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.	)

MOTION BY THE CENTER FOR CONSTITUTIONAL JURISPRUDENCE FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF APPELLANTS

COMES NOW the Center for Constitutional Jurisprudence, by counsel, and pursuant to Fed. R. App. P. 29 hereby requests leave of court to file its Brief Amicus Curiae in support of Appellants. A copy of the proposed brief is submitted with this motion.

Appellants consent to the filing of this amicus curiae brief. Appellees, through counsel, have informed *amicus* that they do not consent to its filing.

The Center for Constitutional Jurisprudence was founded in 1999 as the public interest legal arm of The Claremont Institute, a public policy think tank devoted to restoring the principles of the American founding to their rightful and preeminent authority in our national life. The Center advances this mission by representing clients or appearing as *amicus curiae* in cases of constitutional significance. In particular, the Center has argued in support of the original structural provisions of the Constitution and the Bill of Rights that protect individual liberty, in cases such as *National Federation of Independent Business v. Sebelius*, 132 S.Ct. 2566 (2012), and *Sackett v. Environmental Protection Agency*, 132 S.Ct. 1367 (2012). The Center has also appeared before this Court in cases such as *Coalition to Defend Affirmative Action v. Brown*, 674 F.3d 1128 (9th Cir. 2012); *Guggenheim v. City of Goleta*, 638 F.3d 1111 (9th Cir. 2010); *Vasquez v. Los Angeles County*, 487 F.3d 1246 (9th Cir. 2007); and *Lincoln Club v. City of Irvine, 292 F.3d 934* (9th Cir. 2001). Of special note, the Center participated as *amicus* in *McDonald v. City of Chicago*, 130 S.Ct. 3020 (2010), a case that is central to the issues presented in the instant action.

This brief seeks to present additional information not presented by the parties relating to the standard of review to be applied by the Court in this case, with particular reference to the Second Amendment's history and Supreme Court jurisprudence. For the reasons stated above, the Center for Constitutional

Jurisprudence therefore requests that leave to file its Brief Amicus Curiae be granted.

Respectfully submitted,

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Dated: December 6, 2012

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 6, 2012. All participants in this case are registered CM/ECF users and will be served by the appellate CM/ECF system.

CENTER FOR CONSTITUTIONAL JURISPRUDENCE
John C. Eastman

By: /s/ John C. Eastman
Attorney for *Amicus Curiae Center for Constitutional Jurisprudence*

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DOROTHY McKAY, et al,

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v.

SHERIFF SANDRA HUTCHENS, et al,

Defendants-Appellees.

On Appeal from the United States District Court
For the Central District of California
Case No. SACV 12-1458JVS

BRIEF OF *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE

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CORPORATE DISCLOSURE STATEMENT

The Center for Constitutional Jurisprudence is a project of The Claremont Institute, a 501(c)(3) nonprofit organization, which has no parent corporation. It issues no stock, and therefore, no publicly held company owns 10% or more of its stock.

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INTEREST OF AMICUS CURIAE

The Center for Constitutional Jurisprudence was founded in 1999 as the public interest legal arm of The Claremont Institute, a public policy think tank devoted to restoring the principles of the American founding to their rightful and preeminent authority in our national life. The Center advances this mission by representing clients or appearing as *amicus curiae* in cases of constitutional significance. In particular, the Center has argued in support of the original structural provisions of the Constitution and the Bill of Rights that protect individual liberty, in cases such as *National Federation of Independent Business v. Sebelius*, 132 S.Ct. 2566 (2012), and *Sackett v. Environmental Protection Agency*, 132 S.Ct. 1367 (2012). The Center has also appeared before this Court in cases such as *Coalition to Defend Affirmative Action v. Brown*, 674 F.3d 1128 (9th Cir. 2012); *Guggenheim v. City of Goleta*, 638 F.3d 1111 (9th Cir. 2010); *Vasquez v. Los Angeles County*, 487 F.3d 1246 (9th Cir. 2007); and *Lincoln Club v. City of Irvine, 292 F.3d 934* (9th Cir. 2001). Of special note, the Center participated as *amicus* in *McDonald v. City of Chicago*, 130 S.Ct. 3020 (2010), a case that is central to the issues presented in the instant action.

Pursuant to Federal Rule of Appellate Procedure 29, *amicus curiae* certifies that this brief was not written in whole or in part by counsel for any party, and that

no person or entity other than *amicus*, its members, and its counsel has made a monetary contribution to the preparation and submission of this brief.

Appellants consent to the filing of this brief. Because Appellees have not consented to the filing of this brief, a motion for leave to file is being submitted herewith.

SUMMARY OF ARGUMENT

No standard of review analysis is needed. A government action which forbids almost the entire population from exercising a constitutional right outside the home is *per se* unconstitutional. Banning almost everyone from exercising the right to bear arms in public places is as facially unconstitutional as forbidding almost everyone from speaking in public places. As the Supreme Court made clear in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), self-defense is by itself a "good cause" for exercising the right to keep and bear arms; indeed it is the best possible cause, the core of the right.

The 19th century state court decisions which *Heller* quoted and cited as authoritative and accurate descriptions of the right to keep and bear arms directly show that public bearing of arms may not be banned, as Sheriff Hutchens' policy essentially does. *Heller* thus rejected any theory that the Second Amendment applies only to the home. Twentieth century state court decisions confirm the

existence of a historically-rooted right to carry in public. Accordingly, Orange County's nearly total ban on carry for purposes of self-defense is categorically unconstitutional.

If any forms of means-end scrutiny is applied, it must be strict scrutiny. The right to keep and bear arms is an enumerated, fundamental right, to which strict scrutiny applies. Neither intermediate scrutiny, the rational basis test, nor any other lesser form of scrutiny is appropriate for conduct that is a "central component" of the Second Amendment's protections.

ARGUMENT

I. This case can be decided without resolving the standard of review, because total prohibition of a constitutional right is never constitutional.

As described in detail in Appellants' Opening Brief ("Br. Appellants") at 5-7, carrying of loaded firearms is banned in public places in California, with very limited exceptions. This nearly total ban includes loaded long guns as well as loaded handguns. Even *unloaded* handguns cannot be carried unless they are being transported between designated locations, and they must be in a locked container while being transported, which renders them useless for self-defense. The only method by which a law-abiding citizen can carry a handgun generally in public places is by obtaining a Carry License from the sheriff's office. *Id.*

However, in Orange County, Sheriff Hutchens has interpreted the statutory "good cause" requirement to include a showing that the applicant has a "special need" to carry a concealed handgun, such as specific threats directed against the applicant, or engaging in a business that presents a "far greater risk than the general population." Thus, the "general population" will by definition be prohibited from obtaining a Carry License under Sheriff Hutchens' written policy. *Id.* at 8-9.

This is therefore an easy case. There is no need to resolve the open issue about the appropriate standard of review that should be applied, because the complete ban on the exercise of the constitutional right at issue here fails under even the most deferential standard of review.

In the analogous context of the First Amendment, it is certainly true that the courts have recognized that the constitutional right to the freedom of speech is not absolute. A legislature may impose certain limited restrictions on the exercise of the right, as long as they qualify under the applicable standard of review. For example, "government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'" *Ward v. Rock Against*

Racism, 491 U.S. 781, 791 (1989) (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). Some narrow categories of speech, such as revealing the movement of troops during wartime, may even be prohibited outright. *New York Times Co. v. United States*, 403 U.S. 713, 726 (1971). But a legislature cannot prohibit almost all persons from speaking out loud in public. Similarly, a legislature could, if meeting the appropriate standards of scrutiny, impose some regulations on exercise of the right of assembly. But no legislature could forbid almost all persons from assembling in public.

The same is true for the rights protected by the Second Amendment. The Supreme Court in *Heller* declared the obvious: The right to "keep and bear arms" is "the individual right to possess and carry weapons in case of confrontation." *Heller*, 554 U.S. at 592. Thus, while some restrictions may well be permissible – "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings," for example, *id.* at 626 – a restriction that effectively prohibits the exercise of the constitutional right to keep and bear arms at its core, as this one does, "would be clearly unconstitutional." *Id.* at 629 (citing with approval *State v. Reid*, 1 Ala. 612, 616-617 (1840)). The obvious and inescapable implication of the Supreme Court's recognition in *Heller* that restrictions on the carrying of firearms in *sensitive places* may be valid is that there must be a right to

carry firearms in places which are not "sensitive" if the right is to have any substance at all.

Under Sheriff Hutchens' written policy, she has the power to prohibit entirely the defensive carrying of arms in public by almost the entire population of Orange County – that is, everyone who cannot point to a particular threat or special need. Under *Heller*, this is plainly wrong. Nothing in the *Heller* decision asserted that plaintiff Heller would have Second Amendment rights only if he could point out a specific threat. Nothing in *Heller* asserted that the right to "bear" arms by carrying them for purposes of defense, in places which are not "sensitive," was contingent on a specific threat.

Thus, while it would be necessary to determine the appropriate standard of review to determine whether various other aspects of California's licensing system, such as the training requirement, the application fee, and so on, were constitutional, the complete prohibition on "bearing" arms for all citizens who do not face a documented "good cause," as restrictively interpreted by Sheriff Hutchens, is "clearly unconstitutional" under any standard of review.

The California statute authorizes concealed carry permits to qualified persons who have "good cause." That statute can be interpreted in a constitutional manner by defining "good cause" coextensively with "the core lawful purpose of self-defense" that the Supreme Court in *Heller* held to be the Second

Amendment's purpose. 554 U.S. at 630. The restrictive definition given to the California statutory scheme by Sheriff Hutchens, on the other hand, so severely limits the exercise of the rights protected by the Second Amendment as to be unconstitutional even under the most deferential standard of review.

II. The right to carry firearms outside the home for self-defense is within the scope of the Second Amendment, and Sheriff Hutchens' policy must be struck down as a categorical infringement of that right.

Sheriff Hutchens' interpretation of "good cause" to bar almost everyone from lawfully carrying a firearm in public places violates the Second Amendment only if the scope of the Second Amendment extends to areas outside the home. Plainly, it does. Thus the nearly total ban on carry imposed by Sheriff Hutchens' policy is a categorical violation of the Second Amendment, and no "interest balancing" test should be applied.

A. The scope of the Second Amendment is determined by textual analysis and history.

In *Houston v. City of New Orleans*, 675 F.3d 441 (5th Cir. 2012), Judge Elrod concisely summarized the central importance of text and history, as exemplified in *Heller* and *McDonald*, in determining the scope of the Second Amendment's protections:

> *Heller* and *McDonald* make clear that courts may consider only the text and historical understanding of the Second Amendment when delimiting the Amendment's

> scope. The Supreme Court explained in *Heller* that it would require "an exhaustive historical analysis" to delineate "the full scope of the Second Amendment." 554 U.S. at 626. While declining that undertaking, the *Heller* Court identified as permissible several types of "longstanding" regulatory measures. *Id.* at 626–27. *Heller* then looked to "historical tradition" alone to reach its conclusion that the government may ban certain classes of "dangerous and unusual weapons." *Id.* at 627. Accordingly, the Court interpreted its prior decision in *United States v. Miller*, 307 U.S. 174 (1939), as establishing "only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns," because "[t]hat accords with the historical understanding of the scope of the right." *Heller*, 554 U.S. at 625. In summing up its methodological approach, the Court emphasized that "[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad." *Id.* at 634–35. The Court then reiterated that exceptions to the scope of the Second Amendment depend on "historical justifications." *Id.* at 635. Two years later in *McDonald*, the Court confirmed its historical approach, reassuring state governments that *Heller* "did not cast doubt on [certain categories of] longstanding regulatory measures." 130 S. Ct. at 3047 (controlling opinion of Alito, J.).

Houston, 675 F.3d 449 (Elrod, J., dissenting).[1] Historical analysis of the kind approved in *Heller* confirms that the right to bear arms has always extended to

[1] The panel decision from which Judge Elrod dissented, which imposed ad hoc, non-historical limits on the scope of the Second Amendment, was vacated pursuant to a petition for rehearing. *Houston v. City of New Orleans*, 682 F.3d 361 (5th Cir.

some form of public carry, whether openly or concealed, and that carrying firearms for self-defense cannot be banned.

B. The state court cases approvingly cited in *Heller* expressly affirm the right to carry, or "bear," firearms outside the home (in addition to the right to possess, or "keep," them inside the home).

Heller cited with approval several antebellum state court decisions, applying either the Second Amendment or parallel state constitutional provisions. Directly on point is *State v. Reid*, in which, during the course of upholding a ban on carrying a *concealed* weapon, the Supreme Court of Alabama noted: "A statute which, under the pretence of regulating, amounts to a destruction of the right, *or which requires arms to be so borne as to render them wholly useless for the purpose of defence*, would be clearly unconstitutional." *Reid*, 1 Ala. at 616-17 (emphasis added). This sentence is quoted in *Heller* as an accurate expression of the right to bear arms. *Heller*, 554 U.S. at 629.

Also cited by the U.S. Supreme Court in *Heller* as an accurate reading of the Second Amendment was *Nunn v. State*, 1 Ga. 243 (1846). Applying the Second Amendment itself, the Georgia Supreme Court struck down a general ban on openly carrying handguns in public for protection, only holding that the provisions

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2012). Rather than affirming the trial court's restrictions on the Amendment's scope, on rehearing the court remanded the case for further proceedings.

of the statute banning "carrying certain weapons *secretly*" was valid because it did not "deprive the citizen of his *natural* right of self-defense, or of his constitutional right to keep and bear arms." *Id.* at 251. *Nunn*, too, is approvingly cited in *Heller* for having "perfectly captured" a correct understanding of the Second Amendment. *Heller*, 544 U.S. at 612.

The *Heller* Court also cited *State v. Chandler*, 5 La. Ann. 489 (1850), for correctly expressing that the Second Amendment guarantees a right to carry, but that the legislature may determine whether the carry is to be open or concealed. *Heller*, 554 U.S. at 629. To the exact same effect is *Andrews v. State*, where the Tennessee Supreme Court equated the state constitutional provision to the Second Amendment, and struck down a law against carrying handguns "publicly or privately, without regard to time or place, or circumstances." *Andrews v. State*, 50 Tenn. 165, 187 (1871). Again, the legislature had the power to determine the mode of carry, but no legislature (let alone a sheriff misapplying a statute) could ban public carry altogether. *Andrews*, too, is cited approvingly in *Heller*. 554 U.S. at 608, 614.

Reid, *Nunn*, *Chandler*, and *Andrews*, all cited by the *Heller* Court as correct interpretations of the Second Amendment or parallel state constitutional provisions, provide the controlling guidance in the instant case. They demonstrate beyond peradventure that the right to "keep and bear arms" protected by the

Second Amendment is more than a right to "keep" a museum piece on one's mantel at home. Rather, they demonstrate that the right extends also to "bear[ing] arms," as the text clearly indicates, so as not to render possession of firearms "wholly useless for the purpose of defence." *Reid*, 1 Ala. at 617 (cited approvingly in *Heller*, 554 U.S. at 629).

C. Twentieth century state court decisions affirm the general right to carry for lawful self-defense.

The *Heller* Court relied on the antebellum state cases in its odyssey to determine the meaning of the Second Amendment as it was understood by the early generations of American jurists. But the idea that the right to keep and bear arms for lawful self-defense is a fundamental right that includes the right to carry is also evident in twentieth century state court decisions. Invalidating an ordinance which prohibited firearms from being transported or possessed in a vehicle or place of business for self defense, for example, the Supreme Court of Colorado reasoned:

> A governmental purpose to control or prevent certain activities, which may be constitutionally subject to state or municipal regulation under the police power, may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms. . . . Even though the governmental purpose may be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.

City of Lakewood v. Pillow, 180 Colo. 20, 23, 501 P.2d 744 (1972) (quoting *Aptheker v. Secretary of State*, 378 U.S. 500 (1963) (First and Fifth Amendments, and right to travel); *NAACP v. Alabama*, 377 U.S. 288 (1958) (First Amendment rights of assembly and association)).

The West Virginia Supreme Court invalidated a statute that prohibited carrying a handgun without a license, because the statute operated "to impermissibly infringe upon this constitutionally protected right to bear arms for defensive purposes." *State ex rel. City of Princeton v. Buckner*, 180 W.Va. 457, 462, 377 S.E.2d 139 (1988). Following and citing the Colorado Supreme Court's decision in *Pillow*, the court explained that "the legitimate governmental purpose in regulating the right to bear arms cannot be pursued by means that broadly stifle the exercise of this right where the governmental purpose can be more narrowly achieved." *Id.* at 464. Carrying concealed weapons may be regulated, but not "by means which sweep unnecessarily broadly . . . ." *Id.* at 467. The West Virginia legislature remedied the constitutional problem by enacting a statute for the issuance of concealed carry permits to law-abiding qualified citizens, thereby eliminating the risks of wholesale denial, such as those manifest in the instant case. David B. Kopel & Clayton Cramer, *State Court Standards of Review for the Right to Keep and Bear Arms*, 50 SANTA CLARA L. REV. 1113, 1207-08 (2010).

Similarly, a Connecticut Superior Court held in a case involving a license to carry a handgun: "It appears that a Connecticut citizen, under the language of the Connecticut constitution, has a fundamental right to bear arms in self-defense, a liberty interest which must be protected by procedural due process." *Rabbitt v. Leonard*, 36 Conn. Supp. 108, 413 A.2d 489, 491 (1979).[2] The New Mexico Court of Appeals has held that "an ordinance may not deny the people the constitutionally guaranteed right to bear arms" found in the New Mexico Constitution by generally banning the carrying of arms. *City of Las Vegas v. Moberg*, 82 N.M. 626, 485 P.2d 737 (N.M. App. 1971). The Vermont Supreme Court invalidated a local ordinance that prohibited the carrying of a weapon without written permission of mayor or chief of police as repugnant to the right of the people "to bear arms for the defense of themselves and the state" found in Chapter 1, Article 16 of the Vermont Constitution. *State v. Rosenthal*, 75 Vt. 295, 55 A. 610, 611 (1903). And in *State v. Kerner*, 181 N.C. 574, 107 S.E. 222, 225 (1921), the North Carolina Supreme Court invalidated a requirement of a license to

[2] The existence of a later decision which ignored that principle does not help defendants. *Benjamin v. Bailey*, 662 A.2d 1226, 1232 (Conn. 1995), adopted the very reasoning *Heller* rejected: If "some types of weapons" are available, "other weapons" may be banned. More importantly, the effect of Sheriff Hutchens' policy here is not to narrow the types of firearms which may be carried for lawful self-defense; it is to prohibit defensive carry by almost everyone.

carry a handgun because "the right to bear such arms unconcealed cannot be infringed." The court elaborated: "As a regulation, even, this is void because an unreasonable regulation, and, besides, it would be void because for all practical purposes it is a prohibition of the constitutional right to bear arms. There would be no time or opportunity to get such permit . . . on an emergency." *Id.* at 225.

This Court does not have to go as far as the North Carolina and Vermont Supreme Courts did in interpreting their state constitutions, of course, but it must go as far as the U.S. Supreme Court has mandated for the United States Constitution: protecting the right to bear arms (while allowing legislative choice about open or concealed), and enforcing the requirements that any restrictions on the right to carry be narrowly tailored. The constitutional problems inherent in Orange County's application of the California permit system can be remedied with a fairly administered permit system which recognizes that the concern for self-defense constitutes "good cause."

Orange County's application of the California permit system is anything but narrowly tailored, however. Rather, the effect of Orange County's misuse of the "good cause" standard is to forbid almost all ordinary citizens from exercising their Second Amendment right to bear firearms for lawful self-defense in public. By disqualifying the vast majority of people from obtaining the required license to

carry a loaded firearm for self-defense, Orange County's policy is an unconstitutional ban on peoples' right to carry.

D. Orange County's nearly total ban on carry for purposes of self-defense is categorically unconstitutional.

Heller, it will be recalled, declined to employ any kind of means-end scrutiny, and instead took a categorical approach in striking down an infringement on the core right to keep and bear arms in the home for lawful purpose:

> The handgun ban amounts to a prohibition of an entire class of "arms" that is overwhelmingly chosen by American society for that lawful purpose. The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute. Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home "the most preferred firearm in the nation to 'keep' and use for protection of one's home and family," . . . would fail constitutional muster.

Heller, 554 U.S. at 628-29.

Here, Appellants wish to obtain Carry Licenses for handguns, which are "typically possessed by law-abiding citizens for lawful purposes," and thus within the protection of the Second Amendment. *Heller*, 554 U.S. at 625. As described above, the Supreme Court and other courts have recognized that the purpose for which they desire a Carry License—self-defense—is at the core of the Second Amendment's protections. *McDonald* observed that "Self-defense is a basic right, recognized by many legal systems from ancient times to the present day, and in

Heller, we held that individual self-defense is 'the central component' of the Second Amendment right." *McDonald v. City of Chicago*, 130 S. Ct. at 3036 (citation omitted).

Accordingly, it is not a right that may be balanced away. In *Heller*, Justice Breyer in dissent argued that Second Amendment rights should be subject to an interest-balancing test. *Heller*, 554 U.S. at 689 (Breyer, J., dissenting). The majority in *Heller* rejected that approach, remarking:

> We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding "interest-balancing" approach. 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.

Id. at 634 (majority opinion) (emphasis in original).

The Court in *Heller* made it clear that the historical inquiry must focus on "examination of a variety of legal and other sources to determine *the public understanding* of [the] legal text," particularly during "the founding period." *Id*. at 604-05. Peaceably carrying ordinary arms in public was not prohibited during the founding period. The majority opinion in *Heller*, responding to the dissent, reviewed all of the statutes regulating firearms and gunpowder during the colonial and founding periods that the resources of the Supreme Court and dozens of amici could unearth. *Heller*, 554 U.S. at 631-34. They all related to the misuse of

firearms, or to issues of safe storage or fire prevention. Not one was a prohibition on the mere bearing of common arms outside the home by peaceable citizens.

Like the broad ban against handguns in *Heller*, the broad ban against all forms of carry by nearly every citizen in this case is thus flatly, categorically unconstitutional. In *Heller*, the Court refused to weigh the various public safety rationales offered by the defendants and amici. *Heller*, 554 U.S. 636. The decision as to whether individuals could possess firearms of a type commonly used by law abiding citizens for lawful purposes had already been made by enacting the Second Amendment, and had been confirmed by our nation's history. It was not the role of the courts to revisit constitutional choices already made because "the enshrinement of constitutional rights necessarily takes certain policy choices off the table," including the broad ban in *Heller*. *Heller*, 554 U.S. 636. Similarly, the policy choice exemplified by Sheriff Hutchens' interpretation of "good cause"—disarming nearly all citizens when they step outside their homes—is contrary to the Amendment's text, history, and tradition, and cannot stand.

Heller emphatically stated that the Second Amendment "*elevates above all other interests* the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Heller*, 554 U.S. at 635 (emphasis added). Although this case involves the right of self-defense outside the home, individual self-defense by law-abiding citizens remains the "central component" of the Second Amendment.

As in *Heller*, there no need, and no warrant, to examine the nature of any interests that would allegedly trump that central, fundamental right. Unless Defendants can show that licensing systems that in practice deny to nearly every citizen the right to carry outside the home, either openly or concealed, are directly sanctioned by the text of the Second Amendment, or are deeply rooted in this country's history or traditions, such a restriction is invalid.

III. If Sheriff Hutchens' policy is not declared categorically unconstitutional, it should be subjected to strict scrutiny.

The plurality in *McDonald* explicitly held, without any qualification, that "the right to keep and bear arms is *fundamental* to our scheme of ordered liberty," and is "deeply rooted in this Nation's history and tradition . . . ." *McDonald,* 130 S.Ct. at 3036 (emphasis added).[3]

[3] *McDonald* repeatedly characterized the right as fundamental in holding that the Second Amendment is incorporated through the Due Process Clause of the Fourteenth Amendment. *Id.* at 3036, 3050. It noted that Blackstone's view that the arms right is fundamental was "shared by the American colonists." *Id.* at 3037. "The right to keep and bear arms was considered no less fundamental by those who drafted and ratified the Bill of Rights." *Id.* Its inclusion in the Bill of Rights "is surely powerful evidence that the right was regarded as fundamental in the sense relevant here." *Id.* at 3037. *McDonald* noted that the efforts of the Reconstruction Congress "to safeguard the right to keep and bear arms demonstrate that the right was still recognized to be fundamental." *Id.* at 3040. "[T]he Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty." *Id.* at 3042. *McDonald* concluded that the Second Amendment is "a provision of the Bill of

Justice Thomas, the fifth vote in support of the decision in *McDonald*, stated unmistakably at the outset of his concurrence that:

> the plurality opinion concludes that the right to keep and bear arms applies to the States through the Fourteenth Amendment's Due Process Clause because it is "*fundamental*" to the American "scheme of ordered liberty," *ante*, at 3036 (*citing Duncan v. Louisiana*, 391 U.S. 145, 149 (1968)), and "'deeply rooted in this Nation's history and tradition,'" *ante*, at 3036 (*quoting Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)). *I agree with that description of the right.*

McDonald, 130 S.Ct. at 3059 (Thomas, J., concurring) (emphasis added).

Because the right is fundamental, strict scrutiny should apply. A right is "fundamental" if it is "explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny." *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 17, 33 (1973). "[C]lassifications affecting fundamental rights . . . are given the most exacting scrutiny." *Clark v. Jeter*, 486 U.S. 456, 461 (1988). *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 54 (1983) ("strict scrutiny [is] applied when government action impinges upon a fundamental right protected by the Constitution"). "Under the strict-scrutiny test," the government has the burden to prove that a restriction "is (1) narrowly tailored,

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Rights that protects a right that is fundamental from an American perspective" and thus "applies equally to the Federal Government and the States." *Id.* at 3050.

to serve (2) a compelling state interest." *Republican Party of Minnesota v. White*, 536 U.S. 765, 774-75 (2002). The government bears the burden of proof to show that the interests are compelling and that the law is narrowly tailored. *Miller v. Johnson*, 515 U.S. 900, 920 (1995).

Unquestionably, *Heller* expressly rejected any "rational basis" test for Second Amendment cases:

> [R]ational-basis scrutiny is a mode of analysis we have used when evaluating laws under constitutional commands that are themselves prohibitions on irrational laws. *See, e.g., Engquist v. Oregon Dept. of Agriculture*, 553 U.S. 591, ___ (2008). In those cases, "rational basis" is not just the standard of scrutiny, but the very substance of the constitutional guarantee. Obviously, the same test could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right, be it the freedom of speech, the guarantee against double jeopardy, the right to counsel, or the right to keep and bear arms . . . . If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect.

Heller, 554 U.S. at 628 n.27.

In addition to *Heller*'s repudiation of that test, *McDonald* expressly rejected an argument that would allow "state and local governments to enact any gun control law that they deem to be reasonable . . . ." *McDonald*, 130 S.Ct. at 3046.

The Supreme Court also held that an "interest balancing" test (for example, "intermediate scrutiny") should not be applied in cases involving infringements on Second Amendment rights. During oral argument in the *Heller* case, Chief Justice Roberts cast doubt on whether overly refined standards such as intermediate scrutiny should be injected into Second Amendment jurisprudence. He questioned counsel, who was proposing intermediate scrutiny as the standard, as follows:

> Well, these various phrases under the different standards that are proposed, "compelling interest," "significant interest," "narrowly tailored," none of them appear in the Constitution; and I wonder why in this case we have to articulate an all-encompassing standard. Isn't it enough to determine the scope of the existing right that the amendment refers to, look at the various regulations that were available at the time, including you can't take the gun to the marketplace and all that, and determine how these -- how this restriction and the scope of this right looks in relation to those?

Transcript of Oral Argument, *District of Columbia v. Heller*, March 18, 2008, at 44.

In fact, the Court did not enunciate or apply an intermediate scrutiny standard in *Heller*. Instead, it invalidated the District's law categorically based on textual and historical analysis.

Intermediate scrutiny is a form of "interest balancing." *Heller* rejected Justice Breyer's "judge-empowering 'interest-balancing inquiry' that 'asks whether

the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests.'" *Heller*, 554 U.S. at 634. Such a test would allow "arguments for and against gun control" and the upholding of a handgun ban "because handgun violence is a problem . . . ." *Id.* Justice Breyer's dissent relied on cases such as *Burdick v. Takushi*, 504 U.S. 428 (1992), *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997), and *Thompson v. Western States Medical Center*, 535 U.S. 357 (2002), which are undeniably intermediate scrutiny cases. *See Heller*, 554 U.S. at 690 (Breyer, J., dissenting). Thus, Justice Breyer's interest-balancing test is nothing other than intermediate scrutiny, and the Court's rejection of that approach in *Heller* demonstrates that intermediate scrutiny should not be applied in Second Amendment cases. Indeed, the Supreme Court in *McDonald* expressly noted that: "In *Heller* . . . we expressly rejected the argument that the scope of the Second Amendment right should be determined by judicial interest balancing . . . ." *Id.* at 3047, citing *Heller*, 128 S.Ct. at 2820-2821 (554 U.S. at 632-35).

To fail to apply strict scrutiny would be to disregard what the Supreme Court has characterized as "our central holding in *Heller*: that the Second Amendment protects a *personal right to* keep and *bear arms for lawful purposes*, most notably for self-defense within the home." *McDonald*, 130 S. Ct. at 3044 (emphasis added).

CONCLUSION

For the reasons stated above, this Court should reverse the denial of the preliminary injunction, and afford such other relief as it deems proper.

Respectfully submitted,

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Dated: December 6, 2012

CERTIFICATE OF COMPLIANCE

The undersigned certifies under Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure and Ninth Circuit Rule 32-1, that the attached amicus brief is proportionally spaced, has a type face of 14 points or more and, pursuant to the word count feature of the word processing program used to prepare this brief, contains 5,388 words, exclusive of the matters that may be omitted under Rule 32(a)(7)(B)(iii).

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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 6, 2012. All participants in this case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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