NOS. 10-56971 and 11-16255

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EDWARD PERUTA, et al.,
Plaintiffs-Appellants,
v.
COUNTY OF SAN DIEGO, et al.,
Defendants-Appellees.

ADAM RICHARDS, et al.,
Plaintiffs-Appellants,
v.
ED PRIETO, et al.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURTS
FOR THE SOUTHERN AND EASTERN DISTRICTS OF CALIFORNIA

No. CV09-02371 (Hon. Irma E. Gonzalez, United States District Judge),
No. CV09-01235 (Hon. Morrison C. England, Jr., United States District Judge)

BRIEF OF AMICUS CURIAE NATIONAL RIFLE ASSOCIATION OF AMERICA, INC. IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL UPON REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

The National Rifle Association of America, Inc. does not have a parent corporation, nor does any publicly held corporation own 10% or more of its stock.

Dated: April 30, 2015

s/ Charles J. Cooper
Charles J. Cooper

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INTEREST OF AMICUS CURIAE

The National Rifle Association of America, Inc. ("NRA") is the oldest civil rights organization in America and the Nation's foremost defender of Second Amendment rights. Founded in 1871, the NRA has approximately five million members and is America's leading provider of firearms marksmanship and safety training for civilians. The NRA has a strong interest in this case because its outcome will affect the ability of the many NRA members who reside in California to exercise their fundamental right to carry a firearm.

Pursuant to Federal Rule of Appellate Procedure 29, the NRA certifies that this brief was not written in whole or in part by counsel for any party, that no party or party's counsel made a monetary contribution to the preparation and submission of this brief, and that no person or entity other than the NRA, its members, and its counsel has made such a monetary contribution. All parties have consented to the filing of this brief.

INTRODUCTION

When the People enshrined the right to "carry weapons in case of confrontation" for the "core lawful purpose of self-defense" in the Constitution, *District of Columbia v. Heller*, 554 U.S. 570, 592, 630 (2008), they did not mean to leave the freedom to exercise that right at the mercy of the very government officials whose hands they sought to bind. No, "[t]he very enumeration of the right

takes out of the hands of government . . . the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." *Id.* at 634. But in the most blatant disregard of this rule, local officials in San Diego and Yolo Counties have claimed *precisely* this power: to decide, on a case-by-case basis, whether an applicant for a license to "carry weapons in case of confrontation," *id.* at 592, has, in their estimation, shown "[g]ood cause" that a license should issue, CAL. PENAL CODE § 26150(a)(2). And worse still, these counties have, in the exercise of this unbridled discretion, determined that a general desire to carry a weapon for the purpose of self-defense is not a sufficiently good cause. They have thus struck a balance *directly contrary* to the Constitution's demand that the right to self-defense—"the *central component*" of the Second Amendment, *Heller*, 554 U.S. at 599—must be "elevate[d] above all other interests," *id.* at 635. The panel majorities in the two cases consolidated here were right to hold their actions unconstitutional, and the en banc Court should now do the same.

California by law generally prohibits (with limited exceptions) the open carrying of handguns in public locations, CAL. PENAL CODE § 26350, and it also prohibits the *concealed* carrying of firearms, *id.* § 25400, in the absence of a license to do so, *id.* § 26150. The combined effect of this legal tapestry is to make it wholly illegal for most typical law-abiding citizens to "carry weapons in case of confrontation," *Heller*, 554 U.S. at 592, unless they can convince their county

sheriff that "[g]ood cause exists for issuance of [a] license" to carry a concealed weapon, CAL. PENAL CODE § 26150(a)(2). And while some counties interpret this requirement more or less generously, both San Diego and Yolo County (the "Counties") have instituted policies interpreting "good cause" as excluding "[g]eneralized fear for one's personal safety," *Peruta v. County of San Diego*, 758 F. Supp. 2d 1106, 1110 (S.D. Cal. 2010), *rev'd*, 742 F.3d 1144 (9th Cir. 2014), or the desire for "self protection and protection of family," *Richards v. Prieto*, 560 F. App'x 681, 681 n.1 (9th Cir. 2014), *reh'g en banc granted*, 2015 WL 1381862 (9th Cir. 2015).

The panel opinions in *Peruta* and *Richards* recognized this scheme for what it is: a ban that effectively prevents "the typical responsible, law-abiding citizen" from "bear[ing] arms in public for the lawful purpose of self-defense." *Peruta v. County of San Diego*, 742 F.3d 1144, 1169 (9th Cir. 2014), *reh'g en banc granted*, 2015 WL 1381752 (9th Cir. 2015).[1] To be sure, this legal framework may initially have the appearance of a reasonable regulation of the right to bear arms—the mere requirement that those wishing to carry concealed handguns obtain a license first.

[1] In granting en banc rehearing in *Peruta*, the Ninth Circuit provided that the panel opinion "[s]hall not be cited as precedent by or to any court of the Ninth Circuit." 2015 WL 1381862, at *1. But while the opinion was thus stripped of precedential and preclusive force, it retains its persuasive value. *See, e.g.*, *Los Angeles Cnty. v. Davis*, 440 U.S. 625, 646 n.10 (1979) (Stewart, J., dissenting); *Animal Legal Def. Fund v. Veneman*, 490 F.3d 725, 728 (9th Cir. 2007) (Bybee, J., concurring); *id.* at 729–35 (Thomas, J., concurring in part and dissenting in part).

But the Counties' determination that an ordinary concern for self-defense is not a sufficiently good reason for seeking a license, by nullifying the balance the People struck when they elevated the right to bear arms into the Constitution, transforms California's licensing regime into a frontal assault on the core right protected by the Second Amendment. After all, it is in the very nature of a liberty right that those who seek to exercise it—for precisely the reasons the right was protected—do not have to persuade some government functionary anew that those reasons really are sufficient. And where, as here, it is clear that the government officials in charge have determined from the outset that those reasons *aren't* sufficient, the right has become eclipsed entirely.

Throughout the constellation of American constitutional rights doctrine, courts have recognized that such "ask-permission-first" limitations are as serious an affront to liberty as an outright ban. If the right to bear arms is not to be "a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees," *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010) (plurality), it must be treated no differently. And this means that the district court judgments below must be reversed.

ARGUMENT

In assessing a law challenged on Second Amendment grounds, this Court undertakes a "two-step inquiry," which first "asks whether the challenged law

burdens conduct protected by the Second Amendment" and "if so, directs courts to apply an appropriate level of scrutiny." *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013). Here, text, history, and tradition uniformly indicate that the Counties' implementation of California's licensing law burdens conduct that the Second Amendment protects. Indeed, the conduct in question is so close to the core of the Second Amendment—and the burden so heavy—that the scheme the Counties have imposed is, like the handgun-ban in *Heller* itself, *per se* unconstitutional. "The Constitution" has taken the Counties' "policy choices off the table." *District of Columbia v. Heller*, 554 U.S. 570, 635–36 (2008). But even if this were not so, the Counties' actions would still fail to pass constitutional scrutiny, since they are not narrowly tailored to achieve any interest the government may possess.

I. The Second Amendment Protects the Right To Carry Firearms Outside the Home.

Although the Supreme Court has not attempted to "clarify the entire field" of Second Amendment jurisprudence, *id.* at 635, it was "hardly shy" in *Heller* about "the precise methods by which that right's scope is discerned." *Peruta*, 742 F.3d at 1150. Because "[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them," *Heller*, 554 U.S. at 634–35, charting out the scope of the rights guaranteed by the Second Amendment "requires a textual and historical analysis of the amendment." *Chovan*, 735 F.3d at

1133. Here, the Second Amendment's text and history—both jointly and severally—leave no doubt that that provision's protections do not subside when one leaves the home.

1. The application of the Second Amendment outside the home is clear from the provision's plain text. The Amendment protects "the right of the people to *keep* and *bear* Arms," U.S. CONST. amend. II (emphasis added)—a turn-of-phrase that is not, the Supreme Court has held, "some sort of term of art" with a "unitary meaning," but rather a conjoining of two related guarantees. *Heller*, 554 U.S. at 582–91. Besides "the right to possess a handgun in the home," *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010) (plurality), then, the Second Amendment independently protects the right to "wear, bear, or carry" an operative firearm "upon the person or in the clothing or in a pocket" for the purpose of "being armed and ready for offensive or defensive action." *Heller*, 554 U.S. at 584 (quoting *Muscarello v. United States*, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting)). And because "[t]o speak of 'bearing' arms within one's home would at all times have been an awkward usage," the Constitution's explicit inclusion of the "right to *bear* arms thus implies a right to carry a loaded gun outside the home." *Moore v. Madigan*, 702 F.3d 933, 936 (7th Cir. 2012); *see also Peruta*, 742 F.3d at 1152 ("[T]he idea of carrying a gun . . . does not exactly conjure up images of father

stuffing a six-shooter in his pajama's pocket before heading downstairs to start the morning's coffee . . . .").

Limiting the Second Amendment to the home would thus do great violence to its text, effectively reading the term "bear" out of the Constitution altogether.

2. As the panel opinion in *Peruta* carefully and exhaustively demonstrated, the history of the Second Amendment—at the time of its proposal and ratification, in the post-ratification early republic, and during the aftermath of the Civil War—strongly supports what is obvious from the provision's text: it applies outside the home.

Begin with the founding era. "The commonsense reading of 'bear Arms' . . . finds support in several important constitutional treatises in circulation at the time of the Second Amendment's ratification," *Peruta*, 742 F.3d at 1154, including the most important of the lot: Blackstone's Commentaries, *see Heller*, 554 U.S. at 593–94 (noting the influence of Blackstone's Commentaries). The common-law "right of having and using arms for self-preservation and defence," according to Blackstone, protected "the natural right of resistance and self-preservation." 1 WILLIAM BLACKSTONE, COMMENTARIES *139–40. "And one doesn't have to be a historian to realize that a right to keep and bear arms for personal self-defense in the eighteenth century could not rationally have been limited to the home." *Moore*, 702 F.3d at 936. Indeed, "the most important early American edition of

Blackstone's Commentaries," *Heller*, 554 U.S. at 594, made clear that Congress would exceed its authority were it to "pass a law prohibiting any person from bearing arms." 1 WILLIAM BLACKSTONE, COMMENTARIES App. n.D, at 289 (St. George Tucker ed., 1803).

Moving to the early republic, the history of the interpretation of state-constitutional analogues to the Second Amendment during the first part of the nineteenth century confirms that the right to bear arms extended into the public square and boulevards. "Nine state constitutional provisions written in the 18th century or the first two decades of the 19th . . . enshrined a right of citizens to 'bear arms in defense of themselves and the state' or 'bear arms in defense of himself and the state.' " *Heller*, 554 U.S. at 584–85 & n.8. Just as "it is clear from those formulations that 'bear arms' did not refer only to carrying a weapon in an organized military unit," *id*. at 585, it is likewise clear that "bear arms" did not refer only to toting a weapon from room to room in one's house. Indeed, as the panel majority in *Peruta* noted, "the majority of nineteenth century courts agreed that the Second Amendment right extended outside the home," and though "some courts approved limitations on the manner of carry outside the home, none approved a total destruction of the right to carry in public." 742 F.3d at 1160; *see also, e.g.*, *Nunn v. State*, 1 Ga. 243, 249–51 (1846); *State v. Reid*, 1 Ala. 612, 616–17 (1840); *Bliss v. Commonwealth*, 12 Ky. (2 Litt.) 90, 91–93 (1822).

Those who wrote and ratified the Fourteenth Amendment understood the right to bear arms in the same way. Indeed, Chief Justice Taney recoiled so strongly in the infamous *Dred Scott* case from recognizing freedmen and their descendants as part of "We the People of the United States" precisely because he understood that doing so would entitle them "to keep and carry arms wherever they went." *Dred Scott v. Sandford*, 60 U.S. 393, 417 (1856). During Reconstruction, Congress labored mightily to entomb this legacy of prejudice, *Peruta*, 742 F.3d at 1160–63—and to defeat the post-war South's attempts to deprive every "freedman, free negro or mulatto" of their right to "keep or carry fire-arms of any kind," An Act To Punish Certain Offences Therein Named, and for Other Purposes, ch. 23, § 1, 1865 Miss. Laws 165. This effort culminated in the adoption of the Fourteenth Amendment, which established that *all* Americans, regardless of race, are entitled to carry firearms in public to defend themselves.

Given the clarity with which the Second Amendment's text and history speak, it should come as no surprise that no circuit to have squarely addressed the question has concluded that the rights guaranteed by that amendment are confined to the home. *See, e.g.*, *Moore*, 702 F.3d at 936.

II. Because It Strikes at the Very Core of the Rights Protected by the Second Amendment, the Counties' Conduct Is Categorically Unconstitutional.

Given that the Second Amendment applies out-of-doors, *Heller* makes the next analytical steps clear. Because the Second Amendment "elevates" the rights it most centrally protects "above all other interests," infringements of conduct that falls within its "core protection" must be held unconstitutional categorically, not "subjected to a freestanding 'interest-balancing' approach." *Heller*, 554 U.S. at 634–35. The regime enacted by California—as applied by the Counties—is just such an infringement of core Second Amendment conduct: a "near-total prohibition on bearing [arms]." *Peruta*, 742 F.3d at 1170. Accordingly, it is unconstitutional per se. Appellees attempt to parry both these points, opining that at most intermediate scrutiny should apply to infringements of the Second Amendment like this one and that, in any event, California's licensing regime does not seriously burden Second Amendment rights. But neither argument is persuasive.

a. *Heller* Requires Per Se Invalidation of Categorical Bans on Core Second Amendment Conduct.

Much of the post-*Heller* case law has focused on the level of scrutiny that ought to apply in Second Amendment challenges: whether restrictions on the right to keep and bear arms must be the *least-restrictive* means of furthering a *compelling* government interest, or must only be *substantially* related to an

important government objective, *see, e.g.*, *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1256–57 (D.C. Cir. 2011). The Supreme Court itself has taken a very different tack. In *Heller*, Justice Breyer wrote in favor of applying to the Second Amendment "an interest-balancing inquiry" based on the "approach . . . the Court has applied . . . in various constitutional contexts, including election-law cases, speech cases, and due process cases." *Heller*, 554 U.S. at 689–90 (Breyer, J., dissenting). But the majority expressly *declined* Justice Breyer's invitation, holding instead that the freedom of law-abiding citizens to keep and bear arms for self-defense was "elevate[d] above all other interests" the moment that the People chose to enshrine it in the Constitution's text. And in *McDonald*, the Court reaffirmed that *Heller* had deliberately and "expressly rejected the argument that the scope of the Second Amendment right should be determined by judicial interest balancing." 561 U.S. at 785 (plurality opinion).

Despite the clarity and consistency of these decisions, the circuit courts have massively resisted the Supreme Court's teaching. In *Chovan*, for example, a panel of this Court concluded that laws burdening Second Amendment conduct should be subjected to scrutiny the stringency of which depends on "(1) 'how close the law comes to the core of the Second Amendment right,' and (2) 'the severity of the law's burden on the right.' " 735 F.3d at 1138 (quoting *Ezell v. City of Chicago*, 651 F.3d 684, 703 (7th Cir. 2011)). As even a former Brady Center attorney has

recognized, such a methodology "effectively embrace[s] the sort of interest-balancing approach" that the Supreme Court "condemned" in *Heller*. Allen Rostron, *Justice Breyer's Triumph in the Third Battle over the Second Amendment*, 80 GEO. WASH. L. REV. 703, 706-07 (2012). This Court, sitting en banc, is not bound by previous circuit panels' departures from the Supreme Court's clear instructions; we respectfully submit that it should correct the *Chovan* panel's error and align the law of the circuit with the Court's holding in *Heller* and *McDonald* that the Second Amendment—itself "the very *product* of an interest-balancing by the people"—simply does not "leave[ ] to future evaluation" whether the core rights it protects are "*really worth* insisting upon." *Heller*, 554 U.S. at 634–35.

b. The Counties' Actions Turn California's Licensing Regime into a Ban on the Typical Exercise of Core Second Amendment Rights.

As the panel majority in *Peruta* rightly concluded, California's statutes governing the concealed and open bearing of firearms—paired with the Counties' application of those statutes to bar the bearing of arms, both openly and concealed, in the very instances that the core of the Second Amendment was designed to protect—completely prevent "the typical responsible, law-abiding citizen [from] bear[ing] arms in public for the lawful purpose of self-defense," "requiring *Heller*-style per se invalidation." 742 F.3d at 1169–70. Appellees have sought to resist this logic in two ways.

First, they argue that because California has effectively barred public carrying of firearms in two steps rather than one—by prohibiting open carry in one statute and limiting concealed carry in a different one—Plaintiffs' challenge to the implementation of the *concealed* carry licensing regime must somehow be assessed *in vacuo*, rather than in light of the entirety of California's regulatory scheme. Second, they suggest that because individuals can obtain a concealed-carry license by showing "good cause" to the satisfaction of their county sheriff, California's regime does not amount to a complete ban. Neither contrivance should be allowed to obscure the true nature and total effect of California's regime—a complete ban on the paradigmatic exercise by ordinary citizens of the Second Amendment right that is categorically unconstitutional.

1. The Constitutionality of California Law Must Be Measured as a Whole.

In his dissent from the panel opinion in *Peruta*, Judge Thomas faulted the majority for "evaluat[ing] the entirety of California's handgun regulatory scheme," even though the Plaintiffs had brought only a narrow as-applied challenge to "San Diego County's concealed carry policy." 742 F.3d at 1179–80 (Thomas, J., dissenting). Because the carrying of concealed firearms is, in Judge Thomas's view, not protected by the Second Amendment, "restrictions on that conduct are valid, regardless of the regulatory landscape governing different activities." *Id.* at 1194. Accordingly, "California's decision to restrict other, protected forms of

carry" cannot "magically endow that conduct with Second Amendment protection." *Id.* California, in its petition for rehearing, similarly complains that the panel transformed a narrow challenge to "only the implementation of a concealed-carry permitting scheme" into "a broad assessment of the constitutionality of California's whole system for regulating the public carrying of guns." *See* Intervenor-Appellee's Petition for Rehearing or Rehearing En Banc at 14, *Peruta*, 742 F.3d 1144 (No. 10-56971) ("California PFR"). But surely California cannot insulate its restrictions on the right to bear arms from judicial review by placing those restrictions in two statutory sections rather than one. As the panel majority rightly concluded, the Counties' challenged conduct must be assessed "in light of the California licensing scheme *as a whole*." *Peruta*, 742 F.3d at 1171.

Judge Thomas's—and California's—view to the contrary is based on a conflation of the scope of the Plaintiffs' *challenge* with the scope of the Court's *inquiry*. To be sure, Plaintiffs in these consolidated cases only challenged the Counties' implementation of that provision of law that most directly injured them—California's concealed carry licensing regime. But the legality of the specific, challenged state conduct must nonetheless be assessed in light of the entire legal backdrop. Any other rule would allow two separate state actions that

potentially are independently unobjectionable but jointly unconstitutional to escape all judicial scrutiny.[2]

This type of situation—where actions that are potentially legitimate standing alone combine to violate the Constitution—is far from unknown in constitutional litigation, and it has long been understood that even where a plaintiff sets his face against only one of the jointly unconstitutional acts, the constitutionality of that act must be measured in light of the government's actions as a whole. In the First Amendment context, for example, challenges to content-neutral limitations on speech are assessed in part on the basis of whether the government has left open "ample alternative channels of communication," *Ward v. Rock Against Racism*, 491 U.S. 781, 802 (1989), and such limits may be struck down on this ground even if the separate restrictions that close off the "alternative channels" are not themselves directly challenged by the plaintiffs. *See, e.g.*, *Berkeley Cmty. Health Project v. City of Berkeley*, 902 F. Supp. 1084, 1093–94 (N.D. Cal. 1995) *vacated in part on other grounds*, 966 F. Supp. 941 (N.D. Cal. 1997). Similarly, an out-of-state business can complain under the dormant commerce clause that some

[2] Judge Thomas also objects to Plaintiffs' decision to bring as-applied actions against the Counties when their "real quarrel is with the statute." *Peruta*, 742 F.3d at 1196 (Thomas, J., dissenting). There is nothing to this. Plaintiffs should hardly be penalized for attacking California's scheme as it is applied, rather than on its face; to the contrary, the Supreme Court has emphatically and consistently counseled that "[f]acial challenges are disfavored." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450 (2008).

provision of state law treats it less well than other provisions of that state's law treat in-state enterprises even though it is only regulated by—and therefore only challenges—the first half of this discriminatory pair of regulations. *See Granholm v. Heald*, 544 U.S. 460, 473–76 (2005).

Of course, where two independent state actions combine to cause a constitutional violation in this way, a court may face complicated questions of remedy. *See, e.g., Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 508–10 (2010); *United States v. Booker*, 543 U.S. 220, 258–65 (2005). And the State objects on this ground as well, complaining that enjoining the Counties from refusing to grant concealed carry licenses based on their unconstitutional definition of "good cause" would effectively prevent the California Legislature from remedying the unconstitutionality of its current ban on *any* carrying by allowing *open* rather than concealed carry. *See* California PFR at 14.

But California has *already* made a choice between open and concealed carry by generally barring the former while allowing the latter in some circumstances (though subject to the unconstitutional restrictions challenged here.) And California is free to revisit this decision at any time; indeed, this would be no less the case if an injunction against the Counties' implementation of the State's concealed carry licensing regime were already in place. *See Agostini v. Felton*, 521

U.S. 203, 237–40 (1997); *California Dep't of Soc. Servs. v. Leavitt*, 523 F.3d 1025, 1032 (9th Cir. 2008); FED. R. CIV. P. 60(b)(5) (allowing relief from a judgment where "applying it prospectively is no longer equitable"). What California cannot do, however, is choose concealed (or open) carry as the State's preferred method for bearing arms in public but then make it effectively impossible for law-abiding citizens to lawfully carry arms in that manner. *See Heller*, 554 U.S. at 629 ("A statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would be clearly unconstitutional." (quoting *Reid*, 1 Ala. at 616–17)).

California's permitting laws, as implemented by the Counties, effectively amounts to a total ban on bearing handguns in public by typical, law-abiding citizens. The Court need not blind itself to this fact simply because the State has effected this ban in two steps rather than one.

2. California's Licensing Scheme Strikes at the Heart of the Second Amendment Right.

Even considered as a whole, California's regulation of the public carrying of firearms comes in the guise of a reasonable licensing requirement rather than a flat-out ban. But because licensure is contingent on each local official's assessment of whether an applicant has shown "good cause"—an assessment so boundlessly discretionary that those officials can conclude (as have San Diego and Yolo

Counties' officials) that the precise reasons the Second Amendment was adopted are not sufficient to justify its exercise—it is no better than a complete prohibition. Rather than banning the public bearing of arms itself, in other words, California has delegated to local officials the wholly discretionary authority to do so. Surely California cannot inoculate its regime against constitutional invalidity in this facile way. Though clad in sheep's clothing, California's scheme is an unconstitutional wolf—flatly inconsistent with the Second Amendment. And this is clear not only as a matter of logic but also from the ordinary doctrinal rules that apply to a wide variety of constitutional rights. Indeed, it is clear from *Heller* itself.

1. California's demand that a citizen prove to the State that he has a good enough reason to carry a handgun is flatly inconsistent with the nature of the Second Amendment right. The existence of that right is itself reason enough for its exercise. The Constitution has conferred a right to armed self-defense and the State is not free to deny a handgun permit to a trained, law-abiding, average citizen who has met every legitimate public-safety requirement imposed by the State but has failed to persuade some government functionary that his desire to exercise his constitutional right of armed self-defense is driven by more than a mere "[g]eneralized fear for [his] personal safety," *Peruta v. County of San Diego*, 758 F. Supp. 2d 1106, 1110 (S.D. Cal. 2010). A constitutional right to engage in conduct means *not having* to ask for permission to engage in that conduct. And this

is all the more true where, as here, permission is denied as a matter of course to law-abiding, responsible adults.

Constitutional rights by their very nature and design are meant to settle, at least to some extent, the permissible scope of state power; they settle nothing at all if the state has limitless discretion to disregard them whenever it concludes that there is no "good cause" to abide by their limits. Like any other legal rule, in other words, it is the essence of a right that it bars government officials from infringing it merely because they disapprove of the right. *See* JOSEPH RAZ, ETHICS IN THE PUBLIC DOMAIN 211–15 (1994); FREDERICK SCHAUER, PLAYING BY THE RULES 5, 100, 159, *passim* (1991).

Put differently, the Second Amendment right has force *as a right* only if those who disagree with the central value choice made by those who adopted it—that an individual's interest in self-defense is of such paramount importance that the freedom "to possess and carry weapons in case of confrontation" must be given constitutional protection, *Heller*, 554 U.S. at 592—are bound to follow it in the teeth of that disagreement. By giving local officials the authority to veto the ordinary, law-abiding citizen's choice to carry a firearm based on nothing more than those officials' estimation that "generalized fear for one's personal safety" is not a sufficiently persuasive reason, California has thus struck at the heart of the Second Amendment.

2. These principles are deeply embedded in the law. Across a wide variety of constitutional rights, courts have recognized that the government has utterly failed to honor a right if it demands to know—and assess *de novo*—the reasons justifying each occasion of its exercise.

The rejection of this "ask-permission-first" type of restriction is most familiar in the context of the First Amendment's free speech guarantee. There, it has been understood for centuries that the most serious infringement on the right of free expression is the "prior restraint": a requirement that before you get permission to speak, you must explain to the government why what you have to say is worth hearing. *See New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam); *Near v. Minnesota*, 283 U.S. 697, 713–23 (1931); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 732–44 (1833). While the state can require that you seek its approval before exercising your First Amendment rights for the purpose of regulating the time, place, and manner of your speech, *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 130 (1992); *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941), the Constitution simply will not brook a licensing scheme that leaves government officials with "uncontrolled discretion" to bar you from speaking because "they do not approve" of the proposed speech's "effects upon the general welfare," *Staub v. City of Baxley*, 355 U.S. 313, 322 (1958).

The rule that the state can no more demand that you explain to its satisfaction your reasons for engaging in constitutionally protected conduct than it can ban such conduct altogether is also well established in the law governing the right to free exercise of religion. Of particular importance here, the government cannot arrogate to itself the authority to second-guess citizens' religious judgments. Those judgments are for citizens, and citizens alone, to make. Thus, while courts can determine whether an asserted religious conviction is an "honest" one, *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 716 (1981), they cannot proceed to "question the centrality" or "plausibility" of that conviction, *Employment Div. v. Smith*, 494 U.S. 872, 887 (1990); *see also Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2778 (2014).

The rule is similar with respect to religious believers' selection of their leaders: not only is it "impermissible for the government to contradict a church's determination of who can act as its ministers," *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 704 (2012), but "it would offend the Free Exercise Clause simply to require the church to articulate a religious justification for its personnel decisions," *Bollard v. California Province of the Soc'y of Jesus*, 196 F.3d 940, 946 (9th Cir. 1999); *see also Hosanna-Tabor*, 132 S. Ct. at 710 (Thomas, J., concurring) ("A religious organization's right to choose its ministers would be hollow . . . if secular courts could second-guess the

organization's sincere determination that a given employee is a 'minister' under the organization's theological tenets."). And if the government decides "to condition the solicitation of aid for the perpetuation of religious views or systems upon a license," it cannot allow "the grant of [that license to] rest[ ] in the exercise of a determination by state authority as to what is a religious cause." *Cantwell v. Connecticut*, 310 U.S. 296, 307 (1940).

Finally, very similar considerations inform the Court's substantive-due-process doctrine. In the abortion context, the Court has insisted that the state may not require a woman to obtain her spouse's consent before terminating her pregnancy during the first trimester, for "since the State cannot regulate or proscribe abortion during the first stage, . . . the State cannot delegate authority to any particular person, even the spouse, to prevent abortion during that same period." *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 69 (1976). And because the due process clause protects the right to travel, *Aptheker v. Secretary of State*, 378 U.S. 500, 505–07 (1964), it also limits the ability of the government to delegate "unbridled discretion to grant or withhold it," *Kent v. Dulles*, 357 U.S. 116, 129 (1958).

Though it is perhaps clearer in some of these doctrinal contexts than others, a shared principle unites all of them: if the government cannot prohibit certain conduct, it also cannot make you first explain your reasons for wanting to engage

in it, at least if it retains the plenary discretion to conclude that those reasons do not suffice. And it should come as no surprise that this principle enjoys such wide application in the constellation of constitutional-rights doctrine, for it is part of the *very nature* of a right that the government must honor it simply by virtue of its existence.

3. Because the Second Amendment is not a "second-class right," *McDonald*, 561 U.S. at 780 (plurality opinion), it should also be unsurprising that the Court has in this context already embraced the principle that the exercise of the right to keep and bear arms cannot be conditioned on the government's discretionary, ad hoc weighing of that right's importance. "A Constitutional guarantee subject to future . . . assessments of its usefulness is no constitutional guarantee at all." *Heller*, 554 U.S. at 634. By necessity, "[t]he very enumeration of the right takes out of the hands of government . . . the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." *Id.* But California has seized *precisely* this power. By requiring its residents to beg the leave of local officials before bearing arms publicly, the State has delegated to those officials the unbridled power to ban any exercise of this core Second Amendment conduct within their domain for no reason other than their disapproval of that conduct.

Indeed, the Counties' actions here *embody* the danger this type of wholly-discretionary licensing regime poses to constitutionally protected conduct. Their

conclusion that an individual's "[g]eneralized fear for . . . personal safety," *Peruta*, 758 F. Supp. 2d at 1110, or concern for "self protection and protection of family," *Richards v. Prieto*, 560 F. App'x 681, 681 n.1 (9th Cir. 2014), *reh'g en banc granted*, 2015 WL 1381862 (9th Cir. 2015), are not sufficient reasons for carrying firearms could not more brazenly contradict the choice the founding generation made when they elevated the right to bear arms to constitutional status. The Second Amendment is itself "the very *product* of an interest-balancing by the people," and those who ratified that provision thereby "elevat[ed] above all other interests" the right to bear arms for "the core lawful purpose of self-defense." *Heller*, 554 U.S. at 630, 635. The Constitution will simply not tolerate a regime where local government officials are vested with the naked power to ignore the central choice the sovereign people made when they enshrined the Second Amendment in that document's text.

III. The Counties' Application of California's Licensing Regime Is Not Substantially Related to Any Interest the State May Legitimately Hold, and It Thus Fails Any Measure of Constitutional Scrutiny.

As shown above, *Heller* requires that the Counties' imposition of an effective ban on the public bearing of arms be held categorically unconstitutional, without application of any "tiers of scrutiny." But even if this Court disagrees with that, the district courts in these consolidated cases still erred in upholding the Counties' acts. Appellees are simply unable to show that a ban on public carriage

of firearms substantially advances any of the governmental interests they assert. This ban thus fails to stand up under constitutional scrutiny, and that is so whether the scrutiny is "strict" or "intermediate."[3]

a. Because the Right To Bear Arms Is Fundamental, Government Actions that Burden that Right Should Be Subject to Strict Scrutiny.

Because California's licensing scheme, as shown above, amounts to a near-total ban on the typical exercise of the Second Amendment right to bear arms, it must at least be justified as necessary to advance the most compelling of government interests. It is well established, after all, that "strict judicial scrutiny [is] required" if a law "impinges upon a fundamental right explicitly or implicitly protected by the Constitution." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973). And the right to bear arms is not only specifically enumerated in the constitutional text; it was also counted "among those fundamental rights necessary to our system of ordered liberty" by "those who drafted and ratified the Bill of Rights." *McDonald*, 561 U.S. at 768, 778.

Indeed, *Heller* itself forecloses the application of intermediate scrutiny here. While Justice Breyer—in *dissent*—urged the Court to craft a doctrinal test drawn from "cases applying intermediate scrutiny" in the First Amendment context, such

[3] As this Court has previously noted, *Heller* held that "rational basis review is not appropriate" in the Second Amendment context. *Chovan*, 735 F.3d at 1137 (citing *Heller*, 554 U.S. at 628 n.27).

as *Turner Broadcasting Systems, Inc. v. FCC*, 520 U.S. 180 (1997), *Heller*, 554 U.S. at 704 (Breyer, J., dissenting), the *Heller* majority deliberately *rejected* that suggestion, *id.* at 634–35 (majority opinion). And an increasing number of courts are recognizing that the application of anything less than strict scrutiny to laws burdening core Second Amendment conduct is impossible to square with *Heller* and *McDonald*. *See Tyler v. Hillsdale Cnty. Sheriff's Dep't*, 775 F.3d 308, 328–29 (6th Cir. 2014), *vacated for reh'g en banc*, No. 13-1876 (6th Cir. Apr. 21, 2015) (noting "a significant, increasingly emergent though, as yet, minority view that concludes that . . . strict scrutiny . . . is more appropriate for assessing a challenge to an enumerated constitutional right, especially in light of *Heller*'s rejection of judicial interest-balancing"). Amicus respectfully submits that this Court should do likewise.

b. The Counties' Implementation of California's Licensing Scheme Fails Any Level of Heightened Scrutiny.

Even if this Court concludes that only intermediate scrutiny applies to the Counties' implementation of California's licensing scheme, the Counties' acts still fail constitutional muster. Because the interests generally claimed by the state to justify restricting the right to keep and bear arms—preventing crime, injury, and death—are sufficiently weighty by any standard, the only effective difference between strict and intermediate scrutiny in this context is the degree of "fit"

required between that statute's aim and the limitations it is said to justify. And even this distinction is easily overstated.

Restrictions on constitutionally protected conduct survive strict scrutiny only if they are "the least restrictive means available" of advancing the interest the government puts forward as justification, *Bernal v. Fainter*, 467 U.S. 216, 219 (1984), while intermediate scrutiny demands only that the restriction and the state interest be "substantially related," *Chovan*, 735 F.3d at 1140. But as the Supreme Court clarified only last Term, restrictions must under either standard be "narrowly tailored," *McCullen v. Coakley*, 134 S. Ct. 2518, 2535 (2014); *see also id.* at 2542, 2548 (Scalia, J., concurring)—possessing a "close fit between ends and means," *id.* at 2534 (majority opinion). Here, that close fit is absent.

As an initial matter, the state's scheme must fail any means-ends fit test as a matter of law, since the "means" Appellees have chosen effectively *extinguish* the right to bear arms. As demonstrated above, the state's "ask-permission-first" restriction is no better than an outright ban on carrying firearms in public; it applies indefinitely and it applies to the very "law-abiding, responsible citizens" that the Second Amendment was centrally designed to protect. *Heller*, 554 U.S. at 635. But the state cannot adopt a restriction that wholly and indefinitely prohibits the core conduct protected by the Second Amendment no matter *what* its reasons, since that would empty that constitutional protection of all meaningful content. "[T]he

enshrinement of constitutional rights necessarily takes certain policy choices off the table," *id.* at 636, and surely the choice to completely prohibit the core conduct that the right was enshrined to protect is one of them.

Even if this initial objection is laid aside, however, the Counties' implementation of California's statute still fails. To survive intermediate scrutiny, a restriction must be "substantially related to the achievement" of the government's objective. *United States v. Virginia*, 518 U.S. 515, 533 (1996). "The burden of justification is demanding and it rests entirely on the State." *Id.* Here, the Counties simply cannot meet that burden because, as Amicus emphasized in its brief before the panel in *Richards*, the relevant social science not only fails to demonstrate any "causal link" between restrictions on concealed carriage of firearms and crime rates, FIREARMS AND VIOLENCE: A CRITICAL REVIEW 150 (Charles F. Wellford, John V. Pepper, & Carol V. Petrie eds., 2004), it actually suggests that "permitting law-abiding citizens to carry firearms in public to defend themselves *promotes* public safety." Brief of Amicus Curiae National Rifle Association of America, Inc. at 2–3, *Richards*, 560 F. App'x 681 (No. 11-16255); *see also id.* at 3–21 (exhaustively surveying the relevant social-scientific studies).

Even if this Court concludes that the Counties' acts should be analyzed under intermediate scrutiny, the Counties must still show "that they are narrowly tailored to serve a significant governmental interest." *McCullen*, 134 S. Ct. at 2529.

Plainly, the Counties cannot make this showing if their ban on bearing arms in public perversely *impedes* their avowed interest in ensuring the public safety.

CONCLUSION

For the reasons given above, Amicus Curiae NRA respectfully submits that the district courts' judgments in both cases consolidated here should be reversed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Ninth Circuit Rule 29-2(c)(3) because it contains 6,901 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type-style requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times New Roman font.

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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 April 30, 2015. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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