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, and JAMES MCDONNELL, Sheriff of Los Angeles County,
Defendants-Appellees.

On Appeal from the United States District Court
for the Central District of California
Case No. 2:16-cv-06164-JAK-AS (Hon. John A. Kronstadt)

BRIEF OF *AMICUS CURIAE* EVERYTOWN FOR GUN SAFETY IN SUPPORT OF APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Everytown for Gun Safety has no parent corporations. It has no stock, and hence, no publicly held company owns 10% or more of its stock.

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INTRODUCTION AND INTEREST OF AMICUS CURIAE

Everytown for Gun Safety is the nation's largest gun-violence-prevention organization, with over five million supporters across all fifty states, including hundreds of thousands in California. It was founded in 2014 as the combined effort of Mayors Against Illegal Guns, a national, bipartisan coalition of mayors combatting illegal guns and gun trafficking, and Moms Demand Action for Gun Sense in America, an organization formed after the murder of twenty children and six adults in an elementary school in Newtown, Connecticut. Currently, the mayors of sixty-one California cities are members of Mayors Against Illegal Guns. Everytown also includes a large network of gun-violence survivors who are empowered to share their stories and advocate for responsible gun laws.

Everytown has drawn on its expertise to file briefs in numerous Second Amendment cases, including challenges to laws like the one at issue in this case, offering historical and doctrinal analysis that might otherwise be overlooked. *See, e.g.*, *Gould v. Morgan*, No. 17-2202 (1st Cir.); *Young v. Hawaii*, 12-17808 (9th Cir.); *Peruta v. Cnty. of San Diego*, No. 10-56971 (9th Cir.) (en banc). It seeks to do the same here.[1]

This case involves a constitutional challenge to California's regulatory scheme for carrying handguns in public, as implemented by Los Angeles County—by far the

[1] All parties consent to the filing of this brief, and no counsel for any party authored it in whole or part. Apart from amicus curiae, no person contributed money intended to fund the brief's preparation and submission.

most populous county in America. In 2016, this Court, sitting en banc, upheld California's concealed-carry restrictions against a Second Amendment challenge. *Peruta v. Cnty. of San Diego*, 824 F.3d 919 (9th Cir. 2016). Central to the Court's holding was the existence of a centuries-long Anglo-American tradition of "prohibit[ing] carrying concealed" and "concealable" arms in populous places. *Id.* at 932. The Court canvassed this history and held that California's concealed-carry law was "longstanding" and thus constitutional under *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008). Recently, however, a divided panel of this Court took a strikingly different view of the history in reversing the dismissal of a challenge to Hawaii's public-carry regime. *See Young v. Hawaii*, 896 F.3d 1044 (2018). Although that decision remains in effect as of the date of this brief, a rehearing petition is pending.

Relying on the two-judge majority in *Young*, the plaintiffs in this case press the same reading of history, claiming that it requires invalidation of California's public-carry regime. Everytown files this brief to explain why this historical account is wrong.

We begin with the English history—the centuries-old prohibition on carrying firearms in populated public places dating back to the Statute of Northampton in 1328. History is critical because "*Heller* held that the Second Amendment, as originally adopted," protects a "right inherited from our English ancestors." *Peruta*, 824 F.3d at 929. The plaintiffs seek to alter the meaning of the English prohibition, claiming (at 29) that it "did not prohibit carrying firearms," and instead included an

unwritten "wicked purpose" requirement. But the historical materials reveal otherwise. We then turn to America: Contrary to the challengers' telling, the history shows that, from our nation's founding to its reconstruction, many states and cities enacted laws prohibiting carrying a firearm in populated public places (either generally or without good cause), and that these laws operated as criminal prohibitions. Finally, we discuss the 19th-century American case law. Although the challengers cherry-pick a few cases to support their view, those cases emanate almost exclusively from the slaveholding South—a part of the country that took an outlier approach to public carry, and that included wide variability even within the region. *See Gould v. Morgan*, 907 F.3d 659, 669–70 (1st Cir. 2018) (upholding public-carry regime as constitutional, and noting that *Young* "relied primarily on historical data derived from the antebellum South," which was not representative).

At the end of the day, the plaintiffs do not deny that their reading of the Second Amendment would render dozens of state and local laws—enacted both before and after the Fourteenth Amendment's ratification—unconstitutional. And yet neither the plaintiffs nor the majority in *Young* identify a single historical example of a successful challenge to a good-cause requirement like California's, much less a historical challenge to a requirement applying to an area as highly urbanized as modern-day Los Angeles. They instead point to a divided panel decision from 2017 that relied on a similarly flawed account of the history. *See Wrenn v. District of Columbia*,

864 F.3d 650 (D.C. Cir. 2017). This Court should follow the centuries-long historical tradition of regulating the carrying of firearms in public and uphold California's law as a longstanding, constitutional regulation under *Heller*.

ARGUMENT

A. The plaintiffs' claim that the Statute of Northampton imposed an evil-intent or threatening-conduct requirement is wrong.

As chronicled in *Peruta*, there is a long Anglo-American tradition of broadly restricting public carry in populated areas—a tradition that reaches back to at least 1328, when England enacted the Statute of Northampton. *See* 824 F.3d at 929–39. The plaintiffs barely grapple with the English history, mentioning it in just a single, defensive sentence (at 29). But this history cannot be dismissed so easily. *Heller* itself drew on English history in interpreting the right to keep and bear arms and remarked that "it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a pre-existing right." 554 U.S. at 592.

To the extent that the plaintiffs endeavor to dispute this history, rather than dismiss or downplay it, they argue (at 29) that the Statute of Northampton applied only to public carrying when accompanied by a "wicked purpose" or threatening behavior. And that is how the majority in *Young* interpreted the law, expressing their belief that there is nothing in the "historical record to suggest that the Statute of Northampton barred Englishmen from carrying common (not unusual) arms for defense (not terror)." 896 F.3d at 1064. But that understanding of the statute is wrong.

The "historical record" in fact shows that English law—outside of narrowly circumscribed exceptions—prohibited the bare act of carrying arms in public.[2]

The starting point is the statute itself. On its face, the Statute of Northampton provided that "no Man great nor small" shall "go nor ride armed by night nor by day, in Fairs, Markets, nor in the presence of the Justices or other Ministers, nor in no part elsewhere." 2 Edw. 3, 258, ch. 3 (1328). This broad prohibition was reenacted numerous times over the ensuing decades, and was reflected in England's "first common law treatise," which described the law as mandating that "'no one, of whatever condition he be, go armed in the said city or in the suburbs, or carry arms, by day or by night.'" *Peruta*, 824 F.3d at 930 (quoting Carpenter & Whittington, *Liber Albus: The White Book of the City of London* 335 (1419) (Henry Thomas Riley ed., 1861)). There is no reference to a "wicked purpose" requirement. To the contrary, the law was "strictly enforced as a prohibition on going armed in public," and any violation was punished as "a misdemeanor resulting in forfeiture of arms and up to thirty days imprisonment." Charles, *The Second Amendment in Historiographical Crisis*, 39 Fordham Urb. L.J. 1727, 1804 (2012).

A separate statute, by contrast, made it a felony to carry arms with aggressive or menacing intent. *See* 25 Edw. 3, c. 2 § 13 (1350) (imposing felony penalties on

[2] An appendix of historical laws is attached to this brief. An additional appendix that includes historical treatises is attached to the historians' amicus brief. *See* ECF No. 29.

anyone who went armed "against any other"). Neither the plaintiffs nor the *Young* majority mention this statute, and it is not hard to see why: If Northampton prohibited precisely the same conduct, only with lesser penalties, it would be rendered superfluous.

Historical accounts confirm this plain meaning. Writing several centuries after the law was first enacted, Blackstone explained that "[t]he offence of riding or going armed with dangerous or unusual weapons is a crime against the public peace, *by terrifying the good people of the land*; and is particularly prohibited by the statute of Northampton." 4 Blackstone, *Commentaries on the Laws of England* 148–49 (1769) (emphasis added). Terror, in other words, was considered a *natural consequence* of publicly carrying arms—not an additional element required for prosecution under the statute. Ruben & Cornell, *Firearm Regionalism and Public Carry: Placing Southern Antebellum Case Law in Context*, 125 Yale L.J. Forum 121, 129–30 (Aug. 25 2015) (noting Blackstone's implication that "terrorizing the public was the consequence of going armed"). As one English court put it: "Without all question, the sheriff hath power to commit . . . if contrary to the Statute of Northampton, he sees any one to carry weapons in the high-way, in terrorem populi Regis; he ought to take him, and arrest him, *notwithstanding he doth not break the peace in his presence*." *Chune v. Piott*, 80 Eng. Rep. 1161, 1162 (K.B. 1615) (emphasis added). The plaintiffs have no response to this precedent, and they do not bother to give one.

The only possible reading of *Chune*—a case that the *Young* majority does not mention—is that the phrase "in terrorem populi Regis" described the effect of carrying a firearm in public, not an additional (atextual) requirement of a "wicked purpose" or menacing behavior. Otherwise, it would make no sense for the court to have emphasized the sheriff's power to arrest "any" person carrying a gun in public even though that person did not "break the peace in his presence." *Id.*

Nor can there be any doubt that the statute covered handguns. Although *Young* tried to make something of Blackstone's reference to "dangerous or unusual weapons," *see* 896 F.3d at 1064, that phrase was widely understood to include handguns. In 1579, for example, Queen Elizabeth I issued a proclamation emphasizing that the statute prohibited the carrying of "Pistols, and such like, not only in Cities and Towns, [but] in all parts of the Realm in common high[ways]." Charles, *The Faces of the Second Amendment Outside the Home*, 60 Clev. St. L. Rev. 1, 21 (2012) (spelling modernized). Fifteen years later, she reiterated that carrying pistols in public—whether "secretly" or in the "open"—was "to the terrour of all people professing to travel and live peaceably." *Id.*; *see also Peruta*, 824 F.3d at 931; *Rex v. Harwood*, Quarter Sessions at Malton (Oct. 4–5, 1608), *reprinted in* North Riding Record Society, Quarter Sessions Records 132 (1884) (man arrested for committing "outragious misdemeanours" by going "armed" with "pistolls[] and other offensive weapons").

Against this long trail of historical evidence, the plaintiffs and the *Young* majority support their contrary reading primarily by (1) isolating and misreading a lone 17th-century English prosecution, and (2) taking selective quotes from English commentators out of context. *See* Appellants' Br. 29; *Young*, 896 F.3d at 1064. Neither comes anywhere near rebutting the full historical record.

As to the former: The plaintiffs contend that the prosecution and ultimate acquittal of Sir John Knight in 1686 demonstrates that the statute was interpreted to punish only "people who go armed to terrify the king's subjects." Appellants' Br. 29 (quoting *Sir John Knight's Case*, 87 Eng. Rep. 75, 76 (K.B. 1686)). But this description overlooks the circumstances of the case. Although Knight ordinarily disarmed upon entering town, he went armed once "because he feared for the safety of both himself and the Anglican parishioners," and he was then acquitted by a sympathetic jury. Charles, *Armed in America: A History of Gun Rights from Colonial Militias to Concealed Carry* 118 (2018). The plaintiffs do not deny that there is clear evidence that the statute continued to be enforced long after Knight's acquittal, *see, e.g.*, *Rex v. Edward Mullins*, *Middlesex Sessions*, (K.B. 1751) (reporting conviction in 1751), and did not require a person to "break the peace" while carrying an arm in public, *see Chune*, 80 Eng. Rep. at 1162.

As to the latter: The *Young* majority relied on language from the Hawkins treatise saying that "no wearing of arms is within the meaning of this Statute, unless

it be accompanied by circumstances as are apt to terrify the People." 896 F.3d at 1064. But Hawkins goes on to explain that this language referred to the customary practice of allowing high-ranking nobles to wear ceremonial armor or swords in the "common fashion," for that would not naturally terrify the people. 1 Hawkins, *A Treatise of the Pleas of the Crown*, ch. 63, § 9 (1716). The *Young* majority failed to mention this part of his treatise, just as they failed to mention the part—right before the sentence they quote—where Hawkins provided the blanket rule that one could not carry arms in public, and made clear that this general rule could not be evaded by claiming that one faced a threat. He wrote: "a man cannot excuse the wearing such armor in public, by alleging that such a one threatened him, and that he wears for the safety of his person from his assault." *Id.* § 8. Thus, far from establishing a separate "terror" or "evil intent" requirement, the language cited in *Young* indicates that, aside from the exceptions delineated, wearing arms in public *itself* constituted "circumstances as are apt to terrify the People"—the same understanding of the statute that Blackstone had.

More generally, the plaintiffs' reading of the Statute of Northampton is at odds with its structure. The statute expressly exempted the King's officers, as well as those assisting law enforcement, and (as just explained) implicitly exempted the carrying of swords by nobles for ceremonial purposes. *See* Carpenter & Whittington, *Liber Albus*, at 335 (explaining that "no one" could "carry arms, by day or by night, except the

vadlets of the great lord of the land, carrying the swords of their masters in their presence, and the serjeants-at-arms [of the royal family]," as well as those responsible for "saving and maintaining the peace"); Coke, *Institutes* 161–62. If the statute prohibited public carry only when accompanied by menacing conduct, as the plaintiffs contend, these exceptions would be entirely unnecessary. The plaintiffs have no answer.

In short, all available historical materials—the statutory text, structure, case law, and contemporaneous accounts—point in the same direction: For centuries before America's founding, England broadly prohibited carrying guns in populated places, regardless of whether accompanied by a threat or other menacing conduct.

B. The plaintiffs' attempts to diminish the robust American tradition of restricting public carry are without historical foundation.

1. Early American Northampton-style laws. Turning to American history, the plaintiffs do not dispute that numerous states and colonies, as this Court observed in *Peruta*, "adopted verbatim, or almost verbatim, English law" both before and after ratification of the Constitution. 824 F.3d at 933; *see, e.g.*, 1686 N.J. Laws 289, 289–90, ch. 9; 1694 Mass. Laws 12, no. 6; 1786 Va. Laws 33, ch. 21; 1792 N.C. Laws 60, 61, ch. 3; 1801 Tenn. Laws 710, § 6; 1821 Me. Laws 285, ch. 76, § 1; 1852 Del. Laws 330, 333, ch. 97, § 13.

Instead, the plaintiffs' argument with respect to these early American laws boils down to the same one they make with respect to Northampton: that they imposed a heightened intent or menace requirement. *See* Appellants' Br. 29. But here, too, history proves otherwise. These American laws, like their English predecessor, broadly prohibited carrying a firearm in public, commanding constables to "arrest all such persons as in your sight shall ride or go armed." Haywood, *A Manual of the Laws of North-Carolina* pt. 2 at 40 (1814) (N.C. constable oath). And, as in England, prosecution under these laws did not require the defendant to have "threaten[ed] any person" or "committed any particular act of violence." Ewing, *A Treatise on the Office & Duty of a Justice of the Peace* 546 (1805). There was no requirement, in other words, that the "peace must actually be broken, to lay the foundation for a criminal proceeding." Bishop, *Commentaries on the Criminal Law* 550 (1865).

This robust history of English and American laws prohibiting public carry in populated areas provides strong evidence that carrying arms in populated areas was outside the scope of the Second Amendment as originally understood by the founding generation, and hence constitutional under *Heller*.

2. Good-cause (or "Massachusetts model") laws. But those laws are not the only historical precedents for California's good-cause requirement. In the early- and mid-19th century, many states, starting with Massachusetts, enacted a variant of the Statute of Northampton that expanded the ability of individuals to

publicly carry by allowing those who had "reasonable cause to fear an assault" to do so, while continuing to generally prohibit carrying firearms and other weapons in public. 1836 Mass. Laws 748, 750 ch. 134, § 16; *see* 1838 Wisc. Laws 381, § 16; 1841 Me. Laws 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; 1870 W. Va. Laws 702, 703, ch. 153, § 8; 1871 Tex. Laws 1322, art. 6512. These statutes generally provided that, absent such "reasonable cause," no person could "go armed with a dirk, dagger, sword, pistol, or other offensive and dangerous weapon." 1836 Mass. Laws 748, 750 ch. 134, § 16. And, like the Northampton-style laws, there was no requirement that a person engage in additional threatening conduct beyond bare public carry.[3] These "reasonable cause" laws are further evidence that California's regulation falls outside the historical scope of the Second Amendment.

[3] Newspaper articles from the 19th century describe criminal prosecutions under these laws even when the person was carrying a *concealed* weapon—a form of public carry that, by itself, does not indicate any menacing conduct beyond bare carry. *See, e.g.*, *City Intelligence*, Boston Courier (Mass.), Mar. 7, 1853, at 4 (reporting arrest and charge against person for "carrying a concealed weapon," a "loaded pistol"); *City Items*, Richmond Whig (Va.), Sept. 25, 1860, at 3 (reporting that person was "arraigned" for "carrying a concealed weapon" and "required [to] give security"); *Recorders Court*, Oregonian (Portland, Or.), Aug. 6, 1867, at 4 (reporting conviction for "carrying a concealed weapon," resulting in two-day imprisonment); *Arrested for Carrying Concealed Weapons*, Mineral Point Tribune (Wis.), Aug. 11, 1870 (describing arrest a prosecution for carrying a concealed weapon).

The plaintiffs hardly address these laws on appeal, devoting just two sentences to them. Appellants' Br. 29. Again echoing *Young*, they assert that the laws "did not confine the right to carry to those with 'reasonable cause' to do so, but instead imposed a requirement to pay a surety 'only upon a well-founded complaint that the carrier threatened 'injury or a breach of the peace.'" *Id.* (quoting *Young*, 896 F.3d at 1061–62). But the fact that many of these laws used surety bonds as a form of punishment and allowed the surety penalties to be triggered by a citizen-complaint mechanism does not mean that the laws allowed carrying firearms in public without good cause.[4] Instead, as we now explain, historical evidence indicates that these laws, like California's similar good-cause requirement, operated as criminal restrictions on public carry without any requirement of breaching the peace and thus reinforce the conclusion that California's law is longstanding under *Heller*.

To begin, sureties were often a kind of criminal punishment. "At common law, sureties were similar to present-day guarantors in the bail context: members of the community who would pledge responsibility for the defendant and risk losing their bond if the defendant failed to 'keep the peace.'" Ruben & Cornell, 125 Yale L.J. Forum at 131; *see* 4 Blackstone, *Commentaries* 249 ("This requisition of sureties has been several times mentioned before, as part of the penalty inflicted upon such as

[4] Other states, however, like Virginia, West Virginia, and Texas, did not use a citizen-complaint enforcement mechanism.

have been guilty of certain gross misdemeanors."). What's more, the failure to pay sureties for violating the statute could result in imprisonment for the person carrying in public without good cause. *See, e.g.*, 1836 Mass. Laws 748, 749 ch. 134, § 6 ("If the person, so ordered to recognize, shall refuse or neglect to comply with such order, the magistrate shall commit him to the county jail."); 1846 Mich. Laws 690, 691, ch. 162, § 6 (same); 1851 Minn. Laws 526, 527, ch. 112, § 8 (same).

And contrary to the *Young* majority's assertion that surety penalties were essentially licenses allowing "a disruptive carrier" to "'go on carrying without criminal penalty,'" 896 F.3d at 1062 (quoting *Wrenn*, 864 F.3d at 661), these good-cause laws were specifically characterized by the legislatures as criminal laws. The Massachusetts legislature, to take one example, placed its restriction in Title II of the Code entitled "Of Proceedings in Criminal Cases," and expressly cited the state's previous enactment of Northampton. 1836 Mass. Laws 748, 750, ch. 134, § 16. To take another example, the Minnesota legislature titled the relevant section "Persons carrying offensive weapons, how punished." 1851 Minn. Laws at 527–28, §§ 2, 17, 18. Many of the other laws were likewise contained in acts or chapters explicitly referencing criminal arrests and proceedings. *See, e.g.*, 1846 Mich. Laws 690, ch. 162 § 16 ("Of Proceedings in Criminal Cases"); 1847 Va. Laws 127, ch. 14, § 16 (same); 1871 Tex. Laws 1322, art. 6512 ("Criminal Code").

Finally, contemporaneous evidence also indicates that, although many good-cause-law violations were *punished* by requiring the posting of sureties, these laws were enforced as criminal prohibitions on public carry without reasonable cause. For example, Peter Oxenbridge Thacher, a state judge, commented on Massachusetts's law in a grand jury charge that "drew praise in the contemporary press," explaining that "no person may go armed with a dirk, dagger, sword, pistol, or other offensive and dangerous weapon, without reasonable cause to apprehend an assault or violence to his person, family, or property." Cornell, *The Right to Carry Firearms Outside of the Home: Separating Historical Myths from Historical Realities*, 39 Fordham Urb. L.J. 1695, 1720 (2012); *see id.* at 1721 (noting that Judge Thacher's account "unambiguously interprets this law as a broad ban on the use of arms in public"). And, as explained earlier (in footnote three), contemporaneous newspaper accounts reported a number of criminal arrests and prosecutions involving defendants who had violated these state prohibitions.

3. Early-20th-century "good cause" laws. Even setting aside the Massachusetts-model laws, many early-20th-century laws indisputably prohibited carrying a firearm in public without good cause. To mention just a few here: In 1906 Massachusetts modernized its 1836 law to prohibit the public carrying of a handgun without a license, which could be issued only upon a showing of "good reason to fear an injury to [one's] person or property." 1906 Mass. Acts 150, §§ 1, 2. In 1909,

Alabama made it a crime for anyone "to carry a pistol about his person on premises not his own or under his control," but allowed a defendant to "give evidence that at the time of carrying the pistol he had good reason to apprehend an attack," which the jury could consider as mitigation or justification. 1909 Ala. Laws 258, no. 215, §§ 2, 4. And in 1913, New York prohibited all public carry without a permit, which required a showing of "proper cause," and Hawaii prohibited public carry without "good cause." 1913 N.Y. Laws 1627; 1913 Haw. Laws 25, act 22, § 1.

A decade later, in 1923, the U.S. Revolver Association published a model law, which several states adopted, requiring a person to demonstrate a "good reason to fear an injury to his person or property" before they could obtain a permit to carry a concealed firearm in public.[5] The NRA's future president, Karl T. Frederick, was "one of the draftsmen" of this law. *3rd Report of Comm. on Uniform Act to Regulate the Sale & Possession of Firearms,* Nat'l Conf. on Uniform State Laws 573 (1926). West Virginia also enacted public-carry licensing laws around this time, prohibiting all carry absent a showing of good cause. *See* 1925 W.Va. Laws 25 (Extraordinary Session).

These laws were viewed as a moderate form of firearms regulation. Other states went further, prohibiting all public carry with no exception for good cause. *See,*

[5] *See* 1923 Cal. Laws 701, ch. 339; 1923 Conn. Laws 3707, ch. 252; 1923 N.D. Laws 379, ch. 266; 1923 N.H. Laws 138, ch. 118; 1925 Mich. Laws 473, no. 313; 1925 N.J. Laws 185, ch. 64; 1925 Ind. Laws 495, ch. 207; 1925 Or. Laws 468, ch. 260.

e.g., 1890 Okla. Laws 495, art. 47, §§ 2, 5 (making it a crime for anyone "to carry upon or about his person any pistol, revolver," or "other offensive or defensive weapon," except for carrying "shot-guns or rifles for the purpose of hunting, having them repaired, or for killing animals," or for using them in "military drills, or while travelling or removing from one place to another"); 1903 Okla. Laws 643, ch. 25, art. 45, § 584.

C. The plaintiffs cherry-pick a handful of cases from the slaveholding South, which took an outlier approach to public carry and exhibited wide variability even within the region.

Seeking to overcome the centuries-old tradition of restricting public carry in populated areas, the plaintiffs seize on a smattering of state-court decisions from the slaveholding South. But these antebellum cases demonstrate only that some Southerners took a more permissive view of public carry than the rest of the nation; they do not stand for the proposition that public-carry restrictions throughout the country were widely understood to contravene the right to bear arms.

As the First Circuit recently noted in *Gould*, many states in the South adopted a more permissive approach to public carry than the rest of the country, 907 F.3d at 669, generally allowing white citizens to carry firearms in public so long as the firearms were not concealed. *See, e.g.*, 1854 Ala. Laws 588, § 3272; 1861 Ga. Laws 859, § 4413. This alternative (and minority) tradition owes itself to the South's peculiar history and the prominent institution of slavery. *See generally* Ruben &

Cornell, 125 Yale L.J. Forum 121. It reflects "a time, place, and culture where slavery, honor, violence, and the public carrying of weapons were intertwined," *id.* at 125—a divergent set of societal norms that shaped cases and legislation alike.

So it is no retort to say, as the plaintiffs do, that California's law is not a longstanding, constitutional regulation because a few Southern state courts suggested otherwise in the middle of the 19th century. But even if this Court were to focus on just the South, and to ignore the rest of the country, it would see that courts and legislatures throughout the region took varying stances toward public carry.

Virginia, for example, "home of many of the Founding Fathers," *Edwards v. Aguillard*, 482 U.S. 578, 605 (1987) (Powell, J., concurring), indisputably enacted a law prohibiting public carry absent good cause in 1847, after enacting a broad Northampton-style prohibition at the Founding. 1847 Va. Laws at 129, § 16 (making it illegal for any person to "go armed with any offensive or dangerous weapon, without reasonable cause to fear an assault or other injury, or violence to his person, or to his family or property"); 1786 Va. Laws 33, ch. 21. South Carolina enacted a Northampton-style law during Reconstruction. 1870 S.C. Laws 403, no. 288, § 4. Around the same time, Texas prohibited public carry with an exception for good cause—a prohibition enforced with possible jail time and accompanied by narrow exceptions that confirmed the law's breadth. 1871 Tex. Laws 1322, art. 6512 (prohibiting public carry absent an "immediate and pressing" need for self-defense,

while exempting travelers "carrying arms with their baggage" and people carrying guns on their "own premises" and "place of business"). And West Virginia, added to the Union during the Civil War, similarly allowed public carry only upon a showing of good cause. 1870 W. Va. Laws 702, 703, ch. 153, § 8. Neither the plaintiffs nor the *Young* majority meaningfully respond to these laws.

Southern case law, too, reveals a lack of uniformity. Although a few pre-Civil-War decisions interpreted state constitutions in a way that can be read to support a right to carry openly, even in populated public places, several post-War cases held the opposite. The Texas Supreme Court, for instance, twice upheld that state's good-cause requirement. *English v. State*, 35 Tex. 473 (1871); *State v. Duke*, 42 Tex. 455 (1874). The court remarked that the law—which prohibited carrying "any pistol" in public without good cause, 1871 Tex. Laws 1322, art. 6512—"is nothing more than a legitimate and highly proper regulation" that "undertakes to regulate the place where, and the circumstances under which, a pistol may be carried; and in doing so, it appears to have respected the right to carry a pistol openly when needed for self-defense or in the public service, and the right to have one at the home or place of business," *Duke*, 42 Tex. at 459. The court explained that the law thus made "all necessary exceptions," and noted that it would be "little short of ridiculous" for a citizen to "claim the right to carry" a pistol in "place[s] where ladies and gentlemen are congregated together." *English*, 35 Tex. at 477–79. Further, the court observed,

the good-cause requirement was "not peculiar to our own state," for nearly "every one of the states of this Union ha[d] a similar law upon their statute books," and many had laws that were "more rigorous" in regulating public carry. *Id.* at 479.

When the U.S. Supreme Court considered Texas's law in 1894, it took a similar view. After noting that the law "forbid[s] the carrying of weapons" absent good cause and "authoriz[es] the arrest without warrant of any person violating [it]," the Court determined that a person arrested under the law is not "denied the benefit" of the right to bear arms. *Miller v. Texas*, 153 U.S. 535, 538 (1894). Other courts upheld similar good-cause laws against constitutional attacks. *See, e.g.*, *State v. Workman*, 35 W. Va. 367, 367 (1891) (upholding West Virginia's good-cause requirement, which the court had previously interpreted, in *State v. Barnett*, 34 W. Va. 74 (1890), to require specific, credible evidence of an actual threat of violence, and not an "idle threat"). And even when a law wasn't directly challenged as unconstitutional, like in Virginia, courts "administered the law, and consequently, by implication at least, affirmed its constitutionality." *Id.* (referring to Virginia and West Virginia courts).

By contrast, the plaintiffs have identified no historical case (Southern or otherwise) striking down a good-cause requirement as unconstitutional, let alone a law applying exclusively to urban areas.[6] Even *Andrews v. State*, 50 Tenn. 165 (1871),

[6] The sole case that could reasonably be viewed as calling into question a law like California's is *Bliss v. Kentucky*, in which the Kentucky Supreme Court took an absolutist view of the right to carry firearms in public. 12 Ky. (2 Litt.) 90 (1822).

cited by the plaintiffs (at 28), does not go so far. The Tennessee Supreme Court in that case invalidated a law that "in effect [was] an absolute prohibition" on carrying a weapon "for any and all purposes," whether "publicly *or privately*, without regard to time or place, or circumstances." *Id.* at 187 (emphasis added). "Under this statute," the court explained, "if a man should carry such a weapon about his own home, or on his own premises, or should take it from his home to a gunsmith to be repaired, or return with it, should take it from his room into the street to shoot a rabid dog that threatened his child, he would be subjected to the severe penalties of fine and imprisonment prescribed in the statute." *Id.*

In striking down that broad prohibition, the court did not cast doubt on the constitutionality of a law like California's, which does not prohibit carrying a firearm in all places, but requires only that a person show good cause to carry a firearm *publicly* and (as applied in this case) in a primarily urban area. If anything, the Tennessee Supreme Court did the opposite: It reaffirmed that the legislature "may by a proper law regulate the carrying of this weapon publicly, or abroad, in such a

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Bliss's reading was rejected by this Court in *Peruta*, 824 F.3d at 935–36, and was not followed by any other nineteenth century courts. *See, e.g.*, *State v. Reid*, 1 Ala. 612, 619 (1840) (rejecting *Bliss*'s analysis); *Nunn v. State*, 1 Ga. 243, 251 (1846) (discussing but not adopting *Bliss*); *Commonwealth v. Murphy*, 166 Mass. 171, 173 (1896) (noting that *Bliss*'s interpretation of the right to bear arms "has not been generally approved"). For the same reasons, the D.C. Circuit in *Wrenn* erred in relying on Charles Humphreys's 1822 treatise on the common law and constitutional understanding in effect in Kentucky as representative of the mainstream national understanding of the right to bear arms. *See Wrenn*, 864 F.3d at 660.

manner as may be deemed most conducive to the public peace, and the protection and safety of the community from lawless violence." *Id.* at 187–88. And it endorsed the constitutionality of a law like California's, indicating that the right to bear arms protects public carry "where it was clearly shown that [the arms] were worn *bona fide* to ward off or meet imminent and threatened danger to life or limb, or great bodily harm." *Id.* at 192.

In the end, the plaintiffs' reliance on the Southern case law rests almost entirely on just a couple of cases that, in the course of upholding concealed-carry prohibitions, expressed the view that the right to bear arms protects the right, under some circumstances, to openly carry a weapon in public. *See State v. Reid*, 1 Ala. 612, 619 (1840) (tying open carry to self-defense, stating that "it is only when carried openly, that [weapons] can be efficiently used for defence"); *Nunn v. State*, 1 Ga. 243 (1846) (striking down a broad, statewide prohibition on openly carrying weapons based on the erroneous view that the Second Amendment applied to the states before 1868, but upholding a ban on carrying concealed weapons). These cases do not require the invalidation of California's law, which allows for the carrying of firearms when necessary. Nor do they support a broad right to carry, because even within the South, open carry was rare: The Louisiana Supreme Court, for example, referred to "the extremely unusual case of the carrying of such weapon in full open view." *State v. Smith*, 11 La. Ann. 633, 634 (1856).

At any rate, isolated snippets from a few state-court decisions issued decades after the Framing cannot trump the considered judgments of countless legislatures and courts throughout our nation's history, which have enacted and upheld such laws without casting doubt on their constitutionality.

D. A law that is less restrictive of public carry than laws enacted in dozens of states and cities—both before and after the Fourteenth Amendment's ratification—is constitutional under *Heller*.

Finally, the plaintiffs do not deny the upshot of their position: that *dozens* of state and local laws—passed both before and after ratification of the Fourteenth Amendment—were unconstitutional.

In *Heller*, the Supreme Court instructed courts to look at "how the Second Amendment was interpreted from immediately after its ratification through the end of the 19th century," by "examin[ing] a variety of legal and other sources to determine the public understanding of [the] legal text." 554 U.S. at 605; *see id.* at 610–19 (analyzing "Pre-Civil War Case Law," "Post-Civil War Legislation," and "Post-Civil War Commentators"). For that reason, a regulation need not "mirror limits that were on the books in 1791" (or for that matter, 1868) to qualify as longstanding under *Heller*. *United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010) (en banc); *see also Gould*, 907 F.3d at 669 ("Because the challenge here is directed at a state law, the pertinent point in time would be 1868[.]"); *United States v. Booker*, 644 F.3d 12, 23 (1st Cir. 2011) ("[T]he legislative role did not end [at ratification]."). To

the contrary, as this Court has held, even "early twentieth century regulations" may qualify as longstanding. *Fyock v. City of Sunnyvale*, 779 F.3d 991, 997 (9th Cir. 2015). For example, "*Heller* deemed a ban on private possession of machine guns to be obviously valid" even though "states didn't begin to regulate private use of machine guns until 1927," and Congress didn't begin "regulating machine guns at the federal level" until 1934. *Friedman v. City of Highland Park*, 784 F.3d 406 (7th Cir. 2015). *Heller* also considered "prohibitions on the possession of firearms by felons and the mentally ill" to be sufficiently longstanding, 554 U.S. at 626, despite the fact that they too "are of 20th Century vintage," *Skoien*, 614 F.3d at 640–41 ("The first federal statute disqualifying felons from possessing firearms was not enacted until 1938," while "the ban on possession by all felons was not enacted until 1961.").

Following this precedent, courts have upheld gun laws as longstanding because (for example) nine states and Chicago "enacted similar statutes" in the late 19th and early 20th century. *United States v. Rene E.*, 583 F.3d 8, 14 (1st Cir. 2009). Under this same precedent, this is an easy case, for California's law enjoys a historical foundation that is both deeper and wider. No matter how one reads the English history and the early American history, or how one interprets the surety laws, there can be no doubt that there are over a dozen state laws and over a dozen municipal ordinances from the mid-to-late 19th century and early 20th century that were more

restrictive than (or virtually identical to) the regime at issue here.[7] It is undisputed that these laws either entirely prohibited public carry in urban areas or required good cause for doing so. Thus, these laws—by themselves—are enough to uphold California's law as constitutional under *Heller*.

As against this history, the plaintiffs do not point to *any* historical evidence supporting their claims that public carry was widely permitted in populous cities. And even if they could marshal some historical support for their claims, and some cities took a more permissive view of public carry as a policy matter, that doesn't mean that the Constitution mandates that result. It just means that there's *more than one* longstanding public-carry tradition in this country—and *both are constitutional*. That is exactly what one would expect in our federalist system.

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[7] *See* 1859 N.M. Laws 94, § 2; 1869 N.M. Laws 312, § 1; 1871 Tex. Laws 1322, art. 6512; 1875 Wyo. Laws 352, ch. 52, § 1; 1891 W. Va. Laws 915, ch. 148, § 7; 1889 Ariz. Laws 16, ch. 13, § 1; 1889 Idaho Laws 23, § 1; 1901 Mich. Laws 687, § 8; 1903 Okla. Laws 643, ch. 25, art. 45, § 584; 1906 Mass. Sess. Laws 150 § 1; 1909 Ala. Laws 258, no. 215, §§ 2, 4; 1909 Tex. Laws 105; 1911 Mass Acts 568, ch. 548; 1913 Haw. Laws 25, act 22, § 1; 1913 N.Y. Laws 1627; 1919 Mass. Acts 156, ch. 207; 1922 Mass. Acts 560; *see also* Washington, D.C., Ordinance ch. 5 (1857); Nebraska City, Neb., Ordinance no. 7 (1872); Nashville, Tenn., Ordinance ch. 108 (1873); Los Angeles, Cal., Ordinance nos. 35–36 (1878); Salina, Kan., Ordinance no. 268 (1879); La Crosse, Wis., Ordinance no. 14, § 15 (1880); Syracuse, N.Y., Ordinances ch. 27 (1885); Dallas, Tex., Ordinance (1887); New Haven, Conn., Ordinances § 192 (1890); Checotah, Okla., Ordinance no. 11 (1890); Rawlins, Wyo., Ordinances art. 7 (1893); Wichita, Kan., Ordinance no. 1641 (1899); McKinney, Tex., Ordinance no. 20 (1899); San Antonio, Tex., Ordinance ch. 10 (1899)); *see also When and Where May a Man Go Armed*, S.F. Bulletin, Oct. 26, 1866, at 5 ("The law ordains that no person can carry deadly weapons.").

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Amicus curiae agrees with the parties that *Young v. Hawaii, et al.*, 9th Cir. Case No. 12-17808, and *Nichols v. Edmund G. Brown, et al.*, 9th Cir. Case No. 14-55873, are related cases, as defined by Ninth Circuit Rule 28-2.6.

CERTIFICATE OF COMPLIANCE

I hereby certify that my word processing program, Microsoft Word, counted 6,714 words in the foregoing brief, exclusive of the portions exempted by Rule 32(f).

/s/ Deepak Gupta
Deepak Gupta

CERTIFICATE OF SERVICE

I hereby certify that on November 27, 2018, I electronically filed the foregoing amicus brief with the Clerk of the Court of the U.S. Court of Appeals for the Ninth Circuit by using the Appellate CM/ECF system. All participants are registered CM/ECF users, and will be served by the Appellate CM/ECF system.

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