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EVERYTOWN FOR GUN SAFETY
SUPPORT FUND

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI'I

ANDREW NAMIKI ROBERTS, *Plaintiff*, v. RUSSELL SUZUKI, in his capacity as the Attorney General of the State of Hawaii, and AL CUMMINGS, in his Official capacity as the State Sheriff Division Administrator, *Defendants*.	Civil No. CV18-00125 HG-RT **CONSENT MOTION FOR LEAVE TO FILE BRIEF OF EVERYTOWN FOR GUN SAFETY SUPPORT FUND AS AMICUS CURIAE;** EXHIBIT A (PROPOSED BRIEF) Trial: April 28, 2020

CONSENT MOTION FOR LEAVE TO FILE BRIEF OF EVERYTOWN FOR GUN SAFETY SUPPORT FUND AS AMICUS CURIAE

With the consent of all parties, Everytown for Gun Safety Support Fund ("Everytown") respectfully moves for leave to file an amicus curiae brief in the above-captioned matter in connection with the Parties' motions for summary judgment currently set for hearing on November 18, 2019. If granted leave, Everytown will file the brief attached as Exhibit A.

A "district court has broad discretion to appoint amici curiae." *Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982), *abrogated on other grounds by Sandin v. Conner*, 515 U.S. 472 (1995). "An amicus brief should normally be allowed when . . . the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide." *Cmty. Ass'n for Restoration of the Env't. (CARE) v. DeRuyter Bros. Dairy*, 54 F. Supp. 2d 974, 975 (E.D. Wash. 1999) (citing *Northern Sec. Co. v. United States*, 191 U.S. 555, 556 (1903)). Everytown has this unique information or perspective.

Everytown is the education, research, and litigation arm of Everytown for Gun Safety, the nation's largest gun-violence-prevention organization, with millions of supporters across all fifty states, including thousands in Hawai‘i. Everytown's mission includes defending gun laws through the filing of amicus briefs that provide doctrinal analysis and historical context that might otherwise be

overlooked. Everytown has drawn on its expertise to file briefs in numerous Second Amendment cases, including those involving stun-gun laws like the law at issue here. *See, e.g.*, *Duncan v. Becerra*, No. 19-55376 (9th Cir.); *Young v. Hawaii*, No. 12-17808 (9th Cir.); *Avitabile v. Cuomo*, No. 16-1447 (N.D.N.Y.); *Wright v. District of Columbia,* No. 16-1556 (D.D.C.). Although Everytown takes no position on stun-gun legislation of the sort involved in this case, it has a strong interest in ensuring that the Court is presented with a more complete picture of the relevant Second Amendment doctrine and history.

Everytown seeks to file this brief to help ensure that, in ruling on the parties' cross-motions for summary judgment, the Court is made aware of the is the full, and broad, Second Amendment implications of Plaintiff's arguments.

All parties have consented to the filing of this proposed amicus brief. Allowing Everytown leave to file as amicus will not cause any unnecessary delay, because this Motion is filed well in advance of the November 18, 2019 hearing on the Parties' respective motions for summary judgment.

CONCLUSION

For the foregoing reasons, Everytown respectfully requests that this Court grant it leave to file the amicus curiae brief attached hereto as Exhibit A.

DATED: Honolulu, Hawai‘i, September 16, 2019.

/s/ Pamela W. Bunn
PAMELA W. BUNN
WILLIAM J. TAYLOR, JR. (*Pro Hac Vice*)

Attorneys for Amicus Curiae
EVERYTOWN FOR GUN SAFETY SUPPORT FUND

EXHIBIT A

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI'I

ANDREW NAMIKI ROBERTS, *Plaintiff*, v. RUSSELL SUZUKI, in his capacity as the Attorney General of the State of Hawaii, and AL CUMMINGS, in his Official capacity as the State Sheriff Division Administrator, *Defendants*.	Civil No. CV18-00125 HG-RT **BRIEF OF EVERYTOWN FOR GUN SAFETY SUPPORT FUND AS AMICUS CURIAE** Trial: April 28, 2020

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I. INTRODUCTION AND INTEREST OF AMICUS CURIAE

Amicus curiae Everytown for Gun Safety Support Fund ("Everytown") is the education, research, and litigation arm of Everytown for Gun Safety, the nation's largest gun-violence-prevention organization, with millions of supporters in all fifty states. Everytown for Gun Safety was founded in 2014 as the combined effort of Mayors Against Illegal Guns, a national bipartisan coalition of mayors combating illegal guns and gun trafficking, and Moms Demand Action for Gun Sense in America, an organization formed after the murder of twenty children and six adults in an elementary school in Newtown, Connecticut. Everytown's mission includes defending gun laws through the filing of amicus briefs that provide doctrinal analysis and historical context that might otherwise be overlooked. Everytown has drawn on its expertise to file briefs in numerous Second Amendment cases, including those involving stun-gun laws. *See, e.g.*, *Duncan v. Becerra*, No. 19-55376 (9th Cir.); *Young v. Hawaii*, No. 12-17808 (9th Cir.); *Avitabile v. Cuomo*, No. 16-1447 (N.D.N.Y.); *Wright v. District of Columbia*, No. 16-1556 (D.D.C.). Although Everytown takes no position on stun-gun legislation of the sort involved in this case, it has a strong interest in ensuring that Second Amendment jurisprudence is informed by a broad understanding of both doctrine and history.

Everytown files this brief to make two doctrinal points in response to arguments advanced by Plaintiff—arguments that, if accepted, could have profound effects on Second Amendment cases more broadly. *First*, Plaintiff contends that the challenged law is "categorically unconstitutional" under *District of Columbia v. Heller*, 554 U.S. 570 (2008), because it prohibits a "class of arms" that plaintiff asserts, based on sales data, is "in common use for lawful self-defense." Plaintiff's Memorandum in Support of Motion, ECF No. 51-1 ("Pl.'s Mem.") at 10, 13. But no federal court has held that governments are categorically precluded from prohibiting any arm deemed in "common use" based on such a sales threshold. In fact, the Seventh Circuit has expressly rejected a *less extreme* theory of common use as circular and contrary to federalism, and the Ninth Circuit (among others) has implicitly done the same. If plaintiff's theory were the law, moreover, it would create perverse incentives for gun manufacturers, threatening public safety. *Second*, plaintiff asks for strict scrutiny should the Court reject his broad theory. *Id.* at 15. But if the Court decides to reach the merits and concludes that the Second Amendment applies, intermediate scrutiny is the correct standard.

II. ARGUMENT

A. Plaintiff's Categorical "Common Use" Theory is Inconsistent with Ninth Circuit Precedent, Illogical, and Dangerous.

1. Plaintiff's "common use" theory is inconsistent with precedent.

Plaintiff wants this Court to hold that Hawai'i's law, Haw. Rev. Stat. § 134-16, is *necessarily* unconstitutional under the Second Amendment because the law (in his view) prohibits "a class of arms" that are "commonly used for self-defense." Pl.'s Mem. at 5 n.2, 13; *see id.* at 11 (arguing that the law is "categorically unconstitutional"); *id.* at 11, 13 (advocating a "categorical approach"). On this theory, as soon as *any* type of weapon achieves a certain minimal nationwide sales or manufacturing threshold—and what the magic number is, plaintiff does not say—then the Second Amendment confers an absolute right to acquire it in every state.

Plaintiff locates this "common use" theory in *Heller*, which invalidated a law that "amount[ed] to a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society for [self-defense]." 554 U.S. at 628; *see* Pl.'s Mem. at 13 ("Per *Heller*, this Court could declare Hawai'i's electric arm ban unconstitutional without the need to perform a scrutiny analysis."). *Heller* held that "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home the most preferred firearm in the nation to 'keep' and use for protection of one's home and family,

would fail constitutional muster." 554 U.S. at 628–29 (quotations, citation omitted). Plaintiff asks this Court to stretch this holding far beyond the context of that case—which concerned a law prohibiting a class of 114 million arms, *see* William J. Krouse, *Gun Control Legislation*, Congressional Research Service, at 8 (Nov. 14, 2012), *at* http://bit.ly/1bNw2Br—to compel the invalidation of a law prohibiting a weapon that is many times less common.

Plaintiff supports this sweeping position by relying on the Supreme Court's five-paragraph per curiam opinion in *Caetano v. Massachusetts*, 136 S. Ct. 1027 (2016), which vacated and remanded a decision by the Massachusetts Supreme Judicial Court that had upheld a conviction under that state's stun-gun prohibition. But the Supreme Court did not strike down Massachusetts' law, nor did it expand *Heller* in the slightest. *See Jones v. Bermudez*, No. 15-cv-8527 (PKC) (BCM), 2019 WL 2493539, at *9 n.8 (S.D.N.Y. Feb. 14, 2019) ("*Caetano* did not, however, hold that stun guns are protected by the Second Amendment, or that the Massachusetts law was unconstitutional."), *adopted by* 2019 WL 1416985 (S.D.N.Y. Mar. 29, 2019). Instead, it simply remanded the case and held that "the explanation the Massachusetts court offered for upholding the law"—"that the Second Amendment does not extend to stun guns" because they are a "modern invention" and are not used in the military—"is inconsistent with *Heller*'s clear statement[s]." *Caetano*, 136 S. Ct. at 1027–28. Only Justice Alito, joined by

Justice Thomas, would have adopted the broad categorical argument plaintiff urges here. *See id.* at 1032–33 (2016) (Alito, J., concurring) (expressing the view that, because "[h]undreds of thousands of Tasers and stun guns have been sold to private citizens," a "categorical ban of such weapons therefore violates the Second Amendment"); *see also Kolbe v. Hogan,* 849 F.3d 114, 142 (4th Cir.) (en banc) ("Of course, that reading of *Heller* failed to gain a Court majority in *Caetano*."), *cert. denied,* 138 S. Ct. 469 (2017). No other Justice expressed agreement with this view, and it is not the law in any circuit.

It is certainly not the law in the Ninth Circuit. Several years ago, in a challenge to a local ordinance prohibiting a class of large-capacity ammunition magazines (those holding more than ten rounds), the Ninth Circuit rejected the argument that the law must be struck down as "categorically invalid" because it amounted to a "total ban" on "magazines overwhelmingly chosen by law-abiding citizens, that account for roughly forty-seven percent of all magazines." Appellants' Opening Brief at 24-25, *Fyock v. City of Sunnyvale,* No. 14-15408 (9th Cir. May 16, 2014), 2014 WL 2175455. The Ninth Circuit accepted the district court's finding that such magazines were "in common use," noting that the plaintiff there had "presented sales statistics indicating that millions of magazines, some of which . . . were magazines fitting [the] definition of large-capacity magazines, have been sold over the last two decades in the United States." *Fyock v. City of*

Sunnyvale, 779 F.3d 991, 998 (9th Cir. 2015); *see Fyock v. City of Sunnyvale*, 25 F. Supp. 3d 1267, 1275 (N.D. Cal. 2014) ("Nevertheless, 'it is safe to say that whatever the actual number of such magazines in United States' consumers' hands, it is in the tens-of-millions, even under the most conservative estimates.'"). But, even so, the Court rejected a categorical approach and applied intermediate scrutiny in "affirm[ing] the district court's denial of [the plaintiff's] motion for a preliminary injunction" of the large-capacity magazine prohibition. *Fyock*, 779 F.3d at 999-1001.[1]

2. Plaintiff's "common use" theory is illogical and dangerous and should be rejected for that reason as well.

Even if this Court were free to contravene Ninth Circuit precedent, it should reject plaintiff's theory because it is unworkable, illogical, and would lead to absurd results, as the Seventh Circuit has explained. *See Friedman v. City of Highland Park*, 784 F.3d 406 (7th Cir. 2015). To begin, it is anything but clear what common use means. "[W]hat line separates 'common' from 'uncommon'

[1] In a subsequent unpublished opinion, affirming, under an abuse-of-discretion standard, the grant of a preliminary injunction of California's large-capacity magazine prohibition, the Ninth Circuit confirmed that a categorical analysis is inappropriate here. *See Duncan v. Becerra*, 742 F. App'x 218, 221 (9th Cir. 2018) (holding that the district court did not apply an "incorrect level of scrutiny" where it alternatively applied intermediate scrutiny, which "follows the applicable legal principles," and declining to endorse the district court's application of a categorical approach). (The district court in *Duncan* has since granted summary judgment to plaintiffs, and the State's appeal from that decision is currently pending. *See Duncan v. Becerra*, No. 19-55376 (9th Cir.).)

ownership is something [*Heller*] did not say." *Id.* at 409 (finding "uncertainty" as to whether assault weapons are "commonly owned" based on sales totals); *see generally* Cody J. Jacobs, *End the Popularity Contest*, 84 Tenn. L. Rev. 231 (2015), *at* http://bit.ly/1gVsyGZ. "The *Heller* majority said nothing to confirm it was sponsoring the popularity test." *Kolbe*, 849 F.3d at 142. And even if it had, Plaintiff is silent on what numerical threshold must be reached before a weapon achieves "common use" sufficient to trigger a constitutional mandate that the weapon be made available throughout the country. If a million people own a particular weapon, is that enough? How about a few hundred thousand? Is it a regional test or a national test? Does it look to ownership numbers, sales numbers, or manufacturing numbers? If a survey revealed that half a million people own firearms without serial numbers, would the federal serialization requirement suddenly become unconstitutional because unmarked firearms are in common use? If not, why not? And what would become of the federal prohibition on the manufacture of machine guns (whose constitutionality *Heller* endorsed, *see* 554 U.S. at 627) if some small slice of the American population owned a few hundred thousand M–16s? *See also Kolbe*, 849 F.3d at 135-36 (asking these and other questions). Plaintiff does not answer any of these questions.

More fundamentally, "relying on how common a weapon is at the time of litigation [is] circular." *Friedman*, 784 F.3d at 409. As Judge Easterbrook observed

in rejecting the same theory of common use advanced by plaintiff here, "it would be absurd to say that the reason why a particular weapon can be banned is that there is a statute banning it, so that it isn't commonly owned. A law's existence can't be the source of its own constitutional validity." *Id.*; *see also* Joseph Blocher & Darrell A.H. Miller, *Lethality, Public Carry, and Adequate Alternatives*, 53 Harv. J. on Legis. 279, 288–89 (2016) (discussing the "central circularity" that plagues common use: "what is common depends largely on what is, and has been, subject to regulation"), *at* https://bit.ly/2keK2pT. The constitutionality of a weapon prohibition should not turn on "how widely [the weapon] is circulated to law-abiding citizens by the time a bar on its private possession has been enacted and challenged." *Kolbe*, 849 F.3d at 141.

Consider just some of the absurd results that plaintiff's market-share "common use" test would produce. By focusing on total sales and manufacturing figures, the test would give the firearms industry "the ability to unilaterally make new [highly dangerous] firearms protected simply by manufacturing and heavily marketing them" before the government has had the chance to assess their danger and determine whether to regulate them. Jacobs, *End the Popularity Contest*, at 265. And because American firearm ownership is extremely concentrated—just 3% of adults possess half the country's guns—a small number of people would dictate the Second Amendment's meaning. *See* Lois Beckett, *Meet America's Gun*

Super-Owners—With An Average of 17 Firearms Each, The Trace (Sept. 20, 2016), https://goo.gl/FSsU2w; *see also* Alex Yablon, *Most Californians Who Own 'Assault Rifles" Have 10+ Guns*, The Trace (Nov. 12, 2018), https://goo.gl/aKEtmi (reporting research finding that "four out of five assault rifles in [California] are owned by people who own 10 or more guns"). The result would be that, once gun manufacturers ensure that a particular type of weapon has attained whatever market penetration is enough to make it "common," that weapon would then become constitutionally immune from regulation. Jacobs, *End the Popularity Contest*, at 265. If that were the rule, it would "put[] a great deal of power"—*constitutional* power—"into the hands of gun manufacturers" and gun enthusiasts. *Id.* at 267.

By doing so, it would create perverse incentives for manufacturers to overproduce the very types of firearms that most warrant regulatory attention, and to flood the market with firearms possessing new—and potentially dangerous—technology before regulators could assess their safety. *See Kolbe*, 849 F.3d at 141. That would undoubtedly "hinder efforts to require consumer safety features on guns." Jacobs, *End the Popularity Contest*, at 267. Given the emergence of new firearm technology (like 3-D-printed gun components undetectable using traditional methods), and given the inevitability of future technological

developments, plaintiff's common-use theory, if endorsed by this Court, would pose serious threats to public safety. *Id.*

And that is to say nothing of the federalism consequences of adopting a test that looks to nationwide manufacturing and sales totals. Under that test, whenever a new, potentially dangerous firearm feature became available, state and local governments would either have to prohibit it immediately, and in unison, or else forfeit their ability to do so going forward. If some states chose to gather more information before regulating, or if their citizens simply had a different position on gun policy, those legislative policy judgments would have constitutional effect far beyond those states' borders.

Legislators' decisions in some parts of the country, however, should not make laws in other parts any "more or less open to challenge under the Second Amendment." *Friedman*, 784 F.3d at 408. If they did, that "would imply that no jurisdiction other than the United States as a whole can regulate firearms. But that's not what *Heller* concluded." *Id.* at 412. Because our Constitution "establishes a federal republic where local differences are cherished as elements of liberty," federalism is "no less part of the Constitution than is the Second Amendment." *Id.* The Supreme Court's decision in *Heller* (as applied to the states in *McDonald v. City of Chicago*, 561 U.S. 742 (2010)) "does not foreclose all possibility of experimentation" by state and local governments, *Friedman*, 784

F.3d at 412, but rather permits them to do what they have long done in the realm of firearm legislation: "experiment with solutions to admittedly serious problems," *Jackson v. City & Cty. of S.F.*, 746 F.3d 953, 970 (9th Cir. 2014); *see also McDonald*, 561 U.S. at 784 (noting that "[s]tate and local experimentation with reasonable firearms regulations will continue under the Second Amendment"). Plaintiff's test would eviscerate their ability to do so.

At the same time, plaintiff's test also has the potential to underprotect the Second Amendment right by "creat[ing] an incentive for governments that are interested in restricting access to firearms to ban new weapons completely before they can become popular," even if those weapons would be "extremely effective for self-defense." Jacobs, *End the Popularity Contest*, at 265. But, as scholars have remarked, "[i]f heavy regulation can prevent a weapon from becoming a constitutionally protected 'Arm,' then the Second Amendment right seems hollow indeed." Blocher & Miller, *Lethality*, at 288.

The rights enumerated in our Constitution protect individual liberty by restraining the power of popularly elected legislators. Yet the challengers' constitutional theory would give policymakers (as well as private industry and a small group of consumers) unprecedented power to define the scope of the Second Amendment right—either by broadening it or by narrowing it. That cannot be the law.

To see why, suppose that in 2004 Congress had renewed the federal prohibition on large-capacity magazines and assault weapons that had been enacted ten years earlier, rather than let it lapse. Had Congress made that policy decision, those weapons would not be in common use today, and thus would not be protected on plaintiff's market-share theory. The answer should not be any different because Congress instead decided to let the law lapse. A single twenty-first-century legislative decision should not dictate whether a different legislative judgment made a decade later comports with the Second Amendment. Yet that is the upshot of plaintiff's common-use theory. That is as "illogical" as it dangerous. *See Kolbe,* 849 F.3d at 142. It should be rejected.

B. To the Extent That This Court Decides to Reach the Merits and Finds That the Second Amendment Applies, It Should Not Subject the Law to Strict Scrutiny.

Plaintiff's second argument is no less novel: he wants this Court to apply strict scrutiny in assessing whether the challenged law is constitutional. But, in the eleven-plus years since *Heller*, only two circuit decisions have held that strict scrutiny governed a Second Amendment challenge, and both of those cases were promptly vacated and taken en banc, where intermediate scrutiny was then applied. *See Kolbe v. Hogan*, 813 F.3d 160, 182 (4th Cir. 2016) (facial challenge to state assault-weapon prohibition), *reh'g en banc granted*, 636 F. App'x 880 (Mar. 6, 2016), *decided en banc*, 849 F.3d 114, 130 (4th Cir. 2017) (en banc) (the law "is

subject to—and readily survives—the intermediate scrutiny standard of review"); *Tyler v. Hillsdale Cty. Sheriff's Dep't*, 775 F.3d 308, 328-29 (6th Cir. 2014) (as-applied challenge to federal law prohibiting plaintiff from possessing any firearm for life), *reh'g en banc granted* (Apr. 21, 2015), *decided en banc*, 837 F.3d 678, 692 (6th Cir. 2016) (en banc) ("conclud[ing] that intermediate scrutiny is the appropriate standard").[2]

On the other side of the ledger, scores of circuit decisions have applied intermediate scrutiny to laws that were found or assumed to burden protected Second Amendment conduct. The Ninth Circuit, for its part, has consistently subjected such laws to intermediate scrutiny. *See, e.g.*, *Fyock*, 779 F.3d at 999 (large-capacity magazine prohibition); *United States v. Singh*, 924 F.3d 1030, 1057 (9th Cir. 2019) (prohibition on gun possession by nonimmigrant visa holders); *Jackson*, 746 F.3d at 965, 968 (handgun safe-storage regulation and hollow-point ammunition prohibition).

If this Court reaches the merits and concludes that the Second Amendment applies, it should follow the lead of the Ninth Circuit (and every other circuit) and subject the law to intermediate scrutiny. Indeed, even cases *favorable* to Plaintiff

[2] In *Mance v. Sessions*, the Fifth Circuit "assume[d]. without deciding, that the strict, rather than intermediate, standard of scrutiny [wa]s applicable," and upheld the challenged federal laws, restricting the interstate transfer of handguns, under a strict-scrutiny analysis. 896 F.3d 699, 704 (5th Cir. 2018), *petition for cert. filed*, No. 18-663 (U.S. Nov. 21, 2018).

have applied intermediate scrutiny to similar prohibitions. *See Avitabile v. Beach*, 368 F. Supp. 3d 404, 407, 418 (N.D.N.Y. 2018) (applying intermediate scrutiny in Second Amendment challenge to "New York's total ban on the civilian possession of tasers and stun guns," where plaintiff "has not established that these arms are as popularly owned and used for self-defense as the handgun"); *Maloney v. Singas*, 351 F. Supp. 3d 222, 227, 239 (E.D.N.Y. 2018) (applying intermediate scrutiny in similar challenge to New York's "complete ban on the possession of nunchaku by private citizens"); *State v. DeCiccio*, 105 A.3d 165, 204–06 (Conn. 2014) (holding that intermediate scrutiny is the correct standard to apply to prohibition on dirk knives and police batons, in light of the availability of many "other options for possessing protected weapons in the home," and noting that "courts throughout the country have nearly universally applied some form of intermediate scrutiny" in Second Amendment cases); *State v. Hermann*, 873 N.W.2d 257, 260 (Wis. Ct. App. 2015) (applying intermediate scrutiny in as-applied challenge to switchblade prohibition). There is no reason for this Court to take a different approach here.[3]

[3] As plaintiff notes (*see* Pl.'s Mem. at 8, 12-13), a few state courts have applied a more categorical approach in striking down prohibitions on tasers and stun guns. But these decisions are against the weight of authority, and against all federal case law, which has applied intermediate scrutiny to such challenges. And, as explained, adopting such a categorical analysis here would be directly contrary to Ninth Circuit precedent, including the decisions in *Fyock* and *Duncan* applying intermediate scrutiny in assessing Second Amendment challenges to large-capacity magazine prohibitions. *See supra* pp. 5, 12-13; *see also Worman v. Healey*, 922 F.3d 26, 38 n.6 (1st Cir. 2019) (rejecting the Illinois Supreme Court's holding that

The appropriateness of intermediate scrutiny in this case is underscored by more than a century's worth of history. Weapons far less deadly than firearms have long been regulated in different ways and for a variety of reasons. For instance, laws prohibiting the sale or possession of a weapon known as a "slung shot" (a small weighted ball attached to a rope) were enacted in fourteen states and the District of Columbia between 1850 and 1931. Mass. Gen. Laws ch. 194, §§ 1–2 (1850); 1890 Okla. Sess. Laws 475–76, ch. 25 §§ 18–19; 1907 Ala. Acts 80, No. 55; 1931 N.Y. Laws 1033; Pub. L. No. 275, § 14, codified at 47 Stat. 650 (1932). The same is true for brass knuckles. 1906 Va. Acts 9, ch. 11; 1923 Cal. Stat. 695, ch. 339, § 1. Ten states and the District of Columbia prohibited billy clubs and weapons called "sandbags" between 1889 and 1932, while at least fifteen states prohibited various types of knives between 1837 and 1959. 1837 Ala. Acts 7, No. 11; 1912 N.J. Laws 365; 1925 N.J. Laws 185; 1931 Tenn. Priv. Acts 1089; 1959 N.M. Laws 245. Even Congress, in 1958, passed a law prohibiting the sale or manufacture of switchblades in interstate commerce, carrying a punishment of up to five years in prison. Pub. L. No. 85-623, codified at 72 Stat. 562. As these laws illustrate, the people's elected representatives have long had leeway in assessing the dangerousness of weapons and determining whether (and how) to regulate

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a state law prohibiting the carrying of stun guns and tasers was a "categorical ban" and also disagreeing with that court's "conclusion that any law that restricts a certain type of arms is per se unconstitutional").

them. This leeway is consistent with intermediate scrutiny. *Cf., e.g.*, *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 86 (2d Cir. 2012) ("Because our tradition so clearly indicates a substantial role for state regulation of the carrying of firearms in public, we conclude that intermediate scrutiny is appropriate in this case.").

III. CONCLUSION

Everytown respectfully submits that the Court should reject Plaintiff's request to "apply a categorical approach" to Hawai'i's law, and should instead apply intermediate scrutiny.

DATED: Honolulu, Hawai'i, September 16, 2019.

/s/ Pamela W. Bunn
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EVERYTOWN FOR GUN SAFETY SUPPORT FUND

U.S. District Court

District of Hawaii

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