples for when an urgency or need has been shown, including domestic abuse and threats of death or serious bodily harm, the statute still falls far short of allowing an individual to be prepared to defend themselves at any time.

Crime is unpredictable. As a result, citizens should be allowed to be prepared to defend themselves at all times. Outside of Hawai'i, Americans take advantage of their Second Amendment constitutional right by using their firearms to defend themselves or others between 500,000 and two million times every year.[53] While these defenses may include the situations listed by Attorney General Suzuki, they are not limited to those situations. Most of these defenses are made by "average, everyday Americans who

[53] Amy Swearer, *New Cases of Armed Citizens Stopping Criminals in February*, THE HERITAGE FOUNDATION (Mar. 11, 2019), https://www.heritage.org/firearms/commentary/new-cases-armed-citizens-stopping-criminals-february.

were just going about their lives[,]"[54] and not necessarily individuals who could sufficiently show an urgency or need.

Examples of citizens using their firearms in the defense of themselves or others can be found all across the country. One example of a citizen using their firearm in the defense of others is a man, in Nashville, Tennessee, who heard a woman's cries for help as a purse thief slammed the woman's head into the wall.[55] Upon hearing her screams, the man defended her by firing his gun at the would-be thief, causing the thief to flee.[56] Another example occurred when store clerks in Murfreesboro, Tennessee held a group of teenagers at gun-point following the teens' attempt to steal guns from a pawn shop.[57] In Troy, New York, an individual shot and killed his neighbor's estranged husband who was attacking and stabbing her.[58] In Chicago, Illinois, a man, who

[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] Amy Sweater, *Guns Do Save Lives: Here's Nine Examples From Last Month Alone*, THE NATIONAL INTEREST (Aug. 12, 2020), https://nationalinterest.org/blog/reboot/guns-do-save-lives-heres-nine-examples-last-month-alone-166696.

was trying to stop a car thief, used his gun to stop the theft after the thief drew their gun and started firing at the man.[59]

Cases of firearms being used in self defense or the defense of others are vast and ever growing. Examples of defensive gun use exist in all 50 states.[60] Had these citizens been required to show an urgency or need to carry a weapon, the situations could have ended much differently. The Heritage Foundation is correct when it says, "[w]e don't make citizens safer by disarming them or making them less capable of fighting back against criminals. We only make them easier targets."[61] Hawai'i Revised Statutes section 134-9 makes Hawaiians easier targets by unconstitutionally infringing upon their right to open carry a firearm for self defense purposes.

IV. THE HISTORY OF GUN LAWS SUGGEST THAT THE UNCONCEALED CARRY OF FIREARMS WAS WIDELY ACCEPTED, EXPECTED, AND SOMETIMES, MANDATED.

[59] Emmett Jones, *Chicago Conceal Holder Guns Down Car Thief After Being Shot at in the Street* (Nov. 11, 2021), https://www.foxnews.com/us/chicago-licensed-carry-holder-guns-down-car-thief-response-being-shot.
[60] *See Defensive Gun Uses in the U.S.*, THE HERITAGE FOUNDATION, https://datavisualizations.heritage.org/firearms/defensive-gun-uses-in-the-us/ (last updated Oct. 15, 2021).
[61] *Id.*

When examining historical English law and early Colonial law, it is evident that the open carry of firearms was accepted and the people of those times were accustomed to others openly carrying.[62] The Ninth Circuit warns that they must be "jurists and not historians" and should avoid "law office history[,]" yet they proceed to proclaim that "it is [their] duty to confront" a historical analysis.[63] Unfortunately, this "duty" led to a flawed analysis and the upholding of a statute that infringes upon the constitutional rights of Hawaiians. This section will focus on the Statute of Northampton, which the Ninth Circuit focused on, and early colonial laws and lifestyles.

A. ALTHOUGH THE STATUTE OF NORTHAMPTON PLACED A LIMITED RESTRICTION ON THE CARRYING OF FIREARMS, IT DID NOT BAN CITIZENS FROM CARRYING THEM.[64]

The Statute of Northampton, which was passed by the Parliament of England in 1328, has been the subject of much debate throughout the development of the Second

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[62] Brief of Amici Curiae Historians, Legal Scholars, and CRPA Foundation Supporting Appellees, Wrenn v. District of Columbia, 864 F.3d 650 (D.C. Cir. 2017) (No. 15-7057), 2015 WL 5854083 [hereinafter Brief of Amici Curiae Historians].
[63] Young v. Hawaii, 992 F.3d 765, 785 (9th Cir. 2021) (en banc).
[64] Brief of Amici Curiae Historians, *supra* note 63, at *6.

Amendment.[65] Various courts, historians, and scholars have had varying interpretations as to the true meaning behind the statute and whether, as the Ninth Circuit concluded, it "prohibited all people from going armed in places people were likely to gather."[66] The controversial statute reads:

> That no Man great nor small, of what Condition soever he be, except the King's Servants in his presence, and his Ministers in executing of the King's Precepts, or of their Office, and such as be in their Company assisting them, and also [upon a Cry made for Arms to keep the Peace, and the same in such places where such Acts happen,] be so hardy to come before the King's Justices, or other of the King's Ministers doing their office, with force and arms, nor bring no force in affray of the peace, nor 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.[67]

As stated previously, the Ninth Circuit concluded that this statute "prohibited all people from going armed" in public places.[68] The Ninth Circuit then claims that Englishmen understood the Statute of Northampton to

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[65] *Id.*
[66] Young, 992 F.3d at 788.
[67] *Id.* at 787 (quoting 2 Edw. 3, 258, ch. 3 (1328)).
[68] *Id.* at 788.

completely prohibit the carrying of weapons in public.[69] According to many historians, this interpretation is incorrect.

One such instance of an opposing interpretation is presented in an amicus brief that was jointly written by multiple professors, historians, and legal scholars in favor of plaintiff Brian Wrenn from *Wrenn v. District of Columbia*.[70] This brief was submitted to the District of Columbia Circuit Court of Appeals following the United States District Court for the District of Columbia's incorrect interpretation of the Statute of Northampton.[71] Similar to the Ninth Circuit in the case in question, the district court in *Wrenn* "mischaracterizes" the Statute of Northampton as a ban on public carry by presenting a "thin historical narrative that distorts the actual history of the right to bear arms in England."[72]

Rather than being a ban on all public carry, this statute only restricted the public carry of weapons when

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[69] *Id.*
[70] Brief of Amici Curiae Historians, *supra* note 63.
[71] *Id.* at *6.
[72] *Id.*

done in a manner that causes "fear or terror among the populace."[73] The Chief Justice in the 1686 case of *Rex v. Knight*, described the statute as being a way to "punish people who go armed to terrify the King's subjects."[74] Additionally, the statute could not have been a ban on public carry because the peaceful, public carry of a weapon was a common occurrence. Knives were the most common "arm" during that time and were carried both as a tool and for self defense.[75]

Furthermore, translations equate the word "arms" to "armour," meaning that the Statute of Northampton could be geared towards how individuals should approach the King and his officials without wearing armour.[76] This becomes clearer when looking at the language of the statute. The

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[73] *Id.*
[74] *Id.* at *7 (quoting Rex v. Knight, 3 Mod. 117, 87 Eng. Rep. 75, 76 (K.B. 1686)).
[75] David B. Kopel, *The First Century of Right to Arms Litigation* (2015), https://digitalcommons.du.edu/cgi/viewcontent.cgi?article=1045&context=law_facpub.
[76] *See* Clayton E. Cramer, *The Statute of Northampton (1328) and Prohibitions on the Carrying of Arms*, SSRN, (Sept. 19, 2015), https://poseidon01.ssrn.com/delivery.php?ID=590021110103114123067122064079087089033045032063002023097011097106064116093025015023018006111123006038051124025067118092113079014034002059078064117113111026024024017005051080092086067116007086004115030015115116124024016000079119005030127084028095086&EXT=pdf&INDEX=TRUE.

statute uses language such as "come before the King's Justices or other of the King's Ministers" and "in the presence of the Justices or other Ministers."[77] Between the translation of "arms" to "armour" and how the statute focuses on being in the presence of "the King and Parliament," it appears that the Statute of Northampton isn't about the carrying of firearms or weapons at all.[78]

To claim that the Statute of Northampton prohibited the public carry of a weapon is a great error. Whether you interpret the statute as only banning the carry of weapons when used to terrorize the King's people or as not applying to carrying weapons whatsoever, it is in error to claim the statute banned the carrying of weapons outright. The Ninth Circuit inaccurately interpreted the meaning and intent of the Statute of Northampton, resulting in an erroneous application. Although the Ninth was in error, it is still important to analyze the Statute of Northampton, and when completed, the conclusion that people were allowed to peacefully carry weapons in public can certainly be reached.

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[77] Young, 992 F.3d at 787 (quoting 2 Edw. 3, 258, ch. 3 (1328)).
[78] *See* Cramer, *supra* note 76.

B. AN ANALYSIS OF EARLY COLONIAL LAW AND PRACTICES ALSO SHOWS A HISTORICAL ACCEPTANCE OF THE RIGHT TO THE PUBLIC CARRY OF A FIREARM.

Although the Ninth Circuit is quick to point out how the colonies early in American history implemented restrictions on carrying arms,[79] that is far different from the ban we currently see being upheld by the Ninth Circuit. Simply pointing out that some colonies restricted the carrying of firearms does not give the Ninth Circuit any basis to conclude that "there is no right to carry arms openly in public."[80] In fact, the Ninth Circuit makes known that colonies mandated the carrying of arms in various situations.[81]

a. EARLY AMERICAN COLONIES ENCOURAGED, AND SOMETIMES MANDATED, THE CARRYING OF WEAPONS.[82]

Colonial Virginia is a strong example of a colony that mandated the carrying of weapons in early American history. In the early-to-mid 1600s, Virginia not only mandated that

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[79] Young, 992 F.3d at 794.
[80] *Id.* at 821.
[81] *Id.* at 795.
[82] *Id.*

Virginians own a functioning firearm, but also required them to travel with their firearm and to take their firearm to church.[83] Similarly, Massachusetts, Rhode Island, and Georgia also instituted gun ownership mandates.[84] Rhode Island required citizens to have their weapons at public meetings and Georgia comparably mandated its citizens "to carry firearms to places of worship."[85] Connecticut, Maryland, and South Carolina also required male citizens to carry firearms at church.[86] New Jersey did enact a restriction that prohibited the "privately" wearing of any "pocket pistol, skeines, stilladers, daggers or dirks. . . ."[87] Although this is an example of an early American restriction on gun carry rights, it appears that the usage of the word "privately" meant that the restriction only applied to the concealed carry of weapons, and not open carry.[88] Further analysis indicates that the New Jersey restriction was understood to only be a

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[83] Brief of Amici Curiae Historians, *supra* note 63 at *12 (quoting *The Right to Keep and Bear Arms*, Report of the Subcommittee on the Constitution, Committee on the Judiciary, U.S. Senate, 97th Cong., 2d Sess. 3 (1982)).
[84] Brief of Amici Curiae Historians, *supra* note 63 at *13.
[85] *Id.*
[86] Young, 992 F.3d at 795.
[87] *Id.* at 794.
[88] Brief of Amici Curiae Second Amendment Foundation et al. Supporting Petitioners, N.Y. State Rifle & Pistol Association, Inc., et al. v. Bruen, et al., No. 20-843 (July 20, 2021).

restriction of "carrying for offensive, malicious purposes.[89] Finally, only two other colonies besides New Jersey restricted the public carry of weapons, but those restrictions were similar to the Statute of Northampton because they only limited carrying if the weapons were to disturb the peace.[90] History confirms that no state banned the carrying of weapons, whether concealed or open, within the first 25 years of the Republic, and "all of them permitted open carry of pistols, rifles, and shotguns."[91]

V. CURRENT TRENDS INDICATE AN EVER-BROADENING VIEW OF THE SECOND AMENDMENT, OPENING THE DOOR FOR THE SUPREME COURT TO FINALLY RULE THAT THE SECOND AMENDMENT GUARANTEES THE RIGHT TO OPEN CARRY A FIREARM.[92]

While it is important to analyze the history of the Second Amendment and gun rights in general, it is also important to examine recent developments. Although this section will focus on twenty-first century developments, the Ninth Circuit seemed to dismiss recent developments by stating that they are "not inclined to review twentieth-

[89] *Id.*
[90] *Id.*
[91] Brief of Amici Historians, *supra* note 63 at *18-19.
[92] *See Id.*

century developments. . . because they may be less reliable."[93] The changing of laws at the Supreme Court, federal Courts of Appeals, and even state congressional levels suggest a growing trend towards a more extensive Second Amendment. This broadening gives the Supreme Court further reasoning to find a constitutional right to open carry firearms.

A. TWENTY-FIRST CENTURY DECISIONS MADE BY THE SUPREME COURT AND FEDERAL COURTS OF APPEALS SIGNIFY AN ACCEPTANCE OF A CONSTITUTIONAL RIGHT TO CARRY FIREARMS.

To begin, it would not be a proper discussion of the Second Amendment without discussing *District of Columbia v. Heller* and *McDonald v. City of Chicago*. First, the Supreme Court in *Heller* found the District of Columbia's firearm requirement to be unconstitutional because it required guns within the home to be "rendered and kept inoperable at all times."[94] In doing so, the Court also held that "the core lawful purpose" of the Second Amendment is self defense,[95] which implies carrying firearms for such

[93] Young v. Hawaii, 992 F.3d 765, 811 (9th Cir. 2021) (en banc).
[94] District of Columbia v. Heller, 554 U.S. 570, 630 (2008).
[95] *Id.*

purpose.[96] The Court further stated that "to 'bear' meant to 'carry'"[97] and the meaning of the Second Amendment is to be "'armed and ready for offensive or defensive action in a case of conflict with another person.'"[98] The Court realized the fact that these conflicts will not be limited to inside the home, but could potentially reach far beyond the confines of one's own property. While the Court proclaimed the home to be the place where self defense is "most acute[,]"[99] this does not mean that self defense is unnecessary elsewhere. In fact, other courts have interpreted this language as implying a right to carry outside the home for self defense purposes.[100]

Following the ruling in *Heller*, the Supreme Court in *McDonald v. City of Chicago* reaffirmed that the Second Amendment protects the "right to keep and bear arms. . . most notably for self-defense[.]"[101] In addition, the *McDonald* Court held that "the Second Amendment right is fully

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[96] *Id.* at 584.
[97] *Id.*
[98] *Id.* (quoting Muscarello v. United States, 524 U.S. 125, 143 (1998)).
[99] *Id.* at 628.
[100] *See* Gould v. Morgan, 907 F.3d 659 (1st Cir. 2018); Moore v. Madigan, 702 F.3d 933 (7th Cir. 2012); Wrenn v. District of Columbia, 864 F.3d 650 (D.C. Cir. 2017).
[101] McDonald v. City of Chicago, 561 U.S. 742, 780 (2010).

applicable to the States."[102] These two cases are vital for gun rights because not only do they define the core purpose of self defense within the Second Amendment, but they also leave the door open for future Courts to turn the implication of a right to carry outside the home into a right in itself.

As mentioned above, there are various federal Courts of Appeals cases that have taken a favorable stance of carrying firearms outside the home. Most notable is *Wrenn v. District of Columbia. Wrenn* presented a situation similar to what Young is facing in Hawai'i. In *Wrenn*, Wrenn challenged a D.C. Code that required an applicant to show "good reason to fear injury" due to a "special need for self-protection[,]"[103] which is comparable to Hawai'i's statute requiring an applicant to show "good reason" or an "urgency or need."[104] Arriving at an immensely different outcome than the Ninth Circuit, the court in *Wrenn* found the D.C. Code to be an unconstitutional infringement upon Second Amendment rights because it "is necessarily a total ban on exercises of" a citizen's right to carry a firearm beyond the

[102] *Id.* at 750.
[103] Wrenn, 864 F.3d at 655.
[104] HAWAI'I REV. STAT. ANN. § 134-9 (LexisNexis 2021).

home for self defense.[105] The court also concluded that an "individual right to carry common firearms beyond the home for self-defense. . . falls within the core of the Second Amendment's protections."[106] Similarly, Hawai'i's statute constitutes a ban on the citizens' right to carry a firearm in public. The Supreme Court should reach this conclusion upon grant of certiorari.

In addition to the D.C. Circuit Court of Appeals, various other Courts of Appeals have expressly found a right to carry outside the home or assumed that a right to carry outside the home exists.[107] Both the First Circuit and Seventh Circuit have also expressed that the Second Amendment extends to bearing arms outside the home for self defense purposes,[108] whereas the Second, Third, and Fourth Circuits have assumed such right exists, without expressly stating or deciding that it does.[109] While a few of

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[105] *Wrenn*, 864 F.3d at 667.
[106] *Id.* at 661.
[107] Young v. Hawaii, 992 F.3d 765 (9th Cir. 2021) (en banc), *petition for cert. filed* (U.S. May 11, 2021).
[108] *Id.; See* Gould v. Morgan, 907 F.3d 659 (1st Cir. 2018); Moore v. Madigan, 702 F.3d 933 (7th Cir. 2012).
[109] *Id.*; *See* Kachalsky v. Cty. of Westchester, 701 F.3d 81 (2d Cir. 2012); Drake v. Filko, 724 F.3d 426 (3d Cir. 2013); Woollard v. Gallagher, 712 F.3d 865 (4th Cir. 2013).

these Courts of Appeals have not expressly held that a right to carry outside the home exists, a majority have at least assumed that the right to carry does exist. Either way, the Ninth Circuit is an outlier as they are now "the first and only court of appeals to hold that public carry falls entirely outside the scope of the Amendment's protections."[110]

B. STATE LAWS, AND RECENT CHANGES TO THOSE LAWS, INDICATE A TREND TOWARDS AN OPEN CARRY RIGHT FOR ALL CITIZENS.

Currently, forty-five states allow for the open carry of firearms,[111] with twenty-one of those states being constitutional carry.[112] Constitutional carry, also known as permitless carry, is a type of gun law that a state can implement which allows a citizen, who can legally possess a firearm, to carry a handgun openly or concealed without a state permit.[113] States appear to be steadily trending

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[110] Young, 992 F.3d at 829 (en banc) (O'Scannlain, J. dissenting).
[111] Marion P. Hammer, *The truth about 'open carry' and the 45 states that allow it*, SOUTH FLORIDA SUN SENTINEL (Nov. 5, 2015), https://www.sun-sentinel.com/opinion/commentary/fl-mhcol-oped1106-20151105-story.html.
[112] *Permitless Carry States*, HANDGUNLAW, https://www.handgunlaw.us/documents/Permitless_Carry_States.pdf (last updated Sept. 1, 2021).
[113] *Constitutional Carry/Unrestricted/Permitless Carry*, USCCA, https://www.usconcealedcarry.com/resources/terminology/types-

towards constitutional carry as nineteen of the twenty-one constitutional carry states have passed such statutes since 2010.[114] Although these states remain the minority, the number will likely continue to grow as more states move toward the passage of constitutional carry statutes.[115]

Some constitutional carry states may still require permits to open carry because states differ in whether they allow permitless carry for open, concealed, or both. The trend of states moving towards permitless carry is a strong indicator of how the public, and their elected representatives, currently view Second Amendment rights. This trend, along with a majority of federal Courts of Appeals acknowledging a right to open carry, should give the Supreme Court further

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of-concealed-carry-licensurepermitting-policies/unrestricted/ (last visited Oct. 28, 2021).

[114] *Permitless Carry States*, *supra* note 112.

[115] *See House Committee Passes HB 227 Constitutional Carry Bill*, BUCKEYE FIREARMS ASSOCIATION (Oct. 28, 2021), https://www.buckeyefirearms.org/house-committee-passes-hb-227-constitutional-carry-bill; Margaret Menge, *Indiana looks to scrap carry permits for handguns, allow 'constitutional carry,'* WASHINGTON EXAMINER (Feb. 12, 2021), https://www.washingtonexaminer.com/politics/indiana-scrap-carry-permits-handguns; Lindsay Whitehurst, *Florida among states eyeing concealed carry of guns without a permit*, NEWS 4 JAX (Jan. 25, 2021).

guidance in reaching the decision to provide a Second Amendment right to open carry firearms.

VI. CONCLUSION:

The Ninth Circuit erred in holding that there is no "right within the scope of the Second Amendment" to carry arms openly in public[116] and therefore erroneously upheld Hawai'i Revised Statutes Section 134-9 to be constitutional.[117] The wording of the statute, the historical interpretation of the Second Amendment, and the current legal and state trends in gun rights, show that this Hawai'i statute unconstitutionally infringes upon the rights of citizens to open carry a firearm. The Founding Fathers believed in freedom and that American citizens possess the capability of exercising their freedoms appropriately through personal responsibility.[118] It is time to finally pass along the responsibility of open carrying weapons to American citizens. Granting citizens this right is the logical next step in

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[116] Young, 992 F.3d at 821.
[117] *Id.* at 828.
[118] Frank Ryan, *With Rights Come Responsibilities*, THE LINCOLN INSTITUTE (March 26, 2020), https://www.lincolninstitute.org/with-rights-come-responsibilities/.

ensuring Second Amendment rights to Americans.[119] The Supreme Court should grant certiorari in *Young v. Hawaii*, reverse the Ninth Circuit, and find that every mentally competent, law-abiding, adult American citizen has a Second Amendment right to openly carry a firearm.

[119] Young, 992 F.3d at 831 (en banc).