No. 14-55873

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHARLES NICHOLS,
Appellant

v.

EDMUND BROWN, JR., et al.
Appellees.

On Appeal from the United States District Court for the Central District of California, No. 11-cv-09916 (Otero, J.)

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* LAW CENTER TO PREVENT GUN VIOLENCE IN SUPPORT OF APPELLEES AND AFFIRMANCE

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* LAW CENTER TO PREVENT GUN VIOLENCE IN SUPPORT OF APPELLEES AND AFFIRMANCE

Pursuant to Federal Rule of Appellate Procedure 29(a) and Circuit Rule 29(a), proposed *amicus curiae* Law Center to Prevent Gun Violence ("Law Center") respectfully moves the Court to grant leave to file the attached brief. Prior to filing this motion, the Law Center endeavored to obtain consent of all parties to the filing of this brief. Appellees consent to the Law Center's filing, but Appellant does not. For this reason, the Law Center seeks permission from the Court to file its brief.

The Law Center is a national, nonprofit organization dedicated to reducing gun violence. Founded after an assault weapon massacre at a San Francisco law firm in 1993, the Law Center provides comprehensive legal expertise in support of common sense gun laws. The Law Center tracks and analyzes federal, state, and local firearms legislation, monitors Second Amendment litigation nationwide, and provides support to jurisdictions facing legal challenges to their gun laws. The Law Center has provided informed analysis as an *amicus* in dozens of important firearm-related cases, including: *District of Columbia v. Heller*, 554 U.S. 570 (2008); *McDonald v. City of Chicago, Ill.*, 561 U.S. 742 (2010); *Silvester v. Harris*, 843 F.3d 816 (9th Cir. 2016); and *Peruta v. Cty. of San Diego*, 824 F.3d 919 (9th Cir. 2016) (*en banc*).

The Law Center's participation in the case will provide information relevant to the Second Amendment claim at issue in this appeal. The Law Center has expertise with open carry laws, and represents the interests of Californians who benefit from those laws, and from other reasonable firearms regulations. The attached brief explains why California's open carry laws are consistent with longstanding restrictions on the open carry of firearms, and are also reasonably tailored to achieve important government objectives in safeguarding the public from harm and intimidation, conserving law enforcement resources, and reducing gun-related injuries and deaths.

CONCLUSION

For the foregoing reasons, the Law Center respectfully requests that the Court grant the Motion for Leave to File Brief of *Amicus Curiae* Law Center to Prevent Gun Violence in Support of Appellees and Affirmance.

Dated: February 24, 2017

Respectfully submitted,

By: */s/ Simon J. Frankel*

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on February 24, 2017.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in this case are not registered CM/ECF users. I have mailed the foregoing documents by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

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Dated: February 24, 2017 Respectfully submitted,

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the Law Center to Prevent Gun Violence states that it has no parent corporations. It has no stock, and therefore, no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

State Statutes & City Ordinances

English Authorities

Other Authorities and Articles

INTEREST OF *AMICUS CURIAE*

Amicus curiae Law Center to Prevent Gun Violence ("Law Center") is a national, nonprofit organization dedicated to reducing gun violence. Founded after an assault weapon massacre at a San Francisco law firm in 1993, the Law Center provides comprehensive legal expertise in support of common sense gun laws. The Law Center tracks and analyzes federal, state, and local firearms legislation, monitors Second Amendment litigation nationwide, and provides support to jurisdictions facing legal challenges to their gun laws. The Law Center has provided informed analysis as an *amicus* in dozens of important firearm-related cases nationwide, including *District of Columbia v. Heller*, 554 U.S. 570 (2008); *McDonald v. City of Chicago, Ill.*, 561 U.S. 742 (2010); *Peruta v. Cty. of San Diego*, 824 F.3d 919 (9th Cir. 2016) (*en banc*); and *Silvester v. Harris*, 843 F.3d 816 (9th Cir. 2016).[1]

[1] The Law Center files this brief while seeking leave of the Court pursuant to Federal Rule of Appellate Procedure 29(a)(2) and Circuit Rule 29(a)(2). No counsel of a party in this action authored the brief in whole or in part. No person, inclusive of any party or party's counsel, contributed money that was intended to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The state of California has in recent decades made more progress than any other state toward reducing firearm-related deaths and injuries. This progress has been aided by careful laws designed to improve gun safety and reduce the risks that firearms inherently pose. Statistics on the rate of in-state gun violence suggest that California's legislative efforts have been working. Between 2009 and 2013, there were on average 2,922 firearm-related deaths in California per year, a significant decrease from an average of 5,011 firearm-related deaths between 1991 and 1995.[2] Moreover, California has a lower rate of gun deaths when compared to the rest of the nation, with 7.4 per 100,000 firearm-related deaths in 2014, compared to 10.2 for other states and the District of Columbia.[3]

At issue in this case are measures enacted by the California legislature to protect the public from the significant dangers posed by the open carry of firearms in populated areas. In 1967, the Legislature prohibited the open carry of loaded

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[2] *See* California Department of Public Health, EpiCenter California Injury Data, http://epicenter.cdph.ca.gov/ReportMenus/InjuryDataByTopic.aspx (last visited Jan. 25, 2017). Between 1991 and 2013, more than 82,000 people in California were killed by firearms, and between 1991 and 2014, more than an additional 110,000 were hospitalized from non-fatal, firearm-related injuries. *Id.*

[3] *See* Center for Disease Control and Prevention and National Center for Health Statistics, Stats of the State of California, https://www.cdc.gov/nchs/pressroom/states/california.htm (last visited Jan. 25, 2017).

firearms in incorporated areas such as the City of Los Angeles and the City and County of San Francisco, as well as in those portions of unincorporated areas where it is unlawful to discharge a weapon. *See* Cal. Penal Code §§ 25850, 17030. In 2011 and 2012, responding to a series of mass shootings across the country, the Legislature enacted laws that also generally restrict the open carry of unloaded firearms (in incorporated areas) and unloaded handguns (in those portions of unincorporated areas where it is unlawful to discharge a weapon). *See* Cal. Penal Code §§ 26350, 26400, 17030.

California's open carry laws have antecedents dating back to at least fourteenth century England, and resemble laws since passed by American colonies and states to guard against the myriad risks created when deadly weapons are openly carried in public spaces. California's laws are carefully drafted to mitigate those risks, because they provide for appropriate exceptions in circumstances when the potential need for self-defense is heightened, or the danger to the public is decreased.[4] California's open carry laws—just like the laws banning concealed carry without a permit, *see Peruta v. Cty. of San Diego*, 824 F.3d 919 (9th Cir. 2016) (*en banc*)—are consistent with longstanding Anglo-American tradition imposing restrictions on the open carry of firearms, and, therefore, regulate

[4] *See* discussion at pp. 24–27, *infra*.

conduct falling outside the scope of the Second Amendment.

Even if this Court were to find that California's open carry laws implicate conduct falling within the scope of the Second Amendment, the Court should at most apply intermediate scrutiny. The laws at issue do not concern the "core" Second Amendment right of self-defense in the home, or otherwise substantially burden Second Amendment rights. *See Silvester v. Harris*, 843 F.3d 816, 821 (9th Cir. 2016). California's open carry laws withstand intermediate scrutiny because they are reasonably tailored to address important government objectives: California enacted these laws because open carry intimidates the public, wastes law enforcement resources, and increases the risk of gun-related injuries and deaths.

ARGUMENT

I. California's Open Carry Laws Are Consistent With Longstanding Restrictions On Carrying Weapons In Public To Maintain The Peace.

Under *Heller*, the "first question" in evaluating a Second Amendment challenge is "whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee." *United States v. Chovan*, 735 F.3d 1127, 1134 (9th Cir. 2013); *see also District of Columbia v. Heller*, 554 U.S. 570 (2008). "Laws restricting conduct that can be traced to the founding era and are historically understood to fall outside of the Second Amendment's scope may be upheld without further analysis." *Silvester*, 843 F.3d at 821 (citing *Peruta*, 824 F.3d at 927).

In *Heller*, the Supreme Court "recognized that the Second Amendment does not preclude certain 'longstanding' provisions . . . which it termed 'presumptively lawful regulatory measures.'" *Silvester*, 843 F.3d at 820 (quoting *Heller*, 554 U.S. at 626–27, 627 n.26). Such a law is constitutional if there is "persuasive historical evidence establishing that the regulation at issue imposes prohibitions that fall outside the historical scope of the Second Amendment." *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 960 (9th Cir. 2014) (quotation omitted).[5]

This case calls for the Court to decide whether California's open carry laws are consistent with longstanding restrictions on open carry and therefore regulate conduct falling outside the scope of the Second Amendment. The Court has already recognized that some of the earliest firearm regulations in America prohibited the public carry of arms generally, whether concealed or open. *See Peruta*, 824 F.3d at 931. These early statutes prohibited carrying arms openly because the very act terrorized the public and increased crime—the same reasons California restricts open carry today. *See* Patrick J. Charles, *The Faces of the Second Amendment Outside the Home: History Versus Ahistorical Standards of*

[5] The Supreme Court in *Heller* specifically cited "longstanding prohibitions on the possession of firearms by felons and the mentally ill." *Heller*, 554 U.S. at 626. Prohibitions on firearm possession by felons and the mentally ill began in the twentieth century; thus, "*Heller* demonstrates that a regulation can be deemed 'longstanding' even if it cannot boast a precise founding-era analogue." *See Silvester*, 843 F.3d at 831 (quotation omitted).

Review, 60 CLEV. ST. L. REV. 1, 21, 32–33 (2012) [hereinafter "Charles, *Faces*"]; *see also Peruta*, 824 F.3d at 930 (citing Charles, *Faces*).

A. The Statute of Northampton Broadly Restricted Carrying Arms In Public.

As fully detailed in appellees' answering brief, Anglo restrictions on the open carry of weapons date back to 1328, when England enacted the Statute of Northampton.[6] The historical evidence demonstrates that the Statute of Northampton was "strictly enforced as a prohibition on going armed in public." *See* Patrick J. Charles, *The Second Amendment in Historiographical Crisis*, 39 FORDHAM URB. L. J. 1727, 1804 (2012) (citing 20 Rich. 2, ch. 1 (1396–97) (Eng.)); *see also Peruta*, 824 F.3d at 929, 930–32.

Although this Court has considered the Statute of Northampton to be the antecedent authority for restrictions on concealed carry, *see Peruta*, 824 F.3d at 931, the Statute of Northampton prohibited public carry generally, and particularly prohibited carrying weapons openly. A 1594 proclamation from Elizabeth I emphasized this point, proclaiming that the "common carrying of Dags, otherwise

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[6] The statute provided that, with limited exceptions:

> [N]o Man great nor small, . . . [may] 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*[.]

Statute of Northampton, 2 Edw. 3, ch. 3 (1328) (Eng.) (emphasis added).

called pistols, [was] to the terrour of all people professing to travel and live peaceably," specifically noting that such terror was caused not only by carrying such pistols "secretly" but also "in open carrying such Dags." Queen Elizabeth I, *A Proclamation against the carriage of Dags, and for reformation of some other disorders* (London, Christopher Barker, 1594); *see also Peruta*, 824 F.3d at 931.

While violating the Statute of Northampton was a misdemeanor punishable by fine and jail, a separate English law enacted in 1351 made it a felony for "any man of this Realm [to] ride armed covertly or secretly with men of arms against any other . . . ." 25 Edw. 3, 320, ch. 2, § 13 (1351) (Eng.); *see also* Charles, *Faces* at 18. The Statute of Northampton and this 1351 law bear striking resemblance to California's modern day restrictions on open carry and concealed carry, respectively. They addressed different concerns: the Statute of Northampton prohibited public carry generally, including the intimidation and lawlessness caused when civilians carry arms openly, while the 1351 law prohibited covertly or secretly carrying arms—believed to be inconsistent with a lawful purpose.

B. Numerous Colonies And States Enacted Broad Restrictions On Openly Carrying Firearms Before And After The Ratification Of The Second And Fourteenth Amendments.

"The earliest American statute prohibiting 'going armed' appears to have been enacted in 1686 by the New Jersey Assembly." Charles, *Faces* at 32. The New Jersey law proclaimed that "several Persons wearing swords, daggers,

pistols," and "other unusual and unlawful weapons," imposed "great fear and quarrels" as well as "great abuse of the inhabitants of this Province." Aaron Leaming & Jacob Spicer, *The Grants, Concessions, and Original Constitutions of the Province of New-Jersey* 289, ch. 9 (Philadelphia, W. Bradford ed. 1881). New Jersey's law separately stated that "no person . . . shall presume privately to wear any pocket pistol, skeines, stilladers, daggers or dirks, or other unusual or unlawful weapons within this Province." *Id*. at 290. Thus, because the public carrying of arms disturbed the peace and alarmed the public, from the very earliest stage, the colony of New Jersey forbade public carry generally, including open carry.

A few years later, the colony of Massachusetts Bay followed suit, making it unlawful to "ride or go armed Offensively before any of Their Majesties Justices, or other Their Officers or Ministers doing their Office, *or elsewhere*, by Night or by Day . . . . " Mass. Acts and Laws of October 1692, 1692–1694 Mass. Laws 11 (emphasis added) (spelling modernized). Following the ratification of the Constitution, North Carolina and Virginia enacted similar laws (as did Massachusetts, again, as a state in 1795). *See* Mass. Act of Jan. 29, 1795, ch. 2, 1795 Mass. Acts and Laws 436. North Carolina's law closely tracked the Statute of Northampton, and Virginia's prohibited going "armed by night [or] by day, in

fairs or markets, or in other places, in terror of the country."[7] In the first half of the nineteenth century, more states, including Maine, Tennessee, and Delaware, enacted prohibitions on carrying arms in public.[8] Legal treatises of the time explain that, as in England, prosecution under these state laws did not require the defendant to have threatened any person or committed any particular act of violence.[9] Rather, the act of openly carrying arms was considered terrifying to the rest of the population.

After the ratification of the Fourteenth Amendment, New Mexico passed the Deadly Weapons Act of 1869, which made it "unlawful for any person to carry deadly weapons, either concealed or otherwise, on or about their persons within any of the settlements of this Territory[.]" N.M. Act of Jan. 29, 1869, ch. 32, § 1, 1869 N.M. Laws 72. New Mexico's law provided a self-defense exception—like

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[7] Francois-Xavier Martin, *A Collection of the Statutes of the Parliament of England in Force in the State of North-Carolina* 60-61 (Newbern, Editor's Press 1792) (emphasis added); Va. Act of 1786, ch. 49, 1786 Va. Acts 35.

[8] *See* Tenn. Act of Nov. 13, 1801, ch. 22, § 6, 1801 Tenn. Pub. Acts 260; Del. Laws tit. 15, ch. 97, § 13 (1852); Me. Act of Mar. 15, 1821, ch. 76, § 1, 1821 Me. Laws 285.

[9] *See* Harry Toulmin, *The Magistrates' Assistant* 5 (Natchez, Mississippi, Samuel Terrell ed. 1807) ("[T]here may be an affray, where there is no actual violence; as where a man arms himself with dangerous and unusual weapons, in such a manner as will naturally cause terror to the people."); Joel P. Bishop, *Commentaries on the Criminal Law* 569 § 980 (Boston, Little, Brown & Co. eds., 3d ed. 1865) ("But we should mistake to suppose, that peace must actually be broken, to lay the foundation for a criminal proceeding. If what is done is unjustifiable and unlawful, tending also with sufficient directness to break the peace, no more is required.").

the one in California's current laws—in instances where "being then and there" a person was "threatened with danger." *Id.* § 1.[10] In the following decades, several more states, including Wyoming, Idaho, and Kansas, broadly prohibited the open carry of firearms, while Arizona and Texas adopted similar laws with self-defense exceptions.[11] In the same period that these states restricted open carry, numerous cities across the country did the same at the municipal level.[12]

The public carry restrictions adopted in many states and cities since the Founding demonstrate that the American public considered such laws to be consistent with the right to bear arms. Though not all states historically prohibited open carry, "the Constitution establishes a federal republic where local differences are cherished as elements of liberty, rather than eliminated in a search for national uniformity." *Friedman v. Highland Park*, 784 F.3d 406, 412 (7th Cir. 2015).

C. The U.S. Supreme Court's Decision in *Miller* Supports The Constitutionality of California's Open Carry Restrictions.

In 1894, the U.S. Supreme Court considered a challenge to "the law of the

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[10] California has a similar exception permitting open carry of a loaded firearm in the event of "immediate, grave danger." Cal. Penal Code § 26045(a).

[11] *See* Wyo. Act of Dec. 2, 1875, ch. 52, § 1, 1875 Wyo. Laws 352; Idaho Act of Feb. 4, 1889, § 1, 1889 Idaho Laws 23; Kan. Act of Mar. 4, 1881, ch. 37, § 23, 1881 Kan. Laws 92; Ariz. Act of Mar. 18, 1889, No. 13, § 1, 1889 Ariz. Laws 30; Tex. Act of April 12, 1871, art. 6512.

[12] *See, e.g.*, Nashville, Tenn., Ordinances ch. 108, § 1 (1873); Syracuse, N.Y., Ordinances ch. 27, § 7 (1877); New Haven, Conn., Ordinances § 192 (1890).

state of Texas forbidding the carrying of weapons," and noted that the "defendant was [not] denied the benefit" of "the right of the people to keep and bear arms." *Miller v. Texas*, 153 U.S. 535, 538 (1894). Prior to this decision, the Supreme Court of Texas had twice upheld Texas's prohibition on openly carrying firearms. *See* Tex. Act of April 12, 1871, art. 6512, 1871 Tex. Laws 1322. In 1872, the court wrote:

> We confess it appears to us little short of ridiculous, that any one should claim the right to carry upon his person any of the mischievous devices inhibited by the statute, into a peaceable public assembly, as, for instance into a church, a lecture room, a ball room, *or any other place where ladies and gentlemen are congregated together*.

English v. State, 35 Tex. 473, 478–79 (Tex. 1872) (emphasis added). Three years later, the court again noted that this law "is nothing more than a legitimate and highly proper regulation" of "the place where, and the circumstances which, a pistol may be carried." *State v. Duke*, 42 Tex. 455, 459 (Tex. 1875).[13]

[13] Attempting to counter this authority, appellant highlights *Heller*'s reference to two other state supreme court decisions. *See Heller*, 554 U.S. at 612–13 (citing *Nunn v. State*, 1 Ga. 243, 251 (Ga. 1846); *State v. Chandle*r, 5 La. Ann. 489, 490 (La. 1850). These antebellum decisions reflect a tradition that prevailed in much—but not all—of the slaveholding South, and which restricted concealed carry but permitted white men to openly carry arms to prevent slave rebellion. *See generally* Eric Ruben & Saul Cornell, *Firearm Regionalism and Public Carry: Placing Southern Antebellum Case Law in Context*, 125 Yale L.J. Forum 121 (Sept. 25, 2015). The decisions reflect "a time, place, and culture where slavery, honor, violence, and the public carrying of weapons were intertwined," *id*. at 125, and are not consistent with how public carry was regulated, and how the Second (continued…)

As set out above, the prevalence of longstanding restrictions on open carry "is strongly confirmed by the historical background of the Second Amendment." *Heller*, 554 U.S. at 592. Accordingly, "the history relevant to both the Second Amendment and its incorporation by the Fourteenth Amendment" leads to the conclusion that an unfettered right to openly carry firearms "is not, and never has been, protected by the Second Amendment." *Peruta*, 824 F.3d at 929. No further analysis is necessary. *See, e.g.*, *Silvester*, 843 F.3d at 821.

II. At Most, This Court Should Apply Intermediate Scrutiny, Because Even If California's Open Carry Laws Regulate Conduct Within the Scope Of The Second Amendment, They Do Not Implicate Or Substantially Burden The Core Second Amendment Right.

Like all its sister circuits, this Court applies intermediate scrutiny "if a challenged law does not implicate a core Second Amendment right, or does not place a substantial burden on the Second Amendment right." *Jackson*, 746 F.3d at 960–66. California's open carry restrictions do not implicate or burden core Second Amendment rights. "The core of the *Heller* analysis is its conclusion that the Second Amendment protects the right to self defense in the home." *See Silvester*, 843 F.3d at 820; *Heller*, 554 U.S. at 635. Under *Heller*, "the Second Amendment must protect private firearms ownership." *Silvester*, 843 F.3d at 820; *Heller*, 554 U.S. at 635 ("Assuming that Heller is not disqualified from the

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Amendment was interpreted among regions outside the antebellum south where a majority of the American population resided (*see supra* at pp. 7–10).

exercise of Second Amendment rights, the District must permit him to register his handgun and must issue him a license to *carry it in the home*.") (emphasis added).

The core right articulated by *Heller* does not extend to openly carrying a loaded firearm in public. *See Penuliar v. Mukasey*, 528 F.3d 603, 614 (9th Cir. 2008) (Supreme Court decisions are limited to the boundaries of the question before the Court); *see also Silvester*, 843 F.3d at 821 (*Heller* identified "the [Second] Amendment's core purpose of self defense in the home"). Accordingly, just as it has done for other laws that do not burden the core Second Amendment right,[14] should this Court find that California's open carry restrictions warrant heightened scrutiny at all, it should apply intermediate scrutiny.

Indeed, four other circuit courts evaluating public carry regulations have applied intermediate scrutiny (and then upheld the public carry law at issue). *See Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121 (10th Cir. 2015); *Kachalsky v. Cty. of Westchester*, 701 F.3d 81 (2d Cir. 2012); *Woollard v. Gallagher*, 712 F.3d 865, 882 (4th Cir. 2013); *Drake v. Filko*, 724 F.3d 426, 443 (3rd Cir. 2013). The Tenth

[14] *See Chovan*, 735 F.3d. at 1138 (applying intermediate scrutiny to federal law prohibiting domestic violence misdemeanants from owning a firearm); *Fyock v. Sunnyvale*, 779 F.3d 991, 999 (9th Cir. 2015) (applying intermediate scrutiny to city ordinance restricting possession of large-capacity magazines); *Jackson*, 746 F.3d at 953 (applying intermediate scrutiny to city ordinance which required firearms in the home to either be on the person or unloaded and in a locked container).

Circuit explained its selection of intermediate scrutiny as follows:

> The right to carry weapons in public for self-defense poses inherent risks to others. Firearms may create or exacerbate accidents or deadly encounters, as the longstanding bans on private firearms in airports and courthouses illustrate. The risk inherent in firearms and other weapons distinguishes the Second Amendment right from other fundamental rights that have been held to be evaluated under a strict scrutiny test, such as the right to marry and the right to be free from viewpoint discrimination, which can be exercised without creating a direct risk to others. Intermediate scrutiny appropriately places the burden on the government to justify its restrictions, while also giving governments considerable flexibility to regulate gun safety.

Bonidy, 790 F.3d at 1126.

California's open-carry restrictions primarily apply in densely-populated public areas, and in circumstances where open carry is likely to intimidate and endanger the public and waste law enforcement resources. Because any burden they impose on Second Amendment-protected conduct is slight, and because "[t]he right to carry weapons in public for self-defense poses inherent risks to others," *Bonidy*, 790 F.3d at 1127, at most, intermediate scrutiny should be applied.

III. California's Open Carry Laws Easily Pass Constitutional Muster Under Intermediate Scrutiny Because They Reasonably Fit California's Important Governmental Objectives.

California's open carry restrictions are narrowly tailored to the compelling state interests of preventing armed intimidation of the public, conserving precious law enforcement resources, and decreasing the risk of gun-related injuries and deaths, and therefore, would satisfy even strict scrutiny. Accordingly, as set forth

below, California's laws easily survive intermediate scrutiny.

Intermediate scrutiny requires only that the government's objective be "significant, substantial, or important" and that there is "a reasonable fit between the challenged regulation and the asserted objective." *Chovan*, 735 F.3d at 1139 (citation omitted). "Intermediate scrutiny does not require the least restrictive means of furthering a given end," and here "requires only that the law be 'substantially related to the important government interest of reducing firearm-related deaths and injuries,'" *Silvester*, 843 F.3d at 827 (citation omitted), as well as preventing intimidation of the public and conserving law enforcement resources. In crafting a law to accomplish critical public safety objectives, the legislature may "rely on evidence reasonably believed to be relevant" to its interests. *Fyock*, 779 F.3d at 1000 (citation omitted).

A. California's Open Carry Laws Further The Critical Goals Of Protecting Public Safety And Conserving Police Resources.

Strong evidence supports the Legislature's conclusions that the open carry of firearms intimidates the public, wastes law enforcement resources, and increases gun-related injuries and deaths.

1. Open Carry Intimidates The Public.

The author of Assembly Bill 144—which became California's law restricting the open carry of unloaded handguns—remarked that open carry is "alarming [to] unsuspecting individuals . . . ." *Hearing on A.B. 144 Before*

Assembly Committee on Public Safety, 2011–2012 Cal. Reg. Sess. 6 (Cal. 2011) (Bill Analysis prepared by Chief Counsel Gregory Pagan) (regarding Cal. Penal Code § 26350) [hereinafter "Pagan, Bill Analysis regarding Cal. Penal Code § 26350"]. Prior to extending restrictions on open carry to other firearms, the Legislature also considered arguments that "[t]he carrying of exposed rifles and shotguns in urban settings, such as shopping malls and restaurants, is particularly inappropriate and threatening." *Hearing on A.B. 1527 Before Assembly Committee on Public Safety*, 2011-2012 Cal. Reg. Sess. 8 (Cal. 2011) (Bill Analysis prepared by Geoff Long) (regarding Cal. Penal Code § 26400).

Examples abound of individuals scaring and intimidating members of the public by openly carrying firearms in populated or urban areas. For instance, on December 24, 2012—ten days after the mass shooting at an elementary school in Newtown, Connecticut—at least 65 residents called to report a man walking around Portland, Maine with a rifle.[15] Open carry is permitted in Maine, so the officers that responded to the calls did not inspect the man's weapon or require him to identify himself. The officers did, however, waste resources keeping the man

[15] Dennis Hoey, *Man with assault rifle prompts flurry of police calls in Portland*, PORTLAND PRESS HERALD (December 24, 2012), http://www.pressherald.com/2012/12/24/man-with-gun-attracts-attention-on-back-cove-trail/.

under surveillance for three and a half hours until he left the public area.[16]

About three weeks later, two 22-year-old men in Portland, Oregon carrying assault weapons over their shoulders prompted worried residents to call 911.[17] A school went into lockdown and emailed parents to alert them that there were armed men in the neighborhood. Oregon, like Maine, permits open carry, but police nonetheless needed to spend time investigating the incident.[18] Afterwards, a Portland police sergeant observed, "[a]nyone walking around with a visible firearm is going to generate calls from concerned citizens that we have to respond to."[19]

In November 2015, a man in Vancouver, Washington was arrested after he walked in and around multiple private businesses with a firearm, alarming employees and customers.[20] After walking into a restaurant, triggering the first call to 911, the man proceeded to a bowling alley, which also called 911 and went into lockdown. An employee said that "panicked parents grabbed their children and ran

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[16] *Id.*

[17] *Gun rights walk in Portland spurs 911 calls, lockdown*, THE COLUMBIAN (January 10, 2013), http://www.columbian.com/news/2013/jan/10/gun-rights-walk-spurs-911-calls-lockdown/.

[18] *Id.*

[19] *Id.*

[20] Dan Tilkin, *Open carry debate: Man arrested after causing panic in Vancouver*, KOMO NEWS (November 21, 2015), http://komonews.com/news/local/open-carry-debate-man-arrested-after-causing-panic-in-vancouver-11-21-2015.

into the restaurant while police officers swarmed around" the armed man.[21]

Another fatal incident shows why it is imperative for police to respond to 911 calls reporting open carry activity, even if the calls are not necessarily reporting illegal activity. In November 2015, a woman called 911 after seeing her 33-year-old neighbor armed with a rifle on the street in Colorado Springs.[22] According to the woman, the 911 dispatcher explained that open carry was legal in Colorado.[23] The neighbor then killed three people, including a father of two who begged for his life before being shot. The altercation finally ended after police shot and killed the perpetrator in a shootout.[24]

A simple search of the news reveals that these examples are merely the tip of the iceberg. And with shootings in public places so frequently in the news, the American public is on heightened alert any time they see a person openly carrying a firearm. In states that allow open carry, the public has no recourse but to call the

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[21] *Id.*

[22] Jesse Paul, *Open carry becomes focus after Colorado Springs shooting rampage*, the Denver Post (November 3, 2015), http://www.denverpost.com/2015/11/03/open-carry-becomes-focus-after-colorado-springs-shooting-rampage/.

[23] *Id.*; *see also* Mike Littwin, *On the Colorado Springs open-carry killing*, THE COLORADO INDEPENDENT (November 3, 2015), http://www.coloradoindependent.com/155995/littwin-on-the-colorado-springs-open-carry-killing.

[24] *Id.*

police to report seeing what may be lawful open carry, but might be a mass murder about to happen. Meanwhile, schools and businesses go into lockdown, parents are alerted that their children may be in danger, and law enforcement wastes scarce resources responding to and investigating calls from concerned citizens.

California's open carry laws reflect a well-grounded decision to mitigate these effects of open carry.

2. Open Carry Wastes Police Resources And Endangers Lives.

In adopting Assembly Bill 114, the California Legislature was responding to an "increase in 'open carry' calls [] placed to law enforcement," which "taxed departments dealing with under-staffing and cutbacks due to the current fiscal climate in California, preventing them from protecting the public in other ways." Pagan, Bill Analysis regarding Cal. Penal Code § 26350. As demonstrated by the incidents described above, open carry in populated areas means law enforcement must respond to 911 calls from concerned citizens about people carrying guns.

That is why in 2010, two years before section 26350 became effective, the San Mateo County Sheriff warned against openly carrying unloaded firearms:

> Open carry advocates create a potentially very dangerous situation. When police are called to a "man with a gun" call they typically are responding to a situation about which they have few details other than one or more people are present at a location and are armed. Officers may have no idea that these people are simply "exercising their rights." Consequently, the law enforcement response is one of "hypervigilant urgency" in order to protect the public from an armed threat. Should the gun carrying person fail to comply with a law

> enforcement instruction or move in any way that could be construed as threatening, the police are forced to respond in kind for their own protection. It's well and good in hindsight to say the gun carrier was simply "exercising their rights" but the result could be deadly.[25]

Thus, it is no surprise that law enforcement has supported California's open carry laws. The legislative history of Assembly Bill 1591—California's initial law restricting the carry of loaded firearms—was "actively supported by law enforcement groups." Vernon L. Sturgeon and Jack B. Lindsey, A.B. 1591, Bill Memorandum to Governor Reagan, at 1 (July 28, 1967). More than forty years later, the California Police Chiefs Association, Inc. and the Peace Officer Research Association of California were registered supporters of Assembly Bill 144. *See* Pagan, Bill Analysis regarding Cal. Penal Code § 26350 at 11.

In July 2016, Americans witnessed the devastating impact of overly-permissive open carry laws when the Dallas Police Department could not identify a gunman shooting at officers during a protest, resulting in five officers dead and seven more shot.[26] Up to thirty people attending the protest were lawfully carrying rifles. The Dallas Police Chief explained that the open carry of rifles endangered

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[25] Lt. Ray Lunny, *Unloaded Open Carry*, San Mateo County Sheriff's Office (2010), http://www.calgunlaws.com/wp-content/uploads/2012/09/San-Mateo-County-Sheriffs-Office_Unloaded-Open-Carry.pdf.

[26] Molly Hennessy-Fiske, *Dallas police chief: Open carry makes things confusing during mass shootings*, LOS ANGELES TIMES (July 11, 2016), http://www.latimes.com/nation/la-na-dallas-chief-20160711-snap-story.html.

his officers, observing, "[w]e don't know who the good guy is versus the bad guy when everyone starts shooting."[27] Incidents like this show that strong public carry laws not only save police resources, but also potentially save police officers' lives.

3. Open Carry Increases Risks Of Injury And Death.

The California Legislature reasonably concluded that allowing ordinary citizens to openly carry firearms throughout the state compromises the safety of those sharing public spaces with gun-carrying citizens. Echoing the San Mateo County Sheriff's Office's publication in 2010, the California Legislature concluded that open carry creates an "unsafe environment for all parties involved: the officer, the gun-carrying individuals, and any other people who happen to be in the line of fire." Pagan, Bill Analysis regarding Cal. Penal Code § 26350 at 9.

The Legislature's conclusion was reasonable because of the well-documented danger that open carry poses to law enforcement. It was also a reasonable conclusion because openly carrying firearms may lead to escalation of conflicts with other citizens, endangering those citizens as well as any bystanders. The recent road rage killings of two former NFL players in New Orleans exemplifies how the presence of a firearm can turn everyday disputes with a

[27] *Id.*

stranger into a fatal physical confrontation.[28] One of these incidents started with a minor car collision, and the other started when one driver possibly cut off the other in traffic; both ended with a fatal shooting.

A similar situation occurred just last month in a parking lot in Belford, Texas.[29] The altercation began when one man opened his door, dinging the door of the car next to him belonging to another man. The situation escalated when both men declared they had guns. One of the men, who was in possession of a valid handgun license, shot and killed the other after he purportedly made a threatening move. Later it was discovered that the victim was not carrying a firearm.[30]

Although lethal weapons carried in public can endanger other citizens through the escalation of ordinary conflicts, the corresponding benefit to individuals' self-protection is tenuous, at best. The weight of evidence shows that public carry of firearms is ineffective both for self-defense and crime reduction.

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[28] The Associated Press, *Trial Begins Monday for Man Accused of Killing Ex-NFLer in Louisiana Road-Rage Incident*, NBC NEWS (Dec. 4, 2016), http://www.nbcnews.com/news/us-news/trial-begins-monday-man-accused-killing-ex-nfler-louisiana-road-n691701; CNN Wire, *Man Suspected of Shooting Former USC Running Back Joe McKnight Released from Custody*, KTLA 5 NEWS (Dec. 2, 2016), http://ktla.com/2016/12/02/man-suspected-of-shooting-former-usc-running-back-joe-mcknight-released-from-custody/.

[29] *Parking Lot 'Door Ding' Argument Leads To Haltom City Man's Death*, CBS LOCAL MEDIA (January 17, 2017), http://dfw.cbslocal.com/2017/01/17/parking-lot-door-ding-leads-to-haltom-city-mans-death/.

[30] *Id.*

Using a gun for self-defense is no more likely to reduce a person's chance of being injured during a crime than other protective actions,[31] because most victims who are injured during a crime are injured before they can take any protective action.[32] This finding makes sense because defending oneself with a gun in public requires skills few possess. As one study observed, "[s]hooting accurately and making appropriate judgments about when and how to shoot in chaotic, high-stress situations requires a high level of familiarity with tactics and the ability to manage stress under intense pressure," and accuracy "is influenced by distance, the opponent shooter's actions, lighting, use of cover, type of gun, and more."[33] Most people do not have the tactical ability to effectively use a gun for self-defense in urban or densely populated public areas without endangering themselves or bystanders.

B. California's Open Carry Laws Are Reasonably Tailored Because They Leave Open Avenues For Self-Defense And Other Legitimate Open Carry Activity.

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[31] *See* David Hemenway, *Private Guns, Public Health* 78 (The University of Michigan Press, 2004); David Hemenway and Sara J. Solnick, *The Epidemiology of Self-Defense Gun Use: Evidence from the National Crime Victimization Surveys 2007–2011*, 79 Preventative Med. 22, 22–27 (2015).

[32] Webster et al., *Firearms on College Campuses: Research Evidence and Policy Implications*, Johns Hopkins Bloomberg School of Public Health 1, 13 (2016), http://www.jhsph.edu/research/centers-and-institutes/johns-hopkins-center-for-gun-policy-and-research/_pdfs/GunsOnCampus.pdf.

[33] *Id*. at 11.

California's open carry laws are closely tailored to the state's objectives. They help reduce the risk that quotidian conflicts will escalate into lethal violence, and minimize the public panic and wasted law enforcement resources resulting from "open carry" demonstrations like the incidents described above. And California's laws accomplish this while leaving open ample avenues for self-defense and the exercise of other, legitimate open carry activity.

As an initial matter, California's open carry laws are limited in the geographical area they cover. California only restricts the open carry of handguns in "public places" and "public streets" of incorporated areas, as well as places in unincorporated areas where it is already unlawful to discharge a weapon. *See* Cal. Penal Code §§ 25850(a), 26350(a), 17030. The laws regulating the open carry of other unloaded firearms are even less restrictive. *See* Cal. Penal Code § 26400. They only apply in incorporated areas, and firearms other than handguns—including rifles and shotguns—can be carried openly in unincorporated areas even where it is unlawful to discharge a weapon. Cal. Penal Code § 26400(a); *cf.* Cal. Penal Code §§ 25850(a), 26350(a), 17030. The restrictions on other firearms also only apply if carried on the person "outside a vehicle," permitting one to carry a visible, unloaded rifle or shotgun through city streets so long as it remains in the car. Cal. Penal Code § 26400(a). By generally limiting most of its open carry restrictions to incorporated areas, California has tailored the restrictions to densely-

populated spaces, where the risk of public intimidation and gun violence are at their apex.[34]

California's open carry laws also build in exceptions for exigent circumstances, when a firearm owner perceives an urgent need to carry in public for self-defense. California allows loaded firearms to be carried if someone "reasonably believes" there is "immediate, grave danger" and carrying the firearm is "necessary," *see* Cal. Penal Code § 26045(a), and also permits open carry of loaded and certain unloaded firearms by individuals who have obtained a restraining order from a court, *see id*. §§ 26045(b), 26405(d).[35] In situations when danger is not so imminent, law-abiding individuals can also exercise self-defense by obtaining and carrying less lethal weapons, such as stun guns and pepper spray, almost everywhere in public. *See* Cal. Penal Code §§ 22610, 22810.[36]

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[34] When the population of a county is less than 200,000, the sheriff of the county, or the chief of police of a city within that county, may issue a license to carry a loaded, exposed handgun that is valid within that county. *See* Cal. Penal Code §§ 26150(b)(2), 26155(b)(2).

[35] California's statutory scheme also permits county sheriffs and the heads of municipal police departments to issue licenses for concealed carry of a firearm where "[g]ood cause exists for issuance of the license." Cal. Penal Code §§ 26150(a)(2), 26155(a)(2). If a concealed carry license is issued, the firearm may be carried either loaded or unloaded. Cal. Penal Code § 26010.

[36] California restricts carry of tasers and stun guns in some sensitive areas, but not generally in public. *See* Cal. Penal Code §§ 171b (public buildings and meetings), 626.10 (K-12 schools), 171.5 (sterile areas of airports). In addition, although tasers and stun guns cannot normally be sold to minors in California, adolescents (continued…)

Collectively these laws allow individuals to openly carry firearms for self-defense when the individual reasonably believes it is necessary, while at the same time preventing the intimidation and harm to the public inherently caused by the widespread carrying of openly visible firearms in communities across the state.

California's open carry laws also do not apply to private property—business or residential—if the firearm is lawfully possessed and the property owner permits open carry. Cal. Penal Code §§ 26405(a) – (b), 25605. And the laws do not prohibit the *transport* of firearms between areas where possession or use is permitted if the firearm is "in a locked container or encased." Cal. Penal Code § 26405(c); *see also* Cal. Penal Code § 26389. Accordingly, California's laws leave open various avenues for legitimate open carry.

For firearms which are not handguns, there are several more exceptions to the restrictions on open carry. *See* Cal. Penal Code § 26405(e) – (i). For instance, unloaded firearms may be openly carried by hunters (Cal. Penal Code § 26405(j)), in "school zones" with "written permission of the school district superintendent" or the equivalent (Cal. Penal Code § 26405(n)), in official parades (Cal. Penal Code § 26405(h), (l)), at shooting ranges (Cal. Penal Code § 26405(i), (t)), at gun shows (Cal. Penal Code § 26405(m)), and when a person is lawfully engaged in firearms-

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between age 16 and 18 may purchase and possess them with a parent's written permission. *See* Cal. Penal Code § 22610.

related business such as firearm sale, repair, or transfer (Cal. Penal Code § 26405(g), (q)). These exceptions are further evidence that the California Legislature tailored the open carry laws to prevent intimidating and dangerous conduct while allowing legitimate open carry activity. The open carry restrictions are narrowly tailored, and reasonably fit California's objectives. *Chovan*, 735 F.3d at 1139.

CONCLUSION

Through its open carry laws, California has sought to reduce firearm-related deaths and injuries, protect the public from intimidation, and more efficiently utilize police resources. These laws are consistent with the longstanding restrictions on open carry and are narrowly tailored to permit legitimate open carry activity. For these reasons, California's open carry laws are constitutional and should be upheld.

Dated: February 24, 2017

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on February 24, 2017.

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I further certify that some of the participants in this case are not registered CM/ECF users. I have mailed the foregoing documents by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

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Dated: February 24, 2017 Respectfully submitted,

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SIMON J. FRANKEL

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