12-17808

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE K. YOUNG, JR.,

Plaintiff-Appellant,

—v.—

STATE OF HAWAII; NEIL ABERCROMBIE, in his capacity as Governor of the State of Hawaii; DAVID MARK LOUIE I, Esquire, in his capacity as State Attorney General; COUNTY OF HAWAII, as a sub-agency of the State of Hawaii; WILLIAM P. KENOI, in his capacity as Mayor of the County of Hawaii; HILO COUNTY POLICE DEPARTMENT, as a sub-agency of the County of Hawaii; HARRY S. KUBOJIRI, in his capacity as Chief of Police; JOHN DOES, 1-25; JANE DOES, 1-25; DOE CORPORATIONS, 1-5; DOE ENTITIES, 1-5,

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 EVERYTOWN FOR GUN SAFETY AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

JANET CARTER
WILLIAM J. TAYLOR, JR.
LISA M. EBERSOLE
EVERYTOWN LAW
450 Lexington Avenue #4184
New York, New York 10017
(646) 324-8215
wtaylor@everytown.org

Counsel for Amicus Curiae Everytown for Gun Safety

CORPORATE DISCLOSURE STATEMENT

Everytown for Gun Safety has no parent corporations. It has no stock, and hence, no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

English statutes and royal proclamations

State laws

Books, articles and other authorities

INTEREST OF AMICUS CURIAE

Amicus curiae Everytown for Gun Safety ("Everytown") is the nation's largest gun-violence-prevention organization, with nearly six million supporters across the nation, including thousands in Hawaii.

Everytown has drawn on its expertise to file briefs in numerous Second Amendment cases, including in support of the en banc petition in this case (Dkt Nos. 160, 162) and in other challenges to laws like the one at issue here, offering historical and doctrinal analysis that might otherwise be overlooked. *See, e.g.*, *Flanagan v. Becerra*, No. 18-55717 (9th Cir.); *Peruta v. Cty. of San Diego*, No. 10-56971 (9th Cir.) (en banc).[1]

INTRODUCTION

This case involves a constitutional challenge to Hawaii's long-existing law regulating the carrying of firearms in public. In 2016, this Court, in *Peruta v. County of San Diego*, 824 F.3d 919 (9th Cir. 2016) (en banc), upheld California's similar concealed-carry restrictions against a Second Amendment challenge. Central to the en banc Court's holding was the existence of a centuries-long Anglo-American tradition of "prohibit[ing] carrying concealed" as well as "concealable" arms in public. *Id.* at

[1] All parties consent to this brief's filing and no party's counsel authored it in whole or part. Apart from Everytown, no person contributed money to fund its preparation or submission.

932. The Court canvassed this history and held that California's law was "longstanding" and thus constitutional under *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008).

The divided panel opinion in this case, in reversing the district court's dismissal of plaintiff's challenge to Hawaii's public-carry regime, took a strikingly different view of the history. *Young v. Hawaii*, 896 F.3d 1044 (9th Cir. 2018), *rehearing en banc granted*, 915 F.3d 681 (9th Cir. 2019). In so doing, the panel majority openly defied this Court's decision in *Peruta* and sharply diverged from the historical methodology *Heller* mandated. And it simply got the history wrong.

An exhaustive review of the proper historical record is set forth in the concurrently-filed en banc brief submitted by Hawaii and amicus brief submitted by Professors of History and Law. We do not seek to duplicate that review here. Instead, Everytown files this brief to explain specifically why the panel majority's contrary historical account is incorrect—and, in particular, to rebut the most serious errors in the panel's (and the plaintiff's) "selective historical analysis," Recent Case, 132 Harv. L. Rev. 2066, 2066 (2019) (discussing *Young* panel opinion).

We begin with the English history—the centuries-old prohibition on carrying firearms in public dating back to the Statute of Northampton in 1328. The panel majority misunderstood the English prohibition (as well as its early American analogues), claiming that it "only sought to regulate disruptive—or more specifically, terrifying—arms carrying." *Young*, 896 F.3d at 1066. And the plaintiff likewise has

argued that the Statute of Northampton contained an unwritten "evil intent" requirement. Appellant's Supp. Br. 4, Dkt. No. 87. The historical materials, however, reveal otherwise.

We then turn to America. Contrary to the panel majority's telling, the history shows that, from our nation's founding to its reconstruction, many states and cities enacted laws prohibiting carrying a firearm in public places (either generally or without good cause), and that these laws operated as criminal prohibitions.

Finally, we discuss the 19th-century American caselaw. Although the panel majority focused on a few cases that it incorrectly characterized as supporting its view, those cases emanate almost exclusively from the slaveholding South—a part of the country that took an outlier approach to public carry, and that included wide variability even within the region.

In the end, the panel majority's reading of the Second Amendment would render dozens of state and local laws—enacted both before and after the Fourteenth Amendment's ratification—unconstitutional. And yet the panel (like the plaintiff) failed to identify a single historical example of a successful challenge to a good-cause requirement like Hawaii's. It instead pointed to another divided court of appeals panel decision, from the D.C. Circuit in 2017, that relied on a similarly flawed account of the history. *See Wrenn v. District of Columbia*, 864 F.3d 650 (D.C. Cir. 2017). This Court should decline to adopt those flaws. Rather, it should recognize the centuries-

long historical tradition of regulating the carrying of firearms in public, both openly and concealed, and uphold Hawaii's law as a longstanding, constitutional regulation under *Heller*.

ARGUMENT

A. The panel majority's assertion that the Statute of Northampton imposed an evil-intent or threatening-conduct requirement is wrong.

As chronicled in *Peruta*, there is a long Anglo-American tradition of broadly restricting public carry—a tradition that reaches back to at least 1328, when England enacted the Statute of Northampton. *See* 824 F.3d at 929-39. The panel majority downplayed the relevance of this law, saying that there is little in the "historical record to suggest that the Statute of Northampton barred Englishmen from carrying common (not unusual) arms for defense (not terror)." *Young*, 896 F.3d at 1064. The plaintiff has similarly argued that the Statute of Northampton applies only to public carrying when accompanied by an "evil intent" or threatening behavior. *See* Dkt. No. 87 at 4-5.

But this understanding of the statute is wrong. The historical record in fact shows that English law—outside of narrowly circumscribed exceptions—prohibited the bare act of carrying arms in public.[2]

[2] An addendum of historical laws and treatises is attached to the concurrently-filed amicus brief of Professors of History and Law ("Professors Add."). Additional historical laws are available in the Statutory Addendum to Everytown's amicus brief in *Flanagan v. Becerra*, No. 18-55717, Dkt. No. 39-2 (9th Cir. Nov. 27, 2018).

The starting point is the text of the statute itself, which states: "no Man great nor small" shall "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." 2 Edw. 3, 258, ch. 3 (1328). There is no reference to an "evil intent" requirement. To the contrary, the law was "strictly enforced as a prohibition on going armed in public," and any violation was punished as "a misdemeanor resulting in forfeiture of arms and up to thirty days imprisonment." Charles, *The Second Amendment in Historiographical Crisis*, 39 Fordham Urb. L.J. 1727, 1804 (2012).

A separate statute from the same period, by contrast, made it a felony to carry arms with aggressive or menacing intent. *See* 25 Edw. 3, c. 2 § 13 (1350) (imposing felony penalties on anyone who went armed "against any other"). Neither the panel majority nor the plaintiff ever mentioned this statute, and it is not hard to see why: If Northampton prohibited precisely the same conduct, only with lesser penalties, it would be superfluous.

Historical accounts confirm this plain meaning. Writing several centuries after the law was first enacted, Blackstone explained that "[t]he offence of riding or going armed with dangerous or unusual weapons is a crime against the public peace, *by terrifying the good people of the land*; and is particularly prohibited by the statute of Northampton." 4 Blackstone, *Commentaries on the Laws of England* 148–49 (1769)

(emphasis added).[3] Terror, in other words, was considered a *natural consequence* of publicly carrying arms—not an additional element required for prosecution under the statute. Ruben & Cornell, *Firearm Regionalism and Public Carry*, 125 Yale L.J.F. 121, 129–30 (2015) (noting Blackstone's implication that "terrorizing the public was the consequence of going armed"); *see also* Frassetto, *To the Terror of the People*, 43 S. Ill. L. Rev. 61, 89 (2018) (discussing how the possession of firearms was sufficient to bring conduct within the scope of laws with a "terror" element, even without an intent to terrorize or anyone actually being put in fear). As one English court put it: "Without all question, the sheriff hath power to commit ... if contrary to the Statute of Northampton, he sees any one to carry weapons in the high-way, in terrorem populi

[3] Historical materials establish that the statute—and, equally, Blackstone's phrase "dangerous or unusual weapons"—encompassed handguns. In 1579, for example, Queen Elizabeth I issued a proclamation emphasizing that the statute prohibited the carrying of "Pistols, and such like, not only in Cities and Towns, [but] in all parts of the Realm in common high[ways]." Charles, *The Faces of the Second Amendment Outside the Home*, 60 Clev. St. L. Rev. 1, 21 (2012) (spelling modernized). Fifteen years later, she reiterated that carrying pistols in public—whether "secretly" or in the "open"—was "to the terrour of all people professing to travel and live peaceably." *Id.*; *see also Peruta,* 824 F.3d at 931; *Rex v. Harwood*, Quarter Sessions at Malton (Oct. 4-5, 1608), *reprinted in* North Riding Record Society, Quarter Sessions Records 132 (1884) (arrest under statute for going "armed" with "pistolls[] and other offensive weapons"). Thus, there can be no doubt that the Statute prohibited the public carrying of handguns without any additional "terror" element, and the panel's effort (896 F.3d at 1064) to rely on *Heller*'s citation to Blackstone accordingly missed the mark. *Heller*'s application of "dangerous and unusual" to the entirely different context of which weapons can be prohibited, *see* 554 U.S. at 627, cannot (and does not purport to) countermand the historical fact that the Statute of Northampton prohibited the carrying of handguns *simpliciter*.

Regis; he ought to take him, and arrest him, *notwithstanding he doth not break the peace in his presence*." *Chune v. Piott*, 80 Eng. Rep. 1161, 1162 (K.B. 1615) (emphasis added).

The only possible reading of *Chune*—a case to which neither the panel majority nor the plaintiff referred—is that the phrase "in terrorem populi Regis" described the effect of carrying a firearm in public, not an additional (atextual) requirement of an "evil intent" or menacing behavior. Otherwise, it would make no sense for the court to have emphasized that the sheriff had power to arrest "any" person for carrying a gun in public even though that person did not "break the peace in his presence." *Id.*

Against this long trail of historical evidence, the panel majority supported its contrary reading primarily by (1) isolating and misreading a lone 17th-century English prosecution, and (2) taking selective quotes from English commentators out of context. *See Young*, 896 F.3d at 1064. Neither comes anywhere near rebutting the full historical record.

As to the former: The panel majority asserted that the prosecution and ultimate acquittal of Sir John Knight in 1686 demonstrates that the statute was interpreted to punish only "people who go armed *to terrify the King's subjects*." *Id.* (quoting *Sir John Knight's Case*, 87 Eng. Rep. 75, 76 (K.B. 1686)); *see also* Appellant's Opening Br. 11, Dkt. No. 6-1. But this Court in *Peruta* has already determined that is not so. *See* 824 F.3d at 931. And, as recent scholarship has demonstrated, *Sir John Knight's Case*, in

fact, "was a more complicated case than usually recognized," and newly uncovered evidence reveals why Knight's acquittal "did not confirm that it was legally acceptable for a loyal subject to carry a gun into church so long as his doing so did not terrify people." Harris, *The Right to Bear Arms in English and Irish Historical Context*, *in A Right to Bear Arms?: The Contested Role of History in Contemporary Debates on the Second Amendment* 23, 23-27 (Tucker et al. eds., 2019)).

As to the latter: The panel majority relied on language from the Hawkins treatise saying that "no wearing of Arms is within the meaning of this Statute, unless it be accompanied with such Circumstances as are apt to terrify the People." 896 F.3d at 1064; *see also* Dkt. No. 87 at 4. But Hawkins goes on to explain that this language referred to the customary practice of allowing high-ranking nobles to wear ceremonial armor or swords in the "common fashion," for that would not naturally terrify the people. 1 Hawkins, *A Treatise of the Pleas of the Crown*, ch. 63, § 9 (1716). The panel majority failed to mention this part of Hawkins's treatise, just as it failed to mention the part—right before the sentence quoted—where Hawkins provided the blanket rule that one could not carry arms in public, and made clear that this general rule could not be evaded by claiming that one faced a threat. He wrote: "a man cannot excuse the wearing such armor in public, by alleging that such a one threatened him, and that he wears for the safety of his person from his assault." *Id.* § 8. Thus, far from establishing a separate "terror" or "evil intent" requirement, the language the panel

cited indicates that, aside from the exceptions delineated, wearing arms in public *itself* constituted "[c]ircumstances as are apt to terrify the People"—the same understanding of the statute that Blackstone had.

More generally, the panel's (and the plaintiff's) reading of the Statute of Northampton is at odds with its structure. The statute expressly exempted the King's officers, as well as those assisting law enforcement, and (as just explained) it implicitly exempted the carrying of swords by nobles for ceremonial purposes. *See* Carpenter & Whittington, *Liber Albus: The White Book of the City of London* 335 (1419) (1861 reprint) (explaining that "no one" could "carry arms, by day or by night, except the vadlets of the great lord of the land, carrying the swords of their masters in their presence, and the serjeants-at-arms [of the royal family]," as well as those responsible for "saving and maintaining the peace"); Coke, *The Third Part of the Institutes of the Laws of England* 161-62 (1817 reprint). If the statute prohibited public carry only when accompanied by "evil intent" or menacing conduct, these exceptions would be entirely unnecessary.

In short, all available historical materials—the statutory text, structure, case law, and contemporaneous accounts—point in the same direction: For centuries before America's founding, England broadly prohibited carrying guns in public, regardless of whether accompanied by a threat or other menacing conduct.

B. The panel majority incorrectly interpreted the robust American tradition of restricting public carry.

1. Early American Northampton-style laws. Turning to American history, the panel majority did not appear to dispute that numerous states and colonies "adopted verbatim, or almost verbatim, English law" concerning public carry, *Peruta*, 824 F.3d at 933, both before and after ratification of the Constitution. *See Young*, 896 F.3d at 1066 (acknowledging that there were "various state weapons carry regulations throughout the founding era and beyond that were expressly modelled after the Statute of Northampton"); *id.* at 1077 (Clifton, J., dissenting); *see also* 1686 N.J. Laws 289, 289-90, ch. 9; 1694 Mass. Laws 12, no. 6; 1786 Va. Laws 33, ch. 21; 1792 N.C. Laws 60, 61, ch. 3; 1801 Tenn. Laws 710, § 6; 1821 Me. Laws 285, ch. 76, § 1; 1852 Del. Laws 330, 333, ch. 97, § 13. Instead, the panel applied its same erroneous view of the Statute of Northampton to these early American laws, asserting that they imposed a heightened intent or menace requirement. *Young*, 896 F.3d at 1065-67. But here, too, history proves otherwise.

These American laws, like their English predecessor, broadly prohibited carrying a firearm in public, commanding constables to "arrest all such persons as in your sight shall ride or go armed." Haywood, *A Manual of the Laws of North-Carolina* pt. 2 at 40 (1814) (N.C. constable oath). And, as in England, prosecution under these laws did not require the defendant to have "threaten[ed] any person" or "committed any particular act of violence." Ewing, *A Treatise on the Office & Duty of a Justice of*

the Peace 546 (1805). There was no requirement, in other words, that the "peace must actually be broken, to lay the foundation for a criminal proceeding." Bishop, *Commentaries on the Criminal Law* 550 (1865).

2. Good-cause (or "Massachusetts model") laws. These Northampton-style public-carry prohibitions are not the only, or even the closest, historical precedents for Hawaii's good-cause requirement. In the early- and mid-19th century, many states, starting with Massachusetts, enacted a variant of the Statute of Northampton that expanded the ability of individuals to carry publicly by allowing those who had "reasonable cause to fear an assault" to do so, while continuing generally to prohibit carrying firearms and other weapons in public. 1836 Mass. Laws 748, 750 ch. 134, § 16.[4] These statutes generally provided that, absent such "reasonable cause," no person could "go armed with a dirk, dagger, sword, pistol, or other offensive and dangerous weapon." 1836 Mass. Laws 748, 750 ch. 134, § 16. And, like the Northampton-style laws, there was no requirement that a person engage in threatening conduct beyond bare public carry.[5] These "reasonable cause" laws are further evidence that Hawaii's regulation falls outside the historical scope of the Second Amendment.

---

[4] *See Young*, 896 F.3d at 1078 (Clifton, J., dissenting) (citing Wisconsin, Oregon, Minnesota, Michigan, Virginia, and Maine statutes); 1861 Pa. Laws 248, 250, § 6; 1870 W. Va. Laws 702, 703, ch. 153, § 8; 1871 Tex. Laws 1322, art. 6512.

[5] Newspaper articles from the 19th century describe criminal prosecutions under these laws even when the person was carrying a *concealed* weapon—a form of public carry that, by itself, does not indicate any menacing conduct beyond bare carry.

The panel majority, however, concluded that these early American good-cause laws were unpersuasive because they were often enforced through a surety-bond requirement and, under some of them, "only upon a well-founded complaint that the carrier threatened 'injury or a breach of the peace' did the good cause exception come into play." *Young*, 896 F.3d at 1061–62. But the fact that many of these laws used surety bonds as a form of punishment and triggered the surety penalties with a citizen-complaint mechanism does not mean that the laws allowed carrying firearms in public without good cause. *See id.* at 1078 n.2 (Clifton, J., dissenting).[6] Instead, historical evidence indicates that these laws, like Hawaii's similar good-cause requirement, operated as criminal restrictions on public carry without any requirement of breach of the peace beyond the carrying itself. *See supra* at 5-6 (explaining historical context under which public carry was itself in breach of public peace). Thus, they reinforce the conclusion that Hawaii's law is longstanding under *Heller*.

To begin, the obligation to provide sureties was typically itself a kind of criminal punishment. "At common law, sureties were similar to present-day guarantors in the bail context: members of the community who would pledge responsibility for the defendant and risk losing their bond if the defendant failed to 'keep the peace.'"

See, e.g., *City Intelligence*, Boston Courier (Mass.), Mar. 7, 1853, at 4 (reporting arrest and charge against person for "carrying a concealed weapon," a "loaded pistol").

[6] Moreover, the laws of several states, like Virginia, West Virginia, and Texas, did not use a citizen-complaint enforcement mechanism. *See supra* n.5.

Ruben & Cornell, 125 Yale L.J.F. at 131; *see* 4 Blackstone, *Commentaries* 249 ("This requisition of sureties has been several times mentioned before, as part of the penalty inflicted upon such as have been guilty of certain gross misdemeanors."). The failure to pay sureties for violating the statute could result in imprisonment for the person carrying in public without good cause. *See, e.g.*, 1836 Mass. Laws 748, 749 ch. 134, § 6; 1846 Mich. Laws 690, 691, ch. 162, § 6; 1851 Minn. Laws 526, 527, ch. 112, § 8; *see also* Cornell, *The Right to Carry Firearms Outside of the Home: Separating Historical Myths from Historical Realities*, 39 Fordham Urb. L.J. 1695, 1721 (2012) (noting that state judge's characterization to a grand jury of Massachusetts law "unambiguously interprets this law as a broad ban on the use of arms in public").

Furthermore, contrary to the panel majority's assertion that surety penalties were essentially licenses allowing "a disruptive carrier" to "go on carrying without criminal penalty," 896 F.3d at 1062, legislatures specifically characterized these good-cause laws as criminal laws. The Massachusetts legislature, for example, codified its restriction in Title II of the Code, "Of Proceedings in Criminal Cases," and expressly cited the state's previous enactment of Northampton. 1836 Mass. Laws 748, 750, ch. 134, § 16; *see also, e.g.*, 1851 Minn. Laws at 527-28, §§ 2, 17, 18 (codified in section titled "Persons carrying offensive weapons, how punished"); 1846 Mich. Laws 690, ch. 162 § 16 ("Of Proceedings in Criminal Cases"); 1847 Va. Laws 127, ch. 14, § 16 (same); 1871 Tex. Laws 1322, art. 6512 ("Criminal Code").

3. Late-19th and early-20th-century "good cause" laws. Even setting aside the Massachusetts-model laws, many late-19th and early-20th-century laws—including in Hawaii—indisputably prohibited carrying a firearm in public without good cause. To mention just a few here: In 1906, Massachusetts modernized its 1836 law to prohibit the public carrying of a handgun without a license, which could be issued only upon a showing of "good reason to fear an injury to [one's] person or property." 1906 Mass. Acts 150, §§ 1, 2. In 1909, Alabama made it a crime for anyone "to carry a pistol about his person on premises not his own or under his control," but allowed a defendant to show that "he had good reason to apprehend an attack" as mitigation or justification. 1909 Ala. Laws 258, no. 215, §§ 2, 4. In 1913, New York prohibited all public carry without a permit, which required a showing of "proper cause." 1913 N.Y. Laws 1627. And Hawaii itself has prohibited public carry without "good cause" for more than 150 years—including since the U.S. Constitution was extended in full to the territory of Hawaii in 1898. 1852 Haw. Sess. Laws 19, § 1; 1913 Haw. Sess. Laws 25, act 22, § 1.

C. The panel majority wrongly focused on a handful of cases from the slaveholding South, which took an outlier approach to public carry, and ignored the wide variability even within the region.

Seeking to overcome the centuries-old tradition of restricting public carry, the panel majority seized on a smattering of state-court decisions from the slaveholding South. *See Young*, 896 F.3d at 1054-57; *see also* Dkt. No. 6-1 at 14-15. But these

antebellum cases, allowing white citizens to carry firearms in public so long as the firearms were not concealed, demonstrate only that some Southerners took a more permissive view of public carry than the rest of the nation. *See Gould v. Morgan*, 907 F.3d 659, 669-70 (1st Cir. 2018), *petition for cert. filed*, No. 18-1272 (U.S. Apr. 1, 2019). And none called into question laws requiring those who wish to carry in public to show a special need.

To begin with, this alternative (and minority) tradition arose from the South's peculiar history and the prominent institution of slavery. *See Young*, 896 F.3d at 1076-77 (Clifton, J., dissenting). It reflects "a time, place, and culture where slavery, honor, violence, and the public carrying of weapons were intertwined"—a divergent set of societal norms that "do[es] not reflect the full range of American legal history." Ruben & Cornell, 125 Yale L.J.F.at 125; *see also* Recent Case, 132 Harv. L. Rev. at 2070-71.

But even if this Court were to focus only on the South, and to ignore the rest of the country, it would see that courts and legislatures throughout the region took varying stances toward public carry. Virginia, for example, enacted a law prohibiting public carry absent good cause in 1847, after enacting a broad Northampton-style prohibition at the Founding. 1847 Va. Laws at 129, § 16 (making it illegal for any person to "go armed with any offensive or dangerous weapon, without reasonable cause to fear an assault or other injury, or violence to his person, or to his family or property"); 1786 Va. Laws 33, ch. 21. South Carolina enacted a Northampton-style law during

Reconstruction. 1870 S.C. Laws 403, no. 288, § 4. Around the same time, Texas prohibited public carry with an exception for good cause. 1871 Tex. Laws 1322, art. 6512 (prohibiting public carry absent an "immediate and pressing" need for self-defense, while exempting travelers "carrying arms with their baggage"). And West Virginia, added to the Union during the Civil War, similarly allowed public carry only upon a showing of good cause. 1870 W. Va. Laws 702, 703, ch. 153, § 8.

Furthermore, even as Southern legislatures took varied positions on public carry, Southern case law recognized the constitutionality of good-cause open-carry restrictions. The Texas Supreme Court, for instance, twice upheld that state's good-cause requirement. *English v. State*, 35 Tex. 473 (1871); *State v. Duke*, 42 Tex. 455 (1874). These cases were decided by two very different courts—first made up solely of Republicans and then, after Reconstruction, solely of Democrats—in the decade after the ratification of the Fourteenth Amendment, demonstrating broad, bipartisan acceptance of good-cause laws. Frassetto, *The Law and Politics of Firearms Regulation in Reconstruction Texas*, 4 Tex. A&M L. Rev. 95 (2016). *Duke* called the law—which prohibited carrying "any pistol" in public without good cause, 1871 Tex. Laws 1322, art. 6512—"a legitimate and highly proper regulation." 42 Tex. at 459. *English* noted that it would be "little short of ridiculous" for a citizen to "claim the right to carry" a pistol where people congregate. 35 Tex. at 477-79. Further, the court observed, the good-cause requirement was "not peculiar to our own state," for nearly "every one of

the states of this Union ha[d] a similar law upon their statute books," and many had laws that were "more rigorous than the act under consideration." *Id.* at 479. And other Southern courts upheld similar good-cause laws against constitutional attacks. *See, e.g.*, *State v. Workman*, 35 W. Va. 367, 367 (1891) (upholding West Virginia's good-cause requirement, which the court had previously interpreted, in *State v. Barnett*, 34 W. Va. 74 (1890), to require specific, credible evidence of an actual threat of violence, and not an "idle threat"); *see also* Everytown Br. in Support of Reh'g En Banc 4-5, Dkt. No. 160 (discussing cases).[7]

By contrast, the panel majority identified no historical case (Southern or otherwise) striking down a good-cause requirement as unconstitutional. And the sole case that could reasonably be viewed as even calling into question a law like Hawaii's is *Bliss v. Commonwealth*, in which the Kentucky Supreme Court took an absolutist view of the right to carry firearms in public, both openly and concealed. 12 Ky. (2 Litt.) 90 (1822). This Court rejected reliance on *Bliss* in *Peruta*, 824 F.3d at 935–36, and no other 19th-century courts followed *Bliss*. *See, e.g.*, *State v. Reid*, 1 Ala. 612, 619

[7] The panel majority simply deemed these cases upholding good-cause laws irrelevant, primarily because they rested in part on a connection between the right to bear arms and "the common defense of the state," whereas *Heller* held that the right "always has been an individual right centered on self-defense." *Young*, 896 F.3d at 1058. But, as Everytown has explained (Dkt. No. 160 at 3-6), that approach is directly inconsistent with both *Peruta* and *Heller*, which cited these very cases as evidence of the original public understanding of the right.

(1840) (rejecting *Bliss*'s analysis); *Nunn v. State*, 1 Ga. 243, 251 (1846) (discussing but not adopting *Bliss*); *Commonwealth v. Murphy*, 166 Mass. 171, 173 (1896) (noting that *Bliss*'s interpretation of right to bear arms "has not been generally approved"); *see also* Dkt. No. 160 at 6 (explaining that *Heller* directly contradicted *Bliss*'s view of the right).

In sum, isolated snippets from a few antebellum Southern state-court decisions cannot trump the considered judgments of countless legislatures and courts throughout our nation's history, which have enacted and upheld such laws without casting doubt on their constitutionality.

D. A law like those enacted in dozens of states and cities—both before and after the Fourteenth Amendment's ratification—is constitutional under *Heller*.

Finally, and perhaps most tellingly, the panel majority failed to address the upshot of its decision: that *dozens* of state and local laws—passed both before and after ratification of the Fourteenth Amendment—were unconstitutional. No matter how one reads the English history and the early American history, or how one interprets the surety laws, there can be no doubt that there are over a dozen state laws and over a dozen municipal ordinances from the mid-to-late 19th century and early 20th century that were at least as restrictive as the regime at issue here.[8] It is undisputed that these

[8] *See* 1859 N.M. Laws 94, § 2; 1847 Va. Laws 127, ch. 14, § 15; 1857 D.C. Laws 567, ch. 141, § 15; 1869 N.M. Laws 312, § 1; 1870 W. Va. Laws 702, ch. 153, § 8; 1871 Tex. Laws 1322, art. 6512; 1875 Wyo. Laws 352, ch. 52, § 1; 1889 Ariz. Laws 16, ch. 13, § 1; 1889 Idaho Laws 23, § 1; 1891 W. Va. Laws 915, ch. 148, § 7;

laws either entirely prohibited public carry or required good cause for doing so. Thus, these laws—by themselves—are enough to uphold Hawaii's law as constitutional under *Heller*. *See, e.g.*, *Fyock v. City of Sunnyvale*, 779 F.3d 991, 997 (9th Cir. 2015) (noting that even "early twentieth century regulations" may qualify as longstanding).

In the end, in undertaking its faulty historical inquiry, the panel majority "employed a tactic that Justice Scalia cautioned against: marshaling support for a single perspective by 'look[ing] over the heads of the crowd and pick[ing] out your friends.'" Recent Case, 132 Harv. L. Rev. at 2072 (quoting Antonin Scalia, *Common-Law Courts in a Civil-Law System, in A Matter of Interpretation* 3, 36 (Gutmann ed., 1997)). That lopsided approach provides no grounds for upending Hawaii's long-existing, and historically well supported, public-carry regime.

1901 Mich. Laws 687, § 8; 1903 Okla. Laws 643, ch. 25, art. 45, § 584; 1906 Mass. Sess. Laws 150 § 1; 1909 Ala. Laws 258, no. 215, §§ 2, 4; 1909 Tex. Laws 105; 1911 Mass Acts 568, ch. 548; 1913 Haw. Sess. Laws 25, act 22, § 1; 1913 N.Y. Laws 1627; 1919 Mass. Acts 156, ch. 207; 1922 Mass. Acts 560; Professors Add. 219-246 (compiling municipal ordinances).

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

/s/ William J. Taylor, Jr.
Janet Carter
William J. Taylor, Jr.
Lisa M. Ebersole
EVERYTOWN LAW
450 Lexington Avenue #4184
New York, New York 10017
(646) 324-8215
wtaylor@everytown.org

Counsel for Amicus Curiae
Everytown for Gun Safety

June 4, 2020

CERTIFICATE OF COMPLIANCE

I hereby certify that my word processing program, Microsoft Word, counted 4,997 words in the foregoing brief, exclusive of the portions exempted by Rule 32(f).

/s/ William J. Taylor, Jr.

CERTIFICATE OF SERVICE

I hereby certify that on June 4, 2020, I caused the foregoing amicus brief to be filed electronically with the Clerk of the Court of the U.S. Court of Appeals for the Ninth Circuit by using the Appellate CM/ECF system. All participants are registered CM/ECF users, and will be served by the Appellate CM/ECF system.

/s/ William J. Taylor, Jr.