No. 12-57049

IN THE

United States Court of Appeals for the Ninth Circuit

DOROTHY MCKAY *et al.*,

Plaintiffs-Appellants,

v.

SHERIFF SANDRA HUTCHENS *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court
for the Central District of California, No. SACV 12-1458JVS
District Judge James V. Selna

BRIEF FOR *AMICI CURIAE* BRADY CENTER TO PREVENT GUN VIOLENCE; RON DAVIS AND LUCIA MCBATH, PARENTS OF JORDAN DAVIS; MAJOR CITIES CHIEFS ASSOCIATION; AND INTERNATIONAL BROTHERHOOD OF POLICE OFFICERS IN SUPPORT OF DEFENDANTS-APPELLEES AND IN SUPPORT OF AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the Brady Center to Prevent Gun Violence; Ron Davis and Lucia McBath, parents of Jordan Davis; Major Cities Chiefs Association; and International Brotherhood of Police Officers state that they have no parent corporations, nor have they issued shares or debt securities to the public. The organizations are not subsidiaries or affiliates of any publicly owned corporation, and no publicly held corporation holds ten percent of their stock.

/s/ Neil R. O'Hanlon
Neil R. O'Hanlon

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amicus Brady Center to Prevent Gun Violence is the nation's largest non-partisan, non-profit organization dedicated to reducing gun violence through education, research, and legal advocacy. Through its Legal Action Project, it has filed numerous *amicus curiae* briefs in cases involving firearms regulations, including *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3095 n.13, 3105 n.30, 3107 n.34 (2010) (Stevens, J., dissenting) (citing Brady Center brief), *United States v. Hayes*, 555 U.S. 415, 427 (2009) (citing Brady Center brief), and *District of Columbia v. Heller*, 554 U.S. 570 (2008). *Amicus* brings a broad and deep perspective to the issues raised here and has a compelling interest in ensuring that

the Second Amendment does not impede reasonable governmental action to prevent gun violence.

Amicus Major Cities Chiefs Association ("MCCA") is a professional association representing the largest cities in the United States and Canada. MCCA membership is comprised of chiefs and sheriffs of the 70 largest law enforcement agencies in the United States and Canada. Together they serve more than 76.5 million people (68 US, 8.5 Canada) with a combined sworn workforce of 177,150 (159,300 US, 17,850 Canada) officers.

Amicus International Brotherhood of Police Officers ("IBPO") is one of the largest police unions in the country, representing more than 25,000 members. While the IBPO fully supports and defends the Second Amendment right to keep and bear arms, it strongly supports states' authority to enforce reasonable and constitutional gun laws, which will protect the public and law enforcement officers.

Amici Ron Davis and Lucia McBath are the parents of Jordan Davis, a 17 year old who was shot and killed on November 23, 2012 as he sat in his car. The killer was licensed by the state of Florida to carry a loaded concealed firearm in public. He allegedly began firing after becoming upset that the music being played in Jordan's car was too loud.

INTRODUCTION

The right to keep and bear arms recognized in *District of Columbia v. Heller*, 554 U.S. 570 (2008), is unique among constitutional rights in the risks that it presents. Guns are designed to kill, and both gun possession and use subject others to a serious and often deadly risk of harm. While the Supreme Court held in *Heller* that the Second Amendment protects a limited right of law-abiding, responsible people to possess a gun *in the home* for self-defense, it has *never* recognized a far broader right to carry guns in public. *Id*. at 635. That restraint is well-founded. As this Court's sister Circuits have cautioned, the risks associated with gun carrying could "rise exponentially as one moved the right [announced in *Heller*] from the home to the public square." *United States v. Masciandaro*, 638 F.3d 458, 476 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 756 (2011). Neither *Heller* nor history undermines the longstanding authority of states to restrict public carrying of guns.

Regulations such as California's concealed carry provisions have deep roots in English and early American law, and have long been recognized *not* to implicate the right to bear arms. *Heller* stands firmly in that unbroken line of history. Specifically, *Heller* found concealed carrying prohibitions in line with permissible gun laws, *Heller*, 554 U.S. at 626-27, and did not disturb longstanding precedent that "the right of the people to keep and bear arms (article 2) is not infringed by

laws prohibiting the carrying of concealed weapons," *Robertson v. Baldwin*, 165 U.S. 275, 281-82 (1897). *Heller*, moreover, expressly approved of decisions upholding "prohibitions on carrying concealed weapons," as well as "the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.' " *Heller*, 554 U.S. at 626-27.

The District Court's decision upholding California's handgun permit requirements and Sheriff Hutchens's policy implementing those laws is consistent with the "assurances" of *Heller* and *McDonald* that "reasonable firearms regulations" remain permissible, and with the Supreme Court's well-established recognition that the exercise of protected activity must be balanced against legitimate public interests—chief among which is public safety. *McDonald*, 130 S. Ct. at 3046-47; *Heller*, 554 U.S. at 626-27 & n.26. Numerous courts—federal and state, trial and appellate—have either concluded that the Second Amendment does not extend beyond the home or have upheld restrictions or prohibitions on public carrying. *See, e.g.*, *infra* Section I.A. This Court should follow suit and affirm the judgment of the District Court.

ARGUMENT

California's handgun permitting process and Sheriff Hutchens's policy implementing that process are constitutional for two reasons. First, neither burdens the right of a law-abiding citizen to possess guns in the home and therefore does

not implicate protected Second Amendment activity. Second, even if they do, the permitting process and Sheriff Hutchens's policy survive the applicable level of scrutiny because they are well-tailored to furthering California's compelling interest in preventing gun violence.

I. CALIFORNIA'S CONCEALED WEAPONS PERMITTING PROCESS AND SHERIFF HUTCHENS'S POLICY IMPLEMENTING THAT PROCESS DO NOT IMPLICATE PROTECTED SECOND AMENDMENT ACTIVITY BECAUSE THEY DO NOT IMPACT THE RIGHT TO POSSESS FIREARMS IN THE HOME RECOGNIZED IN *HELLER* AND *MCDONALD*.

The Supreme Court's decision in *Heller* recognized that the Second Amendment protects "the right of law-abiding, responsible citizens to use arms *in defense of hearth and home*." *Heller*, 554 U.S. at 635 (emphasis added). Contrary to Appellants' portrayal of the holding, *see* Appellants' Br. at 21-28, the Court only recognized Heller's right "to carry [] *in the home*," *id.* (emphasis added), and did not endorse a constitutional right to carry firearms in public. *See id*. It focused on the historical recognition of the right of individuals "to keep and bear arms to defend their homes, families or themselves," *id.* at 615 (internal quotation marks omitted), and the continuing need to keep and use firearms "in defense of hearth and home." *Id.* at 635. Accordingly, the Court held only that "the District's ban on handgun possession *in the home* violates the Second Amendment, as does its prohibition against rendering any lawful firearm *in the home* operable for the purpose of immediate self-defense." *Id.* at 635 (emphasis added); *see also*

Robertson v. Baldwin, 165 U.S. at 281-82 ("[T]he right of the people to keep and bear arms (article 2) is not infringed by laws prohibiting the carrying of concealed weapons . . . .").

Appellants argue, in essence, that the *Heller* Court embraced a constitutional right to carry guns in public, but for some reason chose not to say so explicitly. That misreads *Heller*. Appellants cannot explain why the Court, though expounding upon a wide range of gun laws beyond those directly at issue, and aware that District law barred (and still bars) Mr. Heller from carrying guns in public, openly or concealed, repeatedly and explicitly stated that it was only granting him a right to "carry [] in the home." *Heller*, 554 U.S. at 635; D.C. Code § 22-4504. Appellants do not explain why the Court—despite dedicating Part III of its opinion to discussing numerous gun laws not at issue, and holding both that the Second Amendment was "not unlimited" and that a (non-exhaustive) host of gun laws remained "presumptively lawful"—did not even suggest Mr. Heller was being deprived of a right to carry guns anywhere *beyond* his home. Nor can Appellants explain why the *Heller* Court expressly approved of decisions upholding concealed carry bans, but chose not to state the inverse point that is crucial to their argument: that some form of public carrying must be permitted. And any argument that the Court's approval of bans on carrying in sensitive places implied disapproval of bans on carrying in nonsensitive places ignores the Court's

cautionary note: "We identify these presumptively lawful regulatory measures only as *examples*; our list does *not* purport to be exhaustive." *Id*. at 627 n.26 (emphasis added).[1]

In *McDonald*, the Court incorporated the Second Amendment to states, but "repeat[ed]" *Heller*'s "assurances" regarding its limited scope, and agreed that "state and local experimentation with reasonable firearms regulations will continue under the Second Amendment." *McDonald*, 130 S. Ct. at 3046-47 (internal citation omitted). Once again, the Court did not extend the Second Amendment right beyond the home, or cast doubt on *Robertson*.

A. Courts Post-*Heller* Have Agreed That the Second Amendment Does Not Extend Beyond the Home To Protect Public Gun Carrying.

The District Court concluded that Appellants did not have a likelihood of showing that either California's concealed weapons provisions or the local policies adopted to implement those laws violated their constitutional rights. *See McKay v. Hutchens*, No. 8:12-cv-01458-JVS-JPR, slip op. at 4 (C.D. Cal. Jan. 13, 2012). That holding is consistent with those of numerous other courts that have declined to extend the Second Amendment's scope to strike down laws regulating the possession of firearms beyond the home.

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[1] *See also Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 700 F.3d 185, 196 (5th Cir. 2012) ("[A] longstanding, presumptively lawful regulatory measure—whether or not it is specified on *Heller*'s illustrative list—would likely fall outside the ambit of the Second Amendment . . . .").

Other federal appellate courts have exercised appropriate caution in defining the scope of the Second Amendment. For example, the Fourth Circuit has declined to extend the Second Amendment right beyond the home, refusing to "push *Heller* beyond its undisputed core holding."[2] *Masciandaro*, 638 F.3d at 475. The court reasoned:

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

Id. at 475-76.[3] And the D.C. Circuit has warned against holding "longstanding" handgun regulations—such as California's permit requirement—unconstitutional. *Heller v. District of Columbia*, 670 F.3d 1244, 1253 (D.C. Cir. 2011) ("*Heller II*")

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[2] *Moore v. Madigan*, --- F.3d ----, 2012 WL 6156062 (7th Cir. Dec. 11, 2012), disregards the fact that *Heller* carefully limited its holding to the home. Instead, the two-judge majority there relied on a three-sentence syllogism to conclude that, because "[t]o speak of 'bearing' arms within one's home" would have been "awkward," a "right to bear arms thus implies a right to carry a loaded gun outside the home." *Id.* at *2.

[3] Two district courts within the Fourth Circuit improperly have disregarded *Masciandaro*'s warning that the Supreme Court has not extended this right outside the home, relying instead on Judge Niemeyer's minority views expressed in his separate *Masciandaro* opinion. *Bateman v. Perdue*, No. 5:10-CV-265-H, 2011 WL 1261575 (E.D.N.C. Mar. 31, 2011); *Woollard v. Sheridan*, 863 F. Supp. 2d 462, 469 (D. Md. 2012). *See* Dennis A. Henigan, *The* Woollard *Decision and the Lessons of the Trayvon Martin Tragedy*, 71 Md. L. Rev. 1188, 1191 (2012) (noting that *Woollard* "ignored the Fourth Circuit's wise counsel, as [it] distorted the *Heller* ruling beyond recognition").

(noting that a longstanding regulation is one that "has long been accepted by the public," and "concomitantly the activities covered by a longstanding regulation are presumptively not protected from regulation by the Second Amendment").

The vast majority of federal district courts have taken a similar approach, holding "the Court, both in *Heller*, and subsequently in *McDonald*, took painstaking effort to clearly enumerate that the scope of *Heller* extends only to the right to keep a firearm *in the home* for self-defense purposes." *Richards v. County of Yolo*, 821 F. Supp. 2d 1169, 1174 & n.4 (E.D. Cal. 2011). [4]

Moreover, state appellate courts have agreed that *Heller* is confined to the home. *See, e.g.*, *Riddick v. United States*, 995 A.2d 212, 222 (D.C. 2010); *People v. Williams*, 962 N.E.2d 1148, 1152 (Ill. App. Ct. 2011) ("[T]he rulings in both *Heller* and *McDonald* made clear that the only type of firearms possession they were declaring to be protected under the second amendment was the right to possess handguns in the home for self-defense purposes."); *State v. Knight*, 218 P.3d 1177, 1189 (Kan. Ct. App. 2009) ("It is clear that the [*Heller*] Court was

[4] *See also, e.g.*, *Dorr v. Weber*, 741 F. Supp. 2d 993, 1005 (N.D. Iowa 2010) ("[A] right to carry a concealed weapon under the Second Amendment has not been recognized to date."); *United States v. Hart*, 726 F. Supp. 2d 56, 60 (D. Mass. 2010) ("[Defendant] suggests this right extends to the possession of concealed handguns outside one's home. *Heller* does not hold, nor even suggest, that concealed weapons laws are unconstitutional."); *United States v. Tooley*, 717 F. Supp. 2d 580, 596 (S.D.W. Va. 2010) ("Additionally, possession of a firearm outside of the home or for purposes other than self-defense in the home are not within the 'core' of the Second Amendment right as defined by *Heller*.").

drawing a narrow line regarding the violations related solely to use of a handgun in the home for self-defense purposes.").

The District Court's opinion here is thus fully consistent with the views of a broad swath of courts across the country after *Heller*. It would be out of step with these cases for a federal appellate court to hold now that the Constitution bars states and communities from restricting public gun carrying, or—as California has done—from allowing those tasked with protecting public safety to determine whether "good cause" exists to allow the carrying of handguns into public spaces. *See* Cal. Penal Code § 26150 (formerly § 12050). The District Court's sound holding should be affirmed.

B. The Right Recognized In *Heller* Is Subject To Historical Restrictions and Prohibitions on Public Carrying of Firearms.

A finding that California's licensing scheme does not implicate protected activity is fully consistent with the historical record of enumerated rights protected by the Second Amendment. The Supreme Court has stated that the Second Amendment codified a preexisting right, "inherited from our English ancestors . . . subject to certain well-recognized exceptions . . . which continued to be recognized as if they had been formally expressed." *Robertson*, 165 U.S. at 281; *see also Heller*, 554 U.S. at 592-95, 600-03, 605-19, 626-28 (tracing the right to bear arms through Anglo-American origins and state analogues); *McDonald*, 130 S. Ct. at 3056 ("[T]raditional restrictions" on the Second Amendment "show the scope of

the right," just as they do "for *other* rights.") (Scalia, J., concurring). And *Heller* stated specifically that it was not "to cast doubt on longstanding prohibitions" in the history of Anglo-American jurisprudence.[5] 554 U.S. at 626.

Among the "longstanding prohibitions" cited in *Heller* were "prohibitions on carrying concealed weapons." *Id.* at 626; *see also Robertson*, 165 U.S. at 281-82 (one of those exceptions is that "the right of the people to keep and bear arms . . . is not infringed by laws prohibiting the carrying of concealed weapons . . . ."). *Heller* also recognized the "historical tradition of prohibiting the carrying of 'dangerous and unusual weapons,'" a limitation construed to allow for prohibitions on the public carrying of handguns. 554 U.S. at 627.

Heller cited as authority for this "historical tradition" the 19th-century case of *English v. State*, 35 Tex. 473 (1871) (cited in *Heller*, 554 U.S. at 627), in which the Texas Supreme Court upheld a conviction for carrying a pistol in public under a statute banning the public carry of deadly weapons, including handguns. In reaching that conclusion, the Texas court tracked the history of analogous statutes, noting that Blackstone had characterized "the offense of riding around or going

[5] In *Moore*, while acknowledging that "the Supreme Court has not yet addressed the question whether the Second Amendment creates a right of self-defense outside the home," 2012 WL 6156062, at *1, the Seventh Circuit also paradoxically refused to consider historical evidence showing that the right to bear arms was limited to the home on the grounds that to do so would "repudiate the Court's historical analysis." *Id.* at *2. *But see id.* at *10 (Williams, J., dissenting) ("By asking us to make that assessment, the State is not asking us to reject the Court's historical analysis in *Heller*; rather, it is being true to it.").

around with dangerous or unusual weapons" as a crime. 35 Tex. at 476. *English* further traced the roots of such statutes back through "the statute of Northampton (2 Edward III, c.3)," the "early common law of England," and even to "the laws of Solon" in ancient Greece. *Id.* The court rebuffed the argument that the Second Amendment prohibited such laws, noting that it was "useless to talk about personal liberty being infringed by laws such as that under consideration." *Id.* at 477. As such, it was a "little short of ridiculous, that any one should claim the right to carry upon his person any of the mischievous devices inhibited by the statute, into a peaceable public assembly, as, for instance into a church . . . or any other place where ladies and gentlemen are congregated together." *Id.* at 478-79. The *English* court recognized that prohibiting the public carry of deadly weapons was important to prevent crime, and it quoted John Stewart Mill that "[i]t is one of the undisputed functions of government, to take precautions against crime before it has been committed, as well as to detect and punish afterwards," given "[t]he right inherent in society to ward off crimes against itself by antecedent precautions. . . ." 35 Tex. at 478.

English recognized that restrictions and prohibitions on public carrying were widespread: "It is safe to say that almost, if not every one of the states of this Union have a similar law upon their statute books, and, indeed, so far as we have been able to examine them, they are more rigorous than the act under

consideration." *Id.* at 479. Indeed, even Wyatt Earp prohibited gun carrying in Dodge City. *See* Dodge City, Kan., Ordinance No. 16, § XI (Sept. 22, 1876); *see also* 1876 Wyo. Comp. Laws ch. 52, § 1 (1876 Wyoming law prohibiting anyone from "bear[ing] upon his person, concealed or openly, any firearm or other deadly weapon, within the limits of any city, town or village"); Ark. Act of Apr. 1, 1881; Tex. Act of Apr. 12, 1871; *Fife v. State*, 31 Ark. 455 (1876) (upholding carrying prohibition as a lawful "exercise of the police power of the State without any infringement of the constitutional right" to bear arms); *Hill v. State*, 53 Ga. 472, 474 (1874) ("at a loss to follow the line of thought that extends the guarantee"—the state constitutional "right of the people to keep and bear arms"—"to the right to carry pistols, dirks, Bowieknives, and those other weapons of like character, which, as all admit, are the greatest nuisances of our day"); *State v. Workman*, 35 W. Va. 367, 373 (1891); *Ex parte Thomas*, 97 P. 260, 262 (Okla. 1908) ("Practically all of the states under constitutional provisions similar to ours have held that acts of the Legislatures against the carrying of weapons concealed did not conflict with such constitutional provision denying infringement of the right to bear arms, but were a valid exercise of the police power of the state . . . ."); *Aymette v. State*, 21 Tenn. 154, 159-61 (1840) ("The Legislature, therefore, have a right to prohibit the wearing or keeping weapons dangerous to the peace and safety of the citizens, and which are not usual in civilized warfare, or would not

contribute to the common defence."); *State v. Buzzard*, 4 Ark. 18, 21 (1842); *State v. Jumel*, 13 La. Ann. 399, 400 (1858).[6]

Another authority cited by *Heller*, 554 U.S. at 608, 613, 629, *Andrews v. State*, 50 Tenn. 165, 188-89 (1871), similarly drew a sharp distinction between carrying firearms at home and in public, explaining that "no law can punish" a man "while he uses such arms at home or on his own property,"

> Yet, when he carries his property abroad, goes among the people in public assemblages where others are to be affected by his own conduct, then he brings himself within the pale of public regulation, and must submit to such restriction on the mode of using or carrying his property as the people through their Legislature, shall see fit to impose for the general good.

Accordingly, the historic scope of the right to keep and bear arms properly includes a recognition that restricting public carry was not understood to implicate the right. *See* Patrick J. Charles, *The Faces of the Second Amendment Outside the Home*, 60 Cleveland St. L. Rev. 1, 8 (2012) (hereinafter Charles, *Outside the Home*) (quoting 2 Edw. 3, c.3 (1328) (Eng.)); Darrell A. H. Miller, *Guns As Smut: Defending the Home-Bound Second Amendment*, 109 Colum. L. Rev. 1278, 1318 n.246 (2009) (noting that Blackstone compared the Statute of Northampton to "the

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[6] *Bliss v. Commonwealth*, 12 Ky. 90, 91, 93 (1822), in which Kentucky's Supreme Court held Kentucky's concealed-weapons ban in conflict with its Constitution, is recognized as an exception to this precedent. *See* Joel Prentiss Bishop, *Commentaries on the Criminal Law* § 125, at 75-76 (1868). In fact, the legislature later corrected the anomalous decision by amending its constitution to allow a concealed weapons ban. *See* Ky. Const. of 1850, art. XIII, § 25.

laws of Solon," under which "every Athenian was finable who walked about the city in armour") (quoting 2 William Blackstone, Commentaries *149).

Noted scholars and commentators have also long recognized that a right to keep and bear arms does not prevent states from restricting or forbidding guns in public places. For example, John Norton Pomeroy's Treatise, which *Heller* cited as representative of "post-Civil War 19th-century sources" commenting on the right to bear arms, 554 U.S. at 618, stated that the right to keep and bear arms "is certainly not violated by laws forbidding persons to carry dangerous or concealed weapons . . . ." John Norton Pomeroy, *An Introduction to the Constitutional Law of the United States*, 152-53 (1868). Similarly, Judge John Dillon explained that even where there is a right to bear arms, "the peace of society and the safety of peaceable citizens plead loudly for protection against the evils which result from permitting other citizens to go armed with dangerous weapons." Hon. John Dillon, *The Right to Keep and Bear Arms for Public and Private Defense (Part 3)*, 1 Cent. L. J. 259, 287 (1874). And an authoritative study published in 1904 concluded that the Second Amendment and similar state constitutional provisions had "not prevented the very general enactment of statutes forbidding the carrying of concealed weapons," which demonstrated that "constitutional rights must if possible be so interpreted as not to conflict with the requirements of peace, order and security." Ernst Freund, *The Police Power, Public Policy and Constitutional*

Rights (1904).[7]

Such "restrictions began appearing on the carrying or using of 'arms' as a means to prevent public injury" since "the Norman Conquest." Patrick J. Charles, *Scribble Scrabble, the Second Amendment, and Historical Guideposts: A Short Reply to Lawrence Rosenthal and Joyce Lee Malcolm*, 105 Nw. U. L. Rev. Colloquy 225 (2011). *See also* Darrell A. H. Miller, *supra* 14, at 1354 ("[S]tates and municipalities, far more sensitive to local needs and gun cultures, should be given free reign to design gun control policy that fits their specific demographic."). To hold that the Constitution dictates that public carry *must* be permitted carves into stone a rule that prevents state and local governments from adopting arms regulations that have been recognized since antiquity as one of the ways in which government protects the public good. The District Court's holding protects that legislative discretion that Appellants now seek to eliminate.

[7] An authority cited by the *Heller* Court on the Second Amendment's original meaning concluded that the only public carrying of firearms protected by the Second Amendment "is such transportation as is implicit in the concept of a right to possess—*e.g.*, transporting them between the purchaser or owner's premises and a shooting range, or a gun store or gun smith and so on." Don B. Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 Mich. L. Rev. 204, 267 (1983).

II. EVEN IF CALIFORNIA'S PERMITTING PROCESS IMPLICATES SECOND AMENDMENT RIGHTS, IT WOULD WITHSTAND THE APPROPRIATE LEVEL OF SCRUTINY.

A. Strict Scrutiny Does Not Apply.

Heller implicitly rejected any form of heightened scrutiny that would require the government to ensure that firearms legislation has a tight fit between means and ends. The Court recognized that the Constitution provides legislatures with "a variety of tools for combating" the "problem of handgun violence," *Heller*, 554 U.S. at 636, and deemed a host of existing firearms regulations to be "presumptively lawful" without subjecting those laws to any analysis, much less strict scrutiny. *Id.* at 626-27 & n.26. In the aftermath of *Heller* and *McDonald*, an overwhelming majority of Circuits have rejected strict scrutiny. *See, e.g.*, *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 93-97 (2d Cir. 2012); *Nat'l Rifle Ass'n.*, 700 F.3d at 196; *United States v. Marzzarella*, 614 F.3d 85, 98 (3d Cir. 2010); *United States v. Chester*, 628 F.3d 673, 682-83 (4th Cir. 2010); *United States v. Reese*, 627 F.3d 792, 802 (10th Cir. 2010).

While these courts have applied some form of intermediate scrutiny, it bears note that state courts construing analogous state rights to bear arms have long applied a more deferential "reasonable regulation" test.[8] Under that test, a state

[8] *See* Adam Winkler, *Scrutinizing the Second Amendment*, 105 Mich. L. Rev. 683, 686-87, n. 12 (2007) (describing "hundreds of opinions" by state courts with "surprisingly little variation" that have adopted the "reasonableness" standard for right-to-bear-arms cases).

"may regulate the exercise of [the] right [to bear arms] under its inherent police power so long as the exercise of that power is reasonable." *Robertson v. City & Cnty. of Denver*, 874 P.2d 325, 328 (Colo. 1994); *accord State v. Mendoza*, 920 P.2d 357, 368 (Haw. 1996).[9]

B. The Statute Satisfies Appropriate Scrutiny.

By any measure, the law here is constitutional because California "has substantial, indeed compelling, governmental interests in public safety and crime prevention." *Kachalsky*, 703 F.3d at 97. Indeed, the Second Circuit recently upheld New York's permitting scheme, which closely paralleled Sheriff Hutchens's policy at issue here. *Compare id.* at 86 (noting that a concealed-carry permit applicant must "demonstrate a special need for self-protection" and that a "generalized desire to carry a concealed weapon to protect one's person" would be insufficient (internal quotation mark omitted)) *with* Appellants' Br. Addend. 000098 (noting that "good cause" is defined as, among other things, "specific evidence that there has been or is likely to be an attempt on the part of a second

[9] Though more deferential than intermediate scrutiny, the test is more demanding than rational basis, and does not possess the fatal flaw in the "interest balancing" test suggested by Justice Breyer's *Heller* dissent, because it does not permit states to prohibit all firearm ownership. On the contrary, under "reasonable regulation," laws that "eviscerate," *State v. Hamdan*, 665 N.W.2d 785, 799 (Wis. 2002), render "nugatory," *Trinen v. City of Denver*, 53 P.3d 754, 757 (Colo. Ct. App. 2002), or result in the effective "destruction" of a Second Amendment right, *State v. Dawson*, 159 S.E.2d 1, 11 (N.C. 1968), would be struck down. The test focuses on whether "the restriction . . . is a reasonable exercise of the State's inherent police powers." *State v. Cole*, 665 N.W.2d 328, 338 (Wis. 2003).

party to do great bodily harm to the applicant" or the applicant's business or occupation being "such that it is subject to . . . far greater risk than the general population").

Like New York, California's "decision to regulate handgun possession [in public] was premised on the belief that it would have an appreciable impact on public safety and crime prevention" and restricting such possession "to those who have a reason to possess the weapon for a lawful purpose is substantially related to [its] interest in public safety and crime prevention." *Kachalsky*, 701 F.3d at 98. As the Illinois Appellate Court explained:

> In his home, an individual generally may be better able to accurately assess a threat to his safety due to his familiarity with his surroundings and knowledge of his household's occupants. In public, however, there is no comparable familiarity or knowledge, and, thus, an increased danger that an individual carrying a loaded firearm will jump to inaccurate conclusions about the need to use a firearm for self-defense. The extensive training law enforcement officers undergo concerning the use of firearms attests to the degree of difficulty and level of skill necessary to competently assess potential threats in public situations and moderate the use of force.

People v. Williams, 964 N.E.2d 557, 571 (Ill. App. Ct. 2011) (quoting *People v. Mimes*, 953 N.E.2d 55, 77 (Ill. App. Ct. 2011)); *accord People v. Yarbrough*, 86 Cal. Rptr. 3d 674, 682 (Cal. Ct. App. 2008); *United States v. Walker*, 380 A.2d 1388, 1390 (D.C. 1977) (noting "inherent risk of harm to the public of such dangerous instrumentality being carried about the community and away from the residence or business of the possessor"). The carrying of firearms in public

introduces risks not presented by firearm possession in the home and thus undoubtedly implicates significant and important State interests. Three aspects are worthy of note.

First, carrying firearms outside the home threatens the safety of a broader range of individuals. Firearms kept in the home are primarily a threat to gun owners, and their family members, friends, and houseguests.[10] But firearms carried in public present a threat to strangers, law enforcement offices, random passersby, and other citizens. Such guns expose all members of society to great risks, as guns are "used far more often to intimidate and threaten than they are used to thwart crimes." David Hemenway & Deborah Azrael, *The Relative Frequency of Offensive and Defensive Gun Uses: Results From a National Survey*, 15 Violence & Victims 257, 271 (2000). Over the last five years, concealed handgun

[10] *See, e.g.*, Matthew Miller *et al.*, *State-Level Homicide Victimization Rates in the US in Relation to Survey Measures of Household Firearm Ownership, 2001-2003*, 64 Soc. Sci. & Med. 656 (Feb. 2007) ("States with higher rates of firearm ownership had significantly higher homicide victimization rates."); Lisa M. Hepburn & David Hemenway, *Firearm Availability and Homicide: A Review of the Literature*, 9 Aggression & Violent Behav. 417 (2004) ("[H]ouseholds with firearms are at higher risk for homicide, and there is no net beneficial effect of firearm ownership."); Matthew Miller *et al.*, *Rates of Household Firearm Ownership and Homicide Across US Regions and States, 1988–1997*, 92 Am. J. Pub. Health 1988, 1988 (Dec. 2002) ("[I]n areas where household firearm ownership rates were higher, a disproportionately large number of people died from homicide."); Mark Duggan, *More Guns, More Crime*, 109 J. Pol. Econ. 1086 (2001); Matthew Miller *et al.*, *Firearm Availability and Unintentional Firearm Deaths*, 33 Accident Analysis & Prevention 477 (Jul. 2000) ("A statistically significant and robust association exists between gun availability and unintentional firearm deaths.").

permit holders have shot and killed over 400 people, including fourteen law enforcement officers. *See* Violence Policy Center, *Concealed Carry Killers* (2013), *available at* http://vpc.org/ccwkillers.htm (last accessed Jan. 24, 2013).

Second, carrying firearms in public is not an effective form of self-defense. In fact, public carrying repeatedly has been shown to *increase* the chances that one will fall victim to violent crime. Most states that broadly allow concealed carrying of firearms in public appear to "experience increases in violent crime, murder, and robbery when [those] laws are adopted." John Donohue, *The Impact of Concealed-Carry Laws*, Evaluating Gun Policy Effects on Crime and Violence 289, 320 (2003). Laws broadly allowing concealed carrying of weapons "have resulted, if anything, in an *increase* in adult homicide rates." Jens Ludwig, *Concealed-Gun-Carrying Laws and Violent Crime: Evidence from State Panel Data*, 18 Int'l Rev. L. & Econ. 239 (1998). Likewise, "firearms homicides increased in the aftermath of [enactment of these] laws," and such laws may "raise levels of firearms murders" and "increase the frequency of homicide." David McDowall *et al.*, *Easing Concealed Firearms Laws: Effects on Homicide in Three States*, 86 J. Crim. L. & Criminology 193, 202-203 (1995). Similarly, "[f]or robbery, many states experience increases in crime" after concealed carry laws are enacted. Hashem Dezhbakhsh & Paul Rubin, *Lives Saved or Lives Lost? The*

Effects of Concealed-Handgun Laws on Crime, 88 Am. Econ. Rev. 468 (May 1998).

Analyses of the connection between increased gun prevalence and crime "indicate a rather substantial increase in robbery," John Donohue, *Guns, Crime, and the Impact of State Right-To-Carry Laws*, 73 Fordham L. Rev. 623, 633 (2004), while "policies to *discourage* firearms in public may help prevent violence." McDowall *et al.*, *Easing Concealed Firearms Laws*, 86 J. Crim. L. & Criminology at 203 (emphasis added). Another study found that "gun possession by urban adults was associated with a significantly increased risk of being shot in an assault," and that "guns did not seem to protect those who possessed them from being shot in an assault." Charles C. Branas *et al.*, *Investigating the Link Between Gun Possession and Gun Assault*, 99 Am. J. Pub. Health 2034 (Nov. 2009). Likewise, another study found that:

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

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

Third, the carrying of firearms in public negatively implicates other social

issues and portends societal ills unlike firearms in the home. For one, if drivers carry loaded guns, road rage can become a more serious and potentially deadly phenomenon. David Hemenway, *Road Rage in Arizona: Armed and Dangerous*, 34 Accident Analysis and Prevention 807-14 (2002). Increases in gun prevalence in public may cause an intensification of criminal violence. Philip Cook & Jens Ludwig, *The Social Costs of Gun Ownership*, 90 J. Pub. Econ. 379, 387 (2006).

Further, law enforcement's ability to protect themselves and the public could be greatly restricted if officers were required to presume that a person carrying a firearm in public was doing so lawfully. When the carrying of guns in public is restricted, "possession of a concealed firearm by an individual in public is sufficient to create a reasonable suspicion that the individual may be dangerous, such that an officer can approach the individual and briefly detain him in order to investigate whether the person is properly licensed." *Commonwealth v. Robinson*, 600 A.2d 957, 959 (Pa. Super. Ct. 1991); *accord Commonwealth v. Romero*, 673 A.2d 374, 377 (Pa. Super. Ct. 1996). By contrast, under an expansive Second Amendment regime, an officer might not be deemed to have cause to arrest, search, or stop a person seen carrying a loaded gun, even though far less risky behavior could justify police intervention. Law enforcement should not have to wait for a gun to be fired before protecting the public.

The California provisions at issue do not infringe on the Second Amendment rights of law-abiding, responsible citizens to carry a gun in the home for the self-defense. To the contrary, state law recognizes a variety of exceptions—including carrying by private investigators, members of the military, hunters, and target shooters, as well as by any person who "reasonably believes that any person or the property of any person is in immediate, grave danger" and believes that carrying a weapon is necessary. Cal. Penal Code § 26045(a). The Second Amendment does not forbid state or local governments from restricting the public carrying of firearms as California has done.

States have significant interests in averting the spike in gun crimes and accidental shootings that will result from unrestricted public carrying. California "determined that limiting handgun possession to persons who have an articulable basis for believing they will need the weapon for self-defense is in the best interest of public safety and outweighs the need to have a handgun for an unexpected confrontation." *Kachalsky*, 703 F.3d at 100. It "did not run afoul of the Second Amendment by doing so."[11] *Id.* This Court should affirm the District Court's sound conclusion and find California's concealed carry provisions and Sheriff Hutchens's policy implementing those provisions constitutional.

[11] Moreover, to the extent disagreements arise over the probative value of the studies cited above, "[i]t is the legislature's job, not [the courts'], to weigh conflicting evidence and make policy judgments." *Kachalsky*, 703 F.3d at 99.

CONCLUSION

For all the foregoing reasons, as well as those stated by Appellees, this Court should affirm the decision of the District Court.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 29(d) and Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 6,156 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

This brief also complies with the typeface requirements of Rule 32(a)(5)(A) and the type style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in 14-point font and in Times New Roman.

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Dated: January 24, 2013

CERTIFICATE OF SERVICE

I hereby certify that on January 24, 2013, I filed this *Amici Curiae* brief with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system, which will electronically serve this brief on all parties and participants in this case.

/s/ Neil R. O'Hanlon
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Dated: January 24, 2013

CONSENT TO FILE

Pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure, *Amici* requested consent from all parties on January 23, 2013. All parties consented to this filing. No party's counsel authored this brief in whole or in part. No party, party's counsel, or person other than *amici*, their members, or counsel, contributed money intended to fund preparation and submission of this brief.

/s/ Neil R. O'Hanlon
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Dated: January 24, 2013