No. 23-7517

In the

Supreme Court of the United States

CHRISTOPHER L. WILSON,
Petitioner,
v.
HAWAII,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE HAWAII SUPREME COURT

AMICI CURIAE BRIEF OF THE BUCKEYE INSTITUTE, KANSAS JUSTICE INSTITUTE, AND GOLDWATER INSTITUTE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the *Bruen* test determines when a State's criminal prosecution for carrying a handgun without a license violates the Second Amendment.

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INTEREST OF *AMICI CURIAE*[1]

The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—to formulate and promote free-market policy in the states. The Buckeye Institute accomplishes the organization's mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policies, and marketing those public policy solutions for implementation in Ohio and replication across the country. The Buckeye Institute assists executive and legislative branch policymakers by providing ideas, research, and data to enable lawmakers' effectiveness in advocating free-market public policy solutions. The Buckeye Institute works to restrain governmental overreach at all levels of government. In fulfillment of that purpose, The Buckeye Institute files lawsuits and submits amicus briefs. As it pertains to this case, The Buckeye Institute has been active in advocating for the constitutional right to keep and bear arms. See, *e.g.*, *New York State Rifle & Pistol Ass'n, Inc.* v. *Bruen*, 597 U.S. 1 (2022); *Herrera* v. *Raoul*, No. 23-878 (Cert. Pet. filed Feb. 12, 2024); *Antonyuk* v. *James*, No. 23-910 (Cert. Pet. filed Feb. 20, 2024); *Doe* v. *Columbus*, Delaware C.P. No. 23-cv-H-02-0089 (Ohio). The Buckeye Institute is a non-partisan, nonprofit, tax-exempt organization, as defined by I.R.C. § 501(c)(3).

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amici curiae* made any monetary contribution toward the preparation or submission of this brief. Counsel provided the notice required by Rule 37.2.

The Goldwater Institute was established in 1988 as a nonpartisan public policy and research foundation devoted to advancing the principles of limited government, individual freedom, and constitutional protections through litigation, research, policy briefings, and advocacy. Through its Scharf-Norton Center for Constitutional Litigation, the Goldwater Institute litigates cases, and it files amicus briefs when its or its clients' objectives are directly implicated. Among other rights the Institute seeks to protect is the right of armed self-defense, and in that regard the Goldwater Institute has represented parties and appeared as amicus in several cases involving this fundamental right. See, *e.g.*, *United States* v. *Rahimi*, No. 22-915 (pending); *Arizona Citizens Defense League, Inc.* v. *Pima County*, No. C2024-2478 (Ariz. Super. Ct.) (pending); *Marszalek* v. *Kelley*, No. 20-CV-4270, 2022 WL 225882 (N.D. Ill. Jan. 26, 2022); *McDonald* v. *Chicago*, 561 U.S. 742 (2010); *Korwin* v. *Cotton*, 323 P.3d 1200 (Ariz. 2014). Institute scholars have also published important research on the right to possess firearms. See, *e.g.*, Timothy Sandefur, *The Permission Society* ch. 7 (2016).

Kansas Justice Institute (KJI) is a nonprofit, *pro bono*, public-interest litigation firm committed to upholding constitutional freedoms, protecting individual liberty, and defending against government overreach and abuse. KJI believes that the Second Amendment to the U.S. Constitution codified a pre-existing, natural and fundamental right to keep and bear arms. See, *e.g.*, *United States* v. *O'Neal*, No. 21-cr-40046-TC (D. Kan. 2022).

SUMMARY OF ARGUMENT

The meaning and scope of the Second Amendment have long been debated and ratiocinated. However, in *District of Columbia* v. *Heller*, 554 U.S. 570 (2008), this Court settled many of those debates. In *McDonald* v. *City of Chicago, Ill.*, 561 U.S. 742 (2010), it incorporated those protections and applied them to the states. And in *New York State Rifle & Pistol Ass'n, Inc.* v. *Bruen*, 597 U.S. 1 (2022), the Court reinforced and clarified the proper mode of analysis for Second Amendment challenges.

Yet, despite being "bound to adhere to the controlling decisions" of this Court on constitutional issues, *Hutto* v. *Davis*, 454 U.S. 370, 375 (1982), some lower state and federal courts have either ignored or outright refused to apply *Bruen*. The refusal to follow this Court's precedent is not a new phenomenon—especially in politically charged situations. The tendency to stray from recent precedent has been manifest in Second Amendment jurisprudence since *Heller*.

Litigants and the public may take the cynical view that Justice O'Connor voiced, noting that lower court judges "know how to mouth the correct legal rules with ironic solemnity while avoiding those rules' logical consequences." *TXO Prod. Corp.* v. *Alliance Resources Corp.,* 509 U.S. 443, 500 (1993) (O'Connor, J., dissenting). They may also see deviations from this Court's holdings as attempts to properly apply precedent to new facts or even to anticipate how this Court might rule. In this case, however, the Hawaii Supreme Court disparaged this Court's Second Amendment framework and refused to apply it.

It remains for this Court to function as the final authority and promote uniformity on federal constitutional issues throughout the federal and state judiciaries. The Court should, therefore, grant the petition to correct the lower court's misstep. In cases like this, a summary reversal is appropriate.

ARGUMENT

"[Chief Justice] John Marshall has made his decision; now let him enforce it." [2]

I. The Supreme Court's decisions are the law of the land as to the United States Constitution.

There are times when presidents, legislators, and judges are so unhappy with the rulings of the Supreme Court that they either subtly or openly defy the Court. Usually, it is subtle, but occasionally, it is more overt. For example, the quote at the opening of this argument, attributed to President Jackson, came following this Court's decision in *Worcester* v. *State of Ga.*, 31 U.S. 515 (1832). There, the Chief Justice determined that Georgia could not invade the Cherokee nation's sovereignty. See *id.* at 561–562. "Georgia then refused to obey the Court . . . [a]nd Jackson sent troops to evict the Cherokees . . . ." Breyer, *supra*.

The Hawaii Supreme Court's decision below similarly defies the Court's Second Amendment jurisprudence, dismissing it as "inconsistent with the

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[2] Attributed to President Andrew Jackson, 1832. Stephen Breyer, Assoc. Just., U.S. Supreme Court, University of Pennsylvania Law School Commencement Remarks (May 19, 2003), https://www.supremecourt.gov/publicinfo/speeches/viewspeech/sp_05-19-03.

Spirit of Aloha." Pet. App. at 54a. While Hawaii's heritage and history are valuable, they do not supersede the United States Constitution.

This Court has been clear: Lower courts "are bound to adhere to the controlling decisions of the Supreme Court. *Hutto*, 454 U.S. at 375. This Court has sole authority to overturn its own precedent. "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas* v. *Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989). Justice Rehnquist explained the danger of allowing inconsistent appellate decisions to stand, warning that "unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower [ ] courts no matter how misguided the judges of those courts may think it to be." *Hutto*, 454 U.S. at 375.

Allowing lower court decisions that appear to ignore governing precedent presents another problem for the federal judiciary as an institution. Scholars, judges, and citizens have seen shadows of result-oriented jurisprudence underlying the underruling of politically charged cases. Regardless of the merits of these suspicions, when the Court allows a decision that seems plainly at odds with precedent—particularly a politically charged issue—its legitimacy can suffer. As Professor Evan Caminker writes:

> If federal law means one thing to one court but something else to another, the public might think either or both courts

> unprincipled or incompetent, or that the process of interpretation necessarily is indeterminate. Each of these alternatives subverts the courts' efforts to make their legal rulings appear objective and principled.

Evan Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 Stan. L. Rev. 817, 853–54 (1994).

Professor Caminker remarks that "[c]onsiderable anecdotal evidence suggests that when judges care deeply about a particular legal issue but disagree with existing precedent, they often attempt to subvert the doctrine and free themselves from its fetters by stretching to distinguish the holdings of the higher court." *Id.* at 819. Professor Bhagwat agrees, writing that while "outright defiance" remains exceedingly rare," "both evidence and observation suggest that more subtle, subterranean defiance, [than direct noncompliance] through means such as reading Supreme Court holdings narrowly, denying the logical implications of a holding, or treating significant parts of opinions as dicta, is far from unusual." Ashutosh Bhagwat, *Separate but Equal?: The Supreme Court, the Lower Federal Courts, and The nature of the "Judicial Power"*, 80 B.U. L. Rev. 967, 986 (2000).

Indeed, Justice O'Connor voiced the concern that some lower court judges "know how to mouth the correct legal rules with ironic solemnity while avoiding those rules' logical consequences." *TXO Prod. Corp.*, 509 U.S. at 500 (O'Connor, J., dissenting). The Hawaii Supreme Court's decision in this case not only avoids *Bruen's* logical conclusion, it denounces it.

II. Judicial resistance to hierarchical precedent shows the need for the Court's action.

Lamentably, some of our jurisprudential history demonstrates how, without this Court's reinforcement of its decisions, obdurate lower court judges can frustrate unfashionable constitutional rights. Some of the grossest—and most shameful—examples of lower courts "underruling" this Court's clear holdings occurred immediately following this Court's in *Brown* v. *Board of Education*, 347 U.S. 483 (1954). Despite the Court's plain holding that "separate but equal" facilities were "inherently unequal," numerous courts, deploying language that would make modern readers cringe, clung to the discredited rule in *Plessy* v. *Ferguson*, 163 U.S. 537 (1896), taking great pains to avoid *Brown's* logical conclusion. See, *e.g.*, *Flemming* v. *S.C. Elec. & Gas. Co.,* 128 F. Supp. 469, 470 (E.D.S.C. 1955) (holding that *Brown* applied only to "the field of public education"); *Lonesome* v. *Maxwell*, 123 F.Supp. 193 (D.Md. 1954) (upholding a "whites only" golf course), *rev'd sub nom*. *Dawson* v. *Mayor & City Council of Baltimore City*, 220 F.2d 386 (4th Cir.1955), *aff'd*, 350 U.S. 877 (1955). They could not accept the concept that all men really are "created equal." The Declaration of Independence ¶ 2 (U.S. 1776).

This is not to suggest that the Court, in deciding the cases and controversies before it in the years immediately following *Brown*, could have—or should have—enacted all the Civil Rights Act's protections by judicial fiat. But the early post-*Brown* cases, which gave lip service to precedent while declining to apply it, show that judges, whether consciously or

unconsciously, can bring their own motives or prejudices to the bench and fundamentally misread this Court's direction. When they do, quick correction is warranted.

In more recent years, some lower courts have continued to be hostile to certain Supreme Court rulings. Before the Court's modernizing Second Amendment jurisprudence, "[t]he last constitutional revolution led by the Supreme Court—via its *Lopez* and *Morrison* decisions limiting congressional power under the Commerce Clause—essentially petered out in the face of lower-court resistance." Glenn H. Reynolds & Brannon P. Denning, Heller's *Future in the Lower Courts*, 102 Nw. U. L. Rev. 2035, 2038 (2008) (*Heller's Future*) (citing *United States* v. *Lopez*, 514 U.S. 549 (1995) and *United States* v. *Morrison*, 529 U.S. 598 (2000)). Following *Lopez*, Professors Reynolds & Denning "undertook a survey of lower court decisions in which Commerce Clause challenges were raised to ascertain the impact of *United States v. Lopez* in the lower courts." Brannon P. Denning & Glenn H. Reynolds, *Rulings and Resistance: The New Commerce Clause Jurisprudence Encounters the Lower Courts*, 55 Ark. L. Rev. 1253, 1253 (2003). They concluded that, with few exceptions, "the lower courts tended to limit the holding in *Lopez* to its facts and to treat it as an isolated case, or at least as commanding no more than minimal scrutiny to ensure that the Government make some showing of a connection between regulated activity and interstate commerce." *Id.* at 1253–254. Professors Reynolds and Denning later observed that in light of *Gonzales* v. *Raich*, 545 U.S. 1 (2005), "lower court reluctance to read *Lopez* and *Morrison* looked prescient." *Heller's Future*,

supra, at 2038. Except for rare circumstances, see *Nat'l Small Bus. United* v. *Yellen*, No. 5:22-CV-1448-LCB, 2024 WL 899372 (N.D. Ala. Mar. 1, 2024), their prediction appears to be correct, see, *e.g.*, *United States* v. *Bron*, 709 F. App'x 551, 553 (11th Cir. 2017) (distinguishing *Lopez* and upholding a conviction for unlawful intrastate possession of a firearm).

III. Judicial Resistance to This Court's Second Amendment Decisions

The constitutional rights preserved by the Second Amendment are "not [ ] second-class right[s], subject to an entirely different body of rules than the other Bill of Rights guarantees." *Bruen*, 597 U.S. at 70 (citing *McDonald*, 561 U.S. at 780). But some lower courts still have not accepted that clear directive.

There were some who disagreed with this Court's holding in *Heller*, that the Second Amendment conferred an individual right to keep and bear arms. But, whether out of an earnest attempt to apply a new rule to new facts or the "subterranean defiance" recognized by Professor Bhagwat, some courts at both the state and federal levels declined to enforce it. For example, in *People* v. *Abdullah*, 870 N.Y.S.2d 886, 887 (N.Y. Crim. Ct. 2008), a New York court "underruled" *Heller* on the basis that its ban on home firearm possession was not a complete ban, and *Heller* had not been expressly incorporated into the Fourteenth Amendment and did not apply to the states. The *Abdullah* court premised its nonincorporation holding on a pre-*Heller* Second Circuit case, *Bach* v. *Pataki*, 408 F.3d 75 (2d Cir. 2005), which was subsequently overruled in *McDonald*. But this help came too late for Mr. Abdullah, whose conviction was affirmed.

Yet, even after this Court decided *McDonald*, lower courts continued to find ways to distinguish *Heller* and frustrate its holding. *E.g., Silvester* v. *Becerra,* 583 U.S. 1139 (2018) (Thomas, J., dissenting from the denial of cert.) (discussing lower courts' resistance to *McDonald* and *Heller*).

> Instead of following the guidance provided in *Heller*, these courts minimized that decision's framework. See, *e.g.*, *Gould* v. *Morgan*, 907 F.3d 659, 667 (C.A.1 2018) (concluding that our decisions "did not provide much clarity as to how Second Amendment claims should be analyzed in future cases"). They then "filled" the self-created "analytical vacuum" with a "two-step inquiry" that incorporates tiers of scrutiny on a sliding scale.

Rogers v. *Grewal*, 140 S. Ct. 1865, 1866 (2020) (Thomas, J., dissenting from the denial of cert.). Some courts simply seized the "presumptively lawful" dicta in *Heller* and outright refused to conduct any further analysis. See, *e.g.*, Leo Bernabei, Bruen *as* Heller: *Text, History, and Tradition in the Lower Courts*, 92 Fordham L. Rev. Online 1, 11 (2024).

One example of the lower courts refusing to apply *Heller* is *Peruta* v. *County of San Diego*, 742 F.3d 1144 (9th Cir. 2014), *on reh'g en banc*, 824 F.3d 919 (9th Cir. 2016). There, the District Court for the Southern District of California upheld an ordinance allowing the carrying of weapons outside of the home only with "good cause." The Ninth Circuit initially reversed and remanded, but sitting *en banc*, held that the general

public had no Second Amendment right to carry concealed weapons. This holding was narrower than the district's court decision but still qualified the individual right. Two members of this Court found the approach taken by the *en banc* court to be "indefensible" and "untenable." *Peruta* v. *California*, 582 U.S. 943 (2017) (Thomas, J., dissenting from the denial of cert.).

Bruen itself, of course, arose from cramped readings of *Heller* and a challenge to a New York licensing scheme that essentially prohibited the carrying of firearms outside of the home absent a showing of a particular need, even when an applicant had acquired a license for hunting and target practice. The Second Circuit held that the statute, which effectively banned individuals from bearing arms in contravention of *Heller*, passed constitutional muster under the intermediate scrutiny test. See *Kachalsky* v. *County of Westchester*, 701 F.3d 81 (2d Cir. 2012).

Judicial resistance to *Heller* was not surprising. As Professors Reynolds and Denning noted shortly after the opinion was published, "[e]xperience with other seemingly groundbreaking Supreme Court decisions in recent years, such as *United States* v. *Lopez*, suggests that lower-court foot-dragging may limit *Heller's* reach . . . ." *Heller's Future*, *supra*, at 2035. They observed that, at the time, it was "impossible to review the Second Amendment jurisprudence from the federal courts of appeals . . . without noting two things: a significant hostility toward individual rights arguments and a surprisingly deep investment in their own case law, despite its rather tenuous anchor in the Supreme Court's decisions." *Id.* at 2038.

Expected or not, where lower courts refuse to apply this Court's precedent, they deny citizens their fundamental rights and return the Second Amendment to a second-class status.

Despite further admonishment in *Bruen*, lower courts have continued to neglect this Court's precedent. Some state and federal courts have applied *Bruen* so narrowly as to give it no meaning. See, *e.g.*, *People* v. *Rodriguez*, 171 N.Y.S.3d 802, 806 (N.Y. Sup. Ct. 2022); see also *Rocky Mountain Gun Owners* v. *Polis*, No. 23-CV-02563-JLK, 2023 WL 8446495, at *13 n.13 (D. Colo. Nov. 13, 2023) (claiming to "perform the analysis as instructed," but stretching *Bruen* because of "reservations that turning to a particular historical era should dispositively determine how we conceive of and defend certain rights"). Indeed, some courts have even expressed Reinhardt-like defiance. See *Frey* v. *Nigrelli*, No. 21 CV 05334, 2023 WL 2929389, *5 (S.D.N.Y Apr. 13, 2023) (denying injunction to prevent enforcement of licensing regime on the basis that "while *Bruen* did away with means end scrutiny when considering whether a law violates the Second Amendment, the Court must still consider the parties' hardships and the public interest when deciding on whether to issue an injunction") (internal citations omitted). As some lower courts did with *Heller*, some courts avoid *Bruen* by "upholding modern laws based on loose, or only a few, historical predecessors . . . jettison[ing] historical inquiry entirely by fashioning a *Bruen* 'Step Zero' or by relying on pre-*Bruen* circuit precedent." Bernabei, *supra*, at 15.

Through the opinion below, the Hawaii Supreme Court became one of the worst offenders. The Hawaii

Court's opinion echoes Judge Reinhardt's blatant "open resistance, defiance even, toward [the] Supreme Court . . . ." Linda Greenhouse, *Dissenting Against the Supreme Court's Rightward Shift*, N.Y. Times (Apr. 12, 2018).[3] When asked about his record number of reversals, Judge Reinhardt "took it with a smile. 'They can't catch 'em all,' he said." *Id.*

While the Hawaii Supreme Court is, of course, free to interpret its constitution as it likes, when a litigant raises both state and federal constitutional challenges, the court must assess the federal claims if the state claims do not resolve the issue in their favor.

The Hawaii Supreme Court failed to do its duty. After an extensive diatribe criticizing this Court's Second Amendment analytical framework, it dismissed the Second Amendment challenge to Hawaii's firearms licensing and "place to keep" laws in only a few sentences and without even attempting to apply this Court's framework to that statutory regime.

In fact, the court erroneously found that Wilson didn't even have standing to challenge the underlying licensing scheme, Haw. Rev. Stat. § 134-9 (2007),[4]

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[3] https://www.nytimes.com/2018/04/12/opinion/supreme-court-right-shift.html.

[4] At the time Wilson was arrested, Hawaii's pre-*Bruen* "may issue" licensing scheme was in place. *Bruen*, of course, invalidated such regimes, resulting in the vacatur and remand of *Young* v. *Hawaii*, 992 F.3d 765 (9th Cir. 2021), *cert. granted, judgment vacated*, 142 S. Ct. 2895 (2022), which had upheld Hawaii's pre-*Bruen* regulatory framework. See Pet. at 11. The Hawaii Legislature amended its licensing statute in response to *Bruen*. See 2023 Haw. Sess. Laws 52, § 7.

because he was not charged with violating that statute directly and he "made no attempt to obtain a carry license." Pet. App. at 6a.

But the criminal "place to keep" statutes he *was* charged with violating—Haw. Rev. Stat. §§ 134-25(a) and 134-27(a)—both incorporated[5] the unconstitutional[6] licensing scheme by reference. And even if they did not, a person does *not* have to apply for a license before challenging an unconstitutional licensing scheme. See, *e.g.*, *Patsy* v. *Bd. of Regents of the State of Florida*, 457 U.S. 496, 506 (1982) (state administrative exhaustion not required for federal constitutional challenge); *City of Chicago* v. *Atchison, T. & S. F. Ry. Co.*, 357 U.S. 77, 89 (1958) (application for a certificate of convenience and necessity are not required to challenge facial constitutionality of requirement); *Kaahumanu* v. *Hawaii*, 682 F.3d 789, 796 (9th Cir. 2012) ("Plaintiffs who challenge a permitting system are not required to show that they have applied for, or have been denied, a permit.").

In dispensing with the Second Amendment challenge to the "place to keep" statutes, the court determined that citations to Justice Kavanaugh's *Bruen* concurrence, stating that *Bruen* "does not prohibit States from imposing licensing requirements for carrying a handgun for self-defense," 597 U.S. at 79–80 (Kavanaugh, J., concurring), and a Second Circuit decision upholding New York's *Bruen* response

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[5] The "place to keep" statutes have never been directly amended—even after *Bruen*—since their codification in 2006.

[6] See *Young* v. *Hawaii*, 45 F.4th 1087 (9th Cir. 2022) (O'Scannlain, J., dissenting from denial of summary reversal).

law, *Antonyuk* v. *Chiumento*, 89 F.4th 271 (2d Cir. 2023), was all that was needed. This is not unlike the lower courts that cite *Heller's* "presumptively lawful" dicta to avoid engaging in a proper analysis.

But Justice Kavanaugh's comment was dicta in a concurrence. And even if it constituted part of the Court's holding, it did not give blanket cover for any and all state licensing schemes. He restricted his comments to "shall-issue" regimes—not the discretionary "may-issue" scheme that Hawaii used at the time Wilson was arrested.[7] The Hawaii Court made no effort to utilize *Bruen's* framework to analyze the Hawaii statutes. While Hawaii's constitution does not guarantee an individual right to "keep and bear" a firearm, the Second Amendment does, and Hawaii cannot ignore that right.

The reason for the Hawaii Supreme Court's lack of analysis of the Second Amendment challenge is not a secret. While purporting to interpret its constitution, the Hawaii Supreme Court demonstrated its open disdain for this Court's Second Amendment decisions.

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[7] "To carry a concealed weapon, the [Hawaii resident] applicant had to demonstrate an 'exceptional case' and a 'good reason to fear injury to [their] person or property.'" Pet. App. at 53a (quoting *Young,* 992 F.3d at 774, *cert. granted, judgment vacated on other grounds*, 142 S. Ct. 2895 (2022)); Haw. Rev. Stat. § 134-9 (2007). This is far from a "shall-issue" regime seemingly approved by Justice Kavanaugh. In fact, it closely tracked the "proper cause" standard struck down in *Bruen*. See *Bruen*, 597 U.S. at 13–15. Whether the amended statute, Haw. Rev. Stat. § 134-9 (2024), is constitutional is not at issue here. That the old licensing regime was unconstitutional makes Wilson's criminal charges even more egregious and the Hawaii Supreme Court's decision all the more worthy of summary reversal.

See, *e.g.*, Pet. App. at 29a ("Article I, section 17 traces the language of the Second Amendment. Those words do not support a right to possess lethal weapons in public for possible self-defense. . . . The original public purpose of article I, section 17 (and the Second Amendment also supports a collective, military interpretation."); Pet. App. at 29a ("The Supreme Court makes state and federal courts use a fuzzy 'history and traditions' test to evaluate laws designed to promote public safety."). The court claimed that "*Heller* flipped the nation's textual and historical understanding of the Second Amendment," Pet. App. at 37a, because, in its view, *United States* v. *Miller*, 307 U.S. 174 (1939), "concluded that the Second Amendment's purpose was to preserve an effective state militia," Pet App. at 33a. But see *Heller*, 554 U.S. at 621 ("*Miller* did not hold [ ] and cannot possibly be read to have held that" "the Second Amendment 'protects the right to keep and bear arms [only] for certain military purposes . . . .'").

The Hawaii Supreme Court's open disdain for this Court's jurisprudence, which led it to refuse to properly analyze a constitutional claim, is "indefensible" and "untenable." *Peruta*, 582 U.S. at 943 (Thomas, J., dissenting from the denial of cert.). While the "spirit of Aloha" may "clash[ ]" with this Court's precedent, Pet. App. at 54a, the Hawaii Supreme Court's abdication of its responsibility to apply the law clashes with our legal system.

IV. Summary reversal is a proper remedy in this case.

This case and other cases now before the Court demonstrate the need for strong reinforcement of this

Court's Second Amendment jurisprudence. In *Caetano* v. *Massachusetts*, 577 U.S. 411, 412 (2016), the Court found that the Supreme Judicial Court of Massachusetts' three reasons for upholding a firearm control law contradicted this Court's Second Amendment precedent. Consequently, the petition for a writ of certiorari was granted, the judgment vacated, and the case remanded for further proceedings not inconsistent with the Court's opinion. *Id.* The Court rejected the Massachusetts court's reasons because the first was "inconsistent with *Heller's* clear statement that the Second Amendment 'extends . . . to . . . arms . . . that were not in existence at the time of the founding.'" *Id.* (quoting *Heller*, 554 U.S. at 582). Second, "[b]y equating 'unusual' with 'in common use at the time of the Second Amendment's enactment,'" the Court concluded that the "second explanation is the same as the first; it is inconsistent with *Heller* for the same reason." *Id.* Finally, the Court concluded that "*Heller* rejected the proposition 'that only those weapons useful in warfare are protected.'" *Id.* (quoting *Heller*, 554 U.S. at 624–625). Similar to the Hawaii court's application of *Bruen* below, "[a]lthough the Supreme Judicial Court professed to apply *Heller*, each step of its analysis defied *Heller's* reasoning. *Id.* at 415 (Alito, J., concurring in the judgment).

However, the "GVR" process is usually applied when there have been new developments in Supreme Court jurisprudence. That is not the case here. Rather, the Hawaii Supreme Court just ignored existing Supreme Court jurisprudence. And, when correction is necessary, but judicial economy discourages full briefing, summary reversal is a useful tool to "target lower court decisions that strike the Court as clearly

erroneous." Edward A. Hartnett, *Summary Reversals in the Roberts Court*, 38 Cardozo L. Rev. 591, 597 (2016). Scholars have recognized lower court resistance to this Court's precedent as one of the leading categories of summary reversal cases. *Id.*; William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 NYU J.L. & Liberty 1, 2 (2015) ("[A] majority [of summary reversals] are designed to enforce the Court's supremacy over recalcitrant lower courts . . . ."); see also *id.* at 27 (suggesting that Justices Alito and Scalia seem to believe that "summary reversals are warranted in areas of law where there is an unusual epidemic of lower-court judges willfully refusing to apply the Supreme Court's interpretations of the law"). Scholars have also noted that "[i]n other cases, the Court observed that the lower court decision is 'as inexplicable as it is unexplained' and has 'no basis,' or that it was contrary to 'clear precedents' that are 'so well settled . . . that this Court may proceed by summary disposition.'" Hartnett, *supra*, at 613 (citations omitted).

The Hawaii court below criticized this Court's Second Amendment precedent and refused to apply *Bruen*. It "seized on language" originating in dicta and concurrences to justify its holding without applying *Bruen's* test. *Caetano*, 577 U.S. at 416 (Alito, J., concurring in the judgment). Its Second Amendment analysis is "as inexplicable as it is unexplained." *Felkner* v. *Jackson*, 562 U.S. 594, 598 (2011). The Hawaii court's "ill treatment of [*Bruen*] cannot stand. The reasoning [or lack thereof] of the [Hawaii] court poses a grave threat to the fundamental right of self-defense." *Caetano*, 577 U.S. at 421 (Alito, J., concurring in the judgment). If lower courts are

allowed to ignore this Court's Second Amendment precedent, "then the safety of all Americans [will be] left to the mercy of state authorities who may be more concerned about disarming the people than about keeping them safe." *Id.* at 422 (Alito, J., concurring in the judgment); see Pet. App. at 54a ("The history of the Hawaiian Islands does not include a society where armed people move about the community *to possibly combat the deadly aims of others*. See Haw. Const. art. IX, § 10 ('The law of the splintered paddle . . . shall be a unique and living symbol of the State's concern for public safety.')." (emphasis added)).

To prevent a degradation of this Court's precedent, the Court should summarily reverse lower courts—like the Hawaii Supreme Court here—that refuse to apply such precedent.

CONCLUSION

As this Court has repeatedly stated, "[t]he government of the United States has been emphatically termed a government of laws, and not of men." *Marbury* v. *Madison*, 5 U.S. 137, 163 (1803). This Court should grant the petition and reverse the Hawaii Supreme Court.

Respectfully submitted,

The Buckeye Institute,
Kansas Justice Institute, and
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