

No. 20-1639

IN THE
Supreme Court of the United States

GEORGE K. YOUNG, JR.,
Petitioner,

v.

STATE OF HAWAII, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

Brief *Amicus Curiae* of Hawaii Rifle Association in support of Plaintiff-
Appellant's Petition for Writ of Certiorari

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INTEREST OF AMICUS CURIAE

This amicus curiae brief is filed on behalf of the Hawaii Rifle Association in support of petitioner¹. Hawaii Rifle Association, is a non-profit organization, exempt from federal income tax under either section 501(c)(3) or 501(c)(4) of the Internal Revenue Code (“IRC”). It is dedicated, *inter alia*, to the correct construction, interpretation, and application of the law. Its mission is to protect Hawaiians’ Second Amendment right to keep and bear arms, and to protect Hawaii’s hunting and shooting traditions.

SUMMARY OF ARGUMENT

The petition merits review because the Courts of Appeal have not followed *Heller’s* (*District of Columbia v. Heller*, 554 U.S. 570) instruction that the Second Amendment’s interpretation of that fundamental, preexisting, natural right, is based on the text, history and tradition as America’s founding fathers understood the right and including analysis of the right up to the time after the civil war and ratification of the Fourteenth Amendment. Instead, the Courts of Appeal, resisting *Heller* mightily, have developed a watered down, means-ends, sliding scrutiny approach that ratchets in only one direction, toward an ever diminishing Second Amendment right. The Ninth Circuit’s majority opinion here ruled as constitutional a brazenly unconstitutional framework that amounts to the total destruction of the right under the pretense of regulation.

The Amicus emphasizes two reasons that this case warrants this court’s review. First, the majority opinion of the Ninth Circuit launched its defense of the current

¹ This brief is filed under Supreme Court Rule 37.4, and all counsel of record received timely notice of the intent to file this amicus brief under Rule 37.2 and no party objected.

Hawaii state carry law by initially citing to an 1852 Hawaii kingdom law. The majority opinion used this 1852 royal code to justify Hawaii's so-called longstanding regulation of the carriage of firearms. Before discovery Hawaii was filled with warring chiefs on different islands. Unification under one Hawaiian, a king, with a government sprinkled with foreigners, was manifested in the first Hawaii constitution of 1840. That constitution set up a constitutional monarchy. The King, Kamehameha, saw and used law, the constitution and later, the penal laws of 1852, as any new king would- to solidify power and to keep arms from his subjects and enemies. As *Heller* indicated, the analysis of the Second Amendment includes the text, history and tradition of the Second Amendment. That necessarily included understanding the Second Amendment how the Founding Fathers did. *Heller* also examined how interpretation of the Second Amendment, specifically phrases such as the militia, to keep and bear arms and the scope of the right, relied on authorities from, not only significantly before 1791, but also during the 1800's. Hawaii's 1852 kingdom carrying ban however should not be read in pari materia to the authorities referenced in *Heller* used to interpret the Second Amendment. Hawaii's kingdom days and paradigm echoed into the future including territorial days and even into statehood². The 1852 kingdom carry ban should be viewed in context and if anything should prove the unconstitutional nature of the current statutory scheme from which it flows.

² Hawaii even has a state holiday celebrating a king, King Kamehameha I day, H.R.S. 8-1.

Second, and related to the first reason, the 1852 Hawaii kingdom carry ban does not flow from the ancient, fundamental, and natural preexisting right brought over by the English and guaranteed to be protected by the Second Amendment. The 1852 Hawaii kingdom carry ban, and in fact the Hawaii kingdom constitutions, before and after the 1852 Hawaii kingdom carry ban, are in no way connected to and have no basis in the rights understood by the founding fathers to be rights of all men, all free Englishmen, etc. American rights are not connected to and are not limited or defined by a law, that just so happened to have occurred in 1852, if that law does not have its roots in western civilization and American jurisprudence.

ARGUMENT

I HAWAII'S MONARCHICAL CARRY BAN IS PROOF OF THEN NEW AUTOCRATIC POWER NOT LONGSTANDING REGULATION OF A DEEP-ROOTED FUNDAMENTAL RIGHT

Hawaii was discovered by Captain Cook of the British navy in 1778. The Hawaiians were then the most isolated people on the planet living on a chain of small islands without natural resources in a paradisiac environment. “In that environment the most serious limitations were the absence of metals such as copper and iron, in useable form, confining the people to stone age tools and utensils...”, (Ralph S. Kuykendall, *The Hawaiian Kingdom 1778-1854*, page 4 (1938) “Before Hawaii was unified under a single king, it was a chain of islands ravaged by warring chiefs.” (Maxine Mrantz, *Hawaiian Monarchy, the Romantic Years*, page 8 (1974). The Hawaiians, prior to western discovery, had no concept or history of polity, of government structure, of monarchy, of democracy, of a congress, senate or parliament, of republic, of natural

law, of civil or criminal law or of rights of the person vis a vis powers of the government. After Hawaii was discovered, it quickly became a bustling trading port. Hawaiians were inundated with foreigners- first traders, explorers and naval officers. “Until the year 1796, war was the characteristic note in the islands, with various chieftains engaged in a fierce struggle for supremacy.” “Vancouver³, during his visits to the islands, found much evidence of a regular traffic in arms, by which the **chiefs** on all the islands were supplied with the means of carrying out their factional warfare...”. (Emphasis added), “The coming of foreigners presented a golden opportunity, and foreign men, foreign weapons and foreign ships were eagerly sought.”, “The latter **chief** in 1791 informed Lieutenant Quimper⁴ that all the ships which anchored at the island of Hawaii **gave him** firearms.” (Emphasis added). (Ralph S. Kuykendall, *The Hawaiian Kingdom 1778-1854*, pages 22-23 (1935).

In 1820 missionaries arrived in Hawaii. “...the greater number came out of Puritan new England.” (Ralph S. Kuykendall, *The Hawaiian Kingdom 1778-1854*, page 101 (1938). The Hawaiians, prior to western contact, and through the first several decades of contact, had no institutions of government and no written language or any written laws at all. With the assistance of the missionaries, a written Hawaiian language was created sometime in the 1820’s. Having had no prior government whatsoever and no specific laws at all, and being heavily influenced by New England Puritans, the first

³ Vancouver was a Midshipman under Captain Cook the great explorer and later a Captain of his own ship who led additional exploration missions.

⁴ Quimper was a Spanish naval officer.

“laws” were modest and demonstrated their origins. “It was decided to adopt only three laws at this time, to go into effect in three months (March 1828). These three laws were: first against murder...second against theft,...third against adultery...” (Ralph S. Kuykendall, *The Hawaiian Kingdom 1778-1854*, page 125 (1938).

As the Hawaiian people struggled culturally with being thrust from the stone age to the industrial revolution of the early 1800’s, trade, an influx of foreigners and a new religion, Christianity, demanded that they also progress from warring chiefs to some form of government. Armed with a written language and with the guidance of the missionaries, Hawaiians attempted to form a government. That meant all the chiefs would have to be subjected to one chief. Kamehameha, who was to later be the first king of Hawaii, had formed early relations with British officers and sailors. As discussed above, all the chiefs quickly learned about firearms, and sought and gathered them- For the chiefs themselves and their armies- not for their individual subjects.

Kamehameha, through the use of foreign ships, men and arms, conquered the islands⁵. In fact, a popular tourist site still today, the Pali lookout, atop a mountain with sharp cliffs and an expansive view, is the site where Kamehameha drove his fellow Hawaiians off the cliffs to their deaths to secure the island of Oahu⁶. Once chief, or king, of the new kingdom of the whole of the islands, governmental structure was needed by Kamehameha. Although the Ninth Circuit’s en banc decision cites the

⁵ The chief of Kauai was not conquered but later acquiesced and joined Kamehameha’s newly minted kingdom.

⁶ <https://www.hvcb.org/listing/nuuanu-pali-lookout/109450/>

Hawaiian penal code of 1852's "To Prevent the carrying of deadly weapons" law, (*Young v Hawaii*, 992 F.3d 765 (9th. Cir, 2021), at 773), one must first consider the history and context of the Hawaiian kingdom and its laws. In order to understand how the kingdom's carry ban, described above, was promulgated into law, the starting place is the Hawaii kingdom's first constitution of 1840.

The Hawaii kingdom Constitution of 1840 is replete with language that proves the haughty approach cited by the dissent (*Young* at 852) "haughty notions of ... state sovereignty and state supremacy" as allowing "the state [to] assum[e] a supercilious preeminence above the people, who have formed it"). While the United States Constitution flows, as stated in the opening verse, from "We the people...", the Hawaii Constitution of 1840 declares an "Exposition Of the Principles on which the present dynasty is founded" and further explains "The origin of the present government, and system of polity, is as follows: Kamehameha I was the founder of the kingdom, and to him belonged all the land from one end of the Islands to the other, ..." The Hawaiian 1840 constitution continues "The kingdom is permanently confirmed to Kamehameha III⁷, and his heirs,...". (1840 Kingdom of Hawaii Constitution) In the Hawaii Constitution of 1840 section "Prerogatives of the King", it is explained "He is the sovereign of all the people and all of the chiefs. The kingdom is his. He shall have the

⁷ Kamehameha I, with aid from foreigner sailors, ships and arms, successfully conquered all islands except Kauai by approximately 1795. The island of Kauai, through its chief, joined the kingdom in 1824. By the time written law, the 1840 constitution, was promulgated, Kamehameha III was king.

direction of the army and all the implements of war of the kingdom⁸.” (Emphasis added) The king, believing himself descended from the gods, viewed his subjects as needing his protection and the Hawaii Constitution of 1840 states as much, “Protection is hereby secured to the persons of all the people,...”.

But make no mistake, while Kamehameha, and other chiefs like him, gathered and secured arms, *for their armies*, subjects were not allowed arms. “Kamehameha I did not believe in democracy. His rule was decidedly autocratic” (Maxine Mrantz, *Hawaiian Monarchy, The Romantic Years*, page 11 (1974). While the missionaries attempted to insert concepts of rights and due process into governing documents, Kamehameha, and his progeny had developed strong ties with the British and had no doubt recognized the role of an all-powerful king like the king of England.

As the Hawaii Constitution of 1840 was promulgated, one of the first promulgated laws made clear that those living in Hawaii were not citizens but were in fact subjects. Kamehameha III signed the first set of laws in 1840 and it began by stating “The subjection of the people to the chiefs, from former ages down, is a subject well understood, as is also a portion of the ancient laws. That subjection and those laws are not now as a matter of course discontinued, but there are at the present time many

⁸ The British Brown Bess was the standard musket of the British military infantry from before the American Revolutionary war to the early 1800’s. American colonists, civilians, had, not only the Brown Bess, a common military arm, but the Kentucky long rifle, a newer military arm not only in common use at the time but much better at sniping due to its longer range, 300 yards versus 100 yards. American citizens, not in the Continental Army, had the same or better military arms than the British army. In Hawaii, all implements of war were the king’s. Comparing the British musket’s reloading speed to the American rifle’s range and accuracy it is noted “The rifle had thus arrived upon the military scene as a force to be reckoned with.” (Harold L. Peterson, *Arms And Armor In Colonial America 1526-1783*, page 196 (1956).

new laws, with which it is well that all the people should become acquainted.” (Hawaii Kingdom Laws 1840) This constitution sets the stage and is the bedrock and foundation of the 1852 Hawaii royal carriage law. That foundation is that the people are not citizens or freemen, but subjected to the power and authority of the king. It is the opposite of “We the people”, Americans who grant limited power to government to perform limited functions. It should also be remembered that without any written language and without any form of governmental institutions, when catapulted from the stone age into the industrial revolution, Hawaiians, and Kamehameha and his descendants, found themselves in a whirlwind of conflict. American and European traders and naval explorers transited through Hawaii, sometimes for a night, sometimes remaining forever. Foreigners brought new ships, new technology, metals, firearms, and other tangible items. Foreigners also brought new cultures, the concept of private property⁹, the concept of laws etc. Many times, clashes of cultures led to lawlessness since, at the time, there were no laws. Regarding the years between 1814 and 1854 and Kamehameha III, it is noted “The islands were going through a time of violence and lawlessness. Theft of foreign properties was common among Hawaiians. Widespread drunkenness, stealing and vandalism were also common.” (Maxine Mrantz, *Hawaiian Monarchy, The Romantic Years*, page 16 (1974).

Shortly after the Penal Code of 1852, cited by the Ninth Circuit, to prevent the carrying of deadly weapons, Hawaii promulgated another constitution just twenty-four

⁹ It was only after decades of persistent effort that the king decided in 1848 to institute private ownership of lands.

years after its first one. Although pressure mounted from foreigners within the governmental bureaucracy to move the government away from an all powerful monarchy¹⁰, the Kamehamehas and the government of Hawaii still treated the people as subjects without any reference, connection or understanding of deeply-rooted rights of Americans and their forebearers, the English. The Hawaii 1864 Constitution began by proclaiming “CONSTITUTION- **GRANTED**, by HIS MAJESTY KAMEHAMEHA V.,...” (Emphasis added). (Hawaii Kingdom Constitution 1864) The foreigners in the bureaucracy convinced the king to include some minor parts that might look vaguely familiar to Americans, such as “The privilege of the writ of *Habeas Corpus*” which of course was subject to the discretion of the king. Conspicuously absent of course, is the Second Amendment and the right of the people to keep and bear arms.

There is no documentation to be found regarding whether or not the Second Amendment was ever discussed in drafting the 1840 or 1864 Hawaii kingdom Constitution, but it is unlikely a king seeking to remain all powerful would have allowed his subjects to become and remain armed as was understood to be an American’s pre-existing right (As described by the dissent in *Young*, “The Court in *Heller* observed that the right to “bear arms” historically referred to a right to ‘wear, bear, or carry upon the person or in the clothing or in a pocket, for the purpose of being

¹⁰ This persistence to keep an all powerful monarchy finally came to a head when queen Liliuokalani, in January 1893, told her cabinet that she would not uphold the constitution she had sworn to uphold and would instead write one with a much stronger monarchy after which she was deposed in a nearly bloodless overthrow. The Republic of Hawaii, without any royalty, later sought admission to the United States which occurred in 1898.

armed and ready for offensive or defensive action in a case of *conflict with another person.*” (*Young v Hawaii* at 831).

It should be remembered that “In the old days and as late as 1824 capital punishment was inflicted at the will of the king or superior chief and without trial.” (Ralph S. Kuykendall, *The Hawaiian Kingdom 1778-1854*, page 127 (1934). In fact, in the 1864 Hawaii kingdom Constitution, one of the few places where arms are discussed, the people are specifically not allowed them- “All men shall have the right, in an orderly and peaceable manner, to assemble, without arms, to consult upon the common good, and to petition the King or Legislative Assembly for redress of grievances.” (Emphasis added¹¹) (Hawaii kingdom Constitution 1864 Article 4). The king’s haughty approach to his subjects is again reiterated in Article 14 of the 1864 Hawaii kingdom constitution, “Each member of society has a right to be protected by it...”.

It should be finally noted that the 1852 royal penal law cited by the Ninth Circuit en banc majority is further illustrative of the monarchical approach of controlling all subjects. The Ninth Circuit notes, without consideration of what it means, that the exemptions to the law, i.e. those that are authorized or *allowed by the king* to carry arms or to be armed with various weapons including edged weapons and other “deadly weapons”, most certainly to include firearms, include “All persons holding official,

¹¹ The United States Constitution, Amendment I, guarantees the right to peacefully assemble to petition for redress and that assembly can be peacefully accomplished while armed. The Second Amendment is “for the purpose of being armed and *ready* for offensive or defensive action in a case of conflict with another person.” That is, carrying, without evil intent or offensive action, is presumed lawful.

military or naval rank, either under this government, or that of any nation at peace with this kingdom, when worn for legitimate purposes”. What that means is **all** the king’s men may bear arms, “when worn for legitimate purposes.” But no one else- ever- under any circumstances. That is not nuanced, considered, balanced “regulation” of a deeply-rooted fundamental right- it is the destruction of the right. That is the king exercising absolute subjection over his subjects and all others in the kingdom, save his men. In *Heller* this was discussed as a reason why the Second Amendment evolved in the way it did. See *Heller* “Between the Restoration and the Glorious Revolution, the Stuart Kings Charles II and James II succeeded in using select militias loyal to them to suppress political dissidents, in part by disarming their opponents.” (*Heller* at 592) In Hawaii, the king merely disarmed everyone.

The Ninth Circuit seriously erred when it considered the Hawaiian king’s 1852 monarchical carry ban and used it as its launch point. Without the necessary history and context as explained herein of the, at the time, newly minted kingdom, which didn’t last very long thereafter, the 1852 royal carry ban seems like just another law of the 1800’s to be considered like other states and territories of the time. In fact, the Ninth Circuit uses Hawaii’s 1852 ban to close the loop declaring “The Territory of Hawai’i’s enumerated restrictions on carrying weapons were well within this tradition. Hawai’i’s 1852 law punished...” (*Young* at 802)(Emphasis added) The 1852 royal law is not anywhere on par with American states of the 1700’s and 1800’s. The Ninth Circuit failed to consider the history and context of how the kingdom’s laws, carried over to the Territory of Hawaii upon annexation, were, ab initio, bereft of any

connection to the deeply-rooted fundamental rights guaranteed by the Second Amendment to the United States Constitution. In fact, the history and context of the 1852 kingdom carry ban¹² should not just be ignored when a Second Amendment analysis is conducted, it should in fact be counted as an glaring example of why the Second Amendment exists and an example of a clearly unconstitutional law.

II THE SECOND AMENDMENT IS AN EXPANDED VIEW OF A FUNDAMENTAL RIGHT DEEPLY ROOTED IN WESTERN CIVILIZATION AND ENGLISH COMMON LAW GOING BACK TO THE ROMAN EMPIRE

Amicus fully supports the dissent's opening statement "The majority's decision undermines not only the Constitution's text, but also half a millennium of Anglo-American legal history, the Supreme Court's decisions in *District of Columbia v. Heller*, 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010), and the foundational principles of American popular sovereignty itself." (*Young* at 829) Amicus also concurs with the dissent's observation "... (noting that the Second Amendment "was adopted with some modification and **enlargement** from the English Bill of Rights"); William Rawle, *A View of the Constitution of the United States of America* 126 (2d ed. 1829)" (Emphasis added) (*Young* at 843).

¹² The 1852 ban is also a complete weapon category ban and also a complete ban upon all persons since only government agents are exempt when carrying arms "when worn for legitimate purposes." It bans all weapons equally and all persons, save the king's agents. It is in fact worse than a law that allows for special people in special circumstances to have certain arms. The current Hawaii Revised Statute at issue, though it claims to allow certain people under extraordinarily special circumstances to carry arms, in practice it acts as the king did and no one can exercise the fundamental English right.

Amicus points out that the Second Amendment right, which is an enlarged version of the English right to keep and bear arms as codified in the English Bill of rights, was understood by the founders as a right going back to ancient times. When that language is used it is because the founding fathers were versed and well familiar with history, tradition, law and government harking back to the Romans and the Greeks. *Heller* instructs us that to determine the meaning, broad scope and deep breadth of the Second Amendment right, it is important to understand how the founding fathers understood the right.

“While relying to a great extent on Cisero,...philosopher of Rome, ...the founders of this nation based their thinking on the role of the Roman militia...” (Stephen P. Halbrook, *That Every Man Be Armed*, page 7 (Second Edition 1994) The founding fathers were also quite familiar with Plato. Plato stated “Then, to be sure, the people will learn what sort of creature it has bred and nursed to greatness in its bosom, until now the child is too strong for the parent to drive out. Do you mean that the despot will dare to lay hands on this father of his and beat him if he resists? Yes, when once he has disarmed him.” (Stephen P. Halbrook, *That Every Man Be Armed*, page 10 (Second Edition 1994).

The Second Amendment is interpreted under the framework set out by *Heller*. That framework is based on how the founding fathers understood the right, the people and how the people interacted with the American government. The founders viewed the world with a deep understanding of the history of man in western civilization- from the rise and fall of the Roman empire, the Greeks, through the Assize of Arms of 1181,

through the Glorious Revolution to the American Revolution. Hawaii kingdom laws, including specifically the 1852 carriage ban, and in fact the Hawaii kingdom constitutions of 1840 and 1864, the bedrock of the Hawaii kingdom of the 1800's, do not flow from the evolution of the understanding of the ancient right of the citizen to keep and bear arms. They are untethered and unconnected from the founding fathers' understanding of that natural, fundamental, pre-existing, enlarged right that is protected by the Second Amendment. This court would not examine the Japanese 1892 Meiji Constitution and the roles of the Japanese subjects and the Japanese Emperor set therein to illuminate and determine the meaning of the Second Amendment. It does not matter that the 1892 Japanese Meiji Constitution was within 100 years of the founding of the United States nor that it was a culmination of the Meiji Restoration¹³ that began in 1868 at the same time that the United States was in the Reconstruction Period following the American civil war and the same year as the ratification of the Fourteenth Amendment. This Court should not give any positive weight to any of the Hawaii kingdom laws because they have no connection to western civilization and the founding fathers' understanding of the citizen, the people, their rights, and the government. In America the government serves the people, and serves to guarantee the rights of the people, including the distinctly broader American right to keep and bear arms, not to protect the king.

¹³ <https://www.britannica.com/event/Meiji-Restoration>.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted or, alternatively, the Court should hold this case pending a decision in *NYSRPA*.

Respectfully submitted,

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DATED: JUNE 22ND, 2021