No. _____

In the

Supreme Court of the United States

EDWARD PERUTA; MICHELLE LAXSON; JAMES DODD; LESLIE BUNCHER, DR.; MARK CLEARY; CALIFORNIA RIFLE AND PISTOL ASSOCIATION FOUNDATION,
Petitioners,

v.

STATE OF CALIFORNIA; COUNTY OF SAN DIEGO; WILLIAM D. GORE, individually and in his capacity as Sheriff,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Under California law, openly carrying a handgun outside the home is generally prohibited, but concealed carry is permissible with a license. While an applicant must demonstrate "good cause" to obtain a concealed-carry license, county sheriffs can—and many do—interpret "good cause" to include a desire to carry a handgun for self-defense. The San Diego County Sheriff takes a different, and much more restrictive, approach, defining "good cause" to require a *particularized* need for self-defense that differentiates the applicant from the ordinary citizen. The majority of a three-judge panel held the Sheriff's policy unconstitutional, concluding that ordinary, law-abiding citizens may not be deprived of the ability to obtain concealed-carry licenses for self-defense when state law already prohibits open carry. But the majority of an en banc panel reached the opposite conclusion, holding that the Sheriff may deny concealed-carry licenses on any terms he chooses because there is no independent constitutional right to *concealed* carry. In reaching that conclusion, the Ninth Circuit added to the sharp division among the lower courts over whether the Second Amendment allows ordinary, law-abiding citizens to be deprived of all means of carrying a handgun for self-defense.

The question presented is:

Whether the Second Amendment entitles ordinary, law-abiding citizens to carry handguns outside the home for self-defense in some manner, including concealed carry when open carry is forbidden by state law.

PARTIES TO THE PROCEEDING

Petitioners are Edward Peruta, Michelle Laxson, James Dodd, Leslie Buncher, Mark Cleary, and the California Rifle and Pistol Association Foundation. They were plaintiffs in the District Court and plaintiffs-appellants in the Court of Appeals.

Respondents are the State of California, the County of San Diego, and William D. Gore, who was sued individually and in his capacity as Sheriff of San Diego County. The County of San Diego and William D. Gore were defendants in the District Court and defendants-appellees in the Court of Appeals. The State of California was intervenor in the Court of Appeals.

CORPORATE DISCLOSURE STATEMENT

The California Rifle and Pistol Association Foundation has no parent corporation and has issued no stock to any publicly held corporation.

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PETITION FOR WRIT OF CERTIORARI

This case presents perhaps the single most important unresolved Second Amendment question after this Court's landmark decisions in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742 (2010): whether the Second Amendment secures an individual right to bear arms for self-defense outside the home. The text of the amendment and this Court's decisions interpreting it plainly support the conclusion that the Constitution guarantees ordinary, law-abiding citizens *some* means of bearing firearms outside the home for self-defense, whether it be open or concealed carrying. And the majority of the three-judge panel in this case agreed, concluding that San Diego County could not deprive petitioners of the ability to obtain concealed-carry licenses when California law prohibits open carry. But an en banc panel concluded, in a sharply divided 7-4 decision, that the San Diego Sheriff's policy of reserving concealed-carry licenses to those who can document a *particularized* need for self-defense passes constitutional muster—because individuals have no independent constitutional right to *concealed* carry.

That conclusion is wrong for any number of reasons, not the least of which is (as the en banc panel openly acknowledged) that petitioners "do *not* contend that there is a free-standing Second Amendment right to carry concealed firearms." App.10. The only right they have ever asserted is the right to bear a handgun outside the home *in some manner*, whether openly or concealed. They challenged the Sheriff's policy, rather than the

State's laws, only because there is no dispute that state law does not compel the restrictive policy that the Sheriff employs, and other counties have adopted concealed-carry policies that render both state law and those policies constitutional. And yet, the en banc court concluded that depriving petitioners of *any* means of carrying handguns outside the home for self-defense does not violate their Second Amendment rights because the *only* way individuals may vindicate the right to bear arms outside the home (to the extent the Ninth Circuit is even willing to acknowledge its existence) is by insisting on *open* carry.

That conclusion readily warrants this Court's review, particularly given the exceptional importance of the constitutional question presented and the anomaly that the decision below effectively deprives states of the flexibility (flexibility petitioners have never disputed) to choose whether to allow open carry, concealed carry, or both. And the pressing need for certiorari is confirmed by the fact that the Ninth Circuit is just the most recent court to consider whether, and to what extent, the Second Amendment applies outside the home. Numerous courts have now weighed in on that question, with some concluding that it applies with full force outside the home, others concluding that it does not apply outside the home at all, others still reaching the confounding conclusion that it applies (or at least presumptively applies) outside the home, but that states and municipalities nonetheless may prohibit *both* open *and* concealed carry, and now the en banc Ninth Circuit weighing in with yet another position—that the government always has *carte*

blanche to prohibit concealed carry even when it bans open carry.

The time has come for this Court to resolve that four-way split of authority. The majority of circuits where jurisdictions have severely restricted the right to bear arms outside the home have already addressed whether those restrictions are constitutional. And as the divided three-judge and en banc panel opinions below vividly illustrate, jurists are no closer to consensus on how to answer that question. This Court should grant review and provide clarity on this important constitutional question.

OPINIONS BELOW

The en banc panel's opinion is reported at 824 F.3d 919. App.1-86. The three-judge panel's opinion is reported at 742 F.3d 1144. App.89-204. The District Court's opinion is reported at 758 F. Supp. 2d 1106. App.205-32.

JURISDICTION

The en banc panel issued its opinion on June 9, 2016. Petitioners timely filed a petition for full court rehearing en banc, which the court denied on August 15, 2016. On November 1, 2016, Justice Kennedy extended the time for filing this petition to and including December 14, 2016. On December 6, 2016, Justice Kennedy further extended the time to file this petition to and including January 12, 2017. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Second Amendment, the Fourteenth Amendment, the relevant portions of the California Penal Code, and the Sheriff's "good cause" policy are reproduced at App.233-53.

STATEMENT OF THE CASE

A. Statutory and Regulatory Scheme

California law recognizes two potential ways citizens can bear arms outside the home: open carry and concealed carry. California has made the policy decision to prohibit individuals from openly carrying firearms, whether loaded or unloaded, outside the home. *See* Cal. Penal Code §25850 (prohibiting carry of loaded firearms in public); §26350 (prohibiting open carry of unloaded handguns in public). There are exceptions to this general prohibition on open carry, but they either are exceptions in name only,[1]

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[1] For example, while California's firearms prohibitions do not apply in "unincorporated" (largely remote) areas, they do apply "in any public place or on any public street in a prohibited area of unincorporated territory." *See* Cal. Penal Code §§25850(a), 26350(a). A "prohibited area" is "any place where it is unlawful to discharge a weapon." *Id.* §17030. In San Diego County, it is unlawful to discharge a weapon in "any place within the unincorporated territory of the County which is not a reasonably safe distance from all recreational areas, communities, roads or occupied dwelling house, residence, or other building or any barn or other outbuilding used in connection therewith." San Diego, Cal. County Code tit. 3, div. 3, ch. 1, §33.101. Thus, if individuals are anywhere near civilization in San Diego County—in other words, are pretty much anywhere in San Diego County where a need for self-defense might arise—they are prohibited from open carry.

or apply only to a narrow set of persons or places.[2] For example, California allows individuals to carry a loaded firearm if they reasonably believe that they are in "immediate, grave danger." *Id.* §26045(a). But an individual may carry the firearm under this exception *only* during "the brief interval" between when law enforcement officials are notified of the danger and when law enforcement arrives on scene. *Id.* §26045(c). And as Judge O'Scannlain pointedly noted, "where the fleeing victim would obtain a gun during that interval is apparently left to Providence." App.90 n.1.

California also generally bans the concealed carry of firearms outside the home. Cal. Penal Code §25400.[3] But California has made the policy choice that an individual may carry a concealed handgun outside the home if he obtains a license. *Id.* §25655. Concealed-carry licenses are issued by the sheriff or police chief in the county or city where the individual resides or works. *See id.* §§26150, 26155. Applicants must meet a host of eligibility requirements that are not challenged here, including passing a criminal background check and successfully completing a

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[2] *See, e.g.*, Cal. Penal Code §25900 (peace officers); *id.* §26005 (target ranges and hunting on premises of shooting clubs); *id.* §26015 (armored vehicle guards); *id.* §26020 (retired federal officers); *id.* §26025 (animal control officers and zookeepers); *id.* §26035 (individuals engaged in lawful business); *id.* §26040 (hunters); *id.* §26050 (individuals making a lawful arrest); *id.* §26055 (residences).

[3] The concealed carry ban includes many of the same narrow and inapplicable exemptions as the open carry ban. *See, e.g.*, Cal. Penal Code §§25450, 25520, 25525, 25530, 25630, 25635, 25640, 26055.

training course covering handgun safety and California firearms laws. *Id.* §§26165, 26185. An applicant must also convince the sheriff or police chief that the applicant is of "good moral character" and has "good cause" to carry a loaded handgun in public. *Id.* §§26150(a)(1)-(2), 26155(a)(1)-(2).

Rather than defining "good cause," the State has delegated that task to each sheriff or police chief. *Id.* §26160. Consistent with the concealed-carry regimes that govern in the vast majority of states, many sheriffs have reasonably (and constitutionally) concluded that an individual's desire to carry a handgun for self-defense in case of confrontation qualifies as "good cause." And the State treats that policy judgment as a permissible interpretation of "good cause."

The Sheriff of San Diego County, however, has taken a different tack. His policy requires applicants to prove a *particularized* need to carry a handgun in public:

> [G]ood cause has been determined to be circumstances which would make a person a specific target in contrast to a random one. Applicants are require[d] to demonstrate the specific situation that places them in danger and submit evidence of current incidents which documents their claim. Licenses are NOT issued based on fear alone.

App.250 (quotation marks omitted). In other words, to establish "good cause" in San Diego County, an applicant must "distinguish" himself from "the mainstream," App.252, and provide supporting documentation, such as "restraining orders," "law

enforcement referrals," or "documented victim case incidents or threats." App.251. If an applicant cannot document a particularized threat that satisfies this narrow definition of "good cause" and distinguishes his need for self-defense from that of other citizens, then the Sheriff will not issue a concealed-carry license.

The net effect of this restrictive interpretation of "good cause" is that the typical law-abiding resident of San Diego County cannot obtain a concealed-carry license. Indeed, the whole point of the Sheriff's policy is to confine concealed-carry licenses to a very narrow subset of law-abiding residents. And because California law prohibits openly carrying a handgun outside the home, the result is that the typical law-abiding resident cannot bear a handgun for self-defense outside the home at all.

B. District Court Proceedings

Petitioners are five individuals who reside in San Diego County and the California Rifle and Pistol Association Foundation, which includes numerous San Diego County residents. Each individual petitioner either was denied a concealed-carry license for failure to establish "good cause" or declined to apply after being informed that the County would not accept an undifferentiated need for self-defense as a "good cause."[4] No petitioner is prohibited under federal or state law from possessing firearms.

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[4] The Sheriff Department's will provide prospective applicants with an "educated guess" as to whether they will receive a concealed-carry license. App.206-07 n.1.

Petitioners initiated this case against the County and its Sheriff over seven years ago, on October 23, 2009, not long after this Court issued its landmark decision in *Heller*. Their principal claim was that the Sheriff's restrictive interpretation of "good cause" infringed their Second Amendment rights to bear arms for self-defense outside the home. As petitioners explained in their complaint, "[b]ecause California does not permit the open carriage of loaded firearms, concealed carriage with a CCW permit is the only means by which an individual can bear arms in public spaces in order to exercise his or her Second Amendment right to armed self-defense." Am.Compl.11. To remedy this violation of their "right to bear arms," *id.* at 17, petitioners sought a declaration that the Sheriff's interpretation of "good cause" is unconstitutional and an injunction preventing the Sheriff from denying concealed-carry licenses based on that restrictive interpretation, *id.* at 22-23. Petitioners also sought such other "relief as the Court deems just and proper." *Id.* at 24.

As the District Court explained, "the heart of the parties' dispute [wa]s whether the right recognized by the Supreme Court's rulings in [*Heller* and *McDonald*] … extends to … the right to carry a loaded handgun in public, either openly or in a concealed manner." App.205-06. The court resolved that dispute by concluding that even if the Second Amendment protects that right, any burden the Sheriff's policy imposed on that right was sufficiently "mitigated" because state law "permit[s] loaded open carry for *immediate* self-defense." App.218 (emphasis added). The court did not explain, however, how an individual could obtain a loaded

firearm should the need for "immediate self-defense" arise given that state law prohibited an individual from carrying a loaded firearm unless and until an "immediate, grave danger" manifested.[5] The court further held that, even if the Sheriff's policy burdened petitioners' Second Amendment rights, the law passed muster under intermediate scrutiny because it allows California "to effectively differentiate between individuals who have a bona fide need to carry a concealed handgun for self-defense and individuals who do not." App.224 n.1.

C. Panel Proceedings

Petitioners appealed, and the Ninth Circuit reversed. Writing for the panel, Judge O'Scannlain began by recognizing that the issue in the case is "whether a responsible, law-abiding citizen has a

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[5] At the time of the District Court's opinion, state law allowed the open carry of *unloaded* firearms, which the court apparently believed sufficed to create the potential for an individual to pause and load the firearm if suddenly attacked. Whatever the merits of that far-fetched speculation, the law permitting unloaded open carry has since been repealed. *See* Cal. Penal Code §12031 (2011), *repealed by* AB 144, 2011-12 Leg., 2011-12. Sess. (Cal. 2011). Under the law that was in place by the time this case reached the three-judge and en banc panels, individuals who reasonably believe they are in "immediate, grave danger" may still carry a loaded firearm during "the brief interval" between when law enforcement officials are notified of the danger and when they arrived on scene, *see* Cal. Penal Code §§26045(a)-(c), but they may no longer have an unloaded firearm on or near their persons to load should "immediate, grave danger" arise, *see id.* §26350 (prohibiting open carry of unloaded firearms). Accordingly, "where the fleeing victim would obtain a gun during that interval is apparently left to Providence." App.90 n.1.

right under the Second Amendment to carry a firearm in public for self-defense." App.90. To answer that question, the panel examined this Court's precedents and found that "both *Heller* and *McDonald* identify the 'core component' of the right as self-defense, which necessarily 'take[s] place wherever [a] person happens to be,' whether in a back alley or on the back deck." App.102 (quoting Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. Rev. 1443, 1515 (2009)). After conducting an exhaustive historical analysis, the court further found that "the majority of nineteenth century courts agreed that the Second Amendment right extended outside the home." App.118. The court thus concluded that "the carrying of an operable handgun outside the home for the lawful purpose of self-defense … constitutes 'bear[ing] Arms' within the meaning of the Second Amendment." App.131.

With that "unsurprising" conclusion established, *id.*, the court turned to whether the Sheriff's interpretation of "good cause" infringed petitioners' Second Amendment rights. The panel recognized that petitioners could vindicate their rights with a narrow challenge to the Sheriff's "good cause" licensing requirement, rather than a sweeping challenge to California's entire statutory scheme, because "in light of the California licensing scheme *as a whole* … acquiring such a license is the only practical avenue by which [petitioners] may come lawfully to carry a gun for self-defense in San Diego County." App.141. The panel then held that the Sheriff's policy deprived petitioners of their right to

bear arms because, "in California, the only way that the typical responsible, law-abiding citizen can carry a weapon in public for the lawful purpose of self-defense is with a concealed-carry permit," and, "in San Diego County, that option has been taken off the table." App.137. By "enjoin[ing] completely a responsible, law-abiding citizen's right to carry in public for self-defense," the "good cause" requirement led to "a destruction of the right to bear arms" that "cannot be sustained under any standard of scrutiny." App.151 (emphasis omitted). While the panel made clear that the Second Amendment does not "require[] the states to permit *concealed* carry," it concluded that it "does require that the states permit *some form* of carry for self-defense outside the home." App.143-44 (first emphasis added).

Judge Thomas dissented, insisting that the case should be resolved on the ground that the Second Amendment does not confer a right to carry a *concealed* weapon. App.186. He further maintained that even if the Sheriff's policy implicated petitioners' Second Amendment rights, that policy should survive intermediate scrutiny. App.192.

D. En Banc Proceedings

The County and the Sheriff declined to seek rehearing or further defend their position. Dkt.149 at 1. The State moved to intervene, however, on the ground that "this case draws into question the constitutionality of the State's statutory scheme regulating the public carrying of firearms." Dkt.122-1 at 1. Although the panel denied that motion as untimely, *Peruta v. Cty. of San Diego*, 771 F.3d 570, 573-74 (9th Cir. 2014), the Ninth Circuit *sua sponte*

granted rehearing before an 11-judge en banc panel and permitted the State to argue, *Peruta v. Cty. of San Diego*, 781 F.3d 1106 (9th Cir. 2015). Due to the Ninth Circuit's unique en banc process, the en banc panel excluded the panel opinion's authoring judge, Judge O'Scannlain.

Echoing their written submissions, petitioners reiterated at the en banc argument that they are not asserting "a constitutional right to concealed carry," but rather seek only "a constitutional right to some outlet to exercise the right to bear, or carry, arms for purposes of self-defense." Oral Arg. Rec. 1:47-2:05. The State, for its part, conceded that the Second Amendment must have *some* purchase outside the home, and acknowledged that a state may not be able to "categorically … ban both open and concealed carry" without running afoul of the Constitution. *Id.* at 41:05-50; 44:06-16.

The en banc panel issued a divided decision in which Judge Fletcher, writing for a seven-judge majority, rejected petitioners' constitutional claims. Rather than decide whether denying petitioners any outlet to carry firearms for self-defense violates the Second Amendment, however, the court resolved the case on the ground that "there is no Second Amendment right for members of the general public to carry *concealed* firearms in public." App.11 (emphasis added). Although the majority acknowledged that petitioners "do *not* contend that there is a free-standing Second Amendment right to carry concealed firearms," App.10, it nonetheless refused to analyze the claim petitioners actually pressed—*i.e.*, that prohibiting them from carrying a

firearm *either openly or concealed* violates the Second Amendment. And although the majority allowed the State to intervene to defend "the entirety of California's statutory scheme," App.40, it refused to accept the State's concession that the Second Amendment must protect "to some degree a right of a member of the general public to carry a firearm in public," instead opining only that "[i]f there is such a right, it is only a right to carry a firearm openly," App.44.

Four judges dissented from the majority's "over-simplistic analysis." App.71. Judge Callahan authored the principal dissent, which Judges Silverman, Bea, and Randy Smith joined in whole or in part. Judge Callahan explained that the "majority sets up and knocks down an elaborate straw argument by answering only a narrow question—whether the Second Amendment protects a right to carry concealed firearms in public." App.55. In her view, the "individual constitutional right that Plaintiffs seek to protect is not the right to concealed carry per se," but "their individual right to self-defense guaranteed by" the Second Amendment. App.70. And because California chose "to prohibit open carry," the Sheriff's refusal to issue concealed-carry licenses to ordinary, law-abiding citizens was "tantamount to [a] complete ban[] on the Second Amendment right to bear arms outside the home for self-defense," which the Constitution cannot tolerate. App.64-65. Judge Callahan also lamented the perverse effects that the majority's contrary conclusion will have, as "States may have good reasons for allowing concealed carry but banning open carry," yet under the majority's opinion, "states

must accommodate the right to bear arms through open carry." App.74.

Petitioners sought rehearing en banc before the full Ninth Circuit, but the court denied their petition.

REASONS FOR GRANTING THE PETITION

There are few unresolved constitutional questions of greater legal and practical significance than whether the Second Amendment entitles ordinary, law-abiding citizens to bear handguns outside the home for self-defense. While the vast majority of states have adopted laws that obviate the need to answer that question by respecting the right to bear arms, a small number of jurisdictions have insisted that they may both prohibit open carry and confine concealed carry to individuals who can demonstrate a *particularized* need for self-defense that distinguishes them from their fellow citizens. And nearly ten years after *Heller*, lower courts are no closer to consensus on the constitutionality of those regimes. Even before the divided panel and en banc decisions here, the lower courts split three ways, with some recognizing that the Second Amendment protects the right to bear arms for self-defense outside the home, other courts rejecting that position, and a third group adopting a hybrid approach.

Rather than pick a side in that extant three-way split of authority, the en banc court adopted a "fourth way" that is deeply flawed. Instead of squarely addressing petitioners' argument that the Second Amendment demands some outlet—whether open or concealed carry—for the right to bear arms for self-defense outside the home, the en banc court adopted the entirely novel view that states have *carte blanche*

to prohibit concealed carry, even when they prohibit open carry, and thus that open carry laws must accommodate whatever constitutional right to bear arms may exist.

That result has nothing to recommend it. This Court has previously recognized that states historically have had flexibility to favor either open carry or concealed carry and have gotten themselves in constitutional trouble only when they banned both. *See, e.g., Heller*, 554 U.S. at 629 (discussing with approval cases establishing that proposition). The en banc court's decision unjustifiably places all the constitutional pressure on open carry laws and needlessly restricts the options of states and localities. Equally important, the en banc court's decision leaves petitioners in the constitutionally untenable position of having no valid outlet to exercise their constitutional right to bear arms for self-defense. That intolerable situation cries out for this Court's review, especially in light of the four-way split in authority that now exists.

I. This Case Presents An Exceptionally Important Constitutional Question That Has Divided The Lower Courts.

This case presents a constitutional question of profound importance: whether the individual, fundamental, and enumerated right to keep and bear arms is confined to the home. If the answer to that question is no, then the legal regime petitioners have challenged cannot possibly withstand constitutional scrutiny, as the Sheriff's policy of reserving concealed-carry licenses to the few who can document a particularized need for self-defense deprives

ordinary, law-abiding residents of the only lawful means of carrying a handgun—"the quintessential self-defense weapon," *Heller*, 554 U.S. at 629—outside the home for self-defense in California.

While the applicability of the Second Amendment outside the home seems clear—especially after this Court's decisions in *Heller* and *McDonald*—the issue has divided the lower courts. The Seventh Circuit has held that the Second Amendment applies with full force outside the home. *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2013). As Judge Posner explained, this "Court has decided that the amendment confers a right to bear arms for self-defense, which is as important outside the home as inside." *Id.* at 942. Accordingly, "[t]o confine the right to be armed to the home is to divorce the Second Amendment from the right of self-defense described in *Heller* and *McDonald*." *Id.* at 937. Nonetheless, some courts have held that the Second Amendment has *no* application outside the home, and that individuals thus may keep and bear arms only within the confines of their homes. *See Commonwealth v. Gouse*, 965 N.E.2d 774, 802 (Mass. 2012) ("The case before us does not implicate th[e Second Amendment] right: the defendant was charged with and convicted of possessing a firearm in an automobile, not his home."); *Williams v. State*, 10 A.3d 1167, 1777 (Md. 2011) ("If the Supreme Court … meant its holding to extend beyond home possession, it will need to say so more plainly."); *Mack v. United States*, 6 A.3d 1224, 1236 (D.C. 2010) ("[W]e simply cannot find any error that is 'plain' in failing to extend *Heller* to a case … where a weapon is carried outside the home.").

Other courts have concluded that even assuming (without deciding) that the Second Amendment *does* apply outside the home, ordinary, law-abiding citizens nonetheless may be denied any ability to lawfully carry a handgun outside the home. *See Kachalsky v. Cty. of Westchester*, 701 F.3d 81 (2d Cir. 2012); *Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013); *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013). Considering legal regimes indistinguishable from the one challenged here, those courts have concluded that the government may both prohibit open carry entirely and confine concealed-carry to "persons known to be in need of self-protection" without infringing on the assumed-but-not-actually-recognized right to carry a firearm for self-defense. *Woollard*, 712 F.3d at 881; *see also Kachalsky*, 701 F.3d at 98 (applying "intermediate scrutiny" to uphold a law "[r]estricting handgun possession in public to those who have a reason to possess the weapon for a lawful purpose"); *Drake*, 724 F.3d at 434 (deeming law nearly identical to Sheriff's "good cause" policy a "longstanding regulation that enjoys presumptive constitutionality" and therefore "regulates conduct falling outside the scope of the Second Amendment's guarantee").

As the panel recognized in this case, that reasoning is impossible to reconcile with this Court's admonishment that the Second Amendment protects a fundamental right that may not be "singled out for special—and specially unfavorable—treatment," *McDonald*, 561 U.S. at 778-79 (plurality opinion). *See, e.g.*, App.151-58; *Drake*, 724 F.3d at 457 (Hardiman, J., dissenting); *Woollard v. Sheridan*, 863 F. Supp. 2d 462, 474 (D. Md. 2012); *Grace v. District*

of Columbia, No. 15-2234, 2016 WL 2908407 (D.D.C. May 17, 2016). Assuming, as the Second, Third, and Fourth Circuits all purport to do, that the Second Amendment does in fact protect a right to carry a handgun outside the home for self-defense, then it simply cannot be correct that the government may deprive ordinary, law-abiding citizens of any avenue for lawfully exercising that right. After all, the Second Amendment secures a fundamental right to "the people," not just to whatever subset of the people a state or locality deems in particular need of that right. Indeed, there is no other fundamental right that the government may categorically deny to ordinary, law-abiding citizens. Simply put, if the Constitution protects a right, then the government must allow law-abiding citizens to exercise it and not demand an especially good reason to exercise a right secured to "the people." That is why rights are enshrined in the Constitution in the first place.

Rather than pick a side in this three-way split of authority, as the panel opinion forthrightly did, the en banc panel adopted a novel "fourth way." The en banc panel sidestepped the question whether the Second Amendment guarantees individuals some outlet to exercise a right to bear arms for self-defense outside the home. Instead, the en banc panel rested its decision on the absence of a free-standing right to concealed, as opposed to open, carry. Based on that premise, which no party to the litigation contested, the en banc panel then concluded that states and localities have *carte blanche* to prohibit concealed carry, even when, as in this case, the state prohibits open carry. As a result, the en banc panel held that there is never a right to concealed carry, even when

that is the only permissible avenue for exercising the right to bear arms for self-defense outside the home. The en banc court thus erected an anomalous regime where all the constitutional pressure is directed at laws restricting open carry. That result is deeply flawed, as demonstrated below, but also cements a four-way split of authority on the question presented. No other court of appeals or state high court has adopted this slice-and-dice approach to the right to bear arms. And since the en banc Ninth Circuit has embraced this anomaly, the circuit split will remain unless and until this Court grants review.

Equally problematic, as things stand, in numerous circuits cities and states have been judicially empowered to deprive ordinary, law-abiding citizens of any means of exercising a right that courts purport to recognize is protected by the Constitution. And by insisting that individuals may vindicate that right *only* by demanding *open* carry, the en banc panel's decision in this case adds yet another option to the menu of paths through which ordinary, law-abiding citizens may be deprived of their Second Amendment rights. That is intolerable. Whether individuals may exercise the fundamental rights the Constitution protects cannot depend on the policy views of the city or state in which they live. Nor can it depend on whether they are fortunate enough to live in the rare circuit that is willing to acknowledge the clear import of this Court's Second Amendment precedents. Accordingly, this Court's intervention is imperative, as only this Court can resolve the pressing and hotly disputed question whether the Second Amendment requires states and municipalities to both recognize *and protect* the right

of ordinary, law-abiding citizens to bear arms for self-defense outside the home.

II. The Decision Below Is Profoundly Wrong.

This Court's review is all the more imperative because the decision below not only deepens an entrenched split of authority but also is profoundly wrong, both in its bottom line and in its mode of analysis. The Second Amendment plainly protects the right to bear arms outside the home for self-defense, and the Sheriff's decision to close off the only lawful outlet for exercising that right in California clearly violates the Constitution. That conclusion cannot be avoided by conflating the remedy petitioners have sought with the constitutional right they have spent seven years trying to vindicate.

A. The Second Amendment Protects the Right to Carry a Handgun Outside the Home for Self-Defense.

The Second Amendment provides that "the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. Nearly a decade ago, this Court settled the debate over the nature of that right, holding that the Second Amendment "confer[s] an individual right" that belongs to "the people," not a collective right reserved only to those in the "Militia." *Heller*, 554 U.S. at 595. That individual right contains two distinct components: the right to "keep arms" and the right to "bear arms." The "most natural reading of 'keep Arms' in the Second Amendment is to 'have weapons.'" *Id.* at 582. And to "bear arms" means to "'wear, bear, 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 (quoting *Muscarello v. United States*, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting)). Accordingly, this Court explained in *Heller* that the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation." *Id.* at 592. Indeed, the "core lawful purpose" of the Second Amendment, the Court confirmed, is "self-defense." *Id.* at 630.

While *Heller* did not definitively hold that the Second Amendment applies outside the home, its explication of the right protected by the amendment all but answers that question. The Court emphasized that the Second Amendment protects the right to bear arms, not just to keep them in the home, and to do so for purposes of self-defense. As a matter of common sense, the right to be "armed and ready for offensive or defensive action in a case of conflict with another person" must extend beyond the home. *Id.* at 584. After all, the notion of carrying a handgun to be "armed and ready" for confrontation naturally "brings to mind scenes such as a woman toting a small handgun in her purse as she walks through a dangerous neighborhood, or a night-shift worker carrying a handgun in his coat as he travels to and from his job site." App.100. Indeed, Justice Ginsburg's dissent in *Muscarello* explained that "one could carry his gun to a car, transport it to the shooting competition, and use it to shoot targets." *Muscarello*, 524 U.S. at 147. Thus, the very opinion that *Heller* invoked to define the meaning of "bear arms" expressly recognized that the term naturally applies outside the home.

To be sure, *Heller* recognized that the need for self-defense may be "most acute" in the home. *Heller*, 554 U.S. at 628. But it by no means suggested that the home is the *only* place where that need arises, let alone the only place where the Second Amendment applies. To the contrary, in the entirety of its nearly 50-page analysis of the scope of the Second Amendment right (as opposed to its application of the right to the D.C. ordinances at issue), the Court referred to the "home" or "homestead" a grand total of three times, in each instance quoting a historical source that recognized a right to keep and bear arms to defend both one's home *and* one's person and family. *See id.* at 615-16, 625. And when the Court searched in vain for past restrictions as severe as the District's handgun ban, it deemed restrictions that applied *outside* the home most analogous, and noted with approval that "some of those [restrictions] have been struck down." *Id.* at 629 (citing *Nunn v. State*, 1 Ga. 243, 251 (1846) (striking down prohibition on carrying pistols openly), and *Andrews v. State*, 50 Tenn. 165, 187 (1871) (same)). Such laws could hardly constitute analogous or "severe" restrictions on the Second Amendment right, *id.*, if that right were limited to the home.

The historical understanding of the right to bear arms also confirms that it encompasses the right to carry a handgun outside the home for self-defense. "Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures … think that scope too broad." *Id.* at 634-35. The Second Amendment, "like the First and Fourth Amendments, codified a *pre-existing* right," *id.* at

592, and that right undoubtedly included carrying arms outside the home for self-defense. In his seminal commentary on English law in the 18th century, William Blackstone described "the right of having and using arms for self-preservation and defence," which, as *Heller* authoritatively concluded, corresponded to "an individual right protecting against *both public and private* violence." *Id.* at 594 (emphasis added). As St. George Tucker explained in his American version of Blackstone's Commentaries, "[i]n many parts of the United States, a man no more thinks, of going out of his house on any occasion, without his rifle or musket in his hand, than a European fine gentleman without his sword by his side." App.105-06; *see also Moore*, 702 F.3d at 936 (in 18th-century America, one "would need from time to time to leave one's home to obtain supplies from the nearest trading post, and en route one would be as much (probably more) at risk if unarmed as one would be in one's home unarmed").

The reality that the need for self-defense is as likely to arise outside the home as inside it remains as true today as it was when the Second Amendment was ratified. Even if the home is not literally a castle, it does provide a measure of protection that one lacks when walking or driving on a deserted street in a dangerous neighborhood. And as several legal scholars have noted, statistics unfortunately show that a substantial majority of rapes, armed robberies, and other serious assaults occur outside the home. *See* Michael P. O'Shea, *Modeling the Second Amendment Right to Carry Arms (I): Judicial Tradition and the Scope of "Bearing Arms" for Self-Defense*, 61 Am. U. L. Rev. 585, 610-11

(2012); Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. Rev. at 1518.

Finally, the beyond-the-home understanding of the right to "bear arms" is reinforced by longstanding precedent. "Over the past two centuries, American courts applying the individual right to bear arms for the purpose of self-defense have held with near-uniformity that this right includes the carrying of handguns and other common defensive weapons outside the home." O'Shea, *Modeling the Second Amendment Right*, 61 Am. U. L. Rev. at 590; *id.* at 623-37 (discussing cases in detail); *see* App.109-19 (same). In an illustrative case, the Georgia Supreme Court held that a state statute that banned *both* open *and* concealed carry of handguns "is in conflict with the Constitution, and *void*." *Nunn*, 1 Ga. at 251; *see also Andrews*, 50 Tenn. at 187 (same); *State v. Reid*, 1 Ala. 612, 615-17 (1840) (same). Those are the very cases this Court cited with approval in *Heller* when observing that the few historical restrictions as severe as the District's handgun ban did not survive judicial review. *Heller*, 554 U.S. at 629.

In sum, this Court's precedents, the historical record, and the Second Amendment itself all confirm what the three-judge panel majority concluded: The individual and fundamental right protected by the Second Amendment includes the right to carry a handgun outside the home for self-defense.

B. The En Banc Panel's Reasoning Is Deeply Flawed.

Given the clarity with which the Second Amendment's text and history protect a right to bear arms outside the home, this should have been an easy case. California prohibits openly carrying a handgun outside the home but allows concealed carry if an individual obtains a license. It is perfectly permissible as a matter of state law for a sheriff to treat the "good cause" requirement for obtaining a concealed-carry license as met by an individual's satisfaction of various eligibility and training requirements along with a stated interest in carrying a handgun for self-defense. Indeed, that is precisely how numerous other jurisdictions in California implement the concealed carry laws. Yet the Sheriff of San Diego County refuses to employ that approach, instead defining "good cause" to require a *particularized* need for self-defense that differentiates the applicant from the ordinary, law-abiding citizen. But Second Amendment rights are secured to "the people," not a subset of the people with a particularly strong need for constitutional protection. Accordingly, as the three-judge panel majority correctly concluded, the Sheriff's policy violates the Second Amendment "[u]nder any of the standards of scrutiny." *Heller*, 554 U.S. at 629.

The en banc panel majority concluded otherwise not by denying that the Second Amendment applies outside the home, but by "set[ting] up and knock[ing] down an elaborate straw argument." App.55. Instead of asking whether the Sheriff may deprive petitioners of their only lawful means of carrying a

firearm outside the home for self-defense, the en banc panel asked only "whether the Second Amendment protects a right to carry *concealed* firearms in public." *Id.* (emphasis added). Never mind that petitioners have never claimed such a right—in fact, they have expressly disavowed any such claim repeatedly. And never mind that every party and both courts below proceeded on the understanding that this case is about whether the right to carry a handgun outside the home may be denied *entirely*. Determined to definitively deny petitioners relief while avoiding a definitive ruling that the Second Amendment tolerates a complete ban on all means of carrying for self-defense, the en banc court embraced a novel and deeply flawed analysis that gives constitutional primacy to a right to carry openly and gives jurisdictions *carte blanche* to restrict concealed carry.

That transparent effort to avoid the unenviable task of trying to explain how the challenged regime could possibly withstand scrutiny while denying any outlet for bearing arms for self-defense outside the home underscores the need for this Court's review. While the en banc panel declined to explain how California law could be reconciled with the right to have some outlet to carry arms for self-defense outside the home, it nonetheless definitively rejected petitioners' effort to vindicate the only avenue for exercising that right consistent with California law. And lest there be any confusion about whether that result is the product of some technicality unique to this case, the Ninth Circuit has already applied its decision in this case to end challenges to comparable "good cause" regimes in other California counties.

See, e.g., *Birdt v. Beck*, No. 12-55115, 2016 WL 6610221 (9th Cir. Nov. 9, 2016) (Los Angeles); *McKay v. Hutchens*, No. 12-57049, 2016 WL 4651412 (9th Cir. Sept. 7, 2016) (Orange County). Accordingly, it is now Ninth Circuit law that the *only* way individuals may even *try* to vindicate their constitutional right to bear arms is by insisting on being permitted to carry a handgun *openly*.

That conclusion is as wrong in its reasoning as in its result. From day one, petitioners made perfectly clear that the right they are asserting is the right to carry a handgun *in some manner* outside the home for self-defense. Indeed, their complaint invokes the "right to bear arms" repeatedly without once mentioning any purported "right to concealed carry." Am.Compl.2, 4, 5, 13, 15, 17. To be sure, petitioners sought concealed-carry licenses as a *remedy* for the violation of that right—but only because that is "the least intrusive remedy" given California's decision to prohibit open carry but allow counties to grant concealed-carry licenses without requiring the kind of particularized need for self-defense that San Diego demands. App.141. Whether petitioners have an independent constitutional right to concealed-carry licenses is therefore beside the point, as they neither claimed such a right nor needed to invalidate anything other than the Sheriff's policy to obtain concealed-carry licenses.[6] Accordingly, the question

[6] Of course, the situation might be different if petitioners were independently barred from obtaining concealed-carry licenses by some law or rule that they *did not* challenge. But that is manifestly not the case, as there is no dispute that California allows sheriffs to interpret "good cause" to include a general desire to carry a handgun for self-defense. Indeed, numerous

the en banc panel should have asked is not whether petitioners have a constitutional right to concealed-carry licenses, but whether the Sheriff's policy of refusing to grant them such licenses deprives them of their Second Amendment rights.

That conclusion follows directly from *Heller*. There, petitioner sought "to enjoin the city from enforcing the bar on the registration of handguns [and] the licensing requirement insofar as it prohibits the carrying of a firearm in the home without a license." *Heller*, 554 U.S. at 575-76. In resolving those claims, this Court did not ask whether individuals have a constitutional right to possess an unregistered handgun, or to possess a handgun without a license. The Court instead asked whether individuals have a constitutional right to possess a handgun in the home for self-defense. And after concluding that they do, the Court did not invalidate the District's licensing or registration regimes in toto, or empower Heller to ignore them. It instead held that "the District must permit [Heller] to register his handgun and must issue him a license to carry it in the home." *Id.* at 635. In other words, the Court simply ordered the District to protect Heller's Second Amendment rights in a manner consistent with the District's preference that firearms be registered and licensed. By failing to abide by that approach, the en banc panel blurred the basic distinction between "rights" and "remedies." *See Lewis v. Lewis & Clarke Marine, Inc.*, 531 U.S. 438, 445 (2001) ("A right is a well founded or acknowledged claim; a remedy is the

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sheriffs and police chiefs have adopted exactly that practice, and the State has conceded that it is permissible for them to do so.

means employed to enforce a right or redress an injury." (quoting *Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372, 384 (1918)).

As Judge Callahan explained in dissent, App.70-71, the en banc panel's approach also is inconsistent with how this Court approaches efforts to vindicate other constitutional rights. As the Court recently noted when deciding whether laws refusing to recognize same-sex marriages violate the Constitution:

> *Loving* did not ask about a "right to interracial marriage"; *Turner* did not ask about a "right of inmates to marry"; and *Zablocki* did not ask about a "right of fathers with unpaid child support duties to marry." Rather, each case inquired about the right to marry in its comprehensive sense[.] … That principle applies here.

Obergefell v. Hodges, 135 S. Ct. 2584, 2602 (2015). Likewise, this Court did not ask whether there is "a right to hold Nazi parades in Skokie, Illinois," *Nat'l Socialist Party of Am. v. Village of Skokie*, 432 U.S. 43 (1977) (per curiam); or to "picket at a soldier's funeral," *Snyder v. Phelps*, 562 U.S. 443 (2008); or to "caricature religious ministers with sexually charged double-entendre," *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988). Instead, it simply asked whether the challenged state action deprived the complaining parties of their First Amendment rights. The en banc panel's refusal to follow the same approach here is another impermissible effort to relegate the Second Amendment to 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 opinion).

Indeed, the decision below is an outlier even among Second Amendment decisions. Every other circuit faced with a challenge to a legal regime like the Sheriff's "good cause" policy has at least acknowledged that it could not assess the constitutionality of such a policy without taking into consideration whether open carry was permitted. *See, e.g.*, *Drake*, 724 F.3d at 433; *Woollard*, 712 F.3d at 869; *Kachalsky*, 701 F.3d at 85-87. In *Kachalsky*, for example, the Second Circuit did not ask whether there is an independent "right to concealed carry," but rather accounted for New York's ban on open carry in determining whether Westchester County could confine concealed-carry permits to those able to show something comparable to the Sheriff's "good cause" policy without violating the plaintiffs' Second Amendment rights. 701 F.3d at 85-87. The en banc panel, by contrast, blinded itself to the very thing that makes the Sheriff's policy unconstitutional—*i.e.*, that it deprives petitioners of the *only* outlet they have under California law for exercising their asserted right to carry handguns outside the home.

In doing so, the panel not only reached the wrong result, but also arrived at a decision that has perverse consequences for federalism. It is one thing to say that the Second Amendment does not entitle individuals to demand a choice between carrying their firearms openly or concealed. It is another thing to say that the Second Amendment protects "*only* a right to carry a firearm openly," and that individuals may vindicate the right to bear arms only

by insisting on open carry. App.43-44 (emphasis added). An overwhelming majority of states allow concealed carry, and many follow California's approach of allowing only concealed carry. *See* NRA-ILA, *Gun Laws*, https://www.nraila.org/gun-laws/ (last visited Jan. 11, 2017); *see also, e.g.*, 430 Ill. Comp. Stat. 66/10; N.Y. Penal Law §400.00(2)(f); Fla. Stat. Ann. §790.06; D.C. Code §22-4506(a). There are certainly reasons why a state might prefer concealed carry to the exclusion of open carry. *See, e.g.*, App.74 (quoting Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. Rev. at 1521); James Bishop, Note, *Hidden or on the Hip: The Right(s) to Carry After* Heller*,* 97 Cornell L. Rev. 907, 925 (2012). And the same 19th-century sources on which *Heller* relied indicate that it is for states to decide whether to accommodate Second Amendment rights through open carry, concealed carry, or both. *See, e.g.*, *State v. Chandler*, 5 La. Ann. 489, 489-90 (1850); *Nunn*, 1 Ga. at 243; 1 *The American Students' Blackstone* 84 n.11 (George Chase ed. 1884).

Yet under the en banc panel's reasoning, all those regimes are constitutionally suspect, as they foreclose the only mode of carry the court was willing to suggest might be entitled to Second Amendment protection. At a minimum, the decision below invites challenges to those regimes, as that is the only way plaintiffs can even *assert* a right to bear arms outside the home under the en banc panel's reasoning. Indeed, a lawsuit challenging California's open carry ban was initiated within months of the en banc panel's decision. *See Flanagan v. Harris*, No. 16-cv-6164 (C.D. Cal. filed Aug. 17, 2016). So at the end of

the day, the Ninth Circuit inevitably will still be forced to answer the question petitioners posed—whether the Second Amendment protects the right to carry a handgun *in some manner* outside the home for self-defense—but will have artificially constrained itself to providing only one remedy if the answer is yes. And in the meantime, the en banc panel's insistence that individuals separately litigate the constitutionality of California's *open* carry prohibition will have achieved nothing but countless more years of delay, waste of judicial and litigant resources, and, worst of all, deprivation of fundamental rights.[7]

* * *

In sum, this is the right case, and this is the right time, for this Court to resolve the division of authority over whether the Second Amendment secures the rights of law-abiding citizens to carry firearms outside the home for self-defense. This case is in a summary-judgment posture in which the material facts are uncontested, including the fact

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[7] That is particularly true given the Ninth Circuit's penchant for ordering en banc proceedings any time a panel recognizes even *the possibility* of a viable Second Amendment claim—a pattern that typically adds at least a year (here, more than two) onto already-drawn-out appellate proceedings. *See Teixeira v. Cty. of Alameda*, No. 13-17132, 2016 WL 7438631 (9th Cir. 2016) (granting rehearing en banc to reconsider panel's holding that plaintiff stated a viable claim by alleging that county effectively banned new gun stores); *Nordyke v. King*, 664 F.3d 775 (9th Cir. 2011) and *Nordyke v. King*, 575 F.3d 890 (9th Cir. 2009) (granting rehearing en banc twice to reconsider panel's holdings that plaintiffs could state a viable claim by alleging that county banned gun shows on county property).

that the Sheriff's "good cause" policy was outcome-determinative as to petitioners' inability to obtain concealed-carry licenses. So the only dispute is the parties' purely legal dispute over whether the Sheriff's policy deprives petitioners of their Second Amendment rights, an exceptionally important question that has divided courts and judges. There is now a four-way split on the constitutionality of restrictions on the right to bear arms outside the home for self-defense, with en banc Ninth Circuit cementing that split by adopting an entirely anomalous position. There is no prospect of the Ninth Circuit changing that view or any other circuit adopting its analysis. Only this Court's review can bring clarity to the law.

Absent that review, millions of individuals will be forced to continue to live under legal regimes in which they are denied any outlet to exercise what courts have repeatedly purported to assume is a fundamental constitutional right, while who knows how many other jurisdictions will be emboldened to adopt the same rights-denying approach. If it is indeed to be the law of the nation that ordinary, law-abiding individuals may be flatly deprived of the ability to carry handguns outside the home for self-defense, then at least this Court should be the one to say so.

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

Respectfully submitted,

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Appendix A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 10-56971

EDWARD PERUTA; MICHELLE LAXSON; JAMES DODD; LESLIE BUNCHER, DR.; MARK CLEARY; CALIFORNIA RIFLE AND PISTOL ASSOCIATION FOUNDATION,

Plaintiffs-Appellants,

v.

COUNTY OF SAN DIEGO; WILLIAM D. GORE, individually and in his capacity as Sheriff,

Defendants-Appellees,

STATE OF CALIFORNIA,

Intervenor.

Appeal from the United States District Court for the Southern District of California, Irma E. Gonzalez, Senior District Judge, Presiding
No. 3:09-cv-02371-IEG-BGS

No. 11-16255

ADAM RICHARDS; SECOND AMENDMENT FOUNDATION; CALGUNS FOUNDATION, INC.; BRETT STEWART,

Plaintiffs-Appellant,

v.

ED PRIETO; COUNTY OF YOLO,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of California, Morrison C. England, Chief District Judge, Presiding
No. 2:09-cv-01235-MCE-DAD

Argued and Submitted En Banc June 16, 2015
San Francisco, California
Opinion Filed: June 9, 2016

Before: Sidney R. Thomas, Chief Judge and Harry Pregerson, Barry G. Silverman, Susan P. Graber, M. Margaret McKeown, William A. Fletcher, Richard A. Paez, Consuelo M. Callahan, Carlos T. Bea, N. Randy Smith and John B. Owens, Circuit Judges.

OPINION

W. FLETCHER, Circuit Judge:

Under California law, a member of the general public may not carry a concealed weapon in public unless he or she has been issued a license. An applicant for a license must satisfy a number of conditions. Among other things, the applicant must show "good cause" to carry a concealed firearm. California law authorizes county sheriffs to establish and publish policies defining good cause. The sheriffs of San Diego and Yolo Counties published policies defining good cause as requiring a particularized reason why an applicant needs a concealed firearm for self-defense.

Appellants, who live in San Diego and Yolo Counties, allege that they wish to carry concealed firearms in public for self-defense, but that they do not satisfy the good cause requirements in their counties. They contend that their counties' definitions of good cause violate their Second Amendment right to keep and bear arms. They particularly rely on the Supreme Court's decisions in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

We hold that the Second Amendment does not preserve or protect a right of a member of the general public to carry concealed firearms in public.

I. Procedural History

Plaintiff Edward Peruta lives in San Diego County. He applied for a license to carry a concealed firearm in February 2009, but his application was denied because he had not shown good cause under the policy published in his county. Plaintiff Adam Richards lives in Yolo County. He sought a license to carry a concealed firearm in May 2009, but was told he could not establish good cause under his county's policy. Peruta, Richards, and the other plaintiffs—five residents of San Diego and Yolo Counties, as well as several gun-rights organizations—brought two separate suits challenging under the Second Amendment the two counties' interpretation and application of the statutory good cause requirement under California law.

The district courts granted summary judgment in each case, holding that the counties' policies do not violate the Second Amendment. *Peruta v. Cty. of San*

Diego, 758 F. Supp. 2d 1106 (S.D. Cal. 2010); *Richards v. Cty. of Yolo*, 821 F. Supp. 2d 1169 (E.D. Cal. 2011). A divided three-judge panel of this court reversed both decisions. The panel majority held in a published opinion in *Peruta* that San Diego's policy violated the Second Amendment. *See Peruta v. Cty. of San Diego*, 742 F.3d 1144 (9th Cir. 2014); *see also id.* at 1179 (Thomas, J., dissenting). Although Plaintiffs challenged only the county's concealed firearms policy, the panel held that their challenge should not be "viewed in isolation." Rather, in the view of the panel majority, Plaintiffs' suit should be viewed as a challenge to "the constitutionality of [California's] entire [statutory] scheme." *Id.* at 1171. In the majority's view, the Second Amendment required that "the states permit *some form* of carry for self-defense outside the home." *Id.* at 1172 (emphasis in original). Because California's statutory scheme permits concealed carry only upon a showing of good cause and because open carry is also restricted, the panel held that the county's definition of good cause for a concealed carry license violates the Second Amendment. *Id.* at 1179. The panel held in *Richards* that, in light of its holding in *Peruta*, the Yolo County policy also violated the Second Amendment. *See Richards v. Prieto*, 560 F. App'x 681 (9th Cir. 2014); *see also id.* at 682 (Thomas, J., concurring in the judgment).

Yolo County and its sheriff, Ed Prieto, filed a petition for rehearing en banc in *Richards*. San Diego County's sheriff, William Gore, announced that he would not petition for rehearing en banc in *Peruta*. After Sheriff Gore declined to file a petition, the State of California moved to intervene in *Peruta* in

order to seek rehearing en banc. The same divided three-judge panel denied California's motion to intervene. *See Peruta v. Cty. of San Diego*, 771 F.3d 570 (9th Cir. 2014); *see also id.* at 576 (Thomas, J., dissenting).

We granted rehearing en banc in both cases. *Peruta v. Cty. of San Diego*, 781 F.3d 1106 (9th Cir. 2015); *Richards v. Prieto*, 782 F.3d 417 (9th Cir. 2015).

II. Standard of Review

We review a district court's grant of summary judgment de novo. *Sanchez v. Cty. of San Diego*, 464 F.3d 916, 920 (9th Cir. 2006). We review constitutional questions de novo. *Am. Acad. of Pain Mgmt. v. Joseph*, 353 F.3d 1099, 1103 (9th Cir. 2004).

III. California Firearms Regulation

California has a multifaceted statutory scheme regulating firearms. State law generally prohibits carrying concealed firearms in public, whether loaded or unloaded. Cal. Penal Code § 25400. State law also generally prohibits carrying loaded firearms on the person or in a vehicle in any public place or on any public street, in either an incorporated city or a "prohibited area" of "unincorporated territory." *Id.* § 25850. Finally, state law generally prohibits carrying unloaded handguns openly on the person in a public place or on a public street, in either an incorporated city or a "prohibited area" of an "unincorporated area of a county." *Id.* § 26350.

However, there are numerous exceptions to these general prohibitions. For example, the prohibitions of §§ 25400 and 25850 do not apply to active and retired

"peace officers." *Id.* §§ 25450, 25900. The prohibition of § 25400 does not apply to guards or messengers of common carriers of banks or financial institutions while employed in the shipping of things of value. *Id.* § 25630. The prohibition of § 25850 does not apply to armored vehicle guards, guards or messengers of common carriers, banks or financial institutions, security guards, animal control officers, or zookeepers, provided they have completed an approved course in firearms training. *Id.* §§ 26015, 26025, 26030.

Further, the prohibition of § 25400 does not apply to licensed hunters or fishermen while engaged in hunting or fishing, to members of target shooting clubs while on target ranges, or to the transportation of unloaded firearms while going to or returning from hunting or fishing expeditions or target ranges. *Id.* §§ 25640, 25635. Nor does it apply to the transportation of a firearm to and from a safety or hunting class or a recognized sporting event involving a firearm, to transportation between a person's residence and business or private property owned or possessed by the person, or to transportation between a business or private residence for the purpose of lawful repair, sale, loan, or transfer of the firearm. *Id.* §§ 25520, 25525, 25530. The prohibition of § 25850 does not apply to a person having a loaded firearm at his or her residence, including a temporary residence or campsite. *Id.* § 26055. Nor does it apply to a person having a loaded firearm at his or her place of business or on his or her private property. *Id.* § 26035. It also does not apply to a person "who reasonably believes that any person or the property of any person is in

immediate, grave danger and that the carrying of the weapon is necessary for the preservation of that person or property." *Id.* § 26045. Nor does it apply to persons using target ranges for practice, or to members of shooting clubs while hunting on the premises of the clubs. *Id.* § 26005. Finally, the prohibitions of §§ 25400, 25850 and 23650 do not apply to transportation of firearms between authorized locations, provided that the firearm is unloaded and in a locked container, and that the course of travel has no unreasonable deviations. *Id.* § 25505.

The case before us concerns the general prohibition of § 25400 against carrying loaded or unloaded concealed weapons, and a license-based exception to that prohibition. The prohibition of § 25400 does not apply to those who have been issued licenses to carry concealed weapons. *Id.* § 25655. The sheriff of a county may issue a concealed carry license to a person upon proof of all of the following:

> (1) The applicant is of good moral character.
>
> (2) Good cause exists for issuance of the license.
>
> (3) The applicant is a resident of the county or a city within the county, or the applicant's principal place of employment or business is in the county or a city within the county and the applicant spends a substantial period of time in that place of employment or business.
>
> (4) The applicant has completed a course of training as described in Section 26165.

Id. § 26150(a). The chief of a municipal police department may issue a concealed carry license under comparable criteria; the only difference is that the applicant must be a "resident of that city." *Id.* §§ 26155(a), 26155(a)(3) (residence). Sheriffs and municipal police chiefs are required to "publish and make available a written policy summarizing the provisions" of §§ 26150(a) and 26155(a). *Id.* § 26160.

An affidavit of Blanca Pelowitz, Manager of the San Diego Sheriff's Department License Division, describes the definition of good cause in San Diego County:

> Good Cause . . . is defined by this County to be a set of circumstances that distinguish the applicant from the mainstream and causes him or her to be placed in harm's way. Simply fearing for one's personal safety alone is not considered good cause. This criterion can be applied to situations related to personal protection as well as those related to individual businesses or occupations.
>
> Good cause is also evaluated on an individual basis. Reasons applicants request a license will fall into one of . . . four general categories[.]

The only two general categories potentially relevant to this appeal are:

> Category 2 = Personal Protection Only includes: documented threats, restraining orders and other related situations where an applicant can demonstrate they are a specific target at risk.

> Category 4 = Business owners/employees includes a diversity of businesses & occupations, such as doctors, attorneys, CEO's, managers, employees and volunteers whose occupation or business places them at high risk of harm.

The published policy of Yolo County does not define "good cause" but gives examples of where good cause does, or does not, exist. The policy provides as follows:

> Examples of valid reasons to request a permit include, but are not limited to:
>
> > Victims of violent crime and/or documented threats of violence.
> >
> > Business owners who carry large sums of cash or valuable items.
> >
> > Business owners who work all hours in remote areas and are likely to encounter dangerous people and situations.
>
> Examples o[f] invalid reasons to request a permit include, but are not limited to:
>
> > Recreation in remote areas.
> >
> > Hunting or fishing.
> >
> > Self protection and protection of family (without credible threats of violence).
> >
> > Employment in the security field, i.e., security guard, body guard, VIP protection.
> >
> > Personal safety due to job conditions or duties placed on the applicant by

their employer.

IV. Second Amendment and Concealed Carry

Plaintiffs contend that the good cause requirement for concealed carry, as interpreted in the policies of the sheriffs of San Diego and Yolo Counties, violates the Second Amendment. Plaintiffs' arguments in the two cases differ in some particulars, but they essentially proceed as follows. First, they contend that the Second Amendment guarantees at least some ability of a member of the general public to carry firearms in public. Second, they contend that California's restrictions on concealed and open carry of firearms, taken together, violate the Amendment. Third, they contend that there would be sufficient opportunity for public carry of firearms to satisfy the Amendment if the good cause requirement for concealed carry, as interpreted by the sheriffs of San Diego and Yolo Counties, were eliminated. Therefore, they contend, the counties' good cause requirements for concealed carry violate the Amendment. While Plaintiffs base their argument on the entirety of California's statutory scheme, they allege only that they have sought permits to carry concealed weapons, and they seek relief only against the policies requiring good cause for such permits. Notably, Plaintiffs do *not* contend that there is a free-standing Second Amendment right to carry concealed firearms.

We do not reach the question whether the Second Amendment protects some ability to carry firearms in public, such as open carry. That question was left open by the Supreme Court in *Heller*, and we have no need to answer it here. Because Plaintiffs

challenge only policies governing concealed carry, we reach only the question whether the Second Amendment protects, in any degree, the ability to carry concealed firearms in public. Based on the overwhelming consensus of historical sources, we conclude that the protection of the Second Amendment—whatever the scope of that protection may be—simply does not extend to the carrying of concealed firearms in public by members of the general public.

The Second Amendment may or may not protect, to some degree, a right of a member of the general public to carry firearms in public. But the existence *vel non* of such a right, and the scope of such a right, are separate from and independent of the question presented here. We hold only that there is no Second Amendment right for members of the general public to carry concealed firearms in public.

A. *Heller* and *McDonald*

The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. The watershed case interpreting the Amendment is *District of Columbia v. Heller*, 554 U.S. 570 (2008). The plaintiff in *Heller* challenged a District of Columbia statute that entirely banned the possession of handguns in the home, and required that any lawful firearm in the home be "disassembled or bound by a trigger lock at all times, rendering it inoperable." *Id.* at 628.

Relying on the phrase "shall not be infringed," the Court in *Heller* viewed the Amendment as having

"codified a *pre-existing* right." *Id.* at 592 (emphasis in original). The Court focused on the history leading to the adoption of the Amendment, and on the common understanding of the Amendment in the years following its adoption. The Court concluded that the "pre-existing right" to keep and bear arms preserved by the Second Amendment was in part an individual right to personal self-defense, not confined to the purpose of maintaining a well-regulated militia. The Court struck down the challenged statute, concluding that the Amendment preserves the right of members of the general public to keep and bear arms in their homes for the purpose of self-defense: "[W]e hold that the District's ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense." *Id.* at 635.

The Court in *Heller* was careful to limit the scope of its holding. Of particular interest here, the Court noted that the Second Amendment has not been generally understood to protect the right to carry concealed firearms. The Court wrote:

> *Like most rights*, *the right secured by the Second Amendment is not unlimited.* From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. *For example*, *the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second*

> *Amendment or state analogues. See, e.g.*, *State v. Chandler*, 5 La. Ann. at 489-90 [(1850)]; *Nunn v. State*, 1 Ga. at 251 [(1846)]; *see generally* 2 Kent, [Commentaries on American Law (O. Holmes ed., 12th ed. 1873)] *340, n.2; The American Students' Blackstone 84, n.11 (G. Chase ed. 1884).

Id. at 626-27 (emphasis added) (some citations omitted).

At the end of its opinion, the Court again emphasized the limited scope of its holding, and underscored the tools that remained available to the District of Columbia to regulate firearms. Referring the reader back to the passage just quoted, the Court wrote:

> The Constitution leaves the District of Columbia a variety of tools for combating th[e] problem [of handgun violence], including some measures regulating handguns, *see supra* at 626-627, and n.26.

Id. at 636.

Heller left open the question whether the Second Amendment applies to regulation of firearms by states and localities. The Court answered the question two years later, in *McDonald v. City of Chicago*, 561 U.S. 742 (2010), holding that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment. In substantial part, the Court based its holding on the understanding of a "clear majority" of the states when the Fourteenth Amendment was adopted. The Court wrote:

> A clear majority of the States in 1868 . . .

> recognized the right to keep and bear arms as being among the foundational rights necessary to our system of Government.
>
> In sum, it is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty.

Id. at 777-78.

B. Second Amendment Right to Keep and Bear Concealed Arms

In analyzing the meaning of the Second Amendment, the Supreme Court in *Heller* and *McDonald* treated its historical analysis as determinative. The Court in *Heller* held that the Second Amendment, as originally adopted, "codified a pre-existing right," 554 U.S. at 592 (emphasis omitted), a "right inherited from our English ancestors," *id.* at 599 (internal quotation marks omitted). The Court in *McDonald* held, further, that this "pre-existing right" was incorporated into the Fourteenth Amendment, based in substantial part on the importance attached to the right by a "clear majority" of the states. In determining whether the Second Amendment protects the right to carry a concealed weapon in public, we engage in the same historical inquiry as *Heller* and *McDonald*. As will be seen, the history relevant to both the Second Amendment and its incorporation by the Fourteenth Amendment lead to the same conclusion: The right of a member of the general public to carry a concealed firearm in public is not, and never has been, protected by the Second Amendment.

1. History Relevant to the Second Amendment

a. Right to Bear Arms in England

The right to bear arms in England has long been subject to substantial regulation. In 1299, Edward I directed the sheriffs of Safford and Shalop to prohibit anyone from "going armed within the realm without the king's special licence." 4 Calendar Of The Close Rolls, Edward I, 1296-1302, at 318 (Sept. 15, 1299, Canterbury) (H.C. Maxwell-Lyte ed., 1906). Five years later, in 1304, Edward I ordered the sheriff of Leicester to enforce his prohibition on "any knight, esquire or other person from . . . going armed in any way without the king's licence." 5 Calendar Of The Close Rolls, Edward I, 1302-1307, at 210 (June 10, 1304, Stirling) (H.C. Maxwell-Lyte ed., 1908).

In 1308, Edward II ordered the town of Dover to ensure that "no knight, esquire, or other shall . . . go armed at Croydon or elsewhere before the king's coronation." 1 Calendar Of The Close Rolls, Edward II, 1307-1313, at 52 (Feb. 9, 1308, Dover) (H.C. Maxwell-Lyte ed., 1892). In 1310, he issued a similar order to the sheriff of York, demanding that the sheriff prohibit any "earl, baron, knight, or other" from going armed. *Id.* at 257 (Mar. 20, 1310, Berwick-on-Tweed). Two years later, in 1312, Edward II ordered the sheriffs in Warwick and Leicester to seize the weapons of any that "go armed" without special permission from the king. *Id.* at 553 (Oct. 12, 1312, Windsor). These early prohibitions, targeting particular towns and counties, and particular actors, foreshadowed a more general proclamation nearly two decades later, in which Edward II prohibited "throughout [the King's] realm"

"any one going armed without [the King's] licence." 4 Calendar Of The Close Rolls, Edward II, 1323-1327, at 560 (Apr. 28, 1326, Kenilworth) (H.C. Maxwell-Lyte ed., 1892).

In 1328, under Edward III, Parliament enacted the Statute of Northampton, an expanded version of Edward II's earlier prohibition. The Statute provided that

> no Man great nor small, of what Condition soever he be, except the King's Servants in his presence, and his Ministers in executing of the King's Precepts, or of their Office, and such as be in their Company assisting them . . . be so hardy to come before the King's Justices, or other of the King's Ministers doing their office, with force and arms, nor bring no force in affray of the peace, nor 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, upon pain to forfeit their Armour to the King, and their Bodies to Prison at the King's pleasure.

2 Edw. 3, c. 3 (1328). The Statute of Northampton would become the foundation for firearms regulation in England for the next several centuries. *See* Patrick J. Charles, *The Faces of the Second Amendment Outside the Home: History Versus Ahistorical Standards of Review*, 60 Clev. St. L. Rev. 1, 7-36 (2012) (describing the Statute of Northampton, as well as English firearms regulation before and after the adoption of the statute).

The Statute of Northampton was widely

enforced. In 1388, for example, Richard II issued to the bailiffs of Scardburgh an

> [o]rder to arrest and imprison until further order for their deliverance all those who shall be found going armed within the town, leading an armed power, making unlawful assemblies, or doing aught else whereby the peace may be broken and the people put in fear . . . as in the statute lately published at Northampton among other things it is contained that no man of whatsoever estate or condition shall be bold to appear armed before justices or king's ministers in performance of their office, lead an armed force in breach of the peace, ride or go armed by day or night in fairs and markets or elsewhere in presence of justices etc. . . .

3 Calendar Of The Close Rolls, Richard II, 1385-1389, at 399-400 (May 16, 1388, Westminster) (H.C. Maxwell-Lyte ed., 1914). A half-century later, Henry VI issued a similar order, reminding his subjects of the

> statute published in the parliament holden at Norhampton [*sic*] in 2 Edward III, wherein it is contained that no man of whatsoever estate or condition shall go armed, lead an armed power in breach of the peace, or ride or pass armed by day or night in fairs, markets or elsewhere in the presence of the justices, the king's ministers or others under pain of losing his arms and of imprisonment at the king's will . . . .

4 Calendar Of The Close Rolls, Henry VI, 1441-1447,

at 224 (May 12, 1444, Westminster) (A.E. Stamp ed., 1937).

John Carpenter's *The White Book of the City of London* published in 1419—England's first common law treatise—documented the continuing authority of the Statute of Northampton. With narrow exceptions, Carpenter wrote, the law mandated that "no one, of whatever condition he be, go armed in the said city or in the suburbs, or carry arms, by day or by night." *Liber Albus: The White Book Of The City Of London* 335 (Henry Thomas Riley ed., 1861).

In 1541, under the second Tudor king, Henry VIII, Parliament enacted a statute to stop "shamefull murthers roberies felonyes ryotts and routs." 33 Hen. 8, c. 6, § 1 (1541-1542) (Eng.). The statute limited gun ownership to the wealthy—those who "have lands tents rents fees annuityes or Offices, to the yearley value of one hundred Pounds." 33 Hen. 8, c. 6, § 2 (1541-1542) (Eng.). Of particular importance to the case now before us, the statute expressly forbade everyone, including the wealthy, from owning or carrying concealable (not merely concealed) weapons, such as "little shorte handguns and little hagbutts," and guns "not of the lengthe of one whole Yarde or hagbutt or demyhake beinge not of the lenghe of thre quarters of a Yarde." *Id.*; *see* Lois G. Schwoerer, *To Hold and Bear Arms: The English Perspective*, 76 Chi.-Kent L. Rev. 27, 35-37 (2000-2001) (discussing the 1541 statute of Henry VIII and related laws).

A half-century later, Elizabeth I continued her father's prohibition against concealed weapons. She issued a proclamation in 1594 emphasizing that the Statute of Northampton prohibited not just the "open

carrying" of weapons, but also the carrying of "a device to have secretly small Dagges, commonly called pocket Dags." By The Quenne Elizabeth I: A Proclamation Against the Carriage of Dags, and for Reformation of Some Other Great Disorders (London, Christopher Barker, 1594). Six years later, she ordered "all Justices of the Peace" to enforce the Statute "according to the true intent and meaning of the same," which meant a prohibition on the "car[r]ying and use of Gunnes . . . and especially of Pistols, Birding pieces, and other short pieces and small shot" that could be easily concealed. By The Quenne Elizabeth I: A Proclamation Prohibiting The Use And Cariage Of Dagges, Birding Pieces, And Other Gunnes, Contrary To Law 1 (London, Christopher Barker 1600).

The first Stuart king, James I, issued a proclamation in 1613, forbidding concealed weapons and reciting that the "bearing of Weapons covertly . . . hath ever beene . . . straitly forbidden":

> Whereas the bearing of Weapons *covertly*, and specially of short Dagges, and Pistols, (truly termed of their use, pocket Dagges, that are apparently made to be carried *close*, and *secret*) *hath ever beene*, *and yet is* by the Lawes and policie of this Realme *straitly forbidden* as carying with it inevitable danger in the hands of desperate persons . . . .

By The King James I: A Proclamation Against The Use Of Pocket-Dags 1 (London, Robert Barker, 1613) (emphases added). Three years later, James I issued another proclamation similar to Elizabeth I's,

banning the sale, wearing, and carrying of "Steelets, pocket Daggers, pocket Dags and Pistols, which are weapons utterly unserviceable for defence, Militarie practise, or other lawfull use, but odious, and noted Instruments of murther, and mischiefe." By The King James I: A Proclamation Against Steelets, Pocket Daggers, Pocket Dagges and Pistols, *reprinted in* 1 Stuart Royal Proclamations 359-60 (James F. Larkin & Paul L. Hughes eds., 1973).

In the late 1600s, in *Sir John Knight's Case*, England's Attorney General charged John Knight with violating the Statute of Northampton by "walk[ing] about the streets armed with guns." 87 Eng. Rep. 75 (K.B. 1686). After clarifying that "the meaning of [the Statute of Northampton] was to punish people who go armed to terrify the King's subjects," *id.*, the Chief Justice acquitted Knight, but only because, as a government official, he was exempt from the statute's prohibition.

In 1694, Lord Coke described the Statute of Northampton as providing that a man may neither "goe nor ride armed by night nor by day . . . in any place whatsoever." *The Third Part of the Institutes of the Laws of England* 160, ch. 73 (London, R. Brooke, 1797). Coke recounted the case of Sir Thomas Figett, who was arrested when he "went armed under his garments" before a justice of the King's bench. *Id.* at 161-62. William Hawkins wrote in 1716 that, under the Statute of Northampton, "a Man cannot excuse the wearing [of] such Armour in Publick, by alledging that such a one threatened him, and that he wears it for the Safety of his Person from his Assault." 1 William Hawkins, *A Treatise Of The Pleas Of The*

Crown 489, ch. 28, § 8 (London, J. Curwood, 8th ed. 1824). Blackstone, writing in the 1760s, compared the Statute of Northampton to "the laws of Solon, [under which] every Athenian was finable who walked about the city in armour." 5 William Blackstone, *Commentaries on the Laws of England*, edited by St. George Tucker, 149 § 9 (Phila. 1803).

James II, the last of the Stuart kings and England's last Catholic monarch, sought to disarm his Protestant subjects. James II was driven from the throne in 1688 in the Glorious Revolution. In 1689, under his Protestant successors, William of Orange (William III) and Mary II, Parliament enacted the English Bill of Rights, which, as the Court in *Heller* recognized, has "long been understood to be the predecessor to our Second Amendment." *Heller*, 554 U.S. at 593. The Bill of Rights provided, with respect to the right to bear arms, "[t]hat the subjects which are Protestants may have arms for their defence suitable to their conditions and *as allowed by law*." 1 W. & M., c. 2, § 7, in 3 Eng. Stat. at Large 441 (1689) (emphasis added).

To the degree that the English Bill of Rights is an interpretive guide to our Second Amendment, the critical question is the meaning of the phrase "as allowed by law." More narrowly, with respect to the case now before us, the specific question is whether the arms that are "allowed by law"—that is, the arms Protestants had the right to bear—included concealed firearms. The history just recounted demonstrates that carrying concealed firearms in public was not "allowed by law." Not only was it generally prohibited by the Statute of Northampton,

but it was specifically forbidden by the statute enacted under Henry VIII, and by the later proclamations of Elizabeth I and James I.

The English writer, Granville Sharp, addressed this precise point in 1782. Sharp is a particularly important source, given that the Court in *Heller* cited his treatise as an authority supporting its understanding of the English Bill of Rights. *See Heller*, 554 U.S. at 594. According to Sharp, the phrase "as allowed by law" referred to pre-existing restrictions, including the statute passed under Henry VIII prohibiting concealed arms. Sharp wrote:

> [The] latter expression, "*as allowed by law*," respects the limitations in the above-mentioned act of 33 Hen. VIII c. 6, which restrain the use of *some particular sort of arms*, meaning only such arms as were liable to be *concealed*, or otherwise favour the designs of murderers, as "*cross-bows*, *little short hand-guns*, *and little hagbuts*," and all guns UNDER CERTAIN LENGTHS, specified in the act . . . .

Tracts, Concerning the Ancient and Only True Legal Means of National Defence, by a Free Militia 17-18 (3d ed. 1782) (emphasis in original).

Thus, by the end of the eighteenth century, when our Second Amendment was adopted, English law had for centuries consistently prohibited carrying concealed (and occasionally the even broader category of concealable) arms in public. The prohibition may be traced back generally to the Statute of Northampton in 1328, and specifically to the Act of Parliament under Henry VIII in 1541. The

prohibition was continued in the English Bill of Rights, adopted in 1689, and was clearly explained by Granville Sharp in 1782, less than a decade before the adoption of the Second Amendment.

b. Right to Bear Arms in Colonial America

We have found nothing in the historical record suggesting that the law in the American colonies with respect to concealed weapons differed significantly from the law in England. In 1686, the New Jersey legislature, concerned about the "great abuses" suffered by "several people in the Province" from persons carrying weapons in public, passed a statute providing that "no person or persons . . . shall presume privately to wear any pocket pistol, skeins, stilladers, daggers or dirks, or other unusual or unlawful weapons within this Province." *An Act Against Wearing Swords*, *&c*., N.J. Laws Chap. IX (1689). Other colonies adopted verbatim, or almost verbatim, English law. For example, in 1692, the colony and province of Massachusetts Bay authorized the Justice of the Peace to arrest those who "shall ride or go armed Offensively before any of Their Majesties Justices . . . or elsewhere, by Night or by Day, in Fear or Affray of Their Majesties Liege People." *An Act for the Punishing of Criminal Offenders*, Mass. Laws Chap. XI § 6 (1692).

c. Right to Bear Arms in the States

The Supreme Court in *Heller* discussed state court decisions after the adoption of the Second Amendment on the ground that they showed how the Amendment—and the right to bear arms generally—was commonly understood in the years following its adoption. We recognize that these decisions are

helpful in providing an understanding of what the adopters of the Second Amendment intended, but we postpone our discussion to the next section, for they are even more helpful in providing an understanding what the adopters of the Fourteenth Amendment intended.

2. History Relevant to the Fourteenth Amendment

a. Pre-amendment History

Following the lead of the Supreme Court in both *Heller* and *McDonald*, we look to decisions of state courts to determine the scope of the right to keep and bear arms as that right was understood by the adopters of the Fourteenth Amendment. With only one exception—and a short-lived exception at that—state courts before the Civil War unanimously concluded that members of the general public could be prohibited from carrying concealed weapons.

In *State v. Mitchell*, 3 Blackf. 229 (Ind. 1833), the Supreme Court of Indiana, in a one-sentence opinion, upheld a state statute prohibiting the general public from carrying concealed weapons: "It was *held* in this case, that the statute of 1831, prohibiting all persons, except travelers, from wearing or carrying concealed weapons, is not unconstitutional." *Id.* at 229 (emphasis in original).

In *State v. Reid*, 1 Ala. 612 (1840), the defendant had been convicted of violating a statute prohibiting any person from "carry[ing] concealed about his person, any species of fire arms, or any Bowie knife, Arkansaw tooth pick, or any other knife of the like kind, dirk, or any other deadly weapon." *Id.* at 614. The Supreme Court of Alabama upheld the statute against a challenge under the state constitution. It

based its analysis in substantial part on its conclusion that the English Bill of Rights did not protect a right to carry concealed weapons. The court wrote:

> The evil which was intended to be remedied [by the English Bill of Rights] was a denial of the right of Protestants to have arms for their defence, and *not an inhibition to wear them secretly*.

Id. at 615 (emphasis added). The court defended the Alabama statute on practical as well as legal grounds:

> [A] law which is intended merely to promote personal security, and to put down lawless aggression and violence, and to that end inhibits the wearing of certain weapons, in such a manner as is calculated to exert an unhappy influence upon the moral feelings of the wearer, by making him less regardful of the personal security of others, does not come in collision with the constitution.

Id. at 617.

In *Aymette v. State*, 21 Tenn. 154 (1840), a jury convicted the defendant of wearing a bowie knife concealed under his clothes. The defendant contended that the conviction violated a Tennessee constitutional provision stating that "free white men of this State have a right to keep and bear arms for their common defence." *Id.* at 156. The Tennessee Supreme Court interpreted the English Bill of Rights, as well as the Tennessee constitution, as protecting a group right to engage in military action rather than an individual right to self-defense:

> When, therefore, Parliament says that "subjects which are Protestants may have arms for their defence, suitable to their condition, as allowed by law," it does not mean for private defence, but, being armed, they may as a body rise up to defend their just rights, and compel their rulers to respect the laws.

Id. at 157. In the view of the court, concealable weapons did not come within the scope of either the English Bill of Rights or the state constitution:

> The Legislature, therefore, have a right to prohibit the wearing or keeping [of] weapons dangerous to the peace and safety of the citizens, and which are not usual in civilized warfare, or would not contribute to the common defence.

Id. at 159.

In *State v. Buzzard*, 4 Ark. 18, 19 (1842), the trial court quashed an indictment alleging violation of a state statute providing that "every person who shall wear any pistol, dirk, butcher or large knife, or a sword in a cane, concealed as a weapon, unless upon a journey, shall be adjudged guilty of a misdemeanor." The Arkansas Supreme Court reversed. Even though the Fourteenth Amendment had not yet been adopted, the court believed that the statute was properly challenged under both the Second Amendment and the state constitution. The court held that the statute violated neither the federal nor the state constitution. In upholding the statute, Justice Dickinson wrote that the purpose of the two constitutional provisions was to provide

"adequate means for the preservation and defense of the State and her republican institutions." *Id.* at 27.

> The act in question does not, in my judgment, detract anything from the power of the people to defend their free state and the established institutions of the country. It inhibits only the wearing of certain arms concealed.

Id.

In *Nunn v. State*, 1 Ga. 243 (1846), the defendant was charged with carrying a pistol, but the indictment did not specify that he carried it "secretly." An 1837 state statute criminalized carrying concealed weapons, but allowed open carry. Like the Arkansas Supreme Court in *Buzzard*, the Georgia Supreme Court addressed the statute under both the Second Amendment and the state constitution. The court discussed extensively the right to bear arms, writing that the Second Amendment

> assigns as a reason why this right [to keep and bear arms] shall not be interfered with, or in any manner abridged, that the free enjoyment of it will prepare and qualify *a well-regulated militia*, which are necessary to the security of a free State.

Id. at 250 (emphasis in original). The court concluded that insofar as it prohibited the carrying of concealed weapons, the statute was constitutional:

> We are of the opinion . . . that so far as the act of 1837 seeks to suppress the practice of carrying certain weapons *secretly*, that it

> is valid, inasmuch as it does not deprive the citizen of his *natural* right of self-defense, or of his constitutional right to keep and bear arms.

Id. at 251 (emphasis in original). However, because the indictment failed to allege that the defendant had carried his pistol in a concealed manner, the court dismissed it. *See* Saul Cornell, *The Right to Carry Firearms Outside of the Home: Separating Historical Myths from Historical Realities*, 39 Fordham Urb. L.J. 1695, 1716-26 (2011-2012) (discussing *Nunn* and the emergence of public carry regulation outside the south).

In *State v. Chandler*, 5 La. Ann. 489 (1850), the defendant argued that the trial judge should have instructed the jury that it was not a crime in Louisiana to carry a concealed weapon because the Second Amendment guaranteed to citizens the right to bear arms. The Louisiana Supreme Court rejected the argument, holding that a law prohibiting concealed weapons did not violate the Amendment:

> The [Louisiana statute] makes it a misdemeanor to be "found with a concealed weapon, such as a dirk, dagger, knife, pistol, or any other deadly weapon concealed in his bosom, coat, or any other place about him, that does not appear in full open view." This law became absolutely necessary to counteract a vicious state of society, growing out of the habit of carrying concealed weapons, and to prevent bloodshed and assassinations committed upon unsuspecting persons. It interfered with no man's right to

> carry arms . . . "in full open view," which places men upon an equality. This is the right guaranteed by the Constitution of the United States, and which is calculated to incite men to a manly and noble defence of themselves, if necessary, and of their country, without any tendency to secret advantages and unmanly assassinations.

Id. at 489-90.

The only exception to this otherwise uniform line of cases is *Bliss v. Commonwealth*, 12 Ky. 90 (1822), in which the Kentucky Court of Appeals, by a vote of two to one, struck down a state statute prohibiting the wearing of "a pocket pistol, dirk, large knife, or sword in a cane, concealed as a weapon." *Id.* at 90. The court held that the statute violated Article 10, § 23 of Kentucky's constitution, which provided that "the right of the citizens to bear arms in defense of themselves and the state, shall not be questioned." *Id.* The court wrote:

> [I]n principle, there is no difference between a law prohibiting the wearing concealed arms, and a law forbidding the wearing such as are exposed; and if the former be unconstitutional, the latter must be so likewise.

Id. at 92.

The court's decision in *Bliss* was soon attacked, and was overruled over a decade before the Civil War. In 1837, Governor James Clark, deeply concerned about the "bloodshed and violence" caused by concealed weapons in the wake of *Bliss*, called on the Kentucky legislature to pass a new statute

banning the practice. The Kentucky legislative committee that received the Governor's message criticized the court for reading the state constitution too literally. *See* Robert M. Ireland, *The Problem of Concealed Weapons in Nineteenth-Century Kentucky*, 91 Reg. Ky. Hist. Soc'y 370, 373 (1993). In 1849, a Kentucky constitutional convention adopted without debate a provision authorizing the legislature to "pass laws to prevent persons from carrying concealed arms." Ky. Const. art. XIII, § 25. Then, in 1854, the Kentucky legislature passed a new statute prohibiting the concealed carry of "any deadly weapons other than an ordinary pocket knife." *An Act to prohibit the carrying of concealed weapons*, Mar. 10, 1853, Ky. Acts, Chap. 1020 (1854).

The Supreme Court stated in *Heller* that "*the majority* of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues." 554 U.S. at 626 (emphasis added). The Court substantially understated the matter. As just noted, with the exception of *Bliss*, those pre-Civil War state courts that considered the question *all* upheld prohibitions against concealed weapons. Four of the six courts upholding prohibitions specifically discussed, and disagreed with, *Bliss*. *See Reid*, 1 Ala. at 617-20; *Aymette*, 21 Tenn. at 160-61; *Buzzard*, 4 Ark. at 25-26; *Nunn*, 1 Ga. at 247-48. Moreover, the two-to-one *Bliss* decision did not last. *Bliss* was decided in 1822; a state constitutional amendment was adopted in 1849 to overturn *Bliss*; the legislature then passed a statute in 1854 outlawing concealed weapons.

The Supreme Court wrote in *McDonald* that a "*clear majority* of the States in 1868 . . . recognized the right to keep and bear arms as being among the foundational rights necessary to our system of Government." 561 U.S. at 777 (emphasis added). Based in substantial part on its understanding of the "clear majority" of states, the Court held that the adopters of the Fourteenth Amendment intended to incorporate the right to bear arms preserved by the Second Amendment. As just seen, an *overwhelming majority* of the states to address the question—indeed, after 1849, *all* of the states to do so—understood the right to bear arms, under both the Second Amendment and their state constitutions, as not including a right to carry concealed weapons in public.

b. Post-Amendment History

The Supreme Court in *Heller* discussed the decisions of early 19th century courts after the adoption of the Second Amendment, on the ground that they were relevant to understanding the intent of the eighteenth century adopters of the Amendment. 554 U.S. at 605-14. We follow the Court's lead with respect to the Fourteenth Amendment and discuss decisions after its adoption.

The pre-Civil War consensus about the meaning of the right to keep and bear arms continued after the war and the adoption of the Fourteenth Amendment. The post-war constitutions of five states explicitly stated that the right to carry concealed weapons could be prohibited by the legislature. N.C. Const. of 1868, art. I, § 24 (1875) ("A well-regulated militia being necessary to the security of a free State,

the right of the people to keep and bear arms shall not be infringed; . . . Nothing herein contained shall justify the practice of carrying concealed weapons, or prevent the Legislature from enacting penal statutes against said practice."); Colo. Const. art. II, § 13 (1876) ("The right of no person to keep and bear arms in defense of his home, person and property, or in aid of the civil power when thereto legally summoned, shall be called in question; but nothing herein contained shall be construed to justify the practice of carrying concealed weapons."); La. Const. of 1879, art. III ("A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be abridged. This shall not prevent the passage of laws to punish those who carry weapons concealed."); Mont. Const. of 1889, art. II, § 12 ("The right of any person to keep or bear arms in defense of his own home, person, and property, or in aid of the civil power when thereto legally summoned, shall not be called in question, but nothing herein contained shall be held to permit the carrying of concealed weapons."); Miss. Const. art. III, § 12 (1890) ("The right of every citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power when thereto legally summoned, shall not be called in question, but the legislature may regulate or forbid carrying concealed weapons."). *See generally* David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. Rev. 1359, 1410 n.190 (1998).

The post-war constitutions of another six states, while not explicitly granting to the legislatures the authority to prohibit concealed weapons, gave state legislatures broad power to regulate the manner in

which arms could be carried. *See* Ga. Const. of 1868, art. I, § 14 ("A well-regulated militia being necessary to the security of a free people, the right of the people to keep and bear arms shall not be infringed; but the general assembly shall have power to prescribe by law the manner in which arms may be borne."); Tex. Const. of 1868, art. I, § 13 ("Every person shall have the right to keep and bear arms in the lawful defence of himself or the State, under such regulations as the legislature may prescribe."); Tenn. Const. art. I, § 26 (1870) ("That the citizens of this State have a right to keep and to bear arms for their common defense; but the Legislature shall have power, by law, to regulate the wearing of arms with a view to prevent crime."); Fla. Const. of 1885, art. I, § 20 ("The right of the people to bear arms in defence of themselves and the lawful authority of the State, shall not be infringed, but the Legislature may prescribe the manner in which they may be borne."); Idaho Const. of 1889, art. I, § 11 ("The people have the right to bear arms for their security and defense; but the Legislature shall regulate the exercise of this right by law."); Utah Const. of 1896, art. I, § 6 ("The people have the right to bear arms for their security and defense, but the legislature may regulate the exercise of this right by law."). *See generally* Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 Tex. Rev. of L. & Pol. 191, 192-217 (2006) (collecting state constitutional provisions). In these states, the legislatures of Georgia and Tennessee had already passed statutes prohibiting concealed weapons, and the supreme courts of those states, in *Nunn* and *Aymette*, had already upheld the statutes against constitutional challenges. *Aymette*, 21 Tenn. 154;

Nunn, 1 Ga. 243. As will be seen in a moment, the Texas legislature would soon pass a statute prohibiting concealed weapons, and that statute, too, would be upheld.

Two state courts and one territorial court upheld prohibitions against carrying concealable (not just concealed) weapons in the years following the adoption of the Fourteenth Amendment. In *English v. State*, 35 Tex. 473 (1871), a Texas statute "regulating, and in certain cases prohibiting, the carrying of deadly weapons," including "pistols, dirks, daggers, slungshots, swordcanes, spears, brass-knuckles and bowie knives," *id.* at 474, was challenged under the Second Amendment, as well as under an analogous provision of the Texas constitution. The Texas Supreme Court upheld the statute. The court construed "arms" in the Second Amendment and the Texas constitution as referring only to weapons "used for purposes of war." *Id.* at 475. The court wrote:

> To refer the deadly devices and instruments called in the statute "deadly weapons," to the proper or necessary arms of a "well-regulated militia," is simply ridiculous. No kind of travesty, however subtle or ingenious, could so misconstrue this provision of the constitution of the United States, as to make it cover and protect that pernicious vice, from which so many murders, assassinations, and deadly assaults have sprung, and which it was doubtless the intention of the legislature to punish and prohibit.

Id. at 476.

In *State v. Workman*, 14 S.E. 9, 11 (W. Va. 1891), a West Virginia statute prohibited carrying, whether openly or concealed, "any revolver or other pistol, dirk, bowie-knife, razor, slung-shot, billy, metallic or other false knuckles, or any other dangerous or deadly weapon of like kind or character." The statute exempted from the prohibition a person who is "a quiet and peaceable citizen, of good character and standing in the community in which he lives," and who had "good cause to believe, and did believe, that he was in danger of death or great bodily harm at the hands of another person." *Id.* at 9. Defendant was convicted under the statute because he failed to prove that he was of good character, despite the fact that he had been in clear and immediate danger of death from a particular individual. *Id.* at 10. Defendant contended that the statute violated the Second Amendment. *Id.* at 11. The West Virginia Supreme Court upheld the statute on the ground that the Amendment protected only the right to carry weapons of war:

> [I]n regard to the kind of arms referred to in the amendment, it must be held to refer to the weapons of warfare to be used by the militia, such as swords, guns, rifles, and muskets,—arms to be used in defending the state and civil liberty,—and not to pistols, bowie-knife, brass knuckles, billies, and such other weapons as are usually employed in brawls, street fights, duels, and affrays, and are only habitually carried by bullies, blackguards, and desperadoes, to the terror

of the community and the injury of the state.

Id.

In *Walburn v. Territory*, 59 P. 972 (Okla. 1899), the defendant was convicted of "carrying a revolver on his person." The Supreme Court of the Territory of Oklahoma sustained the law under which the defendant had been convicted. "[W]e are of the opinion that the statute violates none of the inhibitions of the constitution of the United States, and that its provisions are within the police power of the territory." *Id.* at 973.

Finally, and perhaps most importantly, in *Robertson v. Baldwin*, 165 U.S. 275 (1897), the United States Supreme Court made clear that it, too, understood the Second Amendment as not protecting the right to carry a concealed weapon. The Court wrote:

> [T]he first 10 amendments to the constitution, commonly known as the "Bill of Rights," were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had, from time immemorial, been subject to certain well-recognized exceptions, arising from the necessities of the case. In incorporating these principles into the fundamental law, there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed. Thus . . . the right of the people to keep and bear arms (article 2) is not infringed by laws

> prohibiting the carrying of concealed weapons[.]

Id. at 281-82.

3. No Second Amendment Right to Carry Concealed Weapons

The historical materials bearing on the adoption of the Second and Fourteenth Amendments are remarkably consistent. Under English law, the carrying of concealed weapons was specifically prohibited since at least 1541. The acknowledged predecessor to the Second Amendment, the 1689 English Bill of Rights, protected the rights of Protestants to have arms, but only those arms that were "allowed by law." Concealed weapons were not "allowed by law," but were, instead, flatly prohibited. In the years after the adoption of the Second Amendment and before the adoption of the Fourteenth Amendment, the state courts that considered the question nearly universally concluded that laws forbidding concealed weapons were consistent with both the Second Amendment and their state constitutions. The only exception was Kentucky, whose court of appeals held to the contrary in a two-to-one decision based on its state constitution. Kentucky thereafter amended its constitution to overturn that result. In the decades immediately after the adoption of the Fourteenth Amendment, all of the state courts that addressed the question upheld the ability of their state legislatures to prohibit concealed weapons. Finally, the United States Supreme Court unambiguously stated in 1897 that the protection of the Second Amendment does not extend to "the carrying of

concealed weapons." *Baldwin*, 165 U.S. at 282.

We therefore conclude that the Second Amendment right to keep and bear arms does not include, in any degree, the right of a member of the general public to carry concealed firearms in public. In so holding, we join several of our sister circuits that have upheld the authority of states to prohibit entirely or to limit substantially the carrying of concealed or concealable firearms. *See Peterson v. Martinez*, 707 F.3d 1197 (10th Cir. 2013) (right to carry concealed weapons does not fall within the Second Amendment's scope); *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013) (Maryland requirement that handgun permits be issued only to individuals with "good and substantial reason" to wear, carry, or transport a handgun does not violate Second Amendment); *Drake v. Filko*, 724 F.3d 426, 429-30 (3d Cir. 2013) (New Jersey "justifiable need" restriction on carrying handguns in public "does not burden conduct within the scope of the Second Amendment's guarantee"); *Kachalsky v. Cty. of Westchester*, 701 F.3d 81 (2d Cir. 2012) (New York "proper cause" restriction on concealed carry does not violate Second Amendment).

Our holding that the Second Amendment does not protect the right of a member of the general public to carry concealed firearms in public fully answers the question before us. Because the Second Amendment does not protect in any degree the right to carry concealed firearms in public, any prohibition or restriction a state may choose to impose on concealed carry—including a requirement of "good cause," however defined—is necessarily allowed by

the Amendment. There may or may not be a Second Amendment right for a member of the general public to carry a firearm openly in public. The Supreme Court has not answered that question, and we do not answer it here.

V. Intervention by the State of California

The State of California moved to intervene in *Peruta* after Sheriff Gore of San Diego County declined to petition for rehearing en banc. Plaintiffs did not oppose intervention by the State. As recounted at the beginning of this opinion, however, a divided panel denied the State's motion. We disagree and grant the motion.

Under Federal Rule of Civil Procedure 24(a)(2), a party may intervene as of right if

> (1) it has a significant protectable interest relating to the subject of the action; (2) the disposition of the action may, as a practical matter, impair or impede its ability to protect its interest; (3) the application is timely; and (4) the existing parties may not adequately represent its interest.

Day v. Apoliona, 505 F.3d 963, 965 (9th Cir. 2007) (citation, internal quotation marks, and alterations omitted); *see also* Fed. R. Civ. P. 24(a)(2).

There is no question that California has a significant interest in *Peruta* (and, indeed, in *Richards*). As the panel majority noted, Plaintiffs "focuse[d] [their] challenge on [the counties'] licensing scheme for concealed carry." *Peruta*, 742 F.3d at 1171. But the panel majority construed the challenge as an attack on "the constitutionality of

[California's] entire [statutory] scheme." *Id.* at 1171; *see also id.* at 1169 (assessing whether "*the California scheme* deprives any individual of his constitutional rights" (emphasis added)). While Plaintiffs' original challenge to the county policies did not appear to implicate the entirety of California's statutory scheme, the panel opinion unmistakably did.

The panel opinion in *Peruta*, if left intact, would have substantially impaired California's ability to regulate firearms. A key premise of the opinion was that the Second Amendment requires the states to "permit *some form* of carry for self-defense outside the home." *Id.* at 1172 (emphasis in original). Though California's statutory scheme permits many residents, in many contexts, to carry a firearm outside the home, it does not permit law-abiding residents of sound mind to do so without a particularized interest in self-defense.

Under the circumstances presented here, we conclude that California's motion to intervene was timely. To determine whether a motion to intervene is timely, we consider "(1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and length of the delay." *United States v. Alisal Water Corp.*, 370 F.3d 915, 921 (9th Cir. 2004) (internal quotation marks omitted). We recognize that California sought to intervene at a relatively late stage in the proceeding. But the timing of California's motion to intervene did not prejudice Plaintiffs; indeed, Plaintiffs did not, and do not, oppose the State's intervention. Equally important, California

had no strong incentive to seek intervention in *Peruta* at an earlier stage, for it had little reason to anticipate either the breadth of the panel's holding or the decision of Sheriff Gore not to seek panel rehearing or rehearing en banc.

Our conclusion that California's motion to intervene was timely is consistent with our decision in *Apoliona*, in which the State of Hawai'i had made an argument, as *amicus curiae* before the district court, that the defendants had chosen not to make. 505 F.3d at 964. The district court agreed with Hawai'i's argument, but we reversed, holding that the argument was foreclosed by circuit precedent. *Id.* Hawai'i moved to intervene as a party in order to file a petition for rehearing en banc. *Id.* Notwithstanding the fact that "the state was aware of the litigation and that the litigation had the potential to affect its interests," we granted the motion. *Id.* at 966. Permitting Hawai'i to intervene, we wrote, "will not create delay by injecting new issues into the litigation, but instead will ensure that our determination of an already existing issue is not insulated from review simply due to the posture of the parties." *Id.* at 965 (citation, internal quotation marks, and alterations omitted).

If we do not permit California to intervene as a party in *Peruta*, there is no party in that case that can fully represent its interests. At trial and on appeal, attorneys representing Sheriff Gore ably defended San Diego County's interpretation of the good cause requirement. But after the panel decision was issued, Sheriff Gore informed the court that he would neither petition for rehearing en banc nor

defend the county's position in en banc proceedings. California then appropriately sought to intervene in order to fill the void created by the late and unexpected departure of Sheriff Gore from the litigation.

VI. Response to Dissents

Our colleagues Judges Callahan, Silverman and N.R. Smith have each written dissenting opinions. We consider Judge Callahan's opinion to be the principal dissent because its argument provides an essential premise for the other two.

None of the dissents contends that there is a free-standing Second Amendment right for a member of the general public to carry a concealed weapon in public. Nor do they make any effort to contradict or undermine any of the historical evidence showing that the carrying of concealed weapons was consistently forbidden in England beginning in 1541; was consistently forbidden in the American colonies; and was consistently forbidden by the states (with the sole and short-lived exception of Kentucky) both before and after the Civil War. Nor do they dispute that the United States Supreme Court in 1897 clearly stated that carrying concealed weapons was not protected by the Second Amendment. *Robertson v. Baldwin*, 165 U.S. 275, 281-82 (1897) ("[T]he right of the people to keep and bear arms (article 2) is not infringed by laws prohibiting the carrying of concealed weapons[.]").

The argument of the principal dissent begins with the premise that Plaintiffs, as members of the general public, have a Second Amendment right to carry firearms in public as a means of self-defense.

Principal Diss. at 66. The principal dissent characterizes California's restrictions on open carry as effectively prohibiting open carry. It concludes that when California's restrictions on open and concealed carry are considered together, they violate the Second Amendment: "In the context of California's choice to prohibit open carry, the counties' policies regarding the licensing of concealed carry are tantamount to complete bans on the Second Amendment right to bear arms outside the home for self-defense, and are therefore unconstitutional." *Id.* at 69-70. Therefore, according to the principal dissent, California's restrictions on concealed carry violate the Second Amendment. Judge N.R. Smith's dissent agrees with this argument, emphasizing the "context" of Plaintiffs' challenge to California's restrictions on concealed carry.

The argument of the principal dissent is based on a logical fallacy. Even construing the Second Amendment as protecting the right of a member of the general public to carry a firearm in public (an issue we do not decide), and even assuming that California's restrictions on public open carry violate the Second Amendment so construed (an issue we also do not decide), it does not follow that California's restrictions on public concealed carry violate the Amendment.

As the uncontradicted historical evidence overwhelmingly shows, the Second Amendment does not protect, in any degree, the right of a member of the general public to carry a concealed weapon in public. The Second Amendment may or may not protect to some degree a right of a member of the

general public to carry a firearm in public. If there is such a right, it is only a right to carry a firearm openly. But Plaintiffs do not challenge California's restrictions on open carry; they challenge only restrictions on concealed carry.

If there is a Second Amendment right of a member of the general public to carry a firearm openly in public, and if that right is violated, the cure is to apply the Second Amendment to protect that right. The cure is not to apply the Second Amendment to protect a right that does not exist under the Amendment.

VII. Agreement with the Concurrence

Our colleague Judge Graber concurs fully in our opinion, but writes separately "to state that, even if we assume that the Second Amendment applied to the carrying of concealed weapons in public, the provisions at issue would be constitutional." Graber, J., concurrence at 52. Even if we assume that the Second Amendment applies, California's regulation of the carrying of concealed weapons in public survives intermediate scrutiny because it "promotes a substantial government interest that would be achieved less effectively absent the regulation." *Id.* at 58 (internal quotation marks omitted). For the reasons given in our opinion, we do not need to reach the question addressed by the concurrence. But if we were to reach that question, we would entirely agree with the answer the concurrence provides.

Conclusion

We hold that the Second Amendment does not protect, in any degree, the carrying of concealed firearms by members of the general public. This

holding resolves the Second Amendment question presented in this case. It also necessarily resolves, adversely to Plaintiffs, their derivative claims of prior restraint, equal protection, privileges and immunities, and due process. In light of our holding, we need not, and do not, answer the question of whether or to what degree the Second Amendment might or might not protect a right of a member of the general public to carry firearms openly in public.

We AFFIRM the judgments of the district courts in both cases.

GRABER, Circuit Judge, with whom THOMAS, Chief Judge, and McKEOWN, Circuit Judge, join, concurring:

I concur fully in the majority opinion. I write separately only to state that, even if we assume that the Second Amendment applied to the carrying of concealed weapons in public, the provisions at issue would be constitutional. Three of our sister circuits have upheld similar restrictions under intermediate scrutiny. Such restrictions 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." *Woollard v. Gallagher*, 712 F.3d 865, 881 (4th Cir. 2013); *see also Drake v. Filko*, 724 F.3d 426, 431-32 (3d Cir. 2013) (assuming that the Second Amendment applies and upholding New Jersey's "justifiable need" restriction on carrying handguns in public); *Kachalsky v. County of Westchester*, 701 F.3d 81, 89, 97 (2d Cir. 2012) (assuming that the Second Amendment applies and upholding New York's "proper cause" restriction on the concealed carrying of firearms). If restrictions on concealed carry of weapons in public are subject to Second Amendment analysis, we should follow the approach adopted by our sister circuits.

Judge Silverman's dissent acknowledges the "significant, substantial, and important interests in promoting public safety and reducing gun violence." (Dissent at 81-82.) He contends, though, that Defendants have failed to demonstrate "a reasonable fit" between the challenged licensing criteria and the government's objectives. (Dissent at 82.) I disagree.

Judge Silverman points to evidence cited by two amici "showing that concealed-carry license holders are disproportionately *less* likely to commit crimes . . . than the general population." (Dissent at 83-84 (citing Amicus Brief for the Governors of Texas, Louisiana, Maine, Mississippi, Oklahoma, and South Dakota at pp. 10-15; and Amicus Brief for International Law Enforcement Educators and Trainers Association, et al., at pp. 22-26.)) There are, however, at least two reasons to question the relevance of those studies.

First, even accepting Judge Silverman's premise, lawmakers are entitled to weigh the severity of the risk as well as the likelihood of its occurrence. Indeed, examples abound of "law-abiding citizens" in the seven states studied who place the public safety in jeopardy. In Florida, a state touted in the second of the cited amicus briefs, a "law-abiding" holder of a concealed-weapons permit shot and killed another person in 2014 in a movie theater after an argument over texting and popcorn. Amicus Brief for the Law Center to Prevent Gun Violence and Marin County Sheriff Robert Doyle In Support of Appellees' Petition for Rehearing En Banc at 13. Two years earlier, another concealed-carry permit holder in Florida fatally shot someone after an argument over loud music in a gas station's parking lot. *Id.* In Arizona, a qualified handgun carrier shot 19 people, including a congresswoman and a federal judge, outside a supermarket in 2011. *Id.* Those shooters all were legally entitled to carry their concealed firearms, which they used to kill others. Sadly, those incidents are not anomalies. Nationwide, since May 2007, concealed-carry permit holders have shot and killed

at least 17 law enforcement officers and more than 800 private citizens—including 52 suicides. *Concealed Carry Killers*, Violence Policy Center, www.concealedcarrykillers.org (last visited Apr. 6, 2016). Thus, even if we assume that each and every one of those tragedies was less likely to occur because of the shooter's prior status as a "law-abiding citizen," that does not mean that a state legislature's regulation of concealed carry fails to address the problem in a reasonable way.

Second, to the extent that concealed-carry license holders are, in fact, less likely to commit crimes, their relative peacefulness may result from (and not exist in spite of) the restrictions that are disputed in this case. For example, in Delaware, five upstanding citizens must swear that carrying a concealed deadly weapon is necessary for the protection of the applicant, the applicant's property, or both. 11 Del. Code Ann. § 1441(a)(2). In Maryland, the applicant must show that he or she has a "good and substantial reason to wear, carry, or transport a handgun." Md. Code Ann., Pub. Safety § 5-306(a)(6)(i). In Hawaii, a concealed-carry permit may be issued only "[i]n an exceptional case, when an applicant shows reason to fear injury to the applicant's person or property." Haw. Rev. Stat. § 134-9(a). In New York, a person seeking a license to carry a concealed handgun must show "proper cause," N.Y. Penal Law § 400.00(2)(f); and, in New Jersey, the applicant must demonstrate "that he has a justifiable need to carry a handgun," N.J. Stat. Ann. § 2C:58-4. Rhode Island and the District of Columbia require the applicant to show that he or she is a "suitable person" and has a "reason," such as "fear[ing] an injury to his or her

person or property," for carrying a firearm. Mass. Gen. Laws ch. 140, § 131(d); 1956 R.I. Gen. Laws § 11-47-11(a); D.C. Code § 22-4506(a). In other words, it may be the heightened restrictions on concealed-carry permits in many jurisdictions—the very provisions challenged in this case—that cause statistically reduced violence by permit holders.

Of equal importance, the studies to which Judge Silverman alludes are not the only side of the story. Much respected evidence is to the contrary. 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." John J. Donohue, *The Impact of Concealed-Carry Laws*, *in* Evaluating Gun Policy Effects on Crime and Violence 287, 320 (2003), *available at* http://www.brookings.edu/~/media/press/books/2003/evaluatinggunpolicy/evaluatinggunpolicy_chapter.pdf; *see also* Jens Ludwig, *Concealed-Gun-Carrying Laws and Violent Crime: Evidence from State Panel Data*, 18 Int'l Rev. L. & Econ. 239, 239 (1998) (noting that laws broadly allowing concealed carrying of weapons "have resulted, if anything, in an *increase* in adult homicide rates"), *available at* http://home.uchicago.edu/ludwigj/papers/IJLE-ConcealedGunLaws-1998.pdf; David McDowall et al., *Easing Concealed Firearms Laws: Effects on Homicide in Three States*, 86 J. Crim. L. & Criminology 193, 202-03 (1995) (noting that, in the aftermath of relaxed concealed-carry laws, "firearms homicides increased" while "homicides without guns remained steady," and concluding that weaker firearms regulation may "raise levels of firearms

murders"), *available at* http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=6855& context=jclc.

Similarly, some studies suggest that "policies to *discourage* firearms in public may help prevent violence." McDowall et al., *Easing Concealed Firearms Laws* at 203. A study of prisoners incarcerated for gun offenses, for example, found that two-thirds of those prisoners "reported that the chance of running into an armed victim was very or somewhat important in their own choice to use a gun." Philip Cook et al., *Gun Control After Heller: Threats and Sideshows From a Social Welfare Perspective*, 56 U.C.L.A. L. Rev. 1041, 1081 (2009). The study continues:

> Currently, criminals use guns in only about 25 percent of noncommercial robberies and 4 percent of assaults. If increased gun carrying among potential victims causes criminals to carry guns more often themselves, or become quicker to use guns to avert armed self-defense, the end result could be that street crime becomes more lethal.

Id. (footnote omitted).

Clearly, social scientists disagree about the practical effect of modest restrictions on concealed carry of firearms. In the face of that disagreement, and in the face of inconclusive evidence, we must allow the government to select among reasonable alternatives in its policy decisions. As the Second Circuit explained, in upholding a requirement that an applicant show an objective threat to personal safety, or a special need for self-protection, to obtain

a concealed-carry license for a handgun:

> To be sure, we recognize the existence of studies and data challenging the relationship between handgun ownership by lawful citizens and violent crime. We also recognize that many violent crimes occur without any warning to the victims. But New York also submitted studies and data demonstrating 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. It is the legislature's job, not ours, to weigh conflicting evidence and make policy judgments.

Kachalsky, 701 F.3d at 99; *see also Woollard*, 712 F.3d at 876-82 (detailing the reasons why Maryland's law, requiring a good and substantial reason to carry a concealed firearm in public, advances the government's important public safety objectives); *Drake*, 724 F.3d at 439 (noting that "conflicting empirical evidence . . . does not suggest, let alone compel, a conclusion that the 'fit' between [a state's] individualized, tailored approach and public safety is not 'reasonable'").

Defendants must show only that the regulation "promotes a 'substantial government interest that would be achieved less effectively absent the regulation,'" not that the chosen regulation is the "least restrictive means" of achieving the government's important interest. *Fyock v. City of Sunnyvale*, 779 F.3d 991, 1000 (9th Cir. 2015)

(quoting *Colacurcio v. City of Kent*, 163 F.3d 545, 553 (9th Cir. 1998)); *see also United States v. Marzzarella*, 614 F.3d 85, 98 (3d Cir. 2010) (stating that the fit need only "be reasonable, not perfect"). In examining reasonableness, we "must accord substantial deference to the predictive judgments" of legislative bodies, *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 665 (1994), and the government must be allowed to experiment with solutions to serious problems, *Jackson v. City of San Francisco*, 746 F.3d 953, 966 (9th Cir. 2014) (citing *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 52 (1986)).

Finally, despite Judge Silverman's argument to the contrary, California's decision to confer permit discretion on its counties is not an arbitrary one. 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 and decreasing the extent of the restriction that otherwise would apply, statewide, in places that do not require it. Similarly, localizing the decision allows more careful and accurate consideration of each individual's license application. California entrusts the decision-making responsibility to local law enforcement officials because they are best positioned to evaluate the potential dangers that increasing or decreasing concealed carry would have in their communities. This structure allows for a nuanced assessment of the needs of each locality in processing applications for concealed carry. In short, California's decision to place licensing in local hands is itself reasonable.

In sum, even if the Second Amendment applied

to concealed carry of firearms in public, the challenged laws and actions by Defendants survive heightened scrutiny. No constitutional violation occurred.

CALLAHAN, Circuit Judge, dissenting, in which SILVERMAN, Circuit Judge, joins as to all parts except section IV, BEA, Circuit Judge, joins, and N.R. SMITH, Circuit Judge, joins as to all parts except section II.B:

The Second Amendment is not a "second-class" constitutional guarantee. *See McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010). In the watershed case *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court held that the Second Amendment codified an existing individual right to keep and bear arms for self-defense. Two years later, the Court reaffirmed *Heller* in *McDonald*, 561 U.S. at 742, and held that the individual right to bear arms for self-defense under the Second Amendment was fundamental and applied to the states. Although these opinions specifically address firearms in the home, any fair reading of *Heller* and *McDonald* compels the conclusion that the right to keep and bear arms extends beyond one's front door. Like the rest of the Bill of Rights, this right is indisputably constitutional in stature and part of this country's bedrock.

Plaintiffs assert that the counties' concealed weapons licensing schemes, in the context of California's regulations on firearms, obliterate their right to bear arms for self-defense in public. The Supreme Court in *Heller* addressed concealed-carry restrictions and instructed that those restrictions be evaluated in context with open-carry laws to ensure that the government does not deprive citizens of a constitutional right by imposing incremental burdens. *Heller*, 554 U.S. at 629. In the context of

present-day California law, the Defendant counties' limited licensing of the right to carry concealed firearms is tantamount to a total ban on the right of an ordinary citizen to carry a firearm in public for self-defense. Thus, Plaintiffs' Second Amendment rights have been violated. While states may choose between different manners of bearing arms for self-defense, the right must be accommodated.

The majority sets up and knocks down an elaborate straw argument by answering only a narrow question—whether the Second Amendment protects a right to carry concealed firearms in public. But this approach is contrary to *Heller*, and contrary to the prescribed method for evaluating and protecting broad constitutional guarantees. Indeed, the majority's lengthy historical analysis fails to appreciate that many of its cited cases either presumed a right to openly carry a firearm in public or relied on a pre-*Heller* interpretation of the Second Amendment. Because the majority eviscerates the Second Amendment right of individuals to keep and bear arms as defined by *Heller* and reaffirmed in *McDonald*, I respectfully dissent.

I. The Individual Right to Bear Arms Extends Beyond the Home

A. Under *Heller* and *McDonald*, the individual right to bear arms for self-defense extends beyond the home

Our analysis begins with the text of the Second Amendment and the Supreme Court's opinions in *Heller* and *McDonald*, which instruct that the right to bear arms extends beyond the home.

The Second Amendment guarantees "the right of

the people to keep and bear Arms." U.S. Const. amend. II. *Heller* held that the Second Amendment conferred an individual right to keep and bear arms for self-defense. 554 U.S. at 595. Indeed, *Heller* adopted Justice Ginsburg's definition of "carries a firearm" 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 (quoting *Muscarello v. United States*, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting)). *McDonald* affirmed that the constitutional right to keep and bear arms applies to the states. *McDonald*, 561 U.S. at 778 ("[T]he Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty.").

Heller and *McDonald* also instruct that the right to bear arms exists outside the home. Under these cases, the Second Amendment secures "an individual right protecting against both public and private violence," indicating that the right extends in some form to locations where a person might become exposed to public or private violence. *See Heller*, 554 U.S. at 594. The Court reinforced this view by noting that the need for the right is "most acute" in the home, *id.* at 628, thus implying that the right exists outside the home. *See also McDonald*, 561 U.S. at 780 ("[T]he Second Amendment protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home."). *Heller* also identifies "laws forbidding the carrying of firearms in sensitive places such as schools and

government buildings" as presumptively lawful. 554 U.S. at 626. Were the right to self-defense confined to the home, the validity of such laws would be self-evident.

The history of the Second Amendment also indicates that the right to bear arms applies outside the home. The common-law "right of having and using arms for self-preservation and defence," according to Blackstone, protected "the natural right of resistance and self-preservation." 1 William Blackstone, *Commentaries* *144. Blackstone's Commentaries also made clear that Congress would exceed its authority were it to "pass a law prohibiting any person from bearing arms." 1 William Blackstone & St. George Tucker, *Blackstone's Commentaries: With Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia* 289 (St. George Tucker ed., 1803). Furthermore, the majority of Nineteenth Century courts agreed that the Second Amendment right extended outside the home and included, at minimum, the right to carry an operable weapon in public for the purpose of lawful self-defense.[1] Although some courts approved limitations on the manner of carry outside the home, none approved a total destruction of the right to carry in public.

Our sister circuits either have agreed that the

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[1] *See* Judge O'Scannlain's comprehensive analysis of the historical underpinnings of the Second Amendment's right to some form of carry for self-defense outside the home set forth in *Peruta v. Cty. of San Diego*, 742 F.3d 1144 (9th Cir. 2014), *vacated* 781 F.3d 1106 (9th Cir. 2015).

Second Amendment right to bear arms extends outside the home or have assumed that the right exists. *See Drake v. Filko*, 724 F.3d 426, 431 (3d Cir. 2013) (recognizing that "the Second Amendment's individual right to bear arms *may* have some application beyond the home"); *Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013) (assuming without deciding "that the *Heller* right exists outside the home"); *Moore v. Madigan*, 702 F.3d 933, 937 (7th Cir. 2012) ("To confine the right to be armed to the home is to divorce the Second Amendment from the right of self-defense described in *Heller* and *McDonald*."); *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 89 & n.10 (2d Cir. 2012) (noting that "[t]he plain text of the Second Amendment does not limit the right to bear arms to the home," and assuming that the Amendment has "some application" in the context of public possession of firearms (emphasis omitted)). Notably, the majority does not refute this analysis, hedging that "[t]he Second Amendment may or may not protect, to some degree, a right of a member of the general public to carry firearms in public." Maj. Op. 19. Thus, pursuant to *Heller* and *McDonald*, an individual's right to self-defense extends outside the home and includes a right to bear arms in public in *some* manner.

B. States may choose between different manners of bearing arms for self-defense so long as the right to bear arms for self-defense is accommodated

Heller balances the Second Amendment right to bear arms in public with a state's ability to choose

between regulating open carry or concealed carry. *Heller* first noted that laws prohibiting concealed carry were examples of how the right secured by the Second Amendment was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose:

> Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. *See, e.g.*, *Sheldon*, in 5 Blume 346; Rawle 123; Pomeroy 152-153; Abbott 333. For example, the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues. *See, e.g.*, *State v. Chandler*, 5 La. Ann., at 489-490; *Nunn v. State*, 1 Ga., at 251; *see generally* 2 Kent *340, n.2; The American Students' Blackstone 84, n.11 (G. Chase ed. 1884). Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the

commercial sale of arms.

554 U.S. at 626-27.

Importantly, while the Court enumerated four presumptively lawful "longstanding prohibitions," it did not list prohibitions of concealed weapons as one of them. Instead, the Court identified concealed weapons prohibitions as an example of regulating the *manner* in which individuals can exercise their right to keep and carry a firearm for self-defense. The Court further noted that a prohibition on carrying concealed handguns in conjunction with a prohibition of open carry of handguns would destroy the right to bear and carry arms:

> Few laws in the history of our Nation have come close to the severe restriction of the District's handgun ban. And some of those few have been struck down. In *Nunn v. State*, the Georgia Supreme Court struck down a prohibition on carrying pistols openly (even though it upheld a prohibition on carrying concealed weapons). *See* 1 Ga., at 251. In *Andrews v. State*, the Tennessee Supreme Court likewise held that a statute that forbade openly carrying a pistol "publicly or privately, without regard to time or place, or circumstances," 50 Tenn., at 187, violated the state constitutional provision (which the court equated with the Second Amendment). That was so even though the statute did not restrict the carrying of long guns. *Ibid. See also State v. Reid*, 1 Ala. 612, 616-617 (1840) ("A statute which, under the pretence of regulating, amounts to a

> destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would be clearly unconstitutional").

Id. at 629.

In sum, *Heller* indicates that concealed-weapons prohibitions may be proper as long as individuals retain other means to exercise their Second Amendment right to bear arms for self-defense. However, where other ways of exercising one's Second Amendment right are foreclosed, a prohibition on carrying concealed handguns constitutes a "severe restriction" on the Second Amendment right, just like the District of Columbia's unconstitutional handgun ban in *Heller*.

II. Given California's Choice to Prohibit Open Carry, the Counties' Policies of Not Allowing for Concealed Carry for Self-Defense are Unconstitutional

As the Plaintiffs have some right to carry a firearm in public for self-defense, the next task is to determine whether the counties' policies, in light of the state's open-carry restrictions, are constitutional. We have held (and the majority does not hold otherwise) that when a law burdens conduct falling within the scope of the Second Amendment's guarantee, a two-step inquiry is appropriate. *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 963 (9th Cir. 2014). "The two-step inquiry we have adopted '(1) asks whether the challenged law burdens conduct protected by the Second Amendment and (2) if so, directs courts to apply an appropriate level of scrutiny.'" *Id.* at 960 (quoting *United States v.*

Chovan, 735 F.3d 1127, 1136 (9th Cir. 2013)).

A. Procedural posture and California's gun control regime

First, we consider the posture of this case in the context of California's concealed- and open-carry laws. The *Richards* Plaintiffs filed suit in May 2009, and the *Peruta* Plaintiffs filed suit in October 2009. Both plaintiff groups challenged their respective counties' concealed weapons licensing policies under the Second Amendment.

California prohibits an individual from carrying a concealed handgun in public. Cal. Penal Code § 25400 (prohibiting concealed carry of a loaded firearm in public). There are exceptions to this prohibition on concealed carry, including for peace officers, military personnel, and persons in private security. *Id.* §§ 25450, 25620, 25630, 25650. There are also exceptions for persons engaged in particular activities, such as hunting. *Id.* § 25640.

A member of the general public, however, cannot carry a concealed handgun without a concealed-weapons license. The sheriff of a county may issue an applicant a license to lawfully carry a concealed handgun in the city or county in which that applicant works or resides. *Id.* §§ 26150, 26155. However, the applicant must be a resident of (or spend substantial time in) the county in which he or she applies, pass a background check, take a firearms course, demonstrate good moral character, and demonstrate "good cause." *Id.* §§ 26150, 26155, 26165.

The counties' interpretation of "good cause" is a focal point in this case. Both counties define "good cause" as requiring a particular need. San Diego

County defines "good cause" as "a set of circumstances that distinguish[es] the applicant from the mainstream and causes him or her to be placed in harm's way." Similarly, Yolo County's written policy requires "valid" reasons for requesting a license. Importantly, under both policies a general desire for self-protection and protection of family does not constitute "good cause."

In upholding the counties' restrictions, the district courts relied on the fact that, at that time, California permitted unloaded open carry of handguns under then Penal Code § 12031(g). Thus, the district courts found that the counties' licensing schemes did not substantially burden the right to bear arms for self-defense. *Peruta v. Cty. of San Diego*, 758 F. Supp. 2d 1106, 1114 (S.D. Cal. 2010) ("As a practical matter, should the need for self-defense arise, nothing in section 12031 restricts the open carry of unloaded firearms and ammunition ready for instant loading."); *Richards v. Cty. of Yolo*, 821 F. Supp. 2d 1169, 1175 (E.D. Cal. 2011) ("Under the statutory scheme, even if Plaintiffs are denied a concealed weapon license for self-defense purposes from Yolo County, they are still more than free to keep an unloaded weapon nearby their person, load it, and use it for self-defense in circumstances that may occur in a public setting.").

However, during the pendency of these appeals, California repealed its open-carry law, and enacted broad legislation prohibiting open carry of handguns in public places. AB 144, 2011-12 Leg., 2011-12 Sess.

(Cal. 2011).[2] Thus, California now generally prohibits individuals from openly carrying a handgun—whether loaded or unloaded—in public locations. *See* Cal. Penal Code § 25850 (prohibiting carry of a loaded firearm); *id.* § 26350 (prohibiting open carry of an unloaded firearm).[3]

B. In the context of California's ban on open carry, the counties' ban on concealed carry for self-defense is unconstitutional

In the context of California's choice to prohibit

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[2] AB 144 provided, among other things, that "[a] person is guilty of openly carrying an unloaded handgun when that person carries upon his or her person an exposed and unloaded handgun outside a vehicle while in or on any of the following: (A) A public place or public street in an incorporated city or city and county. (B) A public street in a prohibited area of an unincorporated area of a county or city and county. (C) A public place in a prohibited area of a county or city and county." Cal. Penal Code § 26350(a)(1).

[3] There are exceptions. California law permits (1) possession of a loaded or unloaded firearm at a person's place of residence, temporary residence, campsite, on private property owned or lawfully possessed by the person, or within the person's place of business, Cal. Penal Code §§ 25605, 26035, 26055; (2) the transportation or carrying of any pistol, revolver, or other firearm capable of being concealed upon the person within a motor vehicle, unloaded and locked in the vehicle's trunk or in a locked container in the vehicle, and carrying the firearm directly to or from any motor vehicle within a locked container, *id.* §§ 25505, 25610, 25850; (3) carrying a loaded or unloaded firearm in some unincorporated areas, *id.* §§ 25850(a), 26350(a); and (4) carrying a loaded firearm where the person reasonably believes that any person or the property of any person is in immediate, grave danger and that the carrying of the weapon is necessary for the preservation of that person or property, *id.* § 26045.

open carry, the counties' policies regarding the licensing of concealed carry are tantamount to complete bans on the Second Amendment right to bear arms outside the home for self-defense, and are therefore unconstitutional.

Heller defined the right to bear arms as the right to be "armed and ready for offensive or defensive action in a case of conflict with another person." *Heller*, 554 U.S. at 584 (quoting *Muscarello*, 524 U.S. at 143 (Ginsburg, J., dissenting)). Here, California has chosen to ban open carry but grants its citizens the ability to carry firearms in public through county-issued concealed weapons licenses. Thus, in California, the only way that the average law-abiding citizen can carry a firearm in public for the lawful, constitutionally protected purpose of self-defense is with a concealed-carry license. And in San Diego and Yolo Counties that option has been taken off the table. Both policies specify that concern for one's personal safety alone does not satisfy the "good cause" requirement for issuance of a license.

California's exceptions to the general prohibition against public carry do little to protect an individual's right to bear arms in public for self-defense. The exceptions for particular groups of law enforcement officers and military personnel do not protect the average citizen. Bearing arms on private property and at places of business does not allow citizens to protect themselves by bearing arms in public. And the exceptions for "making or attempting to make a lawful arrest" or for situations of "immediate, grave danger" offer no solace to an individual concerned about protecting self and family

from unforeseen threats in public.

Here, as in *Heller*, the exceptions are limited and do not adequately allow the ordinary citizen to exercise his or her right to keep and bear arms for self-defense within the meaning of the Second Amendment, as defined by the Supreme Court. Thus, the counties' concealed-carry policies in the context of California's open-carry ban obliterate the Second Amendment's right to bear a firearm in some manner in public for self-defense. *See also Moore v. Madigan*, 702 F.3d 933, 936-42 (7th Cir. 2012) (striking down the open-and-concealed-carry regulatory regime in Illinois because the state failed to justify "so substantial a curtailment of the right of armed self-defense").

C. If the counties' policies were not a ban, remand to the district courts would be appropriate

Even if the counties' policies in light of the California laws prohibiting open carry were not tantamount to complete bans, the proper remedy would be to remand to the district courts. The district courts did not have the benefit of our recent case law applying our Second Amendment framework. *See Jackson*, 746 F.3d at 963; *Chovan*, 735 F.3d at 1130. Additionally, the underlying statutory scheme has changed dramatically since the district courts' decisions. At the time the district courts rendered their decisions, California permitted unloaded open carry, a fact that both district courts relied upon to find that the counties' policies did not substantially burden any Second Amendment rights. *See Peruta*, 758 F. Supp. 2d at 1114-15; *Richards*, 821 F. Supp. 2d at 1175. However, open carry is now effectively

prohibited.

Furthermore, reasonable jurists might find triable issues of material fact as to whether the policies substantially burden the right to carry a firearm in public for self-defense, whether there are open alternative channels to bear arms for self-defense, whether there are sufficient governmental interests that justify some of the restrictions, and whether the restrictions are sufficiently tailored to those interests. *See Jackson*, 746 F.3d at 963; *Chovan*, 735 F.3d at 1127. Thus, if the counties' policies are to be upheld, in whole or in part, the parties ought to have the opportunity to present evidence as to these issues, and the district court ought to have the opportunity to consider this evidence under the correct framework.[4]

Instead of remanding, the concurrence would hold that the concealed-weapons restrictions here survive intermediate scrutiny. The concurrence follows the approach of the Second, Third, and Fourth Circuits, which have held that states may limit the right to bear arms to persons who show good cause or meet a similar elevated standard. But the analyses in these cases are questionable as they rely on pre-*Heller* interpretations of the Second

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[4] On a remand, I would apply heightened scrutiny. *Jackson*, 746 F.3d at 964 (noting that a "severe burden" on the Second Amendment right "requires [a] higher level of scrutiny"); *see also Ezell v. City of Chicago*, 651 F.3d 684, 691-92, 708 (7th Cir. 2011) (applying "rigorous" review "if not quite 'strict scrutiny'" to law that required firing range training prior to gun ownership but then banned all firing ranges).

Amendment.[5] Even if *Heller* and *McDonald* are seen as a departure from any prior understanding of the Second Amendment, they are law and remain binding upon us.

III. The Majority Errs By Ignoring California's Choice to Ban Open Carry and Focusing Myopically on the Counties' Bans on Concealed Carry

The majority's opinion is not in accord with our usual approach to broadly defined constitutional rights, and fails to appreciate the context in which

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[5] For example, in *Drake*, the Third Circuit upheld New Jersey's requirement that prior to receiving a license to carry a gun, either openly or concealed, an applicant had to show a "justifiable need." 724 F.3d at 428. The court held that restrictions on concealed weapons are "longstanding regulation[s] that enjoy[] presumptive constitutionality," and thus "regulate[] conduct falling outside the scope of the Second Amendment's guarantee." *Id.* at 434. *Drake* noted that New Jersey courts had upheld the restriction of gun permits in *Siccardi v. State*, 284 A.2d 533, 538 (N.J. 1971), and *Siccardi*, in turn, relied on *Burton v. Sills*, 248 A.2d 521, 525-26 (N.J. 1968). *Drake*, 724 F.3d at 432. *Burton*, however, erroneously held that the Second Amendment referred only to the collective right of the people to keep and bear arms, and not an individual right to self-defense. *Burton*, 248 A.2d at 526 ("As the language of the [Second] [A]mendment itself indicates it was not framed with individual rights in mind. Thus it refers to the collective right 'of the people' to keep and bear arms in connection with 'a well-regulated militia.'").

Similarly in *Kachalsky*, the Second Circuit noted that New York had long regulated the possession and use of firearms. 701 F.3d at 84-85. However, the Second Circuit acknowledged that "the law was upheld, in part, on what is now the erroneous belief that the Second Amendment does not apply to the states." *Id.* at 85.

the Plaintiffs' challenges to the counties' policies arise. Moreover, its historical analysis is largely irrelevant because it again fails to appreciate the contexts in which the cited cases arose.

A. Courts review a law's constitutionality in that law's larger context, just as the Supreme Court did in *Heller*

A holistic approach to evaluating concealed weapons laws in context of the open-carry laws comports with how courts have evaluated other laws that allegedly infringed on constitutional rights. In the First Amendment context, for example, our precedents inform us that we should not cabin our inquiry to the challenged law before us. Rather, the preferred course is to examine other, related laws to determine the nature of the asserted constitutional right and the extent of the burden on that right. *See, e.g.*, *Doe v. Reed*, 561 U.S. 186 (2010) (examining other disclosure laws to determine the constitutionality of a requirement to disclose petition signatories); *Chula Vista Citizens for Jobs & Fair Competition v. Norris*, 782 F.3d 520 (9th Cir. 2015) (en banc) (examining other disclosure laws to determine the constitutionality of a requirement to disclose the identity of a petition proponent). Similarly here, we must examine the applicable open-carry restrictions to determine the nature of Plaintiffs' asserted right to some carry in public and the extent of the burden of the policies on that right.

B. Defining the constitutional right to bear arms narrowly is inconsistent with judicial protection of other fundamental freedoms

Regardless of how a jurist feels about the Second

Amendment, there can be no doubt that *Heller* construed the words "keep and bear arms" broadly to encompass an individual's right to self-defense, as opposed to a collective right to keep and bear arms for maintaining a militia. The Court has defined other constitutional rights broadly as well. *See, e.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015) (defining constitutional right as right to marry, not right to same-sex marriage); *Lawrence v. Texas*, 539 U.S. 558, 566-70 (2003) (right to privacy, not right to engage in sodomy); *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (right to marital privacy, not the right to use birth control devices). Thus, the question in *Obergefell* was not whether the plaintiffs have a right to same-sex marriage, the question was whether the states' limitation of marriage to a man and woman violated the right to marry. The question in *Griswold* was not whether there was a constitutional right to use birth control, but rather whether the state's prohibition on birth control violated a person's right to marital privacy.

So too here. The individual constitutional right that Plaintiffs seek to protect is not the right to concealed carry per se, but their individual right to self-defense guaranteed by *Heller*. States may choose how to accommodate this right but they must accommodate it. This distinction may be subtle, but it is critical. Narrowly defining the right may disguise a law's substantive impact on a constitutional freedoms. *See, e.g.*, *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986) (upholding sodomy law, holding that the Constitution does not "confer[] a fundamental right upon homosexuals to engage in sodomy"), *overruled by Lawrence*, 539 U.S. at 569 (striking

down sodomy law, holding that "criminal convictions for adult consensual sexual intimacy in the home violate[d] [plaintiffs'] vital interests in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment").

The majority reasons, however, that "if that right is violated, the cure is to apply the Second Amendment to protect that right. The cure is not to apply the Second Amendment to protect a right that does not exist under the Amendment." Maj. Op. 51. This is an over-simplistic analysis. The counties and California have chipped away at the Plaintiffs' right to bear arms by enacting first a concealed weapons licensing scheme that is tantamount to a complete ban on concealed weapons, and then by enacting an open carry ban. Constitutional rights would become meaningless if states could obliterate them by enacting incrementally more burdensome restrictions while arguing that a reviewing court must evaluate each restriction by itself when determining its constitutionality. *See Heller*, 554 U.S. at 629 ("A statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would be clearly unconstitutional" (quoting *State v. Reid*, 1 Ala. 612, 616-17 (1840))). Indeed, such an approach was rejected by *Heller* which discussed concealed-carry laws in the context of open-carry prohibitions. *Id.*[6]

[6] Under the majority's approach, a court reviewing a challenge to California's regulation of the open carrying of firearms could

By narrowly defining the asserted right as a right to concealed carry, the majority fails to recognize the real impact of the counties' policies on the Second Amendment right to keep and bear arms.

C. Given the right to bear arms for self-defense extends beyond the home, states must accommodate that right to self-defense

As explained above, given the right to bear arms for self-defense exists outside the home, it follows then that states must accommodate that right. While *Heller* prohibits states from completely banning carrying a firearm in public for self-defense, it leaves states room to choose what manner of carry is allowed. States may choose how to accommodate the right by allowing only open carry, only concealed carry, or some combination of both. However, states may not disallow both manners of carry as the counties and California have done here.

The majority concedes that "[t]he Second Amendment may or may not protect to some degree a right of a member of the general public to carry a firearm in public." Maj. Op. 51. However, it claims that "[i]f there is such a right, it is only a right to carry a firearm openly." Maj. Op. 51. The majority's holding—that California *must* accommodate the right to bear arms in public through open carry—is unsupported by Supreme Court precedent and contrary to federalism principles. The Supreme Court has *never* dictated how states must accommodate a right to bear arms. The majority's cited cases, also

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not consider the fact that in some counties an ordinary citizen also cannot carry a concealed weapon.

cited in *Heller*, make this point clear. *See, e.g.*, *Reid*, 1 Ala. at 616-17 ("We do not desire to be understood as maintaining, that in regulating the manner of bearing arms, the authority of the Legislature has no other limit than its own discretion. A statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would be clearly unconstitutional."); *Nunn v. State*, 1 Ga. 243, 243 (1846) ("A law which merely inhibits the wearing of certain weapons in a concealed manner is valid. But so far as it cuts off the exercise of the right of the citizen altogether to bear arms, or, under the color of prescribing the mode, renders the right itself useless—it is in conflict with the Constitution, and void.").[7] Thus, the majority errs by suggesting that

[7] Because the majority miscasts the issue in these appeals, its historical analysis is largely irrelevant. But there are also substantive problems with that analysis. Some authorities are unpersuasive as they rely on a pre-*Heller* interpretation of the Second Amendment as being limited to a right to bear arms for purposes of maintaining a "well-regulated" militia. *See, e.g.*, *Aymette v. State*, 21 Tenn. 154, 158 (1840) (limiting "arms" to mean those "such as are usually employed in civilized warfare, and that constitute the ordinary military equipment"); *State v. Buzzard*, 4 Ark. 18, 19 (1842) (rejecting individual Second Amendment right to self-defense; holding that right was tied to well-regulated militia); *English v. State*, 35 Tex. 473, 476 (1871) ("The word 'arms' in the connection we find it in the constitution of the United States, refers to the arms of a militiaman or soldier, and the word is used in its military sense."); *State v. Workman*, 14 S.E. 9, 11 (W. Va. 1891) (limiting "arms" to mean those "weapons of warfare to be used by the militia, such as swords, guns, rifles, and muskets,—arms to be used in defending the state and civil liberty").

states must accommodate the right to bear arms through open carry.

Moreover, the majority's requirement that states accommodate the right to bear arms through open carry is unwise. States may have good reasons for allowing concealed carry but banning open carry. *See* Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and A Research Agenda*, 56 UCLA L. Rev. 1443, 1521 (2009) ("In many places, carrying openly is likely to frighten many people, and to lead to social ostracism as well as confrontations with the police."). Different states may have different opinions about whether concealed carry or open carry is preferable. The point is that, under *Heller*, states cannot prohibit both open and concealed carry, thus eviscerating the right to bear arms in public for self-defense.[8]

Still other authorities, such as *Robertson v. Baldwin*, 165 U.S. 275 (1897), are of limited value because they fail to disclose whether the concealed-weapon law existed in conjunction with laws permitting open carry, or do not indicate whether the court interpreted the Second Amendment to be limited to a collective right related to the militia, instead of an individual right to self-defense. *See also Walburn v. Territory*, 59 P. 972 (Okla. 1899).

[8] Despite California's belated appreciation of the importance of these appeals, the majority grants its motion to intervene. Hence, now that California is a party, there is no reason to confine our inquiry to the counties' policies. Rather, California's intervention supports examining Plaintiffs' challenges to the counties' policies in the context of the California open carry ban.

IV. The Counties' Unfettered Discretion to Grant or Deny Concealed Weapons Licenses is Troubling

Finally, while the majority and I would decide this case on Second Amendment grounds, Plaintiffs have raised non-frivolous concerns as to whether the counties' discretion as to who obtains a license violates the Equal Protection Clause and constitutes an unlawful prior restraint. The issues are not ripe for review, but I note that a discretionary licensing scheme that grants concealed weapons permits to only privileged individuals would be troubling.[9] Such discretionary schemes might lead to licenses for a privileged class including high-ranking government officials (like judges), business owners, and former military and police officers, and to the denial of licenses to the vast majority of citizens. *See, e.g.*, *McDonald*, 561 U.S. at 771 ("After the Civil War, many of the over 180,000 African Americans who served in the Union Army returned to the States of the old Confederacy, where systematic efforts were made to disarm them and other blacks. The laws of some States formally prohibited African-Americans from possessing firearms." (citations omitted)); Br. for Congress of Racial Equality, Inc. as Amicus Curiae Supporting Appellants 15, 20, 24, ECF No. 249 (arguing that California's gun control history evidences attempts to disarm ethnic minorities including persons of Mexican Heritage, Asian-Americans, and African-Americans); *cf.* Br. for Pink

[9] Indeed, a declaration submitted by the County of San Diego indicates that the point of the concealed weapons licensing policy was to make concealed carry "a very rare privilege."

Pistols et al. as Amici Curiae Supporting Appellants 3, ECF No. 240 ("[W]ithout self-defense, there are no gay rights." (alteration and emphasis omitted)). Whatever licensing scheme remains in place in California or in other states, the right to keep and bear arms must not become a right only for a privileged class of individuals.

* * *

The Second Amendment is not a "second-class" Amendment. *See McDonald*, 561 U.S. at 780.

> Undoubtedly some think that the Second Amendment is outmoded in a society where our standing army is the pride of our Nation, where well-trained police forces provide personal security, and where gun violence is a serious problem. That is perhaps debatable, but what is not debatable is that it is not the role of th[e] [Supreme] Court to pronounce the Second Amendment extinct.

Heller, 554 U.S. at 636. Today the majority takes a step toward extinguishing the Second Amendment right recognized by the Supreme Court in *Heller* and *McDonald*.

With no clear guidance from the Court regarding how to evaluate laws that restrict and obliterate the right to keep and bear arms for self-defense, the Second Amendment is becoming "[a] constitutional guarantee subject to future judges' assessments" which is "no constitutional guarantee at all." *Id.* at 634.

Accordingly, I dissent.

SILVERMAN, Circuit Judge, with whom BEA, Circuit Judge joins, dissenting:

I dissent from the majority's opinion because the challenged laws do not survive any form of heightened scrutiny—strict or intermediate scrutiny. *See D.C. v. Heller*, 554 U.S. 570, 629 n.27 (2008) (explaining that "rational-basis scrutiny" is inappropriate for reviewing Second Amendment challenges); *see also United States v. Chovan*, 735 F.3d 1127, 1137 (9th Cir. 2013), *cert. denied*, 135 S. Ct. 187 (2014) ("In *Heller*, the Supreme Court did not specify what level of scrutiny courts must apply to a statute challenged under the Second Amendment. The *Heller* Court did, however, indicate that rational basis review is not appropriate."). The more lenient of the two standards—intermediate scrutiny—requires "(1) the government's stated objective to be significant, substantial, or important; and (2) a reasonable fit between the challenged regulation and the asserted objective." *Chovan*, 735 F.3d at 1139.

No one disputes that the County Defendants and California have significant, substantial, and important interests in promoting public safety and reducing gun violence. *See Fyock v. Sunnyvale*, 779 F.3d 991, 1000 (9th Cir. 2015) ("Sunnyvale's interests in promoting public safety and reducing violent crime are substantial and important government interests."). However, the County Defendants and California have failed to provide sufficient evidence showing that there is a reasonable fit between the challenged laws and these two objectives. *See Chovan*, 735 F.3d at 1140-41 (stating that it is the government's burden to establish that the challenged

law survives intermediate scrutiny); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (explaining that summary judgment is appropriate if "the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof").

In evaluating the constitutionality of a law under intermediate scrutiny, a reviewing court must assure that, in formulating their judgments, lawmakers have "'drawn reasonable inferences based on *substantial evidence*.'" *Turner Broad. Sys., Inc. v. F.C.C.*, 520 U.S. 180, 195 (1997) (emphasis added) (quoting *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 666 (1994)); *see also City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-52 (1986) (explaining that the evidence that the lawmakers relied on must be "reasonably believed to be relevant to the problem" the government is addressing). In evaluating whether California lawmakers have drawn reasonable inferences based on substantial evidence, it is important to note that the constitutional claims at issue in this case do not seek to provide all California citizens with the unrestricted ability to carry concealed firearms in public. To the contrary, Plaintiffs do not challenge California Penal Code §§ 25655 and 26150's requirements: (1) that a person desiring to carry a concealed firearm in public first obtain a concealed carry license; and (2) that in order to obtain that license the person must be a law-abiding citizen of good moral character and complete the necessary course of firearms training.

Thus, Plaintiffs only challenge California's

concealed carry licensing scheme as interpreted and implemented by San Diego County and Yolo County to the extent it prohibits certain law-abiding citizens, who have completed the necessary training and applied for the necessary license, from carrying a concealed firearm in public because they cannot satisfy San Diego County and Yolo County's required heightened showing of a particular need to carry a firearm in public for self-defense purposes. This distinction is important because the County Defendants and California have not provided any evidence, let alone substantial evidence, specifically showing that preventing law-abiding citizens, trained in the use of firearms, from carrying concealed firearms helps increase public safety and reduces gun violence. The County Defendants have merely provided evidence detailing the general dangers of gun violence and concealed firearms. This evidence is of questionable relevance to the issues in this case because it does not distinguish between firearm violence committed by people who are either concealed carry license holders or are qualified to obtain such a license and firearm violence committed by people who could not obtain a concealed carry license because of either their criminal record or because they have not completed the necessary course of firearms training.

There is simply no evidence in the record showing that establishing a licensing regime that allows trained law-abiding citizens to carry concealed firearms in public results in an increase in gun violence. Indeed, the only evidence in the record shows the exact opposite. Amici have provided evidence showing that concealed-carry license

holders are disproportionately *less* likely to commit crimes—including violent crimes such as aggravated assault with a deadly weapon—than the general population, and that the adoption of a concealed carry licensing regime such as the one proposed by Plaintiffs in other areas of the country has either had no effect on violent crime or has helped reduce violent crime. *See* Amicus Brief for the Governors of Texas, Louisiana, Maine, Mississippi, Oklahoma, and South Dakota at 10-15; Amicus Brief for International Law Enforcement Educators and Trainers Association, et al. at 22-26. Accordingly, the evidence in the record is insufficient to show that there is a reasonable fit between the challenged laws and the government's stated objectives.

Moreover, the undisputed facts in this case show that there is not a reasonable fit because California law arbitrarily allows its counties to set forth different standards for obtaining a concealed carry license without any reasonable or rational explanation for the differences. For example, in Sacramento County, Fresno County, Stanislaus County, and Ventura County, California Penal Code § 26150(a)'s "good cause" requirement is satisfied by the applicant simply stating that he wishes to carry a firearm in public for self-defense purposes. In contrast, in the two counties at issue in the present appeals—San Diego County and Yolo County—a desire to carry a firearm in public for self-protection purposes by itself is insufficient to satisfy § 26150(a)'s "good cause" requirement. California argues that local officials are best situated to determine what applicants should be required to show in order to satisfy the "good cause"

requirement; and, therefore, it is reasonable to confer this discretion to its County sheriffs. However, it does not appear that California's sheriffs are exercising this discretion in a rational way. Neither California nor the County Defendants have provided any explanation for why it is reasonable and rational for a desire to carry a firearm in public for self-defense purposes to be insufficient to constitute "good cause" in Yolo County (population 213,016[1]) when right next door in Sacramento County (population 1,501,335[2]) it is sufficient to constitute "good cause." There cannot be a reasonable fit if the same standard—here, § 26150(a)'s "good cause" requirement—is arbitrarily applied in different ways from county to county without any explanation for the differences.

In sum, I would hold that the challenged laws are unconstitutional under the Second Amendment because they do not survive any form of heightened scrutiny analysis, and therefore, I would reverse.

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[1] United States Census Bureau, State & County QuickFacts, Yolo County, California, http://www.census.gov/quickfacts/table/PST045215/06113,00 (last visited June 2, 2016).

[2] United States Census Bureau, State & County QuickFacts, Sacramento County, California, http://www.census.gov/quickfacts/table/PST045215/06067,00 (last visited June 2, 2016).

N.R. SMITH, Circuit Judge, dissenting:

I join the dissent of Judge Callahan. I agree that the majority errs "by answering only a narrow question—whether the Second Amendment protects a right to carry concealed firearms in public." Dissent 60. I write separately only to express my opinion that the appropriate remedy is to remand this case to the district courts.

I.

This case turns on how the applicable issue is framed. The majority states the issue narrowly—whether the "Second Amendment . . . preserve[s] or protect[s] a right to carry concealed firearms in public." Maj. Op. 11. In contrast, the dissent[1] asks whether "[i]n the *context* of California's choice to prohibit open carry," the counties' restrictions on concealed carry violate the Second Amendment. Dissent 69 (emphasis added).

As a result of this difference in framing the applicable issue, the majority's arguments and the dissent's arguments are often like "two ships passing in the night." For example, the majority engages in a lengthy academic exercise to reach the conclusion that "the carrying of concealed weapons was consistently forbidden in England beginning in 1541; was consistently forbidden in the American colonies; and was consistently forbidden by the states." Maj. Op. 49-50. This historical analysis is relevant to the issue framed by the majority, but it is irrelevant to the issue framed by the dissent "because it again fails

[1] All references to the dissent refer to the dissent of Judge Callahan.

to appreciate the *contexts* in which the cited cases arose." Dissent 73 (emphasis added).

The majority's historical analysis is also unnecessary to resolve the issue as framed by the majority opinion. In *District of Columbia v. Heller*, the Supreme Court explicitly recognized that prohibitions on carrying concealed weapons were appropriate for regulating the manner in which individuals could exercise their Second Amendment rights.[2] 554 U.S. 570, 626 (2008). If the issue before us is truly whether California can, in isolation, prohibit concealed carry, a simple memorandum disposition citing to *Heller* would be sufficient. A formal opinion, much less the gathering of our en banc panel, would not be necessary to answer the issue framed by the majority.

Accordingly, I agree with the dissent's articulation of the relevant issue in this case. We should not review the counties' concealed weapons licensing schemes in isolation. Instead, we must review them in the context of the underlying statutory scheme as a whole. That review is consistent with the Supreme Court's approach in *Heller*.[3] It is also consistent with our court's two-step

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[2] The Supreme Court also recognized that context was important when reviewing a statute that regulates rights secured by the Second Amendment. "A statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would be clearly unconstitutional." *Heller*, 554 U.S. at 629 (quoting *State v. Reid*, 1 Ala. 612, 616-17 (1840)).

[3] *Heller* involved, in part, various prohibitions in the District of Columbia that (i) made it a crime to carry an unregistered

Second Amendment inquiry. *See Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 961 (9th Cir. 2014) (noting that, under the second step of the inquiry, courts should consider whether firearm regulations "leave open alternative channels for self-defense"). Accordingly, we cannot ignore the context surrounding the counties' concealed carry prohibitions.

II.

During the pendency of these appeals, California's underlying statutory scheme changed. At the time the district courts issued their decisions, California permitted unloaded open carry. However, under the current scheme, open carry (loaded and unloaded) is prohibited. *See* Dissent 68-69. Further, as noted by the dissent, the district courts did not have the benefit of our recent decisions in *Jackson*, 746 F.3d 953 and *United States v. Chovan*, 735 F.3d 1127 (9th Cir. 2013). *See* Dissent 71.

We have consistently concluded that, when confronted with an intervening change in law, the better approach would be to remand for the district court to consider the case under the new legal framework. *See, e.g.*, *Betz v. Trainer Wortham & Co.*, 610 F.3d 1169, 1171 (9th Cir. 2010) (discussing why "remand is the better procedure" when an intervening change in the law required further

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firearm, (ii) prohibited the registration of handguns, and (iii) required a license to carry a handgun. *Heller*, 554 U.S. at 574-75. The Supreme Court did not review these prohibitions in isolation, but instead concluded that the various prohibitions together "totally ban[ned] handgun possession in the home." *Id.* at 628.

analysis of the facts of the case); *Baker v. Hazelwood (In re Exxon Valdez)*, 270 F.3d 1215, 1241 (9th Cir. 2001) (noting that, in cases where there is an intervening change in the law, it will often be "the better approach" to remand for the district court to "apply the appropriate standards"); *White Mountain Apache Tribe v. Ariz., Dep't of Game & Fish*, 649 F.2d 1274, 1285-86 (9th Cir. 1981) ("This court may remand a case to the district court for further consideration when new cases or laws that are likely to influence the decision have become effective after the initial consideration.").

Of course, we have discretion to determine "what questions may be taken up and resolved for the first time on appeal." *Singleton v. Wulff*, 428 U.S. 106, 121 (1976). We typically feel most comfortable resolving such an issue when it has nonetheless been "extensively litigated in the district court" or "where the proper resolution is beyond any doubt." *Beck v. City of Upland*, 527 F.3d 853, 867 (9th Cir. 2008) (quoting *Golden Gate Hotel Ass'n v. City & Cty. of San Francisco*, 18 F.3d 1482, 1487 (9th Cir. 1994)). However, neither circumstance is present here. The issue at hand—whether the counties' licensing scheme for concealed carry violates the Second Amendment in light of California's restrictions on open carry—was not litigated in the district courts. Further, as is apparent from the various opposing views of my colleagues, proper resolution of this issue is not beyond any doubt.

Indeed, we would benefit greatly from the district courts' expertise in developing the record and applying the appropriate standards in light of

California's significant intervening change in its legal framework. I agree that the "challenged law burdens conduct protected by the Second Amendment." *Chovan*, 735 F.3d at 1136. I would therefore remand to allow the district courts to initially determine and "apply an appropriate level of scrutiny." *Id.*

Accordingly, I dissent.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 10-56971

EDWARD PERUTA; MICHELLE LAXSON; JAMES DODD; LESLIE BUNCHER, DR.; MARK CLEARY; CALIFORNIA RIFLE AND PISTOL ASSOCIATION FOUNDATION,

Plaintiffs-Appellants,

v.

COUNTY OF SAN DIEGO; WILLIAM D. GORE, individually and in his capacity as Sheriff,

Defendants-Appellees.

STATE OF CALIFORNIA,

Intervenor.

Appeal from the United States District Court for the Southern District of California, Irma E. Gonzalez, Senior District Judge, Presiding
No. 3:09-cv-02371-IEG-BGS

No. 11-16255

ADAM RICHARDS; SECOND AMENDMENT FOUNDATION; CALGUNS FOUNDATION, INC.; BRETT STEWART,

Plaintiffs-Appellant,

v.

ED PRIETO; COUNTY OF YOLO,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of California, Morrison C. England, Chief District Judge, Presiding
No. 2:09-cv-01235-MCE-DAD

Filed: August 15, 2016

ORDER

THOMAS, Chief Judge:

The full court was advised of appellants' petitions for full court en banc rehearing (Docket Entry Nos. 334 and 335). A judge requested a vote on whether to rehear the matter en banc by the full court. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of full court en banc consideration. Fed. R. App. P. 35. Accordingly, the petitions for full court en banc rehearing (Docket Entry Nos. 334 and 335) are denied.

In No. 10-56971, appellants' motion for leave to file a reply brief (Docket Entry No. 344) is denied as moot.

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 10-56971

EDWARD PERUTA; MICHELLE LAXSON; JAMES DODD; LESLIE BUNCHER, DR.; MARK CLEARY; CALIFORNIA RIFLE AND PISTOL ASSOCIATION FOUNDATION,

Plaintiffs-Appellants,

v.

COUNTY OF SAN DIEGO; WILLIAM D. GORE, individually and in his capacity as Sheriff,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of California
Irma E. Gonzalez, Chief District Judge, Presiding
No. 3:09-cv-02371-IEG-BGS

Argued and Submitted: December 6, 2012
San Francisco, California
Filed: February 13, 2014

Before: Diarmuid F. O'Scannlain, Sidney R. Thomas, and Consuelo M. Callahan, Circuit Judges.

OPINION

O'SCANNLAIN, Circuit Judge:

We are called upon to decide whether a responsible, law-abiding citizen has a right under the Second Amendment to carry a firearm in public for self-defense.

I

A

California generally prohibits the open or concealed carriage of a handgun, whether loaded or unloaded, in public locations.[1] *See* Cal. Penal Code § 25400 (prohibiting concealed carry of a firearm); *id.* § 25850 (prohibiting carry of a loaded firearm); *id.* § 26350 (prohibiting open carry of an unloaded firearm); *see also id.* § 25605 (exempting the gun owner's residence, other private property, and place of business from section 25400 and section 26350).

Nonetheless, one may apply for a license in California to carry a concealed weapon in the city or county in which he or she works or resides. *Id.*

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[1] There are a few narrow exceptions to this rule. Armored vehicle guards and retired federal officers may carry a loaded firearm in public without meeting stringent permitting requirements. *See* Cal. Penal Code § 26015 (armored vehicle guards); *id.* § 26020 (retired federal officers). And a citizen may carry a loaded firearm in public if: (1) he is engaged in the act of attempting to make a lawful arrest; (2) he is hunting in locations where it is lawful to hunt; or (3) he faces immediate, grave danger provided that the weapon is only carried in "the brief interval" between the time law enforcement officials are notified of the danger and the time they arrive on the scene (where the fleeing victim would obtain a gun during that interval is apparently left to Providence). *Id.* § 26040 (hunting); *id.* § 26045 (immediate, grave danger); *id.* § 26050 (attempting to make a lawful arrest).

§§ 26150, 26155. To obtain such a license, the applicant must meet several requirements. For example, one must demonstrate "good moral character," complete a specified training course, and establish "good cause." *Id.* §§ 26150, 26155.

California law delegates to each city and county the power to issue a written policy setting forth the procedures for obtaining a concealed-carry license. *Id.* § 26160. San Diego County has issued such a policy. At issue in this appeal is that policy's interpretation of the "good cause" requirement found in sections 26150 and 26155: "[A] set of circumstances that distinguish the applicant from the mainstream and causes him or her to be placed in harm's way." Good cause is "evaluated on an individual basis" and may arise in "situations related to personal protection as well as those related to individual businesses or occupations." But—important here—concern for "one's personal safety alone is not considered good cause."

The power to grant concealed-carry licenses in San Diego County is vested in the county sheriff's department. Since 1999, the sheriff's department has required all applicants to "provide supporting documentation" in order "to demonstrate and elaborate good cause." This "required documentation, such as restraining orders, letters from law enforcement agencies or the [district attorney] familiar with the case, is discussed with each applicant" to determine whether he or she can show a sufficiently pressing need for self-protection. If the applicant cannot demonstrate "circumstances that distinguish [him] from the mainstream," then he will

not qualify for a concealed-carry permit.

B

Wishing to carry handguns for self-defense but unable to document specific threats against them, plaintiffs Edward Peruta, Michelle Laxson, James Dodd, Leslie Buncher, and Mark Cleary (collectively "the applicants"), all residents of San Diego County, were either denied concealed-carry licenses because they could not establish "good cause" or decided not to apply, confident that their mere desire to carry for self-defense would fall short of establishing "good cause" as the County defines it. An additional plaintiff, the California Rifle and Pistol Association Foundation, comprises many San Diego Country residents "in the same predicament as the individual Plaintiffs." No plaintiff is otherwise barred under federal or state law from possessing firearms.

C

On October 23, 2009, after the County denied his application for a concealed-carry license, Peruta sued the County of San Diego and its sheriff, William Gore (collectively "the County"), under 42 U.S.C. § 1983, requesting injunctive and declaratory relief from the enforcement of the County policy's interpretation of "good cause." Peruta's lead argument was that, by denying him the ability to carry a loaded handgun for self-defense, the County infringed his right to bear arms under the Second Amendment.

About a year later, the applicants and the County filed dueling motions for summary judgment. The district court denied the applicants' motion and granted the County's. Assuming without deciding that the Second Amendment "encompasses Plaintiffs'

asserted right to carry a loaded handgun in public," the district court upheld the County policy under intermediate scrutiny. As the court reasoned, California's "important and substantial interest in public safety"—particularly in "reduc[ing] the risks to other members of the public" posed by concealed handguns' "disproportionate involvement in life-threatening crimes of violence"—trumped the applicants' allegedly burdened Second Amendment interest. The district court rejected all of the other claims, and the applicants timely appealed.

II

As in the district court, on appeal the applicants place one argument at center stage: they assert that by defining "good cause" in San Diego County's permitting scheme to exclude a general desire to carry for self-defense, the County impermissibly burdens their Second Amendment right to bear arms.

The Supreme Court's opinions in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), direct our analysis of this claim. In *Heller*, the Court confronted a Second Amendment challenge to a District of Columbia law that "totally ban[ned] handgun possession in the home" and "require[d] that any lawful firearm in the home be disassembled or bound by a trigger lock." 554 U.S. at 603, 628-29. The validity of the measures depended, in the first place, on whether the Second Amendment codified an individual right, as plaintiff Dick Heller maintained, or a collective right, as the government insisted. *Id.* at 577.

Consulting the text's original public meaning,

the Court sided with *Heller*, concluding that the Second Amendment codified a pre-existing, individual right to keep and bear arms and that the "central component of the right" is self-defense. *Id.* at 592, 599. It further held that, because "the need for defense of self, family, and property is most acute in the home," the D.C. ban on the home use of handguns—"the most preferred firearm in the nation"—failed "constitutional muster" under any standard of heightened scrutiny. *Id.* at 628-29 & n.27 (rejecting rational-basis review). The same went for the trigger-lock requirement. *Id.* at 635. The Court had no need to "undertake an exhaustive historical analysis . . . of the full scope of the Second Amendment" to dispose of Heller's suit. *Id.* at 626-27. Nor had it reason to specify, for future cases, which burdens on the Second Amendment right triggered which standards of review, or whether a tiered-scrutiny approach was even appropriate in the first place. *Id.* at 628-29. By any measure, the District of Columbia law had overreached.

Two years later, the Court evaluated a similar handgun ban enacted by the City of Chicago. The question presented in *McDonald*, however, was not whether the ban infringed the city residents' Second Amendment rights, but whether a state government could even be subject to the strictures of the Second Amendment. That depended on whether the right could be said to be "deeply rooted in this Nation's history and tradition" and "fundamental to our scheme of ordered liberty." 130 S. Ct. at 3036. To these questions, the *McDonald* Court declared, "[o]ur decision in *Heller* points unmistakably to the answer." *Id.* After all, self-defense, recognized since

ancient times as a "basic right," is the "central component" of the Second Amendment guarantee. *Id.* Consequently, that right restricted not only the federal government but, under the Fourteenth Amendment, also the states. *Id.* at 3026. Having so concluded, the Court remanded the case to the Seventh Circuit for an analysis of whether, in light of *Heller*, the Chicago handgun ban infringed the Second Amendment right. *Id.* at 3050.

It doesn't take a lawyer to see that straightforward application of the rule in *Heller* will not dispose of this case. It should be equally obvious that neither *Heller* nor *McDonald* speaks explicitly or precisely to the scope of the Second Amendment right outside the home or to what it takes to "infringe" it. Yet, it is just as apparent that neither opinion is silent on these matters, for, at the very least, "the Supreme Court's approach . . . points in a general direction." *Ezell v. City of Chicago*, 651 F.3d 684, 700 (7th Cir. 2011) (noting that *Heller* does not leave us "without a framework for how to proceed"). To resolve the challenge to the D.C. restrictions, the *Heller* majority described and applied a certain methodology: it addressed, first, whether having operable handguns in the home amounted to "keep[ing] and bear [ing] Arms" within the meaning of the Second Amendment and, next, whether the challenged laws, if they indeed did burden constitutionally protected conduct, "infringed" the right. We apply that approach here, as we have done in the past, *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013), and as many of our sister circuits have done in similar cases. *See, e.g.*, *Nat'l Rifle Ass'n of Am.*, *Inc. v. Bureau of Alcohol*, *Tobacco*,

Firearms, & Explosives, 700 F.3d 185, 194 (5th Cir. 2012) ("A two-step inquiry has emerged as the prevailing approach."); *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012); *Heller v. District of Columbia* (*Heller II*), 670 F.3d 1244, 1252 (D.C. Cir. 2011); *Ezell*, 651 F.3d at 701-04; *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010); *United States v. Reese*, 627 F.3d 792, 800-01 (10th Cir. 2010); *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010).

A

The first question goes to the scope of the guarantee: Does the restricted activity—here, a restriction on a responsible, law-abiding citizen's[2] ability to carry a gun outside the home for self-defense—fall within the Second Amendment right to keep and bear arms for the purpose of self-defense? *Ezell*, 651 F.3d at 701; *see also Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 96 (2d Cir. 2012). Concerning the precise methods by which that right's

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[2] In this case, as in *Heller*, we consider the scope of the right only with respect to responsible, law-abiding citizens. *See Heller*, 554 U.S. at 635 ("And whatever else it leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home."). With respect to irresponsible or non-law-abiding citizens, a different analysis—which we decline to undertake here—applies. *Chovan*, 735 F.3d at 1138 (holding that a statute "does not implicate this core Second Amendment right [if] it regulates firearm possession for individuals with criminal convictions"); *see also Heller*, 554 U.S. at 626 ("[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill . . . .").

scope is discerned, the *Heller* and *McDonald* Courts were hardly shy: we must consult "both text and history." *Heller*, 554 U.S. at 595; *see also McDonald*, 130 S. Ct. at 3047 (reiterating that "the scope of the Second Amendment right" is determined by historical analysis and not interest balancing).

The analysis begins—as any interpretive endeavor must—with the text. "Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad." *Heller*, 554 U.S. at 634-35. To arrive at the original understanding of the right, "we are guided by the principle that '[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning,' " unless evidence suggests that the language was used idiomatically. *Id.* at 576 (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931)).

Since the goal is to arrive at a *fair*, not a hyper-literal, reading of the Constitution's language, *Heller*'s analysis is necessarily a contextual—and therefore a historical—one. *See Chester*, 628 F.3d at 680 ("This historical inquiry seeks to determine whether the conduct at issue was understood to be within the scope of the right . . . ."). It begins with the pre-ratification "historical background of the Second Amendment," since "the Second Amendment . . . codified a preexisting right." *Heller*, 554 U.S. at 592 (emphasis omitted). Next, it turns to whatever sources shed light on the "public understanding [of the Second Amendment] in the period after its

enactment or ratification," *see id.* at 605-10, such as nineteenth-century judicial interpretations and legal commentary. *See id.* at 605 ("We now address how the Second Amendment was interpreted from immediately after its ratification through the end of the 19th century."); *id.* at 610-19 (surveying "Pre-Civil War Case Law," "Post-Civil War Legislation," and "Post-Civil War Commentators").

Of course, the necessity of this historical analysis presupposes what *Heller* makes explicit: the Second Amendment right is "not unlimited." *Id.* at 595. It is "not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id.* at 626. Rather, it is a right subject to "traditional restrictions," which themselves—and this is a critical point—tend "to show the scope of the right." *McDonald*, 130 S. Ct. at 3056 (Scalia, J., concurring); *see also Kachalsky*, 701 F.3d at 96; *Nat'l Rifle Ass'n of Am.*, 700 F.3d at 196 ("For now, we state that a longstanding presumptively lawful regulatory measure . . . would likely [burden conduct] outside the ambit of the Second Amendment."); *United States v. Skoien*, 614 F.3d 638, 640 (7th Cir. 2010) (en banc) ("That some categorical limits are proper is part of the original meaning.").

In short, the meaning of the Second Amendment is a matter not merely of abstract dictionary definitions but also of historical practice. As "[n]othing but conventions and contexts cause [language] to convey a particular idea," we begin our analysis of the scope of the Second Amendment right by examining the text of the amendment in its

historical context. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* xxvii (2012).

1

The Second Amendment secures the right not only to "keep" arms but also to "*bear*" them—the verb whose original meaning is key in this case. Saving us the trouble of pulling the eighteenth-century dictionaries ourselves, the Court already has supplied the word's plain meaning: "At the time of the founding, as now, to 'bear' meant to 'carry.'" *Heller*, 554 U.S. at 584.[3] Yet, not "carry" in the ordinary sense of "convey[ing] or transport[ing]" an object, as one might carry groceries to the check-out counter or garments to the laundromat, but "carry for a particular purpose—confrontation." *Id.* The "natural meaning of 'bear arms,' " according to the *Heller* majority, was best articulated by Justice Ginsburg in her dissenting opinion in *Muscarello v. United States*, 524 U.S. 125 (1998): to "'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.'" *Heller*, 554 U.S. at 584 (quoting *Muscarello*, 524 U.S. at 143) (Ginsburg, J.,

[3] Although we are dealing with the Second Amendment right as incorporated against the states through the Fourteenth Amendment, we—consistent with the Court's analysis in *McDonald*—assume that the right had the same scope at the time of incorporation as it did at the time of the founding. *See, e.g.*, 130 S. Ct. at 3036 (using the definition of the Second Amendment right espoused in *Heller* when analyzing incorporation against the states).

dissenting) (quoting *Black's Law Dictionary* 214 (6th ed. 1998)); *see also id.* at 592 (concluding that the Second Amendment "guarantee[s] the individual right to . . . carry weapons in case of confrontation").

Speakers of the English language will all agree: "bearing a weapon inside the home" does not exhaust this definition of "carry." For one thing, the very risk occasioning such carriage, "confrontation," is "not limited to the home." *Moore v. Madigan*, 702 F.3d 933, 936 (7th Cir. 2012). One needn't point to statistics to recognize that the prospect of conflict—at least, the sort of conflict for which one would wish to be "armed and ready"—is just as menacing (and likely more so) beyond the front porch as it is in the living room. For that reason, "[t]o speak of 'bearing' arms within one's home would at all times have been an awkward usage." *Id.* To be sure, the idea of carrying a gun "in the clothing or in a pocket, for the purpose . . . of being armed and ready," does not exactly conjure up images of father stuffing a six-shooter in his pajama's pocket before heading downstairs to start the morning's coffee, or mother concealing a handgun in her coat before stepping outside to retrieve the mail. Instead, it brings to mind scenes such as a woman toting a small handgun in her purse as she walks through a dangerous neighborhood, or a night-shift worker carrying a handgun in his coat as he travels to and from his job site.

More importantly, at the time of the Second Amendment's enactment, the familiar image that "bear arms" would have painted is one of an eighteenth-century frontiersman, who "from time to

time [would] leave [his] home to obtain supplies from the nearest trading post, and en route one would be as much (probably more) at risk if unarmed as one would be in one's home unarmed." *Id.* at 936. Indeed, it was this spirit of the arms-bearing settler that Senator Charles Sumner invoked (and the *Heller* Court cited as instructive of the scope of the right) in the (in)famous "Crime against Kansas" speech in 1856: "The rifle has ever been the companion of the pioneer and, under God, his tutelary protector against the red man and the beast of the forest. Never was this efficient weapon more needed in just self-defence, than now in Kansas, and at least one article in our National Constitution must be blotted out, before the complete right to it can in any way be impeached." 4 *The Works of Charles Sumner* 211-12 (1875); *see also Heller*, 554 U.S. at 609.

Other passages in *Heller* and *McDonald* suggest that the Court shares Sumner's view of the scope of the right. The Second Amendment, *Heller* tells us, secures "the right to 'protect[] [oneself] against both *public* and private violence,' thus extending the right in some form to wherever a person could become exposed to public or private violence." *United States v. Masciandaro*, 638 F.3d 458, 467 (4th Cir. 2011) (Niemeyer, J., specially concurring) (quoting *Heller*, 554 U.S. at 594 (emphasis added)). The Court reinforced this view by clarifying that the need for the right is "most acute" in the home, *Heller*, 554 U.S. at 628, thus implying that the right exists outside the home, though the need is not always as "acute." *See also McDonald*, 130 S. Ct. at 3044 (2010) ("[T]he Second Amendment protects a personal right to keep and bear arms for lawful purposes, most

notably for self-defense within the home."). In a similar vein, *Heller* identifies "laws forbidding the carrying of firearms in sensitive places such as school and government buildings" as presumptively lawful. 554 U.S. at 626. Were the right restricted to the home, the constitutional invincibility of such restrictions would go without saying. Finally, both *Heller* and *McDonald* identify the "core component" of the right as self-defense, which necessarily "take[s] place wherever [a] person happens to be," whether in a back alley or on the back deck. Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. Rev. 1443, 1515 (2009); *see also Moore*, 702 F.3d at 937 ("To confine the right to be armed to the home is to divorce the Second Amendment from the right of self-defense described in *Heller* and *McDonald*.").

These passages alone, though short of dispositive, strongly suggest that the Second Amendment secures a right to carry a firearm in some fashion outside the home. Reading those lines in light of the plain-meaning definition of "bear Arms" elucidated above makes matters even clearer: the Second Amendment right "could not rationally have been limited to the home." *Moore*, 702 F.3d at 936. Though people may "keep Arms" (or, per *Heller*'s definition, "have weapons," 554 U.S. at 582) in the home for defense of self, family, and property, they are more sensibly said to "bear Arms" (or, *Heller*'s gloss: "carry [weapons] . . . upon the person or in the clothing or in a pocket," *id.* at 584) in *nondomestic*

settings.[4] *Kachalsky*, 701 F.3d at 89 n.10 ("The plain text of the Second Amendment does not limit the right to bear arms to the home."); *see also Drake v. Filko*, 724 F.3d 426, 444 (3d Cir. 2013) (Hardiman, J., dissenting) ("To speak of 'bearing' arms solely within one's home not only would conflate 'bearing' with 'keeping,' in derogation of the Court's holding that the verbs codified distinct rights, but also would be awkward usage given the meaning assigned the terms by the Supreme Court.").

2

In addition to a textual analysis of the phrase "bear Arms," we, like the Court in *Heller*, look to the original public understanding of the Second Amendment right as evidence of its scope and meaning, relying on the "important founding-era legal scholars." *See Heller*, 554 U.S. at 600-03, 605-10 (examining the public understanding of the Second Amendment in the period after its ratification because "[t]hat sort of inquiry is a critical tool of constitutional interpretation").

The commonsense reading of "bear Arms" previously discussed finds support in several important constitutional treatises in circulation at

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[4] *Heller* and *McDonald* focus on the Second Amendment right to keep and bear arms *for self-defense*—the core component of the right, which this case implicates. We need not consider, therefore, whether the right has other ends. *See* Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. Rev. 1443, 1448 (2009) (suggesting that the right "may have other components," such as the right to keep and bear arms for recreation, hunting, or resisting government tyranny).

the time of the Second Amendment's ratification. *See id.* at 582-83, 592-93 (treating such sources as instructive of the clause's original meaning). Writing on the English right to arms, William Blackstone noted in his *Commentaries on the Laws of England* that the "the right of having and using arms for self-preservation and defence" had its roots in "the natural right of resistance and self-preservation." *Heller*, 554 U.S. at 594 (internal citations and quotations omitted). It was this inherited right of armed self-defense, according to *Heller*, that "by the time of the founding [was] understood to be an individual right protecting against both *public* and private violence." *Id.* (emphasis added). Although Blackstone elsewhere described a fourteenth-century English statute that forbad the "riding or going armed with dangerous or unusual weapons," that prohibition was understood to cover carriage of uncommon, frightening weapons only. Indeed, Justice James Wilson, an early American legal commentator and framer, confirmed this narrower reading, *see* 2 James Wilson, *The Works of James Wilson* 654 (Robert McCloskey ed. 1967), citing an English commentator for the proposition that wearing ordinary weapons in ordinary circumstances posed no problem. *See* Eugene Volokh, *The First and Second Amendments*, 109 Colum. L. Rev. Sidebar 97, 101 (2009) ("American benchbooks for justices of the peace echoed [Wilson's observation]."); Joyce Lee Malcolm, *To Keep and Bear Arms: The Origins of an Anglo-American Right* 105 (1994) (quoting an English case recognizing "a general Connivance to Gentlemen to ride armed for their security," notwithstanding the statute); *see also* William Rawle,

A View of the Constitution of the United States of America 126 (2d ed. 1829) (observing that the Second Amendment would not forbid the prohibition of the "carrying of arms abroad by a single individual, attended with circumstances giving just reason to fear that he purposes to make an unlawful use of them"). It is likely for this reason that *Heller* cites Blackstone's commentary on the statute as evidence *not* of the scope of the "keep and bear" language but of what weapons qualify as a Second Amendment "arms." *See Heller*, 554 U.S. at 627.

Writing over thirty years later in what *Heller* calls the "most important" American edition of Blackstone's *Commentaries*, *id.* at 594, St. George Tucker, a law professor and former Antifederalist, affirmed Blackstone's comments on the British right and commented further on its American dimensions. The right to armed self-defense, Tucker insisted, is the "first law of nature," and any law "prohibiting any person from bearing arms" crossed the constitutional line. St. George Tucker, *Blackstone's Commentaries: With Notes of Reference to the Constitution and Laws of the Federal Government of the United States; and of the Commonwealth of Virginia* 289 (1803). Tucker went on to note that, though English law presumed that any gathering of armed men indicated that treasonous plotting was afoot, it would have made little sense to apply such an assumption in the colonies, "where the right to bear arms is recognized and secured in the constitution itself." Tucker, *supra*, vol. 5, app., n.B, at 19. After all, "[i]n many parts of the United States, a man no more thinks, of going out of his house on any occasion, without his rifle or musket in his hand,

than a European fine gentleman without his sword by his side." *Id.; see also* Michael P. O'Shea, *Modeling the Second Amendment Right to Carry Arms (I): Judicial Tradition and the Scope of "Bearing Arms" for Self-Defense*, 61 Am. U. L. Rev. 585, 637-38 (2012). Likewise, Edward Christian—another Blackstone commentator from that period—maintained that this inherited right allowed "everyone . . . to keep or carry a gun, if he does not use it for the [unlawful] destruction of game." *See* Clayton E. Cramer & Joseph Edward Olson, *What Did "Bear Arms" Mean in the Second Amendment?*, 6 Geo. J.L. & Pub. Pol'y 511, 517 (2008) (quoting 2 William Blackstone, *Commentaries* 441 (Edward Christian ed., 1795)).

3

In keeping with the views of the important late-eighteenth-century commentaries, the great weight of nineteenth-century precedent on the Second Amendment or its state-law analogues confirms the *Heller*-endorsed understanding of "bear Arms."[5] In

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[5] Following *Heller*, we credit nineteenth-century judicial interpretations of the right to bear arms as probative of the Second Amendment's meaning. *Heller*, 554 U.S. at 586; *id.* at 605 ("We now address how the Second Amendment was interpreted from immediately after its ratification through the end of the 19th century.").

We decline, however, to undertake an exhaustive analysis of twentieth-century interpretations of the right for the same reason that the *Heller* Court presumably did: coming over a hundred years after the Amendment's ratification, they seem poor sources of the text's *original* public meaning. *Cf. id.* at 614 ("Since discussions [in Congress and elsewhere after the Civil War] took place 75 years after the ratification of the Second

fact, as we will show, many of the same cases that the *Heller* majority invoked as proof that the Second Amendment secures an individual right may just as easily be cited for the proposition that the right to carry in case of confrontation means nothing if not the general right to carry a common weapon outside the home for self-defense.

a

But before turning to the cases themselves, we offer a word on methodology. We set out to review the bulk of precedents from this period.[6] All are, in a broad sense, equally relevant, for every historical gloss on the phrase "bear arms" furnishes a clue of that phrase's original or customary meaning. Still, some cases are more equal than others.[7] That's because, with *Heller* on the books, the Second Amendment's original meaning is now settled in at least two relevant respects. First, *Heller* clarifies that the keeping and bearing of arms is, *and has always been*, an individual right. *See, e.g.*, 554 U.S. at 616. Second, the right is, *and has always been*, oriented to the end of self-defense. *See, e.g.*, *id.* Any contrary interpretation of the right, whether propounded in 1791 or just last week, is error. What that means for

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Amendment, they do not provide as much insight into its original meaning as earlier sources.").

[6] We will inevitably miss some. The briefs filed in this appeal were able to address only so many before running up against word limits.

[7] With apologies to George Orwell. *See* George Orwell, *Animal Farm* 118 (2009) (1945) (distilling Manor Farm's Seven Commandments of Animalism to a single rule: "All animals are equal, but some animals are more equal than others").

our review is that historical interpretations of the right's scope are of varying probative worth, falling generally into one of three categories ranked here in descending order: (1) authorities that understand bearing arms for self-defense to be an individual right, (2) authorities that understand bearing arms for a purpose *other than* self-defense to be an individual right, and (3) authorities that understand bearing arms not to be an individual right at all.

To illustrate, a precedent in the first category that declared a general right to carry guns in public would be a great case for Peruta, while a decision in the same group that confined exercise of the right to the home would do his position much damage. By contrast, those cases in the third category—which, like the dissenting opinions in *Heller*, espouse the view that one has a right to bear arms only collectively in connection with militia service and *not* for self-defense within or outside the home—are of no help. The second category, consisting mostly of cases that embrace the premise that the right's purpose is deterring tyranny, is only marginally useful. Since one needn't exactly tote a pistol on his way to the grocery store in order to keep his government in check, it is no surprise (and, thus, of limited significance for purposes of our analysis) when these courts suggest that the right is mostly confined to the home. Likewise, a second-category case asserting that the goal of tyranny prevention does indeed call for public weapon bearing lends only indirect support for the proposition that bearing arms in case of confrontation includes carrying weapons in public for self-defense.

b

Having set forth the methodology to be employed, we turn to the nineteenth-century case law interpreting the Second Amendment, beginning with the cases that the Court itself relied upon in *Heller*.

The first case is *Bliss v. Commonwealth*, 12 Ky. (2 Litt.) 90 (1822), *cited in Heller*, 554 U.S. at 585 n.9, a decision "especially significant both because it is nearest in time to the founding era and because the state court assumed (just as [*Heller*] does) that the constitutional provision . . . codified a preexisting right." Nelson Lund, *The Second Amendment*, Heller, *and Originalist Jurisprudence*, 56 UCLA L. Rev. 1343, 1360 (2009). There, Kentucky's highest court interpreted that state's Second Amendment analogue ("the right of the citizens to bear arms in defense of themselves and the state, shall not be questioned") as invalidating a ban on "wearing concealed arms." *Bliss*, 12 Ky. (2 Litt.) at 90. The Commonwealth's lead argument to the contrary had been that, though Kentucky's constitution forbad prohibitions on the exercise of the right, it permitted laws "merely regulating the manner of exercising that right." *Id.* at 91. Although the court agreed with the Commonwealth's argument in principle, it disagreed with the conclusion that the ban on "wearing concealed arms" was merely a means of "regulating the manner of exercising" the right. *Id.* An act needn't amount to a "complete destruction" of the right to be "forbidden by the explicit language of the constitution," since any statute that "diminish[ed] or impair[ed the right] as it existed when the

constitution was formed" would also be "void." *Id.* at 92. Thus, had the statute purported to prohibit both the concealed and open carriage of weapons, effecting an "*entire destruction of the right*," it would have been an obvious nullity; but even as a ban on concealed carry alone there could be "entertained [no] reasonable doubt but [that] the provisions of the act import a restraint on the right of the citizens to bear arms." *Id.* at 91-92 (emphasis added). Striking down the law, the court explained that the preexisting right to bear arms had "no limits short of the moral power of the citizens to exercise it, and it in fact consisted in nothing else but in the liberty of the citizens to bear arms. Diminish that liberty, therefore, and you necessarily restrain the right." *Id.* at 92.

In *Simpson v. State*, the Tennessee Supreme Court read that state's Second Amendment analogue just as the *Bliss* court read Kentucky's. 13 Tenn. (5 Yer.) 356 (1833), *cited in Heller*, 554 U.S. at 585 n.9. Convicted of the crime of affray for appearing in public "arrayed in a warlike manner" (i.e., armed), Simpson argued that the state should have had to prove that he had committed acts of physical violence to convict him. *Id.* at 361-62. The court agreed, concluding in part that even if the common law did not require proof of actual violence to punish persons for merely walking around with weapons, the state constitution's protection of the "right to keep and to bear arms" would trump: "[I]t would be going much too far, to impair by construction or abridgment a constitutional privilege which is so declared." *Id.* at 360; *cf. State v. Huntly*, 25 N.C. (3 Ired.) 418 (1843) (rejecting a "right to bear arms" defense and

upholding an affray conviction of a defendant who, threatening to kill off a certain family, was caught carrying an unusual weapon in public). It went without saying, evidently—for the court offered little in the way of analysis—that whatever else the constitution meant by "bear arms," it certainly implied the right to carry operable weapons in public. The court confirmed as much in 1871, holding that an act that proscribed openly carrying a pistol "publicly or privately, without regard to time or place, or circumstances" went too far, even though the statute exempted from its prohibitions the carrying of long guns. *Andrews v. State*, 50 Tenn. 165, 187 (1871), *cited in Heller*, 554 U.S. at 608, 629.

Though the Tennessee Supreme Court announced a slightly different view of the right to bear arms in *Aymette v. State*, that case is plainly consistent with—and indeed affirms—the principle that the right to bear arms extends out of doors. 21 Tenn. 154 (1840), *cited in Heller*, 554 U.S. at 613-14. Commenting on the "manifest distinction" between a restriction on "wearing concealed weapons" (which the court upheld) and a prohibition on open carry, the court observed with little fanfare that "[i]n the nature of things, if [persons] were not allowed to bear arms openly, they could not bear them in their defense of the State at all." *Id.* at 160. The court marshaled this point in support of the second-category position "whereby citizens were permitted to carry arms openly, unconnected with any service in a formal militia, but were given the right to use them only for the military purpose of banding together to oppose tyranny"—a view of the right's end that *Heller* explicitly rejects. *Heller*, 554

U.S. at 613 ("[*Aymette*'s] odd reading of the right is, to be sure, not the one we adopt."). Nonetheless, what remains of *Aymette* is its observation that the right to bear arms, even if not in the service of personal self-defense, must include the right to carry guns outside the home.

The Alabama Supreme Court weighed in that same year. *See State v. Reid*, 1 Ala. 612 (1840), *cited in Heller*, 554 U.S. at 629. Taking a view of the right narrower than that of the *Simpson* court, it nonetheless declared that the constitutional guarantee of "a right to bear arms, in defense of [ ]self and the State," meant that an Alabamian must be permitted to carry a weapon in public in some fashion. *Id.* at 615. Reid, found guilty of the "evil practice of carrying weapons secretly," challenged the constitutionality of the statute of conviction. *Id.* at 614. Rejecting this challenge, the court held that the state constitution's enumeration of the right did not strip the legislature of the power "to enact laws in regard to the manner in which arms shall be borne . . . as may be dictated by the safety of the people and the advancement of public morals." *Id.* at 616. And, departing to some degree from the approach in *Bliss*, the court concluded that Alabama's concealed-carry law was just such a regulation, going no further than forbidding that means of arms bearing thought "to exert an unhappy influence upon the moral feelings of the wearer, by making him less regardful of the personal security of others." *Id.* at 617. The act's narrowness ensured its validity:

> We do not desire to be understood as maintaining, that in regulating the manner

> of bearing arms, the authority of the Legislature has no other limit than its own discretion. A statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would be clearly unconstitutional.

Id. at 616-17. Read in light of the court's earlier statement that a restriction on arms bearing would stand so long as it simply proscribed the "manner in which arms shall be borne," this passage suggests that to forbid nearly all forms of public arms bearing would be to destroy the right to bear arms entirely.[8]

Embracing precisely that position, the Georgia Supreme Court's decision in *Nunn v. State* six years later—praised in *Heller* as "perfectly captur [ing]" the relationship between the Second Amendment's two clauses, 554 U.S. at 612—made explicit what *Reid* intimated. 1 Ga. 243 (1846), *cited in Heller*, 554 U.S. at 612, 626, 629. Convicted of keeping a pistol on his person—a statutory misdemeanor (whether the pistol was carried openly or "secretly")—Nunn attacked the statute of conviction as an unconstitutional infringement of his right to bear arms under the

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[8] The Indiana Supreme Court appeared to take the same view. *Compare State v. Mitchell*, 3 Blackf. 229 (Ind. 1833) (publishing a one-sentence opinion that reads, "It was held in this case, that the statute of 1831, prohibiting all persons, except travelers, from wearing or carrying concealed weapons, is not unconstitutional.") *with Walls v. State*, 7 Blackf. 572, 573 (Ind. 1845) (implying that a citizen could avoid legal trouble under the concealed weapons law if "he exhibited his pistol so frequently that it could not be said to be concealed").

Second Amendment. *Id.* at 246. The court began with a statement of the constitutional standard: "The right of the whole people, old and young, men, women and boys, and not militia only, to keep and bear arms of every description, and not such merely as are used by the militia, shall not be infringed, curtailed, or broken in upon, in the smallest degree." *Id.* at 251. Turning to the statute, the court reasoned that had it merely limited the manner of the exercise of the right to carry, it would have withstood scrutiny. As written, however, it went too far:

> We are of the opinion, then, that so far as the act of 1837 seeks to suppress the practice of carrying certain weapons *secretly*, that it is valid, inasmuch as it does not deprive the citizen of his *natural* right of self-defence, or of his constitutional right to keep and bear arms. But that so much of it, as contains a prohibition against bearing arms *openly*, is in conflict with the Constitution, and *void*; and that, as the defendant has been indicted and convicted for carrying a pistol, without charging that it was done in a concealed manner, under that portion of the statute which entirely forbids its use, the judgment of the court below must be reversed, and the proceeding quashed.

Id. In other words, as the same court explained in a later case involving a defendant charged with illicit open carriage, to ban *both* the open and concealed carriage of pistols "would be to prohibit the bearing of those arms" altogether. *Stockdale v. State*, 32 Ga. 225, 227 (1861) (adding that such a set of restrictions

"would . . . bring the Act within the decision in *Nunn*'s case").

Although the Arkansas Supreme Court in *State v. Buzzard* appeared at first to take the contrary position, viewing restrictions on carrying weapons for self-defense as permissible police-power regulations, *see* 4 Ark. 18 (1842); *see also Fife v. State*, 31 Ark. 455 (1876) (relying on *Buzzard* to uphold a prohibition on concealed carry); *Carroll v. State*, 28 Ark. 99 (1872) (same), the court staked its position on two interpretations of the Second Amendment right that the *Heller* Court repudiated—and from which the Arkansas court itself later retreated. According to one judge in the splintered majority, the Second Amendment secured a right to bear arms for use in militia service but *not* a right to bear arms for personal self-defense. *Id.* at 22 (opinion of Ringo, C.J.). Writing separately, the other judge in the majority went further, asserting that the Second Amendment secured *no individual right*. *Id.* at 32 (opinion of Dickinson, J.); *compare id.* at 43 (Lacy, J., dissenting) (arguing that the court should have embraced the *Bliss* view). Neither interpretation survives *Heller*—which is also to say that neither opinion elucidates the right's originally understood scope.[9] Yet it didn't take *Heller* to convince the Arkansas Supreme Court that *Buzzard* could use

[9] By assuming that the right to bear arms is an individual one focused on militia service rather than self-defense, the Chief Judge Ringo's opinion in *Buzzard* falls into the second-category; Judge Dickinson's opinion for the majority is consistent with the third-category position in concluding that the Second Amendment does not secure an individual right at all.

some shearing. Writing in 1878, the court clarified that while "the Legislature might, in the exercise of the police power of the State, regulate the mode of wearing arms," banning "the citizen from wearing or carrying a war arm, except upon his own premises or when on a journey . . . or when acting as or in aid of an officer, is an unwarranted restriction upon his constitutional right to keep and bear arms." *Wilson v. State*, 33 Ark. 557, 560 (1878).

State v. Chandler, an 1850 decision of the Louisiana Supreme Court, proceeds along the lines drawn in *Nunn*. 5 La. Ann. 489 (1850), *cited in Heller*, 554 U.S. at 613, 626. Rejecting the argument that Louisiana's ban on carrying concealed weapons infringed the Second Amendment right, the court explained that the prohibition was "absolutely necessary to counteract a vicious state of society, growing out of the habit of carrying concealed weapons, and to prevent bloodshed and assassinations committed upon unsuspecting persons." *Id.* at 489-90. A ban on the open carriage of weapons, by contrast, would enjoy no such justification. Echoing *Reid*, the court said:

> [The Act] interfered with no man's right to carry arms (to use its words) "in full open view," which places men upon an equality. This is the right guaranteed by the Constitution of the United States, and which is calculated to incite men to a manly and noble defence of themselves, if necessary, and of their country, without any tendency to secret advantages and unmanly assassinations.

Id. at 490; *see also Heller*, 554 U.S. at 613 (citing favorably *Chandler*'s holding that "citizens had a right to carry arms openly"); *State v. Jumel*, 13 La. Ann. 399, 400 (1858) (invoking *Chandler* for the proposition that "prohibiting only *a particular mode* of bearing arms which is found dangerous to the peace of society" does not infringe the right).

Nine years later, the Texas Supreme Court declared that "[t]he right of a citizen to bear arms, in the lawful defense of himself or the state, is absolute," permitting even the wielding of a Bowie knife, "the most deadly of all weapons in common use." *Cockrum v. State*, 24 Tex. 394, 403 (1859). Though the state legislature was free to discourage the carriage of such an "exceeding[ly] destructive weapon," it could not adopt measures effectively prohibiting its use as a defensive arm: "[A]dmonitory regulation of the abuse [of the right] must not be carried too far. It certainly has a limit. For if the legislature were to affix a punishment to the abuse of this right, so great, as in its nature, it must deter the citizen from its lawful exercise, that would be tantamount to a *prohibition of the right*." *Id.*[10]

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[10] The court rested this holding on the Texas constitution's guarantee of the right to bear arms, not that of the Second Amendment, which it read as a strictly tyranny-deterring measure "based on the idea, that the people cannot be effectually oppressed and enslaved, who are not first disarmed." *Cockrum*, 24 Tex. at 410. Though *Heller*, of course, rejects such a reading as contrary to the Amendment's original meaning, *Cockrum* retains probative value for purposes of our analysis, as it "illustrates the thesis that, when an antebellum court concluded that a constitutional right to bear arms had a self-defense component, then this normally entailed presumptive

Thus, the majority of nineteenth century courts agreed that the Second Amendment right extended outside the home and included, at minimum, the right to carry an operable weapon in public for the purpose of lawful self-defense. Although some courts approved limitations on the manner of carry outside the home, none approved a total destruction of the right to carry in public.

Indeed, we know of only four cases from that period rejecting the presumptive-carry view. Three of the four, however, are not category-one cases. *See Haile v. State*, 38 Ark. 564 (1882) (espousing a militia-based reading of the right); *Hill v. State*, 53 Ga. 472 (1874) (same); *English v. State*, 35 Tex. 473 (1872) (same). Consequently, they shed no light on the question whether, *if* the right to bear arms is an individual right directed to the end of self-defense, it sanctions the public carriage of common weapons. In the fourth case, *State v. Duke*, the court does begin with the *Heller*-endorsed understanding of the right but nonetheless concludes that, while the right contemplates weapon carrying in certain places outside the home (e.g., one's business) and in circumstances reasonably giving rise to fear of attack, the right is otherwise subject to heavy-handed regulation. 42 Tex. 455, 459 (1875). Yet, *Duke* is distinguishable: it construed the guarantee of the right to bear arms as it appeared in the Texas Constitution of 1869, which permitted "such regulations [of the right] as the legislature may prescribe." *Id.* at 458. The Second Amendment's text

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carry rights, even as applied to a very potent and dangerous weapon such as the Bowie knife." O'Shea, *supra*, at 632.

contains no such open-ended clause restricting its application, and we ought not to go looking for an unwritten one.

4

As the Court did in *Heller*, we turn next to the post-Civil War legislative scene. Although consulting post-Civil War discussions may seem to be an unusual means for discerning the original public meaning of the right—particularly given that these discussions postdate the Second Amendment's ratification by three-quarters of a century—we hew to the Supreme Court's conclusion that they retain some significance, albeit less than earlier interpretations of the right. *See Heller*, 554 U.S. at 614-18; *see also McDonald*, 130 S. Ct. at 3038-42. After the Civil War, "there was an outpouring of discussion of Second Amendment in Congress and in public discourse, as people debated whether and how to secure constitutional rights for newly freed slaves." *Heller*, 554 U.S. at 614. As this discussion was led by "those born and educated in the early 19th century" near the time of the Second Amendment's enactment, "their understanding of the origins and continuing significance of the Amendment is instructive." *Id.*

Perhaps unsurprisingly, our review suggests that their understanding comports with that of most nineteenth-century courts: then, as at the time of the founding, "[t]he right of the people . . . to bear arms meant to carry arms on one's person." Stephen P. Halbrook, *Securing Civil Rights*, *Freedmen*, *the Fourteenth Amendment*, *and the Right to Bear Arms* 50 (1998).

Our examination of the Civil War legislative

scene begins with the Supreme Court's infamous decision in *Dred Scott v. Sanford*, 60 U.S. 393 (1856). According to the Supreme Court in *Dred Scott*, black slaves and their descendants "had no rights which the white man was bound to respect"—pouring fuel on the flames of the nation's already-blazing sectional crisis just four years before the firing on Fort Sumter. *Id.* at 407. At the heart of this holding was the Court's conclusion that at no point had blacks ever been members of the sovereign "people" of the United States. It apparently followed from this premise that, as constitutional non-citizens, blacks lacked not only the right to "full liberty of speech in public and private" and "to hold meetings upon political affairs" but also the constitutional right "to keep and *carry arms wherever they went*." *Id.* at 417 (emphasis added). It was in large part in reaction to *Dred Scott*'s logic, on which the Black Codes of the post-war South plainly rested, that the Reconstruction Congress sprung into action. *Heller*, 554 U.S. at 614. It was, of course, no coincidence that the codes, designed to deny the privileges of constitutional citizenship to the freedmen, took aim at that most fundamental right of keeping and bearing arms. Clayton E. Cramer, *The Racist Roots of Gun Control*, 4 Kan. J.L. & Pub. Pol'y 17, 20 (Winter 1995) ("The various Black Codes adopted after the Civil War required blacks to obtain a license before carrying or possessing firearms or bowie knives. . . . These restrictive gun laws played a part in provoking Republican efforts to get the Fourteenth Amendment passed."); *see also* Stephen P. Halbrook, *Personal Security*, *Personal Liberty*, *and "The Constitutional Right to Bear Arms": Visions of the*

Framers of the Fourteenth Amendment, 5 Seton Hall Const. L.J. 341, 348 (1995) ("One did not have to look hard to discover state 'statutes relating to the carrying of arms by negroes' and to an 'act to prevent free people of color from carrying firearms.'" (citations omitted)). As *Heller* notes, "[t]hose who opposed these injustices frequently stated that they infringed blacks' constitutional right to keep and bear arms." *Heller*, 554 U.S. at 614.

By all accounts, the model of such codes was Mississippi's 1865 "Act to Regulate the Relation of Master and Apprentice Relative to Freedman, Free Negroes, and Mulattoes," which provided in part that "no freedman, free negro or mulatto . . . shall keep or carry fire-arms of any kind, or any ammunition, dirk or bowie knife" and that "any freedman, free negro or mulatto found with any such arms or ammunition" was subject to arrest. 1866 Miss. Laws ch. 23, § 1, 165 (1865). The act, rigorously enforced, led to a thorough confiscation of blackowned guns, whether found at home or on the person: "The militia of this country have seized every gun and pistol found in the hands of the (so called) freedmen. . . . They claim that the statute laws of Mississippi do not recognize the negro as having any right to carry arms. They commenced seizing arms in town," as well as, later, "the plantations." *Harper's Weekly*, Jan. 13, 1866, at 19, col. 2. A similar law enacted by a city in Louisiana, which a special report "had brought to Congress' attention," forbad freedmen from carrying firearms or any other kind of weapon within the limits of town without special permission from the government and one's employer. Halbrook, *supra*, at 5; *see also* "The Freedmen's Bureau Bill," *New York*

Evening Post, May 30, 1866, at 2, col. 1 ("In South Carolina and Florida the freedmen are forbidden to wear or keep arms.").

Among the proposed legislative solutions to the problem of the Black Codes was a bill to add to the powers of the Freedmen's Bureau, a federal agency dispatched to the South to aid the former slaves. One senator, a Democrat from Indiana, seemed to fear that the bill's section securing civil rights to blacks would cast doubt on the legitimacy of his state's laws securing only whites' right to carry weapons openly. *See* Halbrook, *supra*, at 8. Another senator, though he opposed the bill, knew well the nature of the fundamental rights it sought to secure: They included "the subordination of the military to the civil power in peace, in a war, and always," "the writ of *habeas corpus*," and "trial by jury," he declared. They *also* included the right "for every man bearing his arms about him *and* keeping them in his house, his castle, for his own defense." Cong. Globe, 39th Cong., 1st Sess. 340, 371 (Jan. 23, 1866) (Sen. Henry Winter Davis) (emphasis added), *cited in Heller*, 554 U.S. at 616. Meanwhile, in the House, T.D. Eliot, the chairman of the Committee on Freedman's Affairs, quoted from the Louisiana city ordinance mentioned above, citing its prohibition on "carrying firearms" within the town as an example of the sort of black code that federal legislation securing fundamental rights would undo. Cong. Globe, 39th Cong., 1st Sess. 517 (Jan. 29, 1866). Underscoring the danger that the Southern states' abridgement of the right portended for blacks, he quoted a letter from a teacher at a black school in Maryland, which told of violence prompting "both the mayor and sheriff [to]

warn[] the colored people to go armed to school, (which they do)." She apparently added: "The superintendent of schools came down and brought me a revolver." Cong. Globe, 39th Cong., 1st Sess. 658 (Feb. 5, 1866). Concerned by such peril, Massachusetts Congressman Nathaniel P. Banks proposed making the language of the act more specific by explicitly listing "the constitutional right to bear arms" among the civil rights protected. Cong. Globe, 39th Cong., 1st Sess. 585 (Feb. 1, 1866). The language made it into both the first bill, which President Johnson vetoed (though he did not object to its arms-bearing provision), as well as the final version, passed by a veto-proof supermajority. Cong. Globe, 39th Cong., 1st Sess. 915-17 (Feb. 19, 1866); Cong. Globe, 39th Cong., 1st Sess. 3842 (July 16, 1866).

Orders of Union commanders charged with managing Reconstruction in the South lend further support to the notion that citizens in the post-Civil War era conceived of the right to bear arms as extending to self-defense outside the home. The Union commanders, who were given authority over various "departments" of the defeated South, issued orders that were just as important to the task of securing the constitutional rights of liberated slaves as Congressional legislation. "To the end that civil rights and immunities may be enjoyed," General Daniel Sickles issued General Order No. 1 for the Department of South Carolina, stating in part that "[t]he constitutional rights of all loyal and well-disposed inhabitants to bear arms, will not be infringed," though such a guarantee neither foreclosed bans on "the unlawful practice of carrying

concealed weapons" nor authorized "any person to enter with arms on the premises of another against his consent." Cong. Globe, 39th Cong., 1st Sess. 908 (Feb. 17, 1866) (Rep. William Lawrence) (quoting Sickles' order on the floor of the House). Congressman William Lawrence of Ohio lauded Sickles' order as just the right medicine. *Id.* The *Loyal Georgian*, a known black journal, applauded its issuance, editorializing that blacks "certainly . . . have the same right to own and carry arms that other citizens have." The Loyal Georgian (Augusta), Feb. 3, 1866, 3, col. 4, *cited in Heller*, 554 U.S. at 615.

Just as it was "plainly the understanding in the post-Civil War Congress that the Second Amendment protected an individual right to use arms for self-defense," *Heller*, 554 U.S. at 616, it appears that the right was also understood to encompass carrying weapons in public in case of confrontation.

5

We consider next the major "[p]ost-Civil War [c]ommentators[']" understanding of the right. *Id.*; *see also* David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 B.Y.U. L. Rev 1359, 1461-1503 (1998) (collecting relevant commentary from the period). The first and most influential was Thomas Cooley, judge, professor, and author of two leading treatises on constitutional law. Quoted at length in *Heller* solely for his view that the right is an individual one, Cooley's works say little on the self-defense component of the right. Nonetheless, his treatment of the Second Amendment in his more popular treatise supports a self-defense view of the right. There, he notes that "happily" there has been

"little occasion" for consideration by courts of the extent to which the right may be regulated, citing only—and without disapproval—the pro-carriage decisions in *Bliss*, *Nunn*, and a third case on "the right of self-defence." Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union* 350 & n.1 (1868), cited in *Heller*, 554 U.S. at 616-17.[11] Also of note, Cooley observes elsewhere in the book that state constitutions typically secure (among others) the right of each citizen to "bear arms for the *defence of himself*." *Id.* at 35-36 (emphasis added). Cooley's view of the right is thus at least compatible with the mainstream self-defense view and did not preclude certain kinds of defensive weapons bearing.[12] *See also* Cooley, *The General*

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[11] The editors of an 1875 edition of Blackstone also highlighted these three cases in their discussion of "[t]he right of carrying arms for self-protection." 1 William Blackstone, *Commentaries on the Laws of England* 121 n.64 (Herbert Broom & Edward A. Hadley eds., 1875). William Draper Lewis, a later editor, wrote "[t]hat the right of carrying arms as secured by the U.S. Constitution, and generally by State constitutions, does not include the habitual carrying of concealed deadly weapons by private individuals." 1 William Blackstone, *Commentaries on the Laws of England* 144 n.91 (William Draper Lewis ed., 1897). Both these readings, like Cooley's, presume that some arms bearing for self-defense outside the home is encompassed in the right.

[12] In Cooley's other treatise, he often described the right to bear arms as oriented toward the goal of citizenry-wide military readiness. To this end, "to bear arms implies something more than the mere keeping; it implies the learning to handle and use them in a way that makes those who keep them ready for their efficient use; in other words, it implies the right to meet for voluntary discipline in arms, observing in doing so the laws of

Principles, *supra*, at 270 (observing that the right was adopted in its inherited English form, "with some modification and enlargement").

A second constitutional commentator from the era, also cited in *Heller*, seemed to concur in Cooley's account. *See* John Pomeroy, *An Introduction to the Constitutional Law of the United States* (8th ed. 1885), *cited in Heller*, 554 U.S. at 618. Though Pomeroy associated the right with the "object" of "secur[ing] a well-regulated militia," he suggested that, while restrictions on the frowned-upon method of "secret" carrying would not violate the right, restrictions on open carry likely would. Consistent with the majority of nineteenth century courts, Pomeroy did not see "laws forbidding persons to carry dangerous or concealed weapons" alone as incompatible with the Amendment's "intent and

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public order." Thomas M. Cooley, *The General Principles of Constitutional Law in the United States of America* 271 (1880), *cited in Heller*, 554 U.S. at 617-18.

Although one might be tempted to read this passage, and the section in which it appears, as suggesting that Cooley believed the right to be devoted *solely* to the defense of the community, two of his later comments suggest otherwise. First, a later line in the same treatise clarifies: "[T]he secret carrying of those [arms] suited merely to deadly individual encounters may be prohibited." *Id.* at 272. If Cooley understood the right to allow weapons bearing only for training in "discipline in arms" and the like, this later clarification would not have been necessary: *of course* the Amendment would not foreclose restrictions on concealed carrying, just as it would not foreclose restrictions on open carrying—or carrying altogether. And second, as previously noted, Cooley's more popular treatise referenced and contemplated a self-defense component to the right. Cooley, *A Treatise on the Constitutional Limitations*, *supra*, at 350 & n.1.

design," (in contrast with laws barring carry altogether) for the right is not absolute: "Freedom, not license, is secured." *Id.* at 152-53.

The observations of Oliver Wendell Holmes Jr. in his annotations to James Kent's canonical *Commentaries on American Law*, are in accord. "As the Constitution of the United States . . . declare[s] the right of the people to keep and bear arms," he wrote, "it has been a subject of grave discussion, in some of the state courts, whether a statute prohibiting persons, when not on a journey, or as travellers, from *wearing or carrying concealed weapons*, be constitutional. There has been a great difference of opinion on the question." 2 J. Kent, *Commentaries on American Law* *340 n.2 (Holmes ed., 12th ed. 1873), *cited in Heller*, 554 U.S. at 618. Reviewing a handful of cases "in favor of" concealed-carry restrictions and others wholly against it, Holmes tellingly ends with an analysis of *Nunn v. State*, in which a statutory prohibition on carrying was "adjudged to be valid so far as it goes to suppress the wearing of arms *secretly*, but unconstitutional so far as it prohibits the bearing or carrying arms *openly*." *Id.* For his own part, Holmes thought a state acting pursuant to its general police power may (and should) prohibit the "atrociously abused" practice of concealed carry. *Id.* Notably, though, he stops short of suggesting that bans on arms bearing altogether would be appropriate, though he was obviously aware that some courts had adopted a more aggressive regulatory posture toward the right.

The account of George Chase, yet another nineteenth-century editor of Blackstone, also reflects

the mainstream view of the right—and quite explicitly so. Though the right may not be infringed, he wrote, "it is generally held that statutes prohibiting the carrying of concealed weapons are not in conflict with these constitutional provisions, since they merely forbid the carrying of arms *in a particular manner*, which is likely to lead to breaches of the peace and provoke to the commission of crime, rather than contribute to public or personal defence." *The American Students' Blackstone: Commentaries on the Laws of England* 84 n.11 (George Chase ed., 3d ed. 1890) [hereinafter "Chase"], *cited in Heller*, 554 U.S. at 626.

Legal commentator John Ordronaux, also cited in *Heller*, understood the right clearly to include arms bearing outside the home. Predating the Constitution, "[t]he right to bear arms has always been the distinctive privilege of freemen," rooted in part in the "necessity of self-protection to the person." John Ordronaux, *Constitutional Legislation in the United States: Its Origin, and Application to the Relative Powers of Congress, and of State Legislatures* 241 (1891), *cited in Heller*, 554 U.S. at 619. He described the special province of the privilege in American history: "Exposed as our early colonists were to the attacks of savages, the possession of arms became an indispensable adjunct to the agricultural implements employed in the cultivation of the soil. Men went armed into the field, and went armed to church. There was always public danger." *Id.* at 242. Still, for all its robustness, the Amendment has never prevented "a State from enacting laws regulating the manner in which arms may be carried. Thus, the carrying of concealed weapons may be absolutely

prohibited without the infringement of any constitutional right, while a statute forbidding the bearing of arms openly would be such an infringement." *Id.* at 243 (adding that a state may require a private citizen to "obtain a license in order to be permitted to carry a concealed weapon"). Thus, Ordronaux squarely comes down on the side of *Nunn* and like authorities, affirming in no uncertain terms the right's viability outside the home.

That position also prevailed, to a greater or lesser extent, in some of the minor late-nineteenth-century commentaries. Henry Campbell Black, *Handbook of American Constitutional Law* 463 (1895) (noting that, though the arms-bearing privilege belongs to individuals and is a "natural right," restrictions on carrying concealed weapons are not unconstitutional); James Schouler, *Constitutional Studies: State and Federal* 226 (1897) ("To the time-honored right of free people to bear arms was now [in the mid-nineteenth-century] annexed, . . . the qualification that carrying concealed weapons was not to be included."); *see also*, *supra*, n.12 (late-nineteenth-century editors of Blackstone).

That is not to say that this period was without proponents of a dissenting view. Indeed, there were several. *See* Joel Prentiss Bishop, *Commentaries on the Law of Statutory Crimes* 497-98 (1873) (disagreeing that the right permits the carrying of weapons for personal self-defense); J.C. Bancroft Davis, "Appendix," *in* Samuel Freeman Miller, *Lectures on the Constitution of the United States* 645 (1893) [hereinafter "Davis"] (understanding the right to secure the characteristic activities of "military

bodies and associations"); George Boutwell, *The Constitution of the United States at the End of the First Century* 358 (1895) (same); 2 John Randolph Tucker, *The Constitution of the United States* 671-72 (Henry St. George Tucker ed., 1899) (same).[13] Yet, we must accord these commentaries little weight, and for the same reason we discounted the state cases finding no individual or self-defense-based right to keep and bear arms: *Heller* tells us that they are—and always have been—incorrect interpretations of the nature and scope of the right.

The weight of authority suggests that the right to bear arms, as understood in the post—Civil War legal commentary, included the right to carry weapons outside the home for self-defense, which, as

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[13] Some of these authorities took their cues from the Supreme Court's decision in *Presser v. Illinois*, 116 U.S. 252 (1886), which they understood as tying the right exclusively to militia service. *See, e.g.*, Davis, *supra*, at 645. Justice Stevens, dissenting in *Heller*, read it similarly. *Heller*, 554 U.S. at 673 (Stevens, J., dissenting). The majority called that view "simply wrong," concluding that "*Presser* said nothing about the Second Amendment's meaning or scope, beyond the fact that it does not prevent the prohibition of private paramilitary organizations." *Id.* at 621 (majority opinion).

One other nineteenth-century author cited in *Heller* registers disapproval of public arms bearing but offers no legal assessment of whether such bearing is within the scope of the right. *See* Benjamin Vaughan Abbott, *Judge and Jury: A Popular Explanation of Leading Topics in the Law of the Land* 333-34 (1880) ("Carrying them for defence, in the more settled parts of the land, savors of cowardice rather than of prudence; a well-behaved man has less to fear from violence than from the blunders of himself and friends in managing the pistol he might carry as a protection."), *cited in Heller*, 554 U.S. at 619.

shown, is consistent with the understanding of the right articulated in most eighteenth-century commentary, nineteenth-century court opinions, and by many post—Civil War political actors.

So concludes our analysis of text and history: the carrying of an operable handgun outside the home for the lawful purpose of self-defense, though subject to traditional restrictions, constitutes "bear[ing] Arms" within the meaning of the Second Amendment.

6

Our conclusion that the right to bear arms includes the right to carry an operable firearm outside the home for the lawful purpose of self-defense is perhaps unsurprising—other circuits faced with this question have expressly held, or at the very least have assumed, that this is so. *Moore*, 702 F.3d at 936 ("A right to bear arms thus implies a right to carry a loaded gun outside the home."); *see also*, *e.g.*, *Drake*, 724 F.3d at 431 (recognizing that the Second Amendment right "*may* have some application beyond the home"); *Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013) ("We . . . assume that the *Heller* right exists outside the home . . . ."); *Kachalsky*, 701 F.3d at 89 (assuming that the Second Amendment "must have *some* application in the very different context of the public possession of firearms").

Given this consensus, one might consider it odd that we have gone to such lengths to trace the historical scope of the Second Amendment right. But we have good reason to do so: we must fully understand the historical scope of the right before we can determine whether and to what extent the San

Diego County policy burdens the right or whether it goes even further and "amounts to a destruction of the right" altogether. *See Heller*, 554 U.S. at 629 (quoting *Reid*, 1 Ala. at 616-17). *Heller* instructs that text and history are our primary guides in that inquiry.

One of *Heller*'s most important lessons is that the Second Amendment "codif[ies] a pre-existing right" whose contours can be understood principally through an evaluation of contemporaneous accounts by courts, legislators, legal commentators, and the like. *Heller*, 554 U.S. at 603, 605; *see also McDonald*, 130 S. Ct. at 3056-57 (Scalia, J., concurring) ("The traditional restrictions [on the keeping and bearing of arms] go to show the scope of the right."). Tracing the scope of the right is a necessary first step in the constitutionality analysis-and sometimes it is the dispositive one. *See Heller*, 554 U.S. at 628-35. "[C]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them. . . ." *Id.* at 634-35. A law that "under the pretence of regulating, amounts to a destruction of the right" would not pass constitutional muster "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights." *Id.* at 628-29. Put simply, a law that destroys (rather than merely burdens) a right central to the Second Amendment must be struck down. *Id.*

We thus disagree with those courts—including the district court in this case—that have taken the view that it is not necessary (and, thus, necessary *not*) to decide whether carrying a gun in public for the lawful purpose of self-defense is a

constitutionally protected activity. *See, e.g.*, *Drake*, 724 F.3d at 431; *Woollard*, 712 F.3d at 876; *Kachalsky*, 701 F.3d at 89; *cf. Masciandaro*, 638 F.3d at 475. Understanding the scope of the right is not just necessary, it is key to our analysis. For if self-defense outside the home is part of the core right to "bear arms" and the California regulatory scheme prohibits the exercise of that right, no amount of interest-balancing under a heightened form of means-ends scrutiny can justify San Diego County's policy. *See Heller*, 554 U.S. at 634 ("The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon.").

B

Having concluded that carrying a gun outside the home for self-defense comes within the meaning of "bear[ing] Arms," we ask whether San Diego County's "good cause" permitting requirement "infringe[s]" the right.

1

a

To determine what constitutes an infringement, our sister circuits have grappled with varying sliding-scale and tiered-scrutiny approaches, agreeing as a general matter that "the level of scrutiny applied to gun control regulations depends on the regulation's burden on the Second Amendment right to keep and bear arms." *Nordyke v. King*, 681 F.3d 1041, 1045-46 (9th Cir. 2012) (en banc) (O'Scannlain, J., concurring) (collecting cases);

see Heller II, 670 F.3d at 1257 (requiring a "strong justification" for regulations imposing a "substantial burden upon the core right of self-defense"); *Ezell*, 651 F.3d at 706, 708 (applying more demanding scrutiny to "severe burden[s] on the core Second Amendment right"); *Masciandaro*, 638 F.3d at 469-70 (requiring "strong justification[s]" for "severe burden[s] on the core Second Amendment right" (quoting *Chester*, 628 F.3d at 682-83)); *Marzzarella*, 614 F.3d at 97 (calibrating the level of scrutiny to the "severity" of the burden imposed). Under this general approach, severe restrictions on the "core" right have been thought to trigger a kind of strict scrutiny, while less severe burdens have been reviewed under some lesser form of heightened scrutiny. *See, e.g.*, *United States v. Decastro*, 682 F.3d 160, 166 (2d Cir. 2012); *Heller II*, 670 F.3d at 1257; *Masciandaro*, 638 F.3d at 470; *Chester*, 628 F.3d at 682. Confronting challenges to curtailments of the right to carry, one court has applied "some form of heightened scrutiny . . . less than strict scrutiny." *Kachalsky*, 701 F.3d at 93-94. Another, eschewing a tiered approach, required the state to "justif[y]" the burden. *Moore*, 702 F.3d at 941 ("Our analysis is not based on degrees of scrutiny, but on Illinois's failure to justify the most restrictive gun law of any of the 50 states."). Still another has applied intermediate scrutiny. *See Woollard*, 712 F.3d at 876.

And there is, of course, an alternative approach for the most severe cases—the approach used in *Heller* itself. In *Heller*, applying heightened scrutiny was unnecessary. No matter what standard of review to which the Court might have held the D.C.

restrictions,[14] "banning from the home the most preferred firearm in the nation to keep and use for protection of one's home and family would fail constitutional muster." *Id.* at 628-29 (internal quotation marks and citation omitted). A law effecting a "*destruction* of the right" rather than merely *burdening* it is, after all, an infringement under any light. *Heller*, 554 U.S. at 629 (emphasis added) (quoting *Reid*, 1 Ala. at 616-17); *see also Heller II*, 670 F.3d at 1271 (Kavanaugh, J., dissenting) ("In my view, *Heller* and *McDonald* leave little doubt that courts are to assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny.").[15]

b

Our first task, therefore, is to assess the nature of the infringement that the San Diego County policy purportedly effects on the right to bear arms—namely, does it burden the right or, like in *Heller*, does it destroy the right altogether?

California's regulatory scheme addresses two types of arms-bearing: open and concealed carry. Under California law, open carry is prohibited in San

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[14] Excluding, of course, rational basis review. *See Heller*, 554 U.S. at 628 n.27.

[15] In *Chovan*, we applied intermediate scrutiny to a Second Amendment claim that involved "a substantial burden on" a right outside the core of the Second Amendment. 735 F.3d at 1138. Intermediate scrutiny is not appropriate, however, for cases involving the destruction of a right at the core of the Second Amendment.

Diego County[16] regardless of whether the weapon is loaded or unloaded. *See* Cal. Penal Code §§ 25850, 26350. Because California law has no permitting provision for open carry, *cf. id.* §§ 26150, 26155 (providing licensing only for concealed carry), it is illegal in virtually all circumstances.

California law also severely restricts concealed carry, although not to the same extent as open carry. As a general rule, concealed carry is not allowed regardless of whether the weapon is loaded. *See id.* § 25400. But there are certain exceptions. Concealed carry is acceptable with a proper permit. *Id.* §§ 26150, 26155. And even without a permit, it is sanctioned for particular groups, *see, e.g.*, *id.* § 25450 (peace officers); *id.* § 25455 (retired peace officers); *id.* § 25620 (military personnel); *id.* § 25650 (retired federal officers), in particular locations, *see, e.g.*, *id.* § 26035 (private property or place of business); *id.* § 26040 (where hunting is allowed), and at particular times, *see, e.g.*, *id.* § 26045 (when faced with "immediate, grave danger" in the "brief interval before and after the local law enforcement agency . . . has been notified of the danger and before the arrival of its assistance); *id.* § 26050 (making or attempting to make a lawful arrest).

Clearly, the California scheme does not prevent every person from bearing arms outside the home in every circumstance. But the fact that a small group of people have the ability to exercise their right to

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[16] San Diego, like most of the populous cities and counties in California, is incorporated. *See* California State Association of Counties, *available at* http://www.csac.counties.org/cities-within-each-county (last visited Feb. 4, 2014).

bear arms does not end our inquiry. Because the Second Amendment "confer[s] an individual right to keep and bear arms," we must assess whether the California scheme deprives any individual of his constitutional rights. *Heller*, 554 U.S. at 595. Thus, the question is not whether the California scheme (in light of San Diego County's policy) allows *some* people to bear arms outside the home in *some* places at *some* times; instead, the question is whether it allows the typical responsible, law-abiding citizen to bear arms in public for the lawful purpose of self-defense. The answer to the latter question is a resounding "no."[17]

In California, the only way that the typical responsible, law-abiding citizen can carry a weapon in public for the lawful purpose of self-defense is with a concealed-carry permit. And, in San Diego County, that option has been taken off the table. The San Diego County policy specifies that concern for "one's personal safety alone" does not satisfy the "good cause" requirement for issuance of a permit. Instead, an applicant must demonstrate that he suffers a unique risk of harm: he must show "a set of circumstances that distinguish [him] from the mainstream and cause[] him . . . to be placed in harm's way." Given this requirement, the "typical" responsible, law-abiding citizen in San Diego County

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[17] It is worth noting that California has one of the most restrictive gun regulatory regimes in the nation. Indeed, it is one of only eight states with a "may-issue" permitting regime, meaning that a general desire to carry in self-defense is not sufficient to justify obtaining a permit. *See Drake*, 724 F.3d at 442 (Hardiman, J., dissenting).

cannot bear arms in public for self-defense; a *typical* citizen fearing for his "personal safety"—by definition—cannot "*distinguish* [*himself*] *from the mainstream*."

Although California law provides other specified exceptions from the general prohibition against public carry, these do little to protect an individual's right to bear arms in public for the lawful purpose of self-defense. The exemptions for particular groups of law enforcement officers and military personnel do not protect the typical responsible, law-abiding citizen. Excluding private property and places of business does not protect the right to bear arms for *public* confrontation. And the exceptions for "making or attempting to make a lawful arrest" or for situations of "immediate, grave danger" (to the extent that they are not entirely illusory—for how would one obtain a gun for use in public when suddenly faced with such a circumstance?) do not cover the scope of the right, which includes the right to carry *in case of public confrontation*, not just after a confrontation has occurred. *Heller*, 554 U.S. at 584 (defining bear arms to mean carrying a weapon "for the purpose . . . of being *armed and ready* for offensive or defensive action *in a case of conflict* with another person." (emphasis added) (quoting *Muscarello*, 524 U.S. at 143 (Ginsburg, J., dissenting)). To reason by analogy, it is as though San Diego County banned all political speech, but exempted from this restriction particular people (like current or former political figures), particular places (like private property), and particular situations (like the week before an election). Although these exceptions might preserve small pockets of freedom,

they would do little to prevent destruction of the right to free speech as a whole. As the Court has said: "The Second Amendment is no different." *Heller*, 554 U.S. at 635. It too is, in effect, destroyed when exercise of the right is limited to a few people, in a few places, at a few times.

c

It is the rare law that "destroys" the right, requiring *Heller*-style per se invalidation, but the Court has made perfectly clear that a ban on handguns in the home is not the only act of its kind. We quote the relevant paragraph in full, telling case citations included:

> Few laws in the history of our Nation have come close to the severe restriction of the District's handgun ban. *And some of those few have been struck down.* In *Nunn v. State*, the Georgia Supreme Court struck down a prohibition on carrying pistols openly (even though it upheld a prohibition on carrying concealed weapons). See 1 Ga., at 251. In *Andrews v. State*, the Tennessee Supreme Court likewise held that a statute that forbade openly carrying a pistol "publicly or privately, without regard to time or place, or circumstances," 50 Tenn., at 187, violated the state constitutional provision (which the court equated with the Second Amendment). That was so even though the statute did not restrict the carrying of long guns. *Ibid.* See also *State v. Reid*, 1 Ala. 612, 616-617 (1840) ("A statute which, under the pretence of regulating, amounts to a destruction of the

> right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would be clearly unconstitutional").

Id. at 629. In other words, D.C.'s complete ban on handguns in the home amounted to a destruction of the right precisely because it matched in severity the kinds of complete carry prohibitions confronted (and struck down) in *Nunn* and *Andrews*. These, in turn, resemble the severe restrictions in effect in San Diego County, where the open or concealed carriage of a gun, loaded or not, is forbidden. *Heller* teaches that a near-total prohibition on keeping arms (*Heller*) is hardly better than a near-total prohibition on bearing them (this case), and vice versa. Both go too far.

2

The County presents one further argument in support of the constitutionality of its "good cause" policy, which it perceives as its ace in the hole: the *Heller* Court's description of concealed-carry restrictions as "presumptively lawful regulatory measures." *Id.* at 627 n.26. "The right [is] not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose," *Heller* says. *Id.* at 626. "For example, the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment and state analogues." *Id.* According to the County, this means that their concealed-carry policy (which stops just short of an all-out ban) must also be lawful. Ergo, this suit must fail.

But the County's argument has two flaws. First, it misapprehends Peruta's challenge. This is not a case where a plaintiff who is permitted to openly carry a loaded weapon attacks the validity of a state's concealed-carry rule because he would rather carry secretly. Rather, Peruta and his fellow plaintiffs argue that the San Diego County policy in light of the California licensing scheme *as a whole* violates the Second Amendment because it precludes a responsible, law-abiding citizen from carrying a weapon in public for the purpose of lawful self-defense in *any* manner. True, Peruta focuses his challenge on the licensing scheme for concealed carry, but for good reason: acquiring such a license is the only practical avenue by which he may come lawfully to carry a gun for self-defense in San Diego County. *See* Cal. Penal Code §§ 26150, 26155 (creating a licensing scheme for concealed carry only). As we have explained, open carry is prohibited in San Diego County, and elsewhere in California, without exception. *See id.* §§ 25850, 26350. It is against this backdrop of the California carry regime at large, Peruta argues, that the unconstitutionality of the County's restrictive interpretation of "good cause" becomes apparent. His is not an attack trained on a restriction against concealed carry as such, or viewed in isolation. Rather, he targets the constitutionality of the entire scheme and requests the least intrusive remedy: that the County of San Diego, in line with many of the other counties in the State of California, should be made to issue carry licenses to citizens whose only "good cause" is the *Heller*-approved desire for self-defense.

The second, somewhat-related mistake in the

County's argument is that it reads too much into *Heller*'s ostensible blessing of concealed-carry restrictions. A flat-out ban on concealed carry in a jurisdiction permitting open carry may or may not infringe the Second Amendment right—the passage from *Heller* clearly bears on that issue, which we need not decide. But whether a state restriction on *both* concealed *and* open carry overreaches is a different matter. To that question, *Heller* itself furnishes no explicit answer. But the three authorities it cites for its statement on concealed-carry laws do. *See Heller*, 554 U.S. at 626. We have analyzed all three already. The first, *State v. Chandler*, stands for the principle that laws prohibiting the carry of concealed weapons are valid only so long as they do not destroy the right to carry arms in public altogether. *See* 5 La. Ann. at 489-90 ("[The Act] interfered with no man's right to carry arms (to use its words) 'in full open view,' which places men upon an equality."); *see also Jumel*, 13 La. Ann. at 400 (citing *Chandler* for the principle that "prohibiting only *a particular mode* of bearing arms . . . found dangerous" does not infringe the right). The second, *Nunn v. State*, was even more explicit: "A law which merely inhibits the wearing of certain weapons in a *concealed manner* is *valid*. But so far as it cuts off the exercise of the right of the citizen altogether to *bear arms*, *or*, under the color of prescribing the *mode*, renders the right itself useless—it is in conflict with the Constitution, and *void*." 1 Ga. at 243. *Heller*'s third and final source, Chase's *American Students' Blackstone*, takes a similar stance, concluding that, though the Constitution forbids the infringement of the right to

bear arms, "statutes prohibiting the carrying of *concealed* weapons are not in conflict with [it or its state analogues], since they merely forbid the carrying of arms in a particular manner, which is likely to lead to breaches of the peace and provoke to the commission of crime, rather than contribute to public or personal defence." Chase, *supra*, at 84 n.11.

Of course, these three sources are not the only exponents of this view. As we have shown, dozens of other cases and authorities from the same period—many of which *Heller* cites as probative of the right's original meaning—contend likewise. *See, e.g.*, *Reid*, 1 Ala. at 616-17 (striking down a concealed carry law because "the Legislature[has] the right to enact laws in regard to the manner in which arms shall be borne," but noting that a statute that destroys the right altogether under the "pretence of regulating" the manner of carry "would be clearly unconstitutional"); *Bliss*, 12 Ky. (2 Litt.) at 91 (holding that a ban on concealed carry, which "restrain[ed] the full and complete exercise of [the] right," was unconstitutional and void). As Judge Hardiman aptly summarized "courts have long h[eld] that although a State may prohibit the open *or* concealed carry of firearms, it may not ban *both* because a complete prohibition on public carry violates the Second Amendment and analogous state constitutional provisions." *Drake*, 724 F.3d at 449 (Hardiman, J., dissenting).

To be clear, we are not holding that the Second Amendment requires the states to permit concealed carry. But the Second Amendment does require that the states permit *some form* of carry for self-defense

outside the home. Historically, the preferred form of carry has depended upon social convention: concealed carry was frowned upon because it was seen as "evil practice" that endangered "the safety of the people" and "public morals" by "exert[ing] an unhappy influence upon the moral feelings of the wearer[and] making him less regardful of the personal security of others." *Reid*, 1 Ala. at 616-17. States thus often passed laws banning concealed carry and state courts often allowed prohibitions on concealed carry *so long as* open carry was still permitted. *Id.; see also Nunn*, 1 Ga. at 251 ("[S]o far as the act of 1837 seeks to suppress the practice of carrying certain weapons *secretly*, th[en] it is valid. . . . But [to the extent it] contains a prohibition against bearing arms *openly*, is in conflict with the Constitution, and *void*.").

California, through its legislative scheme, has taken a different course than most nineteenth-century state legislatures, expressing a preference for concealed rather than open carry.[18] *See* Cal. Penal Code § 26350 (prohibiting open carry of an unloaded firearm); *see also id.* §§ 26150, 26155 (establishing a licensing procedure only for concealed carry). And it has the power to do so: as the historical sources have repeatedly noted, the state has a right to prescribe a particular manner of carry, provided that it does not "cut[] off the exercise of the right of the citizen altogether to bear arms, or, under the color of

[18] This is likely the result of a changing social convention in favor of concealed rather than open carry. *See* Volokh, *Implementing the Right*, *supra*, at 1521 ("In many places, carrying openly is likely to frighten many people, and to lead to social ostracism as well as confrontations with the police.").

prescribing the mode, render[] the right itself useless." *Nunn*, 1 Ga. at 243 (emphasis omitted). California's favoring concealed carry over open carry does not offend the Constitution, so long as it allows one of the two.

To put it simply, concealed carry *per se* does not fall outside the scope of the right to bear arms; but insistence upon a particular mode of carry does. As we have explained previously, this is not the latter type of case. Peruta seeks a concealed carry permit because that is the only type of permit available in the state. As the California legislature has limited its permitting scheme to concealed carry—and has thus expressed a preference for that manner of arms-bearing—a narrow challenge to the San Diego County regulations on concealed carry, rather than a broad challenge to the state-wide ban on open carry, is permissible.[19]

For these reasons, *Heller*'s favorable mention of concealed-carry restrictions is not the silver bullet the County had hoped it was, at least not in this case.

3

Our opinion is not the first to address the question of whether the Second Amendment protects a responsible, law-abiding citizen's right to bear arms outside the home for the lawful purpose of self-defense. Indeed, we are the fifth circuit court to opine expressly on the issue, joining an existent circuit split. *Compare Moore*, 702 F.3d at 936-42 (holding

[19] The dissent curiously misinterprets our opinion as ruling on the constitutionality of California statutes. We decline to respond to its straw-man arguments.

that "[a] right to bear arms . . . implies a right to carry a loaded gun outside the home" and striking down the open-and-concealed-carry regulatory regime in Illinois because the state failed to justify "so substantial a curtailment of the right of armed self-defense"), *with Drake*, 724 F.3d at 431-35 (recognizing that the right to bear arms may have some application outside the home, but concluding that New Jersey's "justifiable need" permitting requirement was a presumptively lawful longstanding regulation or, alternatively, that the New Jersey regulatory scheme survived intermediate scrutiny); *Woollard*, 712 F.3d at 876, 879-82 (presuming that Second Amendment protections exist outside the home and upholding Maryland's regulatory scheme because it could not "substitute [a different] view[] for the considered judgment of the General Assembly," which "appropriate[ly] balance[d]" the interests involved), *and Kachalsky*, 701 F.3d at 89, 97-99 (proceeding on the "assumption" that the right to bear arms extends outside the home, but affording "substantial deference to the predictive judgments of [the legislature]" and thus upholding the gun regulations under intermediate scrutiny). Our reading of the Second Amendment is akin to the Seventh Circuit's interpretation in *Moore*, 702 F.3d at 936-42,[20] and at odds with the approach of the Second, Third, and Fourth Circuits in *Drake*, 724 F.3d at 431-35,

[20] The Supreme Court of Illinois has also found *Moore* persuasive. *See People v. Aguilar*, 2013 IL 112116, at *5-6 (Sept. 12, 2013) (ruling "that the second amendment protects the right to possess and use a firearm for self-defense outside the home").

Woollard, 712 F.3d at 876, and *Kachalsky*, 701 F.3d at 89, 97-99.

a

We are unpersuaded by the decisions of the Second, Third, and Fourth Circuits for several reasons. First, contrary to the approach in *Heller*, all three courts declined to undertake a complete historical analysis of the scope and nature of the Second Amendment right outside the home. *Compare Heller*, 554 U.S. at 605 (examining the post-ratification interpretations of the Second Amendment because "the public understanding of a legal text in the period after its enactment or ratification" is "a critical tool of constitutional interpretation" (emphasis omitted)), *with Drake*, 724 F.3d at 431 (noting that the court was "not inclined to address [text, history, tradition and precedent] by engaging in a round of full-blown historical analysis" and relying on the Second Circuit's conclusion that "[h]istory and tradition do not speak with one voice" (quoting *Kachalsky*, 701 F.3d at 91)); *Woollard*, 712 F.3d at 874-76 (declining to "impart a definitive ruling" regarding the scope of the Second Amendment right), *and Kachalsky*, 701 F.3d at 91 (refusing to look at "highly ambiguous history and tradition to determine the meaning of the Amendment"). As a result, they misapprehend both the nature of the Second Amendment right and the implications of state laws that prevent the vast majority of responsible, law-abiding citizens from carrying in public for lawful self-defense purposes.

For example, in *Kachalsky*, the Second Circuit's perfunctory glance at the plaintiffs' historical

argument misunderstood the historical consensus regarding the right to bear arms outside the home. Relying on three cases, the court concluded that "history and tradition [did] not speak with one voice" regarding the ability to restrict public carry because at least three states "read restrictions on the public carrying of weapons as entirely consistent with constitutional protections." *Kachalsky*, 701 F.3d at 90-91 (citing *Fife v. State*, 31 Ark. 455 (1876), *English*, 35 Tex. at 473, and *Andrews v. State*, 50 Tenn. 165 (1871)). But in its brief historical analysis, the court missed a critical factor: the cases it cites in favor of broad public carry restrictions adhere to a view of the Second Amendment that is and always has been incorrect. *Cf. Moore*, 702 F.3d at 941 (referencing "disagreement . . . with some of the historical analysis in [*Kachalsky* because] we regard the historical issues as settled in *Heller* "). All three cases interpret the Second Amendment as a militia-based (rather than a self-defense-centered) right; they uphold regulations on carrying pistols in public because pistols are not the type of weapons that would be used by militia men. *See Fife*, 31 Ark. at 461 (upholding a prohibition against carrying pistols in public because such weapons are "used in private quarrels and brawls" and are not "effective as a weapon of war, and useful and necessary for 'the common defense'"); *English*, 35 Tex. at 475 ("[W]e shall be led to the conclusion that the [Second Amendment] protects only the right to 'keep' such 'arms' as are used for purposes of war, in distinction from those which are employed in quarrels and broils, and fights between maddened individuals . . . ."); *Andrews*, 50 Tenn. at 186-87

(affirming the constitutionality of a law regulating public carry of certain weapons which were not the "usual equipment of the soldier" but remanding for consideration of whether a revolver was the "character of weapon" used in warfare).

Because the Second Amendment has always been an individual right to defend oneself, cases that—like these—uphold gun regulations because they do not offend the militia-based nature of the right are inapposite and should not factor into a historical analysis of the right's scope. *See, e.g.*, *Heller*, 554 U.S. at 605. And with these cases off the table, the remaining cases speak with one voice: states may not destroy the right to bear arms in public under the guise of regulating it. *See, e.g.*, *Kachalsky*, 701 F.3d at 90 (recognizing that some state courts "offered interpretations of the Second Amendment" consistent with the plaintiffs' position that "though a state may regulate open or concealed carrying of handguns, it cannot ban *both*"); *see also Drake*, 724 F.3d at 449 (Hardiman, J., dissenting) (noting that the "crux of the[] historical precedents[] endorsed by the Supreme Court, is that a prohibition against both open and concealed carry without a permit is different in kind, not merely in degree, from a prohibition covering only one type of carry"). In light of *Heller*, the Second Circuit erred in outright rejecting history and tradition as unhelpful and ambiguous, and the Third and Fourth Circuits erred in following suit.[21] *See Kachalsky*, 701 F.3d at 91; *see*

[21] Indeed, the Third Circuit went even further than that. It not only rejected history and tradition, but specifically relied on more recent mid-twentieth century developments to justify New

also Drake, 724 F.3d at 431; *Woollard*, 712 F.3d at 875-76.

By evading an in-depth analysis of history and tradition, the Second, Third, and Fourth Circuits missed a crucial piece of the Second Amendment analysis. They failed to comprehend that carrying weapons in public for the lawful purpose of self defense is a central component of the right to bear arms. *See Moore*, 702 F.3d at 941 (criticizing the

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Jersey's permitting scheme. *See Drake*, 724 F.3d at 432-34; *see also id.* at 447-52 (Hardiman, J., dissenting) (criticizing the majority's reliance on mid-twentieth-century New Jersey law to justify narrowing the scope of the Second Amendment right). The Third Circuit majority concluded that even if the Second Amendment right extended outside the home, permitting restrictions that required individuals to show a "justifiable need to carry a handgun" in the form of "specific threats or previous attacks which demonstrate a special danger to the applicant's life" were analogous to the type of "longstanding" regulations that the Supreme Court had identified as "presumptively lawful" in *Heller*. *Id.* at 428-29 (majority opinion). To reach this conclusion, the Third Circuit relied upon New Jersey law, which had incorporated some version of the "justifiable need" requirement into its permitting scheme since 1924. *Id.* at 432. We reject this analysis because it goes against the analysis of the Second Amendment's scope employed in *Heller* and *McDonald*: those cases made clear that the scope of the Second Amendment right depends not on post-twentieth century developments, but instead on the understanding of the right that predominated from the time of ratification through the nineteenth century. *See, e.g.*, *Heller*, 554 U.S. at 605; *see also Drake*, 724 F.3d at 452 (Hardiman, J., dissenting) ("[R]egardless of whether New Jersey's justifiable need requirement dates to 1924 or 1966 for purposes of the inquiry, there is not a sufficiently longstanding tradition of regulations that condition the issuance of permits on a showing of special need for self-defense to uphold New Jersey's law on that basis.").

court in *Kachalsky* for "suggest[ing] that the Second Amendment should have a much greater scope inside the home than outside" and noting that the "interest in self-protection [and thus in the Second Amendment right] is as great outside as inside the home"). And further, they failed to comprehend that regulations on the right, although permissible to an extent, could not go so far as to enjoin completely a responsible, law-abiding citizen's right to carry in public for self-defense. Such regulations affecting a destruction of the right to *bear arms*, just like regulations that affect a destruction of the right to *keep arms*, cannot be sustained under any standard of scrutiny. *See Heller*, 554 U.S. at 629.

Because the Second, Third, and Fourth Circuits eschewed history and tradition in their analysis of the constitutionality of these regulations, despite the Supreme Court's admonition that "the public understanding of a legal text in the period after its enactment or ratification" is a "critical tool of constitutional interpretation," we find their approaches unpersuasive. *See Heller*, 554 U.S. at 605. Our independent analysis of history and tradition leads us to take a different course.

b

Because our analysis paralleled the analysis in *Heller* itself, we did not apply a particular standard of heightened scrutiny. *See also Moore*, 702 F.3d at 941 (declining to subject the "most restrictive gun law of any of the 50 states" to an "analysis . . . based on degrees of scrutiny"). Thus, the Second, Third, and Fourth Circuits' extensive discussions regarding the application of intermediate scrutiny to similar

regulations in other states is not particularly instructive to our view of the issues in this case.

Nonetheless, to the extent those opinions suggest that the type of regulation at issue here can withstand some form of heightened scrutiny, it is worth noting our disagreement with their reasoning.

When analyzing whether a "substantial relationship" existed between the challenged gun regulations and the goal of "public safety and crime prevention" the Second Circuit concluded that it owed "substantial deference to the predictive judgments of [the legislature]" regarding the degree of fit between the regulations and the public interest they aimed to serve. *Kachalsky*, 701 F.3d at 97. Relying on New York's historical regulation of handguns from 1911 to the present, the court deferred to the state legislature's "belief" that regulation of handgun possession would have "an appreciable impact on public safety and crime prevention." *Id.* at 97-98. It thus upheld New York's regulatory scheme, emphasizing that there was "general reticence to invalidate the acts of [our] elected leaders." *Id.* at 100 (citing *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2579 (2012)). Taking a similar approach, the Third Circuit deferred to the legislature's judgment that the permitting regulations would serve its interest in ensuring public safety even though "New Jersey [could not] present[] [the court] with much evidence to show how or why its legislators arrived at this predictive judgment." *Drake*, 724 F.3d at 437; *see also id.* at 454 (Hardiman, J., dissenting) (clarifying that in actuality "New Jersey . . . provided *no evidence at all*

to support its proffered justification . . ."). And the Fourth Circuit, in a familiar vein, relied on the legislature's judgment that "reduc[ing] the number of handguns carried in public" would increase public safety and prevent crime, despite conflicting evidence on the issue. *Woollard*, 712 F.3d at 879-82.

This is not an appropriate application of intermediate scrutiny in at least two respects. First, the analysis in the Second, Third, and Fourth Circuit decisions is near-identical to the freestanding "interest-balancing inquiry" that Justice Breyer proposed—and that the majority explicitly rejected—in *Heller*. *See Heller*, 554 U.S. at 689-90 (Breyer, J., dissenting) (proposing that in Second Amendment cases the court should "ask[] whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests"); *see also id.* at 634-35 (majority opinion) (rejecting a "judge-empowering 'interest-balancing inquiry'" as a test for the constitutionality of Second Amendment regulations because "no other enumerated constitutional right [had its] core protection . . . subjected to [such] a freestanding" inquiry). All three courts referenced, and ultimately relied upon, the state legislatures' determinations weighing the government's interest in public safety against an individual's interest in his Second Amendment right to bear arms. *See Kachalsky*, 701 F.3d at 100 (deferring to the state legislature's determination "that limiting handgun possession to persons who have an articuable basis for believing they will need the weapon for self-defense is in the best interest of public safety and *outweighs* the need

to have a handgun for an unexpected confrontation" (emphasis added)); *see also Drake*, 724 F.3d at 439 (noting that "New Jersey has decided that this somewhat heightened risk to the public may be *outweighed* by the potential safety benefit to an individual with a justifiable need to carry a handgun" (emphasis added) (internal quotation marks omitted)); *Woollard*, 712 F.3d at 880 (relying on the state's determination that "the good-and-substantial-reason requirement '*strikes a proper balance* between ensuring access to handgun permits for those who need them while preventing a greater-than-necessary proliferation of handguns in public places that . . . increases risks to public safety.'" (emphasis added)). As we previously explained, such an approach ignores the *Heller* court's admonition that "the very enumeration of the right takes out of the hands of government . . . the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." *Heller*, 554 U.S. at 634; *see also Drake*, 724 F.3d at 457 (Hardiman, J., dissenting) (recognizing that the *Heller* court "rejected this sort of balancing inquiry as inconsistent with the very idea of constitutional rights").

Our second disagreement with our sister circuits' application of intermediate scrutiny relates to the high degree of deference they afforded the state legislatures' assessments of the fit between the challenged regulations and the asserted government interest they served. Although all three cite *Turner Broadcasting System, Inc. v. FCC (Turner II)*, 520 U.S. 180 (1997), for the proposition that courts must afford deference to legislative findings, they apply this premise in the wrong context. *See Drake*, 724

F.3d at 436-37; *Woollard*, 712 F.3d at 881; *Kachalsky*, 701 F.3d at 97. In Part II.A. of Turner, the Court applied deference to the legislature's judgment regarding the first portion of the intermediate scrutiny analysis: whether there was a "real harm" amounting to an important government interest and "whether [the statutory provisions at issue] will alleviate it in a material way." *Turner*, 520 U.S. at 195. But in Part II.B, when assessing "the fit between the asserted interests and the means chosen to advance them," the Court applied no such deference. *Id.* at 213. Instead, it required the government to prove that the statute did not burden the right "'substantially more . . . than is necessary to further' [the government's legitimate] interests." *Id.* at 214 (quoting *Turner Broadcasting System*, *Inc. v. FCC (Turner I)*, 512 U.S. 622, 662 (1994)).

In *Drake*, *Woollard*, and *Kachalsky*, the government failed to show that the gun regulations did not burden "substantially more" of the Second Amendment right than was necessary to advance its aim of public safety. Indeed, as the district court noted in *Woollard*, the government could not show that the challenged regulation served its needs any better than a random rationing system, wherein gun permits were limited to every tenth applicant. *See also Drake*, 724 F.3d at 455 (Hardiman, J., dissenting) ("[I]t is obvious that the justifiable need requirement [in New Jersey] functions as a rationing system designed to limit the number of handguns carried in [the state]."). As that court so aptly put it:

> The Maryland statute's failure lies in the overly broad means by which it seeks to

advance this undoubtedly legitimate end. The requirement that a permit applicant demonstrate "good and substantial reason" to carry a handgun does not, for example, advance the interests of public safety by ensuring that guns are kept out of the hands of those adjudged most likely to misuse them, such as criminals or the mentally ill. It does not ban handguns from places where the possibility of mayhem is most acute, such as schools, churches, government buildings, protest gatherings, or establishments that serve alcohol. It does not attempt to reduce accidents, as would a requirement that all permit applicants complete a safety course. It does not even, as some other States' laws do, limit the carrying of handguns to persons deemed "suitable" by denying a permit to anyone "whose conduct indicates that he or she is potentially a danger to the public if entrusted with a handgun."

Rather, the regulation at issue is a rationing system. It aims, as Defendants concede, simply to reduce the total number of firearms carried outside of the home by limiting the privilege to those who can demonstrate "good reason" beyond a general desire for self-defense.

. . . .

The challenged regulation does no more to combat [the state's public safety concerns] than would a law indiscriminately limiting

> the issuance of a permit to every tenth applicant. The solution, then, is not tailored to the problem it is intended to solve. Maryland's "good and substantial reason" requirement will not prevent those who meet it from having their guns taken from them, or from accidentally shooting themselves or others, or from suddenly turning to a life of crime. . . . If anything, the Maryland regulation puts firearms in the hands of those most likely to use them in a violent situation by limiting the issuance of permits to "groups of individuals who are at greater risk than others of being the victims of crime."

Woollard v. Sheridan, 863 F. Supp. 2d 462, 474-75 (D. Md. 2012) (internal citations and quotation marks omitted), *rev'd sub nom. Woollard*, 712 F.3d at 865; *see also City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417-18 (1993) (holding that the "city did not establish the reasonable fit" between a regulation prohibiting the distribution of commercial handbills and a government interest in safety and esthetics and rejecting the city's argument that it could show "a close fit between its ban on newsracks dispensing 'commercial handbills' and its interest in safety and esthetics because every decrease in the number of such dispensing devices necessarily effect[ed] an increase in safety and an improvement in the attractiveness of the cityscape.").

In light of the states' failure to demonstrate sufficient narrow tailoring in *Drake*, *Woollard*, and *Kachalsky*, the gun regulations at issue in those

cases should have been struck down even under intermediate scrutiny.

III

We conclude by emphasizing, as nearly every authority on the Second Amendment has recognized, *regulation* of the right to bear arms is not only legitimate but quite appropriate. We repeat *Heller*'s admonition that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession"—or carriage—"of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Heller*, 554 U.S. at 626-27. Nor should anything in this opinion be taken to cast doubt on the validity of measures designed to make the carrying of firearms for self-defense as safe as possible, both to the carrier and the community.

We are well aware that, in the judgment of many governments, the safest sort of firearm-carrying regime is one which restricts the privilege to law enforcement with only narrow exceptions. Nonetheless, "the enshrinement of constitutional rights necessarily takes certain policy choices off the table. . . . Undoubtedly some think that the Second Amendment is outmoded in a society where our standing army is the pride of our Nation, where well-trained police forces provide personal security, and where gun violence is a serious problem. That is perhaps debatable, but what is not debatable is that it is not the role of this Court [or ours] to pronounce the Second Amendment extinct." *Id.* at 636. Nor may

we relegate the bearing of arms to a "second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees that we have held to be incorporated into the Due Process Clause." *McDonald*, 130 S. Ct. at 3044.

The district court erred in denying the applicant's motion for summary judgment on the Second Amendment claim because San Diego County's "good cause" permitting requirement impermissibly infringes on the Second Amendment right to bear arms in lawful self-defense.[22]

REVERSED and REMANDED.

[22] Because we reverse on the basis of the Second Amendment issue, we do not reach any of Peruta's other claims.

THOMAS, Circuit Judge, dissenting:

In its landmark decision in *Heller*, the Supreme Court held that a complete ban on handgun possession in the home violated the Second Amendment. *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008). In doing so, it reminded us that: "the right secured by the Second Amendment is not unlimited" and that it "was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id.* at 626. Significantly for our case, the Court then specifically discussed restrictions on carrying concealed weapons, explaining that "the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues." *Id.* The Court then emphasized that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions," which it labeled as "presumptively lawful." *Id.* at 626-27 & n.26. *Heller*'s pronouncement is consistent with the Supreme Court's prior observation that "the right of the people to keep and bear arms . . . is not infringed by laws prohibiting the carrying of concealed weapons." *Robertson v. Baldwin*, 165 U.S. 275, 281-82.

This case involves California's "presumptively lawful" and longstanding restrictions on carrying concealed weapons in public and, more specifically, an even narrower question: the constitutionality of San Diego County's policy of allowing persons who show good cause to carry concealed firearms in public. When we examine the justification provided for the policy, coupled with *Heller*'s direction, our

conclusion must be that the County's policy is constitutional.

Unfortunately, the majority never answers the question posed. Instead, in a sweeping decision that unnecessarily decides questions not presented, the majority not only strikes down San Diego County's concealed carry policy, but upends the entire California firearm regulatory scheme. The majority opinion conflicts with *Heller*, the reasoned decisions of other Circuits, and our own case law.

Therefore, I must respectfully dissent.

I

We are not asked in this case to determine the reach of the Second Amendment outside the home or to evaluate the entirety of California's handgun regulatory scheme. Rather, the narrow questions presented in this case are: (1) Does the scope of the Second Amendment extend to protect the concealed carrying of handguns in public, and (2) if so, does San Diego County's policy of allowing public concealed weapon carry upon a showing of good cause unconstitutionally infringe on that right?

Second Amendment jurisprudence has rapidly evolved in the last several years, commencing with the Supreme Court's groundbreaking decisions in *Heller* and *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010). Although these cases are of recent origin, *Heller* and *McDonald*, along with decisions of our sister circuits, have provided an analytical framework for examining Second Amendment challenges, which we recently distilled in *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013).

The Supreme Court has not as yet defined the extent to which the Second Amendment applies outside the home, and that issue has been the subject of intense debate in the intermediate appellate courts.[1] As Judge Wilkinson has observed, the question of the extent of the Second Amendment's reach beyond the home post-*Heller* is "a vast *terra incognita* that courts should enter only upon necessity and only then by small degree." *United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011) (Wilkinson, J., concurring).

In this changing landscape, with many questions unanswered, our role as a lower court is "narrow and constrained by precedent," and our task "is simply to apply the test announced by *Heller* to the challenged provisions." *Heller v. District of Columbia*, 670 F.3d 1244, 1285 (D.C. Cir. 2011) ("*Heller II*").

In this case, we are not presented with a broad challenge to restrictions on carrying firearms outside the home. Instead, we are asked a much more circumscribed question concerning regulation of public carry of concealed firearms. As the Supreme Court emphasized in *Heller*, that issue has a much different and unique history than the Second Amendment challenge at issue in *Heller*, and the history of concealed carry restrictions differs from the history of open carry regulations. Those differences are crucial to resolution of the issues in this case.

Simply put, concealed carry presents an entirely different Second Amendment issue from possessing

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[1] *Compare Moore v. Madigan*, 702 F.3d 933, 935-36 (7th Cir. 2012) *with Moore*, 702 F.3d at 944-49 (Williams, J., dissenting).

handguns in the home for self-defense. As the Supreme Court recognized in *Heller*, courts and state legislatures have long recognized the danger to public safety of allowing unregulated, concealed weapons to be carried in public. Indeed that danger formed part of the rationale for allowing police "stop and frisks" in *Terry v. Ohio*, 392 U.S. 1 (1968). As Justice Harlan observed in that case, "[c]oncealed weapons create an immediate and severe danger to the public." *Id.* at 31-32.

Under *Heller* and *Chovan*, we employ a two-part inquiry when reviewing Second Amendment challenges to firearm regulations. "The first question is whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee." *Chovan*, 735 F.3d at 1134 (citing *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010) (internal quotation marks and citation omitted)).

"This historical inquiry seeks to determine whether the conduct at issue was understood to be within the scope of the right at the time of ratification." *Chester*, 628 F.3d at 680. "If it was not, then the challenged law is valid." *Id.* "If the challenged regulation burdens conduct that was within the scope of the Second Amendment as historically understood, then we move to the second step of applying an appropriate form of means-end scrutiny." *Id.*

II

The first question is whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee. *Chovan*, 735

F.3d at 1134. The Supreme Court has instructed that the core of the Second Amendment is "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Heller*, 554 U.S. at 635.[2] Carrying concealed weapons in public by

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[2] In post-*Heller* jurisprudence, nearly every other circuit that has addressed this question has similarly identified the Second Amendment's core guarantee as the right of responsible, law-abiding adults to possess usable firearms in their homes. *See Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 93 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 1806 (2013) ("*Heller* explains that the 'core' protection of the Second Amendment is the right of law-abiding, responsible citizens to use arms in defense of hearth and home.") (some internal quotation marks and citation omitted); *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 195 (5th Cir. 2012) (describing "a right at the core of the Second Amendment" as "the right of a law-abiding, responsible adult to possess and use a handgun to defend his or her home and family"); *United States v. Greeno*, 679 F.3d 510, 517 (6th Cir. 2012) ("The core right recognized in *Heller* is the right of law-abiding, responsible citizens to use arms in defense of hearth and home.") (internal quotation marks and citation omitted); *Heller II*, 670 F.3d at 1255 (explaining that the "core lawful purpose protected by the Second Amendment" is that of "a person lawfully to acquire and keep a firearm, including a handgun, for the purpose of self-defense in the home") (internal quotation marks and citation omitted); *United States v. Barton*, 633 F.3d 168, 170 (3d Cir. 2011) ("At the core of the Second Amendment is the right of law-abiding, responsible citizens to use arms in defense of hearth and home.") (internal quotation marks and citation omitted); *United States v. Chester*, 628 F.3d 673, 676 (4th Cir. 2010) (explaining that *Heller* "clearly staked out the core of the Second Amendment" as "the right of law-abiding, responsible citizens to use arms in defense of hearth and home") (internal quotation marks and citation omitted); *see also Peterson v. Martinez*, 707 F.3d 1197, 1218 (10th Cir. 2013) (Lucero, J., concurring separately); *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1259 (11th Cir. 2012) (noting that the

definition does not inherently involve defense of hearth and home, so the core of the Second Amendment is not implicated. Thus, we must begin by examining the conduct at issue in this case using the analysis prescribed by *Heller* and *Chovan*.

A

The majority's first—and crucial—mistake is to misidentify the "conduct at issue." *Chester*, 628 F.3d at 680. The majority frames the question as "whether a responsible, law-abiding citizen has a right under the Second Amendment to carry a firearm in public for self-defense." This is certainly an important issue, but it is not the question we are called upon to answer. The Plaintiffs are not seeking a general license to carry firearms in public for self-defense—they are seeking a license to carry *concealed* firearms in public.

Properly identifying the "conduct at issue" is the lynchpin of the two-step inquiry because the first question we ask, as with all constitutional challenges based on enumerated rights, is "whether the challenged law imposes a burden *on conduct* falling within the scope of the Second Amendment's guarantee." *Id.* (emphasis added). The Bill of Rights guarantees that individuals may engage in specified protected conduct. Challenges based on the Bill of Rights seek to vindicate its guarantees by striking down laws that interfere with protected conduct. In the context of firearm regulations, "[t]he specific

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Heller Court "went to great lengths to emphasize the special place that the home—an individual's private property—occupies in our society.").

constitutional challenge thus delineates the proper form of relief and clarifies the particular Second Amendment restriction that is before us." *Peterson*, 707 F.3d at 1209.

Thus, the proper analytic approach is to answer the historical inquiry as to whether carrying a concealed weapon in public was understood to be within the scope of the right protected by the Second Amendment at the time of ratification. This examination must be approached with caution, bearing in mind Justice Stevens' admonition that "[i]t is not the role of federal judges to be amateur historians." *McDonald*, 130 S. Ct. at 3119 (Stevens, J., dissenting). Care is also required to avoid the danger inherent in any exercise of historiography: that we assemble history to fit a pre-conceived theory. As judges undertaking this examination, we must also set aside any personal views we may have on the important, but contentious, policy question of firearm regulation.

B

Heller instructed us to look to the Second Amendment's historical background to understand its scope. 554 U.S. at 592; *see also Chester*, 628 F.3d at 680. In its own consideration of the Second Amendment's history, *Heller* identified a catalogue of historical materials bearing on the provision's meaning. In examining those same sources—from the history of the right in England to the interpretations of nineteenth-century American courts and commentators—we must conclude that carrying concealed weapons has routinely been restricted, and has often been outright banned. As the majority

fairly acknowledges at several points in its extensive historical survey, nearly every source cited in *Heller* concluded that carrying concealed weapons is not part of the right to bear arms and that restrictions on carrying concealed weapons therefore do not offend the Second Amendment.

Because of the importance attached to the historical sources by the Supreme Court in *Heller*, it is necessary to examine them in some detail.

1

History of the Right to Bear Arms in England. Because the Second Amendment "codified a right inherited from our English ancestors," the Supreme Court looked to the history of the right in England to divine whether the Second Amendment protected an individual or a collective right. *Heller*, 554 U.S. at 592-95, 599 (internal quotation marks and citation omitted). A look at the same history suggests that the "right inherited from our English ancestors" did not include a right to carry concealed weapons in public. *See id.* at 592-95.

Restrictions on the carrying of open and concealed weapons in public have a long pedigree in England. The fourteenth-century Statute of Northampton provided that "no man" shall "go nor ride armed by night nor by day, in fairs, markets, nor in the presence of the justices or other ministers, nor in no part elsewhere, upon pain to forfeit their armour to the King, and their bodies to prison at the King's pleasure." 2 Edw. 3, c. 3 (1328). In *Sir John Knight's Case*, an English court explained that the statute had two purposes. 87 Eng. Rep. 75 (K.B. 1686). One "was to punish people who go armed to

terrify the King's subjects." *Id.* The other was to codify the common law, which prohibited the described conduct because it promoted the sense that "the King [was] not able or willing to protect his subjects." *Id.* Ultimately, the court acquitted Sir John Knight under the statute's exception for the king's ministers and servants and anyone otherwise authorized "to keep the peace." 2 Edw. 3, c. 3 (1328).

Following the enactment of the Statute of Northampton, English monarchs repeatedly called on their officials to enforce it. *See* Patrick Charles, *The Faces of the Second Amendment Outside the Home: History Versus Ahistorical Standards of Review*, 60 Clev. St. L. Rev. 1, 13-30 (2012). For example, in 1579, Queen Elizabeth I called for the enforcement of the Statute of Northampton and other laws prohibiting the carrying of "Dagges, Pistolles, and such like, not on[]ly in Cities and Townes, [but] in all partes of the Realme in common high[ways], whereby her Majesties good qu[i]et people, desirous to live in peaceable manner, are in feare and danger of their lives." *Id.* at 21 (internal quotation marks and citation omitted). In 1594, the Queen again called for the enforcement of gun control laws because her subjects were being terrorized by the carrying of arms, including concealed "pocket Dags," in public. *Id.* at 22 (internal quotation marks and citation omitted).

More than three centuries after the enactment of the Statute of Northampton, William and Mary declared "[t]hat the subjects which are Protestants may have arms for their defence suitable to their Conditions, and as allowed by Law." 1 W. & M., 2d

sess., c. 2, § 7 (1689). This provision of the English Bill of Rights "has long been understood to be the predecessor to our Second Amendment." *Heller*, 554 U.S. at 593. But despite England's adoption of this right, the Statute of Northampton remained in full force and was still understood to sharply limit the freedom to carry arms in public. In his guide for British constables, Robert Gardiner interpreted the statute to mean that

> if any Person shall Ride or go Arm'd offensively . . . in Fairs or Markets or elsewhere, by Day or by Night, in affray of Her Majesties Subjects, and Breach of the Peace; *or wear or carry any Daggers*, *Guns or Pistols Charged;* the Constable upon sight thereof, may seize and take away their Armour and Weapons, and have them apprized as forfeited to Her Majesty.

Robert Gardiner, *The Compleat Constable*, 18-19 (1708) (emphasis added). Notably, Gardiner distinguished between going armed offensively in breach of the peace, on the one hand, and merely wearing or carrying arms, on the other. *Id.* This distinction suggests that he considered carrying weapons in public a violation of the statute, regardless of whether doing so actually breached the peace. Charles, *supra*, at 25-28. Blackstone confirmed this understanding:

> The offense of riding or going armed with dangerous or unusual weapons, is a crime against the public peace, by terrifying the good people of the land; and is particularly prohibited by the Statute of Northampton,

> upon pain of forfeiture of the arms, and imprisonment during the king's pleasure: in like manner as, by the laws of Solon, every Athenian was finable who walked about the city in armour.

4 William Blackstone, *Commentaries on the Laws of England* 148-49 (1st ed. 1769) (citations omitted). According to Blackstone, the Statute of Northampton proscribed the public carrying of "dangerous or unusual" weapons *because* doing so terrified the people. *Id.* Thus, in England, as in ancient Athens, it was an offense simply to go armed—or, at least, armed in a dangerous manner—in public areas. *Id.*

Certainly, this history does not provide a ready or easy answer to this case. Indeed, history—especially history as old as that recited here—is often ambiguous or contradictory. Nonetheless, from what we know, we can be sure that "the right we inherited from our English ancestors" left ample leeway for restrictions on the public carrying of firearms in the interest of public safety.

2

Post-Ratification Commentary. The *Heller* Court relied heavily on the post-ratification commentary of St. George Tucker, William Rawle, and Joseph Story. *See* 554 U.S. at 605-10. Unfortunately, these commentators revealed little of their opinions about concealed weapons. Still, Rawle wrote that the Second Amendment right "ought not . . . , in any government, to be abused to the disturbance of the peace." William Rawle, *A View of the Constitution of the United States* 123 (1825). *Heller* cited this statement when it noted that, "[f]rom Blackstone

through the 19th-century cases, commentators and courts routinely explained that the [Second Amendment] right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." 554 U.S. at 626. At the least, *Heller*'s language suggests that there is room for restricting certain manners of carrying firearms where they threaten public peace and safety.

3

Pre-Civil War State Constitutions and Legislation. To confirm its understanding of the Second Amendment's guarantee, the *Heller* Court looked to state legislation and state constitutional provisions from the Founding Era and subsequent generations. 554 U.S. at 600-03. These same sources support the conclusion that publicly carrying concealed weapons falls outside the Second Amendment's scope.

By the Founding era, three of the original thirteen states—Massachusetts, North Carolina, and Virginia—had expressly adopted the Statute of Northampton. Charles, *supra*, at 31-32 & n.166. There is no indication that in doing so these states meant to exclude the longstanding interpretations of the statute.

In the early nineteenth century, states increasingly limited the carrying of concealed firearms.[3] And "[m]ost states enacted laws banning

[3] *See* Act of Mar. 25, 1813, 1813 La. Acts at 172; Act of Jan. 14, 1820, ch. 23, 1820 Ind. Acts at 39; Act of Oct. 19, 1821, ch. XIII, 1821 Tenn. Pub. Acts. 15 ("[E]ach and every person so degrading himself, by carrying a dirk, sword cane, French knife, Spanish stiletto, belt or pocket pistols . . . shall pay a fine."); Act

the carrying of concealed weapons."[4] *Kachalsky*, 701 F.3d at 95; *see also* Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 Ford. L.Rev. 487, 502-16 (2004). Georgia banned the sale of concealable weapons altogether, and Tennessee promptly followed suit by banning the sale of bowie knives. Act of Dec. 25, 1837, 1837 Ga. Laws 90; Act of Jan. 27, 1838, ch. 137, 1837-38 Tenn. Pub. Acts 200-01. Notably, some of these bans contained only narrow exceptions, or no exceptions at all. For example, Ohio's concealed-carry ban allowed a narrow exception for those carrying a

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of Feb. 2 1838, 1838 Va. Acts. ch. 101, at 76 (making it unlawful for a person to "habitually or generally keep or carry about his person any pistol, dirk, bowie knife, or any other weapon of the like kind . . . hidden or concealed from common observation"); Act of Feb. 1, 1839, ch. 77, 1839 Ala. Acts at 67-68; Act. of Mar. 18, 1859, 1859 Ohio Laws 56 (providing that "whoever shall carry a weapon or weapons, concealed on or about his person, such as a pistol, bowie knife, dirk, or any other dangerous weapon, shall be deemed guilty.").

[4] "*See* Act of Feb. 1, 1839, ch. 77, 1839 Ala. Acts at 67-68; Act of Apr. 1, 1881, ch. 96, § 1, 1881 Ark. Acts at 191; Act of Feb. 1, 1881, 1881 Colo. Sess. Laws at 74; Act of Feb. 12, 1885, ch. 3620, 1885 Fla. Laws at 61; Act of Apr. 16, 1881, 1881 Ill. Laws at 73-74; Act of Jan. 14, 1820, ch. 23, 1820 Ind. Acts at 39; 29 Ky. Gen.Stat. art. 29, § 1 (as amended through 1880); Act of Mar. 25, 1813, 1813 La. Acts at 172; 1866 Md. Laws, ch. 375, § 1; Neb. Gen.Stat., ch. 58, ch. 5, § 25 (1873); Act of Mar. 5, 1879, ch. 127, 1879 N.C. Sess. Laws at 231; N.D. Pen.Code § 457 (1895); Act of Mar. 18, 1859, 1859 Ohio Laws at 56; Act of Feb. 18, 1885, 1885 Or. Laws at 33; Act of Dec. 24, 1880, no. 362, 1881 S.C. Acts at 447; S.D. Terr. Pen.Code § 457 (1883); Act of Apr. 12, 1871, ch. 34, 1871 Tex. Gen. Laws at 25-27; Act of Oct. 20, 1870, ch. 349, 1870 Va. Acts at 510; Wash.Code § 929 (1881); W. Va.Code, ch. 148, § 7 (1891)." *Kachalsky*, 701 F.3d at 95 n.21.

weapon in connection with their lawful employment where a "prudent man" would carry weapons in defense of himself, his family, or his property. 1859 Ohio Laws at 56-57. By contrast, Virginia's ban had no exceptions at all, even if the defendant was acting in self-defense when using the concealed weapon. 1838 Va. Acts ch. 101 at 76.

4

Pre-Civil War Case Law. The *Heller* Court relied heavily on several early-nineteenth-century court cases interpreting the Second Amendment and state analogues. 554 U.S. at 610-14. For example, when the Court pointed to prohibitions on carrying concealed weapons as a prime example of how "the right secured by the Second Amendment is not unlimited," it specifically cited the 1846 Georgia case *Nunn v. State* and the 1850 Louisiana case *State v. Chandler*. *Id.* at 626. Those cases, and others relied on in *Heller*, provide some of the strongest evidence that the Second Amendment does not protect the carrying of concealed firearms in public.

In *State v. Mitchell*, 3 Blackf. 229 (Ind. 1833), the Indiana Supreme Court succinctly declared "that the statute of 1831, prohibiting all persons, except travelers, from wearing or carrying concealed weapons, is not unconstitutional." *Id.*

In the 1840 case of *State v. Reid*, the defendant—who had been convicted under Alabama's Act of February 1, 1839, which made it a crime for any person to "carry concealed about his person, any species of fire arms" or "any other deadly weapon"—challenged his conviction under Alabama's arms-bearing constitutional guarantee. 1 Ala. 612, 614-15,

616 (1840) (cited in *Heller*, 554 U.S. at 629). The Alabama Supreme Court began its analysis of the defendant's challenge by considering the history of the right to bear arms in England, including the English Bill of Rights, which the court considered to be the progenitor of the right to bear arms in Alabama. *Id.* at 615. After examining this history, the court held that Alabama's concealed firearm ban did not "trench upon the constitutional rights of the citizen." *Id.* at 616. The court reasoned that Alabama's Second Amendment analogue "neither expressly nor by implication, denied to the Legislature, the right to enact laws in regard to the manner in which arms shall be borne." *Id.* Just as the English Bill of Rights allowed Parliament "to determine what arms shall be borne and how," the Alabama constitution permitted the legislature to determine that carrying concealed weapons was not a proper mode of exercising the right to bear arms. *Id.* The majority cites *Reid* as support for the theory that a ban on concealed weapons carry would not be permitted if restrictions on public carry went too far. But *Reid* plainly does not stand for that proposition. It rejected the "evil practice of carrying weapons secretly," *id.* at 616, and supported the power of the legislature to proscribe the "manner in which arms shall be borne," *id. Reid* cannot be construed as supporting a Second Amendment right to carry concealed weapons in public.

In the same year as *Reid*, the Tennessee Supreme Court considered a similar challenge to the constitutionality of a law criminalizing the carrying of concealed weapons. *Aymette v. State*, 21 Tenn. 154 (1840) (cited in *Heller*, 554 U.S. at 613). As in *Reid*,

the court first considered the history of the right to bear arms in England, including the English Bill of Rights under William and Mary. *Id.* at 156, 157. Based on this history, the court concluded that the Tennessee legislature was well within its powers to criminalize the carrying of concealed weapons:

> To hold that the Legislature could pass no law upon this subject by which to preserve the public peace, and protect our citizens from the terror which a wanton and unusual exhibition of arms might produce, or their lives from being endangered by desperadoes with concealed arms, would be to pervert a great political right to the worst of purposes, and to make it a social evil of infinitely greater extent to society than would result from abandoning the right itself.

Id. at 159.[5] The court's opinion also included the following passage, which is quite relevant in assessing its view of legislative power:

> Supose [sic] it were to suit the whim of a set of ruffians to enter the theatre in the midst of the performance, with drawn swords, guns, and fixed bayonets, or to enter the church in the same manner, during service, to the terror of the audience, and this were to become habitual; can it be that it would be

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[5] As the majority observes, the Supreme Court rejected *Aymette*'s conclusion that the Second Amendment enshrined only a militia-centered right. *Heller*, 554 U.S. at 613. However, the Court did not question *Aymette*'s reasoning with respect to the validity of the state's prohibition on the carrying of concealed weapons. *Id.*

> beyond the power of the Legislature to pass laws to remedy such an evil? Surely not. . . . The convention, in securing the public political right in question, did not intend to take away from the Legislature all power of regulating the social relations of the citizens upon this subject.

Id. at 159.

The majority concedes that *Aymette* does not support a Second Amendment right to bear concealed weapons, but argues that it is relevant to other Second Amendment rights. However, if the "conduct at issue" here—the right to bear concealed weapons in public—is not protected by the Second Amendment, the existence of other rights is not relevant to our inquiry.

In *State v. Buzzard*, 4 Ark. 18 (1842), the Arkansas Supreme Court held that the Arkansas law banning the wearing of concealed weapons was not contrary to either the Arkansas or United States Constitution. *Id.* at 28. As the Chief Justice wrote:

> The act in question does not, in my judgment, detract anything from the power of the people to defend their free state and the established institutions of the country. It inhibits only the wearing of certain arms concealed. This is simply a regulation as to the manner of bearing such arms as are specified. The practice of so bearing them the legislative department of the government has determined to be wrong, or at least inconsistent with sound policy. So far, that department had a discretion in

> regard to the subject, over which the judiciary, as I conceive, has no control, and therefore, the duty of the courts must be the same, whether the policy of the law be good or bad. In either event it is binding, and the obligation of the courts to enforce its provisions, when legally called upon to do so, is imperative.

Id. at 27.

In the 1846 case of *Nunn v. State*, the defendant—who had been convicted for carrying a pistol in violation of Georgia's Act of December 25, 1837—challenged his conviction under the Second Amendment and Georgia's analogous constitutional provision. 1 Ga. at 245, 247 (cited in *Heller*, 554 U.S. at 612, 626). After considering *State v. Reid* and the Kentucky case *Bliss v. Commonwealth*, the Georgia Supreme Court concluded that a law prohibiting the carrying of concealed weapons does not violate the right to keep and bear arms. *Nunn*, 1 Ga. at 247, 251. Relying on *Reid*, the court explained

> that so far as the act of 1837 seeks to suppress the practice of carrying certain weapons *secretly*, . . . it is valid, inasmuch as it does not deprive the citizen of his *natural* right of self-defence, or of his constitutional right to keep and bear arms. But that so much of it, as contains a prohibition against bearing arms *openly*, is in conflict with the Constitution, and *void* . . . .

Id. at 251. Because the criminal charges had not specified the manner in which the defendant carried his pistol, the court reversed his conviction. *Id.*

Nunn plainly does not support the notion that bearing concealed weapons falls within the protection of the Second Amendment. It stands for precisely the opposite proposition. Nonetheless, the majority embraces *Nunn* as supporting other Second Amendment rights. It argues that, if those other rights are restricted, then the legislature could not prohibit concealed carry. However, *Nunn* does not say that. Its holding is that Georgia's analogous constitutional protection of the right to bear arms did not include the right to carry concealed weapons.[6]

Finally, in *State v. Chandler*, the Louisiana Supreme Court joined its counterparts in Alabama, Tennessee, and Georgia to hold that a state law

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[6] The majority also claims that a later Georgia case, *Stockdale v. State*, 32 Ga. 225 (1861), explained that "to ban *both* the open and concealed carriage of pistols" 'would be to prohibit the bearing of those arms' altogether." This stretches *Stockdale* far beyond what it actually said. In that case, the defendant had been charged with violating a statute that forbade the carrying of concealed weapons. *Id.* at 226. The defendant requested the judge to instruct the jury that he was not guilty so long as he wore his pistol in such a way that other people could see that it was a pistol. *Id.* The judge refused, and instead instructed the jury that the defendant was guilty so long as *any* portion of his pistol was hidden from view. *Id.* at 226-27. The Georgia Supreme Court reversed the defendant's conviction, holding that the trial judge's instructions were erroneous. *Id.* at 227-28. The court reasoned that it is impossible to carry a pistol without concealing at least some portion of it, so requiring that every inch of the pistol be exposed to view would make it practically impossible to carry it, thereby violating *Nunn*'s admonition that any regulation that practically prohibits a person from bearing arms *openly* is unconstitutional. *Id.* at 227. *Stockdale* was a simple application of *Nunn*'s clear holding, and the majority is wrong to attribute a different meaning to it.

criminalizing the carrying of concealed weapons did not conflict with the Second Amendment. 5 La. Ann. 489, 490 (1850) (cited in *Heller*, 554 U.S. at 613, 626). According to the court, the statute "became absolutely necessary to counteract a vicious state of society, growing out of the habit of carrying concealed weapons, and to prevent bloodshed and assassinations committed upon unsuspecting persons." *Id.* at 489-90. It further explained that the statute

> interfered with no man's right to carry arms . . . in full open view, which places men upon an equality. This is the right guaranteed by the Constitution of the United States, and which is calculated to incite men to a manly and noble defence of themselves, if necessary, and of their country, without any tendency to secret advantages and unmanly assassinations.

Id. at 490 (internal quotation marks omitted). Eight years later, the Louisiana Supreme Court reaffirmed its holding, explaining that the state's concealed-carry ban did not violate the Second Amendment because it "prohibit[ed] only *a particular mode* of bearing arms which is found dangerous to the peace of society." *State v. Jumel*, 13 La. Ann. 399, 399-400 (1858) (emphasis in original).

To be sure, there was at least one state high court whose voice was out of tune with this nineteenth-century chorus. In the 1822 case of *Bliss v. Commonwealth*, the Kentucky high court reversed the defendant's conviction for carrying a concealed weapon (a sword in a cane). 12 Ky. at 93 (cited in

Heller, 554 U.S. at 585 n.9). The court held that under the Kentucky constitution, any restraint or regulation on the right to bear arms, including regulations on the manner of carry, were void. *Id.* at 92, 93. Therefore, the court saw no difference between acts forbidding the carrying of concealed weapons and acts forbidding the carrying of weapons openly. *Id.*

But the reign of *Bliss* was short-lived in Kentucky. The ruling was met with disbelief by the Kentucky legislature. Indeed, "[a] committee of the Kentucky House of Representatives concluded that the state's Supreme Court had misconstrued the meaning of the state's constitutional provision on arms bearing." Saul Cornell, *The Early American Origins of the Modern Gun Control Debate: The Right to Bear Arms, Firearms Regulation, and the Lessons of History*, 17 Stan. L. & Pol'y Rev. 571, 586 (2006) (citing Journal of the Kentucky House of Representatives 75. (Frankfort, Ky. 1837)). It issued a stinging criticism of *Bliss*. *Id.* And Kentucky eventually amended its constitution specifically to overrule *Bliss*. *See id.* at 587; Ky. Const. of 1850 art. XIII, § 25 ("[T]he rights of the citizens to bear arms in defence of themselves and the State shall not be questioned; but the General Assembly may pass laws to prevent persons from carrying concealed arms."). As Professor Cornell concluded, the holding of *Bliss* was "bizarre and out of touch with mainstream legal and constitutional thinking in the early Republic." Cornell, 17 Stan. L. & Pol'y Rev. at 586.

Bliss was clearly a judicial outlier. The courts in *Buzzard*, *Reid*, *Aymette*, and *Nunn* all considered

Bliss's conclusions and expressly rejected them. *Nunn*, 1 Ga. at 247-48, 251; *Aymette*, 21 Tenn. at 160; *Reid*, 1 Ala. at 617; *Buzzard*, 4 Ark. 25-26. *Reid* speculated that *Bliss*'s solitary position was the result of the unique language of Kentucky's constitution. 1 Ala. at 619. Aymette more directly questioned the correctness of *Bliss*'s reasoning, explaining that "there is a manifest distinction" between carrying arms secretly and carrying arms openly. 21 Tenn. at 160. *Buzzard* pointedly disagreed with Bliss, observing:

> However captivating such arguments may appear upon a merely casual or superficial view of the subject, they are believed to be specious, and to rest upon premises at variance with all the fundamental principles upon which the government is based; and that, upon a more mature and careful investigation, as to the object for which the right was retained their fallacy becomes evident. The dangers to be apprehended from the existence and exercise of such right, not only to social order, domestic tranquillity and the upright and independent administration of the government, but also to the established institutions of the country, appears so obvious as to induce the belief that they are present to every intelligent mind, and to render their statement here unnecessary.

4 Ark. 25-26.

In short, *Bliss* does not in any way alter the great weight of early-nineteenth century cases

holding that carrying concealed weapons is conduct that falls outside the bounds of Second Amendment protection.

5

Post-Civil War Legislation and Commentary. Even though laws enacted after the Civil War were far removed from the Founding Era, the *Heller* Court found them instructive for discerning the Second Amendment's nature. 554 U.S. at 614. Likewise, the Court looked to post-Civil War commentaries for illumination. *Id.* at 616-19. These sources further cemented the understanding of the early-nineteenth-century courts that concealed carry is not protected by the Second Amendment.

By the latter half of the nineteenth century, most states had enacted bans or limitations on the carrying of concealed weapons. *See Kachalsky*, 701 F.3d at 95 & n.21 (collecting statutes). During that time, three states and one territory even passed total bans on carrying of pistols, whether concealed or open. *Id.* at 90 (citing Ch. 96, §§ 1-2, 1881 Ark. Acts at 191-92; Act of Dec. 2, 1875, ch. 52, § 1, 1876 Wyo. Terr. Comp. Laws, at 352; Act of Apr. 12, 1871, ch. 34, § 1, 1871 Tex. Gen. Laws at 25; Ch. 13, § 1, 1870 Tenn. Acts at 28).

Despite these widespread restrictions on the carrying of concealed weapons, legal commentators saw no Second Amendment violations. John Pomeroy wrote that the Second Amendment's "inhibition is certainly not violated by laws forbidding persons to carry dangerous or concealed weapons." John Norton Pomeroy, *An Introduction to the Constitutional Law of the United States* 152-53 (1868) (cited in *Heller*,

554 U.S. at 618). Like the Court in *Heller*, he compared the Second Amendment to the First: "The clause is analogous to the one securing freedom of speech and of the press. Freedom, not license, is secured; the fair use, not the libellous abuse, is protected." *Id.; see Heller*, 554 U.S. at 618.

In his edition of Kent's *Commentaries*, Justice Holmes noted a "great difference of opinion" among the state courts on whether prohibitions on carrying concealed weapons were constitutional. 2 James Kent, *Commentaries on American Law* *340 n.2 (Oliver Wendell Holmes, Jr. ed., 12th ed. 1873) (cited in *Heller*, 554 U.S. at 618, 626). After summarizing the state courts' cases (including those discussed above), he sided with the courts that found such prohibitions constitutional: "As the practice of carrying concealed weapons has been often so atrociously abused, it would be very desirable, on principles of public policy, that the respective legislatures should have the competent power to secure the public peace, and guard against personal violence by such a precautionary provision." *Id.*

George Chase, like Justice Holmes, concluded in *The American Students' Blackstone* (1984) that concealed weapons bans were necessary to ensure public safety, and that they were widely deemed lawful: "[I]t is generally held that statutes prohibiting the carrying of *concealed* weapons are not in conflict with these constitutional provisions, since they merely forbid the carrying of arms in a particular manner, which is likely to lead to breaches of the peace and provoke to the commission of crime, rather than contribute to public or personal defence."

Chase, *supra*, at 85 n.11 (cited in *Heller*, 554 U.S. at 626) (emphasis in original).

John Ordronaux wrote that although "[t]he right to bear arms has always been the distinctive privilege of freemen," the Second Amendment does not limit a state's power to "enact[] laws regulating the manner in which arms may be carried. Thus, the carrying of *concealed* weapons may be *absolutely prohibited* without the infringement of *any constitutional right*." John Ordronaux, *Constitutional Legislation in the United States* 241 (1891) (cited in *Heller*, 554 U.S. at 619) (some emphasis added).

In addition to these commentators cited in *Heller*, the majority recognizes other commentators who concluded that the Second Amendment was not concerned with concealed carry. For example, Henry Campbell Black wrote simply that "[t]he right to bear arms is not infringed by a state law prohibiting the carrying of concealed deadly weapons." Henry Campbell Black, *Handbook of American Constitutional Law* 463 (1895). And the editor of an 1897 edition of Blackstone wrote that "the right of carrying arms as secured by the U.S. Constitution, and generally by State constitutions, does not include the habitual carrying of concealed deadly weapons by private individuals." 1 William Blackstone, *Commentaries on the Laws of England* 144 n.91 (William Draper Lewis ed., 1897).

6

Given this extensive history, it is not surprising that in 1897 the Supreme Court endorsed the view that carrying concealed weapons is not protected conduct under the Second Amendment. *Robertson*,

165 U.S. at 281-82. In rejecting a challenge under the Thirteenth Amendment, the Court noted that the freedoms enumerated in the Bill of Rights are subject to "certain well-recognized exceptions." *Id.* at 281. As an example of such a well-recognized exception, the Court explained that "the right of the people to keep and bear arms . . . is not infringed by laws prohibiting the carrying of concealed weapons." *Id.* at 281-82. Although this passage is old, no case, including *Heller*, has ever called it into question.

Most of our sister circuits that have considered the question have reached similar conclusions. In *Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013), the Third Circuit considered the New Jersey Handgun Permit Law, which required persons who wished to carry a handgun in public to apply for permit and show "justifiable need." Against a Second Amendment challenge, the Third Circuit held that "the requirement that applicants demonstrate a 'justifiable need' to publicly carry a handgun for self-defense qualifies as a 'presumptively lawful,' 'longstanding' regulation and therefore does not burden conduct within the scope of the Second Amendment's guarantee. *Id.* at 429-30.

In *Peterson*, the Tenth Circuit considered a Second Amendment challenge to Colorado's concealed handgun licensing regime, which restricted the issuance of licenses to Colorado residents. The Tenth Circuit concluded that "[t]here can be little doubt that bans on the concealed carrying of firearms are longstanding." 707 F.3d at 1210. After conducting an historical analysis, the Court concluded that "the Second Amendment does not confer a right to carry

concealed weapons." *Id.* at 1211.

Although the Second Circuit did not reach the question of the scope of the Second Amendment, it concluded that "state regulation of the use of firearms in public was 'enshrined with[in] the scope' of the Second Amendment when it was adopted" and that "extensive state regulation of handguns has never been considered incompatible with the Second Amendment." *Kachalsky*, 701 F.3d at 96, 100.

D

In sum, employing the analysis prescribed by the Supreme Court, the answer to the historical inquiry is clear: carrying a concealed weapon in public was not understood to be within the scope of the right protected by the Second Amendment at the time of ratification. This conclusion is in accord with *Heller*'s recognition that there were "longstanding prohibitions" on firearms that were "presumptively lawful," 544 U.S. at 626-27 & n.26, and the Supreme Court's observation in *Robertson* that "the right of the people to keep and bear arms . . . is not infringed by laws prohibiting the carrying of concealed weapons," 165 U.S. at 281-82. *See Peterson*, 707 F.3d at 1211. Because the right asserted is not protected by the Second Amendment, our inquiry should be at an end: San Diego County's good cause requirement for a person to carry a concealed weapon in San Diego County is constitutional. *Chester*, 628 F.3d at 680.

III

Because the act of carrying concealed weapons in public is not protected by the Second Amendment, it is unnecessary to reach the second part of the Second

Amendment inquiry. However, even if we were to assume that San Diego County's good cause requirement implicates the Second Amendment, I would conclude that the San Diego County policy easily passes constitutional muster.

The second *Chovan* inquiry is whether the challenged government action survives means-end scrutiny under the appropriate level of review. *Chovan*, 735 F.3d at 1136. In Second Amendment analysis, the level of scrutiny depends 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.'" *Id.* at 1138 (quoting *Ezell v. City of Chicago*, 651 F.3d 684, 703 (7th Cir. 2011)).

The core of the Second Amendment right is "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Heller*, 554 U.S. at 635. Carrying concealed weapons in public does not implicate the core right. Assuming, for argument's sake, that the burden placed in this case on whatever Second Amendment rights extend outside the home is substantial, then application of intermediate scrutiny is appropriate. *Chovan*, 735 F.3d at 1138.

Surviving intermediate scrutiny requires "(1) the government's stated objective to be significant, substantial, or important; and (2) a reasonable fit between the challenged regulation and the asserted objective." *Id.* at 1139 (citing *Chester*, 628 F.3d at 683).[7]

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[7] We are not alone in this application. Other circuits that have considered a restriction similar to the good cause requirement have applied intermediate scrutiny. *See Woollard v. Gallagher*,

The County claims that its application of the good cause requirement protects the public peace and protects "the safety of the public from unknown persons carrying concealed, loaded firearms." As the Supreme Court has repeatedly made clear, public safety and preventing crime are important, indeed compelling, government interests. *See, e.g.*, *Schenk v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357, 376 (1997) (public safety is a significant government interest); *United States v. Salerno*, 481 U.S. 739, 750 (1987) (preventing crime is a compelling government interest).

The County argues that the good cause requirement helps protect public safety because it reduces the number of concealed firearms circulating in public. According to the County, reducing the number of guns carried in public ensures public safety by, among other things:

- Limiting the lethality of violent crimes. According to an expert declaration filed in support of the County's motion for summary judgment, even though the general availability of guns may or may not influence the absolute number of violent crimes, when guns are used in such crimes it is much more likely that

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712 F.3d 865, 869, 876 (4th Cir. 2013) (applying intermediate scrutiny to a Maryland statute requiring applicants to demonstrate a "good and substantial reason to wear, carry, or transport a handgun" in order to obtain a license to do so); *Kachalsky*, 701 F.3d at 96 (applying intermediate scrutiny to a New York statute requiring applicants to demonstrate "proper cause" in order to obtain a license to carry concealed handguns).

the crime will result in the death of the victim.

- Limiting the ability of criminals to legally take advantage of stealth and surprise.
- Protecting police officers and ensuring their practical monopoly on armed force in public. According to the County, more than ninety percent of police officers who are killed in the line of duty are killed with guns.
- Limiting the danger to other members of the public. The decision to carry a concealed firearm in public exposes other people to increased risk of injury or death without their knowledge or control.
- Limiting the likelihood that minor altercations in public will escalate into fatal shootings.

The County presented data showing that the more guns are carried in public, the more likely it is that violent crimes will result in death and detailing the specific risks posed by concealed weapons.

Obviously, the Plaintiffs disagree with the efficacy of the policy to achieve these goals, and have marshaled evidence challenging conventional wisdom about the correlation between violence and the prevalence of handguns. But ours is not the forum in which to resolve that debate. Rather, we owe "substantial deference to the predictive judgments" of legislative bodies. *Turner Broad. Sys. Inc. v. FCC*, 520 U.S. 180, 195 (1997). "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 (quoting *Turner Broad. Sys. Inc. v. FCC*, 512 U.S. 622, 665 (1994)). As the Second Circuit aptly explained, "[i]t is the legislature's job, not ours, to weigh conflicting evidence and make policy judgments." *Id.* at 99; *accord Woollard*, 712 F.3d at 881. Further, the test on the first step of intermediate scrutiny only requires that "the government's stated objective to be significant, substantial, or important." *Chovan*, 735 F.3d at 1139.

The second inquiry in an intermediate scrutiny analysis is whether there is "a reasonable fit between the challenged regulation and the asserted objective." *Id.* First, as the majority properly notes, California does not impose a complete ban on the carrying of concealed weapons in public. Cal. Penal Code § 25400. A gun owner's residence, place of business, and private property are exempt from § 25400. *Id.* at § 25605. Carrying a concealable firearm within a vehicle is not a crime if the firearm is within a vehicle and is either locked in the vehicle's trunk or in a locked container. *Id.* at § 25610. Peace officers, retired officers, military personnel, and retired federal officers are permitted to carry concealed weapons. *Id.* at §§ 25450, 25455, 25620, 25650. Hunters and anglers may carry concealable firearms while hunting or fishing. *Id.* at § 25640. Section 25400 does not apply to transportation of firearms to or from gun shows or similar events, *id.* at § 25535, nor does it apply to people practicing shooting targets

at established target ranges, whether public or private, *id.* at 25635.[8] And, of course, California is a "may-issue" state, in which concealed public carry is allowed with a proper permit. *Id.* § 26150.

Because of these exceptions, the California Court of Appeal concluded that California's concealed carry statutes were "narrowly tailored to protect the public," and did "not substantially burden defendant's exercise of his Second Amendment right." *People v. Ellison*, 196 Cal.App.4th 1342, 1351, 128 Cal.Rptr.3d 245, 252 (Cal. App. 2011).

Second, the San Diego County "good cause" permit requirement itself does not preclude all carrying of concealed weapons in public. It limits the risk to public safety by reducing the number of guns in public circulation, but allows those who will most likely need to defend themselves in public to carry a handgun. In this way, the licensing scheme is "oriented to the Second Amendment's protections." *Kachalsky*, 701 F.3d at 98. Of course, the good cause requirement is not perfect. Not everyone who may ultimately need the protection of a handgun may obtain a permit, and there is a risk that some concealed-carry license holders may misuse their firearms. But the good cause requirement does not have to be perfect; indeed, it is unrealistic to expect any regulatory measure to perfectly solve the problem to which it is addressed, especially a problem as complex as gun violence. Rather, under intermediate scrutiny, the challenged regulation

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[8] Carrying a concealable firearm is permitted in a number of other circumstances. *See generally id.* at §§ 25450-25650.

must strike a reasonable balance between the burdened right and the public need. By granting concealed-carry licenses only to those who are known to need them for self-defense, the good cause requirement strikes a reasonable balance between individuals' interest in self-defense and the public's interest in limiting the proliferation of handguns in public spaces.

When viewed objectively, the San Diego County "good cause" policy easily survives intermediate scrutiny. The government has identified significant, substantial, or important objectives and provided a reasonable fit between the challenged regulation and the asserted objective. Therefore, even if the Second Amendment protection were extended to provide a right to carry concealed weapons in public, the "good cause" San Diego County requirement would still pass constitutional muster.

IV

Rather than employing the straightforward methodology prescribed by *Chovan*, the majority wanders off in a different labyrinthian path, both in its analysis of the Second Amendment right at issue and its analysis of the government regulation in question. In doing so, it conflicts with the instruction of the Supreme Court, the holdings of our sister circuits, and our own circuit precedent. It needlessly intrudes and disrupts valid and constitutional legislative choices. I must respectfully disagree with its approach.

A

The majority never answers the question as to whether carrying concealed weapons in public is

protected under the Second Amendment. Rather, it engages in a broader circular inquiry. It first exceeds the bounds of *Heller* by determining that the Second Amendment protects at least some conduct outside the home. It then reasons that because the Second Amendment protects *some* conduct outside the home, states may not completely prohibit carrying handguns outside the home. The majority then examines the California regulatory scheme and concludes that, because California bans open carry in most public areas, it must allow concealed carry without the necessity of showing good cause. Therefore, it reasons, San Diego County's "good cause" requirement must be unconstitutional.

1

The majority's logical tapestry quickly unravels under close examination. If carrying concealed firearms in public falls outside the Second Amendment's scope, then nothing—not even California's decision to restrict other, protected forms of carry—can magically endow that conduct with Second Amendment protection.

An analogy to the First Amendment context illustrates this point. *See Heller*, 554 U.S. at 595 (analogizing the Second Amendment to the First). There are, of course, certain types of speech that do not fall within the protection of the First Amendment, such as child pornography, obscene material without serious literary, artistic, political, or scientific value, "fighting words," and speech that

materially assists a foreign terrorist organization.[9] If a state decided to ban all protected First Amendment speech, would that bring child pornography, obscenity, "fighting words," and material assistance to a foreign terrorist organization under the protection of the First Amendment? Of course not. However, that is precisely the flawed reasoning that the majority employs.

The same logic applies in the Second Amendment context. If certain conduct falls outside the scope of the Second Amendment, then restrictions on that conduct are valid, regardless of the regulatory landscape governing different activities. *Chester*, 628 F.3d at 680. The majority simply makes up the right out of whole cloth, or perhaps more aptly put, no cloth. Regulation of unrelated conduct cannot create a new right where none existed before.

Unsurprisingly, the majority does not—and cannot—cite any authority that supports its assertion. It claims that several nineteenth-century sources cited in *Heller* support its proposition. As I have discussed, those sources support no such proposition. In *Chandler*, the Louisiana Supreme Court explained that a concealed weapons ban "interfered with no man's right to carry arms" under the Second Amendment, which it defined as the right

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[9] *See New York v. Ferber*, 458 U.S. 747, 764 (1982) (child pornography); *Roth v. United States*, 354 U.S. 476, 484 (1957) (obscenity); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) (fighting words); *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2722-23 (2010) (material assistance to terrorists).

to carry arms "in full open view." 5 La. Ann. 489, 490 (1850). In *Nunn*, the Georgia Supreme Court held that "[a] law which merely inhibits the wearing of certain weapons in a *concealed manner* is *valid*." 1 Ga. 243, 243 (1846) (emphasis in original); *see also id.* at 251. In *Reid*, the Alabama Supreme Court explained that a concealed-carry ban did not "come in collision with the constitution" because it sought to "promote personal security" by "inhibit[ing] the wearing of certain weapons, in such a manner as is calculated to exert an unhappy influence upon the moral feelings of the wearer, by making him less regardful of the personal security of others." 1 Ala. 612, 617 (1840). And George Chase's *American Students' Blackstone* notes a consensus that "statutes prohibiting the carrying of *concealed* weapons are not in conflict with these constitutional provisions, since they merely forbid the carrying of arms in a particular manner, which is likely to lead to breaches of the peace and provoke to the commission of crime, rather than contribute to public or personal defence." 1 *The American Students' Blackstone* 84 n.11 (George Chase ed. 1884) (emphasis in original).

Although all the nineteenth-century cases cited by the majority cautioned against restrictions on the open carrying of weapons, none of them—except the discredited, outlier *Bliss*—suggests that restrictions on carrying concealed weapons implicate the Second Amendment. *See Chandler*, 1 La. Ann. at 490; *Nunn*, 1 Ga. at 251; *Reid*, 1 Ala. at 616-17. And nothing in these cases or Chase's *Blackstone* even hints that a restriction on carrying concealed weapons would become invalid if restrictions were placed on open carry. Rather, they suggest that restrictions on

concealed carry are always valid, while there are limits to restrictions on open carry.

The majority concedes that it is in conflict with the Second, Third, and Fourth Circuits in *Drake*, *Woollard*, and *Kachalsky*. However, it insists that it is in accord with the Seventh Circuit's decision in *Moore*. But *Moore* did not involve a challenge to the implementation of a "good cause" requirement to carry a concealed weapon in public. Rather, it was a direct challenge to an Illinois law banning almost all forms of carrying a loaded firearm outside the home and did not involve "narrower, better tailored restrictions" such as the one at issue here. *See Moore v. Madigan*, 708 F.3d 901, 904 (7th Cir. 2013) (Hamilton, J., dissenting from denial of rehearing en banc).

2

The majority essentially concedes that the Plaintiffs' challenge to San Diego County's "good cause" policy fails unless we consider California's regulatory scheme in its entirety. According to the majority, the Plaintiffs' challenge "is not an attack trained on a restriction against concealed carry as such, or viewed in isolation." Rather, the Plaintiffs "target[] the constitutionality of the entire scheme" of carry regulation in California. Indeed, if California did not restrict open carry, Plaintiffs would have no cause for complaint. And, of course, if California law permitted unrestricted concealed public carry, there would be no case at all. It is by California statute that local Sheriffs are invested with the discretion to grant concealed carry permits. Plaintiffs' real quarrel is with the statute. Their theory is that the statutory

discretion afforded Sheriffs should be uniformly excised. Thus, by arguing that the Second Amendment compels the County to interpret "good cause" to include a general desire to carry a concealed gun, the Plaintiffs in reality are challenging the constitutionality of the § 26150 good cause provision. Their proposed remedy of preventing California Counties from exercising discretion eliminates the statutory "good cause" requirement and transforms it into a "no cause" limitation for the general public. Thus, Plaintiffs' complaint and theory necessarily specifically calls into question the constitutionality of state concealed carry law. Further, by arguing that California is required to provide some outlet for public carry of handguns, it indirectly implicates the constitutionality of the entire California firearm regulation scheme.

Although the constitutionality of the entire scheme is at issue, the Plaintiffs did not name the State of California as a defendant, and the Plaintiffs have not complied with Fed. R. Civ. P. 5.1. Under that rule, if the state or one of its agents is not a party to a federal court proceeding, "[a] party that files a pleading . . . drawing into question the constitutionality of a . . . state statute must promptly" serve the state's attorney general with notice of the pleading and the constitutional question it raises. Fed. R. Civ. P. 5.1(a). In addition, the district court must certify to the state's attorney general that the constitutionality of the state statute has been questioned, and must permit the state to intervene to defend it. Fed. R. Civ. P. 5.1(b), (c); 28 U.S.C. § 2403. The rule protects the public interest by giving the state an opportunity to voice its views

on the constitutionality of its own statutes. *Oklahoma ex rel. Edmondson v. Pope*, 516 F.3d 1214, 1216 (10th Cir. 2008).

Given the real essence of the Plaintiffs' argument, they were required to comply with Fed. R. Civ. P. 5.1. They did not. If we are to consider the constitutionality of the entire California regulatory scheme, California should have been afforded an opportunity to defend it. And, to the extent that the majority strikes down the entirety of California firearm regulations, it should have stayed the mandate to permit a legislative response, as the Seventh Circuit did in *Moore*. 708 F.3d at 942.

B

I must also respectfully disagree with the majority's analysis of the government regulation at issue, which directly conflicts with our circuit precedent in *Chovan*.

1

The majority acknowledges that we, like our sister circuits, employ a sliding-scale approach, where the level of scrutiny we apply to a challenged law depends on how severe a burden the law imposes on the "core" of the Second Amendment guarantee. *Chovan*, 735 F.3d at 1138; *see, e.g.*, *Kachalsky*, 701 F.3d at 93; *Heller*, 670 F.3d at 1257; *Ezell*, 651 F.3d at 708; *Chester*, 628 F.3d at 682; *United States v. Reese*, 627 F.3d 792, 801 (10th Cir. 2010); *United States v. Marzzarella*, 614 F.3d 85, 96-97 (3d Cir. 2010). But then the majority purports to take an "alternative approach," which it claims was used in *Heller*. Under that alternative approach, the majority rejects any means-ends scrutiny. In doing so, it

directly conflicts with *Chovan*.

Despite whatever pedigree the majority claims for this alternative approach, we are bound to follow the law of our Circuit. Further, the majority approach has no support in *Heller*. The *Heller* Court held only that the D.C. handgun ban was unconstitutional "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights" because "[f]ew laws in the history of our Nation have come close" to the severity of its restriction. *Heller*, 554 U.S. at 628, 629. The Court did not expressly reject means-ends scrutiny, and it is extremely unlikely that the Court rejected by implication such a well-established method for assessing the constitutionality of laws. Indeed, by taking care to specifically rule out rational-basis scrutiny, the Court necessarily implied that other, heightened levels of means-ends scrutiny are appropriate. *See Heller*, 554 U.S. at 628 n.27.

The majority suggests that the *Heller* Court rejected any means-ends scrutiny when it rejected Justice Breyer's "interest-balancing inquiry." *See* 554 U.S. at 634-35; *id.* at 689-90 (Breyer, J., dissenting). However, the Court did no such thing. Justice Breyer's dissent advocated against applying established tiers of scrutiny, preferring instead to decide case-by-case whether a challenged law burdened the Second Amendment at all. *Id.* at 689 (Breyer, J., dissenting). The *Heller* Court dismissed this case-by-base inquiry, noting that "[w]e know of no other enumerated constitutional right whose *core protection* has been subjected to a freestanding 'interest-balancing' approach." *Id.* at 634 (emphasis

added). By this, the *Heller* Court did not disavow the means-ends scrutiny framework for evaluating burdens on enumerated rights, which has long been a fixture of constitutional rights jurisprudence. *See generally* Adam Winkler, *Scrutinizing the Second Amendment*, 105 Mich. L. Rev. 683 (2007); see *also Kachalsky*, 701 F.3d at 99 n.23 (rejecting the argument that "handgun possession in public has the ring of an absolute constitutional right"). Rather, the Court meant only that severe burdens on "core protections" would fail any level of scrutiny and cannot be excused through the sort of freewheeling interest-balancing approach Justice Breyer proposed. *Heller*, 554 U.S. at 628 ("Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home the most preferred firearm in the nation to keep and use for protection of one's home and family would fail constitutional muster.") (internal quotation marks, footnote, and citation omitted).

The majority's new alternative approach to establishing the appropriate level of scrutiny is unsupported in Supreme Court precedent and is in direct conflict with our Circuit's precedent and the approach taken by our sister circuits.

2

The majority also errs in its alternative intermediate scrutiny analysis. The majority acknowledges the *Chovan* second step inquiry as to whether the government policy is a reasonable fit between the challenged regulation and the asserted objective. But, rather than applying that analysis, it substitutes the demanding and inappropriate least

restrictive means test.

There is no support for the application of a least restrictive means test in *Chovan*, and our sister circuits have repeatedly and emphatically recognized that, in this context, intermediate scrutiny does not require the least restrictive means available. *See Masciandaro*, 638 F.3d at 474 ("[I]ntermediate scrutiny does not require that a regulation be the least intrusive means of achieving the relevant government objective, or that there be no burden whatsoever on the individual right in question."); *Heller*, 670 F.3d at 1258 (explaining that under intermediate scrutiny, there must be a tight fit "'that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective'" (quoting *Bd. of Trustees of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989)). In other words, the fit between the good cause requirement and public safety objectives must be "reasonable, not perfect." *Marzzarella*, 614 F.3d at 98.

The majority also rejects *Turner Broadcasting*'s admonition to afford "substantial deference to the predictive judgments" of legislative bodies, *Turner Broad. Sys. Inc. v. FCC*, 520 U.S. 180, 195 (1997), and criticizes our sister circuits' reliance on *Turner Broadcasting*.

However, "[i]n the context of firearm regulation, the legislature is 'far better equipped than the judiciary' to make sensitive public policy judgments." *Kachalsky*, 701 F.3d at 97; *see also Drake*, 724 F.3d at 436-37; *Woollard*, 712 F.3d at 881. This advice is particularly apt when we consider the widely-varying

state and local gun laws that are tailored to particular community needs. What law enforcement deems a critical restriction in urban areas may not be as important in rural portions of the country. Those sensitive policy assessments are best made by the respective legislative branches and, when permitted by statute, by local law enforcement officials.[10]

Turner Broadcasting itself provides a sound rejoinder to the majority: "Even in the realm of First Amendment questions where Congress must base its conclusions upon substantial evidence, deference must be accorded to its findings as to the harm to be avoided *and to the remedial measures adopted for that end*, lest we infringe on traditional legislative authority to make predictive judgments when enacting nationwide regulatory policy." *Turner*, 520 U.S. at 196 (emphasis added).

Finally, the majority derides the good cause requirement as nothing more than an arbitrary, overbroad rationing system. In fact, the record supports the opposite conclusion. The County does not randomly allocate concealed-carry licenses to people regardless of need. Instead, it makes the best prediction possible of who actually needs firearms for self-defense, and grants concealed-carry licenses

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[10] Indeed, the California State Sheriffs Association, the California Police Chiefs Association, and the California Peace Officers Association note in their amicus brief that the diversity of communities and regions in California warrants the exercise of discretion by chief law enforcement executives to determine, in the context of the issues presented in their jurisdiction, the circumstances under which a concealed gun permit should issue.

accordingly.[11]

IV

A careful examination of the narrow questions before us can only lead to the conclusion that San Diego County's "good cause" policy falls squarely within the Supreme Court's definition of "presumptively lawful regulatory measures." *Heller*, 554 U.S. at 626, 627 n.26, 636. There is no need to reach any other issue presented in the case. In dealing a needless, sweeping judicial blow to the public safety discretion invested in local law

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[11] I would also reject the Plaintiffs' alternative equal protection claims. Their first claim is merely an attempt to bootstrap an equal protection argument to their Second Amendment claim, so it is more appropriately analyzed under the Second Amendment. *Cf. Albright v. Oliver*, 510 U.S. 266, 273 (1994); *Orin v. Barclay*, 272 F.3d 1207, 1213 n.3 (9th Cir. 2001) (holding that an equal protection claim was "no more than a First Amendment claim dressed in equal protection clothing" and was therefore "subsumed by, and co-extensive with" the former). As for their "class of one" equal protection claim, the Plaintiffs did not establish a genuine issue of material fact with regard to whether they were situated similarly to the renewal applicants belonging to the Honorary Deputy Sheriff's Association ("HDSA"). *See Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam) (recognizing a "class of one" equal protection claim "where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment."). The HDSA renewal applicants documented specific threats or otherwise qualified for renewals, so they were not similarly situated. I would also reject Plaintiffs' remaining due process and privileges & immunities claims because Plaintiffs failed to "specifically and distinctly argue [them] in [their] opening brief." *Greenwood v. F.A.A.*, 28 F.3d 971, 978 (9th Cir. 1994).

enforcement officers and to California's carefully constructed firearm regulatory scheme, the majority opinion conflicts with Supreme Court authority, the decisions of our sister circuits, and our own circuit precedent.

I respectfully dissent.

Appendix D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

No. 09-cv-02371-IEG (BGS)

EDWARD PERUTA; MICHELLE LAXSON; JAMES DODD; DR. LESLIE BUNCHER; MARK CLEARY; and CALIFORNIA RIFLE AND PISTOL ASSOCIATION FOUNDATION,

Plaintiffs,

v.

COUNTY OF SAN DIEGO; WILLIAM D. GORE, individually and in his capacity as sheriff,

Defendants.

Filed: December 10, 2010

ORDER: (1) DENYING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT, and (2) GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This is an action brought pursuant to 42 U.S.C. § 1983 in which Plaintiffs seek injunctive and declaratory relief from Defendant's policies for obtaining a license to carry a concealed weapon pursuant to California Penal Code § 12050. At the heart of the parties' dispute is whether the right recognized by the Supreme Court's rulings in *District of Columbia v. Heller,* 128 S. Ct. 2783 (2008) and

McDonald v. City of Chicago, 130 S. Ct. 3020 (2010)—the right to possess handguns in the home for self-defense—extends to the right asserted here: the right to carry a loaded handgun in public, either openly or in a concealed manner. The matter is presently before the Court is a motion for partial summary judgment brought by Plaintiffs and a motion for summary judgment brought by Defendant William Gore. For the reasons set forth below, the Court DENIES Plaintiff's motion for partial summary judgment and GRANTS Defendant's motion for summary judgment.

BACKGROUND

The Plaintiffs

Each individual Plaintiff is a resident of San Diego County. Pls.' Statement of Undisputed Facts ("SUF") at 6. None of the Plaintiffs is disqualified under federal or California law from purchasing or possessing firearms. *Id.* Each individual Plaintiff applied to the San Diego Sheriff's Department for a license to carry a concealed weapon ("CCW") or a renewal, and each was denied for lack of "good cause" or told by the Sheriff's Department that he or she would be ill-advised to apply due to lack of "good cause."[1] *Id.* at 7. In addition to being denied due to

[1] In 2006, the Sheriff's Department initiated an interview process to assist applicants and staff in determining pre-eligibility and to avoid applicants having to pay application fees and firearms safety course fees when they would not qualify for the license. The interview is voluntary and any person can submit an application without the assistance offered by the interview. Based on what the applicant outlines during the interview, counter clerks are permitted to offer an educated

lack of "good cause," Plaintiff Edward Peruta alleges he was denied a CCW license based on his residency. *See* Pls.' Consolidated SUF ¶ 15. Defendant maintains the residency requirement was not a factor in the denial. *Id.* Plaintiff California Rifle and Pistol Association Foundation ("CRPAF") is an organization dedicated to educating the public about firearms and protecting the rights thereto. *See* Pls.' SUF at 6.

Concealed Carry Licensing Scheme

California Penal Code sections 12050-12054 set forth the criteria that applicants for CCW licenses must meet: Applicants must be of good moral character, be a resident of or spend substantial time in the County in which they apply, demonstrate good cause and take a firearms course. In San Diego County, all license applications go to Defendant Sheriff William Gore are handled by his authorized representatives. *See* Def.'s SUF ¶ 1. The "good cause" provision of Penal Code section 12050 is at issue in this case.

Defendant defines "good cause" under Penal Code section 12050 as a set of circumstances that distinguishes the applicant from other members of the general public and causes him or her to be placed in harm's way. *See* Def.'s SUF ¶ 5. Generalized fear for one's personal safety is not, standing alone, considered "good cause." *Id.* To demonstrate "good

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guess as to whether an applicant is eligible for a license based on the scenarios described by applicants. *See* Def.'s SUF ¶ 7.

Plaintiffs contend that the counter clerks sometimes discourage applicants from applying for a license, and in doing so, they serve Defendants' purpose of minimizing the number of applicants and the documentation of denial.

cause," new applicants must provide supporting documentation. *See* Pls.' SUF ¶ 9.

License holders may renew licenses up to 30 days prior to the expiration date. Def.'s SUF ¶ 8. Renewals are issued on the spot absent any negative law enforcement contacts, crime cases, arrests, etc. *See id.* Applicants still need to provide some form of documentation to support a continued need but not to the extent of the initial application. *Id.* Plaintiffs maintain that Plaintiff Cleary was required to produce documentation for his renewal, but that the County granted several renewal applications of Honorary Deputy Sheriffs' Association ("HDSA") members without requiring supporting documentation. Pls.' Consolidated SUF ¶ 10.

Defendant defines residency under Penal Code section 12050 to include any person who maintains a permanent residence in the County or spends more than six months of the taxable year within the County if the individual claims dual residency. *See id.* ¶ 16. Part-time residents who spend less than six months in the County are considered on a case-by-case basis and CCW licenses have been issued to part-time residents. *Id.*

Procedural Background

Plaintiff Edward Peruta filed his original complaint on October 23, 2009, asserting that Penal Code section 12050 violated the right to bear arms under the Second Amendment, the right to equal protection under the Fourteenth Amendment, and the right to travel under the Fourteenth Amendment. (Doc. No. 1.) Defendant moved to dismiss Plaintiff's complaint on November 13, 2009. (Doc. No. 3.) The

Court denied Defendant's motion to dismiss on January 14, 2010, and Defendant filed an answer soon thereafter. (Doc. Nos. 7, 8.) On April 22, 2010, Plaintiff filed a motion for leave to file a First Amended Complaint to add additional Plaintiffs and claims. (Doc. No. 16.) The Court granted Plaintiffs' motion on June 25, 2010, and Defendant filed an answer to Plaintiffs' First Amended Complaint on July 9, 2010. (Doc. Nos. 24, 28.)

Presently before the Court is a motion for summary judgment by Defendant and a motion for partial summary judgment by Plaintiffs. (Doc. Nos. 34, 38.) Defendant has moved for summary judgment on all claims, whereas Plaintiffs have moved for summary judgment only on the right to bear arms and certain equal protection claims. For purposes of their motions, and with the Court's approval, the parties adopted (and later modified) a stipulated briefing schedule and completed briefing by November 10, 2010. The Court held oral argument on the parties' motions on November 15, 2010. (Doc. No. 60.)

LEGAL STANDARD

Summary judgment is proper where the pleadings and materials demonstrate "there is no genuine issue as to any material fact and . . . the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c)(2); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). A material issue of fact is a question a trier of fact must answer to determine the rights of the parties under the applicable substantive law. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). A dispute is genuine "if the evidence is

such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

The moving party bears "the initial responsibility of informing the district court of the basis for its motion." *Celotex,* 477 U.S. at 323. To satisfy this burden, the movant must demonstrate that no genuine issue of material fact exists for trial. *Id.* at 322. Where the moving party does not have the ultimate burden of persuasion at trial, it may carry its initial burden of production in one of two ways: "The moving party may produce evidence negating an essential element of the nonmoving party's case, or, after suitable discovery, the moving party may show that the nonmoving party does not have enough evidence of an essential element of its claim or defense to carry its ultimate burden of persuasion at trial." *Nissan Fire & Marine Ins. Co. v. Fritz Cos.,* 210 F.3d 1099, 1106 (9th Cir. 2000). To withstand a motion for summary judgment, the non-movant must then show that there are genuine factual issues which can only be resolved by the trier of fact. *Reese v. Jefferson Sch. Dist. No. 14J,* 208 F.3d 736, 738 (9th Cir. 2000). The non-moving party may not rely on the pleadings alone, but must present specific facts creating a genuine issue of material fact through affidavits, depositions, or answers to interrogatories. Fed. R. Civ. P. 56(e); *Celotex,* 477 U.S. at 324.

The court must review the record as a whole and draw all reasonable inferences in favor of the non-moving party. *Hernandez v. Spacelabs Med. Inc.,* 343 F.3d 1107, 1112 (9th Cir. 2003). However, unsupported conjecture or conclusory statements are insufficient to defeat summary judgment. *Id.*; *Surrell*

v. Cal. Water Serv. Co., 518 F.3d 1097, 1103 (9th Cir. 2008). Moreover, the court is not required "'to scour the record in search of a genuine issue of triable fact,'" *Keenan v. Allan,* 91 F.3d 1275, 1279 (9th Cir. 1996) (citations omitted), but rather "may limit its review to the documents submitted for purposes of summary judgment and those parts of the record specifically referenced therein." *Carmen v. San Francisco Unified Sch. Dist.,* 237 F.3d 1026, 1030 (9th Cir. 2001).

DISCUSSION

I. Right to Bear Arms

A. The Scope of the Right: *Heller and McDonald*

The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." In *District of Columbia v. Heller,* 128 S. Ct. 2783, 2799 (2008), the Supreme Court recognized that the Second Amendment protects the individual right to keep and bear arms for self-defense. Two years later in *McDonald v. City of Chicago,* 130 S. Ct. 3020, 3026, 3044 (2010), the Court evaluated restrictions "similar to the District of Columbia's" in *Heller* and held that the Due Process Clause of the Fourteenth Amendment "incorporates the Second Amendment right recognized in *Heller*."

The *Heller* Court focused on two restrictions, both of which are relevant to the right asserted in this case: (1) a ban on handgun possession in the home, which the Court characterized as among the most restrictive in the "history of our Nation," and

(2) the requirement that firearms be kept inoperable at all times. 128 S. Ct. at 2817-18. The Court's analysis of these restrictions is important because it provides guidance on the scope of the Second Amendment right in terms of both "place" and "manner."

Place. After evaluating the prefatory and operative clauses of the amendment, the Court turned to the District of Columbia's total ban on handgun possession in the home. 128 S. Ct. at 2817. In doing so, the Court singled out the home as a place "where the need for defense of self, family, and property is most acute." *Id.* Likewise, while declining to expound fully on the scope of the Second Amendment, the Court observed that "whatever else it leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Id.* at 2821. Accordingly, the Court held that "the District's ban on handgun possession in the home violates the Second Amendment." *Id.*

Manner. The *Heller* Court also addressed the District's requirement that firearms in the home be rendered and kept inoperable at all times, and without exception.[2] *Id.* at 2818. The Court held that the District's restriction "makes it impossible for citizens to use [firearms] for the core lawful purpose of self-defense and is hence unconstitutional." *Id.* In dicta, the *Heller* Court explained that the Second Amendment right is "not unlimited" and not a "right

[2] Against the District's urging, the Court declined to construe the statute as containing an exception for self-defense. *Id.* at 2818.

to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." 128 S. Ct. at 2816 (citations omitted). For example, the Court noted that:

> the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues. Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

Id. at 2816-17 (internal citations omitted). In a footnote immediately following, the Court explained: "We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive." *Id.* at 2817 n.26.

The Court's recitation of lawful regulatory measures does not provide a blueprint for the validity of future restrictions; it should be interpreted as "precautionary language" that "warns readers not to treat *Heller* as containing broader holdings than the Court set out to establish: that the Second Amendment creates individual rights, one of which is keeping operable handguns at home for self-defense."

United States v. Skoien, 614 F.3d 638, 640 (7th Cir. 2010) (en banc) (Easterbrook, J.).

B. Plaintiffs' Challenge in the Context of California's Statutory Framework

Plaintiffs maintain that the right recognized in *Heller* includes a right to carry a loaded handgun in public, either openly or in a concealed manner. *See generally* Pls.' Mem. In accordance with such a right, Plaintiffs maintain that under California law, there is a single outlet for carrying a handgun for self-defense: concealed carry with a license pursuant Penal Code section 12050. *See id.* at 1-2. Because Penal Code section 12050 allows sheriffs to grant concealed carry licenses, Plaintiffs argue that Defendant's policy—under which an assertion of self-defense is insufficient to demonstrate "good cause"—is unconstitutional both on its face and as applied. *See generally id.*

Defendant disputes each aspect of Plaintiffs' position and argues against extending *Heller* beyond its express holding. *See generally* Def.'s Mem. According to Defendant, the right recognized in *Heller* does not extend beyond the home, and the right to self-defense does not entail the right to loaded carry in the absence of an immediate threat. *Id.* Accordingly, Defendant argues that concealed carry pursuant to Penal Code section 12050 is not the sole outlet for carrying a handgun for self-defense. Defendant highlights other California provisions that permit unloaded open carry and loaded open carry if

the individual is in immediate grave danger.[3] *Id.* In light of the foregoing, and based on the Supreme Court's approval of cases upholding concealed weapons bans, Defendant maintains that the restrictions at issue here are "presumptively lawful." *See id.* at 9.

Before turning to the burden imposed by Defendant's policy, the Court evaluates Plaintiffs' contention that, under California's statutory framework, concealed carry with a license pursuant Penal Code section 12050 contains the sole outlet for carrying a handgun for self-defense. *See* Pls.' Mem. at 1-2. Plaintiff's contention is based on the assumption that Penal Code section 12031 unlawfully burdens the right to self-defense.[4]

California Penal Code section 12031 generally restricts the open carry of loaded firearms in public. The statute contains several exceptions, however, including specific exceptions for self-defense and defense of the home.[5] *See* Cal. Penal Code

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[3] Defendant also contends that Plaintiffs' challenge amounts to a backdoor attack on the constitutionality of section 12050, rather than mere challenge to its policy. *See* Def.'s Mem. at 8. The Court addresses this contention below.

[4] In its order denying Defendant's motion to dismiss, based on the posture of the case and the briefing of the parties, the Court abided the assumption that section 12031 unlawfully burdens the right to self-defense. At this stage, however, the Court scrutinizes the assumption more carefully.

[5] There are also exceptions for individuals such as security guards, police officers and retired police officers, private investigators, members of the military, hunters, target shooters, persons engaged in "lawful business" who possess a loaded firearm on business premises and persons who possess a loaded

§§ 12031(j)(1)-(3). Section 12031(j)(1) permits loaded open carry by "a person who reasonably believes that the person or property of himself or herself or of another is in immediate, grave danger and that the carrying of the weapon is necessary for the preservation of that person or property." The term immediate refers to the "brief interval before and after the local law enforcement agency, when reasonably possible, has been notified of the danger and before the arrival of its assistance." *Id.* Section 12031(j)(2) permits loaded open carry by a person who "reasonably believes that he or she is in grave danger because of circumstances forming the basis of a current restraining order issued by a court against another person or persons who has or have been found to pose a threat to his or her life or safety." And Section 12031(*l*) expressly ensures the right of self-defense in the home: "Nothing in this section shall prevent any person from having a loaded weapon, if it is otherwise lawful, at his or her place of residence, including any temporary residence or campsite." As a practical matter, should the need for self-defense arise, nothing in section 12031 restricts the open carry of unloaded firearms and ammunition ready for instant loading. *See* Cal. Penal Code § 12031(g).

In their Sur-Reply, Plaintiffs argue that despite its self-defense exception, section 12031 does not preserve the right to self-defense because such a need can arise "in a split second." *See* Pls.' Sur-Reply at 1-

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firearm on their own private property. *See* Cal. Penal Code §§ 12031(b)-(d) and (h).

2. Like the District of Columbia requirement that firearms be "unloaded and dissembled or bound by a trigger lock or similar device," Plaintiffs maintain that a general requirement that handguns be kept unloaded is foreclosed by *Heller*. *See id.*

The Court disagrees. There is an important distinction between section 12031 and the District of Columbia law at issue in *Heller,* which required that firearms in the home be rendered and kept inoperable *at all times. See Heller,* 128 S. Ct. at 2818. Unlike section 12031, the District of Columbia law did not contain, and the Supreme Court declined to infer, an exception for self-defense. *Id.* The *Heller* Court did not reach the question of whether the law would have been constitutional had there been an exception for self-defense. *See id.* As a consequence, the Court declines to assume that section 12031 places an unlawful burden on the right to carry a firearm for self-defense, and Plaintiffs have elected not to challenge section 12031.[6]

Although Plaintiffs have elected not to challenge section 12031, focusing instead on concealed carry pursuant to section 12050, the validity and open carry restrictions of section 12031 are relevant and important here. The *Heller* Court relied on 19th-century cases upholding concealed weapons bans, but

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[6] The Court notes that section 12031 has been challenged and upheld following *Heller*. *See People v. Flores*, 169 Cal. App. 4th 568, 576-77 (Cal. Ct. App. 2008) (holding "section 12031 does not burden the core Second Amendment right announced in *Heller*—the right of law-abiding, responsible citizens to use arms in defense of hearth and home—to any significant degree").

in each case, the court upheld the ban because alternative forms of carrying arms were available. *See State v. Chandler,* 5 La. Ann. 489, 490 (1850) (holding concealed weapons ban "interfered with no man's right to carry arms . . . in full open view"); *Nunn v. State,* 1 Ga. 243, 251 (1846) (holding concealed weapons ban valid so long as it does not impair the right to bear arms "altogether"). *See also Andrews v. State,* 50 Tenn. 165, 178 (1871) (holding that a statute that forbade openly carrying a pistol "publicly or privately, without regard to time or place, or circumstances," violated the state right to keep and bear arms); *State v. Reid,* 1 Ala. 612, 616-17 (1840) (observing that a regulation that amounts to a total ban would be "clearly unconstitutional")). For that reason, in its order denying Defendant's motion to dismiss, this Court emphasized that not *all* concealed weapons bans are presumptively lawful. *See* Order Denying William D. Gore's Motion to Dismiss (Doc. No. 7) at 7-10. *Heller* and the 19th-century cases it relied upon instruct that concealed weapons restrictions cannot be viewed in isolation; they must be viewed in the context of the government's overall scheme. Here, to the extent that Penal Code sections 12025 and 12050 and Defendant's policy burden conduct falling within the scope of the Second Amendment, if at all, the burden is mitigated by the provisions of section 12031 that expressly permit loaded open carry for immediate self-defense. With the foregoing in mind, the Court proceeds to the question of whether Defendant's policy satisfies the appropriate level of judicial

scrutiny.[7] Because Defendant's policy for issuing concealed carry licenses under section 12050 would

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[7] Plaintiffs maintain they are not challenging the constitutionality of any of the California Penal Code sections. Pls.' Reply at 1-3. Instead, Plaintiffs contend they are challenging only the Defendant's policy of issuing concealed weapons licenses, both as applied and on its face. *Id.* In doing so, Plaintiffs urge the Court to hold that section 12050's "good cause" provision is satisfied whenever applicants of good moral character assert self-defense as their basis. *See* Pls.' Reply at 1 ("This means holding section 12050's 'good cause' criterion to be satisfied where CCW applicants of good moral character assert 'self-defense as their basis' "). Defendant, however, maintains Plaintiffs are asserting a back door attack on the constitutionality of section 12050. *See* Def.'s Mem. at 8 ("Plaintiffs are asking the Court to strike the 'good cause' language from the statute"); Def.'s Reply at 1 (Plaintiffs are "asking the court to mandate that the State of California become a 'shall issue' state by forbidding Sheriffs from requiring a showing of 'good cause' for concealed carry licensure").

Section 12050 provides that when applicants meet certain requirements, and the sheriff finds that "good cause" exists, the sheriff "may issue" a license to carry a concealed firearm. Cal. Penal Code § 12050(a). "Section 12050 explicitly grants discretion to the issuing officer to issue or not issue a license to applicants meeting the minimum statutory requirements." *Erdelyi v. O'Brien*, 680 F.2d 61, 63 (9th Cir. 1982); *see also Gifford v. City of Los Angeles*, 88 Cal. App. 4th 801, 805 (Cal. Ct. App. 2001) (observing that "Section 12050 gives "extremely broad discretion" to the sheriff concerning the issuance of concealed weapons licenses"); *Nichols v. County of Santa Clara*, 223 Cal. App. 3d 1236, 1241 (Cal. Ct. App. 1990) (same). Holding that sheriffs must issue concealed carry licenses all individuals who meet the minimum statutory requirements and assert self-defense as their basis would eliminate the discretion afforded sheriffs under section 12050. Accordingly, Plaintiffs' challenge cannot be properly construed as a mere challenge to Defendant's policy.

pass constitutional muster even if it burdens protected conduct, the Court does not need to decide whether the Second Amendment encompasses Plaintiffs' asserted right to carry a loaded handgun in public.

C. Whether Defendant's Policy Satisfies the Appropriate Level of Scrutiny

Plaintiffs acknowledge that the *Heller* Court expressly declined to prescribe the appropriate level of judicial scrutiny for firearms regulations, but they nevertheless argue that "*Heller* points clearly to strict scrutiny." *See* Pls.' Mem. at 9-15. Noting that the *Heller* Court ruled out a rational basis inquiry and the "interest-balancing" approach suggested by Justice Breyer, Plaintiffs contend that when a law interferes with "fundamental constitutional rights," it must be subject to strict scrutiny. Pls.' Mem. at 9. Plaintiffs also maintain that "the trend after *McDonald* is toward adopting strict scrutiny." *See* Pls.' Reply at 11. Defendant argues that, since *Heller,* heightened scrutiny has been reserved for instances in which the "core right" of possession of a firearm in the home is infringed. *See* Def.'s Mem. at 17. Defendant contends the appropriate standard is "reasonableness review," or in the alternative, intermediate judicial scrutiny. *See id.* at 11-17.

The Court is unpersuaded that strict scrutiny is warranted here. Contrary to Plaintiffs' suggestion, fundamental constitutional rights are not invariably subject to strict scrutiny. In the First Amendment context, for example, content-neutral restrictions on the time, place and manner of speech are subject to a form of intermediate scrutiny. *See United States v.*

O'Brien, 391 U.S. 367, 377 (1968). Other restrictions on speech may be held to an even lower standard of review. *See Int'l Soc'y for Krishna Consciousness v. Lee,* 505 U.S. 672, 678-79 (1992) (noting that limitations on expressive activity conducted in a nonpublic forum need only be reasonable, as long as they are viewpoint neutral); *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.,* 473 U.S. 788, 806 (1985) (same). Drawing on First Amendment jurisprudence, several courts have applied intermediate scrutiny in the Second Amendment context. *See, e.g., United States v. Smith,* 2010 WL 3743842, at *8 (S.D. W. Va. Sept. 20, 2010); *United States v. Walker,* 709 F. Supp. 2d 460, 466 (E.D. Va. 2010); *United States v. Marzzarella,* 595 F. Supp. 2d 596 (W.D. Pa. 2009). Accordingly, Plaintiffs are wrong in suggesting that the Court must apply strict scrutiny.

Plaintiffs are also wrong in suggesting there a trend after *McDonald* toward adopting strict scrutiny. In support of such a trend, Plaintiffs cite two cases.[8] The first case is *United States v. Engstrum,* 609 F. Supp. 2d 1227, 1231-32 (D. Utah

[8] Following submission of the case, Plaintiffs filed a Notice of Lodgment of Recent Authority in Support of Plaintiffs' Motion for Partial Summary Judgment. (Doc. No. 62.) The Lodgment contains two cases as exhibits: *United States v. Ligon*, 2010 U.S. Dist. Lexis 116272 (D. Nev. Oct. 20, 2010) and *United States v. Huet*, 2010 U.S. Dist. Lexis 123597 (Nov. 22, 2010). Neither of the cases changes the Court's analysis in a meaningful way: The court in *Ligon* employed strict scrutiny for the sake of argument, and the court in *Huet* did not employ a levels of scrutiny analysis at all, instead focusing on the restriction's impact on the "core right" of possession in the home.

2009). *Engstrum* predated *McDonald* and therefore cannot demonstrate a post-*McDonald* trend. The second case is *State of Wisconsin v. Schultz,* No. 10-CM-138, slip. op. (Wis. Ct. App. Oct. 12, 2010). There, the state appellate court appears to have relied on Justice Thomas' concurrence in *McDonald,* rather than the majority, in deciding the appropriate level of scrutiny. At best, *Engstrum* and *Schultz* reveal that a post-*McDonald* trend toward strict scrutiny may emerge but is thus far indiscernible. To date, a majority of cases citing to *McDonald* and employing some form of heightened scrutiny—most of which are challenges to criminal convictions—have employed intermediate scrutiny. *E.g., United States v. Skoien,* 614 F.3d 638 (7th Cir. 2010); *United States v. Marzzarella,* 614 F.3d 85, 97 (3rd Cir. 2010). The trend prior to *McDonald* was intermediate scrutiny. *See Heller v. District of Columbia,* 698 F. Supp. 2d 179, 188 (D.D.C. 2010) (*Heller II*) (surveying the landscape of post-*Heller* decisions and joining "the majority of courts" in holding that "intermediate scrutiny is the most appropriate standard").

Neither party has cited, and the Court is not aware of, a case in which a court has employed strict scrutiny to regulations that do not touch on the "core" Second Amendment right: possession in the home.[9] If it exists, the right to carry a loaded handgun in public cannot be subject to a more rigorous level of judicial scrutiny than the "core right" to possess firearms in the home for self-defense. *See Heller,* 128

[9] In fact, the Court is not aware of a case in which a court has employed *any* form of heightened scrutiny of regulations that do not affect the "core right."

S. Ct. at 2717 (focusing on the home as the place "where the need for defense of self, family, and property is most acute"); *McDonald,* 130 S. Ct. at 3036 (quoting same). If anything, the opposite is true; unlike possession in the home, carrying a concealed firearm in public presents a "recognized threat to public order" and "poses an imminent threat to public safety." *People v. Yarbrough,* 169 Cal. App. 4th 303, 313-14 (Cal. Ct. App. 2010) (quotation marks and citations omitted); *see also McDonald,* 130 S. Ct. at 3105 (Stevens, J., dissenting) ("firearms kept inside the home generally pose a lesser threat to public welfare as compared to firearms taken outside . . ."). At most, Defendant's policy is subject to intermediate scrutiny.

In contrast with strict scrutiny, intermediate scrutiny, "by definition, allows [the government] to paint with a broader brush." *United States v. Miller,* 604 F. Supp. 2d 1162, 1172 (W.D. Tenn. 2009). In *United States v. Marzzarella,* 614 F.3d 85, 98 (3rd Cir. 2010), the Third Circuit crafted an intermediate scrutiny standard for the Second Amendment based on the various intermediate scrutiny standards utilized in the First Amendment context. Pursuant to that standard, intermediate scrutiny requires the asserted governmental end to be more than just legitimate; it must be either "significant," "substantial," or "important," and it requires the "fit between the challenged regulation and the asserted objective be reasonable, not perfect." *Id.* (citations omitted); *United States v. Huet,* 2010 U.S. Dist. Lexis 123597, at *28 (W.D. Pa. Nov. 22, 2010).

In this case, Defendant has an important and substantial interest in public safety and in reducing the rate of gun use in crime. In particular, the government has an important interest in reducing the number of concealed weapons in public in order to reduce the risks to other members of the public who use the streets and go to public accommodations. *See* Zimring Decl. The government also has an important interest in reducing the number of concealed handguns in public because of their disproportionate involvement in life-threatening crimes of violence, particularly in streets and other public places. *Id.* Defendant's policy relates reasonably to those interests. Requiring documentation enables Defendant to effectively differentiate between individuals who have a bona fide need to carry a concealed handgun for self-defense and individuals who do not.

The Court acknowledges Plaintiffs' argument that many violent gun crimes, even a majority, are committed by people who cannot legally have guns, and the ongoing dispute over the effectiveness of concealed weapons laws. *See* Moody Decl. But under intermediate scrutiny, Defendant's policy need not be perfect, only reasonably related to a "significant," "substantial," or "important" governmental interest. *Marzzarella,* 614 F.3d at 98. Defendant's policy satisfies that standard. Accordingly, the Court DENIES Plaintiffs' motion for summary judgment and GRANTS Defendant's motion for summary judgment on Plaintiffs' right to bear arms claim.

II. Equal Protection

The "Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Center, Inc.,* 473 U.S. 432, 439 (1985); *Shaw v. Reno,* 509 U.S. 630 (1993). When a government's action does not involve a suspect classification or implicate a fundamental right, even intentional discrimination will survive constitutional scrutiny for an equal protection violation as long as it bears a rational relation to a legitimate state interest. *New Orleans v. Dukes,* 427 U.S. 297, 303-04 (1976); *Cleburne,* 473 U.S. at 439; *Lockary v. Kayfetz,* 917 F.2d 1150, 1155 (9th Cir. 1990). However, "[w]here fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized." *Hussey v. City of Portland,* 64 F.3d 1260, 1265 (9th Cir. 1995) (quoting *Harper v. Va. Bd. of Elections,* 383 U.S. 663, 670 (1966)).

A. Defendant's "Good Cause" Policy

For the reasons stated in above, the Court concludes that Defendant's "good cause" policy is valid. Accordingly, the policy does not treat similarly situated individuals differently because not all law-abiding citizens are similarly situated, as Plaintiffs contend. Those who can document circumstances demonstrating "good cause" are situated differently than those who cannot. Therefore, Defendant's "good cause" policy does not violate equal protection.

B. Defendant's Treatment of Honorary Deputy Sheriffs

The Honorary Deputy Sheriffs' Association ("HDSA") is a civilian organization whose primary purpose is to finance projects for the San Diego Sheriff's Department. Plaintiffs allege that Defendant engages in preferential treatment of HDSA members. Pls.' Mem. at 20-22. Defendant denies such allegation and maintains that "Sheriff Gore does not offer special treatment to anyone and membership in the [HDSA] has no bearing on the ability to obtain a CCW license." Def.'s Mem. at 22. Plaintiffs do not contest or attempt to refute the premise that Defendant's policy is facially even-handed, instead asserting arguments consistent with a purely as-applied challenge. *See generally* Pls.' Mem.; Pls.' Reply.

A concealed weapons licensing program administered so as to unjustly discriminate between persons in similar circumstances may deny equal protection. *Guillory v. County of Orange,* 731 F.2d 1379, 1383 (9th Cir. 1984); *see also Kuzinich v. County of Santa Clara,* 689 F.2d 1345, 1349 (9th Cir. 1983) (citing *Yick Wo v. Hopkins,* 118 U.S. 356 (1886)). At this stage, the Court evaluates whether there is actual evidence that would allow a reasonable jury to conclude first, that others similarly situated to Plaintiffs generally have not been treated in a like manner; and second, that the denials of concealed weapons licenses to them were based on impermissible grounds. *See March v. Rupf,* 2001 WL 1112110, at *5 (N.D. Cal. 2001) (citing *Kuzinich v. County of Santa Clara,* 689 F.2d 1345,

1349 (9th Cir. 1983) (applying this test to a claim of "selective prosecution" in zoning decision context)).

In *March v. Rupf,* plaintiffs asserted claims similar to those at issue here, that in granting concealed weapons licenses, sheriffs favored a "privileged class" of individuals. 2001 WL 1112110, at *5 (N.D. Cal. 2001). Plaintiffs submitted more than 700 pages of applications and renewals. *Id.* The court observed that "some applicants were granted concealed weapons licenses after stating on paper basically the same grounds for issuance upon which plaintiffs' applications were denied." *Id.* Nonetheless, the court held there was no genuine issue of material fact because the records did not establish those who received licenses were similarly situated to plaintiffs. *Id.* The records were incomplete—they did not reveal information compiled in background checks, oral interviews and the like—and the records did not establish a causal connection between factors suggesting "privileged class" and the issuance of a concealed weapons license. *Id.* The court concluded that, "without evidence of anything more than vagaries in [] administration," plaintiffs equal protection claim could not survive summary judgment. *Id.*

Like the plaintiffs in *March,* Plaintiffs here cannot demonstrate they were treated differently than similarly situated others. To show disparate treatment, Plaintiffs have offered a number of HDSA renewal applications as a contrast to Plaintiffs initial applications. *See* Exs. U-PP. But the two types of applications are not comparable; renewal applications are generally issued on the spot and

subject to less rigorous documentation requirements than initial applications. *See* Pelowitz Decl. ¶ 12. Just one of the Plaintiffs contends his renewal was denied, and in that case, the renewal was granted following an appeal. *See* Exs. K-S. Accordingly, the evidence introduced by Plaintiffs does not establish or create a genuine issue of material fact regarding whether similarly situated individuals were treated differently. At most, it demonstrates "vagaries in [] administration." *See March,* 2001 WL 1112110, at *5 (N.D. Cal. 2001). Moreover, for the reasons stated above, Plaintiffs have not demonstrated the denials of concealed weapons licenses to them were based on impermissible grounds. Defendant's policy does not favor HDSA members in violation of the equal protection clause of the Fourteenth Amendment.

Accordingly, the Court DENIES Plaintiffs' motion for summary judgment and GRANTS Defendant's motion for summary judgment on Plaintiffs' equal protection claims as they relate to Defendant's "good cause" policy and treatment of HDSA members.

C. Defendant's Residency Requirement[10]

For the reasons stated below, in differentiating between residents (and part-time residents who spend more than six months of the taxable year within the County) and non-residents, Defendant

[10] The only Plaintiff who alleges the residency requirement impacted his application is Edward Peruta, and the parties agree that Peruta's application was denied for lack of "good cause." See Pls.' Consolidated SUF ¶ 15. In addition to challenging the residency requirement as applied to Peruta, Plaintiffs challenge facial validity of the residence requirement.

utilizes means that are substantially related to a substantial governmental interest. Because residents and non-residents are situated differently, the residency requirement of Defendant's policy does not violate equal protection. Therefore, the Court GRANTS Defendant's motion for summary judgment on Plaintiffs' equal protection claim as it relates to Defendant's residency requirement.

III. Right to Travel

The right to travel is usually considered to be one of the rights guaranteed by the Privileges and Immunities Clause of Article IV and the Privileges and Immunities Clause of the Fourteenth Amendment. *See Attorney General of N.Y. v. Soto-Lopez,* 476 U.S. 898, 902 (1986) (plurality) (citations omitted). The right to travel embraces at least three different components: (1) the right of a citizen of one State to enter and to leave another State; (2) the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and (3) for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State. *Saenz v. Roe,* 526 U.S. 489, 500 (1999). However, not all regulations that merely have an effect on travel raise an issue of constitutional dimension. Rather, "[a] state law implicates the right to travel when it actually deters such travel, when impeding travel is its primary objective, or when it uses any classification which serves to penalize the exercise of that right." *Soto-Lopez,* 476 U.S. at 903 (plurality) (internal quotation marks and citations omitted). A law embracing means that are "substantially" related to a

"substantial" government interest will survive a right to travel analysis. *Bach v. Pataki,* 408 F.3d 75, 88 n.27 (2nd Cir. 2005). Plaintiffs allege Defendant's residency requirement "penalizes applicants for traveling and spending time outside of San Diego," FAC ¶ 122, and accordingly, Plaintiffs allege the policy burdens the right to travel. Relying on *Bach,* Defendant contends that its policy passes muster as a bona fide residence requirement. *See* Def.'s Mem. at 30.

Like the restrictions at issue here, the Second Circuit in *Bach* evaluated restrictions that inhibited non-residents from applying for a permit to carry a concealed weapon. Assuming, without deciding, that entitlement to a New York carry license was a privilege under Article IV of the Privileges and Immunities Clause, the Second Circuit concluded that New York had a substantial interest in monitoring gun licensees and that limiting licenses to residents and those working primarily within the state was sufficiently related to that interest. *Bach,* 408 F.3d at 91-94. The Court is unable to discern a meaningful distinction between the issues facing the Second Circuit in *Bach* and those at issue here. Adopting the rationale set forth in that decision, the Court concludes there is no genuine issue of material fact as to whether Defendant's policy violates the right to travel. Accordingly, the Court GRANTS Defendant's motion for summary judgment on Plaintiffs' right to travel claim.[11]

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[11] In addition to their right to travel claim, which arises under the Privileges and Immunities Clause of Article IV and the Privileges and Immunities Clause of the Fourteenth

IV. Due Process

A threshold requirement for asserting a due process claim is the existence of a property or liberty interest. *Board of Regents v. Roth,* 408 U.S. 564, 569 (1972). Plaintiffs' due process claim is governed by *Erdelyi v. O'Brien,* 680 F.2d 61, 63 (9th Cir. 1982), which held that by virtue its discretionary language, Section 12050 does not create a property interest. Moreover, the Court held that the Plaintiff in that case "did not have a liberty interest in obtaining a concealed weapons license." *Id.* at 64. Pursuant to *Erdelyi,* the Court concludes that because Plaintiffs do not have "property or liberty interest in a concealed weapons license, the Due Process Clause did not require [Defendant] to provide [them] with due process before denying [their] initial [license] application[s]." *Id.* In any event, there is nothing to suggest that Defendant's licensing procedures deprive Plaintiffs of the opportunity to be heard at a meaningful time in a meaningful manner. *See Mathews v. Eldridge,* 424 U.S. 319, 333 (1976). The Court GRANTS Defendant's motion for summary judgment on Plaintiffs' due process claim.

Amendment, Plaintiffs have asserted a separate claim for relief under the Privileges and Immunities Clause of Article IV. In its motion for summary judgment, Defendant suggests the claims are identical, *see* Def.'s Mem. at 29, and Plaintiffs have not disputed Defendant's contention, *see generally* Pls.' Mem.; Pls.' Reply. The Court agrees that separate analyses of the claims would be duplicative and dismisses Plaintiffs' Privileges and Immunities claim along with their right to travel claim.

CONCLUSION

For the foregoing reasons, the Court concludes that Defendant's policy does not infringe on Plaintiffs' right to bear arms or violate equal protection, the right to travel, the Privileges and Immunities Clause of Article IV, or due process.[12] Accordingly, the Court DENIES Plaintiffs' Motion for Summary Judgment and GRANTS Defendant's Motion for Summary Judgment.

IT IS SO ORDERED.

DATED: December 10, 2010

[handwritten: signature]
IRMA E. GONZALEZ, Chief Judge
United States District Court

[12] Plaintiffs have also asserted a claim for relief under 42 U.S.C. § 1983 for Defendant's alleged violation of California Penal Code section 12050. Because there is no cause of action under section 1983 for violation of a state statute, *see Moore v. Marketplace Restaurant, Inc.*, 754 F.2d 1336, 1349 (7th Cir. 1985), the Court dismisses the claim.

Appendix E

U.S. Const. amend. II

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

U.S. Const. amend. XIV, § 1

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Cal. Penal Code § 25850

CARRYING A LOADED FIREARM IN PUBLIC; EXAMINATION OF FIREARM BY PEACE OFFICER; PUNISHMENT; ARREST WITHOUT WARRANT

(a) A person is guilty of carrying a loaded firearm when the person carries a loaded firearm on the person or in a vehicle while in any public place or on any public street in an incorporated city or in any public place or on any public street in a prohibited area of unincorporated territory.

(b) In order to determine whether or not a firearm is loaded for the purpose of enforcing this section, peace officers are authorized to examine any firearm carried by anyone on the person or in a vehicle while in any public place or on any public street in an incorporated city or prohibited area of an unincorporated territory. Refusal to allow a peace officer to inspect a firearm pursuant to this section constitutes probable cause for arrest for violation of this section.

(c) Carrying a loaded firearm in violation of this section is punishable, as follows:

(1) Where the person previously has been convicted of any felony, or of any crime made punishable by a provision listed in Section 16580, as a felony.

(2) Where the firearm is stolen and the person knew or had reasonable cause to believe that it was stolen, as a felony.

(3) Where the person is an active participant in a criminal street gang, as defined in

subdivision (a) of Section 186.22, under the Street Terrorism Enforcement and Prevention Act (Chapter 11 (commencing with Section 186.20) of Title 7 of Part 1), as a felony.

(4) Where the person is not in lawful possession of the firearm, or is within a class of persons prohibited from possessing or acquiring a firearm pursuant to Chapter 2 (commencing with Section 29800) or Chapter 3 (commencing with Section 29900) of Division 9 of this title, or Section 8100 or 8103 of the Welfare and Institutions Code, as a felony.

(5) Where the person has been convicted of a crime against a person or property, or of a narcotics or dangerous drug violation, by imprisonment pursuant to subdivision (h) of Section 1170, or by imprisonment in a county jail not to exceed one year, by a fine not to exceed one thousand dollars ($1,000), or by both that imprisonment and fine.

(6) Where the person is not listed with the Department of Justice pursuant to Section 11106 as the registered owner of the handgun, by imprisonment pursuant to subdivision (h) of Section 1170, or by imprisonment in a county jail not to exceed one year, or by a fine not to exceed one thousand dollars ($1,000), or both that fine and imprisonment.

(7) In all cases other than those specified in paragraphs (1) to (6), inclusive, as a misdemeanor, punishable by imprisonment in a county jail not to exceed one year, by a fine not to

exceed one thousand dollars ($1,000), or by both that imprisonment and fine.

(d) (1) Every person convicted under this section who has previously been convicted of an offense enumerated in Section 23515, or of any crime made punishable under a provision listed in Section 16580, shall serve a term of at least three months in a county jail, or, if granted probation or if the execution or imposition of sentence is suspended, it shall be a condition thereof that the person be imprisoned for a period of at least three months.

(2) The court shall apply the three-month minimum sentence except in unusual cases where the interests of justice would best be served by granting probation or suspending the imposition or execution of sentence without the minimum imprisonment required in this section or by granting probation or suspending the imposition or execution of sentence with conditions other than those set forth in this section, in which case, the court shall specify on the record and shall enter on the minutes the circumstances indicating that the interests of justice would best be served by that disposition.

(e) A violation of this section that is punished by imprisonment in a county jail not exceeding one year shall not constitute a conviction of a crime punishable by imprisonment for a term exceeding one year for the purposes of determining federal firearms eligibility under Section 922(g)(1) of Title 18 of the United States Code.

(f) Nothing in this section, or in Article 3 (commencing with Section 25900) or Article 4 (commencing with Section 26000), shall preclude prosecution under Chapter 2 (commencing with Section 29800) or Chapter 3 (commencing with Section 29900) of Division 9 of this title, Section 8100 or 8103 of the Welfare and Institutions Code, or any other law with a greater penalty than this section.

(g) Notwithstanding paragraphs (2) and (3) of subdivision (a) of Section 836, a peace officer may make an arrest without a warrant:

(1) When the person arrested has violated this section, although not in the officer's presence.

(2) Whenever the officer has reasonable cause to believe that the person to be arrested has violated this section, whether or not this section has, in fact, been violated.

(h) A peace officer may arrest a person for a violation of paragraph (6) of subdivision (c), if the peace officer has probable cause to believe that the person is carrying a handgun in violation of this section and that person is not listed with the Department of Justice pursuant to paragraph (1) of subdivision (c) of Section 11106 as the registered owner of that handgun.

Cal. Penal Code § 26035

CARRYING OF LOADED FIREARM AT PLACE OF BUSINESS, PRIVATE PROPERTY EXEMPT FROM APPLICATION OF SECTION 25850

Nothing in Section 25850 shall prevent any person engaged in any lawful business, including a nonprofit organization, or any officer, employee, or agent authorized by that person for lawful purposes connected with that business, from having a loaded firearm within the person's place of business, or any person in lawful possession of private property from having a loaded firearm on that property.

Cal. Penal Code § 26045

CARRYING OF WEAPON TO PROTECT PERSON OR PROPERTY; PERSONS UNDER THREAT FROM SUBJECT OF RESTRAINING ORDER; EXEMPT FROM APPLICATION OF SECTION 25850

(a) Nothing in Section 25850 is intended to preclude the carrying of any loaded firearm, under circumstances where it would otherwise be lawful, by a person who reasonably believes that any person or the property of any person is in immediate, grave danger and that the carrying of the weapon is necessary for the preservation of that person or property.

(b) A violation of Section 25850 is justifiable when a person who possesses a firearm reasonably believes that person is in grave danger because of circumstances forming the basis of a current restraining order issued by a court against another

person who has been found to pose a threat to the life or safety of the person who possesses the firearm. This subdivision may not apply when the circumstances involve a mutual restraining order issued pursuant to Division 10 (commencing with Section 6200) of the Family Code absent a factual finding of a specific threat to the person's life or safety. It is not the intent of the Legislature to limit, restrict, or narrow the application of current statutory or judicial authority to apply this or other justifications to a defendant charged with violating Section 25400 or committing another similar offense. Upon trial for violating Section 25850, the trier of fact shall determine whether the defendant was acting out of a reasonable belief that the defendant was in grave danger.

(c) As used in this section, "immediate" means the brief interval before and after the local law enforcement agency, when reasonably possible, has been notified of the danger and before the arrival of its assistance.

Cal. Penal Code § 26055

POSSESSION OF LOADED WEAPON AT PLACE OF RESIDENCE EXEMPT FROM APPLICATION OF SECTION 25850

Nothing in Section 25850 shall prevent any person from having a loaded weapon, if it is otherwise lawful, at the person's place of residence, including any temporary residence or campsite.

Cal. Penal Code § 26150

APPLICATION FOR LICENSE TO CARRY CONCEALED WEAPON; COUNTY SHERIFF RESPONSIBILITIES; AUTHORITY TO ENTER INTO AGREEMENT WITH HEAD OF MUNICIPAL POLICE DEPARTMENT

(a) When a person applies for a license to carry a pistol, revolver, or other firearm capable of being concealed upon the person, the sheriff of a county may issue a license to that person upon proof of all of the following:

(1) The applicant is of good moral character.

(2) Good cause exists for issuance of the license.

(3) The applicant is a resident of the county or a city within the county, or the applicant's principal place of employment or business is in the county or a city within the county and the applicant spends a substantial period of time in that place of employment or business.

(4) The applicant has completed a course of training as described in Section 26165.

(b) The sheriff may issue a license under subdivision (a) in either of the following formats:

(1) A license to carry concealed a pistol, revolver, or other firearm capable of being concealed upon the person.

(2) Where the population of the county is less than 200,000 persons according to the most recent federal decennial census, a license to carry loaded and exposed in only that county a

pistol, revolver, or other firearm capable of being concealed upon the person.

(c) (1) Nothing in this chapter shall preclude the sheriff of the county from entering into an agreement with the chief or other head of a municipal police department of a city to process all applications for licenses, renewals of licenses, or amendments to licenses pursuant to this chapter, in lieu of the sheriff.

(2) This subdivision shall only apply to applicants who reside within the city in which the chief or other head of the municipal police department has agreed to process applications for licenses, renewals of licenses, and amendments to licenses, pursuant to this chapter.

Cal. Penal Code § 26155

APPLICATION FOR LICENSE TO CARRY CONCEALED WEAPON; RESPONSIBILITY OF MUNICIPAL POLICE DEPARTMENT; AGREEMENT WITH COUNTY SHERIFF

(a) When a person applies for a license to carry a pistol, revolver, or other firearm capable of being concealed upon the person, the chief or other head of a municipal police department of any city or city and county may issue a license to that person upon proof of all of the following:

(1) The applicant is of good moral character.

(2) Good cause exists for issuance of the license.

(3) The applicant is a resident of that city.

(4) The applicant has completed a course of training as described in Section 26165.

(b) The chief or other head of a municipal police department may issue a license under subdivision (a) in either of the following formats:

(1) A license to carry concealed a pistol, revolver, or other firearm capable of being concealed upon the person.

(2) Where the population of the county in which the city is located is less than 200,000 persons according to the most recent federal decennial census, a license to carry loaded and exposed in only that county a pistol, revolver, or other firearm capable of being concealed upon the person.

(c) Nothing in this chapter shall preclude the chief or other head of a municipal police department of any city from entering an agreement with the sheriff of the county in which the city is located for the sheriff to process all applications for licenses, renewals of licenses, and amendments to licenses, pursuant to this chapter.

Cal. Penal Code § 26160

WRITTEN POLICY TO BE MADE AVAILABLE

Each licensing authority shall publish and make available a written policy summarizing the provisions of Section 26150 and subdivisions (a) and (b) of Section 26155.

Cal. Penal Code § 26165

COURSE OF TRAINING REQUIREMENTS FOR NEW AND RENEWAL LICENSE APPLICANTS

(a) For new license applicants, the course of training for issuance of a license under Section 26150 or 26155 may be any course acceptable to the licensing authority, shall not exceed 16 hours, and shall include instruction on at least firearm safety and the law regarding the permissible use of a firearm.

(b) Notwithstanding subdivision (a), the licensing authority may require a community college course certified by the Commission on Peace Officer Standards and Training, up to a maximum of 24 hours, but only if required uniformly of all license applicants without exception.

(c) For license renewal applicants, the course of training may be any course acceptable to the licensing authority, shall be no less than four hours, and shall include instruction on at least firearm safety and the law regarding the permissible use of a firearm. No course of training shall be required for any person certified by the licensing authority as a trainer for purposes of this section, in order for that person to renew a license issued pursuant to this article.

(d) The applicant shall not be required to pay for any training courses prior to the determination of good cause being made pursuant to Section 26202.

Cal. Penal Code § 26185

FINGERPRINT REPORT

(a) (1) The fingerprints of each applicant shall be taken and two copies on forms prescribed by the Department of Justice shall be forwarded to the department.

(2) Upon receipt of the fingerprints and the fee as prescribed in Section 26190, the department shall promptly furnish the forwarding licensing authority a report of all data and information pertaining to any applicant of which there is a record in its office, including information as to whether the person is prohibited by state or federal law from possessing, receiving, owning, or purchasing a firearm.

(3) No license shall be issued by any licensing authority until after receipt of the report from the department.

(b) Notwithstanding subdivision (a), if the license applicant has previously applied to the same licensing authority for a license to carry firearms pursuant to this article and the applicant's fingerprints and fee have been previously forwarded to the Department of Justice, as provided by this section, the licensing authority shall note the previous identification numbers and other data that would provide positive identification in the files of the Department of Justice on the copy of any subsequent license submitted to the department in conformance with Section 26225 and no additional application form or fingerprints shall be required.

(c) If the license applicant has a license issued pursuant to this article and the applicant's fingerprints have been previously forwarded to the Department of Justice, as provided in this section, the licensing authority shall note the previous identification numbers and other data that would provide positive identification in the files of the Department of Justice on the copy of any subsequent license submitted to the department in conformance with Section 26225 and no additional fingerprints shall be required.

Cal. Penal Code § 26350

OPENLY CARRYING AN UNLOADED HANDGUN; PENALTIES; DEFINITION

(a) (1) A person is guilty of openly carrying an unloaded handgun when that person carries upon his or her person an exposed and unloaded handgun outside a vehicle while in or on any of the following:

(A) A public place or public street in an incorporated city or city and county.

(B) A public street in a prohibited area of an unincorporated area of a county or city and county.

(C) A public place in a prohibited area of a county or city and county.

(2) A person is guilty of openly carrying an unloaded handgun when that person carries an exposed and unloaded handgun inside or on a vehicle, whether or not on his or her person, while in or on any of the following:

(A) A public place or public street in an incorporated city or city and county.

(B) A public street in a prohibited area of an unincorporated area of a county or city and county.

(C) A public place in a prohibited area of a county or city and county.

(b) (1) Except as specified in paragraph (2), a violation of this section is a misdemeanor.

(2) A violation of subparagraph (A) of paragraph (1) of subdivision (a) is punishable by imprisonment in a county jail not exceeding one year, or by a fine not to exceed one thousand dollars ($1,000), or by both that fine and imprisonment, if both of the following conditions exist:

(A) The handgun and unexpended ammunition capable of being discharged from that handgun are in the immediate possession of that person.

(B) The person is not in lawful possession of that handgun.

(c) (1) Nothing in this section shall preclude prosecution under Chapter 2 (commencing with Section 29800) or Chapter 3 (commencing with Section 29900) of Division 9, Section 8100 or 8103 of the Welfare and Institutions Code, or any other law with a penalty greater than is set forth in this section.

(2) The provisions of this section are cumulative and shall not be construed as restricting the application of any other law.

However, an act or omission punishable in different ways by different provisions of law shall not be punished under more than one provision.

(d) Notwithstanding the fact that the term "an unloaded handgun" is used in this section, each handgun shall constitute a distinct and separate offense under this section.

Cal. Penal Code § 26400

CARRYING AN UNLOADED FIREARM THAT IS NOT A HANDGUN IN AN INCORPORATED CITY OR CITY AND COUNTY; PENALTIES; DEFINITION

(a) A person is guilty of carrying an unloaded firearm that is not a handgun in an incorporated city or city and county when that person carries upon his or her person an unloaded firearm that is not a handgun outside a vehicle while in the incorporated city or city and county.

(b) (1) Except as specified in paragraph (2), a violation of this section is a misdemeanor.

(2) A violation of subdivision (a) is punishable by imprisonment in a county jail not exceeding one year, or by a fine not to exceed one thousand dollars ($1,000), or by both that fine and imprisonment, if the firearm and unexpended ammunition capable of being discharged from that firearm are in the immediate possession of the person and the person is not in lawful possession of that firearm.

(c) (1) Nothing in this section shall preclude prosecution under Chapter 2 (commencing with

Section 29800) or Chapter 3 (commencing with Section 29900) of Division 9, Section 8100 or 8103 of the Welfare and Institutions Code, or any other law with a penalty greater than is set forth in this section.

(2) The provisions of this section are cumulative and shall not be construed as restricting the application of any other law. However, an act or omission punishable in different ways by different provisions of law shall not be punished under more than one provision.

(d) Notwithstanding the fact that the term "an unloaded firearm that is not a handgun" is used in this section, each individual firearm shall constitute a distinct and separate offense under this section.

Appendix F

San Diego County Sheriff's Department
Concealed Weapons License Policy Statement
EXCERPTS

SUBJECT: CONCEALED WEAPONS LICENSE

POLICY STATEMENT:

The Sheriff may issue a concealed weapon license to law-abiding residents of San Diego County who comply with the provisions of Penal Code Section 12050.

In accordance to PC 12050 and subject to department procedure, any resident of San Diego County may submit an application to the Sheriff's License Division.

Each applicant will be interviewed by License Division Staff to determine initial eligibility. Applications accepted will be individually investigated to determine residency, moral character, and good cause. Applicants will be required to submit to documentation to support and demonstrate their need.

* * *

San Diego County Sheriff's Department CCW Key Points to Remember While Interviewing or Giving Out Information on CCW's EXCERPTS

- The authority and guidelines for CCW comes from Penal Code § 12050 et al.
- California is NOT a "shall issue State" (may issue)
- Each County in the State approves CCW privileges based upon its own definition of "good cause"
- In SD County, "good cause" has been determined to be "circumstances which would make a person a specific target in contrast to a random one.
- Applicants are requires to demonstrate the specific situation that places them in danger and submit evidence of current incidents which documents their claim. Licenses are NOT issued based on "fear" alone.
- The Sheriff's policy statement states . . . "Any resident of San Diego County may submit an application to carry a concealed weapon to the Sheriff's License. Each applicant is individually interviewed and investigated to establish good moral character, residency in San Diego County and that good cause exist for issuance.
- CCW licenses issued in San Diego County primarily are related to business purposes. All applicants must produce proof they are an actual legitimate business; by this we mean fully credentialed. Business ownership

does not automatically constitute granting of the license and must demonstrate how it places them in danger. The same applies for licenses issued for personal protection; applicants must provide documentation e.g., restraining orders, law enforcement referrals, documented victim case incidents or threats. A single random act of violence may not necessarily be considered good cause for issuance. The determination for issuance or recommendation to deny is based on the results of the background investigation.

* * *

Declaration of Blanca Pelowitz in Support of Defendant's Motion for Summary Judgment EXCERPTS

I, BLANCA PELOWITZ, declare as follows:

1. I am the Manager of the San Diego County Sheriff's Department License Division which is responsible for administering the concealed weapons permit program for the County of San Diego ("County").

* * *

2. The License Division is responsible for all the regulatory licensing, criminal registrations and State mandated licenses which include the processing of all carry concealed weapon (CCW) licenses in the County. In my capacity, I have been designated to act as the Sheriff's sole authorized representative for reviewing CCW applications and making the final determination for the issuance of CCW licenses through the Law Enforcement Service Bureau.

* * *

6. California is not a "Shall Issue" or "Right to Carry" State. California Penal Code §12050-12054 sets forth the general criteria that applicants for concealed weapon licenses must meet. This requires applicants to be of good moral character, a resident of the County they apply in, demonstrate good cause and take a firearms course.

* * *

7. Good Cause in this context is defined by this County to be a set of circumstances that distinguish the applicant from the mainstream and

causes him or her to be placed in harm's way. Simply fearing for one's personal safety alone is not considered good cause. This criterion can be applied to situations related to personal protection as well as those related to individual businesses or occupations.

Good cause is also evaluated on an individual basis. Reasons applicants request a license will fall into one of the four general categories originally set by Judge Huffman in 1987. Since the 1999 State mandates, the scrutiny in accepting applications and supporting documentation became more prevalent in the initial processing. For instance, all new applicants must provide supporting documentation. If applying for business purposes, proof it is a legitimate and fully credentialed business is required as well as having to demonstrate and elaborate good cause for carrying a firearm. The same requirement of documentation applies to those applying strictly for personal protection (i.e., self-defense). In addition, the required documentation, such as restraining orders, letters from law enforcement agencies or the DA familiar with the case, is discussed with each applicant.

* * *