XAVIER BECERRA
Attorney General of California
STEPAN A. HAYTAYAN
Supervising Deputy Attorney General
P. PATTY LI
Deputy Attorney General
JONATHAN M. EISENBERG
Deputy Attorney General
State Bar No. 184162
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 897-6505
Fax: (213) 897-5775
E-mail: Jonathan.Eisenberg@doj.ca.gov
Attorneys for Defendant Xavier Becerra, Attorney General of the State of California

IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

MICHELLE FLANAGAN, et al., Plaintiffs, **v.** **CALIFORNIA ATTORNEY GENERAL XAVIER BECERRA, in his official capacity as Attorney General of the State of California, et al.,** Defendants.	2:16-cv-06164-JAK-AS **DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT** Date: November 6, 2017 Time: 8:30 a.m. Courtroom: 10B Judge: Hon. John A. Kronstadt Action Filed: August 17, 2016

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Defendant Xavier Becerra, Attorney General of the State of California, sued in his official capacity ("Defendant"), submits this opposition to the motion for summary judgment filed by Plaintiffs Michelle Flanagan, Samuel Golden, Dominic Nardone, Jacob Perkio, and the California Rifle and Pistol Association ("CRPA"; together with the other plaintiffs herein, "Plaintiffs").

INTRODUCTION

The foundational contention of Plaintiffs' motion for summary judgment is that the Second Amendment to the U.S. Constitution protects the right of every ordinary, law-abiding person to carry a firearm openly in public—regardless of whether the person has "a particularized need for self-defense." Pls.' Mem. of P. & A. in Supp. of Mot. for Summ. J. (ECF No. 48-1) ("Pls.' Opening Br.") at 1:19. Plaintiffs assert that "the text, history, and purpose of the Second Amendment make clear" that it guarantees the broad individual right that Plaintiffs posit. *Id*. at 1:14-1:15. Plaintiffs castigate California's open-carry statutes for supposedly producing a "complete denial of th[e] constitutional right" to keep and bear arms. *Id*. at 1:24-1:25.

Plaintiffs are asserting "rights" not found in the text of the Second Amendment, or how it has been understood historically. Plaintiffs also mischaracterize California's regulations of firearms in public places. The Second Amendment, as read literally and as historically understood, does not protect from regulation the open carrying of firearms regardless of circumstances. As Defendant showed in his cross-motion for summary judgment, for at least 180 years in this country (since Massachusetts enacted an influential version of the English Statute of Northampton), a person's particularized need for self-defense, based on a bona fide threat, has been an accepted precondition for lawfully carrying a firearm in public. Def.'s Mem. Of P. & A. in Supp. of Mot. for Summ. J. (ECF No. 45) ("Def.'s Opening Br.") at 9-11. In addition, regulations in urban areas have differed from regulations in rural areas. Hardly outliers compared to other firearm

regulations, California's open-carry statutes follow the mainstream American tradition in advancing important societal interests in enhancing public safety and minimizing firearm violence in public places, without conflicting with the Second Amendment.

From Plaintiff's expansive interpretation of the Second Amendment, Plaintiffs draw the conclusion that a right of public carry in virtually all circumstances comprises the core of the Second Amendment right, such that restricting public carry destroys the right and is categorically unconstitutional, with no need for scrutiny of the means or ends of public-carry regulations. Consequently, Plaintiffs' offensive motion for summary judgment contains only a perfunctory discussion of the appropriate level of scrutiny for California's open-carry statutes. Because the open-carry statutes do not completely destroy the Second Amendment right, if the statutes nonetheless do implicate the Second Amendment, then the Court must perform full intermediate-scrutiny analysis, not the perfunctory version that Plaintiffs have offered. Plaintiffs thereby fail to carry their burden as movants for summary judgment.

PLAINTIFFS' SECOND AMENDMENT CLAIM

This case raises a Second Amendment challenge to California's open-carry statutes, specifically the following laws: California Penal Code sections 25850 (regarding loaded firearms),[1] 26350 (unloaded handguns),[2] 26400 (unloaded long guns),[3] and 26150(b)(2) (open-carry licenses in counties of less than 200,000

[1] "A person is guilty of carrying a loaded firearm when the person carries a loaded firearm on the person or in a vehicle while in any public place or on any public street in an incorporated city or in any public place or on any public street in a prohibited area of unincorporated territory." Cal. Penal Code § 25850(a).

[2] "A person is guilty of openly carrying an unloaded handgun when that person carries upon his or her person an exposed and unloaded handgun outside a vehicle while in or on any of the following: (A) A public place or public street in an incorporated city or city and county. (B) A public street in a prohibited area of an unincorporated area of a county or city and county. (C) A public place in a prohibited area of a county or city and county." Cal. Penal Code § 26350(a)(1).

[3] "A person is guilty of carrying an unloaded firearm that is not a handgun in an incorporated city or city and county when that person carries upon his or her

people).[4] Compl. for Decl. and Injunctive Relief (ECF No. 1) ("Compl."), at 19, 20.

ARGUMENT

I. PLAINTIFFS' ARGUMENT FOR CATEGORICAL INVALIDATION OF CALIFORNIA'S OPEN-CARRY STATUTES MISAPPLIES CASE PRECEDENT AND MISCONSTRUES THE STATUTES

On the supposed legal authority of *District of Columbia v. Heller*, 554 U.S. 570 (2008), Plaintiffs argue that this Court should "categorically" invalidate California's open-carry statutes, without scrutinizing California's rationales for having these statutes, and how well they advance California's public-policy objectives, as is generally required by Ninth Circuit precedent.

Plaintiffs are wrong to insist that California's open-carry statutes destroy the Second Amendment right. These statutes are analogous to, but *more* permissive of public carry, than many public-carry regulations throughout U.S. history. Those regulations long co-existed with the Second Amendment, informing the scope of the right and indicating that conditioning public carry on a particularized self-defense need does not offend any such right. Having stricter regulations in urban areas and looser regulations in rural areas has characterized the law in many U.S. jurisdictions over the decades. Because the Second Amendment right is not as expansive as Plaintiffs argue, there is no merit to Plaintiffs' call for the categorical invalidation of California's open-carry laws.

Indeed, Plaintiffs' argument relies very heavily on two dubious premises: (1) that the Second Amendment applies in essentially the same way inside the home and beyond the home, in urban areas as well as rural areas, and (2) that California's open-carry statutes annihilate the alleged fundamental right of open carry.

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person an unloaded firearm that is not a handgun outside a vehicle while in the incorporated city or city and county." Cal. Penal Code § 26400(a).

[4] "Where the population of the county is less than 200,000 persons according to the most recent federal decennial census, [the sheriff may issue] a license to carry loaded and exposed in only that county a pistol, revolver, or other firearm capable of being concealed upon the person." Cal. Penal Code § 26150(b)(2).

Plaintiffs then conclude that California's statutes categorically violate the Second Amendment and deserve immediate invalidation. Pls.' Opening Br. at 19. Both premises must bear out, or else Plaintiffs' analysis fails. And even if the Court agrees or assumes that the Second Amendment upholds an expansive, fundamental right to carry a firearm anywhere outside the home (the first premise), the Court must still determine whether California's open-carry statutes completely destroy the right to keep and bear arms (the second premise). Only if the Court, having already accepted Plaintiffs' broad conception of the Second Amendment, makes that second determination would summary invalidation of the statutes be warranted. Otherwise, the Court must decide which level of constitutional scrutiny, above rational-basis review, is most appropriate, and then apply that level of review. As shown below, neither of Plaintiffs' premises withstands scrutiny.

A. The *Heller* Decision's Analysis of Regulatory "Destruction" of the Second Amendment Right Does Not Apply Here

The *Heller* opinion teaches that a few extreme firearm regulations—which effect a "complete prohibition" of "an entire class of 'arms'" commonly used for self-defense, or which otherwise make it "impossible" for people to defend themselves with commonly used firearms—actually destroy the Second Amendment right. 554 U.S. at 628-30; *see also id.* at 636 (denigrating "*absolute* prohibition of handguns held and used for self-defense in the home" (emphasis added)). Such a restrictive regulation could not withstand any level of constitutional scrutiny, as it is immediately obvious that the regulation violates the Second Amendment. *Id.* at 628-29. A court must invalidate such a regulation without first analyzing its purpose and how it achieves that purpose. *Id.*

Invoking *Heller*, Plaintiffs contend that California's open-carry laws are the kind of extreme, right-destroying measures that a court should categorically strike down. Pls.' Opening Br. at 19. However, as *Heller* itself indicates, California's open-carry statutes do not resemble completely restrictive firearm regulations

warranting summary condemnation.[5] *Heller* holds, or at least very strongly indicates, that a firearm regulation with a self-defense exception does not destroy the Second Amendment right. 554 U.S. at 629. *Heller* makes this holding in the course of considering at length whether the statute at issue in *Heller* contains a self-defense exception (and ultimately finding no self-defense exception in the statute). *Id.*

Under this analysis, it is of great significance that California's open-carry statutes contain multiple self-defense exceptions, and thus *permit* people to defend themselves with firearms *outside* the home, as needed. Foremost, per the "Exigent Circumstances Exception," the carrying of a loaded firearm in public is allowed for any person who reasonably believes that doing so is necessary to protect himself or herself, another person, or property from an immediate, grave danger (while if possible notifying and awaiting the arrival of law enforcement). Cal. Penal Code § 26045. Another exception permits public carrying by a person making or attempting to make a lawful arrest. *Id.* § 26050. Additionally, California law permits the carrying of a firearm in certain public locations where a self-defense need might especially arise, such as in a person's place of business (*id.* § 26035) or temporary residence or campsite (*id.* §26055). Furthermore, a person may carry a loaded handgun outside incorporated cities in public spaces where it would be lawful to discharge the weapon (*id.* §§ 25850(a), 17030), and an unloaded long gun generally may be carried in unincorporated areas (*id*. § 26400). Finally, California law allows any person, not prohibited from possessing a firearm, to seek a permit to carry a concealed handgun in his or her county, even in an urban or residential area, for "[g]ood cause" shown to law-enforcement authorities. *Id.* §§ 26150(a)(2), 26155(a)(2). Such a permit, in a county of less than 200,000 people, may allow for

[5] As noted in Defendant's motion for summary judgment (Def.'s Opening Br. at 1:24-2:6), *Heller*, at 554 U.S. at 627, discusses approvingly several restrictions on the carrying of firearms in public places, in favorably citing three 19th-century state-court decisions, *State v. Langford*, 10 N.C. 381 (1824); *English v. State*, 35 Tex. 473 (1871); and *State v. Lanier*, 71 N.C. 288 (1874).

the carrying of a handgun in an "exposed" (i.e., open) manner. *Id.* §§ 26150(b)(2), 26155(b)(2). The California Legislature has delegated to local authorities (county sheriffs or city police chiefs) the authority to determine what constitutes "good cause" for the issuance of such a permit in local areas. *See id.* §§ 26150, 26155, 26160.

In sum, California's flexible public-carry laws, with their express self-defense and related exceptions, differ markedly from the extremely prohibitory firearm regulations that *Heller* indicated should be invalidated immediately, bypassing traditional scrutiny-based analysis. Plaintiffs misconstrue *Heller* in arguing otherwise.

B. Plaintiffs Cannot Equate California's Open-Carry Laws with Regulations that Absolutely Prohibit Self-Defense

Plaintiffs acknowledge, but try to minimize, the various opportunities embedded in California law for carrying firearms openly or otherwise in public, arguing that California "effectively" bans public carry because (1) concealed carry licenses are unavailable in Los Angeles County and other areas; (2) the "immediate, grave danger" exception (i.e., the Exigent Circumstances Exception) and others are narrow and ineffectual; and (3) open carry is not actually available in unincorporated areas because "prohibited areas" are so prevalent there. Pls.' Opening Br. at 20-23. In each of these instances, Plaintiffs mischaracterize California's laws, and fail to cast doubt upon them.

1. Plaintiffs' Arguments About Concealed-Carry Licenses in Los Angeles County Are Off-Point

Plaintiffs point to the supposed impossibility of obtaining a carry-concealed-weapon ("CCW") license from the Los Angeles County Sheriff's Department, and "several other Issuing Authorities," as evidence that California imposes a complete ban on carrying firearms in public. Pls.' Opening Br. at 20:23-26. Plaintiffs have not presented any statistical evidence about the rate that CCW license applications

in Los Angeles County (or elsewhere) are granted.[6] Nor have Plaintiffs identified any uncontroverted facts on this topic. *See* ECF No. 50. But even assuming for the sake of argument that Plaintiffs could prove these allegations, for at least two reasons, Plaintiffs do not thereby come closer to proving that California's open-carry laws should be struck down as unconstitutional. *First*, *Peruta v. County of San Diego*, 824 F.3d 919 (9th Cir. 2016), already held that California could completely prohibit the concealed carry of firearms—just as many U.S. jurisdictions have done, since the earliest years of our nation's existence—without violating the Second Amendment. The leeway for concealed carry that California law affords goes above and beyond what the Second Amendment requires. *Second*, although Defendant "has direct supervision over the sheriffs of the several counties of the State" (Cal. Gov't Code § 12560), in the specific case of defining "good cause" for a CCW permit, California law entrusts decision-making responsibility to local law-enforcement agencies. Cal. Penal Code §§ 26150(a), 26155(a). Therefore, this Court cannot affect Los Angeles County's CCW policies and practices in the present case; the Los Angeles County Sheriff would have to have remained a defendant in this case, for the Court to have the necessary jurisdiction. *See Additive Controls & Measurement Syss., Inc. v. Flowdata, Inc.*, 96 F.3d 1390, 1394-95 (9th Cir. 1996) (discussing prohibition against court entering injunction against non-party).

2. The Exigent-Circumstances Exception Is Precisely Tailored

Plaintiffs criticize as "extremely narrow" the Exigent-Circumstances Exception to the general restriction on carrying loaded firearms (Cal. Penal Code § 26045), because the exception applies during only "the brief interval" before law enforcement arrives on the scene. Pls.' Opening Br. at 21:4. The pertinent part of the statute states as follows:

[6] By way of anecdotal evidence, Plaintiffs have submitted declarations from the four individual plaintiffs testifying to failed attempts to obtain CCW licenses in Los Angeles County. ECF Nos. 48-2, 48-3, 48-4, 48-5.

> Nothing in Section 25850 [regarding open carry of loaded firearms] is intended to preclude the carrying of any loaded firearm, under circumstances where it would otherwise be lawful, by a person who reasonably believes that any person or the property of any person is in immediate, grave danger and that the carrying of the weapon is necessary for the preservation of that person or property.

Cal. Penal Code § 26045(a). The statute defines "immediate" as "the brief interval before and after the local law enforcement agency, when reasonably possible, has been notified of the danger and before the arrival of its assistance." *Id.* § 26045(c).

In several important respects, the Exigent-Circumstances Law is far from "extremely narrow." *First*, the person carrying a firearm may do so upon having a mere reasonable belief, not proof, that the carrying is necessary. Cal. Penal Code § 26045(a). *Second*, the firearm can be lawfully carried for self-protection, or to protect *another* person, or to protect mere property. *Id*. *Third*, although Plaintiffs complain that the definition of "immediate" is too restrictive (Pls.' Opening Br. at 5:16-5:19), in fact the time period includes all the time after a local law-enforcement agency has been apprised of the danger, but before a law-enforcement agent arrives. This is precisely the period during which an immediate, grave danger exists. *Fourth*, nor is it required that the person engaging in self-defense notify a law-enforcement agency; the notification must be given only "when reasonably possible." Cal. Penal Code § 26045(c). In this regard, California's open-carry laws are scrupulously protective of self-defense by firearm, even when compared with the numerous historical examples of laws permitting open carry based on exigent circumstances. *See* Def.'s Opening Br. at 10-11; Brief of Everytown for Gun Safety as Amicus Curiae in Support of Defendants (ECF No. 54-1) at 14-16.

Plaintiffs also contend that the Exigent-Circumstances Exception falls short because it is an "affirmative defense." Pls.' Opening Br. at 21:12. Of course, in almost any conceivable context, the use of a firearm for self-defense—by brandishing the firearm, or displaying it with an associated threat or intent to use it, or discharging it—reasonably could lead to a criminal charge of, e.g., brandishing a

firearm, assault, unlawfully discharging a firearm, or some other offense relating to the use of the firearm. The possible need to interpose an affirmative defense as a result of using a firearm in self-defense cannot violate the Second Amendment, otherwise any criminal charge involving a firearm that offers such a defense would also violate the Second Amendment. In any event, in California, a criminal prosecutor ultimately bears the burden of proof beyond a reasonable doubt, including with respect to negating a defense based on self-defense. *People v. Flood*, 18 Cal. 4th 470, 481-82 (1998) (discussing burden of proof in criminal case generally); *People v. Lloyd*, 236 Cal. App. 4th 49, 62-63 (2015) (discussing burden of proof regarding self-defense). The Exigent-Circumstances Exception regarding open carry of firearms in public is a true exception in both form and substance.

C. Plaintiffs' Analysis of Open Carry in Unincorporated Areas Misreads California Laws and Local Laws

Plaintiffs contend that the opportunities for open carry in unincorporated areas are meaningless, because the "prohibited areas" there are so large that people seeking to carry firearms openly must "avoid all roads, buildings, populous areas, and other regions designated off-limits by the state or county." Pls.' Opening Br. at 23:5-23:6; see also *id*. at 3, n.1, 22. In making this assessment, Plaintiffs ignore the lack of restrictions on the open carry of long guns in unincorporated areas, and misinterpret California and local laws regarding "prohibited areas" in unincorporated territory.

1. California State Laws

Under California law, the restrictions on open carry in unincorporated areas apply (1) "in any public place or on any public street in a prohibited area of unincorporated territory," Cal. Penal Code § 25850(a) [loaded firearms]; (2) on "[a] public street in a prohibited area of an unincorporated area of a county or city and county," *id.* § 26350(a)(1)(B) and (a)(2)(B) [unloaded handguns]; and (3) in "[a] public place in a prohibited area of a county or city and county," *id.*

§ 26350(a)(1)(C) and (a)(2)(C) [unloaded handguns]. A "prohibited area" is "any place where it is unlawful to discharge a weapon." Cal. Penal Code § 17030.

In attacking these laws, Plaintiffs err in assuming that the restrictions in unincorporated territory apply to all "prohibited areas," where it is unlawful to discharge a weapon, as opposed to just "public places" or "public streets" within "prohibited areas." Pls. Opening Br. at 22:13-22:22. This leads Plaintiffs to wrongly assert that open carry is prohibited "within 150 yards of any building." Pls. Opening Br. at 22:14. In fact, the restrictions apply within 150 yards of any *occupied* building that is within a "public place," as explained in a California Attorney General opinion interpreting various open-carry restrictions. 51 Cal. Op. Atty. Gen. 197, 201 (1968) (interpreting "any public place or on any public street in a prohibited area of unincorporated territory" in light of 150-yard prohibition in former Cal. Fish & Game Code § 3004, current Cal. Fish & Game Code § 3004(a).)

Plaintiffs' interpretive error also extends to their contention that open carry is not permitted on "any public road or highway" within unincorporated territory. Pls.' Opening Br. at 22:13-22:14. Although California Penal Code section 374c provides that "[e]very person who shoots any firearm from or upon a public road or highway is guilty of a misdemeanor," this prohibition "does *not* prohibit the carrying of loaded firearms" on public roads and highways in unincorporated areas. 51 Cal. Op. Atty. Gen. at 199 (emphasis added). The reason is that a "public street in a prohibited area of an unincorporated area" includes "only the public ways of towns and villages and not the 'open roads' in rural sections of unincorporated areas," and so does not include all "public roads or highways." *Id*. at 200. As the opinion states, "To make 'public streets' synonymous with 'public roads and highways' would leave little meaningful difference between incorporated and unincorporated areas." *Id*. at 200.

Finally, Plaintiffs' discussion of open carry in unincorporated areas lacks any mention of open carry for unloaded long guns. Pls.' Opening Br. at 22:10-23:6.

California's restrictions on the open carry of long guns apply in incorporated areas only. Cal. Penal Code § 26400(a).

2. Local Laws

Plaintiffs cite three Los Angeles County ordinances that restrict the discharge of firearms in certain incorporated areas and unincorporated areas, arguing that these ordinances make "much of the county. . .a 'prohibited area.'" Pls.' Opening Br. at 22:17-22:18. Plaintiffs cannot attack the constitutionality of these ordinances here, because the ordinances were never challenged in the Complaint, and because the Court does not currently have before it as defendants all entities with authority to enforce the ordinances. *See Additive Controls & Measurement Syss., Inc.*, 96 F.3d at 1394-95 (discussing prohibition against court entering injunction against non-party); *see also* Fed. R. Civ. P. 19(a)(1)(A) (joinder required if "in that person's absence, the court cannot accord complete relief among existing parties"). To the extent Plaintiffs rely on the ordinances to establish the invalidity of California's open-carry laws, Plaintiffs tacitly acknowledge that California's open-carry laws, in and of themselves, do not violate the Second Amendment.

Even if the Court could consider the Los Angeles County ordinances in ruling on Plaintiffs' motion for summary judgment, the Court should reject Plaintiffs' position on the merits, because the ordinances do not make "much of the county . . . a 'prohibited area,'" as Plaintiffs contend. Pls.' Opening Br. at 22:17-22:18. The first ordinance, Los Angeles County Code of Ordinances § 13.66.050[7] is essentially duplicative of California Penal Code section 374c, which, as explained above, does *not* make all public roads and highways prohibited places. The second ordinance, Los Angeles County Code of Ordinances § 13.66.130[8] provides that a firearm may

[7] "A person shall not shoot, fire or discharge, and a person, firm or corporation shall not cause or permit to be shot, fired or discharged, upon, along or across any public highway, road, street or way, any rifle, shotgun, pistol, revolver or firearm."

[8] "Except as otherwise provided in this chapter, a person shall not shoot, fire or discharge, and a person, firm or corporation shall not cause or permit to be shot, fired or discharged, in the unincorporated territory lying within the boundaries of

not be discharged within unincorporated areas of designated districts. Because the open-carry restrictions in unincorporated territory apply to "public streets" or "public places" (Cal. Penal Code §§ 25850(a), 26350(a)), where discharging a firearm is prohibited, the second ordinance does *not* subject all unincorporated areas of designated districts to the open-carry restrictions. And the third ordinance, Los Angeles County Code of Ordinances § 13.66.500,[9] prohibits the discharge of a firearm with a certain firing range within unincorporated areas of designated districts. Because the prohibition does not apply to all firearms, it is not clear that the public streets or public places within these unincorporated areas would thereby be subject to the open-carry restrictions of California Penal Code sections 25850(a) and 26350(a).

Finally, Plaintiffs assert that "[n]othing short of a civil engineering degree and high skill level of map-reading" is required in order legally to carry a firearm openly without a CCW license "in the unincorporated portions of Los Angeles County, and most likely all other counties." Pls.' Opening Br. at 22:26-23:1. Plaintiffs have not raised this issue before; the complaint alleges no due-process or void-for-vagueness claim. Nor have Plaintiffs cited evidence to support these sweeping assertions regarding California's open-carry laws, the local ordinances, or the relationship between the two sets of laws.[10]

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any district or area defined in this Part 2, any rifle, shotgun, revolver or firearm of any kind."

[9] "Except as otherwise provided in this chapter, a person shall not shoot, fire or discharge, and a person, firm or corporation shall not cause or permit to be shot, fired or discharged in the unincorporated territory lying within the boundaries of any district or area defined in this Part 3, any firearm of any kind having a firing range of, or capable of propelling any bullet, shot or missile for any distance of one-half mile or more."

[10] Moreover, even if a law can be difficult to interpret or apply, this does not mean it is unconstitutionally vague. *Cf. First Vagabonds Church of God v. City of Orlando*, 610 F.3d 1274, 1286 (11th Cir. 2010), *reinstated following rehearing en banc*, 638 F.3d 756, 763 (11th Cir. 2011) (holding that statute's "constitutionality does not hang on whether every police officer would understand the ordinance in the same way in every conceivable factual circumstance. Absolute clarity is too much to expect from the drafters of laws, and perfect knowledge of the fullest reach of the laws is too much to expect of even the most reasonable police officers.").

In sum, Plaintiffs have misrepresented and overstated the scope of the open-carry restrictions under California law and local law, as mixed together. California's open-carry laws as they truly apply in unincorporated areas do not effectuate a "complete ban" on conduct protected by the Second Amendment.

II. CALIFORNIA'S OPEN-CARRY STATUTES DO NOT IMPLICATE THE SECOND AMENDMENT, AS HISTORICALLY UNDERSTOOD

In applying the two-step Second Amendment analysis required by the Ninth Circuit for this case (after rejecting Plaintiffs' proposed summary invalidation of California open-carry laws), this Court must consider "whether there is persuasive historical evidence showing that the regulation does not impinge on the Second Amendment right as it was historically understood." *Silvester*, 843 F.3d at 821. Defendant provided such evidence in the cross-motion for summary judgment. Def.'s Opening Br. at 8-17.

Plaintiffs also give their own presentation of evidence of the historical understanding of the Second Amendment. Advocating for an expansive right of public carry of firearms, Plaintiffs set forth their analysis of the text of the Second Amendment, recent case decisions on the scope of the Second Amendment, quotations from ancient law treatises, and finally court decisions about the historical understanding of the Second Amendment. *See* Pls.' Opening Br. at 9-18. Each part of Plaintiffs' analysis contains grave flaws, and the whole does not exceed the sum of the parts.

A. Textual Analysis of the Second Amendment Does Not Support Invalidation of California's Open-Carry Laws

Initially, Plaintiffs focus on the phrase "to keep and bear arms" in the Second Amendment, and conclude that this text, by itself, confirms that there is a general right to carry firearms in public. (Pls.' Opening Br. at 9:22-11:12.) Plaintiffs bolster this interpretation with a quote from a recent case observing that "[t]o speak of 'bearing' arms within one's home would at all times have been an awkward

usage" (*id.* at 10:9-10:11, quoting *Moore v. Madigan*, 702 F.3d 933, 936 (7th Cir. 2012))—meaning that the right must extend to public places.

However, this analysis assumes a world divided into just two kinds of places, (1) the *interior* of the home or (2) public places, and that the writers of the Second Amendment expected "bear" to refer to public places, monolithically. This analysis presents a false dichotomy, inconsistent with the physical spaces in which day-to-day life occurred in the United States circa 1791, when the Second Amendment was enacted. At that time, most people spent most of their time awake *outside* their homes yet *not* in public places. In those years, at least 94 percent of people in America lived in rural areas. E. Helen Berry, *Rural Aging in International Context*, in *International Handbook of Rural Demography* 70 (László J. Kulcsár & Katherine J. Curtis, eds., 2012).[11] There were, on average, only 6.1 people per square mile. Peter B. Kenen, *A Statistical Survey of Basic Trends*, in *American Economic History* 67 (Seymour E. Harris, ed., 1961).[12] Even the cities were uncrowded by modern standards; the biggest cities had only about 30,000 residents each. *The Greenwood Encyclopedia of Daily Life in America, Vol. I* ("The War of Independence and Antebellum Expansion and Reform, 1763-1861") ("*The Greenwood Encyclopedia*") 6 (Theodore J. Zeman, ed., 2009).[13] Free people could readily find land to claim, and upon which to build homes and to establish farms, and therefore lived much more spread out, away from neighbors, compared to the way people reside today. *Id.* at 6, 70. Back then, 80 percent of people worked in agriculture, mostly on small farms, growing corn, rye, and wheat, and raising cattle, horses, and pigs—i.e., spending large amounts of time outdoors on the farms. *Id.* at 68. These places were neither inside homes nor in public; the lands were almost

[11] *Available at* https://books.google.com/books?id=NwOIgBv0xE0C (last visited Sept. 29, 2017).
[12] *Available at* https://books.google.com/books?id=66_LmjBFHBYC (last visited Sept. 29, 2017).
[13] *Available at* https://books.google.com/books?id=o7bkGF4DytgC (last visited Sept. 29, 2017).

always privately owned. *Id.* at 68, 239-40. Assuming for the sake of argument that most free people owned guns and carried them around in those days, the carrying would have occurred on private land, primarily or exclusively. Therefore, the term "bear" in the Second Amendment is not indicative of any tradition of carry in public places.

Ironically, even the pro-public-carry *Moore v. Madigan* Court's depiction of daily life in the Founding Era of the United States provides support for this understanding, by admitting that most people spent most of their time on their own or their landlords' farms, and only "from time to time" would people need to "leave home to obtain supplies at the nearest trading post." 702 F.3d at 936. It follows that the *Moore* Court's estimation that a modern-day Chicago resident needs a gun for self-defense less in his or her high-rise apartment in Park Tower than on the city streets below (*id.* at 937) refers to a physical environment alien to most people in the Founding Era of the United States, and unilluminating of the historical understanding of the Second Amendment.

B. Ancient Law Treatises Do Not Support Invalidation of California's Open-Carry Statutes

Plaintiffs continue their overview of the relevant history by supplying short quotes from various ancient law treatises, known in shorthand as Blackstone, Hawkins, and Hale (Pls.' Opening Br. at 13:15-13:27), but Plaintiffs misconstrue each quote.

The phrase from Blackstone about the right to use firearms for self-preservation (Pls.' Opening Br. at 13:15-13:21) is followed by a sentence that greatly qualifies the right: "And all the[s]e rights and liberties it is our birthright to enjoy entire; *unle[ss] where the laws of our country have laid them under nece[ss]ary re[s]traints*." William Blackstone, *Commentaries on the Laws of England*, Vol. 1, 140 (1765) (emphasis added).[14] California's open-carry statutes

[14] *Available at* https://books.google.com/books?id=21BpRD8cR3wC.

law places necessary restraints on the public carry of firearms, in keeping with Blackstone's understanding of the law.

The phrase from Hawkins about justifiable homicide makes no mention of arms as the means used to commit the homicide and thus has little relevance here. (Pls.' Opening Br. at 13:21-13:24.) Notably, elsewhere in the same treatise, Hawkins discusses the relevant law, that arming oneself "with dangerous and unusual weapons, in such a manner as will naturally cause a terror to the people" has "been always an offence at common law, and is strictly prohibited by many statutes." William Hawkins, *A Treatise of the Pleas of the Crown*, Vol. 1, 488 (1824).[15] In other words, Hawkins directly supports *Defendant's* account of the history of the regulation of public carrying of firearms, and subtracts from Plaintiffs' contrary account. Indeed, Hawkins reveals that much more severe restrictions on public carry, even with less opportunities to carry for self-defense, were accepted in the early 19th century, by writing that "a man cannot excuse the wearing of such armour in public, by alleging that such a one threatened him, and he wears it for the safety of his person from his assault." *Id.* at 489. California's open-carry statutes acknowledge and preserve any right of self-defense that might have historical roots, and would easily pass muster with Hawkins.

Plaintiffs make the same error with Hale, quoting his off-point commentary about self-defense, with or without arms, generally (Pls.' Opening Br. at 13:24-13:27), yet omitting Hale's mention and construction of the Statute of Northampton, "whereby it is prohibited that anyone . . . go armed by night, or by day." Matthew Hale, *Hi[s]toria Placitorum Coron[ae]* 151 n.(c) (1778).[16]

Next, Plaintiffs offer a quote from another ancient scholar, St. George Tucker, about the supposed regularity with which some people carried rifles and muskets outdoors in the many parts of the United States. Pls.' Opening Br. at 14:2-14:7. Of

[15] *Available at* https://books.google.com/books?id=9vpEAAAAcAAJ.
[16] *Available at* https://books.google.com/books?id=PWpKAAAAYAAJ.

course, this quote conveys Tucker's own observations, about an unknown fraction of the country, and does not purport to be a statement of law. The quote appears in the middle of an essay on the topic of how obligated the U.S. judiciary should feel to follow the common law of England. St. George Tucker, *Blackstone's Commentaries with Notes of Reference, to the Constitution and Laws of the Federal Government of the United States; and of the Commonwealth of Virginia, Vol. 5,* Appendix, Note B, 19-20 (1803).[17] That essay has no relevance to this case. Meanwhile, elsewhere in the same treatise, Tucker notes that, by 1794, Virginia had adopted the Statute of Northampton, which criminalized going riding or going armed, with dangerous or unusual weapons, to the terror of the people. *Id*. at 134 n.14. And Tucker never indicates that the Virginia law is unconstitutional.

C. Case Law Does Not Support Invalidation of California's Open-Carry Statutes

Then Plaintiffs move on to case law, but Plaintiffs' arguments fare no better with this evidence.

First, Plaintiffs claim that all federal appellate courts to consider whether the Second Amendment guarantees a right of public carry have held that there is such a right. Pls.' Opening Br. at 1:15-1:16. But that claim is false; Plaintiffs ignore or misinterpret many judicial opinions that rule to the contrary. For example, at page 15 of Plaintiffs' opening brief, Plaintiffs claim that the Second Circuit, in *Kachalsky v. County of Westchester*, 701 F.3d 81 (2d Cir. 2012), concluded that the Second Amendment "must have some application in the . . . context of the public possession of firearms." In fact, that court merely stated, "Our analysis proceeds on this *assumption*." *Kachalsky*, 701 F.3d at 89 (emphasis added).

Second, Plaintiffs, at page 14 of their brief, repeat a stark quote from the trial-court decision in *Grace v. District of Columbia*, 187 F. Supp. 3d 124, 136 (D.D.C. 2016): "[i]t is unquestionable that the public carrying of firearms was widespread

[17] *Available at* https://books.google.com/books?id=NTQ0AQAAMAAJ.

during the Colonial and Founding Eras." However, neither *Grace* nor Plaintiffs supply any evidence in support of that statement, which thus deserves to be disregarded.

Third, Plaintiffs review in detail the history discussion in the overturned and vacated three-judge-panel decision in *Peruta v. County of San Diego*, 742 F.3d 1144 (9th Cir. 2014). This exercise serves little purpose, because the en banc Ninth Circuit rejected that panel opinion's interpretation of the history of firearms regulations, and set forth a directly contrary interpretation, demonstrating that for many centuries people in both England and the United States have accepted as constitutional regulations—sometimes very severe regulations, certainly more severe than California's regulations—of the public carry of firearms. *See Peruta*, 824 F.3d at 929-33.[18] Defendant, in his own motion for summary judgment, reviewed and elaborated upon the valid *Peruta* en banc opinion's history discussion.[19] Def.'s Opening Br. at 9.

Fourth, Plaintiffs repeatedly cite the D.C. Circuit's recent opinion in *Wrenn v. District of Columbia*, 864 F.3d 650 (2017), particularly that case's citations to judicial opinions from the South in the era of slavery, supposedly establishing that the Second Amendment has been historically understood to protect the right to

[18] Plaintiffs describe the Ninth Circuit's opinion in *Baker v. Kealoha*, 564 Fed. Appx. 903 (9th Cir. 2012), as having been vacated because it rested on "contrary reasoning" to the vacated *Peruta II* decision. Pls.' Opening Br. at 18:8-18:10. But the Ninth Circuit vacated and remanded *Baker* for reconsideration in light of the en banc *Peruta* decision, not because *Baker* was decided contrary to the vacated *Peruta* panel decision. *Baker v. Kealoha*, 679 Fed. Appx. 625 (9th Cir. 2017).

[19] Plaintiffs also point to statements made at the *Peruta* en banc oral argument as an admission by Defendant that the Second Amendment applies outside the home and that California's "categorical ban" on open carry is constitutionally invalid. Pls.' Opening Br. at 18:20-18:23. Plaintiffs report these statements as being that the Second Amendment must have "some purchase" outside the home, and that a state may not be able to "categorically" ban carry beyond the home. *Id.* These statements are entirely consistent with Defendant's position in this litigation that California's open-carry laws respect any Second Amendment right to self-defense in public places, as that concept has been historically understood. See Def.'s Opening Br. at 1:19-2:20.

carry a firearm in public, in some manner. Defendant's motion for summary judgment discusses more fully the error of relying on the peculiar Southern case law about the right to bear arms. Def.'s Opening Br. at 15-16. And in exalting the case law from the Antebellum South, *Wrenn* gives short shrift to the prevalent, statewide restrictions on open carry enacted into law between the 1790s and the 1860s in numerous U.S. states, including Delaware, Maine, Massachusetts, Michigan, Minnesota, North Carolina, Oregon, Pennsylvania, Virginia, and Wisconsin and many municipalities. *Wrenn*, at 864 F.3d at 658, expressly takes the position that those laws and supporting case decisions should be erased from U.S. history, and not counted in determining the historical understanding of the Second Amendment, on the dubious grounds that the laws and case decisions generally endorsed the so-called "militia-based" or "collective rights" theory of the Second Amendment, whereas, more than 100 years later, the Supreme Court, in *Heller*, confirmed the opposing individual-rights theory of the Second Amendment. However, the prevalence of laws restricting public carry of firearms before the Civil War remains a historical fact—and direct evidence of the early American understanding of the Second Amendment. *Heller* expressly calls for a historical assessment of past case law in evaluating the historical understanding of the Second Amendment right. 554 U.S. at 595, 598. It is surely improper to erase a line of case decisions because they were based on different fundamental premises than *Heller* was based on, given that *Heller* itself affirmatively cites some of the same judicial opinions, which *Wrenn* would dismiss. For example, the *Heller* Court, 554 U.S. at 627, favorably cited *English v. State*, in which the Texas Supreme Court upheld against a Second Amendment challenge a statute that prohibited the carrying of "pistols, dirks, daggers, slungshots, swordcanes, spears, brass-knuckles and bowie knives." 35 Tex. 473, 474 (1871).

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III. IF CALIFORNIA'S OPEN-CARRY STATUES IMPLICATE THE SECOND AMENDMENT, THE COURT SHOULD APPLY INTERMEDIATE SCRUTINY TO THE STATUTES

If the Court determines, or chooses to assume, that the Second Amendment protects conduct regulated by California's open-carry laws, then the Court would choose an appropriate level of scrutiny by considering "(1) how close the challenged law comes to the core of the Second Amendment right, and (2) the severity of the law's burden on that right." *Silvester v. Harris*, 843 F.3d 816, 821 (9th Cir. 2016) (citation omitted). "A law that implicates the core of the Second Amendment right and severely burdens that right warrants strict scrutiny. Otherwise, intermediate scrutiny is appropriate." *Bauer v. Becerra*, 858 F.3d 1216, 1221 (9th Cir. 2017) (citations omitted). Both factors weigh in favor of intermediate scrutiny here, although either factor weighing in that direction would compel application of intermediate scrutiny. *Jackson v. City and County of San Francisco*, 746 F.3d 953, 961 (9th Cir. 2014).

Plaintiffs contend that, if not categorical invalidation, strict scrutiny applies because the "core Second Amendment right" is self-defense unlimited as to place, "and restrictions on bearing arms beyond the home clearly implicate that core right." Pls.' Opening Br. at 23:19-23:20 (quotation marks omitted). But by this reasoning, *any* restrictions on a person's ability to use a firearm for self-defense—including limits on the types of firearms that may be carried, or prohibitions on carrying firearms in government buildings or public schools—should be subject to strict scrutiny. Obviously, this absolutist position cannot be correct.

In *United States v. Chovan*, which first articulated the Ninth Circuit's two-step Second Amendment analysis, the panel opinion held that the "core of the Second Amendment is 'the right of law-abiding, responsible citizens to use arms in defense of hearth and home.'" 735 F.3d 1127, 1138 (9th Cir. 2013) (emphasis omitted) (quoting *Heller*, 554 U.S. at 635). The Ninth Circuit has repeated this language in numerous Second Amendment opinions, including most recently in *Bauer*, 858

F.3d at 1222, and *Fortson v. Los Angeles City Attorney's Office*, 852 F.3d 1190, 1193 (9th Cir. 2017). This conception of the core right is drawn directly from *Heller*'s statement that the Second Amendment not only has "the core lawful purpose of self-defense," but that it also "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; *see also Jackson*, 746 F.3d at 961; *Fyock v. Sunnyvale*, 779 F.3d 991, 996 (9th Cir. 2015); *Wilson v. Lynch*, 835 F.3d 1083, 1092 (9th Cir. 2016). Other circuit courts have taken the same approach. *See Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013) (holding that "intermediate scrutiny applies to laws that burden [any] right to keep and bear arms outside of the home" (internal quotation marks and citation omitted)); *Kolbe v. Hogan*, 849 F.3d 114, 138 (4th Cir. 2017) (applying intermediate scrutiny and describing core Second Amendment right as "the right of law-abiding, responsible citizens to use arms for self-defense in the home").

Even if the core Second Amendment right were the right to use firearms in self-defense regardless of location, California's open-carry laws still do not substantially burden this "right." In *Mahoney v. Sessions*, the Ninth Circuit recently rejected a Second Amendment challenge to a police department's use-of-force policy, which provided that when using department-issued firearms "[d]eadly force may only be used in circumstances where threat of death or serious physical injury to the officer or others is imminent[]." No. 14-35970, 2017 WL 4126943, *5 (9th Cir. Sept. 19, 2017). That court applied intermediate scrutiny based on a finding that the policy did not impose a substantial burden on the core Second Amendment right of the officers "to use a firearm for the purpose of lawful self-defense," because the policy "explicitly recognizes that [officers] may use their department-issued firearms in self-defense in an encounter with a suspect—including the use of deadly force with a firearm." *Id.* The circumstances limitation did not give that court pause. This Court should similarly find that California's

open-carry laws permit the use of firearms "where threat of death or serious physical injury . . . is imminent," and do not substantially burden the core Second Amendment right.

Moreover, application of intermediate scrutiny here would be consistent with the approach taken by the Ninth Circuit and numerous other federal courts of appeal. In *Bauer*, 858 F.3d at 1222, the Ninth Circuit recently explained that "we have repeatedly applied intermediate scrutiny" in Second Amendment cases, citing *Silvester*, 843 F.3d at 823 (applying intermediate scrutiny to a law mandating ten-day waiting periods for the purchase of firearms); *Fyock*, 779 F.3d at 999 (applying intermediate scrutiny to a law prohibiting the possession of large-capacity magazines); *Jackson*, 746 F.3d at 965, 968 (applying intermediate scrutiny to laws mandating certain handgun storage procedures in homes and banning the sale of hollow-point ammunition in San Francisco); and *Chovan*, 735 F.3d at 1138 (applying intermediate scrutiny to a law prohibiting domestic violence misdemeanants from possessing firearms). In addition, other circuits "have overwhelmingly applied intermediate scrutiny when analyzing Second Amendment challenges under *Heller*'s second step." *Bauer*, 858 F.3d at 1222–23 (citing cases). Indeed, there is "near unanimity in the post-*Heller* case law that when considering regulations that fall within the scope of the Second Amendment, intermediate scrutiny is appropriate." *Silvester*, 843 F.3d at 823 (citing *Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013) (regarding handgun permit requirement); *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013) (same); *Nat'l Rifle Ass'n v. McCraw*, 719 F.3d 338 (5th Cir. 2013) (prohibition on carrying of handguns in public by 18-to-20-year-old people); *Kachalsky*, 701 F.3d 81 (special need requirement for concealed carry license); *Heller v. Dist. of Columbia*, 670 F.3d 1244 (D.C. Cir. 2011) (prohibition on assault weapons); *United States v. Yancey*, 621 F.3d 681 (7th Cir. 2010) (prohibition on firearm possession by drug users)).

In sum, the appropriate level of scrutiny here is intermediate scrutiny, not strict scrutiny.

IV. CALIFORNIA'S OPEN-CARRY STATUTES SATISFY INTERMEDIATE SCRUTINY

California's open-carry laws survive intermediate scrutiny because they serve at least reasonably well the important governmental objective of protecting public safety. There is no dispute that the protection of public safety is an important governmental interest, as Plaintiffs acknowledge "the State's legitimate objective of public safety." Pls.' Opening Br. at 24:9. *See also* Def.'s Opening Br. at 19-20 (citing California open-carry statutes legislative history and cases). Meanwhile, Plaintiffs have not engaged in the second part of the analysis—whether the challenged laws "reasonabl[y] fit" with the governmental objective—and therefore have not even tried to meet the burden for obtaining offensive summary judgment.

To prevail on an offensive summary judgment motion, Plaintiffs must show that there is no genuine dispute of material fact as to each matter on which *Defendant* would have the burden of persuasion at trial—here, the reasonableness of the fit between California's open-carry laws and the asserted governmental objective—either by disproving an essential element of Defendant's defense, or by showing that Defendant lacks evidence sufficient to carry the ultimate burden of persuasion at trial. *See* Fed. R. Civ. P. 56(c)(1)(B); *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc.*, 210 F.3d 1099, 1102 (9th Cir. 2000).

Plaintiffs have made neither showing. Although, again, Plaintiffs recognize that California's open-carry laws are intended to support a sufficiently important governmental objective, Plaintiffs erroneously contend that "[c]ompletely prohibiting ordinary, law-abiding citizens from carrying handguns is not a remotely, let alone reasonably, tailored means of furthering" public safety, because a "complete ban" is simply "off the table." Pls.' Opening Br. at 24:7-24:8; 24:26 (citing *Heller*, 554 U.S. 635-36). As can be seen, although Plaintiffs purport to

perform intermediate scrutiny, Plaintiffs do not actually assess the quality of the link between the challenged laws and the public-safety objective. Plaintiffs do not even dispute that the restrictions on the open carry of firearms improve public safety. Plainly, Plaintiffs have not properly engaged in intermediate-scrutiny analysis.

"Reasonable fit" requires only that the challenged law effectuate a method that, supported by a sufficient modicum of evidence, would seem persuasive to a reasonable legislature in achieving the asserted governmental interest. *See Silvester*, 843 F.3d at 829; *Fyock*, 779 F.3d at 1000. The open-carry laws have this reasonable fit with enhancing public safety, because, as Defendant showed at length in his cross-motion for summary judgment, the laws reduce violent-crime rates, conserve law-enforcement resources, protect law-enforcement officers and the public from unnecessary and potentially dangerous confrontations, and respect distinctions between urban counties and rural counties. Def.'s Opening Br. at 21-25.

Conspicuously, Plaintiffs have not submitted any evidence that could tend to disprove the reasonableness of the fit between California's open-carry laws and the governmental interest of protecting public safety. Indeed, Plaintiffs have not submitted any evidence at all on this issue. Hence Plaintiffs have failed to demonstrate that Defendant lacks sufficient evidence to prove its case at trial. Fed. R. Civ. P. 56(c)(1)(B); *Nissan Fire & Marine*, 210 F.3d at 1102.

Plaintiffs also incorrectly contend that the Ninth Circuit's opinion in *Jackson* requires that the open-carry laws fail intermediate scrutiny, because the laws leave no "alternative channels" for self-defense. Pls.' Opening Br. at 24:12-24:13. *First*, *Jackson* actually states that "firearm regulations which leave open alternative channels for self-defense *are less likely to* place a severe burden on the Second Amendment right than those which do not." 746 F.3d at 961 (emphasis added). *Jackson*'s discussion of "alternative channels" relates to the degree of the burden

that would inform the selection of a level of constitutional scrutiny, not to the application of intermediate scrutiny. *Second*, it is simply not true that the open-carry laws leave no alternative channels for self-defense; the laws respect and allow for self-defense, as explained above.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in Defendant's cross-motion, the Court should deny Plaintiffs' motion for summary judgment.

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Respectfully submitted,

XAVIER BECERRA
Attorney General of California
STEPAN A. HAYTAYAN
Supervising Deputy Attorney General
P. PATTY LI
Deputy Attorney General

/s/ Jonathan M. Eisenberg
JONATHAN M. EISENBERG
Deputy Attorney General
Attorneys for Defendant Xavier Becerra, Attorney General of the State of California