No. 08-15773

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID K. MEHL, ET AL.,
Plaintiffs-Appellants

v.

LOU BLANAS, ET AL.,
Defendants-Appellees

On Appeal from the United States District Court for the Eastern District of California, No. S-03-02682 (England, J.)

MOTION OF LAW CENTER TO PREVENT GUN VIOLENCE FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF AND TO PARTICIPATE IN DECEMBER 10, 2012 ORAL ARGUMENT

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PREVENT GUN VIOLENCE

INTRODUCTION

Pursuant to Federal Rule of Appellate Procedure 29, the Law Center to Prevent Gun Violence ("Law Center") submits this motion for leave to file an *amicus curiae* brief and to participate in the oral argument currently set for December 10, 2012. A copy of the Law Center's proposed brief is attached to this motion as Exhibit A.

On October 26, 2012, the Court issued an order: (1) directing the parties to appear for an oral argument on December 10, 2012; and (2) granting the motion of the California Rifle and Pistol Association Foundation ("CRPA Foundation") to participate in oral argument. (Dkt. No. 50.) The October 26 Order stated that the Court would also give 10 minutes of oral argument to "one amicus curiae supporting the validity of Sacramento County's concealed-carry licensing scheme should an appropriate request be made." (*Id.* at 2.)

Pursuant to the October 26, 2012 Order, the Law Center respectfully submits this motion for leave to file an *amicus curiae* brief and to participate in the oral argument to support the validity of Sacramento County's concealed-carry licensing scheme and the state law upon which it is based. The Law Center makes this motion after attempting to obtain the consent of all parties, pursuant to Circuit Rule

29-3. Except for Plaintiffs-Appellants, the parties do not object to the Law Center's filing of an *amicus* brief.[1]

LEGAL STANDARD

Under Fed. R. App. P. 29(a), a party may file an *amicus curiae* brief upon the consent of the parties or upon leave of court. Fed. R. App. P. 29(a). A motion for leave of court must identify the moving party's interest, and state why an *amicus* brief is desirable and why the asserted matters are relevant to the case's disposition. Fed. R. App. P. 29(b). Further, a proposed brief must accompany the motion. *Id.* Finally, an *amicus curiae* may participate in oral argument only with the court's permission. Fed. R. App. P. 29(g).

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[1] Plaintiffs opposed the motion in an e-mail stating "We oppose unless you are going to state your position on the *per se* policy requirements AND the retired officer exception requirement." The email exchange between counsel for the Law Center and the Plaintiffs-Appellants is attached hereto as Exhibit B. Because the Law Center seeks to participate as *amicus* to offer helpful perspectives on the history of gun regulation and the appropriate standard of review and is not required to address all issues in dispute, *see In re Roxford Foods Litig.*, 790 F. Supp. 987, 997 (E.D. Cal. 1991) ("an individual seeking to appear as *amicus* merely had to show that his participation would be useful or otherwise desirable to the court"), the Law Center did not respond with any position on those issues as Plaintiffs-Appellants demanded.

Defendants California Attorney General and Blanas and *amicus curiae* CRPA Foundation all took no position on this motion. By the time of this filing, the other defendants did not respond to an email sent on November 13 requesting their position.

BASIS FOR MOTION

I. THE LAW CENTER TO PREVENT GUN VIOLENCE'S INTEREST

The Law Center to Prevent Gun Violence is a national organization dedicated to preventing gun violence. Founded as Legal Community Against Violence by Bay Area lawyers in the wake of an assault weapon massacre at a San Francisco law firm in 1993, the Law Center provides legal and technical assistance to state and local governments seeking to adopt or defend laws that reduce gun violence. The Law Center tracks and analyzes federal, state, and local firearms legislation, as well as legal challenges to firearms laws nationwide.

The Law Center has an interest in this case because its outcome could impact the ability of law enforcement to address the threat that loaded and hidden firearms pose to the safety of the general public and to law enforcement statewide. Because of its steadfast commitment to preventing gun violence, the Law Center seeks to participate as *amicus curiae* in this case.

II. DESIRABILITY OF THE LAW CENTER'S *AMICUS* BRIEF

An *amicus curiae* brief by the Law Center is desirable for several reasons. First, the Law Center has significant expertise in analyzing regulatory issues with

firearms legislation, having issued seminal publications on state and federal firearms policy.[2]

Second, the Law Center has extensive experience in providing informed analysis in a wide-range of firearms-related cases, most notably *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010). The Law Center has also filed *amicus* briefs in two pending Ninth Circuit appeals concerning California laws regulating concealed carrying of firearms in public places. *See Peruta v. County of San Diego*, No. 09-cv-2371 (9th Cir.) (appeal of 758 F. Supp. 2d 1106 (S.D. Cal. 2010)); *Richards v. County of Yolo*, No. 09-cv-01235 (9th Cir.) (appeal of 821 F. Supp. 2d 1169) (E.D. Cal. 2011)).

Notably, the Law Center will present a unique perspective in evaluating the constitutionality of Sacramento's concealed-carry licensing scheme and the state law upon which it is based. The Law Center's brief will offer a survey of relevant English and American history regarding the right to bear arms and the scope of laws regulating the carrying of weapons in public, which are relevant to the constitutional issues here. In addition, the Law Center's submission will respond

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[2] *See, e.g.*, Regulating Guns in America: An Evaluation and Comparative Analysis of Federal, State and Selected Local Gun Laws (2008) available at http://smartgunlaws.org/regulating-guns-in-america-an-evaluation-and-comparative-analysis-of-federal-state-and-selected-local-gun-laws/.

to the CRPA Foundation's presentations and will provide pertinent background material on the appropriate standard of review for the laws at issue.

III. THE LAW CENTER SHOULD BE ALLOWED TO PARTICIPATE IN THE DECEMBER 10, 2012 ORAL ARGUMENT

As noted, the Court's October 26, 2012 Order stated that the Court would permit 10 minutes of oral argument to "one amicus curiae supporting the validity of Sacramento County's concealed-carry licensing scheme should an appropriate request be made." *Id.* It will be appropriate and helpful for the Law Center to participate in the December 10, 2012 oral argument in support of defendants so as to assist the Court's consideration of the full range of historical perspectives, particularly given the participation of the CRPA Foundation as *amicus curiae*.

CONCLUSION

For the foregoing reasons, the Law Center respectfully requests that this Court grant this Motion for Leave to file an *Amicus Curiae* brief. The Law Center also requests permission to participate in the December 10, 2012 oral argument.

Dated: November 16, 2012 COVINGTON & BURLING LLP

By: */s/ Simon J. Frankel*

Simon J. Frankel
Attorneys for *Amicus Curiae* Applicant
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 16, 2012.

Participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

Dated: November 16, 2012

COVINGTON & BURLING LLP

By *_/s/ Simon J. Frankel_*
SIMON J. FRANKEL

EXHIBIT A

No. 08-15773

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Plaintiffs-Appellants

v.

LOU BLANAS, ET AL.,
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On Appeal from the United States District Court for the Eastern District of California, No. S-03-02682 (England, J.)

[PROPOSED] BRIEF OF *AMICI CURIAE* LAW CENTER TO PREVENT GUN VIOLENCE IN SUPPORT OF APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Law Center to Prevent Gun Violence ("Law Center") states that it has no parent corporation. It has no stock, and therefore no publicly held company owns 10% or more of the stock of any *amicus* signatory to this brief.

STATEMENT PURSUANT TO FRAP 29(C)(5)

This brief was not authored in whole or in part by counsel for any party. No party or counsel for a party contributed money intended to fund preparation or submission of this brief. No person—other than the Law Center, its members, and its counsel—contributed money that was intended to fund preparation or submission of this brief.

AUTHORITY TO FILE

This brief is to be filed pursuant to the Court's permission in response to the Law Center's Motion for Leave to File *Amicus Curiae* Brief and to Participate in December 10, 2012 Oral Argument, filed on November 16, 2012.

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INTEREST OF *AMICI CURIAE*

Amicus Law Center to Prevent Gun Violence (the "Law Center") is a national organization dedicated to preventing gun violence. Founded as Legal Community Against Violence by Bay Area lawyers in the wake of 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 firearm-related cases, including *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010). The Law Center has also filed numerous amicus briefs in this Court, including briefs in *Peruta v. County of San Diego*, 758 F. Supp. 2d 1106 (S.D. Cal. 2010) (appeal pending), and *Richards v. County of Yolo*, 821 F. Supp. 2d 1169 (E.D. Cal. 2011) (appeal pending *sub nom. Richards v. Prieto*, No. 11-16255 (9th Cir.)).

INTRODUCTION AND SUMMARY OF ARGUMENT

The State of California authorizes local law enforcement agencies like the Sacramento County Sheriff's Department to issue concealed weapon licenses to individuals who can, among other requirements demonstrate "good cause" for the issuance of the license. *See* Cal. Penal Code § 26150 *et seq*. (formerly Cal. Penal Code § 12050). The California statute challenged here, which gives discretion to local law enforcement to grant or deny such a concealed weapon license, and the

Sacramento County Sheriff's application of that statute are legitimate exercises of the state's police power aimed at the threat that loaded and hidden firearms pose to public safety.

California has the right—indeed, the duty—to take reasonable steps to protect its citizens from gun violence. Firearms cause over 30,000 deaths and almost 70,000 injuries in the United States each year.[1] In 2009, 2,972 people died from firearm-related injuries in California.[2]

California's concealed carry law does not burden the Second Amendment right to possess a firearm in the home for self-defense, the only right articulated by the Supreme Court in *Heller* and *McDonald*. Over the past two centuries, states nationwide have recognized the inherent dangers that firearms pose to public safety and responded by adopting laws limiting the carrying of guns in public. As the Supreme Court recognized in *Heller*, the Second Amendment was never intended to, and does not, invalidate these regulations. Plaintiffs' attempt to undermine California's concealed carry law on Second Amendment grounds is overreaching,

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[1] *See* Centers for Disease Control and Prevention, WISQARS Injury Mortality Reports, 1999-2007, available at http://webappa.cdc.gov/sasweb/ncipc/mortrate10_sy.html; WISQARS Nonfatal Injury Reports, 2001-2010 available at http://www.cdc.gov/injury/wisqars/nonfatal.html.

[2] *See* Law Center to Prevent Gun Violence, California State Law Summary, available at http://smartgunlaws.org/california-state-law-summary/.

inconsistent with existing case law, and contrary to the long historical record in this area. Further, because the California statute is outside the purview of the Second Amendment, it is not subject to heightened scrutiny. Even if this Court were to find that the law was subject to heightened scrutiny, intermediate scrutiny review is proper and the statute and its application easily satisfy this test.

ARGUMENT

I. California's Concealed Carry Law Does Not Implicate, Let Alone Substantially Burden, the Right Protected by the Second Amendment.

A. The Right Described in *Heller* and *McDonald* Does Not Extend Beyond the Home.

The Supreme Court's decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008), addressed a "law [that] totally ban[ned] handgun possession in the home," and found that such a prohibition violated the Second Amendment. *Id.* at 628. The Court focused on laws containing "prohibition[s] against rendering any lawful firearm in the home operable for the purpose of immediate self-defense," and the Court's specific holding was that the District's "ban on handgun possession in the home violates the Second Amendment." *Id.* at 635.

The *Heller* Court, however, made clear that 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. Further, the *Heller* Court also left undisturbed legislative efforts to confront gun violence

where statutory measures did not touch upon the right of domestic self-defense. The decision explained that

> 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 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.

Id. at 626-27 (internal citations omitted); *see id.* n.26 ("[w]e identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive").

The Court's subsequent decision in *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), did not expand the Second Amendment beyond the domestic boundaries 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 to keep and bear arms for self-defense within the home. *McDonald*, 130 S. Ct. at 3044, 3047.

Accordingly, the right articulated by *Heller* and *McDonald* does not extend to carrying a concealed and loaded handgun in public. *See Penuliar v. Mukasey*, 528 F.3d 603, 614 (9th Cir. 2008) (Supreme Court decisions are limited to the boundaries of the question before the Court). *See also United States v. Vongxay*, 594 F.3d 1111, 1114-15 (9th Cir. 2010) (noting "Courts often limit the scope of their holdings, and such limitations are integral to those holdings"); *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").

B. Numerous Lower Courts Have Recognized the Limited Reach of *Heller* and *McDonald*.

Since *Heller* and *McDonald*, many courts—including the Ninth Circuit—have taken the Supreme Court's warnings about the limited nature of its holdings seriously, and have overwhelmingly rejected challenges to laws regulating firearms outside of the home. *See, e.g., Vongxay*, 594 F.3d at 1114-15 (describing the *Heller* right as "the right to register and keep a loaded firearm in [the] home for self-defense"); *NRA v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, No. 11-10959, --- F.3d ---, 2012 WL 5259015 at *15 (5th Cir. Oct. 25, 2012) ("these laws [prohibiting the sale of handguns by licensed dealers to people under the age of 21] do not strike the core of the Second Amendment because they do not prevent 18–to–20–year–olds from possessing and using handguns 'in defense of

hearth and home"); *Hightower v. Boston*, 693 F.3d 61, 73 (1st Cir. 2012) (upholding Massachusetts' concealed carry law and 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"); *Peruta v. County of San Diego*, 758 F. Supp. 2d 1106, 1114-17 (S.D. Cal. 2010) (appeal pending) (rejecting Second Amendment challenge to California's concealed carry law); *Richards v. County of Yolo*, 821 F. Supp. 2d 1169, 1174 (E.D. Cal. 2011) (appeal pending *sub nom. Richards v. Prieto*, No. 11-16255 (9th Cir.)) (similar); *Piszczatoski v. Filko*, 840 F. Supp. 2d 813, 821 (D.N.J. 2012) (appeal pending) (addressing New Jersey concealed carry law and 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) (upholding New York concealed carry law); *Young v. Hawaii*, No. 08-00540 DAE-KSC, 2009 WL 1955749, at *9 (D. Haw. Jul. 2, 2009) (upholding Hawaii concealed carry law); *Baker v. Kealoha*, No. 11-00528 ACK-KSC (D. Haw. Apr. 30, 2012) (appeal pending) (same); *Kuck v. Danaher*, 822 F. Supp. 2d 109, 156 (D. Conn. 2011) (upholding Connecticut concealed carry law).

II. California's Concealed Weapons Statute Is Consistent with Centuries of State Laws Regulating Concealed Firearms.

Public carry laws such as those at issue here are the sort of "presumptively

lawful" regulations that have been widely accepted throughout American history, including at the time of the ratification of the Constitution. States have exercised their police power to restrict the carrying of guns in public for nearly 200 years. The Court should consider the current challenge to California's law in this historical context.

A. At the Time of Ratification, the Second Amendment Was Not Understood to Protect Public Carry.

As the Second Amendment "codified a *pre-existing* right," courts must examine the historical record to determine its meaning. *Heller*, 554 U.S. at 592; *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, from both England and early America, firmly establishes that the Framers did not understand the Second Amendment right to include public carry.

1. English Public Carry Laws

English law prohibited the public carry of weapons for centuries before the framing of the U.S. Constitution. Under the Statute of Northampton, drafted in 1328 by King Edward III and Parliament, 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 . . . ." Statute of Northampton, 2 Edw. 3,

c. 3 (1328) (Eng.). This statute thus affirmed the common law rule that there is no right to carry weapons in public.

Even after the 1689 *Declaration of Right* codified the right to bear arms under the English Bill of Rights, restrictions on public carry remained widely accepted under English law. *See Heller*, 554 U.S. at 593. A December 21, 1699 proclamation recalled all licenses to carry weapons in public, due to people's use of void or falsified licenses. *See* Patrick Charles, *The Faces of the Second Outside the Home: History versus Ahistorical Standards of Review*, 60 Clev. St. L. Rev. 1, 27 (quoting *The Post Boy* at 1, col. 1 (London Dec. 221, 1699)). Moreover, 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).

2. Founding Era Public Carry Laws

The Founding generation also adopted laws that restricted or even prohibited public carrying of firearms. *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). Indeed, Thomas Jefferson wrote a bill penalizing any person who "bear[ed] 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)). Massachusetts, North Carolina, and Virginia also expressly incorporated English law's restrictions on public carry into their laws immediately after the Constitution's adoption. Charles, 60 Clev. St. L. Rev. at 31-32.

In light of *Heller*'s historical approach, English law and its adoption in early America confirm that the Second Amendment was never recognized to extend beyond the home to protect public carry. Thus, California's concealed weapons statute does not implicate the Second Amendment.

B. State Laws Regulating Public Carry Are Part of a Longstanding Tradition in the United States.

For over 200 years since the Founding era, states have exercised their police power to restrict public carry, with courts repeatedly affirming the constitutionality of these restrictions. *See, e.g., Robertson v. Baldwin*, 165 U.S. 275, 281-82 (1897) ("[T]he right of the people to keep and bear arms . . . is not infringed by laws prohibiting the carrying of concealed weapons."). Thus, California's concealed weapons statute is part of a longstanding tradition of similar restrictions that are, under *Heller*, "presumptively lawful" and outside the scope of the Second Amendment. *Heller II*, 670 F.3d at 1253 ("activities covered by a longstanding regulation are presumptively not protected from regulation by the Second Amendment.").

1. Pre-Civil War Era Public Carry Laws

Before the Civil War, many states passed laws similar to California's concealed weapons statute, and courts generally upheld these laws.[3] Oregon in 1853, for example, 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.[4] New York prohibited the 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).

2. Post-Civil War Era Public Carry Laws

After the Civil War, states continued adopting public carry regulations similar to California's concealed weapons statute. From 1870 to 1900, at least fourteen states adopted new laws regulating the carrying of concealed weapons in

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[3] *See, e.g.*, *Aymette v. State*, 21 Tenn. 154, 159, 1840 WL 1554, at *4 (1840); *State v. Reid*, 1 Ala. 612, 616, 1840 WL 229, at *3 (1840); *State v. Buzzard*, 4 Ark. 18, 28, 1842 WL 331, at *6 (1842); *Nunn v. State*, 1 Ga. 243, 251 (1846); *State v. Jumel*, 13 La. Ann. 399, 400, 1858 WL 5151, at *1 (1858); *Owen v. State*, 31 Ala. 387, 388, 1858 WL 340, at *1 (1858).

[4] The Statutes of Oregon Enacted and Continued In Force By the Legislative Assembly, As The Session Commencing 5th December, 1853, ch. 16 § 17 (Asahel Bush, Oregon 1854).

public.[5] Several states went further, completely banning the carrying of firearms in various ways.[6]

To the extent such restrictions on the carrying of concealed weapons were challenged in court, they overwhelmingly survived constitutional review.[7] As *Heller* recognized, "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." 554 U.S. at 626.

3. Early Twentieth Century Public Carry Laws

This longstanding tradition of regulating public carry continued into the early twentieth century. Between 1903 and 1927, at least eleven states passed laws that, like California's statute, prohibited the carrying of a concealed or concealable

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[5] 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. Penal 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. Penal 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).

[6] *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.

[7] *See, e.g.*, *State v. Workman*, 14 S.E. 9, 10-11 (W.V. 1891); *English v. State*, 35 Tex. 473, 478, 1872 WL 7422, at *4 (1871); *Andrews v. State*, 50 Tenn. 165, 182, 1871 WL 3579, at *8 (1871); *State v. Wilforth*, 74 Mo. 528, 531, 1881 WL 10279, at *1 (1881).

weapon without a permit or without the permission of law enforcement.[8] Early twentieth-century laws also granted broad discretion to law enforcement officers in their decisions whether to issue 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). Like California's statute, such laws required applicants to show they were "suitable" or of "good moral character" or to prove they had a proper reason or "good cause" for the public carry license.[9]

Thus, the authorities make clear that laws regulating public carry—or even banning it—are a longstanding, historically accepted tradition in the United States.

C. Many States Continue to Regulate the Carrying of Concealed Firearms Today and Such Laws Have Been Held Constitutional.

Today, California and nearly all other states require residents to obtain a

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[8] 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.

[9] *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.

permit before carrying a firearm in public.[10] Further, California and nine other states afford discretion to state or local officials to determine whether to issue a public carry permit.[11] Importantly, federal courts in these states have overwhelmingly rejected challenges to discretionary licensing laws like California's concealed weapons statute.

1. California

Section 26150 (formerly Section 12050) has been upheld as constitutional under the Second Amendment by the Southern District of California, the Eastern District of California, and the California Court of Appeals. In *Peruta v. County of San Diego*, the Southern District of California, after reviewing historical case law endorsing public carry restrictions such as Section 25850, found no Second Amendment issue with Section 12050's public carry licensing restrictions. 758 F. Supp. 2d 1106, 1114-17 (S.D. Cal. 2010) (appeal pending). After finding that the defendant county's application of California's concealed handgun licensing law

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[10] *See* Law Center, *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/.

[11] Alabama, Connecticut, Delaware, Hawaii, Maryland, Massachusetts, New Jersey, New York, and Rhode Island also provide the agency issuing concealed handgun licenses with discretion to approve or deny a license application. *See* Law Center, *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/.

was at most subject to intermediate scrutiny—without deciding whether the state law implicated the Second Amendment—the court upheld the defendant county's application of the law. *Id.* at 1116-17.

Similarly, the Eastern District of California in *Richards v. County of Yolo* rejected a facial challenge to Section 12050's public carry licensing restrictions. 821 F. Supp. 2d 1169, 1174-77 (E.D. Cal. 2011) (appeal pending). The court explained that the Supreme Court, "both in *Heller*, and subsequently in *McDonald*, took pain-staking effort to clearly enumerate that the scope of *Heller* extends only to the right to keep a firearm *in the home* for self-defense purposes." *Id*. at 1174 n.4 (emphasis in original). Accordingly, the court held that "the Second Amendment does not create a fundamental right to carry a concealed weapon in public." *Id*. at 1174. The court then upheld the "good cause" and "good moral" character provisions of Section 12050 as constitutional. *Id.* at 1176.

California state courts have also rejected challenges to general restrictions and licensing-specific restrictions on public carry. In *People v. Yarbrough*, the California Court of Appeal remarked that carrying a concealed firearm "poses an imminent threat to public safety." 169 Cal. App. 4th 303, 314 (2008) (internal quotations and citations omitted). The court declared that California's concealed carry law "does not broadly prohibit or even regulate the possession of a gun in the home for lawful purposes of confrontation or self-defense, as did the law declared

constitutionally infirmed in *Heller*." *Id.* at 313; *see also People v. Dykes*, 46 Cal. 4th 731, 778 (2009); *People v. Ellison*, 196 Cal. App. 4th 1342 (2011) (similar).

2. Other States

In New Jersey, New York, and Hawaii, courts have similarly upheld licensing restrictions that require a showing of justifiable need or proper cause, finding that these restrictions do not implicate the Second Amendment. *See Piszczatoski v. Filko*, 840 F. Supp. 2d 813, 813 (D.N.J. 2012); *Kachalsky*, 817 F. Supp. 2d. at 260; *and Young*, 2009 WL 1955749, at *9.

As set out above, the overwhelming majority of courts since *Heller* has limited the Second Amendment right to the home and upheld licensing restrictions on public carry.[12] Therefore, this Court should follow suit by rejecting Plaintiffs' challenges to California's statute.

III. California's Concealed Carry Restrictions Are Not Subject to Heightened Scrutiny, And, Even If Heightened Scrutiny Is Required, Intermediate Scrutiny Should Be Applied—and the California Statute Satisfies That Standard.

The historical context examined above, the limited scope of *Heller* and *McDonald*, and the overwhelming majority of the lower courts' subsequent rulings make clear that the law at issue here is outside the purview of the Second Amendment and therefore do not warrant heightened scrutiny. *See United States v.*

[12] *See* cases cited at pp. 5-6, *supra*.

Decastro, 682 F.3d 160, 166 (2d Cir. 2012) ("heightened scrutiny is triggered only by those restrictions that (like the complete prohibition on handguns struck down in *Heller*) operate as a substantial burden on the ability of law-abiding citizens to possess and use a firearm for self-defense (or for other lawful purposes)"); *NRA*, 2012 WL 5259015 at *7 ("If the challenged law burdens conduct that falls outside the Second Amendment's scope, then the law passes constitutional muster"); *United States v. Marzzarella*, 614 F.3d 85, 91 (3d Cir. 2010) (describing the presumptively lawful regulations as "exceptions to the Second Amendment guarantee").

However, if this Court were to depart from the limited holdings of *Heller* and *McDonald* and conclude that the concealed carry law at issue here substantially burdens the Second Amendment right, the Court would have to address the issue left undecided by *Nordyke v. King*, 681 F.3d 1041 (9th Cir. 2012) (en banc): what standard of heightened scrutiny applies to laws imposing such a burden. For reasons set forth below, intermediate scrutiny would be the most appropriate level of review for Second Amendment challenges, and California's concealed carry law meets this standard.

A. Intermediate Scrutiny Is Appropriate for Regulations that Substantially Burden the Second Amendment Right.

Because the exercise of the Second Amendment right creates unique and significant risks to public safety, the level of scrutiny must afford legislatures

flexibility to address the problem of gun violence. *See Heller*, 554 U.S. at 636 (Constitution permits legislatures "a variety of tools for combating that problem"). Firearms—which are, by their very nature, extremely dangerous instruments, responsible for over 30,000 deaths and almost 70,000 injuries each year[13]—must be reasonably regulated. The purpose and design of firearms is to inflict grievous injury and death, the effects of which are all too apparent in the 85 gun-related deaths that occur every day. To allow legislatures flexibility to respond to this danger, intermediate, rather than strict, scrutiny is appropriate for reviewing laws that substantially burden the Second Amendment.

Intermediate scrutiny requires a showing that the asserted governmental goal 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 only that the fit between the challenged regulation and the stated objective be reasonable, not perfect, and does not require that the regulation

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[13] 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* (2010), at http://webappa.cdc.gov/sasweb/ncipc/mortrate10_sy.html; U.S. Dep't of Health & Human Servs., Centers for Disease Control & Prevention, National Center for Injury Prevention & Control, Web-Based Injury Statistics Query & Reporting System (WISQARS), *WISQARS Nonfatal Injury Reports* (2010), at http://webappa.cdc.gov/sasweb/ncipc/nfirates2001.html.

be the least restrictive means of serving the interest. *See, e.g.*, *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 556 (2001); *Ward*, 491 U.S. at 798.

The overwhelming majority of the courts that have applied any heightened scrutiny at all in evaluating Second Amendment challenges have applied the intermediate scrutiny test. *See NRA*, 2012 WL 5259015 at *15 (applying intermediate scrutiny to a categorical ban on sale of handguns to 18- to 20-year-olds); *United States v. Huitron-Guizar*, 678 F.3d 1164, 1169 (10th Cir. 2012) cert. denied, No. 12-5078, --- S. Ct. ---, 2012 WL 2814321 (Oct. 1, 2012) (applying intermediate scrutiny to alien-in-possession statute); *United States v. Masciandaro*, 638 F.3d 458, 470-71 (4th Cir. 2011) (applying intermediate scrutiny to ban on loaded weapons in federal parkland); *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 possession of firearms by persons convicted of domestic violence misdemeanors); *Marzzarella*, 614 F.3d at 98-99 (applying intermediate scrutiny to statute prohibiting possession of guns with obliterated serial numbers).[14]

[14] *See* Post-*Heller* Litigation Summary (Updated November 1, 2012) available at http://smartgunlaws.org/post-heller-litigation-summary/ at 9-10 (surveying standard of review).

B. The Application of Strict Scrutiny Would Be Improper.

1. The Justifications That Might Warrant Strict Scrutiny Do Not Exist in the Area of Firearm Regulations.

While intermediate scrutiny is appropriate for laws that substantially burden the Second Amendment, strict scrutiny is not. Most constitutionally enumerated rights do not trigger strict scrutiny. Even among the rights that *do* require strict scrutiny, that standard is only applied in limited circumstances, based on justifications not applicable here.

For example, strict scrutiny is applied in evaluating challenges to content-based speech restrictions and laws involving racial classifications. Courts apply the most stringent level of review to laws burdening speech of a particular content because they "raise[] the specter that the government may effectively drive certain ideas or viewpoints from the marketplace." *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991). Such laws are fundamentally at odds with "the premise of individual dignity and choice upon which our political system rests." *Id.* Racial classifications 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 Inc., v. Pena*, 515 U.S. 200, 216 (1995).

Gun regulations do not raise similar policy considerations. On the contrary, state and local governments have a profound interest—indeed, "cardinal civic responsibilities"—in protecting the public and law enforcement personnel from gun violence. *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 342 (2008). A "rigid" inquiry of the type mandated by strict scrutiny, *Korematsu v. United States*, 323 U.S. 214, 216 (1944), is thus not appropriate for Second Amendment legal challenges.

2. Strict Scrutiny is Inconsistent with the Supreme Court's Opinion in *Heller*.

Although *Heller* did not articulate a level of review, the decision implicitly rejected strict scrutiny. Strict scrutiny, which requires a rigorous analysis of whether the challenged law is the least restrictive means to further a compelling objective, cannot be squared with the majority's approval of various firearms regulations as "presumptively lawful regulatory measures." *See Heller*, 554 U.S. at 626-27 & n.26. Strict scrutiny is also inconsistent with *Heller*'s recognition that legislatures must be allowed to employ "a variety of tools for combating" the problem of gun violence. *Heller*, 554 U.S. at 636.

Heller also emphasized that the Second Amendment right is, by its nature, "not unlimited," and is not a "right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Heller*, 554 U.S. at 626. That *Heller* referred favorably to the outright prohibition on carrying concealed

weapons—considerably more restrictive than the regulation at issue here—further demonstrates that strict scrutiny review was not envisioned by the Court.

C. California's Concealed Carry Law Would Satisfy Intermediate Scrutiny.

California's "may issue" permitting system would survive judicial review under intermediate scrutiny, as the statute enables the state to fulfill two of its most important purposes: guarding public safety and protecting the citizenry from violent crime.

1. Preservation of Public Safety and Prevention of Crime Are Paramount Government Interests.

The regulation of firearms and other dangerous instrumentalities lies at the core of the state's police power. As the Supreme Court has recognized, 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 Kelley v. Johnson*, 425 U.S. 238, 247 (1976) ("promotion of safety of persons and property is unquestionably at the core of the State's police power").

a) The Carrying of Concealed Weapons Jeopardizes Public Safety.

Although some Americans choose to own a gun for self-defense, studies have consistently shown that a gun in the home actually *increases* the likelihood that the firearm owner or a loved one will be the victim of gun violence. *See, e.g.*,

Garen J. Wintemute, *Guns, Fear, the Constitution, and the Public's Health*, 358 New Eng. J. Med. 1421, 1422 (April 3, 2008) (observing that "Americans have purchased millions of guns, predominantly handguns, believing that having a gun at home makes them safer. In fact, handgun purchasers substantially increase their risk of a violent death.").

Guns carried outside the home place the public at serious risk of suffering this same fate. Common sense dictates that allowing individuals to carry concealed and loaded guns in public increases the risk of accidental or intentional shootings in places where large numbers of people are congregated. *See People v. Yarbrough*, 169 Cal. App. 4th 303, 314 (2008) ("carrying a concealed firearm [in public] presents a recognized 'threat to public order'" and "poses an 'imminent threat to public safety'"). Members of the public who carry such guns risk escalating everyday disagreements into public shootouts. This sensible conclusion is supported by public opinion, as a majority of Americans in a recent poll opposed laws allowing the carrying of concealed weapons in public places.[15]

The danger of weak state laws permitting large numbers of concealed guns in public places was made disturbingly apparent on January 8, 2011, when Jared

[15] Lake Research Partners for the Brady Center to Prevent Gun Violence, *Findings from a National Survey of 600 Registered Voters*, April 26-28, 2010, at http://www.bradycampaign.org/xshare/bcam/legislation/open_carry/polling-overview-slides.ppt.

Lee Loughner approached a gathering led by Congresswoman Gabrielle Giffords outside a Tucson supermarket and then shot 19 individuals, including Representative Giffords. Six people were killed. Because Arizona law allows the carrying of a concealed handgun without a permit, Loughner's possession of a firearm at that location violated no laws until he began shooting—despite his history of mental health issues.[16] In contrast, California's concealed carry statute empowers law enforcement to prevent individuals who have no legitimate need from carrying firearms in public.

Research has also shown that individuals issued concealed carry licenses commit a significant number of violent crimes. An analysis of concealed handgun license-holders in Texas revealed that thousands of the 215,000 licensees were arrested for criminal behavior or found to be mentally unstable between 1995 and 2000.[17] Another study found that Texas permit-holders were arrested for weapons-related crimes at a rate 81% higher than that of the state's general adult

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[16] Tamara Audi, Daniel Gilbert & John R. Emshwiller, *Emails on Loughner Reveal College's Worries*, Wall St. J., May 20, 2011, at A5, *also available at* http://online.wsj.com/article/SB10001424052748704904604576333982710893582.html?KEYWORDS=loughner; Ariz. Rev. Stat. § 13-3102.

[17] William C. Rempel & Richard A. Serrano, *Felons Get Concealed Gun Licenses Under Bush's 'Tough' Gun Law*, L.A. Times, Oct. 3, 2000, at A1, *also available at* http://articles.latimes.com/2000/oct/03/news/mn-30319.

population.[18] Since 2007, according to a review of published reports, concealed-weapon licensees have killed at least 484 private citizens and members of law enforcement.[19]

Weak laws regulating the carrying of concealed weapons have also been shown to increase gun trafficking. According to a September 2010 report by Mayors Against Illegal Guns (a national coalition of over 600 mayors that targets illegal guns), states with laws that deprive law enforcement of discretion regarding the issuance of concealed carry permits are the source of crime guns recovered in other states at more than twice the rate of states that (like California) grant law enforcement such discretion.[20]

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[18] Violence Policy Center, *License to Kill IV,* http://www.vpc.org/studies/ltk4intr.htm.

[19] Violence Policy Center, *Concealed Carry Killers,* http://www.vpc.org/ccwkillers.htm.

[20] Mayors Against Illegal Guns, *Trace the Guns: The Link Between Gun Laws and Interstate Gun Trafficking* 18-19 (Sept. 2010), http://www.tracetheguns.org/report.pdf. The American Bar Association has recently recognized the dangers of weak concealed carry laws. On August 8, 2011, the Association's House of Delegates adopted a resolution expressing its support for laws giving law enforcement broad discretion to determine whether a permit or license to engage in concealed carry should be issued, and its opposition to laws limiting such discretion.

b) Guns in Public Jeopardize the Safety of Law Enforcement.

The spread of hidden guns in public spaces also poses an ever-present risk to law enforcement officers. Firearms are the leading cause of death for such officers nationwide.[21] Hostile gunfire took the lives of 232 officers in the United States during the last five calendar years.[22] Of those, at least 139 were shot in public places, including restaurants, stores, and public roadways.[23] While many of the officers were killed while investigating or attempting to thwart criminal activity, many others were killed while conducting routine patrols or traffic stops.[24] Thirty-two officers were ambushed while sitting in patrol cars or were targeted merely because they were law enforcement personnel.[25] These grim statistics do not account for officers who sustained non-lethal (but nonetheless devastating) gunshot

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[21] Federal Bureau of Investigation, *Crime Statistics*, http://www.fbi.gov/stats-services/crimestats.

[22] National Law Enforcement Officers Memorial Fund, *Officers Killed by Gunfire 2001-2009* (April 18, 2011); *Officers Killed by Gunfire—NLEOMF 2010 Report* (June 9, 2011) ("NLEOMF Reports") (unpublished reports of database search results on file with the Law Center).

[23] NLEOMF Reports.

[24] *Id.*

[25] *Id.*

wounds in the course of their employment—more than four times the number of officers who died as a result of their injuries.[26]

While many of these shootings appear to have been perpetrated by individuals carrying guns in violation of the law, others were carried out by persons legally licensed to carry concealed weapons. Since 2007, concealed weapons licensees have killed at least 14 law enforcement officers.[27] Because laws in many states protect the identities of license holders, it is impossible to determine how many additional officers may have been killed or injured by individuals legally carrying concealed weapons under non-discretionary licensing systems. But one thing is clear: the law enforcement community—whose commitment to the public welfare is the keystone of safety and security—benefits from laws that limit the carrying of guns in public to those individuals demonstrating a justifiable need.

2. California's Concealed Carry Law is Substantially Related to Both Interests.

As discussed above, for almost two centuries, states have sought to address the unique dangers that the carrying of concealed firearms present to both law enforcement officers and the public at large by restricting concealed weapons

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[26] Federal Bureau of Investigation, *Crime Statistics*, http://www.fbi.gov/stats-services/crimestats.

[27] *See* note 19, *supra*.

possession. "It is a well-recognized function of the legislature in the exercise of the police power to restrain dangerous practices and to regulate the carrying and use of firearms and other weapons in the interest of the public safety." *People v. Seale*, 274 Cal. App. 2d 107, 114 (1969).

Given these real and immediate risks, California has made the sound and reasonable decision to restrict public carry of concealed firearms by requiring "good cause" for carrying a concealed loaded firearm in public. Law enforcement officers are uniquely suited to administer California's concealed carry permitting system. Police and sheriffs' departments are local, and thus more likely to be familiar with the backgrounds and personalities of the applicants in their communities. For example, police and sheriffs' departments will be better able to investigate and confirm the severity of an alleged threat posed to the applicant as well as his or her relevant criminal history. By giving law enforcement officers discretion in the permitting process, California has addressed important government interests with a solution that is substantially related to those interests, thereby satisfying intermediate scrutiny. *See Ward*, 491 U.S. at 791, 798.

CONCLUSION

California's concealed carry statute is a valuable and necessary exercise of the state's police powers that neither implicates nor burdens the Second Amendment right to possess a firearm for self-defense in the home. As such, both

the statute and its application by the Sacramento County Sheriff's Department pass constitutional muster regardless of the level of scrutiny to which they might be subjected. Similar laws have long protected Americans from gun violence and have long been upheld by the nation's courts. This Court should continue in that tradition by affirming the district court's decision below.

Dated: November 16, 2012

Respectfully submitted,

COVINGTON & BURLING LLP

By *__/s/ Simon J. Frankel__*
SIMON J. FRANKEL

Attorneys for *Amici Curiae* Law Center to Prevent Gun Violence

CERTIFICATION OF COMPLIANCE

I hereby certify that:

1. This brief complies with the type-volume limitation of Fed R. App. P. 29(d) and 32(a)(7)(B) because it contains 6,245 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. The brief further complies with the requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App P 32(a)(6) because it has been prepared in a proportionately spaced typeface using Microsoft Word 2010 in 14-point Times New Roman.

Dated: November 16, 2012

COVINGTON & BURLING LLP

By *__/s/ Simon J. Frankel__*
SIMON J. FRANKEL

Attorneys for *Amici Curiae*

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 16, 2012.

Participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

Dated: November 16, 2012

COVINGTON & BURLING LLP

By *_/s/ Simon J. Frankel_*
SIMON J. FRANKEL

EXHIBIT B

Choe, Samantha

From: gary w. gorski <usrugby@gmail.com>
Sent: Thursday, November 15, 2012 6:56 AM
To: Frankel, Simon; dankaralash@gmail.com; george.waters@doj.ca.gov; Lavra@Longyearlaw.com; lavra@lolllp.com; cmichel@michellawyers.com
Cc: Choe, Samantha
Subject: RE: Mehl v. Blanas, Ninth Circuit No. 08-15773

We oppose unless you are going to state your position on the *per se* policy requirements AND the retired officer exception requirement.

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Cc: Choe, Samantha
Subject: Mehl v. Blanas, Ninth Circuit No. 08-15773

Dear counsel,

On behalf of the Law Center to Prevent Gun Violence ("Law Center") we will be filing an application for leave to file amicus brief in support of defendants and for leave to participate in oral argument in *Mehl v. Blanas*, pending in the Ninth Circuit. We expect to file the application by the close of business tomorrow. The application will be made pursuant to the Court's October 26, 2012 Order, which anticipated participation of "one amicus curiae supporting the validity of Sacramento County's concealed-carry licensing scheme."

Please let me know by 3:00 p.m. tomorrow, November 14, if your clients consent to or oppose our anticipated application for the Law Center.

Thank you.

Best,

Simon Frankel

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