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"Filed Proposed Lodged Order"

FAXED

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

20 JONATHAN BIRDT,
21 Plaintiffs,
22 v.
23 CHARLIE BECK, et al.,
24 Defendants.

CASE NO: 10-CV-8377 RGK
(JEM)

APPLICATION OF BRADY
CENTER TO PREVENT GUN
VIOLENCE TO FILE BRIEF AS
AMICUS CURIAE

DATE: May 16, 2011
TIME: 9 AM
CRTRM: 850
JUDGE: Hon. R. Gary Klausner

APPLICATION OF BRADY CENTER TO
PREVENT GUN VIOLENCE TO FILE BRIEF
AS *AMICUS CURIAE*

1 Through undersigned counsel, the Brady Center to Prevent Gun Violence
2 applies to the Court for leave to file a brief as *amicus curiae* in this case for the
3 facts and reasons stated below. The proposed brief is attached hereto as Exhibit A
4 for the convenience of the Court and counsel.

5 This motion is made following the conference of counsel pursuant to L.R. 7-
6 3 which took place on March 8, 2011. Defendants stated that they consent to the
7 filing of this application. Plaintiff stated that he does not consent.

8 The Brady Center to Prevent Gun Violence ("*amicus*") is the nation's largest
9 non-partisan, non-profit organization dedicated to reducing gun violence through
10 education, research, and legal advocacy. Through its Legal Action Project, the
11 Brady Center has filed numerous briefs *amicus curiae* in cases involving both state
12 and federal gun laws, including cases involving public carry regulations. *See, e.g.,*
13 *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010); *United States v. Hayes*, 129
14 S. Ct. 1079, 1087 (2009) (citing *amicus* brief of Brady Center to Prevent Gun
15 Violence); *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008); *Bateman v.*
16 *Perdue*, No. 5:10-CV-265-H (D.N.C. Jan. 20, 2011) (order granting Brady Center's
17 application as "timely and useful").

18 District courts have inherent power to grant third parties leave to file briefs as
19 *amici curiae*, particularly regarding "legal issues that have potential ramifications
20 beyond the parties directly involved or if the [*amicus* has] unique information or
21 perspective that can help the court beyond the help that the lawyers for the parties
22 are able to provide." *NGV Gaming, Ltd. v. Upstream Point Molate, LLC*, 335 F.
23 Supp. 2d 1061, 1067 (N.D. Cal. 2005) (internal quotations omitted). Here, *amicus*
24 brings a broad and deep perspective to the issues raised by this case and has a
25 compelling interest in the federal courts' interpretation of Second Amendment
26 issues. *Amicus* thus respectfully submits the attached brief to assist the Court with
27 the constitutional issues in this case, including important matters of first impression
28 under the Second Amendment.

1 The proposed brief provides an overview of recent and longstanding
2 Supreme Court Second Amendment jurisprudence, the policy implications of
3 recognizing a right to carry firearms in public, and addresses an open question that
4 has resulted from this jurisprudence—namely, what the appropriate standard of
5 review for Second Amendment claims should be, and shows how lower courts have
6 answered that question thus far. The brief also discusses the emerging trend in
7 lower courts towards using a two-pronged approach to Second Amendment claims
8 that asks (1) whether the law or regulation at issue implicates protected Second
9 Amendment activity, and if so, (2) whether it passes the appropriate standard of
10 review. The brief then applies this two-pronged approach to Second Amendment
11 issues in the case at hand, employing case law, sociological data, and legal
12 commentary to place the permitting process of California Penal Code § 12050 in
13 the larger context of Second Amendment issues. The brief concludes that (1)
14 California’s concealed weapons permitting process does not implicate protected
15 Second Amendment activity because the Supreme Court has only recognized a
16 Second Amendment right to possess and carry guns in the home, and (2) that even
17 if the permitting process did implicate protected Second Amendment activity, it
18 would survive the appropriate level of review – the reasonable regulation test that
19 over forty states have adopted – because it is a valid exercise of the state’s police
20 powers to enact legislation designed to protect public safety. *Amicus*, therefore,
21 respectfully submits the attached brief to assist the Court in deciding the complex
22 and significant issues raised in this matter.

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CONCLUSION

For the foregoing reasons, *amicus curiae* Brady Center to Prevent Gun Violence respectfully requests that the Court grant leave to file the attached *amicus* brief.

Dated: April 20, 2011

Respectfully submitted,

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BRIEF OF *AMICUS CURIAE*, BRADY
CENTER TO PREVENT GUN VIOLENCE

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1 INTRODUCTION

2 The right to keep and bear arms recognized in *District of Columbia v. Heller*,
3 is unique among constitutional rights in the risks that it presents. 554 U.S. 570
4 (2008). Guns are designed to kill, and gun possession and use subject others to a
5 serious risk of harm that is often deadly. While the Supreme Court held that the
6 Second Amendment protects a limited right to possess a gun *in the home* for self-
7 defense, the Court has never recognized a broader right to carry guns in public,
8 which would expose the public to grave risks. On the contrary, *Heller* found
9 prohibitions on concealed carrying in line with permissible gun laws, *Heller*, 554
10 U.S. at 626-27, and did not disturb the Court’s ruling that “the right of the people to
11 keep and bear arms (article 2) is not infringed by laws prohibiting the carrying of
12 concealed weapons.” *Robertson v. Baldwin*, 165 U.S. 275, 281-82 (1897).

13 In *Heller*, *supra*, and *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010),
14 the Court had ample opportunity to announce a right to carry in public, but it did
15 not, and repeatedly stated its holding as bound to the home. Numerous courts, from
16 the 19th century to post-*McDonald*, have recognized that the Second Amendment
17 does not prevent states from restricting or barring the carrying of handguns in
18 public. It would be unprecedented and unwise to hold that the Constitution bars
19 California from allowing those tasked with protecting public safety to determine
20 whether individuals have “good cause” to bring hidden handguns into public
21 spaces. Such a ruling would run counter to *Heller* and *McDonald*’s “assurances”
22 that “reasonable firearms regulations” will remain permissible, as well as the
23 Court’s longstanding recognition that the exercise of protected activity must be
24 balanced against legitimate public interests, chief among which is public safety.
25 *McDonald*, 130 S. Ct. at 3047; *Heller*, 554 U.S. at 626-27 & n. 26. There is no
26 Constitutional requirement that the general public, when walking to school, driving
27 to work, or otherwise going about their daily life, be subjected to the risks of gun
28 carrying. And there never has been.

1 California's law governing the carrying of concealed weapons – California
2 Penal Code section 12050 – does not implicate protected Second Amendment
3 activity, and even if it did, it is a reasonable and permissible exercise of state police
4 powers. While Plaintiff may disagree, his recourse is the legislative process. This
5 Court is obligated to uphold legislation where there is a reasonable basis, and it
6 should not declare a new Second Amendment right that the Supreme Court has not
7 recognized by striking down a law that is crucial to protect public safety.

8 **INTEREST OF *AMICUS***

9 *Amicus*, the Brady Center to Prevent Gun Violence, is the nation's largest
10 non-partisan, non-profit organization dedicated to reducing gun violence through
11 education, research, and legal advocacy. Through its Legal Action Project, the
12 Center has filed many briefs *amicus curiae* in cases involving state and federal gun
13 laws, including on the right to carry and the scope of the Second Amendment post-
14 *Heller*. *Amicus* brings a broad and deep perspective to the issues raised by this case
15 and has a compelling interest in ensuring that the Second Amendment does not
16 impede reasonable governmental action to prevent gun violence.

17 **LEGAL BACKGROUND**

18 Recent Supreme Court Second Amendment Jurisprudence: In *Heller*, the
19 Supreme Court recognized an individual right to keep and bear arms in the home
20 for the purpose of self-defense. 554 U.S. at 628-29. But the Court explained that
21 its holding did not “cast doubt” on other gun laws – even approving of the
22 constitutionality of a number of laws and stating that “[w]e identify these
23 presumptively lawful regulatory measures only as examples; our list does not
24 purport to be exhaustive.” *Id.* at 626-27 & n. 26. The Court noted approvingly that
25 “the majority of the 19th-century courts to consider the question held that
26 prohibitions on carrying concealed weapons were lawful under the Second
27 Amendment or state analogues.” *Id.* at 626. The Court did not disturb its ruling in
28 *Robertson v. Baldwin* that “the right of the people to keep and bear arms (article 2)

1 is not infringed by laws prohibiting the carrying of concealed weapons.” 165 U.S.
2 at 282. *Heller* also made clear that “carry” did not imply “outside the home,” as the
3 Court held that “[a]ssuming that *Heller* is not disqualified from the exercise of
4 Second Amendment rights, the District must permit him to register his handgun and
5 must issue him a license *to carry it in the home*.” 554 U.S. 635 (emphasis added).¹

6 In *McDonald*, the Court incorporated the Second Amendment to the states,
7 but “repeat[ed]” *Heller*’s “assurances” regarding its limited effect, and agreed that
8 “state and local experimentation with reasonable firearms regulation will continue
9 under the Second Amendment.” 130 S. Ct. at 3047 (internal citation omitted). The
10 Court did not extend the right outside the home.

11 Standard of Review: Neither *Heller* nor *McDonald* articulated a standard of
12 review for Second Amendment challenges, though *Heller* explicitly rejected
13 “rational basis” and implicitly rejected the “strict scrutiny.” See *Heller v. District*
14 *of Columbia* (“*Heller IP*”), 698 F. Supp. 2d 179, 187 (D.D.C. 2010) (“[S]trict
15 scrutiny standard of review would not square with the [*Heller*] majority’s
16 references to ‘presumptively lawful regulatory measures’”). Courts are left
17 with choosing a standard which allows legislatures “a variety of tools for
18 combating” the “problem of handgun violence,” and under which a host of firearms
19 regulations are “presumptively lawful,” even without analysis. *Heller*, 554 U.S. at
20 636, 627 & n. 26. The “reasonable regulation” test, overwhelmingly applied by
21 courts construing right to keep and bear arms provisions in the states, is the most
22 appropriate standard of review.

23 ARGUMENT

24 For at least two principal reasons, the firearms regulations in Section 12050
25 are constitutional. First, the permitting process in Section 12050 does not implicate
26

27 ¹ *Heller*’s narrow scope was apparent in *United States v. Hayes*, 555 U.S. 415
28 (2009), which upheld a broad reading of 18 U.S.C. § 922(g)(9) – which prohibits
gun possession by persons convicted of misdemeanor crimes of domestic violence
– without mentioning the Second Amendment.

1 protected Second Amendment Activity. Second, even if it did, Section 12050 is a
2 reasonable regulation that furthers important governmental interests established by
3 the California Legislature and the law enforcement community.

4 **I. THE PERMITTING PROCESS IN SECTION 12050 DOES NOT**
5 **IMPLICATE PROTECTED SECOND AMENDMENT ACTIVITY.**

6 *Amicus* respectfully suggests that this Court hold, first, that the permitting
7 process in Section 12050 does not implicate protected Second Amendment activity
8 because Plaintiff has no general “right to ‘possess and carry weapons in case of
9 confrontation’” in public places.

10 **A. The Concealed Weapons Permitting Process at Issue Here Does**
11 **Not Implicate Protected Second Amendment Activity Because it**
12 **Does Not Impact The Right to Possess Firearms in The Home**
13 **Protected in *Heller* and *McDonald*.**

14 The Supreme Court’s decision in *Heller* recognized that the Second
15 Amendment protects “the right of law-abiding, responsible citizens to use arms *in*
16 *defense of hearth and home.*” *Heller*, 554 U.S. at 635 (emphasis added). In the
17 course of its lengthy majority opinion, the Court had ample opportunity to
18 announce a right to carry guns in public. However, the Court’s holding only
19 mentions a right “to carry [] *in the home,*” *id.* (emphasis added), and does not
20 mention the carrying of firearms in public. *See id.* The Court focused on the
21 historical recognition of the right of individuals “to keep and bear arms to defend
22 their homes, families or themselves,” *id.* at 615 (internal quotation marks omitted),
23 and the continuing need to keep and use firearms “in defense of hearth and home.”
24 *Id.* at 635. The Court’s holding is limited to the home: “[i]n sum, we hold that the
25 District’s ban on handgun possession *in the home* violates the Second Amendment,
26 as does its prohibition against rendering any lawful firearm *in the home* operable for
27 the purpose of immediate self-defense.” *Id.* at 635 (emphasis added). The Court
28 had previously stated that “the right of the public to bear arms (article 2) is not
infringed by laws prohibiting the carrying of concealed weapons,” *Robertson v.*

1 *Baldwin*, 165 U.S. at 281-82, and *Heller* did not question this ruling.

2 Plaintiff argues, essentially, that *Heller* embraced a Constitutional right to
3 carry guns in public, but chose not to say so. Plaintiff cannot explain why the Court
4 would explicitly hold that the Second Amendment was “not unlimited” and that a
5 non-exhaustive host of gun laws remained “presumptively lawful,” yet keep its
6 supposed ruling that the Second Amendment protected a right to carry guns in
7 public implicit, leaving courts with (at most) supposed tea leaves to find a right to
8 carry in public. Nor can Plaintiff explain why *Heller* expressly approved of
9 decisions upholding concealed carry bans, without stating the flip side crucial to
10 Plaintiff’s argument -- that some form of public carrying must be permitted.

11 Plaintiff takes snippets from *Heller* to argue that the Court recognized a right
12 to carry guns outside the home, but the Court never recognized such a right. In the
13 quoted passages the Court was only explaining its conclusion that the Second
14 Amendment was not limited to participants in a well-regulated militia. The Court
15 concludes its discussion of the meaning of “bear” and “carry”: “Although the
16 phrase [“bear arms”] implies that the carrying of the weapon is for the purpose of
17 “offensive or defensive action,” it in no way connotes participation in a structured
18 military organization.” *Heller* at 584. The Court’s concern was *who* may exercise
19 the right, not *where* it may be exercised.

20 This Court should not reach for an interpretation of *Heller* as implicitly
21 overruling *Robertson*’s recognition that the Second Amendment does not protect a
22 right to carry concealed weapons – especially given *Heller*’s embrace of concealed
23 carry bans and its repeated statements limiting its holding to the home. Lower
24 courts “should uphold State regulation whenever possible,” *Agricultural Prorate*
25 *Commission v. Superior Court in and for Los Angeles County*, 55 P.2d 495, 509
26 (Cal. 1936), not expand a novel Constitutional right to strike down democratically-
27 enacted legislation.

28 California courts have refused to read *Heller* and *McDonald* as recognizing a

1 right to carry guns in public. In *People v. Dykes*, the California Supreme Court
2 noted that:

3 The [*Heller*] court did not recognize a “right to keep and carry any
4 weapon whatsoever in any manner whatsoever and for whatever
5 purpose,” observing that historically, most courts have “held
6 that prohibitions on carrying concealed weapons were lawful under
7 the Second Amendment or state analogues.” The high court’s decision
in *Heller* does not require us to conclude that possession in a public
place of a loaded, cocked, semiautomatic weapon with a chambered
round, concealed in a large glove and ready to fire, cannot be defined
as a crime under state law.

8 209 P.3d 1, 44 (2009) (emphasis added) (internal citations omitted). And in *People*
9 *v. Flores*, 169 Cal.App.4th 568, 575 (2008), the California Supreme Court stated
10 that, “[g]iven this implicit approval of concealed firearm prohibitions, we cannot
11 read *Heller* to have altered the courts’ longstanding understanding that such
12 prohibitions are constitutional.” Recently, a district court rejected a similar
13 challenge, upholding §12050 as constitutional. *Peruta v. County of San Diego*, ---
14 F. Supp. 2d ---, 2010 WL 5137137, *6 (S.D. Cal. Dec. 10, 2010) (finding it
15 unnecessary to decide whether Second Amendment protects right to carry a loaded
16 handgun in public).

17 Other courts have held similarly that the Second Amendment, post-*Heller*,
18 does not protect a right to carry concealed weapons in public. Maryland’s highest
19 court rejected the argument that *Heller* endorsed a public right to carry handguns:

20 *** *Heller* and *McDonald* emphasize that the Second Amendment is
21 applicable to statutory prohibitions against home possession, the dicta
22 in *McDonald* that “the Second Amendment protects a personal right to
23 keep and bear arms for lawful purposes, most notably for self-defense
24 within the home,” notwithstanding. Although Williams attempts to
25 find succor in this dicta, it is clear that prohibition of firearms in the
home was the gravamen of the certiorari questions in both *Heller* and
McDonald and their answers. If the Supreme Court, in this dicta,
meant its holding to extend beyond home possession, it will need to
say so more plainly.

26 *Williams v. State*, 10 A.3d 1167, 1177 (Md. 2009) (internal citations omitted).

27 In *People v. Dawson*, the Illinois Court of Appeals rejected arguments
28 strikingly similar to Plaintiff’s, and held:

1 The specific limitations in *Heller* and *McDonald* applying only to a
2 ban on handgun possession in a home cannot be overcome by
3 defendant's pointing to the *Heller* majority's discussion of the natural
4 meaning of "bear arms" including wearing or carrying upon the person
5 or in clothing. Nor can the *Heller* majority's holding that the operative
6 clause of the second amendment "guarantee[s] the individual right to
7 possess and carry weapons in case of confrontation" require
8 heightened review of the AUUW statute's criminalization of the
9 carrying of an uncased and loaded firearm. As addressed above,
10 *Heller* specifically limited its ruling to interpreting the amendment's
11 protection of the right to possess handguns in the home, not the right
12 to possess handguns outside of the home in case of confrontation—a fact
13 the dissent heartily pointed out by noting that "[n]o party or *amicus*
14 urged this interpretation; the Court appears to have fashioned it out of
15 whole cloth." The *McDonald* Court refused to expand on this right,
16 explaining that the holding in *Heller* that the second amendment
17 protects "the right to possess a handgun in the home for the purpose of
18 self-defense" was incorporated.

19 934 N.E.2d 598, 605-606 (Ill. App. Ct. 2010) (internal citations omitted) (emphasis
20 added). Recognizing that "when reasonably possible, a court has the duty to uphold
21 the constitutionality of a statute," *id.* at *6, *Dawson* rejected the contention that the
22 Second Amendment protects a broad right to carry that would invalidate Illinois's
23 law. *See also People v. Aguillar*, --- N.E.2d ---, 2011 WL 693241 (Ill.App. 1 Dist.,
24 Feb. 23, 2011) (*Heller* and *McDonald* limited to "the right to possess handguns in
25 the home, not the right to possess handguns outside the home.")

26 The Kansas Court of Appeals recognized that "[i]t is clear that the [*Heller*]
27 Court was drawing a narrow line regarding the violations related solely to use of a
28 handgun in the home for self-defense purposes. [The defendant's] argument, that
Heller conferred on an individual the right to carry a concealed firearm, is
unpersuasive." *State v. Knight*, 218 P.3d 1177, 1189 (Kan. Ct. App. 2009).

The United States Court of Appeals for the Fourth Circuit declined to extend
the Second Amendment right beyond the home, refusing to "push *Heller* beyond its
undisputed core holding." *United States v. Masciandaro*, --- F.3d ---, 2011 WL
1053618, *16 (4th Cir. Mar. 24, 2011). The Court held: "On the question of
Heller's applicability outside the home environment, we think it prudent to await
direction from the Court itself * * * If ever there was an occasion for restraint, this

1 would seem to be it.” *Id.* at 16-17.

2 Other courts have similarly held that the right recognized in *Heller* and
3 *McDonald* is confined to the home. *See, e.g., Gonzalez v. Village of W. Milwaukee*,
4 No. 09CV0384, 2010 WL 1904977, *4 (E.D. Wis. May 11, 2010) (“The Supreme
5 Court has never held that the Second Amendment protects the carrying of guns
6 outside the home.”); *United States v. Hart*, 725 F. Supp. 2d 56, 60 (D. Mass. 2010)
7 (“*Heller* does not hold, nor even suggest, that concealed weapons laws are
8 unconstitutional.”); *Dorr v. Weber*, 741 F. Supp. 2d 993, 1005 (N.D. Iowa 2010)
9 (“[A] right to carry a concealed weapon under the Second Amendment has not been
10 recognized to date.”); *Teng v. Town of Kensington*, No. 09-cv-8-JL, 2010 WL
11 596526, *5 (D.N.H. Feb. 17, 2010) (“Given that *Heller* refers to outright
12 ‘prohibition on carrying concealed weapons’ as ‘presumptively lawful,’ far lesser
13 restrictions of the sort imposed here (i.e., requiring that Teng complete a one-page
14 application and meet with the police chief to discuss it) clearly do not violate the
15 Second Amendment.”) (internal citation omitted); *United States v. Tooley*, 717 F.
16 Supp. 2d 580, 596 (S.D. W. Va. 2010) (“Additionally, possession of a firearm
17 outside of the home or for purposes other than self-defense in the home:are not
18 within the ‘core’ of the Second Amendment right as defined by *Heller*.”); *In re*
19 *Factor*, 2010 WL 1753307, *3 (N.J. Super. Ct. App. Div. Apr. 21, 2010) (“[T]he
20 United States Supreme Court has not held or even implied that the Second
21 Amendment prohibits laws that restrict carrying of concealed weapons.”); *Riddick*
22 *v. United States*, 995 A.2d 212, 222 (D.C. 2010) (Second Amendment does not
23 “compel the District to license a resident to carry and possess a handgun outside the
24 confines of his home, however broadly defined.” (quoting *Sims v. United States*,
25 963 A.2d 147, 150 (D.C. 2008))).

26 This understanding of the Second Amendment (and state analogues) as not
27 protecting a right to carry guns or concealed weapons has been recognized for over
28 a century. *See, e.g.,* 1876 Wyo. Comp. Laws ch. 52, § 1 (1876 Wyoming law

1 prohibiting anyone from “bear[ing] upon his person, concealed or openly, any
2 firearm or other deadly weapon, within the limits of any city, town or village”). *See*
3 *also* Ark. Act of Apr. 1, 1881; Tex. Act of Apr. 12, 1871; *Andrews v. State*, 50
4 Tenn. 165 (1871); *Fife v. State*, 31 Ark. 455 (1876); *English v. State*, 35 Tex. 473,
5 478 (1871); *Hill v. State*, 53 Ga. 472, 474 (1874); *State v. Workman*, 35 W. Va.
6 367, 373 (1891); *Ex parte Thomas*, 97 P. 260, 262 (Okla. 1908); *Aymette v. State*,
7 21 Tenn. 154, 159-61 (1840); *State v. Buzzard*, 4 Ark. 18, 21 (1842); *State v. Jumel*,
8 13 La. Ann. 399, 400 (1858).²

9 Noted scholars and commentators have also long recognized that a right to
10 keep and bear arms does not prevent states from restricting or forbidding guns in
11 public places. John Norton Pomeroy’s Treatise, which *Heller* cited as representative
12 of “post-Civil War 19th century sources” on the right to bear arms, 554 U.S. at 618,
13 stated that the right to keep and bear arms “is certainly not violated by laws
14 forbidding persons to carry dangerous or concealed weapons” JOHN NORTON
15 POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED
16 STATES 152-53 (1868). Judge John Dillon explained that even where there is a
17 right to bear arms, “the peace of society and the safety of peaceable citizens plead
18 loudly for protection against the evils which result from permitting other citizens to
19 go armed with dangerous weapons.” Hon. John Dillon, *The Right to Keep and Bear*
20 *Arms for Public and Private Defense (Part 3)*, 1 CONT. L.J. 259, 287 (1874).
21 Another authoritative study noted that the Second Amendment and similar state
22 provisions had “not prevented the very general enactment of statutes forbidding the
23 carrying of concealed weapons,” which demonstrated that “constitutional rights
24 must if possible be so interpreted as not to conflict with the requirements of peace,
25

26 ² *Bliss v. Commonwealth*, 12 Ky. 90, 91, 93 (1822), in which the Kentucky
27 Supreme Court declared Kentucky’s concealed-weapons ban in conflict with its
28 Constitution, is recognized as an exception to this precedent. *See* Joel Prentiss
Bishop, *Commentaries on the Criminal Law* § 125, at 75-76 (1868). The Kentucky
legislature corrected the anomalous decision by amending the state constitution to
allow a concealed weapons ban. *See* KY. CONST. of 1850, art. XIII, § 25.

1 order and security.” ERNST FREUND, *THE POLICE POWER, PUBLIC POLICY AND*
2 *CONSTITUTIONAL RIGHTS* (1904). Post-*Heller* scholars recognize the logic behind
3 limiting the right to the home. See, e.g., Darrell A.H. Miller, *Guns as Smut:*
4 *Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278 (Oct.
5 2009); Michael C. Dorf, *Does Heller Protect a Right to Carry Guns Outside the*
6 *Home?*, 59 SYRACUSE L. REV. 225 (2008).

7 As the concealed weapons permitting process at issue does not impede on the
8 ability of individuals to keep handguns in defense of their homes, the Court should
9 not find that Plaintiff is challenging protected Second Amendment activity.

10 **B. The Second Amendment Right Should Not Be Extended to Prevent**
11 **Restricting or Prohibiting Carrying Guns in Public.**

12 There are profound public safety rationales for restricting guns in public, as
13 California courts continue to recognize post-*Heller*:

14 Unlike possession of a gun for protection within a residence, carrying
15 a concealed firearm presents a recognized threat to public order, and is
16 prohibited as a means of preventing physical harm to persons other
17 than the offender. A person who carries a concealed firearm on his
person or in a vehicle, which permits him immediate access to the
firearm but impedes others from detecting its presence, poses an
imminent threat to public safety. . . .

18 *People v. Yarbrough*, 169 Cal.App.4th 303, 314 (2008) (internal quotations and
19 citations omitted); see also *United States v. Walker*, 380 A.2d 1388, 1390 (D.C.
20 1977) (there is an “inherent risk of harm to the public of such dangerous
21 instrumentality being carried about the community and away from the residence or
22 business of the possessor”). The Fourth Circuit recognized that these public safety
23 concerns support not extending the right to arms beyond the home, stating:

24 This is serious business. We do not wish to be even minutely responsible for
25 some unspeakably tragic act of mayhem because in the peace of our judicial
26 chambers we miscalculated as to Second Amendment rights. It is not far-
27 fetched to think the *Heller* Court wished to leave open the possibility that
such a danger would rise exponentially as one moved the right from the
home to the public square.

28 *Masciandaro*, 2011 WL 1053618, *17.

1 The public carrying of firearms – especially of *concealed* weapons – pose
2 issues and challenges not presented by the possession of firearms in the home.
3 First, a broader range of individuals is threatened. Firearms in the home are
4 primarily a threat to their owners, family members, friends, and houseguests,³ but
5 firearms in public are a threat to law enforcement officers and other citizens. The
6 risks posed to society are great, as guns are used “far more often to kill and wound
7 innocent victims than to kill and wound criminals ... [and] guns are also used far
8 more often to intimidate and threaten than they are used to thwart crimes.” David
9 Hemenway & Deborah Azrael, *The Relative Frequency of Offensive and Defensive*
10 *Gun Uses: Results From a National Survey*, 15 VIOLENCE & VICTIMS 257, 271
11 (2000). And while the threat to public safety is far broader than Plaintiff’s claimed
12 “shootings in street [sic] over parking places,” Pl. Brief at 11, numerous concealed
13 carry permit holders have shot and killed persons in public disputes, including over
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21 ³ See, e.g., Matthew Miller et al., *State-level homicide victimization rates in the US*
22 *in relation to survey measures of household firearm ownership, 2001-2003*, SOC.
23 SCI. & MED. (2006) (“States with higher rates of firearm ownership had
24 significantly higher homicide victimization rates”); Lisa M. Hepburn & David
25 Hemenway, *Firearm availability and homicide: A review of the literature*, 9
26 AGGRESSION & VIOLENT BEHAVIOR 417 (2004) (“households with firearms are at
27 higher risk for homicide, and there is no net beneficial effect of firearm
28 ownership”); Matthew Miller et al., *Rates of Household Firearm Ownership and*
Homicide Across US Regions and States, 1988-1997, 92 AM J. PUB. HEALTH 1988
(Dec. 2002) (“in areas where household firearm ownership rates were higher, a
disproportionately large number of people died from homicide); Mark Duggan,
More Guns, More Crime, 109 J. POL’Y. ECON. 1086 (2001); Matthew Miller et al.,
Firearm availability and unintentional firearm deaths, 33 ACCIDENT ANALYSIS &
PREVENTION 477 (Jul. 2000) (“A statistically significant and robust association
exists between gun availability and unintentional firearm deaths.”).

1 trivial matters such as parking.⁴ In just the last four years, concealed handgun
2 permit holders have shot and killed at least 11 law enforcement officers and 286
3 private citizens. Violence Policy Center, *Concealed Carry Killers* (2011),
4 available at: <http://vpc.org/cckillers.htm>. States have a stronger need to protect
5 citizens from guns in public than from guns in homes.

6 Second, the carrying of firearms in public is not a useful or effective form of
7 self-defense and, in fact, has been shown to *increase* the chances of falling victim
8 to violent crime. While Plaintiff claims that an “armed citizenry” has caused a
9 “drop in violent crime” in other states, Pl. Brief at 11, he supplies no citations, and
10 the opposite is true. Most states with laws broadly allowing concealed carrying of
11 firearms in public appear to “experience increases in violent crime, murder, and
12 robbery when [those] laws are adopted.” John J. Donohue, *The Impact of*
13 *Concealed-Carry Laws*, in EVALUATING GUN POLICY EFFECTS ON CRIME AND
14 VIOLENCE 289, 320 (2003). These laws “have resulted, if anything, in an *increase*
15 in adult homicide rates.” Jens Ludwig, *Concealed-Gun-Carrying Laws and Violent*
16 *Crime: Evidence from State Panel Data*, 18 INT’L REV. L. & ECON. 239 (1998)
17 (emphasis in original). Likewise, “firearms homicides increased in the aftermath of
18 [enactment of these] laws,” and may “raise levels of firearms murders” and
19 “increase the frequency of homicide.” David McDowall et al., *Easing Concealed*
20 *Firearms Laws: Effects on Homicide in Three States*, 86 J. CRIM. L. &
21 CRIMINOLOGY 193, 202-203 (1995). Similarly, “[f]or robbery, many states

22 ⁴ See, e.g., Brian Hass, *Finger gestures, brake slamming, then road rage turned into*
23 *a murder*, SOUTH FLORIDA SUN-SENTINEL, Aug. 8, 2008 (concealed carry permit
24 (“CCW”) holder shot customs agent in parking lot); *Man shot over parking space,*
25 *suspect in custody*, WMCTV.COM, Sept. 16, 2010 (CCW holder shot and kill man
26 over parking dispute); Kathleen Cochrane, *Parking lot shooter claims self-defense*,
27 [WWW.FOX8.COM](http://www.fox8.com), Apr. 14, 2010 (CCW holder shot and killed attendant over
28 parking dispute); *Suspected McDonald's shooter arrested*, WMBFNEWS.COM, July
29, 2009 (CCW holder killed man over parking dispute); Jeff Woods, *Yet Another*
Killing Charged to State-Licensed Gunman, NASHVILLE SCENE, Apr. 19, 2010,
(CCW holder shot and killed man for driving golf cart into car’s path); Lawrence
Buser, *Coleman found guilty of second-degree murder in parking lot shooting*,
MEMPHIS COMMERCIAL APPEAL, July 17, 2010 (CCW holder shot man over parking
dispute).

1 experience increases in crime” after concealed carry laws are enacted. Hashem
2 Dezhbakhsh & Paul Rubin, *Lives Saved or Lives Lost? The Effects of Concealed-*
3 *Handgun Laws on Crime*, THE ECON. OF GUN CONTROL 473 (May 1998). Several
4 statistical approaches “indicate a rather substantial increase in robbery,” while
5 “policies to *discourage* firearms in public may help prevent violence.” John
6 Donohue, *Guns, Crime, and the Impact of State Right-To-Carry Laws*, 73
7 FORDHAM L. REV. 623 (2004). Another study found “gun possession by urban
8 adults was associated with a significantly increased risk of being shot in an assault,”
9 and “guns did not protect those who possessed them from being shot in an assault.”
10 Charles C. Branas et al., *Investigating the Link Between Gun Possession and Gun*
11 *Assault*, AMER. J. PUB. HEALTH, vol. 99, No. 11 at 1, 4 (Nov. 2009). Likewise,
12 another study found:

13 Two-thirds of prisoners incarcerated for gun offenses reported that the
14 chance of running into an armed victim was very or somewhat
15 important in their own choice to use a gun. Currently, criminals use
16 guns in only about 25 percent of noncommercial robberies and 5
17 percent of assaults. If increased gun carrying among potential victims
causes criminals to carry guns more often themselves, or become
quicker to use guns to avert armed self-defense, the end result could be
that street crime becomes more lethal.

18 Philip Cook et al., *Gun Control After Heller: Threats and Sideshowes from a Social*
19 *Welfare Perspective*, 56 UCLA L. REV. 1041, 1081 (2009).

20 Third, the carrying of firearms in public has other negative implications that
21 are not impacted by handguns in the home. When the carrying of guns in public is
22 restricted, “possession of a concealed firearm by an individual in public is sufficient
23 to create a reasonable suspicion that the individual may be dangerous, such that an
24 officer can approach the individual and briefly detain him in order to investigate
25 whether the person is properly licensed.” *Commonwealth v. Robinson*, 600 A.2d
26 957, 959 (Pa. Super. Ct. 1991); *see also Commonwealth v. Romero*, 673 A.2d 374,
27 377 (Pa. Super. Ct. 1996) (“officer’s observance of an individual’s possession of a
28 firearm in a public place in Philadelphia is sufficient to create reasonable suspicion

1 to detain that individual for further investigation”). Out of “a growing concern over
2 an increase in the carrying of loaded firearms” and the dangers resulting “from
3 either the use of such weapons or from violent incidents arising from the mere
4 presence of such armed individuals in public places,” *People v. Zonver*, 132
5 Cal.App.3d Supp.1, 5 (1982) (quoting Stats. 1967, ch. 960, § 6), the California
6 legislature similarly enacted Section 12031, which generally prohibits the carrying
7 of loaded firearms in public or in vehicles, and states that peace officers may arrest
8 persons who they have probable cause to believe are illegally carrying loaded guns.
9 CAL. PENAL CODE §12031(a)(5). Yet if officers were required to effectively
10 presume that a person carrying a firearm in public was doing so lawfully, it is
11 possible that an officer would not be deemed to have cause to arrest, search, or
12 engage in a *Terry* stop if she spotted a person carrying a loaded gun, even though
13 far less risky behavior could justify police intervention. Law enforcement should
14 not have to wait for a gun to be fired before protecting the public. Further, if
15 drivers were allowed to carry loaded guns, road rage can become a more serious
16 and deadly problem. David Hemenway, *Road Rage in Arizona: Armed and*
17 *Dangerous*, 34 ACCIDENT ANALYSIS & PREVENTION 807-14 (2002). An increase in
18 gun prevalence in public also may cause an intensification of criminal violence.
19 Philip Cook & Jens Ludwig, *The Social Costs of Gun Ownership*, J. PUB. ECON.
20 379, 387 (2006).

21 The concealed weapons permitting process at issue here prevents many of
22 these risks to the public, without implicating Second Amendment activity protected
23 in *Heller*. Individuals in California who are not otherwise disqualified by operation
24 of law and who can demonstrate that they can possess and use firearms responsibly
25 are allowed to maintain handguns to protect themselves in the home. See CAL.
26 PENAL CODE § 12026(b). There is no basis to expand that right to the carrying of
27 concealed weapons in public.

28 **II. EVEN IF THE CONCEALED WEAPONS PERMITTING PROCESS**

1 **IN SECTION 12050 DID IMPLICATE PROTECTED SECOND**
2 **AMENDMENT ACTIVITY, IT WOULD WITHSTAND THE**
3 **APPROPRIATE LEVEL OF SCRUTINY.**

4 Even if this Court were to hold that the Second Amendment protects a right
5 to carry concealed guns in public, California's permitting process is a permissible
6 regulation of such a right under any appropriate level of scrutiny.

7 **A. The Reasonable Regulation Test is the Appropriate Standard of**
8 **Review.**

9 In choosing a level of scrutiny for Second Amendment challenges, this court
10 should not be limited to the choices utilized in First Amendment jurisprudence,⁵ for
11 the exercise of Second Amendment rights creates unique risks that threaten public
12 safety and can be far more lethal than even the most dangerous speech. "Words can
13 never hurt me," but guns are designed to inflict grievous injury and death. Prior
14 restraint of speech may be unacceptable, but prophylactic measures to prevent
15 shootings before they occur are essential to protect the public. *Amicus* respectfully
16 submits that the standard of review best suited to the Second Amendment is the
17 "reasonable regulation" test, which has been applied by courts across the country,
18 for over a century, to construe the right to keep and bear arms.

19 While courts are just beginning to grapple with a private right to arms under
20 the federal Constitution, courts in over forty states have construed analogous state
21 provisions for over a century. With remarkable unanimity, they have coalesced
22 around a single standard: the "reasonable regulation" test. *See* Adam Winkler,
23 *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 686-87, n. 12 (2007).
24 Under this test, a state "may regulate the exercise of [the] right [to bear arms] under

25 ⁵ The Supreme Court has fashioned a variety of standards of review tailored to
26 specific constitutional inquiries. *See, e.g., Kennedy v. Louisiana*, 554 U.S. 407, 420
27 (2008) (Eighth Amendment's prohibition of cruel and unusual punishment
28 measured by "evolving standards of decency" test); *Planned Parenthood v. Casey*,
505 U.S. 833, 874 (1992) (right to choose measured by "undue burden" test);
Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (procedural due process requires
balancing three competing interests); *Terry v. Ohio*, 392 U.S. 1, 30 (1968) ("stop
and frisk" under Fourth Amendment upheld on officer's "reasonable grounds").

1 its inherent police power so long as the exercise of that power is reasonable.”
2 *Robertson v. City & County of Denver*, 874 P.2d 325, 328, 333 n. 10 (Colo. 1994).⁶
3 This “reasonable regulation” test protects Second Amendment activity, while
4 recognizing “the state’s right, indeed its duty under its inherent police power, to
5 make reasonable regulations for the purpose of protecting the health, safety, and
6 welfare of the people.” *State v. Comeau*, 448 N.W.2d 595, 599 (Neb. 1989).

7 The reasonable regulation test is more demanding than the rational basis test
8 rejected by the *Heller* majority, as it focuses on whether “the restriction . . . is a
9 reasonable exercise of the State’s inherent police powers” and not “merely on
10 whether any conceivable rationale exists under which the legislature may have
11 concluded the law could promote the public welfare.” *State v. Cole*, 665 N.W. 2d
12 328, 338 (Wis. 2003). And unlike the “interest balancing” test suggested by Justice
13 Breyer’s dissent, it does not permit states to prohibit all firearm ownership. *See*
14 Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense:*
15 *An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1458
16 (2009); *State v. Hamdan*, 665 N.W.2d 785, 799 (Wis. 2002); *Trinen v. City of*
17 *Denver*, 53 P.3d 754, 757 (Colo. Ct. App. 2002); *State v. Dawson*, 159 S.E.2d 1, 11
18 (N.C. 1968). Rather, the test allows laws that are reasonably designed to further
19 public safety. *See, e.g., Robertson*, 874 P.2d at 328, 330 n. 10 (“The state may
20 regulate the exercise of [the] right [to bear arms] under its inherent police power so
21 long as the exercise of that power is reasonable.”); *Jackson*, 68 So.2d 850, 852
22 (Ala. Ct. App. 1953) (same); *Bleiler*, 927 A.2d at 1223 (same).

23 Adopting the reasonable regulation test here would not be at odds with
24 district courts that have elected to use intermediate scrutiny following *Heller*, for in
25

26 ⁶ *See also Bleiler v. Chief, Dover Police Dep’t*, 927 A.2d 1216, 1223 (N.H. 2007)
27 (the relevant inquiry is “whether the statute at issue is a ‘reasonable’ limitation
28 upon the right to bear arms”); *Jackson v. State*, 68 So.2d 850, 852 (Ala. Ct. App.
1953) (“It is uniformly recognized that the constitutional guarantee of the right of a
citizen to bear arms, in defense of himself and the State... . is subject to
reasonable regulation by the State under its police power.”).

1 virtually all such cases the court evaluated broad restrictions on classes of
2 individuals and types of arms, not individualized determinations of the sort at issue
3 here. *See, e.g., United States v. Chester*, 628 F.3d 673 (4th Cir. 2010); *United*
4 *States v. Marzzarella*, 614 F.3d 85 (3rd Cir. 2010); *United States v. Yanez-Vasquez*,
5 No. 09-40056-01-SAC, 2010 WL 411112 (D. Kan. Jan. 28, 2010); *United States v.*
6 *Miller*, 604 F. Supp. 2d 1162 (W.D. Tenn. 2009); *United States v. Bledsoe*, No. SA-
7 08-CR-13(2)-XR, 2008 WL 3538717 (W.D. Tex. 2008).⁷ As courts are more wary
8 of laws that restrict broad classes of people than laws that require individual
9 determinations, heightened scrutiny is less appropriate here.

10 The reasonable regulation test affords law enforcement officials the
11 discretion they need to adequately enforce handgun laws. Given their training and
12 expertise in firearms and their risks, and their familiarity with members of their
13 communities, local law enforcement is best situated to make determinations about
14 who in their communities can carry concealed weapons safely and responsibly.⁸
15 *See, e.g., Harman v. Pollock*, 586 F.3d 1254, 1265 (10th Cir. 2009) (“[Courts] must
16 defer to trained law enforcement personnel, allowing officers to draw on their own
17 experience and specialized training to make inferences from and deductions about
18 the cumulative information available to them.”) (internal quotation omitted); *Avant*
19 *Indus. Ltd. v. Kelly*, 318 A.2d 47, 50 (N.J. Super. Ct. App. Div. 1974) (“[w]e defer
20 to [police’s] expertise in this field” of reviewing gun permits). Law enforcement
21 also has a particular stake in who can carry firearms, as they enforce gun laws,
22 respond to situations involving firearms, and are often placed at grave risk.

23
24 ⁷ The only exception appears to be *Heller v. District of Columbia*, in which
25 plaintiffs challenged the District of Columbia’s firearm registration procedures, and
26 prohibitions on assault weapons, and large capacity ammunition feeding devices.
27 698 F. Supp. 2d 179, 181 (D.D.C. 2010). But in that case, two of the three
28 provisions were broad restrictions on classes of weapons.

⁸ States that do *not* afford any discretion to law enforcement officials have issued
handgun carry permits to numerous individuals who have gone on to kill innocent
civilians and law enforcement members. *See Violence Policy Center, Private*
Citizens Killed by Concealed Handgun Permit Holders: May 2007 to the Present,
available at [http:// www.vpc.org/ccwkillers.htm](http://www.vpc.org/ccwkillers.htm).

1 There is a profound governmental interest in regulating the possession and
2 use of firearms. States have “cardinal civic responsibilities” to protect the health,
3 safety, and welfare of their citizens. *Dep’t of Revenue of Ky. v. Davis*, 553 U.S. 328,
4 342 (2008); *see also Queenside Hills Realty Co. v. Saxl*, 328 U.S. 80, 83 (1946)
5 (“[T]he legislature may choose not to take the chance that human life will be lost . .
6 . .”). States are generally afforded “great latitude” in exercising “police powers to
7 legislate as to the protection of the lives, limbs, health, comfort, and quiet of all
8 persons” *Gonzales v. Oregon*, 546 U.S. 243, 270 (2006) (internal quotations
9 omitted). Regulations on the carrying of firearms are an essential exercise of those
10 powers, for the “promotion of safety of persons and property is unquestionably at
11 the core of the State’s police power.” *Kelley v. Johnson*, 425 U.S. 238, 247 (1976).

12 While individuals and organizations differ on the net risks posed by guns,
13 such disagreement underlines that firearm regulation is best suited for the
14 legislative arena, not the courts. *See Miller*, 604 F. Supp. 2d at 1172 n. 13 (“[D]ue
15 to the intensity of public opinion on guns, legislation is inevitably the result of
16 hard-fought compromise in the political branches.”). Legislatures are designed to
17 make empirical judgments about the need for and efficacy of regulation, even when
18 that regulation affects the exercise of constitutional rights. *See, e.g., Turner Broad.*
19 *Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997) (state legislatures are “far better
20 equipped than the judiciary to ‘amass and evaluate the vast amounts of data’
21 bearing upon legislative questions.”); *Richmond v. J.A. Croson Co.*, 488 U.S. 469,
22 544 (1989) (“Local officials, by virtue of their proximity to, and their expertise
23 with, local affairs, are exceptionally well qualified to make determinations of public
24 good within their respective spheres of authority.”) (internal quotations and
25 citations omitted). State governments “must [thus] be allowed a reasonable
26 opportunity to experiment with solutions to admittedly serious problems.” *Young v.*
27 *American Mini Theatres, Inc.*, 427 U.S. 50, 71 (1976).

28 In fulfilling their responsibility to protect the public, states have enacted laws

1 and permitting regimes – like the one at issue here – to ensure that guns are used
2 responsibly and possessed by responsible, law-abiding persons, and these laws have
3 reduced the use of guns in crime and saved lives. *See, e.g.,* D.W. Webster et al.,
4 *Effects of State-Level Firearm Seller Accountability Policies on Firearm*
5 *Trafficking*, 86 J. URBAN HEALTH: BULLETIN OF THE N.Y. ACAD. OF MED. 525
6 (2009); D.W. Webster et al., *Relationship Between Licensing, Registration, and*
7 *Other State Gun Sales Laws and the Source State of Crime Guns*, 7 INJURY
8 PREVENTION 184 (2001); Douglas Weil & Rebecca Knox, *Effects of Limiting*
9 *Handgun Purchases on Interstate Transfer of Firearms*, 275 J. AM. MED. ASS’N
10 1759 (1996). The risk posed by unduly restricting these legislative judgments is
11 severe, and courts should review such judgments with appropriate deference. The
12 reasonable regulation test is best situated to defer to these legislative judgments.

13 **B. The Concealed Weapons Permitting Process at Issue Is**
14 **Constitutionally Permissible.**

15 California’s concealed weapons permitting process clearly passes the
16 reasonable regulation test. The law does not infringe on the Second Amendment
17 rights of law-abiding, responsible citizens to a gun in the home for the self-defense.
18 Yet it is supported by the “compelling state interest in protecting the public from
19 the hazards involved with certain types of weapons, such as guns,” particularly
20 given “the danger [posed by the] widespread presence of weapons in public places
21 and [the need for] police protection against attack in these places.” *Cole*, 665 N.W.
22 2d at 344 (internal quotations omitted). There is strong evidence that permitting
23 and registration procedures for public carrying reduce gun deaths and criminal
24 access to firearms. *See, e.g.,* Webster et al., *Relationship Between Licensing*, at
25 184. Webster et al., *Effects of State-Level*, at 525; Weil & Knox, *Effects of Limiting*
26 *Handgun Purchases*, at 1759. The Second Amendment does not forbid state or
27 local governments from using thus restricting the public carrying of firearms as
28

1 California has done.⁹

2 **CONCLUSION**

3 For all the foregoing reasons, *amicus* respectfully requests that the Court find
4 Section 12050 to be constitutional.

5
6
7 Dated: April 20, 2011

Respectfully submitted,

8 

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27 ⁹ Even under intermediate scrutiny, which *amicus* maintains need not be applied in
28 this case, California's statute would pass constitutional muster. *See Peruta*, 2010
WL 5137137, at *8.

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PROOF OF SERVICE

STATE OF CALIFORNIA)
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I am employed in the County of Los Angeles, State of California. I am over the age of eighteen and not a party to the within action; my business address is: Hogan Lovells US LLP, 1999 Avenue of the Stars, Suite 1400, Los Angeles, CA 90067.

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Marjorie Sener
Print Name


Signature

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