Case No. 18-55717

In the United States Court of Appeals
for the Ninth Circuit

MICHELLE FLANAGAN, et al.,
Plaintiffs-Appellants,

v.

XAVIER BECERRA, et al.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Central District of California
(CV 16-06164-JAK-AS)

APPELLANTS' REPLY BRIEF

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INTRODUCTION

California has countless policy options at its disposal to seek to protect the safety and welfare of its citizens. And when it comes to firearms, no one questions the State's power to prohibit the carrying of weapons in select "sensitive places." *McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010). But California's exceedingly restrictive carry regime makes that narrow exception the rule: Virtually the entirety of Los Angeles County has been declared a "sensitive place" in which the Second Amendment has no force. That regime cannot be reconciled with the text of the Second Amendment, which makes the right to keep and bear arms the rule, and not the exception. Nor can California's restrictive carry regime be reconciled with the historical record, which, contrary to the State's contentions, confirms that a robust right to carry firearms for self-defense—including in "public"—was both widely recognized and widely protected at the founding. By effectively prohibiting law-abiding Californians from carrying firearms anywhere and everywhere outside the home that actually matters, the State and Sheriff McDonnell prevent individuals like Michelle Flanagan from exercising that right.

In short, California may favor allowing citizens to carry openly but not concealed. *See Peruta v. County of San Diego*, 824 F.3d 919, 942 (9th Cir. 2016). The State may, inversely, allow citizens to carry their weapons concealed but not openly. And it may even take both options off the table in especially sensitive places. What it

may not do, however, is prohibit the carrying of firearms entirely in virtually all of a county. By doing so, the State has run afoul of the Second Amendment.

ARGUMENT

I. THE SECOND AMENDMENT GUARANTEES A RIGHT TO BEAR ARMS, INCLUDING IN "PUBLIC" AND "POPULATED" PLACES.

As explained in Appellants' opening brief, AOB 20-33, the constitutional text, Supreme Court precedent, and a wealth of history confirm that law-abiding Americans possess a right to carry firearms outside the home for self-defense. The State thus wisely concedes that the Second Amendment is not confined to "the home or its immediate environs." State's Br. 13. Instead, the State tries to demonstrate that, while the right to bear arms was not entirely homebound, it did not extend to "public" or "populated" places, but rather was confined to remote, isolated, and unpopulated areas. That argument is overwhelming refuted by the historical record.

A. Text and Precedent Confirm That the Second Amendment Protects a Robust Right to Bear Arms.

The Second Amendment guarantees "the People" the right to bear arms. *Heller* confirms that this right extends beyond the confines of one's home. *See* 554 U.S. 570, 584 (2008); *see also Young*, 896 F.3d at 1052. As *Heller* explained, the term "bear" means to "wear" or to "carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person." *Heller*, 554 U.S. at 584 (quoting *Muscarello v. United States*, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting)). Because "conflict

with another person" typically occurs outside the four walls of one's dwelling, the right to bear arms encompasses a right to carry outside the home. *See Young v. Hawaii*, 896 F.3d 1044, 1052 (9th Cir. 2018) ("The prospect of confrontation is, of course, not limited to one's dwelling."); *Wrenn v. D.C.*, 864 F.3d 650, 657 (D.C. Cir. 2017) ("After all, the Amendment's core lawful purpose is self-defense, and the need for that might arise beyond as well as within the home." (internal quotations and citations omitted)); *Moore v. Madigan*, 702 F.3d 933, 941 (7th Cir. 2012) ("[T]he interest in self-protection is as great outside as inside the home."). To say otherwise would frustrate the "core lawful purpose" of the Second Amendment: self-defense. *Heller*, 554 U.S. at 630.

Although the State acknowledges that the Second Amendment guarantees a right to carry a firearm outside the home, *see* State's Br. at 11-15, it insists that California's carry regime—which effectively eliminates that right for ordinary Californians—is nevertheless permissible because the right identified by *Heller* is not "unfettered," *id.* at 15. But while *Heller* certainly acknowledged that the Second Amendment does not protect a right to "carry any weapon whatsoever in any manner whatsoever and for whatever purpose," *Heller*, 554 U.S. at 626, it cannot plausibly be read to support the State's crabbed contention that the right bear arms does not apply in "public" or "populated" placed. State's Br. at 21. Indeed, the case arose in the highly populated District of Columbia, and the Court would not have needed to note that "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings" are "presumptively lawful," *id.* at 626 & n.26, if there was no

right to carry a firearm in the "public" and "populated places" where schools and government buildings are located. Nor would the Court have described the rare state law that prohibited carrying a firearm "publicly" as a "severe restriction" on Second Amendment rights, or have cited approvingly to decisions that struck down such restrictions, *Heller*, 554 U.S. at 629, if there was no right to carry in "public" places in the first place. As this Court thus correctly concluded in *Young*, "carrying firearms outside the home fits comfortably within *Heller*'s definition of 'bear.'" *Young*, 896 F.3d at 1052.

B. The Anglo-American Tradition Recognizes a Robust Right to Bear Arms

Heller's recognition, and *Young*'s conclusion, that the Second Amendment encompasses a robust right to bear arms is unsurprising, as the historical record overwhelmingly supports that proposition. "Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures . . . think that scope too broad." *Heller*, 554 U.S. at 634-35. From its English origins, to colonial America, through the ratification of the Fourteenth Amendment and beyond, the right to bear arms was overwhelmingly understood to include a robust right to carry firearms, including in "public" and "populous" places. The State's contrary claims are revisionist history.

1. The Right to Bear Arms in Pre-Founding England

The State continues, as it did before the district court, to promote the fiction that in England the carrying of firearms was either heavily restricted or outright banned. Those claims are flatly contradicted by the historical record, which confirms that England recognized a robust right to bear arms for self-defense. Indeed, the ability to carry arms was a right respected by the Crown, and regulations concerning its exercise were carefully crafted to preserve its enjoyment.

The State's contrary claims dramatically mischaracterize English law. For example, the State cites a statute from 1285 as supposed evidence that English authorities from an early era often "categorically banned" the carrying of arms. State's Br. at 17 (quoting 13 Edw. 1, 102 (1285)). But that law did not forbid "wandering about the streets of [London]" while armed, as the State claims—it prohibited anyone (except a "great man," "other lawful person of good repute," or their "certain messenger") from being on the streets after curfew, *regardless of whether he was armed*:

> [I]t is enjoined that none be so hardy to be found going or wandering about the Streets of the City, after curfew tolled at St. Martin's le Grand, with Sword or Buckler, or other Arms for doing mischief, or whereof evil suspicion might arise, ***nor any in any other manner***, unless he be a great man or other lawful Person of good repute, or their certain messenger, having their Warrants to go from one to another, with Lanthorn [lantern] in hand.

Statutes for the City of London, 13 Edw. I (1285) (emphasis added). In short, the statute authorized the enforcement of a curfew, not a ban on carrying arms.

The State next contends that this supposed "tradition" of prohibiting the carrying of firearms was furthered by enactment of the Statute of Northampton in 1328. State's Br. at 17. The State's apocryphal account of Northampton and its prodigy has been soundly rejected by this Court, and for good reason—neither the text nor historical understanding of that law support the State's reading. *See Young*, 896 F.3d at 1063-68. The Statute of Northampton prohibited all but the king's servants and ministers from bringing "force in affray of the peace," 2 Edw. 3 (Eng. 1328), "affray" meaning "a public offence *to the terror of the King's subjects*, and so called because it affrighteth and maketh men afraid, and is enquirable in a leet as a common nuisance." *State v. Huntly*, 25 N.C. 418, 421 (1843) (emphasis added) (quoting Sir Edward Coke, 3d Just. 158); *Young*, 896 F.3d at 1063 n.15. The act of carrying alone did not constitute an "affray" or a crime.

That is how English courts characterized Northampton long before (and long after) the founding. Perhaps most famously, in the 1686 case of *Rex v. Knight*, Chief Justice Holt explained that "the meaning of the statute of [Northampton] was to punish people who go armed *to terrify the King's subjects*." 87 Eng. Rep. 75 & 90 Eng. Rep. 330 (K.B. 1686) (emphasis added); *see also Rex v. Smith*, 2 Ir. R. 190 (K.B. 1914) ("[W]e think that the statutable misdemeanor is to ride or go armed *without lawful occasion in terrorem populi* . . . ." (emphasis in original)). As a later English court would explain, Northampton did not infringe upon the liberty of an Englishman to carry a firearm for self-defense: "But are arms suitable to the condition of people in the

ordinary class of life, and are they allowed by law? A man has a clear right to protect himself when he is going singly or in a small party upon the road where he is travelling or going for the ordinary purposes of business." *Rex v. Dewhurst*, 1 State Trials, N.S. 529, 601-02 (1820).

Prominent commentators around the time of the founding confirm the same understanding. As eighteenth century legal scholar William Hawkins explained, "no wearing of arms is within the meaning of this statute, unless it be accompanied with such circumstances as are apt to terrify the people." 1 William Hawkins, *A Treatise of the Pleas of the Crown* 135, ch. 63, § 4, at 135 (1716). Blackstone concurred, noting that Northampton banned only the carrying of "dangerous and unusual weapons." *See Heller*, 554 U.S. at 627 (citing 4 Blackstone 148–149 (1769)). Blackstone recognized the basic right of "having arms for . . . defence," which was "a public allowance under due restrictions, of the natural right of resistance and self-preservation." 1 William Blackstone, Commentaries 143-44. It was only when the weapon was "dangerous" and "unusual" that carrying it was "a crime against the public peace, by terrifying the good people of the land." 4 Blackstone 148. James Wilson, "virtual coauthor of the Constitution," likewise opined that Northampton laws banned only the carrying of "'dangerous and unusual weapons, in such a manner, as will naturally diffuse a terrour among the people.'" *Wrenn v. D.C.*, 864 F.3d 650, 660 (D.C. Cir. 2017) (quoting James Wilson, *The Works of the Honourable James Wilson* 79 (1804)).

In short, by the time of the Declaration of Rights in 1689, the forerunner to the Second Amendment, it was clear that peaceable carrying of arms for defense not only was lawful—it was a natural right. *See* 1 Wm. & Mary, sess. 2, ch. 2. Blackstone, commenting on the Declaration, explained that "public allowance" to carry arms emanated from "the natural right of resistance and self-preservation." 1 Blackstone, *Commentaries* 139 (1765). The State's contention that "Northampton generally prohibited public carry" is thus a canard; English law demonstrated a profound respect for the right of individuals to defend themselves.

2. The Right to Bear Arms During the Founding Era

Just as it does with English law, the State misrepresents early American statutes, claiming they often prohibited the carrying of firearms. In reality, American analogs to the Statute of Northampton followed the same tradition as their English predecessor, punishing only those who used arms to terrorize their fellow citizens.

For example, Virginia's version of the Statute of Northampton forbade citizens from "rid[ing] armed by night []or by day, in fairs or markets, or in other places, *in terror of the County*," 1786 Va. Laws 33, ch. 21 (emphasis added), and Massachusetts punished those who went "armed offensively, *to the fear or terror of the good citizens of this Commonwealth,*" 1795 Mass. Laws 436, ch. 2 (emphasis added). Other states followed a similar approach. *See, e.g.*, 1801 Tenn. Laws 710, § 6 ("publicly ride or go armed to the terror of the people"); 1821 Me. Laws 285, ch. 76 § 1 ("ride or go armed offensively, to the fear or terror of the good citizens of this State"). While the State

suggests these statutes prohibited the public carrying of firearms, it conveniently fails to quote their text.

Elsewhere the State insists that North Carolina's early Northampton statute, making it illegal to "go []or ride armed by night [] or by day, in fairs, markets . . . [or] part[s] elsewhere," was tantamount to a ban on public carry. State's Br. at 20 (quoting 1792 N.C. Law 60, ch. 3). The State fails to note, however, that the North Carolina Supreme Court definitively *rejected* that construction of the statute, instead concluding that the law followed the Northampton tradition of prohibiting only "the offence of riding or going about armed with unusual and dangerous weapons, to the terror of the people," *not* the general carrying of a weapon, *Huntly*, 25 N.C. at 418, 420, 422–23.

As the State is forced to acknowledge, "[s]ome modern courts"—i.e., this Court and the D.C. Circuit—have squarely rejected its account of the history as well. State's Br. at 23 (citing *Young*, 896 F.3d at 1065; *Wrenn*, 864 F.3d at 660). The State attempts to dismiss these decisions as anachronistic, but reality is the interpretation of Northampton that this Court embraced in *Young* is supported by the overwhelming weight of historical evidence. *See, e.g.*, *Simpson v. State*, 13 Tenn. 356, 358-60 (1833); Conductor Generalis, Or, the Office, Duty, and Authority of the Justice of the Peace 11-12 (James Parker, ed. 1764); *Sir John Knight's Case*, (1686) 87 Eng. Rep. 75 (K.B.) 76, 90 Eng. Rep. 330 (K.B.) 330, Comberbach; *Chune v. Piott*, (1615) 80 Eng. Rep. 1161 (K.B.) 39; 1 Sir William Oldnall Russell, A Treatise on Crimes and Indictable Misdemeanors 271-72 (2d ed. 1826); 1 William Hawkins, A Treatise of the Pleas of

the Crown 489 (1824 ed.); 4 William Blackstone, Commentaries *148-49. The historical record is clear: Neither Northampton nor its American analogs banned carrying firearms in "public" or "populated" places.

Indeed, historical accounts of the early years of the Republic confirm that Americans not only were not prohibited from carrying firearms, but at times were even required to. *See* Opening Br. at 26. The Founders themselves and their contemporaries regularly traveled with weapons. *See Grace v. District of Columbia*, 187 F. Supp. 3d 124, 136–37 (D.D.C. 2016); 5 Tucker's Blackstone at App. 1 ("In many parts of the United States, a man no more thinks, of going out of his house on any occasion, without his rifle or musket in hand, than an European fine gentleman without his sword by his side."). The State claims this robust tradition was limited to "remote" areas. State's Br. at 21. "[O]nce a traveler in this era arrived in a population center," the State contends, he was prohibited from carrying. *Id.* at 22. But the State offers no evidence to support such a claim (or explanation for the lack of a well-documented history of firearm stables or any other plausible explanation for what all these travelers did with their weapons when reaching town). Instead, it simply cites Virginia and Massachusetts's Northampton statutes and a quotation from John Adams to the effect that the citizens of Boston had a right to arm themselves in response to the Boston Massacre.

In reality, Adams did not suggest, as the State would have it, that this right arose only *after* the massacre began. Instead, he explained in no uncertain terms that

"*every private person is authorized to arm himself*; and on the strength of this authority I do not deny the inhabitants had a right to arm themselves at that time for their defence." John Adams, *First Day's Speech in Defence of the British Soldiers Accused of Murdering Attucks*, Gray and Others, in the Boston Riot of 1770, in 6 Masterpieces of Eloquence 2569, 2578 (Hazeltine et al. eds. 1905) (emphasis added). All that is to say, there is no support for the State's claim that the right to carry a firearm for self-defense was forfeited upon a citizen riding into town; the State's distinction between urban and rural areas simply did not exist.

3. The Right to Bear Arms in Nineteenth Century America

The State next argues that laws restricting the right to carry were the norm throughout the Nineteenth Century, both before the Civil War and leading up to adoption of the Fourteenth Amendment. *See* State's Br. at 24-30. Again, the historical evidence is to the contrary. In reality, states during that era maintained regulatory regimes that were careful to preserve the right to carry.

The State bases its contrary argument largely on surety laws, claiming that under these statutes "[a] person caught carrying a firearm in public could have been arrested by the justice of the peace and required to pay sureties—often a hefty sum—in order to be released." *Id.* at 25. The State severely mischaracterizes how surety laws functioned. These laws did not prohibit the carrying of firearms, let alone impose fines on those who carried them. They simply required someone who was accused by sworn complaint of carrying a firearm *for the impermissible purpose of injuring*

another or breaching the peace to pay a surety (i.e., a bond). Massachusetts' 1836 surety statute (in its entirety, rather than just the portion the State selectively quotes) is illustrative:

> If any person shall go armed . . . without reasonable cause to fear an assault or other injury, or violence to his person, or to his family or property, he may, ***on complaint of any person having reasonable cause to fear an injury, or breach of peace, be required to find sureties for keeping the peace***, for a term not exceeding six months, with the right of appealing as before provided.

1836 Mass. Laws 750 § 16 (emphasis added); *see also* 1838 Wisc. Laws 381, § 16; 1841 Me. Laws 707, 709, ch. 169, § 16; 1846 Mich. Laws 690, 692, ch. 162, § 16; 1847 Va. Laws 127, 129, ch. 14, § 16; 1851 Minn. Laws 526, 528, ch. 112, § 18; 1853 Or. Laws 218, 220, ch. 16, § 17; 1861 Pa. Laws 248, 250, § 6. These laws thus manifestly did not confine the carrying of firearms to those who could establish "reasonable cause." To the contrary, they presumed that it *was* lawful to carry a firearm, and indeed did not even prohibit *those who caused others to fear injury* from continuing to do so. They simply required such individuals to pay a surety for keeping the peace. These statutes thus in no way resemble California's regime, in which fear for one's life represents a limited *exception* to a general *prohibition* on carrying firearms.

In reality, Nineteenth Century case law makes clear that the right to carry was well-established during that period. *See, e.g.*, *Andrews v. State*, 50 Tenn. 165, 178 (1871) ("The right to keep arms, necessarily involves the right to . . . . carry them to and from his home, and no one could claim that the Legislature had the right to punish him for

it, without violating this clause of the Constitution."); *State v. Chandler*, 5 La. Ann. 489, 490 (1850) (The open carrying of firearms is a "right guaranteed by the Constitution of the United States, and which is calculated to incite men to a manly and noble defence of themselves, if necessary, and of their country . . . ."); *State v. Reid*, 1 Ala. 612, 616–617 (1840) ("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").

The State attempts to reduce these cases to a regional phenomenon, relegated to "[o]ne group of mostly southern States" with a purportedly "aggressive gun culture" resulting from an "embrace of slavery and honor." State's Br. at 26, 13 (quoting Ruben & Cornell, *Firearm Regionalism and Public Carry: Placing Southern Antebellum Case Law in Context*, 125 Yale L.J. Forum 121, 128 (2015)). That effort is at considerable odds with *Heller*, which expressly relied upon the very same cases the State maligns as persuasive evidence of the scope of the Second Amendment right. *See* 554 U.S. at 626-29 (citing *Andrews v. State*, 50 Tenn. 165 (1871); *State v. Chandler*, 5 La. Ann. 489, 490 (1850), *Nunn* v. *State*, 1 Ga. 243 (1846); *State v. Reid*, 1 Ala. 612 (1840)). Indeed, *Heller* even described *Nunn* as having "perfectly captured" an aspect of the Second Amendment. *Id.* at 612.

Moreover, the State's attempt to associate the right to carry with slavery is puzzling, as it was the *denial* of Second Amendment rights to slaves that helped sustain that horrific institution. The fear of slave rebellions, for instance, "led Southern

legislatures to take particularly vicious aim at the rights of free blacks and slaves to speak or to keep and bear arms for their defense." *McDonald*, 561 U.S. at 845; *see Young*, 896 F.3d at 1059. Indeed, Chief Justice Taney's concern that freed slaves might "keep and carry arms wherever they went" was part of the rationale for his infamous decision to deny freed Blacks citizenship. *See Dred Scott v. Sandford*, 60 U.S. 393, 417 (1857). And even after the Civil War, "black codes" adopted by southern governments "required blacks to obtain a license before carrying or possessing firearms or bowie knives." Clayton E. Cramer, *The Racist Roots of Gun Control*, 4 Kan. J.L. & Pub. Pol'y 17, 20 (1995); *see Young*, 896 F.3d at 1059-61. These restrictive gun regulations helped inspire Republican efforts to pass the Fourteenth Amendment. *See id.* In ratifying that Amendment, the People affirmed that the right to carry arms, as with other civil rights, belonged to *all* of the People, not just a privileged subset of them.

The State next highlights regulations from the territorial West. *See* State's Br. at 28-29. But these ordinances, enacted largely by isolated localities with reputations for lawlessness, not only are outliers, but were enacted long after the Founding, and typically after the Fourteenth Amendment, making them of little (if any) probative value in analyzing the historical scope of the Second Amendment. *See Heller*, 554 U.S. at 614. Furthermore, much of the Old West—places like New Mexico, Wyoming, Arizona, Idaho—remained under territorial governance at the time. Whatever the validity of these territorial ordinances, there is no historical support for the

proposition that they could have survived following statehood. Indeed, the Idaho Supreme Court, citing the Second Amendment and its state analog, invalidated one such territorial law following Idaho's admission to the Union: "the legislature has no power to prohibit a citizen from bearing arms in any portion of the state of Idaho, whether within or without the corporate limits of cities, towns, and villages." *In re Brickey*, 70 P. 609, 609 (Idaho 1902).

Finally, the State insists that select authorities following the passage of the Fourteenth Amendment demonstrate that state governments were free to restrict severely the ability of Americans to carry firearms. But the State offers scant support for this theory. For example, the State emphasizes that military governors imposed carry restrictions on the defeated southern states following the Civil War. *See* State's Br. at 30 n.14. Needless to say, post-war decrees imposed by military rule are hardly the benchmark by which to measure the historical extent of constitutional rights. The State also relies on *Andrews v. State*, but if anything, that case emphasized the importance of the right to carry when it struck down "a statute that forbade openly carrying a pistol 'publicly or privately, without regard to time or place, or circumstances.'" 50 Tenn. at 187. Other cases the State cites, *see* State's Br. at 29, rely on the flawed premise—expressly rejected by *Heller*—that the right to bear arms exists solely to serve the common defense, *see Hill v. State*, 53 Ga. 472, 475 (1874); *English v. State*, 35 Tex. 473, 477 (1871). Although *State v. Duke* upheld regulations restricting the carrying of firearms to certain locations, it nevertheless acknowledged "the right

to carry a pistol openly when needed for self-defense or in the public service." 42 Tex. 455, 459 (1875). *Duke* is clearly an outlier, *see* Michael P. O'Shea, *Modeling the Second Amendment Right to Carry Arms (I): Judicial Tradition and the Scope of "Bearing Arms" for Self-Defense*, 61 Am. U. L. Rev. 585, 655 (2012), and notably based its reasoning on the interpretation of a Texas constitutional provision more permissive of regulation than the Second Amendment, *see Young*, 896 F.3d at 1058.

In short, in Nineteenth Century America, carrying firearms was a common practice, and was not confined to remote, isolated, or unpopulated areas. States throughout that period respected the right of their citizens to carry firearms. The State's insistence that "ordinary people," State's Br. at 33, do not enjoy the right to protect themselves and their loved ones in "urban areas" is therefore a dramatic departure from historical law and custom that flies in the face of the letter and spirit of the Second Amendment.

II. CALIFORNIA'S RESTRICTIVE CARRY REGIME VIOLATES THE SECOND AMENDMENT

The reality that the right to bear arms is not confined to remote, isolated, or unpopulated areas all but resolves this case. The State does not and cannot dispute that a law that denies a constitutionally protected right to those entitled to exercise it must "fail constitutional muster" under "any of the standards of scrutiny." *Heller*, 554 U.S. at 628-29; *see also Jackson v. City and Cnty. of San Francisco*, 746 F.3d 953, 961 (9th Cir. 2014). Instead, the State resists the premise that California law categorically

denies ordinary, law-abiding citizens like Appellants their right to bear arms. The State is wrong as a matter of law and fact.

A. California Law Categorically Forecloses Appellants from Exercising Their Constitutional Right to Public Carry in Any Practical Way

According to the State, Californians have even more opportunities to bear arms than the Second Amendment requires because they are supposedly able to carry firearms without a license: on private property, such as the area "immediately around an individual's home or place of business," or with the owner's permission, someone else's home or place of business; while engaged in certain specified activities; if confronted by a deadly threat that law enforcement cannot immediately defend against; and when in "less populated areas." State's Br. at 34. Of course, the first and fatal problem with the State's argument is that the State is wrong about what the Second Amendment requires, rendering this debate largely beside the point. But even setting that problem aside, the picture painted by the State is an illusion.

1. The State vastly exaggerates the scope and significance of the exceptions to California's carry restrictions

The State first notes that people may lawfully carry without a license on private property in California that is not a "public place." State's Br. at 3. But the State neglects to mention that "California courts have routinely held that privately-owned property can constitute a public place." *People v. Tapia*, 129 Cal. App. 4th 1153,1161 (2005). Indeed, California courts have even gone so far as to deem front yards and driveways "public places" where carry restrictions apply if those areas allow for public

entry. *See e.g.*, *People v. Cruz*, 44 Cal. 4th 636, 674 (2008); *People v. Yarborough*, 169 Cal. App. 4th 303, 318-19 (2008). Contrary to the State's depiction, then, Californians not only are not generally entitled to carry firearms on "private property," but are not even necessarily entitled to carry firearms on their *own* private property.

Likewise, if a business is a "public place," the relevant exception applies only to its owner, and allows the owner only to "*have*" (keep) a loaded firearm on the premises, not to *carry* (bear) one. *See* Cal. Penal Code § 26035; *People v. Overturf*, 64 Cal.App.3d Supp 1, 6 (1976) (holding that a statute that says it is lawful to "have" without mentioning "carry" does not allow "carrying" a loaded firearm). And there is no exception to the carry restrictions for property surrounding a business, unless it is private property that the public cannot enter. Carrying on private property is thus vastly more limited than the State suggests.

The State also repeatedly invokes its "grave danger exception," even going so far as to suggest that it all but decides the Second Amendment question in its favor. State's Br. at 1, 10, 32, 50, 51, 56-57. Setting aside the exceedingly narrow circumstances in which this *affirmative defense* may be invoked, as a practical matter, it is illusory. The State effectively concedes as much when it finally gets around to addressing the critical question of where someone is supposed to get a loaded firearm from should "immediate, grave danger" arise. As the State is forced to admit, there is no right to have even an *unloaded* firearm on hand to load in case such danger should arise, so the lawful invocation of this self-defense exception is effectively illusory.

State's Br. At 57; *see* Cal. Penal Code §§ 26350, 25400. If people cannot lawfully possess a firearm *before* "immediate, grave danger" arises, an affirmative defense for possessing one during the narrow window between when law enforcement is called and law enforcement arrives is of no practical use, as "where the fleeing victim would obtain a gun during that interval is apparently left to Providence." *Peruta v. Cnty. of San Diego*, 742 F.3d 1144, 1147 n.1 (9th Cir. 2014) (*Peruta II*).

2. The State also exaggerates the extent to which one can lawfully carry in unincorporated areas of California

The State's proclamation that "gun owners may carry without a license in significant areas" of unincorporated Los Angeles County is equally divorced from reality. State's Br. at 50-51. While Los Angeles County has much unincorporated territory, the vast majority of it—like much of California—is subject to either state or local carry restrictions.

In California, it is generally illegal to carry "a loaded firearm on the person or in a vehicle while . . . in any public place or on any public street in a prohibited area of unincorporated territory." Cal. Pen. Code § 25850. A "prohibited area" is "any place where it is unlawful to discharge a weapon." *Id.* § 17030. Any "public place" within 150 yards of a building meets the definition of a "prohibited area," as does any public "road or highway." Cal. Fish & Game Code § 3004; Cal. Penal Code § 374(c), *see also People v. Belanger*, 243 Cal. App. 2d 654, 657 (1966) (defining "public place" as including "public streets, ***roads***, ***highways***, and sidewalks."). In reality, then,

individuals may not carry a loaded firearm on *any* public road or highway, or in *any* public place (incorporated or not) that is within 150 yards of building. In a highly-developed county like Los Angeles, that may encompass much, if not most, of its unincorporated area. And it certainly encompasses the vast majority of places where people are likely to *be*, as well as the vast majority of places where people are likely to want to be "armed and ready" in case of confrontation, *Heller*, 554 U.S. at 584.

Relying on a decades-old California Attorney General Opinion, the State claims that its carry restrictions apply only in "villages and towns" of unincorporated areas; *See* 51 Op. Cal. Att'y Gen. 197, 200-201 (Oct. 3, 1968). But while the opinion may support that view, *id.*, it is not binding, *see, e.g.*, *Moore v. Panish* (1982) 32 Cal.3d 535, and the State tellingly identifies no evidence that its restrictions are actually being enforced that way today. What is more, the State simply ignores the many statutes and state-allowed municipal ordinances that prohibit carrying a firearm without a license in rural areas outside of villages and towns. AOB 5-6. Los Angeles County is replete with them. *Id.* The State's effort to belittle Appellants' "quip" that only well-trained individuals could decipher where it is legal to carry, State's Br. 4, 51, n. 24, thus not only is misguided, but misses the point. At most, the State suggests only that it may be lawful to carry in a handful of remote, isolated islands of rural areas if residents can manage to avoid all roads, buildings, populous areas, and other regions designated off-limits by the state or county. Even assuming that is the case, that does not and cannot change the fact that law-abiding residents of Los Angeles County are

effectively denied the right to carry almost everywhere that they are actually likely to want to exercise it.

* * *

In sum, Appellants are, as a practical matter, categorically prohibited from exercising their fundamental right to carry firearms for self-defense. That California allows others to carry firearms is irrelevant. The Second Amendment means that the right to keep and bear arms is the rule, not the exception. It guarantees the right to bear arms to "the People," not just to peace officers, zookeepers, or whomever else the State or the Sheriff may deem worthy of exercising it. And there is no dispute that *Appellants* have been denied the Carry License necessary under California law to exercise that right—and were denied licenses because, in the eyes of the official to whom the State gives "unfettered discretion" to decide such matters, *Nichols v. Cnty. of Santa Clara*, 223 Cal. App. 3d 1236, 1243 (1990), a generalized need for self-defense is not a sufficient reason for an ordinary, law-abiding citizen to carry a handgun. Thus, for Appellants, California law is, in all meaningful respects, the functional equivalent of a ban on the very right that the Second Amendment protects.

B. California's Restrictive Carry Regime Cannot Survive Any Level of Means-end Scrutiny

Because California's carry regime denies Appellants their constitutional right to bear arms, it "fail[s] constitutional muster" under "any of the standards of scrutiny." *Heller*, 554 U.S. at 628-29. There is thus no need to engage in a levels of scrutiny

analysis, as all roads lead to the same result: California's refusal to allow ordinary, law-abiding citizens any meaningful capacity to bear arms for self-defense is unconstitutional.

That said, if this Court were to apply any level of scrutiny, strict scrutiny would plainly be the correct one. As explained, *see supra* Part II, and as this Court recognized in *Young*, the right to bear arms is every bit as core to the Second Amendment as the right to keep them. *Young*, 896 F.3d at 1070; AOB 20-25. To be sure, *Heller* notes 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." 554 U.S. at 635. But that passing observation, which has not been essential to any case in which this Court has invoked it, does not eliminate *Heller*'s thorough explication of the text and historical understanding of the Second Amendment—an analysis that gives "independent and seemingly equal treatments" to the separate rights to "keep" arms and to "bear" them. *Wrenn*, 864 F.3d at 657 (citing *Heller*, 554 U.S. at 570-628). Accordingly, it is "more natural to view the Amendment's core as including a law-abiding citizen's right to carry common firearms for self-defense beyond the home." *Id.*

The kind of categorical ban on public carry at issue here also so "severely burdens" the right as to demand strict scrutiny. *Silvester v. Harris*, 843 F.3d 816, 821 (9th Cir. 2016). The State suggests that the burden is light because carry restrictions apply only in "populated" areas that are under the watchful eye of law enforcement.

State's Br. at 41-42. But as already explained, the right to bear arms applies with equal force in "populated" areas, so even assuming the State did confine its restrictions to such areas (which, in reality, it does not), that would not lessen the burden on Second Amendment rights in any meaningful way.

In all events, just like the possession ban in *Heller*, California's carry ban plainly violates Appellants' Second Amendment rights regardless of which standard of scrutiny applies, for the State cannot begin to meet its burden of showing that denying law-abiding citizens all practical outlets to carry for self-defense furthers its concededly compelling public safety interest in a manner that "avoid[s] unnecessary abridgement" of Second Amendment rights. *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 196-200.[1] To the contrary, denying the exercise of a right to ordinary, law-abiding citizens is the very antithesis of the kind of tailoring that both strict *and* intermediate scrutiny demand. Indeed, even assuming that a carry ban might further public safety ends, it would do so only in the same way that a ban on possessing a handgun in the home might do so—namely, by making it harder to exercise the right to keep and bear arms. That, of course, is precisely what the Second Amendment declares off limits, as the Framers already drew the public safety balance in favor of protecting the right to keep and bear arms. And just as "protected speech may [not]

[1] Nor, contrary to its contentions, State's Br. at 44, is the State owed any deference on whether its carry regime is sufficiently tailored. *Turner Broad. Sys., Inc. v. F.C.C.* ("*Turner II*"), 520 U.S. 180, 214 (1997).

be banned as a means to ban unprotected speech," *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 255 (2002), banning the protected carrying of firearms by the many to get at their unprotected use by the few is an option that the Second Amendment takes "off the table." *Heller*, 554 U.S. at 636.

Even setting aside the complete lack of tailoring, moreover, the State could not meet its evidentiary burden of proving that the law meaningfully furthers public safety. In essence, the State has offered a single unpublished (still after several years), non-peer-reviewed paper, E.R.IV 1101-02; State's Br. at 47, fn 20, that uses a method highly sensitive to misleading results and manipulation, E.R.IV 1107-13, 1113, 1125, 1151, 1249-51, 1283-85, that relies on cherry-picked sources, E.R.IV 1131-34, 1140-45, 1148-50, 1158-60, that has been criticized (if not outright rejected) by most in the field, E.R.IV 1282; E.R.IV 1279-1290,[2] and that the State's own expert concedes could be wrong, E.R.IV 1174-1175. The premise of the State's expert, Donohue, is that violent crime increases when a state liberalizes the issuance of *concealed* carry licenses. Yet as many of the critics who have rejected his analysis have explained, and as Donohue himself admits, he did not account for whether *open* carry was already legal in the states he analyzed, E.R.IV 1203-09; 1262, 1290—which it was in the

[2] *See also* The Impact of Right to Carry Laws: A Critique of the 2014 Version of Aneja, Donohue, and Zhang, https://econjwatch.org/File+download/1049/MoodyMarvellJan2018.pdf?mimetype=pdf

majority of them.[3] Nor did he know what percentage of people acquired a license when they became available. E.R.IV 1169. This point is critical in understanding why his paper is worthless here. If he did not know how many people were carrying before the change of law, which he admits he does not, he cannot possibly know whether the rate of carrying increased after the law changed, let alone whether any such increase bore any causal connection to the alleged increase in crime. And the report that the State cites as corroborating Donohue suffers from the same deficiency. State's Br. at 46[4]. Lack of personal experience with open carry likewise dooms the State's reliance on its law enforcement expert. E.R.VI 1329; E.R.VIII 1874-1875, E.R.IX 2116-2120. This is particularly so when contrasted with Appellants' two expert law enforcement witnesses from open carry jurisdictions who rebutted his opinions about the supposed ills of open carry. E.R.VI 1294-1322, 1326-1330. Accordingly, the State has no reliable evidence that permissive open carry laws harm law enforcement.

The State thus is left with zero credible evidence that denying ordinary, law-abiding citizens the right to carry firearms actually furthers its public safety objectives. In fact, the best evidence on that score is directly to the contrary: The overwhelming majority of states have rejected California's view and have longstanding traditions of

[3] There are 29 states that allowed open carry prior to passing liberalized concealed carry permit laws but there are no statutes to cite to.

[4] It also is unreliable based on Donohue's own standards. He avoided analyzing the "crack years" (circa 1990-2001) in his report because it was difficult to isolate crime variables for that time. E.R.IV 1128-1129. The Siegel paper is analyzing mostly that period.

allowing open carry. Accordingly, the State has no reliable evidence that denying citizens the right that the Constitution guarantees them even achieves its intended objectives.

* * *

Individuals like Michelle Flanagan have a right under the Second Amendment to keep *and bear* arms to defend themselves. While California may enact regulations to govern the health and welfare of its citizens, the right to keep and bear arms must remain the rule, not the exception. California's effort to invert matters and relegate the right to carry to the narrowest of exceptions is a direct affront to the Second Amendment that cannot survive any meaningful form of constitutional scrutiny.

CONCLUSION

Appellants respectfully request that this Court reverse and direct the district court to grant Appellants' requested declaratory and injunctive relief.

Date: December 11, 2018

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the length limits permitted by Ninth Circuit Rule 32-1 because this brief contains 6995 words, excluding the parts of the brief exempted by Federal Rules of Appellate Procedure, rule 32(f).

2. This brief complies with the typeface requirements of Federal Rules of Appellate Procedure, rule 32(a)(5), and the type style requirements of Federal Rules of Appellate Procedure, rule 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Garamond type.

Dated: December 11, 2018

s/ C.D. Michel
C.D. Michel

CERTIFICATE OF SERVICE

I hereby certify that on December 11, 2018, an electronic PDF of APPELLANT'S REPLY BRIEF was uploaded to the Court's CM/ECF system, which will automatically generate and send by electronic mail a Notice of Docket Activity to all registered attorneys participating in the case. Such notice constitutes service on those registered attorneys.

Date: December 11, 2018

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