No. 12-17808

IN THE

United States Court of Appeals for the Ninth Circuit

GEORGE K. YOUNG, JR.,

Plaintiff-Appellant,

v.

STATE OF HAWAII, ET AL.,

Defendants-Appellees.

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

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INTRODUCTION

When it comes to the Second Amendment, courts must look to the "historical understanding of the scope of the right." *District of Columbia v. Heller*, 554 U.S. 570, 625 (2008). Tellingly, however, history makes almost no appearance in Young's opening en banc brief. Nowhere does Young dispute the centuries-long history of laws restricting the carrying of firearms to those with a particularized need; the unbroken line of cases upholding those laws against constitutional challenge; or the eighteenth- and nineteenth-century commentators who deemed such laws permissible. Nor does Young offer an alternative historical account to cast doubt on the constitutionality of such laws. Apart from a handful of irrelevant examples, neither do his *amici*.

That should settle this case. The overwhelming history supporting good-cause laws makes clear that the good-cause requirement in Section 134-9 of Hawaii's law comports with the Second Amendment. *See* Amicus Br. of Professors of History and Law; Amicus Br. of New Jersey et al.; Amicus Br. of Everytown for Gun Safety. At a minimum, that history confirms that carrying a firearm for the purpose of general precautionary self-defense lies outside the "core" of the Second Amendment, and that limiting carry to persons with good cause is a reasonable safety measure that satisfies intermediate scrutiny.

Young raises a handful of alternative claims, but they fare no better. Young failed to preserve below any Second Amendment challenge to Hawaii County's regulations. Hawaii's law is not an unconstitutional "prior restraint." And Young's due process claims are meritless and not properly before the Court.

The panel erred by striking down Hawaii's good-cause law. The District Court's judgment dismissing Young's complaint should be affirmed.

ARGUMENT

I. THE GOOD-CAUSE REQUIREMENT IN SECTION 134-9 IS CONSTITUTIONAL.

The principal question before this Court is whether the good-cause requirement in Section 134-9 complies with the Second Amendment. The panel struck down that requirement based on the understanding that this provision restricts open carry to "security guard[s]" and those "similarly employed." Add. 51; *see* Hawaii Br. 6-7, 11. But Young conspicuously abandons that atextual reading of the statute: He repeatedly admits that Section 134-9 makes open-carry licenses available upon a showing of adequate "need." Young Br. 6, 9, 11, 26, 33, 34. And although Young argues that the Attorney General's authoritative opinion interpreting Section 134-9 should not be given much weight, *see id.* at 11, 16-17,

he does not dispute its textual analysis or offer an alternative interpretation of the statute.[1] Nor do any of his *amici*.

Accordingly, to prevail on his Second Amendment claim, Young bears the burden of demonstrating that this Court should find that the Second Amendment bars the duly elected legislature of Hawaii—and the legislatures of all its sister States—from enacting laws restricting public carry to persons who show good cause to wield a firearm in public. Young fails to carry that burden.

A. Hawaii's Law Does Not Burden Conduct Protected By The Second Amendment.

1. In *Heller*, the Supreme Court held that courts should determine the scope of the Second Amendment by looking to "history." 554 U.S. at 592, 595, 625, 626-627 & n.26. This Court has repeated that rule many times, explaining that *Heller* "treated its historical analysis as determinative," *Peruta v. County of San Diego*, 824 F.3d 919, 929 (9th Cir. 2016) (en banc), and that lower courts should evaluate whether "[a] challenged law burdens conduct protected by the Second Amendment . . . based on a 'historical understanding of the scope of the right,' "

[1] Young notes that Attorney General opinions "are not binding" under Hawaii law. Young Br. 16 (quoting *Kepo'o v. Watson*, 952 P.2d 379, 387 n.9 (Haw. 1998)). But as Young does not dispute, the Hawaii Supreme Court has held that such opinions are "highly instructive." *Kepo'o*, 952 P.2d at 387 n.9. And the Attorney General's opinion is not entitled to any less weight, as Young claims, just because it was issued during the pendency of this litigation. *See Nai Yuan Jiang v. Holder*, 611 F.3d 1086, 1092-93 (9th Cir. 2010) (deferring to Attorney General's interpretation of statute that was announced while case was pending).

Silvester v. Harris, 843 F.3d 816, 821 (9th Cir. 2016) (quoting *Heller*, 554 U.S. at 625).

Young, however, offers almost no historical analysis at all. He does not even bother to acknowledge the centuries-long history of laws requiring a particularized need to carry firearms in public. *See* Hawaii Br. 15-22. He does not address the unbroken line of cases upholding such laws against constitutional challenge. *Id.* at 29-32. And he does not offer any credible historical evidence of his own that would cast doubt on the validity of these longstanding laws.

Instead, Young's historical analysis consists—in full—of a citation to the panel opinion and *Wrenn v. District of Columbia*, 864 F.3d 650 (D.C. Cir. 2017), which he says "engaged in the historical analysis required by *Heller*." Young Br. 9. But these opinions do not satisfy Young's obligation to conduct the historical analysis that *Heller* demands.

For one thing, neither opinion addressed the long history of good-cause restrictions on open carry. The panel largely limited its historical inquiry to *total bans* on public carry, which the panel erroneously insisted Hawaii's law imposed. *See* Add. 16-19 (invoking legal commentator who questioned whether Congress could "pass a law *prohibiting* any person from bearing arms" (emphasis added)); Add. 19-23 (surveying courts suggesting that states could not "destroy the right to carry firearms in public *altogether*" (emphasis added)); Add. 28-32 (discussing

"efforts of many Southern states to *disarm* free blacks" (emphasis added)). The *Wrenn* majority, in turn, focused the bulk of its analysis on whether the Second Amendment "cover[s] public carrying *at all*" or "protect[s] carrying in *densely populated or urban areas* like Washington, D.C." 864 F.3d at 657, 659 (emphases added). As Young now acknowledges, this case concerns a good-cause restriction on public carry, not a total ban on carry or a restriction applicable only to urban areas. *See supra* pp. 2-3. Those opinions therefore provide little guidance on the historical question before the Court.

Moreover, to the extent those panels engaged in historical analysis, it was highly flawed. We have already detailed the deficiencies in the panel opinion. *See* Hawaii Br. 20-22, 25-27, 31-32, 33-34; *see also* Everytown Br. 4-19.[2] The *Wrenn* majority likewise committed several significant historical errors. *See* 864 F.3d at 669 (Henderson, J., dissenting) (noting that the majority's analysis is "contradicted by our sister circuits' extensive review of the same historical record"). *Wrenn* distinguished the common law of the Founding era on the ground that it prohibited the carrying of "dangerous or unusual weapons," *id.* at 660 (citation omitted),

[2] Justice Thomas repeated the panel's errors in his dissent from denial of certiorari in *Rogers v. Grewal*, -- S. Ct. --, 2020 WL 3146706 (June 15, 2020). He offered the same unduly cramped understanding of the Statute of Northampton, *id.* at *4-5; focused exclusively on cases, legal commentators, and historical episodes that bore on the constitutionality of complete bans on carry, *id.* at *5-9; and ignored numerous statutes, cases, and commentators demonstrating that good-cause laws are constitutional, *see* Hawaii Br. 23-34.

apparently overlooking the fact that, in the Founding era, "[a] gun [wa]s an 'unusual weapon' " at common law. *State v. Huntly*, 25 N.C. 418, 422 (1843); *see* Hawaii Br. 20-22, 26-27. *Wrenn* also asserted, without citation, that nineteenth-century "reasonable cause" laws applied only to "reckless" individuals and imposed "indirect or purely civil burdens." 864 F.3d at 661. But extensive historical evidence demonstrates that reasonable-cause laws prohibited carry by anyone who lacked a particularized need for a firearm, and that individuals who violated these laws could be required to post substantial criminal bonds or face several months' imprisonment. *See* Hawaii Br. 25-27; Everytown Br. 11-13; History Professors Br. 11-13.

Furthermore, both opinions concluded their historical inquiries in the mid-nineteenth century. *Heller*, however, made clear that " 'longstanding, accepted regulations' may come from the early-twentieth century and need not trace their roots back to the Founding." *Pena v. Lindley*, 898 F.3d 969, 1003-04 (9th Cir. 2018) (Bybee, J., concurring in part and dissenting in part) (citing *Fyock v. City of Sunnyvale*, 779 F.3d 991, 997 (9th Cir. 2015)). The failure of both opinions to consider any evidence from the early twentieth century—when over half the States broadly restricted public carry—further drains their historical analyses of persuasive value.

Young's *amici* fail to fill the gap. Two *amicus* briefs offer a handful of anecdotes from the Founding era in which individuals carried firearms while hunting or traveling, or list seventeenth-century laws requiring individuals to carry firearms in situations of particular danger. *See* Amicus Br. of Professors of Second Amendment Law et al. 16-27; Amicus Br. of Hawaii Rifle Ass'n et al. 12-13. Those examples, however, merely reaffirm that the common law of the Founding era permitted persons to carry guns in certain limited circumstances authorized by law. *See, e.g.*, *Huntly*, 25 N.C. at 423; 1 William Oldnall Russell, *A Treatise on Crimes and Indictable Misdemeanors* 272 (2d ed. 1826); Mark Anthony Frassetto, *Meritless Historical Arguments in Second Amendment Litigation*, 46 Hastings Const. L.Q. 531, 538-548 (2019). They do nothing to refute that carrying guns for the general purpose of precautionary self-defense was unlawful at common law, *see* Hawaii Br. 27, under colonial statutes stretching back nearly a century before the Founding, *see id.* at 22-23, and under state statutes after the Founding, *see id.* at 23-26.

2. Lacking a toehold in history, Young contends that the bare text of the Second Amendment indicates that good-cause restrictions on carry are unconstitutional. Given that the textual meaning of the phrase "the right of the people to keep and bear Arms" must be determined based on the "historical understanding of the scope of the right," *Heller*, 554 U.S. at 625, it is difficult to

see how the text could deem invalid a regulation that history indicates falls outside the scope of the right. Young offers nothing to suggest it does.

First, Young points to the word "bear," which he says indicates that the Second Amendment protects *some* right to carry firearms outside the home. Young Br. 4-8, 9-11. That may be true, but it is irrelevant. *Heller* made clear that any right to carry firearms outside the home "is not unlimited," and that courts must determine the scope of that right by looking to "history." 554 U.S. at 595, 626-627 & n.26; *see Peruta*, 824 F.3d at 929. And here, history establishes that good-cause laws do not burden the "right to . . . bear Arms."

Second, Young claims that good-cause laws improperly limit public carry to "a subclass of the 'people.' " Young Br. 8. Wrong again. Good-cause laws do not restrict *who* may carry firearms but *the circumstances* in which they may do so. In particular, Section 134-9 allows individuals to carry firearms when they have "the urgency or the need" for protection, or meet one of the statute's other criteria. Haw. Rev. Stat. § 134-9(a); *see* Hawaii Br. 4-5 (listing other circumstances in which Hawaii law permits individuals to carry firearms). *Heller* made clear that "the right secured by the Second Amendment" does not include the right to carry weapons "for whatever purpose." 554 U.S. at 626. Hawaii's law simply codifies a historically authorized limit on the purposes for which carry is permitted.

Third, Young appeals to the Second Amendment's objectives, arguing that good-cause laws are inconsistent with the Amendment's goal of protecting individuals' "right of self-defense." Young Br. 4. But Hawaii's law *vindicates* the interest in self-defense, by allowing individuals to carry handguns when they need them to defend life or property. Haw. Rev. Stat. § 134-9. Young suggests that individuals must be permitted to carry firearms whenever they wish just in case the need for self-defense unexpectedly arises. But that unbounded understanding finds no footing in history, which affirms the authority of states to limit the carrying of firearms to cases in which a particularized need for self-defense exists. And Young's understanding would, as a practical matter, allow individuals to carry firearms in public at all times, contradicting *Heller*'s recognition that governments may regulate the "purpose[s]" for which carry is permitted. 554 U.S. at 626-627 & n.26.

Finally, Young argues that because some constitutional rights, such as "the right to speak," are not contingent on a showing of good cause, good-cause limits on public carry are also unconstitutional. Young Br. 9. That does not follow. The historical scope of the Second Amendment does not match other constitutional rights in numerous respects; among other things, it does not extend to felons and the mentally ill, and may be limited to persons with the requisite training or proficiency. These restrictions would be unconstitutional if applied to "the right to

speak." *Id.* So too here, history makes clear that States may require individuals to show good cause before carrying firearms openly in public.

B. Even If Hawaii's Good-Cause Law Burdened Conduct Protected By The Second Amendment, It Would Satisfy Intermediate Scrutiny.

Because history demonstrates that Hawaii's law does not "burden[] conduct protected by the Second Amendment," this Court can uphold the law without further analysis. *Silvester*, 843 F.3d at 821. But even if this Court concludes that Hawaii's law burdens conduct protected by the Second Amendment, the law easily survives intermediate scrutiny.

1. Young argues that this Court should apply strict scrutiny, not intermediate scrutiny. But this Court has held that strict scrutiny applies only if a law "implicates the core of the Second Amendment right." *Id.* Here, Young makes no argument—apart from his overreading of the word "bear"—that carrying firearms in public for purely precautionary self-defense falls within the "core" of the Second Amendment. *See* Young Br. 4-5. That only confirms what history and precedent already demonstrate: Young's claim does not implicate the "core" of the Second Amendment. *See* Hawaii Br. 37-38.

Young nonetheless suggests that strict scrutiny is appropriate because Hawaii's law "completely foreclose[s]" a protected Second Amendment right. Young Br. 23-24. But the premise of that argument is mistaken. History

demonstrates that the Second Amendment has never protected a "right" to carry a firearm openly without particularized need. *See* Hawaii Br. 15-35. And even if the Second Amendment protects some right to "armed self-defense . . . outside the home," Hawaii's law does not "completely foreclose[]" it. Young Br. 23-24. The law permits any person to obtain a permit on a showing of good cause, and also authorizes carry in several other circumstances. *See* Hawaii Br. 4-5, 8-11.

2. Young also asserts that even if intermediate scrutiny applies, Hawaii's law is unconstitutional because there is no "reasonable fit" between the law and the State's interests in enacting it. Young Br. 25-26 (quoting *Silvester*, 843 F.3d at 821-822). Not so. Like the good-cause laws upheld by four other Circuits, Hawaii's law satisfies the "reasonable fit" requirement. *See Gould v. Morgan*, 907 F.3d 659, 670-676 (1st Cir. 2018); *Kachalsky v. County of Westchester*, 701 F.3d 81, 96-99 (2d Cir. 2012); *Drake v. Filko*, 724 F.3d 426, 431-432, 436-439 (3d Cir. 2013); *Woollard v. Gallagher*, 712 F.3d 865, 880-882 (4th Cir. 2013).

Young claims that Hawaii's law is "overbroad" because it "take[s] rights away from everyone" and "makes no effort to identify who would misuse a firearm." Young Br. 26. But Hawaii's law does not prevent "everyone" from carrying a firearm in public. Rather, it ensures on a case-by-case basis that individuals have a good reason to openly carry a firearm. The law also attempts to prevent open carry by individuals who are likely to "misuse a firearm": It limits

open carry to persons of "good moral character" who are not otherwise barred by Hawaii law—based, for example, on a prior criminal conviction—from owning or possessing a firearm. Haw. Rev. Stat. §§ 134-7, 134-9(a); *see* Add. 85.

Young's argument that the law is "overbroad" also runs headlong into this Court's precedents, which make clear that a law does not need to be "the least restrictive means of achieving [the State's] interest" to satisfy intermediate scrutiny. *Fyock*, 779 F.3d at 1000. Rather, under the "reasonable fit" standard, the State need only show that the law "promotes a 'substantial government interest that would be achieved less effectively absent the regulation.'" *Id.* (quoting *Colacurcio v. City of Kent*, 163 F.3d 545, 553 (9th Cir. 1998)).[3]

Hawaii's good-cause law readily satisfies that standard. *See* Hawaii Br. 39-41. A wealth of empirical evidence demonstrates the efficacy of restrictions on public carry. *See id.* at 39-40; Amicus Br. of Social Scientists and Public Health Researchers 10-20 ("Social Scientists' Amicus Br."); Amicus Br. of Giffords Law Center 11-18; Amicus Br. of New Jersey et al. 4-5; Amicus Br. of Prosecutors Against Gun Violence 22-23. Indeed, numerous studies have shown that public

[3] Curiously, Young also complains that Hawaii's law is "underinclusive"—that is, that the law is *too* protective of public carry—in some respects. Young Br. 34. But as this Court has held, "underinclusiveness does not doom" a state law under intermediate scrutiny. *Pena*, 898 F.3d at 981.

carry licensing laws decrease violent crime, homicide rates, and gun thefts. *See, e.g.*, Social Scientists' Amicus Br. 10-20 (citing over 20 peer-reviewed studies).

Young responds by citing a handful of countervailing studies. *See* Young Br. 27-30. But this Court need not sort through the conflicting studies and empirical evidence. "It is the legislature's job, not [the court's], to weigh conflicting evidence and make policy judgments." *Kachalsky*, 701 F.3d at 99. When "social scientists disagree," courts "must allow the government to select among reasonable alternatives in its policy decisions." *Peruta*, 824 F.3d at 944 (Graber, J., concurring); *see id.* at 942 (majority opinion) (noting "agree[ment] with the answer the concurrence provides"). That is what the State did here.

II. THE COUNTY'S APPLICATION OF THE STATE'S GOOD-CAUSE LAW IS NOT PROPERLY BEFORE THE COURT, AND IS CONSTITUTIONAL IN ANY EVENT.

In addition to raising a facial challenge to the State's good-cause statute, Young argues for the first time in his opening en banc brief that the *County's* application of the statute violates the Second Amendment. *See, e.g.*, Young Br. 12-19. That challenge, however, is not properly before the Court. And the County's application of the good-cause requirement is constitutional in any event.

A. Young has forfeited any as-applied challenge to the County's regulations by failing to raise it in the District Court or in his panel-stage briefs.

This Court has held that a plaintiff forfeits an issue by failing to raise it in opposition to a motion to dismiss in district court. *See Walsh v. Nev. Dep't of Human Res.*, 471 F.3d 1033, 1037 (9th Cir. 2006). Here, Young's opposition to the County's motion to dismiss raised only a facial challenge to the statute. *See* Opp. to Mot. to Dismiss, D. Ct. Dkt. 29-2, at 3, 7-12. And the District Court therefore never addressed the County's application of the statute. *See Young v. Hawaii*, 911 F. Supp. 2d 972, 991 (D. Haw. 2012).

Young also did not challenge the County's application of the statute at the panel stage. Although his panel-stage brief made a passing reference to the County's "failure to adopt policies which comport with constitutional guidelines," Dkt. 6, at 5, this "bare assertion"—presented without analysis—was insufficient to preserve the issue. *Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994).

Because Young has forfeited an as-applied challenge to the County's regulations, this claim is not properly before the Court. Indeed, it would be particularly inappropriate for the Court to address the County's application of the statute because Young's claim rests heavily on factual allegations that are found nowhere in his complaint, including evidence regarding the County's geography and its practices in issuing permits. *See* Young Br. 12-19. If Young wishes to rely

on these factual allegations to oppose dismissal, the proper way to do so is to amend his complaint, not to raise them for the first time here.[4]

B. Even if the Court were to reach this claim, the County's practice is constitutional for the same reasons the State's law is. The County has made clear that it follows the Attorney General's opinion interpreting Section 134-9. *See* Hawaii Br. 9 n.3, 10. And it has clarified that any interpretation of the statute or the County's regulations that would limit open-carry permits only to security guards is incorrect. *See* Rehearing Pet. 8-9; Rehearing Pet. Reply 3. Under Hawaii law, the County's interpretation of its own regulations warrants deference. *See In re Water Use Permit Applications*, 9 P.3d 409, 463-464 (Haw. 2000).

Young responds by emphasizing data suggesting that the County has not granted any concealed-carry permits in recent years. Young Br. 15-16. But that data is not probative on the critical question here. The statistics Young cites do not indicate how many *open*-carry permits have been granted or denied in the County. *See, e.g.*, Dep't of the Att'y Gen., *Firearm Registrations in Hawaii, 2017*, at 9 (May 2018), https://ag.hawaii.gov/cpja/files/2018/05/Firearm-Registrations-in-

[4] Young's late-breaking allegations about the manner in which the County enforces Section 134-9 are also irrelevant to his facial challenge. *See Calvary Chapel Bible Fellowship v. County of Riverside*, 948 F.3d 1172, 1177 (9th Cir. 2020) ("when reviewing a facial challenge," courts are "limited to reviewing the text of the [statute] itself"; "[h]ow the statute has been interpreted and applied by local officials is the province of an as-applied challenge").

Hawaii-2017.pdf (reporting data on concealed-carry applications, not open-carry applications). They do not indicate how many people have applied for open-carry permits. They do not provide information regarding the strength of the permit applications. And they do not specify whether the County denied licenses on other grounds, such as ineligibility to possess a firearm.[5]

In short, these statistics—and, for that matter, the complaint and the record—say nothing about how the County has applied the open-carry provision. And they say nothing about whether the County's regulations (let alone state law) are constitutional on their face. Thus, even if the statistics Young cites were properly before the Court, they would not meet Young's burden to "plausibly" allege in his complaint that the County's application of the State's good-cause statute is unconstitutional. *Ashcroft v. Iqbal*, 556 U.S. 662, 682 (2009).

III. YOUNG'S DUE PROCESS ARGUMENTS ARE WITHOUT MERIT.

Finally, Young argues that Section 134-9 and its implementation violate due process. He raises two objections. Neither has merit.

[5] Young also asserts that counsel for the County "openly conceded" at oral argument that the County has not issued any open-carry permits to a private citizen. Young Br. 16. Not so. Counsel for the County did indicate that, "to [his] knowledge," he was not aware of any open-carry permits that had issued. Oral Arg. Recording at 17:02-17:13. But counsel's answer simply reflected the lack of record evidence on this point. None of the available data reported the number of open-carry license applications that had been granted or denied in the County.

A. Young claims that Section 134-9 amounts to an unconstitutional "prior restraint" because it vests police chiefs with "sole and unbridled discretion" to grant or deny a carry license. Young Br. 35-36 (citation omitted). The Second, Third, and Fourth Circuits have rejected substantively identical claims. *See Kachalsky*, 701 F.3d at 91-92; *Drake*, 724 F.3d at 435; *Woollard*, 712 F.3d at 883 n.11. This Court should do the same.

To start, the prior-restraint doctrine has no application to the Second Amendment. All six Circuits to consider the question have "declin[ed] to import the First Amendment's prior-restraint framework into an analysis of challenges brought under the Second Amendment." *United States v. Focia*, 869 F.3d 1269, 1284 (11th Cir. 2017); *see Berron v. Ill. Concealed Carry Licensing Review Bd.*, 825 F.3d 843, 847-848 (7th Cir. 2016); *Kachalsky*, 701 F.3d at 91-92; *Drake*, 724 F.3d at 435; *Woollard*, 712 F.3d at 883 n.11; *Hightower v. City of Boston*, 693 F.3d 61, 80 (1st Cir. 2012). With good reason. The prior-restraint doctrine holds that laws giving officials "unbridled discretion" to impose prior restraints on speech are presumptively invalid because "[i]t is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable." *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553, 559 (1975). Those concerns do not apply to firearm licensing laws, which do not present comparable line-drawing

problems or risks of censorship. On the contrary, licensing schemes are necessary to enforce lawful gun restrictions, including prohibitions on carry by felons, the mentally ill, and minors. *See Berron*, 825 F.3d at 847. Furthermore, firearm licensing laws—unlike prior restraints on speech—have been well-established since at least the beginning of the twentieth century. *See* Hawaii Br. 28-29 & n.9.

In any event, even if the prior restraint doctrine applied, Hawaii's law would satisfy it. Section 134-9 does not vest officials with "unbridled discretion." *Se. Promotions*, 420 U.S. at 553. It sets out clear and objective standards: Issuance of a license is authorized "[w]here the urgency or the need has been sufficiently indicated" and a person "is engaged in the protection of life and property." Haw. Rev. Stat. § 134-9(a). The Attorney General has issued detailed guidance addressing the meaning of those standards, explaining that an applicant satisfies them if he demonstrates "a need to carry a firearm for protection that substantially exceeds the need possessed by ordinary law-abiding citizens," and giving examples of individuals who qualify. Add. 83-85. Those requirements are the "same" as the ones the Second, Third, and Fourth Circuits have upheld as sufficiently definite. Add. 84.

Young also suggests that Section 134-9 grants too much discretion because it requires each chief of police to issue procedures for determining whether an applicant is "'a suitable person' to be licensed." Young Br. 35 (citation omitted);

see Haw. Rev. Stat. § 134-9(b)(2). Young lacks standing to raise this claim. His complaint alleges that he was denied a license because he failed to meet the statute's good-cause requirement, not because he failed to meet the suitable-person requirement. *See* Supp. ER 13. Young thus has no injury traceable to the latter requirement, and would receive no redress if it were declared invalid. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231-233 (1990) (plaintiff lacked standing to challenge provision of licensing statute to which he was not subject).

B. Young also argues that Hawaii's good-cause statute violates due process because it does not provide a hearing or appeal process. Young Br. 21, 37-39. For at least two reasons, that argument is not properly before this Court.

First, the claim is not ripe. Young did not attempt—and so was never denied the ability—to obtain a hearing or appeal his license denial in state court. And no court in Hawaii has considered whether such an appeal or hearing is unavailable as a matter of state law. In fact, it is quite possible that Hawaii law *would* entitle Young to a hearing and an appeal. Hawaii law provides "an opportunity for hearing," as well as a right to judicial review from a "final decision," in any "contested case," Haw. Rev. Stat. §§ 91-9, 91-14(a), and no provision of Hawaii law bars the State's counties or the courts from treating the denial of an open-carry permit as a "contested case." Thus, if Young sought hearing or an appeal of the denial of his license application, a court might well

conclude that he is entitled to one. *See, e.g.*, *E & J Lounge Operating Co. v. Liquor Comm'n of Honolulu*, 189 P.3d 432, 434, 441 (Haw. 2008) (holding that liquor license applicants are entitled to a hearing and an appeal).

Young's claim thus "rests upon contingent future events that may not occur as [he] anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998) (internal quotation marks omitted). Until a Hawaii court denies Young a hearing or appeal from his license denial, his claim remains "premature" and "abstract," and this Court lacks jurisdiction to consider it. *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967).

Second, in the alternative, this Court should abstain from resolving this claim because the question whether Hawaii law provides an appeal from the denial of an open-carry license application is unsettled. The *Pullman* abstention doctrine permits "federal courts to refrain from deciding sensitive federal constitutional questions when state law issues may moot or narrow the constitutional questions." *San Remo Hotel v. City & County of San Francisco*, 145 F.3d 1095, 1104 (9th Cir. 1998); *see R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941). Here, the prerequisites for *Pullman* abstention are met. The "case touch[es] on a sensitive area of social policy." *Columbia Basin Apartment Ass'n v. City of Pasco*, 268 F.3d 791, 802 (9th Cir. 2001). The "constitutional adjudication can be avoided"

because a "definite ruling on the state issue" may moot the claim. *Id.* And the resolution of "the possible determinative issue of state law" is "uncertain." *Id.*

In any event, even if this Court does reach the merits of this due process claim, it is foreclosed by this Court's precedents. The Due Process Clause applies only if the plaintiff has a protected "property" or "liberty" interest. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). But where "state law gives the issuing authority broad discretion to grant or deny license applications in a closely regulated field, initial applicants do not have a property right in such licenses protected by the Fourteenth Amendment." *Erdelyi v. O'Brien*, 680 F.2d 61, 63 (9th Cir. 1982) (per curiam). Based on that established principle, this Court held in *O'Brien* that a "may issue" concealed-carry law in California did not create a cognizable "property" interest. *Id.* at 62-63; *see Peruta v. County of San Diego*, 758 F. Supp. 2d 1106, 1121 (S.D. Cal. 2010). That holding applies with full force to Hawaii's "may issue" open-carry law, and defeats Young's due process claim.

CONCLUSION

The District Court's judgment should be affirmed.

Respectfully submitted,

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FOR THE NINTH CIRCUIT

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