No. 14-55873

In the United States Court of Appeals for the Ninth Circuit

CHARLES NICHOLS,
Plaintiff-Appellant,

v.

EDMUND G. BROWN, JR., in his official capacity as the Governor of California and XAVIER BECERRA, in his official capacity as the Attorney General of California,
Defendants-Appellees.

On Appeal from the United States District Court
for the Central District of California

Case No. 2:11-cv-09916-SJO-SS
The Honorable S. James Otera, Judge

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE IN SUPPORT OF APPELLEES

Everytown for Gun Safety hereby moves this Court for leave to file a brief as amicus curiae in support of the appellees in this case.

1. Everytown for Gun Safety is the nation's largest gun-violence-prevention organization. With more than three million supporters, it advocates for common-sense gun laws across the country. Everytown has a large number of supporters who live and work in the state of California and who believe that the

state's regulation of the public carrying of firearms makes their homes, workplaces, and neighborhoods safer. The leaders of more than 50 California cities—including Los Angeles, Oakland, and San Francisco—are members of Mayors Against Illegal Guns, Everytown's coalition of more than 1,000 current and former mayors advocating for common-sense gun-safety regulations.

2. Everytown seeks to file the proposed amicus brief (attached) to present this Court with a comprehensive account of historical materials that bear on the Second Amendment question in this case: whether California's prohibition on openly carrying firearms in populated public areas—while allowing the carrying of concealed weapons with a permit—violates the right to bear arms.

3. Everytown has a significant interest in the proper resolution of that question. Moreover, it has devoted substantial resources to researching historical firearms legislation. It has drawn on this expertise to file briefs in numerous recent Second Amendment cases, including cases in this Court and in the most recent appeals concerning Second Amendment challenges to restrictions on public carry. *See Peruta v. San Diego*, No. 10-56971 (9th Cir.) (en banc); *Peña v. Lindley*, No. 15-15449 (9th Cir.); *Silvester v. Harris*, No. 14-16840 (9th Cir.); *Wrenn v. District of Columbia*, No. 16-7025 (D.C. Cir.); *Grace v. District of Columbia*, No. 16-7067 (D.C. Cir.); *Wrenn v. District of Columbia*, No. 15-7057 (D.C. Cir.); *Kolbe v. Hogan*, No. 14-1945 (4th Cir.) (en banc); *Norman v. Florida*, No. SC15-650 (Fla.). The proposed

amicus brief will describe in detail the historical predecessors to California's law—from a 1328 English statute, through founding-era America, and up to today.

4. Because this historical background is directly relevant to the constitutionality of California's law, Everytown's proposed brief will assist this Court in deciding that question.

5. Everytown has endeavored to obtain the consent of all parties to the filing of the proposed amicus brief. The appellees consent to the filing the brief. The appellant does not consent to the filing of the brief.

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CERTIFICATE OF SERVICE

I hereby certify that on February 24, 2017, I electronically filed the foregoing motion for leave to file a brief as amicus curiae with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit by using the CM/ECF system. All participants are registered CM/ECF users, and will be served by the appellate CM/ECF system.

Dated: February 24, 2017

/s/ Deepak Gupta
Deepak Gupta

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BRIEF OF AMICUS CURIAE EVERYTOWN FOR GUN SAFETY IN SUPPORT OF APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Amicus Curiae Everytown for Gun Safety has no parent corporations. It has no stock, and therefore, no publicly held company owns 10% or more of its stock.

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INTRODUCTION AND INTEREST OF AMICUS CURIAE

Everytown for Gun Safety is the nation's largest gun-violence-prevention organization.[1] It files this brief to provide the Court with historical analysis that bears on the question whether California's decision to prohibit the open carrying of loaded firearms in populated public areas—while allowing the carrying of concealed weapons with a permit—violates the constitutional right to bear arms.[2]

That is the only question in this case. Plaintiff Charles Nichols has expressly "disavowed any desire, intention or plan to carry a weapon concealed" in public, and he has never applied for a concealed-carry permit despite asserting that he would have "good cause" to obtain one, as required by California law. Appellant's Br. 18, 33. Instead, he "seeks an unrestricted license to openly carry a loaded handgun throughout the state of California," including throughout the streets of Los Angeles, America's second-largest metropolitan area, where he resides. *Id.* at 26. This means that he does not assert a constitutional right to *some* manner of public carry, but a specific and unfettered "right to *openly* carry a firearm"—a right that he claims is violated even if he qualifies for a concealed-carry permit. *Id.* at 26. As a result, "concealed carry is not at issue here on appeal in any shape or form. This is a pure Open Carry case." *Id.* at 25; *see id.* at 11.

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[1] No counsel for a party authored it in whole or part. Apart from amicus, no person contributed money to fund its preparation or submission.

[2] Under California law, open carry is prohibited in incorporated cities but generally allowed in rural areas. Cal. Penal Code §§ 25850(a), 26350(a).

Nichols's expansive open-carry theory is foreclosed by history. Although he claims that the right to bear arms guarantees his ability to openly carry firearms anywhere in public, including in urban areas, a seven-century Anglo-American tradition of restrictions on public carry demonstrates otherwise.

This brief provides an account of that tradition. For centuries, English law broadly prohibited anyone from carrying a dangerous weapon in public, beginning with the Statute of Northampton in 1328, and continuing after the English Bill of Rights of 1689. This tradition took hold in America in the 17th and 18th centuries, when several colonies enacted similar restrictions. And it continued into the 19th century, when many states and municipalities broadly prohibited public carry, while many others allowed public carry only by those with a good reason to fear injury. Altogether, by the early 20th century, more than half of all states, as well as the District of Columbia and numerous cities, had broadly prohibited public carry, illustrating "how the Second Amendment was interpreted from immediately after its ratification through the end of the 19th century." *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008).

Such a robust historical pedigree is not necessary to satisfy the Second Amendment, but it is sufficient to do so. Whatever the Amendment's precise contours, there can be little doubt that a bare open-carry restriction is consistent with "historical tradition," *id.* at 627, and thus constitutional.

ARGUMENT

THE SECOND AMENDMENT DOES NOT GUARANTEE A BROAD RIGHT TO OPENLY CARRY LOADED FIREARMS IN POPULATED PUBLIC PLACES IRRESPECTIVE OF WHETHER CONCEALED CARRY IS AVAILABLE.

The question in this case is not whether the Second Amendment, which the Supreme Court held in *Heller* protects "the right of law-abiding, responsible citizens to use arms in defense of hearth and home," *id.* at 635, has any application outside the home. Nor is it whether the Second Amendment "protect[s], to some degree, a right of a member of the general public to carry firearms in public." *Peruta v. Cnty. of San Diego*, 824 F.3d 919, 927 (9th Cir. 2016). Rather, the question is whether the Amendment guarantees a particular right to open carry such that states have no choice but to allow citizens to openly tote loaded guns in urban areas. Put differently, the question is whether California's open-carry law—notwithstanding its concealed-carry regime—is consistent with the Second Amendment.

To answer that question, courts have adopted "a two-step inquiry," first asking whether the law "burdens conduct protected by the Second Amendment," and then determining, "if so," whether the law satisfies "an appropriate level of scrutiny." *Jackson v. City & Cnty. of San Francisco*, 746 F.3d 953, 960 (9th Cir. 2014). Although California's open-carry law, standing alone, would satisfy the appropriate level of scrutiny, this brief shows that the analysis should not get that far: This law survives at step one.

A. "Longstanding" laws are deemed constitutional under *Heller* because they are consistent with our "historical tradition."

One way to determine whether a law burdens the Second Amendment right is to assess the law based on a "historical understanding of the scope of the right," *Heller*, 554 U.S. at 625, and consider whether the law is one of the "prohibitions that have been historically unprotected," *Jackson*, 746 F.3d at 960. *Heller* identified several "examples" of such regulations, including "prohibitions on the possession of firearms by felons and the mentally ill" and "laws imposing conditions and qualifications on the commercial sale of arms," which are "presum[ed]" not to violate the right because of their historical acceptance as consistent with its protections. 554 U.S. at 626-27 & n.26. Such "longstanding" laws, the Supreme Court explained, are treated as tradition-based "exceptions" by virtue of their "historical justifications." *Id.* at 635; *see Fyock v. Sunnyvale*, 779 F.3d 991, 997 (9th Cir. 2015) ("longstanding prohibitions" are "traditionally understood to be outside the scope of the Second Amendment"); *United States v. Marzzarella*, 614 F.3d 85, 91 (3d Cir. 2010) ("longstanding limitations are exceptions to the right to bear arms" under *Heller*).

What does it mean to be "longstanding" under *Heller*? It does not require that a law "mirror limits that were on the books in 1791." *United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010) (en banc). To the contrary, laws may qualify as longstanding even if they "cannot boast a precise founding-era analogue," *NRA v.*

BATF, 700 F.3d 185, 196 (5th Cir. 2012)—as was the case with the "early twentieth century regulations" deemed longstanding in *Heller*, *see Fyock*, 779 F.3d at 997. But, as we now show, the law at issue in this case is no 20th-century creation; it embodies a tradition of regulation stretching back seven centuries—and is in fact *more permissive* of public carry than many of those historical regulations.

B. California's law has a centuries-long pedigree in Anglo-American history and is therefore "longstanding" and constitutional under *Heller*.

1. English History

Beginning in 1328, England broadly restricts public carry in populated areas. The Anglo-American tradition of broadly restricting public carry stretches back to at least 1328, when England enacted the Statute of Northampton, providing that "no Man great nor small" shall "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*." 2 Edw. 3, 258, ch. 3 (1328) (emphasis added). Shortly thereafter, King Edward III directed sheriffs and bailiffs to arrest "all those whom [they] shall find going armed." Charles, *The Faces of the Second Amendment Outside the Home*, 60 Clev. St. L. Rev. 1, 13-14 (2012). His successors did so as well. *Id.* at 16-25.

Over the ensuing decades, England repeatedly reenacted the Statute of Northampton's public-carry restriction. *See, e.g.*, 7 Ric. 2, 35, ch. 13 (1383); 20 Ric.

2, 93, ch. 1 (1396). Because this restriction carried misdemeanor penalties, violators were usually required to forfeit their weapons and pay a fine. *Id.* A separate law went further, outlawing "rid[ing] armed covertly or secretly with Men of Arms against any other." 25 Edw. 3, 320, ch. 2, § 13 (1351). This law had heavier penalties, *id.*, because it regulated threatening behavior rather than simply carrying weapons in public, the conduct prohibited by the Statute of Northampton.

By the 16th century, firearms had become increasingly accessible in England, and the possibility that they would be carried in public had become increasingly threatening to public safety. To guard against this threat, Queen Elizabeth I in 1579 called for robust enforcement of the Statute of Northampton's prohibition on carrying "Daggers, Pistols, and such like, not only in Cities and Towns, [but] in all parts of the Realm in common high[ways], whereby her Majesty's good quiet people, desirous to live in [a] peaceable manner, are in fear and danger of their lives." Charles, *Faces*, 60 Clev. St. L. Rev. at 21 (spelling modernized). The carrying of "such offensive weapons" (like "Handguns"), she elaborated, and "the frequent shooting [of] them in and near Cities, Towns corporate, [and] the Suburbs thereof where [the] great multitude of people do live, reside, and trav[el]," had caused "great danger" and "many harms [to] ensue." *Id.* at 22 (spelling modernized). Fifteen years later, she reaffirmed that publicly carrying pistols and daggers—

whether "secretly" or in the "open"—was "to the terrour of all people professing to travel and live peaceably." *Id.*

In the 17th and 18th centuries, English authorities interpret the Statute of Northampton to restrict public carry in populated areas. This understanding of the law—as broadly prohibiting carrying guns in populated public places—continued into the 17th and 18th centuries. *See generally* Charles, *The Statute of Northampton by the Late Eighteenth Century*, 41 Fordham Urb. L.J. 1695 (2012). In 1644, for example, Lord Coke—"widely recognized by the American colonists as the greatest authority of his time on the laws of England," *Payton v. New York*, 445 U.S. 573, 593-94 (1980)—described the Statute of Northampton as making it unlawful "to goe nor ride armed by night nor by day . . . in any place whatsoever." Coke, *The Third Part of the Institutes of the Laws of England* 160 (1817 reprint).

One century later, Blackstone—"the preeminent authority on English law for the founding generation," *Heller*, 554 U.S. at 593-94—described the statute similarly: "The offence of riding or going armed with dangerous or unusual weapons is a crime against the public peace, by terrifying the good people of the land; and is particularly prohibited by the statute of Northampton." 4 Blackstone, *Commentaries on the Laws of England* 148-49 (1769). In other words, because carrying a dangerous weapon (such as a firearm) in populated public places naturally terrified the people (particularly if done openly), it was a crime against the peace—even if

unaccompanied by a threat, violence, or any additional breach of the peace. *See Chune v. Piott*, 80 Eng. Rep. 1161, 1162 (K.B. 1615) ("Without all question, the sheriffe hath power to commit . . . if contrary to the Statute of Northampton, he sees any one to carry weapons in the high-way, in terrorem populi Regis; he ought to take him, and arrest him, notwithstanding he doth not break the peace.").

To carry out the Statute of Northampton's prohibition, British constables, magistrates, and justices of the peace were instructed to "Arrest all such persons as they shall find to carry Daggers or Pistols" publicly. Keble, *An Assistance to the Justices of the Peace, for the Easier Performance of Their Duty* 224 (1683). This mandate was unmistakably broad: "[I]f any person whatsoever . . . shall be so bold as to go or ride Armed, by night or by day, in Fairs, Markets, or any other places . . . then any Constable . . . may take such Armor from him for the Kings use, and may also commit him to the Gaol." *Id.*[3]

Heeding this instruction, one court issued an arrest warrant for a man who committed "outragious misdemeanours" by going "armed" with "pistolls[] and other offensive weapons." *Rex v. Harwood*, Quarter Sessions at Malton (Oct. 4-5, 1608), *reprinted in* North Riding Record Society, *Quarter Sessions Records* 132 (1884). Another sentenced a man to prison because he "went armed under his garments,"

[3] *See also* Lambarde, *The Duties of Constables, Borsholders, Tythingmen, and Such Other Low and Lay Ministers of the Peace* 13-14 (1602); 1 Hutcheson, *Treatise on the Offices of Justice of Peace* app. I at xlviii (1806) ("A constable shall arrest any person . . . who shall be found wearing naugbuts, or guns, or pistols, of any sort.").

even though he had not threatened anyone and had done so only to "safeguard . . . his life" after another man had "menaced him." Coke, *Institutes* 161. And a jury convicted a man "for going Armed with a Cutlass Contrary to the Statute," for which he was sentenced to two years in prison plus fines. *Middlesex Sessions: Justices' Working Documents* (1751), *available at* http://bit.ly/1U8OhO7.

The law's narrow exceptions confirm this general public-carry prohibition. In addition to its focus on populated public places, the Statute of Northampton was understood to contain limited exceptions. One important exception was that the prohibition did not apply inside the home, in keeping with principles of self-defense law, which imposed a broad duty to retreat while in public but conferred a strong right to self-defense at home. 4 Blackstone, *Commentaries* 185. As Lord Coke explained, using force at home "is by construction excepted out of this act[,] . . . for a man's house is his castle." *Institutes* 162. "But [a man] cannot assemble force," Coke continued—including by carrying firearms—even "though he [may] be extremely threatened, to go with him to Church, or market, or any other place, but that is prohibited by this act." *Id.*[4] William Hawkins likewise explained that "a man cannot excuse the wearing [of] such armour in public, by alleging that such a one

[4] *See also* 1 Hale, *History of the Pleas of the Crown* 547 (1800) (noting that armed self-defense was permitted at home, but not during "travel, or a journey," because of "special protection" accorded "home and dwelling"); *Semayne's Case*, 77 Eng. Rep. 194, 195 (K.B. 1603) ("[E]very one may assemble his friends and neighbors to defend his house against violence: but he cannot assemble them to go with him to the market, or elsewhere for his safeguard against violence.").

threatened him, and he wears it for [his] safety," but he may assemble force "in his own House, against those who threaten to do him any Violence therein, because a Man's House is as his Castle." 1 Hawkins, *A Treatise of the Pleas of the Crown* 489, 516 (1721) (1824 reprint); 1 Russell, *A Treatise on Crimes & Misdemeanors* 589 (1826) (same in American edition).[5]

There were two other important exceptions to the public-carry prohibition: a narrow (unwritten) exception permitting high-ranking nobles to wear fashionable swords and walk in public with armed servants, and a narrow (written) exception for the King's officers. *See* Hawkins, *Treatise of the Pleas of the Crown* 489, 798 (explaining that noblemen were in "no danger of offending against this statute" by wearing "weapons of fashion, as swords, &c., or privy coats of mail," or by "having their usual number of attendants with them for their ornament or defence," for that would not "terrify the people").[6]

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[5] A contrary rule—permitting armed self-defense in populated areas, even though it terrified the public—would have suggested that "the King were not able or willing to protect his subjects." *Sir John Knight's Case*, 87 Eng. Rep. 75, 76 (K.B. 1686). Hence, the castle doctrine was confined to the home. Tucker, *Blackstone's Commentaries* 225.

[6] *See also* Russell, *Treatise on Crimes & Misdemeanors* 588-89 (same); Charles, *Faces*, 60 Clev. St. L. Rev. at 26 n.123 (citing historical distinction between "go[ing] or rid[ing] *armed*" and nobleman "wear[ing] common *Armour*"); *Rex v. Sir John Knight*, 90 Eng. Rep. 330 (K.B. 1686) (noting a "general connivance" for "gentlemen" to carry arms in this way, but declining to dismiss indictment for "walk[ing] about the streets armed with guns" against a defendant who was later acquitted because he was a King's officer); *Sir John Knight's Case*, 87 Eng. Rep. at 76 (acquittal); *see* Charles, *Faces*, 60 Clev. St. L. Rev. at 28-30 (discussing *Sir John Knight's Case*).

Putting these exceptions together, "no one" could "carry arms, by day or by night, except the vadlets of the great lord of the land, carrying the swords of their masters in their presence, and the serjeants-at-arms [of the royal family]," as well as those responsible for "saving and maintaining the peace." Carpenter & Whitington, *Liber Albus: The White Book of the City of London* 335 (1419).[7]

The Statute of Northampton's public-carry restriction remains fully in effect following the English Bill of Rights of 1689. In the late 17th century, William and Mary enshrined the right to have arms in the Declaration of Rights, later codified in the English Bill of Rights in 1689. This right—which "has long been understood to be the predecessor to our Second Amendment," *Heller*, 554 U.S. at 593—ensured that subjects "may have arms for their defence suitable to their conditions, and as allowed by law." 1 W. & M. st. 2. ch. 2. As Blackstone later wrote, this right was considered "a public allowance, under due restrictions[,] of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression." 1 Blackstone, *Commentaries* 144. One such "due restriction" was the Statute of Northampton, which remained in effect after the right to bear arms was codified in 1689. *See* 4

[7] A 1409 royal order confirms the narrow exception allowing noblemen to carry swords. It "forb[ade] any man of whatsoever estate or condition to go armed within [London] and [its] suburbs, or any except lords, knights and esquires with a sword." 3 *Calendar of the Close Rolls, Henry IV* 485 (Jan. 30, 1409).

Blackstone, *Commentaries* 148-49; Gardiner, *The Compleat Constable* 18 (1692); *Middlesex Sessions* (reporting conviction under law in 1751).

2. Founding-Era American History

The colonies begin adopting England's tradition of public-carry regulation. Around the time that the English Bill of Rights was adopted, America began its own public-carry regulation. The first step was a 1686 New Jersey law that sought to prevent the "great fear and quarrels" induced by "several persons wearing swords, daggers, pistols," and "other unusual or unlawful weapons." 1686 N.J. Laws 289, 289-90, ch. 9. To combat this "great abuse," the law provided that no person "shall presume privately to wear any pocket pistol" or "other unusual or unlawful weapons," and "no planter shall ride or go armed with sword, pistol, or dagger," except for "strangers[] travelling" through. *Id.* This was only the start of a long history of regulation "limiting gun use for public safety reasons"—especially public carry in populated areas. Meltzer, *Open Carry for All*, 123 Yale L.J. 1486, 1523 (2014). As against this history, "there are no examples from the Founding era of anyone espousing the concept of a general right to carry." *Id.*

Many states enact laws mirroring the Statute of Northampton both before and after the Constitution's adoption. Eight years after New Jersey's law, Massachusetts enacted its own version of the Statute of Northampton, authorizing justices of the peace to arrest anyone who "shall ride or go armed

Offensively before any of Their Majesties Justices, or other [of] Their Officers or Ministers doing their Office, or elsewhere." 1694 Mass. Laws 12, no. 6.

By using the word "offensively," Massachusetts ensured that this prohibition applied only to "offensive weapons," as it had in England—not *all* arms. Constable oaths of the 18th century described this law with similar language. *See* Charles, *Faces*, 60 Clev. St. L. Rev. at 34 n.178. One treatise, for example, explained that "[a] person going or riding with offensive Arms may be arrested." Bond, *A Compleat Guide for Justices of the Peace* 181 (1707). Thus, under the law, a person could publicly carry a hatchet or horsewhip, but not a pistol. *See* Hawkins, *Treatise of the Pleas of the Crown* 665 (explaining that hatchets and horsewhips were not "offensive weapons," while "guns, pistols, daggers, and instruments of war" were); *King v. Hutchinson*, 168 Eng. Rep. 273, 274 (1784) (explaining that firearms are offensive weapons).[8]

One century later, Massachusetts reenacted its law, this time as a state. 1795 Mass. Laws 436, ch. 2. Because the prohibition had been on the books for so long, it was "well known to be an offence against law to ride or go with . . . firelocks, or other dangerous weapons," as one newspaper later reported, so it "[could not] be doubted that the vigilant police officers" would arrest violators. Charles, *Faces*, 60 Clev. St. L. Rev. at 33 n.176 (quoting *The Salem Gazette*, June 2, 1818, at 4).

[8] American treatises said the same. *See* Bishop, *Commentaries on the Law of Statutory Crimes* 214 (1873); Russell, *Treatise on Crimes & Misdemeanors* 124.

Following Massachusetts' lead, additional states enacted similar laws, including founding-era statutes in Virginia and North Carolina, a New Hampshire law passed five years after Massachusetts' first enactment, and later enactments in states ranging from Maine to Tennessee. *See* 1699 N.H. Laws 1; 1786 Va. Laws 33, ch. 21; 1792 N.C. Laws 60, 61, ch. 3; 1801 Tenn. Laws 710, § 6; 1821 Me. Laws 285, ch. 76, § 1; 1852 Del. Laws 330, 333, ch. 97, § 13. And still other states incorporated the Statute of Northampton through their common law.[9]

To ensure that these laws were enforced, the constables, magistrates, and justices of the peace in these jurisdictions were required to "arrest all such persons as in your sight shall ride or go armed." Haywood, *A Manual of the Laws of North-Carolina* pt. 2 at 40 (1814) (N.C. constable oath). That was because, as constables were informed, "riding or going armed with dangerous or unusual weapons, is a crime against the public peace, by terrifying the good people of the land, and is prohibited by statute." Haywood, *The Duty and Office of Justices of the Peace, and of Sheriffs, Coronoers, Constables* 10 (1800); *see also* Haywood, *The Duty & Authority of Justices of the Peace, in the State of Tennessee* 176 (1810).

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[9] *See* A Bill for the Office of Coroner and Constable (Mar. 1, 1682), reprinted in *Grants, Concessions & Original Constitutions* 251 (N.J. constable oath) ("I will endeavour to arrest all such persons, as in my presence, shall ride or go arm'd offensively."); Niles, *The Connecticut Civil Officer* 154 (1833) (noting crime of "go[ing] armed offensively," even without threatening conduct); Dunlap, *The New York Justice* 8 (1815); *Vermont Telegraph*, Feb. 7, 1838 (observing that "[t]he laws of New England" provided a self-defense right "to individuals, but *forb[ade] their going armed* for the purpose"). Northampton also applied in Maryland. Md. Const. of 1776, art. III, § 1.

As with the English statute, prosecution under these laws did not require a "threat[] [to] any person in particular" or "any particular act of violence." Ewing, *A Treatise on the Office & Duty of a Justice of the Peace* 546 (1805); *see also* Bishop, *Commentaries on the Law of Statutory Crimes* (noting that there was no requirement that "peace must actually be broken, to lay the foundation for a criminal proceeding"). Nor did these laws have a self-defense exception: No one could "excuse the wearing [of] such armor in public, by alleging that such a one threatened him." Wharton, *A Treatise on the Criminal Law of the United States* 527-28 (1846).

3. Early-19th-Century American History

Many states enact a variant of the Statute of Northampton, allowing public carry with "reasonable cause to fear an assault." In 1836, Massachusetts amended its public-carry prohibition to provide a narrow exception for those having "reasonable cause to fear an assault or other injury, or violence to his person, or to his family or property." 1836 Mass. Laws 748, 750, ch. 134, § 16. Absent such "reasonable cause," no person could "go armed with a dirk, dagger, sword, pistol, or other offensive and dangerous weapon." *Id.* Those who did so could be punished by being made to pay sureties for violating the statute, *id.*; if they did not do so, they could be imprisoned. *See id.* at 749.[10]

[10] Sureties were a form of criminal punishment, like a bond. *See* Punishments, The Proceedings of the Old Bailey, London's Central Criminal Court, 1674 to

Although the legislature chose to trigger these penalties using a citizen-complaint mechanism (allowing "any person having reasonable cause to fear an injury, or breach of the peace" to file a complaint, *id.* at 750, § 16), the law was understood to restrict carrying a firearm in public without good cause. This was so even when the firearm was not used in any threatening or violent manner: The legislature placed the restriction in a section entitled "Persons who go armed may be required to find sureties for the peace," and expressly cited the state's previous enactment of the Statute of Northampton. *Id.* And elsewhere in the same statute the legislature separately punished "any person [who] threatened to commit an offence against the person or property of another." *Id.* at 749, § 2. Thus, as one judge explained in a grand jury charge appearing in the contemporary press in 1837, there was little doubt at the time that "no person may go armed with a dirk, dagger, sword, pistol, or other offensive and dangerous weapon, without reasonable cause to apprehend an assault or violence to his person, family, or property." Cornell, *The Right to Carry Firearms Outside of the Home*, 39 Fordham Urb. L.J. 1695, 1720 & n.134 (2012); *see* Hammond, *A Practical Treatise; Or an Abridgement of the Law Appertaining to the Office of Justice of the Peace* 184-86 (1841).

1913, http://bit.ly/1ED5tC2; 34 Edw. 3, 364, ch. 1 (1360). They continue to exist as a form of criminal punishment in some states. *See* Mass. Gen. Laws ch. 275, § 4.

Within a few decades, many states (all but one outside the slaveholding South) had adopted nearly identical laws.[11] Most copied the Massachusetts law verbatim—enforcing the public-carry prohibition through a citizen-complaint provision and permitting a narrow self-defense exception. *See, e.g.*, 1851 Minn. Laws at 527-28, §§ 2, 17, 18 (section entitled "Persons carrying offensive weapons, how punished"); 1873 Minn. Laws. 1025, § 17 (same after 14th Amendment's ratification). At least one state (Virginia) used slightly different language. 1847 Va. Laws at 129, § 16 ("If any person shall go armed with any offensive or dangerous weapon, without reasonable cause to fear an assault or other injury, or violence to his person, or to his family or property, he may be required to find sureties for keeping the peace."). Semantic differences aside, these laws were understood to do the same thing: broadly restrict public carry, while establishing a limited exception for those with a particular need for self-defense.[12]

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[11] *See, e.g.*, 1838 Wisc. Laws 381, § 16; 1841 Me. Laws 709, ch. 169, § 16; 1846 Mich. Laws 690, 692, ch. 162, § 16; 1847 Va. Laws 127, 129, ch. 14, § 16; 1851 Minn. Laws 526, 528, ch. 112, § 18; 1853 Or. Laws 218, 220, ch. 16, § 17; 1861 Pa. Laws 248, 250, § 6.

[12] Newspaper articles from the 19th century describe criminal prosecutions under these laws even when the person was carrying a *concealed* weapon—a form of public carry that, by itself, does not indicate any menacing conduct beyond bare carry. *See, e.g.*, *City Intelligence*, Boston Courier (Boston, Mass.), Mar. 7, 1853, at 4 (reporting arrest and charge against person for "carrying a concealed weapon," a "loaded pistol"); *Watch Returns*, Evening Star (Washington, D.C.), Nov. 26, 1856, at 3 (describing multiple arrests for "[c]arrying [c]oncealed [w]eapons"); *City Items*, Richmond Whig (Richmond, Va.), Sept. 25, 1860, at 3 (reporting that person was "arraigned" for "carrying a concealed weapon" and "required [to] give security");

Taking a different approach, most southern states elect to permit public carry, while regulating the manner of carry. In contrast to the Northampton model and its good-cause variant, most—but not all—states in the slaveholding South were more permissive of public carry. They generally allowed white citizens to carry firearms in public so long as the weapons were not concealed. *See, e.g.*, 1854 Ala. Laws 588, § 3272; 1861 Ga. Laws 859, § 4413; *see generally* Cramer, *Concealed Weapon Laws of the Early Republic* (1999). It is this alternative (and minority) tradition on which Nichols relies for his mandated-open-carry theory.

This tradition owes itself to the South's peculiar history and the prominent institution of slavery. *See generally* Ruben & Cornell, *Firearm Regionalism and Public Carry: Placing Southern Antebellum Case Law in Context*, 125 Yale L.J. Forum 121 (Sept. 25, 2015), http://bit.ly/1RiqHwv. It reflects "a time, place, and culture where slavery, honor, violence, and the public carrying of weapons were intertwined." *Id.* at 125. Frederick Law Olmsted, for example, "attributed the need to keep slaves in submission as the reason that 'every white stripling in the South may carry a dirk-knife in his pocket, and play with a revolver before he has learned to swim.'" *Id.* at 21 (quoting Olmsted, *A Journey in the Back Country* 447 (1860)); *cf. McDonald v. City of*

Recorders Court, Oregonian (Portland, Or.), Aug. 6, 1867, at 4 (reporting conviction for "carrying a concealed weapon," resulting in two-day imprisonment); *Crimes of the Year*, Kalamazoo Gazette (Kalamazoo, Mich.), Jan. 18, 1889, at 2 (describing conviction for "[c]arrying concealed weapon," resulting in 30-day prison sentence).

Chicago, 561 U.S. 742, 844 (2010) (Thomas, J., concurring) ("[I]t is difficult to overstate the extent to which fear of a slave uprising gripped slaveholders and dictated the acts of Southern legislatures."). And historians agree that "the South was substantially more violent than the North." Cramer, *Concealed Weapon Laws* 18. One southern social scientist, who was "the first person to explore the issue of Southern violence in depth," undertook an exhaustive study of homicide rates in the 19th century and concluded that the rate in southern states was 18 times the rate in New England, and was "greater than any country on earth the population of which is rated as civilized." Redfield, *Homicide, North and South* vii, 10, 13 (1880) (2000 reprint).

Even within the South, however, courts and legislatures took varying stances toward public carry. Virginia, for instance, "home of many of the Founding Fathers," *Edwards v. Aguillard*, 482 U.S. 578, 605 (1987) (Powell, J., concurring), indisputably prohibited public carry (with an exception for good cause) before ratification of the Fourteenth Amendment, after enacting a Northampton-style prohibition at the Founding. 1847 Va. Laws at 129, § 16 (making it illegal to "go armed with any offensive or dangerous weapon, without reasonable cause to fear an assault or other injury, or violence to his person, or to his family or property"); 1786 Va. Laws 33, ch. 21. South Carolina enacted a Northampton-style law during Reconstruction. 1870 S.C. Laws 403, no. 288, § 4. Around the same time, Texas

prohibited public carry with an exception for good cause—a prohibition enforced with possible jail time, and accompanied by narrow exceptions that confirmed the law's breadth. 1871 Tex. Laws 1322, art. 6512 (prohibiting public carry absent an "immediate and pressing" need for self-defense, while exempting travelers "carrying arms with their baggage" and people carrying guns on their "own premises" and "place of business"). And West Virginia, added to the Union during the Civil War, similarly allowed public carry only upon a showing of good cause. 1870 W. Va. Laws 702, 703, ch. 153, § 8.

Southern case law, too, reveals a lack of uniformity. Although a few pre-Civil-War decisions interpreted state constitutions in a way that can be read to support a right to carry openly, even in populated public places without good cause, several post-War cases held the opposite. The Texas Supreme Court, for instance, twice upheld that state's good-cause requirement. *English v. State*, 35 Tex. 473 (1871); *State v. Duke*, 42 Tex. 455 (1874). The court remarked that the law—which prohibited carrying "any pistol" in public without good cause, 1871 Tex. Laws 1322, art. 6512—"is nothing more than a legitimate and highly proper regulation" that "undertakes to regulate the place where, and the circumstances under which, a pistol may be carried; and in doing so, it appears to have respected the right to carry a pistol openly when needed for self-defense or in the public service, and the right to have one at the home or place of business," *Duke*, 42 Tex. at 459. The

court explained that the law thus made "all necessary exceptions," and noted that it would be "little short of ridiculous" for a citizen to "claim the right to carry" a pistol in "place[s] where ladies and gentlemen are congregated together." *English*, 35 Tex. at 477-79. Further, the court observed, the good-cause requirement was "not peculiar to our own state," for nearly "every one of the states of this Union ha[d] a similar law upon their statute books," and many had laws that were "more rigorous than the act under consideration." *Id.* at 479; *see also* Frassetto, *The Law and Politics of Firearms Regulation in Reconstruction Texas*, 4 Tex. A&M L. Rev. 95 (2016), *available at* http://bit.ly/29MMHMO.

When the U.S. Supreme Court considered Texas's law in 1894, it took a similar view. After noting that the law "forbid[s] the carrying of weapons" absent good cause and "authoriz[es] the arrest without warrant of any person violating [it]," the Court determined that a person arrested under the law is not "denied the benefit" of the right to bear arms. *Miller v. Texas*, 153 U.S. 535, 538 (1894). Other courts upheld similar good-cause laws against constitutional attacks. *See, e.g.*, *State v. Workman*, 35 W. Va. 367, 367 (1891) (upholding West Virginia's good-cause requirement, which the court had previously interpreted, in *State v. Barnett*, 34 W. Va. 74 (1890), to require specific, credible evidence of an actual threat of violence, and not an "idle threat"). And even when a law wasn't directly challenged as unconstitutional, like in Virginia, courts "administered the law, and consequently,

by implication at least, affirmed its constitutionality." *Id.* (referring to Virginia and West Virginia courts).

To be sure, a couple of cases, in the course of upholding concealed-carry prohibitions, expressed the view that the right to bear arms protects the right, under some circumstances, to openly carry a weapon in public. *See Nunn v. State*, 1 Ga. 243 (1846) (striking down the open-carry portion of a statewide prohibition on openly carrying weapons based on the erroneous view that the Second Amendment applied to the states before 1868). But even within the South, open carry was rare: The Louisiana Supreme Court, for example, referred to "the extremely unusual case of the carrying of such weapon in full open view." *State v. Smith*, 11 La. Ann. 633, 634 (1856). And California's law, of course, does not go nearly as far as the one struck down in *Nunn*, which prohibited *any* form of public carry, and banned most handguns. It *allows* open carry in many rural areas and provides permits for concealed carry on a showing of "good cause"—a regime neither invoked nor challenged here. At any rate, isolated snippets from a few state-court decisions issued decades after the Framing cannot trump the considered judgments of countless courts and legislatures throughout our nation's history.

4. Mid-to-Late-19th-Century American History

States continue to restrict public carry both before and after the 14th Amendment's ratification. As America entered the second half of the

19th century, additional jurisdictions began enacting laws broadly restricting public carry, often subject to limited self-defense exceptions. Before the Civil War, New Mexico passed *An Act Prohibiting The Carrying Of Weapons, Concealed Or Otherwise*, making it unlawful for "any person [to] carry about his person, either concealed or otherwise, any deadly weapon," and requiring repeat offenders to serve a jail term "of not less than three months." 1859 N.M. Laws 94, § 2.

After the Civil War, several other states enacted similar prohibitions notwithstanding the recent passage of the 14th Amendment. West Virginia and Texas enacted laws that broadly prohibited public carry without good cause. West Virginia's law made clear that "[i]f any person go armed with a deadly or dangerous weapon, without reasonable cause to fear violence to his person, family, or property, he may be required to give a recognizance." 1870 W. Va. Laws 702, 703, ch. 153, § 8.[13] Courts construed this self-defense exception narrowly to require specific evidence of a concrete, serious threat. *See, e.g.*, *Barnett*, 34 W. Va. 74. Texas's law contained a similarly circumscribed exception, barring anyone not acting in "lawful defense of the state" ("as a militiaman" or "policeman") from "carrying on or about his person … any pistol" without "reasonable grounds for

[13] A later version reaffirmed the law's breadth by clarifying that it didn't "prevent any person from keeping or carrying about his dwelling house or premises, any such revolver or other pistol, or from carrying the same from the place of purchase to his dwelling house, or from his dwelling house to any place where repairing is done, to have it repaired and back again." 1891 W. Va. Laws 915, 915-16, ch. 148, § 7. Violators could be fined or jailed. *Id.*

fearing an unlawful attack on his person" that was "immediate and pressing." 1871 Tex. Laws 1322, art. 6512.[14]

Beginning immediately after the 14th Amendment's ratification, many legislatures enact laws banning public carry in populated areas. Starting with New Mexico in 1869, many legislatures enacted Northampton-style prohibitions on public carry in cities and other populated areas. New Mexico made it "unlawful for any person to carry deadly weapons, either concealed or otherwise, on or about their persons within any of the settlements of this Territory," while

[14] Then there are the early-20th-century laws, also deemed "longstanding" under *Heller*. To mention just a few: In 1909, Alabama made it a crime for anyone "to carry a pistol about his person on premises not his own or under his control," but allowed a defendant to "give evidence that at the time of carrying the pistol he had good reason to apprehend an attack." 1909 Ala. Laws 258, no. 215, §§ 2, 4. In 1913, New York prohibited all public carry without a permit, which required a showing of "proper cause," and Hawaii prohibited public carry without "good cause." 1913 N.Y. Laws 1627; 1913 Haw. Laws 25, act 22, § 1. A decade later, in 1923, the U.S. Revolver Association published a model law, which several states adopted, requiring a person to demonstrate a "good reason to fear an injury to his person or property" before obtaining a concealed-carry permit. *See* 1923 Cal. Laws 701, ch. 339; 1923 Conn. Laws 3707, ch. 252; 1923 N.D. Laws 379, ch. 266; 1923 N.H. Laws 138, ch. 118; 1925 Mich. Laws 473, no. 313; 1925 N.J. Laws 185, ch. 64; 1925 Ind. Laws 495, ch. 207; 1925 Or. Laws 468, ch. 260. West Virginia and Massachusetts also enacted public-carry licensing laws around this time, prohibiting all carry absent good cause. *See* 1927 Mass. Laws 413; 1925 W. Va. Laws 25 (Extraordinary Session). And other states went further, prohibiting all public carry with no exception for good cause. *See, e.g.*, 1890 Okla. Laws 495, art. 47, §§ 2, 5 (making it a crime for anyone "to carry upon or about his person any pistol, revolver," or "other offensive or defensive weapon," except for carrying "shot-guns or rifles for the purpose of hunting, having them repaired, or for killing animals," or for using them in "military drills, or while travelling or removing from one place to another"); 1903 Okla. Laws 643, ch. 25, art. 45, § 584.

providing a narrow self-defense exception. 1869 N.M. Laws 312, *Deadly Weapons Act of 1869*, § 1. Violators could serve up to 50 days in jail. *Id.* § 3. Wyoming prohibited carrying firearms "concealed or openly" "within the limits of any city, town or village." 1875 Wyo. Laws 352, ch. 52, § 1. Idaho made it unlawful "to carry, exhibit or flourish any … pistol, gun or other-deadly weapons, within the limits or confines of any city, town or village or in any public assembly." 1889 Idaho Laws 23, § 1. Arizona banned "any person within any settlement, town, village or city within this Territory" from "carry[ing] on or about his person, saddle, or in his saddlebags, any pistol." 1889 Ariz. Laws 16, ch. 13, § 1. And, at the turn of the century, Texas and Michigan granted cities the power to "prohibit and restrain the carrying of pistols." 1909 Tex. Laws 105; *see* 1901 Mich. Laws 687, § 8.

By this time, many cities had imposed such public-carry bans for decades.[15] "A visitor arriving in Wichita, Kansas, in 1873," for example, "would have seen signs declaring, 'LEAVE YOUR REVOLVERS AT POLICE HEADQUARTERS, AND GET A CHECK.'" Winkler, *Gunfight* 165 (2011). Dodge City was no different. A sign read: "THE CARRYING OF FIREARMS STRICTLY PROHIBITED." *Id.* Even in Tombstone,

[15] *See, e.g.*, Washington, D.C., Ordinance ch. 5 (1857); Nebraska City, Neb., Ordinance no. 7 (1872); Nashville, Tenn., Ordinance ch. 108 (1873); Los Angeles, Cal., Ordinance nos. 35-36 (1878); Salina, Kan., Ordinance no. 268 (1879); La Crosse, Wis., Ordinance no. 14, § 15 (1880); Syracuse, N.Y., Ordinances ch. 27 (1885); Dallas, Tex., Ordinance (1887); New Haven, Conn., Ordinances § 192 (1890); Checotah, Okla., Ordinance no. 11 (1890); Rawlins, Wyo., Ordinances art. 7 (1893); Wichita, Kan., Ordinance no. 1641 (1899); San Antonio, Tex., Ordinance ch. 10 (1899).

Arizona, people "could not lawfully bring their firearms past city limits. In fact, the famed shootout at Tombstone's O.K. Corral was sparked in part by Wyatt Earp pistol-whipping Tom McLaury for violating Tombstone's gun control laws." Blocher, *Firearm Localism*, 123 Yale L.J. 82, 84 (2013).

* * *

The California law challenged here prohibits public carry only if the firearm is displayed openly in populated places. Given the seven-century Anglo-American tradition of restrictions on the public carry of firearms, that law is no more restrictive than laws enacted by a majority of states and many cities by the early 20th century. Such a law does not even implicate the Second Amendment—let alone violate it.

CONCLUSION

This Court should affirm the judgment of the district court.

Respectfully submitted,

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February 24, 2017

STATEMENT OF RELATED CASES

The following related cases are pending: *Baker v. Kealoha*, No. 12-16258 and *Young v. Hawaii*, No. 12-17808.

/s/ Deepak Gupta
Deepak Gupta

CERTIFICATE OF COMPLIANCE WITH F.R.A.P. 29 and 32(a)(7) AND CIRCUIT RULE 32-1

I hereby certify that the foregoing brief was prepared in 14-point Baskerville font, and that my word processing program, Microsoft Word, counted 7,000 words in the foregoing brief, exclusive of the portions excluded by Rule 32(f).

/s/ Deepak Gupta
Deepak Gupta

CERTIFICATE OF SERVICE

I hereby certify that on February 24, 2017, I electronically filed the foregoing Brief of Amicus Curiae Everytown for Gun Safety in Support of Appellants with the Clerk of the Court of the U.S. Court of Appeals for the Ninth Circuit by using the Appellate CM/ECF system. All participants are registered CM/ECF users, and will be served by the Appellate CM/ECF system.

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