No. 20-1639

In the Supreme Court of the United States

GEORGE K. YOUNG, JR.
Petitioner,
v.
STATE OF HAWAII, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE STATES OF LOUISIANA, ARIZONA, MONTANA, AND EIGHTEEN OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF CERTIORARI

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INTERESTS OF *AMICI CURIAE*[1]

Amici are the States of Louisiana, Arizona, Montana, Alabama, Arkansas, Georgia, Idaho, Kansas, Kentucky, Mississippi, Missouri, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, West Virginia and Wyoming. One of the highest responsibilities of a State is to safeguard the rights of its citizens, including the right "to keep and bear arms" under the Second Amendment. Law-abiding citizens keep firearms for self-protection—both inside and outside of their homes. *Amici* seek to ensure that their residents will not be deprived of their Second Amendment freedoms. While possessing a gun in one's home is a necessary first step, "[t]he right to possess firearms for protection implies a corresponding right to acquire and maintain proficiency in their use; the core right wouldn't mean much without the training and practice that make it effective." *Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011). Citizens of amici states have an interest—indeed, a constitutional right—not merely in owning guns, but in being able to carry them *outside* the home, for both training and defensive purposes.

Amici also have an interest in the clarity of Second Amendment law. Even after the Supreme Court's landmark decisions in *District of Columbia v.*

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[1] The parties received timely notice and have consented to the filing of this amicus brief. No counsel for a party authored this brief in whole or in part. No person other than amici has made any monetary contributions intended to fund the preparation or submission of this brief.

Heller, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), lower courts have applied inconsistent standards in Second Amendment challenges to state firearm restrictions. Inconsistent decisions by the lower federal courts have left States uncertain as to the precise boundary between permissible and impermissible restrictions. These inconsistencies have also prevented citizens of *amici* States from exercising their right to carry and bear arms across State lines. The Ninth Circuit's en banc decision has only made this uncertainty worse by failing to engage with the argument that Hawaii's licensing scheme effectively amounts to a ban on carrying weapons—not merely a regulation.

Amici desire to curtail illegal and harmful gun activity without running afoul of the Second Amendment or burdening lawful gun owners. Clear precedent from this Court is necessary to achieve that goal.

SUMMARY OF THE ARGUMENT

The plain text of the Second Amendment protects the right to *bear* arms, not just to *keep* them. Yet Hawaii's firearm carrying regulatory regime functions as an outright ban on the right to carry guns outside the home for most people. It therefore violates the Second Amendment.

The Ninth Circuit, however, upheld Hawaii's law against George Young's Second Amendment challenge to it. In doing so, the court's en banc opinion revealed acute misunderstandings about the right to bear arms. First, the Second Amendment protects the People's right of self-defense. Second, this right extends outside of the home. Because both premises flow naturally from the text of the Second Amendment, this Court should grant certiorari to review the Ninth Circuit's erroneous ruling and ensure the sanctity of the Second Amendment.

But the Ninth Circuit's opinion wasn't just wrong—it deepened a growing circuit split on an important constitutional issue. The First, Seventh, and D.C. circuits have all held that the Second Amendment extends outside the home. The Second, Third, and Fourth circuits, meanwhile, have reached conclusions inconsistent with that principle even if they have not—as the Ninth Circuit did—expressly rejected it. This Court should grant certiorari to resolve this major circuit split.

Finally, on the merits, it is abundantly clear that Hawaii's ban on carrying firearms outside the home fails under any level of scrutiny. The basic problem is that it effectively prohibits carrying a firearm outside the home without sufficient justification. And the problem is only highlighted in

light of the text, history, and tradition of the Second Amendment. The law is therefore unconstitutional both inside and outside the usual "tiers of scrutiny" framework.

ARGUMENT

I. THE NINTH CIRCUIT MISUNDERSTOOD THE SCOPE OF THE SECOND AMENDMENT RIGHT.

A. The Second Amendment Guarantees the Fundamental Right of Self-Defense.

After ensuring protection of religious liberty, the freedom of speech, and the freedom of the press in the First Amendment, the Framers next guaranteed that "the right of the people to keep *and bear* arms, shall not be infringed." U.S. Const. amend. II (quoted in *Young v. Hawaii*, 992 F.3d 765, 828–29 [App.128] (9th Cir. 2020) (O'Scannlain, J., dissenting)). This Amendment protects "an individual right unconnected with militia service." *Heller*, 554 U.S. at 582; indeed, the "Second Amendment protects the right to keep and bear arms for the purpose of self-defense," and the right is incorporated against the States under the Fourteenth Amendment. *McDonald*, 561 U.S. at 749–50.

Notwithstanding these clear statements, some lower courts continue to place the Second Amendment on a lower level than the other Amendments in the Bill of Rights. *See, e.g.*, *Mance v. Sessions*, 896 F.3d 390, 398 (5th Cir. 2018) (Ho, J., dissenting from denial of rehearing en banc) ("[T]he Second Amendment continues to be treated as a 'second-class' right—as at

least three Justices have noted in recent years."). That is particularly true in the Ninth Circuit. *See Mai v. United States*, 974 F.3d 1082, 1104–05 (9th Cir. 2020) (VanDyke, J., dissenting from denial of rehearing en banc) ("Show me a burden—any burden—on Second Amendment rights, and this court will find a way to uphold it. Even when our panels have struck down laws that violate the Second Amendment, our court rushes in en banc to reverse course.").

The right to bear arms must "be enforced against the States under the Fourteenth Amendment according to the same standards that protect [fundamental] rights against federal encroachment." *McDonald*, 561 U.S. at 765. "Self-defense is a basic right, recognized by many legal systems from ancient times to the present day, and in *Heller*, [the Court] held that individual self-defense is 'the central component' of the Second Amendment right." *Id.* at 767.

B. Second Amendment Protections Extend Outside the Home.

The need for protection against physical danger applies both inside and outside of the home. "If the fundamental right of self-defense does not protect [citizens outside of their homes], then the safety of all Americans is left to the mercy of state authorities who may be more concerned about disarming the people than about keeping them safe." *Caetano v. Massachusetts*, 136 S. Ct. 1027, 1033 (2016) (Alito, J., concurring). The right to self-defense does not disappear upon stepping out one's front door.

The Second Amendment is also designed to allow the populace "to resist and throw off a tyrannical government," and such resistance would doubtless require the bearing of arms beyond an individual's home. *See Parker v. D.C.*, 478 F.3d 370, 383 (D.C. Cir. 2007), *aff'd sub nom. D.C. v. Heller*, 554 U.S. 570; *see also Silveira v. Lockyer*, 328 F.3d 567, 569 (9th Cir. 2003) (Kozinski, J., dissenting from denial of rehearing en banc) ("[T]yranny thrives best where government need not fear the wrath of an armed people."); *Nordyke v. King*, 319 F.3d 1185, 1196 (9th Cir. 2003) (Gould, J., specially concurring) ("The Second Amendment serves at least the following two key purposes: (1) to protect against external threats of invasion; and (2) to guard against the internal threat that our republic could degenerate to tyranny.").[2]

The Seventh Circuit, when considering a challenge to an Illinois law banning public carry of loaded guns, noted that the right "to bear" arms is protected on par with the right "to keep" arms. *Moore v. Madigan*, 702 F.3d 933, 936 (7th Cir. 2012). Storing firearms in one's home is "keeping," but not "bearing" those arms. The words "to bear" are redundant unless the Second Amendment protects some right beyond merely keeping a gun in one's own home. The Seventh Circuit concluded that the right to bear arms "implies a right to carry a loaded gun outside the home." *Id.* Reason dictates such a holding. As the Seventh

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[2] The majority in *Nordyke* rejected a Second Amendment challenge on the grounds that the Second Amendment created no individual rights, and thus the plaintiffs did not have standing. *See* 319 F.3d at 1191. This view has since been overturned by *Heller* and *McDonald*.

Circuit noted in *Moore v. Madigan*, people are usually more, not less, likely to face violent threats on the street than inside their homes. *Id.* at 937.

The *Moore* panel also reviewed historical English laws, going as far back as the Statute of Northampton in 1328, but the court found nothing supporting Illinois' claim that public carry of guns could be banned. It bears emphasis that British attempts to seize American weapons, presumably allowed under English law, were firmly opposed by the colonists and became a key cause of the Revolutionary War. *See Nordyke v. King*, 563 F.3d 439, 453 (9th Cir. 2009), vacated in light of *McDonald*, 611 F.3d 1015 (9th Cir. 2010) ("[T]he attempt by British soldiers to destroy a cache of American ammunition at Concord, Massachusetts, sparked the battles at Lexington and Concord, which began the Revolutionary War. For the colonists, the importance of the right to bear arms 'was not merely speculative theory. It was the lived experience of the age.'" (quoting Akhil Amar, THE BILL OF RIGHTS 47 (1998)). This undercuts the argument of the majority below that British weapon restrictions, meant to maintain the "king's peace," provide good precedent for gun control schemes under the U.S. Constitution. *See Young*, 992 F.3d at 815–16.

The D.C. Circuit has considered a case remarkably similar to this one. In *Wrenn v. District of Columbia*, the plaintiffs challenged a D.C. law that limited concealed carry permits "to those showing a 'good reason to fear injury to [their] person or property' or 'any other proper reason for carrying a pistol.'" *Wrenn*, 864 F.3d at 655 (quoting D.C. Code § 22-4506(a)-(b)). In practice, this meant that all but a small minority of D.C. residents were blocked from

carrying guns outside the home. The D.C. Circuit found such a restriction unacceptable. *Id.* at 665. But the Ninth Circuit's en banc decision allows exactly what the D.C. Circuit decision forbids.

This Court should take this opportunity to expressly reaffirm that the constitution's plain language means what it says—that the Second Amendment right to self-defense is not limited to the home. *See, e.g.*, *Wrenn*, 864 F.3d at 665; *Moore*, 702 F.3d at 936–37.

II. THE NINTH CIRCUIT'S EN BANC DECISION DEEPENS A MAJOR CIRCUIT SPLIT AND INCREASES CONFUSION ABOUT HOW TO APPLY *HELLER*.

The Ninth Circuit's opinion below employed a two-step test to Plaintiff's Second Amendment challenge. The Ninth Circuit adopted this test to implement *Heller* and *McDonald*, but the test is at odds with those cases. The Ninth Circuit first considered whether Hawaii's permitting regime "affect[ed] conduct that is protected by the Second Amendment." App.35 (citing *Silvester v. Harris*, 843 F.3d 816, 821 (9th Cir. 2016)). This inquiry hinged on the "historical understanding of the scope of the right." *Id.* If the regime burdened protected conduct, the court would then move to step two of the test and determine the appropriate level of scrutiny. App.36. Critically, the Ninth Circuit questioned the extent to which the Second Amendment applies outside the home at all, saying that "[*Heller's*] caveats left open questions concerning state restraints on persons, weapons, and other restrictions for possessing arms outside the home." App.34.

The en banc court noted disagreement amongst circuits even on the first prong of its test. *See* App.37 (noting that the First, Second, Third, and Fourth Circuits have upheld state statutes restricting—though not totally banning—open carry; whereas the Seventh and D.C. Circuits have struck down similar laws as unconstitutional). This disagreement over a fundamental question of the scope of the Second Amendment is reason enough for this Court to take this case.

There is another reason why the first prong of the Ninth Circuit's test warrants review. This Court recently granted certiorari to consider a State restriction on concealed carry in *New York State Rifle & Pistol Association v. Corlett* (No. 20-843, cert. granted 04/26/2021). But the Hawaii restrictions at issue here are no mere restriction, but rather a de facto *ban* on all carry—both concealed and open. The New York statute at issue in *Corlett* specifically limited the ability to carry concealed weapons. The *Corlett* petitioners were denied concealed-carry permits, but the defendants in that case may argue that the petitioners should have sought open-carry permits instead, shifting the focus of the case. In Hawaii, by contrast, the existing regime essentially bans all exercise of the right to bear arms outside the home, as the Ninth Circuit has already expressly held that the Second Amendment provides no protection for concealed carrying of weapons. *See Peruta v. Cty. of San Diego*, 824 F.3d 919 (9th Cir. 2016) (en banc). Thus, Hawaii's regime is more restrictive than New York's.[3] If the petitioners succeed in *Corlett,* then

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[3] *See also* William Baude, *Initial thoughts on the constitutional right to concealed carry in* NY Rifle and Pistol

Young in this case *a fortiori* merits relief. But even if the statute in *Corlett* is upheld, or if this Court sees fit to resolve the case on some other ground, Young's claim remains live, and this Court should consider his challenge to resolve a serious circuit split on the scope of the Second Amendment with respect to the open carry of weapons.

The en banc court below failed to even reach step two of the test, holding that "Young's challenge to Hawai'i's restrictions fails at step one of our framework and 'may be upheld without further analysis.'" App.123. Nonetheless, the majority's description of the second prong of its test is also flawed and heightens the need for this Court's review. The en banc panel engaged in a survey of historical statutes, dating back to medieval England, which regulated the carrying of weapons. App.43. It then concluded that "Hawai'i's licensing scheme stands well within our traditions" by "requir[ing] a license to carry a pistol or revolver, concealed or unconcealed." App.122.

As the dissent pointed out—*see* App.132—this analysis fails to recognize that Hawaii's licensing requirements prevent most law-abiding citizens from carrying a gun outside the home at all. *Cf. Staub v. City of Baxley*, 355 U.S. 313, 322 (1958) ("[A]n ordinance which . . . makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—

Association v. Corlett*, and a possible trip to Hawaii*, 29 April 2021, https://www.summarycommajudgment.com/blog/initial-thoughts-concealed-carry.

is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms."). *Shall*-issue permitting regimes, by contrast, which require citizens to apply for a license to carry a weapon but stipulate that all such applications be granted absent a criminal record or other red flags, are codified in many states; simply requiring a license to carry under such a regime is not unusual. Hawaii's scheme stands out not because a license is required to carry a weapon, but because such licenses are almost never granted, with only a few exceptions such as for law enforcement personnel and security guards. *See* App.267, n.21. The original panel opinion was correct in stating that "[r]estricting open carry to those whose job entails protecting life or property necessarily restricts open carry to a small and insulated subset of law-abiding citizens." App.267. A regime that protects Constitutional rights for a small subset of citizens, but denies them to the majority, is not a permissible regime.

This Court should grant certiorari not merely because the decision below was improper, but also because the majority misunderstood the proper use of history in a Second Amendment analysis under *Heller*. *Heller* made clear that "for most of our history, the question [of Second Amendment challenges to firearms restrictions] did not present itself," in part because the Second Amendment did not apply to the States at all until after incorporation. *Heller*, 554 U.S. at 626. Thus, the existence of State laws restricting firearms in the past would not establish the constitutionality of Hawaii's challenged law here—even if those historical laws involved actual bans on weapons, which most of them did not. And any older cases which were premised on the claim that the

Second Amendment only applies to militia service, and creates no individual rights, were squarely repudiated by *Heller* and should not be given weight in a historical analysis. App.146 (citing *Heller*, 554 U.S. at 592, 599). The majority did not use a survey of historical laws and practices to inform its understanding of the Second Amendment's text, but rather ignored the text altogether in favor of a slanted reading of the historical record. App.135. History can inform the interpretation of a text, but it cannot be used to justify ignoring a text. *See Heller*, 554 U.S. at 595. The majority's failure to seriously engage with the words "the right to keep and bear arms" was incorrect.

Because the petitioner has been denied both concealed carry and open carry permits, the en banc court's decision amounts to a decision that a State may constitutionally prevent most citizens from bearing arms outside the home at all. This places the decision in square conflict with *Gould v. Morgan*, 907 F.3d 659, 670 (1st Cir. 2018), *Moore v. Madigan*, 702 F.3d 933, 937, 942 (7th Cir. 2012), and *Wrenn v. District of Columbia*, 864 F.3d 650, 657-63 (D.C. Cir. 2017), which all held that the Second Amendment extends outside the home—indeed, the possibility of an armed confrontation, the specific situation in which a law-abiding citizen most needs a gun near to hand, is greater outside the home than inside. *See Wrenn v. D.C.*, 864 F.3d 650, 658 (D.C. Cir. 2017). This Court should grant certiorari to resolve the conflict.

III. THE HAWAII STATUTE IS UNCONSTITUTIONAL UNDER STRICT SCRUTINY, INTERMEDIATE SCRUTINY, OR A TEST BASED ON TEXT, HISTORY, AND TRADITION.

The Ninth Circuit doubled down on its view that "the level of scrutiny in the Second Amendment context should depend on the nature of the conduct being regulated and the degree to which the challenged law burdens the right." *See United States v. Chovan*, 735 F.3d 1127, 1138 (9th Cir. 2013) (cleaned up). This focus allowed the Ninth Circuit to breeze past the actual text of the Second Amendment, a legal error only this Court can remedy. The majority below drew heavily upon *Silvester v. Harris*, which short-circuited the test established by *Heller* and held that "[l]aws restricting conduct that can be traced to the founding era and are historically understood to fall outside of the Second Amendment's scope may be upheld without further analysis." App.35 (citing *Silvester v. Harris*, 843 F.3d 816, 821 (2016)).

Although this Court has not yet clarified the applicable standard of review, there is no question Hawaii Revised Statutes § 134-9 must be subjected to a much stricter test than rational-basis or balance-of-interests review, or any test that simply upholds any laws with historical precedents. And, under any appropriate test, § 134-9 fails to pass constitutional muster. The decision below merits reversal simply on the grounds that the majority upheld Hawaii's law "without further analysis" purely because the burdens placed on Young were "not within the scope of the right protected by Second Amendment." App.123 (citing *Silvester*, 843 F.3d at 821).

A. Hawaii's statute fails strict and intermediate scrutiny because it functions as a virtual ban on carrying firearms outside the home.

It bears emphasis that, by its text alone, the Second Amendment right is absolute: "[T]he right to keep and bear arms, shall not be infringed." U.S. Const. amend. II. This Court has observed that the Second Amendment was designed to "take[] certain policy choices off the table" entirely. *McDonald*, 561 U.S. at 790 (quoting *Heller*, 554 U.S. at 636). "As *Heller* made clear, '[a] statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would be clearly unconstitutional.'" *Jackson*, 746 F.3d 953, 960 (9th Cir. 2014) (quoting *Heller*, 554 U.S. at 629 (quoting *State v. Reid*, 1 Ala. 612, 616–617 (1840))).

As the right to keep and bear arms is enumerated and fundamental, *Amici* would support either applying strict scrutiny in this case, or else rejecting the "tiers of scrutiny" framework altogether in favor of interpreting the Second Amendment "based on text, history, and tradition," with no balancing test attached. *See Heller*, 670 F.3d at 1271 (Kavanaugh, J., dissenting).

Under Hawaii's regime, "no one other than a security guard—or someone similarly employed—ha[s] ever been issued an open carry license." App.184. Hawaii's virtual ban on open carry could not survive strict scrutiny. Even under intermediate scrutiny—which *Amici* contend fails to adequately protect the right to keep and bear arms—

§ 134-9 should be struck down. Under the Ninth Circuit's view of intermediate scrutiny, a law is unconstitutional unless the law's defenders can show "(1) the government's stated objective to be significant, substantial, or important; and (2) a reasonable fit between the challenged regulation and the asserted objective." *Chovan*, 735 F.3d at 1139; *cf. Ezell v. City of Chicago*, 846 F.3d 888, 893 (7th Cir. 2017) (calling for a "strong form of intermediate scrutiny" that required "a close fit" between the regulation at issue and the "actual public interest" served). Admittedly, Hawaii's objective of securing public safety is "significant, substantial, or important." *Id.* But by adopting what is in effect blanket ban on carrying of firearms outside the home, Hawaii has failed to seek any "reasonable fit" between its regulatory structure and its objective of public safety.

Hawaii's permitting scheme is clearly improper under intermediate scrutiny, for two reasons. First, academic studies indicate that States that allow carrying a weapon outside the home have lower rates of violent crime. *See, e.g.*, *Concealed Carry Permit Holders Across the United States* (July 16, 2015), Crime Prevention Research Center, https://crimeresearch.org/wp-content/uploads/2015/07/2015-Report-from-the-Crime-Prevention-Research-Center-Final.pdf; *see also* John R. Lott, *Concealed Carry Permit Holders Across the United States* (July 18, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3004915. Thus, Hawaii's regime likely does not achieve its asserted public-safety goals at all—or any such benefits are doubtful and marginal at best.

And second, even if public safety were marginally improved by banning the public carry of weapons—which *Amici* do not concede—a virtual ban would still not qualify as a "reasonable fit" under an intermediate balancing test. Even if there were such marginal public-safety benefits, law-abiding citizens capable of passing a background check should not be barred absolutely from carrying weapons. Instead of a total ban, Hawaii could pursue a "shall-issue" regime in which the State bears the burden of proof for denying an applicant a weapon, rather than Hawaii's regime in which an applicant must prove his own worthiness to exercise a Constitutional right.

Thus, the benefits of § 134-9 are non-existent. And the costs are high because § 134-9 strikes at the heart of a right the Second Amendment guarantees, self-protection. And so § 134-9 fails intermediate scrutiny.

B. The Hawaii statute cannot survive when examined in light of the text, history, and tradition of the Second Amendment.

The Supreme Court has made "it clear that [the right to bear arms for self-defense] is deeply rooted in this Nation's history and tradition." *McDonald*, 561 U.S. at 768 (internal quotation marks omitted). And so, Hawaii's permitting scheme cannot be saved by any tradition or its "historical pedigree." *See* App.106.

When on the D.C. Circuit, it was then-Judge Kavanaugh's view that "courts are to assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as strict or intermediate

scrutiny." *See Heller*, 670 F.3d at 1271 (Kavanaugh, J., dissenting); *see also* Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self–Defense: An Analytical Framework and a Research Agenda,* 56 UCLA L. REV. 1443, 1463 (2009). When considered against text, history, and tradition, it is clear Hawaii's statute should fail.

The Seventh Circuit correctly recognized that the text of the Second Amendment "implies a right to carry a loaded gun outside the home." *Madigan*, 702 F.3d at 936. Any contrary conclusion amounts to eliminating the word "bear" from the phrase "keep and bear arms," and cannot be reconciled with the text of the Second Amendment. That alone is enough to doom the Hawaii statute, which functions as a virtual ban on carrying a gun outside the home.

While *Heller* identified certain "longstanding" firearms restrictions as "presumptively lawful," the examples given—*see Heller,* 554 U.S. at 626–27 & n.26 (banning "felons and the mentally ill" from gun possession, restricting carrying in "schools and government buildings," and "imposing conditions and qualifications on the commercial sale of arms")—do not come close to the level of regulation promulgated under Hawaii's permitting scheme. It is true that the *Heller* Court labelled this list "non-exhaustive," *id.* at 627, n.26, but that does not mean that *any* "longstanding" firearms restriction is allowed under the Second Amendment. "A longstanding, widespread practice is not immune from constitutional scrutiny." *Payton v. New York*, 445 U.S. 573, 600 (1980). And this is particularly true for restrictions, like Hawaii's, that eviscerate the plain meaning of the Second Amendment's text.

Many of the nineteenth and twentieth-century cases cited by Plaintiffs, involving unsuccessful challenges to various state regulations, are not relevant for a very simple reason: Prior to *McDonald* in 2010, it was not clear that the Second Amendment applied to the States at all. The fact that States restricted—in some cases sharply restricted[4]—the right to bear arms prior to incorporation is not a valid excuse for States to continue doing so now that *McDonald* has conclusively settled the issue of incorporation. *See McDonald*, 561 U.S. at 846–50 (Thomas, J., concurring) (noting the numerous restrictions on gun ownership imposed on free blacks prior to incorporation, but also that incorporation rendered such restrictions unconstitutional).

At bottom, § 134-9 cannot survive strict or intermediate scrutiny. And its broad restrictions cannot survive in light of a proper understanding of text, history, and tradition. Thus, it is unconstitutional under the Second Amendment. Only this Court can undo the Ninth Circuit's en banc decision.

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[4] The original panel opinion correctly noted that, after the Fourteenth Amendment was ratified but before it had been used to incorporate much of the Bill of Rights, many Southern states passed harsh gun control measures designed to disarm freed African-Americans, and these laws were generally upheld. App.244.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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