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9  
 10 IN THE UNITED STATES DISTRICT COURT  
 11 FOR THE CENTRAL DISTRICT OF CALIFORNIA  
 12 WESTERN DIVISION

13  
 14 **MICHELLE FLANAGAN, et al.,**  
 15 Plaintiffs,  
 16 v.  
 17 **CALIFORNIA ATTORNEY  
 GENERAL XAVIER BECERRA, in  
 18 his official capacity as Attorney  
 General of the State of California, et  
 19 al.,**  
 20 Defendants.

2:16-cv-06164-JAK-AS

**DEFENDANT’S NOTICE OF  
 MOTION AND MOTION FOR  
 SUMMARY JUDGMENT ON  
 COMPLAINT FOR  
 DECLARATORY AND  
 INJUNCTIVE RELIEF**

Date: November 6, 2017  
 Time: 8:30 a.m.  
 Courtroom: 10B  
 Judge: Hon. John A. Kronstadt  
 Action Filed: August 17, 2016

21  
 22 PLEASE TAKE NOTICE that, on November 6, 2017, at 8:30 a.m., or as soon  
 23 thereafter as the matter may be heard, before the Honorable John A. Kronstadt, U.S.  
 24 District Judge, in Courtroom 10B of the U.S. District Court for the Central District  
 25 of California, located at 350 West First Street, Los Angeles, California 90012,  
 26 Defendant Xavier Becerra, sued in his official capacity as Attorney General of the  
 27 State of California (“Defendant”), will move this Court for summary judgment on  
 28 the August 17, 2016, complaint for declaratory and injunctive relief (the

1 “Complaint”) of Plaintiffs Michelle Flanagan, Samuel Golden, Dominic Nardone,  
2 Jacob Perkio, and the California Rifle and Pistol Association (“CRPA”; together  
3 with the other Plaintiffs, “Plaintiffs”), under Federal Rule of Civil Procedure 56.

4 Defendant seeks summary judgment on the only remaining claim for relief per  
5 the Court’s order (ECF No. 39) on Defendant’s earlier motion to dismiss (ECF  
6 No. 24): the claim under the Second and Fourteenth Amendments to the United  
7 States Constitution, “based on the open carry limitations” (ECF No. 39 at 6). These  
8 “open carry limitations” are identified in the Complaint’s Prayer for Relief as  
9 California Penal Code sections 25850, 26350, 26400, and 26150(b)(2). Complaint  
10 (ECF No. 1) at 19 (Prayer for Relief ¶ 3).

11 This motion for summary judgment is brought on the basis that no genuine  
12 issue of material fact exists as to whether (1) the Second Amendment to the U.S.  
13 Constitution has been historically understood to recognize an individual right of  
14 every law-abiding citizen to carry a firearm openly in public for the purpose of self-  
15 defense, under almost all circumstances, meaning that Plaintiffs cannot prove that  
16 California’s open-carry laws violate the Second Amendment, as alleged in the  
17 Complaint; and (2) even if the Second Amendment has been historically understood  
18 to recognize such a right, the State of California has, as a matter of law, sufficiently  
19 important governmental interests in maintaining those laws, and there is a  
20 reasonable fit between those laws and the governmental interests, such that the laws  
21 survive constitutional scrutiny.

22 This motion is based on this notice, the accompanying memorandum of points  
23 and authorities, the request for judicial notice and attached exhibits, the declaration  
24 of P. Patty Li and attached exhibits, the Statement of Uncontroverted Facts and  
25 Conclusions of Law, the papers and pleadings already on file in this action, and  
26 such matters as may be presented to the Court at the hearing.

27 //

28 //

1           This motion is made following the conference of counsel under L.R. 7-3,  
2 which took place on September 1, 2017.

3  
4 Dated: September 11, 2017

Respectfully submitted,  
XAVIER BECERRA  
Attorney General of California  
STEPAN A. HAYTAYAN  
Supervising Deputy Attorney General  
P. PATTY LI  
Deputy Attorney General

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/s/ Jonathan M. Eisenberg  
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 10 IN THE UNITED STATES DISTRICT COURT  
 11 FOR THE CENTRAL DISTRICT OF CALIFORNIA  
 12 WESTERN DIVISION (TEMPLE STREET)

14 **MICHELLE FLANAGAN, et al.,**  
 Plaintiffs,  
 15  
 16 **v.**  
 17 **CALIFORNIA ATTORNEY**  
**GENERAL XAVIER BECERRA, in**  
 18 **his official capacity as Attorney**  
**General of the State of California, et**  
 19 **al.,**  
 Defendants.

2:16-cv-06164-JAK-AS

**MEMORANDUM OF POINTS AND  
 AUTHORITIES IN SUPPORT OF  
 DEFENDANT’S MOTION FOR  
 SUMMARY JUDGMENT ON  
 COMPLAINT FOR  
 DECLARATORY AND  
 INJUNCTIVE RELIEF**

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12

1 Defendant Xavier Becerra, Attorney General of the State of California, sued in  
2 his official capacity (“Defendant”), submits this memorandum of points and  
3 authorities in support of Defendant’s motion for summary judgment.

#### 4 INTRODUCTION

5 The Second Amendment to the United States Constitution recognizes an  
6 individual right to have a firearm for self-defense, and that right encompasses the  
7 possession of a handgun within the home. *District of Columbia v. Heller*, 554 U.S.  
8 570, 599, 628-29 (2008); *see also McDonald v. City of Chicago*, 561 U.S. 742, 749-  
9 50 (2010) (reiterating *Heller*’s holding). To date, the Supreme Court has not  
10 recognized a personal right to carry a firearm outside the home. And as *Heller*  
11 emphasizes, circumstances matter: “we do not read the Second Amendment to  
12 protect the right of citizens to carry arms for *any sort* of confrontation, just as we do  
13 not read the First Amendment to protect the right of citizens to speak for *any*  
14 *purpose*.” *Heller*, 554 U.S. at 595 (emphasis in original). In fact, *Heller* discusses  
15 approvingly several restrictions on the carrying of firearms in public places. *See*  
16 *id.* at 626-27. This discussion does not comport with Plaintiffs’ prayer for relief in  
17 this case, which would enshrine a broad right of law-abiding citizens to carry  
18 firearms in public under almost all circumstances.

19 Although *Heller* did not attempt to address how the Second Amendment  
20 might apply in circumstances other than those presented by that case itself, *Heller*  
21 instructed lower courts to discern the Second Amendment’s meaning by reference  
22 to the historical understanding of the Second Amendment. *See Heller*, 554 U.S. at  
23 595, 598 (giving that instruction); *see also id.* at 605-19 (conducting historical  
24 review of one aspect of Second Amendment). *Heller* favorably cited three 19th-  
25 century state-court decisions—*State v. Langford*, 10 N.C. 381 (1824); *English v.*  
26 *State*, 35 Tex. 473 (1871); and *State v. Lanier*, 71 N.C. 288 (1874)—that address  
27 the right to keep and bear arms as applied in public places. 554 U.S. at 627. The  
28 three decisions upheld public-carry regulations because they (A) preclude “terror to

1 the people” who observe other people carrying firearms in public (*Langford*, 10  
2 N.C. at 383), (B) minimize “licentiousness” and the breakdown of the social  
3 compact (*English*, 35 Tex. at 477), and/or (C) preserve “the public peace” (*Lanier*,  
4 71 N.C. at 289). These cases, whose continued relevance *Heller’s* approving  
5 recognition confirmed, show that the Second Amendment does not confer the  
6 broad, lightly restricted public-carry right that Plaintiffs have asserted here.

7 The cases also reflect the mainstream Anglo-American legal tradition pre-  
8 dating the Second Amendment, and encompassing case law, statutes, and  
9 regulations, which together historically limited the carrying of firearms in public  
10 and are incompatible with the expansive right that Plaintiffs now assert.  
11 Specifically, mainstream restrictions historically have outlawed carry in public  
12 (openly or otherwise) based on only a presumed, general need for self-defense.  
13 And California’s public-carry statutes are no more—indeed, are less—restrictive  
14 than the historical mainstream of such regulations. California’s laws respect any  
15 Second Amendment right to self-defense in public places, as that concept has been  
16 historically understood. California’s statutes, unlike some more restrictive  
17 historical examples, include multiple exceptions or accommodations for people  
18 who have bona fide needs to carry firearms in public. For those reasons,  
19 California’s statutes do not burden the Second Amendment right, either as  
20 contemplated in *Heller* or as historically understood.

21 If the Court determines or assumes that California’s open-carry laws do  
22 implicate the Second Amendment, then the Court should apply intermediate  
23 scrutiny to the laws, because they do not regulate the core Second Amendment right  
24 or impose severe burdens on the exercise of the right. California’s open-carry laws  
25 readily withstand intermediate scrutiny. In the enforcement of these statutes,  
26 California has indisputably important governmental interests, including bolstering  
27 public safety by minimizing chances for firearm violence in public. And expert  
28 opinion, social-science data, and common sense all demonstrate that there is a

1 reasonable fit between California’s open-carry laws and the fulfillment of those  
2 objectives.

3 The Court should therefore grant Defendant’s motion for summary judgment.

## 4 BACKGROUND

### 5 I. CALIFORNIA’S PUBLIC-CARRY LAWS

6 California law permits the carrying of firearms in public under certain  
7 circumstances, commonly where a self-defense need might arise. A California  
8 resident who is over 18 years old and not otherwise prohibited from possessing  
9 firearms may generally keep or carry a loaded handgun not only in the person’s  
10 home (as guaranteed by *Heller*) but also in the person’s place of business. CAL.  
11 PENAL CODE §§ 25605, 26035. Carrying is also generally permitted at a temporary  
12 residence or campsite. *Id.* § 26055. A person generally may also carry a loaded  
13 handgun in public areas outside incorporated cities where it would be lawful to  
14 discharge the weapon. *See id.* §§ 25850(a), 17030. Licensed hunters and fishers  
15 may carry handguns while engaged in those activities. *Id.* §§ 25640, 26366.  
16 Certain types of individuals, such as peace officers, military personnel, and private  
17 security personnel, likewise may carry firearms in public under various  
18 circumstances. *See id.* §§ 25450, 25620, 25630, 25650, 25900, 26030.

19 State law generally prohibits the public carrying, whether open or concealed, of  
20 a loaded firearm (handgun or long gun) or unloaded handgun in “any public place  
21 or on any public street” in incorporated cities. CAL. PENAL CODE § 25850(a); *see*  
22 *id.* §§ 25400, 26350(a). A similar restriction applies in public places or on public  
23 streets in a “prohibited area” of unincorporated territory—that is, an area where it is  
24 unlawful to discharge a weapon. *Id.* §§ 25850(a), 26350(a); *see id.* § 17030. State  
25 law also generally precludes carrying an unloaded long gun in public places within  
26 the State’s incorporated cities. *Id.* § 26400.

27 There is a focused self-defense exception to all of these restrictions, allowing  
28 the carrying of a loaded firearm by any individual who reasonably believes that

1 doing so is necessary to preserve a person or property from an immediate, grave  
2 danger, while if possible notifying and awaiting the arrival of law enforcement.  
3 CAL. PENAL CODE § 26045. There is also an exception for a person making or  
4 attempting to make a lawful arrest. *Id.* § 26050. And invocations of these  
5 exceptions do not require a license or permit. *Id.* §§ 26045, 26050.

6 California law also recognizes and accommodates the need or desire of some  
7 individuals to carry a handgun in public in situations not otherwise provided for by  
8 law. State law allows any otherwise qualified resident to seek a permit to carry a  
9 handgun, even in an urban or residential area, for “[g]ood cause.” CAL. PENAL  
10 CODE §§ 26150(a)(2), 26155(a)(2). Such a permit authorizes the carrying of a  
11 handgun in a concealed manner, although in counties with populations of less than  
12 200,000 persons, the permit may alternatively allow the carrying of a handgun in an  
13 “exposed” (i.e., open) manner. *Id.* §§ 26150(b)(2), 26155(b)(2). The California  
14 Legislature has delegated to local authorities (county sheriffs or city police chiefs)  
15 the authority to determine what constitutes “good cause” for the issuance of such a  
16 permit in local areas. *See id.* §§ 26150, 26155, 26160.

## 17 **II. THE PRESENT LAWSUIT**

### 18 **A. The Complaint**

19 Plaintiffs are four individuals and an organization, CRPA. Compl. ¶¶13-20.  
20 The four individual plaintiffs are residents of Los Angeles County who applied for  
21 concealed-carry weapons (“CCW”) permits with the Los Angeles County Sheriff,  
22 but were rejected for lack of “good cause.” *Id.* ¶¶ 15-19, 59-60. The individual  
23 plaintiffs allege that they “wish immediately to exercise their constitutional right to  
24 carry a firearm in public for self-defense, but they are precluded from doing so  
25 because they are unable to obtain a Carry License . . . and because California law  
26 prohibits them from carrying a firearm openly.” *Id.* ¶ 23. CRPA alleges that many  
27 of its members in Los Angeles County have applied for but been denied CCW  
28

1 permits, or have refrained from applying for such permits based on a belief that  
2 they are not obtainable. *Id.* ¶ 22, 62, 63.

3 Purporting to state claims under the Second Amendment and the Equal  
4 Protection Clause of the Fourteenth Amendment, Plaintiffs' Complaint, at pages 19  
5 and 20, sought declaratory and injunctive relief against enforcement, by the  
6 California Attorney General and the Los Angeles County Sheriff, of California's  
7 open-carry laws, identified as California Penal Code sections 25850,<sup>1</sup> 26350,<sup>2</sup>  
8 26400,<sup>3</sup> and 26150(b)(2).<sup>4</sup> Alternatively, Plaintiffs sought declaratory and  
9 injunctive relief against the "good cause" requirement for a concealed-carry permit,  
10 as set forth in California Penal Code section 26150(a)(2).

### 11 **B. The Motion to Dismiss**

12 In response to defendants' early motion to dismiss, the Court determined  
13 that *Peruta v. County of San Diego*, 824 F.3d 919 (9th Cir. 2016) (en banc),  
14 foreclosed Plaintiffs' requested remedies regarding concealed carry. The Court  
15 dismissed the Second Amendment claim based on concealed carry, leaving the  
16 Second Amendment claim "based on the open carry limitations." Order on Motion  
17 to Dismiss ("Order"; ECF No. 39) at 6.<sup>5</sup>

18 <sup>1</sup> "A person is guilty of carrying a loaded firearm when the person carries a loaded  
19 firearm on the person or in a vehicle while in any public place or on any public  
20 street in an incorporated city or in any public place or on any public street in a  
21 prohibited area of unincorporated territory." CAL. PENAL CODE § 25850(a).

22 <sup>2</sup> "A person is guilty of openly carrying an unloaded handgun when that person  
23 carries upon his or her person an exposed and unloaded handgun outside a vehicle  
24 while in or on any of the following: (A) A public place or public street in an  
25 incorporated city or city and county. (B) A public street in a prohibited area of an  
26 unincorporated area of a county or city and county. (C) A public place in a  
27 prohibited area of a county or city and county." CAL. PENAL CODE § 26350(a)(1).

28 <sup>3</sup> "A person is guilty of carrying an unloaded firearm that is not a handgun in an  
29 incorporated city or city and county when that person carries upon his or her person  
30 an unloaded firearm that is not a handgun outside a vehicle while in the  
31 incorporated city or city and county." CAL. PENAL CODE § 26400(a).

<sup>4</sup> "Where the population of the county is less than 200,000 persons according to the  
32 most recent federal decennial census, [the sheriff may issue] a license to carry  
33 loaded and exposed in only that county a pistol, revolver, or other firearm capable  
34 of being concealed upon the person." CAL. PENAL CODE § 26150(b)(2).

<sup>5</sup> The Court dismissed the Equal Protection Clause claim as duplicative of the  
35 Second Amendment claim, Order at 7, and also dismissed the Los Angeles County  
(continued...)



1                   **STANDARD FOR MOTION FOR SUMMARY JUDGMENT**

2                   Summary judgment is proper where no genuine issue of material fact exists  
 3 and the moving party is entitled to judgment as a matter of law. Fed. R. Civ.  
 4 P. 56(a). In considering a motion for summary judgment, the Court must draw all  
 5 reasonable inferences in favor of the nonmoving party. *Matsushita Elec. Indus.*  
 6 *Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). “[T]he plain language  
 7 of Rule 56(c) mandates the entry of summary judgment . . . against a party who  
 8 fails to make a showing sufficient to establish the existence of an element essential  
 9 to that party’s case, and on which that party will bear the burden of proof at trial.”  
 10 *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

11                   **RELEVANT SUBSTANTIVE LAW**

12                   The Ninth Circuit uses a two-step inquiry for Second Amendment claims:  
 13 “first, the court asks whether the challenged law burdens conduct protected by the  
 14 Second Amendment; and if so, the court must then apply the appropriate level of  
 15 scrutiny.” *Silvester v. Harris*, 843 F.3d 816, 821 (9th Cir. 2016)

16                   The first step considers whether the challenged law burdens conduct protected  
 17 by the Second Amendment, based on a “historical understanding of the scope of the  
 18 right.” *Silvester*, 843 F.3d at 820 (quoting *Heller*, 554 U.S. at 625). If the law falls  
 19 outside the historical scope of the Second Amendment, then that law “may be  
 20 upheld without further analysis.” *Id.*, 843 F.3d at 821 (citation omitted).

21                   “If the regulation is subject to Second Amendment protection . . . the court  
 22 then proceeds to the second step of the inquiry to determine the appropriate level of  
 23 scrutiny to apply,” and then to apply that level of scrutiny. *Silvester*, 843 F.3d at  
 24 821 (citation omitted). This process requires the court to consider “(1) how close  
 25 the challenged law comes to the core of the Second Amendment right, and (2) the  
 26 severity of the law’s burden on that right.” *Id.* (citation omitted). If the law *either*

27                   (…continued)  
 28                   Sheriff from the case, *id.* at 1, 8.



1 does not come close to the core *or* otherwise does not “substantially” burden the  
2 right, then intermediate scrutiny applies. *Jackson v. City & Cty. of San Francisco*,  
3 746 F.3d 953, 961 (9th Cir. 2014)

4 The core of the Second Amendment, as described in *Heller*, is “the right of  
5 law-abiding, responsible citizens to use arms in defense of hearth and home.” *See*  
6 *Bauer v. Becerra*, 858 F.3d 1216, 1221 (9th Cir. 2017) (quoting *Heller*, 554 U.S. at  
7 635). “A law that imposes such a severe restriction on the fundamental right of self  
8 defense of the home that it amounts to a destruction of the Second Amendment  
9 right is unconstitutional under any level of scrutiny,” whereas a “law that implicates  
10 the core of the Second Amendment right and severely burdens that right warrants  
11 strict scrutiny. Otherwise, intermediate scrutiny is appropriate.” *Bauer*, 858 F.3d  
12 at 1222 (internal quotation marks and citations omitted).

13 The Ninth Circuit’s test for intermediate scrutiny has two requirements:  
14 “(1) the government’s stated objective must be significant, substantial, or  
15 important; and (2) there must be a ‘reasonable fit’ between the challenged  
16 regulation and the asserted objective.” *Silvester*, 843 F.3d at 821-22 (citation  
17 omitted).

## 18 ARGUMENT

19 The Second Amendment does not confer, as Plaintiffs assert, a general right to  
20 carry arms (openly or otherwise) in any non-sensitive public place, based on only a  
21 presumed or asserted need for self-defense. California’s open-carry laws do not  
22 conflict with the Second Amendment, as historically understood and as  
23 contemplated in *Heller*. *Heller* recognized that the scope of the right varies in  
24 different circumstances. As to the historical understanding of carry in public  
25 places, California’s statutes regulate firearms in very much the same way that  
26 firearms have been regulated in public places in many states from before the  
27 “founding era” (roughly the time of the American Revolution until the start of the  
28 Civil War) to the present day, without perceived conflict with the Second

1 Amendment. The statutes do not impose absolute restrictions, but rather allow for  
2 the carrying of a firearm in public in many circumstances.

3 For similar reasons, even if California’s open-carry laws do implicate the  
4 Second Amendment, the statutes are subject to intermediate rather than strict  
5 scrutiny, because they do not come close to the core of the Second Amendment  
6 right, self-defense in the home, or severely burden the exercise of the right. They  
7 readily withstand intermediate scrutiny. The laws are motivated by indisputably  
8 important governmental objectives, including reducing violent crime and protecting  
9 public safety. And expert opinion, social-science data, and common sense establish  
10 that there is a reasonable fit between California’s open-carry laws and the  
11 fulfillment of those objectives.

12 **I. CALIFORNIA’S OPEN-CARRY LAWS DO NOT BURDEN CONDUCT**  
13 **HISTORICALLY UNDERSTOOD TO BE PROTECTED BY THE SECOND**  
14 **AMENDMENT**

15 The first step of the Second Amendment analysis requires “examining whether  
16 there is persuasive historical evidence showing that the regulation does not impinge  
17 on the Second Amendment right as it was historically understood.” *Silvester*, 843  
18 F.3d at 821 (citing *Heller*, 554 U.S. at 625). A court may summarily uphold a  
19 firearm law that can be traced to the founding era, because such a law was  
20 historically understood to fall outside the Second Amendment’s scope. *Id.* Even  
21 firearm laws dating to only the first few decades of the 20th century may be  
22 summarily upheld, if the laws have been sufficiently pervasive and significant since  
23 that time period. *Fyock v. Sunnyvale*, 779 F.3d 991, 997 (9th Cir. 2015).

24 In contrast to the near-total ban on firearm possession in the home at issue in  
25 *Heller*, this case considers much less restrictive regulations in a context outside the  
26 home—non-sensitive public places.<sup>6</sup> Far from eradicating firearm possession or

27 <sup>6</sup> Plaintiffs do not contend that the Second Amendment confers a right to publicly  
28 carry arms in sensitive public places. *See* Compl. ¶¶ 2, 36, 66, 78 (referring to non-  
sensitive public places).

1 use, California’s open-carry laws restrict most people from engaging in specific  
2 conduct, and only in certain circumstances. Indeed, the Supreme Court in *Heller*  
3 has recognized that at least some regulation of the public carrying of firearms has  
4 long coexisted with, and thus does not violate, the Second Amendment. *See Heller*,  
5 554 U.S. at 595, 626-27.

6 **A. Widespread, Substantial Restrictions on Open Carry in Public**  
7 **Places Date Back Many Centuries in Anglo-American Tradition**

8 “[P]ersuasive historical evidence” demonstrates that California’s open-carry  
9 laws do not infringe on the Second Amendment right as it was historically  
10 understood. *Silvester*, 843 F.3d at 821 (citing *Heller*, 554 U.S. at 625). In  
11 considering the constitutionality of regulations on the concealed carry of firearms,  
12 the *Peruta* opinion delved deeply into the history of the regulation of *all* public  
13 carry of firearms, and provided the foundational evidence that strict restrictions of  
14 open carry represent the Anglo-American tradition dating back centuries. Other  
15 sources of history corroborate the *Peruta* interpretation.

16 **1. Restrictions on Open Carry in England, 1300-1800**

17 *Peruta* describes in detail how in England from the late 13th century through  
18 the late 18th century, because of the Statute of Northampton and related royal  
19 proclamations, it was generally unlawful to “go armed,” with concealed or open  
20 weapons, in public places—and *Peruta* also found that the prohibitions were well-  
21 enforced. *Peruta*, 824 F.3d at 929-33. Case law from the late 17th century and  
22 commentary from prominent legal scholars from the first half of the 18th century  
23 confirm that the Statute of Northampton restricted the public (concealed or open)  
24 carry of firearms, regardless of how inconspicuous the carrying was. Patrick J.  
25 Charles, *The Faces of the Second Amendment Outside the Home: History Versus a*  
26 *Historical Standard of Review*, 60 Clev. St. L. Rev. 1, 10-13 (2012); *Peruta*, 824  
27 F.3d at 931-32 (discussing cases).

28

1                   **2. Restrictions on Open Carry in the American Colonies and**  
2                   **the United States, Before and Just After the Civil War**

3                   **a. Statutes**

4                   The Statute of Northampton, and its associated general prohibition on the  
5 public carry of firearms, pervaded America during the Colonial Era (before the  
6 American Revolution). *See* Charles, 60 CLEV. ST. L. REV. at 32. And in the late  
7 18th century through the middle of the 19th century (before the Civil War), a  
8 significant number of the new U.S. jurisdictions adopted versions of that statute,  
9 including North Carolina, Massachusetts, Wisconsin, Maine, Michigan, Virginia,  
10 Delaware, Minnesota, Oregon, Pennsylvania, and the District of Columbia. *See*  
11 Charles, 60 CLEV. ST. L. REV. at 32-35; *see also* Request for Judicial Notice in  
12 Support of Defendant’s Motion for Summary Judgment (“RJN”), Ex. 4.

13                   Many of these jurisdictions adopted a slightly relaxed version of the statute,  
14 which historians refer to as the “Massachusetts Model,” and which included an  
15 express exception to allow a firearm to be carried in public in cases of exigent  
16 threats to persons and/or property. *See* Patrick J. Charles, *The Faces of the Second*  
17 *Amendment Outside the Home, Take Two: How We Got Here and Why It Matters*,  
18 64 CLEV. ST. L. REV. 373, 402-03 (2016). “What distinguished the Massachusetts  
19 Model from its English predecessor was that it provided a statutory exception if the  
20 individual was able to demonstrate an ‘imminent’ or ‘reasonable’ fear of assault or  
21 injury to his or her person, family or property.” *Id.* at 403; *see also* Saul Cornell,  
22 *The Right to Keep and Carry Arms in Anglo-American Law: Preserving Liberty*  
23 *and Keeping the Peace*, 80 LAW & CONTEMP. PROBS. 11, 39-40 (2017)  
24 (Massachusetts public carry law revised in 1835 “prohibited armed travel, but it  
25 recognized an exception in cases where a person had a reasonable cause to fear  
26 imminent violence,” and “states and localities across the nation used it as a model  
27 for enacting limits on public carry”). “Maine, Delaware, the District of Columbia,  
28 Wisconsin, Pennsylvania, West Virginia, Oregon, and Minnesota all adopted

1 variants of the Massachusetts Model.” Charles, 64 CLEV. ST. L. REV. at 402. This  
2 evolution in the Statute of Northampton appears to be the source for California’s  
3 exigent-circumstances exception to the general restriction on public carrying of  
4 firearms, which thus has a historical pedigree that favors its constitutionality.

5 **b. Case Law**

6 Case law from the 1800s, while not uniform regarding the open carry of  
7 firearms, provides substantial support for the notion that in most places in the  
8 country it was unlawful to carry a firearm in public. A primary example is the  
9 Supreme Court of North Carolina’s 1843 opinion in *State v. Huntley*, 3 Ired. 418,  
10 420-22 (1843), stating, on the authority of Blackstone, Hawkins, and Sir John  
11 Knight’s case, that it had long been a violation of the common law for a person to  
12 ride or go armed with dangerous or unusual weapons, because such an act terrifies  
13 other people. The court in *Huntley* stated:

14 A gun is an “unusual weapon,” wherewith to be armed and clad. *No man*  
15 *amongst us carries it about with him, as one of his every day*  
16 *accoutrements—as a part of his dress—and never we trust will the day*  
*come when any deadly weapon will be worn or wielded in our peace*  
*loving and law-abiding State, as an appendage of manly equipment.*

17 *Id.* at 422 (emphasis added). A person “shall not carry about [a gun] or any other  
18 weapon of death to terrify and alarm, and in such manner as naturally will terrify  
19 and alarm, a peaceful people.” *Id.* at 423; *accord, Lanier*, 71 N.C. at 289.

20 Other noteworthy examples include *Andrews v. State*, 50 Tenn. 165 (1871), in  
21 which the Supreme Court of Tennessee upheld as constitutional a restriction on  
22 open carry. “As to arms worn, or which are carried about the person, not being  
23 such arms as we have indicated as arms that may be kept and used [military arms  
24 and other arms useful for military training], the wearing of such arms may be  
25 prohibited if the Legislature deems proper, absolutely, at all times, and under all  
26 circumstances.” *Id.* at 182. And in 1882 the Supreme Court of North Carolina  
27 pointed out that the common-law restrictions on open carry remained in force after  
28

1 the North Carolina Legislature (in 1879) passed a statute banning concealed carry.  
2 *See State v. Roten*, 86 N.C. 701, 704 (1882).

3 Courts in a few Southern slave states issued opinions that align with Plaintiffs'  
4 position in this case, to the effect that there is an individual, general right to carry a  
5 firearm in public, and legislatures therefore may not restrict both concealed carry  
6 and open carry. *See, e.g., Nunn v. State*, 1 Ga. 243 (1846). However, as shown by  
7 the case law above, and as one scholar has reported, “[t]he only persuasive evidence  
8 for a strong tradition of permissive open carry is limited to the slave South.” Saul  
9 Cornell, *The Right to Carry Firearms Outside of the Home: Separating Historical*  
10 *Myths from Historical Realities*, 39 FORDHAM URB. L.J. 1695, 1722-23 (2012)  
11 (footnotes omitted).

### 12 c. Local Regulations

13 Throughout the Western United States in the second half of the 19th century,  
14 prohibitions on open carry were enacted at the local level, and were commonplace.  
15 Town ordinances in the famous frontier outposts of the West, places like  
16 Tombstone, Arizona, and Dodge City, Kansas, required newcomers to hand their  
17 guns over to the sheriff or leave them with their horses at the stables on the  
18 outskirts of town.

19 In the frontier towns . . . where people lived and businesses operated, the  
20 law often forbade people from toting their guns around. Frontier towns .  
21 . . . adopted blanket ordinances against the carrying of weapons by anyone.  
22 The carrying of dangerous weapons of any type, concealed or otherwise,  
23 by persons other than law enforcement officers . . . was nearly always  
24 proscribed . . . . A visitor arriving in Wichita, Kansas, in 1873 would  
25 have seen signs declaring, “LEAVE YOUR REVOLVERS AT POLICE  
26 HEADQUARTERS, AND GET A CHECK.” A grainy, black-and-white  
27 photograph of Dodge City taken around 1879 shows a huge wooden  
28 billboard posted in the middle of the main road through town that says,  
“THE CARRYING OF FIREARMS STRICTLY PROHIBITED.”

Adam Winkler, *Gunfight: The Battle Over the Right to Bear Arms in America* 13,  
165 (2011) (internal punctuation omitted); *see also* Charles, 64 CLEV. ST. L. REV at  
403, 419-22 nn.160, 245 (2016) (describing public-carry bans in numerous cities in  
the years 1866 to 1914).



1                   **3. Restrictions on Open Carry in the United States in the**  
2                   **1900s**

3           Open-carry restrictions persisted and became more widespread in the 20th  
4 century. For example, in 1901, Kansas passed a law authorizing city councils of  
5 small cities “to prohibit and punish the carrying of firearms or other deadly  
6 weapons, *concealed or otherwise . . .*” RJN, Ex. 4 at 071. In 1905, the Supreme  
7 Court of Kansas upheld that law against a challenge under the Kansas Bill of Rights  
8 provision governing the right to bear arms. *City of Salina v. Blaksley*, 83 P. 619,  
9 621 (Kan. 1905). By 1933, firearm-carry restrictions had proliferated to the point  
10 that a contemporary commentator stated that “in the United States . . . it is  
11 recognized that, in the proper exercise of the police power, the carrying of weapons  
12 by the individual may be regulated, restricted, and even prohibited by statute.”  
13 John Brabner-Smith, *Firearm Regulation*, 1 LAW & CONTEMP. PROBS. 400, 413  
14 (1934).

15           **B. *Heller* and Other Modern Cases Recognize that Public Carry of**  
16           **Firearms Has Been Historically Regulated, Consistent with the**  
17           **Second Amendment**

18           As described above, the historical record establishes that prohibitions on open  
19 carry of firearms in public places—which laws were much stricter than California’s  
20 modern open-carry regulations, which contain many exceptions—pre-date the  
21 Second Amendment in England and persisted in America for at least a century after  
22 the ratification of the Second Amendment. The generalized open-carry right sought  
23 by Plaintiffs is contradicted by the historical evidence of commonplace regulation  
24 of public carry of firearms. If there is any historical basis for a right to carry in  
25 public, such a right, at most, would apply in only those situations where some  
26 particularized circumstance gives rise to a particular justification.

27           This understanding is consistent with *Heller*, in which the Supreme Court  
28 relied upon three 19th-century state-court decisions that address the right to keep  
and bear arms as applied in public places. 554 U.S. at 627 (citing *Langford*, 10

1 N.C. at 383; *English*, 35 Tex. at 477; and *Lanier*, 71 N.C. at 289). Thus *Heller*  
2 recognized that at least some regulation of the public carrying of firearms has long  
3 coexisted with, and so does not violate, the Second Amendment. *See id.* at 595,  
4 626-27.

5 This understanding that the historical evidence does not support the  
6 generalized open-carry right sought by Plaintiffs is also consistent with the findings  
7 of most courts that have addressed public-carry regulations after *Heller*. *See, e.g.,*  
8 *Drake v. Filko*, 724 F.3d 426, 432, 434 (3d Cir. 2013) (noting that “[m]any recent  
9 judicial opinions have discussed historical laws regulating or prohibiting the  
10 carrying of weapons in public,” and finding that “‘the justifiable need’ standard of  
11 the Handgun Permit Law is a longstanding regulation that enjoys presumptive  
12 constitutionality”); *Kachalsky v. County of Westchester*, 701 F.3d 81, 94-95, 96 (2d  
13 Cir. 2012) (finding “a longstanding tradition of states regulating firearm possession  
14 and use in public because of the dangers posed to public safety” and concluding  
15 that such regulation “was ‘enshrined with[in] the scope’ of the Second Amendment  
16 when it was adopted”) (quoting *Heller*, 554 U.S. at 634).<sup>7</sup> Although two cases  
17 have struck down public-carry regulations, neither changes the analysis here. One  
18 involved a more restrictive, “blanket” prohibition on carrying firearms in public.  
19 *Moore v. Madigan*, 702 F.3d 933, 939, 940 (7th Cir. 2012) (discussed below). The  
20 other—*Wrenn v. District of Columbia*, 864 F.3d 650 (D.C. Cir. 2017)—is currently  
21 the subject of a petition for en banc review and is in any event unpersuasive.<sup>8</sup>

### 22 C. The D.C. Circuit’s Opinion in *Wrenn* is Not Persuasive

23 Based on a flawed historical analysis, the D.C. Circuit in *Wrenn v. District of*  
24 *Columbia* recently held that the Second Amendment guarantees to every

25 \_\_\_\_\_  
26 <sup>7</sup> The courts in *Drake* and *Kachalsky* went on to assume application of the Second  
27 Amendment and upheld the laws at issue under intermediate scrutiny. *Drake*, 724  
28 F.3d at 434; *Kachalsky*, 701 F.3d at 96.

<sup>8</sup> On August 24, 2017, the District of Columbia filed a petition for rehearing en  
banc of the *Wrenn* decision.



1 “responsible citizen” a right to carry a firearm in public—including in crowded  
2 cities—for the purpose of self-defense and without a special self-defense need.  
3 *Wrenn*, 864 F.3d at 667. *Wrenn*’s holding derives from misinterpretations of  
4 significant elements in vintage case law and regulations on public carry.

5 *Wrenn* mischaracterized historic decisional law on public carry. It  
6 unjustifiably ascribed nationwide significance to a few judicial opinions from the  
7 antebellum South—*Nunn*, 1 Ga. 243; *State v. Chandler*, 5 La. Ann. 489 (1850);  
8 *Cockrum v. State*, 24 Tex. 394 (1859); *inter alia*—that together suggested that a  
9 state may not ban outright both concealed carry and open carry; one or the other  
10 alternative must remain available. 864 F.3d at 658. However, as noted above,  
11 those case decisions reflected a viewpoint accepted in only one geographic region  
12 of the country. *See, e.g.*, Cornell, 39 FORDHAM URB. L.J. at 1722-23. That  
13 minority viewpoint could not authoritatively contradict the historical mainstream  
14 understanding of the Second Amendment that prevailed in a much larger swath of  
15 the country (as discussed above). And, *Cockrum*, the Texas Supreme Court opinion  
16 in this line of cases, was effectively overruled in just a dozen years. *English*, 35  
17 Tex. 473. In sum, the Southern slave state cases are irreconcilable with firearms  
18 regulations prevalent in the rest of the United States.

19 *Wrenn* also erroneously relied on *Johnson v. Tompkins*, 13 F. Cas. 840 (E.D.  
20 Penn. 1833), as supposed evidence of a historically understood constitutional right  
21 to carry a firearm in public without a specific, self-defense related need. 864 F.3d  
22 at 658. The *Johnson* opinion, which is in the form of a trial judge’s charge to a  
23 jury, addressed a complaint of a slaveholder, Caleb Johnson, for false imprisonment  
24 and/or trespass that he allegedly experienced in the course of an attempt to  
25 recapture a runaway slave. *See* 13 F. Cas. at 840-43. Johnson had gone armed  
26 from New Jersey to Pennsylvania to recapture a slave known as “Negro Jack.” *Id.*  
27 By a ruse, Johnson got inside the home of the family protecting Jack, and “arrested”  
28 him, bound him in chains, and tried to take him back to New Jersey and a life of

1 more slavery. *Id.* In instructing the jury to deliberate over Johnson’s claims about  
2 trespass and false imprisonment (in a tavern), the court held that there could be no  
3 dispute that Johnson “clearly” owned Jack, in the same way that another person  
4 owns “land” or “goods,” because “the law of the land recogni[z]es the right of one  
5 man to hold another in bondage, and that right must be protected from violation.”  
6 *Id.* at 843. The court went on to confirm that Johnson had related rights, including  
7 “a right to carry arms in defen[s]e of his property or person, and to use them” in the  
8 recapture of Jack. *Id.* at 852. *Wrenn* highlights that passage—about a slaveholder’s  
9 supposed right to carry arms in the specific circumstance of capturing by force  
10 another human being—as exemplifying a historical understanding of a general right  
11 to carry firearms in public for self-defense without special self-defense need. 864  
12 F.3d at 658. But the *Johnson* holding is more narrow. It supports the public  
13 carrying of a firearm in the specific, atypical, and abominable context of  
14 perpetrating a kidnapping of a slave. Nothing in *Johnson* supports the proposition  
15 that there is a Second Amendment right to carry a firearm in public without special  
16 self-defense need.<sup>9</sup>

17 While mistakenly elevating in importance the cases discussed above, *Wrenn*  
18 simultaneously discounts or ignores the above-cited, prevalent restrictions on open  
19 carry enacted into law between the 1790s and the 1860s in numerous U.S.  
20 jurisdictions. Relying on the overturned panel opinion in *Peruta*, *Wrenn* would in  
21 effect erase all those laws and supporting case decisions from U.S. history. *See* 864  
22 F.3d at 664. However, the prevalence of laws restricting public carry of firearms  
23 before the Civil War remains a historical fact and is direct evidence of the early  
24 American understanding of the Second Amendment. *Heller* itself affirmatively  
25 cites some of the judicial opinions that *Wrenn* would dismiss. *See Heller* 554 U.S.  
26 at 627 (citing *English*, 35 Tex. at 474).

27 <sup>9</sup> *Wrenn* also curiously makes reference to *Andrews v. State*, 50 Tenn. 165 (1871), a  
28 decision that *affirms* the constitutionality of open-carry laws. 864 F.3d at 658.

1            *Wrenn* thus misreads or mischaracterizes nearly every significant aspect of the  
2 history of public-carry regulations in the United States. For almost the entirety of  
3 U.S. history, many states and localities have imposed restrictions on the public  
4 carry of firearms that are irreconcilable with a general right to carry for self-defense  
5 without special need, and almost all courts adjudicating constitutional challenges to  
6 those laws upheld them.

7        **II. IF CALIFORNIA’S OPEN-CARRY LAWS IMPLICATE THE SECOND**  
8        **AMENDMENT, THE LAWS SHOULD BE EVALUATED UNDER**  
9        **INTERMEDIATE SCRUTINY**

10            If the Court determines, or chooses to assume, that the Second Amendment  
11 protects conduct regulated by California’s open-carry laws, the Court would choose  
12 an appropriate level of scrutiny by considering “(1) how close the challenged law  
13 comes to the core of the Second Amendment right, and (2) the severity of the law’s  
14 burden on that right.” *Silvester*, 843 F.3d at 821 (citation omitted). “A law that  
15 implicates the core of the Second Amendment right and severely burdens that right  
16 warrants strict scrutiny. Otherwise, intermediate scrutiny is appropriate.” *Bauer*,  
17 858 F.3d at 1221 (citations omitted). Both factors weigh in favor of intermediate  
18 scrutiny here, although either factor weighing in that direction would compel  
19 application of intermediate scrutiny. *Jackson*, 746 F.3d at 961.

20            Again, the core of the Second Amendment, as described in *Heller*, is “the right  
21 of law-abiding, responsible citizens to use arms in defense of hearth and home.”  
22 *See Bauer*, 858 F.3d at 1221-22 (quoting *Heller*, 554 U.S. at 635). Consequently,  
23 “[t]he state’s ability to regulate firearms and, for that matter, conduct, is  
24 qualitatively different in public than in the home.” *Kachalsky*, 701 F.3d at 94; *see*  
25 *also Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013) (“intermediate  
26 scrutiny applies to laws that burden [any] right to keep and bear arms outside of the  
27 home” (internal quotation marks and citation omitted)); *Kolbe v. Hogan*, 849 F.3d  
28 114, 138 (4th Cir. 2017) (applying intermediate scrutiny to law restricting  
possession of assault weapons and large-capacity magazines, because law “does not

1 severely burden the core protection of the Second Amendment, i.e., the right of  
2 law-abiding, responsible citizens to use arms for self-defense in the home”).

3 By definition, California’s open-carry laws have no impact on self-defense in  
4 the home. This necessarily means that these laws do not burden the core of the  
5 Second Amendment right. The right that Plaintiffs posit, and that *Wrenn* seems to  
6 acknowledge, extends to almost all public places and presumes a self-defense need  
7 in all of those places. Were that right deemed a core right, it would radically  
8 expand the core and jeopardize nearly every regulation of people possessing  
9 firearms.

10 Even if the core of the Second Amendment right could be interpreted to extend  
11 to carrying firearms for self-defense beyond the home, California’s laws do not  
12 impose a severe burden on that right, because the laws have numerous, well-  
13 considered exceptions, including an exigent-circumstances exception for instances  
14 in which there is a specific need to have a firearm for defense of self, other persons,  
15 or property, as well as an exception for a person who has obtained a restraining  
16 order against another person. *See* CAL. PENAL CODE §§ 26045(a) (permitting  
17 carrying a loaded firearm to protect persons or property from immediate, grave  
18 danger); 26045(b) (restraining order exemption); 26362 (exigent-circumstances  
19 exception for open carry of unloaded handgun). And a California resident of a  
20 county with less than 200,000 people may obtain a permit to carry a handgun  
21 openly there, consistent with the policies of local law enforcement authorities. *See*  
22 CAL. PENAL CODE §§ 26150(b)(2), 26155(b)(2). As of January 1, 2017, thirty of  
23 California’s fifty-eight counties have populations of less than 200,000, according to  
24 estimates by the California Department of Finance. Li Decl., Ex. 3. California’s  
25 open-carry laws thus stand in sharp contrast to the “blanket,” statewide Illinois  
26 public-carry prohibition that the Seventh Circuit invalidated in *Moore*, 702 F.3d at  
27 939, 940. That prohibition had no exigent-circumstances exception, and did not  
28 provide for concealed carry with a permit, or open carry in low-population areas.

1 *Id.* at 934, 937. Thus, by either and both of the two relevant factors, intermediate  
2 scrutiny is the appropriate level of scrutiny in the present case.

### 3 **III. CALIFORNIA’S OPEN-CARRY LAWS SATISFY INTERMEDIATE SCRUTINY**

4 California’s open-carry laws survive intermediate scrutiny because they serve  
5 at least reasonably well the important governmental objective of protecting public  
6 safety.

#### 7 **A. California Has a Significant Interest in Protecting Public Safety**

8 California’s objective in enacting its open-carry regulations, as reflected in  
9 their legislative history, is to prevent or at least reduce the danger to public safety  
10 created by firearms in public places. See RJN, Ex. 1 at 029. As law enforcement  
11 authorities testified to the California Legislature, when someone exposes a (loaded  
12 or unloaded) firearm in public, other people become alarmed and call for peace  
13 officers to defuse the situation. *Id.* at 030. A deadly confrontation may ensue  
14 between the person openly carrying a firearm and the responding peace officer, so  
15 the open-carry laws minimize the chances for such confrontations. *Id.*; *see also id.*  
16 at 041-043, 045, 049-051, 057-058; RJN, Ex. 2 at 021, 030, 043, 055-060, 064-067,  
17 072-073 (all similar). Indeed, several of the individual plaintiffs here testified in  
18 their depositions that the open carry of firearms tends to alarm members of the  
19 public and law enforcement officers, and that criminals are likely to use greater or  
20 deadly force when attacking someone carrying a firearm openly. *See* Li Decl., Exs.  
21 1-3; Defendant’s Statement of Uncontroverted Facts, lines 1-7.

22 This public safety objective is undeniably significant. The concurring opinion  
23 in *Peruta*, which was adopted by the majority *en banc* court, acknowledged a  
24 significant governmental interest in precluding a dangerous proliferation of firearms  
25 in the streets. *See* 824 F.3d at 942-43 (citing three other federal circuit court  
26 decisions); *id.* at 942 (“[I]f we were to reach [intermediate scrutiny], we would  
27 entirely agree with the answer the concurrence provides”). “‘It is self-evident’ that  
28

1 public safety is an important government interest.” *Jackson*, 746 F.3d at 965  
2 (quoting *Chovan*, 735 F.3d at 1139).

3 **B. There Is a Reasonable Fit Between California’s Open-Carry**  
4 **Laws and the Protection of Public Safety**

5 California’s open-carry laws also satisfy the second requirement under  
6 intermediate scrutiny, that there be a “reasonable fit” between the laws and the  
7 asserted governmental interest. The open-carry laws directly advance the objective  
8 of protecting public safety, by reducing violent-crime rates, conserving law  
9 enforcement resources, and protecting law enforcement officers and the public from  
10 unnecessary and potentially dangerous confrontations.

11 **1. “Reasonable fit” Requires Deference to the Legislature’s**  
12 **Judgment**

13 To establish a “reasonable fit,” “[t]he State is required to show only that the  
14 regulation ‘promotes a substantial government interest that would be achieved less  
15 effectively absent the regulation.’” *Silvester*, 843 F.3d at 829 (quoting *Fyock*, 779  
16 F.3d at 1000). The laws at issue need not be the “least restrictive means” of  
17 achieving the government’s objective. *Fyock*, 779 F.3d at 1000 (citation omitted).  
18 Nor does the government need to demonstrate that the laws will or do, in fact,  
19 accomplish the desired result. “Sound policymaking often requires legislators to  
20 forecast future events and to anticipate the likely impact of these events based on  
21 deductions and inferences for which complete empirical support may be  
22 unavailable.” *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 665 (1994). The  
23 Supreme Court has “permitted litigants to justify . . . restrictions [under  
24 intermediate scrutiny] by reference to studies and anecdotes pertaining to different  
25 locales altogether, or even, in a case applying strict scrutiny, *to justify restrictions*  
26 *based solely on history, consensus, and simple common sense.*” *Lorillard Tobacco*  
27 *Co. v. Reilly*, 533 U.S. 525, 555 (2001) (emphasis added) (internal quotation marks  
28 and citation omitted).



1 Intermediate scrutiny recognizes that “[i]t is the legislature’s job, not [the  
2 court’s], to weigh conflicting evidence and make policy judgments.” *Kachalsky*,  
3 701 F.3d at 99; *see also Drake*, 724 F.3d at 439 (noting that “conflicting empirical  
4 evidence . . . does not suggest, let alone compel, a conclusion that the ‘fit’ between  
5 [a state’s] individualized, tailored approach and public safety is not ‘reasonable’”);  
6 *accord Peruta*, 824 F.3d at 919, 944 (Graber, J., concurring). Thus, in applying  
7 intermediate scrutiny, courts “must accord substantial deference to the predictive  
8 judgments” of legislative bodies. *Turner Broad. Sys., Inc. v. F.C.C.*, 520 U.S. 180,  
9 195 (1997).

## 10 **2. California’s Open-Carry Laws Reduce Violent Crime and** 11 **Enhance Public Safety**

12 There is a “reasonable fit” between California’s open-carry laws and the  
13 important governmental interest in protecting public safety. Limitations on the  
14 open carry of firearms in public help to lower violent-crime rates. Such limitations  
15 also enhance public safety by conserving law enforcement resources and protecting  
16 law enforcement officers and the public from unnecessary and potentially  
17 dangerous confrontations.

### 18 **a. California’s Open-Carry Laws Reduce Violent Crime**

19 As set forth in the expert report and testimony of Defendant’s expert witness,  
20 Stanford Law Prof. John J. Donohue III, California’s open-carry laws bolster public  
21 safety by minimizing firearm violence. Prof. Donohue has determined that the  
22 enactment of permissive concealed-carry laws around the country in the last 30  
23 years has led to significantly increased rates of violent crime (murder, rape,  
24 robbery, and aggravated assault) in those jurisdictions; and, for multiple reasons,  
25 the results from the generally more recent enactment of permissive open-carry laws,  
26 for which there is negligible data so far, can be expected to be even worse.

27 Defendant submitted to Plaintiffs an expert report of Prof. Donohue (Li Decl.,  
28 Ex. 7), and he was cross-examined by Plaintiffs’ counsel for two days in

1 depositions. The expert report includes as an attachment, and the depositions  
2 covered at length, Prof. Donohue’s (and two co-authors’) soon-to-be-officially-  
3 published academic study, National Bureau of Economic Research, Inc., Working  
4 Paper Series, Working Paper w23510, “Right-to-Carry Laws and Violent Crime: A  
5 Comprehensive Assessment Using Panel Data and State-Level Synthetic Controls  
6 Analysis.” Li Decl., Exs. 8 and 9. The study applies two kinds of statistical  
7 methodologies (panel data analysis and synthetic controls analysis) to multiple  
8 statistical models (one crafted by Prof. Donohue, and other models previously  
9 crafted and used by other scholars—some of whom have advocated that public-  
10 carry laws lead to significantly reduced rates of violent crime), evaluating a large  
11 set of data about violent crime, as well as murder specifically. Here are, in brief,  
12 the major findings of the Donohue study:

13 (1) The decline in American violent crime rates in the last generation has been  
14 far greater in U.S. states without laws permitting public carry of firearms (negative  
15 42 percent), compared with other states that enacted laws permitting public carry  
16 (negative 9-10 percent). Li Decl., Ex. 9 at 007.

17 (2) At a level of statistical significance of 99 percent, the U.S. states that  
18 enacted laws permitting public carry increased police employment at the same  
19 time—yet, as noted above, on a relative basis, rates of violent crime were still much  
20 higher there compared with states that did not enact laws permitting public carry of  
21 firearms. Li Decl., Ex. 9 at 008.

22 (3) Processing 37 years of nationwide data on violent crime through four  
23 different statistical models, employing panel-data analysis, uniformly the results  
24 indicate, at statistically significant levels, that permissive public-carry laws lead to  
25 increased rates of violent crime and/or murder. Li Decl., Ex. 9 at 007.

26 (4) Processing violent-crime data from 33 U.S. states through the four  
27 statistical models, but this time employing synthetic-controls analysis, the results  
28 indicate, at statistically significant levels, that permissive public-carry laws lead to



1 violent crime rates of that are 7 percent higher after five years, and 15 percent  
2 higher after 10 years. Li Decl., Ex. 9 at 031-035.

3 (5) “[T]he weight of the evidence from the panel data estimates as well as the  
4 synthetic controls analysis best supports the view that the adoption of RTC laws  
5 substantially raises overall violent crime in the ten years after adoption.” Li Decl.,  
6 Ex. 9 at 037-038.

7 At deposition, Prof. Donohue summarized the study as follows: “[O]ne of the  
8 main conclusions of the paper is that right-to-carry laws, on balance, seem to be  
9 ticking up your violent crime rate . . . into the neighborhood of 13 to 15 percent  
10 after ten years.” Li Decl., Ex. 4 at 124:3-124:9. In ongoing empirical research,  
11 Prof. Donohue has processed the separate, “disaggregated” data for each category  
12 of violent crime, in the same manner that was used on the aggregated data in the  
13 study reported in the working paper, “[a]nd . . . it pretty much conformed to the  
14 findings of what we saw here” in the study. Li Decl., Ex. 4 at 114:22-114:23. “The  
15 synthetic controls estimates, regardless of the particular set of explanatory variables  
16 that was used, showed a highly statistically significant impact on aggravated assault  
17 rising when right-to-carry laws were [adopted].” Li Decl., Ex. 5 at 353:16-353:20.  
18 And, open carry poses all the same risks, plus others, such as the high likelihood  
19 that significant numbers of people will at times tire of carrying their guns, and put  
20 them down, in their cars or elsewhere, facilitating widespread firearm thefts that  
21 will result in many more guns in the hands of criminals. *See* Li Decl., Ex. 4 at  
22 122:1-124:10.

23 In addition to Prof. Donohue’s recent findings, another new study also  
24 provides strong support for a finding that California’s open-carry laws help to  
25 reduce firearm violence. This study, by Prof. Michael Siegel of the Boston  
26 University School of Public Health (and other authors) reports robust results  
27 indicating a statistically significant relationship between the passage of “shall-  
28 issue” public-carry laws and increases in total homicides (6.5 percent), firearm

1 homicides (8.6 percent), and handgun homicides (10.6 percent). Li Decl., Ex. 11,  
 2 Michael Siegel et al., “Easiness of Legal Access to Concealed Firearms Permits and  
 3 Homicide Rates in the US States,” *AMERICAN JOURNAL OF PUBLIC HEALTH*  
 4 (forthcoming; currently embargoed), at 003:9-10, 0012:217-0013:243.

5 **b. California’s open-carry laws enhance public safety**

6 The expert report and testimony of Defendant’s expert witness, former Covina  
 7 Chief of Police, Kim Raney (“Chief Raney”) also support a finding of a reasonable  
 8 fit between California’s open-carry laws and the protection of public safety. In  
 9 Chief Raney’s opinion, “restrictions on the open carry of firearms greatly enhance  
 10 public safety,” and such restrictions “have been critical to the safety of law  
 11 enforcement officers, our communities, and those people who would want to openly  
 12 carry firearms in public.” Li Decl., Ex. 10, ¶¶ 21, 22. According to Chief Raney,  
 13 California’s open-carry laws promote public safety in the following ways:

14 (1) Reducing the likelihood of deadly confrontations between individuals in  
 15 public. “A person armed with a firearm may decide to use deadly force where it is  
 16 not clearly required, creating a deadly situation that did not exist before.” Li Decl.,  
 17 Ex. 10, ¶ 30.

18 (2) Preserving law enforcement resources by reducing calls for service  
 19 regarding armed persons. Open carry “has the high potential to create panic and  
 20 chaos, and would result in an immediate law-enforcement response.” Li Decl., Ex.  
 21 10, ¶ 28. *See also id.* ¶¶ 22, 26, 29; Li Decl., Ex. 6, 107:7-107:20, 103:8-103:17.

22 (3) Reducing law enforcement’s need to engage in potentially deadly  
 23 encounters. Law enforcement encounters with armed persons have the potential to  
 24 be extremely dangerous, for officers and civilians. *See* Li Decl., Ex. 10, ¶¶ 24, 27;  
 25 Li Decl., Ex. 6, 78:15-79:3.

26 (4) Reducing unnecessary diversion of law enforcement resources and  
 27 attention when responding to active shooter or other firearms-related situations.  
 28 The presence of openly carried firearms at or near a crime scene complicates the

1 law enforcement response and poses a dangerous distraction. Li Decl., Ex. 10,  
2 ¶¶ 23, 25; Li Decl., Ex. 6, 62:14-62:22, 68:24-69:1.

3 **c. Defendant’s Evidence Establishes a “Reasonable Fit”**  
4 **Sufficient to Survive Intermediate Scrutiny**

5 As demonstrated by the opinions of Defendant’s experts, and by common  
6 sense about the likely effects of the open carry of firearms in public places, the  
7 California Legislature would have had more than sufficient grounds to conclude  
8 that California’s open-carry laws serve the governmental objectives of bolstering  
9 public safety and minimizing violence. Defendant has provided evidence that  
10 satisfies the “reasonable fit” standard in support of its motion. *See Silvester*, 843  
11 F.3d at 829; *Fyock*, 779 F.3d at 1000. Defendant is therefore entitled to judgment  
12 as a matter of law.

13 **CONCLUSION**

14 For the foregoing reasons, the Court should grant Defendant’s motion for  
15 summary judgment adverse to Plaintiffs.

16  
17  
18 Dated: September 11, 2017

Respectfully submitted,

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