No. 16-894

# In the Supreme Court of the United States

EDWARD PERUTA, *et al.*,
*Petitioners*,
v.
CALIFORNIA, *et al.*,
*Respondents*.

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

## BRIEF IN OPPOSITION FOR COUNTY OF YOLO AND SHERIFF ED PRIETO


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## ACTUAL QUESTIONS PRESENTED

Some California sheriffs, including Respondents Sheriff Gore (San Diego County) and Sheriff Prieto (Yolo County) require an applicant for a concealed weapon carry permit to show heightened risk of harm as "good cause" under state law for issuance of the permit. Petitioners' applications were denied for lack of such a showing. Although Petitioners concede the Second Amendment does not directly confer a right to carry a concealed weapon in public places, they assert such a right nonetheless arose because California forbids open carry and the Second Amendment compels at least one public gun carry option be available.

Because their premise that "open carry is forbidden by state law" is objectively false, Petitioners offer a broader, and thus more enticing, question than actually exists. California neither generally prohibits the open carrying of firearms outside city limits, nor precludes citizens from openly carrying them on private property, even that accessible to the general public, within incorporated areas. Since some restrictions on urban firearm carry exist, and Petitioners dislike those restrictions, they mischaracterize them as tantamount to bans. Thus, the true issue is whether the Second Amendment confers the right to openly carry loaded firearms in the public areas of municipalities, which Petitioners never sought to do and the Founders did not contemplate.

The specific questions presented are:

(a) Do Petitioners have standing to assert a constitutional right to publicly carry a weapon other than in a concealed fashion?

(b) If so, does the Second Amendment confer a right to carry a loaded weapon in urban public places?

(c) If such a public carry right exists, does California forbid, or rather merely burden, that right?

The correct answers to these questions reveal no need for review of the Ninth Circuit's decision.

## PARTIES

Petitioners and Plaintiffs-Appellants below are: Edward Peruta; Michelle Laxson; James Dodd; Leslie Buncher, Dr.; Mark Cleary; California Rifle and Pistol Association Foundation.

Respondents and Defendants-Appellees below are: County of San Diego; William D. Gore, individually and in his capacity as Sheriff.

Respondent and Intervenor below is: State of California.

Respondents and Plaintiffs-Appellants below are: Adam Richards; Second Amendment Foundation; Calguns Foundation, Inc.; Brett Stewart.

Respondents and Defendants-Appellees below are: Sheriff Ed Prieto; County of Yolo.

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## RESPONDENTS' STANDING

The County of Yolo and its Sheriff, Ed Prieto, who, like Sheriff Gore (App-9), requires more than expression of a general desire for self-defense for issuance of a concealed weapon permit, are defendants in a declaratory relief action entitled *Adam Richards, et al., v. Ed Prieto*, E. D. Cal. Case No. 2:09-CV-01235 MCE. The district court granted summary judgment for Respondents against the *Richards* plaintiffs' claim that the Second Amendment required Sheriff Prieto to grant their concealed carry permit applications regardless of the lack of any heightened threat or specific need for defensive carry. 821 F. Supp. 2d 1169 (E.D. Cal. 2011). Although briefed separately from *Peruta* in the Ninth Circuit, the cases were orally argued concurrently to the same panel, leading to a memorandum decision in *Richards* reversing the summary judgment because of the precedential panel opinion in *Peruta*. *Richards v. Prieto*, 560 F. Appx. 681 (9th Cir. 2014). See App-4.

Although Sheriff Gore did not seek *en banc* rehearing in *Peruta*, Sheriff Prieto and Yolo County did so successfully in *Richards* (782 F.3d 417 (9th Cir. 2015)), leading to the consolidation of *Richards* with *Peruta* for the rehearing. The *en banc* court affirmed both summary judgments by the same opinion for identical reasons. See App-1, 45 (824 F.3d 919, 925, and 942 (9th Cir. 2016)). Thus Sheriff Prieto and Yolo County have standing to oppose the petition under Supreme Court Rule 12(4) and 12(6). Indeed, because the *Peruta* plaintiffs seek the same declaratory relief as the *Richards* plaintiffs sought, a grant of *certiorari* in *Peruta* would equate to a direct grant in *Richards* in

that Sheriff Prieto's concealed carry permit policy would be determined by this Court's decision on the merits.

## ADDITIONAL PERTINENT STATUTES

Petitioners' Appendix lacks numerous California statutes that directly bear on their petition:

Penal Code § 17030 – "As used in this part, 'prohibited area' means any place where it is unlawful to discharge a weapon."

Penal Code § 26040 – "Nothing in Section 25850 shall prevent any person from carrying a loaded firearm in an area within an incorporated city while engaged in hunting, provided that the hunting at that place and time is not prohibited by the city council."

Penal Code § 26383 – "Paragraph (1) of subdivision (a) of Section 26350 does not apply to, or affect, the open carrying of an unloaded handgun by a person when done within a place of business, a place of residence, or on private property, if done with the permission of a person who, by virtue of subdivision (a) of Section 25605, may carry openly an unloaded handgun within that place of business, place of residence, or on that private property owned or lawfully possessed by that person."

Penal Code § 26388 – "Section 26350 does not apply to, or affect, the open carrying of an unloaded handgun on publicly owned land, if the possession and use of a handgun is specifically permitted by the managing agency of the land

and the person carrying that handgun is in lawful possession of that handgun."

Places where it is illegal to discharge a weapon under § 17030 include:

Penal Code § 602, subd.(l)(4) – "Except as provided in subdivisions (u), (v), and (x), and Section 602.8, every person who willfully commits a trespass by any of the following acts is guilty of a misdemeanor:

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(l) Entering any lands under cultivation or enclosed by fence, belonging to, or occupied by, another, or entering upon uncultivated or unenclosed lands where signs forbidding trespass are displayed at intervals not less than three to the mile along all exterior boundaries and at all roads and trails entering the lands without the written permission of the owner of the land, the owner's agent, or the person in lawful possession, and any of the following:

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4) Discharging any firearm."

Penal Code § 626.9, subd. (b) - (c), (e)(4) –

"(b) Any person who possesses a firearm in a place that the person knows, or reasonably should know, is a school zone, as defined in paragraph (1) of subdivision (e), unless it is with the written permission of the school district superintendent, his or her designee, or

equivalent school authority, shall be punished as specified in subdivision (f).

(c) Subdivision (b) does not apply to the possession of a firearm under any of the following circumstances:

(1) Within a place of residence or place of business or on private property, if the place of residence, place of business, or private property is not part of the school grounds and the possession of the firearm is otherwise lawful.

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(e) As used in this section, the following definitions shall apply:

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(4) "School zone" means an area in, or on the grounds of, a public or private school providing instruction in kindergarten or grades 1 to 12, inclusive, or within a distance of 1,000 feet from the grounds of the public or private school."

Fish & Game Code § 3004 –

"(a) It is unlawful for a person, other than the owner, person in possession of the premises, or a person having the express permission of the owner or person in possession of the premises, while within 150 yards of an occupied dwelling house, residence, or other building, or within 150 yards of a barn or other outbuilding used in connection with an occupied dwelling house, residence, or other building, to either hunt or discharge a firearm or other deadly weapon

> while hunting. The 150-yard area is a 'safety zone.'
>
> (b) It is unlawful for a person to intentionally discharge a firearm or release an arrow or crossbow bolt over or across a public road or other established way open to the public in an unsafe and reckless manner."

## ADDITIONAL STATEMENT OF THE CASE

### A. THE DISTRICT COURTS

In both actions, the sole defendants in the district courts were the counties and sheriffs. App-205 (*Peruta v. County of San Diego*, 758 F.Supp.2d 1106 (S.D. Cal. 2010)); *Richards v. County of Yolo*, 821 F.Supp.2d 1169 and 1172, fn. 2 (E.D. Cal. 2011) (noting that the State was not a party). In neither suit did any plaintiff allege legislative frustration of an attempt, or even a desire, to openly carry a firearm; rather they solely alleged discretionary denial of concealed carry permits. App-206; *Richards*, at 1172 – 1173.[1]

In each case, the parties brought cross-motions for summary judgment. App-206; *Richards*, 821 F.Supp.2d at 1171. Each district judge's decision stated that the dispute arose from the sheriff's denial of those plaintiffs' concealed carry permit applications. App-214; *Richards*, at 1173. In *Richards*, Sheriff Prieto's motion asserted concealed public carry did not qualify

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[1] The plaintiffs' personal disinterest in open carry ostensibly stemmed from the fact a concealed weapon could lawfully be borne loaded in urban public places, whereas an openly carried gun could not be loaded prior to the imminence of peril.

as a constitutional right. See *Richards*, at 1174 (describing Sheriff Prieto's position as "the Second Amendment has never been interpreted as granting citizens the right to carry a concealed weapon in public").[2] Richards' motion sought a declaration that various portions of California's concealed carry statute were unconstitutional both on its face and as applied to those plaintiffs. *Id*., at 1177, fn. 2.

The *Peruta* plaintiffs pursued a similar, though more veiled, course. App-219 ("Plaintiffs contend they are challenging only the Defendant's policy of issuing concealed weapons licenses, both as applied and on its face * * * Plaintiffs' challenge cannot be properly construed as a mere challenge to Defendant's policy").

Because in both suits the plaintiffs asserted California law banned effective (i.e., loaded) open carry as the premise for their arguments the Sheriffs' policies resulted in a *de facto* prohibition on *all* public carry, each district court discussed the availability of open carry in public places. App-215, *et seq*.; *Richards*, at 1175. Neither decision indicated any plaintiff directly challenged the constitutionality of the open carry statutes; and the *Peruta* district court confirmed the absence of such a challenge. App-217 ("Plaintiffs have elected not to challenge [former] section 12031, focusing instead on concealed carry pursuant to [former] section 12050"). Nor did either the *Peruta* or

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[2] In *Peruta*, Sheriff Gore unsuccessfully made the same argument via Rule 12(b) motion. See 758 F.Supp.2d at 1114 ("in its order denying Defendant's motion to dismiss, this Court emphasized that not all concealed weapons bans are presumptively lawful").

*Richards* plaintiffs ever assert that any local ordinance restricted their right to public carry.

Although both district courts held for the defendants without deciding whether (or where) the Second Amendment pertains outside one's residential premises, they diverged somewhat in their actual rulings. *Peruta* declined to categorically pronounce concealed public carry as outside the Second Amendment. App-218. In contrast, the *Richards* district court expressly concluded that "the Second Amendment does not create a fundamental right to carry a concealed weapon in public." 821 F.Supp.2d at 1174.

## B. THE PANEL OPINIONS

The *Peruta* panel majority found that the Second Amendment protects a right to concealed public carry, at least where open carry is unavailable, and held that, because California (purportedly) bans open carry, its sheriffs must issue concealed carry permits to otherwise qualified applicants desiring general self-defense.[3] App-90, 135–140, 143–144. The panel majority forgave the plaintiffs' for solely challenging the "licensing scheme for concealed carry" because that permit was the only "practical" way to lawfully carry a

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[3] The panel majority partially based its conclusion on the geographical fallacy that San Diego County is entirely incorporated. App-136. Actually, most of that county is unincorporated. http://www.sandiegocounty.gov/content/dam/sdc/common_components/images/dpw/recyclingpdfs/UnincorporatedMapCommunities.pdf. Similarly, over 621,000 of Yolo County's 653,549 total acres consist of unincorporated land. http://www.yolocounty.org/home/showdocument?id=14351, pp. 2-3.

weapon in public. App-141, 145 ("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"). The panel majority made no mention of any local firearm ordinance regarding open carry as bearing on its analysis.

Judge Thomas' dissent criticized the majority as unnecessarily deciding statutory questions not presented, rather than whether the Second Amendment protects concealed public carry and, if so, whether Sheriff Gore's permitting policy infringed such a right. App-162 ("[i]n this case, we are not presented with a broad challenge to restrictions on carrying firearms outside the home") and 165 ("[t]he 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"). The dissent explained that, because colonial, antebellum, and post-Civil war era laws upheld concealed carry restrictions, culminating in this Court's corresponding (and unqualified) proclamation by illustration in *Robertson v. Baldwin* (1897) 165 U.S. 275, 281–282, carrying a concealed weapon falls outside the Second Amendment. As concealed was the only manner of carry the Plaintiffs sought to exercise, and they had not named the State as a defendant, Judge Thomas concluded that the existence of a different form of carry that might be protected was immaterial. App-193 ("[i]f 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").

In *Richards*, the same panel summarily concluded that, in light of the disposition of *Peruta*, the district court erred in denying the plaintiffs' motion for summary judgment Judge Thomas concurred with the conclusion that *Peruta* required reversing and remanding the case but noted he otherwise would have held "Yolo County's 'good cause' requirement is constitutional because carrying concealed weapons in public is not conduct protected by the Second Amendment." 560 F. Appx., at 682.

### C. THE *EN BANC* DECISION

At *en banc* oral argument, Peruta's counsel confirmed his clients' non-challenge to California's public carry statutes and asserted the immateriality of whether the Second Amendment embraces concealed carry *per se*. Pet, p. 12.[4] Richards' counsel approached the matter somewhat differently, asserting that *Heller*'s definition of "bear" as "carry," which includes items inside clothing or pockets, implicitly recognized that concealed carry falls within the Second Amendment, albeit subject to a state's choice to prefer open carry. Oral Arg. Record, at 29:45–30:16. California's Solicitor General acknowledged the Second Amendment applied to some extent beyond one's home (*ibid*), but asserted that protection did not encompass concealed carry in urban public areas, which views Sheriff Prieto's counsel echoed.[5]

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[4] See Oral Arg. Rec. at 1:00, 2:00, and 3:40 marks.

[5] *Id.*, at 40:50, 57:34, and 1:00:50.

The *en banc* majority opinion recited some of the California statutes governing open and concealed public carry (App-5–6), noting that, although the plaintiffs attacked the California statutes as a comprehensive restriction on both concealed and open carry, "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." App-10. Accordingly, the majority did not address "whether the Second Amendment protects some ability to carry firearms in public, such as open carry." *Ibid* and App-45. Instead, the majority decided that question truly presented in the district courts – whether the Second Amendment protects the right to carry concealed weapons in public – responding in the negative. App-11 and 44. The majority placed particular emphasis on the respective plaintiffs' failures to assert direct constitutional protection for concealed public carry. "Notably, Plaintiffs do *not* contend that there is a free-standing Second Amendment right to carry concealed firearms." App-10.

The three concurring judges agreed with the majority's reasoning and added that, even if the Second Amendment protected public concealed carry, California's laws would survive intermediate scrutiny. App-46. The primary dissent asserted that *Heller* clearly indicated the Second Amendment extends beyond the home and thus condoned concealed carry prohibitions on the assumption open carry is available. App-54, 63-64. The primary dissent concluded that, since California law (supposedly) precludes open carry, California must allow concealed carry. App-55, 72, 74. See App-84.

## WHY CERTIORARI SHOULD BE DENIED

### A. PETITIONERS NEITHER SOUGHT TO OPENLY CARRY NOR CHALLENGED THOSE STATUTORY RESTRICTIONS

As highlighted above, the record confirms:

1. No plaintiff in either suit ever sought to carry openly, either by conduct before suit or by declaratory/injunctive relief prayed for in suit. See generally *Hightower v. City of Boston*, 693 F.3d 61, 70 (1st Cir. 2012) (plaintiff lacked standing to allege Second Amendment violations re open carry laws where she never sought to openly carry pre-suit). Although a party need not incur actual arrest or prosecution to challenge a statute, here the record lacks pleading or evidence any plaintiff desired to openly carry in public places or was deterred from doing so by a particular state law. Plaintiffs bear the burden of showing Article III standing, by actual and imminent threat of injury, rather than hypothetical disagreement, for each type of relief sought. *Summers v. Earth Island Institute,* 555 U.S. 488, 493 (2009). See *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2342, 189 L. Ed. 2d 246 (2014) (standing for pre-enforcement relief requires allegation of intent to act in putatively protected manner and existence of credible threat of prosecution); *Colorado Outfitters Ass'n v. Hickenlooper*, 823 F.3d 537, 551 (10th Cir. 2016) (that plaintiff might at some future time desire to purchase oversized gun magazines insufficient for standing to mount 2d Amend. challenge to magazine size statute).

2. Accordingly, no plaintiff ever facially challenged, by pleading or otherwise, the constitutionality of

California's open carry laws; rather all plaintiffs disavowed such intent. Essentially, they used the putative ban on open carry as an analytical springboard for asserting the Second Amendment entitled them to concealed carry;

3. Prior to the petition, no plaintiff ever pled or otherwise asserted a county ordinance banned open carry; their positions rested entirely on state statutes. No such Yolo County ordinance exists. And the petition itself cites the San Diego ordinance just once (fn. 1), elsewhere always referencing the *state's* purported ban.[6] The petition does not assert that San Diego County interprets its ordinance to apply to defensive discharges, rather than to hunting or target shooting;

4. The *Richards* plaintiffs did facially challenge the constitutionality of California's concealed carry law;

5. Sheriff Prieto moved for summary judgment on the ground concealed public carry lies outside the Second Amendment, and the district court so ruled. Sheriff Gore mounted the same challenge in the district court and lost on the pleadings;

6. During the *en banc* oral argument, all counsel directly debated whether the Second Amendment encompasses concealed carry without any objection by the plaintiffs' attorneys that question wasn't properly before the court. To the contrary, Richards' counsel directly asserted concealed carry falls within the

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[6] See Petition, p. 1 ("California law prohibits open carry"), p. 4 ("California has made the policy decision to prohibit individuals from openly carrying firearms"), p. 7 ("California law prohibits openly carrying a handgun outside the home"), etc.

Second Amendment (subject to a state's right to opt for open carry instead).

In short, the Petitioners exclusively attempted to carry concealed guns, and exclusively challenged the corresponding laws and policies. Sheriff Prieto, at all case levels, asserted concealed public carry fell outside the Second Amendment, as did Sheriff Gore and the State, a proposition the *Richards* district court and *Peruta* panel dissent embraced. Counsel for both sides argued the constitutionality of concealed carry during *en banc* oral argument, which question the *en banc* majority decided. Thus, the *en banc* court squarely answered that question put before it by the underlying facts, the district court pleadings, motions, and decisions, and Sheriff Prieto's rehearing petition. Because all plaintiffs exclusively sought and pled one type of carry – concealed – the *en banc* court lacked an obligation to resolve Petitioners' *argument* that "some outlet" for the public carry right must exist. See *Hightower*, 693 F.3d at 73 [holding permit restrictions on concealed carry fall outside the Second Amendment, without conditioning that view on the availability of open carry).

For these dispositive reasons, Petitioners' challenge to the *en banc* decision as addressing a non-issue fails. And, since Petitioners admit the Second Amendment does not require a state to allow concealed carry, the *only* type of carry they sought, they lack standing to seek the relief the petition requests.

## B. WHETHER THE SECOND AMENDMENT RIGHT EXTENDS OUTSIDE ONE'S OWN HOME ISN'T HERE DISPUTED

Even if Petitioners possess standing to challenge anything other than California's statutory restriction on concealed carry, the petition still lacks merit. As described above, neither in the district nor circuit courts did Sheriff Prieto (or the State of California during rehearing) assert the absence of a right to "carry" a weapon outside one's "home."[7] To the contrary, Sheriff Prieto's counsel affirmatively stated throughout the lower courts that, because from a colonial perspective the carrying of a gun away from one's abode was common for both hunting and defense – the core Second Amendment rights – no such dispute existed in this litigation. Settlers did not live in apartments or high-density housing, so the notion of limiting gun carry to the "house" or cabin, rather than including the surrounding lands, would have been absurd, especially given the lack of publicly-owned land outside cities and towns, or of private property physical boundaries, like walls and fences, in those

[7] Sheriff Prieto views the term "home," under *Heller*, as encompassing one's residential property, both house and land, where one might either keep/store or "carry" a gun. This definition might not matter in urban Washington, D.C., but would have practical significance in much of rural America (like Yolo County) where people reside on acreage and could *carry* a weapon while hunting or engaging in target practice/marksmanship.

frontier/rural areas.[8] Accordingly, the *en banc* court confronted no such threshold scope issue to resolve.

As the petition roughly acknowledges, each circuit, except one, that has considered public carry questions similarly declined to delineate the Second Amendment's geographical boundaries, but instead merely *assumed* some extra-residential purview. Pet., p. 17. In *Moore v. Madigan*, 702 F.3d 933, 935–36 (7th Cir. 2012), the Seventh held the right extends beyond the home, whereas the First,[9] Second, Third, Fourth, Ninth (in these suits), and Eleventh[10] have declined to address the issue. Further, *Moore* (at 941) *distinguished*, rather than disagreed with, *Kachalsky v. County of Westchester*, 701 F.3d 81, 99 (2d Cir. 2012), *cert. den*. 133 S. Ct. 1806 (2013), as involving a heightened need (i.e., "good cause") requirement for a public carry permit, rather than a total prohibition. Thus there is no circuit "split" to resolve – *Moore*'s holding does not clash with either the *Peruta / Richards* decision or the other circuits' opinions. Although Petitioners stretch several state court decisions to confine *Heller* to the home, this litigation does not

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[8] See R. Norejko, *From Metes and Bounds to Grids or a Cliffs Notes History of Land Ownership in the United States*, p. 6, available at http://www.iaao.org/uploads/Norejko.pdf.

[9] *Hightower*, 693 F.3d at 72, fn. 8. See *Powell v. Tompkins*, 783 F.3d 332, 347 (1st Cir. 2015), *cert. den*., 136 S. Ct. 1448 (2016) (purview of 2d Amend. outside the home remains an open question).

[10] *GeorgiaCarry.Org, Inc. v. U.S. Army Corps of Engineers*, 788 F.3d 1318, 1325 (11th Cir. 2015)

present a fitting vehicle for review of that far broader question.

## C. NO PUBLIC OPEN CARRY BAN EXISTS IN CALIFORNIA

In addition to overstating the constitutional issue, the petition rests on a fallacious factual premise – that California bans open carry in public places. Synthesizing the California statutes contained in Petitioners' appendix with those set forth above yields the following:

> (1) Openly carrying firearms in unincorporated/rural areas is allowed with quite limited restrictions: trespassing; hunting without permission within 150 yards of a dwelling; near schools; inside public buildings (without permission), and near some miscellaneous areas infrequently encountered, such as transit stations and munitions plants.[11] Petitioners' general claim to the contrary is belied by their failure to specifically describe what constitutes a "prohibited area" for the purpose of §§ 25850 and 26350; instead they rely on the San Diego County ordinance. Since Petitioners do not, and cannot, assert the Second Amendment gives them a right to trespass or carry on another's land

[11] See Cal. Health & Safety Code § 12084 (munitions); Penal Code § 171b(b)(4) (inside occupied public buildings without permission); Penal Code § 171.7 (posted areas of public transit facilities).

without permission[12], and the restrictions on hunting (without permission) near occupied homes and shooting near schools only minimally affect the right to carry firearms,[13] their position necessarily rests on the purported inability to carry in urban areas;

(2) Although California more restricts public carry in municipalities, Petitioners acknowledge some municipal places where open (and permit-less concealed) carry is allowed, including one's own residential premises, place of work or business (Penal Code §§ 26035, 26065), and in any location when immediate serious danger is perceived (§ 26045). But

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[12] See *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1264 (11th Cir. 2012) ("there is no constitutional infirmity when a private property owner exercises his, her, or its—in the case of a place of worship—right to control who may enter, and whether that invited guest can be armed, and the State vindicates that right").

[13] During the *en banc* oral argument (at 1:06:45–1:07:22) Petitioners' counsel overstated the restriction as applying to all carry near homes, rather than to exclusively carry while *hunting* – an important distinction because precluding hunting within 150 yards of an occupied home, absent permission, very minimally restricts the hunter relative to protecting the homeowner. See also *GeorgiaCarry.Org*, 788 F.3d at 1326 (exclusion of firearms from specific area of federal land permissible because plaintiff could choose to camp elsewhere). Shooting at game near a home entails a much higher risk to the occupant than purely defensive use of a gun to thwart criminal attack (which typically involves a much larger, slower, and closer target), a distinction the statute preserves.

> Petitioners paint these as narrow, and thus merely nominal, exceptions. (Pet., pp. 4–5.) Tellingly, Petitioners omit the other urban areas where open carry is lawful – all other private property not open to the public (with owner permission);[14] as well as all private property open to the public (with owner permission) and all publicly-owned land (with owner permission), if the gun is unloaded;[15] and anywhere while hunting.[16]

Contrary to Petitioners' summary mischaracterization, the urban places where California allows open carry by ordinary citizens are quite meaningful. To begin with, one's own residential property and workplace are significant because that's where most Californians spend most of their time. Furthermore, the hunting exception preserves that core Second Amendment right so vital to the colonists and many subsequent Americans alike. And the exception for private property, both residential and commercial, not open to the general public, matters because it encompasses visiting friends, family, and clients/customers/professionals in their homes and offices.

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[14] Cal. Penal Code §§ 26010 (loaded) and 26383 (unloaded).

[15] Sections 26383 (private property), and 26388 (public land).

[16] Section 26366.

Left are those public places, either privately or publicly-owned, where masses of people may congregate (restaurants, grocery stores, malls, cinemas, stadiums/arenas, etc.) and thus where the risk of danger from inadvertent or ill-advised discharge increases. Even there, no "ban" on open carry exists; rather the gun may (upon owner permission) be borne unloaded, and loaded if and when urgent need for defense arises.[17]

Since the premise that California law prohibits open carry of firearms is essentially false, Petitioners' argument collapses. During the panel briefing, the plaintiffs decried the urban carry restrictions as too onerous because of the supposed right to be instantly ready to shoot at all times and in all places. But *Heller* acknowledged the Second Amendment doesn't extend that universally. *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008) (deeming presumptively valid "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings"); *Kachalsky*, 701 F.3d at 99 (so citing *Heller*). Petitioners have never articulated why a stadium or restaurant is any less sensitive than a school or courthouse. The petition maintains this silence, preferring to advance the fiction of a total ban, except to criticize the immediate need for self-defense exception as useless because there would be no gun available to load. This portrayal, (a) ignores the qualified right to carry unloaded in most public places, and (b) dubiously assumes that many private business owners would

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[17] Like Petitioners, the *en banc* dissent incompletely cataloged, and thus unduly discounted, these exceptions. App-64, fn. 3, and 66-67 ("open carry is now effectively prohibited").

allow firearm carry in/upon their establishments.[18] See *Moore*, 702 F.3d at 941 (noting that the common property right of businesses to ban guns on their premises could render public carry of little practical value). Whether storeowners would allow their customers to bring guns with them also indirectly affects Plaintiffs' purported right to carry on urban streets while walking to or from a destination. If the destination did not allow guns on the premises, one would need to forego bearing the weapon on the journey there, unless the business had a gun check booths at its entrance, and so allowed carry up to that point.

### D. NO HISTORICAL RIGHT TO LOADED URBAN CARRY EXISTS

In *Heller*, this Court heavily relied on the historical treatment of firearm rights before and after the Second Amendment's ratification in 1791 to shed light on its proper construction as protecting residential firearm possession by the average citizen. 554 U.S. at 584–619. Since California largely allows open carry of loaded firearms outside city limits, allows loaded open carry within city limits on private property normally inaccessible to the general public, and allows unloaded open carry in many public places, the only constitutional issue here is whether the Second

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[18] Although there is no way for either side to survey the percentage of business owners in a given community about permitting patrons to carry guns, one strongly suspects that increased liability and workers compensation insurance premiums (if not complete underwriting disqualification), plus potential anxiety to other customers, would deter tolerance.

Amendment affords a right to carry a *loaded* firearm in the public areas of a municipality – stores, parks, restaurants, taverns, etc. The petition makes no such showing in terms of laws enacted during the 18th and 19th centuries; instead it emphasizes the carrying of arms in frontier areas and on journeys.[19] Briefly examining the colonial, antebellum, and post-Civil War era does not reveal a widespread practice of loaded carry within cities.

As Justice Breyer's dissent in *Heller* noted, at 683–685, few laws present prior to the Civil War expressly regulated *carrying* of loaded guns in urban areas – most statutes instead prohibited their *discharge* or regulated powder storage.[20] "Perhaps the most striking aspect of the Founding-era sources is how little they say about the right to carry." Jonathan Meltzer, *Open Carry for All: Heller and Our Nineteenth-Century Second Amendment*, 123 Yale L.J. 1486, 1499 (2014). One likely reason is that, from a practical standpoint, carry of loaded firearms wasn't feasible until repeating rifles and cylinder revolvers became widespread (around the time of the Civil War). With a colonial flintlock, loading was a cumbersome process that included placing gunpowder down the barrel, ramming the ball wrapped in cloth down the

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[19] The panel majority made the same analytical mistake. App-100–101 (describing the rifle-toting frontiersman). See Joseph Blocher, *Firearm Localism*, 123 Yale L.J. 82, 117 (2013) (contrasting prevalence of gun carry in frontier areas with urban carry restrictions).

[20] But see Act of Mar. 1, 1783, ch. XIII, 1783 Mass. Acts 218 (prohibiting keeping of loaded guns in buildings in Boston).

barrel onto the powder, putting more gunpowder on the trigger pan, and cocking the hammer.[21] Thus carrying as a matter of routine a ready to fire flintlock gun was impracticable because rain, snow, fog, and humidity typical of the East, South, and Great Lakes regions operated to nullify the powder charge.[22] Also, the powder contained sulfur, which moisture would cause to produce sulfuric acid, which in turn would corrode the barrel and lock, suggesting the gun not be kept loaded for longer than absolutely necessary. Accordingly, the notion that colonists strolled through Boston or New York City with a loaded flintlock as a matter of daily practice lacks credibility. In short, the flintlock was not a weapon suited to a sudden and immediate need for self-defense.

In the mid-1800's, when carrying a loaded handgun in an urban area became physically feasible and so practically useful, corresponding carry restrictions became more prevalent, including the infamous ban of all public carry in Tombstone which the Wyatt Earp enforced against the Clantons.[23] (See App-34 - 36.) Other frontier towns, like Wichita and Dodge City,

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[21] See e.g., http://www.wikihow.com/Load-and-Fire-a-Muzzleloader; http://science.howstuffworks.com/flintlock2.htm

[22] See https://en.wikipedia.org/wiki/Flintlock (citing *Elements of Military Art and History,* by Edouard La Barre Duparcq, Nicolas Édouard Delabarre-Duparcq, 1863).

[23] Ordinance #9, passed in 1881, generally banned carrying of guns within Tombstone's city limits. See *The Law in Tombstone: Ordinances Relevant in the Preliminary Hearing in the Earp-Holliday Case*, available at http://law2.umkc.edu/faculty/projects/ftrials/earp/ordinances.html.

enacted similar bans,[24] leading one commentator to opine that "[t]he West was not settled by the gun but by gun control laws."[25] Nor were urban carry restrictions peculiar to the West; such laws arose in various jurisdictions throughout America.[26] Although Respondents do not claim the majority of jurisdictions disallowed urban public carry following the Civil War; the significant number of states and cities that heavily restricted or even prohibited urban public carry demonstrates the lack of a widespread belief the

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[24] See Adam Winkler, *Gunfight: The Battle over the Right to Bear Arms in America* 13 (2011); see also Dodge City, Kan., City Ordinances no. 16, § 11 (Sept. 22, 1876).

[25] Garry Wills, Reagan's America: Innocents at Home 89 (1987) ("[T]hose entering the towns had to come disarmed, since it was against the law for anyone but law enforcement officials to carry a gun"). See Blocher, supra, 123 Yale L.J. at 118–19 (citing post-Civil War urban carry restrictions in five Western states [the Idaho law was later declared unconstitutional, whereas the Texas law was upheld]).

[26] See C. Cornell, *The Right To Carry Firearms Outside Of The Home*, 39 Fordham URB L.J. 1695, 1720–1722 (2012) (listing states adopting in mid-1800's Massachusetts' prohibition on public carry absent specific danger); Georgia Public Laws 1870, Vol. 3, Page 42 (barring gun carry at churches, courts, election grounds and other public gathering areas), at http://metis.galib.uga.edu/ssp/cgi-bin/legis-idx.pl?sessionid=24c887b2-e042154d03-9134&type=law&byte=42090860&lawcnt=34&filt=doc; _. See also *Andrews v. State*, 50 Tenn. 165, 182 (1871) (upholding state prohibition on public carry of revolvers - "Therefore, a man may well be prohibited from carrying his arms to church, or other public assemblage, as the carrying them to such places is not an appropriate use of them").

Second Amendment protected carriage of loaded guns in urban places.

Nor is California's differentiation between rural and urban carry currently unique. In a number of states that generally allow open carry of handguns, the right to carry in urban areas is restricted. See e.g., *Commonwealth v. Scarborough*, 89 A.3d 679, 686 (Pa. App. 2014) (though unlicensed open carry is elsewhere legal, public carry in Philadelphia requires a license); 720 Ill. Comp. Stat. Ann. 5/24-1(10) (barring open carry in public places inside city limits); Iowa Code § 724.4(1) (prohibiting loaded carry within city limits); Denver, CO. Municipal Code 38-117(b) (prohibiting open carry)[27]; Mo. Rev. Stat. §§ 571.030.1(1) and .3 (prohibiting loaded concealed carry in various public places); Omaha, NE. Code of Ordinances, 20-206(b) (generally banning loaded carry); Portland, ME. Code of Ordinances 17-42 (barring loaded carry at night). Such regulations match or exceed California law, which requires no permit and allows loading in the face of peril.

## E. ANY RIGHT TO LOADED CARRY IS NOT DESTROYED

Finally, even if Petitioners had standing to here challenge open carry restrictions, and this Court deemed the Second Amendment to protect loaded public carry, review of this case would remain unnecessary. No federal court has held, or even suggested, that a state may not place reasonable time,

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[27] Constitutionality upheld in *State v. City and County of Denver*, 139 P.3d 635 (Colo. 2006).

place, and manner restrictions on firearm possession. And the *Richards* plaintiffs expressly conceded that such restrictions comply with the Second Amendment. Oral Ar. Rec. 22:44-57. California's prohibition on unpermitted concealed carry in public areas regulates place and manner.

In the urban public setting, where the risk of harm to others far exceeds that presented by home or rural carry, heavier restrictions were historically observed, and still exist, because they promote public safety. See *Woollard v. Gallagher*, 712 F.3d 865, 882 (4th Cir. 2013) (possession of a handgun in the home presents a lesser public safety risk than public carry); Blocher, 123 Yale L.J. at 108 ("American cities have traditionally had much more stringent gun control than rural areas"). See also *Shepard v. Madigan,* 734 F.3d 748, 751 (7th Cir. 2013) (clarifying that the *Moore* decision did not prohibit greater regulation outside the home than within).[28] Likewise, *Heller* expressly recognized the validity of, not just restrictions, but actual prohibitions, on carry in "sensitive places," giving as examples schools and government buildings. 554 U.S. at 626.

California's open carry laws also constitute place and manner restrictions, which scale proportionately to the public danger. For some places, such as on residential property and in one's workplace, one may carry loaded. Open loaded carry is also allowed in

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[28] As the author of the *Moore* opinion, Judge Posner's clarification in *Shepard* effectively refutes Petitioners' proffered reading of *Moore* as deeming a right to public carry protected to the same extent as residential carry.

rural areas, with only a few specific place exceptions. In the more crowded public areas of cities, like stores and theaters, one may carry only unloaded guns. And, in a few places, such as vehicles and city streets, the gun must be in a locked container. Yet, even in the most restricted/sensitive areas, one may load the gun once imminent danger presents itself. Cf. *Moore*, 702 F.3d at 940 ("Illinois is the only state that maintains a flat ban on carrying ready-to-use guns outside the home"). Thus California's laws do not destroy any right to openly carry a loaded gun, they merely impair it in certain sensitive places, but with a prominent self-defense exception.

## CONCLUSION

Like the early American frontier, the Second Amendment's landscape outside the home warrants further exploration. But the proper vehicle for that expedition isn't a case factually limited to concealed public carry, especially where the parties *agree* some extra-residential constitutional protection exists. Even if this petition did properly raise the right to open carry, no corresponding circuit split exists to resolve, and California's restrictions on loaded carry in urban places accord with historical regulation of that high danger. Thus the petition should be denied.

Respectfully submitted,

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