

No. 12-17808

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

George K. Young, Jr.

Plaintiff-Appellant,

v.

State of Hawaii, et al,

Defendants-Appellees.

On En Banc Review of Appeal from the United States District Court
for the District of Hawaii,
No. 12-00336-HG-BMK

**BRIEF OF AMICUS CURIAE JOHN CUTONILLI
IN SUPPORT OF PLAINTIFF-APPELLANT**

John Cutonilli
P. O. Box 372
Garrett Park, MD 20896

4 June 2020

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Pursuant to Federal Rule of Appellate Procedure 26.1, amicus John Cutonilli certifies that the amicus is not a publicly held corporation, that the amicus does not have a parent corporation, and that no publicly held corporation owns 10 percent or more of amicus's stock.

/s/John Cutonilli
John Cutonilli
P. O. Box 372
Garrett Park, MD 20896

Table of Contents

INTEREST OF AMICUS CURIAE.....1

INTRODUCTION2

ARGUMENTS5

 1. *Restricting public carry negatively affects the individual’s ability to provide for self-defense and contribute to public safety.....5*

 2. *Insubstantial data leads to unreasonable inferences and a failure to demonstrate that restricting public carry achieves public safety goals.8*

 3. *Concealed carry is a policy decision, not a legal one15*

CONCLUSION.....18

TABLE OF AUTHORITIES

Cases

Aymette v. State, 21 Tenn. 154 (1840).....	17
Castle Rock v. Gonzales, 545 U.S. 748 (2005)	7
DeShaney v. Winnebago County, 489 U.S. 189 (1989).....	7
District of Columbia v. Heller, 554 U.S. 570 (2008)	6, 9, 15
English v. State, 35 Tex. 473 (1871)	16
FCC v. Beach Communications, Inc., 508 U.S. 307 (1993)	8
Fried v. Archer, 775 A. 2d 430 (Md. Ct. Spec. App., 2001)	7
Korematsu v. United States, 323 U.S. 214 (1944).....	2, 3, 5
Korematsu v. United States, 584 F Supp. 1406 (N. D. Cal. 1984).....	3, 4, 5
Marbury v. Madison, 1 Cranch 137, 2 L.Ed. 60 (1803)	9
Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012)	9
Peruta v. County of San Diego, 824 F. 3d 919 (2016)	15
State v. Buzzard, 4 Ark. 18, 19 (1842)	17, 18
State v. Chandler, 5 La. Ann. 489 (1850)	16, 17
State v. Reid, 1 Ala. 612 (1840).....	16
State v. Workman, 14 S.E. 9, 11 (W. Va. 1891).....	16
Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622 (1994)	8
Turner Broadcasting System, Inc. v. FCC, 520 U.S. 180 (1997)	8

Warren v. DC, 444 A. 2d 1 (DCCA 1981)7

Woollard v. Gallagher, 712 F.3d 865 (4th Cir. 2013)1, 10

Statutes

1285 Statue of Winchester5

33 Hen. 8, c. 6, § 1 (1541–1542) (Eng.)16

By The King James I: A Proclamation Against Steeleets, Pocket Daggers, Pocket
 Dagges and Pistols, reprinted in 1 Stuart Royal Proclamations 359–60 (James F.
 Larkin & Paul L. Hughes eds., 1973).16

Other Authorities

Aneja, Donohue & Zhang, The Impact of Right to Carry Laws and the NRC
 Report: The Latest Lessons for the Empirical Evaluation of Law and Policy
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http://papers.ssrn.com/sol3/papers.cfm?abstract_id=244368113

<https://www.dps.texas.gov/rsd/LTC/reports/convrates.htm>14

<https://www.dps.texas.gov/rsd/LTC/reports/demographics.htm>14

Violence Policy Center, License to Kill IV: More Guns, More Crime, at 5 (June
 2002), available at <http://www.vpc.org/graphics/ltk4.pdf>14

INTEREST OF AMICUS CURIAE

Cutonilli is a resident of Maryland and is subject to laws similar to those under consideration in the Hawaii case. As he is unable to bring suit against Maryland due to the precedent set in *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013), he seeks to provide additional insight into other aspects of the law that were neither addressed in *Woollard* nor in the court's decision in this case. His intent is to help this court avoid previous errors so that other fellow Americans are not subject to such laws, which are detrimental to public safety. All parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part. Apart from amicus curiae, no person contributed money to fund this brief's preparation and submission.

There are several key considerations that this amicus brief brings to light, which are missing in the parties' briefs. This brief provides historical insight into the public safety benefit of Second Amendment rights and how laws have been tailored in the past to preserve and protect the individual and societal benefits of these rights while curtailing the criminal use of firearms. It provides additional analysis into public safety, the limits of the government's interest in public safety as well as the role law-abiding individuals play in providing public safety. It also points out the insubstantial nature of the data used by both the State of Hawaii as

well as the County of Hawaii (Hawaii) and the logical fallacies inherent in Hawaii's analysis of that data, each of which leads Hawaii to make to unreasonable and unfounded inferences.

Using the Korematsu case as an object lesson and infamous legal precedent, this brief underscores (1) the detrimental effects that arise when the constitutional rights of law-abiding citizens are unjustly curtailed because of the illicit acts of a few and (2) the vital role that the courts play in ensuring that government actions receive the "close scrutiny and accountability" needed to promote public safety while protecting the rights of law-abiding citizens.

INTRODUCTION

During World War II the United States forced the relocation and incarceration of more than 100,000 Japanese Americans, citing concerns for public safety. The constitutionality of their internment was litigated in *Korematsu v. United States*, 323 U.S. 214 (1944). The Supreme Court found that "exclusion of those of Japanese origin was deemed necessary because of the presence of an unascertained number of disloyal members of the group, most of whom we have no doubt were loyal to this country" *Id.* at 218. The Court's decision resulted in placing restrictions on the Japanese-American population at large—most of whom were law-abiding citizens—because of the illicit acts of a few.

While the Court acknowledged that “all legal restrictions which curtail the civil rights of a single racial group are immediately suspect,” it still asserted that “pressing public necessity may sometimes justify the existence of such restrictions...” *Id.* at 216. While claiming that it applied “the most rigid scrutiny,” instead the Court deferred to the government’s findings, stating an unwillingness to “reject as unfounded the judgment of the military authorities.” *Id.* at 219.

Importantly, the dissent in *Korematsu* claimed that in deferring to the government, the Court had failed to rule on a key judicial question. In doing so, it had permitted the overstepping of "... the allowable limits of military discretion” and failed to impose “definite limits to [the government’s] discretion” *Id.* at 234. In a statement that anticipates the future view of the courts and the American public on the *Korematsu* decision, the dissent further argued that:

“[I]ndividuals must not be left impoverished of their constitutional rights on a plea of military necessity that has neither substance nor support” *Id.* at 234 (Murphy, J., dissenting).

A subsequent trial held long after the war, *Korematsu v. United States*, 584 F Supp. 1406 (N. D. Cal. 1984), found that there is substantial evidence that the government omitted relevant information from the Court and also provided misleading information. While the Court decided not to determine any errors of law, it did grant a writ of *coram nobis* and cautioned subsequent courts that:

“It stands as a caution that in times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability. It stands as a caution that in times of international hostility and antagonisms our institutions, legislative, executive and judicial, must be prepared to exercise their authority to protect all citizens from the petty fears and prejudices that are so easily aroused.” *Id.* at 1420

During a time of marked “distress ... hostility and antagonism” over Second Amendment rights, Hawaii presents a similar case, arguing that the government’s public safety interest supersedes constitutional guarantees. As in the case of *Korematsu*, Hawaii punishes law-abiding citizens for the felonious behavior of criminals. However, Hawaii fails to understand the limits of the government’s public safety interests. It neglects to recognize the critical contribution to public safety made by law-abiding gun owners. It misinterprets precedent, and it promulgates misunderstanding and misinformation by relying on faulty data.

Considering what has been learned by *Korematsu*, it is hoped that this court will properly evaluate the legal merits of the case and, specifically, whether Hawaii makes reasonable inferences based on substantial evidence and meets the standard of intermediate scrutiny. It is hoped that the court will recognize that the illegal acts of some, however heinous, are insufficient to deny the constitutional rights of law-abiding citizens, whose responsible ownership and use of guns can be an indispensable benefit to both self-defense and public safety. It is hoped that at a

time in our nation when critical legal issues are so frequently politicized and sensationalized that this court will be prepared to exercise its authority “to protect all citizens from the petty fears and prejudices that are so easily aroused” *Id.* at 1420.

ARGUMENTS

1. *Restricting public carry negatively affects the individual’s ability to provide for self-defense and contribute to public safety.*

The majority in the *Korematsu* case rationalized its position by claiming it supported the public good. “Pressing public necessity” 323 U.S. at 216 required the infringement of the rights of some people to protect the rights of others, or so the argument went at the time. Similarly, in many Second Amendment cases, the government’s interest in public safety is often used as a rationale for curtailing the constitutional rights of legal gun owners. Yet in these cases, not only are the abridgements of the rights of the law-abiding public rationalized away, but the material contribution to public safety made by those very gun owners is left unconsidered.

A long tradition of gun ownership for self- and community protection predates today’s arguments for gun rights. This tradition can be traced to the 1285 Statue of Winchester, which required most men to maintain arms and actively keep the peace. When the Constitution was written, there was no organized police force,

and it was not until the middle of the 19th century that most major urban police departments were established (Breyer dissent in *District of Columbia v. Heller* 554 US 570, 716 (2008)). Society depended on the armed, law-abiding citizen to protect the public peace. The Maryland State Police force pays homage to this long-standing tradition on its website:

“Under English common law, every person had an active responsibility for keeping the peace...The responsibility included crime prevention through vigilance and the apprehension of suspected lawbreakers by groups of persons raising the ‘hue and cry’ or the more official ‘posse comitatus.’”

Historically, as today, gun owners contribute directly to public safety. They protect themselves and their families, their property, and sometimes the lives and property of members of their community. While many examples of the lawful and, indeed, selfless acts of gun owners can be found in the news, the balance of media coverage is given to illicit gun activity (gang violence, mass murders, etc.) that associates guns with criminal activity and fosters confusion between lawful and unlawful possession and use of firearms. Opponents of gun rights hold that the history of individual citizens contributing to the public safety is now irrelevant. While it is true that police forces make an invaluable contribution to public safety, they cannot be expected to provide for the safety of every individual.

Because the government has limited resources, there are limits to the degree of safety the government can provide. This is not merely a practical issue; it is a

legal issue as well. As explained in *Warren v. DC*, 444 A. 2d 1 (DCCA 1981), “...courts have without exception concluded that when a municipality or other governmental entity undertakes to furnish police services, it assumes a duty only to the public at large and not to individual members of the community” *Id.* at 4. In that case, the District of Columbia was found to have based its case on the “uniformly accepted rule...that a government and its agents are under no general duty to provide public services, such as police protection, to any particular individual citizen” *Id.* at 4.

Consistently, courts have ruled that public safety, through the government’s police power interests, is owed to the public at large and not to any specific individual. (*Warren v. DC*, 444 A. 2d 1, (DCCA 1981), *Fried v. Archer*, 775 A. 2d 430 (Md. Ct. Spec. App.), 2001, *Castle Rock v. Gonzales*, 545 U.S. 748 (2005), *DeShaney v. Winnebago County*, 489 U.S. 189 (1989)). Therefore, the government has no interest in the protection of any specific individual because it cannot deliver protection at the individual level.

It is precisely for this reason that the individual right to self-defense is critical. Not only are lawful gun owners able to fill critical gaps in safety for their own benefit, but they may also provide protective benefits to the greater public. The self-responsible individual who is able and willing to contribute to his own self-defense is a vital component of public safety. Since an individual is a subset of

the public, the safer individuals are, the greater is the level of general or public safety. The aggregation of each individual's safety contributes to the public's safety. The abridgement of individual rights, therefore, diminishes not only the individual's safety, but the public's safety as well.

2. *Insubstantial data leads to unreasonable inferences and a failure to demonstrate that restricting public carry achieves public safety goals.*

One of the problems identified in *Korematsu* is that the government's case relied on faulty evidence: it used misleading information and omitted relevant information. In matters of policy, the role of the court is to ensure that the legislature has "drawn reasonable inferences based on substantial evidence," *Turner II* 520 U.S. at 195 quoting *Turner* 512 U.S. at 666. Without these reasonable inferences based on substantial evidence, the intermediate scrutiny standard evaluated under *Turner* devolves to rational basis, a lower standard. This is because rational basis does not require substantial evidence; instead, it can be based on "rational speculation unsupported by evidence or empirical data." *FCC v. Beach Communications, Inc.* 508 U.S. 307, 315 (1993) Rational basis is not appropriate for fundamental rights such as those of the Second Amendment, 554

U.S. at 628. The Court affords no deference when dealing with matters of law, however.¹

Yet in the *Korematsu* case, the court never validated the evidence, or the inferences drawn from that evidence, instead deferring to the government and citing national security as a rationale. In its argument, Hawaii exploits concerns over public safety the way *Korematsu* exploited concerns over national security, and, similarly, Hawaii appears to expect the court to defer to the government's interpretation of facts, as the court did in *Korematsu*.

Hawaii relies on other courts to substantiate its case, but these other courts have not appropriately validated the evidence presented. One of the cases Hawaii

¹ "The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written." *Marbury v. Madison*, 1 Cranch 137, 176, 2 L.Ed. 60 (1803). Our respect for Congress's policy judgments thus can never extend so far as to disavow restraints on federal power that the Constitution carefully constructed. "The peculiar circumstances of the moment may render a measure more or less wise, but cannot render it more or less constitutional." Chief Justice John Marshall, *A Friend of the Constitution* No. V, *Alexandria Gazette*, July 5, 1819, in *John Marshall's Defense of McCulloch v. Maryland* 190–191 (G. Gunther ed. 1969). And there can be no question that it is the responsibility of this Court to enforce the limits on federal power by striking down acts of Congress that transgress those limits. *Marbury v. Madison*, *supra*, at 175–176." *Nat'l Fed'n of Indep. Bus. v. Sebelius* 567 U.S. 519, 538(2012)

relies on in this manner is *Woollard v. Gallagher*. While *Woollard* presented evidence to demonstrate that “crime is largely random and unpredictable,” the court in that case dismissed this evidence. The court viewed the evidence as a policy dispute, not a legal one, and deferred to the Maryland state legislature *Id.* at 881. In doing so, the court left legal considerations of the actual right unexamined and failed to adjudicate the following legal issues (1) whether reasonable efforts at self-defense outside the home might entail public carry, (2) how disarming the victim lessens crime, or (3) how reducing the number of people protecting themselves and the public increases public safety. In skirting these legal issues, the court in the *Woollard* case did not ensure that the inferences were reasonable or supported by substantial evidence showing an improvement to public safety based on prohibitions on public carry.

When *Woollard* accepted evidence, it accepted irrelevant evidence based on the *criminal behavior of a few*, not on data that pertained to law-abiding citizens. *Woollard*, in other words, failed to demonstrate anything substantial about law-abiding citizens. They instead confused and conflated law-abiding behavior with that of criminal behavior.

The State of Hawaii’s arguments are similarly faulty. The State of Hawaii’s supplemental brief relies on insubstantial evidence in claiming that “[i]t is **having** the gun while in public, period, that creates the danger, and tips the balance”

(emphasis in original). This statement is patently false. If it were true that having a gun in public—in and of itself—were a danger, then Hawaii, according to its own logic, could not responsibly allow police officers or security guards to carry weapons in public. Clearly, merely having guns in public is not a danger. It is the *intent and action* of the person possessing the gun that creates potential or actual danger. On the basis of a faulty premise, Hawaii contends that the constitutional rights of lawful gun owners to possess weapons in public, concealed or otherwise, should be banned because of the criminal acts of some who may intend and/or cause harm. As in *Korematsu*, the rights of all are abridged because of the potential wrongdoing of a few.

The County of Hawaii did not present any facts to demonstrate its claim that its requirements to obtain a license to carry are substantially related to an important government interest. That omission alone should be sufficient to conclude that there is no substantial relationship between its requirements a government interest. They also concede that in more than 20 years, they have not seen fit to issue a single permit to carry to any individual other than security guards, which is tantamount to a ban on carry permits for the general public. Instead of presenting substantial data to show that individuals licensed to carry increase crime, Hawaii simply refers to other courts' determinations, such as *Woollard*. This means that Hawaii relies on evidence whose legal validity is questionable.

What begins to emerge is a pattern whereby cases that would seek to limit Second Amendment rights effectively recycle evidence that has been left inappropriately *scrutinized* by prior courts, which are then deferred to the legislature without appropriate decisions on legal matters. The net effect of this cycle is that the validity of the evidence supporting laws that would place limitations on Second Amendment rights is not being legally evaluated based on appropriate levels of scrutiny. Instead, these laws are being driven by legislatures in environments that are subject to the politics of electioneering and shifting public opinion and are not held to the standards of scrutiny meant to keep government overreach in check.

Another piece of evidence introduced in the State of Hawaii's supplemental brief is a comprehensive study on right-to-carry laws.² The study attempts to demonstrate that right-to-carry laws negatively impact crime rates. Importantly, the study does not attempt to demonstrate that the conceal carry holders themselves commit crimes, which would constitute more substantial evidence against conceal carry and which would be more fitting evidence for intermediate scrutiny. The

² Aneja, Donohue & Zhang, *The Impact of Right to Carry Laws and the NRC Report: The Latest Lessons for the Empirical Evaluation of Law and Policy* (Dec. 2014) Abstract, avail. At http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2443681

findings of this study are so inconclusive that the authors' themselves admit that "with the current evidence *it is not possible to determine that there is a causal link*" *Id.* at 79 between right-to-carry laws and changes in certain crimes (emphasis added). The authors bemoan "how easy it is for mistakes to creep into these empirical studies," *Id.* at 78 citing inadequate data, miscoded data, and the improper selection of data ranges. They also specifically mention the sensitivity of gun-crime estimates to modeling decisions (small changes to the model give very different results) and the lack of certainty it creates.

One of the problems with the approach taken in this study is that in order to be conclusive in demonstrating a causal relationship between one specific factor and an increase in crime, for example, the study must rule out all other factors. This requires a data set far more comprehensive than the one used here. This study, for example, attempts to control for the impact of the crack cocaine epidemic on the crime statistics analyzed—and this may or may not have been done adequately. However, there are many more factors that may have had a causal impact on crime rates, but this study lacks the data to look at those factors. If, for example, the crack cocaine epidemic changed the results, what about the methamphetamine epidemic? The lack of data precludes ruling out other factors, such as this.

It is relatively easy to crunch numbers and make correlations based on those numbers. It is a logical fallacy to think that those correlations have any legal

validity without attaining the much higher standard of a demonstrated *correlation*. Without causation, correlation is, at best, rational speculation, which is permissible under rational basis, but fails to meet the standard of intermediate scrutiny. The other studies presented in the State of Hawaii’s original briefs are marred by similar flaws.

Hawaii includes crime data in its original brief that, when explored further, demonstrates precisely the opposite of what Hawaii contends. Hawaii introduces data from the state of Texas, which is one of the few states to track conviction rates of license-to-carry (LTC) holders. Hawaii claims that Texas LTC holders were arrested for weapons-related offenses at a rate 81 percent higher than the general population.³ However, Hawaii fails to acknowledge that when the *conviction data* is analyzed for this same subset of the Texas population, a very different story emerges.⁴ Based on data from 1996, when the state first started recording convictions among this group, LTC holders were convicted at a rate *24 percent lower* than the general population (135 LTC convictions per 100,000 LTC holders vs 176 convictions per 100,000 population). In 2019, Texas LTC holders were

³ Violence Policy Center, License to Kill IV: More Guns, More Crime, at 5 (June 2002), available at <http://www.vpc.org/graphics/ltk4.pdf>

⁴ <https://www.dps.texas.gov/rsd/LTC/reports/convrates.htm> and <https://www.dps.texas.gov/rsd/LTC/reports/demographics.htm>

convicted at a rate *94 percent lower* than the general population (14 LTC convictions per 100,000 LTC holders vs 219 convictions per 100,000 population). Contrary to Hawaii’s contention, Texas crime data demonstrates that LTC holders are more likely to be law abiding than the general Texas population.

3. Concealed carry is a policy decision, not a legal one

Following *Peruta v. County of San Diego*, 824 F. 3d 919 (2016), Hawaii relies in part on historical information to make its case against public carry and specifically against concealed carry. While the historical record includes past prohibitions on concealed carry, current interpretations of our rights are not limited to these past limitations. As stated in *Heller*, the Supreme Court does not “interpret constitutional rights that way,” 554 U.S. at 582. The courts certainly need to be informed by and the historic intent of the Founders, but they are not bound by the more transitory elements of history—e.g. those things that come in and out of fashion, technologies, which evolve, or specific socio-cultural circumstances. For this reason, historical context is essential to understand why concealed carry was prohibited and to determine if those prohibitions remain relevant.

When analyzed in context, statutes in force before the Constitution was written provide insight into the reasons why concealed carry weapons were prohibited. For example, in 1541, a statute against concealed carry was enacted to stop “shamefull muthers roberies felonyes ryotts and routs.” by “evil disposed

persons.” 33 Hen. 8, c. 6, § 1 (1541–1542) (Eng.). A 1613 proclamation banned the carrying of “Steelets, pocket Daggers, pocket Dags and Pistols” because they were considered “weapons utterly unserviceable for defence, Militarie practise, or other lawfull use, but odious, and noted Instruments of murther, and mischief,” By The King James I: A Proclamation Against Steelets, Pocket Daggers, Pocket Daggess and Pistols, reprinted in 1 Stuart Royal Proclamations 359–60 (James F. Larkin & Paul L. Hughes eds., 1973).

Similar reasoning may be found in many of the early U.S. state court cases. In *State v. Reid*, 1 Ala. 612 (1840) the court upheld the prohibition on concealed carry because it was believed that concealed weapons would “exert an unhappy influence upon the moral feelings of the wearer, by making him less regardful of the personal security of others.” In *State v. Chandler*, 5 La. Ann. 489 (1850), the court upheld the prohibition because it was believed to promote “secret advantages and unmanly assassinations.” In *English v. State*, 35 Tex. 473 (1871), the court upheld the prohibition because it was thought to “protect that pernicious vice, from which so many murders, assassinations, and deadly assaults have sprung, and which it was doubtless the intention of the legislature to punish and prohibit.” In *State v. Workman*, 14 S.E. 9, 11 (W. Va. 1891), the court upheld the prohibition because concealed arms “are only habitually carried by bullies, blackguards, and desperadoes, to the terror of the community and the injury of the state.” In *Aymette*

v. State, 21 Tenn. 154 (1840), the court upheld the prohibition because the legislature has “a right to prohibit the wearing or keeping [of] weapons dangerous to the peace and safety of the citizens, and which are not usual in civilized warfare, or would not contribute to the common defence.” . Importantly, in *State v. Buzzard*, 4 Ark. 18, 19 (1842), the court upheld the prohibition on concealed carry, because it did not curtail public carry and, therefore, “detract anything from the power of the people to defend their free state and the established institutions of the country.”

From the historical context one can understand that concealed carry was prohibited because it was associated with criminal behavior, “murder” and “mischiefe,” and the unsavory moral characteristics of “bullies, blackguards, and desperadoes.” Open carry, on the other hand, was is believed to “incite men to a manly and noble defence of themselves, if necessary, and of their country” See *Chandler*. Today, concealed carry, in and of itself, carries no such negative associations; nor does open carry necessarily signify “manly” intentions. In today’s society, law enforcement personnel routinely carry their weapons discretely rather than overtly, with no negative connotations regarding their moral standing or intentions. This fact represents a shift in public opinion and societal norms and suggests that the question of whether concealed or open carry is appropriate is a

question best decided by the legislature—provided that Second Amendment rights are not infringed upon.

The court should reevaluate the *Peruta* decision in light of these historical changes and the example set by *State v. Buzzard*, which deftly tailors the right of citizens to bear arms in a way that upholds the intent of the Founders while acknowledging the realities of the contemporary social setting. In being guided by any or all of these cases, the court would be guided rightly by precedent that is intended to limit the consequences of criminally malicious behavior in society, while protecting the rights of law-abiding citizens. By denying there is a right to concealed carry, the court takes away policy decisions that are best left to the legislature, specifically whether open carry or concealed carry is best suited for today's society.

CONCLUSION

The restrictions in section 134-9 of the Hawaii Revised Statutes are not constitutional and do not meet the intermediate scrutiny standard. Law-abiding citizens have played a role in providing public safety since at least 1285, and, historically, restrictions on carry have addressed the negative aspects of arms without impinging upon individuals' ability to provide public safety benefits. The historical bans on concealed carry were enacted to address criminal behavior, not

the lawful behavior of the majority of citizens. As shown, the role the government plays in public safety is limited to general protection and does not include protecting any particular member of the public. Public safety, therefore, benefits from law-abiding citizens providing for their own self-defense and their ability to come to the aid of their neighbors.

In addition, Hawaii has failed to draw reasonable inferences from substantial data, which the court requires. Past courts have not properly scrutinized the data in previous cases. Like *Korematsu*, they blame law abiding citizens for the acts of criminals. Much the data they present confuses correlation with causation and fails to show that license to carry holders themselves negatively affect public safety. The data actually shows license to carry holders are more law abiding than the general public. Across the board, Hawaii has not based its case on substantial evidence, and it has repeatedly drawn unreasonable inferences from that faulty evidence.

The judgment of the appellate court should be sustained.

Respectfully submitted,

/s/ John Cutonilli
John Cutonilli
P.O. Box 372
Garrett Park, MD 20896
(410) 675-9444
jcutonilli@gmail.com

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CERTIFICATE OF COMPLIANCE

1. This amicus brief complies with the length limits permitted by Ninth Circuit Rule 32-1 because the amicus brief contains 4439 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).
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 it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman type.

Dated: 4 June 2020

/s/ John Cutonilli

John Cutonilli
P.O. Box 372
Garrett Park, MD 20896
(410) 675-9444
jcutonilli@gmail.com

CERTIFICATE OF SERVICE

I hereby certify that on 4 June, 2020, I emailed a copy of this document to the United States Court of Appeals for the Ninth Circuit to enter into the appellate CM/ECF system.

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/s/ John Cutonilli

John Cutonilli
P.O. Box 372
Garrett Park, MD 20896
(410) 675-9444
jcutonilli@gmail.com