No. 10-56971

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EDWARD PERUTA, et al.,
Appellants

v.

COUNTY OF SAN DIEGO, et al.,
Appellees

On Appeal from the United States District Court for the Southern District of California, No. 09-CV-2371 (Gonzalez, J.)

BRIEF OF *AMICI CURIAE* LEGAL COMMUNITY AGAINST VIOLENCE, MAJOR CITIES CHIEFS ASSOCIATION, ASSOCIATION OF PROSECUTING ATTORNEYS, AND SAN FRANCISCO DISTRICT ATTORNEY GEORGE GASCÓN, IN SUPPORT OF APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Legal Community Against Violence, Major Cities Chiefs Association and Association of Prosecuting Attorneys state that they have no parent corporations. They have no stock, and therefore no publicly held company owns 10% or more of the stock of any *amicus* signatory to this brief.

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INTEREST OF *AMICI CURIAE*

Amicus Legal Community Against Violence ("LCAV") is a national law center dedicated to preventing gun violence.[1] Founded after an assault weapon massacre at a San Francisco law firm in 1993, LCAV provides legal and technical assistance in support of gun violence prevention. LCAV tracks and analyzes federal, state, and local firearms legislation, as well as legal challenges to firearms laws. As an *amicus*, LCAV has provided informed analysis in a variety of firearm-related cases, including *District of Columbia v. Heller* and *McDonald v. City of Chicago*.

Amicus Major Cities Chiefs Association ("MCCA") is comprised of police chiefs and sheriffs of the seventy largest law enforcement agencies in the United States and Canada. Formed in the late 1960s, MCCA enables the sharing of strategies to address the challenges of urban policing. MCCA has a longtime interest in policies affecting firearm possession and use and is particularly interested in this case as it concerns the discretion needed by law enforcement officials to ensure that concealed firearms are carried only by individuals who will not endanger public safety.

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[1] Counsel to the parties have consented to the filing of this brief. Pursuant to Fed. R. App. P. 29(c)(5), *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission.

Amicus Association of Prosecuting Attorneys ("APA") is a national organization representing prosecutors and providing additional resources in an effort to develop proactive and innovative prosecutorial practices that prevent crime, ensure equal justice, and make our communities safer. The APA serves as an advocate on issues related to the administration of justice, including by submitting briefs as *amicus curiae* where appropriate. The APA strongly supports measures to protect public safety, including laws regulating the carrying of concealed weapons.

Amicus The Honorable George Gascón is the District Attorney of San Francisco County, California, representing approximately 775,000 residents of the fourth-largest city in California. District Attorney Gascón has a compelling interest in the defense of state laws regulating the carrying of concealed firearms in public places, which he believes to be critical to public safety. Moreover, the Court's decision in this matter will impact other pending challenges to California's concealed weapons licensing law, including *Pizzo v. City and County of San Francisco*, 09-cv-04493.

INTRODUCTION AND SUMMARY OF ARGUMENT

The State of California—like many states—authorizes local law enforcement agencies to issue concealed weapons licenses to individuals who can demonstrate "good cause," among other requirements, for the issuance of the license. Cal. Pen. Code § 12050. The California statute is a legitimate and constitutional exercise of the state's police power to limit the threat that loaded and hidden firearms pose to the safety of the general public and to law enforcement statewide.

Legislative efforts by pro-gun groups to weaken California's concealed carry law have been repeatedly rejected by the California Legislature. Appellants and their *amici* now seek satisfaction in the courts. The court should reject this endeavor because 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*.

Judges nationwide have limited *Heller* and *McDonald* to the home and this Court should follow suit. Because the California statute places no burden on the Second Amendment, it is properly subject to, and clearly satisfies, rational basis review. In the alternative, should the Court find that the law substantially burdens the Second Amendment, intermediate scrutiny review is proper and the statute also easily satisfies this test. Law enforcement personnel are deeply impacted by gun

violence on a day-to-day basis and well-equipped to evaluate whether an individual has articulated a legitimate need to carry a firearm. Therefore, it is appropriate for them to determine who may carry a hidden, loaded firearm outside the home.

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. The Second Amendment was never intended to, and does not, invalidate these regulations. A decision to invalidate California's concealed carry law on Second Amendment grounds is unwarranted, inconsistent with existing case law, and contrary to the long history of state action in this area.

ARGUMENT

I. California's Concealed Carry Law Does Not Implicate, Let Alone Substantially Burden, the Right Protected by the Second Amendment, and Therefore Is Subject to, and Satisfies, Rational Basis Review.

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

Notably, the *Heller* majority stated that, "The Constitution leaves the District of Columbia a variety of tools for combating [the problem of handgun violence in this country], including some measures regulating handguns. But the enshrinement of constitutional rights necessarily takes certain policy choices off the table. These include the *absolute prohibition of handguns held and used for self-defense in the home*." *Id.* at 636 (emphasis added; internal citation omitted).

The *Heller* Court made clear that it did not intend to undermine 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 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.

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 boundaries articulated in *Heller*. *McDonald* held that the Second Amendment, like many other portions of the Bill of Rights, was incorporated against the states through the Fourteenth Amendment. *Id.* at 3050. The case concerned an ordinance that, like the regulation at issue in *Heller*, entirely prohibited possession of handguns in the home. *Id.* at 3026. Like *Heller*, the *McDonald* decision recognized that "the right to keep and bear arms" is not absolute, and reiterated that the Second Amendment protects the right to keep and bear arms for self-defense within the home. *Id.* 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). Indeed, the recognition in *Heller* and *McDonald* that the Second Amendment's reach is limited and that a wide array of firearm regulations would pass constitutional muster accords with much earlier Court reasoning. In 1897, the Court noted that the Bill of Rights was "subject to

certain well recognized exceptions" from "time immemorial." *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897). With respect to the Second Amendment, the *Robertson* court commented 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.

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 rejected challenges to laws regulating firearms outside of the home. *See, e.g.*, *United States v. Vongxay*, 594 F.3d 1111, 1114-15 (9th Cir. 2010) (describing the *Heller* right as "the right to register and 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."); *United States v. Hart*, 726 F. Supp. 2d 56, 60 (D. Mass. 2010) (dismissing defendant's contention that the *Heller* right "extends to the possession of concealed handguns outside one's home."); *Young v. Hawaii*, 2009 U.S. Dist. Lexis 28387, at *13 (D. Haw. Apr. 1, 2009) (*Heller* inapplicable because challenged statute "pertains only to the carrying of weapons on one's person and does not constitute a complete ban to the carrying of weapons or pertain to possessing weapons in one's home."); *Williams v. State*, 10 A.3d 1167, 1177 (Md. 2011) (stating that "prohibition of firearms in

the home was the gravamen of the certiorari questions in both *Heller* and *McDonald* and their answers. . . If the Supreme Court . . . meant its holding to extend beyond home possession, it will need to say so more plainly."); *People v. Dawson*, 934 N.E.2d 598, 607 (Ill. App. Ct. 2010) (noting that *Heller* and *McDonald* were limited to the right "to keep and bear arms in the home for the purpose of self-defense."); *Little v. United States*, 989 A.2d 1096, 1101 (D.C. 2010) ("Appellant concedes that he was not in his own home. Thus, appellant was outside of the bounds identified in *Heller*.").

In dismissing another Second Amendment challenge to Penal Code Section 12050, the Eastern District of California recently reached the same conclusion, explaining 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. This Court does not infer that *Heller* grants any right that 'extends beyond the home' . . . ." *Richards v. County of Yolo*, 2011 WL 1885641, at *3 n.4 (E.D. Cal. May 16, 2011) (emphasis in original) (appeal pending).

Several California state courts have rejected similar challenges. In *People v. Yarbrough*, 169 Cal. App. 4th 303, 313-14 (2008), the California Court of Appeal remarked that the state'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*," observing that carrying a concealed firearm "poses an 'imminent threat to public safety.'" *See People v. Dykes*, 46 Cal. 4th 731, 778 (2009) (stating that "the court in *Heller* disapproved a statute that prohibited possession of an ordinary handgun *in the home*") (emphasis in original); *People v. Ellison*, 196 Cal. App. 4th 1342 (2011) (similar).

C. Because California's Concealed Carry Law Does Not Burden the Second Amendment Right, Rational Basis Review is Appropriate.

Both the limited scope of *Heller* and *McDonald* and this Court's recent ruling in *Nordyke v. King* make clear that rational basis review is appropriate here. In *Nordyke*, the Ninth Circuit joined numerous other courts in finding that "only regulations which substantially burden the right to keep and to bear arms trigger heightened scrutiny under the Second Amendment." *Nordyke v. King*, 644 F.3d 776, 786 (9th Cir. 2011); *see United States v. Masciandaro*, 638 F.3d 458, 470-71 (4th Cir. 2011); *United States v. Chester*, 628 F.3d 673, 680-83 (4th Cir. 2010); *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010); *Heller v. District of Columbia*, 698 F. Supp. 2d 179, 188 (D.D.C. 2010). Where no such substantial burden is imposed, "rational basis review applies." *Richards*, 2011 WL 1885641, at *3; *see Nordyke*, 644 F.3d at 780 ("regulations command mere rational basis review so long as they do not pose an 'undue burden' on the right" at issue).

Because it only applies to firearm possession outside the home, the challenged statute does not regulate, much less burden to *any* degree, the ability of Californians to keep loaded firearms for self-defense inside their homes. Therefore, it must survive only rational basis review to be found constitutional. *See Richards*, 2011 WL 1885641, at *4.[2]

D. The Law At Issue Clearly Satisfies Rational Basis Review.

Under rational basis review, a statute will be "upheld if [it is] rationally related to a legitimate governmental purpose." *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1137 (9th Cir. 2009); *see Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 84 (2000) (rational basis review is satisfied unless the law is so "unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the [government's] actions were irrational") (citation and quotation marks omitted). "To invalidate a law reviewed under this standard, '[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis

[2] Furthermore, a law does not substantially burden the Second Amendment if it "leaves open sufficient alternative avenues" to exercise a right conferred by the Amendment. *See Nordyke*, 644 F.3d at 787; *Richards*, 2011 WL 1885641, at *3. Accordingly, even if this Court were to find that the California law places *some* burden on the Second Amendment, citizens denied a concealed carry permit have ample alternative means to defend themselves with firearms outside their homes. For example, persons in "immediate, grave danger" who require a weapon to preserve life or property may carry a loaded weapon *openly* under an exception to Penal Code Section 12031. Similarly, Californians may carry an unloaded firearm in a locked container. Cal. Pen. Code § 12026.1.

which might support it.'" *Stormans*, 586 F.3d at 1137 (citation omitted). Appellants cannot meet this burden.

California has made the rational decision to limit which individuals may carry concealed, loaded firearms in public. The requirements to receive a permit—that the applicant demonstrates good cause, has completed a course of training, has good moral character, and is not prohibited by law from possessing a firearm—are all reasonably related to ensuring the safety of the general public. *See Richards*, 2011 WL 1885641, at *4 (Penal Code Section 12050 satisfies rational basis because it "is an essential part of [California's] efforts to maintain public safety and prevent both gun-related crime and, most importantly, the death of its citizens."); *see generally*, *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").

II. Even If Heightened Scrutiny Is Required, Intermediate Scrutiny Should Be Applied, and the California Statute Satisfies That Standard.

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*—what standard of heightened scrutiny applies to laws imposing such a burden. For numerous reasons, intermediate scrutiny would be

the most appropriate level of review for Second Amendment challenges, and California's concealed carry law clearly meets this standard.

A. Intermediate Scrutiny Is the Appropriate Level of Review 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 not deprive legislatures of necessary 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[3]—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

[3] 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.

respond to this epidemic, 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 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 only 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); *Ward*, 491 U.S. at 798.

Because intermediate scrutiny is the level of review best suited for challenges to regulations substantially burdening the right to bear arms, post-*Heller* courts have overwhelmingly applied that test in evaluating Second Amendment challenges. *See Masciandaro*, 638 F.3d at 470-71 (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 firearm 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).

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 makes sense for laws that substantially burden the Second Amendment, strict scrutiny does not. Most constitutionally enumerated rights do not trigger strict scrutiny. Among the rights that *do* require strict scrutiny, it is only appropriate in limited circumstances, based on justifications that do not apply 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 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 NY 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 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; *see also Heller v. District of Columbia*, 698 F. Supp. 2d at 187 (summarizing observations made by other courts and legal scholars on the inconsistency between strict scrutiny and *Heller*'s list of "presumptively lawful" regulations).

The *Heller* Court 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.

Strict scrutiny's requirement that a law be *narrowly* tailored to serve a compelling government interest 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. In *Nordyke*, this Court rejected the blanket application of strict scrutiny to Second Amendment challenges, explaining that strict scrutiny would require courts to engage in empirical inquiries in which courts "lack expertise," and which are more properly left to the better-equipped legislative branch. *Nordyke*, 644 F.3d at 784 (citation omitted); *see also id.* at 785 (even laws regulating fundamental rights do not warrant strict scrutiny unless the burdens they impose are severe).[4]

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[4] The *amicus* brief of the National Rifle Association, which argues that all rights labeled as "fundamental" are automatically subject to strict scrutiny, is at odds with *Nordyke* and with Supreme Court decisions. The Supreme Court has made clear that laws regulating rights labeled "fundamental" are not subject to strict scrutiny where they do not substantially burden the right at issue. *See, e.g., Clingman v. Beaver*, 544 U.S. 581, 592 (2005) ("strict scrutiny is appropriate only if the burden is severe"); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) ("Regulations imposing severe burdens on plaintiffs' rights must be

(continued…)

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*, 425 U.S. at 247 ("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

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narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review . . . .").

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. 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.[5]

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 Lee Loughner approached a gathering led by Congresswoman Gabrielle Giffords

[5] 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.

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.[6] 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.[7] 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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[6] Tamara Audi, Daniel Gilbert & John R. Emshwiller, *Emails on Loughner Reveal College's Worries*, WALL ST. J., May 20, 2011, at A5; Ariz. Rev. Stat. § 13-3102.

[7] 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.

population.[8] Since 2007, according to a review of published reports, concealed-weapon licensees have killed at least 359 individuals.[9]

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.[10]

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

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

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

[10] 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.

nationwide.[11] Hostile gunfire took the lives of 232 officers in the United States during the last five calendar years.[12] Of those, at least 139 were shot in public places, including restaurants, stores, and public roadways.[13] 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.[14] Thirty-two officers were ambushed while sitting in patrol cars or were targeted merely because they were law enforcement personnel.[15] These grim statistics do not account for officers who sustained non-lethal (but nonetheless devastating) gunshot wounds in the course of their employment—more than four times the number of officers who died as a result of their injuries.[16]

While many of these shootings appear to have been perpetrated by individuals carrying guns in violation of the law, others were carried out by

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

[12] 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 LCAV).

[13] NLEOMF Reports.

[14] *Id.*

[15] *Id.*

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

persons legally licensed to carry concealed weapons. Since 2007, concealed weapons licensees have killed at least 11 law enforcement officers.[17] 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 below, for almost two centuries, states have sought to address the unique dangers that the carrying of concealed firearms presents to both law enforcement officers and the public at large by restricting concealed weapons 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, 113 (1969).

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[17] *See* note 9, *supra*.

Given these real and immediate risks, California has made the reasonable choice to limit the number of individuals carrying concealed weapons by imposing certain basic requirements. Law enforcement officers are uniquely suited to administer California's concealed carry permitting system. Police departments are local, and thus more likely to be familiar with the backgrounds and personalities of the applicants in their communities. For example, police 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 police 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.

III. California's Concealed Weapons Statute is Consistent with Centuries of State Laws Regulating Concealed Firearms.

That California's concealed weapons law meets any applicable level of scrutiny[18] is supported by the statute's consistency with the rich history of laws

[18] Although the present inquiry could not reasonably warrant the application of strict scrutiny, California's concealed carry law would also meet that exacting level of review. State action subject to strict scrutiny must be narrowly tailored to achieve a compelling government purpose. *See e.g. Pleasant Grove City v. Summum*, 555 U.S. 460 (2009). Here, the California Legislature has acted to mitigate the real dangers posed by concealed firearms. As discussed above, the proliferation of concealed carry puts both police officers and the public in danger.

(continued…)

regulating concealed weapons nationwide. States have exercised their police power to restrict the carrying of guns in public for nearly 200 years. The Court should consider California's law in this historical context.

A. Laws Prohibiting Concealed Carry Were Widespread and Commonly Upheld Throughout the Nineteenth Century.

In the early nineteenth century, states began to enact concealed carry laws in response to a rise in violence caused, in large part, by the increased use and popularity of concealable firearms.[19]

In the decades before the Civil War, at least eight states outlawed the carrying of concealed weapons.[20] In 1813, Kentucky passed the first concealed weapon statute, which banned carrying a "pocket pistol…concealed as a weapon," subject only to a narrow exception "when traveling on a journey."[21] Louisiana adopted a similar law the same year, hoping to stem "assassinations. . . [that] have of late been of such frequent occurrences as to become a subject of serious alarm to

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By providing concealed carry permits on a "may issue" basis, California has acted to further its compelling interest in guaranteeing its citizens' safety.

[19] SAUL CORNELL, A WELL REGULATED MILITIA 131-40 (2006)

[20] CORNELL at 141-42 (2006).

[21] CORNELL at 141-42; *see also* Act of Feb. 13, 1813, ch. 89, 1813 Ky. Acts 100.

the peaceable and well-disposed inhabitants of the state."[22] Six other states enacted similar laws in the decades that followed.[23]

Firearm possession again increased following the Civil War, prompting another wave of regulations.[24] Former soldiers kept firearms intended for battle, and firearm manufacturers that had been supplying soldiers during the War sought to remain solvent by manufacturing concealable weapons for civilian use.[25] In response, from 1870 to 1900, at least fourteen states prohibited the carrying of concealed weapons in public.[26] Several states went one step further, completely banning the carrying of firearms in some circumstances.[27]

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[22] CORNELL at 141; *see also* Act of Mar. 25, 1813, 1813 La. Acts 172-75.

[23] Indiana (1820), Alabama (1837), Tennessee (1838), Virginia (1838), Georgia (1838) and Ohio (1859). *See* CORNELL at 141-42; Saul Cornell & Nathan DeDino, *The Second Amendment and the Future of Gun Regulation*, 73 FORDHAM L. REV. 487, 513 (2004) (citing Act of Mar. 18, 1859, 1859 Ohio Laws 56; Act of Oct. 19, 1821, ch. XIII, 1821 Tenn. Pub. Acts 15; and Act of Feb. 2, 1838, 1838 Va. Acts ch. 101, at 76); CLAYTON E. CRAMER, CONCEALED WEAPON LAWS OF THE EARLY REPUBLIC 3 (1999) (citing RAYMOND W. THORP, BOWIE KNIFE (1948)); *State* v. *Reid*, 1 Ala. 612 (1840); ALEXANDER DECONDE, GUN VIOLENCE IN AMERICA 79 (2001).

[24] DECONDE at 79.

[25] *Id.*

[26] 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

(continued…)

To the extent such prohibitions on concealed weapons were challenged in court, they overwhelmingly survived constitutional review. 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; *see, e.g.*, *Aymette v. State*, 21 Tenn. 154, 159 (1840) (legislature must be able to "protect our citizens from . . . being endangered by desperadoes with concealed arms"); *Reid*, 1 Ala. at 616 (concealed carry ban "dictated by the safety of the people and the advancement of public morals."); *State v. Buzzard*, 4 Ark. 18, 28 (1842); *State v. Jumel*, 13 La. Ann. 399, 400 (1858) (concealed carry merely a "*particular mode* of bearing arms which is found dangerous to the peace of society") (emphasis in original); *Owen v. State*, 31 Ala. 387, 388 (1858) (concealed carry bans "a mere regulation of the manner in which certain weapons are to be borne . . . ."); *State v. Fife*, 31 Ark 455,

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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).

[27] *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; *Nunn v. State*, 1 Ga. 243 (1846).

461 (1876); *State v. English*, 35 Tex. 473 (1872); *City of Salina v. Blaksley*, 72 Kan. 230 (1905).[28]

Nineteenth-century legal sources also recognized the legitimacy of these restrictions. For example, an 1868 treatise cited by the *Heller* Court as one of several representative "post-Civil War 19th-century sources" (*see* 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 . . . ."[29] Similarly, a 1904 survey of police power observed that the right guaranteed by the Second

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[28] Although some particularly restrictive 19th-century gun laws were invalidated, these statutes generally prohibited possession of an entire class of weapon, not merely the manner in which it was carried. *See, e.g.*, *Nunn*, 1 Ga. at 251 (invalidating a prohibition of pistols, dirks, and spears, while noting the act was valid to the extent it merely aimed to "suppress the practice of carrying certain weapons *secretly*"); *but see Bliss v. Commonwealt*h, 12 Ky. 90 (1822) (finding a statute that prohibited carrying a concealed weapon unconstitutional). After *Bliss*, the legislature amended the Kentucky Constitution to authorize the adoption of "laws to prevent persons from carrying concealed arms." KY. CONST. of 1850, art. XIII, § 25. Indeed, concealed carry laws were invalidated so rarely that when the Missouri Supreme Court took up the issue in 1926, it noted that, "We have been able to find but two cases in the Union holding a law unconstitutional because it prohibited the carrying of concealed weapons." *State v. Keet*, 269 Mo. 206, 210 (1916).

[29] JOHN NORTON POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES 152-53 (1868).

Amendment had "not prevented the very general enactment of statutes forbidding the carrying of concealed weapons . . . ."[30]

B. States Have Enacted Discretionary "May Issue" Statutes Since the Early Twentieth Century.

Between 1903 and 1927, at least eleven states passed new laws that prohibited the carrying of a concealed or concealable weapon without a permit or without the permission of law enforcement.[31] Early twentieth-century laws granted broad discretion to law enforcement officers in their decisions whether to issue such permits.[32] Many such laws required applicants to show they were "suitable"

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[30] ERNST FREUND, THE POLICE POWER: PUBLIC POLICE AND CONSTITUTIONAL RIGHTS 90-91 (1904).

[31] 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. These statutes generally exempted law enforcement personnel.

[32] Clayton E. Cramer & David B. Kopel, *Shall Issue: The New Wave of Concealed Handgun Permit laws*, 62 TENN. L. REV. 679, 681 (1995).

or of "good moral character" or to prove they had a "good reason," "good cause," or "proper reason" for the license.[33]

In 1903, law enforcement officers surmised that 20,000 people in New York City were carrying concealed handguns.[34] In 1911, New York passed the Sullivan Law, which, among other provisions, adopted a discretionary licensing system and prohibited the unlicensed carrying of firearms.[35] That statute prompted several other states to pass similar legislation,[36] and during the 1920s and 1930s many states adopted the Uniform Act to Regulate the Sale and Possession of Firearms, which prohibited the unlicensed carrying of concealed weapons.[37]

C. Many States Continue to Strongly Regulate Concealed Carrying.

Most legislatures continued to restrict significantly the carrying of concealed weapons well into the latter-half of the twentieth century, and laws in most states either prohibited concealed weapons entirely or granted law enforcement broad discretion to issue permits. Although many states have succumbed to recent lobbying efforts by powerful pro-gun groups and weakened their carrying laws, ten

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[33] *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.

[34] DECONDE at 105.

[35] CORNELL at 197; 1911 N.Y. Laws at 442.

[36] DECONDE at 110.

[37] Cramer & Kopel at 681.

states retain discretionary permitting systems, and one state and the District of Columbia strictly prohibit the carrying of concealed weapons.[38]

California has the strongest firearms laws in the nation.[39] Its legislature has repeatedly rejected bills to remove or otherwise weaken law enforcement discretion in concealed weapons licensing.[40] Efforts to undo California's concealed carry law in the courts[41] are a calculated attempt to perform an end-run around the legislature's thoughtful judgment and should be rejected by this Court as well.

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

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[38] Legal Community Against Violence, *Guns in Public Places: The Increasing Threat of Hidden Guns in America*, http://lcav.org/content/LCAV_GunsInPublicPlaces.pdf.

[39] Legal Community Against Violence, *Gun Laws Matter: A Comparison of State Firearms Laws and Statistics*, http://www.lcav.org/Gun_Laws_Matter/Gun_Laws_Matter_Brochure.pdf. (suggesting that states with more restrictive gun laws, like California, have lower gun-death rates than states with weak gun laws).

[40] *See, e.g.*, A.B. 2053, 2009-2010 Sess. (Cal. 2010); A.B. 357, 2009-2010 Sess. (Cal. 2009); A.B. 1369, 1997-1998 Sess. (Cal. 1997).

[41] Local jurisdictions in California currently face numerous lawsuits challenging on Second Amendment grounds the denial of applications for concealed carry licenses. *See* Legal Community Against Violence, *Post*-Heller *Litigation Summary*, http://www.lcav.org/content/post-heller_summary.pdf.

Amendment right to possess a firearm for self-defense in the home. As such, it easily passes constitutional muster, regardless of the level of scrutiny to which it 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: August 19, 2011

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CERTIFICATION OF COMPLIANCE

I hereby certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6977 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: August 19, 2011

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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 August 19, 2011.

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