DOCKET NO. 12-57049

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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DOROTHY McKAY, et al.,

*Plaintiffs-Appellants*

v.

SHERIFF SANDRA HUTCHENS, et al.,

*Defendants-Appellees*

---

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

(SACV 12-1448JVS)

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# MOTION OF THE NRA CIVIL RIGHTS DEFENSE FUND TO EXTEND TIME TO FILE MOTION FOR LEAVE TO APPEAR AS AMICUS CURIAE, AND TO EXTEND TIME TO FILE AMICUS CURIAE BRIEF

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**Counsel for Amicus Curiae**
**NRA Civil Rights Defense Fund**

## DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for the *amicus curiae* certifies the following: The NRA Civil Rights Defense Fund is a trust recognized by the Internal Revenue Service as a 26 U.S.C. § 501(c) (3) entity. The fund has not issued stock or debt securities to the public, and no publicly-held corporation owns ten percent or more of its stock. The National Rifle Association of America is a New York not-for-profit corporation. It does not have a parent corporation, it has not issued stock or debt securities to the public, and no publicly-held corporation owns ten percent or more of it stock. It is recognized by the Internal Revenue Service as a 26 U.S.C. § 501(c) (4) corporation.

Pursuant to Fed. Rule App. Proc. 26(b), the NRA Civil Rights Defense Fund (NRACRDF) respectfully moves this court to extend time for filing its brief amicus curiae, and the accompanying motion for leave to appear as an amicus curiae, in the above-captioned matter. In further support hereof, counsel states:

1. The plaintiffs-appellants, whom the NRACRDF's brief would support, filed their principal brief on November 29, 2012. Pursuant to Fed. Rule. App. Proc. 29(e), the motions to appear as amici, and the amicus curiae briefs, of supporting amici were due no later than December 6, 2012.
2. As of November 29, 2012, counsel for the amicus curiae was neither a member of the bar of this court, nor registered for CM/ECF filings in this circuit.
3. On November 30, 2012, in addition to applying for membership in the bar of this court, counsel for the amicus amended his appellate CM/ECF registration to add this circuit. At that time, counsel received notice from PACER that the amendment could take up to 10 days to take effect.
4. Concerned that his 9th Circuit CM/ECF registration might not take effect by the December 6 filing deadline, counsel contacted the Clerk's Office and was advised that absent an active 9th Circuit CM/ECF registration, he should file his brief and accompanying motion in hard copy form.
5. As of December 6, 2012, counsel for the amicus believed – mistakenly -- that his 9th Circuit CM/ECF registration was still being processed, and was yet active.
6. The NRACRDF's amicus curiae brief, and the accompanying motion or leave to appear as an amicus, were tendered for paper filing on December 6, 2012, via third-party commercial carrier for delivery within three days, in compliance with Fed. Rule App. Proc. 25(a)(2)(B)(i).

7. On December 10, 2012, the Clerk's Office informed counsel that those paper filings were being rejected, and that counsel's 9th Circuit CM/ECF registration had in fact been processed on November 30, 2012. Counsel was able to verify this by logging into the 9th Circuit CM/ECF system.
8. Had counsel realized that his 9th Circuit CM/ECF registration was active as of December 6, 2012, he would have electronically filed the amicus curiae brief and accompanying motion to appear as amicus curiae on that date. In fact, counsel would have strongly preferred to file electronically, as it is vastly more convenient than filing paper documents.

The NRA Civil Rights Defense Fund hereby moves that this court extend the time for filing its amicus curiae brief, and the accompanying motion for leave to appear as an amicus curiae, to December 10, 2012. The brief, and the accompanying motion to appear as amicus curiae, are being tendered contemporaneously with the filing of this motion. Since counsel for the defendants-appellees was served with a hard copy of substantially the same brief on December 6, 2012 (via third-party commercial carrier, for delivery within three days), the granting of this motion to extend the time for filing would not prejudice the defendants-appellees.

Respectfully submitted,

s/ Matthew H. Bower
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**CERTIFICATION OF DIGITAL SUBMISSIONS AND ELECTRONIC SERVICE**

1. All required privacy redactions, if any, have been made and, with the exception of those redactions, every document submitted in digital form is an exact copy of the written document filed with the Clerk.

2. This digital submission has been scanned for viruses with Trend Micro OfficeScan version 10.5.1766 (Virus Scan Engine 9.700.1001), last updated 12/10/2012, and this submission is free of viruses.

3. The hard copies of the foregoing submitted to the Clerk are exact copies of the version that is being electronically filed.

Date: December 10, 2012

s/Matthew H Bower
Matthew H. Bower
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## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on December 10, 2012.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/Matthew H Bower
Matthew H. Bower

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UNITED STATES COURT OF APPEALS
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APPEAL FROM THE UNITED STATES DISTRICT COURT
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(SACV 12-1448JVS)

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# MOTION OF THE NRA CIVIL RIGHTS DEFENSE FUND TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANTS AND IN SUPPORT OF REVERSAL

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**Counsel for Amicus Curiae**
**NRA Civil Rights Defense Fund**

## DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for the *amicus curiae* certifies the following: The NRA Civil Rights Defense Fund is a trust recognized by the Internal Revenue Service as a 26 U.S.C. § 501(c) (3) entity. The fund has not issued stock or debt securities to the public, and no publicly-held corporation owns ten percent or more of its stock. The National Rifle Association of America is a New York not-for-profit corporation. It does not have a parent corporation, it has not issued stock or debt securities to the public, and no publicly-held corporation owns ten percent or more of it stock. It is recognized by the Internal Revenue Service as a 26 U.S.C. § 501(c) (4) corporation.

The NRA Civil Rights Defense Fund (hereafter fund) pursuant to Fed. Rule App. Procedure 29(b) and respectfully asks for leave to appear, by brief only, and file its amicus curiae brief (which is being tendered herewith). In further support hereof, counsel states:

1. The NRA Civil Rights Defense Fund received consent to file its brief from counsel for the appellants. Counsel for the appellees refused to give consent.

2. The NRA Civil Rights Defense Fund is an entity established pursuant to § 501 (c) (3) of the Internal Revenue Code.

3. The fund is organized exclusively for the following purposes:

A. Voluntarily to assist in the preservation and defense of the human, civil, and/or constitutional rights of the individual to keep and bear arms in a free society;

B. To give financial aid gratuitously and to supply legal counsel, which counsel may or may not be directly employed by the fund, to such persons who may appear worthy thereof, who are suffering or are threatened legal injustice or infringement in their said human, civil, and constitutional rights, and who are unable to obtain such counsel or redress such injustice without assistance;

C. To conduct inquiry and research, acquire, collate, compile, and publish information, facts, statistics, and scholarly works on the origins, development and current status of said human, civil, and constitutional rights, and the extent and adequacy of the protection of such rights;

D. To encourage, sponsor, and facilitate the cultivation and understanding of the aforesaid human, civil, and constitutional rights which are protected by the constitution, statutes, and laws of the United States of America or the various states and territories thereof, or which are established by the common law, through the

giving of lectures and the publication of addresses, essays, treatises, reports, and other literary and research works in the field of said human, civil, and constitutional rights;

E. To make donations to organizations which qualify as exempt organizations under Section 501 (c) (3) of the Internal Revenue Code of the United States or the corresponding provision of any future Internal Revenue Law of the United States.

4. The fund has an interest in protecting the right to keep and bear arms. The fund filed amicus briefs in several cases, including *Parker v. District of Columbia*, 478 F.3d 370 (D.C. Cir. 2007) and *Peterson v. Garcia*, No. 11-1149 (10th Cir. argued Mar. 19, 2012). *Parker* was affirmed in the land mark case of *District of Columbia v. Heller*, 128 S.Ct. 2783, 171 L.Ed.2d 637, 554 U.S. 570 (2008).

5. An original and three copies of the amicus curiae brief will be conditionally tendered for filing.

6. The brief is desirable because the matters asserted in the brief are relevant to the disposition of the case, and because the case involves an important matter of first impression in this circuit. The right to bear arms in public is a highly controversial matter of social concern. The court would be well-served by receiving as many different points of view from as many stakeholders as possible.

Wherefore, the NRA Civil Rights Defense Fund moves that this court grant its application for leave to appear, by brief only, and to file its amicus curiae brief.

Respectfully submitted,

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**CERTIFICATION OF DIGITAL SUBMISSIONS AND ELECTRONIC SERVICE**

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3. The hard copies of the foregoing submitted to the Clerk are exact copies of the version that is being electronically filed.

Date: December 10, 2012

s/Matthew H Bower
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**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on December 10, 2012.

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s/Matthew H Bower
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# BRIEF OF *AMICUS CURIAE* NRA CIVIL RIGHTS DEFENSE FUND IN SUPPORT OF APPELLANT SEEKING REVERSAL

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**NRA Civil Rights Defense Fund**

## DISCLOSURE STATEMENT

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## FRAP RULE 29 (c) (5) STATEMENT

No party's counsel authored the brief in whole or in part; no party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than the amicus curiae, its members, or its counsel – contributed money that was intended to fund preparing or submitting the brief. The NRA Civil Rights Defense Fund accepts contributions from the general public in support of its not-for-profit mission, which includes filing briefs *amicus curiae*; however, it has neither solicited nor accepted funds for the specific purpose of submitting a brief in this case.

## AMICUS CURIAE'S IDENTITY AND INTEREST

The NRA Civil Rights Defense Fund is organized exclusively for the following purposes:

1. Voluntarily to assist in the preservation and defense of the human, civil, and/or constitutional rights of the individual to keep and bear arms in a free society;

2. To give financial aid gratuitously and to supply legal counsel, which counsel may or may not be directly employed by the fund, to such persons who may appear worthy thereof, who are suffering or are threatened legal injustice or infringement in their said human, civil, and constitutional rights, and who are unable to obtain such counsel or redress such injustice without assistance;

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The fund has an interest in protecting the right to keep and bear arms. The fund has filed amicus briefs in several cases, including *Parker v. District of Columbia*, 478 F.3d 370 (D.C. Cir. 2007), and *Peterson v. Garcia*, No. 11-1149 (10th Cir. argued Mar. 19, 2012) . *Parker* was affirmed in the land mark case of

*District of Columbia v. Heller*, 128 S.Ct. 2783, 171 L.Ed.2d 637, 554 U.S. 570 (2008).

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## INTRODUCTION AND SUMMARY OF ARGUMENT

### Introduction

California law broadly prohibits the carrying of any loaded firearm, or any unloaded firearm (other than a long gun, which must be locked or cased) by private citizens in public places, except pursuant to a license issued by a county sheriff (a "carry license"). *See* Appellants' Opening Brief (Appellants' Op. Brf.), 5-7. State law requires that carry license applicants must demonstrate that they have "good cause" to carry a firearm, CAL. PENAL CODE § 26150(a)(2), but this determination is left to local sheriffs, who have unfettered discretion to establish the criteria an applicant much meet in order to demonstrate "good cause." The defendants' policies explicitly declare that a generalized desire to be prepared for self-defense shall not constitute good cause for issuance of a license, instead requiring that an applicant demonstrate a special need for a license. *See* Appellants' Op. Brf. 8-9. Consequently, in Orange County, a typical, law-abiding, competent adult cannot carry a firearm in public, non-sensitive places for self-defense.

The plaintiffs-appellants challenge the "good cause" policy of the Orange County defendants – specifically, the policy that a generalized desire to carry a firearm for self-defense does not, standing alone, constitute good cause to obtain a license – on grounds that it violates both the Second Amendment and the Equal Protection Clause of the Fourteenth Amendment to the United

States Constitution. The amicus will address the Second Amendment as it applies to Orange County defendants' "good cause" policy.

**Summary of Argument**

The Supreme Court has made clear that the Second Amendment guarantees a right to bear arms that is: (1) individual; and (2) importantly concerned with self-defense. *District of Columbia v. Heller*, 554 U.S. 570 (2008). It has also declared this right incorporated against the states, while reaffirming the centrality of individual self-defense to the Second Amendment right. *McDonald v. Chicago*, 130 S.Ct. 3020, 3026 (2010). *Heller's* methodology, the state judicial tradition upon which it relies, and what it says about the right to bear arms all strongly suggest the Second Amendment protects a right to carry a firearm on one's person, in public, non-sensitive places for self-defense. In particular, relevant state court opinions strongly support the proposition that in the American judicial tradition, when the right to bear arms for self-defense is recognized as an individual right that is importantly concerned with self-defense, it includes a meaningful right to carry arms on one's person in public places for the purpose of self-defense.

The desire to carry arms for self-defense should be understood, as a matter of constitutional law, to constitute *per se* good cause for carrying a firearm. The defendants' policy turns the concept of a right on its head by presumptively denying the plaintiff-appellants the ability to lawfully bear arms

in public for self-defense unless they can prove special circumstances that, in the subjective opinion of the sheriff, differentiate them from the bulk of their fellow Californians. The defendants' good cause policy converts the right to bear arms into a discretionary privilege.

*Heller* did not explicitly adopt a standard of review for Second Amendment cases, although it firmly rejected rational basis review, or any sort of "freestanding 'interest-balancing' approach." 554 U.S. at 628-29, 629 n.27, 634-35. Courts are still in the process of developing a standard of review framework for Second Amendment cases. This court should apply *at least* intermediate scrutiny to the plaintiffs-appellants' application of the good cause requirement – and it cannot meet that test. The generalized desire for self-defense is a constitutionally adequate reason to carry a handgun.

## ARGUMENT

In any constitutional claim, a threshold question is whether the conduct or policy being challenged touches upon activity that is within the scope of the right asserted. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) (fighting words are unprotected because they are outside the scope of the First Amendment), *United States v. Reese*, 627 F.3d 792, 800-801 (10th Cir. 2010). The right to carry arms for private self-defense in public places is within the scope of the Second Amendment. The policies of the Orange County defendants

severely burden that right by denying them the right to lawfully carry arms for self-defense because they cannot demonstrate to the satisfaction of the sheriff that they are at heightened risk of criminal victimization.

## I. The Second Amendment guarantees an individual right to carry firearms on one's person in public, non-sensitive places for self-defense.

In *District of Columbia v. Heller*, the Supreme Court held that the Second Amendment guarantees an individual "right to keep and bear arms for the purpose of self-defense." *McDonald*, 130 S.Ct. at 3026. Concluding that "the inherent right of self-defense has been central to the Second Amendment right," *Heller*, 554 U.S. at 628, *Heller* held that the District of Columbia ban on possession of unregistered handguns and the carrying of handguns in the home violated the Second Amendment because it, "ban[ned] from the home the most preferred firearm to 'keep' and use for protection of one's home and family." *Id.* at 628-29 (internal quotations omitted). *Heller* declined to adopt a standard of scrutiny for Second Amendment claims, but it rejected both rational basis scrutiny and an interest-balancing test proposed by Justice Breyer. *Id.* at 628-29, 629 n.27, 634-35. The *Heller* court saw no need to adopt a specific standard, concluding that the total ban on handguns so grossly offended the Second Amendment right of armed self-defense that it could not survive any appropriate level of scrutiny. *Id.*

The Second Amendment right to keep and bear arms was subsequently incorporated against the states in *McDonald v. Chicago*, 130 S.Ct. 3020, 3026 (2010), which struck down a similar, local handgun ban while reaffirming that "individual self-defense is 'the central component' of the Second Amendment right." *Id.* at 3036.

*Heller* teaches not only that the right to keep and bear arms belongs to individuals , but that private, armed self-defense is one of the core concerns of the right. It defines the key terms used in the Second Amendment, *id.* at 579-598, which have important implications for cases such as this. *Heller* also teaches that, in deciding Second Amendment claims, courts should study the historical understanding of the scope of the right to keep and bear arms in this country, and that state court opinions are an important repository of this historical understanding. *See id.* at 610-14. Those same state court opinions – of which there are a substantial number, and upon some of which the *Heller* and *McDonald* courts explicitly relied – dispel the notion that there is no judicial precedent from which to draw guidance about the application of the right to keep and bear arms in public places.

A fair reading of *Heller* that is faithful not only to its holdings, but also to its methodology, its rationale, and the historical understanding of the right to keep and bear arms that *Heller* helps to illuminate, compels the conclusion that the Second Amendment protects a robust individual right of law-abiding,

competent adults to carry arms on their persons in public, non-sensitive places, ready for self-defense.

A. *Heller* and *McDonald* compel the conclusion that the Second Amendment guarantees an individual right to carry arms for self-defense.

There can be no doubt that under *Heller* the Second Amendment protects a right not only to keep, but to *carry* arms for the purpose of individual self-defense. *Heller* explicitly held that the term "bear" in the operative clause of the Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation." *Id.* at 592. This flowed from the Court's exegesis of the original meaning of the text, which concluded that, "[a]t the time of the founding, as now, to 'bear' meant to 'carry.' . . . When used with 'arms,' however, the term has a meaning that refers to carrying for a particular purpose – confrontation." 554 U.S., at 584. The Court went on to say that "to bear" means to "wear, bear or carry . . . upon the person or in the clothing or in a pocket, for the purposes . . . of being armed and ready for offensive or defensive action . . . " *Id.* This, the Court said, was the meaning of the term "bear arms" as used in the Second Amendment by the founders. *Id.* at 584-86.

This conclusion was no mere dictum. The District of Columbia in *Heller* argued that the phrase "bear arms" had an idiomatic meaning uniquely connected to military service – a proposition with which the *Heller* dissenters agreed. *Id.* at 646-50 (Stevens, J., dissenting). If accepted, that argument would

have severely undercut or outright defeated the argument that the Second Amendment secures an individual right to own and use firearms for private purposes. The Court's conclusion regarding the meaning of the phrase "bear arms" was essential to its holding that the right belongs to individuals outside the context of militia or other military service.

Furthermore, the District of Columbia laws that Mr. Heller challenged included not only a ban on possessing handguns, but also the carrying of a firearm without a license – even in one's home. Mr. Heller challenged the latter provision as an affront to his right to bear arms, asking the district court to, "to enjoin petitioners from enforcing the separate licensing requirement 'in such a manner as to forbid the carrying of a firearm within one's home or possessed land without a license.'" *Id.* at 630-31. The Supreme Court ultimately held that the District of Columbia "must issue [Heller] a license to carry [his handgun] in the home." *Id.* at 635. There can be no doubt that the meaning of the phrase "to bear" was properly before the court in *Heller*, and that its construction of that phrase constitutes a binding part of the holding In short, *Heller* squarely held that the Second Amendment protects an individual right to carry arms on one's person for self-defense.

B. The individual right to carry arms for self-defense extends to non-sensitive public places.

Nor is it the case that this right to carry arms is limited to the home, or some similarly narrow category of private, real property. *Heller* compels the conclusion that the Second Amendment extends the right to bear arms to a wide variety of public places. *Heller* concluded that the right to bear arms was individual, and importantly concerned with bearing arms for private self-defensed, based in part upon early state cases interpreting and applying the Second Amendment and parallel state constitutional rights to arms. *Id.* at 611-14, citing *Nunn v. State*, 1 Ga. 243, 251 (1846); *State v. Chandler*, 5 La. Ann. 489, 490 (1850); *Aymette v. State,* 21 Tenn. 154 (1840); and, *Andrews v. State*, 50 Tenn. 165 (1871). The vast majority of state cases that have interpreted the right to bear arms as individual, and importantly concerned with self-defense, have concluded that it protects some right to carry arms in public for self-defense This conclusion finds further support in crime statistics that clearly demonstrate Americans' need for armed self-defense outside the home.

*1.* Heller *and the right to carry arms in public.*

*Heller* and *McDonald* decided questions relating to the possession and carrying of firearms in the home. See *Heller*, 540 U.S. at 574; *McDonald*, 130 S.Ct. 3026. Some courts and commentators have seized upon this fact as the basis for arguing either that the Second Amendment right is limited to the home or that, for prudential reasons, lower courts should not extend it beyond

the home until the Supreme Court speaks to the issue and provides guidance. Neither conclusion is justified.

*Heller* and *McDonald* did not explicitly hold whether there is a right of private citizens to bear arms outside the home because the plaintiffs in those cases were not seeking to carry firearms outside the home. That does not mean that they said nothing on the subject. *Heller*, in particular, strongly suggests that the right extends beyond the home. In suggesting that some limits on the right to keep and bear arms would remain "presumptively lawful," 540 U.S. at 626, *Heller* specifically expressed approval of "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings . . . " *Id.* Yet it beggars belief to suggest that when the *Heller* Court identified two types of "sensitive" public places in which the carrying of arms could presumptively be forbidden, what it intended to say was that the carrying of arms can be forbidden in *all* public places. *Heller* was a landmark case on a subject of tremendous social controversy, about which the Supreme Court had not spoken in nearly seventy years. It is impossible that the *Heller* majority failed to grasp the significance of its words when it declared regulations on arms in "sensitive" places to be presumptively lawful. The only sensible reading of this dictum from *Heller* is that the carrying of arms generally cannot be prohibited in non-sensitive public places. This reading was adopted by the Puerto Rico Court of Appeals in *In re Nido Lanausse*, No. G PA2010-0002, 2011 WL

1563927 (P.R. Cir. Jan. 31, 2011) (concluding that after *Heller* the Second Amendment right to carry arms cabins the discretion of authorities to deny concealed handgun licenses).[1]

Some courts have rushed to embrace *Heller*'s dictum that it should not be understood to cast doubt on certain pre-existing firearm regulations, 554 U.S. at 626-27, as justification for upholding regulations on the public carrying of arms. But this dictum clearly was not intended to support blanket approval of all firearm regulations enacted before *Heller*. If we are going to take *Heller*'s dicta seriously – as we should -- we should treat them all with equal respect. *See United States v. Bloom*, 149 F.3d 649, 653 (7th Cir. 1998) ("Appellate courts that dismiss . . . [considered Supreme Court dicta] and strike off on their own increase the disparity among tribunals . . . and frustrate the evenhanded administration of justice . . ."). This court should acknowledge and defer to *Heller*'s unmistakable implication that the right to carry arms extends to a wide variety of public places.

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[1]The amicus has been unable to locate an official translation of the opinion, but an unofficial one is available on the Volokh Conspiracy legal weblog. Eugene Volokh, *The Puerto Rico Appellate Case Recognizing a Second Amendment Right to Carry Guns in Public*, The Volokh Conspiracy (May 18, 2011, 8:13 a.m.), http://volokh.com/2011/05/18/the-puerto-rico-appellate-case-recognizing-a-second-amendment-right-to-carry-guns-in-public/.

*2. State cases also support the conclusion that the right to carry arms has always been understood to extend to public places.*

The individual right to bear arms for the purpose of personal self-defense enjoys a long history in the opinions of state courts. That body of case law strongly supports the view that the right extends to public places. 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). Not all state court have protected the right to bear arms in public; however, when state courts have declined to do so, it has almost always been on the basis that the state constitutional provision in question either did not protect a right of individuals, or did so only in the context of military service. *Id.* at 623-667. Whether those state courts' interpretations of their own constitutions were correct is irrelevant. What is certain is that, according to the Supreme Court, the right protected by the federal Second Amendment is *not* the same right protected by the state provisions in those cases. Indeed, the *Heller* court explicitly criticized one of those early cases, *Aymette*, for erroneously concluding that the English right upon which both the Second Amendment and the state constitutional right to arms were based referred, "only to 'protect[ion of] the public liberty' and 'keeping in awe those who are in power.'" 554 U.S. at 613, quoting *Aymette*, 21 Tenn. at 158.

Many state courts, however, have concluded that their states' rights to arms, like the Second Amendment, protect individual rights are importantly concerned with self-defense. In such jurisdictions the great weight of precedent has long upheld a general right to carry arms for self-defense in public, albeit subject to some regulation as to the type of weapon carried and the manner of its carrying. *Id.* at 623-37, 662-64. While bans on the concealed carry of firearms have often been upheld by courts in such jurisdictions – a fact acknowledged in *Heller*, 554 U.S. at 626 –this generally has been justified by the fact that the open carry of firearms remained permissible. Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 U.C.L.A. L. Rev. 1443, 1516-18 (2009)(internal citations omitted).

Indeed, *Heller* relied on some of those very state cases in forming its understanding of the original meaning of the Second Amendment. *Compare* 554 U.S., at 585 n.9, 629, *with* Volokh, *supra,* at 1517 n. 312 (citing *State v. Reid*, 1 Ala. 612, 616-17 (1840)(upholding prohibition on the carrying if concealed arms because open carry was still permissible), *Nunn v. State*, 1 Ga. 243, 251 (1846) (upholding a prohibition on carrying arms concealed, but concluding – on Second Amendment grounds – that "so much of the [statute] as contains a prohibition against bearing arms openly, is in conflict with the Constitution, and void), and *Andrews v. State*, 50 Tenn. 165, 180-81 (1871)(striking down a

prohibition on the carrying of certain handguns, holding that a state constitutional provision permitting the legislature to regulate the wearing of arms could not support a total prohibition on carrying them, even though the carrying of long guns was still permissible).

Many other state cases and attorney general opinions have held that there is a right to carry arms in public. *See* Volokh, *supra* at 1517 n.312. These include *City of Las Vegas v. Moberg,* 485 P.2d 737 (N.M. App. 1971); *State v. Kerner*, 107 S.E. 222 (N.C. 1921); *In re Brickey*, 70 P. 609 (Idaho 1902); *State v. Rosenthal*, 55 A. 610 (Vt. 1903); *State ex rel City of Princeton v. Buckner*, 377 S.E.2d 139 (W.Va. 1988); and *State v. Blocker*, 631 P.2d 824 (Ore. 1981). In *Blocker* the Oregon Supreme Court rejected an argument that the provision in the state constitution guaranteeing "[t]he people . . . the right to bear arms for the defence of themselves, and the state . . . " did not protect possession of a weapon outside the home. The court responded that, "[t]he text of the constitution is not so limited; the language is not qualified as to place except in the sense that it can have no effect beyond the geographical borders of this state." *Id.* at 825. Nor is the language of the Second Amendment qualified as to place.

A particularly interesting state case for present purposes is *Schubert v. De Bard*, 398 N.E.2d 1339 (Ind. Ct. App. 1980). Much like the California law at issue in this case, Indiana law prohibited carrying a handgun without a carry

license, and the licensing criteria permitted the superintendent of state police to issue the license only if he found that the applicant was "of good character and proper person to be so licensed," and had, "a proper reason for carrying a handgun." Schubert had applied for and was denied a license because the superintended concluded that he did not have a proper reason for carrying a handgun. *Id.* at 1339. The superintendent asserted "the power and duty to subjectively evaluate an assignment of 'self-defense' as a reason for desiring a license and the ability to grant or deny the license upon the basis of whether the applicant 'needed' to defend himself." *Id.* at 1341 -- essentially the same position taken by the defendants-appellees in this case. The Indiana Court of Appeals rejected this assertion, concluding that the state right to bear arms in defense in self-defense meant that self-defense was *per se* a proper purpose for carrying a handgun. The court concluded that the superintendent's "approach contravenes the essential nature of the constitutional guarantee. It would supplant a right with a mere administrative privilege which might be withheld simply on the basis that such matters as the use of firearms are better left to the organized military and police forces even where defense of the individual citizen is involved." *Id.*

*Heller* tells us that the "essential nature of the constitutional guarantee" contained in the Second Amendment – that is, a right to keep and bear arms for self-defense -- is identical to that of the Indiana right to keep and bear arms

considered by the *Schubert* court. And this court should hold, as the *Schubert* court did, that when the constitutional guarantees a right to bear arms for self-defense, self-defense is *per se* a proper reason or "good cause" for obtaining a license to carry a handgun. To hold otherwise would be to conclude that constitutional rights are subject to restriction based upon the state's subjective determination of the individual's "need" to exercise them – a conclusion that would be an affront to the very concept of a right. We do not require women to prove that they *need* abortions before they may obtain them; we do not require pundits to prove that they *need* to criticize politicians before they speak; and we should not require citizens to prove that they *need* to defend themselves before they may exercise their right to bear arms.

As in *Schubert*, many of the state constitutional provisions considered by the cases and attorney general opinions expressly protected a right to bear arms for self-defense. Prior to *Heller*, one might have argued that those provisions were distinguishable from the Second Amendment. However, in light of the self-defense component of the Second Amendment that *Heller* identified, that argument is now untenable. The precise wording of the constitutional provisions in question may slightly from jurisdiction to jurisdiction, but it is fair to say that these state cases, taken together, lay out a traditional, historical American understanding of what it means to have a "right to bear arms" that is importantly concerned with self-defense. One aspect of this right is a right to

carry arms in public places, albeit subject to some regulation. There is no basis on which to conclude that the Second Amendment right, with its central self-defense component, deviates from this historical tradition.

3. *Crime statistics demonstrate the need for self-defense in public.*

Finally, the *Heller* court's determination that personal self-defense was "central" to the right to bear arms as it was understood by the Founders counsels strongly that – judicial tradition aside -- the right must be understood to extend beyond the home. Although *Heller* concluded that the home is the place where, "the need for defense of self, family, and property is most acute," 554 U.S., at 628, it never suggested that the need is exclusive to the home – and as a factual matter, it isn't. According to Bureau of Justice Statistics data for 2008, only 18.4% of crimes of violence (not including homicides) occur at or in the respondent's home. Bureau of Justice Statistics, U.S. Dep't of Justice, Criminal Victimization in the United States, 2008 Statistical Tables, tbl. 61, http://bjs.ojp.usdoj.gov/content/pub/pdf/cvus0804.pdf. Data on the locations of homicides is harder to find, but one study covering all homicides in New York City during 1990-91 concluded that only 19.3% occurred in the victim's home, with another 5.8% occurring in automobiles. Kenneth Tardiff, et al., *A Profile of Homicides on the Streets and in the Homes of New York City*, Pub. Health Rep., Jan-Feb 1995, at 15 tbl. 2, available at http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1382068/pdf/pubhealthrep0

0056—015.pdf. *See also* Volokh, *supra* at 1518 (reaching the same conclusion concerning locations of violent crimes, and providing additional data). In point of fact, a substantial majority of violent crimes occur when victims are away from home. Limiting the Second Amendment right to the home guarantees that firearms will be unavailable for defense in most situations in which they are needed. This would pay perverse lip service to the right of armed-self defense.

For all the foregoing reasons, this court should hold that the Second Amendment guarantees an individual right to carry arms on one's person for self-defense in non-sensitive public places.

## II. THE ORANGE COUNTY POLICY VIOLATES THE PLAINTIFFS-APPELLANTS' SECOND AMENDMENT RIGHT TO CARRY ARMS ON HIS PERSON IN NON-SENSITIVE PUBLIC PLACES.

The Orange County policy relating to California's "good cause" requirement conditions the exercise of Second Amendment rights upon an applicant being able to demonstrate to the sheriff's satisfaction that the applicant is at some heightened risk of criminal victimization, whether by virtue of direct threats, an occupation that is perceived to be particularly hazardous, or other specific facts establishing a particularized danger over and above the generalized risk of crime faced by all Californians. Appellants' Op. Brf. at 8-9. This approach is cannot be reconciled with the Second Amendment. If the Second Amendment secures an individual right to bear

arms for self-defense—as we know that it does – then a person need assert no more reason for exercising it than the fact that *it is his right*.

*Heller* declined to specify a standard of scrutiny in Second Amendment cases, but it clearly rejected rational basis scrutiny. *Id.* at 629. The plaintiffs-appelless in their opening brief suggest a "scope-based" test derived from *Heller* and *McDonald*. Appellants' Op. Brf. At 29-31. Some federal appellate courts have suggested that strict scrutiny may apply in some types of Second Amendment claims, and intermediate scrutiny in others, *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010). Others have applied intermediate scrutiny, i.e., the requirement that there be a substantial relation between the challenged regulation and an important governmental objective, without holding that it is the appropriate standard of review in all Second Amendment cases. *United States v. Skoien*, 614 F.3d 638, 642 (7th Cir. 2010). The amicus urges this court to adopt the approach suggested by the platintiffs-appellants. Nevertheless, this brief shall proceed on the assumption that the Ninth Circuit will apply one of the better-known standards of scrutiny that are familiar in other areas of constitutional litigation.

Under any appropriate level of scrutiny, the Orange County policy cannot stand. It severely limits the carrying of firearms for self-defense, which is core Second Amendment activity, and it is insufficiently related to any legitimate government interest. As such, the policy should be analyzed under

strict scrutiny. However, it cannot pass muster even under intermediate scrutiny.

A. The Orange County policy severely burdens core Second Amendment activity

The Orange County policy, because it severely burdens core Second Amendment activity, and in fact has the effect of completely depriving most residents of Orange County of the right to bear arms for self-defense.

*Heller*, 554 U.S. at 628, and *McDonald*, 130 S.Ct. at 3026, conclude that the Second Amendment protects the fundamental, individual right to keep and bear arms for armed self-defense. The amicus has amply demonstrated that the traditional American understanding of this right includes the right to carry arms on one's person, in public, for self-defense. Yet Californians cannot do that without a carry license (except in the case of unloaded long guns, locked or cased), and the very concept of a "special need" precludes the notion that most Californians will never be able to demonstrate adequate cause to obtain a carry license from the sheriff. Consequently, the Orange County policy – in the context of of the overarching California statutory scheme – has the effect of depriving the majority of people in Orange County – including the plaintiffs-appellants -- of the right to bear arms for self-defense in public. This is not a mere regulation of the right with regard to the type of weapons carried, how they may be carried, or in which "sensitive places" they may not be carried.

With respect to most of the population of Orange County, the policy works a total deprivation of the right to bear arms for self-defense. It would be risible to call this burden anything other than severe.

*Heller* struck D.C.'s requirement that guns in the home be kept inoperable, because it "ma[de] it impossible for citizens to use them for the core lawful purpose of self-defense." *Id.* at 630. The Orange County policy similarly make it impossible for the plaintiffs-appellants to use a firearm for the core lawful purpose of self-defense in public. It also bears mentioning that the handgun ban struck down in *Heller* at least left open the possibility of self-defense with long guns, *id.* at 629, while California law almost totally forecloses the carrying of any sort of firearm in public, at least in a manner that renders it usable for self-defense.

In *Heller*, the severity of the burden resulted from the types of arms that were banned – "the most preferred firearm to 'keep' and use for protection of one's home and family," 554 U.S. at 628-29 – and the impact that this had on armed self-defense. But regulations such as the Orange County policy, which restrict the geographic scope of the right to arms by broadly prohibiting their public carry, rather than banning a particular type of arms, can also severely burden the right.

The defendants-appellees might argue that the ability to carry an unloaded long gun, locked or cased, and to load it should an emergency arise,

adequately vindicates the right to bear arms for self-defense. This would be risible on its face, and if the defendants-appellees do wish to make this argument they should begin by explaining what proportion of their own law enforcement rely solely on unloaded, locked or cased firearms for self-defense in public, whether on- or off-duty.

That point aside, the *Heller* court rejected a similar argument that it was permissible to ban handguns so long as long guns remained available for the defense of the home, declaring,

> It is enough to note, as we have observed, that the American people have considered the handgun to be the quintessential self-defense weapon. . . . . Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid.

554 U.S. at 629. Similarly, handguns are the quintessential self-defense weapon outside the home for some of the same reasons, for both private citizens and law enforcement officers. (It probably is within judicial notice that the nearly every police officer in the United States carries a handgun on duty.)

In addition, the predictable social opprobrium one would experience while walking around many parts of Orange County with a long gun slung over one's shoulder, and the public disturbance that this would likely cause, obviously must have an enormous chilling effect on the exercise of the right to bear arms in that fashion.

The Orange County policy has the effect of preventing the plaintiffs-appellants and most other residents of Orange County from engaging in core Second Amendment conduct. The policy severely burdens the right to carry arms in public for self-defense. And it cannot survive even intermediate scrutiny.

B. The policy cannot survive intermediate scrutiny.

As one court has said in the Second Amendment context, "To pass constitutional muster under intermediate scrutiny, the government has the burden of demonstrating that its objective is an important one and that its objective is advanced by means substantially related to that objective." *Reese*, 627 F.3d at 802. In the First Amendment context, upon which *Marzzarella* drew in adopting intermediate scrutiny for Second Amendment cases, 614 F.3d at 89 n.4, intermediate scrutiny requires that a regulation "leave open ample alternative" means of exercising the right asserted, or be "no more extensive than necessary to further the state's interests." *Id.* at 96 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989), and *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 569-70 (1980)). In this case the means chosen are only distantly related to any legitimate state objective, and are far more extensive than necessary.

Apparently, the objective of Sheriff Hutchens' good cause policy is to reduce "the number of 'concealed firearms' in public." Appellants' Op. Brf. at

10. Reducing the bearing of arms *for its own sake* cannot possibly stand as a legitimate state interest, anymore than suppressing political speech simply for the sake of suppressing it would pass constitutional muster. In order to be legitimate, a restriction on an enumerated, individual right must – even under intermediate scrutiny -- be tailored to address some specific evil that arises from the exercise of the right.

Of course it is not hard to imagine several undesirable secondary effects that could arise from by the public carrying of firearms. One is the risk of accidental shootings. Another is the risk of impulsive suicide. Yet another is the risk that people carrying firearms for lawful purposes will, in a fit of anger or out of ignorance of the law, use them criminally. A fourth is the risk that people carrying guns will have those guns stolen, and used by the very criminals against whom the gun was intended to protect to victimize either the former owners or others. (The amicus leaves aside the issue of those who carry firearms intending from the outset to commit crimes. Presumably, the sheriff will not contend that the good cause policy has the power to affect the social ills caused by that group, which predictably will carry firearms even without carry licenses.) These are all legitimate concerns. Although there is great room for debate about how much risk is posed in each of these areas by lawful concealed carriers, there can be no doubt as to the fundamental proposition that improving public safety and reducing crime are legitimate state objectives.

See, e.g., *United States v. Salerno*, 481 U.S. 739, 748-50 (1987). However, the good cause policy does not bear a substantial relationship to any of these ills.

The good cause policy bases licensing decisions on the sheriff's subjective assessment of an applicant's need to carry a firearm. But even if the sheriff's assessment concerning need is objectively correct, the risk that a person will behave negligently with a firearm, or suicide with it, or use it criminally (either in a fit of rage, or out of ignorance of the law), or have it taken stolen by a criminal, is not rationally related to that person's need to carry the firearm. The amicus is unaware of – and doubts that there exists -- any evidence that people who meet the sample good cause criteria in the sheriff's policy are inherently less negligent, more suicidal, less inclined to fits of rage, or less apt to have their guns stolen than members of the general public. Certainly, nothing in the sheriff's policy requires this. The only way in which the good cause policy attempts to address these legitimate concerns is by reducing the total number of firearms that are lawfully carried in public. But this proves too much. An equally effective means of accomplishing the same goal would be to randomly grant a predetermined proportion of carry license applications. The total number of firearms on the street, and the risks to society that they posed, would presumably remain the same. Thus, there is little if any fit between the good cause policy – insofar as it bases licensing decisions

on perceived need -- and the obvious objectives that the county might cite to support it.

What the sheriff has in fact adopted is essentially an interest-balancing test for the right to bear arms, in which she attempts to assess the strength of the individual's interest in bearing arms against the state's interest in suppressing the potential undesirable side-effects of that practice. When the sheriff perceives the individual's need for self-defense as great, the individual's interest outweighs the state's and the sheriff issues a license. Where the need is weak, the state's interests outweigh the individual's and the sheriff will not issue a license. The obvious problem with this approach is that *Heller* explicitly rejected interest-balancing approaches to the Second Amendment: "The very enumeration of the right takes out of the hands of government--even the Third Branch of Government--the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." 554 U.S. at 634. This is no less true when the case-by-case decisions are made by a law enforcement official than when they are made by the legislature.

Many states, including California, have enacted licensing criteria intended to advance some of the objectives outlined above; for example, California requires an applicant for a carry license to complete training in firearm safety and the permissible use of force. CAL PENAL CODE §§ 26150(a)(4), 26165. This requirement may reduce the chances of accidents or misuse of firearms by

carry licensees. Many states require criminal background checks and deny licenses to those with criminal histories or histories of mental illness – facts which may bear some predictive value in determining which applicants might be predisposed to misuse lawfully carried firearms. *E.g.*, VA. CODE § 18.2-308(E). (The "good character" requirement of the California carry license statute, CAL. PENAL CODE § 26150(a)(1), presumably is intended to serve a similar purpose.) These are examples of licensing criteria that seem to bear some substantial relationship to the legitimate objective of reducing adverse side-effects of the public carrying of firearms. The good cause policy, however, does not exhibit such a substantial relationship to that objective.

The Orange County policy is crucially different from the federal statutes upheld in, *e.g.*, *United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010) (en banc)(upholding federal ban on firearm possession by domestic violence misdemeanants), and *United States v. Barton*, 633 F.3d 168 (3d Cir. 2011)(upholding federal ban on firearm possession by convicted felons), and by this court in *United States v. McCane*, 573 F.3d 1037 (10th Cir. 2009)(same), all of which prohibited the possession of arms by people convicted of certain crimes. Unlike those statutes, the Orange County policy does not deprive people of the right to bear arms based upon individualized findings of guilt of crimes that support a presumption of dangerousness. The Orange County

policy instead starts with the presumption that no such right exists, and grants to certain favored classes of people the privilege of bearing arms.

It would be risible to say that the Orange County policy is no more extensive than necessary. A large majority of American states now issue carry licenses on a "shall-issue" basis, without any showing of need on the part of applicants. National Rifle Association of America, *State Laws at a Glance: Right to Carry Laws,* http://www.nraila.org/gun-laws.aspx (last visited Dec. 6, 2012). Indeed, four states – Vermont, Alaska, Arizona and Wyoming -- now permit nearly any American age twenty-one or older, not otherwise disqualified from possessing firearms, *to carry concealed firearms in public as a matter of right*, without even having to obtain a carry license. *See*, VT. STAT. ANN. tit. 13, §§4001-16 (West, Westlaw current with all laws effective upon passage through No. 7 of the 2011-2012 session (2011) of the Vermont General Assembly) and *State v. Rosenthal*, 55 A. 610 (Vt. 1903); ALASKA STAT. §11.61.220 (West, Westlaw current through the 2010 Second Regular Session of the 26th Legislature 2010); ARIZ. REV. STAT. § 13-3102 (current through the First Special Session, and legislation effective April 28, 2011 of the First Regular Session of the Fiftieth Legislature (2011)); WYO. STAT. ANN. § 6-8-104(a) (Lexis, current though July 15, 2012). The amicus has been unable to locate any evidence that the lack of need-based licensing in these jurisdictions has adversely affected society. The question is not whether firearms are involved in crimes, accidents,

or suicides; clearly, they are. The question is whether the defendants' need-based licensing policy is in any way tailored to reduce those social ills. It is not.

The Second Amendment right to carry arms in public is not immune from regulation. *Heller* suggests some likely permissible regulations, such as prohibitions on carrying firearms concealed, or in demonstrably "sensitive" public places. 554 U.S., at 626-27. There probably are other restrictions that would pass muster as well. But under any standard of scrutiny that takes seriously the command of the Second Amendment, the defendants' policy goes too far.

> No doubt in time of peace, persons might be prohibited from wearing war arms to places of public worship, or elections, etc. But to prohibit the citizen from wearing or carrying a war arm, except upon his own premises or when on a journey traveling through the country . . . or when acting as or in aid of an officer, is an unwarranted restriction upon his constitutional right to keep and bear arms. If cowardly and dishonorable men sometimes shoot unarmed men with army pistols or guns, the evil must be prevented by the penitentiary and gallows, and not by a general deprivation of a constitutional privilege.

*Wilson v. State*, 33 Ark. 557, 560 (1878)(striking down a statute totally prohibiting the carrying of pistols in public, as applied to certain types of pistols).

## CONCLUSION

The Orange County good cause policy for carry licensing works a near-total prohibition on the right to bear arms for self-defense in public places. It does is not substantially related to a legitimate government interest. Under any appropriate standard of review, this violates the plaintiffs-appellants' rights under the Second Amendment. The policy should be declared void.

Date: December 10, 2012

Respectfully Submitted
The NRA Civil Rights Defense Fund
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By Counsel

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