Civil No. 12-55115 [DC No. CV-08377-JAK]

IN THE U.S. COURT OF APPEALS
FOR THE NINTH CIRCUIT

JONATHAN BIRDT,
Plaintiff-Appellant,
vs.
LOS ANGELES SHERIFFS DEPARTMENT, et al.,
Defendants–Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF
LAW CENTER TO PREVENT GUN VIOLENCE

NIXON PEABODY LLP
DAVID H. TENNANT, SBN 132568
1300 Clinton Square
Rochester, NY 14604
Telephone: (585) 263-1600
E-mail: dtennant@nixonpeabody.com

CAMERON R. CLOAR, SBN 267762
One Embarcadero Center, Suite 1800
San Francisco, California 94111
Telephone (415) 984-8200
E-mail: ccloar@nixonpeabody.com

LYNETTE NOGUERAS–TRUMMER, ESQ. (not admitted in California)
Key Towers at Fountain Plaza
40 Fountain Plaza, Suite 500
Buffalo, NY 14202
E-mail: lnoguerastrummer@nixonpeabody.com

Attorneys for Amicus Curiae

The Law Center to Prevent Gun Violence ("the Law Center"), by and through its undersigned counsel, respectfully moves this Court for leave to present an *amicus curiae* brief in the above captioned matter in support of the position of the Los Angeles Police Department. The proposed brief is attached hereto as **Exhibit A**.

This motion is made after the Law Center endeavored to obtain the consent of all parties, pursuant to Federal Rule of Appellate Procedure 29-3. Defendants-Appellees stated that they consent to the filing of the attached brief. Plaintiff-Appellant stated that he does not. Attached hereto as **Exhibit B** is a true and correct copy of the e-mail exchange between counsel for the Law Center and the Plaintiff-Appellant wherein Plaintiff-Appellant refused to consent to the filing of the attached brief.

The Law Center is a national law center dedicated to preventing gun violence. Founded after an assault weapon massacre at a San Francisco law firm in 1993, the Law Center provides legal and technical assistance in support of gun violence prevention. The Law Center tracks and analyzes federal, state, and local firearms legislation, as well as legal challenges to firearms laws. As an *amicus*, the Law Center has provided informed analysis in a variety of

Second Amendment cases, including *District of Columbia v. Heller*, 554 U.S. 570 (2008), *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), and *Peruta v. County of San Diego*, 758 F. Supp. 2d 1106 (S.D. Cal. 2010), *appeal docketed*, No. 10-56971 (9th Cir. Dec. 16, 2010).

This appeal presents important issues concerning gun violence. The Center believes that the attached brief will aid the Court by providing important and necessary perspectives on the legal and historical context of gun laws and the Second Amendment to the United States Constitution. In particular, the attached brief provides a detailed historical analysis of firearm regulation from before the founding of the Republic to present day, and also addresses an open question that has resulted from Second Amendment jurisprudence—namely, what the appropriate standard of review for Second Amendment claims should be, and how lower courts have answered that question thus far.

Additionally, the brief discusses the emerging trend in lower courts towards using a two-pronged approach to Second Amendment claims that query (1) whether the law or regulation at issue implicates protected Second Amendment activity, and if so, (2) whether it passes

the appropriate standard of review. Employing this test to the case at hand, the brief concludes that (1) California's concealed weapons permitting process does not implicate protected Second Amendment activity because the Supreme Court has only recognized a Second Amendment right to possess and carry firearms in the home, and (2) even if the permitting process did implicate protected Second Amendment activity, it easily survives the appropriate level of review – intermediate scrutiny – due to the obvious and substantial public safety benefits from carefully limiting the concealed carry of loaded firearms in public.

Accordingly, the Center respectfully requests that this Court grant this Motion for Leave to File *Amicus Curiae* Brief, and grant any such other and further relief as deemed appropriate.

DATED: November 5, 2012

Respectfully submitted,

NIXON PEABODY LLP

By: /s/ *Cameron R. Cloar*

David H. Tennant, SBN 132568
1300 Clinton Square
Rochester, NY 14604
Telephone: (585) 263-1600
dtennant@nixonpeabody.com

Cameron R. Cloar, SBN 267762
One Embarcadero Center, 18th Floor
San Francisco, California 94111
Telephone: (415) 984-8200
Facsimile: (415) 984-8300
ccloar@nixonpeabody.com

-- *and* --

Of Counsel – Not Admitted in California
Lynette Nogueras –Trummer, Esq.
Key Towers at Fountain Plaza
40 Fountain Plaza, Suite 500
Buffalo, NY 14202
Telephone: (716) 848-8218
lnoguerastrummer@nixonpeabody.com

Counsel for *Amicus Curiae*
Law Center to Prevent Gun Violence

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 5, 2012 .

I certify that all participants in the case are registered CM/ECF users (as shown below) and that service will be accomplished by the appellate CM/ECF system.

/s/ Cameron R. Cloar

Contact Info	Case Number/s	Service Preference	ECF Filing Status
Jonathan Birdt Law Office of Jonathan W. Birdt 18252 Bermuda Street Porter Ranch, CA 91326 Email: jon@jonbirdt.com	12-55115	Email	Active
Kjehl Thomas Johansen LOS ANGELES CITY ATTORNEY'S OFFICE City Hall East 600 200 North Main Street Los Angeles, CA 90012 Email: kjehl.johansen@lacity.org	12-55115	Email	Active

Jennifer Ann Delgado Lehman OFFICE OF THE COUNTY COUNSEL Kenneth Hahn Hall of Administration 6th Floor 500 W. Temple Ave. Los Angeles, CA 90012 Email: jlehman@counsel.lacounty.gov	12-55115	Email	Active
Jonathan McCaverty OFFICE OF THE COUNTY COUNSEL Kenneth Hahn Hall of Administration 6th Floor 500 W. Temple Ave. Los Angeles, CA 90012 Email: jmccaverty@counsel.lacounty.gov	12-55115	Email	Active
Neil R. O'Hanlon HOGAN LOVELLS US LLP Suite 1400 1999 Avenue of the Stars Los Angeles, CA 90067 Email: neil.ohanlon@hoganlovells.com	12-55115	Email	Active

Exhibit “A”

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APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF OF *AMICUS CURIAE* LAW CENTER TO PREVENT GUN VIOLENCE SUPPORTING L.A. POLICE DEPARTMENT AND URGING AFFIRMANCE

NIXON PEABODY LLP
DAVID H. TENNANT, SBN 132568
1300 Clinton Square
Rochester, NY 14604
Telephone: (585) 263-1600
E-mail: dtennant@nixonpeabody.com

CAMERON R. CLOAR, SBN 267762
One Embarcadero Center, Suite 1800
San Francisco, California 94111
Telephone (415) 984-8200
E-mail: ccloar@nixonpeabody.com

LYNETTE NOGUERAS–TRUMMER, ESQ. (not admitted in California)
Key Towers at Fountain Plaza
40 Fountain Plaza, Suite 500
Buffalo, NY 14202
E-mail: lnoguerastrummer@nixonpeabody.com
Attorneys for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

Page

Page

STATE CASES

Page

STATUTES

Page

OTHER AUTHORITIES

Page

Page

Page

STATEMENT PURSUANT TO FRAP 29(C)(5)

This brief was not authored in whole or in part by counsel for any party. Nor party or counsel for a party contributed money intended to fund preparation or submission of this brief. No person—other than The Law Center to Prevent Gun Violence ("the Law Center"), its members, and its counsel—contributed money that was intended to fund preparation or submission of this brief.

/s/ Cameron R. Cloar
Cameron R. Cloar

AUTHORITY TO FILE

The Law Center endeavored to obtain consent of all parties, pursuant to Federal Rule of Appellate Procedure 29-3. Defendants-Appellees consented to the filing of this brief, but Plaintiff-Appellant refused to consent. As a result, the Law Center filed with the Court a Motion for Leave to File *Amicus Curiae* Brief.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c), Amicus Curiae The Law Center to Prevent Gun Violence ("the Law Center") states that is a non-profit corporation; that it has no parent corporations; and that no publicly held company owns any stock in the Law Center.

/s/ Cameron R. Cloar
Cameron R. Cloar

I. INTEREST OF AMICI CURIAE

Amicus the Law Center to Prevent Gun Violence ("the Law Center ") is a national law center dedicated to preventing gun violence. Founded after an assault weapon massacre at a San Francisco law firm in 1993, the Law Center provides legal and technical assistance in support of gun violence prevention. As an *amicus*, the Law Center has provided informed analysis in a variety of Second Amendment cases, including *District of Columbia v. Heller*, 554 U.S. 570 (2008), *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), and *Peruta v. County of San Diego*, 758 F. Supp. 2d 1106 (S.D. Cal. 2010), *appeal docketed*, No. 10-56971 (9th Cir. Dec. 16, 2010).

II. INTRODUCTION

The California "concealed carry" laws at issue allow an individual to apply for a permit to carry a loaded, hidden handgun in public. Specifically, California Penal Code Section 26150(a)(2) authorizes local law enforcement agencies to issue a concealed weapon license to an individual who is able to demonstrate "good cause" for its issuance.[1] Otherwise, California Penal Code Section 25400 criminalizes the concealed carrying of firearms. In regulating concealed carry of

[1] California's licensing regime affords broad discretion to local law enforcement agencies when issuing a permit to applicants seeking to satisfy the statutory requirements. *Gifford v. City of Los Angeles*, 88 Cal. App. 4th 801, 805 (2001). Prior to January 1, 2012, section 26150 was codified at California Penal Code section 12050.

firearms in this fashion, the State of California is exercising the state's core police power to reduce the threat that loaded, hidden guns pose to the public at large and to law enforcement officers in California.

California's concealed carry restrictions reflect the longstanding understanding in this country – from the earliest days of the Republic – that states are empowered to restrict the use and possession of firearms outside the home in order to enhance public safety.

The risk of violence presented by the public carry of firearms has only grown since the country's founding. Crude non-rifled muskets that were hard to aim, slow to load, and impossible to conceal[2] were replaced by small, easily concealed, semiautomatic handguns that rapidly fire multiple rounds with deadly accuracy. The destructive power of modern handguns is demonstrated by the Glock, the most popular handgun in the nation, and the firearm used in many tragic high-profile shootings.[3] For example, a Glock 19 pistol with a large capacity

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[2] *See* Entry in Encyclopedia Britannica for "musket" (noting most muskets were muzzle-loaders; early muskets were typically 5.5 feet long and weighed about 20 pounds; were often handled by two persons and fired from a portable rest; and fired a single 2-ounce ball about 175 yards with little accuracy).

[3] How the Glock Became America's Weapon of Choice, Author Interview, National Public Radio (Jan. 24, 2012) ("Today the Glock pistol has become the gun of choice for both criminals and law enforcement in the United States"), available at http://www.npr.org/2012/01/24/145640473/how-the-glock-became-americas-weapon-of-choice. The Glock 19 pistol, when equipped with a large capacity magazine, can fire 30 bullets in 15 seconds. Louis Klarevas, *Closing the Gap: How to reform U.S. gun laws to prevent another Tucson*, THE NEW REPUBLIC,

ammunition magazine was used in the 2011 Tucson mass shootings that took the life of Chief Judge John Roll and five other people, and gravely wounded Congresswomen Gabrielle Giffords and twelve others. The shooter was stopped only when he went to re-load and dropped a second ammunition magazine, giving bystanders the chance to subdue him. A Glock 19 also was used in the Virginia Tech shootings, which left 49 wounded and 32 dead. In addition, the shooter in this year's tragic Aurora, Colorado theater massacre carried a Glock in his arsenal.

While small, easily-concealed semi-automatic handguns are frequently used in high-profile mass shootings that periodically devastate our nation, modern firearms of all types pose a serious threat to public safety every day in California and other states. Of the 1,811 people murdered in California last year, 1,257, or 69%, were killed by firearms.[4] In 2010, 12,996 people were murdered in the U.S. Of those murders, 8,775 were committed using firearms.[5] All told, firearms are

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January 13, 2011, http://www.tnr.com/article/politics/81410/US-gub-law-reform-tucson.

[4]FBI, Crime in the United States, Murder, by State, Types of Weapons, Table 20, at http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/tables/10tbl20.xls.

[5]FBI, Crime in the United States, Murder, by Weapon, Table 8, at http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/tables/10shrtbl08.xls

responsible for over 30,000 deaths and over 70,000 injuries each year.[6] This translates to 85 deaths a day, or three gunshot deaths every hour.

Gun violence also poses a grave risk to law enforcement officers.[7] Nationwide, 541 officers have been killed in the line of duty in the last ten years, and 498 of those officers were killed by firearms.[8] Although overall fatalities fell in 2009, firearm-related fatalities for law enforcement officers rose 6%.[9] In 2011, for the first time in 14 years, more police officers were killed in gun-related violence than traffic accidents.[10] Law enforcement fatalities have risen for the last

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[6]U.S. Dep't of Health & Human Servs., Centers for Disease Control & Prevention, Nat'l Center for Injury Prevention & Control, Web-Based Injury Statistics Query & Reporting System (WISQARS), *WISQARS Injury Mortality Reports*(last visited October 31, 2012), at http://webappa.cdc.gov/sasweb/ncipc/mortrate10_sy.html; U.S. Dep't of Health & Human Servs., Centers for Disease Control & Prevention, Nat'l Center for Injury Prevention & Control, Web-Based Injury Statistics Query & Reporting System (WISQARS), *WISQARS Nonfatal Injury Reports*(last visited October 31, 2012), at http://webappa.cdc.gov/sasweb/ncipc/nfirates2001.html.

[7]FBI, Crime on the United States, Crime Trends, Table 15, Additional information about selected offenses, at http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/tables/10tbl15.xls.

[8]FBI, Uniform Crime Reports, Law Enforcement Officers Feloniously Killed, Type of Weapon, 2001-2010, Table 27, available at http://www.fbi.gov/about-us/cjis/ucr/leoka/leoka-2010/tables/table27-leok-feloniously-type-of-weapon-01-10.xls.

[9]National Law Enforcement Officers Memorial Fund, *A Tale of Two Trends: Overall Fatalities Fall, Fatal Shootings on the Rise. (Dec 2009)*, available at http://www.nleomf.org/assets/pdfs/2009_end_year_fatality_report.pdf.

[10]National Law Enforcement Officers Memorial Fund, Law Enforcement Officer's Death, 2011 Preliminary Report.

three years, reaching a 20-year high of 68 fatalities.[11] In 2011 alone, six police officers were killed by firearms during traffic stops.[12] Twenty-percent of all police fatal shootings in 2010 were due to ambush style attacks.[13]

Invalidating California's concealed carry laws is not only unwarranted and extremely unwise in view of the modern threat firearms pose to public safety, but it also would be contrary to the long history of state action in this area and a wealth of case law affirming the constitutionality of state restrictions on concealed carry of firearms, including the kind of discretionary licensing regime enacted in California.

Appellant nonetheless claims that, as applied by the Los Angeles Police Department and Los Angeles County Sheriff's Department, California's "good cause" permit requirement for concealed carry violates the Second Amendment under *District of Columbia v. Heller*, 554 U.S. 570 (2008). Appellant's argument should be rejected.

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[11]National Law Enforcement Officers Memorial Fund, Law Enforcement Officer's Death, 2011 Preliminary Report; 2011 Mid-year Report.

[12]FBI, Uniform Crime Reports, Law Enforcement Officers Feloniously Killed, Circumstance at Scene of Incident by Type of Weapon, 2010, Table 31, available at http://www.fbi.gov/about-us/cjis/ucr/leoka/leoka-2010/tables/table31-leok-feloniously-circumstance-by-type-weapon-10.xls.

[13]National Law Enforcement Officers Memorial Fund, Law Enforcement Officer Deaths: Preliminary 2010, Law Enforcement Fatalities Spike Dangerously in 2010.

First, the decision in *Heller* is properly read to protect a responsible, law-abiding citizen's right to possess an operable handgun *in the home for self-defense,* a conclusion supported by lower courts since 2008. The California concealed carry laws do not burden the Second Amendment because they do not prevent anyone from exercising their right to self-defense in the home. Therefore, they are properly analyzed as an exercise of police power and not subject to heightened scrutiny.

Second, even if such regulations are found to burden the Second Amendment and trigger heightened scrutiny, only intermediate scrutiny review should apply. The California statutes easily survive such review due to the obvious and substantial public safety benefits from carefully limiting the concealed carry of loaded firearms in public.

Accordingly, the Court should reject appellant's challenge and affirm the holding of the court below.

III. ARGUMENT

A. The California Statutes Do Not Implicate the Second Amendment.

1. The Second Amendment Protects the Right to Possess a Handgun for Self-Defense Within the Home.

The Second Amendment does not guarantee a "right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Heller*, 554 U.S. at 626. On the contrary, the Supreme Court in *Heller* made clear that its holding was consistent with a variety of laws intended to reduce gun violence:

> Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. For example, **the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful** under the Second Amendment or state analogues ….[N]othing in our opinion should be taken to cast doubt on the longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

554 U.S. at 626-27 (internal citations omitted) (emphasis added); *see also id.* n. 26 ("We identify these *presumptively lawful* regulatory measures only as examples; our list does not purport to be exhaustive") (emphasis added).

The Court's subsequent decision in *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), reaffirmed the domestic boundaries of the Second Amendment articulated in *Heller*. Like *Heller*, *McDonald* recognized that "the right to keep

and bear arms" is not absolute, and confirmed that the Second Amendment protects the right of a responsible, law abiding citizen to possess a handgun for self-defense within the home.

2. The Historical Record Confirms that the Possession of Firearms in Public is Outside the Scope of the Second Amendment.

Because the Second Amendment "codified a *pre-existing* right" at the time of its adoption, courts must examine the historical record to illuminate the amendment's meaning. *Heller*, 554 U.S. at 592. Indeed, *Heller* interpreted the Second Amendment based on historical documents that reflected how the Framers understood the right to bear arms at the time of ratification. *See id.* at 570-619; *see also United States v. Masciandaro*, 638 F.3d 458, 470 (4th Cir. 2011) ("[H]istorical meaning enjoys a privileged interpretative role in the Second Amendment context ….").

The historical record demonstrates that for centuries, states have routinely restricted public carry of firearms as a core incident of their police powers and duty to protect their citizens. This was true at the time or our nation's founding, and remains so today.

a. *English Public Carry Laws*

The Framers borrowed their understanding of the Second Amendment right from English law, and necessarily accepted England's practice of restricting public

carry of weapons. *See* Patrick Charles, *The Faces of the Second Outside the Home: History versus Ahistorical Standards of Review*, 60 Cle. St. L. Rev. 1, 31 (2012) (citing *Heller*, 554 U.S. at 593, 599). English law had long criminalized the public carry of weapons since 1328, when the Statute of Northampton was enacted. Statute of Northampton, 2 Edw. 3, c. 3 (1328) (Eng.). Under that law, no person was permitted to "go nor ride armed by Night nor by Day, in Fairs, Markets, nor in the Presence of the justices or other Ministers, nor in no Part elsewhere . . . ," although an exception existed for those conducting the King's business. *Id*. The Statute of Northampton was thus "an affirmance" of the common law rule that there is no right to carry weapons in public. *Sir Knight's Case*, 87 Eng. Rep. 75 (1686). Indeed, Queen Elizabeth I proclaimed public carry to be "to the terrour of all people professing to travel and live peaceably . . . ." Charles, 60 Clev. St. L. Rev. 1, 14-22 (citing *By the Queene Elizabeth I: A Proclamation Against the Carriage of Dags, and For Reformation of Some Other Great Disorders* 1 (London, Christopher Barker 1594)).

Even after the 1689 *Declaration of Right* codified the right to bear arms under the English Bill of Rights, limitations on public carry remained in English law. *See Heller*, 554 U.S. at 593. A December 21, 1699 proclamation stated:

> [S]everal Persons not Qualified by the Laws of this Realm, to carry Arms, have nevertheless . . . taken on them to Ride and Go Armed, and for their so doing, have sometimes insisted on Licenses formerly

> Granted, which have been Re-called and made Void . . . and others have wholly Falsified and Counterfeited Licenses to carry Arms . . . We have for the Remedying the said Evil, thought fit to Re-call all Licenses whatsoever . . . and to Require all persons whatsoever having such Licenses, to bring in and Lodge the same with the Clerk of the Council . . . .

Charles, 60 Clev. St. L. Rev. at 27 (quoting *The Post Boy* at 1, col. 1 (London Dec. 221, 1699). Furthermore, urban constables in the early eighteenth century had authority not only to arrest persons who were "arm[ed] offensively" and "in affray of Her Majesties Subjects," but also to arrest anyone who publicly carried "Daggers, Guns or Pistols Charged." Robert Gardiner, *The Compleat Constable* 18 (3d ed. 1708). Restrictions on public carry thus were widely accepted at common law – and unambiguously set forth in contemporaneous commentaries on English law by such notable scholars as William Blackstone[14], Lord Edward Coke[15], and William Hawkins.[16]

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[14] Blackstone, the "preeminent authority on English law for the founding generation," *Heller*, 554 U.S. at 593-94, declared that "[t]he offense of riding or going armed, with dangerous or unusual weapons is a crime against the public peace . . . and is particularly prohibited by the [S]tatute of Northampton." William Blackstone, 4 *Commentaries on the Laws of England* 148-49 (1769).

[15] Lord Edward Coke, "the greatest authority of his time on the laws of England," *Payton v. New York*, 445 U.S. 573, 593-94 (1980), declared one could not "goe nor ride armed by night nor by day . . . in any place whatsoever." Edward Coke, 3 *Institutes of the Law of England* 160 (1797).

[16] William Hawkins, an important English legal commentator familiar to lawyers during the Founding era, explained that although the Statute of Northampton allowed armed self-defense "in his House" because "a man's house is as his

Thus, even if self-defense was a valid reason to possess firearms in the home, English law made clear it was not a valid reason to carry them in public.

b. ***Founding Era Public Carry Laws***

The Founding generation in this country likewise distinguished between firearm possession inside and outside the home, adopting laws to allow possession in the home while restricting or even prohibiting it outside the home. *See* Saul Cornell, *The Right to Carry Firearms Outside the Home: Separating Historical Myths from Historical Realities*, 14 (June 12, 2012) (unpublished manuscript) (on file with the Fordham Urban Law Journal). Thomas Jefferson wrote a bill penalizing any person who bore a gun "out of his inclosed ground, unless whilst performing military duty." *Id.* (citing A Bill for Preservation of Deer (1785), *The Papers of Thomas Jefferson* 444 (Julian P. Boyd ed., 1950)). Immediately after the adoption of the Constitution, Massachusetts, North Carolina, and Virginia expressly incorporated into their own laws the longstanding English restrictions on public carry. Charles, 60 Clev. St. L. Rev. at 31-32; *see also* Patrick J. Charles, *Scribble Scrabble, the Second Amendment, and Historical Guideposts*, 105 Nw. U.L. Rev. Colloquy 227, 237 (2011) (citations omitted).

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castle," it did not allow "the wearing of such Armour in Publick." William Hawkins, 1 *Treatise of the Pleas of the Crown*, ch. 63, Section 8 (1716).

c. *19th Century State Regulation of Firearms in Public – Pre-Civil War*

In the early part of the 19th Century, various states adopted carry restrictions in the English tradition in response to a rise in violence caused, in large part, by the increased use and popularity of concealable firearms. *See* Saul Cornell, *A Well-Regulated Militia: The Founding Fathers and the Origins of Gun Control in America* 131-40 (2006).[17] For example, in 1821, Tennessee passed a statute banning concealed carry subject only to an exception for a person who was "on a journey to any place out of his county or state."

In the mid-19th Century, additional states passed laws restricting public carry.For example, in 1853, Oregon permitted only those with "reasonable cause to fear an assault, injury, or other violence to his person, or to his family or property" to carry firearms. New York restricted public carry of firearms by banning the discharge of firearms without exception in city streets, lanes, alleys, gardens, and "any other place where persons frequently walk." Laws of the State of New York, Vol. II, Ch. 43 (1886) (enacted 1786). Seven other states enacted public carry

[17] *See* Clayton E. Cramer, *Concealed Weapon Laws of the Early Republic: Dueling, Southern Violence, and Moral Reform* 143-146, 150-52 (1999); Cornell, *A Well Regulated Militia* at 131-40; Cornell, 73 Fordham L. Rev. at 513 (2004) ("[E]xceptions [during the antebellum period] from the concealed weapons law for self-defense were limited.").

restrictions with narrow exceptions.[18] Tennessee and Georgia banned public carry outright. Saul Cornell & Nathan DeDino, *The Second Amendment and the Future of Gun Regulation: Hystorical, Legal, Policy and Cultural Perspective: A Well Regulated Right: the Early Origins of Gun Control*, 73 Fordham L. Rev. 487, 513 (2004).

The contemporaneous historical record shows that courts regularly affirmed the constitutionality of these antebellum laws.[19]

d. ***Post-Civil War Era Public Carry Laws***

Following the Civil War, firearms possession increased as former soldiers retained their military weapons and firearm manufacturers sought to remain

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[18]Louisiana (1813), Indiana (1820), Alabama (1837), Tennessee (1838), Virginia (1838), Georgia (1838) and Ohio (1859). *See* Cornell at 141-42; Cornell, 73 Fordham L. Rev. at 513 (citing Act of Mar. 18, 1859, 1859 Ohio Laws 56; Act of Oct. 19, 1821, ch. XIII, 1821 Tenn. Pub. Acts 13; Act of Feb. 2, 1838, 1838 Va. Acts ch. 101, at 76); Cramer, *Concealed Weapon Laws of the Early Republic* at 3 (citing Raymond Thorp, *Bowie Knife* 69-74 (1948)); *State v. Reid*, 1 Ala. 612, 1840 WL 229 (1840); Alexander DeConde, *Gun Violence In America* 79 (2001).

[19]*See, e.g.*, *Aymette v. State*, 21 Tenn. 154, 159, 1840 WL 1554, at *4 (1840) ("The Legislature . . . [has] a right to prohibit the wearing or keeping [of] weapons dangerous to peace and safety of the citizens . . . ."); *State v. Reid*, 1 Ala. 612, 616, 1840 WL 229, at *3 (1840) (noting the concealed carry ban was "dictated by the safety of the people and the advancement of public morals"); *State v. Buzzard*, 4 Ark. 18, 28, 1842 WL 331, at *6 (1842) ("It inhibits only the wearing of certain arms concealed. This is simply a regulation as to the manner of bearing such arms as are specified."); *Nunn v. State*, 1 Ga. 243, 251 (1846) (upholding prohibition on carrying concealed weapons); *State v. Jumel*, 13 La. Ann. 399, 400, 1858 WL 5151, at *1 (1858) (noting public carry is merely a "*particular mode* of bearing arms which is found dangerous to the peace of society") (emphasis in original).

solvent by manufacturing concealable weapons for civilian use. DeConde, *Gun Violence in America* at 68, 79.In response to a resultant increase in violence, states enacted additional restrictions on public carry. *See id.*at 71, 79-80, 93, 95, 98, 100. From 1870 to 1900, at least fourteen states passed laws regulating the carrying of concealed weapons in public.[20] Several states went further, completely banning the carrying of firearms in various ways.[21] Wyoming, for instance, prohibited the carry of firearms in any "city, town, or village." 1876 Wyo. Comp. Laws ch. 52, § 1. Even in the "Wild West," renowned for its lawlessness, cattle towns like Dodge City prohibited public carry to limit gun violence. *E.g.*, Dodge City, Kan., Ordinance No. 16, § XI (Sept. 22, 1876).

As with the antebellum public carry laws noted above, contemporaneous judicial opinions upheld these restrictions as lawful exercises of police power by the states. *See, e.g.*, *English v. State*, 35 Tex. 473, 478, 1872 WL 7422, at *4 (1871) ("Our Constitution, however, confers upon the Legislature the power to

[20]Colorado, Florida, Illinois, Kentucky, Nebraska, North Carolina, North Dakota, Oregon, South Carolina, South Dakota, Texas, Virginia, Washington, and West Virginia. *See* Colo. Rev. Stat. § 149, at 229 (1881); Fla. Act of Feb. 12, 1885, ch. 3620, § 1; Ill. Act of Apr. 16, 1881; Ky. Gen. Stat., ch. 29, § 1 (1880); Neb. Cons. Stat. § 5604 (1893); 1879 N.C. Sess. Laws, ch. 127; N.D. Pen. Code § 457 (1895); Act of Feb. 18, 1885, ch. 8, §§ 1-4, 1885 Or. Laws 33; 1880 S.C. Acts 448, § 1; S.D. Terr. Pen. Code § 457 (1877); Tex. Act of Apr. 12, 1871; 1869–1870 Va. Acts 510; Wash. Code § 929 (1881); W. Va. Code ch. 148, § 7 (1870).

[21]*See* 1879 Tenn. Pub. Acts, ch. 186; 1876 Wyo. Laws ch. 52; Act of Apr. 1, 1881, No. 96, 1881 Ark. Acts 191; Tex. Act of Apr. 12, 1871.

regulate the [public carry] privilege."); *Andrews v. State*, 50 Tenn. 165, 182, 1871 WL 3579, at *8 (1871) ("[A] man may well be prohibited from carrying his arms to church, or other public assemblage, as the carrying them to such places is not an appropriate use of them."); *State v. Wilforth*, 74 Mo. 528, 531, 1881 WL 10279, at *1 (1881) ("[W]e must hold the act in question to be valid and binding, and as intending only to interdict the carrying of weapons concealed."); *Fife v. State*, 31 Ark. 455, 1876 WL 1562, at *4 (1876) (upholding statute prohibiting the public carrying of pistols similar to Section 25850 as a lawful "exercise of the police power of the State.").

In *State v. Workman*, the West Virginia Supreme Court of Appeals affirmed the constitutionality of a licensing statute that, like California Penal Code Section 26150, restricted public carry of pistols and other weapons to those who "had good cause to believe, and did believe, that he was in danger of death or great bodily harm at the hands of another person, and that he was, in good faith, carrying such weapons for self-defense and for no other purpose . . . ." 14 S.E. 9, 10-11 (W.Va. 1891) (quoting W. Va. Code ch. 148, § 7 (1870)). The court predicated its decision on the Statute of Northampton, declaring the Second Amendment "should be constructed with reference to the provisions of the common law." *Id*. at 11.

Moreover, late-19th century legal scholars confirmed the long-standing common law rule permitting restrictions on public carry of loaded firearms. For

example, Judge John Dillon, one of the most eminent jurists of the day, wrote that the law must "strike some sort of balance between" the right to bear arms and "the peace of society and the safety of peaceable citizens [seeking] protection against the evils which results from permitting other citizens to go armed with dangerous weapons." John Dillon, *The Right to Keep and Bear Arms for Public and Private Defense* (Part 3), 1 Cent. L.J. 259, 287 (1874). A leading contemporary treatise authored by John Norton Pomeroy -- cited in *Heller* as a valuable historical source for understanding the Second Amendment (554 U.S. at 618) -- explained that the right to keep and bear arms "is certainly not violated by laws forbidding persons to carry dangerous or concealed weapons . , . ." *An Introduction to the Constitutional Law of the United States* 152-153 (1868). And Ernst Freund, author of *The Police Power: Public Police and Constitutional Rights*, published in 1904 (at 90-91), noted that the Second Amendment had "not prevented the very general enactment of statutes forbidding the carrying of concealed weapons."

Just before the turn of the century, the Supreme Court of the United States observed in *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897) that the Bill of Rights was "subject to certain well recognized exceptions" from "time immemorial." With respect to the Second Amendment, the *Robertson* court expressly noted that "the right of the people to keep and bear arms . . . is not infringed by laws prohibiting the carrying of concealed weapons." *Id.* at 281- 82.

e. *20th Century State Laws Restricting Concealed Carry*

Between 1903 and 1927, at least eleven states passed statutes that, like the California concealed carry laws, prohibited the carrying of a concealed or concealable weapon without a permit or without the permission of law enforcement.[22] Like Section 26150, such laws required applicants to show they were "suitable" or of "good moral character" or to prove they had a "good reason," "good cause," or "proper reason" for a public carry license.[23] Early twentieth-century laws also granted broad discretion to law enforcement officers regarding the issuance of such permits. *See* Clayton E. Cramer & David B. Kopel, *Shall Issue: The New Wave of Concealed Handgun Permit Laws*, 62 Tenn. L. Rev. 679, 681 (1995).

By the 1930's, many states adopted the Uniform Act to Regulate the Sale and Possession of Firearms— drafted and promoted by the National Rifle

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[22]Nevada (1903), New Hampshire (1909), Georgia (1910), New York (1911), Iowa (1913), California (1917), Connecticut (1917), Oregon (1917), West Virginia (1925), Hawaii (1927), and Michigan (1927). Act of May 4, 1917, ch. 145, 1917 Cal. Laws 221; Act of Apr. 10, 1917, ch. 129, 1917 Conn. Laws 98; Act of Aug. 12, 1910, No. 432, 1910 Ga. Laws 134; Small Arms Act, Act 206, 1927 Haw. Laws 209; 1913 Iowa Acts, 35th G.A., ch. 297, § 3; Act of June 2, 1927, No. 372, 1927 Mich. Laws 887; Act of Mar. 17, 1903, ch. 114, 1903 Nev. Laws 208; Act of Apr. 6, 1909, ch. 114, 1909 N.H. Laws 451; Act of May 25, 1911, ch. 195, 1911 N.Y. Laws 442; Act of Feb. 21, 1917, ch. 377, 1917 Or. Laws 804; and Act of Apr. 23, 1925, ch. 95, 1925 W.Va. Laws 389.

[23]*See, e.g.*, 1917 Cal. Laws at 222; 1927 Haw. Laws at 210; 1927 Mich. Laws at 889; 1909 N.H. Laws at 451-452; and 1925 W.Va. Laws at 390.

Association—to prohibit the unlicensed carrying of concealed weapons in a manner similar to Sections 25850 and 26150. *See id.* at 131-132; Cramer & Kopel, 62 Tenn. L. Rev. at 681.

B. Modern Concealed Carry Laws Address Modern Threats to Public Safety.

Today, California and nearly all other states require residents to obtain a permit before carrying a concealed, loaded firearm in public.[24] Illinois and the District of Columbia ban public carry outright.[25] Although licensing requirements vary, California and nine other states afford discretion to state or local officials to determine whether to issue a concealed carry permit.[26]

C. California's Concealed Carry Restrictions and Similar State Laws Have Been Upheld Repeatedly.

Federal courts have overwhelmingly rejected *Heller*-based challenges to Section 26150 and similar concealed carry licensing laws. *E.g.*, *Peruta v. County of San Diego*, 758 F. Supp. 2d 1106, 1114-17 (S.D. Cal. 2010) (appeal pending)

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[24]*See* Law Center to Prevent Gun Violence, *Guns in Public Places: The Increasing Threat of Hidden Guns in America*, available at http://smartgunlaws.org/guns-in-public-places-the-increasing-threat-of-hidden-guns-in-america/.

[25]*See id*; *see also* Illinois State Law Summary, available at http://smartgunlaws.org/illinois-state-law-summary/; District of Columbia Law Summary, available at http://smartgunlaws.org/washington-d-c-law-summary/.

[26]The other states are AL, CT, DE, HI, MD, MA, NJ, NY, and RI. *See* LCAV, *Guns in Public Places: The Increasing Threat of Hidden Guns in America*, available at http://smartgunlaws.org/guns-in-public-places-the-increasing-threat-of-hidden-guns-in-america/.

(rejecting Second Amendment challenge to Section 26150); *Richards v. County of Yolo*, 821 F. Supp. 2d 1169, 1174 (E.D. Cal. 2011) (appeal pending) (similar); *Piszczatoski v. Filko*, 840 F. Supp. 2d 813, 821 (D.N.J. 2012) (appeal pending) (New Jersey concealed carry) (noting "The language of Justice Scalia's majority opinion deliberately limited the scope of the right recognized to the home."); *Kachalsky v. Cacace*, 817 F. Supp. 2d. 235, 260 (S.D.N.Y. 2011) (appeal pending) (New York concealed carry); *Young v. Hawaii*, 2009 WL 1955749, *9 (D. Haw. Jul. 2, 2009) (appeal pending) (Hawaii concealed carry); *Baker v. Kealoha*, No. 11-00528 (D. Haw. Apr. 30, 2012) (appeal pending) (Hawaii concealed carry) (denying motion for preliminary injunction finding plaintiff unlikely to prove discretionary licensing scheme burdens the Second Amendment, but even if it did the scheme likely would survive intermediate scrutiny since "The government has a significant interest in empowering local law enforcement to exercise control over both concealed and open-carry firearm permits," and also because "the constitutional right…to carry a concealed weapon in public [] has not been recognized by the Supreme Court or the overwhelming majority of circuit and district courts that have interpreted its holding."); *Kuck v. Danaher*, 822 F. Supp. 2d 109, 156 (D. Conn. 2011) (Connecticut concealed carry); *Hightower v. Boston*, 2012 U.S. App. LEXIS 18445,*23-24 (1st Cir. Aug. 30, 2012) (Massachusetts' concealed carry) (explaining that "the government may regulate the carrying of

concealed weapons outside of the home" because "[l]icensing of the carrying of concealed weapons is presumptively lawful").

Along with the majority of other federal and state courts to so hold, this Court previously recognized in *United States v. Vongxay*, 594 F.3d 1111, 1115 (9th Cir. 2010), that *Heller* did not apply to firearms *outside of the home. Id*. at 1115 (describing the *Heller* right as "the right to keep a loaded firearm in [the] home for self-defense" and noting, "Courts often limit the scope of their holdings, and such limitations are integral to those holdings"); *see also Shepard v. Madigan*, No. 11-cv-405-wds, 2012 U.S. Dist. LEXIS 44828, at *29 (S.D. Ill. Mar. 30, 2012)(appeal pending) ("The holding in *Heller* is narrow, and limited to the possession of firearms in one's home for the purpose of self-defense."); *Moreno v. New York City Police Dep't*, No. 10 Civ. 6269, 2011 U.S. Dist. LEXIS 76129, 7-8 (S.D.N.Y. May 6, 2011) ("*Heller* has been narrowly construed, as protecting the individual right to bear arms for the specific purpose of self-defense within the home.").

Because the laws at issue here are part of a longstanding tradition of restricting public carry of dangerous weapons, this Court should reaffirm the limited reach of *Heller* and hold that those laws are outside the purview of the Second Amendment. *See Heller v. District of Columbia* ("*Heller II*"), 670 F.3d 1244, 1253 (D.C. Cir. 2011) ("activities covered by a longstanding regulation are presumptively not protected from regulation by the Second Amendment"); *United*

States v. Marzzarella, 614 F.3d 85, 91-95 (3d Cir. 2010); *Piszczatoski*, 840 F. Supp. 2d at 829 ("The requirement that an applicant demonstrate need for a permit to carry a handgun in public is a 'longstanding' licensing provision of the kind that *Heller* identified as presumptively lawful. The Third Circuit has found that these longstanding regulations have become exceptions to the right to keep and bear arms so that the regulated conduct falls outside the scope of the *Second Amendment*") (internal citation omitted).

D. Even If The Second Amendment Is Found to Apply, The California Concealed Carry Laws Easily Survive Intermediate Scrutiny.

Should this court find that the Second Amendment extends to possession of firearms outside the home and accordingly subject the California concealed carry laws to heightened scrutiny, the court should apply intermediate scrutiny and, as the district court did, uphold the California laws under that standard of review.

1. Intermediate Scrutiny is the Appropriate Level of Review for Second Amendment Challenges.

Because the exercise of the Second Amendment right creates unique and significant risks of firearm-related death and injury—unlike the exercise of any other constitutional right—courts must be careful not to hamstring legislative efforts to reduce gun violence by subjecting gun laws to overly restrictive scrutiny. *See Heller*, 554 U.S. at 636 (the Constitution permits legislatures "a variety of tools for combating that problem"). Firearms are designed to inflict grievous injury

and death, the effects of which are all too apparent in the 85 gun-related deaths that occur on average every day.[27] Given the intrinsic dangers presented by loaded firearms and actual deaths and injuries inflicted by firearms in California and nationwide each year, firearms must necessarily be regulated.

To enable state legislatures to responsibly address this threat to public safety, courts should employ intermediate scrutiny, and not strict scrutiny, when evaluating laws that trigger review under the Second Amendment. Intermediate scrutiny requires a showing that the asserted governmental end is "significant," "substantial," or "important." *See, e.g.*, *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). It requires that the fit between the challenged regulation and the stated objective be reasonable, not perfect, and does not require that the regulation be the least restrictive means of serving the interest. *See, e.g.*, *Lorrilard Tobacco Co v. Reilly*, 533 U.S. 525, 556 (2001).

Following *Heller*, a majority of courts have applied intermediate scrutiny to laws implicating the Second Amendment. *E.g.*, *Heller II*, 2011 WL 4551558, *8, 14 (applying intermediate scrutiny to laws requiring registration and prohibiting

[27]U.S. Dep't of Health & Human Servs., Centers for Disease Control & Prevention, Nat'l Center for Injury Prevention & Control, Web-Based Injury Statistics Query & Reporting System (WISQARS), *WISQARS Injury Mortality Reports, 1999-2007* (last visited November 17, 2011), at http://webappa.cdc.gov/sasweb/ncipc/mortrate10_sy.html.

assault weapons and large capacity ammunition magazines); *Peruta*, 758 F. Supp. 2d at 1117; *Masciandaro*, 638 F.3d at 470-471 (applying intermediate scrutiny to laws that do not affect a law-abiding citizen's right to self-defense within the home); *United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010) (en banc) (accepting government's concession that intermediate scrutiny is appropriate for reviewing statute prohibiting individuals convicted of domestic violence misdemeanors from possessing firearms); *United States . v. Chester*, 628 F.3d 673, 688-89 (4th Cir. 2010) (similar); *Marzzarella*, 614 F.3d at 98-99 (applying intermediate scrutiny to statute prohibiting possession of guns with obliterated serial numbers).[28]

2. <u>The Application of Strict Scrutiny Would be Improper.</u>

While intermediate scrutiny is appropriate for laws that substantially burden the Second Amendment, strict scrutiny is not. Indeed, most constitutionally enumerated rights do not trigger strict scrutiny. Rights that *do* require strict scrutiny are materially different in character from the gun possession rights at issue here. For example, strict scrutiny is appropriate in evaluating challenges to content-based speech restrictions and laws involving racial classifications. Courts apply the most stringent level of review to laws restricting the content of speech

[28]See Post-Heller Litigation Summary (Updated September 13, 2012) available at http://smartgunlaws.org/post-heller-litigation-summary/, at 7-9 (surveying standard of review).

because they "raise[] the specter that the government may effectively drive certain ideas or viewpoints from the marketplace." *Simon & Schuster, Inc. v. Members of NY State Crime Victims Bd.*, 502 U.S. 105, 116 (1991). Government restrictions on speech content rarely are justified and such laws are fundamentally at odds with "the premise of individual dignity and choice upon which our political system rests." *Id.* Racial classifications similarly merit strict scrutiny because "[d]istinctions between citizens solely because of their ancestry are by their very nature odious." *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943). Such laws are "in most circumstances irrelevant to any constitutionally acceptable legislative purpose." *Adarand Constructors v. Pena*, 515 U.S. 200, 216 (1995).

Gun regulations are fundamentally different in character. State and local governments have "cardinal civic responsibilities" to protect the public and law enforcement personnel from gun violence. *Department of Revenue of Ky. v. Davis*, 553 U.S. 328, 342 (2008). Accordingly, the "rigid" inquiry mandated by strict scrutiny, *see Korematsu v. United States*, 323 U.S. 214, 216 (1944), is not appropriate for Second Amendment challenges.

3. California's Concealed Carry Restrictions Satisfy Intermediate Scrutiny.

a. *The Threat to Public Safety Created by Carrying Loaded, Hidden Firearms in Public is Well-Established*

As noted above, gun violence poses a serious threat to public safety in California and across the nation. Contrary to appellant's theory that law-abiding citizens do not commit gun violence, the unending plague of mass shootings in this country proves otherwise. Each of the recent massacres was committed by an otherwise law-abiding citizen who had complied with state gun laws

In addition, weak laws governing the carrying of concealed weapons increase the risk that every day public conflicts – for example, those that occur between drivers or at sporting events – will turn into deadly encounters. California should not be required to abandon sensible laws restricting concealed carry of loaded firearms in public places.

b. *California's Concealed Carry Laws are Substantially Related to Protecting Public Safety*

California has made the sensible decision to restrict public carry of concealed firearms, requiring each applicant to show "good cause" for carrying a concealed loaded firearm in public. Plaintiff-Appellant seeks a judicial ruling that overrides the will of the people of the State of California and the judgment of their elected representatives in carefully limiting concealed carry of loaded firearms in public places. That radical result is not compelled by the Second Amendment; nor

is it supported by sound public policy, logic, or common sense. A "shall issue" gun licensing regime—one which would require law enforcement to issue licenses to anyone who meets certain minimal standards—doubtlessly would put more guns on the streets and increase the risk of gun violence.[29] Indeed, unlike possession of a gun in the home, where a defined space is under the legal control of the homeowner who exercises a right to exclude others, public carry introduces the firearm into a universe of innumerable variables outside the control of the gun owner. Common sense, as much as any statistical report, compels the conclusion that "carrying a concealed firearm in public presents a recognized threat to public order" and "poses an imminent threat to public safety." *People v. Yarbrough*, 169 Cal. App. 4th 303, 314 (Cal. Ct. App. 2008).

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[29]*See* Law Center to Prevent Gun Violence, *Guns in Public Places: The Increasing Threat of Hidden Guns in America (*available at http://smartgunlaws.org/guns-in-public-places-the-increasing-threat-of-hidden-guns-in-america/); "The Geography of Gun Violence" (available at http://www.theatlanticcities.com/neighborhoods/2012/07/geography-gun-violence/2655/). There is no credible evidence that laws permitting widespread concealed carrying *decrease* crime. Ian Ayres & John J. Donohue III, *Shooting Down the "More Guns, Less Crime" Hypothesis*, 55 Stan. L. Rev. 1193, 1285, 1296 (Apr. 2003); Ian Ayres & John J. Donohue III, *The Latest Misfires in Support of the "More Guns, Less Crime" Hypothesis*, 55 Stan. L. Rev. 1371, 1397 (Apr. 2003). Indeed, Jared Loughner, the Tucson shooter, was lawfully carrying a concealed Glock 19 with high-capacity magazine when he gunned down nineteen people. In Arizona, no license is required to carry a concealed handgun in public. The state maintains a non-discretionary "shall issue" concealed permit licensing law, however, for those who seek a permit that may be recognized by other states under reciprocity agreements.

The district court in *Peruta*, 758 F. Supp. 2d at 1117, correctly identified California's compelling interest regulating public carry of firearms:

> In particular, the government has an important interest in reducing the number of concealed weapons in public in order to reduce the risks to other members of the public who use the streets and go to public accommodations. The government also has an important interest in reducing the number of concealed handguns in public because of their disproportionate involvement in life-threatening crimes of violence, particularly in streets and other public places.

Id. (internal citations omitted).

The promotion of public safety is a basic and well-settled exercise of a state's police power, and states are generally afforded "great latitude" in exercising "police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons . . ." *Gonzales v. Oregon*, 546 U.S. 243, 270 (2006) (internal quotations and citation omitted); *see also Kelley*, 425 U.S. at 247 ("promotion of safety of persons and property is unquestionably at the core of the State's police power"). Reasonable and effective gun regulations are integral to the state's exercise of that power. *See Peruta*, 758 F. Supp. 2d at 1117 ("[The state] has an important and substantial interest in public safety and in reducing the rate of gun use in crime.") (internal citations omitted).

California's concealed carry restrictions are substantially related to the state's legitimate objectives in reducing gun violence. Reasonable licensing requirements for the issuance of concealed weapon permits are an effective means

of limiting the number of guns in public, and, correspondingly, preventing violence on the streets. Law enforcement relies upon the lawful restrictions imposed on public carry of concealed weapons to combat inner city gun violence. *See* Lawrence Rosenthal, *Second Amendment Plumbing After Heller: Of Standards of Scrutiny, Incorporation, Well-Regulated Militias, and Criminal Street Gangs*, 41 Urb. Lawyer 1, 30-48 (2009); Rosenthal, *Pragmatism, Originalism, Race, and the Case against Terry v. Ohio*, 43 Tex. Tech. L. Rev. 299, 321-30 (2010).

Finally, when a regulation is evaluated under intermediate scrutiny, it need not be the least restrictive means of accomplishing its objectives, but only a means substantially related to those important objectives. Because California's concealed carry laws are substantially related to the reduction of gun violence, those laws survive intermediate scrutiny.

IV. CONCLUSION

Gun violence is rampant in America. The daily carnage presents an enormous public health, legal and social problem—a challenge to lawmakers everywhere. In California, the legislative response includes sensible restrictions on carrying concealed loaded firearms in public. Such public carry licensing laws have been routinely upheld nationwide as a legitimate exercise of police power to protect the public against gun violence. This has been true for centuries. This

Court should continue in that tradition by affirming the district court's well-reasoned decision below.

DATED: November 5, 2012

Respectfully submitted,
NIXON PEABODY LLP

By: /s/ *Cameron R. Cloar*

David H. Tennant, SBN 132568
1300 Clinton Square
Rochester, NY 14604
Telephone: (585) 263-1600
dtennant@nixonpeabody.com

Cameron R. Cloar, SBN 267762
One Embarcadero Center, 18th Floor
San Francisco, California 94111
Telephone: (415) 984-8200
Facsimile: (415) 984-8300
ccloar@nixonpeabody.com

-- *and* --

Of Counsel – Not Admitted in California
Lynette Nogueras –Trummer, Esq.
Key Towers at Fountain Plaza
40 Fountain Plaza, Suite 500
Buffalo, NY 14202
Telephone: (716) 848-8218
lnoguerastrummer@nixonpeabody.com

Counsel for *Amicus Curiae*
Law Center to Prevent Gun Violence

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 5, 2012 .

I certify that all participants in the case are registered CM/ECF users (as shown below) and that service will be accomplished by the appellate CM/ECF system.

/s/ Cameron R. Cloar

Contact Info	Case Number/s	Service Preference	ECF Filing Status
Jonathan Birdt Law Office of Jonathan W. Birdt 18252 Bermuda Street Porter Ranch, CA 91326 Email: jon@jonbirdt.com	12-55115	Email	Active
Kjehl Thomas Johansen LOS ANGELES CITY ATTORNEY'S OFFICE City Hall East 600 200 North Main Street Los Angeles, CA 90012 Email: kjehl.johansen@lacity.org	12-55115	Email	Active
Jennifer Ann Delgado Lehman OFFICE OF THE COUNTY COUNSEL Kenneth Hahn Hall of Administration 6th Floor 500 W. Temple Ave. Los Angeles, CA 90012 Email: jlehman@counsel.lacounty.gov	12-55115	Email	Active

Jonathan McCaverty OFFICE OF THE COUNTY COUNSEL Kenneth Hahn Hall of Administration 6th Floor 500 W. Temple Ave. Los Angeles, CA 90012 Email: jmccaverty@counsel.lacounty.gov	12-55115	Email	Active
Neil R. O'Hanlon HOGAN LOVELLS US LLP Suite 1400 1999 Avenue of the Stars Los Angeles, CA 90067 Email: neil.ohanlon@hoganlovells.com	12-55115	Email	Active

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Attorney for Amicus Curiae Law Center to Prevent Gun Violence

Date November 5, 2012

Exhibit “B”

Mangin, Rosie

From: Jon Birdt <jon@jonbirdt.com>
Sent: Wednesday, July 18, 2012 10:45 PM
To: Cloar, Cameron
Subject: Re: Birdt v. LA Sheriffs Department, et al., 9th Circuit Case No. 12-55115

I do no consent, there are many families and charities that could use the money you are wasting. If your supporters cared about lives they would be supporting Doctors, not lawyers who violate their oath to support and defend the constitution.

Jon Birdt
818-400-4485

On Jul 17, 2012, at 20:57, "Cloar, Cameron" <ccloar@nixonpeabody.com> wrote:

> Hello Mr. Birdt,
>
> I represent the Law Center to Prevent Gun Violence in the above-captioned matter. We intend to soon file an *amicus* brief in support of the defendants-appellees. Pursuant to Circuit Rule 29-3, we are first required to seek the consent of all parties before requesting leave of court to file the brief. Would you kindly let me know if you will consent to our filing? I also today left you a voicemail to the same effect. My sincere thanks.
>
> All my best,
>
> Cameron Cloar
> Attorney for
> Law Center to Prevent Gun Violence
>
> **Cameron R Cloar**
> **Associate**
> <image001.gif>
> One Embarcadero Center
> 18th Floor
> San Francisco, CA 94111-3600
> P 415-984-8285
> C (415) 254-3529
> F 877 625-9640
> ccloar@nixonpeabody.com
> www.nixonpeabody.com
>
>