No. 16-894

In the
Supreme Court of the United States

EDWARD PERUTA, ET AL.,

Petitioners,

v.

CALIFORNIA, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE NATIONAL RIFLE ASSOCIATION OF AMERICA, INC. IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

OTHER

INTEREST OF AMICUS CURIAE[1]

The National Rifle Association of America, Inc. ("NRA") is the oldest civil rights organization in America and the Nation's foremost defender of Second Amendment rights. Founded in 1871, the NRA has approximately five million members and is America's leading provider of firearms marksmanship and safety training for civilians. The NRA has a strong interest in this case because its outcome will affect the ability of the many NRA members who reside in California to exercise their fundamental right to carry a firearm.

INTRODUCTION

When the People enshrined in the Constitution the right to "carry weapons in case of confrontation" for the "core lawful purpose of self-defense," *District of Columbia v. Heller*, 554 U.S. 570, 592, 630 (2008), they did not mean to leave the freedom to exercise that right at the mercy of the very government officials

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[1] Pursuant to SUP. CT. R. 37.2(a), amicus certifies that counsel of record for all parties received timely notice of the intent to file this brief; that Respondents State of California, County of San Diego, and William D. Gore have given written consent to the filing of this brief; and that the remaining parties have given blanket consent to the filing of amicus briefs in support of either party. Pursuant to SUP. CT. R. 37.6, amicus certifies that no counsel for any party authored this brief in whole or in part, no party or party's counsel made a monetary contribution to fund its preparation or submission, and no person other than amicus, its members, or its counsel made such a monetary contribution.

whose hands they sought to bind. No, "[t]he very enumeration of the right takes out of the hands of government . . . the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." *Id.* at 634. But local officials in San Diego County have claimed *precisely* this power: to decide, on a case-by-case basis, whether an applicant for a license to "carry weapons in case of confrontation," *id.* at 592, has, in their estimation, shown "good cause" that a license should issue, Pet.App.249.

Worse still, the County has determined that a desire to carry a weapon for the general purpose of self-defense is not a sufficiently good cause. It has thus struck a balance *directly contrary* to the Constitution's demand that the right to self-defense—"the *central component*" of the Second Amendment, *Heller*, 554 U.S. at 599—must be "elevate[d] above all other interests," *id.* at 635. Combined with California's general prohibition on the open carrying of handguns in public locations, CAL. PENAL CODE § 26350, the County's restrictions make it wholly illegal for most typical law-abiding citizens to "carry weapons in case of confrontation," *Heller*, 554 U.S. at 592. That is no less than a frontal assault on the core right protected by the Second Amendment. This Court should grant the writ and the Ninth Circuit's en banc opinion upholding the County's restriction should be reversed.

SUMMARY OF ARGUMENT

I. The plain text of the Second Amendment demonstrates that it protects the right "to bear" arms in public to the same degree as the right "to keep" them in the home. And that proposition is confirmed by abundant historical evidence from every relevant period. The court below determined otherwise only by ignoring the constitutional text entirely and myopically focusing its historical inquiry on "whether the Second Amendment protects, in any degree, the ability to carry concealed firearms in public." Pet.App.11. But that is not the question presented by this case. The question is whether the Second Amendment protects a right to carry firearms outside the home *in some manner*, whether openly or concealed. And the answer to that question is plain, both as a matter of text and the historical record: while the government may regulate the *manner* of carrying firearms in public, it cannot effectively bar typical, law-abiding citizens from carrying firearms outside of the home *at all*, which is what the County has attempted to accomplish here with its "good cause" requirement.

II. The County's limits on the right to bear arms are categorically unconstitutional. *Heller* makes clear that a government restriction that *effectively destroys* a *core Second Amendment right* is invalid per se. The County's policy is just such a restriction. The County has seized the authority to veto the ordinary, law-abiding citizen's choice to carry a firearm, based on nothing more than its judgment that the rights protected by the Second Amendment are too dangerous.

It is in the very nature of an individual constitutional right that those who seek to exercise it—for precisely the reasons the right was protected—do not have to persuade some government functionary anew that those reasons really are sufficient. And where, as here, it is clear that the government officials in charge have determined from the outset that those reasons *are not* sufficient, the right has become eclipsed entirely.

III. The County's restrictions also fail any measure of heightened constitutional scrutiny. Because the rights protected by the Second Amendment are fundamental and necessary to our system of ordered liberty, strict scrutiny should apply, if this Court declines to invalidate the County's policy categorically. But even under intermediate scrutiny, the challenged law must fall. For there is simply no persuasive empirical evidence that restrictions like those at issue here cause *any* beneficial public-safety effect.

ARGUMENT

I. The Second Amendment Protects the Right To Carry Firearms Outside the Home.

The plain text of the Second Amendment conclusively demonstrates that it safeguards the right "to bear" firearms outside the home on equal footing with the right "to keep" them in the home. And the history of the provision removes any conceivable remaining doubt that it protects the right to carry arms outside the home.

A. The Second Amendment's Text Demonstrates that It Applies Outside the Home.

That the Second Amendment's protection extends outside the home is clear from the provision's text. The scope of the Second Amendment right is established by the twin verbs of the operative clause: "the right of the people to *keep* and *bear* Arms, shall not be infringed." U.S. CONST. amend. II (emphases added). That turn-of-phrase, this Court has instructed, is a conjoining of two related guarantees: the "right to possess a firearm . . . for traditionally lawful purposes, such as self-defense," and the right to "carry weapons in case of confrontation"—that is, to " 'wear, bear, or carry' " an operative firearm " 'upon the person or in the clothing or in a pocket' " for self-defense. *Heller*, 554 U.S. at 577, 584, 592 (quoting *Muscarello v. United States*, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting)).

Nor can it seriously be suggested that the right to *bear* arms is nothing more than a right to carry a firearm from room to room *in one's home*. For "[t]o speak of 'bearing' arms within one's home would at all times have been an awkward usage." *Moore v. Madigan*, 702 F.3d 933, 936 (7th Cir. 2012). After all, "the idea of carrying a gun . . . does not exactly conjure up images of father stuffing a six-shooter in his pajama's pocket before heading downstairs to start the morning's coffee." Pet.App.100. And in any event, the right *to keep* arms is sufficient unto itself to secure carrying a firearm from one room in the home to another. "To

speak of 'bearing' arms solely within one's home [thus] would conflate 'bearing' with 'keeping,' in derogation of [this] Court's holding that the verbs codified distinct rights . . . ." *Drake v. Filko*, 724 F.3d 426, 444 (3d Cir. 2013) (Hardiman, J., dissenting).

The en banc Ninth Circuit did not seriously address these textual arguments. And it provided no explanation of how its interpretation of the Second Amendment right—as wholly failing to "protect, in any degree, the right of a member of the general public to carry a concealed weapon in public" in a jurisdiction that bans open carry, Pet.App.43—can be squared with the Second-Amendment text. In fact, the opinion below *did not treat with the Second Amendment's text at all*—it quoted the provision only a single time and made no effort to analyze it or discern its ordinary meaning.

B. History Confirms that the Second Amendment Protects the Right To Carry Firearms Outside the Home.

The historical understanding of the right to keep and bear arms—in every relevant period—confirms what is obvious from the Second Amendment's text: it applies outside the home.

1. As this Court explained in *McDonald v. City of Chicago*, "[s]elf-defense is a basic right, recognized by many legal systems from ancient times to the present day." 561 U.S. 742, 767 (2010). And because the need for self-defense may *arise* in public, it was recognized in England long before the Revolution that the

right may be *exercised* in public. "Sergeant William Hawkins's widely read Treatise of the Pleas of the Crown," *Atwater v. City of Lago Vista*, 532 U.S. 318, 331 (2001), for example, explained that "the killing of a Wrong-doer . . . may be justified . . . where a Man kills one who assaults him in the Highway to rob or murder him." 1 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 71 (1716); *see also* 1 SIR MATTHEW HALE, HISTORIA PLACITORUM CORONAE 481 (Sollom Emlyn ed. 1736) ("If a thief assault a true man *either* abroad *or* in his house to rob or kill him, the true man is not bound to give back, but may kill the assailant, and it is not felony." (emphases added)).

Because the right to self-defense was understood to extend beyond the home, the right to *armed* self-defense naturally was as well. Accordingly, by the late 17th century the English courts recognized that it was the practice and privilege of "gentlemen to ride armed for their security." *Rex v. Knight*, 90 Eng. Rep. 330 (K.B. 1686). A century later, Edward Christian, a law professor at Cambridge, published an edition of Blackstone in which he noted that "every one is at liberty to keep or carry a gun, if he does not use it for the destruction of game." 2 WILLIAM BLACKSTONE, COMMENTARIES *411 n.2 (Christian ed., 1794).

The opinion below adopted a different understanding of English law, as allowing "substantial regulation"—tantamount to an absolute prohibition—of "[t]he right to bear arms." Pet.App.15. The keystone of that interpretation was the court's reading of the medieval Statute of Northampton. Pet.App.16. Adopted

in 1328, that statute provided, *inter alia*, 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, c. 3 (1328). But the historical record shows that Northampton merely limited terrifying the public by carrying "dangerous and unusual" weapons or by carrying with evil intent. *Heller*, 554 U.S. at 627. It did not bar law-abiding citizens from carrying common arms.

To begin, it is important to note that the Statute of Northampton was enacted long before the right to keep and bear arms was recognized in England, at a time when firearms were little more than novelties. In fact, "[t]he earliest records of firearms in Europe date from 1326," KENNETH CHASE, FIREARMS: A GLOBAL HISTORY TO 1700 59 (2003)—a mere *two years* before Northampton was enacted. As firearms became more common, understandings of Northampton's reach dramatically narrowed.

The most explicit recognition of Northampton's limited scope was prompted by King James II's attempt to use that ancient statute to disarm his Protestant detractors. To test that power, in 1686 the King had a case brought against Sir John Knight, "a Bristol merchant and militant Anglican" who had led an effort to enforce the laws against Catholic worship. JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS 104 (1994). James had Knight prosecuted before the King's Bench for violating the Statute of Northampton by going armed "into the Church of St. Michael in

Bristol in the time of Divine Service." *Id.* at 105. The jury acquitted Knight, and Chief Justice Holt interpreted Northampton as merely declaring the common-law rule against "go[ing] armed to terrify the King's subjects." *Sir John Knight's Case*, 87 Eng. Rep. 75, 76 (K.B. 1686). "[T]ho' this statute be almost gone in desuetudinem," Holt added, "yet where the crime shall appear to be malo animo"—that is, with a specific, evil intent—"it will come within the Act (tho' now there be a general connivance to gentlemen to ride armed for their security)." *Rex v. Knight*, 90 Eng. Rep. 330 (K.B. 1686) (different reporter).

The en banc court failed utterly to grapple with *Knight*. It asserted without any citation that Knight was acquitted "only because, as a government official, he was exempt from the statute's prohibition." Pet.App.20. But that hypothesis is flatly inconsistent with the primary source evidence: *all* of the reported accounts of the decision refer to Northampton's intent requirement, *see* 87 Eng. Rep. at 76; 90 Eng. Rep. at 330, *none* mention whether Knight was a government official. It is inconsistent with the secondary accounts of the case: while one contemporary, unofficial description of the case suggests that Knight may have been a government officer, it explicitly attributes his acquittal to the fact that his carrying of arms was not done "with any ill design." 1 NARCISSUS LUTTRELL, A BRIEF HISTORICAL RELATION OF STATE AFFAIRS FROM SEPTEMBER 1678 TO APRIL 1714 389 (1857). And it is inconsistent with several other, undisputed features of the case: for instance, the court never explains why

Knight would have been "bound to good behaviour" after acquittal, 90 Eng. Rep. at 331—or, indeed, how the case could have gone to a jury *at all*—had Knight been outside the scope of the statute entirely because of his status as a government official.

The understanding of Northampton *actually* adopted by *Knight* is reflected by numerous other cases of the era, *e.g.*, *Queen v. Soley*, 88 Eng. Rep. 935, 936-37 (Q.B. 1701); *Chune v. Piott*, 80 Eng. Rep. 1161, 1162 (K.B. 1615); *King v. Dewhurst*, 1 St. Tr. 529, 601-02 (Lancaster Assize 1820), as well as by the leading contemporary legal commentators. As Michael Dalton's influential treatise explained, for example, if men suspected of going armed for an illicit purpose, upon being warned by a Justice of the Peace that such conduct is prohibited by Northampton, "do depart in peaceable Manner, then hath the Justice no Authority . . . to commit them to Prison, nor to take away their Armour." MICHAEL DALTON, THE COUNTRY JUSTICE 129 (1727).

Indeed, the treatises cited by the court below in favor of its broad reading of Northampton in fact *demolish* that reading. Blackstone, for instance, interpreted the statute as proscribing "[t]he offence of *riding* or *going armed*, with *dangerous or unusual weapons*," since such conduct "terrif[ied] the good people of the land." 4 WILLIAM BLACKSTONE, COMMENTARIES *148-49 (St. George Tucker ed., 1803) (third emphasis added). And William Hawkins, in language the court below neglects to cite, *expressly notes* that "no wearing

of arms is within the meaning of [Northampton] unless it be accompanied with such circumstances as are apt to terrify the people" and that as a consequence, persons armed "to the intent to defend themselves, against their adversaries, are not within the meaning of this statute, because they do nothing *in terrorem populi*." 1 HAWKINS, *supra*, at 136.

2. When the colonists brought the right to keep and bear arms with them across the Atlantic and, ultimately, incorporated it into our highest law, they continued to understand that right as fully protecting the carrying of ordinary arms outside the home for lawful purposes.

That is confirmed by the practices of the Founders themselves. George Washington, for example, carried a firearm on an expedition into the Ohio Country. WILLIAM M. DARLINGTON, CHRISTOPHER GIST'S JOURNALS 85–86 (1893). Thomas Jefferson advised his nephew to "[l]et your gun . . . be the constant companion of your walks," 1 THE WORKS OF THOMAS JEFFERSON 398 (letter of August 19, 1785) (H. A. Washington ed., 1884), and Jefferson himself traveled with pistols for self-protection and designed a holster to allow for their ready retrieval, *see Firearms*, MONTICELLO, https://goo.gl/W6FSpM. Even in defending the British soldiers charged in the Boston Massacre, John Adams conceded that, in this country, "every private person is authorized to arm himself; and on the strength of this authority I do not deny the inhabitants had a right to arm themselves at that time for their defence." John Adams, *First Day's Speech in Defence of*

the British Soldiers Accused of Murdering Attucks, Gray and Others, in the Boston Riot of 1770, *in* 6 MASTERPIECES OF ELOQUENCE 2569, 2578 (Hazeltine et al. eds., 1905). And as an attorney, Patrick Henry regularly carried a firearm while walking from his home to the courthouse. HARLOW GILES UNGER, LION OF LIBERTY 30 (2010).

Early American treatises confirm that the Founding generation enjoyed a right to carry firearms outside the home. St. George Tucker, for instance, observed in his widely-read American edition of Blackstone that "[i]n many parts of the United States, a man no more thinks, of going out of his house on any occasion, without his rifle or musket in his hand, than an European fine gentleman without his sword by his side," 5 WILLIAM BLACKSTONE, COMMENTARIES App. n.B, at 19 (St. George Tucker ed., 1803); and he further made clear that Congress would exceed its authority if it "pass[ed] a law prohibiting any person from bearing arms," 1 *id.* at App. n.D, at 289. Similarly, William Rawle's "influential treatise," *Heller*, 554 U.S. at 607, indicates that "the carrying of arms abroad by an individual" is protected by the Second Amendment, unless "attended with circumstances giving just reason to fear that he purposes to make an unlawful use of them." WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 123 (1825).

This understanding was also reflected in the contemporary judicial decisions. Indeed, it is reflected in the *very decisions the court below purported to rely*

upon. In *State v. Reid*, for example, Alabama's highest court held that while the Legislature could "enact laws in regard to *the manner* in which arms shall be borne," the Second Amendment did not permit it to enact "a statute which, under the pretence of *regulating* [the manner of bearing arms], amounts to a *destruction* of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence." 1 Ala. 612, 616 (1840) (emphases added). Similarly, in *Nunn v. State*, 1 Ga. 243 (1846)—a case which *Heller* cites extensively and characterizes as "perfectly captur[ing]" the correct understanding of the Second Amendment's purpose, 554 U.S. at 612—the Georgia Supreme Court struck down a ban on carrying firearms openly (even as it approved limitations on carrying them in a concealed manner) as void under the Second Amendment. *Nunn*,1 Ga. at 249–51; *see also Bliss v. Commonwealth*, 12 Ky. 90, 91–93 (1822).

3. Those who wrote and ratified the Fourteenth Amendment in 1868 understood the right to bear arms in precisely the same way. Indeed, Chief Justice Taney recoiled so strongly in the infamous *Dred Scott* case from recognizing African Americans as citizens precisely because he understood that doing so would entitle them "to keep and carry arms wherever they went." *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 417 (1856).

The post-war South attempted to suppress the rights of former slaves to carry arms for their self-defense at every turn. Mississippi's notorious "Black

Code," for example, forbade any "freedman, free negro or mulatto" to "keep or carry fire-arms of any kind." An Act To Punish Certain Offences Therein Named, and for Other Purposes, ch. 23, § 1, 1865 Miss. Laws 165. An ordinance enacted in several Louisiana towns provided that no freedman "shall be allowed to carry fire-arms, or any kind of weapons, within the parish, without the special written permission of his employers, approved and indorsed by the nearest and most convenient chief of patrol." 1 WALTER L. FLEMING, DOCUMENTARY HISTORY OF RECONSTRUCTION 279–80 (1906). And a series of 1866 reports to Congress from a Freedmen's Bureau Commissioner in Kentucky lamented that that State's "civil law prohibits the colored man from bearing arms," Letter from Assistant Comm'r Fisk, H.R. Exec. Doc. No. 70, 39th Cong., at 233 (1st Sess. 1866), and detailed how "[o]utlaws in different sections of the State . . . make brutal attacks and raids upon the freedmen, who are defenceless, for the civil law-officers disarm the colored man and hand him over to armed marauders," *id.* at 239.

As this Court itself explained at length in *McDonald*, the Reconstruction Congress sought to end this legacy of prejudice, *see* 561 U.S. at 770–77, an effort that culminated in the adoption of the Fourteenth Amendment, which ensured the right of all Americans, regardless of race, to carry firearms to defend themselves.

4. The court below attempted to sidestep this overwhelming historical evidence by refocusing the

historical inquiry into "whether the Second Amendment protects, in any degree, the ability to carry *concealed* firearms in public." Pet.App.11 (emphasis added). But the court's reasoning on this score erred twice over. Whether the Second Amendment protects *a particular manner* of carrying firearms is the wrong question. And having asked the wrong question, the court arrived at the wrong answer.

While the Constitution protects rights of general application, it rarely spells out every detail of their exercise or prohibits specific types of limits the government might adopt. If it tried, it "would partake of the prolixity of a legal code." *M'Culloch v. State*, 17 U.S. 316, 407 (1819). And the attempt would also be futile, since the effect of any given restriction on the exercise of a right depends to a great extent on context: a limit that is innocuous in one context may gut the right in another.

Thus, this Court would not analyze a law banning yard signs by asking whether the text or history of the Free Speech Clause specifically protects the right to put signs in one's yard; nor would it even ask whether that right, in the abstract, had previously found protection in the courts. No, it would ask whether such a restriction *viewed in context*—in light of the other "options to which [speakers] realistically are relegated"—amounts to an impermissible infringement of the right to free speech. *Linmark Assocs., Inc. v. Willingboro Twp.*, 431 U.S. 85, 93 (1977); *see also City of Ladue v. Gilleo*, 512 U.S. 43, 56 (1994). So too here, the proper question is not whether the

Second Amendment's text and history protect in terms a right to carry firearms in a particular manner. It is whether the restrictions the County has imposed on the manner of bearing arms—viewed in light of the other "options to which [law-abiding citizens] realistically are relegated," *Linmark*, 431 U.S. at 93—amount to an impermissible infringement of the right to carry arms for self-defense.

The historical evidence shows beyond any doubt that the Second Amendment protects the right to carry firearms outside the home in at least *some* manner. Thus, when open carry already is banned, the government may not also make carrying concealed firearms effectively impossible for the typical law-abiding citizen. Only three of the pieces of historical evidence cited by the Ninth Circuit—*Nunn*, *Reid*, and *Bliss*—even discuss a restriction that is truly analogous to the one imposed here: a restriction on carrying *concealed* firearms alongside a general ban on carrying them *openly*. And "[t]he crux of these historical precedents . . . is that a prohibition against both open and concealed carry without a permit is different in kind, not merely in degree, from a prohibition covering only one type of carry." *Drake*, 724 F.3d at 449 (Hardiman, J., dissenting). Thus, whether or not the government can prohibit concealed carrying or open carrying individually, *it cannot prohibit both*. *Nunn*, 1 Ga. at 251; *Reid*, 1 Ala. at 617–19; *Bliss*, 12 Ky. at 92–93.

II. The County's Restrictive Application of California's "Good Cause" Requirement Is Categorically Unconstitutional.

Given that the Second Amendment's protection extends to the bearing of arms outside the home, *Heller* makes the next analytical steps clear. Because the Second Amendment "elevates" its core protections "above all other interests," infringements upon its "core protection" must be held unconstitutional categorically, not "subjected to a freestanding 'interest-balancing' approach." *Heller*, 554 U.S. at 634–35. Indeed, the applicability of this categorical approach to severe restrictions on the right to *bear* arms is plain from this Court's reliance on *Nunn*—which it characterized as striking down one of the "[f]ew laws in the history of our Nation" (a restriction on *carrying* firearms) "[that] have come close" to the law at issue in *Heller* (a restriction on *keeping* them). *Id.* at 629.

Like the laws in *Heller* and *Nunn*, the requirement that applicants show a "good cause" for bearing arms that "distinguish[es] the applicant from the mainstream," Pet.App.249, 252, *extinguishes* the core Second Amendment rights of *typical* citizens—who by definition cannot distinguish their need for self-defense from that of the general community. Accordingly, it is unconstitutional per se.

The County's demand that a citizen prove to its satisfaction that he has a good enough reason to carry a handgun is flatly inconsistent with the nature of the Second Amendment right. The existence of that right

is itself reason enough for its exercise. The Constitution has conferred a right to armed self-defense, and the government is not free to deny a handgun permit to a trained, law-abiding adult citizen who has met every legitimate public-safety requirement. A constitutional right to engage in conduct means not having to give the government a reason to engage in that conduct.

These principles are deeply embedded in the law. Across a wide variety of constitutional rights, courts have recognized that the government has utterly failed to honor a right if it demands to know—and assess *de novo*—the reasons justifying each occasion of its exercise.

The rejection of this "ask-permission-first" type of restriction is most familiar in the context of the First Amendment's free speech guarantee. There, it has been understood for centuries that the most serious infringement on the right of free expression is the "prior restraint": a requirement that before you speak, you must explain to the government's satisfaction why what you have to say is worth hearing. *See New York Times Co. v. United States*, 403 U.S. 713, 714 (1971); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 713–23 (1931); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 732–44 (1833). While the state can require that you seek its approval before exercising your First Amendment rights for the purpose of regulating the time, place, and manner of your speech, *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 130 (1992); *Cox v. New Hampshire*, 312

U.S. 569, 574 (1941), the Constitution simply will not brook a licensing scheme that allows government officials to bar you from speaking because "they do not approve" of the proposed speech's "effects upon the general welfare," *Staub v. City of Baxley*, 355 U.S. 313, 322 (1958).

Similar principles are also well established in the law governing the right to free exercise of religion. Of particular importance here, the government cannot arrogate to itself the authority to second-guess citizens' religious judgments. Those judgments are for citizens, and citizens alone, to make. Thus, while courts can determine whether an asserted religious conviction is an "honest" one, *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 716 (1981), they cannot proceed to "question the centrality" or "plausibility" of that conviction, *Employment Div. v. Smith*, 494 U.S. 872, 887 (1990); *see also Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2778 (2014).

Because the Second Amendment is not a "second-class right," *McDonald*, 561 U.S. at 780 (plurality opinion), it is unsurprising that this Court has in this context already embraced the principle that the exercise of the right to keep and bear arms cannot be conditioned on the government's discretionary, ad hoc weighing of that right's importance. "A Constitutional guarantee subject to future . . . assessments of its usefulness is no constitutional guarantee at all." *Heller*, 554 U.S. at 634. While the government may be able to regulate the *manner* of exercising the Second Amendment right through training and the like, "[t]he very

enumeration of the right takes out of the hands of government . . . the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." *Id.* The County has seized *precisely* this power. By requiring its residents to beg the leave of local officials before bearing arms publicly, the government has seized the unbridled power to ban any exercise of this core Second Amendment conduct for no reason other than its disapproval of that conduct.

III. The County's Application of California's Licensing Regime Fails Any Measure of Heightened Constitutional Scrutiny.

As shown above, this Court's decision in *Heller* requires that the County's restrictions be held categorically unconstitutional, without application of any "tiers of scrutiny." But even if it were necessary to resort to tiers of scrutiny, the restrictions must still fall. The County is simply unable to show that its restrictions substantially advance any of the governmental interests it asserts.

1. The challenged policy must at least be justified as necessary to advance the most compelling of government interests. It is well established, after all, that "strict judicial scrutiny [is] required" if a law "impinges upon a fundamental right explicitly or implicitly protected by the Constitution." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973). And the right to bear arms not only is specifically enumerated in the constitutional text; it was also counted "among those fundamental rights necessary to our

system of ordered liberty" by "those who drafted and ratified the Bill of Rights." *McDonald*, 561 U.S. at 768, 778.

2. Ultimately the choice between strict and intermediate scrutiny is immaterial, however, since the restrictions here fail either. That is so, first, as a matter of law. To the extent that the County's policy reduces firearm violence at all, it can do so *only by reducing the quantity of firearms in public*. And as this Court has held in a related context, that is simply "not a permissible strategy"—even if used as a means to further the end of increasing public safety. *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 445 (2002) (Kennedy, J., concurring).

In the secondary-effects area of free speech doctrine, this Court has allowed the government to regulate certain types of expressive conduct—most commonly, adult entertainment—to reduce the negative effects associated with the expression—such as the increased crime that occurs in neighborhoods with a high concentration of adult theaters. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47–51 (1986). But as the controlling[2] opinion in *Alameda Books* makes clear, the government *may not* rely on the proposition "that it will reduce secondary effects by reducing speech in the same proportion." 535 U.S. at 449 (Kennedy, J., concurring in judgment). "It is no trick

[2] *See, e.g.*, *Joelner v. Village of Washington Park*, 378 F.3d 613, 624 n.7 (7th Cir. 2004); *Center for Fair Pub. Policy v. Maricopa Cty.*, 336 F.3d 1153, 1161 (9th Cir. 2003).

to reduce secondary effects by reducing speech or its audience; but [the government] may not attack secondary effects indirectly by attacking speech." *Id.* at 450.

Though this principle developed under the First Amendment, federal courts have also applied it in the context of the right to keep and bear arms. In *Heller v. District of Columbia ("Heller III")*, 801 F.3d 264, 280 (D.C. Cir. 2015), for example, the U.S. Court of Appeals for the D.C. Circuit struck down the District of Columbia's prohibition on registering more than one pistol per month. The District defended that ban as designed to "promote public safety by limiting the number of guns in circulation," based on its theory "that more guns lead to more gun theft, more gun accidents, more gun suicides, and more gun crimes." *Id.* But the D.C. Circuit rejected this line of argument, explaining that "taken to its logical conclusion, that reasoning would justify a total ban on firearms kept in the home," and so it simply cannot be right. *Id.* Similarly, the U.S. District Court for the District of Columbia, which recently held that the District's good cause restriction on carrying firearms in public (similar to that at issue here) is likely unconstitutional under the Second Amendment, reasoned that "it is not a permissible strategy to reduce the alleged negative effects of a constitutionally protected right by simply reducing the number of people exercising the right." *Grace v. District of Columbia*, 187 F. Supp. 3d 124, 148 (D.D.C. 2016) (quotation marks omitted).

3. Even if this objection is put aside, the County's restriction still fails. For there is simply no empirical evidence that restrictions like the ones at issue here cause an increase in public safety.

Indeed, this is shown by the experience of the 42 States that *do not* restrict the carrying of firearms to a privileged few. *See Gun Laws*, NRA-ILA, https://goo.gl/Nggx50. Unlike violent criminals with a total disregard for the law, evidence indicates that duly-licensed citizens who carry firearms in these States pose a disproportionately *small* threat to public safety.

For example, researchers found that "concealed carry licensees [in Texas] had arrest rates far lower than the general population for every category of crime." H. STERLING BURNETT, NAT'L CTR. FOR POLICY ANALYSIS, TEXAS CONCEALED HANDGUN CARRIERS: LAW-ABIDING PUBLIC BENEFACTORS 1 (2000), http://goo.gl/1Ebwpb. Similarly, Florida has issued nearly 3.5 million concealed carry licenses since 1987 and has revoked less than 0.5% of them for any reason, with the vast majority of those revocations having nothing to do with misuse of a firearm. *See* FLORIDA DEP'T OF AGRIC. & CONSUMER SERVS., DIV. OF LICENSING, CONCEALED WEAPON OR FIREARM LICENSE SUMMARY REPORT, OCT. 1, 1987 – JANUARY 31, 2017, http://goo.gl/yFzIwv. Accordingly, even social scientists in favor of gun control have acknowledged that there would be "relatively little public safety impact if courts invalidate laws that prohibit gun carrying out-

side the home, assuming that some sort of permit system for public carry is allowed to stand," since "[t]he available data about permit holders . . . imply that they are at fairly low risk of misusing guns." Philip J. Cook et al., *Gun Control After* Heller, 56 UCLA L. REV. 1041, 1082 (2009).

These findings are confirmed by several independent, comprehensive studies. For instance, in 2004 the National Academy of Sciences' National Research Council (NRC) conducted an exhaustive review of the relevant social-scientific literature. The NRC concluded that "with the current evidence it is not possible to determine that there is a causal link between the passage of right-to-carry laws and crime rates." NATIONAL RESEARCH COUNCIL, FIREARMS AND VIOLENCE: A CRITICAL REVIEW 150 (Charles F. Wellford, John V. Pepper, & Carol V. Petrie eds., 2004), http://goo.gl/WO1ZNZ; *see also* Robert Hahn et al., *Firearms Laws and the Reduction of Violence: A Systematic Review*, 28 AM. J. PREVENTATIVE MED. 40, 53 (2005), http://goo.gl/zOpJFL.

As Judge Posner concluded in *Moore* after surveying "the empirical literature on the effects of allowing the carriage of guns in public," that data does not provide "more than merely a rational basis for believing that [a ban on public carriage] is justified by an increase in public safety." *Moore v. Madigan*, 702 F.3d 933, 939, 942 (7th Cir. 2012). Under this Court's precedents, that does not suffice.

CONCLUSION

For the above reasons, this Court should grant the writ and reverse the judgment of the Ninth Circuit.

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Respectfully submitted,

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