No. 18-55717

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHELLE FLANAGAN, *et al.*,
Plaintiffs-Appellants,

v.

XAVIER BECERRA, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court
for the Central District of California
No. 2:16-cv-6164-JAK-AS
Hon. John A. Kronstadt, Judge

ANSWERING BRIEF FOR THE STATE APPELLEE

Xavier Becerra
Attorney General of California
Edward C. DuMont
Solicitor General
Thomas S. Patterson
Senior Assistant Attorney General
Michael J. Mongan
Samuel P. Siegel
Deputy Solicitors General
Jonathan M. Eisenberg
P. Patty Li
Deputy Attorneys General
1300 I Street
Sacramento, CA 95814
(916) 210-6269
Sam.Siegel@doj.ca.gov
Attorneys for Defendant-Appellee
Xavier Becerra, Attorney General of California

November 20, 2018

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

EARLY AMERICAN STATUTES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

INTRODUCTION

California has compelling interests in protecting both individual rights and public safety. With respect to the public carrying of firearms, the Legislature has carefully balanced these sometimes competing interests. In general, residents may carry guns, without any special license, in their homes or businesses, on much other private property (with the permission of the owner), during various activities, and in many less-populated areas of the State. They may also carry in emergencies, if they reasonably believe that doing so is necessary to protect persons or property from immediate and grave danger while, if possible, summoning public assistance. On the other hand, when it comes to the carrying of firearms by private individuals in populated places such as the streets, parks, plazas, or shopping centers of cities and towns, California has delegated the authority to decide who may carry firearms to local law enforcement officials. This system of tailored rules, exceptions, and local control strikes a proper balance between individual rights and the public interest in order and safety.

Plaintiffs disagree. In their view, the Supreme Court's decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008), requires the State to allow them to carry firearms in virtually any public place. That is wrong. In the course of declaring that the Second Amendment "takes certain policy choices off the table," *id.* at 636, *Heller* made equally clear that the individual right to bear arms has always been,

and remains, subject to reasonable public regulation. Indeed, California's public carry laws are among the measures that *Heller* deems presumptively lawful. They are part of a tradition of strictly limiting the public carrying of firearms in populated places that dates back more than six centuries. And if history alone is not enough, they also satisfy any level of heightened constitutional scrutiny. No one disputes that California has a compelling interest in protecting public safety. There is a substantial body of empirical evidence showing that restrictions on public carry can advance that interest. And the State has crafted a public carry regime that is narrowly tailored to serve that end.

STATEMENT OF JURISDICTION

The State agrees with plaintiffs' statement of jurisdiction.

STATEMENT OF THE ISSUE

Whether California's system of regulating where people may publicly carry firearms, as implemented by the Sheriff of Los Angeles County, is consistent with the Second Amendment.

STATEMENT OF THE CASE

A. California's Regulatory System

California "has a multifaceted statutory scheme regulating firearms." *Peruta v. Cty. of San Diego*, 824 F.3d 919, 925 (9th Cir. 2016) (en banc). Consistent with a longstanding Anglo-American tradition, the State generally allows the carrying of firearms in or around one's own home or business or other private property, in

less-populated places, and by certain persons or for certain purposes—while generally restricting it in the public spaces of cities and towns.

For example, ordinary, law-abiding adults in California may generally carry a gun in or around their homes, at their own places of business, or on other private property they lawfully possess. Cal. Penal Code §§ 25605, 26035. That includes temporary residences or campsites. *Id.* § 26055. They may carry guns openly on another's private property with the owner's permission, so long as the property is not a "public place." *Id.* §§ 25850(a), 26350; *see also id.* § 25400. They may transport guns (unloaded and properly secured) between authorized locations, *id.* § 25505, including between a residence and place of business, or to or from a business or residence for the purpose of repairing, selling, loaning, or transferring the gun. *Id.* §§ 25520, 25525, 25530. And anyone may carry a gun in an otherwise unauthorized place if he reasonably believes doing so is necessary to protect any person or property from "immediate, grave danger," while if possible notifying and awaiting local law enforcement. *Id.* § 26045.

California also allows the carrying of loaded guns while engaged in various activities and professions. Licensed hunters and fishermen may carry while hunting or fishing. Cal. Penal Code §§ 25640, 26040. Members of shooting clubs may carry while hunting on club premises, as may persons practicing at target ranges. *Id.* §§ 25635, 26005. Active and honorably retired peace officers may

carry in most places. *Id.* §§ 25450, 25900. So may guards or messengers who work for common carriers, banks, or other financial institutions while engaged in the shipping of things of value. *Id.* § 25630. Security guards, alarm company operators, animal control officers, and zookeepers may carry in the course of their employment. *Id.* §§ 26025, 26030.

California law is more restrictive with respect to the public carrying of guns by most individuals in populated places. The State generally prohibits the carrying of a loaded or unloaded firearm, whether open or concealed, in "any public place or on any public street" of incorporated cities. Cal. Penal Code § 25850(a); *see also id.* §§ 25400, 26350. A similar restriction applies to public streets or places in any "prohibited area" of unincorporated territory. *Id.* §§ 25850(a), 26350(a). In incorporated areas, "public place[s]" are those that members of the public may access "'without challenge'" (such as sidewalks, plazas, squares, or parks), and "public streets" are publicly-accessible thoroughfares. *People v. Strider*, 177 Cal. App. 4th 1393, 1401-1402 (2009). In unincorporated areas, "public places" and "public streets" are limited to those that the public may access without challenge and that are within "towns and villages." 51 Op. Cal. Att'y Gen. 197, 200-201 (Oct. 3, 1968). Thus, most people may generally carry a gun in any part of an unincorporated area that is not in a town or village, and in any part of an incorporated city or unincorporated town that is not a "public place" or a "public

street." Generally, however, the law forbids ordinary individuals from carrying guns in the public spaces of cities or towns.

Qualified residents who want to carry a gun in situations not otherwise provided for by law may apply for a license to carry one—usually concealed, although in some cases openly. *See* Cal. Penal Code §§ 26150, 26155.[1] The State has delegated the authority to issue such licenses to sheriffs or chiefs of police. *Id.* An applicant must show: (1) good moral character, (2) "[g]ood cause" to issue a license, (3) local residence or a local principal place of employment or business where the applicant spends a substantial amount of time, and (4) completion of a firearm safety course. *Id.* §§ 26150(a), 26155(a).

California allows local licensing authorities to adopt their own standards for what constitutes "good cause" to issue a public carry license. *Cf.* Cal. Penal Code § 26160 (requiring licensing authorities to publish written policies). Some sheriffs will generally issue a license based simply on an otherwise-qualified applicant's stated desire to carry a gun for self-defense. *See, e.g.*, California State Auditor, *Concealed Carry Weapon Licenses* 1 (Dec. 2017) (describing Sacramento's policy).[2] In other counties—often densely populated ones—sheriffs have adopted

[1] Licenses generally authorize only concealed carry; but in counties with fewer than 200,000 residents, the sheriff may issue a license allowing open carry in that county only. Cal. Penal Code §§ 26150(b)(1)-(2), 26155(b)(1)-(2).

[2] *Available at* https://www.auditor.ca.gov/pdfs/reports/2017-101.pdf.

a "good cause" policy that makes it much more difficult to obtain a license. *See, e.g.*, *San Francisco Police Department CCW Licensing Policy*, https://sanfranciscopolice.org/sites/default/files/FileCenter/Documents/25869-CCWLicensingPolicy%5B1%5D.pdf (last visited Nov. 19, 2018).

This case involves the Los Angeles County Sheriff's good cause policy. ER 2196. Under that policy, good cause exists "only if there is convincing evidence of a clear and present danger to life, or of great bodily harm to the applicant, his spouse, or dependent child, which cannot be adequately dealt with by existing law enforcement resources, and which danger cannot be reasonably avoided by alternative measures, and which danger would be significantly mitigated by the applicant's carrying of a concealed firearm." ER 1374.

B. Proceedings below

Plaintiffs filed this lawsuit in August 2016, shortly after this Court's en banc decision in *Peruta v. County of San Diego*. That decision rejected a challenge to the good cause requirements for obtaining concealed carry licenses in San Diego and Yolo Counties, based on a conclusion that "the Second Amendment does not preserve or protect a right of a member of the general public to carry concealed firearms in public." 824 F.3d 919, 924 (9th Cir. 2016) (en banc). The Court reserved judgment on whether the "Second Amendment protects some ability to carry firearms in public, such as open carry." *Id.* at 939.

The plaintiffs in this case are residents of Los Angeles County and the California Rifle & Pistol Association, a non-profit organization with members who live in the County. ER 2199-2201. Each individual plaintiff applied for a concealed carry license from the Los Angeles County Sheriff, and each application was denied. ER 2199-2200. Plaintiffs note that *Peruta* "did not address whether the Second Amendment protects the right to publicly carry a firearm for self-defense," ER 2197-2198, and assert a right "to carry arms in some manner"—either openly or concealed—"for self-defense in case of confrontation" in "non-sensitive, public places." ER 2196; *see also* AOB 36 n.9.

The district court rejected plaintiffs' Second Amendment claim.[3] It held that *Peruta* barred the claim to the extent it was "based on California's concealed carry laws and their enforcement" by the Los Angeles Sheriff. ER 37. With respect to open carry, the court reasoned that California's restrictions do not "infringe upon the 'core' Second Amendment right of self-defense within the home." ER 9. It also noted that "exceptions that permit the carrying of a loaded firearm in public for certain purposes" serve to "'lighten' any burden that the laws impose on rights protected by the Second Amendment." ER 9-10. Accordingly, "intermediate

[3] Plaintiffs also advanced an equal protection claim. ER 2212-2213. The district court dismissed that claim, ER 39-40, and plaintiffs do not renew it here.

scrutiny is the most stringent level [of review] that may be applied to California's open-carry laws." ER 9.

After surveying the evidence submitted by both sides, the court sustained California's open carry restrictions. It concluded that those laws further the "important government interest" of promoting public safety and reducing violent crime. ER 10. Among other things, the court noted that "'open carry creates a potentially dangerous situation for the Citizens of California,'" including the possibility of confrontations between law enforcement and others carrying guns. *Id.* The court further held that there was a "reasonable fit" between California's restrictions and the State's public safety interests. ER 11-14. In light of the evidence, the Legislature "reasonably could have inferred that there was a relationship between prohibiting individuals from carrying firearms openly in public" and those goals. ER 12.[4]

[4] After plaintiffs filed their appeal in this case, a panel of this Court held that Hawaii's public carry restrictions, as implemented by the County of Hawaii, violate the Second Amendment. *Young v. Hawaii*, 896 F.3d 1044, 1074 (9th Cir. 2018). On September 14, 2018, Hawaii sought rehearing en banc. The State in this case has filed a petition supporting further review in *Young* and asking the Court to hear this case initially en banc (unless the Court accepts Hawaii's suggestion to vacate *Young* and remand that case for further proceedings). *See* Dkt. 12. This brief has been framed on the premise that the *Young* panel opinion will not be binding on this case. If that premise proves incorrect, the State respectfully requests the opportunity to submit a supplemental brief.

SUMMARY OF ARGUMENT

In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court recognized that the Second Amendment protects an individual right to keep and bear arms—and that public authorities may nonetheless adopt a variety of reasonable gun-related regulations. *Heller* teaches that courts must evaluate the permissibility of such restrictions by considering first the history of regulation in England and America. That history is of central importance because the Second Amendment (and later the Fourteenth) did not create a new right, but rather recognized as part of the Constitution a pre-existing common-law right, with similarly pre-existing contours and limitations. Here, plaintiffs contend that they have a right to carry firearms in virtually any public place. That sweeping contention cannot be reconciled with Anglo-American legal history, or therefore with *Heller*. Since firearms first appeared, public authorities have often significantly restricted the carrying of firearms by private persons in public places—especially in the populated places of cities and towns. The California statutes and policies that plaintiffs challenge here are consistent with that historical tradition, and thus with the Second Amendment.

If history alone does not resolve this case, then California's public carry restrictions are nonetheless constitutional under any form of heightened judicial scrutiny. They are tailored to advance the compelling interest in public safety,

which the Legislature could reasonably conclude (with the support of a significant body of empirical research) would be substantially undermined by allowing most private individuals the ability to carry guns in almost any public place, over the objection of the local authorities responsible for public law enforcement.

California allows the carrying of guns without any special license in many circumstances, not only in residents' homes or businesses and on much other private property, but also in various public places, including in less-populated areas, while engaged in activities such as hunting or fishing, or in any place if law enforcement is not available to protect against an immediate and grave danger to life or property. The State also allows local sheriffs or police chiefs to issue licenses authorizing public carry—and to determine what showing of "good cause" must be made to obtain such a license in their respective jurisdictions.

Plaintiffs would prefer a more permissive regime, under which the Los Angeles Sheriff would be forced to allow any otherwise-qualified individual to carry a gun in almost any public place based on nothing more than a stated desire to do so. California permits local authorities to use such a standard; but it also allows them to adopt a much more restrictive view of "good cause," such as the one currently in use in Los Angeles County. California's system allows for local variation, but it permits the imposition of tight restrictions on public carry by private persons in populated areas, where local law enforcement views such

restrictions as the best way to protect public safety. In light of history, empirical evidence, and common sense, this calibrated approach to regulating the public carrying of guns is substantially related to the pursuit of important public interests. Indeed, it is narrowly tailored, and the interest at issue is compelling. Under any level of judicial scrutiny, California's policy choices in this critical area are not ones that the Constitution has taken "off the table." *Heller*, 554 U.S. at 636.

ARGUMENT

Plaintiffs argue (*e.g.*, AOB 15) that the Second Amendment protects a broad right to carry firearms in almost any public place. Recognizing this Court's holding in *Peruta v. County of San Diego*, 824 F.3d 919, 925 (9th Cir. 2016) (en banc), that history does not support the existence of any right to concealed carry, they argue for a right to *public* carry, which the State could accommodate by allowing them to carry their guns either openly or concealed. *See* AOB 36 n.9. But whatever the exact scope of the Second Amendment outside the home, it does not give plaintiffs a right to carry guns on the streets and sidewalks of Los Angeles, or in the public spaces of California's other cities and towns.

I. THE SECOND AMENDMENT ALLOWS SUBSTANTIAL RESTRICTIONS ON PUBLIC CARRY

A. *Heller* Does Not Recognize Any Sweeping Right to Public Carry

Heller holds that the Second Amendment protects an individual right to keep and bear arms. 554 U.S. at 636. The *Heller* Court did not "undertake an

exhaustive historical analysis . . . of the full scope of the Second Amendment" or attempt to "clarify the entire field." *Id.* at 626, 635. It did, however, provide important guidance.

First, *Heller* explains that "the most natural reading of 'keep Arms'" is "to 'have weapons,'" 554 U.S. at 582, and that "bear arms" is most naturally read to mean "'wear, bear, or carry upon the person or in the clothing or in a pocket, for the purpose of being armed and ready for offensive or defensive action in a case of conflict with another person,'" *id.* at 584 (ellipses omitted).

Second, the right to bear arms must be construed and applied with careful attention to its "historical background." *Heller*, 554 U.S. at 592; *see id*. at 576-626. This is critical "because it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right," and "declares only that it 'shall not be infringed.'" *Id*. at 592. Thus, while the Second Amendment's inclusion in the Bill of Rights indicates that the right to bear arms ranks as fundamental, nothing about its enumeration in the Constitution changed the right into anything more comprehensive or absolute than would have been understood and expected by "ordinary citizens in the founding generation." *Id*. at 577.

Third, that commonly understood right was and is "not unlimited." *Heller*, 554 U.S. at 595, 626. It is not a right "to keep and carry any weapon whatsoever in

any manner whatsoever and for whatever purpose," *id.* at 626, or "to carry arms for *any sort* of confrontation," *id.* at 595. The core individual right recognized by *Heller* is the right to keep and bear arms "in defense of hearth and home." 554 U.S. at 635; *see also McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010) (plurality op.) (*Heller*'s "central holding" was that "the Second Amendment protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home."). That does not mean that the right to "bear" has no scope or application beyond the home or its immediate environs. *Cf.* AOB 20-33.[5] But nothing in *Heller* suggests that it applies in exactly the same way in all places, so that a restriction on bearing arms in public must be treated just like a restriction on bearing in or around the home. In particular, nothing in *Heller* dictates that, as the plaintiffs here claim, the Second Amendment embodies an individual right to carry a gun in almost any public place. *See Gould v. Morgan*, ___ F.3d ____, 2018 WL 5728640, at *7-*8 (1st Cir. Nov. 2, 2018) (*Heller* implies

[5] As simple examples, restrictions on transporting a firearm home "from the place of purchase," *Young v. Hawaii*, 896 F.3d 1044, 1052 (9th Cir. 2018), or to or from a target range for the purpose of maintaining proficiency, *see Teixeira v. Cty. of Alameda*, 873 F.3d 670, 677 (9th Cir. 2017) (en banc); *Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011), presumably implicate the Second Amendment right, and may properly be reviewed by the courts to ascertain whether the burden imposed is significant and, if so, whether the restriction is nonetheless permissible under an appropriate constitutional test.

that the right to carry extends beyond the home, but does not "answer whether every citizen" may carry in most public places).

On the contrary, *Heller* makes clear that Second Amendment rights are subject to many reasonable regulations. *See* 554 U.S. at 636.[6] Indeed, it identified a list of "presumptively lawful regulatory measures," underscoring that the list was "not . . . exhaustive." *Id.* at 627 n.26. The identified measures include "longstanding prohibitions" such as "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." *Id.* at 626; *accord McDonald*, 561 U.S. at 786 (plurality op.). And in the same paragraph, the Court noted that "prohibitions on carrying concealed weapons" were held lawful by "the majority of the 19th-century courts to consider the question." *Heller*, 554 U.S. at 626.

The plaintiffs therefore overreach when they contend that *Heller* resolves this case in their favor. They reason that because "to 'bear arms' means to 'carry' weapons for 'confrontation,'" and because confrontations may occur outside the home, they are entitled to carry guns with them almost anywhere they go outside their homes. AOB 20; *see id.* at 20-23. No one disputes that self-defense is a

[6] *See also McDonald*, 561 U.S. at 785 (plurality op.) (Second Amendment "by no means eliminates" States' "ability to devise solutions to social problems that suit local needs and values").

central component of the Second Amendment right, *see Heller*, 554 U.S. at 599, or that a need for self-defense can "arise outside the home," AOB 21. But *Heller* does not recognize any unfettered right to carry firearms in the crowded public squares of cities and towns, based solely on an individual's stated desire to be "'armed and ready for offensive or defensive action in a case of conflict with another person,'" 554 U.S. at 584. Rather, under *Heller*, plaintiffs' challenge to California's restrictions on public carry must be evaluated, in the first instance, by examining "the historical understanding of the scope of the right." *Id*. at 625. The challenge cannot succeed if the State's restrictions are a type of reasonable public regulation that has long been considered consistent with a private right to bear arms. *Cf. id*. at 626-627.

B. There Is a Long Anglo-American Tradition of Regulating Public Carry in Populated Areas

The Supreme Court viewed four historical periods as significant to the analysis in *Heller*: English history pre-dating the founding, *see* 554 U.S. at 592-595, and American history at the time of the founding, *see id.* at 605-610, during the antebellum period, *see id*. at 610-614, and after the Civil War, *see id.* at 614-619. After *Heller*, litigants and courts addressing the constitutionality of public carry restrictions generally begin by examining historical materials from those periods. Few would dispute that these are "dense historical weeds." *Wrenn v. District of Columbia*, 864 F.3d 650, 659 (D.C. Cir. 2017); *see also Gould*, 2018

WL 5728640, at *7. At times, reliance on a particular holding or comment from one source or another can seem akin to "entering a crowded cocktail party and looking over the heads of the guests for one's friends." *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring in the judgment).

In some respects, however, the history is not debatable. For more than six centuries, and throughout each of the periods examined in *Heller*, authorities have restricted the carrying of guns by private parties in public places—including, in some circumstances, flatly prohibiting it. True, such restrictions were not universal. Variation across States and localities is to be expected in a federal system; "[a]fter all, our nation is built upon its diversity." *Gould*, 2018 WL 5728640, at *4. And even within individual States, different restrictions have often been imposed in different areas or at different historical times. But the persistent regulation of public carry in many populated places, across more than half a millennium of Anglo-American law, cannot be reconciled with plaintiffs' sweeping claim to a Second Amendment right to carry their guns in virtually any public place.

1. Public Carry Restrictions in England

Although plaintiffs hardly discuss the English history, *see* AOB 27, the "right to bear arms in England has long been subject to substantial regulation." *Peruta*, 824 F.3d at 929. Starting in the thirteenth century, the Crown repeatedly issued

edicts prohibiting individuals from "'go[ing] armed'" in public places. *Id.* Sometimes those edicts allowed individuals to carry a weapon only with "'the king's license.'" *Id.* Others categorically banned carrying arms in certain counties or towns. *Id.*; *see e.g.*, 13 Edw. 1, 102 (1285) (making it a crime to "be found going or wandering about the streets of [London], after Curfew . . . with Sword or Buckler, or other Arms for doing Mischief . . . [nor] in any other Manner").

Parliament continued that tradition in 1328 by enacting the Statute of Northampton, which provided that "no Man great nor small" was to "go nor ride armed by night nor by day, in Fairs, Markets, nor in the presence of the Justices or other Ministers, nor in no part elsewhere," on pain of forfeiture of the arms or prison time. 2 Edw. 3, 258, ch. 3 (1328). Northampton became "the foundation for firearms regulation in England for the next several centuries," and was "widely enforced." *Peruta*, 824 F.3d at 930. It reflected the general rule that, in populated places within reach of the King's officials, "the authority to ensure the public peace rested with the local government authorities." Charles, *The Faces of the Second Amendment Outside the Home*, 60 Clev. St. L. Rev. 1, 20 (2012); *see also* 33 Hen. 8, 835, ch. 6 (1541) (exempting subjects who lived in the Channel Islands, near the border with Scotland, and in other remote areas beyond the security of the Crown).

English authorities extended these restrictions to portable firearms as soon as they emerged on the scene. In 1579, Queen Elizabeth I called for a robust enforcement of Northampton's prohibition on carrying "Dagge[r]s, Pistol[s], and such like, not only in Cities and Towns, [but] in all parts of the Realm[] in common high[ways]," to combat the "danger" that accompanied the carrying of such "offensive weapons." By the Queene Elizabeth I: A Proclamation Against the Common Use of Dagges, Handgunnes, Etc., 1-2 (London, Christopher Barker 1579). When Parliament enacted the English Bill of Rights in 1689, it provided that certain subjects "may have arms for their defence suitable to their conditions and as allowed by law." 1 W. & M., ch. 2, § 7 (1689). As Blackstone later explained, "as allowed by law" embraced restrictions on carrying firearms in public. 1 Blackstone, *Commentaries* 139 (1765).

Blackstone's commentaries, and those of other influential English jurists, confirm that Northampton generally prohibited public carry. Blackstone compared Northampton to the "laws of Solon, [under which] every Athenian was finable who walked about the city in armour." 4 Blackstone, *Commentaries* 149 (1769). And Coke interpreted Northampton as making it unlawful to "goe []or ride armed by night []or by day" in "any place whatsoever." Coke, *The Third Part of the*

Institutes of the Laws of England 160 (1644); *see also* 1 Hawkins, *A Treatise of the Pleas of the Crown* 489, ch. 28, § 8 (London, J. Curwood, 8th ed. 1824).[7]

Some modern judges have suggested that Northampton barred only the public carry of firearms with the "intent to terrorize the local townsfolk." *Young*, 896 F.3d at 1064. The historical evidence undermines that interpretation. Queen Elizabeth I explained that it was the very act of carrying "pistols" that caused "'terrour of all people professing to travel and live peaceably.'" By the Queene Elizabeth I: A Proclamation Against the Carriage of Dags, and for Reformation of Some Other Great Disorders 1 (London, Christopher Barker 1594). A popular seventeenth-century justice of the peace manual similarly explained that merely carrying such a weapon struck "fear upon others" who were unarmed, and constituted a punishable affray even "without word or blow given." Keble, *An Assistance to the Justices of the Peace for the Easier Performance of their Duty* 147 (1683). That is why constables were instructed to "[a]rrest all such persons as

[7] Nor were English prohibitions limited to the carrying of weapons other than handguns, as some courts have suggested. *Cf. Young*, 896 F.3d at 1064. Hawkins explained that "guns, pistols, [and] daggers" were "offensive" weapons that were subject to Northampton's prohibitions. 1 Hawkins, *Pleas* 665, ch. 30, § 9.

they shall find to carry Dags or Pistols," without regard to intent or purpose. *Id.* at 224; *see also* Gardiner, *The Compleat Constable* 18-19 (1708).[8]

2. Public Carry Restrictions in the Founding Era

Similar restrictions on carrying weapons in populated areas were found on the American side of the Atlantic in the period that "preceded and immediately followed adoption of the Second Amendment." *Heller*, 554 U.S. at 600-601. The colonies of Massachusetts, New Hampshire, and New Jersey adopted statutes modeled on Northampton nearly a century before the founding. *See* History Profs. Br. 10. Shortly after the founding, North Carolina adopted its own Northampton statute, making it illegal to "go []or ride armed by night []or by day, in fairs, markets . . . [or] part[s] elsewhere." 1792 N.C. Law 60, ch. 3. Virginia, Massachusetts, Tennessee, and other States soon followed suit. *See, e.g.*, 1786 Va. Acts 33, ch. 21; 1795 Mass. Law 436, ch. 2; 1801 Tenn. Laws 259, 260-261, ch. 22, § 6; 1821 Me. Laws 285, ch. 76, § 1. Several of the States adopting these

[8] *Sir John Knight's Case* does not establish otherwise. *See* AOB 29. That decision recites the general language for an affray ("go armed to terrify the King's subjects"), but does not describe why Knight was acquitted. 87 Eng. Rep. 75 (K.B. 1686); *but see Peruta*, 824 F.3d at 931 ("[T]he Chief Justice acquitted Knight, but only because, as a government official, he was exempt from the statute's prohibition."). If anything, the decision confirms that Northampton broadly prohibited public carry, noting that carrying arms was a "great offence" because it suggested that "the King [was] not able or willing to protect his subjects." 87 Eng. Rep. 75.

restrictions did so in the face of state constitutions that "secured an individual right to bear arms for defensive purposes." *Heller*, 554 U.S. at 602.

No doubt, carrying firearms outside the home in some circumstances was common in many parts of the United States. Many early Americans lived and worked in rural or wilderness areas, far from cities and towns and from public officials who might protect them. They needed firearms to hunt and to fend off dangerous strangers, animals, or "foreign enemies." Levy, *Origins of the Bill of Rights* 139 (1999); *cf.* 5 Tucker, *Blackstone's Commentaries* app., n.B, at 19 (1803). Early Americans also commonly carried firearms "when traveling on unprotected highways or through the unsettled frontier," or to the "town center for repair." Charles, *The Faces of the Second Amendment Outside the Home, Take Two*, 64 Clev. St. L. Rev. 373, 401 (2016). But once they reached the "great Concourse of the People," state and local authorities retained the ability to limit—and even flatly prohibit—the public carrying of firearms. Davis, *The Office and Authority of a Justice of the Peace* 13 (1774).

Plaintiffs ignore the difference between remote and populated areas. *See* AOB 25-27. They argue that history establishes a right to carry virtually anywhere because, for example, "George Washington, Thomas Jefferson, and John Adams, carried firearms in public and spoke in favor of the right to do so." AOB 26 (citing *Grace v. District of Columbia*, 187 F. Supp. 3d 124, 136-137 (D.D.C. 2016)). It is

not surprising that Washington "holstered pistols to his saddle" when he "traveled between Alexandria and Mount Vernon," or that Jefferson carried a pistol "between Monticello and Washington, D.C." *Grace*, 187 F. Supp. 3d at 137. But once a traveler in this era arrived in a population center, he was subject to Virginia's Northampton statute, prohibiting him from going or "rid[ing] armed by night []or by day, in fairs or markets." 1786 Va. Acts Law 33, ch. 21. And while John Adams believed that, in response to the Boston Massacre, the residents of Boston "'had a right to arm themselves *at that time* for their defense,'" *Grace*, 187 F. Supp. 3d at 137 (emphasis added), that hardly establishes that under ordinary circumstances those residents had an individual right to carry firearms on the Boston Common or down the streets of the North End simply because they might need a gun for self-defense at a moment's notice. *See* 1692 Mass. Laws 10, 12, no. 6 (codifying Northampton).[9]

[9] Plaintiffs note (AOB 26) that some colonies had laws "'requiring arms-carrying'" under particular circumstances, such as when the community convened in church. *Cf. Grace* 187 F. Supp. 3d at 136. Such laws served the practical purpose of ensuring that a community could defend itself "against an internal or external threat" at a time when "much of the community would be gathered in one location." *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1264 n.42 (11th Cir. 2012). They do not demonstrate any common understanding that individual colonists had a right to carry a gun wherever they wanted. Indeed, some of the same colonies had Northampton statutes generally prohibiting public carry. *See* Johnson, et al., *Firearms Law and the Second Amendment* 106-108 (2012).

Plaintiffs also invoke (AOB 27) founding-era legal commentary regarding the "right to use arms for 'self-preservation and defense,'" but those sources do not support their arguments here. It is one thing to observe that an individual "retains the right of repelling force by force" when "absolutely necessary" because "the intervention of the society in his behalf, may be too late to prevent an injury," 1 Tucker, *Blackstone's Commentaries* 145 (1803); 1 Blackstone, *Commentaries* 139 (right to self-defense arises when "sanctions of society and laws are found insufficient to restrain the violence of oppression"). But it does not follow that most people may carry firearms at most times or in most public places—including in populated areas where local authorities are presumptively available to assist them. Similarly, the conclusion that a man may kill another who "assaults him," 1 Hawkins, *Pleas* 82, ch. 10, § 21, or who tries "to rob or kill him," 1 Hale, *Historia Pacitorum Coronae* 481 (Sollum Emlyn ed. 1736), does not mean that every man has a right to carry a firearm at all times to prepare for that possibility.

Some modern courts have concluded that founding-era prohibitions on public carry applied only to carrying "'dangerous and unusual weapons'" in a manner that "'naturally diffuse[d] a terrour among the people.'" *Young*, 896 F.3d at 1065; *see Wrenn*, 864 F.3d at 660. But the historical evidence shows that in America—as in England, *see supra* 19 n.7—a gun was considered "an 'unusual weapon,'" *State v. Huntly*, 25 N.C. 418, 422 (1843); and arrests for carrying firearms in populated

areas were made whether or not the offender "threatened any person in particular" or "committed any particular act of violence," Ewing, *A Treatise on the Office and Duty of the Justice of the Peace, Sheriff, Coroner, Constable* 546 (1805).[10] Law enforcement manuals from that time accordingly instructed constables 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, 40 (1814); *see also* Bishop, *Commentaries on the Criminal Law* § 980 (3d ed. 1865) (public carry restrictions did not require that the "peace must actually be broken, to lay the foundation for a criminal proceeding").

3. Public Carry Restrictions in the Antebellum Era

States continued to regulate the carrying of firearms in public places during the period preceding the adoption of the Fourteenth Amendment. In 1821, Tennessee made it a crime to carry "pocket pistols" or other weapons. 1821 Tenn. Pub. Acts 15, ch. 13. In 1836, Massachusetts amended its law to prohibit going "armed with a dirk, dagger, sword, pistol, or other offensive and dangerous weapon" absent "reasonable cause to fear an assault, or other injury, or violence

[10] Plaintiffs focus (AOB 29) on *Huntly*'s statements that the "carrying of a gun *per se* constitute[d] no offence," and that it was carrying with a "wicked purpose" that "constitute[d] the crime." 25 N.C. at 422-423. But they ignore a passage in the same paragraph emphasizing that "[n]o man amongst us carries [a gun] about with him, as one of his every day accoutrements—as a part of his dress—and never we trust will the day come when any deadly weapon will be worn or wielded in our peace loving and law-abiding State, as an appendage of manly equipment." *Id.* at 422.

to . . . person, or to . . . family or property," on pain of being arrested and required to obtain "sureties for keeping the peace." 1836 Mass. Laws 748, 750, ch. 134, § 16. At least seven other States adopted similar "reasonable cause" statutes. *See* 1838 Wisc. Laws 381, § 16; 1841 Me. Laws 707, 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.[11]

Some courts have discounted the significance of these laws, describing them as akin to "'minor public-safety infractions'" because they were enforced by requiring offenders to post surety bonds. *Young*, 896 F.3d at 1062; *see also Wrenn*, 864 F.3d at 661. But sureties were a common way of enforcing criminal prohibitions in "rural society before the age of police forces or an administrative state." Ruben & Cornell, *Firearm Regionalism and Public Carry: Placing Southern Antebellum Case Law in Context*, 125 Yale L.J. Forum 121, 131 (2015). A person caught carrying a firearm in public could have been arrested by the justice of the peace and required to pay sureties—often a hefty sum—in order to be released. *Id.* at 130. And if he carried again without good cause, he would have

[11] Like their English and early American predecessors, these statutes did not require any intent to terrorize. *See* Judge Thacher's Charges, *Christian Register & Boston Observer*, June 10, 1837, at 91. *But see Young*, 896 F.3d at 1061-1062.

been subject to additional criminal penalties. History Profs. Br. 14-16. In any event, the widespread existence of this sort of regulation does not support the existence of any common understanding that ordinary Americans under ordinary circumstances had a fundamental right to carry guns in public.

One group of mostly southern States took a more permissive approach, prohibiting the carrying of concealed firearms but generally allowing open carry. *See, e.g.*, 1813 Ky. Acts 100, ch. 89, § 1; 1813 La. Acts 172, § 1. That choice reflected local customs and concerns. In those States guns were sometimes carried "partly as a protection against the slaves," and partly to be used "in quarrels between freemen." Hildreth, *Despotism in America* 89-90 (1854).[12] And open carry was viewed as the more "noble" and "manly" method of serving those purposes. *State v. Chandler*, 5 La. Ann. 489, 490 (1850). Still, even in those States, apparently it was not a common practice. *See, e.g.*, *State v. Smith*, 11 La. Ann. 633, 634 (1856) (it was "extremely unusual" to carry weapons in "full open view").

Plaintiffs place great weight (AOB 27-28) on state court decisions resolving challenges to such statutes. Some of those decisions do reflect a local preference

[12] *See also* Ruben & Cornell, *Firearm Regionalism*, 125 Yale L.J. Forum at 123-126 (documenting Southern concerns about slavery and the violent nature of life in the South).

for permissive open carry laws. *See, e.g.*, *Nunn v. State*, 1 Ga. 243 (1846). But they all upheld prohibitions on concealed carry (with only one "short-lived exception"). *Peruta*, 824 F.3d at 933-936. In any event, these authorities do not establish any national consensus regarding the meaning of the Second Amendment in this period. They were decided by judges "immersed in a social and legal atmosphere unique to the South" whose "embrace of slavery and honor[] contributed to an aggressive gun culture." Ruben & Cornell, *Firearm Regionalism*, 125 Yale L.J. Forum at 128. And even other southern courts disagreed, suggesting that legislatures could generally ban public carry consistent with the Second Amendment or a state constitutional equivalent. *See State v. Buzzard*, 4 Ark. 18, 27 (1842); *Aymette v. State*, 21 Tenn. 154, 161-162 (1840).[13] Meanwhile, many other States were adopting and enforcing robust restrictions on any sort of public carry. *See supra* 24-25; *Gould*, 2018 WL 5728640, at *7 (practices "in one region of the country" do not "reflect the existence of a national consensus" about the Second Amendment's reach).

[13] The panel opinion in *Young* discounts the significance of these and similar cases. 896 F.3d at 1057-1058. *But see Peruta*, 824 F.3d at 934, 936. But if there was widespread agreement about a fundamental American right to public carry, *see Young*, *896* F.3d at 1054, surely that would have been reflected in cases such as *Buzzard* and *Aymette*.

4. Public Carry Restrictions in the Mid- to Late-Nineteenth Century

In the years immediately surrounding the adoption of the Fourteenth Amendment, States and local governments adopted still more restrictions on the public carry of firearms, often in response to an increase in lawlessness and violence. *See* Charles, *Take Two*, 65 Clev. St. L. Rev. at 414. The post-Civil War constitutions of six States gave their "state legislatures broad power to regulate the manner in which arms could be carried." *Peruta*, 824 F.3d at 937. Five others specified that legislatures could prohibit the carrying of concealed weapons. *Id.* at 936-937. Several state legislatures proceeded to make it illegal to carry weapons in public places. 1870 S.C. Laws 403, no. 288, § 4; 1869-1870 Tenn. Pub. Acts, 2d. Sess., ch. 13, § 1; 1881 Ark. Laws 490, ch. 53, § 1907; 1890 Okla. Laws 495, ch. 25, art. 47, §§ 2, 5. Texas and West Virginia banned public carry without good cause. 1870 W. Va. Laws 702, ch. 153, § 8; 1871 Tex. Gen. Laws 1322, art. 6512. And other States and territories made it illegal to carry firearms "concealed or openly" within the "limits of any city, town, or village." 1875 Wyo. Laws 352, ch. 52, § 1; *see also* 1869 N.M. Laws 312, ch. 32, § 1; 1889 Ariz. Laws 16, ch. 13, § 1; 1889 Idaho Laws 23, § 1.

Many local governments likewise prohibited the carrying of firearms in populated places. Nowhere was this trend more pronounced than in the West. Cattle towns in Kansas "invariably proscribed" the carrying of "dangerous

weapons"—including "six-shooters" and pistols—within city limits, "concealed or otherwise." Dykstra, *The Cattle Towns* 121 (1968). The town of Tombstone likewise outlawed the carrying of weapons in the city limits. Winkler, *Gunfight* 165, 172-173 (2011). And in Los Angeles it was illegal to "wear or carry any dirk, pistol . . . or other dangerous or deadly weapon, concealed or otherwise, within the [city's] corporate limits." Los Angeles, Cal., Ordinance nos. 35-36 (1878); *see also* History Profs. Br. 22 & n.18 (collecting additional examples).

This era saw several constitutional challenges to laws restricting public carry, but none succeeded. The Tennessee Supreme Court held that the legislature could broadly restrict the carrying of firearms "among the people in public assemblages where others are to be affected," although not "where it was clearly shown they were worn *bona fide* to ward off or meet imminent and threatened danger to life or limb, or great bodily harm." *Andrews v. State*, 50 Tenn. 165, 186, 191 (1871). The Texas Supreme Court upheld that State's prohibition on the carrying of firearms unless the carrier had "'reasonable grounds for fearing an unlawful attack,'" calling the law "a legitimate and highly proper regulation." *State v. Duke*, 42 Tex. 455, 459 (1874). Other courts reached similar results. *See English v. State*, 35 Tex. 473, 480 (1871); *Hill v. State*, 53 Ga. 472, 474 (1874); *Fife v. State*, 31 Ark. 455, 461 (1876); *Walburn v. Territory*, 59 P. 972, 973 (Okla. Terr. 1899) (Mem).

Although *Heller* viewed historical evidence from this era as "instructive," 554 U.S. at 614, plaintiffs ignore it. Some modern courts have concluded that this period supports a broad right to public carry, reasoning that the Fourteenth Amendment was largely a response to southern "Black Codes," including laws barring African-Americans from keeping or bearing arms. *See Young*, 896 F.3d at 1059-1061. There is no doubt that the Amendment's framers were concerned about *discriminatory* laws aimed at disarming freed slaves. *See id.* at 1060-1061. But they were surely also aware of the longstanding and widespread practice of imposing race-neutral restrictions on carrying firearms in populated areas, including outside the South.[14] The historical record shows that people of all colors were prosecuted for violating those laws, *see* Charles, *Take Two*, 64 Clev. St. L. Rev. at 430 n.288 (collecting newspaper reports), and nothing in the Fourteenth Amendment disapproved of that tradition.

[14] Indeed, "Reconstruction-era Republicans were strong supporters of generally applicable and racially neutral gun regulations, including in some cases, bans on traveling armed and bans on handguns." Cornell, *The Right to Carry Firearms Outside of the Home*, 39 Fordham Urb. L.J. 1695, 1724 (2012). Several military governors administering former Confederate States issued blanket prohibitions on public carry by civilians. *See, e.g.*, Second Military District Order No. 10 ("The practice of carrying deadly weapons . . . is prohibited"). In Texas, Republicans led the effort to ban public carry absent good cause, in part to protect freed slaves from "targeted violence." Cornell, *The Right to Keep and Carry Arms in Anglo-American Law*, 80 L. & Contemp. Probs. 11, 41 (2017).

C. Public Carry Regimes Like California's Continue the Tradition of Regulating Carry in Populated Areas

Reasonable people can debate how exactly the Statute of Northampton was understood in seventeenth-century England, or where exactly the colonists were allowed to carry firearms in eighteenth-century America. But no one can seriously dispute that restrictions on the public carrying of firearms were commonplace throughout each of the historical periods that *Heller* considered in construing the Second Amendment. Those restrictions were particularly prevalent in populated places, where the routine carrying of firearms by private parties threatened public safety, and where local sheriffs and justices of the peace were generally available to provide protection. They were less prevalent in outlying areas, where firearms were more important in part because public officials typically were not available to assist unarmed settlers or travelers. And, at least in America, local governments had substantial discretion to regulate the carrying of guns—or to ban it entirely—based on conditions and public preferences in their jurisdictions.

California's system for regulating public carry is a part of that tradition. Californians may carry guns without a license under many circumstances—including at their homes and in their places of business, on much private property with the permission of the owner, in more remote parts of the State, at many campsites, hunting grounds, or target ranges, while traveling to and from those and other authorized locations, and in emergencies when public officials are not on the

scene. *See supra* 2-4. On the other hand, California limits the public carrying of guns in cities and towns under ordinary circumstances, with local sheriffs generally determining whether a qualified resident has "good cause" for seeking a license to carry a concealed weapon. Cal. Penal Code §§ 26150, 26155; *cf. id.* § 26045 ("immediate, grave danger" exception). This is similar to the approach used by many other States, which also restrict public carry in populated places to those who can make an individualized showing of good cause (or meet some similar standard). *See* Conn. Gen. Stat. § 29-28(b); Del. Code Ann. tit. 11, § 1441; Haw. Rev. Stat. § 134-9; Mass. Gen. Laws ch. 140, § 131(d); Md. Pub. Safety Code § 5-306(a)(6)(ii); N.J. Stat. § 2C:58-4(c); N.Y. Penal Code § 400.00(2)(f); R.I. Gen. Laws § 11-47-11(a).

Other States take a different approach, generally permitting public carry. *See, e.g.*, La. Rev. Stat. § 40:1379.3; Tex. Gov't Code §§ 411.172, 411.177. Some of these States had similarly permissive policies during earlier eras. *See, e.g.*, 1813 La. Acts 172, § 1. Others once had much more restrictive laws. *See, e.g.*, 1871 Tex. Gen. Laws 1322, art. 6512. But whatever the modern policy debate over these issues, the historical record simply does not support plaintiffs' suggestion that a permissive approach to public carry in populated areas is *required* by the pre-existing, common-law right to bear arms incorporated into the federal Constitution by the Second and Fourteenth Amendments, *see Heller*, 554 U.S. at

592. A resident of England before the founding, or of America at the time of the founding or in the nineteenth century, would have been quite perplexed by plaintiffs' contention (*e.g.*, AOB 15-16) that the right to bear arms includes a right of ordinary people under ordinary circumstances to carry guns in the public places of cities or towns. *Compare, e.g.*, 2 Edw. 3, 258, ch. 3 (1328); 1836 Mass. Laws 748, 750, ch. 134, § 16; 1871 Tex. Gen. Laws 1322, art. 6512; Los Angeles, Cal., Ordinance nos. 35-36 (1878).

II. CALIFORNIA'S PUBLIC CARRY LAWS COMPORT WITH THE SECOND AMENDMENT

"No fundamental right—not even the First Amendment—is absolute." *McDonald*, 561 U.S. at 802 (Scalia, J., concurring). Just as the First Amendment does not confer a right to speak in any time, place, or manner, history and precedent teach that the Second Amendment does not confer a right to carry guns anywhere or at any time. *See Heller*, 554 U.S. at 595. California's laws regulating the public carrying of firearms strike a permissible balance between preserving order and public safety and accommodating the desire of some residents to carry guns. They are consistent with (and in some respects more permissive than) traditional restrictions on public carry, and are presumptively lawful on that basis. And even if they are subject to heightened judicial scrutiny, they are constitutionally permissible as a tailored means of advancing the compelling interest in public safety.

A. The Challenged Public Carry Laws Are Longstanding Regulations That Are Presumptively Lawful Under *Heller*

Where text, history, and tradition show that a challenged law is consistent with the Second Amendment, the restriction "'passes constitutional muster'" and this Court's inquiry "'is complete.'" *Teixeira*, 873 F.3d at 682; *see Heller*, 554 U.S. at 626, 627 n.26. As discussed, history and tradition demonstrate that California's restrictions on public carry comport with the "historical understanding" of the right to bear arms. *Heller*, 554 U.S. at 625.

California broadly allows the carrying of firearms in places and circumstances where it has traditionally been common: in or immediately around an individual's home or place of business and on much other private property with permission; in less-populated areas and during activities such as hunting; and in circumstances of immediate and grave danger to person or property when law enforcement is not available. It also allows qualified individuals to obtain licenses to carry more generally, if they can establish "good cause" under standards set by local officials who are most familiar with the needs and desires of their own communities. In Los Angeles County, the Sheriff has adopted a good cause policy consistent with one long strain of tradition, requiring applicants to show a genuine threat to life or limb that "cannot be adequately dealt with by existing law enforcement resources." ER 1374. That is a circumstance in which many historical gun regulations have recognized exceptions to prohibitions on public carry. *See, e.g.*, *Andrews*,

50 Tenn. at 191 (allowing public carry where "*bona fide* to ward off or meet imminent and threatened danger to life or limb, or great bodily harm"); 1836 Mass. Laws 748, 750, ch. 134, § 16 ("reasonable cause to fear an assault"); 1 Tucker, *Blackstone's Commentaries* 145 (right to self-defense when "the intervention of the society" may be "too late to prevent an injury").

The good cause licensing system challenged by plaintiffs thus "fits comfortably within the longstanding tradition of regulating the public carrying of weapons for self-defense." *Drake v. Filko*, 724 F.3d 426, 433 (3d Cir. 2013); *see generally* Blocher & Miller, *The Positive Second Amendment* 16-42 (2018). Indeed, "it does not go as far as some of the historical bans on public carrying." *Drake*, 724 F.3d at 433. It does not, for example, categorically ban the carry of "pocket pistols" in all parts of the State, 1821 Tenn. Pub. Acts 15, ch. 13; or ban all carry, whether "concealed or openly," within the "limits of any city, town, or village," 1875 Wyo. Law 352, ch. 52, § 1; *see also Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 90 (2d Cir. 2012) (discussing nineteenth-century state laws that "banned the carrying of pistols and similar weapons in public, both in a concealed or an open manner"). And even in crowded public places—such as "fairs" and "markets," *see* 1786 Va. Acts 33, ch. 21—qualified California residents may carry a concealed firearm if local authorities agree that they have "good cause." The historical record is sufficient to conclude that this type of licensing

system "is a longstanding regulation that enjoys presumptive constitutionality under the teachings articulated in *Heller*." *Drake*, 724 F.3d at 434.

B. If Not Presumptively Lawful, California's Public Carry Laws Are Subject to Means-Ends Scrutiny

Without addressing most of this historical evidence, plaintiffs contend that this Court must apply a "categorical approach" and hold that California's public carry laws "'fail[] constitutional muster' under 'any of the standards of scrutiny.'" AOB 33. In their view, *Heller* requires the Court to side-step any form of means-ends scrutiny of the challenged laws—and, consequently, any consideration of the important public safety interests those laws advance—because the laws "amount[] to a destruction of a fundamental constitutional right." AOB 2; *cf. Young*, 896 F.3d at 1070-1071; *Wrenn*, 864 F.3d at 664-667. But *Heller* does not support that approach.

Heller does not discuss in any detail how heightened scrutiny should apply when reviewing laws under the Second Amendment. 554 U.S. at 628-629 & n.27. This Court and others, however, have developed a two-part inquiry to determine the appropriate level of scrutiny in a particular case. *See, e.g.*, *United States v. Chovan*, 735 F.3d 1127, 1138 (9th Cir. 2013). If historical analysis does not demonstrate that a law is presumptively constitutional, then it is subject to intermediate scrutiny unless it substantially burdens the "core" Second Amendment right. *Id.*

Plaintiffs argue that this inquiry is unnecessary here because California's public carry laws "'destr[oy] . . . the Second Amendment right.'" AOB 34. That argument assumes the accuracy of plaintiffs' position that otherwise-qualified individuals have a categorical right to carry a gun in almost any public place. But the very purpose of analyzing the constitutional text and history, and then if necessary applying an appropriate level of means-ends scrutiny, is to determine whether and to what extent the Second Amendment protects particular conduct. Of course, sometimes that analysis will reveal that a particular policy choice is "off the table," *Heller*, 554 U.S. at 636—that no matter how compelling the public interest a challenged law might serve, it cannot be sustained in view of a contrary choice reflected in the Constitution.[15] But just as First Amendment analysis does not end with a determination that a law regulates speech, and Fourth Amendment analysis does not end with a determination that there has been a search, a Second Amendment inquiry does not end once a court concludes that a law implicates the right to keep and bear arms. On the contrary, defining the exact contours of that right through careful judicial scrutiny is especially important in the Second Amendment context because of the profound public interests at stake. *See United*

[15] *Heller* reached that conclusion with respect to a law banning possession of handguns in the home. *See* 554 U.S. at 628-629. The same might be true of a categorical ban on carrying a gun outside the home. *See Moore v. Madigan*, 702 F.3d 933, 940 (7th Cir. 2012). California does not impose any such ban.

States v. Masciandaro, 638 F.3d 458, 475-476 (4th Cir. 2011) (Wilkinson, J.) ("miscalculat[ion] as to Second Amendment rights" could lead to "unspeakably tragic act[s] of mayhem").

Heller does not suggest otherwise. It rejected any "freestanding 'interest-balancing' approach" to enforcing the "core protection" of any enumerated right. 554 U.S. at 634. But it expressly contrasted that approach with the traditional approach to enforcing other enumerated rights, including the application of intermediate or strict scrutiny. *See id*. at 634-635; *see also id.* at 628-629 & n.27. Certainly it did not indicate that Second Amendment rights are entitled to *more* protection against impingement than other fundamental rights. The right to bear arms is not "a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees," *McDonald*, 561 U.S. at 780 (plurality op.); but just as surely it is not to be treated "more deferentially than other important constitutional rights," *Gould*, 2018 WL 5728640, at *8. There is no basis for according it "an unqualified status that the even more emphatic expressions in the First Amendment have not traditionally enjoyed." *Kolbe v. Hogan*, 849 F.3d 114, 150 (4th Cir. 2017) (en banc) (Wilkinson, J., concurring).

C. California's Public Carry Laws Are Constitutional Under Any Level of Means-Ends Scrutiny

Every court of appeals that has applied means-ends scrutiny to public carry restrictions like California's has concluded that the law is subject to intermediate

scrutiny. That is likewise the appropriate standard here. And every court of appeals that has applied intermediate scrutiny to a good cause licensing regime of the type challenged here has sustained the law as substantially related to advancing the compelling interest in public safety. The same is true here. If anything, California's laws are more closely tailored, allowing public carry in many circumstances. Indeed, in light of the powerful public interests at stake, California's calibrated regulation of public carry would pass even strict scrutiny.

1. Intermediate Scrutiny Is the Appropriate Level of Scrutiny

Under this Court's precedent, the level of scrutiny in a Second Amendment case "depend[s] on (1) 'how close the law comes to the core of the Second Amendment right,' and (2) 'the severity of the law's burden on the right.'" *Chovan*, 735 F.3d at 1138. As to what constitutes the "core" of the right, *Heller* declared that the Second Amendment elevates "above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." 554 U.S. at 635. In the same breath, it recognized that other questions about the scope or application of the right must be "le[ft] to future evaluation." *Id*. And this Court's later cases have repeatedly held that, for purposes of determining an appropriate level of scrutiny, the "core" of the Second Amendment right is limited to what *Heller* identified: the right to keep and carry "in defense of hearth and home." *Id.*; *see Chovan*, 735 F.3d at 1138; *Silvester v. Harris*, 843 F.3d 816, 821

(9th Cir. 2016); *Bauer v. Becerra*, 858 F.3d 1216, 1222 (9th Cir. 2017); *Peña v. Lindley*, 898 F.3d 969, 977 (9th Cir. 2018). *But see Young*, 896 F.3d at 1068 n.19. Likewise, every other court of appeals to consider the proper level of scrutiny for public carry regulations such as those challenged here has agreed that "intermediate scrutiny is appropriate" because "the core Second Amendment right is limited to self-defense in the home." *Gould*, 2018 WL 5728640, at *8-*9; *see also Kachalsky*, 701 F.3d at 94, 96; *Drake*, 724 F.3d at 436; *Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013).[16]

Plaintiffs argue that the core of the Second Amendment includes a general right to carry a gun in most public places. AOB 41. But the "historical prevalence" of public carry restrictions similar to (and often more restrictive than) the laws challenged here is inconsistent with that position. *Kachalsky*, 701 F.3d at 96. Because "[f]irearms have always been more heavily regulated in the public sphere," the right to bear arms "most certainly operates in a different manner" in

[16] *Young* concluded that "the right to carry a firearm openly for self-defense falls within the core of the Second Amendment," 896 F.3d at 1070, but did not decide what level of scrutiny to apply, *id.* at 1071-1074. *See also Wrenn*, 864 F.3d at 659, 665-667 (same).

that context than when evaluating restrictions that impinge directly on the core right to keep and carry guns in the home. *Drake*, 724 F.3d at 430 n.5.[17]

This also makes good functional sense. When individuals move outside their homes—and particularly when they move about in populated areas—their interest in carrying a firearm is much more likely to come into conflict with the public interest in order and safety. *See, e.g.*, *Gould*, 2018 WL 5728640, at *9. The "inherent" risk that firearms present when carried in public "distinguishes the Second Amendment right from other fundamental rights . . . such as the right to marry and the right to be free from viewpoint discrimination, which can be exercised without creating a direct risk to others." *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1126 (10th Cir. 2015). And as the Fourth Circuit observed, it "is not far-fetched to think" that *Heller*'s focus on the "core" right to protect the home was born out of a recognition that the danger of "tragic act[s]" of violence "would rise exponentially as one moved the right from the home to the public square." *Masciandaro*, 638 F.3d at 475-476 (Wilkinson, J.). At the same time, any individual need to carry is substantially reduced in many public places, especially in cities in towns, where "police officers, security guards, and the watchful eyes of

[17] In contrast, the Supreme Court observed that "[f]ew laws in history of our nation" paralleled the restriction on in-home possession at issue in *Heller*. 554 U.S. at 629.

concerned citizens . . . mitigate threats." *Gould*, 2018 WL 5728640, at *9. These considerations strongly support evaluating restrictions on public carry differently from restrictions on keeping or carrying in the home.

This Court's approach (until *Young*) of limiting the core of the Second Amendment to the home is also consistent with how other courts have analyzed analogous rights. Free speech is essential to our democratic society, and regulations on many types of speech are subject to the most demanding form of scrutiny. *See, e.g., Holder v. Humanitarian Law Project*, 561 U.S. 1, 25-28 (2010). But some types of speech can harm the public, and States are not powerless to regulate such speech to mitigate that harm. States may, for example, adopt reasonable restrictions on the time, place, and manner of speech. *See Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989). Where public safety is implicated, States may ban certain types of speech altogether, including true threats, *Watts v. United States*, 394 U.S. 705, 707 (1969) (per curiam); "'fighting words,'" *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573-574 (1942); or speech that is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action," *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam). And even the core right to speak on matters of intense public concern may properly be limited to protect "the unique nature of the home." *Frisby v. Schultz*, 487 U.S. 474, 484 (1993).

Similarly, while the Fourth Amendment protects the privacy of "persons" no matter where they are, there is no question that its application is most stringent inside the home. *See Florida v. Jardines*, 569 U.S. 1, 6 (2013). It has never been thought to denigrate the fundamental nature of the Fourth Amendment right to hold that its application may vary depending on the place where a search or inspection occurs, *see Collins v. Virginia*, 138 S. Ct. 1663, 1669-1672 (2018), or when the circumstances indicate that public or officer safety may be at risk, *see Chimel v. California*, 395 U.S. 752, 763 (1969).

There is a legitimate role for public regulation touching on even our most fundamental rights—especially when there is or can be genuine tension between the exercise of individual rights and the safety of law enforcement officers or other members of the public. Surely that is true when society seeks to regulate the carrying of inherently dangerous weapons outside an individual's home and into the public squares, streets, sidewalks, or marketplaces of our cities and towns. Given an individual constitutional right to "bear arms," if such regulation is not presumptively permissible based on history and tradition, then it is subject to some form of heightened scrutiny by the courts. But it is only sensible that regulation of *public* carry should be subject to review under a less stringent standard than would apply to a regulation directly burdening the "core" right to keep or carry "in defense of hearth and home." *Heller*, 554 U.S. at 635.

2. California's Public Carry Laws Are Valid Under Intermediate Scrutiny

When reviewing a law under intermediate scrutiny, courts ask whether the law promotes a "significant, substantial, or important government objective," and whether there is a "'reasonable fit' between the challenged law and the asserted objective." *Peña*, 898 F.3d at 979. While the State must show that the law "promotes a substantial government interest that would be achieved less effectively absent the regulation," it need not demonstrate that the regulation is the "least restrictive means of achieving the government interest." *Id.* (citations and quotation marks omitted). A court's only obligation is to "'assure that, in formulating its judgments, [the State] has drawn reasonable inferences based on substantial evidence,'" an inquiry that must accord "'substantial deference to the predictive judgments'" of the legislature. *Id.* at 979-980 (quoting *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997)).

The need for appropriate deference to legislative predictions is especially clear in the Second Amendment context. "Providing for the safety of citizens within their borders has long been state government's most basic task." *Kolbe*, 849 F.3d at 150 (Wilkinson, J., concurring). State legislatures are "'far better equipped than the judiciary' to make sensitive public policy judgments (within constitutional limits) concerning the dangers in carrying firearms and the manner to combat those risks." *Kachalsky*, 701 F.3d at 97; *accord Gould*, 2018 WL 5728640, at *13. And

while a legislature's judgements *can* be based on empirical evidence, they need not be; "history, consensus, and 'simple common sense'" will suffice. *Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 628 (1995). Indeed, when it comes to regulating firearms, requiring too much in the way of empirical support would be impractical, impair the ability of legislatures to "act prophylactically," and require public leaders to "bide [their] time until another tragedy is inflicted or irretrievable human damage has once more been done." *Kolbe*, 849 F.3d at 150 (Wilkinson, J., concurring); *see also Gould*, 2018 WL 5728640, at *13 ("In dealing with a complex societal problem like gun violence, there will almost always be room for reasonable minds to differ about the optimal solution"; demanding undue certainty would be "foolhardy.").

Here, it is "'self-evident'" that California has a compelling interest in protecting public safety and reducing gun violence. *Jackson v. City & County of San Francisco*, 746 F.3d 953, 965 (9th Cir. 2014); *see also id.* (collecting authorities). And empirical research, in addition to common sense, establishes a "'reasonable fit'" between that interest and restrictions on public carry. *Peña*, 898 F.3d at 979. As Professor John Donohue explains in his expert report, there is a "considerable body of credible statistical evidence" showing that laws broadly allowing individuals to carry firearms in public places "lead[] to increases in overall violent crime." ER 506. A study conducted by Donohue and two other

scholars compared the crime rates of the 33 States that have adopted "right-to-carry" laws—under which most residents have the right to carry a firearm in most public places—to those of States that have not. ER 2012-2114. Using 37 years of FBI crime statistics, the study ran four separate models analyzing the impact of right-to-carry laws on crime rates. ER 2016. Under each model, States experienced a 13-15% increase in violent crime in the decade after adopting a right-to-carry law. ER 516, 2016, 2048-2052 (reports); *see* ER 585-588, 592-595, 665-670, 974 (deposition testimony).[18]

Another peer-reviewed study shows a similar link between permissive public carry regimes and higher murder rates. It reviewed data from 1991 through 2005 and found a "significant[] associat[ion]" between right-to-carry States and higher homicide rates. ER 2130; *see generally* ER 2129-2160 (Siegel, et al., *Easiness of Legal Access to Concealed Firearm Permits and Homicide Rates in the United States*, 107 Am. J. of Public Health 1923 (Dec. 2017)). Those States experienced a

[18] The 13-15% figure was found using a methodology known as "synthetic controls," which is "becoming increasingly prominent in economics and other social sciences." ER 2033; *see also* ER 965 (similar); ER 512-513, 578-580 (explaining synthetic controls). Donohue also ran a "panel data analysis," again using four different models to estimate the impact that right-to-carry laws have on crime rates. ER 2017-2032; *see also* ER 507, 575-578, 581-583 (explaining panel data analysis). That methodology again showed that right-to-carry laws "increased murder and/or overall violent crime," no matter which model was used. ER 2027; *see also* ER 1882-1884 (expert report); ER 585 (deposition).

6.5% increase in the overall homicide rate, an 8.6% rise in "firearm-related" homicide rates, and a 10.6% increase in the "handgun-specific" homicide rate. ER 2130; *see also Gould*, 2018 WL 5728640, at *12 (collecting additional studies).[19]

These studies support a legislative judgment that an increase in guns carried by private persons in public places increases the risk that "'basic confrontations between individuals [will] turn deadly.'" *Woollard*, 712 F.3d at 879.[20] Similarly, misfired shots or accidental discharges are "more likely to hit a bystander where there are more bystanders to hit." Blocher, *Firearm Localism*, 123 Yale L.J. 82, 122-123 (2013). The Legislature could also conclude that widespread public carry increases the "availability of handguns to criminals via theft," *Woollard*, 712 F.3d at 879, and that such guns would then be used to "commit violent crimes" or be transferred to "others who commit crimes," U.S. Dep't of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, *2012 Summary: Firearms Reported*

[19] The Donohue report did not find a statistically significant relationship between right-to-carry laws and murder rates. ER 2016. But Professor Donohue later reviewed the Siegel study, and concluded that it "overwhelmingly supports the view that [right-to-carry] laws increase firearm homicides." Donohue, *Laws Facilitating Gun Carrying and Homicide*, 107 Am. J. of Public Health 1864, 1865 (Dec. 2017).

[20] An updated version of the Donohue study describes several such incidents. *See* Donohue, et al., *Right-to-Carry Laws and Violent Crime* 6-7 (Nov. 2018), *available at* https://www.nber.org/papers/w23510.

Lost and Stolen 2 (2013).[21] As Memphis Police Director Michael Rallings recently observed, laws that "'make guns more accessible to criminals'" had a "'direct effect'" on his city's violent crime rate. *Right-to-Carry* 11; *see also id.* (similar conclusions from Atlanta police officers). Criminals may also "arm themselves more frequently, attack more harshly, and shoot more quickly when citizens are more likely to be armed." *Id.* at 13; *see also* ER 720. And some license-holders themselves commit crimes in public spaces: according to one report, there were 31 occasions in which concealed carry license-holders killed at least three people in a single incident. *Right-to-Carry* 9-10.

Widespread public carry can also endanger police and other law enforcement officials. The former president of the California Police Chiefs Association, Chief Kim Raney, explains in his expert report that when law enforcement is responding to an active shooter, carrying of firearms by other individuals can have deadly consequences, including by "delaying first responders from [their] primary mission" of stopping the shooter and saving lives. ER 2123. In the aftermath of a shooting that left five police officers dead and nine others wounded, Dallas Police Chief David Brown complained that officers "'don't know who the good guy is

[21] *See also* ER 677-678, 694-697; *Right-to-Carry* 10-11 (a "plausible estimate" is that right-to-carry laws result in license-holders "furnishing more than 100,000 guns per year to criminals").

versus the bad guy when everyone starts shooting.'" *Id.* Similarly, when police officers respond to reports that there is a "man with a gun," or encounter an armed civilian on the streets, they often know little about the person's intent or mental state, or whether the person is authorized to carry a gun. ER 2122-2123.[22] These encounters can have fatal consequences. *Id.* Restrictions on public carry also reduce the amount of time that police must spend investigating "handgun sightings," and help police quickly identify those persons carrying firearms who pose a threat. ER 2122, 2124; *accord Woollard*, 712 F.3d at 879-880 (recounting similar policing benefits); ER 1892-1893 (same); *Right-to-Carry* 13-16 (same).

In light of the many public safety risks the Legislature could reasonably deem to be associated with widespread public carry, there is a "'reasonable fit'" between California's calibrated regime governing public carry and the important interests that it serves. *Peña*, 898 F.3d at 979.[23] In less-populated areas where risks of accidental conflict and the like may be lower, self-defense needs may be greater,

---

[22] *See also* ER 1535 (according to Peace Officer Research Association of California, "open carry demonstrations" put "law enforcement and the public in a precarious and possibly dangerous situation," where "any number of things could go wrong").

[23] *Cf. Gould*, 2018 WL 5728640, at *14 (upholding Massachusetts "good reason" licensing regime under intermediate scrutiny); *Drake*, 724 F.3d at 440 (same as to New Jersey's "justifiable need" regime); *Woollard*, 712 F.3d at 882 (same as to Maryland's "good and substantial reason" regime); *Kachalsky*, 701 F.3d at 96, 101 (same as to New York' "proper cause" regime).

and public law enforcement may be less available, the State allows most people to carry firearms without a license. Those provisions for public carry supplement the ability to keep and carry in homes, places of business, and much other private property. But the State places tighter restrictions on public carry in populated places outside the home—where the Legislature could reasonably conclude that widespread carry poses the greatest threat to public safety, and where public law enforcement is generally available to provide protection. Even in such areas, individuals in some lines of work are permitted to carry guns, either at all times or during the course of their duties. Others may seek a license from the local sheriff, based on a showing of "good cause" under standards developed by a local official to suit local conditions. And in emergencies, anyone may carry a gun in public when reasonably necessary to preserve persons or property from an "immediate, grave danger," while if possible notifying and awaiting local law enforcement. Cal. Penal Code § 26045. These rules are reasonably designed to protect California's communities from dangers that the Legislature could soundly conclude would result from unfettered public carry, while nonetheless accommodating the public carrying of guns by private individuals in many situations.

Nothing about the Los Angeles Sheriff's "good cause" standard for issuing concealed carry licenses alters the constitutional analysis. In Los Angeles County,

as in other parts of the State, gun owners may carry without a license in significant areas lying outside of incorporated areas, villages, and towns.[24] In more populated parts of the County, residents are protected by trained and armed police forces, including nearly 10,000 sworn deputies of the Los Angeles Sheriff's Department and approximately 9,000 sworn officers of the Los Angeles Police Department.[25] Residents may obtain a license to carry in those areas by showing that, based on special circumstances, having a gun would mitigate a "clear and present danger" of death or serious injury that public law enforcement cannot adequately address. ER 36. That policy, coupled with the State's general authorization of public carry while awaiting law enforcement in circumstances creating an "immediate, grave danger," Cal. Pen. Code § 26045, provides a constitutionally sufficient outlet for any right to have and use a firearm for self-defense in the face of an imminent threat.

---

[24] Plaintiffs quip that they would need a "civil engineering degree" to determine where they can carry outside the city. AOB 40. Discerning whether or not one is in a public place in a town or village, *see* 51 Op. Cal. Atty'y Gen. at 200-201, is more a matter of common sense than a "cartographic expertise," AOB 40. If plaintiffs believe specific circumstances would support a claim of vagueness or an as-applied challenge, they may bring one; but any uncertainty at the margins provides no basis for the broad facial challenge they have mounted here.

[25] *See* Los Angeles County Sheriff's Department, *Year in Review 2015* 116, *available at* http://shq.lasdnews.net/Content/uoa/SHB/publications/yir2015.pdf; Los Angeles Police Department, *Compstat Plus*, http://www.lapdonline.org/inside_the_lapd/content_basic_view/6364 (last visited Nov. 19, 2018).

In arguing that intermediate scrutiny is not satisfied here, plaintiffs primarily question the methodology used by Professor Donohue in demonstrating the link between right-to-carry laws and higher violent crime rates. *See* AOB 45; ER 12, 1273-1292. But the district court carefully considered those objections before concluding that California "reasonably could have inferred" that its public carry laws promoted its public safety objectives, a conclusion supported by Donohue's findings that "the enactment of right-to-carry laws lead to increased violent crime rates." ER 12; *see also* ER 12, 16-33. Plaintiffs also fault the district court for "refus[ing] even to consider" their evidence. AOB 45. But the district court did evaluate their evidence before holding that California's showing was "sufficient to support the inference that the State reasonably saw a link between" its public carry restrictions and public safety goals. ER 13.[26]

Nor does the record here contain "substantial evidence" (AOB 40) undermining California's conclusion that its carry restrictions advance its public safety interests. Plaintiffs cite no empirical evidence in support of that contention in their opening brief. In the district court, they briefly alluded to two studies, *see* ER 1063, including one from a scholar who purported to find that right-to-carry

[26] For example, the court reviewed a report from plaintiffs' expert submitted to rebut Professor Donohue's conclusions, and reports from former out-of-state law enforcement officials submitted in response to Chief Raney's conclusions. *See* ER 12, 1294-1332.

laws decrease crime, *see* ER 2013. But that scholar's work has been widely criticized, *see id.*, including by plaintiffs' expert in this case, *see* ER 342-343. And the "best available study" identified by plaintiffs' expert actually supports the conclusion that right-to-carry laws lead to an increase in violent crime. *See* ER 97-100, 345, 347-349.[27] In any event, even when there is "conflicting legislative evidence," a court applying intermediate scrutiny must uphold a law so long as the State chose one "'reasonable alternative[],'" *Peña*, 898 F.3d at 980—as California surely did here.

Plaintiffs further criticize the district court for "ask[ing] only whether the State's evidence was 'sufficient to support the inference that the State reasonably saw a link between'" public carry restrictions and public safety concerns. AOB 45-46. But whether the State has "'drawn reasonable inferences based on substantial evidence'" *is* the proper inquiry when applying intermediate scrutiny. *Turner*, 520 U.S. at 195; *see also Jackson*, 746 F.3d at 966 (upholding ordinance because city drew "a reasonable inference" that requiring residents to keep their firearms locked when not being carried would enhance public safety). Similarly, plaintiffs assert that the district court erred by failing to evaluate whether

[27] The reported study concludes that crime rates rise by only 1% over five years. ER 118. But that figure is the result of a misplaced decimal. When corrected, the study shows a 10% increase in crime over five years, and 20% over ten years. ER 99.

California's public carry laws "burden[] substantially more protected conduct than is necessary to further" the State's public safety interests. AOB 41 (citations, brackets, and quotation marks omitted). When a law is subject to intermediate scrutiny, however, a State need only show that its interests would be "achieved less effectively absent the regulation." *Peña*, 898 F.3d at 979 (citations and quotation marks omitted). That standard is satisfied here. ER 12-14.

3. California's Public Carry Laws Satisfy Strict Scrutiny

Indeed, even if strict scrutiny applied here, California's public carry laws are "narrowly tailored to serve a compelling interest." *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1664 (2015). No one has questioned that the State's public safety interests are compelling. And California's system of rules, exceptions, and local control directly serves those interests, while allowing public carry in circumstances that pose less of a threat to public safety.

Heller recognized the constitutional validity of some regulations on public carry, like "forbidding the carrying of firearms in sensitive places such as schools and government buildings," or by particular persons such as "felons and the mentally ill." 554 U.S. at 626. Whether that observation rested solely on "longstanding" tradition, *id.*, or on an implicit recognition (reflected in that tradition) that such restrictions were so obviously reasonable as to withstand even stringent judicial scrutiny, it confirms that States may adopt some restrictions on

public carry. The laws challenged by plaintiffs here are likewise narrowly framed to serve compelling public safety interests, while allowing public carry in other circumstances.[28]

Plaintiffs argue that the Sheriff's good cause policy is not narrowly tailored because not every otherwise-qualified resident is able to obtain a license to carry a gun in public. AOB 42; *see id.* at 40-43; *cf. id.* at 35-37. But that argument merely restates their contention that *any* interpretation of "good cause" short of honoring a stated desire for self-defense constitutes an impermissible "destruction of a fundamental constitutional right." AOB 2. Everyone agrees that the Second Amendment does not embody an individual right of any person to carry in any place for any purpose. *See Heller*, 554 U.S. at 595, 626-627 & n.26. And the particular standard reflected in the Los Angeles Sheriff's good cause policy for allowing private carry in populated parts of Los Angeles County—a clear and present danger to life or property that cannot be addressed by local law enforcement—aligns quite precisely with the limited circumstances in which the historical record shows that public carry was widely viewed as appropriate. *See,*

[28] Far from being "irrelevant," AOB 35, the exceptions in California's public carry regime demonstrate a prudent balance between public safety and individual interests. That is "a hallmark of narrow tailoring, not evidence of unconstitutionality." *Fisher v. Univ. of Texas at Austin*, 136 S. Ct. 2198, 2212 (2016); *see also Williams*, 135 S. Ct. at 1671 (strict scrutiny requires that laws be "narrowly tailored, not 'perfectly tailored'").

e.g., 1836 Mass. Laws 748, 750, ch. 134, § 16 (prohibiting public carry absent "reasonable cause to fear an assault"). If plaintiffs believe that the Second Amendment requires the Sheriff to issue them a license based on some lesser showing of danger (AOB 10-11, 42-43), or requires some official other than the Sheriff to assess the adequacy of law enforcement resources (AOB 43), they could press those arguments on an as-applied basis. If they believe the Sheriff is applying the policy in an unconstitutional manner (AOB 36), or has not adequately accounted for their unique circumstances (AOB 10, 23), they could seek to build a record supporting a specific challenge. But they cannot establish that either California's statutory framework or the Sheriff's policy fails strict scrutiny on its face, merely because an otherwise-qualified person is not entitled to receive a license to carry a firearm in public based on nothing more than a stated desire to have one.

Similarly, plaintiffs contend (AOB 37-38) that California's regime is unconstitutional because the statutory exception for circumstances presenting immediate, grave danger is too narrowly drawn. This exception aligns with the historical understanding that exigent circumstances may create an immediate need for public carry where "*bona fide* to ward off or meet imminent and threatened danger to life or limb, or great bodily harm." *Andrews*, 50 Tenn. at 191; *see, e.g.*, 1 Blackstone, *Commentaries* 139; 1 Tucker, *Blackstone's Commentaries* 145. That

understanding did not historically mean that anyone may carry "an unloaded firearm on or near his person in public to load should 'immediate, grave danger' arise," as plaintiffs suggest. AOB 37. If plaintiffs believe this exception should be more tailored, either because its definition of immediate danger is too demanding (AOB 37), or because it is styled as an affirmative defense to a criminal charge (AOB 38), they could bring that claim. But those arguments provide no basis for their contention that this Court should strike down California's public carry regulations on their face, in favor of a regime under which almost any private person would have a constitutional right to carry a loaded gun in almost any public place.

CONCLUSION

The district court's judgment should be affirmed.

Dated: November 20, 2018

Respectfully Submitted,

s/ Samuel P. Siegel

Xavier Becerra
Attorney General of California
Edward C. DuMont
Solicitor General
Thomas S. Patterson
Senior Assistant Attorney General
Michael J. Mongan
Samuel P. Siegel
Deputy Solicitors General
Jonathan M. Eisenberg
P. Patty Li
Deputy Attorneys General
CALIFORNIA DEPARTMENT OF JUSTICE
1300 I Street
Sacramento, CA 95814
(916) 210-6269
Sam.Siegel@doj.ca.gov
Attorneys for Defendant-Appellee Xavier Becerra, Attorney General of California

STATEMENT OF RELATED CASES

The State agrees with plaintiffs that *Young v. Hawaii, et al.*, 9th Cir. Case No. 12-17808 and *Nichols v. Edmund G. Brown, et al.*, 9th Cir. Case No. 14-55873, are related cases, as defined by Ninth Circuit Rule 28-2.6.

Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28.1-1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number 18-55717

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the end of the brief.*

I certify that (*check appropriate option*):

☐ This brief complies with the length limits permitted by Ninth Circuit Rule 28.1-1.
The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☒ This brief complies with the length limits permitted by Ninth Circuit Rule 32-1.
The brief is [13,990] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the length limits permitted by Ninth Circuit Rule 32-2(b).
The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable, and is filed by (1) ☐ separately represented parties; (2) ☐ a party or parties filing a single brief in response to multiple briefs; or (3) ☐ a party or parties filing a single brief in response to a longer joint brief filed under Rule 32-2(b). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the longer length limit authorized by court order dated [ ]
The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6). The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable.

☐ This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 32-2 (a) and is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32 (f), if applicable. The brief's type size and type face comply with Fed. R .App. P. 32(a)(5) and (6).

☐ This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 29-2 (c)(2) or (3) and is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the length limits set forth at Ninth Circuit Rule 32-4.
The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

Signature of Attorney or Unrepresented Litigant: s/ Samuel P. Siegel

Date: Nov. 20, 2018

("s/" plus typed name is acceptable for electronically-filed documents)

CERTIFICATE OF SERVICE

I certify that on November 20, 2018, I electronically filed the foregoing document with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all other participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: November 20, 2018

s/ Samuel P. Siegel
Samuel P. Siegel