No. 12-16258

In The United States Court of Appeals For The Ninth Circuit

CHRISTOPHER BAKER,

Plaintiff-Appellant,

v.

LOUIS KEALOHA, ET AL.,

Defendants-Appellees.

On Appeal from the United States District Court
For Hawaii, Honolulu
No. 1:11-cv-00528-ACK -KSC
The Honorable Alan C. Kay
United States Senior District Court Judge

BRIEF OF PLAINTIFF-APPELLANT

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APPELLANT'S BRIEF

I. JURISDICTIONAL STATEMENT

Plaintiff-Appellant, Christopher Baker ("Mr. Baker") seeks preliminary injunctive relief barring the enforcement of Hawaii's unreasonable prohibitions on bearing of firearms, non-lethal weapons, and/or ammunition both within and outside of the home. *See* Haw. Rev. Stat. §§ 134-2, 134-5, 134-9(c), 134-23, 134-24, 134-25, 134-26. Alternatively, Mr. Baker seeks preliminary injunctive relief barring Defendants from conditioning issuance of permits to carry handguns upon the chief's subjective assessments of an applicant's demonstration that the applicant's is an "exceptional case" and/or the applicant's "appearance of suitability" pursuant to Section 134-9 of the Hawaii Revised Statutes. And more specifically, Mr. Baker seeks a permit pursuant to Section 134-9 during the pendency of this lawsuit.

The statutory provisions cited above, considered together or individually, violate citizens' rights as guaranteed by the Second and Fourteenth Amendments to the United States Constitution. Accordingly, Mr. Baker sought relief pursuant to 42 U.S.C. § 1983 and the District Court has jurisdiction over this case pursuant to 28 U.S.C. §§ 1331 and 1343.

On April 30, 2012, the District Court denied Mr. Baker's Motion for Preliminary Injunction. Excerpt of Record ("ER") 232-56. Mr. Baker timely filed

his Notice of Appeal on May 29, 2012. ER 257-58.[1] And, this Court has jurisdiction over this appeal pursuant to 28 U.S.C. §§ 1291 and 1292(a).

II. STATEMENT OF THE ISSUE PRESENTED

Whether the District Court based its decision on an erroneous legal standard and/or abused its discretion in denying Mr. Baker's Motion for Preliminary Injunction, when it held: a) that the rights guaranteed by the Second Amendment extinguish at the threshold of the front door, may be limited to "exceptional cases" and/or may be left to the sole discretion of a government official; b) that Hawaii does not prohibit the bearing of operational handguns within the confines of the home; and, c) that due process protections are not offended where a state vests sole discretion in a government official to arbitrarily determine which citizens may exercise fundamental rights, without providing citizens any meaningful opportunity to be heard, without providing any reasons or justifications for the government official's decision, and without affording aggrieved citizens any opportunity to seek review of that official's decision.

III. REVIEWABILITY AND STANDARD OF REVIEW

Whether to grant Mr. Baker's Motion for Preliminary Injunction was, thus far, the core issue before the District Court. The issue was specifically raised via

[1] Mr. Baker amended his Notice of Appeal that same day, changing the title of the document from "Notice of Appeal of Order Denying Preliminary Injunction" to "Preliminary Injunction Appeal." ER 266-67.

Mr. Baker's Motion for Preliminary Injunction, and briefed extensively by both parties. The District Court ruled on each of these issues. ER 232-56.

"The district court's preliminary injunction order may be reversed only if the district court abused its discretion, or based its decision on an erroneous legal standard or on clearly erroneous findings of fact." *Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1397, n. 2 (9th Cir. 1997) (citations omitted); *Vision Sports, Inc. v. Melville Corp.*, 888 F.2d 609, 612 (9th Cir. 1989).

IV. STATEMENT OF THE CASE

Mr. Baker enjoys a fundamental constitutional right to bear arms. This right does not extinguish at the threshold of Mr. Baker's front door. Indeed, the Second Amendment guarantees the right to bear firearms for protected purposes, such as self defense, militia training, and hunting which cannot be accomplished within the confines of a home.

Alternatively, Hawaii's prohibitions on keeping and bearing firearms are unreasonable and unduly restrictive. The plain language of those restrictions are irreconcilable with the plain meaning, construed to its narrowest interpretation, of the holding of *District of Columbia v. Heller*, 554 U.S. 570 (2008).

Despite these constitutional guarantees, Hawaii has erected a stringent system of prior restraint designed to limit the exercise of the fundamental constitutional right to bear arms – a prior restraint that has proven so successful

that there is effectively no right to bear arms in Hawaii. This prior restraint is accomplished through the wholesale prohibition on the bearing of arms.

The only exception to this wholesale prohibition is found in Section 134-9 of the Hawaii Revised Statutes. This provision contemplates the issuance of carry permits but only when an applicant shows that his or hers is an "exceptional case" and when the applicant can show "reason to fear injury to [his or her] person or property." Section 134-9 further vests unbridled discretion in the chief of police to determine whether a permit should issue. And, it fails to define what constitutes an "exceptional case" or what proof an applicant must present to satisfy the chief that the applicant has reason to fear such injury.

Also, Section 134-9 vests unbridled discretion with chief of police to determine whether an applicant "appears suitable." Again, the statute is silent as to what circumstances or proof may satisfy such a requirement. Thus, the chief of police is left to arbitrarily choose those applicants that may exercise their rights and those that may not. In practice, this is an easy decision as all applications submitted by those who are not "engaged in the protection of life and property," *i.e.*, security guards or armored truck attendants, are routinely denied without explanation as was Mr. Baker's. ER 94-105 (showing all permits issued were "security" related and none were issued for "citizens").

Perhaps even worse, aggrieved applicants have no means of seeking any review, judicial or otherwise, of the chief's decision. There is no administrative, judicial or appellate review of application denials. Instead, the applicants are currently left to seek relief from the courts in separate civil actions.

While Mr. Baker recognizes that Defendants have an interest in firearms regulation to promote public safety, just as it may regulate the time, place, or manner of speech and/or public assemblies, it may not reserve for itself the power to arbitrarily decide, in all cases, whether individuals deserve to exercise their fundamental constitutional right to bear arms for self-defense. Defendants must be enjoined from imposing this prior restraint, accomplished through the sole and unbridled discretion of the chief of police.

On August 30, 2011, Mr. Baker filed a Complaint seeking declaratory, injunctive, and other relief, in which he challenges: Hawaii's unreasonable prohibition of his right to bear arms and other protected weapons; Defendants' assertion of authority to deny handgun carry permits upon the chief's assessment of whether an "exceptional case" exists and/or whether the applicant is otherwise fit and/or qualified; and, the lack of any due process protections in the application process or thereafter. ER 1. On the same day, Mr. Baker filed a Motion for Preliminary Injunction ("Motion"). ER 2-4.

The Motion was not heard until March 21, 2012. ER 122-92. After hearing the arguments, the district court indicated its intent to deny the Motion. ER 190. The written Order was filed on April 30, 2012 and is discussed below. ER 193-256. Mr. Baker timely filed his Notice of Appeal on May 29, 2012. ER 259-73.

V. STATEMENT OF FACTS

A. Hawaii prohibits the bearing of protected weapons for all purposes.

Hawaii law generally bars the carrying of firearms and protected non-lethal weapons. See Haw. Rev. Stat. §§ 134-2, 134-5, 134-9(c), 134-23, 134-24, 134-25, 134-26. This bar includes but is not limited to the bearing of firearms within the home. Haw. Rev. Stat. §§ 134-24 (requiring that a firearm must be *confined*, a term which is not defined, to a possessor's residence or sojourn, and criminalizing the carrying of a firearm other than a pistol with no exception for carrying in the home), 134-25 (prohibits possession or carrying of pistols outside of an enclosed container with no exception for carrying within the home).

The only way a qualified law-abiding citizen can bear a handgun is to obtain a permit pursuant to Section 134-9 of the Hawaii revised Statutes. Applications are made to the chief of police. Haw. Rev. Stat. § 134-9. Applicants seeking a permit must somehow satisfy the chief that theirs is an "exceptional case" and that they have "reason to fear injury to person or property." *Id.* Further, in addition to

background checks and fitness and qualification requirements, the applicant must convince the chief that he or she "appears suitable" to bear arms. *Id*.

The chief is vested with sole discretion to issue or deny a permit. And, an applicant, aggrieved by denial of the application, has no recourse. No procedure for administrative, judicial or other review of such denial exists in the code or otherwise. Thus, absent relief obtained in a separate civil action, such as this one, the chief's decision is final.

In practice, this prior restraint operates as an absolute bar on law-abiding citizens' ability to bear arms. All applications submitted by those who are not "engaged in the protection of life and property" (*i.e.*, security guards or armored truck attendants) are, without any known exceptions, routinely denied. ER 94-105 (showing all permits issued were "security" related and none were issued for "citizens").

B. *Despite being fit and qualified, Mr. Baker's application was denied for an alleged failure to show "sufficient justification."*

Mr. Baker is a law-abiding citizen of Honolulu, Hawaii, fully qualified under federal and Hawaii law to purchase and possess firearms. ER 5-10, 67-68, 72-82. On July 25, 2010, Mr. Baker wrote the Honolulu Police Department requesting a permit pursuant to Section 134-9 of the Hawaii Revised Statutes. ER 69-70, 198. In response to this letter, Mr. Baker was instructed to complete an

application form in person. ER 198. Mr. Baker complied with this request on August 31, 2010. ER 198.

On September 18, 2010, Mr. Baker received a letter denying his application. ER 124, 251. The letter did not express concern over Mr. Baker's fitness or qualifications. ER 71, 198. Instead, the letter denied Mr. Baker's application stating only: "[w]e do not believe that the reasons you provided constitute sufficient justification to issue you a permit." ER 71, 198.

Mr. Baker seeks to exercise his Second Amendment right to carry a handgun for personal protection. ER 8.

C. *The lower court erroneously denied Mr. Baker's request for a preliminary injunction.*

In its April 30, 2012 Order, the lower court denied Mr. Baker's request for a preliminary injunction. ER 256. Three specific erroneous holdings are dispositive of this appeal because the remainder of the court's analysis depended on those holdings. *See* ER 231-256.

First, the court below erroneously held that Mr. Baker had no right to bear arms outside his home. ER 239, 246. The court acknowledged that Mr. Baker "emphasi[zed] that the Supreme Court dedicated eight pages [in *Heller*] to analyzing the meaning of the phrase 'bear arms,' concluding that it 'is the right to carry weapons in case of confrontation.'" ER 237. Nevertheless, the lower court did not apply that definition of "bear" taken from *Heller*, to this case.

Instead, the court recognized that the "state of Second Amendment case law in this Circuit, and the applicable level of scrutiny is in flux" and "heed[ed] the Third Circuit's admonition in *Masciandaro*." ER 238 ("'[o]n the question of *Heller*'s applicability outside the home environment, we think it prudent to await direction from the Court itself.'") (*quoting United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011)). Thus, the court "join[ed] other courts in awaiting direction from the Supreme Court with respect to the outer bounds of the Second Amendment." ER 236-37 n. 20.

The court also found that intermediate scrutiny would apply to Mr. Baker's Second Amendment claims. ER 246. And, because the government has a "compelling interest in preventing crime," Mr. Baker would not succeed on the merits of his lawsuit. ER 246. Thus, the court effectively held that the government's interest in preventing crime swallows the Second Amendment rights of all law-abiding citizens.

Second, despite the plain language of the Hawaii statutes, the court found that Hawaii's prohibitions on the bearing of firearms did not apply to the bearing of firearms inside the home. ER 240 n. 24, 244-46. And, while apparently recognizing that Hawaii law prohibits the bearing of firearms in non-sensitive places, the court "decline[d] to extend the reach of the Second Amendment right to

bear arms to all 'non-sensitive' places without further guidance from the higher courts." ER 245.

Third, in a footnote, the court summarily dismissed Mr. Baker's argument that Section 134-9 fails to provide adequate due process protections to applicants. ER 247 n. 31. The court did not determine what due process protections, if any, Section 134-9 provides. *Id*. Instead, the court correctly noted that Mr. Baker's "due process argument is based upon his assertion that he has a fundamental Second Amendment right to a gun license under Section 134-9. *Id*. And because, according to the court, there is no right to bear arms outside the home, there need be no due process protections. *Id*.

The erroneous holding that no right to bear arms exists outside the home not only required the denial of Mr. Baker's due process claims, but also dictated the remainder of the court's analysis regarding the issuance of Mr. Baker's requested preliminary injunction. ER 247-56. Thus, the court denied preliminary injunctive relief. ER 256.

VI. SUMMARY OF ARGUMENT

Four years ago, the United States Supreme Court issued the landmark decision styled *District of Columbia v. Heller*, 554 U.S. 570 (2008). In that case, the Court held that "ban[s] on handgun possession in the home violate the Second Amendment as does [a] prohibition against rendering any lawful firearm in the

home operable for the purpose of immediate self-defense." *Heller*, 554 U.S. at 635. Nevertheless, Hawaii continues to prohibit the bearing of operable handguns even within the home.

Further, the *Heller* Court clearly intended that the fundamental right to bear arms extend beyond the threshold of the front door. There is no dispute that states may regulate the right in any number of ways not relevant here. But there is also no disputing the fact that the *Heller* Court additionally held that "[a]t the time of the founding, as now, to 'bear' meant to 'carry.'" *Id*. at 584 (citations omitted). And, that the protected purposes necessitating the right, secured by the Second Amendment and identified by *Heller*, cannot be accomplished within the confines of the home. Defendants have offered no alternative explanation as to the meaning of the term "bear"; and there can be little serious dispute as to the definition supplied by the United Supreme Court in *Heller*, *supra*. Defendants have also offered no explanation as to how the activities protected by the Second Amendment could be accomplished within the confines of the home.

Two years after *Heller*, in *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), the Court held that the right to keep and bear arms was a fundamental right, made applicable to the states through the Fourteenth Amendment. Thus, as with any other fundamental right, the government must regulate the exercise of Second Amendment rights pursuant to objective, well-defined standards – standards absent

from Section 134-9 of the Hawaii Revised Statutes. Prior restraints cannot turn on the personal whims and arbitrary assessments of one government official, particularly where there is no opportunity for citizens to be heard or seek further review of the official's decision.

To the extent that the discretionary licensing scheme set forth in Section 134-9 implicates the Equal Protection Clause, the case might well be decided under some level of means-end scrutiny. Here, at least heightened scrutiny would apply as law-abiding citizens may not exercise their fundamental right to bear arms unless their individual circumstances constitute an "exceptional case," an undefined determination left to the sole discretion of the chief of police. Thus, the exercise of the right to bear arms constitutes substantial burden on the right to bear arms, heightened scrutiny applies, and permitting citizens to exercise the right only in "exceptional cases" (and then at the whim of the chief of police) cannot overcome such a level of scrutiny.

Nevertheless, a simpler option exists. In deciding this case, it is enough to acknowledge that the exercise of fundamental rights do not apply only in "exceptional cases." Further, access to these rights does not turn on the unbridled discretion of a government official regardless of the feelings of the government official as to the propriety of the right. As the *Heller* Court observed, "the

enshrinement of constitutional rights necessarily takes certain policy choices off the table." *Heller*, 554 U.S. at 636.

Yet, when denying Mr. Baker's requested preliminary injunction, the court below applied an erroneous legal standard. Specifically, the court found that there is no right to bear arms outside the home, departed from the plain language of Hawaii's statutory prohibition of bearing firearms within the home, and applied intermediate scrutiny to this analysis. Further, the court abused its discretion in declining to determine the scope of the Second Amendment rights, despite having been squarely confronted with that question.

VII. ARGUMENT

A. *The right to self-defense does not extinguish at the threshold of one's front door.*

There is no dispute that *Heller* squarely held that citizens have the right to *keep* firearms within their homes. *Heller*, 554 U.S. at 635. However, Defendants (and the anticipated *amici*) would have this Court somehow construe the observation in *Heller* that "[u]nder any of the standards of scrutiny the Court has applied to enumerated constitutional rights, this prohibition – in the place where the importance of the lawful defense of self, family, and property is *most* acute – would fail constitutional muster" to mean that no right exists beyond the threshold of the front door. *Id*. at 571.

This Court should not be seduced into adopting such a strained reading of *Heller* for at least three reasons:

1. The *Heller* Court, itself, rejected this strained reading;

2. The constitutionally protected purposes which are secured by the Second Amendment cannot be accomplished within the home; and

3. Such an interpretation would abrogate the entire right to *bear* arms, which is separate and distinct from the right to *keep* arms.

Each of these reasons is discussed below.

Heller holds that the right applies outside the home.

The *Heller* Court devoted eight pages of its decision to defining the term "bear." The Court specifically stated:

> At the time of the founding, as now, to "bear" meant to "carry." See Johnson 161; Webster; T. Sheridan, A Complete Dictionary of the English Language (1796); 2 Oxford English Dictionary 20 (2d ed.1989) (hereinafter Oxford). When used with "arms," however, the term has a meaning that refers to carrying for a particular purpose—confrontation. In *Muscarello v. United States*, 524 U.S. 125, 118 S.Ct. 1911, 141 L.Ed.2d 111 (1998), in the course of analyzing the meaning of "carries a firearm" in a federal criminal statute, Justice GINSBURG wrote that "[s]urely a most familiar meaning is, as the Constitution's Second Amendment ... indicate[s]: 'wear, bear, or carry ... upon the person or in the clothing or in a pocket, for the purpose ... of being armed and ready for offensive or defensive action in a case of conflict with another person.' " *Id.*, at 143, 118 S.Ct. 1911 (dissenting opinion) (quoting Black's Law Dictionary 214 (6th ed.1998)). We think that Justice GINSBURG accurately captured the natural meaning of "bear arms." Although the phrase implies that the carrying of the weapon is for the purpose of "offensive or defensive action," it in no way connotes participation in a structured military organization.

> From our review of founding-era sources, we conclude that this natural meaning was also the meaning that "bear arms" had in the 18th century. In numerous instances, "bear arms" was unambiguously used to refer to the carrying of weapons outside of an organized militia.

Heller, 554 U.S. at 584. After this plain recognition that the term "bear" means exactly what it is commonly understood to mean, *i.e.*, to carry, the Court then conducted an exhaustive historical analysis, confirming its previously stated conclusion that the term "bear" meant at the time of the framing what it means now:

> From our review of founding-era sources, we conclude that this natural meaning was also the meaning that 'bear arms' had in the 18th century. In numerous instances, "bear arms" was unambiguously used to refer to the carrying of weapons outside of an organized militia. The most prominent examples are those most relevant to the Second Amendment: Nine state constitutional provisions written in the 18th century or the first two decades of the 19th, which enshrined a right of citizens to "bear arms in defense of themselves and the state" or "bear arms in defense of himself and the state." It is clear from those formulations that "bear arms" did not refer only to carrying a weapon in an organized military unit. Justice James Wilson interpreted the Pennsylvania Constitution's arms-bearing right, for example, as a recognition of the natural right of defense "of one's person or house"—what he called the law of "self preservation." 2 Collected Works of James Wilson 1142, and n. x (K. Hall & M. Hall eds.2007) (citing Pa. Const., Art. IX, § 21 (1790)); see also T. Walker, Introduction to American Law 198 (1837) ("Thus the right of self-defence [is] guaranteed by the [Ohio] constitution"); see also *id.*, at 157 (equating Second Amendment with that provision of the Ohio Constitution). That was also the interpretation of those state constitutional provisions adopted by pre-Civil War state courts. These provisions demonstrate—again, in the most analogous linguistic context—that "bear arms" was not limited to the carrying of arms in a militia.

> The phrase 'bear Arms' also had at the time of the founding an idiomatic meaning that was significantly different from its natural meaning: 'to serve as a soldier, do military service, fight' or 'to wage war.' See Linguists' Brief 18; *post,* at 2827 – 2828 (STEVENS, J., dissenting). But it *unequivocally* bore that idiomatic meaning only when followed by the preposition 'against,' which was in turn followed by the target of the hostilities. See 2 Oxford 21. (That is how, for example, our Declaration of Independence ¶ 28, used the phrase: "He has constrained our fellow Citizens taken Captive on the high Seas to bear Arms against their Country ....") Every example given by petitioners' *amici* for the idiomatic meaning of "bear arms" from the founding period either includes the preposition "against" or is not clearly idiomatic. See Linguists' Brief 18–23. Without the preposition, "bear arms" normally meant (as it continues to mean today) what Justice GINSBURG's opinion in *Muscarello* said.

Id. at 584-87.

The majority then individually rejected each of Justice Stevens' arguments, all of which advocated limiting the definition of the term "bear" more narrowly than its common understanding. Specifically, Justice Stevens believed that the term "bear arms" should be limited to bearing arms for military service. *Id*. Noting that "[n]o dictionary has ever adopted" such a limited definition, the majority sharply criticized the limitation as an "absurdity" because: it would limit the Second Amendment to a right to fight and wage war but not to carry a weapon; it would cause the term "arms" to take on a different definition depending on whether it was the object of "keep" or "bear"; the historical federal authorities, relied by proponents of the limitation also include terms such as "'carry arms,' 'possess arms,' and 'have arms' – though no one thinks that those *other* phrases

also had special military meanings"; and, numerous other historical sources use the term "bear arms" in nonmilitary contexts. *Id*. at 585-88. During this discussion the majority repeatedly affirmed what it most plainly stated as follows: "bear arms means, *as we think, simply the carrying of arms* . . ." *Id*. at 590 (emphasis added).[2]

Accordingly, "the Second Amendment creates individual rights, *one of which* is keeping operable handguns at home for self-defense." *United States v. Skoien*, 614 F.3d 638, 640 (7 th Cir. 2010) (*en banc*) (emphasis added). And, "the core right identified in *Heller* [is] the right of a law-abiding responsible citizen to possess and carry a weapon for self-defense." *United States v. Chester*, 628 F.3d 673, 683 (4th Cir. 2010).

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[2] Lower courts are bound by *Heller*'s discussion of the meaning of "bear arms." This discussion was more than mere dictum:

> When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound . . . the principle of *stare decisis* directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law . . .

Seminole Tribe of Fla. v. *Florida*, 517 U.S. 44, 67 (1996) (citations and internal quotation marks omitted). Thus, a statement that "explains the court's rationale . . . is part of the holding," *United States* v. *Bloom*, 149 F.3d 649, 653 (7th Cir. 1998), while statements "not necessary to the decision" of the case "have no binding or precedential impact." *Export Group v. Reef Indus., Inc.*, 54 F.3d 1466, 1472 (9th Cir.1995) (adopting Black's Law Dictionary definition of "dictum" as "an observation or remark ... not necessarily involved in the case or essential to its determination").

Despite the *Heller* majority's flat rejection of narrowing the definition of the term "bear arms" beyond its common understanding, Defendants and the *amici* effectively argued that "bear arms" should be interpreted to apply only within the home. This definition completely abrogates the right to "bear arms," swallowing the second idiom of the Second Amendment (the right to "bear arms") into the first (the right to "keep arms"). It is even more absurd (and less supported by historical authority) to hold that the historical definition of "bear arms" was intended to apply only within the confines of the home than it is, as found by the *Heller* majority, to limit the term to military applications. And, certainly, no dictionary has ever adopted any such a limited and illogical definition of the word "bear."

To adopt the Defendants' definition of "bear" would completely redefine the common understanding of the term into an incomprehensible definition, as unimaginable today as it was in the 18th Century. "Grotesque." *Heller*, 554 U.S. at 588. Indeed, such limitation is wholly irreconcilable with the specific finding of the majority as to the meaning of the term "bear arms":

> Putting all of these textual elements together, we find that they guarantee the individual right to possess **and carry weapons in case of confrontation**. This meaning is strongly confirmed by the historical background of the Second Amendment.

Id. at 592 (emphasis added).

Further, *Heller* specifically stated that Second Amendment protection was "most acute" within the home. *Id*. at 571. This necessarily implies that the

Second Amendment guarantees the right to carry arms in places where the need for protection is less acute, *i.e.*, outside the home. As stated by the Honorable Paul V. Niemeyer, of the Fourth Circuit Court of Appeals:

> The [*Heller*] Court stated that its holding applies to the home, where the need 'for defense of self, family, and property *is most acute*,' suggesting that some form of the right applies where that need is not 'most acute.' Further when the Court acknowledged that the Second Amendment was not unlimited, it listed as examples of regulations that were presumptively lawful, those 'laws forbidding the carrying of firearms in sensitive places such as *schools and government buildings*.' If the Second Amendment right were confined to self defense *in the home*, the Court would not have needed to express a reservation for 'sensitive places' outside of the home.

United States v. Masciandaro, 638 F.3d 458, 468 (4th Cir. 2011).

Accordingly, *Heller* has already determined that the right to bear arms applies beyond the threshold of his front door. As one District Court Judge has observed:

> The fact that courts may be reluctant to recognize the protection of the Second Amendment outside the home says more about the courts than the Second Amendment. Limiting this fundamental right to the home would be akin to limiting the protection of First Amendment freedom of speech to political speech or college campuses.

United States v. Richard Timothy Weaver, et. al., No. 2:09-cr-00222, Memorandum Opinion and Order, pages 8-9 n. 7 (S.D. W. Va. March 7, 2012) (attached as ER 16-37).

The constitutionally protected purposes which are secured by the Second Amendment cannot be accomplished within the home.

The *Heller* Court also identified key purposes for which the Second Amendment was codified. For example, the core of the Second Amendment is to effectuate the inalienable right to self defense, which "was by the time of the founding understood to be an individual right protecting against both *public* and private violence." *Heller*, 554 U.S. at 592, 594 (emphasis added). And, "self-defense has to take place wherever [a] person happens to be." *Masciandaro*, 638 at 468 (Niemeyer, J., concurring) (*quoting* 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, 1515-18 (2009)).

Further, when rejecting the suggested definition of bear that would limit the term to only a military application, the *Heller* Court stated "[t]he prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right; most undoubtedly thought it *even more important for self-defense and hunting*." *Heller*, 554 U.S. at 599. Clearly, neither hunting nor militia training can be accomplished within the confines of the home.

Because these key purposes for the very existence of the Second Amendment simply cannot be accomplished within the confines of a home, it is not surprising that various United States District Courts are also finding that the right extends beyond the home:

> The Supreme Court itself has acknowledged a Second Amendment right to protect oneself not only from private violence, but also from public violence. *See Heller*, 554 U.S. at 594 (stating that, by the time of the founding, the right to have arms was "fundamental" and "understood to be an individual right protecting against both public and private violence.") The *Heller* Court additionally mentioned militia membership and hunting as key purposes for the existence of the right to keep and bear arms. Confining the right to the home would unduly eliminate such purposes from the scope of the Second Amendment's guarantee.

United States v. Richard Timothy Weaver, et. al., No. 2:09-cr-00222, Memorandum Opinion and Order, page *4 (S.D. W. Va. March 7, 2012) (unpublished) (attached as ER 16-37).

The United States District Court for the District of Maryland also found that:

> In addition to self-defense, the right was also understood to allow for militia membership and hunting. To secure these rights, the Second Amendment's protections must extend beyond the home: neither hunting nor militia training is a household activity, and 'self defense has to take place wherever [a] person happens to be.'

Raymond Woollard, et. al. v. Terrence Sheridan, et. al., Civil Case No. L-10-2068, Memorandum at *23 (D. Md. March 2, 2012) (unpublished) (attached as ER 38-60). Thus,

> Maryland's requirement of a 'good and substantial reason' for issuance of a handgun permit is insufficiently tailored to the State's interest in public safety and crime prevention. The law impermissibly infringes the right to keep and bear arms, guaranteed by the Second Amendment.

Id. at *10 (citations omitted) (ER 48).

The United States District Court for the District for the Western Division of North Carolina has also found:

> Although considerable uncertainty exists regarding the scope of the Second Amendment right to keep and bear arms, it undoubtedly is not limited to the confines of the home. In *Heller*, the Supreme court found that the Second Amendment includes 'the right to protect[] [oneself] against both *public* and private violence,' thus extending the right in some form to wherever a person could become exposed to public or private violence.' *United States v. Masciandaro*, 638 F.3d 458, 467 (4th Cir 2011) (Niemeyer, J., writing separately as to Part III.B) (*quoting Heller*, 128 S.Ct. at 2799). 'Moreover, the right to keep and bear arms was found to have been understood to exist not only for self-defense, but also for membership in a militia and for hunting, neither of which is a home-bound activity.' *Id*. at 468 (citation omitted); *see also Heller*, 128 S.Ct. at 2801 (noting that the right to keep and bear arms was valued not only for preserving the militia, but 'more importantly for self-defense and hunting'). Therefore, the Second Amendment right to keep and bear arms 'is not strictly limited to the home environment but extends in some form to wherever those activities or needs occur.'

Michael Bateman, et. al. v. Beverly Perdue, et. al., No. 5:10-CV-265-H (W.D.N.C. March 29, 2012) (unpublished) (attached as ER 122-138).

These holdings are wholly consistent with the United States Supreme Court's first endeavor into the meaning of the Second Amendment. *United States v. Miller*, 307 U.S. 174 (1939). There, the issue was whether a sawed-off shotgun could be transported from Oklahoma to Arkansas – which obviously could not be accomplished inside the home. *Id*. at 175. Thus, regardless of what could be construed from the *Miller* opinion, it clearly suggests that the Second Amendment applies outside the home.

The key purposes for which the Second Amendment exists cannot be accomplished within the home. Accordingly, the Second Amendment cannot be held to extinguish at the threshold of the front door.

Defendants advocate the abrogation of the right to bear arms.

The Second Amendment specifically protects the right "to keep ***and*** bear arms." U.S. Const. amend. II. Other Amendments within the Bill of Rights use similar language in guaranteeing one or more right or facet of the same right. For example, the Sixth Amendment guarantees the right to a "speedy and public trial." U.S. Const. amend. VI. That clause is understood to guarantee both a speedy *and* a public trial. The Eighth Amendment protects people from "cruel and unusual punishment." U.S. Const. amend. VIII. That clause is also understood to prohibit both cruel punishments *and* unusual punishments. Like the Sixth and the Eighth Amendments, the Second Amendment refers to two distinct concepts – the keeping of arms and the bearing of arms. *See Heller*, 554 U.S. at 584 (the Second Amendment's "words and phrases were used in their normal and ordinary as distinguished from technical meaning.").

Should this Court adopt the Defendants' strained and limited interpretation of *Heller*, the right to bear arms would be completely abrogated. Citizens would be left only with the right to keep arms within the confines of their home. Clearly that was neither the intent of the framers nor of the *Heller* majority.

It is important to, again, note that Mr. Baker is not suggesting that Hawaii cannot regulate permitting and prevent the bearing of firearms in sensitive places, such as schools and government buildings. Such regulations are entirely consistent with the Second Amendment. However, what is in effect an absolute bar, where the only exception is at the whim of one government official with no means to review that official's decision, cannot pass constitutional muster. Indeed, Hawaii's prohibition is so extensive that it runs afoul of the narrowest interpretation of *Heller*'s holding.

B. *Hawaii prohibits the bearing of handguns inside the home.*

The prohibitions *sub judice* clearly run afoul of the holding of *Heller*. *See Heller*, 554 U.S. at 629 (quoting *State v. Reid*, 1 Ala. 612, 616-17 (1840) for the proposition that "[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 defense, would be clearly unconstitutional."). And, even if the Court did not interpret the term "bear" as broadly as the *Heller* analysis discussed above, Hawaii's prohibitions on the right to keep and bear arms preclude the bearing of arms even within the confines of the home and in non-sensitive places such as target ranges. Thus, these expansive prohibitions contradict the specific holding of *Heller*, construed in its most narrow terms, *i.e.*,

the bearing of firearms for the purpose of self-defense within the confines of the home.

In fact, Mr. Baker faces severe criminal punishment if he so much as:

- Possesses or exercises control of a loaded firearm, Haw. Rev. Stat. § 134-23;
- Transports an unloaded firearm to places other than: a place of repair, a target range, a licensed dealer's place of business, a firearms show or exhibit, a place of formal hunter or firearm use training or instruction, or a police station, Haw. Rev. Stat. § 134-23;
- Transports an unloaded firearm outside an enclosed container, Haw. Rev. Stat. § 134-25;
- Stores a weapon in his personal vehicle, Haw. Rev. Stat. § 134-25;
- Transports a firearm on a public highway, Haw. Rev. Stat. § 134-26;
- Transports ammunition outside of an enclosed container or to any place other than those also specifically defined in Section 134-23, *supra*., Haw. Rev. Stat. § 134-27;
- Bears a firearm within his home. Haw. Rev. Stat. § 134-24 (dictates that a firearm must be *confined*, a term which is not defined, to a possessor's residence or sojourn, and further makes the carrying or possession of a firearm other than a pistol a class C felony without any exception for carrying within the home); Haw. Rev. Stat § 134-25 (prohibits possession or carrying of pistols outside of an enclosed container, under penalty of a class B felony, again with no exception for carrying within the home);
- Uses a handgun for proficiency training such as target practice. Haw. Rev. Stat. § 134-5 (which authorizes a person to carry and use *only* a *rifle* or *shotgun* when engaged in target shooting, but *not* a pistol or handgun); and

- Keeps or bears (in any place and for any purpose) any number of protected non-lethal weapons. Haw. Rev. Stat. §§ 134-16, 51.[3]

The plain language of those Hawai'i statutory provisions are beyond dispute. And, if a citizen, including Mr. Baker, chooses to exercise his rights, there is also no dispute that the Defendants threaten to enforce those provisions, exposing Mr. Baker and any other law-abiding Hawai'i citizen who wishes to exercise his or her Second Amendment Rights to felony charges and presumably convictions.

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[3] The "Second Amendment extends prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of founding." *Heller*, 554 U.S. at 582. Thus, while "dangerous and unusual weapons" may likely be regulated, "the sorts of weapons protected [a]re those 'in common use at th[is] time.'" *Id*. at 627 (refusing to diminish the Second Amendment because advances in technology may require effective militias to utilize sophisticated and unusual arms). This includes knives, clubs, and tasers – all of which are banned under Hawaii's prohibitions. *See Heller*, 554 U.S. at 590 ("[i]n such circumstances the temptation [facing Quaker frontiersmen] to seize a hunting rifle or *knife* in self-defense ... must sometimes have been almost overwhelming."); *City of Akron v Rasdan*, 663 NE2d 947 (Ohio App. 1995) (concluding that the "right to keep and bear arms" under the Ohio Constitution extends to knives); *State v Delgado*, 692 P2d 610, 612-14 (1984) (holding that the "right to keep and bear arms" under the Oregon Constitution extends to knives); *State v Blocker*, 630 P2d 824 (Ore. 1981) (same as to clubs) (citing *State v Kessler*, 614 P2d 94 (Ore. 1980)); *Barnett v State*, 695 P2d 991 (Ore. App. 1985) (same as to blackjacks); *People v. Dean Scott Yanna*, Case No. 10-10536-FH, Order (Bay County, Mich., April 21, 2011) (tasers) (attached as ER 162-70); Ron F. Wright, *Shocking The Second Amendment: Invalidating States Prohibitions on Taser with the District of Columbia v. Heller*, 20 Alb. L.J. Sci. & Tech. 159, 178, (2010)(internal quotation marks omitted); Eugene Volokh, *Nonlethal Self-Defense, (Almost Entirely) Nonlethal Weapons, And the Rights to Keep and Bear Arms and Defend Life*, 62 Stanford Law Review, 199, 207-208(2009)

These prohibitions, read singularly or combined, constitute clear substantial burdens on the citizens' right to bear arms. Indeed, citizens are wholly prohibited from carrying arms for the purposes of self-defense and from even keeping firearms within their homes in a manner whereby the arm would be ready and available for self-defense. And, in the case of non-lethal weapons, citizens may not even keep those arms.

The only exception to these complete prohibitions is the illusory licensing statute codified at Section 134-9. Yet, that statute provides no meaningful vehicle that would adequately allow citizens to exercise their Second Amendment rights.

C. *Hawaii's licensing procedure violates due process.*

The text of the due process clause –"nor shall any State deprive any person of life, liberty, or property without due process of law" requires procedural safeguards to accompany substantive choices. U.S. Const. amend. XIV. Section 134-9 of the Hawaii Revised Statutes (the permit statute) is the only means by which a law-abiding citizen could exercise his or her Second Amendment rights.

> It is settled by a long line of recent decisions of this Court that an 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—is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.

Staub v. *City of Baxley*, 355 U.S. 313, 322 (1958) (citations omitted); *see also FW/PBS* v. *City of Dallas*, 493 U.S. 215, 226 (1990) (plurality opinion);

Shuttlesworth v. *Birmingham*, 394 U.S. 147, 151 (1969). "While prior restraints are not unconstitutional per se, any system of prior restraint comes to the courts bearing a heavy presumption against its constitutional validity." *Clark* v. *City of Lakewood*, 259 F.3d 996, 1005 (9th Cir. 2001) (citations omitted).

Here, the prior restraint is the statutory presumption that only citizens who establish that theirs is an "exceptional case" may exercise their Second Amendment right to bear arms.[4] And worse, pursuant to Section 134-9 of the Hawai'i Revised Statutes, the chief of police has the sole discretion with little statutory guidance as to when to issue a firearm permit. There is no opportunity for an applicant to participate, be heard, or advocate his or position during the decision-making process. There is no opportunity for an applicant to seek judicial,

[4] Perhaps even less defensible is permitting the chief to determine whether an applicant "appears suitable." Presumably, the chief could (and would) find that an applicant "appears unsuitable" based upon the chief's perception of the applicant's moral character. The Supreme Court long ago rejected the constitutionality of an ordinance demanding "good character" as a prerequisite for a canvassing license. *Schneider* v. *New Jersey (Town of Irvington)*, 308 U.S. 147, 158 (1939). Absent further definition, courts typically reject all forms of "moral character" standards for the licensing of fundamental rights. *See MD II Entertainment* v. *City of Dallas*, 28 F.3d 492, 494 (5th Cir. 1994); *Genusa* v. *Peoria*, 619 F.2d 1203, 1217 (7th Cir. 1980); *N.J. Envtl. Fed'n* v. *Wayne Twp.*, 310 F. Supp. 2d 681, 699 (D.N.J. 2004); *Ohio Citizen Action* v. *City of Mentor-On-The-Lake*, 272 F. Supp. 2d 671, 682 (N.D. Ohio 2003); *R.W.B. of Riverview, Inc*. v. *Stemple*, 111 F. Supp. 2d 748, 757 (S.D.W.Va. 2000); *Elam* v. *Bolling*, 53 F. Supp. 2d 854, 862 (W.D.Va. 1999); *Ohio Citizen Action* v. *City of Seven Hills*, 35 F. Supp. 2d 575,579 (N.D. Ohio 1999); *Broadway Books, Inc.* v. *Roberts*, 642 F. Supp. 486, 494-95 (E.D.Tenn. 1986); *Bayside Enterprises, Inc.* v. *Carson*, 450 F. Supp. 696, 707 (M.D. Fla. 1978).

appellate, or even administrative review of the Chief's decision. And, the Chief is not required to disclose the reasons for denying the application.[5] Thus, the statute is unconstitutional. *See Largent v. Texas*, 318 U.S. 418, 422 (1943) (striking ordinance allowing speech permit where mayor "deems it proper or advisable"); *Louisiana v. United States*, 380 U.S. 145, 153 (1965) ("The cherished right of people in a country like ours to vote cannot be obliterated by the use of laws . . . which leave the voting fate of a citizen to the passing whim or impulse of an individual registrar); *Berger v. City of Seattle*, 569 F.3d 1029, 1042 n. 9 (9th Cir. 2009) (*en banc*) ("Rules that grant licensing officials undue discretion are not constitutional.").

Furthermore, the language of the statute formulates an unconstitutional undue burden.[6] As noted above, Section 134-9 of the Hawai'i Revised Statutes requires applicants to satisfy the chief of police that theirs is an "exceptional case." There is no guidance for an applicant or the chief to ascertain what constitutes an "exceptional case." Instead, the statute leaves that decision to the sole discretion of

[5] Indeed, in this case, Chief Kealoha simply wrote that he did not believe that Mr. Baker had shown "sufficient justification" to exercise Second Amendment rights. ER 71, 198.

[6] "A finding of an undue burden is shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a person seeking the exercise of a fundamental liberty." *Planned Parent Hood of Southern Pennsylvania v. Casey*, 505 U.S. 833, 877 (1992).

the chief. Obviously, this discretion can be (and, moreover, has been in this case) exercised arbitrarily.

The purpose and effect of this "exceptional case" requirement is to place a substantial obstacle in the path of applicants. Indeed, this requirement shifts the paradigm from the presumption that citizens are permitted to exercise their constitutional rights to a presumption that such is forbidden. "And a statute, which while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path [of exercising a right] … cannot be considered a permissible means of serving its legitimate ends." *Casey*, 505 U.S. at 877.

Even if it were somehow determined that it is permissible to require an applicant to satisfy the Chief of Police that "exceptional circumstances" exist or that the applicant "appears suitable" before a permit is issued, as currently required by Section 134-9, the statute would still violate due process.

When analyzing procedural due process the court should apply the three factor test articulated by the Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319 (1976). There, the Supreme Court stated that in order to determine the adequacy of due process, the following should be considered: "[t]he private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of

additional or substitute procedural safeguards; and, finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id*.

Under the current Hawaii statutory scheme Mr. Baker's liberty and property interests are being unduly restricted. The risk of continued deprivation of the interest is great. Pursuant to Section 134-9 of the Hawai'i Revised Statutes, the chief's decision is absolute and final. And, the Chief is not required to disclose the reasons for denying the application.[7]

Because, as discussed above, Section 134-9 allows the exercise of a fundamental constitutional right, *i.e.*, the right to bear arms, only in "exceptional cases," which is determined solely by the Chief of Police without any guidance or restraint in the decision-making process whatsoever, an undue and, therefore, unconstitutional burden is imposed. Further, despite the clear deprivation of liberty and property resulting from the denial of Mr. Baker's application to carry, Mr. Baker has no opportunity to seek judicial, appellate or even administrative review of the chief's decision. The chief's decision, no matter how seemingly unfair or unfounded, is final.

[7] Indeed, in this case and without explanation, Chief Kealoha simply wrote that he did not believe that Mr. Baker had shown "sufficient justification" to exercise his Second Amendment rights. ER 71, 198. Apparently, no citizen who is not engaged "in the protection of life or property" has. ER 94-105.

Remedying these unfair provisions would not unduly burden the government. Allowing citizens to exercise their Second Amendment rights has been shown to reduce crime.[8] Thus, the government's anticipated argument that the islands will be overrun with crime is simply untrue, as it has been proven otherwise in other jurisdictions. But even if it could be shown that crime would increase crime, no matter how dramatically, the Second Amendment nevertheless remains in effect:

> But the enshrinement of constitutional rights necessarily takes certain policy choices off the table. These include the absolute prohibition of [the right to bear arms]. Undoubtedly some think that the Second Amendment is outmoded in a society where our standing army is the pride of our Nation, where well-trained police forces provide personal security, and where gun violence is a serious problem. That is perhaps debatable, but what is not debatable is that it is not the role of this Court to pronounce the Second Amendment extinct.

Heller, 554 U.S. at 636.

On the other hand, amending the application process to comport with due process would impose only the imposition of some appellate process. Striking the "exceptional cases" requirement would cause no burden on the government.

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[8] See Florida Department of Agriculture and Consumer Services, *Concealed Weapon/ Firearm Summary Report(s)*, October 1, 1987 through November 30, 2009, available online at http://licgweb.doacs.state.fl.us/stats/cw_monthly.html (showing that Florida has, since 1987, issued 2,031,106 permits and, in 24 years, has only revoked 168 permits, or .00827%, for firearm-related crimes involving a licensed carrier). North Carolina has issued 195,533 permits and has only revoked 1,007, or 0.5149%, *for any reason*.

Similarly, simply placing a requirement that there be more defined guidelines and transparency in the process would also have a *de minimus* impact on the administrative burden of issuing permits to carry. Finally, perhaps the best indication that the courts will not be overburdened by permitting basic judicial review of a Chief's decision to deny an application is that this has not already happened. Since *McDonald, supra*., any aggrieved applicant could file a civil rights lawsuit in state or federal court. This is the first known to the undersigned.

In deciding this matter, this Court should consider that the statutes *sub judice* were passed before *Heller* and *McDonald*. *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38 (1936) ("the judicial scrutiny must of necessity take into account the entire legislative process, including the reasoning and findings upon which the legislative action rests"). Thus, the Legislature was under the erroneous assumption that this legislation was not affecting fundamental rights. While these statutes may have passed constitutional muster pre-*Heller*, the legal landscape has changed dramatically. These statutes have not.

Since *Heller* and *McDonald*, however, clearly these laws do affect fundamental rights and, therefore, must comport with due process and the Second Amendment to the United States Constitution. And, because Second Amendment rights are now recognized as fundamental rights, that codified ancient pre-existing basic human rights, made "fully" applicable to the states, the lack of due process

safeguards now renders these statutes plainly unconstitutional. The statute is outdated and, in its current form, fails to adequately provide procedural due process. Specifically, the elimination of unconstitutional prohibitions, undue regulations and restrictions, better-defined guidelines, transparency, and the right to judicial review of the chief's decision must now be incorporated into the statute.

D. The preliminary injunction was denied based on an erroneous legal standard

The entire analysis of whether the preliminary injunction should issue hinges on the questions of whether the right to bear arms is extinguished at the threshold of the front door or, alternatively, whether Hawaii's statutes prohibit the bearing of protected arms for protected purposes within the confines of the home. While at least acknowledging that Mr. Baker's argument may be correct, ER 237-39, the lower court held that there was no right to bear arms outside the home. ER 239, 246. And, apparently recognizing that Hawaii prohibits the bearing of firearms in non-sensitive places, the court "decline[d] to extend the reach of the Second Amendment right to bear arms to all 'non-sensitive' places without further guidance from the higher courts."[9] ER 240 n. 24, 244-47. These erroneous holdings not only required the denial of Mr. Baker's due process claims, but also

[9] There was no finding as to Mr. Baker's argument regarding the keeping and/or bearing of non-lethal weapons.

dictated the remainder of the court's analysis regarding the issuance of Mr. Baker's requested preliminary injunction. ER 247-56.

In order to obtain preliminary injunctive relief, Mr. Baker must establish "that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 55 U.S. 7, 19 (2008). The lower court, having found that there is no right to bear arms outside the home and that Hawaii has not prohibited the bearing of arms inside the home, naturally found that Mr. Baker had not established that he was likely to succeed on the merits. The remaining prongs of the *Winter* analysis, however, were dependent on that initial erroneous finding. As a result, no meaningful *Winter* analysis was conducted.

For example, the United Supreme Court has long held that "the loss of … freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury". *Elrod v. Burns*, 427 U.S. 347 (1976). Indeed, when liberties are infringed, irreparable injury is presumed. 11A Charles Alan Wright et al., Federal Practice & Procedure § 2948.1 (2d ed. 1995) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary."). Accordingly, the Court of Appeals for the Seventh Circuit has recognized that because "[t]he Second Amendment protects

similarly intangible and unquantifiable interests [as those secured by the First Amendment]. . . . [i]nfringements of this right cannot be compensated by money damages." *Ezell v. Chicago*, 651 F.3d 684 (7th Cir. 2011). And, although that case specifically recognized that the core of the Second Amendment is to possess firearms for self-defense purposes, *Id.*, the lower court simply found that *Ezell* was distinguishable and ignored the presumptions of irreparable harm occasioned by loss of freedom.

As for the remaining prongs of the *Winter* analysis, *i.e.*, the balance of equities and the public interest, the lower court essentially held that placing a firearm in the hands of Mr. Baker (or presumably other law-abiding, qualified citizens choosing to exercise their Second Amendment rights) would somehow endanger the community. This surprising finding was not supported by the record in this case. Indeed, the discovery provided by the Defendants, themselves, in addition to Mr. Baker's unchallenged Declaration, establishes that Mr. Baker was highly fit and qualified to exercise his Second Amendment rights. ER 5-10, 67-68, 72-82. That same discovery further reveals that no ordinary law-abiding citizens are issued permits regardless of the qualifications of the applicant. ER 94-105 (showing all permits issued were "security" related and none were issued for "citizens").

Mr. Baker argued that this case is analogous to *Klein v. City of San Clemente*, 584 F.3d 1196 (9th Cir. 2009). In *Klein* the plaintiffs challenged a prohibition of their fundamental right to free speech. *Klein*, 584 F.3d 1196. This Court ruled that since the state action affected "anyone seeking to express their views in this manner in the City of San Clemente[,] the balance of equities and the public interest thus tip *sharply* in favor of enjoining the ordinance." *Id*. at 1208 (emphasis added). Similarly, the statutes *sub judice*, affect anyone that wishes to exercise their fundamental right to keep and bear arms.

Yet, the lower court simply dismissed that analogy stating that this Court (in deciding *Klein*) "was not faced with the potentially severe repercussions of unleashing countless firearms into the open streets of the city." ER 251. Thus, the lower court appears to have supplanted its own belief that the First Amendment is more worthy of judicial protection than the Second. And, it left unanswered how citizens could actually exercise their Second Amendment rights if the balance of equities can never overcome the perceived danger of actually allowing qualified citizens to exercise that right.

Of course, as with the remainder of its analysis, the lower court did qualify its holding on its previous erroneous finding that Mr. Baker "ha[d] also failed to establish that the statutes at issue infringe upon a fundamental right such as the one at issue in *Klein*" and that Mr. Baker "apparently ignore[d] the potential severe

safety risk that is created in exchange for 'protecting and promoting' a right that [he] likely cannot establish is fundamental under the Constitution as an initial matter." ER 251. Because as established above, fundamental rights are at stake, the lower court again applied an erroneous legal standard when determining this prong of the *Winter* analysis.

Finally, as for the public interest, the lower court held that "Section 134-9 provides for exceptions in cases where an individual demonstrates an urgency or need for protection in public places." ER 252. In other words, because of the lower court's initial belief that no fundamental rights were at stake, permitting the bearing of arms only in "exceptional cases" is sufficient. Again, fundamental rights *are* at stake. The exercise of no other fundamental right is constrained to "exceptional cases." Indeed, such constraints would diminish constitutional rights into non-existence.[10]

[10] Public safety is invoked to justify most laws, but where a fundamental right is concerned, the mere incantation of a public safety rationale does not save arbitrary licensing schemes. In the First Amendment arena, where the concept has been developed extensively,

> [W]e have consistently condemned licensing systems which vest inan administrative official discretion to grant or withhold a permit upon broad criteria unrelated to proper regulation of public places . . . There are appropriate public remedies to protect the peace and order of the community if appellant's speeches should result in disorder or violence.

Acceptance of the court's ultimate conclusion that "[t]he potential harm to [Mr. Baker] is speculative and far from irreparable, whereas the potential harm to society posed by a preliminary injunction presents a clear and serious risk to public safety", ER 255, would abrogate all Second Amendment rights. The vast majority of victims of violent crimes would assume that such crime could never happen to them. To impose some requirement of clairvoyance in such victims so as to allow them to convince a chief of police of when and where they will be victimized imposes more than a substantial burden on Hawaii citizens. Instead, it imposes a burden that is beyond human capability. The only speculation found in this case is the assumption that allowing Mr. Baker to exercise his fundamental right to bear arms could somehow "present a clear and serious risk to public safety."

Kunz v. *New York*, 340 U.S. 290, 294 (1951); *Shuttlesworth*, 394 U.S. at 153. "[U]ncontrolled official suppression of the privilege cannot be made a substitute for the duty to maintain order in connection with the exercise of the right." *Hague* v. *Committee for Indus. Org.*, 307 U.S. 496, 516 (1937) (plurality opinion).

A municipality may not empower its licensing officials dispense or withhold permission to speak, assemble, picket, or parade, according to their own opinions even where public areas are involved and the officials are concerned about the activity's effece on the "welfare," "decency," or "morals" of the community. *Shuttlesworth*, 394 U.S. at 153. Accordingly, this Court rejects alleged public health and safety concerns as a substitute for objective standards and due process. *Desert Outdoor Advertising* v. *City of Moreno Valley*, 103 F.3d 814, 819 (9th Cir. 1996).

E. *The "exceptional case" and "appearance of suitability" requirements fail Second Amendment means end scrutiny.*

Mr. Baker joins the Plaintiffs in *Richards, et. al. v. Prieto, et. al.*, No. 11-16255 in asserting that a prior restraint analysis is superior to application of means end scrutiny. Nevertheless, if this Court decides to analyze this case applying a level of means end scrutiny, whether viewed as an equal protection analysis or a direct constitutional violation, the "exceptional case" and "appearance of suitability" requirements fail any level of scrutiny.

The level of scrutiny to be applied in this Circuit is unsettled:

> The Ninth Circuit had occasion to consider this issue in *Nordyke v. King*, holding that 'only regulations which substantially burden the right to keep and to bear arms trigger heightened scrutiny.' 644 F.3d 776, 786 (9th Cir. 2011). However, the court decided to rehear *Nordyke en banc* and declared that its earlier opinion may not be cited as precedent by or to any court in this Circuit. *See Nordyke v. King*, 664 F.3d 774 (9th Cir. 2011). On March 20, 2012, an *en banc* panel of the Ninth Circuit Court of Appeal heard arguments and ordered the dispute to mediation. *Nordyke v. King*, No. 07-15763 (9th Cir. April 4, 2012). Accordingly, the state of Second Amendment law in this Circuit, and the applicable level of scrutiny, is in flux.

ER 239.

Although the level of "heightened scrutiny" to be applied was never clarified, where fundamental rights are at stake, strict scrutiny should generally be applied. *See Hussey v. City of Portland*, 64 F.3d 1260, 1265 (9th Cir. 1995) (*quoting Harper v. Virginia Board of Elections*, 383 U.S. 663, 670 (1966)). This level of scrutiny may not apply in every Second Amendment case. Instead, "the

rigor of this judicial review will depend on how close the law comes to the core of the Second Amendment right and the severity of the law's burden on the right." *Ezell*, 651 F.3d at 702; *Maciandaro*, 638 F.3d at 470. Thus, where a violent abuser's Second Amendment rights were asserted, the Fourth Circuit applied intermediate as opposed to strict scrutiny. *Chester*, 628 F.3d at 683. In contrast, when Chicago banned gun ranges and gun ownership depended upon the applicant being qualified to safely use a firearm, the Seventh Circuit applied a level of scrutiny practically identical to strict scrutiny:

> Labels aside, we can distill this First Amendment doctrine and extrapolate a few general principles to the Second Amendment context. First, a severe burden on the core Second Amendment right of armed self-defense will require an extremely strong public interest justification and a close fit between the government's means and its end. Second, laws restricting activity lying closer to the margins of the Second Amendment right, laws that merely regulate rather than restrict, and modest burdens on the right may be more easily justified. How much more easily depends on the relative severity of the burden and its proximity to the core of the right.

Ezell, 651 F.3d at 708.

This case deserves strict scrutiny. As shown above, there is a fundamental right at stake. However, regardless of what it may be called, as in *Heller*, *supra*., these prohibitions and/or licensing scheme could pass no level of judicial scrutiny.

There is little dispute as to whether Mr. Baker's right to bear arms is substantially burdened, both inside and outside of his home. Indeed, Mr. Baker is

absolutely forbidden from exercising the right to bear arms for self-defense.[11] The only exception to this prohibition operates solely at the unbridled discretion of the chief – and then only in "exceptional cases" and when the applicant "appears suitable" to the chief. Haw. Rev. Stat. § 134-9.

There simply is no governmental interest for permitting the exercise of a citizen's rights to hinge solely on his or her ability to gain the favor of the chief. Certainly, the government has no interest in prohibiting ordinary law-abiding citizens from exercising a right until such time as they may satisfy the chief that theirs is an "exceptional case" and that their need is greater than that of the remaining law-abiding populous. While the government has a compelling interest in regulating arms for public safety purposes, the government may not swallow the entire exercise of the right to bear arms based on some officials' belief that it might be too dangerous as was effectively held by the court below. The very existence of any right means that, without more, the state lacks an interest in preventing citizens from enjoying it.

Further, the licensing scheme is not tailored to any interest in public safety. Applicants, burdened with showing that theirs are "exceptional cases" are unable to predict crime as are Defendants. Crime is largely unforeseeable. By the time

[11] Even if the right to bear arms were not a fundamental right, handgun carry permitting may be subject to Equal Protection constraints. *Guillory* v. *County of Orange*, 731 F.2d 1379 (9th Cir. 1984).

that a victim knows that they are to be victimized, confrontation has already commenced. The only predictable factor is that the violent crime may lead to death or serious injury to innocent victims. And it is from such injury that citizen victims are entitled to defend.

If crime could be predicted, victims could and would take preventive measures. But since it cannot, Mr. Baker wishes to take the only preventive measure available to him – to prepare for the worst. Individuals enjoy a right to carry arms "for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person." *Heller*, 554 U.S. at 584. This right is not extended only to previously victimized or "exceptionally" threatened individuals. Yet, that is precisely how Hawaii has tailored its statutory scheme.

VIII. CONCLUSION

The basis of the lower court's entire analysis hinges on its rejection of Mr. Baker's position that the Second Amendment applies outside of his home and/or the misinterpretation of Hawaii's ban on the bearing of firearms inside the home. Once the inevitable conclusion is accepted, *i.e.*, that Second Amendment protections *do* apply outside the home (and/or that Hawaii prohibits the keeping and/or bearing of protected arms even inside the home), Mr. Baker's various challenges fall into place. And, extraordinary preliminary injunctive relief is

warranted. Because the lower court misapplied the law in that regard (which Mr. Baker believes also constitutes an abuse of discretion), this Court should reverse the Order and issue the injunction. At the very least, this case should be remanded for findings consistent with the rights guaranteed by the Second Amendment.

IX. RELATED CASES

Peruta v. San Diego, No. 10-56971

Richards, et. al. v. Prieto et. al., No. 11-16255

Dated: Honolulu, Hawaii, June 26, 2012.

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CERTIFICATE OF COMPLIANCE
TYPE-VOLUME LIMITATIONS, TYPEFACE REQUIREMENTS,
AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Circuit Rule 32-3(3) because this brief contains 11,059 words, excluding the parts of the brief excluded by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in proportionately spaced typeface using Microsoft Word 2007 in 14 point Times New Roman font.

s/ Richard L. Holcomb
Richard L. Holcomb
Counsel for Appellant

Dated: June 26, 2012

CERTIFICATE OF SERVICE

On this, the 26th day of June 2012, I served the foregoing Brief by electronically filing it with the Court's CM/ECF system, which generated a Notice of Filing and effects service upon counsel for all parties in the case.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this the 26th day of June, 2012

s/ Richard L. Holcomb____
Richard L. Holcomb

ADDENDUM

ADDENDUM

U.S. Const. amend. II

A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Haw. Rev. Stat. § 134-2 – Permits to Acquire

(a) No person shall acquire the ownership of a firearm, whether usable or unusable, serviceable or unserviceable, modern or antique, registered under prior law or by a prior owner or unregistered, either by purchase, gift, inheritance, bequest, or in any other manner, whether procured in the State or imported by mail, express, freight, or otherwise, until the person has first procured from the chief of police of the county of the person's place of business or, if there is no place of business, the person's residence or, if there is neither place of business nor residence, the person's place of sojourn, a permit to acquire the ownership of a firearm as prescribed in this section. When title to any firearm is acquired by inheritance or bequest, the foregoing permit shall be obtained before taking possession of a firearm; provided that upon presentation of a copy of the death certificate of the owner making the bequest, any heir or legatee may transfer the inherited or bequested firearm directly to a dealer licensed under section 134-31 or licensed by the United States Department of Justice without complying with the requirements of this section.

(b) The permit application form shall include the applicant's name, address, sex, height, weight, date of birth, place of birth, country of citizenship, social security number, alien or admission number, and information regarding the applicant's mental health history and shall require the fingerprinting and photographing of the applicant by the police department of the county of registration; provided that where fingerprints and photograph are already on file with the department, these may be waived.

(c) An applicant for a permit shall sign a waiver at the time of application, allowing the chief of police of the county issuing the permit access to any records that have a bearing on the mental health of the applicant. The permit application form and the waiver form shall be prescribed by the attorney general and shall be uniform throughout the State.

(d) The chief of police of the respective counties may issue permits to acquire firearms to citizens of the United States of the age of twenty-one years or more, or duly accredited official representatives of foreign nations, or duly commissioned law enforcement officers of the State who are aliens; provided that any law enforcement officer who is the owner of a firearm and who is an alien shall transfer ownership of the firearm within forty-eight hours after termination of employment from a law enforcement agency. The chief of police of each county may issue permits to aliens of the age of eighteen years or more for use of rifles and shotguns for a period not exceeding sixty days, upon a showing that the alien has first procured a hunting license under chapter 183D, part II. The chief of police of each county may issue permits to aliens of the age of twenty-one years or more for use of firearms for a period not exceeding six months, upon a showing that the alien is in training for a specific organized sport-shooting contest to be held within the permit period. The attorney general shall adopt rules, pursuant to chapter 91, as to what constitutes sufficient evidence that an alien is in training for a sport-shooting contest. Notwithstanding any provision of the law to the contrary and upon joint application, the chief of police may issue permits to acquire firearms jointly to spouses who otherwise qualify to obtain permits under this section.

(e) The permit application form shall be signed by the applicant and by the issuing authority. One copy of the permit shall be retained by the issuing authority as a permanent official record. Except for sales to dealers licensed under section 134-31, or dealers licensed by the United States Department of Justice, or law enforcement officers, or where a license is granted under section 134-9, or where any firearm is registered pursuant to section 134-3(a), no permit shall be issued to an applicant earlier than fourteen calendar days after the date of the application; provided that a permit shall be issued or the application denied before the twentieth day from the date of application. Permits issued to acquire any pistol or revolver shall be void unless used within ten days after the date of issue. Permits to acquire a pistol or revolver shall require a separate application and permit for each transaction. Permits issued to acquire any rifle or shotgun shall entitle the permittee to make subsequent purchases of rifles or shotguns for a period of one year from the date of issue without a separate application and permit for each acquisition, subject to the disqualifications under section 134-7 and subject to revocation under section 134-13; provided that if a permittee is arrested for committing a felony or any crime of violence or for the illegal sale of any drug, the permit shall be impounded and shall be surrendered to the issuing authority. The issuing authority shall perform an inquiry on an applicant who is a citizen of the United States by using the National Instant Criminal Background Check System before any determination to issue a permit or to deny an application is made. If the applicant is

not a citizen of the United States and may be eligible to acquire a firearm under this chapter, the issuing authority shall perform an inquiry on the applicant, by using the National Instant Criminal Background Check System, to include a check of the Immigration and Customs Enforcement databases, before any determination to issue a permit or to deny an application is made.

(f) In all cases where a pistol or revolver is acquired from another person within the State, the permit shall be signed in ink by the person to whom title to the pistol or revolver is transferred and shall be delivered to the person who is transferring title to the firearm, who shall verify that the person to whom the firearm is to be transferred is the person named in the permit and enter on the permit in the space provided the following information: name of the person to whom the title to the firearm was transferred; names of the manufacturer and importer; model; type of action; caliber or gauge; and serial number as applicable. The person who is transferring title to the firearm shall sign the permit in ink and cause the permit to be delivered or sent by registered mail to the issuing authority within forty-eight hours after transferring the firearm.

In all cases where receipt of a firearm is had by mail, express, freight, or otherwise from sources without the State, the person to whom the permit has been issued shall make the prescribed entries on the permit, sign the permit in ink, and cause the permit to be delivered or sent by registered mail to the issuing authority within forty-eight hours after taking possession of the firearm.

In all cases where a rifle or shotgun is acquired from another person within the State, the person who is transferring title to the rifle or shotgun shall submit, within forty-eight hours after transferring the firearm, to the authority which issued the permit to acquire, the following information, in writing: name of the person who transferred the firearm, name of the person to whom the title to the firearm was transferred; names of the manufacturer and importer; model; type of action; caliber or gauge; and serial number as applicable.

(g) Effective July 1, 1995, no person shall be issued a permit under this section for the acquisition of a pistol or revolver unless the person, at any time prior to the issuance of the permit, has completed:

(1) An approved hunter education course as authorized under section 183D-28;

(2) A firearms safety or training course or class available to the general public offered by a law enforcement agency of the State or of any county;

(3) A firearms safety or training course offered to law enforcement officers, security guards, investigators, deputy sheriffs, or any division or subdivision of law enforcement or security enforcement by a state or county law enforcement agency; or

(4) A firearms training or safety course or class conducted by a state certified or National Rifle Association certified firearms instructor or a certified military firearms instructor that provides, at a minimum, a total of at least two hours of firing training at a firing range and a total of at least four hours of classroom instruction, which may include a video, that focuses on:

(A) The safe use, handling, and storage of firearms and firearm safety in the home; and

(B) Education on the firearm laws of the State.

An affidavit signed by the certified firearms instructor who conducted or taught the course, providing the name, address, and phone number of the instructor and attesting to the successful completion of the course by the applicant shall constitute evidence of certified successful completion under this paragraph.

(h) No person shall sell, give, lend, or deliver into the possession of another any firearm except in accordance with this chapter.

(i) No fee shall be charged for permits, or applications for permits, under this section, except for a single fee chargeable by and payable to the issuing county, for individuals applying for their first permit, in an amount equal to the fee actually charged by the Federal Bureau of Investigation to the issuing police department for a fingerprint check in connection with that application or permit. In the case of a joint application, the fee provided for in this section may be charged to each person to whom no previous permit has been issued.

Haw. Rev. Stat. § 134-5 – Possession by licensed hunters and minors; target shooting; game hunting

(a) Any person of the age of sixteen years, or over or any person under the age of sixteen years while accompanied by an adult, may carry and use any lawfully acquired rifle or shotgun and suitable ammunition while actually engaged in hunting or target shooting or while going to and from the place of hunting or target

shooting; provided that the person has procured a hunting license under chapter 183D, part II. A hunting license shall not be required for persons engaged in target shooting.

(b) A permit shall not be required when any lawfully acquired firearm is lent to a person, including a minor, upon a target range or similar facility for purposes of target shooting; provided that the period of the loan does not exceed the time in which the person actually engages in target shooting upon the premises.

(c) A person may carry unconcealed and use a lawfully acquired pistol or revolver while actually engaged in hunting game mammals, if that pistol or revolver and its suitable ammunition are acceptable for hunting by rules adopted pursuant to section 183D-3 and if that person is licensed pursuant to part II of chapter 183D. The pistol or revolver may be transported in an enclosed container, as defined in section 134-25 in the course of going to and from the place of the hunt, notwithstanding section 134-26.

Haw. Rev. Stat. § 134-9 – Licenses to carry

(a) In an exceptional case, when an applicant shows reason to fear injury to the applicant's person or property, the chief of police of the appropriate county may grant a license to an applicant who is a citizen of the United States of the age of twenty-one years or more or to a duly accredited official representative of a foreign nation of the age of twenty-one years or more to carry a pistol or revolver and ammunition therefor concealed on the person within the county where the license is granted. Where the urgency or the need has been sufficiently indicated, the respective chief of police may grant to an applicant of good moral character who is a citizen of the United States of the age of twenty-one years or more, is engaged in the protection of life and property, and is not prohibited under section 134-7 from the ownership or possession of a firearm, a license to carry a pistol or revolver and ammunition therefor unconcealed on the person within the county where the license is granted. The chief of police of the appropriate county, or the chief's designated representative, shall perform an inquiry on an applicant by using the National Instant Criminal Background Check System, to include a check of the Immigration and Customs Enforcement databases where the applicant is not a citizen of the United States, before any determination to grant a license is made. Unless renewed, the license shall expire one year from the date of issue.

(b) The chief of police of each county shall adopt procedures to require that any person granted a license to carry a concealed weapon on the person shall:

(1) Be qualified to use the firearm in a safe manner;

(2) Appear to be a suitable person to be so licensed;

(3) Not be prohibited under section 134-7 from the ownership or possession of a firearm; and

(4) Not have been adjudged insane or not appear to be mentally deranged.

(c) No person shall carry concealed or unconcealed on the person a pistol or revolver without being licensed to do so under this section or in compliance with sections 134-5(c) or 134-25.

(d) A fee of $10 shall be charged for each license and shall be deposited in the treasury of the county in which the license is granted.

Haw. Rev. Stat. § 134-16 – Restriction on possession, sale, gift, or delivery of electric guns

(a) It shall be unlawful for any person, including a licensed manufacturer, licensed importer, or licensed dealer, to possess, offer for sale, hold for sale, sell, give, lend, or deliver any electric gun.

(b) Any electric gun in violation of subsection (a) shall be confiscated and disposed of by the chief of police.

(c) This section shall not apply to:

(1) Law enforcement officers of county police departments;

(2) Law enforcement officers of the department of public safety;

(3) Conservation and resources enforcement officers of the department of land and natural resources;

(4) Members of the army or air national guard when assisting civil authorities in disaster relief, civil defense, or law enforcement functions, subject to the requirements of section 121-34.5; and

(5) Vendors providing electric guns to the individuals described in paragraphs (1) through (4);

provided that electric guns shall at all times remain in the custody and control of the law enforcement officers of the county police departments, the law enforcement officers of the department of public safety, the conservation and resources enforcement officers of the department of land and natural resources, or the members of the army or air national guard.

(d) The county police departments of this State, the department of public safety, the department of land and natural resources, and the army and air national guard shall maintain records regarding every electric gun in their custody and control. The records shall report every instance of usage of the electric guns; in particular, records shall be maintained in a similar manner as for those of discharging of firearms. The county police departments, the department of public safety, the department of land and natural resources, and the army and air national guard shall annually report to the legislature regarding these records no later than twenty days before the beginning of each regular session of the legislature.

(e) The department of land and natural resources and the department of public safety shall ensure that each of their conservation and resources enforcement officers and law enforcement officers who is authorized to use an electric gun and related equipment shall first receive training from the manufacturer or from a manufacturer-approved training program, as well as by manufacturer-certified or approved instructors in the use of electric guns prior to deployment of the electric guns and related equipment in public. Training for conservation and resources enforcement officers of the department of land and natural resources and law enforcement officers of the department of public safety may be done concurrently to ensure cost savings.

(f) The conservation and resources enforcement program of the department of land and natural resources shall meet the law enforcement accreditation or recognition standards of the Commission on Accreditation for Law Enforcement Agencies, Inc., in the use of electric guns prior to obtaining electric guns, related equipment, and training for the use of the electric guns.

Haw. Rev. Stat. § 134-23 – Place to keep loaded firearms other than pistols and revolvers; penalty

(a) Except as provided in section 134-5, all firearms shall be confined to the possessor's place of business, residence, or sojourn; provided that it shall be lawful to carry unloaded firearms in an enclosed container from the place of purchase to the purchaser's place of business, residence, or sojourn, or between these places upon change of place of business, residence, or sojourn, or between these places and the following:

(1) A place of repair;
(2) A target range;
(3) A licensed dealer's place of business;
(4) An organized, scheduled firearms show or exhibit;
(5) A place of formal hunter or firearm use training or instruction; or
(6) A police station.

"Enclosed container" means a rigidly constructed receptacle, or a commercially manufactured gun case, or the equivalent thereof that completely encloses the firearm.

(b) Any person violating this section by carrying or possessing a loaded firearm other than a pistol or revolver shall be guilty of a class B felony.

Haw. Rev. Stat. § 134-24 – Place to keep unloaded firearms other than pistols and revolvers; penalty

(a) Except as provided in section 134-5, all firearms shall be confined to the possessor's place of business, residence, or sojourn; provided that it shall be lawful to carry unloaded firearms in an enclosed container from the place of purchase to the purchaser's place of business, residence, or sojourn, or between these places upon change of place of business, residence, or sojourn, or between these places and the following:

(1) A place of repair;
(2) A target range;
(3) A licensed dealer's place of business;
(4) An organized, scheduled firearms show or exhibit;
(5) A place of formal hunter or firearm use training or instruction; or

(6) A police station.

"Enclosed container" means a rigidly constructed receptacle, or a commercially manufactured gun case, or the equivalent thereof that completely encloses the firearm.

(b) Any person violating this section by carrying or possessing an unloaded firearm other than a pistol or revolver shall be guilty of a class C felony.

Haw. Rev. Stat. § 134-25 – Place to keep pistol or revolver; penalty

(a) Except as provided in sections 134-5 and 134-9, all firearms shall be confined to the possessor's place of business, residence, or sojourn; provided that it shall be lawful to carry unloaded firearms in an enclosed container from the place of purchase to the purchaser's place of business, residence, or sojourn, or between these places upon change of place of business, residence, or sojourn, or between these places and the following:

(1) A place of repair;
(2) A target range;
(3) A licensed dealer's place of business;
(4) An organized, scheduled firearms show or exhibit;
(5) A place of formal hunter or firearm use training or instruction; or
(6) A police station.

"Enclosed container" means a rigidly constructed receptacle, or a commercially manufactured gun case, or the equivalent thereof that completely encloses the firearm.

(b) Any person violating this section by carrying or possessing a loaded or unloaded pistol or revolver shall be guilty of a class B felony.

Haw. Rev. Stat. § 134-26 – Carrying or possessing a loaded firearm on a public highway; penalty

(a) It shall be unlawful for any person on any public highway to carry on the person, or to have in the person's possession, or to carry in a vehicle any firearm loaded with ammunition; provided that this section shall not apply to any person

who has in the person's possession or carries a pistol or revolver in accordance with a license issued as provided in section 134-9.

(b) Any vehicle used in the commission of an offense under this section shall be forfeited to the State, subject to the notice and hearing requirements of chapter 712A.

(c) Any person violating this section shall be guilty of a class B felony.

Haw. Rev. Stat. § 134-27 – Place to keep ammunition; penalty

(a) Except as provided in sections 134-5 and 134-9, all ammunition shall be confined to the possessor's place of business, residence, or sojourn; provided that it shall be lawful to carry ammunition in an enclosed container from the place of purchase to the purchaser's place of business, residence, or sojourn, or between these places upon change of place of business, residence, or sojourn, or between these places and the following:

(1) A place of repair;
(2) A target range;
(3) A licensed dealer's place of business;
(4) An organized, scheduled firearms show or exhibit;
(5) A place of formal hunter or firearm use training or instruction; or
(6) A police station.

“Enclosed container” means a rigidly constructed receptacle, or a commercially manufactured gun case, or the equivalent thereof that completely encloses the ammunition.

(b) Any person violating this section shall be guilty of a misdemeanor.

Haw. Rev. Stat. § 134-51 – Deadly weapons; prohibitions; penalty

(a) Any person, not authorized by law, who carries concealed upon the person's self or within any vehicle used or occupied by the person or who is found armed with any dirk, dagger, blackjack, slug shot, billy, metal knuckles, pistol, or other deadly or dangerous weapon shall be guilty of a misdemeanor and may be immediately arrested without warrant by any sheriff, police officer, or other officer

or person. Any weapon, above enumerated, upon conviction of the one carrying or possessing it under this section, shall be summarily destroyed by the chief of police or sheriff.

(b) Whoever knowingly possesses or intentionally uses or threatens to use a deadly or dangerous weapon while engaged in the commission of a crime shall be guilty of a class C felony.