No. 18-55717

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Michelle Flanagan, *et al*.,

Plaintiff-Appellants,

v.

Xavier Becerra, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court
for the Central District of California, No. 2:16-cv-06164-JAK-AS
District Judge John A. Kronstadt

BRIEF OF NEW JERSEY, CONNECTICUT, DELAWARE, IOWA, MARYLAND, MASSACHUSETTS, NEW YORK, OREGON, RHODE ISLAND, VIRGINIA, AND THE DISTRICT OF COLUMBIA IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

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Amici States, New Jersey, Connecticut, Delaware, Iowa, Maryland, Massachusetts, New York, Oregon, Rhode Island, Virginia, and the District of Columbia, have an interest in defending their ability to protect their residents from gun violence. Many of the amici States have, like California, tailored their public carry regimes to fit their local public safety needs. In particular, because the available evidence shows that "right-to-carry" laws—which allow for widespread public carrying of firearms—substantially increase the risk that confrontations in the public sphere will turn deadly, many of the amici States have instead required applicants for public carry licenses to show an individualized safety need to carry a weapon in public. Appellants challenge that approach and urge this Court to second-guess legislative decisions on public safety issues. Whether this Court defers to the predictive judgments of State legislatures or overrides their careful determinations thus affects each State.

States also have an interest in defending their longstanding laws. As the U.S. Supreme Court has made clear, the longstanding nature of a statute is an important part of the Second Amendment inquiry, and laws with a particularly impressive historical pedigree are presumptively lawful. Amici States thus have an interest in explaining why their enduring approach to public carry withstands constitutional scrutiny.

SUMMARY OF THE ARGUMENT

California's careful approach to the public carrying of firearms, like the similar laws in other States, is constitutional. Statutes like this one reflect a centuries-old approach to advancing States' interests in public safety.

I. States have a right and an obligation to protect their residents from the scourge of gun violence. In evaluating the best way to advance their compelling interest in public safety, States have a variety of legislative tools at their disposal. One important policy option is the ability to limit the situations in which a person may carry a firearm in public. California adopted that approach in light of all the evidence confirming that this regime advances public safety, and its law does not offend the Second Amendment. Although the Constitution bars States from adopting certain laws, it affords States significant leeway within those broad boundaries to place limits on public carry. Legislatures are best suited to evaluate the evidence and decide how to keep their residents safe. That is why the majority of this Court's sister circuits have upheld similar laws, and why a majority of this Court already reached that conclusion in *Peruta v. County of San Diego*, 824 F.3d 919 (9th Cir. 2016) (en banc) (*Peruta II*), *cert. denied*, 137 S. Ct. 1995 (2017).

II. There is another, independently sufficient basis to uphold the State's licensing law: its longstanding historical pedigree. As this Court previously (and correctly) held, "longstanding prohibitions" on firearms use are "traditionally

understood to be outside the scope of the Second Amendment." *Fyock v. Sunnyvale*, 779 F.3d 991, 996 (9th Cir. 2015). State statutes limiting public carry—including outright bans—were common and relatively uncontroversial in the nineteenth century. Such laws boast a lineage even more impressive than the specific statutes the Supreme Court identified as "longstanding" and "presumptively lawful" in *District of Columbia v. Heller*, 554 U.S. 570 (2008). Other circuits have upheld analogous laws on this ground, and the reasoning of *Peruta II* compels that result here.

ARGUMENT

I. CALIFORNIA'S FIREARMS LICENSING LAW, LIKE OTHER SIMILAR LAWS THROUGHOUT THE NATION, PROMOTES PUBLIC SAFETY WITHOUT CONTRAVENING SECOND AMENDMENT RIGHTS.

In *Young v. Hawaii*, 896 F.3d 1044, 1070 (9th Cir. 2018), a divided panel of this Court held that the right to carry a firearm openly for self-defense outside of the home falls within the core of the Second Amendment. The Court struck down a Hawaii statute that limited the public carry of firearms to people engaged in the protection of life and property. Appellees filed a timely petition for rehearing en banc, which remains pending as of the filing of this brief. The amici States have separately filed a brief with this Court supporting the en banc petition. We respectfully submit that the panel in *Young* impermissibly substituted its own

judgment for that of the legislature on an important public safety issue and rejected Hawaii's longstanding approach to firearm safety.

California, in its opening brief here, has framed its arguments on the premise that rehearing in *Young* will be granted and that the *Young* panel opinion will not be binding in this case. *See* Appellee's Br. 8, n.4. The amici States adopt that same approach. Even assuming that the Second Amendment applies outside the home, restrictions on public carry of firearms are subject to, at most, intermediate scrutiny. *See Gould v. Morgan*, 907 F.3d 672-73 (1st Cir. 2018); *Drake v. Filko*, 724 F.3d 426, 436 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 2134 (2014); *Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir.), *cert. denied*, 571 U.S. 952 (2013); *Kachalsky v. County of Westchester*, 701 F.3d 81, 96 (2d Cir. 2012), *cert. denied*, 569 U.S. 918 (2013). As the First Circuit recently observed:

> Societal considerations . . . suggest that the public carriage of firearms, even for the purpose of self-defense, should be regarded as falling outside the core of the Second Amendment right. The home is where families reside, where people keep their most valuable possessions, and where they are at their most vulnerable (especially while sleeping at night). Outside the home, society typically relies on police officers, security guards, and the watchful eyes of concerned citizens to mitigate threats. . . . Last, but surely not least—the availability of firearms inside the home implicates the safety only of those who live or visit there, not the general public. Viewed against this backdrop, the right to self-defense—upon which the plaintiffs rely—is at its zenith inside the home. This right is plainly more circumscribed outside the home.

Gould, 907 F.3d at 671-72. Additionally, the amici States agree with California that, even if strict scrutiny were to apply, California's restrictions on carrying firearms in public do not contravene the Second Amendment. *See* Appellee's Br. 54-57.

* * *

One of a State's primary obligations, and thus one of its most compelling interests, is to ensure the public safety of its residents. Indeed, "[i]t is 'self-evident' that [a State's] interests in promoting public safety and reducing violent crime are substantial and important government interests," as are its "interests in reducing the harm and lethality of gun injuries in general … and in particular as against law enforcement officers." *Fyock*, 779 F.3d at 1000; *see also Drake*, 724 F.3d at 437 (explaining that a State has "a significant, substantial and important interest in protecting its citizens' safety"); *Woollard*, 712 F.3d at 877 (finding that "protecting public safety and preventing crime … are substantial governmental interests").

The legislature's chosen solution to this problem must, of course, still fit the problem States are trying to solve, but California's licensing laws clearly do. As other courts of appeals have observed, and as the record here shows, *see* Appellee's Br. 45-47 & nn.18-19, the "studies and data demonstrat[e] that widespread access to handguns in public increases the likelihood that felonies will result in death and fundamentally alters the safety and character of public spaces." *Kachalsky*, 701 F.3d at 99; *see also Woollard*, 712 F.3d at 879 (citing evidence that "limiting the public

carrying of handguns protects citizens and inhibits crime by, *inter alia*: [d]ecreasing the availability of handguns to criminals via theft [and] [l]essening the likelihood that basic confrontations between individuals would turn deadly"); *Peruta II*, 824 F.3d at 944 (Graber, J., concurring) ("Several studies suggest that 'the clear majority of states' that enact laws broadly allowing concealed carrying of firearms in public 'experience increases in violent crime, murder, and robbery when [those] laws are adopted.'") (citation omitted). That is not surprising: "[i]ncidents such as bar fights and road rage that now often end with people upset, but not lethally wounded, take on deadly implications when handguns are involved." *Woollard*, 712 F.3d at 879 (citation omitted).

Recent studies confirm these courts' assessments of the evidence. *See, e.g.*, John Donohue et al., *Right-to-Carry Laws & Violent Crime: A Comprehensive Assessment Using Panel Data and a State-Level Synthetic Controls Analysis* at 42 (Nat'l Bureau of Econ. Research, Working Paper No. 23510, Nov. 2018) ("[T]he weight of the evidence … best supports the view that the adoption of [right-to-carry] laws substantially raises overall violent crime in the ten years after adoption."); Abhay Aneja et al., *The Impact of Right to Carry Laws and the NRC Report: The Latest Lessons for the Empirical Evaluation of Law and Policy* 80-81 (Nat'l Bureau of Econ. Research Working Paper No. 18294, 2014) (finding that right-to-carry laws lead to an increase in aggravated assaults, rapes, and robberies); Jens Ludwig,

Concealed-Gun-Carrying Laws & Violent Crime: Evidence from State Panel Data, 18 Int'l Rev. L. & Econ. 239, 239 (1998) (noting that such laws "resulted, if anything, in an increase in adult homicide rates"). And "[t]here is not even the slightest hint in the data that [right-to-carry] laws reduce violent crime." Donohue, *Right-to-Carry Laws*, *supra*, at 63.

This is of special concern for law enforcement officers, as the evidence below amply demonstrated. *See, e.g.*, Appellee's Br. 48-49 (citing, *inter alia*, expert report from former president of the California Police Chiefs Association). From 2007 to 2016, "concealed-carry permit holders have shot and killed at least 17 law enforcement officers and more than 800 private citizens—including 52 suicides." *Peruta II*, 824 F.3d at 943 (Graber, J., concurring). Right-to-carry regimes only make the problem worse—"civilians without sufficient training to use and maintain control of their weapons, particularly under tense circumstances, pose a danger to officers and other civilians." *Woollard*, 712 F.3d at 880 (citation omitted). That will, of course, impact "routine police-citizen encounters": "If the number of legal handguns on the streets increased significantly, officers would have no choice but to take extra precautions … effectively treating encounters between police and the community that now are routine, friendly, and trusting, as high-risk stops, which demand a much more rigid protocol." *Id.* (citation omitted). This evidence is why legislatures and law enforcement have instead opted to "strike a permissible balance

between 'granting handgun permits to those persons known to be in need of self-protection and precluding a dangerous proliferation of handguns on the streets.'" *Peruta II*, 824 F.3d at 942 (Graber, J., concurring) (citation omitted).

Despite this evidence of the importance of licensing laws for combatting gun violence, and proof that the States were motivated by these safety concerns, Appellants nevertheless argue that the Court must cover its eyes and refuse even to weigh the public interests in the analysis. Br. at 33-34. In their view, the denial of an individual's Second Amendment right to carry a firearm outside the home always trumps public safety. *Id*. Appellants are wrong; constitutional rights are frequently balanced against important government interests, particularly when public safety is involved. *See* Appellee's Br. 37-38, 42-43. Under the First Amendment, for example, courts are often called upon to weigh a State's compelling interest in safety. *See Schenck v. Pro-choice Network of W. N.Y.*, 519 U.S. 357, 375 (1997) ("[I]n assessing a First Amendment challenge, a court looks not only at the private claims … but also inquires into the governmental interests that are protected … which may include an interest in public safety and order."). So too when asking whether a search is reasonable under the Fourth Amendment. *See, e.g.*, *Maryland v. King*, 569 U.S. 435, 448 (2013) ("[The Amendment] requires a court to weigh 'the promotion of legitimate governmental interests' against 'the degree to which [the search] intrudes upon an individual's privacy.'"). Courts thus regularly make their decisions with a

view towards public safety needs, and the Second Amendment is no exception to that rule. *See also Gould*, 907 F.3d at 672 (upholding Massachusetts's public carry restrictions, and noting that "[m]any constitutional rights are virtually unfettered inside the home but become subject to reasonable regulation outside the home"); *Kolbe v. Hogan*, 849 F.3d 114, 150 (4th Cir. 2017) (Wilkinson, J., concurring) (criticizing the approach that "envisions the Second Amendment almost as an embodiment of unconditional liberty, thereby vaulting it to an unqualified status that the even more emphatic expressions in the First Amendment have not traditionally enjoyed").

To be sure, not every State has balanced these important public safety interests in the same way, and not every State has chosen to adopt California's particular licensing scheme. But that is the very point of federalism. *See* Appellee's Br. 16, 26-27, 32-33. Although *McDonald v. City of Chicago*, 561 U.S. 742 (2010), establishes that the Second Amendment "creates individual rights that can be asserted against state and local governments," *McDonald* does not "define the entire scope of the Second Amendment—to take all questions about which weapons are appropriate for self-defense out of the people's hands." *Friedman v. Highland Park*, 784 F.3d 406, 412 (7th Cir. 2015). Instead, "[t]he central role of representative democracy is no less part of the Constitution than is the Second Amendment: when there is no definitive constitutional rule, matters are left to the legislative process." *Id.* That is

because, as Judge Easterbrook put it, "the Constitution establishes a federal republic where local differences are cherished as elements of liberty, rather than eliminated in a search for national uniformity." *Id.* Although no State can trammel on the rights that *McDonald* set forth, *McDonald* only "circumscribes the scope of permissible experimentation by state[s]" and "does not foreclose all possibility of experimentation. Within the limits [it] establishe[s] … federalism and diversity still have a claim." *Id.*; *see also, e.g.*, *Drake*, 724 F.3d at 439 ("[Although some] states have determined that it is unnecessary to conduct the careful, case-by-case scrutiny mandated by [these] gun laws before issuing a permit to publicly carry a handgun … this does not suggest, let alone compel, a conclusion that the 'fit' between [this] individualized, tailored approach and public safety is not 'reasonable.'").

Legislators, representing local communities, are in the best position to determine whether particular firearms restrictions, such as restrictions on public carry, are well-tailored to serve the compelling interest in public safety. A restriction that might be appropriate for New Jersey, the nation's most densely populated state, might not be appropriate for Wyoming. Similarly, a restriction imposed in a densely populated city might not be appropriate for a rural county. *See Gould*, 907 F.3d at 672 ("public safety interests often outweigh individual interests in self-defense" particularly "in densely populated urban areas like Boston and Brookline"); *Peruta II*, 824 F.3d at 945 (Graber, J., concurring) ("Localizing the decision allows closer

scrutiny of the interests and needs of each community, increasing the 'reasonable fit' between the level of restriction and local conditions"). States and localities have "a credible concern that civilians (even civilians who, like the plaintiffs, are law-abiding citizens) might miss when attempting to use a firearm for self-defense on crowded public streets and, thus, create a deadly risk to innocent bystanders." *Gould*, 907 F.3d at 675. As a result, legislators must be free to canvass the evidence and make the tough calls on how to protect local residents from the scourge of gun violence.

As Judge Wilkinson explained, it is not possible "to draw from the profound ambiguities of the Second Amendment an invitation to courts to preempt this most volatile of political subjects and arrogate to themselves decisions that have been historically assigned to other, more democratic, actors." *Kolbe*, 849 F.3d at 150 (Wilkinson, J., concurring); *see also Heller*, 554 U.S. at 636 ("We are aware of the problem of handgun violence in this country, and … [t]he Constitution leaves … a variety of tools for combating that problem, including some measures regulating handguns."). "Disenfranchising the American people on this life and death subject would be the gravest and most serious of steps." *Kolbe*, 849 F.3d at 150 (Wilkinson, J., concurring). These concerns have never mattered more than they do today: "To say in the wake of so many mass shootings in so many localities across this country that the people themselves are now to be rendered newly powerless, that all they can

do is stand by and watch as federal courts design their destiny—this would deliver a body blow to democracy as we have known it since the very founding of this nation." *Id.*

In sum, no State is *required* to protect residents from the dangers of public carry, but every State is *permitted* to do so under the Second Amendment. And that is precisely what this Court's sister circuits have found when upholding analogous licensing laws. *See Gould*, 907 F.3d at 663, 666 (upholding Massachusetts firearms licensing statute requiring applicant for license to carry in public to demonstrate a "reason" for carrying a firearm, and to distinguish his own need for self-defense from that of the general public); *Kachalsky*, 701 F.3d at 98 ("Restricting handgun possession in public to those who have a reason to possess the weapon for a lawful purpose is substantially related to New York's interests in public safety and crime prevention."); *Drake*, 724 F.3d at 437 (upholding New Jersey's scheme given the legislature's "predictive judgment … that limiting the issuance of permits to carry a handgun in public to only those who can show a 'justifiable need' will further its substantial interest in public safety"); *Woollard*, 712 F.3d at 880 ("We are convinced by the State's evidence that there is a reasonable fit between the good-and-substantial-reason requirement and Maryland's objectives of protecting public safety and preventing crime.").

While appellants rely heavily on this Court's recent panel decision in *Young*, this Court's analysis in *Peruta II*—where this Court was sitting en banc—makes clear that the *Young* majority went astray. Although the opinion for the Court in *Peruta II* focused on the history of concealed-carry regulation, Judge Graber wrote a concurrence discussing whether a public-carry regime could survive intermediate scrutiny. Writing for three judges, she explained that such statutes are constitutional because they "strike a permissible balance between 'granting handgun permits to those persons known to be in need of self-protection and precluding a dangerous proliferation of handguns on the streets.'" *Peruta II*, 824 F.3d at 942 (Graber, J., concurring) (citation omitted). Critically, "[t]he other four judges on the panel who made up the majority stated that 'if we were to reach that question, we would entirely agree with the answer the concurrence provides.'" *Young*, 896 F.3d at 1075 (Clifton, J., dissenting) (quoting *Peruta II*, 824 F.3d at 942 (majority op.)). In short, "seven of the eleven members of that en banc panel expressed views that are inconsistent with the majority opinion" in *Young*. *Id.*; *see also id.* at 1082 ("As other circuits have held in *Kachalsky*, *Drake*, and *Woollard*, and as a majority of the judges on our en banc panel indicated in *Peruta II*, there is a reasonable fit between good cause limitations on public carry licenses and public safety."). In coming to the contrary result, the *Young* majority disregarded this Court's unambiguous conclusions in *Peruta II*.

And this happened for one simple reason—the panel "substitute[d] its own judgment about the efficacy" of the challenged open-carry law for the legislature's conclusions. *Young*, 896 F.3d at 1083 (Clifton, J., dissenting). That deviation from the well-established practice of deferring to legislatures' safety judgments was unwarranted. The "Supreme Court has long granted deference to legislative findings regarding matters that are beyond the competence of courts," *Kachalsky*, 701 F.3d at 97, and has made clear that, in those areas, courts must accord "substantial deference to the predictive judgments" of legislatures, *Peruta II*, 824 F.3d at 945 (quoting *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 665 (1994)). That makes sense: "In the context of firearm regulation, the legislature is '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. After all, "assessing the risks and benefits of handgun possession and shaping a licensing scheme to maximize the competing public-policy objectives … is precisely the type of discretionary judgment that officials in the legislative and executive branches of state government regularly make." *Id.* at 99. As Judge Clifton explained, "[a]lthough the [panel] majority may not like the outcomes of [the] studies" on which Hawaii had relied, it had no authority "to dismiss statutes based on [its] own policy views or disagreements with aspects of the analyses cited." 896 F.3d at 1082; *see also Gould*, 907 F.3d at 676 ("We conclude

that this case falls into an area in which it is the legislature's prerogative—not ours—to weigh the evidence, choose among conflicting inferences, and make the necessary policy judgments.").

California, like the other States with similar laws, acted permissibly in seeking to protect its residents from the dangers that unlimited public carry of firearms pose. This Court should respect and uphold that judgment.

II. CALIFORNIA'S LAW PASSES CONSTITUTIONAL MUSTER IN LIGHT OF ITS HISTORICAL PEDIGREE.

Under *Heller*, a law's historical pedigree offers an independently sufficient reason to uphold it against a Second Amendment challenge. That leads inexorably to one result here—California's longstanding law is constitutional.

There is little doubt that the historical pedigree of the law matters. Indeed, as *Heller* established, the longstanding nature of a law can be a sufficient (though not necessary) reason to decide that it withstands Second Amendment scrutiny. *Heller* held "that the rights guaranteed by the Second Amendment were 'not unlimited'"; instead, the Supreme Court identified restrictions rooted in history on carrying and possessing firearms that were left intact by the Second Amendment. *Heller*, 554 U.S. at 626. It follows, the Court explained, that these "'longstanding' restrictions" are "'presumptively lawful.'" *Id.* at 626, 627 n.26. Put simply, these "longstanding prohibitions" are "traditionally understood to be outside the scope of the Second Amendment." *Fyock*, 779 F.3d at 996. Nor does that historical analysis stop at the

ratification of the Second Amendment; *Heller* itself looked to "nineteenth-century state laws as evidence of 'longstanding' firearms restrictions." *United States v. Rene E.*, 583 F.3d 8, 12 (1st Cir. 2009). The issue is thus whether public carry statutes like California's law are "presumptively lawful, longstanding licensing provision[s]." *Drake*, 724 F.3d at 432.

To understand why that inquiry calls for affirming California's law, start with the long history of such laws. This Court is not writing on a blank slate; as Judge Clifton noted, *Peruta II* walked through the history of laws regulating the public carrying of weapons. *See Young*, 896 F.3d at 1076 (Clifton, J., dissenting) ("Much of the analysis offered in the majority opinion repeats what was said in *Peruta I*, despite the en banc rejection of that opinion in *Peruta II*.").[1] In short, *Peruta II* explained that, "[d]ating back to the thirteenth century, England regulated public carry of firearms, including both concealed *and concealable* weapons." 896 F.3d at 1077 (emphasis added) (citing *Peruta II*, 824 F.3d at 929-32). To borrow a few

[1] *Peruta II* hardly stands alone in its conclusions. As other circuits have explained, "[f]irearms have always been more heavily regulated in the public sphere." *Drake*, 724 F.3d at 430 n.5; *see also*, *e.g.*, *Kachalsky*, 701 F.3d at 96 (concluding that "our tradition so clearly indicates a substantial role for state regulation of the carrying of firearms in public"); *United States v. Masciandaro*, 638 F.3d 458, 470 (4th Cir.) (explaining that "outside the home, firearms rights have always been more limited because public safety interests often outweigh individual interests"), *cert. denied*, 565 U.S. 1058 (2011); *Gould*, 907 F.3d at 672 ("This right is plainly more circumscribed outside the home.").

examples from *Peruta II*'s analysis, in 1328 Parliament enacted the Statute of Northampton, stating that no one could "go nor ride armed by night nor by day." 824 F.3d at 930. This statute, which *Peruta II* called "the foundation for firearms regulation in England for the next several centuries," *id.*, was not limited to concealed carry; it banned the public carrying of firearms more generally. Indeed, in 1594, Elizabeth I issued a proclamation confirming that the Statute of Northampton prohibited the "open carrying" of weapons. *Id.* at 931; 896 F.3d at 1077 (Clifton, J., dissenting) (agreeing that "subsequent laws emphasiz[ed] that the Statute prohibited the carrying of concealable weapons"). It was not the only English law to do so; in 1541, Parliament enacted a law forbidding "owning or carrying concealable (not merely concealed) weapons." *Peruta II*, 824 F.3d at 931.

There is a similarly long history of public-carry regulations in the United States, dating back to the seventeenth and eighteenth centuries. *See Peruta II*, 824 F.3d at 933-37; *see also, e.g.*, Eric M. Ruben & Saul Cornell, *Firearm Regionalism & Public Carry: Placing Southern Antebellum Case Law in Context*, 125 Yale L.J. Forum 121, 129 n.43 (2015). Many states still limited public carry after passage of the Second and Fourteenth Amendments. During the nineteenth century, as the Second Circuit has explained, myriad "states enacted laws banning … concealable weapons … whether carried openly or concealed." *Kachalsky*, 701 F.3d at 95-96. And, as this Court in *Peruta II* already laid out, multiple state courts had "upheld

prohibitions against carrying concealable (not just concealed) weapons in the years following the adoption of the Fourteenth Amendment." 824 F.3d at 937.[2] Importantly, both the English and the American legal traditions recognized that firearms restrictions were more common and appropriate for populated cities and town than for more remote locales. *See* Appellee's Br. 17, 21-22, 31, 49-50.

The same is true for the particular licensing standards on which California and other States now rely. These laws "do[] not go as far as some of the historical bans on public carrying; rather, [they] limit[] the opportunity for public carrying to those who can demonstrate" a need to do so. *Drake*, 724 F.3d at 433. Yet they boast an impressive pedigree. As Judge Clifton pointed out in his dissent, "[n]umerous states adopted good cause limitations on public carry in the early 20th century." 896 F.3d at 1079. Indeed, Massachusetts adopted a "good cause" statute for public carry in 1836, *Gould*, 907 F.3d at 669, and Oklahoma imposed strict limits on public carry dating back to 1890, *see Young*, 896 F.3d at 1079 (Clifton, J., dissenting). New York's "legislative judgment concerning handgun possession in public was made one-hundred years ago," in 1913, when it "limit[ed] handgun possession in public to

[2] The *Young* panel disputed that conclusion by focusing "on the laws and decisions from one region, the antebellum South." 896 F.3d at 1076 (Clifton, J., dissenting). But *Peruta II* rejected the idea that "the approach of the antebellum South reflected a national consensus about the Second Amendment's implications." *Id*. at 1076-77. The "more balanced historical analysis" in *Peruta II* instead "reveals that states have long regulated and limited public carry of firearms and, indeed, have frequently limited public carry to individuals with specific self-defense needs." *Id*.at 1077.

those showing proper cause." *Kachalsky*, 701 F.3d at 97. So too New Jersey, which has maintained a similar standard for resolving public-carry applications since 1924. *See Drake*, 724 F.3d at 432. Hawaii enacted a statute in 1852 that made it a crime for "[a]ny person not authorized by law" to "carry, or be found armed with, any . . . pistol . . . or other deadly weapon . . . unless good cause be shown for having such dangerous weapons." Act of May 25, 1852, § 1. Thus, it is clear these "good cause" statutes are of longstanding provenance.

Unsurprisingly, other Circuits have noted the long history of state limitations on public carry in upholding laws similar to California's. The First Circuit, surveying the historical record through a "wider-angled lens" recently concluded that there is no national historical consensus in favor of a right to carry firearms publicly. *Gould*, 907 F.3d at 669. The fact that different states, territories, and regions of the country have long taken divergent approaches when regulating public carry, demonstrates that the Second Amendment was not widely understood as creating an insurmountable barrier to such restrictions. *Id*. at 669-70 (citing *Young*, 896 F.3d at 1076, 1078 (Clifton, J., dissenting)). The Second Circuit was explicit: "There is a longstanding tradition of states regulating firearm possession and use in public because of the dangers posed to public safety." *Kachalsky*, 701 F.3d at 94-95. Given "the history and tradition of firearm regulation," that court "decline[d] Plaintiffs' invitation to strike down New York's one-hundred-year-old law and call into

question the state's traditional authority to extensively regulate handgun possession in public." *Id.* at 101. And the Third Circuit was, if anything, even more direct, determining that "the requirement that applicants demonstrate a 'justifiable need' to publicly carry a handgun for self-defense is a presumptively lawful, longstanding licensing provision [because it] has existed in New Jersey in some form for nearly 90 years." *Drake*, 724 F.3d at 432. That is appropriate in light of Supreme Court precedent; *Heller*, after all, described other laws that dated from the early twentieth century as longstanding and thus presumptively lawful. *See Young*, 896 F.3d at 1079 (Clifton, J., dissenting) (citing *Heller*, 670 F.3d at 1253). This Court should reach the same result here and uphold California's public carry restrictions.

CONCLUSION

Because California's regulatory scheme directly advances its compelling interest in public safety and reflects a centuries-old approach to governing the public carrying of firearms, this Court should affirm the judgment below.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(a)(4)(G) and Fed. R. App. P. 32(g)(1), the undersigned hereby certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(i) and Fed. R. App. P. 29(a)(5):

1. This brief contains 4,899 words, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable.
2. This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman type, which complies with Fed. R. App. P. 32 (a)(5) and (6).

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CERTIFICATE OF SERVICE

I hereby certify that on November 27, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. Counsel for all parties are registered CM/ECF users and will be served by the appellate CM/ECF system.

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