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12 **IN THE UNITED STATES DISTRICT COURT**
13 **CENTRAL DISTRICT OF CALIFORNIA**
14 **WESTERN DIVISION**

15 MICHELLE FLANAGAN, et al.,
16
17 Plaintiffs,

18 v.

19 CALIFORNIA ATTORNEY
20 GENERAL XAVIER BECERRA, in
21 her official capacity as Attorney
22 General of the State of California, et
23 al.,

24 Defendants.

Case No.: 2:16-cv-06164-JAK-AS

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT**

Judge: John A. Kronstadt
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1 INTRODUCTION

2 Plaintiffs are competent, law-abiding Californians who seek to carry firearms
3 outside their homes for protection from violent crime. California generally forbids
4 anyone who does not hold a license from doing so. Plaintiffs have each sought such
5 a license but the State-designated authority exercised his discretion to deny their
6 applications, concluding that their desire to carry for self-defense was insufficient
7 “good cause” to obtain a license. Plaintiffs thus have no lawful means to carry a
8 firearm in the clear majority of locations outside their homes “for the core lawful
9 purpose of self-defense.” *District of Columbia v. Heller*, 554 U.S. 570, 630, 128 S.
10 Ct. 2783, 171 L. Ed. 2d 637 (2008).

11 This case presents two questions: Does the Second Amendment protect a
12 right to carry a firearm outside the home? And, if so, can a state flatly deny that
13 right to law-abiding, competent adults? Although firearm regulation cases can be
14 complex, this one is not. As the text, history, and purpose of the Second
15 Amendment make clear—and as every federal court of appeals to consider the
16 question has agreed—the right to bear arms is not confined to the home. Nor can
17 that right, which the Second Amendment grants to “the people,” be limited to the
18 tiny fragment of the people who satisfy the very narrow exceptions California has
19 created, or who can demonstrate a particularized need for self-defense that
20 distinguishes them from other ordinary, law-abiding citizens. In short, given the
21 Framers’ decision to extend the Second Amendment to “the people,” a “law-
22 abiding citizen’s right to bear common arms must enable the typical citizen,” “to
23 carry a gun.” *Wrenn v. District of Columbia*, 864 F.3d 650, 2017 WL 3138111, at
24 *12 (D.C. Cir. July 25, 2017) (No. 16-7025). California’s complete denial of that
25 constitutional right to Plaintiffs cannot be reconciled with the Second Amendment.

26 To be clear, the relief Plaintiffs request is narrow. They do not challenge
27 California’s myriad restrictions on the purchase, sale, and possession of firearms.
28 They do not seek to carry in sensitive places, such as government buildings. They

1 do not seek to carry dangerous and unusual weapons. They seek only to carry
2 protected arms beyond their homes *in some manner*, whether it be openly or
3 concealed. Defendants may accommodate that right in different ways, but they must
4 accommodate it. Denying all manner of carry to ordinary law-abiding citizens is
5 one policy choice the Constitution takes “off the table.” *Heller*, 554 U.S. at 635.

6 STATEMENT OF FACTS

7 I. THE CHALLENGED PROVISIONS

8 California imposes extensive regulations on who may obtain a firearm and
9 how they may do so. To obtain a firearm, one must first pass a test covering firearm
10 safety and laws to obtain a Firearm Safety Certificate from a California Department
11 of Justice (“DOJ”) certified instructor. Cal. Penal Code §§ 31610-31670. Once that
12 is completed, to begin the purchase process, individuals must go to a licensed
13 firearm dealer, present “clear evidence of identity and age,” and sufficient proof of
14 California residency, and complete federal and state forms, which are designed to
15 confirm the purchaser is eligible for firearm possession. *Id.* §§ 16400, 26800-
16 26850; *see also* Cal. Code Regs. tit., § 4045. The purchaser must then wait 10 days,
17 during which the DOJ performs a background check and will deny the transfer if
18 the purchaser is legally ineligible for firearm possession. Cal. Penal Code §§ 27540,
19 28220. If approved, the purchaser must demonstrate to the licensed dealer a
20 command of safe-handling protocol for the firearm before receiving it. *Id.* §§
21 26850-26860. Upon delivery, the firearm must be accompanied by a DOJ-approved
22 firearm safety device (unless the buyer owns an approved gun safe and signs an
23 affidavit to that effect) and certain warning labels. *Id.* § 23635(b); *see also id.* §§
24 23620-23690. The firearm is also registered to the purchaser in a DOJ database. *Id.*
25 §§ 33850. Once the purchaser has obtained the firearm, individuals remain subject
26 to further restrictions on how they must store it. *Id.* §§ 25000, 25100-25140, 25200-
27 25225. Local ordinances often expand this and many other firearm restrictions.

28 None of those restrictions is challenged here. This case challenges only the

1 provisions of California law that prevent Plaintiffs and other ordinary, law-abiding
2 adults from carrying firearms outside their homes for self-defense in any manner. In
3 California, it is generally illegal to carry “a loaded firearm on the person or in a
4 vehicle while in any public place or on any public street in an incorporated city or
5 in any public place or on any public street in a prohibited area of unincorporated
6 territory.” *Id.* § 25850.¹ These same restrictions apply to carrying unloaded firearms
7 openly, except for long-guns that remain in a vehicle. *Id.* §§ 26350, 26400. And,
8 regardless of whether the firearm is loaded, California law also generally prohibits
9 the possession of a concealed firearm in any place outside one’s residence, place of
10 business, or other private property, including within a vehicle. *Id.* §§ 25400, 25605.

11 While these general prohibitions are subject to several exceptions, most
12 apply only to narrow sets of persons or places.² Accordingly, for most Californians,
13

14 ¹ Because California law does not define “public place,” whether a location is
15 deemed one depends on the facts of each case. Private property, including one’s
16 yard and business, can still be a “public place” for purposes of these restrictions.
17 *See, e.g., People v. Cruz*, 44 Cal. 4th 636, 674, 187 P.3d 970 (2008); *People v.*
Yarbough, 169 Cal. App. 4th 303, 318-19 (2008) (driveway is a “public place”); *In*
re Zorn, 59 Cal.2d 650, 381 P.2d 635 (1963) (barbershop is a “public place”).

18 A “prohibited area” is “any place where it is unlawful to discharge a
19 weapon.” Cal. Penal Code § 17030. For example, because discharge of a firearm
20 within 150 yards of buildings without the prior permission of the lawful possessor
21 is illegal, Cal. Fish & Game Code § 3004(a), so is carrying a firearm in such areas.
22 Likewise, the prohibition on discharging a firearm over any public road or highway,
23 according to Defendant’s predecessor, makes carrying a firearm on them illegal too.
24 Cal. Penal Code § 374c; 51 Op. Atty. Gen. 197, 10-3-68 (Penal Code section 374c
makes every public road or highway a “prohibited area” as defined in Penal Code
section 17030); *see also* 36 C.F.R. § 27.41 (national wildlife refuges); 36 C.F.R. §
26.10(d) (national forest road, cave, or within 150 feet of a building); Cal. Fish &
Game Code § 10500 (state game refuge); Cal. Code Regs. tit. 14, § 43B(a) (state
parks); Cal. Code Regs. tit. 14, § 550(cc) (state wildlife areas); Cal. Code Regs. tit.
14, § 630 (ecological reserves). And local no-discharge ordinances can also create
“prohibited areas.”

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

28 The concealed carry ban includes many of the same narrow and inapplicable
exemptions as the open carry ban. *See, e.g., id.* §§ 25510-25595.

1 the only potentially available exception is the one for “Carry License” holders,
2 which allows individuals who have obtained a Carry License to carry a loaded
3 handgun in public, subject to restrictions. *Id.* §§ 26150-26155.³ California
4 authorizes city police chiefs and county sheriffs (“Issuing Authorities”) to issue
5 Carry Licenses to their residents. To obtain a Carry License, the applicant must
6 meet a host of eligibility requirements that are not challenged here, including
7 passing a criminal background check and successfully completing a training course
8 covering handgun safety and California firearms laws. *Id.* §§ 26165, 26185. The
9 applicant must also convince the Issuing Authority that the applicant is of “good
10 moral character” and has “good cause” to carry a loaded handgun in public. *Id.* §§
11 26150(a)(1)-(2), 26155(a)(1)-(2).

12 Rather than defining “good cause,” the State has delegated that task to each
13 Issuing Authority. *Id.* § 26160. Issuing Authorities currently exercise “unfettered
14 discretion” in deciding whether an applicant has “good cause” to be issued a Carry
15 License. *Erdelyi v. O’Brien*, 680 F.2d 61, 63 (9th Cir. 1982); *Nichols v. County of*
16 *Santa Clara*, 223 Cal. App. 3d 1236, 1243 (1990); *CBS, Inc. v. Block*, 42 Cal. 3d
17 646, 665-66, 725 P.2d 470 (1986) (Mosk, J., dissenting). Some Issuing Authorities
18 deny Carry Licenses to virtually all law-abiding residents, while others issue to any
19 law-abiding, competent, otherwise-qualified adult applicant who seeks a Carry
20 License for self-defense. *See Peruta v. County of San Diego*, 742 F.3d 1144, 1169
21 (9th Cir. 2014) (*Peruta II*), *vacated*, 824 F.3d 919 (9th Cir. 2016) (en banc).

22 Issuing Authorities in counties with populations over 200,000 residents can
23 only issue licenses allowing the holder to carry a *concealed* firearm. California law
24 prohibits them from issuing licenses to carry a loaded handgun in an exposed, open
25 manner (e.g., in a visible hip holster). Cal. Penal Code §§ 26150(b)(2), 26155(b)(2).

27 ³ Carry License holders are still restricted from carrying a firearm into
28 schools, sterile areas of public transit facilities, certain California government
buildings, and gun shows. Cal. Penal Code §§ 171b, 171.7(b)(1), 626.9, 27330.

1 Consequently, if the Issuing Authority in such a county has a restrictive “good
2 cause” policy, then the typical law-abiding citizen cannot obtain a license to
3 lawfully carry a loaded firearm either openly or concealed. Indeed, without a Carry
4 License, the typical law-abiding citizen may possess a firearm in a “public place”
5 only for the sole purpose of transporting it to a vehicle or an authorized location,
6 and, even then, the firearm must be unloaded and stored in a locked container (if a
7 handgun) or properly “encased” (if a long-gun) and “the course of travel shall
8 include only those deviations between authorized locations as are reasonably
9 necessary under the circumstances.” *Id.* §§ 25505, 26405(c).⁴

10 Carrying a firearm in public without a Carry License or without meeting one
11 of the other limited exceptions to California’s carry restrictions is punishable as
12 either a misdemeanor or a felony. *Id.* §§ 25400, 25850, 26350, 26400. California
13 provides one—and only one—affirmative defense to these prohibitions, for
14 individuals who violate the loaded (but not concealed) carry restriction when they
15 reasonably believe they or someone else is in “immediate, grave danger” of being
16 attacked. *Id.* § 26045(a). But this defense is extremely narrow, as the law defines
17 “immediate” to mean only “the brief interval before and after the local law
18 enforcement agency, when reasonably possible, has been notified of the danger and
19 before the arrival of its assistance.” *Id.* § 26045(c).

20 In sum, under current law, ordinary law-abiding citizens in California are
21 effectively banned from carrying firearms outside their homes for self-defense in
22 any manner, whether openly or concealed, unless they have a Carry License, which
23 can only be obtained upon the whim of an Issuing Authority.

24 **II. THE CHALLENGED PROVISIONS APPLIED TO PLAINTIFFS**

25 Plaintiffs have experienced the effect of California’s carry ban. All individual
26

27 ⁴ What locations are “authorized” is not expressly explained in the California
28 Code, but it seems that this is referring exclusively to those locations listed in Penal
Code sections 25510-26405.

1 plaintiffs are adult residents of Los Angeles County who are qualified to possess
2 firearms under federal and California laws and have not been found to pose any
3 threat to public safety. Pls.’ State. Uncont. Facts & Concl. of Law (“S.U.F.”) ¶¶ 2-
4 3, 5-6. Each currently possesses a handgun lawfully. S.U.F. ¶ 4.

5 The Sheriff of Los Angeles County, James McDonnell, is the sole Issuing
6 Authority for Plaintiffs. Cal. Penal Code § 26150. Because Los Angeles County has
7 a population well exceeding 200,000 people, Pls.’ Req. Jud. Not. 2 & Ex. 8. A
8 license to carry openly is completely unavailable under California law. For a
9 concealed Carry License, Sheriff McDonnell requires applicants to prove a
10 particularized need to carry a handgun in public. Specifically, to even potentially
11 satisfy his “good cause” standard, an applicant must provide:

12 convincing evidence of a clear and present danger to life,
13 or of great bodily harm to the applicant, his spouse, or
14 dependent child, which cannot be adequately dealt with
15 by existing law enforcement resources, and which danger
16 cannot be reasonably avoided by alternative measures,
17 and which danger would be significantly mitigated by the
18 applicant’s carrying of a concealed firearm.

19 Pls.’ Req. Jud. Not. 3 & Ex. 10.

20 Plaintiffs applied for Carry Licenses and satisfied all other requirement to
21 obtain one, but Sheriff McDonnell denied each of their applications because their
22 articulated desire to carry firearms for self-defense did not satisfy his exceedingly
23 narrow “good cause” standard. S.U.F. ¶¶ 18, 23, 26, 29. Countless members of
24 Plaintiff CRPA were likewise denied a Carry License by Sheriff McDonnell or
25 refrained from applying for one, knowing that they could not satisfy his “good
26 cause” standard. S.U.F. ¶ 35. Plaintiffs and CRPA’s members accordingly cannot
27 lawfully carry firearms in public for self-defense, as they have no means to obtain
28 open carry licenses and have sought and been denied concealed carry licenses.

1 But for California’s comprehensive restrictions on the public carriage of
2 firearms and Plaintiffs’ inability to obtain a Carry License, the individual Plaintiffs,
3 and those members of Plaintiff CRPA who are similarly affected, would lawfully
4 carry a firearm in non-sensitive public places for self-defense, but they refrain from
5 doing so for fear of liabilities for violating one or more of California’s laws that
6 criminalize carrying a firearm. S.U.F. ¶¶ 7, 36.

7 **LEGAL STANDARD**

8 Summary judgment is proper when the record shows there is “no genuine
9 dispute as to any material fact . . . and the moving party is entitled to judgment as a
10 matter of law.” Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S.
11 317, 323-24, 1106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Material facts are those
12 which may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477
13 U.S. 242, 248, 107 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). A dispute is genuine if
14 there is sufficient evidence for a reasonable jury to return a verdict for the
15 nonmoving party. *Id.* Initially, the moving party bears the burden of showing the
16 absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. If the movant
17 meets its burden, the nonmoving party must produce sufficient evidence to rebut the
18 movant’s claim and create a genuine issue of material fact. *Id.* at 322-23.

19 **ARGUMENT**

20 **I. ANALYTICAL FRAMEWORK FOR SECOND AMENDMENT CHALLENGES**

21 The Second Amendment provides that “the right of the people to keep and
22 bear Arms . . . shall not be infringed.” For decades, there was uncertainty among
23 lower courts about whether those words protect an individual right or only a
24 collective right. *Compare, e.g., Silveira v. Lockyer*, 312 F.3d 1052, 1060-61 (9th
25 Cir. 2002) (affirming 1996 decision concluding that the Second Amendment
26 protects a collective right), *with Silveira v. Lockyer*, 328 F.3d 567, 568-70 (9th Cir.
27 2003) (Kozinski, J., dissenting from denial of rehearing en banc) (individual right);
28 *id.* at 570-71 (Kleinfeld, J., dissenting from denial of rehearing en banc) (same).

1 The Supreme Court resolved that uncertainty in *Heller*, concluding after an
2 exhaustive textual and historical analysis that the Second Amendment protects an
3 “individual right to possess and carry weapons” for self-defense. 554 U.S. at 592.
4 The Court then held that the law at issue in the case, a District of Columbia
5 ordinance banning the possession of operable handguns in the home, violated the
6 Second Amendment under “any of the standards of scrutiny that we have applied to
7 enumerated constitutional rights”—that is, any standard of scrutiny stricter than
8 rational basis review. *Id.* at 628 & n.27.

9 In *McDonald v. City of Chicago*, 561 U.S. 742, 130 S. Ct. 3020, 177 L. Ed.
10 2d 894 (2010), the Court held that the “right to keep and bear arms for the purpose
11 of self-defense” recognized in *Heller* is “fully applicable to the States,” *id.* at 750,
12 because it is “among those fundamental rights necessary to our system of ordered
13 liberty,” *id.* at 778. Accordingly, the Court explained, states and municipalities
14 must comply with the individual right protected by the Second Amendment and
15 may not simply “enact any gun control law that they deem to be reasonable.” *Id.* at
16 783 (plurality opinion); *see also Caetano v. Massachusetts*, ___ U.S. ___, 136 S. Ct.
17 1027, 194 L. Ed. 2d 99 (2016) (vacating state court decision on Second
18 Amendment grounds).

19 In the years since *Heller* and *McDonald*, the Ninth Circuit has developed a
20 two-step framework for adjudicating Second Amendment claims. First, a court
21 “asks if the challenged law burdens conduct protected by the Second Amendment,
22 based on a historical understanding of the scope of the right.” *Silvester v. Harris*,
23 843 F.3d 816, 821 (9th Cir. 2016) (citing *Heller*, 554 U.S. at 625). If so, the court
24 analyzes the law under heightened scrutiny, with the degree of scrutiny varying
25 depending on “how close the challenged law comes to the core of the Second
26 Amendment right, and . . . the severity of the law’s burden on that right.” *Id.* (citing
27 *Jackson v. City & County of San Francisco*, 746 F.3d 953, 960-61 (9th Cir. 2014)).

28 The court need not determine the level of scrutiny, however, if a law

1 “amounts to a destruction of the Second Amendment right,” as such a law “is
2 unconstitutional under any level of scrutiny.” *Jackson*, 746 F.3d at 961. After all,
3 “[t]he very enumeration of the right takes out of the hands of government—even
4 the Third Branch of Government—the power to decide on a case-by-case basis
5 whether the right is *really worth* insisting upon.” *Heller*, 554 U.S. at 634. And as
6 the Supreme Court has admonished, the Second Amendment is not “a second-class
7 right, subject to an entirely different body of rules than the other Bill of Rights
8 guarantees.” *McDonald*, 561 U.S. at 780 (plurality opinion). In short, the Second
9 Amendment is “a real constitutional right. It’s here to stay.” *Fisher v. Kealoha*, 855
10 F.3d 1067, 1072 (9th Cir. 2017) (Kozinski, J., separate opinion).

11 **II. THE LAW BURDENS CONDUCT PROTECTED BY THE SECOND AMENDMENT** 12 **BECAUSE THE SECOND AMENDMENT EXTENDS BEYOND THE HOME**

13 California law prohibits Plaintiffs, who are ordinary, law-abiding adults,
14 from carrying a handgun in public. The critical question in determining whether
15 that prohibition “burdens conduct protected by the Second Amendment” is thus
16 whether the Second Amendment protects a right to carry firearms that extends
17 beyond the home. *Silvester*, 843 F.3d at 821. The text, structure, purpose, and
18 history of the Second Amendment—not to mention common sense—all confirm
19 that it does. Precedent reinforces that conclusion. Indeed, *Heller* itself suggests that
20 the Second Amendment protects the right to carry firearms in public *in some*
21 *fashion*. And no federal court (at least without provoking reversal) has rejected a
22 Second Amendment claim on the theory that the right is confined to the home.

23 **A. The Text, Structure, and Purpose of the Second Amendment** 24 **Confirm That the Right to Bear Arms Extends Beyond the Home**

25 Any inquiry into the scope of the Second Amendment must begin with its
26 text. *See Heller*, 554 U.S. at 576. That text provides: “A well regulated Militia,
27 being necessary to the security of a free State, the right of the people to keep and
28 bear Arms, shall not be infringed.” U.S. Const. amend. II. Critically, the Supreme
Court has already held that the text protects two separate rights: the right to “keep”

1 arms, and the right to “bear” them. *See Heller*, 554 U.S. at 591 (“keep and bear
2 arms” is *not* a “term of art” with a “unitary meaning”). Under *Heller*’s binding
3 construction, to “keep arms” means to “have weapons.” *Id.* at 582. To “bear arms”
4 means to “carry” a weapon for “confrontation”—to “ ‘wear, bear, or carry’ ” a
5 firearm “ ‘upon the person or in the clothing or in a pocket, for the purpose . . . of
6 being armed and ready for offensive or defensive action in a case of conflict with
7 another person.’ ” *Id.* at 584 (quoting *Muscarello v. United States*, 524 U.S. 125,
8 143, 118 S. Ct. 1911, 141 L. Ed. 2d 111 (1998) (Ginsburg, J., dissenting)).

9 The right to bear arms cannot plausibly be confined to the home. “To speak
10 of ‘bearing’ arms within one’s home would at all times have been an awkward
11 usage.” *Moore v. Madigan*, 702 F.3d 933, 936 (7th Cir. 2012); *see Grace v. District*
12 *of Columbia*, 187 F. Supp. 3d 124, 135 (D.D.C. 2016), *vacated on other grounds*,
13 *Wrenn v. District of Columbia*, 864 F.3d 650 (D.C. Cir. 2017) (“[R]eading the
14 Second Amendment right to ‘bear’ arms as applying only in the home is forced or
15 awkward at best, and more likely is counter-textual.”). It is far “more natural to
16 view the Amendment’s core as including a law-abiding citizen’s right to carry
17 common firearms for self-defense beyond the home.” *Wrenn*, 864 F.3d at 657.
18 After all, “the idea of carrying a gun ‘in the clothing or in a pocket, for the purpose .
19 . . of being armed and ready,’ does not exactly conjure up images of father stuffing
20 a six-shooter in his pajama’s pocket before heading downstairs to start the
21 morning’s coffee, or mother concealing a handgun in her coat before stepping
22 outside to retrieve the mail.” *Peruta II*, 742 F.3d at 1152. To the contrary, bearing
23 arms “brings to mind scenes such as a woman toting a small handgun in her purse
24 as she walks through a dangerous neighborhood, or a night-shift worker carrying a
25 handgun in his coat as he travels to and from his job site”—much like what
26 plaintiffs seek to do here. *Id.*

27 Accordingly, as every federal court that has analyzed the text has concluded,
28 it is not plausible that the Framers understood the Second Amendment to protect

1 little more than carrying a gun from the bedroom to the kitchen. Indeed, this much
2 is clear from the very opinion *Heller* cited to define the meaning of “bear arms.”
3 *Heller*, 554 U.S. at 584 (citing *Muscarello*, 524 U.S. at 147). Justice Ginsburg’s
4 opinion in *Muscarello*—on which *Heller* expressly relied—explained that “one
5 could carry his gun to a car, transport it to the shooting competition, and use it to
6 shoot targets.” *Muscarello*, 524 U.S. at 147.

7 Finally, confining the right to “bear arms” to the home not only would be
8 nonsensical, but would render the right largely duplicative of the separately
9 protected right to “keep” arms. That would contradict the foundational principle
10 that no “clause in the constitution is intended to be without effect.” *Marbury v.*
11 *Madison*, 5 U.S. (1 Cranch) 137, 174, 2 L. Ed. 60 (1803). In short, the most natural
12 reading of the right to bear arms encompasses public carry.

13 That natural reading of the text is reinforced by the amendment’s structure.
14 As *Heller* explained, the Second Amendment’s prefatory clause—“[a] well
15 regulated Militia, being necessary to the security of a free State”—performs a
16 “clarifying function” with respect to the meaning of the operative clause. 554 U.S.
17 at 577-78. Here, the prefatory clause’s reference to “the Militia” clarifies that the
18 operative clause’s protection of the right to “bear Arms” encompasses a right that
19 extends beyond the home. Militia service, of course, necessarily includes bearing
20 arms in public. The Revolutionary War was not won with muskets left at home; nor
21 were the Minutemen notorious for their need to return home first before being ready
22 for action. And all the Justices in *Heller* agreed that the right to bear arms was
23 codified at least in part to ensure the viability of the militia. *See id.* at 599; *id.* at 637
24 (Stevens, J., dissenting). The Court thus *unanimously* agreed that one critical aspect
25 of the right to bear arms extends beyond the home.

26 Confining the right to the home is also irreconcilable with the right’s “*central*
27 *component*”: individual self-defense. *Id.* at 599 (majority opinion); *see id.* at 594
28 (“right to enable individuals to defend themselves”); *id.* at 616 (“individual right to

1 use arms for self-defense”); *id.* at 628 (“inherent right of self-defense”). The need
2 for self-defense, of course, is “not limited to the home.” *Moore*, 702 F.3d at 936. To
3 the contrary, “the need for [self-defense] might arise beyond as well as within the
4 home.” *Wrenn*, 864 F.3d at 657; *accord Heller*, 554 U.S. at 679 (Stevens, J.,
5 dissenting) (“[T]he need to defend oneself may suddenly arise in a host of locations
6 outside the home.”).

7 If anything, the need to carry a firearm for self-defense is *more likely* to arise
8 outside the home than within. Even if one’s home is not literally a castle, it
9 provides a measure of protection that a person lacks when walking through a
10 dangerous neighborhood or traveling on a deserted street. In America’s early days,
11 for example, “[o]ne would need from time to time to leave one’s home to obtain
12 supplies from the nearest trading post, and en route one would be as much
13 (probably more) at risk if unarmed as one would be in one’s home unarmed.”
14 *Moore*, 702 F.3d at 936. The “right to keep and bear arms for personal self-defense
15 in the eighteenth century” therefore “could not rationally have been limited to the
16 home.” *Id.*

17 The same is true today. Statistics compiled by the federal government show
18 that a greater percentage of violent crimes “occur on the street or in a parking lot or
19 garage” than “in the victim’s home.” *Grace*, 187 F. Supp. 3d at 135. Likewise, a
20 substantial majority of rapes, armed robberies, and other serious assaults occur
21 outside the home. See Michael P. O’Shea, *Modeling the Second Amendment Right*
22 *to Carry Arms (I): Judicial Tradition and the Scope of “Bearing Arms” for Self-*
23 *Defense*, 61 Am. U. L. Rev. 585, 610-11 (2012) (citing Bureau of Justice Statistics,
24 U.S. Dep’t of Justice, *Criminal Victimization in the United States, 2007 Statistical*
25 *Tables* tbl.62 (2010), available at [http://bjs.ojp.usdoj.gov/content/pub/pdf/](http://bjs.ojp.usdoj.gov/content/pub/pdf/cvus07.pdf)
26 [cvus07.pdf](http://bjs.ojp.usdoj.gov/content/pub/pdf/cvus07.pdf)). As the Seventh Circuit explained, “a Chicagoan is a good deal more
27 likely to be attacked on a sidewalk in a rough neighborhood than in his apartment
28 on the 35th floor of the Park Tower.” *Moore*, 702 F.3d at 937. Likewise, a “woman

1 who is being stalked or has obtained a protective order against a violent ex-husband
2 is more vulnerable to being attacked while walking to or from her home than when
3 inside.” *Id.* “To confine the right to be armed to the home is [thus] to divorce the
4 Second Amendment from the right of self-defense described in *Heller* and
5 *McDonald*.” *Id.*

6
7 **B. The History of the Second Amendment Shows That the Right
Extends Beyond the Home**

8 The “historical background” of the Second Amendment “strongly
9 confirm[s]” that the right to bear arms extends beyond the home. *Heller*, 554 U.S.
10 at 592; *see Silvester*, 843 F.3d at 820 (“determining the scope of the Second
11 Amendment’s protections requires a textual and historical analysis”). Indeed, many
12 of the “same sources” that *Heller* consulted to determine that the Second
13 Amendment protects an individual right also show that the right is not confined to
14 the home. *Wrenn*, 864 F.3d at 658.

15 The Second Amendment traces its roots back to England, where Blackstone
16 described “ ‘the right of having and using arms for self-preservation and defence’ ”
17 as “ ‘one of the fundamental rights of Englishmen.’ ” *Heller*, 554 U.S. at 594
18 (quoting 1 Blackstone 136, 139-40 (1765)). The fundamental right to use arms for
19 “self-preservation and defense” necessarily includes the right to carry firearms
20 outside the home because, as explained above, the need for self-defense necessarily
21 arises outside the home. *See supra* Part II.A. Indeed, English authorities made clear
22 that “the killing of a Wrong-doer . . . may be justified . . . where a Man kills one
23 who assaults him *in the Highway* to rob or murder him.” 1 William Hawkins, *A*
24 *Treatise of the Pleas of the Crown* 71 (1762) (emphasis added); *see also* 1 Matthew
25 Hale, *Historia Pacitorum Coronae* 481 (Sollum Emlyn ed. 1736) (“If a thief assault
26 a true man either abroad or in his house to rob or kill him, the true man . . . may kill
27 the assailant, and it is not felony.”).

28 The need to carry for self-defense beyond the home was even greater in an

1 early America dominated by “wilderness,” threats from “hostile Indians,” and other
2 dangers. *Moore*, 702 F.3d at 936. As St. George Tucker explained in his American
3 version of Blackstone’s Commentaries, “[i]n many parts of the United States, a
4 man no more thinks, of going out of his house on any occasion, without his rifle or
5 musket in his hand, than a European fine gentleman without his sword by his
6 side.’ ” *Grace*, 187 F. Supp. 3d at 137 (quoting 5 George Tucker, *Blackstone’s*
7 *Commentaries*, app., n.B, at 19 (1803). Indeed, “it is unquestionable that the public
8 carrying of firearms was widespread during the Colonial and Founding Eras.” *Id.* at
9 136. Many of the Founding Fathers, including George Washington, Thomas
10 Jefferson, and John Adams carried firearms in public and spoke in favor of the right
11 to do so—a strong indication that the right to bear arms was not limited to the
12 home. *Id.* at 136-37. And in many parts of early America, “carrying arms publicly
13 was not only permitted—it was often *required*.” *Id.* at 136; *see also* Nicholas J.
14 Johnson, et. al., *Firearms Law and the Second Amendment* 106 (2012) (“[A]bout
15 half the colonies had laws requiring arms-carrying in certain circumstances.”).

16 Early American judicial authorities, including many relied upon in *Heller*,
17 likewise make clear that the Second Amendment was understood to include the
18 right to bear arms in public in some manner. The nineteenth century cases are
19 analyzed in comprehensive detail by *Peruta II*, 742 F.3d at 1155-66, which
20 concluded that “the majority of nineteenth century courts agreed that the Second
21 Amendment right extended outside the home and included, at minimum, the right to
22 carry an operable weapon in public for the purpose of lawful self-defense,” *id.* at
23 1160; *see also* O’Shea, *supra*, at 590 (“American courts applying the individual
24 right to bear arms for the purpose of self-defense have held with near-uniformity
25 that this right includes the carrying of handguns and other common defensive
26 weapons outside the home.”).

27 The critical point, reiterated in each of these cases, is that the Second
28 Amendment requires “*some form* of carry for self-defense outside the home.”

1 *Peruta II*, 742 F.3d at 1172. The Georgia Supreme Court’s decision in *Nunn v.*
2 *State*, 1 Ga. 243 (1846), lauded for its analysis by *Heller*, 554 U.S. at 612, is
3 illustrative. There, the court held a state statute “valid” so far as it “seeks to
4 suppress the practice of carrying certain weapons *secretly*,” because banning
5 concealed-carry alone would not “deprive the citizen of his *natural* right of self-
6 defence, or of his constitutional right to keep and bear arms.” 1 Ga. at 251. But to
7 the extent the law “contains a prohibition against bearing arms *openly*,” the court
8 explained, it “is in conflict with the Constitution, and *void*.” *Id.*

9 Numerous other cases relied upon by *Heller* followed the same approach.
10 554 U.S. at 613, 629 (citing *Andrews v. State*, 50 Tenn. 165, 187 (1871); *State v.*
11 *Chandler*, 5 La. Ann. 489 (1850); *State v. Reid*, 1 Ala. 612 (1840)). The few cases
12 that reached a different result have been “sapped of authority by *Heller* . . . because
13 each of them assumed that the [Second] Amendment was only about militias and
14 not personal self-defense.” *Wrenn*, 864 F.3d at 658. In sum, under *Heller*, “history
15 matters, and here it favors the plaintiffs.” *Id.*

16 **C. Precedent Confirms That the Right Extends Beyond the Home**

17 Precedent too favors the plaintiffs on this question. Numerous federal courts
18 have analyzed the scope of the Second Amendment in depth and concluded that it
19 extends beyond the home. *See id.* at 657-64; *Moore*, 702 F.3d at 935-36; *Grace*,
20 187 F. Supp. 3d at 135-38; *Palmer v. District of Columbia*, 59 F. Supp. 3d 173,
21 181-82 (D.D.C. 2014). Notably, even courts of appeals that ultimately upheld carry
22 restrictions like those at issue here did not hold that the Second Amendment *does*
23 *not even apply* to those restrictions. The Second Circuit, for example, concluded
24 that the Second “Amendment must have *some* application in the . . . context of the
25 public possession of firearms.” *Kachalsky v. County of Westchester*, 701 F.3d 81,
26 89 (2d Cir. 2012).

27 That consensus should come as little surprise, as *Heller* itself strongly
28 suggests that the Second Amendment applies outside the home. For instance, when

1 the Court searched in vain for past restrictions as severe as the District’s handgun
2 ban, it deemed restrictions on carrying firearms *outside* the home most analogous,
3 and noted with approval that “some of those [restrictions] have been struck down.”
4 *Heller*, 554 U.S. at 629 (citing *Nunn*, 1 Ga. at 251 (striking down prohibition on
5 carrying pistols openly), and *Andrews*, 50 Tenn. at 187 (same)). Such laws could
6 hardly represent “severe” restrictions on the right to keep and bear arms for self-
7 defense, *id.*, if the Second Amendment’s protection were limited to the home. And
8 when the Court identified certain “presumptively lawful” regulatory measures, it
9 included on that list “laws forbidding the carrying of firearms in sensitive places
10 such as schools and government buildings.” *Id.* at 626-27 & n.26. The Court would
11 not have needed to single out those public places as sites of permissible restrictions
12 if there was no right to carry outside the home at all.

13 To be sure, *Heller* did observe that “the need for defense of self, family, and
14 property is most acute” in “the home.” 554 U.S. at 628. But the Court did so only in
15 the section of its opinion devoted to applying the constitutional principles it
16 recognized to the specific restriction at hand—namely, a ban on possession *in the*
17 *home*. *Id.* at 628-36. By contrast, in the entirety of its 50-page explication of the text
18 and historical understanding of the Second Amendment, the Court referred to the
19 “home” or “homestead” a grand total of three times, and never once to suggest that
20 the right is confined to the home. *Id.* at 576-626. That hardly suffices to compel the
21 conclusion that the Court somehow intended to recognize “only a narrow individual
22 right to keep an operable handgun at home for self-defense.” *Young v. Hawaii*, 911
23 F. Supp. 2d 972, 989 (D. Haw. 2012).

24 Moreover, that the need for self-defense may be “most acute” in the home
25 certainly “doesn’t mean it is not acute”—let alone nonexistent—“outside the
26 home.” *Moore*, 702 F.3d at 935; *accord Wrenn*, 864 F.3d at 657. Many
27 constitutional rights are particularly important within the home but also extend
28 beyond the home. The privacy protection of the Fourth Amendment, for example, is

1 “at its zenith” in the home, *United States v. Scott*, 450 F.3d 863, 871 (9th Cir.
2 2006), but undeniably extends beyond the home as well, *see Riley v. California*, ___
3 U.S. ___, 134 S. Ct. 2473, 139 L. Ed. 2d 430 (2014); *United States v. Jones*, 565
4 U.S. 400, 132 S. Ct. 945, 181 L. Ed. 2d 945 (2012). There is no reason why the
5 Second Amendment should be treated any differently. *See McDonald*, 561 U.S. at
6 780 (plurality opinion) (rejecting notion that Second Amendment is a “second-class
7 right, subject to an entirely different body of rules than the other Bill of Rights
8 guarantees”). Indeed, the Supreme Court has at least implicitly rejected the
9 suggestion that the Second Amendment is confined to the home by unanimously
10 vacating a state court opinion that held the Second Amendment inapplicable to a
11 stun gun possessed by a woman *in a public parking lot*. *Caetano*, 136 S. Ct. at
12 1027-28; *see also id.* at 1029 (Alito, J., concurring).

13 Nor can anything be gleaned from the fact that *Heller* (like most judicial
14 decisions) struck down only the law before it. Federal courts, particularly the
15 Supreme Court, decide cases according to “general principles” that apply beyond
16 the fact patterns at hand. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, ___
17 U.S. ___, 137 S. Ct. 2012, 2026, 198 L. Ed. 2d 551 (2017) (Gorsuch, J., concurring).
18 The Court’s conclusion that the Equal Protection Clause bars racial segregation in
19 public schools, *Brown v. Bd. of Educ.*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873
20 (1954), for example, applies equally to public buses and beaches, *see Gayle v.*
21 *Browder*, 352 U.S. 903, 77 S. Ct. 145, 1 L. Ed. 2d 114 (1956) (per curiam). *Cf.*
22 *Pavan v. Smith*, ___ U.S. ___, 137 S. Ct. 2075, 198 L. Ed. 2d 636 (2017) (access to
23 marriage by same-sex couples extends to “the Constellation of benefits” linked to
24 marriage). Nothing in *Heller* suggests that the Court’s decision is uniquely confined
25 to the facts at hand, or that lower courts are excused from the obligation to apply
26 the principles the Court enunciated to other Second Amendment cases—an
27 obligation the Ninth Circuit has acknowledged in applying *Heller* to fact patterns
28 beyond handgun possession in the home. *See Fyock v. Sunnyvale*, 779 F.3d 991,

1 998 (9th Cir. 2015) (possession of large-capacity magazines); *Jackson*, 746 F.3d at
2 967 (ammunition purchases). Simply put, the suggestion that *Heller*, while
3 recognizing the individual right to keep and bear arms, simultaneously imposed a
4 silent restriction on the exercise of that right anywhere but the home is fanciful.

5 Ninth Circuit precedent is not to the contrary. Indeed, the only Ninth Circuit
6 opinion to squarely discuss the question concluded that the right to bear arms
7 requires states to “permit *some form* of carry for self-defense outside the home,”
8 either concealed or open, *Peruta II*, 742 F.3d at 1172, and the Ninth Circuit vacated
9 a decision resting on contrary reasoning, *Baker v. Kealoha*, 679 F. App’x 625 (9th
10 Cir. 2017). To be sure, the panel decision in *Peruta II* was subsequently vacated
11 and superseded by a decision of an en banc panel. *See Peruta v. County of San*
12 *Diego*, 824 F.3d 919, 927 (9th Cir. 2016) (en banc) (*Peruta III*). But the en banc
13 panel concluded only that the Second Amendment does not protect a freestanding
14 right to *concealed* carry; the court expressly reserved the question of “whether the
15 Second Amendment protects *some ability* to carry firearms in public.” *Id.* (emphasis
16 added); *see also id.* at 939, 942.⁵ *Peruta II* thus remains the only Ninth Circuit
17 decision to address the question, and it continues to be cited frequently as
18 persuasive authority that the right to bear arms extends beyond the home. *See, e.g.,*
19 *Wrenn*, 864 F.3d at 658, 663-64; *Grace*, 187 F. Supp. 3d at 130 n.2. Indeed,
20 California itself conceded in *Peruta III* that the Second Amendment must have
21 “some purchase” outside the home, and that a state may not be able to
22 “categorically” ban carry beyond the home. Oral Arg. Rec. 41:05-50, 44:06-16,
23 *Peruta III*, 824 F.3d 919 (9th Cir. 2016) (en banc) (No. 10-56971).

24 In short, *no federal court* to confront the question has concluded (at least
25 without provoking appellate reversal) that the Second Amendment has no

26
27 ⁵ Plaintiffs accept *Peruta III* as binding precedent on the question it
28 addressed at this stage of the proceedings but preserve their right to challenge its
holding in an appropriate forum. *Cf. Wrenn*, 864 F.3d at 663 n.5 (disagreeing “with
the Ninth Circuit” position in *Peruta III*).

1 application beyond the home. This Court should not be the first.

2 **III. BANNING CARRY BEYOND THE HOME FAILS UNDER ANY APPLICABLE**
3 **LEVEL OF SCRUTINY**

4 Concluding that the right to bear arms extends beyond the home all but
5 resolves this case, as the total denial of a right protected by the Second Amendment
6 “fail[s] constitutional muster” under “any of the standards of scrutiny.” *Heller*, 554
7 U.S. at 628-29. Accordingly, whether this Court applies the categorical approach
8 that *Heller* demands or applies one of the levels of heightened scrutiny, the result is
9 the same: California’s refusal to allow ordinary law-abiding citizens—the very
10 “people” the Second Amendment protects—is unconstitutional.

11 **A. California’s Effective Ban on Carry by Ordinary, Law-abiding**
12 **Citizens Is Categorically Invalid**

13 Because California completely denies ordinary law-abiding residents any
14 outlet to carry outside the home, there is no need to determine the applicable level
15 of scrutiny, as a law that completely denies a constitutionally protected right to
16 those entitled to exercise it “fail[s] constitutional muster” under “any of the
17 standards of scrutiny.” *Id.* That is the approach *Heller* took in striking down a total
18 denial of the ordinary citizen’s right to *keep* arms, *id.*, and it is the approach
19 numerous courts have taken in striking down bans on the right to *bear* arms, *see*
20 *Wrenn*, 864 F.3d at 664-66; *Peruta II*, 742 F.3d at 1175; *Moore*, 702 F.3d at 941-
21 42; *Palmer*, 59 F. Supp. 3d at 182-83. It is also an approach that a unanimous Ninth
22 Circuit panel endorsed in *Jackson*, noting that a law that “amounts to a destruction
23 of the Second Amendment right, is unconstitutional under any level of scrutiny.”
24 746 F.3d at 961. Because California law prevents Plaintiffs from publicly carrying a
25 firearm, it “amounts to a destruction” of the ordinary citizen’s right to bear arms,
26 and is thus “unconstitutional under any level of scrutiny.” *Id.*

27 To be sure, California’s scheme is subject to a long litany of exceptions. But
28 none of these exceptions, whether individually or in aggregate, satisfies the Second

1 Amendment's mandates.

2 First, that California's carry prohibitions exempt certain narrow categories of
3 individuals that do not include Plaintiffs makes no difference at all. The Second
4 Amendment guarantees the right to keep and bear Arms to "the people," not just to
5 peace officers or other subsets of the people the state deems worthy of exercising
6 the right. The right to bear arms can no more be limited to such individuals than the
7 right to free speech can be limited to paid newspaper columnists. *See, e.g., First*
8 *Nat'l. Bank of Boston v. Bellotti*, 435 U.S. 765, 777, 98 S. Ct. 1407, 55 L. Ed. 2d
9 707 (1978) (speech protection "does not depend upon the [speaker's] identity").
10 Indeed, the possession ban at issue in *Heller* had "minor exceptions" for certain
11 people, such as retired police officers, *see* 554 U.S. at 575 n.1, but that did not stop
12 the Court from characterizing it as a "complete prohibition" on the right of "the
13 people" to keep arms or from categorically invalidating it, *id.* at 629. The same
14 result should follow here. Because a ban "on the ability of most citizens to exercise
15 an enumerated right would have to flunk any judicial test that was appropriately
16 written and applied," this Court should "strike down [California's] law here apart
17 from any particular balancing test." *Wrenn*, 864 F.3d at 666.

18 California's exception for Carry Licenses holders is irrelevant here for the
19 same reason. To be sure, if the state required Issuing Authorities to recognize self-
20 defense as "good cause" to obtain a Carry License, then that exception would
21 provide ordinary-law abiding individuals with an outlet to exercise their right to
22 bear arms. But the state does not impose such a limitation on Issuing Authorities'
23 discretion, and Sheriff McDonnell (like several other Issuing Authorities) has
24 chosen to adopt an exceedingly narrow "good cause" requirement that he concluded
25 Plaintiffs do not satisfy. So, the Carry License exception is no exception at all, at
26 least not for ordinary law-abiding individuals like Plaintiffs.⁶

27 _____
28 ⁶ Plaintiffs recognize that this Court has dismissed their Second Amendment
claim to the extent it challenged the State's "good cause" regime or the Sheriff's

1 Nor is California’s narrow affirmative defense to criminal prosecution for an
2 individual facing “immediate, grave danger” a meaningful caveat to its otherwise-
3 comprehensive prohibitions. That defense is not only limited to “grave danger,” but
4 it also applies *only* during “the brief interval” between when law enforcement
5 officials are notified of the “grave danger” and when they arrive on scene. Cal.
6 Penal Code §§ 26045(a)-(c). Being as an individual is prohibited from having an
7 unloaded firearm on or near his person to load should “immediate, grave danger”
8 arise, *see id.* §§ 26350 (prohibiting open carry of unloaded firearms) and 25400
9 (prohibiting concealed carry of firearms, even if unloaded), “where the fleeing
10 victim would obtain a gun during that interval is apparently left to Providence.”
11 *Peruta II*, 742 F.3d at 1147, n.1. More fundamentally, the notion that the right to
12 bear arms is sufficiently accommodated by a potential affirmative defense to a
13 prosecution for its exercise cannot be reconciled with the Supreme Court’s repeated
14 admonishments that the Second Amendment protects a fundamental right;
15 specifically, the right to be “armed and ready” in case of confrontation. *Heller*, 554
16 U.S. at 584 (quoting *Muscarello*, 524 U.S. at 143 (Ginsburg, J., dissenting)).

17 If anything, California’s recognition through this affirmative defense and its
18 Carry License exception that carrying firearms outside the home is useful for self-
19 defense makes its refusal to allow ordinary law-abiding citizens to publicly carry
20 *more* constitutionally problematic, not less. Unlike an effort to restrict a type of
21 firearm or manner of carry that the government deems either unrelated to the
22 constitutionally valid goal of self-defense or peculiarly dangerous, California’s law
23 recognizes that carrying handguns directly furthers the constitutionally valid end of

24
25 “good cause” policy. Order Re Def. Harris’ Mot. to Dismiss [Compl.] for Decl. &
26 Inj. Rel.; Def. McDonnell’s Mot. to Dismiss at 1 (Dkt. 39). Nonetheless, the fact
27 that the Sheriff has adopted such a restrictive policy is relevant to the analysis of the
28 constitutionality of the State’s open carry prohibitions, as it confirms that Plaintiffs
do not have an alternative channel for exercising their right to bear arms for self-
defense. Plaintiffs preserve their right to challenge the constitutionality of the “good
cause” regime and policy in the appropriate forum. Likewise, Plaintiffs preserve
their previously dismissed second claim under the Equal Protection Clause.

1 self-defense. Having acknowledged as much, California cannot limit the carrying of
2 handguns to a subset of “the people” protected by the Second Amendment. Wholly
3 apart from any levels-of-scrutiny approach, the State’s effort to limit the pursuit of
4 a constitutionally protected end by a constitutionally protected means to only a
5 subset of those protected by the Constitution is invalid. It is no different—and no
6 more constitutional—than limiting the First Amendment to those with an
7 exceptionally good reason to criticize the government (as judged by the censor), or
8 to restricting the Sixth Amendment right to counsel or a criminal trial to those with
9 an exceptional need to prove their innocence (as judged by the prosecutor).

10 Finally, while, as a technical matter, there are portions of unincorporated
11 areas where it is legal to openly carry a firearm, the reality for most counties is that
12 these are tiny islands in a sea of “prohibited areas.” Cal. Penal Code §§ 17030,
13 25850(a). Under state law, “prohibited areas” generally include any public road or
14 highway, as well as anywhere within 150 yards of any building. *See supra* n.1. The
15 State also expressly describes certain areas it controls as “prohibited areas.” *See*
16 *supra* Part n.1. Moreover, local laws typically create additional “prohibited areas”
17 via ordinance. In Los Angeles County, for example, much of the county is a
18 “prohibited area.” Req. Jud. Not. 2-3 & Ex. 9 (L.A. Cty., Cal., County Code of
19 Ordinances 13.66.050, 13.66.130, 13.66.500). Thus, if individuals are anywhere
20 near civilization in Los Angeles County—in other words, are pretty much anywhere
21 in Los Angeles County where a need for self-defense might arise—they are
22 prohibited from openly carrying a firearm.

23 Moreover, even for the limited areas in the county where it is legal to carry a
24 firearm, those areas are often described in such a confusing manner that it makes it
25 all but impossible for average law-abiding citizens to know with any amount of
26 certainty where their boundaries lie. Nothing short of a civil engineering degree and
27 a high skill level of map-reading will help individuals avoid legal trouble while
28 attempting to carry a firearm without a Carry License in the unincorporated

1 portions of Los Angeles County, and most likely all other counties. In any event,
2 even if one could determine where every “prohibited area” is located, that would
3 not cure the more fundamental problem that the Second Amendment guarantees a
4 right to bear arms *for self-defense*—a purpose that manifestly is not achieved by a
5 law that allows individuals to carry firearms only if they avoid all roads, buildings,
6 populous areas, and other regions designated off-limits by the state or county.

7 In short, for ordinary, law-abiding individuals like Plaintiffs, California’s
8 prohibitions are, in all meaningful respects, the functional equivalent of a flat ban
9 on publicly carrying firearms for self-defense. Because a flat ban on the exercise of
10 a right protected by the Constitution “amounts to a destruction” of the right,
11 California’s carry prohibitions are “unconstitutional under any level of scrutiny.”
12 *Jackson*, 746 F.3d at 961 (citing *Heller*, 554 U.S. at 629).

13 **B. California’s Effective Ban on Carry by Ordinary, Law-abiding**
14 **Citizens Is Invalid Under Either Strict or Intermediate Scrutiny**

15 If the Court applies one of the traditional levels of scrutiny, it should apply
16 strict scrutiny. Under Ninth Circuit law, a “law that implicates the core of the
17 Second Amendment right and severely burdens that right warrants strict scrutiny.”
18 *Silvester*, 843 F.3d at 821. The “core Second Amendment right” is the “right of
19 self-defense,” *Jackson*, 746 F.3d at 968; *see Heller*, 554 U.S. at 599, and
20 restrictions on bearing arms beyond the home clearly “implicate[]” that core right,
21 *Silvester*, 843 F.3d at 821. *See supra* Part I. By any measure, moreover, a complete
22 ban “severely burdens” the right to bear arms for self-defense. *Silvester*, 843 F.3d at
23 821. Strict scrutiny accordingly applies.

24 Ultimately, however, this Court need not resolve whether strict or
25 intermediate scrutiny applies because California’s total carry ban cannot survive
26 even intermediate scrutiny. *Cf. McCutcheon v. FEC*, __U.S.__, 134 S. Ct. 1434,
27 1446, 188 L. Ed. 2d 468 (2014) (plurality opinion). Intermediate scrutiny requires a
28 “reasonable fit between the challenged regulation” and a “significant, substantial, or

1 important” government objective. *Silvester*, 843 F.3d at 821-22; *Jackson*, 746 F.3d
2 at 965. The government “bears the burden of justifying its restrictions” and “must
3 affirmatively establish the reasonable fit” required. *Jackson*, 746 F.3d at 965. While
4 a reasonable fit “is not necessarily perfect” and “not necessarily the least restrictive
5 means,” it must be “a means narrowly tailored to achieve the desired objective.”
6 *McCutcheon*, 134 S. Ct. at 1456-57.

7 Completely prohibiting ordinary, law-abiding citizens from carrying
8 handguns is not a remotely, let alone reasonably, tailored means of furthering the
9 State’s legitimate objective of public safety. To the contrary, that flat ban is the
10 paradigmatic *opposite* of tailoring. In applying intermediate scrutiny under the
11 Second Amendment, the Ninth Circuit has stressed the distinction between laws
12 that completely prohibit protected conduct and those that leave open “alternative
13 channels” for that conduct. *Jackson*, 746 F.3d at 968. Unlike laws the Ninth Circuit
14 has upheld under intermediate scrutiny, California’s carry ban does *not* leave open
15 alternative channels to bear arms for self-defense outside the home. Instead, the law
16 flatly denies the right to all but those who can demonstrate—to the satisfaction of
17 an Issuing Authority with unbridled discretion—a “good cause” for carrying—a
18 criterion that “says nothing about whether he or she is more or less likely to misuse
19 a gun.” *Grace*, 187 F. Supp. 3d at 149.

20 California’s carry ban thus can be justified only on the theory that allowing
21 law-abiding citizens to carry handguns for self-defense creates an intolerable public
22 safety risk. Not only is that theory lacking in empirical support, *see, e.g., Moore*,
23 702 F.3d at 937-42, and belied by the State’s recognition of the value of providing
24 for Carry Licenses and an affirmative defense to prosecution for violating the carry
25 restrictions when one is in “immediate” “grave danger”; it is a theory that the
26 Second Amendment takes “off the table,” *Heller*, 554 U.S. at 635-36. The drafters
27 and ratifiers of the right to bear arms understood carrying firearms poses safety
28 risks, but they chose to protect the right anyway. The State may disagree with that

1 determination, and they may do so with the best of intentions. But they have no
2 more authority to second-guess the People’s decision to protect the right to bear
3 arms than they do to override the protection against unreasonable searches and
4 seizures, the inadmissibility of coerced confessions, the criminal defendant’s right
5 to confront adverse witnesses, or any other provision of the Bill of Rights with
6 “disputed public safety implications.” *McDonald*, 561 U.S. at 783 (plurality
7 opinion). Put simply, the Second Amendment “is the very *product* of an interest
8 balancing by the people,” and defendants may not “conduct [it] for them anew.”
9 *Heller*, 554 U.S. at 635; *cf. United States v. Stevens*, 559 U.S. 460, 470, 130 S. Ct.
10 1577, 176 L. Ed. 2d 435 (2010) (“The First Amendment itself reflects a judgment
11 by the American people that the benefits of its restrictions on the Government
12 outweigh the costs. Our Constitution forecloses any attempt to revise that judgment
13 simply on the basis that some speech is not worth it.”).

14 In short, California’s desire to bar ordinary citizens from publicly carrying
15 handguns might be understandable, but it is nevertheless unconstitutional. The
16 “enumeration of the right takes out of the hands of government . . . the power to
17 decide on a case-by-case basis whether the right is *really worth* insisting upon.”
18 *Heller*, 554 U.S. at 634-65.

19 CONCLUSION

20 There are no material facts in dispute here. This case presents a pure and
21 straightforward question of law: whether the Second Amendment protects a right to
22 bear arms beyond the home. Because the answer is plainly yes, and Plaintiffs are
23 deprived of that right, their Motion for Summary Judgment should be granted.

24 Dated: September 11, 2017

MICHEL & ASSOCIATES, P.C.

25
26 /s/ Sean A. Brady
27 Sean A. Brady
28 Attorneys for Plaintiffs

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CERTIFICATE OF SERVICE
IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

Case Name: *Flanagan, et al. v. California Attorney General Xavier Becerra, et al.*
Case No.: 2:16-cv-06164-JAK-AS

IT IS HEREBY CERTIFIED THAT:

I, the undersigned, am a citizen of the United States and am at least eighteen years of age. My business address is 180 East Ocean Boulevard, Suite 200, Long Beach, California 90802.

I am not a party to the above-entitled action. I have caused service of:

**MEMORANDUM OF POINTS AND AUTHORITIES IN
SUPPORT OF PLAINTIFFS’ MOTION FOR SUMMARY JUDGMENT**

on the following party by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

Xavier Becerra, Attorney General of California	<i>Attorneys for Attorney</i>
P. Patty Li, Deputy Attorney General	<i>General of the State of</i>
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I declare under penalty of perjury that the foregoing is true and correct.

Executed September 11, 2017

/s/ Laura Palmerin
Laura Palmerin