No. 18-55717

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHELLE FLANAGAN, ET AL.,
Plaintiffs-Appellants,

v.

XAVIER BECERRA, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, ET AL.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Central District of California
No. 2:16-cv-6164-JAK-AS
Hon. John A. Kronstadt, Judge

PETITION FOR INITIAL HEARING EN BANC

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RULE 35 STATEMENT

This case involves a question of exceptional importance: whether California's system of regulating where and how people may carry firearms in public places is consistent with the Second Amendment. A panel of this Court recently addressed a similar question with respect to public carry regulations in the State and County of Hawaii in *Young v. Hawaii*, No. 12-17808 (filed July 24, 2018). As Hawaii explains in its petition for en banc rehearing in *Young* (Dkt. 155, filed Sept. 14, 2018), the *Young* majority's decision and reasoning conflict with other decisions of this Court and other courts. *See Young* Pet. 11-16. If allowed to stand, they will improperly constrain any future panel decision addressing the constitutionality of public carry laws (and possibly other firearms regulations) in California. *See also id.* at 2.

California thus supports Hawaii's petition for rehearing en banc in *Young*. If, as Hawaii has suggested (*Young* Pet. 3, 10, 18), this Court grants rehearing, vacates the panel's decision, and remands the case to the district court for further proceedings, then it would be appropriate for the present case to proceed before a three-judge panel in the first instance. But if this Court decides to consider *Young* en banc on the merits, then California respectfully submits that the Court should also hear this case initially en banc. Doing so will allow the Court to consider the questions presented by both cases on a more developed record and with the benefit

of a broader and more varied context for evaluating the range of legal and practical issues involved.

STATEMENT OF THE CASE

California has a "multifaceted statutory scheme regulating firearms." *Peruta v. County of San Diego*, 824 F.3d 919, 925 (9th Cir. 2016) (en banc). In general, any law-abiding California resident over the age of 18 may keep or carry a gun in his or her home or place of business—including temporary residences and campsites—or on other private property owned or lawfully possessed by the resident. *Id.*; *see also* Cal. Penal Code §§ 25605, 26035. Individuals generally may carry guns in areas outside of incorporated cities or towns, other than in public places or on public streets in a "prohibited area" of unincorporated territory. *See* Cal. Penal Code §§ 25850(a), 26350(a); *see also id.* § 17030 (defining "prohibited" area to mean "any place where it is unlawful to discharge a weapon"). Licensed hunters and fishermen may carry loaded handguns while engaged in those activities, as may individuals practicing at target ranges. *Peruta*, 824 F.3d at 925. And individuals may transport guns (unloaded and properly secured) to and from authorized places. *Id.*

California does restrict the carrying of firearms in public spaces in cities, towns, and the "prohibited areas" of unincorporated territory. State law generally prohibits the public carrying of firearms, whether open or concealed, in "any

public place or on any public street" of incorporated cities. Cal. Penal Code § 25850(a); *see id.* §§ 25400, 26350(a), 26400(a). Similarly, one may not carry firearms in public places or on public streets in a "prohibited area" of unincorporated territory. *Id.* §§ 25850(a), 26350(a), 17030. These laws are subject to exceptions for certain defined categories of individuals, such as retired peace officers or current security guards or licensed investigators acting within the scope of their employment. *See, e.g.*, *id*. §§ 25900, 26030. There is also a general exception for the temporary carrying of a loaded firearm by any individual who reasonably believes that doing so is necessary to preserve a person or property from immediate, grave danger, while awaiting the arrival of law enforcement (if notifying local authorities is reasonably possible). *Id.* § 26045.

California further recognizes that some individuals may need or want to carry a handgun in public in situations not otherwise provided for by law. State law therefore provides for otherwise qualified residents to seek a permit to carry a handgun (typically concealed, although in some circumstances openly), even in urban or residential areas, for "[g]ood cause." Cal. Penal Code §§ 26150, 26155. The state Legislature has delegated the authority to determine what constitutes "good cause" for the issuance of such a permit in particular areas to local authorities, generally county sheriffs or city police chiefs. *Id.* §§ 26150, 26155, 26160. Some local authorities, such as the Sheriff of Los Angeles County, require

a showing of specific, individualized need. Others will generally issue a permit to any otherwise qualified individual who states that he or she wishes to carry a firearm for self-defense.

In *Peruta v. County of San Diego*, an en banc panel of this Court rejected a Second Amendment challenge to this "good cause" permit system as applied to the issuance of concealed-carry permits by the Sheriff of San Diego County—who, like the Sheriff of Los Angeles County, requires an individualized showing of "good cause." 824 F.3d at 926. The Court held that the "Second Amendment does not protect, in any degree, the carrying of *concealed* firearms by members of the general public." *Id.* at 942 (emphasis added).[1] But it reserved the question "whether the Second Amendment protects some ability to carry firearms in public, such as open carry." *Id.* at 927.

In this case, filed after the *Peruta* en banc decision, the plaintiffs contend that the Second Amendment does protect "the right to carry a firearm for self-defense in public." D. Ct. Dkt. 1 at 4.[2] They acknowledge that state or local law may to

[1] Three judges wrote separately to emphasize that even if the Second Amendment applied to the carrying of concealed weapons in public, the type of individualized "good cause" requirement imposed in San Diego County would satisfy intermediate scrutiny. *Peruta*, 824 F.3d at 942-945 (Graber, J., concurring). The majority observed that if it reached that question it would "entirely agree with the answer the concurrence provides." *Id.* at 942.

[2] District court docket references are to the docket in No. 2:16-cv-6164 (C.D. Cal.).

some extent specify a permitted *manner* of carry—open or concealed. *See id.* at 4, 19. But they argue that the Constitution guarantees them a right to carry firearms in some manner in most public places, including the streets and sidewalks of cities and towns, based solely on their stated desire to have a gun at hand for possible self-defense. *See id.* at 2, 17-20. The district court rejected that claim, holding that the question of the constitutionality of California's concealed carry restrictions was settled by *Peruta*, and that California's open carry restrictions, if subject to scrutiny under the Second Amendment, are valid under intermediate scrutiny. *See* D. Ct. Dkt. 39 at 4-5; D. Ct. Dkt. 81 at 10-12; D. Ct. Dkt. 99. Plaintiffs filed their notice of appeal on June 5, 2018, *see* Dkt. 1, and the parties have agreed to complete briefing by December 14, 2018.

While *Flanagan* was proceeding in the district court, another case presenting similar issues was pending in this Court. In 2012, George Young filed a challenge to Hawaii's public carry laws, arguing (among other things) that denying him a license to carry a handgun, either openly or concealed, violated "his Second Amendment right to carry a loaded firearm in public for self-defense." *Young v. State of Hawaii*, No. 12-17808, slip op. 7 (July 24, 2018); *see id*. at 6-7. The district court dismissed his challenge, and Young appealed. *Id*. at 7-8. That appeal remained pending in this Court until *Peruta* was finally resolved in 2016. On July 24, 2018, a divided three-judge panel ruled in Young's favor. The panel

decision holds that "the Second Amendment does protect a right to carry a firearm in public for self-defense" (*id*. at 58); that "the right to carry a firearm openly for self-defense falls within the core of the Second Amendment" (*id*. at 51); and that Hawaii's limitation of that right, as understood by the panel majority, "'amounts to a destruction'" of the right and is unconstitutional (*id*. at 52-53). The *Young* decision characterizes Hawaii's current system as "effectively a ban on the concealed carry of firearms," and reserves the question "whether, after *Peruta* [], a concealed carry [licensing] regime could provide a sufficient channel for typical, law-abiding citizens to exercise their right to bear arms for self-defense." *Id*. at 52 n.21, 59.

In dissent, Judge Clifton reasons that the panel majority's decision cannot be reconciled with *Peruta* or with decisions of three other courts of appeals. *Young*, slip op. 60-62 (Clifton, J., dissenting). Judge Clifton would have upheld Hawaii's public carry restrictions as "longstanding" and therefore "presumptively lawful" regulations under the Supreme Court's decision in *District of Columbia v. Heller*, 554 U.S. 570, 626-627 & n.26 (2008). *Id.* Alternatively, he would have applied intermediate scrutiny, because the "core of the Second Amendment does not include a general right to publicly carry firearms," and Hawaii's restrictions on public carry therefore do not destroy or severely burden a core right. *Id.* at 62, 70-72. And he would have upheld Hawaii's laws under that standard, because "there

is a reasonable fit between the [State's] licensing scheme and Hawaii's legitimate interest in promoting public safety." *Id.* at 62; *see id*. at 72-75.

REASONS FOR HEARING *FLANAGAN* INITIALLY EN BANC

Flanagan and *Young* both present questions of exceptional importance: whether longstanding state and local systems for regulating the carrying of firearms in public places are consistent with the Second Amendment. *See Young* Pet. 16 (panel "struck down carry restrictions that have been in effect in Hawaii in some form for over 150 years"). The panel decision in *Young* articulates the legal standards for analyzing these questions, and applies them to the panel's understanding of Hawaii's public carry regulations, in ways that depart from precedent and that would improperly constrain any later panel's consideration of the constitutionality of the California regulations at issue in this case. California thus supports Hawaii's petition for rehearing en banc in *Young*. If, as Hawaii has suggested (Pet. 3, 10, 18), this Court grants rehearing in *Young*, vacates the panel's decision, and remands the case to the district court for further proceedings, then the present appeal may appropriately proceed before a three-judge panel. If, however, the Court decides to consider *Young* en banc on the merits at this time, then California respectfully submits that the Court should also grant initial en banc review in this case and consider the two in tandem. Doing so would allow the

Court to consider the important issues presented in a broader context and with a more developed record.

We are authorized to state that the Sheriff of Los Angeles County, who was a defendant below and is an appellee in this Court, supports this petition. As set out more fully at the end of this motion, the plaintiffs-appellants here see no reason for en banc review in *Young* and believe that the panel decision in *Young* should be dispositive of this appeal. They agree, however, that if the Court decides to reconsider the *Young* decision en banc, then it should also grant initial en banc review in this case.

1. So long as the panel decision in *Young* prescribes the law of this circuit, it will improperly constrain any consideration of the present case at the panel level. Among other things, the decision concludes for the first time in this circuit, and in conflict with opinions of other panels and courts, that "the right to carry a firearm openly [in public] for self-defense falls within the core of the Second Amendment." *Young*, slip op. 51; *see id*. at 46-51; *compare id*. at 70-72 (Clifton, J., dissenting) (discussing conflicting authority). That conclusion is important because, under the framework that this Court and others have used for evaluating Second Amendment claims, the level of constitutional scrutiny applicable to a challenged regulation depends in part on whether and to what degree the regulation burdens a "core" Second Amendment right. *See, e.g.*, *id*. at 46.

In addition, the panel decision in *Young* applies the Second Amendment to its understanding of Hawaii's system of public carry regulation in a way that, as Judge Clifton explains, departs from the better reasoning of prior decisions of this Court and other courts of appeals. *See, e.g.*, *Young*, slip op. 60-62, 72-75 (Clifton, J., dissenting). While there are differences between California's public carry regulations and Hawaii's, the plaintiffs-appellants in this case have already stated their position that the *Young* panel decision, if it stands, will require judgment in their favor in this case. *See infra*, pp. 13-14. If this case proceeds at the panel level while *Young* remains in effect, the arguments will focus at least in significant part on the interpretation and application of *Young*, rather than on prior precedents or first principles. It would be more productive for the Court instead to reconsider the *Young* majority's reasoning en banc, in this case as well as in *Young* itself.

2. If the Court decides to rehear *Young* en banc, it could hold this case pending resolution of those proceedings. Under the circumstances here, however, California submits that the better course would be to order initial en banc hearing in this case and consider both cases at the same time.

Although the context of public carry regulation in California is similar to that in Hawaii in some respects, it differs in others. California is, for example, a much larger State, both in size and in population. There is great variation in local conditions throughout the State, from highly concentrated urban areas to suburban

areas to smaller cities and towns to wilderness areas. And as noted above, California's general statutory standards for public carry turn in part on these variations—generally permitting, for example, public carry in areas outside incorporated cities where it would not otherwise be unlawful to discharge a firearm. *See* Cal. Penal Code §§ 25850(a), 17030. The law also provides a variety of categorical exceptions for special professional or other situations (*see, e.g.*, *id.* §§ 25450, 25900 (active and retired peace officers), 26005 (target practice), 25640 (hunting and fishing)), and a general (although limited) exception for situations in which local law enforcement is not available and there is an immediate need to protect persons or property (*see id.* § 26045).

Moreover, while state law requires a showing of "good cause" for the issuance of a concealed carry permit, it allows local authorities to determine how to define and apply that standard for residents of their own jurisdictions. Cal. Penal Code §§ 26150, 26155, 26160. With that local flexibility, some authorities, such as the Sheriffs of Los Angeles County and San Diego County, require individualized showings of a special need and issue relatively few permits to private individuals. *See, e.g.*, D. Ct. Dkt. 39 at 3 (describing Los Angeles standard); *Peruta*, 824 F.3d at 926 (describing San Diego standard). Others generally accept a self-declared desire to carry for self-defense as "good cause," and have issued thousands of concealed carry permits. *See* California State

Auditor, *Concealed Carry Weapon Licenses* 7 (Dec. 2017) (Sacramento County had 9,130 active licenses as of June 30, 2017).[3]

In considering whether and to what extent the Second Amendment protects a right to public carry, the Court should have before it the example of California's system of tailored rules, exceptions, and local control. *See generally*, *e.g.*, Blocher, *Firearm Localism*, 123 Yale L.J. 82, 108-121 (2013); *id*. at 120 (describing history of gun control in U.S. cities and towns, "from the harbors of Boston to the dusty streets of Tombstone"); *Peruta*, 824 F.3d at 930 (describing Statute of Northampton's specific prohibition on carrying arms in crowded places such as fairs or markets); Winkler, *Gunfight: The Battle Over the Right to Bear Arms in America* 164-165 (2011) (describing history in "untamed wilderness" of American frontiers, where "[a]lmost everyone carried firearms"). That system would also provide a particularly good context for the Court to consider an important question reserved by the *Young* majority: "[W]hether, after *Peruta* [], a concealed carry [licensing] regime could provide a sufficient channel for typical, law-abiding citizens to exercise their right to bear arms for self-defense." *Young*, slip op. 52 n.21.

[3] *Available at* https://www.auditor.ca.gov/pdfs/reports/2017-101.pdf.

In addition, this case was decided in part on cross-motions for summary judgment, and thus has a more complete record than *Young*, which was decided on a motion to dismiss. The record here includes an expert report (and deposition testimony) by a leading empirical researcher, Stanford Law Professor John Donohue, concluding that right-to-carry regimes akin to the ones sought by the plaintiffs in this case and in *Young* "substantially raise[] overall violent crime" over a ten-year period. D. Ct. Dkt. 45-11 at 38 (report); D. Ct. Dkt. 45-5 at 14 (deposition); *see also Young* Pet. 17 (citing published version of expert report). California also introduced an expert report and deposition testimony from Kim Raney, former Chief of Police for the City of Covina and former president of the California Police Chiefs Association, concluding among other things that restrictions on open carry in populated areas are "critical to the safety of law-enforcement," that the presence of civilians openly carrying firearms can create "deadly scenarios" in the event of an active shooter, and that the carrying of firearms in crowded public areas has a "high potential to create panic and chaos." D. Ct. Dkt. 45-13 at 7-10 (report); *see also* D. Ct. Dkt. 45-7 at 8-14 (deposition testimony). Plaintiffs submitted reports from three experts, who were likewise deposed. D. Ct. Dkt. 57-1 at 208-226, 228-258, 260-264 (reports); D. Ct. Dkt. 63-5; 63-7; 63-8 (deposition testimony). The district court received the conflicting

reports and testimony into evidence, evaluated them, and relied on its evaluation in upholding California's laws. D. Ct. Dkt. 81 at 9-12.

Record evidence of this sort would be of significant value in this Court's consideration of the validity of legal restrictions on public carry, under any standard of constitutional review. *See, e.g.*, *Young*, slip op. 74-75 (Clifton, J., dissenting) (discussing publicly available studies in applying intermediate scrutiny).

Finally, hearing this case initially en banc and in conjunction with *Young* should not unduly delay or complicate any en banc proceedings. The parties in this case have agreed to a schedule under which the appellants' reply brief on the merits will be filed by December 14, 2018. The parties do not anticipate that additional briefing would be required if the Court agrees to hear the case initially en banc.

3. As noted above, we are authorized to state that the Sheriff of Los Angeles County supports the granting of this petition.

Plaintiffs-appellants have provided the following statement setting out their position on this petition:

"Appellants do not join or support the California Attorney General in seeking initial en banc review of this appeal because they contend that the Court's opinion in *Young v. State of Hawaii*, No. 12-17808, correctly holds that the

right to bear arms extends beyond the home, accurately applies this Circuit's Second Amendment jurisprudence, and dispositively decides this appeal in their favor. As a result, they see no reason for that opinion, or its underpinnings, to be reevaluated by this Court. However, Appellants do agree that if this Court decides to reconsider the *Young* decision in an en banc hearing, this matter should be included in that hearing, so that this Court can consider the constitutionality of California's carry prohibitions alongside Hawaii's. Accordingly, if the Court is inclined to reconsider the *Young* decision en banc, Appellants agree that the Court should grant initial en banc review in this case."

CONCLUSION

Unless the Court accepts Hawaii's suggestion to vacate the panel opinion in *Young* and remand that case to the district court for further proceedings, the Court should grant en banc review in both *Young* and *Flanagan* and consider the cases in tandem.

Dated: September 21, 2018

Respectfully submitted,

s/ Samuel P. Siegel

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Form 11. Certificate of Compliance Pursuant to 9th Circuit Rules 35-4 and 40-1 for Case Number 18-55717

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the back of each copy of the petition or answer.*

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/answer to petition (check applicable option):

☒ Contains 3,277 words (petitions and answers must not exceed 4,200 words), and is prepared in a format, type face, and type style that complies with Fed. R. App. P. 32(a)(4)-(6).

or

☐ Is in compliance with Fed. R. App. P. 32(a)(4)-(6) and does not exceed 15 pages.

Signature of Attorney or Unrepresented Litigant: s/ Samuel P. Siegel

Date: Sept. 21, 2018

("s/" plus typed name is acceptable for electronically-filed documents)

CERTIFICATE OF SERVICE

I certify that on September 21, 2018, I electronically filed the foregoing document with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all other participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: September 21, 2018

s/ Samuel P. Siegel
Samuel P. Siegel