No. 12-17808

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

GEORGE K. YOUNG, JR.,

Plaintiff-Appellant,

v.

STATE OF HAWAII, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Hawaii, No. 1:12-cv-00336-HG-BMK
District Judge Helen Gillmor

BRIEF OF NEW JERSEY, CALIFORNIA, CONNECTICUT, DELAWARE, ILLINOIS, IOWA, MASSACHUSETTS, MARYLAND, OREGON, RHODE ISLAND, VIRGINIA, AND THE DISTRICT OF COLUMBIA IN SUPPORT OF APPELLEES' PETITION FOR REHEARING EN BANC

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IDENTITY OF AMICI CURIAE

Amici States, New Jersey, California, Connecticut, Delaware, Illinois, Iowa, Massachusetts, Maryland, Oregon, Rhode Island, Virginia, and the District of Columbia, have an interest in defending their ability to protect their residents from gun violence. Working to tailor their public-carry regimes to fit those safety needs, many of the amici have required applicants for public-carry licenses to show an individualized safety need to carry a weapon in public in light of the available evidence that "right-to-carry" laws—which allow for widespread public carrying of firearms—substantially increase gun-related violence in the public sphere. The panel's decision in this case, however, second-guesses those legislative decisions on these public safety questions. Whether this Court ultimately decides to defer to the predictive judgments of State legislatures or to instead override their careful determinations thus affects each State.

States also have an interest in defending their longstanding laws. As the U.S. Supreme Court made clear, the longstanding nature of a statute is part and parcel of the Second Amendment inquiry—and laws with a particularly impressive historical pedigree are presumptively lawful. So amici have an interest in explaining why this enduring approach to public carry withstands constitutional scrutiny.

SUMMARY OF ARGUMENT

Hawaii's careful scheme to govern the public carrying of firearms, like laws in other States, is plainly constitutional. Statutes like this one reflect a centuries-old approach to advancing States' interests in public safety. In holding otherwise, the panel disagreed with other circuits that have considered the question, split with an en banc opinion of this Court, and undermined a key tenet of federalism—the right of each State to protect its residents and its law enforcement officers. This Court should rehear this case to correct this erroneous and far-reaching decision.[1]

I. States have an obligation to protect their residents from the scourge of gun violence. To advance that compelling interest, States have a variety of tools at their disposal. One approach is to limit the situations in which a person can carry a firearm in public, whether concealed or carried openly. Hawaii chose that approach in light of the evidence confirming that public carry undermines public safety, and its law does not offend the Second Amendment. While the Constitution prevents States from adopting certain laws, it affords States significant leeway within those boundaries to place limits on public carry. As Judge Clifton explained in dissent, legislatures—not courts—are best suited to decide how to keep residents safe. That

[1] Amici States also support California's pending petition for initial hearing en banc in *Flanagan v. Becerra*, No. 18-55717. As California explains, consideration of both cases en banc will enable this Court to consider the same constitutional issue on a more developed record and in two different practical contexts.

is why the majority of this Court's sister circuits upheld similar laws, and why a majority of this Court already reached that conclusion in *Peruta v. County of San Diego*, 824 F.3d 919 (9th Cir. 2016) (en banc) (*Peruta II*).

II. There is another, independently sufficient basis to uphold the State's law—its historical pedigree. Longstanding restrictions on firearm possession, this Court has held, are presumptively lawful under the Second Amendment. State laws limiting public carry—including outright bans—were common in the nineteenth century, and Hawaii's regime dates back over a century. Such laws thus boast a lineage even more impressive than those the Court identified as "longstanding" and "presumptively lawful" in *District of Columbia v. Heller*, 554 U.S. 570 (2008). Other circuits have upheld analogous laws on this ground too, and the reasoning of *Peruta II* should have compelled that result here. Because the panel rejected *Peruta II*'s historical analysis, this Court should rehear this case en banc.

ARGUMENT

I. HAWAII'S LAW OFFERS A REASONABLE APPROACH TO PROMOTING PUBLIC SAFETY.

One of a State's primary obligations, and thus one of its most compelling interests, is to ensure the public safety of its residents. Indeed, "[i]t is 'self-evident' that [a State's] interests in promoting public safety and reducing violent crime are substantial and important government interests," as are its "interests in reducing the harm and lethality of gun injuries in general … and in particular as against law

enforcement officers." *Fyock v. City of Sunnyvale*, 779 F.3d 991, 1000 (9th Cir. 2015); *see also Drake v. Filko*, 724 F.3d 426, 437 (3d Cir. 2013) (explaining that a State has "a significant, substantial and important interest in protecting its citizens' safety"), *cert. denied*, 134 S. Ct. 2134 (2014); *Woollard v. Gallagher*, 712 F.3d 865, 877 (4th Cir.) (finding that "protecting public safety and preventing crime … are substantial governmental interests"), *cert. denied*, 571 U.S. 952 (2013).

The legislature's chosen solution to this problem must, of course, still fit the problem States are trying to solve—and Hawaii's law undoubtedly does. As other circuits have explained, "studies and data demonstrat[e] that widespread access to handguns in public increases the likelihood that felonies will result in death and fundamentally alters the safety and character of public spaces." *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 99 (2d Cir. 2012), *cert. denied*, 569 U.S. 918 (2013); *see also Woollard*, 712 F.3d at 879 (agreeing that "limiting the public carrying of handguns protects citizens and inhibits crime by, *inter alia*: [d]ecreasing the availability of handguns to criminals via theft [and] [l]essening the likelihood that basic confrontations between individuals would turn deadly"). This is unsurprising: "[i]ncidents such as bar fights and road rage that now often end with people upset, but not lethally wounded, take on deadly implications when handguns are involved." *Woollard*, 712 F.3d at 879 (citation omitted); *see also* Add. 74 (Clifton, J., dissenting) ("That limiting public carry of firearms may have a positive effect

on public safety is hardly a illogical proposition. Many other states appear to have reached similar conclusions, and so have most other nations."). These courts also recognized that right-to-carry regimes add to the risks law enforcement face: "[i]f the number of legal handguns on the streets increased significantly, officers would have no choice but to take extra precautions … effectively treating encounters between police and the community that now are routine, friendly, and trusting, as high-risk stops." *Woollard*, 712 F.3d at 880 (citation omitted).

Recent studies only confirm these courts' assessments of the evidence. As a study earlier this year concluded, "the weight of the evidence … best supports the view that the adoption of [right-to-carry] laws substantially raises overall violent crime in the ten years after adoption." John Donohue et al., *Right-to-Carry Laws & Violent Crime: A Comprehensive Assessment Using Panel Data, the LASSO, & a State-Level Synthetic Controls Analysis* 63 (Nat'l Bureau of Econ. Research, Working Paper No. 23510, Jan. 2018); *see also, e.g.*, Abhay Aneja et al., *The Impact of Right to Carry Laws and the NRC Report: The Latest Lessons for the Empirical Evaluation of Law and Policy* 80-81 (Nat'l Bureau of Econ. Research Working Paper No. 18294, 2014) (determining that right-to-carry laws lead to an increase in aggravated assaults, rapes, and robberies). "There is not even the slightest hint in the data that [right-to-carry] laws reduce violent crime." Donohue, *Right-to-Carry Laws*, *supra*, at 63.

To be sure, not every State has balanced these interests in the same way, and not every State has chosen to adopt this licensing scheme. But that is the very point of federalism. *McDonald v. City of Chicago,* 561 U.S. 742 (2010), establishes that the Second Amendment "creates individual rights that can be asserted against state and local governments," but that decision does not "define the entire scope of the Second Amendment—to take all questions about which weapons are appropriate for self-defense out of the people's hands." *Friedman v. Highland Park*, 784 F.3d 406, 412 (7th Cir. 2015). Instead, "[t]he central role of representative democracy is no less part of the Constitution than is the Second Amendment: when there is no definitive constitutional rule, matters are left to the legislative process." *Id.* That is because "the Constitution establishes a federal republic where local differences are cherished as elements of liberty, rather than eliminated in a search for national uniformity." *Id.* Although no State can trammel on the rights that *McDonald* set forth, *McDonald* "does not foreclose all possibility of experimentation. Within the limits [it] establishe[s] … federalism and diversity still have a claim." *Id.*; *see also New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (describing as one of the "happy incidents of the federal system" that States may "serve as a laboratory" for policies that fit their local needs, and concluding that the "[d]enial [by the courts] of the right to experiment may be fraught with serious consequences to the [n]ation").

That means States are free to canvass the evidence and make the tough calls about how to protect residents from gun violence. As Judge Wilkinson recently explained, it is not possible "to draw from the profound ambiguities of the Second Amendment an invitation to courts to preempt this most volatile of political subjects and arrogate to themselves decisions that have been historically assigned to other, more democratic, actors." *Kolbe v. Hogan*, 849 F.3d 114, 150 (4th Cir. 2017) (Wilkinson, J., concurring); *see also District of Columbia v. Heller*, 554 U.S. 570, 636 (2008) ("We are aware of the problem of handgun violence in this country, and … [t]he Constitution leaves … a variety of tools for combating that problem…."). That concern has never mattered more than it does today: "To say in the wake of so many mass shootings in so many localities across this country that the people themselves are now to be rendered newly powerless, that all they can do is stand by and watch as federal courts design their destiny—this would deliver a body blow to democracy as we have known it since the very founding of this nation." *Kolbe*, 849 F.3d at 150 (Wilkinson, J., concurring).

In sum, no State is *required* to protect residents from the dangers of public carry, but every State is *permitted* to do so under the Second Amendment. And that is precisely what most other circuits have found when upholding public-carry laws. *See Kachalsky*, 701 F.3d at 98 ("Restricting handgun possession in public to those who have a reason to possess the weapon for a lawful purpose is substantially

related to New York's interests in public safety and crime prevention."); *Drake*, 724 F.3d at 437 (upholding New Jersey's law given the legislature's "predictive judgment … that limiting the issuance of permits to carry a handgun in public to only those who can show a 'justifiable need' will further its substantial interest in public safety"); *Woollard*, 712 F.3d at 880 ("We are convinced by the State's evidence that there is a reasonable fit between the good-and-substantial-reason requirement and Maryland's objectives of protecting public safety and preventing crime."); *see also* Add. 72 (Clifton, J., dissenting) (relying on these decisions to find that "there is a reasonable fit between Hawaii's public-carry regulations and its unquestionably legitimate goal of promoting public safety").

This Court's analysis in *Peruta II* makes clear how far the panel majority has gone astray. Although the en banc majority focused on the history of concealed-carry regulation, Judge Graber wrote a concurrence discussing whether a public-carry regime could survive intermediate scrutiny. Speaking for three judges, she explained that such statutes are constitutional because they "strike a permissible balance between 'granting handgun permits to those persons known to be in need of self-protection and precluding a dangerous proliferation of handguns on the streets.'" *Peruta II*, 824 F.3d at 942 (Graber, J., concurring) (citation omitted). Critically, "[t]he other four judges on the panel who made up the majority stated that 'if we were to reach that question, we would entirely agree with the answer the

concurrence provides.'" Add. 61 (Clifton, J., dissenting) (quoting *Peruta II*, 824 F.3d at 942 (majority op.)). In short, "seven of the eleven members of that en banc panel expressed views that are inconsistent with the majority opinion in this case." *Id.*; *see also* Add. 75 ("As other circuits have held in *Kachalsky*, *Drake*, and *Woollard*, and as a majority of the judges on our en banc panel indicated in *Peruta II*, there is a reasonable fit between good cause limitations on public carry licenses and public safety."). In coming to the contrary result, the panel disregarded this Court's own conclusions.

And this happened for one simple reason—the panel "substitute[d] its own judgment about the efficacy" of Hawaii's open-carry law for the State legislature's determinations. Add. 76 (Clifton, J., dissenting). That deviation from the well-established practice of deferring to legislatures' safety judgments was unwarranted. The "Supreme Court has long granted deference to legislative findings regarding matters that are beyond the competence of courts," *Kachalsky*, 701 F.3d at 97, and has made clear that in those areas, courts must accord "substantial deference to the predictive judgments" of legislatures, *Peruta II*, 824 F.3d at 945 (quoting *Turner Broad. Sys. v. FCC*, 520 U.S. 180, 195 (1997)). That makes sense: "In the context of firearm regulation, the legislature is 'far better equipped than the judiciary' to make sensitive public policy judgments (within constitutional limits) concerning the dangers in carrying firearms and the manner to combat those risks." *Kachalsky*,

701 F.3d at 97 (citation omitted). After all, "assessing the risks and benefits of handgun possession and shaping a licensing scheme to maximize the competing public-policy objectives … is precisely the type of discretionary judgment that officials in the legislative and executive branches of state government regularly make." *Id.* at 99. As Judge Clifton put the point, "[a]lthough the [panel] majority may not like the outcomes of [the] studies" on which Hawaii has relied, it had no authority "to dismiss statutes based on [its] own policy views or disagreements with aspects of the analyses cited." Add. 74. This Court must rehear this case to correct that central error. No matter whether a judge would come to the same conclusions as Hawaii, the State's choice was plainly supportable.

II. HAWAII'S LAW PASSES CONSTITUTIONAL MUSTER IN LIGHT OF ITS HISTORICAL PEDIGREE.

Under *Heller*, a law's historical pedigree offers an independently sufficient reason to uphold it against a Second Amendment challenge. That leads inexorably to one result here—Hawaii's longstanding law is constitutional.

There is little doubt that the historical pedigree of the law matters. Indeed, as *Heller* established, the longstanding nature of a law can be a sufficient (though not necessary) reason to decide that it withstands Second Amendment scrutiny. *Heller* held "that the rights guaranteed by the Second Amendment were 'not unlimited,'" *Heller*, 554 U.S. at 626; to the contrary, the Court found that "'longstanding' restrictions" on carrying and possessing firearms are "'presumptively lawful.'" *Id.*

at 626, 627 n.26. Put simply, these "longstanding prohibitions" are "understood to be outside the scope of the Second Amendment." *Fyock*, 779 F.39 at 996. Nor does that historical analysis stop at the ratification of the Second Amendment—*Heller* itself had looked to "nineteenth-century state laws as evidence of 'longstanding' firearms restrictions." *United States v. Rene E.*, 583 F.3d 8, 12 (1st Cir. 2009). The issue is thus whether open-carry statutes like Hawaii's law are "presumptively lawful, longstanding licensing provision[s]." *Drake*, 724 F.3d at 432.

To understand why that inquiry calls for affirming Hawaii's law, start with the long history of such laws. This Court is not writing on a blank slate—as Judge Clifton noted, and as Hawaii highlights in its petition, *Peruta II* walked through the history of laws regulating the public carrying of weapons. *See* Add. 63 (Clifton, J., dissenting) ("Much of the analysis offered in the majority opinion repeats what was said in *Peruta I*, despite the en banc rejection of that opinion in *Peruta II*.").[2] In short, *Peruta II* explained that, "[d]ating back to the thirteenth century, England regulated public carry of firearms, including both concealed *and concealable*

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[2] *Peruta II* hardly stands alone in its conclusions. As other circuits have explained, "[f]irearms have always been more heavily regulated in the public sphere." *Drake*, 724 F.3d at 430 n.5; *see also, e.g.*, *Kachalsky*, 701 F.3d at 96 (concluding that "our tradition so clearly indicates a substantial role for state regulation of the carrying of firearms in public"); *United States v. Masciandaro*, 638 F.3d 458, 470 (4th Cir.) (explaining that "outside the home, firearms rights have always been more limited because public safety interests often outweigh individual interests"), *cert. denied*, 565 U.S. 1058 (2011).

weapons." *Id.* (emphasis added) (citing *Peruta II*, 824 F.3d at 929-32). To borrow a few examples from *Peruta II*'s analysis, in 1328, under Edward III, Parliament enacted the Statute of Northampton, stating that no one could "go nor ride armed by night nor by day." 824 F.3d at 930. This statute, which *Peruta II* called "the foundation for firearms regulation in England for the next several centuries," *id.*, was not limited to concealed carry; it banned the public carrying of firearms more generally. Indeed, in 1594, Elizabeth I issued a proclamation confirming that the Statute of Northampton prohibited the "open carrying" of weapons. *Id.* at 931; Add. 65 (Clifton, J., dissenting) (agreeing that "subsequent laws emphasiz[ed] that the Statute prohibited the carrying of concealable weapons"). It was not the only English law to do so; in 1541, Parliament enacted a law forbidding "owning or carrying concealable (not merely concealed) weapons." *Peruta II*, 824 F.3d at 931.

There is a similarly long history of public-carry regulations in the United States, dating back to the seventeenth and eighteenth centuries. *See Peruta II*, 824 F.3d at 933-37; *see also, e.g.*, Eric M. Ruben & Saul Cornell, *Firearm Regionalism & Public Carry: Placing Southern Antebellum Case Law in Context*, 125 Yale L.J. Forum 121, 129 n.43 (2015). Many states still limited public carry after passage of the Second and Fourteenth Amendments. During the nineteenth century, as the Second Circuit has explained, myriad "states enacted laws banning … concealable weapons … whether carried openly or concealed." *Kachalsky*, 701 F.3d at 95-96.

And, as this Court in *Peruta II* already laid out, multiple state courts had "upheld prohibitions against carrying concealable (not just concealed) weapons in the years following the adoption of the Fourteenth Amendment." 824 F.3d at 937.[3]

The same is true for the particular licensing standards on which Hawaii and other States now rely. These laws "do[] not go as far as some of the historical bans on public carrying; rather, [they] limit[] the opportunity for public carrying to those who can demonstrate" a need to do so. *Drake*, 723 F.3d at 433. Yet they boast an impressive pedigree—"[n]umerous states adopted good cause limitations on public carry in the early 20th century." Add. 68 (Clifton, J., dissenting). Hawaii is a perfect example. In 1852, Hawaii enacted a statute that made it a crime for "[a]ny person not authorized by law" to "carry, or be found armed with, any … pistol … or other deadly weapon … unless good cause be shown for having such dangerous weapons." Act of May 25, 1852, § 1. In 1927, Hawaii's territorial legislature enacted a licensing regime for public carry. *See* 1927 Haw. Sess. Laws Act 206, § 5-7. In 1934, Hawaii barred public carrying of firearms except in an "exceptional case, when the applicant shows good reason to fear injury to his person or

[3] The panel disputed that conclusion by focusing "on the laws and decisions from one region, the antebellum South." Add. 63 (Clifton, J., dissenting). But *Peruta II* rejected the idea that "the approach of the antebellum South reflected a national consensus about the Second Amendment's implications." Add. 64. The "more balanced historical analysis" in *Peruta II* instead "reveals that states have long regulated and limited public carry of firearms and, indeed, have frequently limited public carry to individuals with specific self-defense needs." *Id.*

property." 1933 (Special Sess.) Haw. Sess. Laws Act 26, § 6 & 8 (Jan. 9, 1934). And in 1961, a mere two years after the State's admission to the union, Hawaii adopted an open-carry regime that permitted an applicant to receive a permit to carry a firearm only when he could show the "urgency of the need" and that he "is engaged in the protection of life and property," 1961 Haw. Sess. Laws Act 163, §1—essentially the same as the standard today. The same is true of other state licensing laws.[4] New York's "legislative judgment concerning handgun possession in public was made one-hundred years ago," in 1913, when it "limit[ed] handgun possession in public to those showing proper cause." *Kachalsky*, 701 F.3d at 97. So too New Jersey, which has maintained a similar standard for resolving public-carry applications since 1924. *See Drake*, 724 F.3d at 432. It is clear these statutes are of particularly longstanding provenance.

No wonder, then, that other circuits have relied on similar history to uphold analogous state laws. The Second Circuit was explicit: "There is a longstanding tradition of states regulating firearm possession and use in public because of the dangers posed to public safety." *Kachalsky*, 701 F.3d at 94-95. Given "the history and tradition of firearm regulation," that court "decline[d] Plaintiffs' invitation to

[4] Indeed, other states set the precedent for Hawaii's law in the nineteenth century, limiting public carry to individuals who had a "reasonable cause" to fear assault—a group that included Maine, Massachusetts, Michigan, Minnesota, Oregon, Pennsylvania, Texas, Virginia, Wisconsin, and West Virginia. *See* Add. 65-68 (Clifton, J., dissenting) (citing, *inter alia*, *Kachalsky*, 701 F.3d at 90-93).

strike down New York's one-hundred-year-old law and call into question the state's traditional authority to extensively regulate handgun possession in public." *Id.* at 101. And the Third Circuit was, if anything, even more direct, determining that "the requirement that applicants demonstrate a 'justifiable need' to publicly carry a handgun for self-defense is a presumptively lawful, longstanding licensing provision [because it] has existed in New Jersey in some form for nearly 90 years." *Drake*, 724 F.3d at 432. That is appropriate in light of Supreme Court precedent—*Heller*, after all, described other laws that dated from the early twentieth century as longstanding and thus presumptively lawful. *See* Add. 68 (Clifton, J., dissenting). The panel in this case should have reached the same result.

The panel's decision thus "disregarded the fact that states and territories in a variety of regions have long allowed for extensive regulations of and limitations on the public carry of firearms." Add. 75 (Clifton, J., dissenting). Because Hawaii's licensing regime is longstanding under *Heller*, this Court should rehear the case en banc to render a decision in line with *Kachalsky*, *Drake*, and *Peruta II*.

CONCLUSION

Because the panel impermissibly substituted its own judgment for that of the Hawaii legislature on a public safety issue, and rejected the State's longstanding approach to firearm safety as a result, this Court should grant Appellees' petition for rehearing en banc and ultimately affirm the judgment below.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Circuit Rule 29-2, the foregoing amicus brief in support of a petition for rehearing en banc:

1. Contains 3,802 words; and
2. Has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman type, which complies with Fed. R. App. P. 32 (a)(4)-(6).

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CERTIFICATE OF SERVICE

I hereby certify that on September 24, 2018, I filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. Counsel for all parties are registered CM/ECF users and will be served by the appellate CM/ECF system.

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