No. 23-7517

In the Supreme Court of the United States

CHRISTOPHER L. WILSON,

Petitioner,

v.

HAWAII,

Respondent

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

BRIEF OF *AMICI CURIAE* MOUNTAIN STATES LEGAL FOUNDATION CENTER TO KEEP AND BEAR ARMS IN SUPPORT OF PETITION FOR CERTIORARI

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CORPORATE DISCLOSURE STATEMENT

The undersigned attorney certifies that amicus curiae Mountain States Legal Foundation ("MSLF") is a nonprofit corporation, formed and in good standing in the state of Colorado under Section 501(c)(3) of the Internal Revenue Code. MSLF is not publicly traded and has no parent corporation. There is no publicly held corporation that owns ten percent or more of its stock.

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IDENTITY AND INTEREST OF AMICI *CURAE*[1]

The Center to Keep and Bear Arms ("CKBA") is a project of Mountain States Legal Foundation ("MSLF"), a Colorado-based non-profit, public interest legal foundation. MSLF was founded in 1977 to defend the Constitution, protect private property rights, and advance economic liberty. CKBA was established in 2020 to continue MSLF's litigation to protect Americans' natural and fundamental right to self-defense. CKBA represents individuals and organizations challenging infringements on the constitutionally protected right to keep and bear arms. *See, e.g., VanDerStok v. Garland*, 633 F. Supp. 3d 847 (N.D. Tex. 2022), cert. granted Apr. 22, 2024 (No. 23-852); *Sullivan, et al. v. Ferguson, et al.*, W.D. Wash. 3:22-cv-05403; *Garcia v. Polis*, D. Colo. 1:23-cv-02563-JLK; *Kansas, State of et al v. United States Attorney General et al*, D. of KS 24-cv-01086-TC; and *Ortega et al v. Lujan Grisham et al*, D. of NM. 24-CV-0471-JB.

CKBA also files amicus curiae briefs with the U.S. Supreme Court and circuit courts across the nation. *See, e.g., New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022) (representing amicus

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), the undersigned affirms that no counsel for a party authored this brief in whole or in part, and no person or entity other than Mountain States Legal Foundation, or its counsel, made a monetary contribution specifically for the preparation or submission of this brief. And counsel of record for all parties received notice of *amici curiae*'s intention to file this brief at least 10 days prior to the due date for the brief. *See* Rule 37.2.

curiae CKBA); *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (representing amici curiae Rocky Mountain Gun Owners and National Association for Gun Rights); *District of Columbia v. Heller*, 554 U.S. 570 (2008) (representing amicus curiae MSLF); *Teter v. Connors*, 76 F. 4th 938 (9th Cir. 2023), reh'g en banc granted, 2024 WL 719051 (9th Cir. Feb. 22, 2024) (representing amicus curiae MSLF). The Court's decision will directly impact CKBA's current clients and litigation.

SUMMARY OF THE ARGUMENT

In *State v. Wilson*, 543 P.3d 440 (Haw. 2024), the Hawaii Supreme Court refused to apply the *Bruen*[2] test when determining the constitutionality of a law which made it a crime for any person in Hawaii to "carry or possess" a handgun or ammunition outside of their home.[3] In their written opinion, the Hawaii Supreme Court not only expressed disagreement with this Court's decision in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, but outright contempt over the requirement that contemporary courts should consider "the history and tradition of the very old days" when analyzing modern day firearm regulations. *State v. Wilson*, 543 P.3d 440, 453 (Haw. 2024). The Hawaii Supreme Court lamented

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[2] In *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022), this Court held that a law burdening the right to keep and bear arms is constitutional only if it "is consistent with this Nation's historical tradition" of firearm regulation. *Id* at 4.

[3] Hawai'i Revised Statutes §§ 134-25(b), 134-27(b), and 134-9.

that the history of the Founding and Reconstruction eras was "messy" and "not fair", and that judges were ill equipped to review and consider it when analyzing these laws. *Id.*

Despite these protestations, the fact of the matter is that judges have always used history to help them reach and justify their conclusions. Indeed, the heart of legal decision-making has always involved evaluating whether prior decisions and precedents, as well as long-established legal principles and cannons, apply to the case at hand. So, it is clear that any recent objection by the courts to consult history when analyzing firearm related regulations is less about the ability of judges to do so, and more about their objection to the idea that Founding era principles should even be considered when determining the constitutionality of modern laws that impact the rights of Americans to keep and bear arms.

The Hawaii Supreme Court's failure to apply the *Bruen* test to a case involving the prosecution of an individual who was carrying a firearm in self-defense was obvious and egregious error that warrants summary reversal. But summary reversal is also independently warranted in this case due to the fact that the Hawaii Supreme Court did not just "misapply" this Court's relevant Second Amendment precedents, it openly defied them and, in the process, undermined the doctrine of *stare decisis*.

Unfortunately, the Hawaii Supreme Court is not the only lower court that has expressed resistance

to – and at times outright defiance of – *Heller*, *McDonald* and *Bruen*. For this reason, a summary reversal in this case would not only send a clear message to the Supreme Court of Hawaii, but to all jurists who need a reminder about the controlling authority of this Court's precedents.

ARGUMENT

I. Despite the Recent Lamentations of Many Courts, Attorneys and Judges are Well-Equipped to Use History When Reviewing Second Amendment Cases

In its written opinion, the Hawaii Supreme Court went out of its way to mock and undermine this Court's holding in *Bruen*—before ultimately refusing to apply it to the present case altogether. After emphasizing that an "overwhelming majority" of jurists and historians had come to reject the *Bruen* test as well as the holding in *District of Columbia v. Heller*—that that the Second Amendment conferred an individual right to keep and bear arms, and not just a collective one—the Hawaii Supreme Court accused this Court of reaching its faulty conclusions in these cases by "distort[ing] and cherry-pick[ing] historical evidence . . . and discard[ing] historical facts that did not fit." (cleaned up) *Wilson* at 453.

Ultimately, the Hawaii Supreme Court decided that instead of considering "the history and tradition of the very old days" it would ignore the precedent set by the *Heller* and *Bruen* holdings and continue to use

a "public safety balancing test" to evaluate firearms laws. *Id.*

The Hawaii Supreme Court sought to justify this break with precedent by declaring that "[h]istory is messy" and "not fair" enough to be of any real use to the courts. *Id.* The court repeatedly cast doubt on its own ability—and the ability of all courts—to consistently review history and tradition in the context of firearms regulation. It flippantly stated that, "Judges are not historians . . . [and are therefore not well-suited to] excavat[e] 18th and 19th century experiences to figure out how 'old times' control 21st century life." *Id.* (internal quotation marks added). To bolster this point, the Hawaii Supreme Court referenced the prolific handwringing and disparagement that other state and federal courts—as well as academia—had heaped on this Court in the wake of the *Heller* and *Bruen* decisions. *See Wilson at 21. (quoting United States v. Bullock*, 679 F.Supp.3d 501, 507-08 (2023) ("Judges are not historians. We were not trained as historians. We practice law, not history. And we do not have historians on staff. Yet the standard articulated in *Bruen* expects us to play historian in the name of constitutional adjudication."); (quoting Darrell A.H. Miller, *Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second*, 122 Yale L.J. 852, 935 (2013) ("[I]n addition to the risk that [judges] will not understand the materials they are charged to consult, there is the additional risk that they will not conduct a dispassionate examination of the historical evidence

and will simply marshal historical anecdotes to achieve what they have already decided is the preferred outcome.").

While *amicus* recognizes the difficulty in judging any case involving extensive factual and historical evidence, the concerns expressed by the Hawaii Supreme Court are misplaced and nothing more than a feeble attempt to justify their intransigence.

History and law have always gone hand in hand; and there is history involved in nearly every case that comes before a court, whether criminal or civil in nature. Using and applying historical precedents is—and has *always* been—a crucial tool for all state and federal judges. Courts often look several hundred years into the past to glean insights from our Founding documents, the words of the Framers of the Constitution, contemporary writings of prominent authors, and the basic traditions of our country. *See generally, Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 536 (2022) ("The line that courts and governments must draw between the permissible and the impermissible has to accord with history and faithfully reflect the understanding of the Founding Fathers.") (cleaned up); *Moore v. Harper*, 600 U.S. 1, 22 (2023) (citing to Alexander Hamilton's words in Federalist No. 78 to support the proposition that the Framers intended for state courts to exercise judicial review over state legislatures).

Generalist judges are not scientists, yet they

frequently evaluate scientific evidence when a person's liberty is at stake in criminal cases. Judges are not economists, but they can capably evaluate economic evidence in antitrust cases. It is the very role of the judiciary in the adversarial process to evaluate competing evidence and provide a reasoned rationale for decisions. Indeed, in *Bruen* itself, the Court pointed to other contexts in which the government bears the burden of using history to establish the constitutionality of its restrictions on liberty. *See Bruen*, 597 U.S. at 24-25 ("[T]o carry that burden, the government must generally point to historical evidence about the reach of the First Amendment's protections."); *see also N.L.R.B. v. Noel Canning*, 573 U.S. 513, 523 (2014) (citing Federalist No. 76 for the proposition that Senate approval of presidential nominees is a critical part of the constitutional system).

In context after context, courts look to history without thinking twice, or engaging in extensive handwringing about how experts may disagree over the meaning or weight of various sources. For instance, in *Wisconsin v. Yoder*, the Court held that the right of parents to be the primary decision-makers for their own children was a "right recognized because it reflects a 'strong tradition' founded on the 'history and culture of Western civilization.'" 406 U.S. 205, 232 (1977). *See also Moore v. East Cleveland*, 431 U.S. 494, 504 (1977). Indeed, this Court held that "history and tradition" was sufficient rational basis to overcome a challenge to a prayer delivered at the outset of a

legislative session. *See Marsh v. Chambers*, 463 U.S. 783, 790 (1983).

Bruen's history and tradition test is thus well within the judicial norms of constitutional analysis. As noted in *Bruen*:

> And beyond the freedom of speech, our focus on history also comports with how we assess many other constitutional claims. If a litigant asserts the right in court to "be confronted with the witnesses against him," U.S. Const., Amdt. 6, we require courts to consult history to determine the scope of that right. *See, e.g., Giles v. California*, 554 U.S. 353, 358, 128 S. Ct. 2678, 171 L.Ed.2d 488 (2008) ("admitting only those exceptions [to the Confrontation Clause] established at the time of the founding" (internal quotation marks omitted)). Similarly, when a litigant claims a violation of his rights under the Establishment Clause, Members of this Court "loo[k] to history for guidance."

597 U.S. at 25 (some citations omitted); *accord Crawford v. Washington*, 541 U.S. 36, 43 (2004) ("The right to confront one's accusers is a concept that dates back to Roman times."); *id.* at 44 ("Suspecting that [Lord] Cobham would recant, [Sir Walter] Raleigh demanded that the judges call him to appear, arguing that "the Proof of the Common Law is by witness and jury: let Cobham be here, let him speak it. Call my

accuser before my face.'") (cleaned up). This approach also comports with this Court's approach to other rights. *See, e.g. United States v. Stevens*, 559 U.S. 460, 468–71 (2010) (placing the burden on the government to show that a type of speech belongs to a "historic and traditional categor[y]" of constitutionally unprotected speech "long familiar to the bar") (internal quotation marks omitted).

The act of judging itself relies on applying historical antecedents to unique situations. Just last year, this Court relied on history and tradition in another context to reject Texas's ability to challenge federal immigration policy. In support of the majority's opinion that Texas lacked standing, Justice Kavanaugh noted: "In adhering to that core principle [of hearing cases only where an asserted injury is redressable], the Court has examined 'history and tradition,' among other things, as a meaningful guide to the types of cases that Article III empowers federal courts to consider." *United States v. Texas*, 599 U.S. 670, 676 (2023); *see id.* at 677 ("The States have not cited any precedent, history, or tradition of courts ordering the Executive Branch to change its arrest or prosecution policies so that the Executive Branch makes more arrests or initiates more prosecutions."). Notably, two of the dissenters in *Bruen* signed onto this opinion.

And long before Texas's challenge to federal immigration policy, the Supreme Court relied on the famed English scholar William Blackstone for its

jurisprudence surrounding sovereign immunity. *See Alden v. Maine*, 527 U.S. 706, 715 (1999) ("Blackstone—whose works constituted the preeminent authority on English law for the founding generation—underscored the close and necessary relationship understood to exist between sovereignty and immunity from suit."). In *Heller* itself, the Court cited Blackstone's Commentaries on the Laws of England, dated 1769. *Heller*, 554 U.S. at 582 ("The phrase 'keep arms' was not prevalent in the written documents of the founding period that we have found, but there are a few examples, all of which favor viewing the right to "keep Arms" as an individual right unconnected with militia service.") (relying on Blackstone, among other treatises).

Indeed, the heart of legal decision-making involves evaluating whether prior decisions and precedents, as well as long-established legal principles and cannons, apply to the case at hand. Federal and state judges frequently rely on decisions from many years ago to guide their interpretations of the law, ensuring consistency, predictability, and respect for established norms. *See, e.g.*, Ketanji Brown Jackson, *Questions for the Record Upon Nomination as an Associate Justice of the Supreme Court of the United States*, at 1 (Undated) ("I look at history and practice at the time the document was created to understand what those who created the text intended; I also look at precedent to understand how the text has been previously interpreted and applied."); *id.* at 4 ("[A]s a general matter, due process protects those

fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty.") (cleaned up).[4]

And while—since *Bruen*—too many judges have taken the opportunity to publicly lament the requirement that they have to consider the historical tradition of firearms regulation when dealing with cases involving Second Amendment rights, the fact of the matter is that courts have *always* had to consider history and tradition as part of their everyday operations. A Westlaw search reveals the term "history and tradition" in thousands of cases, used in a similar manner since at least 1857. *See, e.g., Fisher v. Haldeman*, 61 U.S. 186, 193 (1857) (evaluating Pennsylvania's history and tradition as it related to property rights, all the way back to the mid-1700s); *id.* at 194 ("This doctrine has continued to be recognized as settled law in Pennsylvania for half a century.").

All of this is to say that judges use history on a regular and continuous basis to justify their conclusions; so saying that history is "messy", "fuzzy" or difficult to interpret when it comes to cases which involve the Second Amendment is nothing more than a cop out.

Much of this is intuitive to lawyers and judges.

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[4]https://www.judiciary.senate.gov/imo/media/doc/Judge%20Ketanji%20Brown%20Jackson%20Written%20Responses%20to%20Questions%20for%20the%20Record.pdf

An undergraduate coursework in history is often a pathway to law school and legal practice.[5] Using historical sources, evidence, and American traditions is often in the bones of attorneys across the country.[6] The adversarial process brings out the relevant examples of potentially analogous laws, traditions, and precedents that Courts can use to determine whether or not a given law fits within the history and tradition of American firearms regulation.[7]

Honest minds may disagree about history. That's especially true when the question is whether a

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[5] According to the United States Bureau of Labor Statistics, more than ten percent of undergraduate history majors enter legal occupations. https://www.bls.gov/ooh/field-of-degree/history/history-field-of-degree.htm

[6] One District Court recently commented on how it had still managed to comport with *Bruen's* test despite its limited judicial resources. *See United States v. Pierret-Mercedes*, — F. Supp. 3d —, 2024 WL 1672034, *14 (D. P.R. Apr. 18, 2024) ("[T]he Court has benefited from the well-researched opinions of other district and circuit courts and from numerous works by legal scholars dedicated to the history of firearms regulation. For good measure, the Court has also made use of a well-known historical gun law repository maintained by the Duke Center for Firearms Law to verify the primary sources.").

[7] In a concurrence, Judge Higginson of the Fifth Circuit Court of Appeals noted that in cases where historical precedents may be in tension, a public call for amicus briefs may be of value to a lower court. *United States v. Daniels*, 77 F.4th 337, 360 n. 15 (5th Cir. 2023) (Higginson, J., concurring) ("Accordingly, in this case, we found it helpful to publish a court directive inviting briefs from amici curiae who wish to supply relevant information regarding the history and tradition of the issues presented in this case.") (cleaned up).

challenged statute is sufficiently analogous to a prior statute. But the process itself—of analogizing and distinguishing—is intuitive to the bar, and a skill that attorneys start learning in their 1L year.

In sum, history isn't as "messy" or as difficult to apply as the Hawaii Supreme Court and many other state and federal courts have made it out to be; and, regardless of how they may feel about it, under *Bruen* it is a court's obligation to consider and consult history when analyzing Second Amendment claims.

II. The Supreme Court of the State of Hawaii Requires a Clear Message from this Court: Summary Reversal

Whether the standard for summary reversal is egregious error or intransigence, the Hawaii Supreme Court's decision in this case demands it. They have thumbed their nose at this Court and brazenly refused to apply the *Bruen* test to conduct that is plainly covered by the Second Amendment.

When a lower court refuses to apply United States Supreme Court precedent, it upends the constitutional order and threatens the very foundation upon which our legal system is based.

A central component of that system is the doctrine of *stare decisis*. It is what allows our nation's system of federalism to operate efficiently, effectively and predictably. Justice Antonin Scalia addressed the significance of the doctrine of *stare decisis* in his

following concurrence:

> The doctrine of *stare decisis* protects the legitimate expectations of those who live under the law, and, as Alexander Hamilton observed, is one of the means by which exercise of 'an arbitrary discretion in the courts' is restrained. Who ignores it must give reasons, and reasons that go beyond mere demonstration that the overruled opinion was wrong (otherwise the doctrine would be no doctrine at all).

Hubbard v. U.S., 514 U.S. 695, 716 (1995) (Scalia, J., concurring in part and in judgement).

In ruling as it has in the present case, the Hawaii Supreme Court has unabashedly ignored precedent, and brought into question not only the rigidity of the structure supporting American jurisprudence by disregarding *stare decisis*, but more importantly bringing into question the rigidity of all rights enshrined within the Constitution. If left unchecked, state and federal courts could begin to follow Hawaii's lead and snub their nose not only at the Second Amendment but all other constitutional rights that they feel don't suit the "best interests" of their particular states or environs. For this reason, summary reversal is appropriate.

As outlined above, summary reversal is also appropriate due to the fact that the Hawaii Supreme Court committed egregious error by failing to apply

the *Bruen* test to a case involving the prosecution of an individual who was carrying a firearm in self-defense. *See Gonzalez v. Thomas*, 54 7 U.S. 183, 185 (2006) (summary reversal warranted where lower court's error is "obvious").

The fact that this obvious error was intentional further justifies summary reversal in this case. The Hawaii Supreme Court did not simply misapply the relevant Second Amendment precedents, it willfully resisted them.

In the past, when courts have engaged in this type of recalcitrance, this Court has summarily reversed them to both correct an error and "enforce the Court's supremacy". William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 NYU J.L. & Liberty 1, 2 (2015). *Accord American Tradition Partnership, Inc. v. Bullock*, 567 U.S. 516 (2012) (summarily reversing a Montana Supreme Court decision that attempted to carve out an exception to *Citizens United v. Federal Election Comm'n*, 558 U.S. 310 (2010), based on unique state law circumstances); *see also Pavan v. Smith*, 582 U.S. 563, 566 (2017) (summarily reversing the Arkansas Supreme Court's conclusion that *Obergefell v. Hodges*, 576 U.S. 644 (2015), protected only same-sex marriage, and therefore did not protect same-sex couples' rights to be named on their children's birth certificates).

Resisting the right to keep and bear arms is an unfortunate but longstanding tradition in the United States. Before *Heller*, numerous lower court judges

rejected the principle that the Second Amendment protected an individual right to keep and bear arms. *See Parker v. District of Columbia*, 478 F. 3d 370, 403 n.4 (D.C. Cir. 2007) (Henderson, J., dissenting) (collecting circuit court cases and explaining that "[n]ine of our sister circuits have noted that the declaratory clause modifies the guarantee clause" with respect to the Second Amendment – concluding, therefore, that there was *no individual right* to keep and bear arms) (emphasis added).

Even after *Heller,* numerous lower courts defiantly engaged in loosely tethered means-end scrutiny when determining whether a plaintiff was protected by the Second Amendment. *Bruen*, 597 U.S. at 19 ("Despite the popularity of this two-step approach, it is one step too many."); *see also Rogers v. Grewal*, 140 S. Ct. 1865, 1866 (2020) (Mem.) (Thomas, J., dissenting from denial of certiorari) ("[A]s I have noted before, many courts have resisted our decisions in *Heller* and *McDonald*. … Instead of following the guidance provided in *Heller*, these courts minimized that decision's framework."); *McDougall v. County of Ventura*, 23 F.4th 1095, 1119 (9th Cir. 2022) (VanDyke, J., concurring) ("As I've recently explained, our circuit can uphold any and every gun regulation because our current Second Amendment framework is exceptionally malleable and essentially equates to rational basis review.").

And, as the present case makes clear, this resistance to – and at times outright defiance of –

Heller, McDonald and *Bruen* continues throughout both the state and federal court systems today. For this reason, a summary reversal in this case would not only send a clear message to the Supreme Court of Hawaii, but would also serve as a "lightning bolt" that would reverberate across the legal landscape reminding all of this Court's authority to enforce its precedents, and the right of the people to keep and bear Arms. Baude, 9 NYU J.L. & Liberty 1, 2.

CONCLUSION

Summary reversal would send this message loud and clear. Therefore, Mountain States Legal Foundation respectfully urges the Court to grant the petition for certiorari and summarily reverse the Hawaii Supreme Court's decision in this case.

Respectfully submitted,

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