14-55873

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHARLES NICHOLS,

Plaintiff-Appellant,

v.

EDMUND G. BROWN JR., in his official capacity as Governor of California, and XAVIER BECERRA, in his official capacity as Attorney General of California,

Defendants-Appellees.

On Appeal from the United States District Court
for the Central District of California,
Case No. 2:11-cv-09916-SJO-SS,
The Honorable S. James Otero, Judge

APPELLEES' BRIEF

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Defendants-Appellees Edmund G. Brown Jr., Governor of California, and Xavier Becerra, Attorney General of California, submit the following brief in response to the opening brief of Plaintiff-Appellant Charles Nichols. Governor Brown, who was never a proper defendant in this case, joins only those parts of this brief regarding his dismissal based on immunity from suit under the Eleventh Amendment to the U.S. Constitution.[1]

INTRODUCTION

Nichols facially challenges a set of California state laws regulating the open carry of firearms in public places.[2] Nichols is a proponent of open carry who disapproves of concealed carry. *See* Appellant's Opening Brief, Docket Entry 26-1 (AOB), at 38 (stating that Nichols "personally embraces"

[1] Under Federal Rule of Civil Procedure 25(d), Xavier Becerra, presently the Attorney General of the State of California, should have his name substituted into this case in place of Kamala D. Harris, formerly the Attorney General of the State of California.

[2] The relevant statutes are California Penal Code sections 25850 (California's primary regulation for open carry of loaded firearms in public places); 25900-26060 (exemptions); 26150 (regulation authorizing sheriffs in counties with less than 200,000 people to issue open-carry licenses to county residents); 26155 (regulation authorizing municipal police chiefs in counties with less than 200,000 people to issue open-carry licenses to municipal residents); 26350 (primary regulation of open carry of unloaded handguns in public places); 26361-26391 (exemptions); 26400 (primary regulation of open carry of unloaded long guns in public places); 26405 (exemptions). The full texts of these statutes, as well as relevant related statutes, are provided in the attached addendum.

prohibitions on concealed carry). He believes that that the Second Amendment precludes virtually all open-carry restrictions in all "non-sensitive" public places. Espousing a specific view of the Second Amendment, Nichols insists on a very precise right: (1) open carry, in particular, and as opposed to concealed carry, (2) for any lawful purpose, (3) in any non-sensitive place outside the home. *Id.* at 24-25, 43.

Nichols has made clear that he is not asserting a generalized right to carry a firearm in public in *some* manner, for self-defense. In Nichols's view, even if he were granted an unconditional, *concealed*-carry firearm license, this would not fulfill the Second Amendment right. AOB 17, 33. Nichols's appeal thus puts before this Court a single, explicit question: Do law-abiding Californians have the essentially unfettered Second Amendment right to carry firearms openly in public places, under almost any circumstances? AOB 38; *see also id.* 26, 44 ("Open Carry is the Second Amendment right.") Indeed, he expressly disclaims any alternative framing of his Second Amendment claim. *Id.* 33 ("[S]hould this Court discern an opportunity to decide this appeal without deciding the Second Amendment Open Carry question then consider that part of the argument forfeited . . . .").

Nichols's particular framing of the Second Amendment right is unsound. The Supreme Court has made clear that the Second Amendment

right codified a right that was already in existence at the time of the founding of our country. The historical record establishes that regulations restricting open carry in public places were common in England for centuries, were in force in the American colonies, and persisted through our country's Founding Era, the Civil War, and into recent times. The virtually unlimited open-carry right that Nichols posits cannot be reconciled with the history of Anglo-American open-carry restrictions in public places. None of the many cases that Nichols cites supports the precise right that he advocates. This Court should decline to create such an unprecedented right.

Nichols also claims that California's open-carry laws violate the Fourth Amendment, contradict the Fourteenth Amendment (Equal Protection Clause), are void for vagueness, and conflict with the California Constitution. These other claims, which Nichols himself considers secondary (AOB 33), also lack merit.

This Court should affirm in full the judgment of the lower court.

JURISDICTIONAL STATEMENT

Appellees agree that the district court had subject-matter jurisdiction over this case generally—but not over Governor Brown—and that this Court has appellate jurisdiction. Likewise, Appellees do not dispute that Nichols timely noticed his appeal.

STATEMENT OF ISSUES

(1) Whether the Second Amendment (as applied to California under the Fourteenth Amendment) encompasses a virtually unfettered right to carry a firearm openly in all non-sensitive public places. (This issue corresponds with Nichol's third and fourth issues. AOB 11.)

(2) Whether California's law authorizing a peace officer to conduct a search of an openly carried firearm in a public place to see if the firearm is loaded is facially invalid under the Fourth Amendment. (See Nichols's fifth issue.)

(3) Whether California's law authorizing sheriffs and police chiefs in counties with fewer than 200,000 people to issue open-carry permits, while forbidding sheriffs and police chiefs in counties with 200,000 or more people to issue open-carry permits, facially violates the Equal Protection Clause of the Fourteenth Amendment. (See Nichols's sixth issue.)

(4) Whether California's open-carry laws are unconstitutionally vague on their face regarding the terms "loaded" (for a firearm) and "prohibited area" (where it is unlawful to carry a firearm). (See Nichols's seventh issue.)

(5) Whether the Eleventh Amendment bars Nichols's claims against Governor Brown, sued in his official capacity, and/or Nichols's California

state-law claims against California officials. (See Nichols's first and second enumerated issues.)

STATEMENT OF THE CASE

Nichols first filed this lawsuit in federal trial court in Los Angeles in November 2011. *See Nichols v. Brown*, U.S.D.C., C.D. Cal., Case No. 2:11-cv-09916-SJO-SS, Dkt. Item #1 (Nov. 30, 2011). In early 2012, the several defendants filed different motions to dismiss the original complaint on various grounds, and, in May 2012, the district court granted all the motions, with leave to amend in some aspects. Excerpts of Record, 1 ER 110-11. From those May 2012 rulings, Nichols now appeals: (1) the dismissal with prejudice of Governor Brown, and (2) the dismissal with prejudice of Nichols's claims that California's open-carry laws violate the California Constitution. 1 ER 110.

Nichols timely amended his complaint, which led to another round of dismissal motions and further rulings by the district court. 1 ER 59-60. Nichols then filed what became the case's operative complaint, the second amended complaint, in March 2013. 2 ER 216-56. The crux of Nichols's second amended complaint—and the crux of this appeal—is as follows:

> This case involves an important constitutional principle, that neither the state nor local governments may prohibit PLAINTIFF or similarly situated individuals from *openly carrying* a fully

> functional firearm (loaded and unloaded) for the purpose of self-defense (or for other lawful purposes) in non-sensitive public places . . . .

2 ER 219, ¶ 8 (emphasis added).

The operative complaint sought to invalidate California's open-carry statutes (2 ER 241-46) and the City of Redondo Beach's open-carry municipal ordinances (2 ER 250-51). Of the three claims in Nichols's second amended complaint, on appeal, Nichols pursues only the (multi-pronged) claim challenging the constitutionality of the California open-carry laws, specifically California Penal Code sections 25850, 26350, and 26400, which together regulate the open carry of loaded and unloaded firearms. *See* 2 ER 241-46.[3] Nichols moved for summary judgment on his remaining claims, the Attorney General moved for judgment on the pleadings, and, in May 2014, the district court denied Nichols's motion and simultaneously granted the Attorney General's motion. 1 ER 7, 9-11.

In the dispositive rulings, the district court interpreted Nichols's complaint as stating only facial challenges to California's open-carry laws (1 ER 24); held that restrictions on open carry did not burden the Second

[3] The two other dismissed claims, which are not being pursued in this appeal, involved allegations against defendants affiliated with Redondo Beach. 2 ER 246-51.

Amendment right, as that right was historically understood (1 ER 28-29); and applied rational-basis review to California's open-carry laws, which passed that test (1 ER 30-31). In the course of that review, the district court found: "California has determined that regulating the carrying of loaded firearms in public reduces public shootings. Allowing the open carry of unloaded handguns and firearms would create an unsafe environment for law enforcement, the person carrying the firearm, and bystanders." 1 ER 32. The district court concluded that California's open-carry laws are rationally related to the legitimate governmental objective of maintaining public safety. 1 ER 33, 43-44. The district court also granted judgment on the pleadings to Defendants as to Nichols's claims under the Fourth Amendment, the Fourteenth Amendment, and his vagueness claims. 1 ER 33-42.

Nichols now appeals the district court's May 2014 ruling (in addition to the dismissal of Governor Brown and the claims under the California Constitution).

STANDARD OF REVIEW

This Court reviews *de novo* a district court's grant of a motion on the pleadings, constitutional questions, and whether a party has immunity from suit under the Eleventh Amendment. *Doe v. United States*, 419 F.3d 1058, 1061 (9th Cir. 2005) (regarding judgment on the pleadings); *Am. Acad. of Pain Mgmt. v. Joseph*, 353 F.3d 1099, 1103 (9th Cir. 2004) (constitutional questions) *Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1040 (9th Cir. 2003) (Eleventh Amendment immunity). This Court reviews a denial of a request for leave to amend a complaint for abuse of discretion. *Wilson v. Lynch*, 835 F.3d 1083, 1090 (9th Cir. 2016).

SUMMARY OF ARGUMENT

Nichols asks this Court to recognize a stand-alone right to carry a firearm openly in most public places; but that right does not exist under the Second Amendment. The historical record of Anglo-American firearms restrictions on open carry in public, from 13th century England to the present-day United States, refutes Nichols's claim. Even assuming that the Second Amendment provides for some right to carry a firearm outside the home for self-defense, the Second Amendment does not require California to accommodate that right by allowing unconstrained open carry of firearms in public places for any reason. Nichols's citations of cases from the 1800s do

not contradict that evidence. This Court should decline Nichols's invitation to depart from history and precedent.

Nichols's remaining claims also lack merit. The statute authorizing a peace officer to conduct a "chamber check" to determine if a publicly carried firearm is loaded does not violate the Fourth Amendment because there is no reasonable expectation of privacy for the firing chamber of a firearm carried in the open in public. Nichols's challenge under the Equal Protection Clause—that residents of only small counties may obtain open-carry permits—fails at the threshold, because he did not even attempt to show that he could establish good cause to receive a permit, regardless of his residency. Moreover, to the extent that Nichols complains about the requirement to obtain a permit, his claim is essentially duplicative of the Second Amendment claim, seeking the same remedy, recognition of the lawfulness of open carry for all people. And, in any event, the California Legislature has a legitimate rationale for limiting open-carry permits to people in less-populated counties, using total county population as a rough proxy for population density. In addition, Nichols's facial vagueness claims regarding two terms in the open-carry statutes fail because there are, indisputably, scenarios in which the challenged terms would apply unambiguously, thus defeating the facial vagueness challenges. Finally, the

Eleventh Amendment required dismissal of both (1) Governor Brown, because he has no direct role in enforcing California' open-carry statutes, and (2) Nichols's state-law claims, because a federal court cannot hold a state official liable for violating his or her state constitution.

ARGUMENT

I. THE SECOND AMENDMENT DOES NOT CODIFY A VIRTUALLY UNFETTERED RIGHT TO "OPEN CARRY" IN PUBLIC PLACES

The Second Amendment states: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court "announced for the first time that the Second Amendment secured an 'individual right to keep and bear arms.'" *Silvester v. Harris*, 843 F.3d 816, 819 (9th Cir. 2016) (quoting *Heller*, 554 U.S. at 595). *Heller* recognized "it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a pre-existing right." 554 U.S. at 592. In *McDonald v. City of Chicago*, 561 U.S. 742 (2010), the Supreme Court held that the Second Amendment right "is incorporated against states and municipalities under the Fourteenth Amendment." *Nordyke v. King*, 681 F.3d 1041, 1044 (9th Cir. 2012) (en banc).

In *Heller*, the Supreme Court struck down a District of Columbia statute that "totally ban[ned] handgun possession in the home," noting that "[f]ew laws in the history of our Nation have come close to the severe restriction" imposed by the District. 554 U.S. at 628-629. The *Heller* Court expressly did not "purport to 'clarify the entire field' of Second Amendment jurisprudence," nor did it provide "explicit guidance on the constitutionality of regulations which are less restrictive than the near-total ban at issue in that case." *Jackson v. City and County of San Francisco*, 746 F.3d 953, 959 (9th Cir. 2014) (quoting *Heller*, 554 U.S. at 635).

This case involves such less-restrictive regulations. Far from eradicating firearm possession or use, California's open-carry laws restrict most people from engaging in specific conduct—openly carrying firearms in public. Nichols's claim focuses on that constraint on open carry. Although Nichols makes passing references to the question of whether the "Second Amendment right extend[s] beyond the interior of one's home," AOB 37, Nichols's brief is clear that he is not asking this Court to resolve the broader issue.[4] As framed by Nichols, this "is, and always has been, a pure Open

[4] For a discussion of curtilage, see page 34, footnote 25, below.

Carry case." AOB 33.[5] This appeal thus presents a narrow question: Whether the Second Amendment conveys a free-standing right to "openly carry loaded and unloaded firearms . . . for the purpose of self-defense, or any other lawful purpose," in any non-sensitive public place throughout California. AOB 24-25; *see also* AOB 26 (Nichols "seeks an unrestricted license to openly carry a loaded handgun throughout the state of California").

Accordingly, this case does not implicate the broader question of whether the Second Amendment "protect[s], to some degree, a right of a member of the general public to carry firearms in public," either concealed or open. *Peruta v. County of San Diego*, 824 F.3d 919, 927 (9th Cir. 2016) (en banc). (California is prepared to litigate that question if and when it is raised in another proceeding.)[6] Even if the Second Amendment guarantees ordinary, law-abiding citizens some right to carry a firearm outside the home, the Second Amendment does not require California to accommodate

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[5] Indeed, Nichols expressly disclaims any contrary interpretation of the case; and, as noted above, Nichols "disavow[s] any desire, intention or plan to carry a" concealed deadly weapon instead of an exposed deadly weapon. AOB 33.

[6] Possibly *Flanagan v. Harris*, U.S.D.C., C.D. Cal. Case No. 16-cv-6164, Dkt. 1 at 17-18.

that right by allowing people to carry firearms openly in public. *See Peruta*, 824 F.3d at 946 (Callahan, J., dissenting) (asserting that while States must allow an "ordinary citizen to carry a firearm in public for self-defense," States "may choose between different manners of bearing arms for" that purpose).

Nichols does not seek to vindicate a right to *some* form of public carry. Instead, he insists that the Second Amendment requires California to allow him to carry a weapon in the manner that he prefers. But "the right secured by the Second Amendment . . . [is] not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Heller*, 554 U.S. at 626. As set out below, the overwhelming weight of historical evidence demonstrates that the Second Amendment does not guarantee a person the right to carry a firearm openly in any non-sensitive public place. None of Nichols's authority recognizes the particular right that he envisions.

A. Substantial Restrictions on Open Carry in Public Places Date Back Many Centuries

In evaluating the scope of the Second Amendment, "the Supreme Court in *Heller and McDonald* treated its historical analysis as determinative." *Peruta*, 824 F.3d at 929. Nichols's claim fails because "persuasive historical evidence" demonstrates that California's open-carry laws do not impinge on the "Second Amendment right as it was historically understood." *Silvester*, 843 F.3d at 821. This Court may thus uphold these laws "without further analysis." *Silvester*, 843 F.3d at 821.

1. Prohibitions on open carry were widely accepted throughout England, especially in highly-populated areas, before the American Revolution

"The right to bear arms in England has long been subject to substantial regulation." *Peruta*, 824 F.3d at 929. Those regulations include restrictions on openly carrying arms in public places. In the late 1200s and early 1300s, for example, King Edward I and King Edward II issued a series of orders that forbade members of the public from "going armed within the realm without the king's special license." *Id.*[7] And, in 1328, under King Edward III, the English Parliament enacted the Statute of Northampton, a law that

[7] Quoting 4 Calendar Of The Close Rolls, Edward I, 1296-1302, at 318 (Sept. 15, 1299, Canterbury) (H.C. Maxwell-Lyte ed., 1906).

"would become the foundation for firearms regulation in England for the next several centuries." *Id.* at 930. The Statute of Northampton prohibited persons "great [and] small" from "com[ing] before the King's Justices" or ministers "with force and arms" and from "go[ing] nor rid[ing] armed by night nor by day, in Fairs, Markets," or "part[s] elsewhere." *Id.*[8] The Statute of Northampton "was widely enforced." *Peruta*, 824 F.3d at 930.

Over the next 450 years, English authorities continued to restrict heavily the public carry of firearms. *Peruta*, 824 F.3d at 930-933. In the late 1500s, Queen Elizabeth I issued a proclamation emphasizing that the Statute of Northampton barred the carrying of weapons "in Cities and Townes [and] in all partes of the Realme in common highways,"[9] and another proclamation reiterating that the Statute of Northampton prohibited the carrying of weapons, both "openly" and "secretly."[10] And six years after that, the Queen ordered "all Justices of the Peace" to enforce the Statute of

[8] Quoting 2 Edw. 3, c. 3 (1328).

[9] By The Quenne Elizabeth I: A Proclamation Against the Common Use of Dagges, Handgunnes, Harquebuzes, Calliuers, and Cotes of Defence 1 (London, Christopher Barker 1579).

[10] By The Quenne Elizabeth I: A Proclamation Against the Carriage of Dags, and for Reformation of Some Other Great Disorders (London, Christopher Barker, 1594).

Northampton according to its "true intent," including a prohibition on the "car[r]ying and use of Gunnes."[11]

In 1694, Lord Coke reiterated that the Statute of Northampton prohibited persons from "go[ing] []or rid[ing] armed by night [o]r by day … in any place whatsoever."[12] Indeed, severe prohibitions on open carry in most places continued into the 1700s in England.[13] Case law from the late 17th century and commentary from prominent legal scholars from the first half of the 18th century show that the Statute of Northampton restricted the public carry of firearms, regardless of how non-provocative or inconspicuous, even prohibiting public carry for the purpose of self-defense against a claimed threat of physical assault. Patrick J. Charles, *The Faces of the Second Amendment Outside the Home: History Versus Ahistorical Standards of Review*, 60 Clev. St. L. Rev. 1, 10-13 (2012) ("Charles"); *Peruta*, 824 F.3d at 931-32 (discussing cases).

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[11] By The Quenne Elizabeth I: A Proclamation Prohibiting The Use And Cariage Of Dagges, Birding Pieces, And Other Gunnes, Contrary To Law 1 (London, Christopher Barker 1600).

[12] *The Third Part of the Institutes of the Laws of England* 160, ch. 73 (London, R. Brooke, 1797).

[13] 1 William Hawkins, *A Treatise Of The Pleas Of The Crown* 489, ch. 28, § 8 (London, J. Curwood, 8th ed. 1824); 5 William Blackstone, *Commentaries on the Laws of England*, edited by St. George Tucker, 149 § 9 (Phila. 1803).

2. Prohibitions on open carry were commonplace in the American Colonies, and in the Founding Era of the United States

The American Colonies also barred most people from openly carrying firearms in public places. Many colonies "adopted verbatim, or almost verbatim, English law." *Peruta*, 824 F.3d at 933. Other colonies adopted variations of the Statute of Northampton.[14]

That pattern of adopting the Statue of Northampton continued after the founding of the United States. North Carolina and Virginia expressly incorporated the Statute of Northampton "immediately after the adoption of the Constitution." Charles, 60 Clev. St. L. Rev. at 32; *see* 1792 N.C. Law 60, 61 ch.3; 1786 Va. Law 33, ch. 21. The Statute of Northampton, with slight variations in wording, was also enacted in Wisconsin, Maine, Michigan, Virginia, Delaware, Minnesota, Oregon, Pennsylvania, and the District of Columbia before the Civil War.[15]

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[14] *See, e.g.*, Aaron Leaming and Jacob Spicer, *The Grants, Concessions, and Original Constitutions of the Province of New Jersey [Etc.], 2d Ed.* 290, ch. IX (Somerville: Honeyman & Co., 1881). (A copy of this text is in the addendum to this brief.)

[15] *A Collection of All Such Acts of the General Assembly of Virginia [Etc.]* ("Virginia Statues") 30, ch. XXI (Richmond: Samuel Peasants, Jun. and Henry Pace, 1803) ("nor go nor ride armed . . . in terror of the Country") (Virginia, 1786); Francois-Xavier Martin, *A Collection of the Statutes of the*

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Parliament of England in Force in the State of North Carolina ("North Carolina Statutes") 60, ch. 3 (Newbern: Editor's Press, 1792) ("nor to go nor ride armed"); *see also* John Haywood, ed., *A Manual of the Laws of North-Carolina, 2d Ed.*, vol. II, 31 (Raleigh, J. Gales and W. Boylan, 1808) (giving text of oath for constables, requiring them to swear to "arrest all such persons as in your sight shall ride or go armed offensively"); (North Carolina, 1792) (In this context, the term "offensively" encompasses both bringing force in affray (in a threatening manner) and carrying dangerous weapons, including pistols and firearms, in the public concourse); Charles at 383; *The Perpetual Laws of the Commonwealth of Massachusetts [Etc.]* 259, ch. XXV (Boston: I. Thomas and E.T. Andrews, Mar. 1801) ("such as shall ride or go armed offensively, to the fear or terror of the good citizens of the Commonwealth") (Massachusetts, 1794); *The Revised Statutes of the State of Wisconsin [Etc.]*, ch. CLXXV ("Of Proceedings to Prevent the Commission of Crime") ("Wisconsin Statutes") 985, ch. 176, § 18 (Chicago: W.B. Keen, 1858) (providing that no person "go armed with a dirk, dagger, sword, pistol or pistols, or other offensive and dangerous weapon") (Wisconsin, 1838); *Laws of the State of Maine [Etc.]*, 285, ch. LXXVI, § 1 (Hallowell: Glazier, Masters & Co., 1830) (providing that justices of the peace are to arrest people "such as shall ride or go armed offensively, to the fear or terrour of the good citizens of this State") (Maine, 1821); *The Revised Statutes of the State of Maine [Etc.], 2nd Ed.* ("Maine Statutes"), 709, ch. 169, § 15 (Hallowell: Glazier, Masters & Smith, 1847) ("such as shall ride or go armed offensively, to the fear or terrour of the good citizens of this State") (Maine, 1841); Sanford M. Green, *The Revised Statutes of the State of Michigan* ("Michigan Statutes") 692, ch. 162, § 16 (Detroit: Bagg & Harmon, 1846) (providing that no person "shall go armed with a dirk, dagger, sword, pistol, or other offensive and dangerous weapon") (Michigan, 1846); *Revised Statutes of the State of Delaware, to the Year of Our Lord One Thousand Eight Hundred and Fifty-Two* ("Delaware Statutes") 333, ch. 97, § 13 (Dover, W.B. Keen 1852) (outlawing "all who go armed offensively to the terror of the people") (Delaware, 1852); *The Statutes of Oregon [Etc.]*, ch. XVI, "Proceedings to Prevent Commission of Crimes" ("Oregon Statutes"), 220, § 17 (providing that no person "shall go armed with a dirk, dagger, sword, pistol, or other offensive and dangerous weapon") (Oregon: Asahel Bush, 1854) (Oregon, 1853); *The Revised Code*
(continued…)

In 1795, Massachusetts adopted a version of the Statute of Northampton that prohibited persons from riding or going armed "offensively, *to the fear or terror of good citizens*." 1795 Mass. Act 435 (emphasis added). Yet this law did not prohibit *only* brandishing a weapon or otherwise displaying the weapon in a particularly provocative manner, or threatening others with the weapon. *See* Brian Enright, *The Constitutional 'Terra Cognita' of Discretionary Concealed Carry Laws*, 2015 U. Ill. L. Rev. 909, 936 (2015) ("[O]ne commenter claims that tracing the history of the Statute of Northampton, both before and after promulgation, using monarchal proclamations, statutes, and treatises suggests that public carry of weapons was illegal for the very reason that it generally terrified citizens, not that it was illegal *if* it would terrify citizens."). As Blackstone had taught, "terrorizing the public was the consequence of going armed[.]" Eric M.

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of the District of Columbia ("D.C. Code") 570, ch. 14, § 16 (Washington, D.C.: A.O.P. Nicholson, 1857) (providing that no person "shall go armed with a dirk, dagger, sword, pistol, or other offensive and dangerous weapon") (District of Columbia, 1857); John Purdon, *A Digest of the Laws of Pennsylvania, from the year One Thousand Seven Hundred to the Twenty-First Day of May, One Thousand Eight Hundred and Sixty-One* ("Pennsylvania Digest") 250, § 6 (9th ed., Phila. 1862) (Pennsylvania, 1861). Photocopies from the 18th- and 19th-century law books containing the full texts of these statutes are in the attached addendum.

Ruben and Saul Cornell, *Firearm Regionalism and Public Carry: Placing Southern Antebellum Case Law in Context*, 125 Yale L.J. Forum 121 ("Ruben-Cornell"), 129-30 (Sept. 25, 2015).

Notably, many of the early-1800s U.S. versions of the Statute of Northampton added an express exception for exigent threats to persons and property. The leading 1835 Massachusetts law afforded an exception for a person who has "reasonable cause to apprehend an assault or violence to his person, family, or property." *See* Peter Oxenbridge Thacher, Two Charges to the Grand Jury of the County of Suffolk [Etc.] 27 (Boston: Dutton and Wentworth, 1837). Over the next few decades, Wisconsin, Maine, Michigan, Virginia, Delaware, Minnesota, Oregon, Pennsylvania, and the District of Columbia adopted similar exceptions in statutes.[16]

[16] Wisconsin Statutes, 985, ch. 176, § 18 (permitting public carry where there was a "reasonable cause to fear an assault or other injury or violence to his person"); *see also* Virginia Statutes, 30, ch. XXI; Maine Statutes, 709, ch. 169, § 15; Michigan Statutes, 692, ch. 162, § 16; Delaware Statutes, 333, ch. 97, § 13; Oregon Statutes, 220, § 17, D.C. Code, 570, ch. 14, § 16; Pennsylvania Digest, 250, § 6. Current California law recognizes exigent-circumstances exceptions. *See* Cal. Penal Code §§ 26045(a) (permitting carrying a loaded firearm to protect persons or property from immediate, grave danger), 26362 (exigent circumstances exception for open carry of unloaded handgun), 26405(b) (exigent circumstances exception for open carry of unloaded long gun). California's exceptions are part of a long tradition in U.S. law dating back to the 1830s.

This evolution in the Statute of Northampton sheds light on its proper interpretation. If the Statute of Northampton prohibited only threatening open carry—and permitted peaceful open carry—then there would be no need for an exigent-circumstances exception. A person facing a real, concrete threat could for the relevant duration carry a firearm in public for self-defense, regardless of the general prohibition. That many States adopted the exigent-circumstances exception strongly suggests that, without the exception, such people could *not* carry firearms in public for self-defense, much less other purposes. In other words, open carry under the Statute of Northampton was virtually prohibited in the general case.

3. Open-carry restrictions continued to proliferate in the United States through the Civil War and into modern times

Open-carry restrictions were prevalent not only before and during the Founding Era of the United States, but also in the time periods that followed. Throughout the first half of the 19th century and later, many States passed as legislation or announced by judicial decision laws that regulated open carry.

In 1843, the Supreme Court of North Carolina issued an opinion in *State v. Huntley*, 3 Ired. 418, stating, on the authority of Blackstone, Hawkins, and Sir John Knight's case, that it had long been a violation of the common law for a person to ride or go armed with dangerous or unusual

weapons, because such an act terrifies other people. *Id.* at 420-22.

Furthermore, the court in *Huntley* stated that a:

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

Id. at 422 (emphasis added). A person "shall not carry about [a gun] or any other weapon of death to terrify and alarm, and in such manner as naturally will terrify and alarm, a peaceful people." *Id.* at 423; *accord*, *State v. Lanier*, 71 N.C. 288, 289 (1874). In *Andrews v. State*, 50 Tenn. 165 (1871), the Supreme Court of Tennessee upheld as constitutional a restriction on open carry. "As to arms worn, or which are carried about the person, not being such arms as we have indicated as arms that may be kept and used, the wearing of such arms may be prohibited if the Legislature deems proper, absolutely, at all times, and under all circumstances." *Id.* at 182. And in 1882, the Supreme Court of North Carolina pointed out that the common-law restrictions on open carry remained in force after the North Carolina Legislature [in 1879] passed a statute banning concealed carry. *See State v. Roten*, 86 N.C. 701, 704 (1882).

Departures from the general acceptance of open-carry regulations were few and geographically localized. In 1837, Georgia enacted a statute that forbade "any . . . persons whatsoever . . . to have about their persons or elsewhere . . . Bowie, or any other kind of knives, manufactured and sold for the purpose of wearing, or carrying the same as arms of offense or defense[;] pistols, dirks, sword canes, spears etc., shall also be contemplated in this act, save such pistols as are known and used, as horseman's pistols, etc." 1837 Ga. Laws 90, § 1 (Dec. 25, 1837). In 1846, the Supreme Court of Georgia in *Nunn v. State*, 1 Ga. 243 (1846), held that this statute was valid as a ban on concealed carry, but the statute's ban on open carry violated the Second Amendment. *Id*. at 251. A few nearby States adopted that theory of constitutional law. *See, e.g., State v. Reid*, 1 Ala. 612, 619 (1840) ("the Legislature cannot inhibit the citizen from bearing arms openly"); *State v. Chandler*, 5 La. Ann. 489, 490 (1850) (holding that "right to carry arms . . . 'in full open view' . . . is the right guaranteed by the Constitution of the United States"). However, as one scholar has observed, "*Nunn*'s permissive view of public carry was not universally held in the United States—indeed, it was not universally held in the South. Another prevalent view accepted robust regulation of the right to carry." Ruben-Cornell at 132; *see also* Saul Cornell, *The Right to Carry Firearms Outside of the Home: Separating*

Historical Myths from Historical Realities, 39 Fordham Urb. L.J. 1695 ("Cornell"), 1722-23 (Oct. 2012) (footnotes omitted) ("The only persuasive evidence for a strong tradition of permissive open carry is limited to the slave South."). Thus, in the period before the Civil War, the open carry of firearms had, at one time or another, been prohibited or significantly restricted in at least the following States: Arkansas, Delaware, the District of Columbia, Georgia (although the ban was later invalidated in court), Maine, Maryland, Massachusetts, Michigan, New Jersey, New York, North Carolina, Oregon, Pennsylvania, Tennessee, Vermont, and Virginia.

Very shortly after the Civil War, in 1866, Minnesota passed its version of the Statute of Northampton.[17] And in 1869, New Mexico passed an even *stricter* law broadly prohibiting open or concealed carry "within any settlement of this Territory."[18] This law remained in effect at least through 1918. *See State v. Jordi*, 174 P. 204, 205 (N.M. 1918) (observing that

[17] *See* Edward C. Palmer, *The General Statutes of Minnesota* 629, ch. CIV, § 17 (St. Paul: Davidson & Hall, 1867); George Brooks Young, *The General Statutes of the State of Minnesota [Etc.]* 930, ch. CIV, § 17 (St. Paul: West, 1879).

[18] Edward L. Bartlett, et al., eds., *Compiled Laws of New Mexico [Etc.]* 494, ch. V, §§ 941-43 (Santa Fe: New Mexico Printing Co., 1885).

private citizens had not been authorized by the legislature to carry deadly weapons).

Throughout the Western United States in the second half of the 19th century, prohibitions on open carry were enacted at the local level, and were commonplace.[19]

> Town ordinances in the famous gun havens of the West, places like Tombstone, Arizona, and Dodge City, Kansas, required newcomers to hand their guns over to the sheriff or leave them with their horses at the stables on the outskirts of town. . . .*In the frontier towns . . . where people lived and businesses operated, the law often forbade people from toting their guns around. Frontier towns . . . adopted* blanket ordinances against the carrying of weapons by anyone. The carrying of dangerous weapons of any type, concealed or otherwise, by persons other than law enforcement officers . . . was nearly always proscribed . . . . A visitor arriving in Wichita, Kansas, in 1873 would have seen signs declaring, "LEAVE YOUR REVOLVERS AT POLICE HEADQUARTERS, AND GET A CHECK." A grainy, black-and-white photograph of Dodge City taken around 1879 shows a huge wooden billboard posted in the middle of the main road through town that says, "THE CARRYING OF FIREARMS STRICTLY PROHIBITED."

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[19] On April 13, 1850, very soon after becoming one of the United States, California, by statute, adopted the common law of England. *The Statutes of California, Passed at the First Session of the Legislature*, ch. 95, 219 (San Jose: J. Winchester, 1850). This presumably included the Statute of Northampton, although California quickly enacted its own firearm laws, including what is now California Penal Code section 417, about brandishing weapons.

Adam Winkler, *Gunfight: The Battle over the Right to Bear Arms in America* 13, 165 (2011) (internal punctuation omitted).[20]

In 1874, the Texas Supreme Court upheld an open-carry prohibition, noting that:

> it undertakes to regulate the place where, and the circumstances under which, a pistol may be carried; and in doing so, it appears to have respected the right to carry a pistol openly when needed for self-defense or in the public service, and the right to have one at the home or place of business. We hold that the statute under consideration is valid.

State v. Duke, 42 Tex. 455, 456-57 (1874). Wyoming and Idaho enacted similar prohibitions.[21]

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[20] *See also* Charles at 403, 419-22 nn.160, 245-46 (describing open-carry bans in San Francisco, CA (1866); New Haven, CT (1870); Nashville, TN (1873); Dodge City, KS (1876); Syracuse, NY (1877); New York, NY (1878); San Jose, CA (1882); Fort Worth, TX (1900); Providence, RI (1900); Hope, ND (1904); and Houston, TX (1914)).

[21] *See* J.R. Whitehead, ed., *The Compiled Laws of Wyoming* 352, ch. 52 (Cheyenne: H. Glafcke, 1876) (In 1875, Wyoming passed a law broadly prohibiting open or concealed carry in cities, towns, or villages); Joseph Blocher, *Firearms Localism*, 123 Yale L.J. 82, 119 n.195 (2013) (In 1888, Idaho passed a statute (similar to the earlier New Jersey and Tennessee laws) forbidding the carrying of "any dirk, dirk-knife, sword, sword-cane, pistol, gun or other deadly weapons . . . in any public assembly of Idaho Territory.").

In 1894, in *Miller v. Texas*, the U.S. Supreme Court upheld the Texas law against Second and Fourteenth Amendment attacks, but without discussing the issue in any depth. 153 U.S. 535, 538.[22]

Moving into the 20th century, restrictions on open carry in public persisted throughout States and localities. For example, in 1911, the Supreme Court of Georgia recounted that many States, including Arkansas, Kansas, Oklahoma, Tennessee, and West Virginia, had in prior years passed laws "prohibiting the carrying of certain kinds of weapons, or the carrying of weapons under certain circumstances and at certain spaces"—and that those laws had survived court challenges invoking the Second Amendment or analogous state constitutional provisions. *Strickland v. State*, 72 S.E. 260, 261-62 (Ga. 1911).[23] By 1933, firearm carry restrictions had proliferated to the point that a contemporary commentator stated that "in the United States

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[22] And in 1973, the Court of Criminal Appeals of Texas rejected a state constitutional challenge to the Texas prohibition. *Collins v. State*, 501 S.W.2d 876, 877 n.3, 878 (1973) ("We hold that [the statute] which makes it unlawful to 'carry on or about his person . . . any pistol . . .' is not violative of the constitutional right of every citizen to keep and bear arms in the lawful defense of himself or the state.").

[23] *See also* C.F.W. Dassler, ed., *General Laws of Kansas 1901 Authenticated [Etc.]* 233, ch. 19, art. 8, § 1003 (Topeka, Crane & Co., 1901) (emphasis added). In 1901, Kansas passed a law authorizing city councils of (continued…)

. . . it is recognized that, in the proper exercise of the police power, the carrying of weapons by the individual may be regulated, restricted, and even prohibited by statute." John Brabner-Smith, *Firearm Regulation*, 1 Law & Contemp. Probs. 400, 413 (1934).

In sum, the historical record establishes that prohibitions on open carry of firearms in public places—which laws were much stricter than California's open-carry regulations, which contain many exceptions, including for exigent circumstances—pre-date the Second Amendment in England and persisted in America after the ratification of the Second Amendment.[24]

B. The Cases Cited by Nichols Do Not Undermine That History

Nichols's opening brief attempts—but fails—to demonstrate that a broad open-carry right is the historic legal tradition in the United States. Nichols cites 35 cases from the 1800s that purportedly stand for the

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(…continued)
small cities "to prohibit and punish the carrying of firearms or other deadly weapons, *concealed or otherwise* . . . .") And in 1905, the Supreme Court of Kansas upheld that law against a state constitutional challenge under the Kansas Bill of Rights provision governing the right to bear arms. *City of Salina v. Blaksley*, 83 P. 619, 621 (1905).

[24] The exceptions to the California laws are referenced on page 1, footnote 2, above.

proposition that "Open Carry is the right" guaranteed by the Second Amendment. AOB 59-60. In most instances, Nichols has misrepresented the holdings of the cases. Only a few of Nichols's case cites provide limited support for his claim: *Nunn* from Georgia and progeny; *Chandler* from Louisiana and progeny; *Sutton v. State*, 12 Fla. 135 (1867); and *Porter v. State*, 66 Tenn. 106 (1874)). Courts in those four States—Florida, Georgia, Louisiana, and Tennessee—held that those States could prohibit concealed carry only if open carry remained available. But, as discussed above, those cases are outliers in the entire American experience, and may not even reflect the way that these laws were administered on a day-to-day basis. More importantly, those cases do not support Nichols's claim here that—regardless of the availability of concealed carry—ordinary, law-abiding residents of California are *entitled* to unfettered *open* carry.

Most of the cases that Nichols cites do not hold or imply that the Second Amendment guarantees a broad right to openly carry firearms in public places. The decision in *State v. Mitchell*, 3 Blackf. 229 (Ind. 1833), concerned a statute generally prohibiting concealed carry, and did not address open carry. Similar are: *Aymette v. State*, 21 Tenn. 154 (1840); *State v. Buzzard*, 4 Ark. 18 (1842); *Day v. State*, 37 Tenn. 496 (1857); *Owens v. State*, 31 Ala. 387 (1858); *Sears v. State*, 33 Ala. 347 (1859);

Hopkins v. Commw., 66 Ky. 480 (1868); *Cutsinger v. Commw.*, 70 Ky. 392 (1870); *Evins v. State*, 46 Ala. 88 (1871); *Lockett v. State*, 47 Ala. 42 (1872); *Carroll v. State*, 28 Ark. 99 (1872); *Eslava v. State*, 49 Ala. 355 (1873); *Baker v. State*, 49 Ala. 350 (1873); *Wright v. Commonwealth*, 77 Pa. 470 (1875); *Gholson v. State*, 53 Ala. 519 (1875); *Atwood v. State*, 53 Ala. 508 (1875); *Stroud v. State*, 55 Ala. 77 (1876). The decision in *State v. Smith*, 11 La. Ann. 633 (1856), also concerned concealed carry, yet notably made reference to the rarity of open carry as "the extremely unusual case of the carrying of [a] weapon in full open view, and partially covered by the pocket or clothes." *Id.* at 634.

The remaining decisions also do not support Nichols's claim. For example, in *Maxwell v. State*, 38 Tex. 170 (1873), the court held, as a matter of statutory construction only, that the Texas statute prohibiting open carry did not apply to the limited situations of travelers on journeys. *See id.* at 171. *Reid*, discussed also above, upheld a statutory ban on concealed carry as consistent with the Alabama Constitution. 1 Ala. 612 at 620-21. However, while the decision suggested that the defendant, charged with violating the concealed carry ban, may have been privileged to carry a firearm openly in public, the defendant was the locality's sheriff (*see id.* at 622), whose privilege would have been based on holding that office, and

who also "had been attacked by an individual or dangerous and desperate character, who afterwards threatened his person, and came to his office several times to look for him." *Id.* at 612-63. In short, the decision was about an unusual situation and did not endorse open carry generally.

Other decisions mention open carry in an ambiguous way, but they do not firmly establish a right to open carry in public. In *Walls v. State*, 7 Blackf. 572 (Ind. 1845), the court upheld the trial court's refusal to give a jury instruction, requested by the defense, that if the evidence showed that the defendant carried a pistol "for the purpose of exhibiting it as a curiosity, they should find him not guilty" of violating Indiana's ban on concealed carry. *Id.* at 573. The opinion also stated ambiguously that "[i]f he exhibited his pistol so frequently that it could not be said to be concealed, that was another matter." *Id.* That passage may mean that open carry was constitutional, or that it just had not been specifically banned. Similarly, *Jones v. State*, 51 Ala. 16 (1874), examined whether a person violated Alabama's concealed-carry ban by wearing a firearm only partially concealed. *See id.* at 17. The decision states that "if the jury are not convinced of its being carried concealed, the defendant must be acquitted." *Id.* That holding could mean that open carry was permitted in Alabama, but there is no indication that the permission was in the form of a constitutional

right, as opposed to a privilege granted by the Alabama Legislature. The holding also could be merely describing the concealed-carry law, without implying anything about the legality of actions not covered by the law.

Other authorities cited by Nichols specifically upheld partial prohibitions on open carry. *See e.g.*, *State v. Wilburn*, 66 Tenn. 57, 62-63 (1872) (upholding under the Tennessee Constitution a statute from 1871 that forbade open carrying of certain firearms, expressly excepting army pistols, unless they were carried in the hand); *Porter v. State*, 66 Tenn. 106 (1874) (same). The decision in *Titus v. State*, 42 Tex. 578 (1874), held that a person could violate the Texas statutory open-carry prohibition by hunting. *Id.* at 579. Finally, in *Hill v. State*, 53 Ga. 472 (1874), the court evaluated under the U.S. Constitution and the Georgia Constitution an 1870 statute that forbade the carrying of deadly weapons in courts, places of worship, "or any other public gathering in the state, except militia muster grounds." *Id.* at 474. This statute, in brief, prohibited open or concealed carry in places where groups of people congregated together. *Id.* "The practice of carrying arms at courts, elections and places of worship, etc., is a thing so improper in itself, so shocking to all sense of propriety, so wholly useless and full of evil, that it would be strange if the framers of the constitution have used words broad enough to give it a constitutional guarantee." *Id.* at 475.

In sum, the many cases that Nichols cites fail to support his claim that California is required to allow him to openly carry a firearm in public, for any lawful purpose, including free expression. AOB 24-25, 43. And, as exhaustively established previously, the historical evidence in this case is clear and to the opposite. Even assuming that the Second Amendment guarantees some right to public carry, the Second Amendment does not require the State to accommodate that right by allowing individuals to carry a firearm openly in any non-sensitive place. This Court thus should uphold California's open-carry laws against Nichols's challenge, "without further analysis." *Silvester*, 843 F.3d at 821.

Another formulation of the requisite historical analysis leads to the same result. A "longstanding" firearm regulation would be "presumptively lawful" under the Second Amendment if there are analogous, prevalent, and significant regulations dating back to the early 20th century. *Fyock v. City of Sunnyvale*, 779 F.3d 991, 997 (9th Cir. 2015). This brief has just made that showing of relevant analogous regulations—dating back to not just the early 20th century, but to the beginning of the United States. Once again, the Court could and should reject Nichols's Second Amendment claim on the basis of the relevant legal history alone.

II. A STATE'S REFUSAL TO ALLOW UNFETTERED OPEN CARRY IN PUBLIC PLACES IS PERMISSIBLE UNDER INTERMEDIATE SCRUTINY

If, despite the substantial historical evidence, the Court determines, or chooses to assume, that open carry in public places is a right specifically protected by the Second Amendment, then the Court would move to the second step of the analysis. Under the second step, the court chooses an appropriate level of scrutiny, the more permissive intermediate scrutiny or the more demanding strict scrutiny, and applies it to California's open-carry laws. *See United States v. Chovan*, 735 F.3d 1127, 1138 (9th Cir. 2013). Because California's open-carry laws impose no serious burden on the "core Second Amendment right of defense of the *home*," this Court should evaluate the restrictions under intermediate scrutiny. *Silvester*, 843 F.3d at 821 (emphasis added); *Woolard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013) ("[I]ntermediate scrutiny applies to laws that burden any right to keep and bear arms outside of the home" (internal punctuation omitted)); *Kachalsky v. Westchester Cty.*, 701 F.3d 81, 94 (2nd Cir. 2012) ("The state's ability to regulate firearms and, for that matter, conduct, is qualitatively different in public than in the home. *Heller* reinforces this view . . . . Treating the home as special and subject to limited state regulation is not

unique to firearm regulation; it permeates individual rights jurisprudence.").[25]

Furthermore, California's laws contain numerous well-considered exceptions, including an exigent-circumstances exception for instances in which there is a bona fide need to have a firearm for defense of self, other persons, or property, and an exception for people who have obtained restraining orders against other people, etc. *See* Cal. Penal Code §§ 26045(a) (permitting carrying a loaded firearm to protect persons or property from immediate, grave danger), 26362 (exigent circumstances exception for open carry of unloaded handgun), 26405(b) (exigent circumstances exception for open carry of unloaded long gun). Each of these exceptions lessens any burden imposed by the laws. In this respect,

[25] While Nichols makes clear that the right he seeks is to carry firearms openly in public places, he does allude to the "curtilage" of a home many times in his opening brief. AOB 1, 19, 21, 23-25, 27, 40, 42, 43, 47, 50, 66, 71. Nichols refers to curtilage mostly as an example of an area where he believes his broadly conceived open-carry right should reach. *See id.* Nichols also claims that California Penal Code section 25850 prohibits open carry in the curtilage of one's home. However, the curtilage of a person's home is part of the home, *not* a public place; open carry is usually allowed in the curtilage. *See People v. Strider*, 100 Cal. Rptr. 3d 66, 77 (Cal. Ct. App. 2009) (concluding that home's porch and area inside fenced yard are curtilage, not public place). Whether a particular space near a particular home is its curtilage is necessarily determined case-by-case, and is neither appropriately presented nor capable of being resolved in the present, facial challenge to California's open-carry laws.

California's open-carry laws contrast with the "blanket," statewide Illinois public-carry prohibition that the Seventh Circuit invalidated in *Moore v. Madigan*, 702 F.3d 933, 939, 940 (2012) ("Remarkably, Illinois is the only state that maintains a flat ban on carrying ready-to-use guns outside the home") (some internal punctuation omitted). In contrast to the California laws, the Illinois law had no exigent-circumstances exception, and did not provide for concealed carry with a permit, or open carry in low-population areas. *See id.* at 934, 937. In short, intermediate scrutiny is appropriate in the present case.

Intermediate scrutiny asks whether the law at issues serves a "significant, substantial, or important" state interest, and whether there is a "'reasonable fit' between the challenged regulation and the asserted objective." *Silvester*, 843 F.3d at 821-822; *see also Chovan*, 735 F.3d at 1141 (holding that prohibition of possession of firearm by person convicted of domestic violence misdemeanor passes constitutional muster under intermediate scrutiny because it is "supported by an important government interest and substantially related to that interest"); *Jackson*, 746 F.3d at 966 (upholding requirement that a handgun must be stored in a locked storage container or with a trigger lock when not carried on the person because it is

"substantially related to the important government interest of reducing firearm-related deaths and injuries").

A. California's Open-Carry Laws Serve an Important Governmental Objective

California's objective in enacting its open-carry regulations, particularly the unloaded open-carry laws, as reflected in their legislative history, was to prevent or at least to reduce the danger to public safety created by firearms in public places. Supplemental Excerpts of Record, Supp. ER 097 (legislative history). When someone exposes a (loaded *or* unloaded) firearm in public, other people usually become alarmed and call for peace officers to defuse the situation. *Id.* at Supp. ER 098. A deadly confrontation may ensue between the person openly carrying a firearm and the responding peace officer, so the open-carry laws minimize the chances for such confrontations. *Id.*; *see also id.* at 108-10, 112, 116-18, 124-25, 158, 167, 180, 192-97, 201-04, 209-10 (all similar).

This objective is undeniably significant, substantial, and important. Judge Graber, in her concurring opinion in *Peruta*, acknowledged the governmental interest in precluding a dangerous proliferation of firearms in the streets. *See* 824 F.3d at 942-943 (citing three other federal circuit court decisions). Judge Silverman, dissenting in *Peruta*, also acknowledged the

"significant, substantial, and important interest in promoting public safety and reducing gun violence." *Id*. at 956; *see also Fyock*, 779 F.3d at 1000 (acknowledging substantial and important governmental interest in promoting public safety and reducing firearm violence).

B. California's Open-Carry Laws Reasonably Fit that Objective.

To make a "reasonable fit," the laws at issue must promote "a 'substantial government interest that would be achieved less effectively absent the regulation,'" and need not be the "least restrictive means" of achieving the government's objective. *Fyock*, 779 F.3d at 1000 (quoting *Colacurcio v. City of Kent*, 163 F.3d 545, 553 (9th Cir. 1998)). In making these determinations, courts "must accord substantial deference to the predictive judgments" of legislative bodies, *Turner Broadcast Systems, Inc. v. FCC*, 520 U.S. 180, 195 (1997), and the State must be given "a reasonable opportunity to experiment with solutions to admittedly serious problems." *Jackson*, 746 F.3d at 966 (quoting *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 52 (1986)).

Although the district court here relied on case law subsequently superseded to apply rational-basis review and to uphold California's open-

carry laws, the district court's evidence-based analysis still fulfills intermediate scrutiny analysis, and correctly upholds the laws.

> California has determined that regulating the carrying of loaded firearms in public reduces public shootings. Allowing the open carry of unloaded handguns and firearms would create an unsafe environment for law enforcement, the person carrying the firearm, and bystanders. At the same time, California has created numerous exceptions that allow for the open carry of loaded and unloaded handguns and firearms.

1 ER 32.

Because this case was resolved at the pleading stage, however, the parties did not submit, and the district court consequently did not rely on, evidence of the efficacy of open-carry laws in maintaining public safety and minimizing firearm violence in public places.[26] Nevertheless, ample evidence supports the fit between the laws and their objective.

A November 2016 survey of on-point research demonstrates that sufficient scholarship supports the California Legislature's conclusion that laws permitting unfettered public carry—including open carry—of firearms lead to increased firearm violence and thus diminished public safety. Lois K.

[26] If the Court believes that this or additional evidence requires further exploration, the Court should remand the case so that the district court can receive and evaluate the evidence in the first instance.

Lee, et al., *Firearm Laws and Firearm Homicides: A Systematic Review*, JAMA Internal Med. ("Lee") E1, E1 (Nov. 2016) (Addendum 267-80).

- The Ginwalla study, summarized in the Lee report, found that the enactment of a law allowing citizens to carry concealed guns in public without permits or training was associated with a statistically significant increase in gun-related homicides in the period after the law was enacted. Addendum at 270.
- The La Valle study found that the enactment of "shall-issue" concealed-carry permit laws was associated with a 27 percent increase in the homicide rate (while the enactment of "may-issue" laws was associated with a 26-30 percent reduction in the homicide rate). Addendum at 271.
- The McDowall study found that changing from may-issue to shall-issue for concealed-carry permits was associated with increases in firearm homicides in four out of five large urban areas studied. Addendum at 271.
- "From 15 studies, there is . . . evidence for the effectiveness of laws to restrict firearms in public places in reducing firearm homicide. Some evidence suggests that permitting the concealed

> carrying of firearms is associated with increases in firearm homicide. However, there are also methodologically sophisticated studies that failed to replicate these findings." Addendum at 278.

Additionally, the Aneja study from November 2014 concluded that the evidence that RTC laws increase aggravated assault "is not overwhelming," but "it does find support in different models and different time periods using both state and county data sets in different panel data regressions both for all assaults and gun assaults . . . and in models estimating year-by-year effects." Abhay Aneja, et al., *The Impact of Right to Carry Laws and the NRC Report: The Latest Lessons for the Empirical Evaluation of Law and Policy* 82 (Dec. 1, 2014) (Addendum 267-80). In addition, "RTC laws *increase* aggravated assault, auto theft, burglary, and larceny." Addendum at 195 (emphasis in original). "If we look at the . . . 18 year period from 1993-2010 . . . RTC laws are associated with higher rates of murder, aggravated assault, robbery, and burglary." Addendum at 216. "Robbery rates similarly increase over time after the passage of RTC laws." Addendum at 231.

In recent years, as open carry has been legalized in places outside of California, the effects of permissive open carry on public safety have become more apparent. In Dallas, Texas, on July 7, 2016, Micah X. Johnson ambushed and fired upon a group of Dallas police officers, killing five of

them and injuring seven others plus two civilians.[27] The incident occurred at a crowded downtown Dallas protest, whose attendees included 20 to 30 people carrying firearms openly, as is permitted in Texas.[28] Dallas Police Chief David O. Brown described these people who "showed up with AR-15 rifles slung across their shoulder . . . . They were wearing gas masks . . . . They were wearing bulletproof vests and camo fatigues, for effect, for whatever reason." *Id.* As was reported:

> When the shooting started, "they began to run," [Chief Brown] said. And because they ran in the middle of the shooting, he said, the police on the scene viewed them as suspects. "Someone is shooting at you from a perched position, and people are running with AR-15s and camo gear and gas masks and bulletproof vests; they are suspects, until we eliminate that."

Id. The presence of people openly carrying firearms complicated an already tragically dangerous situation, and illustrated another public safety argument for restricting open carry.

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[27] Manny Fernandez, et al., "Five Dallas Officers Were Killed as Payback, Police Chief Says," *N.Y. Times* (Jul. 8, 2016) (available online at http://www.nytimes.com/2016/07/09/us/dallas-police-shooting.html?_r=0; last checked December 22, 2016).

[28] Manny Fernandez, et al., "Texas Open-Carry Laws Blurred Lines Between Suspects and Marchers," *N.Y. Times* (Jul. 10, 2016) (available online at http://www.nytimes.com/2016/07/11/us/texas-open-carry-laws-blurred-lines-between-suspects-and-marchers.html; last checked December 22, 2016).

The Court "must allow the government to select among reasonable alternatives in its policy decisions" (*Peruta*, 824 F.3d at 944 (Graber, J., concurring); *accord*, *Kachalsky*, 701 F.3d at 99), so long as the significant governmental objective "would be achieved less effectively absent the regulation." *Fyock*, 779 F.3d at 1000 (quoting *Colacurcio v. City of Kent*, 163 F.3d 545, 553 (9th Cir. 1998)). The arguments and evidence marshaled here in defense of California's open-carry laws demonstrate a reasonable fit between the governmental objective for those laws and the means and effects of the laws.

Because public safety is an important governmental objective and California's open carry-laws reasonably fit that objective, California's open-carry laws pass muster under intermediate scrutiny.

III. THE DISTRICT COURT PROPERLY DISMISSED NICHOLS'S FOURTH AMENDMENT CLAIM

Nichols asserted a facial challenge under the Fourth Amendment to California Penal Code Section 25850(b), which authorizes peace officers to conduct "chamber checks"—examinations of the firing chambers—of publicly-carried weapons. The district court properly dismissed this claim because the statute is not unconstitutional in all of its applications. In addition, Nichols cannot state a claim for a Fourth Amendment violation

because a person has no reasonable expectation of privacy in the contents of the firing chamber of a firearm.

The Fourth Amendment protects people against "unreasonable searches and seizures" by the government. *See Soldal v. Cook Cty.*, 506 U.S. 56, 62 (1992). "A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed." *Id.* at 63 (citation omitted); *see also Rakas v. Illinois*, 439 U.S. 128, 142 (1978) (articulating theory of Fourth Amendment based on reasonable expectation of privacy). The Fourth Amendment protects property as well as privacy. *Lyall v. City of Los Angeles*, 807 F.3d 1178, 1185-86 (9th Cir. 2015).

To succeed in a facial challenge to a legislative act, the challenger must establish that no set of circumstances exists under which the statute would be valid. *Alphonsus v. Holder*, 705 F.3d 1031, 1042 (9th Cir. 2013) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)); *accord United States v. Mohamud*, 843 F.3d 420, 438 n. 21 (9th Cir. 2016). California Penal Code section 25850(b) authorizes peace officers to perform chamber checks of firearms carried in public. Given that a firearm could be used to kill a person, there are obvious public-safety reasons, including preserving the safety of the peace officer, for allowing such a check to be done. Thus, the

statute is not unconstitutional in all of its applications and Nichols's facial challenge must fail.[29]

Additionally, it is well-established that a peace officer who suspects a person of wrongdoing may *frisk* that person (*see United States v. Werle*, 815 F.3d 614, 617 n.1 (9th Cir. 2016)) and/or even *arrest* the person. *See United States v. Smith*, 633 F.3d 889, 892 (9th Cir. 2011). It follows that there can be no legitimate Fourth Amendment objection if the peace officer instead opts for a far less intrusive inspection of the firing chamber of the firearm to see if it is loaded—and that is all that California Penal Code section 25850(b) allows. *See People v. DeLong*, 90 Cal. Rptr. 193, 196 (Cal. Ct. App. 1970) (holding that people do not have reasonable expectations of privacy in the firing chambers of their firearms carried in public, so a chamber check "may hardly be deemed a search at all," and further holding that "[t]he minimal intrusion [of a chamber check] does not begin to approach the indignity of the frisk").[30]

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[29] Of course, any specific concerns regarding the application of California Penal Code section 25820(b) in a particular circumstance could be raised at that time, by an appropriate person, in an as-applied challenge.

[30] To the extent that there might be a Fourth Amendment claim based on a search during legal open carry of weapons, Nichols presents no such

(continued…)

Finally, Nichols's claim fails because the statutory search authorization falls outside the scope of Fourth Amendment restrictions. *Cf.* ER 38 (magistrate report noting that the application of the Fourth Amendment to a firearm chamber is questionable.) There can be no reasonable expectation of privacy, and no Fourth Amendment protection, in the interior of the firearm, the sole place that the statute allows to be searched. A firearm is, in a sense, a container for ammunition. *Cf. DeLong*, 90 Cal. Rptr. at 196. The only thing other than empty space that should be inside the firing chamber of a firearm is ammunition. *See id.* Therefore, a person who is openly exposing a firearm in a public place has no reasonable expectation of privacy as to the contents of the firing chamber of that firearm. *Id*. at 196; *see also United States v. Banks*, 514 F.3d 769, 774-75 (8th Cir. 2008) (holding that container labeled with name of firearm manufacturer indicated that contents would be firearm, and Fourth Amendment did not apply against search or seizure of container, for the contents of which there could be no reasonable expectation of privacy).

(…continued)
factual scenario here. Indeed, it is undisputed that Nichols lacks a legal right to carry a firearm openly in California's cities and many other places.

This Court should affirm the judgment on Nichols's Fourth Amendment claim.

IV. THE DISTRICT COURT PROPERLY DISMISSED NICHOLS'S FOURTEENTH AMENDMENT CLAIM

Nichols asserts an Equal Protection Claim based on the alleged disparate treatment between Californians who live in populous counties and those who live in sparsely populated counties. AOB 63-64. The district court properly dismissed this claim. To the extent it is simply a restatement of his Second Amendment claim, it necessarily fails. Further, Nichols fails to frame his claim properly because he does not allege disparate treatment between similarly situated groups or individuals. And, in any event, the Equal Protection claim fails on its merits because the differentiation between people based on whether they reside populous counties or less-populous counties survives the appropriate level of scrutiny, which is rational-basis scrutiny.

First, the Fourteenth Amendment necessarily fails to the extent that it simply restates his Second Amendment claim. *Cf. Orin v. Barclay*, 272 F.3d 1207, 1213 n.3 (9th Cir. 2001) (finding that Equal Protection Clause claim was "no more than a First Amendment claim dressed in equal protection clothing" and was "subsumed by, and co-extensive with" plaintiff's First

Amendment claim); *Albright v. Oliver*, 510 U.S. 266, 273 (1994) ("Where a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims." (citations and internal quotation marks omitted)). Nichols's true and sole goal—as he admits, and as the remedy that he seeks for the alleged Equal Protection Clause violation shows—is for this Court to recognize a nearly unfettered right to public open carry for all persons throughout California. AOB 92-94. Thus, there is no practical difference between Nichol's Second Amendment and his Fourteenth Amendment claims. This Court should decline to recognize a right under the latter provision that clearly does not exist under the former.

Second, Nichols's Equal Protection claim is improperly presented. He asserts that he is treated differently than a hypothetical Californian who lives in a less populated county who can obtain an open carry permit. AOB 92-94. But to present that claim, he must be similarly situated to a resident of those other counties. *See Arizona Dream Act Coalition v. Brewer*, 757 F.3d 1053, 1064 (9th Cir. 2014) (citing *Country Classic Dairies, Inc. v. Milk Control Bureau*, 847 F.2d 593, 596 (9th Cir. 1988); *see also McGraw v. Exeter Region Co-op. School Dist.*, 145 N.H. 709, 713 (2001) (holding that,

in the voting context, residents of communities located in same State but operating under different forms of local government are not "similarly situated"). For proper comparison purposes, the groups "must be comprised of similarly situated persons so that the factor motivating the alleged discrimination can be identified." *Id*. (quoting *Thornton v. City of St. Helens*, 425 F.3d 1158, 1167 (9th Cir. 2005)). The groups need not be similar in all respects, but they must be similar in those respects relevant to the challenged policy. *Id*. (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992).) In other words, he must be able to obtain a permit to carry a firearm in public, and then establish that the only reason he cannot carry *openly* is the population size of his county. But Nichols lives in Los Angeles County, which has its own legal regime and requires a showing of particularized need. (ER __.) Nichols has made no showing that he can meet the requirement to obtain a carry permit in that county. Because Nichols failed to present the district court (or this Court) with similarly situated groups for purpose of an Equal Protection comparison, he did not present a proper present a Fourteenth Amendment claim. Dismissal was proper.

Finally, Nichols's Equal Protection Clause claim fails on the merits. In general, a law, statute, or regulation challenged as violating the Equal

Protection Clause, by treating similarly situated people differently, is subject to mere rational-basis review. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441-42 (1985). Only if a governmental classification that differentiates among similarly situated people infringes on a fundamental right or implicates a "suspect" class of persons would a court apply heightened scrutiny to that classification. *See Honolulu Weekly, Inc. v. Harris*, 298 F.3d 1037, 1047 (9th Cir. 2002). But Nichols did not and could not show that California's open-carry laws infringe on a fundamental right or implicate a suspect class of persons. Neither the Supreme Court nor the Ninth Circuit has recognized open carry in public as a fundamental right. Neither the Supreme Court nor the Ninth Circuit has recognized people who live in counties with more than 200,000 persons as belonging to a suspect class. Therefore, Nichols's Fourteenth Amendment claim calls for rational-basis review. *United States v. Navarro*, 800 F.3d 1104, 1113 (9th Cir. 2015). That kind of scrutiny requires that the law in question merely rationally relate to a legitimate governmental interest. *Id*.

The open-carry laws survive rational-basis review, because the California Legislature could reasonably conclude that the virtually unlimited open carry of firearms in populous areas would be a source of public terror and present a danger to public safety generally and to peace officers.

California's policy choice has a legitimate rationale in that there is generally less danger of public terror and violence in places where people are physically farther apart from one another, and more danger where people are packed more closely together. And the population of a county is a reasonable proxy for population density. Hence the population requirement regarding open-carry permits passes rational basis review.

The Court should affirm the judgment.

V. THE DISTRICT COURT PROPERLY DISMISSED NICHOLS'S VOID-FOR-VAGUENESS CLAIM AGAINST CALIFORNIA'S OPEN-CARRY LAWS

Nichols presented to the district court a void-for-vagueness argument against California's open-carry laws, alleging that the term "loaded" is unconstitutionally vague when used in connection with a firearm. *See* 1 ER 168, 220-21. The district court rejected Nichols's argument. *See* 1 ER 49-50. Nichols repeats his challenge to the term "loaded" in this appeal, but does so only briefly. AOB 84-85. On appeal, Nichols focuses on an entirely new, different void-for-vagueness argument, that the term "prohibited area" is unconstitutionally vague where used in reference to unincorporated territory where open carry is illegal. AOB 87-91.

First, because Nichols fails to reargue here his claim regarding "loaded," and brings his claim regarding "prohibited area" for the first time

on appeal, the vagueness argument is waived. *See Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009) (per curiam) (holding that this Court does not consider matters not specifically and distinctly raised and argued in opening brief, or arguments and allegations raised for first time on appeal).

Second, the void-for-vagueness arguments fail on the merits. To abide by the Fifth Amendment protection of due process, a criminal statute, such as the open-carry statutory scheme at issue here, must define the criminal offense (1) with sufficient definiteness that ordinary people can understand what conduct is prohibited, and (2) in a manner that does not encourage arbitrary and discriminatory enforcement. *United States v. JDT*, 762 F.3d 984, 996 (9th Cir. 2014) (quoting *Skilling v. United States*, 561 U.S. 358, 402-03 (2010)). The challenged statute enjoys a presumption of constitutionality. *JDT*, 762 F.3d at 999. Nichols could succeed on his challenge to California's open-carry laws as void-for-vagueness only as the laws have been applied to him, unless the laws are unduly vague in *all* applications. *United States v. Iverson*, 162 F.3d 1015, 1021 (9th Cir. 1998). Hence this Court analyzes the vagueness challenges under the facts of this particular case and decides whether, under a reasonable construction of the California open-carry statutes, the conduct in question is prohibited. *United States v. Parker*, 761 F.3d 986, 991 (9th Cir. 2014). The Court need not

address whether the statute is vague in other potential applications. *United States v. Tabacca*, 924 F.2d 906, 912 (9th Cir. 1991) (citations omitted).

Nichols's vagueness challenges face an insurmountable problem here, because this case does not involve any fact pattern (at all), much less criminal charges or a criminal prosecution against Nichols, in which the concept of loaded versus unloaded firearms or prohibited versus unprohibited areas in California's open-carry laws have arisen. Nichols has never been charged with violating any part of California's open-carry laws. The Court has no facts to examine when analyzing whether a (hypothetical) criminal prosecution invoking the prohibited-areas provision of California's open-carry laws would fail for vagueness. Consequently, the vagueness challenges fail to overcome this threshold problem and therefore fail on the merits.

It is clear that the loaded-firearms or prohibited-areas provisions of California's open-carry laws are not vague in all potential applications. A reasonable person would know and not be left to guess whether his or her firearm is loaded. "Under the commonly understood meaning of the term 'loaded,' a firearm is 'loaded' when a shell or cartridge has been placed into a position from which it can be fired; the shotgun is not 'loaded' if the shell or cartridge is stored elsewhere and not yet placed in a firing position."

People v. Clark, 53 Cal. Rptr. 2d 99, 102-03 (Cal. Ct. App. 1996). The term "loaded" is defined this way in California Penal Code section 16840(a). Likewise, in multiple scenarios, a person would know whether he or she is in a "prohibited area"—another term defined in statute, in California Penal Code section 17030—as a local government likely clearly marked the area by signs. It is hard to imagine a prosecutor exploiting the alleged ambiguities of such laws in pursuing a criminal case thereunder for arbitrary or discriminatory reasons, and Nichols certainly has not offered any evidence to that end.

VI. THE DISTRICT COURT PROPERLY DISMISSED GOVERNOR BROWN ON ELEVENTH AMENDMENT GROUNDS

While the Eleventh Amendment permits actions for prospective declaratory or injunctive relief against state officials in their official capacities for allegedly violating federal law, the only proper defendants in such actions are officials with direct responsibility to enforce or to supervise enforcement of the state law at issue; an official's duty to enforce laws generally is insufficient. *Coalition to Defend Affirmative Action v. Brown*, 674 F.3d 1128, 1133-34 (9th Cir. 2012); *accord, Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 943 (9th Cir. 2013).

As Chief Executive of California, Governor Brown has a general duty to see that the law is faithfully executed (under the California Constitution, article V, section 1), and generally may direct the Attorney General to assist a County District Attorney on a matter (under *id.*, article V, section 1). AOB 34-37. But these attenuated connections between Governor Brown and the open-carry laws do not make Governor Brown a proper defendant in this case. These generalities, which are all that Nichols has presented as Governor Brown's ostensible connection to the enforcement of California's open-carry laws, are exactly what *Coalition to Defend* ruled were insufficient for that purpose. Hence the decisions in *Coalition to Defend* and *Association de Eleveurs* squarely support the district court's dismissal of Governor Brown from this case, and this Court should affirm that dismissal.

VII. THE DISTRICT COURT PROPERLY DISMISSED NICHOLS'S CLAIM UNDER THE CALIFORNIA CONSTITUTION

The district court did not err in dismissing Nichols's claim under the California Constitution. Under the Eleventh Amendment, a federal court may not grant relief in a lawsuit against a state official, acting in his or her official capacity, on the basis of state law. *Vasquez v. Rackauckas*, 734 F.3d 1025, 1041 (9th Cir. 2013). In any event, for two reasons, Nichols's two-

part claim under the California Constitution failed to allege a valid cause of action in any respect.

First, the California Constitution does not have a Second Amendment analogue, and thus provides no independent protection of an individual right to keep and bear arms. *People v. Yarborough*, 86 Cal. Rptr. 3d 674, 681 n.3 (Cal. Ct. App. 2008) ("The right to bear arms is not recognized as one of the rights enumerated in the California Constitution") (citing *Kasler v. Lockyer*, 97 Cal. Rptr. 2d 334, 339 (Cal. 2000)). The other personal rights identified in the California Constitution, article I, section 1, do not relate to, much less support, Nichols's state-law claim for the freedom to carry a firearm openly in public places.

Second, the California Constitution protection against unreasonable searches and seizures (Cal. Const. art. I, § 13) is essentially co-extensive with the analogous protection provided by the Fourth Amendment. *Sanchez v. Cty. of San Diego*, 464 F.3d 916, 930 (9th Cir. 2006) (quoting *In re York*, 892 P. 2d 804, 813 (Cal. 1995)); *see also Sanchez*, 464 F.3d at 928-29 ("The right to be free from unreasonable searches under art. I § 13 of the California Constitution parallels the Fourth Amendment inquiry into the reasonableness of a search"). Therefore, Nichols's state-law search-and-seizure challenge

shares the same fate as the Fourth Amendment claim, as discussed previously.

These legal deficiencies in both parts of Nichols's state-law claim are fatal and could not be cured by amending the complaint, as there is no truthful way to amend the complaint in this respect. The district court correctly dismissed this claim without leave to amend; this Court should affirm the dismissal.

CONCLUSION

For the foregoing reasons, Governor Brown respectfully requests that

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his dismissal be affirmed, and the Attorney General respectfully requests that this Court affirm the district court's judgment in full.

Dated: February 17, 2017 Respectfully submitted,

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14-55873

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHARLES NICHOLS,

Plaintiff-Appellant,

v.

EDMUND G. BROWN JR., in his official capacity as Governor of California, and XAVIER BECERRA, in her official capacity as Attorney General of California,

Defendants-Appellees.

STATEMENT OF RELATED CASES

The following related cases are pending: *Baker v. Kealoha*, No. 12-

16258 and *Young v. Hawaii*, No. 12-17808.

Dated: February 17, 2017

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CERTIFICATE OF COMPLIANCE
PURSUANT TO FED.R.APP.P 32(a)(7)(C) AND CIRCUIT RULE 32-1
FOR 14-55873

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 31-2, the attached answering brief is proportionately spaced, has a typeface of 14 points or more and contains 12,601 words.

February 17, 2017
Dated

s/Jonathan M. Eisenberg
Jonathan M. Eisenberg
Deputy Attorney General

9th Circuit Case Number(s) 14-55873

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