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IN THE UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

MICHELLE FLANAGAN, et al.,

Plaintiffs,

v.

CALIFORNIA ATTORNEY GENERAL XAVIER BECERRA, in his official capacity as Attorney General of the State of California, et al.,

Defendants.

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

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Judge: John A. Kronstadt
Hearing Date: November 6, 2017
Hearing Time: 8:30 a.m.
Courtroom: 10B

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Constitutional Provisions

Regulations

Other Authorities

INTRODUCTION

Plaintiffs are competent, law-abiding Californians who seek to carry firearms outside their homes for protection from violent crime. Rather than seeking some broad right to carry firearms without restriction, Plaintiffs seek to carry a firearm in public in *some manner*. California generally forbids anyone who does not hold a license from doing so. Plaintiffs have each sought such a license, but the State-designated authority denied their applications. Plaintiffs thus have no lawful means to carry a firearm in most locations outside their homes "for the core lawful purpose of self-defense." *District of Columbia v. Heller*, 554 U.S. 570, 630 (2008).

The State cannot flatly deny this right to law-abiding, competent adults. The right to bear arms, which the Second Amendment grants to "the people," cannot be limited to the tiny fragment of the people who satisfy the very narrow exceptions California has created, or who can demonstrate a particularized need for self-defense. In short, given the Framers' decision to extend the Second Amendment to "the people," a "law-abiding citizen's right to bear common arms must enable the typical citizen," "to carry a gun." *Wrenn v. District of Columbia*, 864 F.3d 650, 668 (D.C. Cir. 2017). California's complete denial of that constitutional right to Plaintiffs cannot be reconciled with the Second Amendment. Indeed, denying all manner of carry to ordinary law-abiding citizens is one policy choice the Constitution takes "off the table." *Heller*, 554 U.S. at 635.

The State seeks to justify its complete ban on constitutionally protected conduct by claiming that doing so furthers its public safety interests. But, even if the State's asserted public safety interests were furthered by its ban on carry—which they are not—no interest is sufficient to nullify a constitutional right. That is anathema to the notion of fundamental rights. Accordingly, the State cannot prevail on its motion for summary judgement.

BACKGROUND

In describing its public carry laws, California omits critical elements to make

its regime appear less restrictive than it is in practice. In reality, California's oppressive laws effectively prohibit law abiding citizens from carrying arms for their own defense. For instance, while it is true that the law does not prohibit *openly* carrying a loaded firearm in unincorporated areas where discharging one is legal, Cal. Penal Code § 25850, such areas are generally remote, isolated, and ill-defined. *See, e.g.*, Cal. Fish & Game Code § 3004(a) (prohibiting discharge, and thus carrying, of a firearm within 150 yards of buildings without lawful possessor's permission); Cal. Penal Code § 374c; 51 Op. Atty. Gen. 197, 10-3-68 (prohibiting discharge of a firearm over any public road or highway, which, according to Defendant's predecessor, prohibits carrying on every public road or highway); 36 C.F.R. § 27.41 (national wildlife refuges); Cal. Fish & Game Code § 10500 (state game refuge); Cal. Code Regs. tit. 14, § 43B(a) (state parks); Cal. Code Regs. tit. 14, § 550 (cc) (state wildlife areas); Cal. Code Regs. tit. 14, § 630 (ecological reserves). And, local no-discharge ordinances can also create "prohibited areas" where carrying firearms is illegal.

While there are exceptions to the carry restrictions for certain types of individuals, Def.'s Mot. Summ. J. at 3, none of those exceptions includes ordinary, law-abiding citizens like Plaintiffs. Likewise, while California allows individuals with the proper license to carry a loaded handgun in public, Cal. Penal Code §§ 26150-26155, the government authorities authorized to issue such licenses currently exercise "unfettered discretion" in deciding whether to issue one. *Nichols v. County of Santa Clara*, 223 Cal. App. 3d 1236, 1243 (1990); *see also Erdelyi v. O'Brien*, 680 F.2d 61, 63 (9th Cir. 1982). Each Plaintiff has, in fact, applied for and been denied such a license. Pls.' Add'l Uncont. Facts & Concl. of Law ("Pls.' A.U.F.") ¶¶ 45, 48; Statement of Uncont. Facts & Concl. of Law Supp. Pls.' Mot. Summ. J. ¶¶ 16-18, 22-23, 25-26, 28-29.

Finally, the "focused self-defense exception to all of these restrictions," as the State describes it, Def.'s Mot. Summ. J. at 3, is merely a defense that

individuals can assert *after being charged* with violating the loaded (but not concealed) carry restriction. To be successful, one must prove to a trier of fact that there was a reasonable belief that he or someone else was in "immediate, grave danger" of being attacked. Cal. Penal Code § 26045(a). And the defense applies only during "the brief interval" between when law enforcement officials are notified and when they arrive on scene. *Id.* § 26045(c). Further, because an individual is prohibited from having an unloaded firearm on or near his person, should "immediate, grave danger" arise, *see id.* §§ 26350 (prohibiting open carry of unloaded firearms) and 25400 (prohibiting concealed carry of firearms, even if unloaded), "where the fleeing victim would obtain a gun during that interval is apparently left to Providence." *Peruta v. County of San Diego* (*Peruta II*), 742 F.3d 1144, 1147, n.1 (9th Cir. 2014), *vacated*, 824 F.3d 919 (9th Cir. 2016) (en banc).

While several of the Plaintiffs did testify at their deposition that they would prefer to carry concealed rather than openly, *all* Plaintiffs also testified that they would without question opt to carry a firearm openly rather than not carry at all. *Compare* Def.'s Sep. Statement of Uncont. Facts & Concl. of Law Supp. Mot. Summ. J. ¶¶ 1-7, *with* Pls.'A.U.F. ¶¶ 38-44, 47. And, contrary to the State's claim, not one said he or she believes criminals are "likely" to use greater or deadly force when attacking someone openly carrying. The State's quoted excerpts of Plaintiffs' depositions show only that they thought the risk *could* be higher than if carrying concealed.

In sum, California effectively bars ordinary, law-abiding citizens from carrying firearms outside their homes for self-defense in any manner, whether openly or concealed, unless they have a Carry License, issuance of which is subject to the discretion of a government actor. California has exercised such "discretion" to deny each Plaintiff in this case a Carry License.

ARGUMENT

I. THE SECOND AMENDMENT PROTECTS THE RIGHT TO CARRY ARMS IN PUBLIC

A. The Text and Structure of the Second Amendment Illustrate that the Right to Bear Arms Is Not Confined to the Home

Any inquiry into the scope of the Second Amendment must begin with its text. *See Heller*, 554 U.S. at 576. That text provides: "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. Critically, the Supreme Court has already held that the text protects two separate rights: the right to "keep" arms, and the right to "bear" them. *See Heller*, 554 U.S. at 591 ("keep and bear arms" is *not* a "term of art" with a "unitary meaning"). To "keep arms" means to "have weapons." *Id.* at 582. While to "bear arms" means to " 'wear, bear, or carry' " them " 'upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person.' " *Id.* at 584 (quoting *Muscarello v. United States*, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting)). "To speak of 'bearing' arms within one's home would at all times have been an awkward usage." *Moore v. Madigan*, 702 F.3d 933, 936 (D.C. Cir. 2017). It is "more natural" to view the Second Amendment as encompassing public carry. *Wrenn*, 864 F.3d at 657.

That natural reading of the text is reinforced by the amendment's structure. As *Heller* explained, the Second Amendment's prefatory clause—"[a] well regulated Militia, being necessary to the security of a free State"—performs a "clarifying function" with respect to the meaning of the operative clause. 554 U.S. at 577-78. The prefatory clause's reference to "the Militia" clarifies that the operative clause's protection of the right to "bear Arms" encompasses a right that extends beyond the home. Militia service, of course, necessarily includes bearing arms in public. And all the Justices in *Heller* agreed that the right to bear arms was codified at least in part to ensure the viability of the militia. *See id.* at 599; *id.* at 637

(Stevens, J., dissenting).

B. The History of the Second Amendment Shows that the Right to Bear Arms Is Not Confined to the Home

"Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures . . . think that scope too broad." *Heller*, 554 U.S. at 634-35. The Second Amendment, "like the First and Fourth Amendments, codified a *pre-existing* right." *Id.* at 592. From its English origins to colonial America, through the ratification of the Fourteenth Amendment and beyond, that right was overwhelmingly understood to include carry outside the home. Notwithstanding the State's efforts at historical revisionism, the record is clear—a state may not enact laws diminishing the ability of law-abiding citizens to carry firearms for self-defense. It is no wonder, then, the State is hard-pressed to find an historical law resembling its oppressive regime.

1. Historically, the Laws of England and America Recognized a Broad Right to Carry Arms

The Supreme Court has twice held that the Second Amendment protects the right of law-abiding, responsible citizens to keep and bear arms *for lawful self-defense. McDonald v. City of Chicago*, 561 U.S. 742, 767-78 (2010), *Heller*, 554 U.S. at 635. "Self-defense," the Court held, "is a basic right, recognized by many legal systems from ancient times to the present day." *McDonald*, 561 U.S. at 767. And our British predecessors were no exception. Blackstone, whose works greatly shaped the Founders' understanding of English law, cited " 'the right of having and using arms for self-preservation and defence,' " as "one of the fundamental rights of Englishmen." *Heller*, 554 U.S. at 594. That "fundamental right" necessarily includes the right to carry firearms outside the home because the need for self-defense necessarily arises outside the home. *Wrenn*, 864 F.3d at 657; *Moore*, 702 F.3d at 935-36. To wit, English authorities made clear that "the killing of a Wrong-doer . . . may be justified . . . where a Man kills one who assaults him *in the*

Highway to rob or murder him." 1 William Hawkins, *A Treatise of the Pleas of the Crown* 82 (1716) (emphasis added); *see also* 1 Matthew Hale, *Historia Pacitorum Coronae* 481 (Sollum Emlyn ed. 1736) ("If a thief assault a true man *either* abroad *or* in his house to rob or kill him, the true man . . . may kill the assailant, and it is not a felony." (emphasis added)). Indeed, there was "no Reason why a Person, who without Provocation, is assaulted by another *in any Place whatsoever*, in such a Manner as plainly shews an Intent to murder him, . . . may not justify killing such an Assailant . . .." Hawkins, *supra* at 83. Following the Glorious Revolution of 1688, the English Bill of Rights codified the natural right to possess and carry weapons. *See Heller*, 554 U.S. at 593. As the *Heller* Court authoritatively concluded, this guarantee—a direct predecessor of our Second Amendment—recognized "an individual right protecting against *both public and private* violence." *Id.* at 594 (emphasis added).

The need to carry arms for self-defense beyond the home was even greater in an early America dominated by "wilderness," threats from "hostile Indians," and other dangers. *Moore*, 702 F.3d at 936. As St. George Tucker explained, "[i]n many parts of the United States, a man no more thinks, of going out of his house on any occasion, without his rifle or musket in his hand, than a European fine gentleman without his sword by his side." 5 George Tucker, *Blackstone's Commentaries*, app., n.B, at 19 (1803). P ractices of the Founding Fathers demonstrate just how well established the right was. George Washington is said to have customarily ridden between Alexandria and Mount Vernon with pistols holstered to his horse's saddle. Benjamin Ogle Tayloe, *In Memoriam: Anecdotes and Reminiscences* 95 (Wash., D.C., 1872). Thomas Jefferson advised his nephew to "[l]et your gun . . . be the constant companion on your walks." 1 *The Writings of Thomas Jefferson* 398 (letter of August 19, 1785) (H.A. Washington ed., 1853). And John Adams, during his defense of the British soldiers charged in the Boston Massacre, conceded that in America, "every private person is authorized to arm himself; and on the strength of

this authority I do not deny the inhabitants had a right to arm themselves at that time for their defence." John Adams, *First Day's Speech in Defence of the British Soldiers Accused of Murdering Attucks, Gray and Others, in the Boston Riot of 1770*, in 6 *Masterpieces of Eloquence* 2569, 2578 (Hazeltine et. al. eds. 1905).

Indeed, in colonial America not only did individuals have a right to carry firearms in public, they were often required to do so. "About half the colonies had laws *requiring* arms-carrying in certain circumstances." Nicholas J. Johnson et al., *Firearms Law and the Second Amendment* 106 (2012). For example, a 1770 Georgia law enacted, " 'for the security and defence of this province from internal dangers and insurrections' required those men who qualified for militia duty individually 'to carry fire arms' 'to places of public worship.' " *Heller*, 554 U.S. at 601 (quoting 19 *Colonial Records of the State of Georgia* 137-39 (A. Candler ed. 1911 (pt. 1) (emphasis omitted)). A 1639 Newport, Rhode Island ordinance provided that "noe man shall go two miles from the Towne unarmed, eyther with Gunn or Sword; and that none shall come to any public Meeting without his weapon." Johnson, *supra* at 107 (quoting 1 *Records of the Colony of Rhode Island & Providence Plantations, in New England* 94 (John Russell Bartlett ed., 1856)).

The right to carry outside the home was further entrenched through the adoption of Second Amendment analogues in state constitutions. For example, the Pennsylvania Declaration of Rights of 1776 proclaimed: "That the people have a right to bear arms for the defence of themselves and the state . . . ." *Heller*, 554 U.S. at 601 (quoting § XIII, in 5 Thorpe 3082, 3083 (emphasis removed) (alteration in original)). In the 18th and early 19th century, nine states enshrined such provisions in their constitutions—provisions that, according to *Heller*, protected an individual's right to carry arms. *See Heller*, 554 U.S. at 585-86 & n. 8.

2. The Statute of Northampton and Its American Successors Respected the Right to Carry Arms

The historical record leading up to the ratification of the Second Amendment

is clear: There was a generally recognized right to carry firearms outside the home for self-defense. Relying on the ancient Statute of Northampton and its early American progeny, the State attempts to paint a very different historical picture, in which the carrying of firearms outside the home was a rare event, either heavily regulated or outright banned. The State's revisionist history cannot be reconciled with the historical record.

At the outset, the State claims that the 1382 Statute of Northampton made it "generally unlawful to 'go armed,' with concealed or open weapons, in public places" in England, Def.'s Mot. Summ. J. at 9—that is simply not true. It prohibited all but the king's servants and ministers from bringing "force in affray of the peace," Statute of Northampton, 2 Edw. 3 (Eng. 1328), "affray" meaning "a public offence *to the terror of the King's subjects*, and so called because it affrighteth and maketh men afraid, and is enquirable in a leet as a common nuisance." *State v. Huntly*, 25 N.C. 418, 421 (1843) (emphasis added) (quoting Sir Edward Coke, 3d Just. 158). The mere act of carrying did not constitute a crime; it was only unlawful to carry for an *unlawful purpose*. The English courts made that clear. In the famous case of *Rex v. Knight*, Chief Justice Holt explained that "the meaning of the statute of [Northampton] was to punish people who go armed to terrify the King's subjects." 87 Eng. Rep. 75 & 90 Eng. Rep. 330 (K.B. 1686); *see also Rex v. Smith*, 2 Ir. R. 190 (K.B. 1914) ("[W]e think that the statutable misdemeanor is to ride or go armed *without lawful occasion in terrorem populi* . . . .").

Prominent commentators in the centuries to follow agreed. As 18th century legal scholar William Hawkins explained, "[N]o wearing of arms is within the meaning of this statute, unless it be accompanied with such circumstances as are apt to terrify the people." Hawkins, *supra* at 135. Blackstone concurred, noting that Northampton banned only the carrying of "dangerous and unusual weapons." *See Heller*, 554 U.S. at 627 (citing 4 William Blackstone, *Commentaries on the Laws of England* 148-49 (1769)). James Wilson, "virtual coauthor of the Constitution,"

opined that by the Founding, Northampton banned only the carry of " 'dangerous and unusual weapons, in such a manner, as will naturally diffuse a terrour among the people.' " *Wrenn*, 864 F.3d at 660 (quoting James Wilson, *The Works of the Honourable James Wilson* 79 (1804)).

American versions of the Statute of Northampton followed the same tradition of punishing only those who used arms to terrorize their fellow citizens. For example, Virginia's version of the statute forbade citizens from "rid[ing] armed by night []or by day, in fairs or markets, or in other places, *in terror of the County*," 1786 Va. Laws 33, ch. 21 (emphasis added), while Massachusetts punished those who went "armed offensively, to the fear or terror of the good citizens of this Commonwealth," 1795 Mass. Laws 436, ch. 2. Other states followed a similar approach. *See, e.g.*, 1801 Tenn. Laws 710, § 6 ("publicly ride or go armed to the terror of the people"); 1821 Me. Laws 285, ch. 76 § 1 ("ride or go armed offensively, to the fear or terror of the good citizens of this State"); 1852 Del. Laws 330, ch. 97, § 13 ("all who go armed offensively to the terror of the people"). When confronted with this exact question, the Supreme Court of North Carolina confirmed that Northampton codified only "the offence of riding or going about armed with unusual and dangerous weapons, to the terror of the people," *not* the general carrying of weapons. *Huntly*, 25 N.C. at 420, 422-23.

The State also seriously misconstrues Massachusetts's 1836 statute and similar laws, claiming that they prohibited the carrying of weapons absent "exigent threats to persons and/or property." Def.'s Mot. Summ. J. at 10. Those statutes did nothing of the sort. What the illustrative Massachusetts statute actually says is:

> If any person shall go armed . . . ***without reasonable cause to fear an assault or other injury***, or violence to his person, or to his family or property, he ***may, on complaint of any person having reasonable cause to fear an injury, or breach of peace***, be required to find sureties for keeping the peace, for a term not exceeding six months, with the right of appealing as before provided.

1836 Mass. Laws 750 § 16 (double emphasis added). The statute plainly did not

require people to have "reasonable cause" to carry firearms. To the contrary, it *assumed* that everyone could carry firearms, but created a mechanism whereby someone accused of carrying a firearm with intent to injure another or breach the peace could be required to post a bond to continue to carry a firearm. But even that requirement—which was by no means a prohibition on carrying—was subject to an *exception* if the person otherwise required to post a surety had reasonable cause to fear assault or injury. If anything, then, these laws only underscore that public carry was the norm, not the exception, in our nation's early years.

3. Laws of the Old West Are Poor Indicators of the Right's Scope

The State also highlights scattered 19th century regulations from the territorial west as purported evidence that the right to bear arms did not include a right to carry weapons. *See* Def.'s Mot. Summ. J. at 12-13. These ordinances, enacted largely by isolated localities with reputations for lawlessness, represent outliers. They are generally not probative of the scope of the Second Amendment because most were enacted long after the Founding and, typically, after the Fourteenth Amendment. *See Heller*, 554 U.S. at 614. Furthermore, much of the Old West—places like New Mexico, Wyoming, Arizona, Idaho—remained under territorial governance at the time. It is questionable whether such ordinances could have survived scrutiny following statehood. Indeed, the Idaho Supreme Court, citing the Second Amendment and its state analogue, invalidated one such territorial law following Idaho's admission to the Union: "the legislature has no power to prohibit a citizen from bearing arms in any portion of the state of Idaho, whether within or without the corporate limits of cities, towns, and villages." *In re Brickey*, 70 P. 609, 609 (Idaho 1902).

4. Nineteenth Century Precedent Confirms that the Right to Carry Could Not be Unduly Burdened by the State

The far better indicator of how the right was understood during the 19th

century is the near-unanimous body of caselaw concluding that the right enshrined in the Second Amendment included a robust right to carry a firearm outside one's home. *See generally* Michael P. O'Shea, *Modeling the Second Amendment Right to Carry Arms (I): Judicial Tradition and the Scope of "Bearing Arms" for Self-Defense*, 61 Am. U. L. Rev. 585 (2012).

For example, while the State inexplicably describes the Supreme Court of North Carolina's decision in *Huntly* as "[a] primary example" of "the notion that in most places in the country it was unlawful to carry a firearm in public," Def.'s Mot. Summ. J. at 11, *Huntly actually* held "the carrying of a gun *per se* constitutes no offence. For any lawful purpose—either of business or amusement—the citizen is at perfect liberty to carry his gun." 25 N.C. at 422-23. *Nunn v. State* reached a similar conclusion. 1 Ga. 243 (1846). There, the Georgia Supreme Court held in favor of a man convicted of carrying a pistol on his person. *See id.* at 251. As the court explained, any statute preventing the carrying of handguns in a manner that "deprive[s] the citizen of his *natural* right of self-defence, or of his constitutional right to keep and bear arms . . . . is in conflict with the Constitution, and *void*." *Id.*

Additional examples are plentiful. *See, e.g.*, *Andrews v. State*, 50 Tenn. 165, 178 (1871) ("The right to keep arms, necessarily involves the right to . . . . carry them to and from his home, and no one could claim that the Legislature had the right to punish him for it, without violating this clause of the Constitution."); *State v. Chandler*, 5 La. Ann. 489, 490 (1850) (The open carrying of firearms is a "right guaranteed by the Constitution of the United States, and which is calculated to incite men to a manly and noble defence of themselves, if necessary, and of their country . . . ."); *State v. Reid*, 1 Ala. 612, 616-17 (1840) ("A statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would be clearly unconstitutional").

The few cases to the contrary proffered by the State are unpersuasive because

they largely rely on the flawed premise expressly rejected by *Heller*, 554 U.S. at 602—namely, that the right to bear arms was associated exclusively with militia service. *See City of Salina v. Blaksley*, 83 P. 619, 620 (Kan. 1905) (explaining that both the Second Amendment and its Kansas analogue apply "only to the right to bear arms as a member of the state militia, or some other military organization provided for by law."); *English v. State*, 35 Tex. 473, 475 (1871) ("[W]e shall be led to the conclusion that the [Second Amendment] protects only the right to 'keep' such 'arms' as are used for purposes of war. . . .").

With no answer to the wealth of 19th century authority confirming that the government may not unduly restrict the right to carry—much of it relied upon by *Heller* itself, 554 U.S. at 612-15, 627—the State asks this Court to simply ignore these cases because they come from "the antebellum South." Def.'s Mot. Summ. J. at 15. The State tellingly cites no authority for the proposition that decisions from the antebellum South are somehow lacking in any value when understanding the scope of constitutional rights. At any rate, notwithstanding the State's not-so-subtle suggestion that each of these decisions must have been motivated by racism, it identifies just one case (from Pennsylvania, which was hardly part of "the antebellum South") that had anything to do with slavery—a case in which Supreme Court Justice Baldwin, sitting as a circuit judge, concluded that a citizen has "a right to carry arms in defence of his property or person, and to use them, if either were assailed with such force, numbers or violence as made it necessary for the protection or safety of either." *Johnson v. Tompkins*, 13 F. Cas. 840, 852 (C.C.E.D. Pa. 1833). But the fact that Justice Baldwin recognized this right in the abhorrent context of recapturing an escaped slave hardly suggests that the right extended only to that context, and the State identifies nothing in the opinion suggesting as much.

Indeed, what the historical record reflects is that it was not the exercise of the right to bear arms that proved troublesome, but rather its restriction to certain segments of the population. Limiting the right served as a tool of oppression.

Indeed, Chief Justice Taney's fear that freed slaves might "keep and carry arms wherever they went" was part of the rationale for his infamous decision to deny African Americans citizenship. *See Dred Scott v. Sandford*, 60 U.S. 393, 417 (1857). In ratifying the Fourteenth Amendment, the People affirmed that the right to carry arms, as with other civil rights, belongs to all Americans.

* * *

Without question, the right to keep and bear arms, as historically understood, extended beyond the confines of one's home. By denying that right entirely to ordinary, law-abiding citizens, California's carry laws plainly burden—indeed, eviscerate—a right protected by the Second Amendment.

II. CALIFORNIA'S BAN ON BEARING ARMS VIOLATES THE SECOND AMENDMENT UNDER ANY APPLICABLE TEST

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

A. California's Ban on Bearing Arms by Ordinary, Law-abiding Citizens Is Categorically Unconstitutional

Because California completely denies ordinary law-abiding residents any outlet to exercise their right to carry outside the home, there is no need to determine the applicable level of scrutiny. For a law that completely denies a constitutionally protected right to those entitled to exercise it must "fail constitutional muster" under "any of the standards of scrutiny." *Heller*, 554 U.S. at 628-29. That is the approach *Heller* took in striking down a total denial of the ordinary citizen's right to *keep* arms, *id.*, and it is the approach numerous courts have taken in striking

down bans on the right to *bear* arms, *see Wrenn*, 864 F.3d at 664-66; *Peruta II*, 742 F.3d at 1175; *Moore*, 702 F.3d at 941-42; *Palmer*, 59 F. Supp. 3d at 182-83. It is also an approach that a unanimous Ninth Circuit panel endorsed in *Jackson v. City and County of San Francisco*, noting that a law that "amounts to a destruction of the Second Amendment right, is unconstitutional under any level of scrutiny." 746 F.3d 953, 961 (9th Cir. 2014). Because California law prevents Plaintiffs from publicly carrying a firearm, it "amounts to a destruction" of the ordinary citizen's right to bear arms, and is thus "unconstitutional under any level of scrutiny." *Id.*

While the State's scheme is subject to various exceptions, none of them—individually or in aggregate—satisfies the Second Amendment. That California's carry prohibitions exempt narrow categories of people (not including Plaintiffs) makes no difference. The Second Amendment guarantees the right to keep and bear Arms to "the people," not just to special subsets the state deems worthy of exercising the right. Indeed, the possession ban at issue in *Heller* had "minor exceptions" for certain people, such as retired police officers, *see* 554 U.S. at 575 n.1, but that did not stop the Court from declaring it a "complete prohibition" on the right of "the people" to keep arms or from categorically invalidating it, *id.* at 629. The same result should follow here. Because a ban "on the ability of most citizens to exercise an enumerated right would have to flunk any judicial test that was appropriately written and applied," this Court should "strike down [California's] law here apart from any particular balancing test." *Wrenn*, 864 F.3d at 666.

Nor is California's narrow affirmative defense to criminal prosecution for an individual facing "immediate, grave danger" a meaningful caveat to its otherwise comprehensive prohibitions. As described above, if a victim is even legally able to access a firearm under the circumstances triggering this defense, it applies only during the narrow window until law enforcement arrives in response. *See supra* pp. 2-3 (citing Cal. Penal Code § 26045(a)-(c)). More fundamentally, however, the notion that the right to bear arms is sufficiently accommodated by a potential

defense to a prosecution for its exercise cannot be reconciled with the Supreme Court's repeated admonishments that the Second Amendment protects a fundamental right to be "armed and ready" in case of confrontation. *Heller*, 554 U.S. at 584 (quoting *Muscarello*, 524 U.S. at 143 (Ginsburg, J., dissenting)).

Finally, while there are technically parts of unincorporated areas where it is legal to openly carry a firearm, the reality for most counties is that these are tiny islands in a sea of "prohibited areas." Cal. Penal Code §§ 17030, 25850(a). Indeed, as explained above, if individuals are anywhere near civilization in Los Angeles County—i.e., almost anywhere in Los Angeles County where the need for self-defense might arise—they are prohibited from openly carrying. *See supra* pp. 3.

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

B. Regardless, California's Ban on Open Carry Cannot Survive Any Level of Means-end Review

Even if the Court applies a traditional tiers-of-scrutiny approach, the same result must obtain. Under *United States v. Chovan*, courts select the appropriate level of means-end scrutiny, either strict or intermediate,[1] based on "how close the law comes to the core of the Second Amendment" and "the severity of the law's burden on the right." 735 F.3d 1127, 1138 (9th Cir. 2013). Because the State generally bars ordinary, law-abiding citizens from bearing arms in public for self-defense, its laws impose a severe burden on conduct at the core of the right. Strict scrutiny must thus apply. But even if this Court selects intermediate scrutiny, the

[1] It is clear from *Heller* that heightened review must apply, for the Court specifically rejected rational-basis review. 554 U.S. at 628-29 & n.27.

government must still establish that the law is sufficiently tailored to achieve an important government interest. As explained below, there is nothing remotely tailored about a law that bars most law-abiding residents from meaningfully exercising their right to bear arms for self-defense.

1. Because Banning the Carry of Firearms for Self-defense Severely Burdens Core Second Amendment Conduct, Strict Scrutiny Must Apply

In determining the appropriate level of scrutiny, courts must first determine whether the burdened conduct lies at the "core" of the Second Amendment. *Id.* at 1137. As the D.C. Circuit recently recognized, "the 'core' or '*central component*' of the Second Amendment right to keep and bear arms protects 'individual self-defense,' (citation omitted), by 'law-abiding, responsible citizens' (citation omitted)." *Wrenn*, 864 F.3d at 657 (quoting *McDonald*, 561 U.S. at 767-78, and *Heller I*, 554 U.S. at 635). That "core," *Wrenn* confirms, extends beyond the home—to the public carry of firearms. *Id.*; *see also Moore*, 702 F.3d at 935. It must, for "the need to defend oneself may suddenly arise in a host of locations outside the home." *Heller*, 554 U.S. at 679 (Stevens, J., dissenting).

Sure, *Heller* mentions that "the need for defense of self, family, and property is most acute" in "the home." 554 U.S. at 628. But that passing observation is muffled by the Court's more boisterous explication of the text and historical understanding of the Second Amendment—an analysis giving "independent and seemingly equal treatments" to the separate rights to "keep" arms and to "bear" them. *Wrenn*, 864 F.3d at 657 (citing *Heller*, 554 U.S. at 570-628). Ultimately, as the D.C. Circuit has held, it is "more natural to view the Amendment's *core* as including a law-abiding citizen's right to carry common firearms for self-defense beyond the home." *Wrenn*, 864 F.3d at 657 (emphasis added).

This conclusion should lead us directly to strict scrutiny. If we are guided by First Amendment principles—and *Chovan* expressly holds that we are, 735 F.3d at 1138—laws regulating core conduct command strict scrutiny. *See, e.g., Citizens*

United v. FEC, 558 U.S. 310, 340 (2010). For when a law restricts activity central to the right, "it makes little difference whether [courts] determine burden first because [such] restrictions . . . *so plainly impose a 'severe burden.'* " *Buckley v. Am. Const. L. Found., Inc.*, 525 U.S. 182, 208 (1999) (Thomas, J., concurring) (emphasis added); *see also United States v. Masciandaro*, 638 F.3d 458, 470 (4th Cir. 2011) (Just as "*any* law regulating the content of speech is subject to strict scrutiny, . . . *any* law that would burden the 'fundamental,' core right of self-defense in the home by a law-abiding citizen would be subject to strict scrutiny.") (emphasis added). Because burdens on core protected conduct are necessarily "severe," strict scrutiny *must* apply.[2]

Regardless, by any measure, a complete ban "severely burdens" the right to bear arms for self-defense. *Silvester v. Harris*, 843 F.3d 816, 821 (9th Cir. 2016). Citing several exceptions that allow for varying degrees of public carry in California, the State claims that the burden it imposes is insignificant. Def.'s Mot. Summ. J. 2. But these trivial exceptions—which, as explained above and in Plaintiffs' Motion for Summary Judgment, do not apply to Plaintiffs—do not alleviate the severity of the burden on Plaintiffs' rights. Because the State clearly imposes a severe burden on conduct that is central to the Second Amendment, strict scrutiny must apply. And because the State does not attempt to defend its ban under a strict scrutiny analysis, Plaintiffs must prevail.

2. California's Ban on Carry Fails Even Intermediate Scrutiny

Ultimately, however, this Court need not resolve whether strict or intermediate scrutiny applies because California's total carry ban cannot survive even intermediate scrutiny. *Cf. McCutcheon v. FEC*, __U.S.__, 134 S. Ct. 1434,

[2] To the extent that *Jackson v. City and County of San Francisco*, 746 F.3d 953, 964-65 (9th Cir. 2014), or *Bauer v. Becerra*, 858 F.3d 1216, 1222 (9th Cir. 2017), suggest otherwise, these cases conflict with longstanding precedent regarding the treatment of fundamental rights. Plaintiffs preserve their right to challenge such holdings on appeal.

1446 (2014) (plurality opinion). Intermediate scrutiny requires a "reasonable fit between the challenged regulation" and a "significant, substantial, or important" government objective. *Silvester*, 843 F.3d at 821-22; *Jackson*, 746 F.3d at 965. The government "bears the burden of justifying its restrictions," and it "must affirmatively establish the reasonable fit" required. *Jackson*, 746 F.3d at 965. While a reasonable fit "is not necessarily perfect" and "not necessarily the least restrictive means," it must be "a means narrowly tailored to achieve the desired objective." *McCutcheon*, 134 S. Ct. at 1456-57.

a. A flat ban on constitutionally protected *cannot* be sufficiently tailored to survive heightened scrutiny.

Completely prohibiting ordinary, law-abiding citizens from carrying handguns is not a remotely, let alone reasonably, tailored means of furthering the State's legitimate objective of public safety. To the contrary, that flat ban is the paradigmatic *opposite* of tailoring. In applying intermediate scrutiny under the Second Amendment, the Ninth Circuit has stressed the distinction between laws that completely prohibit protected conduct and those that leave open "alternative channels" for that conduct. *Jackson*, 746 F.3d at 968. Unlike laws the Ninth Circuit has upheld under intermediate scrutiny, California's carry ban does *not* leave open alternative channels to bear arms for self-defense outside the home. Instead, the law flatly denies the right to all but those who can demonstrate—to the satisfaction of an Issuing Authority with unbridled discretion—a "good cause" for carrying—a criterion that "says nothing about whether he or she is more or less likely to misuse a gun." *Grace v. District of Columbia*, 187 F. Supp. 3d 124, 149 (D.C. Cir. 2016).

To be sure, intermediate scrutiny's "requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.' " *Ward v. Rock Against Racism*, 491 U.S. 781, 782-83 (1989). But "[t]his standard does not mean that a . . . regulation may burden substantially more [conduct] than necessary to

further the government's . . . interests." *Id.* at 799. No, the government "may not regulate [] in such a manner that a substantial portion of the burden [] does not serve to advance its goals." *Id.*; *Colacurcio v. City of Kent*, 63 F.3d 545, 553 (9th Cir. 1998). And, contrary to the State's claim, Def.'s Mot. Summ. J. at 20, the government is not entitled to *any* deference when assessing the "fit" between its important interest and the means selected to advance it. *Wrenn v. District of Columbia*, 107 F. Supp. 3d 1, 9-10 (D.D.C. 2015), *vacated on other grounds* 808 F.3d 81 (D.C. Cir. 2015) (citing *Turner Broad. Sys., Inc. v. FCC* (*Turner II*), 520 U.S. 180 (1997); *Peruta II*, 742 F.3d at 1177). Rather, the State, without the benefit of deference to its assertions, bears the burden of establishing that California's laws do not burden substantially more conduct than necessary to further its public safety goals. *Id.*; *cf. Moore*, 702 F.3d 933. It cannot make that showing here.

Because the laws challenged here, in practice, constitute an outright ban on carrying firearms in public, *see supra* pp. 1-3, 13-15, they must fail any means-ends fit test, since the "means" the State has chosen effectively extinguish the right to bear arms. The State cannot adopt a restriction that wholly and indefinitely prohibits core Second Amendment conduct, no matter what its reasons, since that would empty that constitutional protection of all meaningful content. "[T]he enshrinement of constitutional rights necessarily takes certain policy choices off the table." *Heller*, 554 U.S. at 636. Surely, the choice to completely prohibit conduct the right was enshrined to protect is one of them.

That conclusion follows directly from the Supreme Court's precedents in the secondary-effects area of free speech doctrine. Justice Kennedy's opinion in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002), makes clear that in defending a restriction as sufficiently tailored to further an important governmental interest, the government may not rely on the proposition "that it will reduce secondary effects by reducing speech in the same proportion." *Id.* at 449. "It is no trick to reduce secondary effects by reducing speech or its audience; but [the

government] may not attack secondary effects indirectly by attacking speech." *Id*. at 450; *see also City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-51 (1986).

At least one circuit court has already embraced this kind of reasoning in the Second Amendment context. In *Heller v. District of Columbia* (*Heller III*), 801 F.3d 264 (D.C. Cir. 2015), the D.C. Circuit struck down a prohibition on registering more than one pistol per month. The government defended the ban as designed to "promote public safety by limiting the number of guns in circulation," based on its theory "that more guns lead to more gun theft, more gun accidents, more gun suicides, and more gun crimes." *Id*. at 280. The court rejected this simplistic more-guns, more-crime syllogism, explaining that "taken to its logical conclusion, that reasoning would justify a total ban on firearms kept in the home," and so it simply cannot be right. *Id*.; *see also Grace*, 187 F. Supp. 3d at 147. In other words, the government may not adopt a law with the design and effect of limiting the quantity of conduct protected by the Second Amendment.

That is precisely what California has done. The laws challenged here do not regulate the mere manner of bearing arms or impose reasonable training and safety requirements. Perhaps if California allowed some other means of carrying firearms that would be so. But because it prohibits concealed carry too, the laws' purpose is clearly not simply to avoid supposed problematic and costly encounters between law enforcement and the public or to reduce violent crime. *See* Def.'s Mot. Summ. J. at 21. Rather, it is to limit the number of arms borne in public. To the extent doing so leads to a reduction of gun crime or increase in public safety, that is only a byproduct of the State's suppression of the quantity of core Second Amendment conduct. As one Second Amendment opinion recently acknowledged, however, narrow tailoring requires the government to demonstrate that its law is "not broader than necessary to achieve its substantial government interest in preventing crime and protecting public safety." *Wrenn*, 107 F. Supp. 3d at 9. It is telling that the State makes no meaningful effort to explain how the challenged statutes are sufficiently

tailored to survive scrutiny.

California's attempt to paint its restrictive laws as merely benign measures to promote public safety, Def.'s Mot. Summ. J. at 19-21, does not help its cause. Setting aside semantics and pretexts, California's goal is ultimately to reduce the number of arms borne in public. That goal is illegitimate. This Court should not credit a purpose so blatantly unconstitutional. It is the equivalent of "decid[ing] on a case-by-case basis whether the right is *really worth* insisting upon," which the Supreme Court has expressly forbidden. *Heller*, 554 U.S. at 634. Thus, no matter what interest California puts forth, and regardless of how well its challenged laws may further that interest, its ban on bearing arms can never be sufficiently tailored to pass muster. Even if it were, however, California's carry ban still fails.

b. California's ban on carry does not further the government interests that Defendant asserts.

To survive intermediate scrutiny, a restriction must also be "substantially related to the achievement" of the government's legitimate interest. *United States v. Virginia*, 518 U.S. 515, 533 (1996). "The burden of justification is demanding and it rests entirely on the State." *Id*. The State cannot meet that burden. Defendant asserts three public safety interests that California's ban on open carry supposedly furthers: (1) violent-crime reduction; (2) conserving law enforcement resources; and (3) avoiding dangerous interactions between law enforcement and the public for both their sakes. Mot. Summ. J. at 20. While these are legitimate interests, Defendant cannot show that they are furthered by the State's open carry ban.

i. The State's evidence of its open carry ban's supposed crime reduction effect is irrelevant and unreliable.

The only evidence Defendant offers to support his assertion that California's *open* carry ban will reduce violent crime is a report by a designated expert witness, John Donohue, III. This witness essentially summarizes an unpublished study he co-authored that exclusively looked at the impacts of laws liberalizing *concealed*

carry. Brady Decl., Ex. 5, 185:17-20; 197:7-8. Aside from the many fatal criticisms of Donohue's study described in the report submitted by Plaintiffs' expert, Gary Kleck, the study is essentially irrelevant. Brady Decl., Ex. 6, at 13.

Donohue "didn't focus on open carry in [his] paper." Brady Decl., Ex. 5, at 179:5. He neither conducted any research nor examined data from any state concerning the impacts of *open* carry. *Id.* at 178:10-12. Nor is he aware of any research of open carry's potential impacts on criminality. *Id.* at 179:20-25; 180:1-3. Donohue admits a distinction between open and concealed carry, *id.* at 197:16. Nevertheless, he uses inferences from his work on *concealed carry*, *id.* at 197:1-13, to make conclusory remarks about the impacts of *open carry*, *id.* at 197:7-13. As Kleck points out, the "obviously unscholarly, evidence-free character" of those conclusions speaks for itself. Brady Decl., Ex. 6, at 17.

Even if his conclusions were relevant, Donohue's study is rife with the sort of "shoddy data or reasoning" that the Supreme Court has held insufficient to meet the burdens of constitutional scrutiny. *See City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 426, (2002). Donohue misleadingly quotes various studies as supporting his conclusions when they do not. Brady Decl., Ex. 5, at 91:13-21; 92:14-18, 24-25; 93:1-10, 17-19; 94:15-19. He relied on undeniably biased and problematic sources, Brady Decl., Ex. 6, at 12, 14, while ignoring relevant data about right to carry laws, Brady Decl., Ex. 5, at 159:17-18; 321:7-25; 322:1-5. He also admits not controlling for admittedly important factors, including different states' requirement for a carry license or existing gun control laws. *Id.* at 125:9-16; 126:17-25; 127:12-18. But, what is fatal to his entire study is the fact that at least 25 of the 33 states that he analyzed for the impacts of its right to concealed carry laws already allowed open carry beforehand, and Donohue failed to control for such. Brady Decl., ¶¶ 10-14; Ex. 5, at 304-06. In other words, he has no idea how many people were already carrying in public before permissive concealed carry laws were adopted or after. Nor does he know how many people obtained permits following

adoption of such laws. Brady Decl., Ex. 5, at 127:12-13.Without knowing these facts, it is impossible to conclude that there was an *increase* in public carry—let alone one that was responsible for an increase in crime.

Even setting aside these credibility issues, Donohue has admitted that his analysis is highly sensitive to the control variables he alone chooses, *id.* at 34:20-25; 35:1-4, and that he could be wrong, *id.* at 133:20-25. Moreover, Donohue could not identify any other study that supported his findings. *Id.* at 312:12-20; 313:3-14; 314:9-25; 315:1-25; 316:1-20. Meanwhile several studies exist that challenge his conclusions, including ones Donohue cites himself. *Id.* at 311:12-16; *see also* John R. Lott, Jr., *What a Balancing Test Will Show for Right-to-Carry Laws*, 71 Md. L. Rev. 1205, 1206 (2012).

Nor can it be said that crime reduction resulting from carry restrictions is a matter of "common sense" as the State suggests, Def.'s Mot. Summ. J. at 2, since there are various studies, including ones cited by Donohue, concluding otherwise. Carlisle Moody, et al., *The Impact of Right-to-Carry Laws on Crime: An Exercise in Replication* 80-81 (2014) (right to carry laws are "socially beneficial".) Accordingly, there is no reliable evidence that shows that the impact of allowing open carry increases the rate of violent crime.

The lack of evidence that laws such as California's advance public safety should not be surprising, because violent criminals will continue to carry guns in public regardless, leaving law-abiding citizens defenseless when confronted with criminal violence. As the Supreme Court recently held in the context of abortion restrictions, "[d]etermined wrongdoers, already ignoring existing statutes and safety measures, are unlikely to be convinced to [change their conduct] by a new overlay of regulations." *Whole Woman's Health v. Hellerstedt*, __U.S.__, 136 S. Ct. 2292, 2313-14 (2016). Instead, California's carry ban must be examined by reference to those persons "for whom the provision is an actual rather than an irrelevant restriction," *id*. at 2320 (brackets omitted).

ii. California's open carry ban does not conserve resources or reduce dangerous encounters with law enforcement.

Defendant's additional claim that public safety is furthered by the carry ban because it will avoid waste of law enforcement resources is equally unavailing. As an initial matter, Defendant does not cite any authority that such an interest, even if furthered by a law, is sufficiently important to meet intermediate scrutiny. And, it is doubtful that it is. If saving police resources were sufficient to restrict constitutional rights, the government could restrict speech that drew crowds under the First Amendment, excuse failures to procure search warrants under the Fourth Amendment, or refuse to produce its officers as witnesses at criminal jury trials under the Sixth Amendment.

Even assuming it is a legitimate interest, however, it is not furthered by California's open carry ban. The State's expert, Chief Kim Raney (Ret.), does assert that allowing open carry would result in a drain on law enforcement resources because of officers being called to investigate individuals openly carrying. Li Decl., Ex. 10, 101:9-105:2. But he has been shown to be basing his assertion on pure speculation. While Chief Raney has an extensive and distinguished law enforcement career, he has almost zero experience with open carry, having spent his career entirely in a jurisdiction where open carry was unlawful. *Id.* at 37:17-20, 39: 5-15, 46:23-47:15. He did not conduct or review any research on open carry from other jurisdictions that allows the practice. *Id.* at 105:10-20. Nor did he speak with officers from such jurisdictions in reaching his conclusions. *Id.* at 102:2-7, 106:22-107:4.

Plaintiffs' expert witnesses, on the other hand, both have extensive experience in open carry jurisdictions, and both included in their reports that open carry does not result in the types of law enforcement problems California seeks to address with its open carry ban. Brady Decl., Exs. 7 & 8. Moreover, even if Californians did initially react to open carry as the State suggests it might, the State

cannot say that the alleged problem will not abate over time when open carry becomes normative, as it has in all but a handful of the other states. *Id.*

The State's justifications for its laws might be sufficient, if licenses to carry were available to plaintiffs or concealed carry were legal. But it cannot ban all forms of carry and then claim that a specific issue associated with open carry justifies upholding the entire ban.

Finally, at least 40 states allow people to openly carry a firearm in public. Brady Decl. ¶ 10. Thirty-four of these states require no permit to carry openly, six of the states require a permit but distribute permits on a "shall issue" basis. Brady Decl. ¶ 13. Most of these states have allowed open carry for as long as they have existed. Brady Decl. ¶ 14. The fact that not even one of these states has decided to restrict the practice of open carrying firearms casts serious doubt on whether the State's purported public safety interest is furthered by forbidding open carry. It simply cannot be that all of these states are choosing to harm their residents.

CONCLUSION

The State derides Plaintiffs' view of the Second Amendment right to bear arms as "expansive." But, Plaintiffs are not arguing for a right to "carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Heller*, 554 U.S. at 626. Rather, they seek to exercise their right to carry "the quintessential self-defense weapon" in the manner favored by the State for the "core lawful purpose of self-defense." *Id.* at 629, 630. If the Second Amendment's right to bear arms does not protect this conduct, it might as well not be in the Constitution. Because the State completely bars the right to bear arms, there is no interest sufficient to justify the challenged laws under any level of constitutional scrutiny. The Court should deny the State's motion for summary judgment.

Dated: October 2, 2017

MICHEL & ASSOCIATES, P.C.

/s/ Sean A. Brady
Sean A. Brady
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

IN THE UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

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

IT IS HEREBY CERTIFIED THAT:

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

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

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

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

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I declare under penalty of perjury that the foregoing is true and correct.

Executed October 2, 2017

/s/ Laura Palmerin
Laura Palmerin