Nos. 10-56971, 11-16255

In the United States Court of Appeals for the Ninth Circuit

EDWARD PERUTA, et al.,
Plaintiffs-Appellants,

v.

COUNTY OF SAN DIEGO, et al.,
Defendants-Appellees.

ADAM RICHARDS, et al.,
Plaintiffs-Appellants,

v.

ED PRIETO, et al.,
Defendants-Appellees.

On En Banc Review of Appeals from the United States District Courts for the Southern and Eastern Districts of California

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

DEEPAK GUPTA
JONATHAN E. TAYLOR
GUPTA BECK PLLC
1735 20th Street, NW
Washington, DC 20009
(202) 888-1741
deepak@guptabeck.com

Counsel for Amicus Curiae Everytown for Gun Safety

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CORPORATE DISCLOSURE STATEMENT

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

/s/ Deepak Gupta
Deepak Gupta

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

American statutes

American municipal ordinances

English statutes and royal proclamations

Books and articles

INTRODUCTION AND INTEREST OF *AMICUS CURIAE*

Everytown for Gun Safety is the largest gun-violence-prevention organization in the country. It has over 2.5 million supporters, including over 275,000 California residents and the mayors of over 50 California cities. Everytown has devoted substantial resources to researching historical firearms legislation and has recently drawn on this material to file briefs in two important Second Amendment cases. *See Silvester v. Harris*, No. 14-16840 (9th Cir.); *Colorado Outfitters Ass'n v. Hickenlooper*, No. 14-1290 (10th Cir.). In these briefs, Everytown sought to assist the courts by providing relevant, previously overlooked historical materials. It seeks to do the same here.[1]

These consolidated cases involve a constitutional challenge to California's regulatory scheme for carrying handguns in public. California does not ban all public carry, nor do the two counties whose policies are at issue. Instead, California has taken an approach like that of eight other States, collectively expressing the popular will of more than a quarter of the American people. As implemented by San Diego and Yolo Counties, California's law has two important features: First, it generally allows open carry in sparsely populated (*i.e.*, unincorporated) areas comprising the vast majority of each County's geography (84% and 95%,

[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 preparation and submission of the brief.

respectively). Cal. Penal Code §§ 25850(a), 26350(a). Second, it permits concealed carry throughout the State, including in populated (*i.e.*, incorporated) areas, but only upon a showing of "good cause," which the Counties have interpreted to require more than a generalized fear for personal safety. *Id.* § 26170(a)(2).

In striking down this regime, a panel of this Court held that California's law "destroy[s] the right [to bear arms] altogether." Panel Op. 47. But that holding rests on both a misapprehension of how the law operates and a woefully incomplete historical account. As to the former: Although the panel determined that "open carry is prohibited in San Diego County," *id.* at 48 & n.16, it is in fact permitted in the unincorporated areas that constitute 84% of the County. As to the latter: Although the panel purported to undertake "a complete historical analysis" of the right to bear arms outside the home, *id.* at 58, it relied almost entirely on 19th-century cases and laws from the slaveholding and sparsely populated South—while overlooking a seven-century Anglo-American tradition of restricting public carry in populated areas.

This brief provides an account of that tradition. For centuries, English law broadly prohibited anyone from carrying a dangerous weapon in public, beginning with the Statute of Northampton in 1328, and continuing after the English Bill of Rights of 1689. This tradition took hold in America in the 17th and 18th centuries, when several colonies enacted similar restrictions. And it carried into the 19th

century, when three distinct types of public-carry laws predominated: one primarily northern, one southern, and one western. The panel focused exclusively on the southern model, the most permissive of the three, which regulated only the manner of carry (open, not concealed) and was motivated largely by the ever-present fear of slave rebellions. But the other two approaches—which themselves derived from centuries-old regulations—provide a firm historical pedigree for the law at issue here. The northern model required "reasonable cause to fear an assault or other injury" to carry a firearm in public (much like California's "good cause" requirement), while the western model prohibited public carry in cities, towns, and villages, but not rural areas (much like California's incorporated/unincorporated distinction). Altogether, by the end of the 19th century, nearly 20 States and many cities had at some point enacted laws embodying one of these two approaches.

Because California's law carries forward this longstanding tradition, it is constitutional under *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742 (2010). Although such a robust historical pedigree is not necessary to satisfy the Second Amendment, it is sufficient to do so. Whatever the Second Amendment's precise contours or scope, there can be no doubt that a law that has its roots in 14th-century England, and operates as dozens of American laws did throughout the 19th century, both before and after the 14th Amendment, is consistent with our "historical tradition," *id.* at 627, and thus constitutional.

BACKGROUND

A. English History

1. Beginning in 1328, England broadly restricts public carry in populated areas. The Anglo-American tradition of restricting public carry in populated areas stretches back to at least 1328, when England enacted the Statute of Northampton, providing 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) (emphasis added). Shortly thereafter, King Edward III directed sheriffs and bailiffs to arrest "all those whom [they] shall find going armed." Charles, *The Faces of the Second Amendment Outside the Home*, 60 Clev. St. L. Rev. 1, 13-14 (2012). His successors did so as well. *Id.* at 16-25. This prohibition "did not extend to the realm's unpopulated and unprotected enclaves," however, because "English law generally made exceptions for the use of arms in the countryside." *Id.* at 19.

Over the ensuing decades, England repeatedly reenacted the public-carry restriction. *See, e.g.*, 7 Ric. 2, 35, ch. 13 (1383); 20 Ric. 3, 93, ch. 1 (1396) ("[No one] little nor great, shall go nor ride by Night nor by Day armed . . . without the King's special License."). Because this restriction carried misdemeanor penalties, violators were usually required to forfeit their weapons and pay a fine. *See id.* A separate law went further, outlawing "rid[ing] armed covertly or secretly with Men

of Arms against any other." 25 Edw. 3, 320, ch. 2, § 13 (1350). Because this law regulated more dangerous behavior than simple public carry, it had heavier penalties. *Id.*

By the 16th century, firearms had become increasingly accessible in England, and thus increasingly threatening to public safety. To guard against this threat, Queen Elizabeth I in 1579 called for robust enforcement of the Statute of Northampton's prohibition on carrying "Daggers, Pistols, and such like, not only in Cities and Towns, [but] in all parts of the Realm in common high[ways], whereby her Majesty's good quiet people, desirous to live in [a] peaceable manner, are in fear and danger of their lives." Charles, *Faces of the Second Amendment*, 60 Clev. St. L. Rev. at 21 (spelling modernized). The carrying of "such offensive weapons" (like "Handguns"), she elaborated, and "the frequent shooting [of] them in and near Cities, Towns corporate, [and] the Suburbs thereof where [the] great multitude of people do live, reside, and trav[el]," had caused "great danger" and "many harms [to] ensue." *Id.* at 22 (spelling modernized). Fifteen years later, she reaffirmed that publicly carrying pistols and daggers—whether "secretly" or in the "open"—was "to the terrour of all people professing to travel and live peaceably." *Id.*

2. In the 17th and 18th centuries, English authorities interpret the Statute of Northampton to restrict public carry in populated areas. This understanding of the law—as broadly prohibiting carrying guns in populated

public places—continued into the 17th and 18th centuries. *See generally* Charles, *The Statute of Northampton by the Late Eighteenth Century*, 41 Fordham Urb. L.J. 1695 (2012). In 1644, for example, Lord Coke—"widely recognized by the American colonists as the greatest authority of his time on the laws of England," *Payton v. New York*, 445 U.S. 573, 593-94 (1980)—described the Statute of Northampton, in a chapter entitled "Against going or riding armed," as making it unlawful "to goe nor ride armed by night nor by day . . . in any place whatsoever." Coke, *The Third Part of the Institutes of the Laws of England* 160 (1817 reprint).

One century later, Blackstone—"the preeminent authority on English law for the founding generation," *Heller*, 554 U.S. at 593-94—described the statute similarly: "The offense 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). In other words, because carrying a dangerous weapon (such as a firearm) in populated public places naturally terrified the people, it was a crime against the peace—regardless of whether it was accompanied by a threat, violence, or any additional breach of the peace. *See Chune v. Piott*, 80 Eng. Rep. 1161, 1162 (K.B. 1615) (Croke, J.) ("Without all question, the sheriffe 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."); *King v. Hutchinson*, 168 Eng. Rep. 273, 276 (1784) (holding that "guns [and] pistols" are "dangerous" and "offensive" weapons). Blackstone traced this prohibition back to "the laws of Solon," under which "every Athenian was finable who walked about the city in armour." Blackstone, *Commentaries* 149.[2]

To carry out the Statute of Northampton's prohibition, British constables, magistrates, and justices of the peace were instructed to "Arrest all such persons as they shall find to carry Daggers or Pistols" publicly. Keble, *An Assistance to the Justices of the Peace, for the Easier Performance of Their Duty* 224 (1683) (further advising that "if any person whatsoever . . . shall be so bold as to go or ride Armed, by night or by day, in Fairs, Markets, or any other places . . . then any Constable . . . may take such Armor from him for the Kings use, and may also commit him to the Gaol"); *see also* Lambarde, *The Duties of Constables, Borsholders, Tythingmen, and Such Other Low and Lay Ministers of the Peace* 13-14 (1602) (same).[3]

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[2] The same description of the statute appears in "the most important early American edition of Blackstone's Commentaries (by the law professor and former Antifederalist St. George Tucker)." *Heller*, 554 U.S. at 594; *see* Tucker, *Blackstone's Commentaries* 149 (1803).

[3] *See also* 1 Hutcheson, *Treatise on the Offices of Justice of Peace* app. I at xlviii (1806) (citing Cromwell, *Instructions Concerning Constables* (1665)) ("A constable shall arrest any person, not being in his Highness service, who shall be found wearing naugbuts, or guns, or pistols, of any sort."); *id.* at lxv-lxvi (citing *Commission and Instructions to the Justices of Peace & Constables* (1661)) (same).

3. The law's narrow exceptions confirm this general prohibition on public carry. In addition to its focus on populated public places, the Statute of Northampton was understood to contain several limited exceptions. One important exception was that the prohibition did not apply inside the home, in keeping with principles of English self-defense law. As Lord Coke explained, using force inside the home "is by construction excepted out of this act[,] . . . for a man's house is his castle." Coke, *Laws of England* 162. "But [a man] cannot assemble force," Coke continued—including by carrying firearms—even "though he [may] be extremely threatened, to go with him to Church, or market, or any other place, but that is prohibited by this act." *Id.*[4] William Hawkins, in writing about the law, likewise explained that "a man cannot excuse the wearing [of] such armour in public, by alleging that such a one threatened him, and he wears it for the safety of his person from his assault," but he may assemble force "in his own House, against those who threaten to do him any Violence therein, because a Man's House is as his Castle." 1 Hawkins, *A Treatise of the Pleas of the Crown* 489 (1721) (1824 reprint); *see also id.* at 516; 1 Russell, *A Treatise on Crimes & Misdemeanors* 589 (1826) (writing

[4] *See also* 1 Hale, *History of the Pleas of the Crown* 547 (1800) (noting that armed self-defense was permitted in the home, but not during "travel, or a journey," because of the "special protection" accorded the "home and dwelling"); *Semayne's Case*, 77 Eng. Rep. 194, 195 (K.B. 1603) ("[E]very one may assemble his friends and neighbors to defend his house against violence: but he cannot assemble them to go with him to the market, or elsewhere for his safeguard against violence.").

same to American audience); Tucker, *Blackstone's Commentaries* 225 (explaining castle doctrine's confinement to the home).[5]

There were two other important exceptions to the general public-carry prohibition: a narrow (unwritten) exception permitting high-ranking nobles to wear fashionable swords and walk in public with armed servants, and a narrow (written) exception for the King's officers. *See* Hawkins, *Treatise of the Pleas of the Crown* 489, 798 (explaining that noblemen were in "no danger of offending against this statute" by wearing "weapons of fashion, as swords, &c., or privy coats of mail," or by "having their usual number of attendants with them for their ornament or defence," for that would not "terrify the people").[6] Putting these exceptions together, "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

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[5] A contrary rule—permitting armed self-defense in populated public areas, despite the fact that it terrified the public—would have suggested that "the King were not able or willing to protect his subjects." *Sir John Knight's Case*, 87 Eng. Rep. 75, 76 (K.B. 1686). Thus, English law imposed a broad duty to retreat while in public, Blackstone, 4 *Commentaries* 185—a duty that would become the law in all American colonies, and subsequently the States, Garret Epps, *Any Which Way But Loose*, 55 Law & Contemp. Probs. 303, 311-14 (1992).

[6] *See also* Russell, *Treatise on Crimes & Misdemeanors* 588-89 (same); Charles, *Faces of the Second Amendment*, 60 Clev. St. L. Rev. at 26 n.123 (citing 18th-century legal dictionary's distinction between "go[ing] or rid[ing] *armed* with dangerous and unusual Weapons" and nobleman "wear[ing] common *Armour*"); *Rex v. Sir John Knight*, 90 Eng. Rep. 330 (K.B. 1686) (noting a "general connivance" for "gentlemen" to carry arms in this way, but declining to dismiss indictment for "walk[ing] about the streets armed with guns" against a defendant who was later acquitted because he was a King's officer, *see Sir John Knight's Case*, 87 Eng. Rep. at 76; Charles, *Faces of the Second Amendment*, 60 Clev. St. L. Rev. at 28-30).

family]," as well as those responsible for "saving and maintaining the peace." Carpenter & Whitington, *Liber Albus: The White Book of the City of London* 335 (1419) (1861 reprint) (emphasis added).[7]

4. The Statute of Northampton's public-carry restriction remains fully in effect following the English Bill of Rights of 1689. In the late 17th century, William and Mary enshrined the right to bear arms in the Declaration of Rights, later codified in the English Bill of Rights in 1689. This right—which "has long been understood to be the predecessor to our Second Amendment," *Heller*, 554 U.S. at 593—ensured "[t]hat the subjects which are protestants, may have arms for their defence suitable to their conditions, and as allowed by law." 1 W. & M. st. 2. ch. 2. As Blackstone later wrote, this right was considered "a public allowance, under due restrictions[,] of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression." 1 Blackstone, *Commentaries* 144. One such "due restriction" was the Statute of Northampton, which remained fully in effect after the right to bear arms was codified in 1689. *See, e.g.*, 4 Blackstone, *Commentaries* 148-49; Gardiner, *The Compleat Constable* 18 (1692) (informing constables that they may

[7] A 1409 royal order confirms the narrow exception allowing noblemen to carry swords. It "forb[ade] any man of whatsoever estate or condition to go armed within the city [of London] and suburbs, or any except lords, knights and esquires with a sword." 3 *Calendar of the Close Rolls, Henry IV* 485 (Jan. 30, 1409).

seize the weapons of anyone "wear[ing] or carry[ing] any Daggers, Guns or Pistols Charged").

B. Founding-Era American History

1. The colonies begin importing England's tradition of regulating public carry into their own laws. Around the time that the English Bill of Rights was adopted, America began its own regulation of public carry. The first step was a 1686 New Jersey law entitled *An Act Against Wearing Swords, &c.*, which sought to prevent the "great fear and quarrels" induced by "several persons wearing swords, daggers, pistols," and "other unusual or unlawful weapons." 1686 N.J. Laws 289, 289-90, ch. 9. To combat this "great abuse," the law provided that no person "shall presume privately to wear any pocket pistol" or "other unusual or unlawful weapons within this Province," and "no planter shall ride or go armed with sword, pistol, or dagger," except for "strangers[] travelling" through. *Id.* This law was only the start of what would become a long history of regulation "limiting gun use for public safety reasons," particularly with respect to public carry in populated areas. Meltzer, *Open Carry for All*, 123 Yale L.J. 1486, 1523 (2014). As against this history, "there are no examples from the Founding era of anyone espousing the concept of a general right to carry." *Id.*

2. Many States enact laws mirroring the Statute of Northampton both before and after the Constitution's adoption. Eight years after New

Jersey's law, Massachusetts enacted its own version of the Statute of Northampton, expressly authorizing justices of the peace to arrest anyone who "shall ride or go armed Offensively before any of Their Majesties Justices, or other Their Officers or Ministers doing their Office, or elsewhere." 1694 Mass. Laws 12, no. 6.

By using the word "offensively," Massachusetts ensured that this prohibition would apply only to carrying an "offensive weapon," as it had in England—not *all* arms. Constable oaths published in 18th-century legal treatises used similar language when discussing the law. *See* Charles, *Faces of the Second Amendment*, 60 Clev. St. L. Rev. at 34 n.178. One guide for justices of the peace, for example, explained that "Persons with offensive Weapons in Fairs, Markets or elsewhere in Affray of the King's People, may be arrested." Bond, *A Compleat Guide for Justices of the Peace* 42 (1707); *id.* at 181 ("A person going or riding with offensive Arms may be arrested."). Thus, under the law, a person could carry a hatchet or horsewhip in public, but not a pistol. *See Hutchinson*, 168 Eng. Rep. at 276 (making clear that "guns, pistols, daggers, and instruments of war" are "offensive" weapons); Hawkins, *Treatise of the Pleas of the Crown* 665 (explaining that a hatchet, horsewhip, and a "large stick with three natural prongs and a large head" were not "offensive weapons," while "guns, pistols, daggers, and instruments of war" were).[8]

[8] American treatises said the same. *See* Russell, *Treatise on Crimes & Misdemeanors* 124; Bishop, *Commentaries on the Law of Statutory Crimes* 214 (1873).

One century later, Massachusetts reenacted its law, this time as a State. 1795 Mass. Laws 436, ch. 2 ("[No person] shall ride or go armed offensively, to the fear or terror of the good citizens of this Commonwealth."). Because the prohibition had been on the books for so long, it was "well known to be an offence against law to ride or go with . . . firelocks, or other dangerous weapons," as one Massachusetts newspaper later reported, so it "[could not] be doubted that the vigilant police officers" would arrest violators. Charles, *Faces of the Second Amendment*, 60 Clev. St. L. Rev. at 33 n.176 (quoting *The Salem Gazette*, June 2, 1818, at 4).

Following Massachusetts's lead, five more States enacted similar laws before the Civil War: two in the Founding Era (Virginia and North Carolina); three in the 19th century (Tennessee, Maine, and Delaware). *See* 1786 Va. Laws 33, ch. 21 ("[No one may] go nor ride armed by night nor by day, in fairs or markets, or in other places, in terror of the Country."); 1792 N.C. Laws 60, 61 ch. 3 ("[No one may] go nor ride armed by night nor by day, in fairs, markets, . . . nor in no part elsewhere."); 1801 Tenn. Laws 710, § 6 (making it illegal for "any person or persons [to] publically ride or go armed to the terror of the people"); 1821 Me. Laws 285, ch. 76, § 1 ("[No one] shall ride or go armed offensively, to the fear or terror of the [people]."); 1852 Del. Laws 330, 333, ch. 97, § 13 (similar).[9]

[9] The Statute of Northampton also applied in Maryland by virtue of that State's constitutional guarantee of all rights granted by "the Common Law of

To ensure that these laws were enforced, the constables, magistrates, and justices of the peace in these States (as well as in New Jersey) were required 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); A Bill for the Office of Coroner and Constable (Mar. 1, 1682), reprinted in *Grants, Concessions & Original Constitutions* 251 (N.J. constable oath) ("I will endeavour to arrest all such persons, as in my presence, shall ride or go arm'd offensively."). That was because, as constables were informed, "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 prohibited by statute." Haywood, *The Duty and Office of Justices of the Peace, and of Sheriffs, Coronoers, Constables* 10 (1800); *see also* Haywood, *The Duty & Authority of Justices of the Peace, in the State of Tennessee* 176 (1810).

As with the English statute, these laws lacked a self-defense exception. No one could "excuse the wearing [of] such armor in public, by alleging that such a one threatened him." Wharton, *A Treatise on the Criminal Law of the United States* 527-28 (1846).

C. Early-19th-Century American History

1. Many States enact laws restricting public carry while creating a narrow exception for "reasonable cause to fear an assault." In 1836,

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England" and "the English statutes" in effect at the time of independence. Md. Const. of 1776, art. III, § 1.

Massachusetts amended its public-carry prohibition to provide a narrow exception for those having "reasonable cause to fear an assault or other injury, or violence to his person, or to his family or property." 1836 Mass. Laws 748, 750 ch. 134, § 16. Absent such "reasonable cause," no person could "go armed with a dirk, dagger, sword, pistol, or other offensive and dangerous weapon." *Id.* Those who did so could be punished by being made to pay sureties for violating the statute, *id.*; if they did not do so, they could be arrested. *See* 1784 Mass. Laws 105, ch. 27.[10]

Although the legislature chose to trigger these penalties using a citizen-complaint mechanism (allowing "any person having reasonable cause to fear an injury, or breach of the peace" to file a complaint, 1836 Mass. Laws 750, § 16), the law was generally understood to restrict carrying a firearm in public without good cause—even when the firearm was not used in any threatening or violent manner. The legislature placed the restriction in a section entitled "Persons who go armed may be required to find sureties for the peace," and expressly cited the State's previous enactment of the Statute of Northampton. *Id.* And elsewhere in the same statute the legislature separately punished "any person [who] threatened to commit an offence against the person or property of another." *Id.* at 749, § 2. Thus, as Massachusetts Judge Peter Oxenbridge Thatcher explained in a grand jury charge

[10] Sureties were a form of criminal punishment in England and early America, akin to a bond. *See, e.g.*, *Punishments*, The Proceedings of the Old Bailey, London's Central Criminal Court, 1674 to 1913, http://bit.ly/1ED5tC2; 34 Edw. 3, 364, ch. 1 (1360).

appearing in the contemporary press in 1837, there was little doubt at the time 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*, 39 Fordham Urb. L.J. 1695, 1720 & n.134 (2012); *see also* Hammond, *A Practical Treatise; Or an Abridgement of the Law Appertaining to the Office of Justice of the Peace* 184-86 (1841).

Within a few decades, almost a dozen States (all but one outside the slaveholding South) had adopted nearly identical laws. *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, § 15; 1851 Minn. Laws 526, 528, ch. 112, § 18; 1853 Or. Laws 218, 220, ch. 16, § 17; 1857 D.C. Laws 567, 570, ch. 141, § 15; 1861 Pa. Laws 248, 250, § 6. Most of these States copied the Massachusetts law verbatim—enforcing the public-carry prohibition through a citizen-complaint provision and permitting a narrow self-defense exception, while separately prohibiting threats and violence. *See, e.g.*, 1851 Minn. Laws at 527-28, §§ 2, 17, 18 (placing prohibition in section entitled "Persons carrying offensive weapons, how punished"); 1873 Minn. Laws. 1025, § 17 (doing same after 14th Amendment's ratification). At least one State (Virginia) used slightly different language, providing that "[i]f any person shall 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, he may be required to find sureties for keeping the peace." 1847 Va. Laws at 129, § 15. Semantic differences aside, these laws were understood to do the same thing: broadly restrict public carry, while establishing a limited exception for those with a particular need for self-defense.

2. Taking a different approach, most southern States elect to permit public carry, but only if the weapon is not concealed. In contrast to the Massachusetts approach, most States in the slaveholding South were more permissive of public carry. They generally allowed white citizens to carry firearms in public so long as the weapons were not concealed. *See, e.g.*, 1854 Ala. Laws 588, § 3272; 1861 Ga. Laws 859, § 4413; *see generally* Cramer, *Concealed Weapon Laws of the Early Republic* (1999).

This "lash and pistol" model is perhaps attributable to widespread concerns about slave rebellions in the South, as well as the more prevalent violence there. *See id.* at 21 ("[Frederick Law] Olmsted attributed the need to keep slaves in submission as the reason that, 'every white stripling in the South may carry a dirk-knife in his pocket, and play with a revolver before he has learned to swim.'" (quoting Olmsted, *A Journey in the Back Country* 447 (1860)); *id.* at 18 ("Modern historians . . . conclude that the South was substantially more violent than the North."); *see also McDonald*, 561 U.S. at 844 (Thomas, J., concurring) ("[I]t is

difficult to overstate the extent to which fear of a slave uprising gripped slaveholders and dictated the acts of Southern legislatures.").

D. Mid-to-Late-19th-Century American History

1. States continue to restrict public carry both before and after the 14th Amendment's ratification. As America entered the second half of the 19th century, other States began enacting laws broadly restricting public carry, subject to limited self-defense exceptions. Before the Civil War, New Mexico passed *An Act Prohibiting The Carrying Of Weapons, Concealed Or Otherwise*, making it unlawful for "any person [to] carry about his person, either concealed or otherwise, any deadly weapon," and requiring repeat offenders to serve a jail term "of not less than three months." 1859 N.M. Laws 94, § 2. After the Civil War, several other States enacted similar prohibitions notwithstanding the recent passage of the 14th Amendment.[11]

West Virginia and Texas enacted laws within a few years of ratifying the 14th Amendment that broadly prohibited public carry without reasonable cause to fear violence. West Virginia's law made clear that "[i]f any person go armed with a

[11] Much congressional discussion about the right to bear arms before the 14th Amendment's adoption focused on self-defense inside the home. *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 1182 (Mar. 5, 1866) (Sen. Pomeroy) (describing the constitutional "safeguards of liberty" as including "the right to acquire and hold" a homestead, "the right to be safe and protected in that citadel," and "the right to bear arms for the defense of himself and family and his homestead"); *see also* Amar, *The Bill of Rights* 265 (1998) (focusing on "home-centered vision").

deadly or dangerous weapon, without reasonable cause to fear violence to his person, family, or property, he may be required to give a recognizance." 1870 W. Va. Laws 702, 703, ch. 153, § 8.[12] Courts construed this self-defense exception narrowly to require specific evidence of a concrete, serious threat. *See, e.g.*, *State v. Barnett*, 34 W. Va. 74 (1890). Texas's law contained a similarly circumscribed exception, barring anyone not acting in "lawful defense of the state" ("as a militiaman" or "policeman") from "carrying on or about his person . . . any pistol" without "reasonable grounds for fearing an unlawful attack on his person" that was "immediate and pressing." 1871 Tex. Laws 1322, art. 6512.[13]

2. Beginning immediately after the 14th Amendment's ratification, many western legislatures enact laws prohibiting public carry in populated areas. Starting with New Mexico in 1869, many legislatures in the West began to enact public-carry prohibitions that were sensitive to local conditions. These laws generally differentiated between cities, towns, and villages

[12] A later version reaffirmed the law's breadth by clarifying that it didn't "prevent any person from keeping or carrying about his dwelling house or premises, any such revolver or other pistol, or from carrying the same from the place of purchase to his dwelling house, or from his dwelling house to any place where repairing is done, to have it repaired and back again." 1891 W. Va. Laws 915, 915-16, ch. 148, § 7. Violators were "guilty of a misdemeanor" and could be fined or jailed. *Id.*

[13] During this time, some States enacted laws without self-defense exceptions. Tennessee made it illegal for "any person to publicly or privately carry a . . . pocket pistol or revolver other than an army pistol." 1871 Tenn. Laws 81, ch. 90, § 1. Arkansas did similarly, while permitting "carrying any weapon when upon a journey, or upon [one's] own premises." 1881 Ark. Laws 490, ch. 53, § 1907.

(where the prohibition applied) and rural areas (where it did not). New Mexico made it "unlawful for any person to carry deadly weapons, either concealed or otherwise, on or about their persons within any of the settlements of this Territory," while providing a narrow self-defense exception. 1869 N.M. Laws 312, *Deadly Weapons Act of 1869*, § 1. Violators could serve up to 50 days in jail. *Id.* § 3.

Over the next two decades, Wyoming, Idaho, and Arizona enacted similar location-sensitive prohibitions. *See* 1875 Wyo. Laws 352, ch. 52, § 1 (banning carrying firearms "concealed or openly" "within the limits of any city, town or village"); 1889 Idaho Laws 23, § 1 (making it unlawful "to carry, exhibit or flourish any . . . pistol, gun or other-deadly weapons, within the limits or confines of any city, town or village or in any public assembly"); 1889 Ariz. Laws, ch. 13, § 1 ("[No] person within any settlement, town, village or city within this Territory shall carry on or about his person, saddle, or in his saddlebags, any pistol."). And Texas and Michigan later enacted laws granting cities the power to "prohibit and restrain the carrying of pistols" within their limits. 1909 Tex. Laws 105; *see* 1901 Mich. Laws 687, § 8.

When Texas and Michigan enacted these laws, many cities throughout the country had imposed such restrictions for decades. *See, e.g.*, 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);

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., Rev. Ordinances art. 7 (1893); Wichita, Kan., Ordinance no. 1641 (1899); McKinney, Tex., Ordinance no. 20 (1899). "A visitor arriving in Wichita, Kansas, in 1873," for example, "would have seen signs declaring, 'LEAVE YOUR REVOLVERS AT POLICE HEADQUARTERS, AND GET A CHECK.'" Winkler, *Gunfight* 165 (2011). Dodge City was no different. *Id.* (mentioning sign that read: "THE CARRYING OF FIREARMS STRICTLY PROHIBITED"). Even in Tombstone, Arizona, people "could not lawfully bring their firearms past city limits. In fact, the famed shootout at Tombstone's O.K. Corral was sparked in part by Wyatt Earp pistol-whipping Tom McLaury for violating Tombstone's gun control laws." Blocher, *Firearm Localism*, 123 Yale L.J. 82, 84 (2013) (footnote omitted).

ARGUMENT

BECAUSE CALIFORNIA'S LAW CARRIES FORWARD A SEVEN-CENTURY ANGLO-AMERICAN TRADITION OF RESTRICTING PUBLIC CARRY IN POPULATED AREAS, IT IS A "LONGSTANDING," CONSTITUTIONAL REGULATION UNDER *HELLER*.

The question in this case is not whether the Second Amendment, which the Supreme Court held in *Heller* protects "the right of law-abiding, responsible citizens to use arms in defense of hearth and home," 554 U.S. at 635, has any application outside the home. Rather, it is whether California's public-carry regime (as

implemented by San Diego and Yolo Counties) is consistent with the Second Amendment's protections (as applied to the States by the 14th Amendment).

Before this Court may answer that question, it must first understand how the regulatory scheme works. California law, as implemented here, generally allows individuals to openly carry a firearm for self-defense in the unincorporated, sparsely populated areas that comprise most of San Diego and Yolo Counties' geography (84% and 95%, respectively). Cal. Penal Code §§ 25850(a), 26350(a); San Diego County, http://bit.ly/1DBC3El (3,572 square miles unincorporated out of 4,261); Yolo County, http://bit.ly/1HVypru & http://bitly.com/1Gz9Nl6 (621,224 acres unincorporated out of 653,549). And it allows public carry of a concealed weapon throughout the State—including in the Counties' incorporated, more densely populated areas—with a permit, which requires a showing of "good cause." Cal. Penal Code § 26170(a)(2). In San Diego and Yolo Counties, this requirement is not satisfied by a generalized fear for personal safety, but is met if the applicant can provide "documented threats" or "restraining orders" showing that "he or she is a specific target presently at risk of harm." San Diego Cnty. Br. 6; *see also* Yolo Cnty. Br. 9. It is also met if the applicant is an active or retired law-enforcement officer, security or investigative personnel, or a business owner or employee in a high-risk occupation. San Diego Cnty. Br. 6. The question here is whether this scheme is constitutional.

To answer that question, this Court "employs a two-prong test," first "ask[ing] whether the challenged law burdens conduct protected by the Second Amendment," and then determining, "if so, what level of scrutiny should be applied." *Fyock v. Sunnyvale*, 779 F.3d 991, 996 (9th Cir. 2015). Although California's law would satisfy the appropriate level of scrutiny if subjected to it (for reasons laid out in other briefs filed in this case), the purpose of this brief is to show that the analysis needn't go that far: This law survives at step one.

A. "Longstanding" laws are deemed constitutional under *Heller* because they are consistent with our "historical tradition."

One way to determine whether a law burdens Second Amendment conduct is to assess the law based on a "historical understanding of the scope of the right," *Heller*, 554 U.S. at 625, and consider whether the law is one of the "prohibitions 'that have been historically unprotected.'" *Jackson v. City & Cnty. of San Francisco*, 746 F.3d 953, 960 (9th Cir. 2014). The Supreme Court in *Heller* identified several "examples" of such regulations, including "prohibitions on the possession of firearms by felons and the mentally ill" and "laws imposing conditions and qualifications on the commercial sale of arms," which are presumed not to violate the Second Amendment because of their historical acceptance as consistent with its protections. 554 U.S. at 626-27 & n.26. Such "longstanding" laws, the Court explained, should be treated as tradition-based "exceptions" by virtue of their "historical justifications." *Id.* at 635. Or put in this Court's words: "longstanding

prohibitions" are "traditionally understood to be outside the scope of the Second Amendment." *Fyock*, 779 F.3d at 997.

So what does it mean to be longstanding? As Judge Easterbrook has noted, it does not require that a law "mirror limits that were on the books in 1791" (or in this case involving a state law, 1868). *United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010) (en banc); *see also United States v. Booker*, 644 F.3d 12, 23 (1st Cir. 2011) ("[T]he legislative role did not end in 1791."). To the contrary, as this Court has held, even laws that "cannot boast a precise founding-era analogue"—like the "early twentieth century regulations" identified in *Heller*—may "demonstrate a history of longstanding regulation if their historical prevalence and significance is properly developed in the record." *Fyock*, 779 F.3d at 997.

The law in this case, however, is no 20th-century creation. By requiring good cause to publicly carry a firearm in populated areas, and allowing public carry in rural areas, California's law embodies a deep historical tradition of public-carry regulations. It is "longstanding" and hence constitutional under *Heller*.

B. California's law has a centuries-long pedigree in Anglo-American history and is therefore "longstanding" and constitutional under *Heller*.

1. The law's special sensitivity to local conditions traces back to 13th-century England and 19th-century America.

For centuries, English and American laws have restricted public carry in populated areas and largely permitted it in unpopulated areas—just like California

does today. The Statute of Northampton, first enacted in 1328, trained its prohibition on "fairs," "markets," and other populous places, 2 Edw. 3, 258, ch. 3, while a royal declaration from a century later specifically directed "the mayor and sheriffs of London" to enforce the prohibition against "any man of whatsoever estate or condition [who] go[es] armed within the city and suburbs." 3 *Calendar of the Close Rolls* 485. One century after that, Queen Elizabeth spoke of the need to focus enforcement in the areas where the "great multitude of people do live, reside, and trav[el]." Charles, *Faces of the Second Amendment*, 60 Clev. St. L. Rev. at 21.

When this localism tradition came to America, it gained particular popularity in the West during the mid-to-late 19th century. From 1869 to 1889, New Mexico, Wyoming, Idaho, and Arizona all enacted laws broadly prohibiting public carry in cities, towns, and villages. *See* 1869 N.M. Laws 312, § 1; 1875 Wyo. Laws 352, ch. 52, § 1; 1889 Idaho Laws 23, § 1; 1889 Ariz. Laws, ch. 13, § 1. And, as discussed above (at 20-21), numerous local governments imposed similar restrictions around the same time—from New Haven to Nashville, Dallas to Los Angeles, and even in places like Dodge City and Tombstone.

These laws illustrate "how the Second Amendment was interpreted from immediately after its ratification through the end of the 19th century," *Heller*, 554 U.S. at 605, and carry special relevance when determining the scope of the right to bear arms as understood when it was applied to the States in 1868. Because they

help "determine *the public understanding* of a legal text in the period after its enactment or ratification," they are "a critical tool of constitutional interpretation." *Id.* And they unmistakably show that large swaths of the American public considered public-carry prohibitions to be permissible in populated areas and consonant with the right to bear arms.

California's law fits comfortably within this localism tradition. Although not all States and cities enacted such laws in the 19th century, "the Constitution establishes a federal republic where local differences are cherished as elements of liberty, rather than eliminated in a search for national uniformity." *Friedman v. Highland Park*, — F.3d —, 2015 WL 1883498, *5 (7th Cir. Apr. 27, 2015) (Easterbrook, J.). *McDonald* "does not foreclose *all* possibility of experimentation. Within the limits established by the Justices in *Heller* and *McDonald*, federalism and diversity still have a claim." *Id.*

2. The law's good-cause requirement has its roots in pre-Civil War America.

California's law also falls squarely within another historical tradition—the requirement that a person have "good cause" to carry a firearm in populated public areas. In the middle of the 19th century, numerous States enacted laws containing such a requirement. Virginia, for example, made it unlawful for anyone to "go armed" with a gun "without reasonable cause to fear an assault or other injury." 1847 Va. Laws at 129, § 15; *see also, e.g.*, 1836 Mass. Laws 750, § 16; 1851

Minn. Laws 528, ch. 112, § 18. And West Virginia and Texas did the same. *See* 1870 W. Va. Laws 702, ch. 153, § 8; 1871 Tex. Laws 1322, art. 6512. These prohibitions would have meant nothing if anyone could have satisfied the exception by asserting a generalized fear of self-defense, and they were not enforced that way. *See, e.g.*, *Barnett*, 34 W. Va. 74.

California has not violated our Constitution by continuing this tradition. Nor have the eight States that currently have similar laws. Although such a lengthy historical pedigree is not necessary to satisfy the Second Amendment, it is sufficient to do so. Whatever else the Second Amendment permits, it surely allows a State's citizens to decide for themselves whether to carry forward a centuries-long legislative tradition.

CONCLUSION

The judgments of the district courts in both cases should be affirmed.

Respectfully submitted,

/s/ Deepak Gupta

DEEPAK GUPTA
JONATHAN E. TAYLOR
GUPTA BECK PLLC
1735 20th Street, NW
Washington, DC 20009
(202) 888-1741

Counsel for Amicus Curiae Everytown for Gun Safety

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

I hereby certify that my word processing program, Microsoft Word, counted 6,993 words in the foregoing brief, exclusive of the portions excluded by Rule 32(a)(7)(B)(iii).

/s/ Deepak Gupta

April 30, 2015 Deepak Gupta

CERTIFICATE OF SERVICE

I hereby certify that on April 30, 2015, I electronically filed the foregoing Brief of *Amicus Curiae* Everytown for Gun Safety in Support of Appellees 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.

/s/ Deepak Gupta
Deepak Gupta