No. 23-7517

In the
Supreme Court of the United States

CHRISTOPHER L. WILSON,
Petitioner,

v.

STATE OF HAWAI'I,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Hawaii

BRIEF OF *AMICUS CURIAE* THE SECOND AMENDMENT FOUNDATION IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The Second Amendment Foundation ("SAF"), is a non-profit membership organization founded in 1974 with over 720,000 members and supporters in every State of the Union. Its purposes include education, research, publishing, and legal action focusing on the constitutional right to keep and bear arms. Amicus Curiae has an intense interest in this case because SAF's members are subject to the Supreme Court of Hawaii's unconstitutional decree that individuals do not have the right to carry firearms for self-defense outside their homes. This plainly does not comport with "the Second Amendment's text, as informed by history." *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 20 (2022).

SUMMARY OF ARGUMENT

Although Hawaii is geographically separate from the rest of the nation, the United States Constitution and this Court's rulings apply with equal force there as in any other part of the country. Yet, on February 7, 2024, the Supreme Court of Hawaii (the "Hawaii Court") brazenly defied this Court and held that in Hawaii, "there is no constitutional right to carry a firearm in public for possible self-defense." *State v. Wilson*, 543 P.3d 440, 459 (2024). As the lower Court was well aware, this Court reached the opposite holding in *Bruen*—"the Second and Fourteenth Amendments protect an individual's right to carry a handgun for self-defense outside the home." 597 U.S.

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[1] No counsel for any party authored the brief in whole or in part. Only *amicus curiae* funded its preparation and submission. All parties received timely notice of the filing of this brief.

at 8. But the Hawaii Court—seeking to thwart the right to bear arms within its borders—asserted that its holding was justified, purportedly because "[i]n Hawai'i, the Aloha Spirit inspires constitutional interpretation." *Id.* In the Hawaii Court's upside-down view of constitutional interpretation, "[t]he spirit of Aloha clashes with a federally-mandated lifestyle that lets citizens walk around with deadly weapons during day-to-day activities." *Id.* Local permitting authorities in Hawaii are now free to deny carry permits sought by peaceable, law-abiding adults, for any reason, or no reason, at all.

The Supremacy Clause of the U.S. Constitution forbids States from violating the minimum standards of the Constitution and federal law. U.S. CONST. art. VI, cl. 2. To that end, this Court has made clear that its interpretations of fundamental rights provide a floor of minimum constitutional protections; States are free to adopt more expansive interpretations of rights where authorized by State constitutions, but they may not use State constitutions to diminish rights provided by the U.S. Constitution. Here the Hawaii Court did the opposite—it reduced an established right below the floor provided by the federal Constitution. In so doing, the Hawaii Court declared its open rebellion against the Supremacy Clause. Lawless judicial activism of such an extreme nature, if left undisturbed, would set a dangerous precedent that State supreme courts are free to tunnel below the constitutional floor of the Second Amendment. Millions of peaceable, law-abiding adults would be deprived of their fundamental right to carry firearms in public for self-defense based on

geographical luck of the draw. As a consequence of such chaos, *Bruen* would be rendered dead letter.

Because the "constitutional right to bear arms in public for self-defense is not a 'second-class right,'" *Bruen*, 597 U.S. at 70 (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010)), it is worthy of the same status afforded to other fundamental individual rights. To that end, part one of this brief discusses the immutable principle that the U.S. Constitution sets a floor for the protection of fundamental individual rights, which States may go above, but not below, to enhance constitutional protections. Part two reviews the longstanding fidelity of State supreme courts to this immutable principle of federalism. Part three highlights the fact that severe infringements on the right to bear arms in public for self-defense are not only unconstitutional breaches of the constitutional minimum protection but are also on the losing side of American history. Indeed, the current majority approach in the United States is permitless carry, also known as "constitutional carry"—a clear signal that the majority of States have decided to *raise* Second Amendment rights above the floor. Finally, part four discusses how the Hawaii Court willfully ignored this Court by taking the opposite approach.

The "Aloha Spirit" does not trump the Constitution of these United States. This Court should send a message to lower Courts who defy its commands and summarily reverse.

ARGUMENT

I. The U.S. Constitution Sets a Floor for the Protection of Fundamental Individual Rights

In *American Legion v. American Humanist Association*, 588 U.S. 29, 36 (2019), this Court held that the prominent display of a 32-foot tall Latin cross on Maryland public land, which was erected as a memorial to area soldiers who died serving in World War I, did not violate the First Amendment's Establishment Clause. Notably, the Court found that the First Amendment *allowed* the cross to remain, but it did not *require* Maryland to maintain the cross on public land. *Id.* at 72 (Kavanaugh, J., concurring). In so finding, the holding affirmed that the Constitution sets the minimum the protection of individual rights, but states are free to ensure rights above that minimum.. *Id*.. As Justice Kavanaugh stated:

> This Court fiercely protects the individual rights secured by the U.S. Constitution. ***But the Constitution sets a floor for the protection of individual rights***. The constitutional floor is sturdy and often high, but it is a floor. Other federal, state, and local government entities generally possess authority to safeguard individual rights above and beyond the rights secured by the U.S. Constitution.

Id. (emphasis added).

Time and time again, this Court has righted wrongs that resulted when states failed to respect the

floor that the U.S. Constitution set for individual rights. For example, in *Bracy v. Gramley*, 520 U.S. 899 (1997), this Court held that the minimum rights of a habeas petitioner who had been convicted of robbery, kidnapping, and murder, had not been respected where he had been convicted before a state judge who was himself later convicted of taking bribes from other criminal defendants. *Id.* at 900-01. In so holding, the Court observed that "the Due Process Clause of the Fourteenth Amendment establishes a constitutional floor, not a uniform standard." *Id. at* 904. But, "the floor established by the Due Process Clause clearly requires a 'fair trial in a fair tribunal . . . .'" *Id.* (quoting *Withrow v. Larkin*, 421 U.S. 35, 46 (1975)). Additionally, the constitutional minimum guarantees "a judge with no actual bias against the defendant or interest in the outcome of his particular case." *Bracy*, 520 U.S. at 905.

Thus, it is well-settled that the U.S. Constitution sets a floor for the protection of individual rights. As discussed below, State supreme courts have adhered to this maxim. Hawaii's current Court, however, has chosen to ignore this well-established principle.

II. State Supreme Courts Other than Hawaii's Current Court Have Long Respected Their Duty to Adhere to the Constitution's Minimum Protections

The Supremacy Clause of Article VI of the U.S. Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in

> Pursuance thereof; and all Treaties made . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Law of any State to the Contrary notwithstanding.

U.S. CONST. art VI, cl. 2.

Other State supreme courts have long acknowledged that, under the Supremacy Clause, this Court's decisions control in matters relating to the U.S. Constitution. They have also respected their duty to stay above the constitutional minimum requirements set by this Court. Yet, in the case below, Hawaii's Court went rogue and disregarded the Supremacy Clause. But the Supremacy Clause is a basic principle of federalism, under which there is no room for a State supreme court to push a radical social agenda and dare this Court to grant certiorari and summarily reverse.

The Tennessee Supreme Court, for example, recognized:

> We are bound by the interpretation given to the United States Constitution by the Supreme Court of the United States. This is fundamental to our system of federalism. The full, final, and authoritative responsibility for the interpretation of the federal constitution rests upon the Supreme Court of the United States. This is what the Supremacy Clause means. However, as to Tennessee's Constitution, we sit as a court

> of last resort, ***subject solely to the qualification that we may not impinge upon the minimum level of protection established by Supreme Court interpretations of the federal constitutional guarantees***. But state supreme courts, interpreting state constitutional provisions, may impose higher standards and stronger protections than those set by the federal constitution.

State ex rel. Anglin v. Mitchell, 596 S.W.2d 779, 789 (Tenn. 1980) (emphasis added) (quoting *Miller v. State*, 584 S.W.2d 758 (Tenn. 1979)).

The Supreme Court of Utah similarly recognized:

> [T]he protections in the federal Constitution provide a constitutional floor, which, if Utah's Constitution or laws provide a lesser level of protection, renders interpretation of Utah's Constitution unnecessary. In other words, if the challenged state action violates the federal Constitution, we need not reach the question of whether the Utah Constitution provides additional protection; we may instead resolve the case with reference only to the federal Constitution.

State v. Briggs, 199 P.2d 935, 942 (Utah 2008).

Other state courts of last resort have long adhered to the same principles. *See, e.g., Stallworth v. City of Evergreen*, 680 So. 2d 229, 234 (Ala. 1996) ("Alabama Courts must apply Federal constitutional

law as enunciated by the United States Supreme Court . . . ."); *State v. Mechtel*, 499 N.W.2d 662, 666 (Wis. 1993) ("Certainly, the United States Supreme Court's determination on federal questions bind state courts."); *People v. Barber*, 799 P.2d 936, 940 (Colo. 1990) (holding that Supreme Court "decisions on federal law bind all lower state and federal courts"); *Andrews v. State*, 652 S.W.2d 370, 382-83 (Tex. Crim. App. 1983); *State v. Coleman*, 214 A.2d 393, 402 (N.S. 1965) ("We, of course, recognize that the United States Supreme Court is the final arbiter in all questions of federal constitutional law."); *State v. Intoxicating Liquors*, 49 A. 670, 671 (Me. 1901) ("[W]e must certainly recognize the authority of [the Supreme Court] in passing upon a provision of the federal constitution and upon congressional legislation thereunder, and be governed by the result.").

Conversely, where State constitutions permit more expansive interpretations of rights than provided by the U.S. Constitution, States have sometimes taken the opportunity to expand rights. This is particularly common in matters of criminal procedure. For example, in the context of self-incrimination, the Florida Supreme Court fashioned more expansive protections against self-incrimination than this Court. The Florida Court correctly observed that, "in this context, the federal Constitution sets the floor, not the ceiling, and the Court retains the ability to interpret the right against self-incrimination afforded by the Florida Constitution more broadly than that afforded by its federal counterpart." *Rigterink v. State*, 2 So.3d 221, 241 (Fla. 2009); *Horizon Outdoor, LLC v. City of Indus.*, 228 F. Supp.

2d 1113, 1122 (C.D. Cal. 2002) (acknowledging that "state constitutional provisions offer more expansive protection than the federal constitution"); *Boldt v. Am. Fork City*, No. 2:20-cv-817, 2021 U.S. Dist. LEXIS 231976, at *27 (D. Utah Dec. 2, 2021) ("[i]n fact, we have not hesitated to interpret the provisions of the Utah Constitution to provide more expansive protections than similar federal provisions where appropriate.") (citing *Briggs*, 199 P.3d at 942; *State v. Tiedemann*, 162 P.3d 1106, 1114 (Utah 2007)).

This proposition is also extensively supported by this Court's precedent. As Chief Justice Rehnquist wrote in a decision by a unanimous Court in *Pruneyard Shopping Center v. Robins*, states may grant "individual liberties more expansive than those conferred by the Federal Constitution. . . ." 447 U.S. 74, 81 (1980); *see also Id.* at 76 (J. Marshall, concurring)(acknowledging "a healthy trend of affording state constitutional provisions a more expansive interpretation than was being given to the federal Constitution"); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (describing requirements of the federal constitution as "the irreducible constitutional minimum."); *State v. Hunt*, 91 N.J. 338, 357 (1982) (describing this Court's role "as final arbiter of at least the minimum scope of constitutional rights for a vastly diverse nation"); *Mills v. Rogers*, 457 U.S. 291, 293 (1982) (state law "may create liberty interests and procedural protections broader than those protected by the federal Constitution," and that "the broader state protections would define the actual substantive rights possessed by a person living within that state").

In summary, while *expansion* of constitutional rights may occur at the State level, contraction of rights is verboten. The Supremacy Clause makes the U.S. Constitution—as interpreted by this Court the *minimum standard*, which all states must enforce. This is a non-negotiable matter of federalism.

But, on the subject of the Second Amendment, the Hawaii Court stands alone in its open rebellion against the Supremacy Clause, as part of its larger effort to thwart the right to bear arms. Indeed, as discussed in Section IV, below, the Hawaii Court had an obligation to maintain the floor of the right to carry a firearm in public for self-defense in the State of Hawaii. Instead, the Hawaii Court chose a very different path—in a fit of intemperate anti-gun judicial activism, choosing to ignore the minimum Second Amendment protections announced by this Court.

III. The Second Amendment Sets a Floor for the Protection of the Fundamental Right to Carry Firearms in Public for Self-Defense, a Minimum that the Majority of States Have Exceeded

The constitutional minimum protecting the fundamental right to carry firearms in public for self-defense is so clearly demarcated that only a State supreme court intent on anti-gun judicial activism could fail to adhere to it. States, including Hawaii, may not outlaw the right to carry a firearm in public for self-defense inside their borders, because that right is guaranteed by the U.S. Constitution to individuals in *all* states of the Union, irrespective of the opinion of any State supreme court—*full stop*. *Bruen*, 597 U.S. at

70-71. This is the floor. Yet, the Hawaii Court refuses to comply with even this baseline, and, to the contrary, thumbs its nose at this Court's jurisprudence as mere ignorable nuisance.

By effectively outlawing public carry of firearms in Hawaii, the Hawaii Court is also on the losing side of American history. The majority approach of the States is permitless carry, also known as "constitutional carry." *See* "Constitutional Carry/Unrestricted/Permitless Carry," available at https://www.usconcealedcarry.com/resources/terminology/types-of-concealed-carry-licensurepermitting-policies/unrestricted/ (last visited June 3, 2024). The majority of States—29 in all—have exercised their prerogative to raise the right to bear arms for self-defense in public above the constitutional floor. *See Id*., *see also* Chip Brownlee, *A Majority of U.S. States Now Have Permitless Carry*, TRACE (April 3, 2023), available at https://www.thetrace.org/2023/04/permitless-concealed-carry-gun-law-map/ (last visited June 3, 2024). This flexibility is the strength of the Constitution's protection of a minimum level of rights—it acts as a bulwark against tyrannical restriction of rights but gives States the prerogative to improve the lives of their residents by enhancement of constitutional rights. While a minority of States remain hostile to public carry and impose draconian permitting restrictions on peaceable, law-abiding adults, Hawaii now stands alone in failing to recognize the constitutionally protected right to carry firearms in public whatsoever.

IV. The Hawaii Supreme Court Intentionally Ignored the Minimum Protection Afforded by the Second Amendment

The Hawaii Court began its constitutional analysis at the correct starting point, but then quickly veered into prohibited territory. Indeed, the Court actually started with the sensible observation about the constitutional floor, acknowledging, "[o]nly if the Hawai'i Constitution does not reach the minimum protection provided by a parallel federal constitutional right should this court construe the federal analogue." *Wilson*, 543 P.3d at 445. But the Court then made a stunning admission—it considers the Supreme Court of the United States to be nothing more than an advisory, co-equal authority:

> Hawai'i has chosen not to lockstep with the Supreme Court's interpretation of the federal constitution. Rather, this court frequently walks another way. Long ago, the Hawai'i Supreme Court announced that an '**opinion of the United States Supreme Court . . . is merely another source of authority**, admittedly to be afforded respectful consideration, but which we are free to accept or reject in establishing the outer limits of protection afforded by . . . the Hawai'i Constitution.' Further, '**this court has not hesitated to adopt dissents** in U.S. Supreme Court cases when it was believed that the dissent was better reasoned than the majority opinion.'

Id. at 445-446 (emphases added) (internal citations omitted).

Infected by its casual disregard for this Court's supreme authority, the lower Court proceeded with its substantive analysis, noting that even though Hawaii's Second Amendment analogue—Article I, section 17 of the Hawaii Constitution—is differentiated from the Second Amendment only by two commas and three capital letters, Hawaii has a "historical tradition of weapons regulation support[ing] a collective, militia meaning," and thus, "we hold that the Hawai'i Constitution does not afford a right to carry firearms in public places for self-defense." *Id.* at 447. Of course, the Hawaii Supreme Court can interpret its own constitution as it sees fit.

But, even if Hawaii's constitution does not afford a right to carry firearms in public, the Hawaii Supreme Court is obligated to ensure that the federal constitutional minimum is respected. Thus, regardless of its interpretation of the Hawaiian Constitution, the lower Court was obligated to ensure that the right to keep and bear arms in Hawaii does not fall below the minimum standard set by the U.S. Constitution. The Hawaii Court itself acknowledged the need to do just that earlier in its decision. *Id.* at 445. The Hawaii Court, aware that the Hawaii Constitution falls below the Second Amendment floor, should have relied on this Court's analysis of the U.S. Constitution in the first instance, as the Supreme Court of Utah eloquently explained: "[T]he protections in the federal Constitution provide a constitutional floor, which, if Utah's Constitution or laws provide a lesser level of

protection, renders interpretation of Utah's Constitution unnecessary." *Briggs*, 199 P.2d at 942.

Following Utah's sound reasoning, the Hawaii Court's interpretation of its own Constitution was irrelevant if it did not enhance federally established rights. However it chose to reach the federal minimum protection, the Hawaii Court would have stood on firm ground if it had respected the minimum right to carry firearms in pubic for self-defense. But the Hawaii Court chose instead to announce that *Bruen* has no force or effect in Hawaii.

> *Bruen* unravels durable law. No longer are there levels of scrutiny and public safety balancing tests long-used by our nation's courts to evaluate firearms laws. Instead, the Court ad-libs a "history-only" standard.

Id. at 453.

The Hawaii Court continued its criticism of this Court:

> As the world turns, it makes no sense for contemporary society to pledge allegiance to the founding era's culture, realities, laws, and understanding of the Constitution. 'The thing about the old days, they the old days.'

Id. at 454 (quoting *The Wire: Home Rooms* (HBO television broadcast Sept. 24, 2006) (Season Four, Episode Three)).

The result of this outrageous disregard for this Court's authority is clear: when it comes to the right

to keep and bear arms in Hawaii, the constitutional floor has been disregarded.

Only a clear rebuke from this Court will prevent this judicial cancer from spreading.

CONCLUSION

Having flouted this Court's authority, the Hawaii Supreme Court's decision cannot be allowed to stand. This Court should grant certiorari, and summarily reverse the ruling of the Hawaii Court.

Respectfully Submitted,

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