No. 11-16255

IN THE

United States Court of Appeals for the Ninth Circuit

ADAM RICHARDS *et al.*,

Plaintiffs-Appellants,

v.

ED PRIETO *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of California, No. 2:09-CV-01235
District Judge Morrison C. England, Jr.

BRIEF FOR *AMICI CURIAE* BRADY CENTER TO PREVENT GUN VIOLENCE, THE INTERNATIONAL BROTHERHOOD OF POLICE OFFICERS, AND THE POLICE FOUNDATION

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the Brady Center to Prevent Gun Violence, the International Brotherhood of Police Officers, and the Police Foundation state that they have no parent corporations, nor have they issued shares or debt securities to the public. The Brady Center to Prevent Gun Violence is a § 501(c)(3) non-profit corporation, and no publicly held corporation holds ten percent of its stock.

/s/ Neil R. O'Hanlon
Neil R. O'Hanlon

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INTRODUCTION

The right to keep and bear arms recognized in *District of Columbia v. Heller* is unique among constitutional rights in the risks it presents. 554 U.S. 570 (2008). Guns are designed to kill, and gun possession and use subject others to a serious risk of deadly harm. While the Supreme Court held that the Second Amendment protects a right to possess guns *in the home* for self-defense, it never recognized a broader right to carry guns in public. On the contrary, *Heller* found concealed

carrying prohibitions in line with permissible gun laws, *Heller*, 554 U.S. at 626-27, and did not disturb longstanding precedent that "the right of the people to keep and bear arms (article 2) is not infringed by laws prohibiting the carrying of concealed weapons." *Robertson v. Baldwin*, 165 U.S. 275, 281-82 (1897).

In *Heller* and *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), which incorporated the Second Amendment to the states, the Court did not announce a right to carry in public but instead repeatedly stated its holding as bound to the home. Numerous courts, beginning in the 19th century and continuing after *McDonald*, have recognized that the Second Amendment does not prevent states from restricting or barring the carrying of handguns in public. It would be unprecedented to now hold that the Constitution bars California from allowing those tasked with protecting public safety to determine whether individuals have "good cause" to bring hidden handguns into public spaces.

Accordingly, the California permitting process governing the carrying of concealed weapons—authorized under Penal Code section 12050—does not implicate protected Second Amendment activity. Even if it does, the permitting process does not substantially burden the right to keep and bear arms in the home, in case of an emergency, or for other purposes recognized by California law. Moreover, Section 12050's permitting process would survive heightened scrutiny because it furthers California's compelling interest in preventing gun violence.

INTEREST OF *AMICI*

Amicus the Brady Center to Prevent Gun Violence is the nation's largest non-partisan, non-profit organization dedicated to reducing gun violence through education, research, and legal advocacy. Through its Legal Action Project, the Brady Center has filed numerous briefs *amicus curiae* in cases involving state and federal gun laws. *Amicus* brings a broad and deep perspective to the issues raised in this case and has a compelling interest in ensuring that the Second Amendment does not impede government's paramount objective to prevent gun violence.

Amicus the International Brotherhood of Police Officers is one of the largest police unions in the country, representing more than 50,000 members.

Amicus the Police Foundation is a national, non-partisan, non-profit organization with a long history of promoting public policies that enhance the safety of law enforcement officers and the public they serve. The Police Foundation strongly believes that the handgun permitting process at issue in this case is necessary and constitutional. Policing the streets and confronting the risks inherent in even routine traffic stops is perilous enough without increasing the number of guns that officers encounter. Concealed carrying permit laws, like California's, give local authorities the tool to reduce the risk of lethal harm to the public and law enforcement community.

LEGAL BACKGROUND

Recent Supreme Court Second Amendment Jurisprudence: In *Heller*, the Supreme Court held that the Second Amendment protects the right of responsible, law-abiding citizens to possess guns in the home for the purpose of self-defense. 554 U.S. at 628-29. While the Court could have stopped there, it went out of its way to stress that its holding did not "cast doubt" on other gun laws and even identified a non-exhaustive list of "presumptively lawful" measures that pass constitutional muster. *Id.* at 626-27 & n.26. Those "presumptively lawful" measures included laws restricting, and even banning, the public carry of weapons.[1] Indeed, in approvingly discussing long-understood limitations on the right to keep and bear arms, the Court specifically noted that "the majority of the 19th-century courts" considered outright "prohibitions on carrying concealed weapons . . . lawful under the Second Amendment or state analogues." *Id*. at 626.

Two years later, the Court incorporated the Second Amendment to states, but "repeat[ed]" *Heller's* "assurances" regarding its limited scope, and agreed that "state and local experimentation with reasonable firearms regulations will continue under the Second Amendment." *McDonald*, 130 S. Ct. at 3046-47 (internal

[1] In fact, in *Nordyke v. King*, this Court recognized *Heller*'s list of presumptively legal measures as a " 'warn[ing to] readers not to treat *Heller* as containing broader holdings than the Court set out to establish.' " 644 F.3d 776, 790 n.14 (9th Cir. 2011) (quoting *United States v. Skoien*, 614 F.3d 638, 640 (7th Cir. 2010) (en banc)).

citation omitted). Once again, the Court did not extend the right beyond the home.

Standard of Review: Since *Heller*, an increasing number of courts have considered two preliminary questions when deciding Second Amendment challenges: (1) does the law or regulation at issue implicate protected Second Amendment activity, and (2) if so, does it withstand the appropriate level of scrutiny? *See, e.g., United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010); *United States v. Reese*, 627 F.3d 792, 800 (10th Cir. 2010); *Kachalsky v. Cacace*, No. 10-CV-5413 (CS), 2011 WL 3962550, at *20 (S.D.N.Y. Sept. 2, 2011). As to the second inquiry, this Court held in *Nordyke* that "only regulations which substantially burden the right to keep and to bear arms trigger heightened scrutiny under the Second Amendment." *Nordyke*, 644 F.3d at 786.

Neither *Heller* nor *McDonald* articulated a standard of review for regulations that implicate the Second Amendment, though *Heller* explicitly rejected rational basis and implicitly rejected strict scrutiny. *See Nordyke*, 644 F.3d at 783-84; *Heller v. District of Columbia* ("*Heller II*"), 698 F. Supp. 2d 179, 187 (D.D.C. 2010). Likewise, in *Nordyke*, this Court did not decide "what type" of heightened scrutiny applies, *id.* at 786 n.9, but it unanimously rejected strict scrutiny. *Id.* at 784 ("[A]pplying strict scrutiny to every gun-control regulation would be inconsistent with *Heller*'s reasoning."); *see also id.* at 796 (Gould, J., concurring in part and in the judgment).

ARGUMENT

The firearms permitting process authorized by Section 12050 and implemented by Appellees is constitutional for three reasons. First, the permitting process does not burden the right of a law-abiding citizen to possess guns in the home and therefore does not implicate protected Second Amendment activity. Second, even if it does, California law provides ample alternatives for public carrying and does not substantially burden Second Amendment rights. Third, Section 12050's permitting process would survive heightened scrutiny because it reasonably fits California's interest in public safety, and the Supreme Court has already deemed this interest compelling.

The dangers posed to law enforcement provide the law enforcement *amici* with a particular interest in upholding California's reasonable restrictions on concealed carrying of firearms in public. Between 2009 and May 2011, at least 122 law enforcement officers were shot and killed with firearms.[2] The year 2010 saw a dramatic 24% spike in officer deaths by gunfire over the previous year,[3] and since 2007, eleven police officers have been killed by concealed weapon permit

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[2] *See* Brady Center to Prevent Gun Violence, *Officers Gunned Down*, 1 (May 2011), http://www.bradycampaign.org/xshare/pdf/reports/Officers-Gunned-Down.pdf (last visited Sept. 27, 2011).

[3] *Violence Against Police Spikes in January*, ASSOCIATED PRESS, Jan. 25, 2011, http://m.spokesman.com/stories/2011/jan/25/violence-against-police-spikes-january/ (last visited Sept. 27, 2011).

holders while administering routine traffic stops and serving warrants.[4] The deadliest shooting against law enforcement officers by a concealed weapon permit holder occurred on April 4, 2009, when a white supremacist shot and killed three police officers and injured one.[5] Invalidating Section 12050's permitting process would only expose more police officers to lethal harm.

I. CALIFORNIA'S CONCEALED WEAPONS PERMITTING PROCESS DOES NOT IMPLICATE PROTECTED SECOND AMENDMENT ACTIVITY BECAUSE IT DOES NOT IMPACT THE RIGHT TO POSSESS FIREARMS IN THE HOME.

The Supreme Court's decision in *Heller* recognized that the Second Amendment protects "the right of law-abiding, responsible citizens to use arms *in defense of hearth and home*." *Heller*, 554 U.S. at 635 (emphasis added). The Court only recognized Heller's right "to carry [] in the home," *id.*, and did not mention, much less approve, the carrying of firearms in public. *See id*. It instead focused on the historical recognition of the right of individuals "to keep and bear arms to defend their homes, families or themselves," *id.* at 615 (internal quotation marks omitted), and the continuing need to keep and use firearms "in defense of hearth and home." *Id.* at 635. The Court thus held no more than that "the District's ban on handgun possession *in the home* violates the Second Amendment,

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[4] *See* Violence Policy Center, *Law Enforcement Officers Killed by Concealed Handgun Permit Holders – May 2007 to the Present* (2011), http://vpc.org/fact_sht/ccwlawenforcement.pdf (last visited Sept. 27, 2011).

[5] *Id.*

as does its prohibition against rendering any lawful firearm *in the home* operable for the purpose of immediate self-defense." *Id.* at 635 (emphasis added).[6]

In keeping with the Court's narrow holding, California courts have consistently refused to read *Heller* and *McDonald* as recognizing a right to carry guns in public. In *People v. Dykes*, for instance, the California Supreme Court noted that "most courts have 'held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues' . . . . [and] *Heller* does not require us to conclude" otherwise. 209 P.3d 1, 44 (Cal. 2009) (internal citation omitted). And in *People v. Flores*, the California Supreme Court stated that, "[g]iven this implicit approval of concealed firearm prohibitions, we cannot read *Heller* to have altered the courts' longstanding understanding that such prohibitions are constitutional." 169 Cal. App. 4th 568, 575 (Cal. 2008).

In rejecting this challenge to the permitting process authorized under Section 12050, Judge England of the Eastern District of California declared:

> [T]he [Supreme] Court was careful to explain that their decision did not, in any way, invalidate many of the longstanding state and federal prohibitions on firearm possession. Based upon this, *Heller* cannot be read to invalidate Yolo County's concealed weapon policy, *as the Second Amendment does not create a fundamental right to carry a concealed weapon in public*.

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[6] Moreover, the Court has long acknowledged that "the right of the people to keep and bear arms (article 2) is not infringed by laws prohibiting the carrying of concealed weapons," *Robertson*, 165 U.S. at 281-82, and the *Heller* Court did not question, much less reverse, this precedent.

Richards v. County of Yolo, No. 2:09-cv-01235, 2011 WL 1885641, at *3 (E.D. Cal. May 16, 2011) (emphasis added) (internal citations omitted).

After *Heller*, other state and federal courts have similarly held that the Second Amendment does not protect a right to carry concealed weapons in public. Maryland's highest court stated that the "prohibition of firearms in the home was the gravamen of the certiorari questions in both *Heller* and *McDonald* and their answers. If the Supreme Court . . . meant its holding to extend beyond home possession, it will need to say so more plainly." *Williams v. State*, 10 A.3d 1167, 1177 (Md. 2011). In *People v. Dawson*, the Illinois Court of Appeals held:

> *Heller specifically limited its ruling to interpreting the amendment's protection of the right to possess handguns in the home*, not the right to possess handguns outside of the home in case of confrontation—a fact the dissent heartily pointed out by noting that "[n]o party or *amicus* urged this interpretation; the Court appears to have fashioned it out of whole cloth." The *McDonald* Court refused to expand on this right . . . .

934 N.E.2d 598, 605-606 (Ill. App. Ct. 2010) (emphasis added) (internal citations omitted), *cert. denied*, 131 S. Ct. 2880 (U.S. May 2, 2011). *See also Commonwealth v. Williams*, No. 09-P-813, 2011 WL 3299022, at *3 (Mass. App. Ct. Aug. 3, 2011) ("The Second Amendment does not protect [defendant] in this case because he was in possession of the firearm outside of his home."); *People v. Aguilar*, 944 N.E.2d 816, 823 (Ill. App. Ct. 2011) (*Heller* and *McDonald* limit "the right to possess handguns in the home, not the right to possess handguns outside

the home."); *State v. Knight*, 218 P.3d 1177, 1189 (Kan. Ct. App. 2009) (rejecting as "unpersuasive" the argument "that *Heller* conferred on an individual the right to carry a concealed firearm").

Likewise, the Fourth Circuit declined to extend the Second Amendment right beyond the home, refusing to "push *Heller* beyond its undisputed core holding." *United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011). "On the question of *Heller*'s applicability outside the home environment," the Fourth Circuit "think[s] it prudent to await direction from the Court itself." *Id.* at 475.[7]

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[7] Other courts have similarly held that the right recognized in *Heller* and *McDonald* is confined to the home. *See, e.g.*, *Kachalsky v. Cacace*, No. 10-CV-5413 (CS), 2011 WL 3962550, at *20 (S.D.N.Y. Sept. 2, 2011) ("[T]he language of *Heller* makes clear that the Court recognized 'not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose,' 554 U.S. at 626, but rather a much narrower right—namely the 'right of law-abiding, responsible citizens to use arms in defense of hearth and home,' *id.* at 635."); *Gonzalez v. Village of W. Milwaukee*, No. 09CV0384, 2010 WL 1904977, at *4 (E.D. Wis. May 11, 2010) ("The Supreme Court has never held that the Second Amendment protects the carrying of guns outside the home."); *United States v. Hart*, 726 F. Supp. 2d 56, 60 (D. Mass. 2010) ("*Heller* does not hold, nor even suggest, that concealed weapons laws are unconstitutional."); *Dorr v. Weber*, 741 F. Supp. 2d 993, 1005 (N.D. Iowa 2010) ("[A] right to carry a concealed weapon under the Second Amendment has not been recognized to date."); *Teng v. Town of Kensington*, No. 09-cv-8-JL, 2010 WL 596526, at *5 (D.N.H. Feb. 17, 2010) ("Given that *Heller* refers to outright 'prohibitions on carrying concealed weapons' as 'presumptively lawful,' far lesser restrictions of the sort imposed here (i.e., requiring that Teng complete a one-page application and meet with the police chief to discuss it) clearly do not violate the Second Amendment.") (internal citation omitted); *United States v. Tooley*, 717 F. Supp. 2d 580, 596 (S.D.W. Va. 2010) ("Additionally, possession of a firearm outside of the home or for purposes other than self-defense in the home are not within the 'core' of the Second Amendment right as defined by *Heller*."); *In re Factor*, No. A-5202-08T4, 2010 WL 1753307,

This understanding of the Second Amendment (and state analogues) as not protecting a right to carry guns or concealed weapons has been recognized for more than a century. *See, e.g.*, 1876 Wyo. Comp. Laws ch. 52, § 1 (1876 Wyoming law prohibiting anyone from "bear[ing] upon his person, concealed or openly, any firearm or other deadly weapon, within the limits of any city, town or village"); *see also* Ark. Act of Apr. 1, 1881; Tex. Act of Apr. 12, 1871; *Andrews v. State*, 50 Tenn. 165 (1871); *Fife v. State*, 31 Ark. 455 (1876); *English v. State*, 35 Tex. 473, 478 (1871); *Hill v. State*, 53 Ga. 472, 474 (1874); *State v. Workman*, 14 S.E. 9, 11 (W. Va. 1891); *Ex parte Thomas*, 97 P. 260, 262 (Okla. 1908); *Aymette v. State*, 21 Tenn. 154, 159-61 (1840); *State v. Buzzard*, 4 Ark. 18, 21 (1842); *State v. Jumel*, 13 La. Ann. 399, 400 (1858).[8]

Noted scholars and commentators have also long recognized that a right to keep and bear arms does not prevent states from restricting or forbidding guns in

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at *3 (N.J. Super. Ct. App. Div. Apr. 21, 2010) ("[T]he United States Supreme Court has not held or even implied that the Second Amendment prohibits laws that restrict carrying of concealed weapons."); *Riddick v. United States*, 995 A.2d 212, 222 (D.C. 2010) (Second Amendment does not "compel the District to license a resident to carry and possess a handgun outside the confines of his home, however broadly defined." (quoting *Sims v. United States*, 963 A.2d 147, 150 (D.C. 2008))).

[8] *Bliss v. Commonwealth*, 12 Ky. 90, 91, 93 (1822), in which the Kentucky Supreme Court declared Kentucky's concealed-weapons ban in conflict with its Constitution, is recognized as an exception to this precedent. *See* JOEL PRENTISS BISHOP, COMMENTARIES ON THE CRIMINAL LAW § 125, at 75-76 (1868). The Kentucky legislature corrected the anomalous decision by amending the state constitution to allow a concealed weapons ban. *See* KY. CONST. of 1850 art. XIII, § 25.

public places. John Norton Pomeroy's treatise, which *Heller* heralded as representative of "post-Civil War 19th-century sources" on the right to bear arms, 554 U.S. at 618, stated that the right to keep and bear arms "is certainly not violated by laws forbidding persons to carry dangerous or concealed weapons." JOHN NORTON POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES 157 (1868). Judge John Dillon explained that even where there is a right to bear arms, "the peace of society and the safety of peaceable citizens plead loudly for protection against the evils which result from permitting other citizens to go armed with dangerous weapons." Hon. John Dillon, *The Right to Keep and Bear Arms for Public and Private Defense (Part 3),* 1 CENT. L.J. 259, 287 (1874). Another authoritative study noted that the Second Amendment and similar state provisions had "not prevented the very general enactment of statutes forbidding the carrying of concealed weapons." ERNST FREUND, THE POLICE POWER, PUBLIC POLICY AND CONSTITUTIONAL RIGHTS 90 (1904). Post-*Heller* scholars recognize the logic behind limiting the right to the home. *See, e.g.*, Darrell A.H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment,* 109 COLUM. L. REV. 1278 (Oct. 2009); Michael C. Dorf, *Does Heller Protect a Right to Carry Guns Outside the Home?*, 59 SYRACUSE L. REV. 225 (2008).

The concealed weapons permitting process at issue does not impede the right of individuals to keep firearms in defense of their homes. Accordingly, Appellants

fail to challenge protected Second Amendment activity.

II. CALIFORNIA'S CONCEALED WEAPONS PERMITTING PROCESS DOES NOT SUBSTANTIALLY BURDEN SECOND AMENDMENT RIGHTS BECAUSE CALIFORNIA LAW PROVIDES SUFFICIENT ALTERNATIVE AVENUES TO CARRY FIREARMS FOR SELF-DEFENSE.

In keeping with the Supreme Court's recognition that *Heller* and *McDonald* "d[o] not imperil every law regulating firearms," *McDonald*, 130 S. Ct. at 3047, *Nordyke* held "that only regulations which substantially burden the right to keep and to bear arms trigger heightened scrutiny under the Second Amendment." *Nordyke*, 644 F.3d at 786. A regulation does not substantially burden Second Amendment rights if it "leaves open sufficient alternative avenues" for the protected activity. *Id.* at 787; *Richards*, 2011 WL 1885641, at *3.[9]

For the purpose of this inquiry, the protected activity at issue is the right to keep and bear arms for *self-defense*. *See Heller*, 554 U.S. at 599 (noting that "self-defense . . . was the *central component* of the right" codified in the Second Amendment); *id.* at 628 ("[T]he inherent right of self-defense has been central to the Second Amendment right."); *Nordyke*, 644 F.3d at 782 ("the Second Amendment protects an individual right to keep and to bear arms for self-

[9] The District Court, while recognizing that Yolo County's policy overlapped with and derived its authority from California state law, construed Appellants' challenge as one to Appellees' interpretation of their statutory authority. *See Richards*, 2011 WL 1885641, at *1 & n.2. Nevertheless, Appellants indicate that they are challenging both Penal Code section 12050 and Appellees' implementation of the permitting process. *See* Appellants' Opening Br. 42-44, 50.

defense"); *Richards*, 2011 WL 1885641, at *3 ("The appropriate inquiry here, under a substantial burden analysis, is whether [Section 12050] leave[s] Plaintiffs with 'reasonable alternative means' to obtain and keep a firearm 'sufficient for self-defense purposes.'"). By this standard, it is clear that the permitting process authorized by Section 12050 does not substantially burden Second Amendment rights because California law provides ample reasonable alternative avenues to carry firearms for self-defense. *See Richards*, 2011 WL 1885641, at *1; *Peruta v. County of San Diego*, 758 F. Supp. 2d 1106, 1113-14 (S.D. Cal. 2010). Most significantly, California law protects the possession of firearms in any manner at home (including any temporary residence or campsite), place of business, or other designated private property. *See* Cal. Penal Code §§ 12026, 12031(h) & (l).

California law also protects the right to carry firearms outside the home during exigent circumstances that give rise to self-defense. *See* Cal. Penal Code §§ 12031(j)(1) (permitting loaded firearm by "a person who reasonably believes that the person or property of himself or herself or of another is in immediate, grave danger and that the carrying of the weapon is necessary for the preservation of that person or property."); 12031(k) (permitting "loaded firearm by any person while engaged in the act of making or attempting to make a lawful arrest). Additionally, Californians may possess firearms outside their homes for hunting or sports as part of a gun club, Cal. Penal Code § 12031(i), or otherwise transport their firearms in a

locked container or trunk in a vehicle. Cal. Penal Code § 12026.1

Beyond these exceptions, California law also protects firearm possession by active or retired peace officers, special police officers, animal control officers or zookeepers, harbor police officers, guards or messengers of financial institutions, guards operating armored vehicles, private investigators, uniformed security guards, hunters, and target shooters, among others. *See* Cal. Penal Code § 12031(b)-(d) & (h); *see also Peruta*, 758 F. Supp. 2d at 1113 n.5.

Moreover, the self-defense exception in California law substantially attenuates the burden, if any, caused by Section 12050. *See Peruta*, 758 F. Supp. 2d at 1114. It protects the self-defense component that emanates from the right to possess firearms in the home while preserving the state's paramount interest in the safety of law enforcement officers and members of the general public. In *Heller*, the Supreme Court invalidated the District of Columbia's restrictive gun law in part because it lacked a self-defense exception and the Court refused the District's invitation to infer one. *See Heller*, 554 U.S. at 630. But unlike the District's restrictive ordinance, California's regulatory scheme carves out a significant self-defense exception. As the district court in *Peruta* explained, "to the extent that . . . [California's permitting law] burden[s] conduct falling within the scope of the Second Amendment, if at all, the burden is mitigated by the provisions of section 12031 that expressly permit loaded open carry for immediate self-defense." 758 F.

Supp. 2d at 1114-15.

Similarly, Judge England emphasized that the "California Penal Code has carved out a number of exceptions that allow individuals to possess and carry loaded firearms in public settings, including for use in hunting, or in a situation where someone who believes they are in 'immediate, grave, danger and that the carrying of the weapon is necessary for the preservation of that person or property.' " *Richards*, 2011 WL 1885641, at *4 (quoting Cal. Penal Code § 12031(j)(1)). California law imposes no substantial burden on the right to bear arms, the District Court reasoned, because "even if [Plaintiffs-Appellants] are denied a concealed weapon license for self-defense purposes from Yolo County, they are still more than free to keep an unloaded weapon nearby their person, load it, and use it for self-defense in circumstances that may occur in a public setting." *Id.*

Appellants reject those reasonable alternatives available under California law and instead assert a generalized fear of confrontation that may give rise to self-defense in any second. *See, e.g.*, Appellants' Opening Br. 34 (arguing that *Heller* recognizes a general right to be " '*armed and ready* for offensive or defensive action in a case of conflict with another person' ") (quoting *Heller*, 554 U.S. at 584 (citation omitted)). Yet by this logic, virtually no gun restriction could pass constitutional muster. Under such a view, laws forbidding carrying firearms in

government buildings and sensitive places, or even by non-violent felons, would be suspect, for the need to be "*armed and ready* for offensive or defensive action" may arise anywhere, from any person, or at any time. *See id*. The Supreme Court rightly rejected this view because it tolerates no limit. *See Heller*, 554 U.S. at 627 & n.26. So should this Court.

Finally, the *Nordyke* court made clear that "a law does not substantially burden a constitutional right simply because it makes the right more expensive or more difficult to exercise." *Nordyke*, 644 F.3d at 787-88. Here, the right to keep and bear arms remains robust in the home and many other places outside it. But even to the extent that California law forbids unlicensed or unexempted persons from carrying concealed firearms in public, the burden is minimal and the effect is significant in securing a safer environment for law enforcement to operate and for people to move freely without exposure to lethal harm. This type of incidental burden has been deemed constitutionally permissible. *See, e.g.*, *Gonzales v. Carhart*, 550 U.S. 124, 157-58 (2007) (upholding law forbidding partial-birth abortion because it "serves a valid purpose, one not designed to strike at the right itself, [even though it] has the incidental effect of making it more difficult or more expensive to procure an abortion") (internal quotation marks omitted); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (permitting "reasonable restrictions on the time, place, or manner of protected speech"). Because

California's regulatory framework does not impose a substantial burden on the right to keep and bear arms in public for self-defense, this Court should affirm the decision below.

III. EVEN IF THE CONCEALED WEAPONS PERMITTING PROCESS SUBSTANTIALLY BURDENS SECOND AMENDMENT RIGHTS, IT WOULD WITHSTAND HEIGHTENED SCRUTINY.

The *Nordyke* majority refused to "decide . . . precisely what type of heightened scrutiny applies to laws that substantially burden Second Amendment rights," 644 F.3d at 786 n.9, although it rejected Judge Gould's reasonable review test as akin to rational basis. *Id.* at 790-91. In the wake of *Heller* and *McDonald*, however, an overwhelming majority of courts have joined this Circuit in rejecting strict scrutiny.[10] *See, e.g.*, *United States v. Chester*, 628 F.3d 673, 682-83 (4th Cir. 2010); *United States v. Reese*, 627 F.3d 792, 802 (10th Cir. 2010); *United States v. Marzzarella*, 614 F.3d 85, 98 (3d Cir. 2010); *United States v. Skoien*, 614 F.3d 638, 641-42 (7th Cir. 2010) (en banc); *Osterweil v. Bartlett*, No. 1:09-cv-825

[10] In *Ezell v. Chicago*, the Seventh Circuit held that Chicago's post-*McDonald* ban on firing ranges while conditioning firearm licensing on certification in a firearm-safety course is a "serious encroachment on the right to maintain proficiency in firearm use, an important corollary to the meaningful exercise of the core right to possess firearms for self-defense." No. 10-3525, 2011 WL 2623511, at *17 (7th Cir. July 6, 2011). Since Chicago's ordinance rendered the right to arms in the home impracticable, the court concluded that "a more rigorous showing than that applied in *Skoien* should be required, if not quite 'strict scrutiny.'" *Id.* *Ezell* flows from *Heller* precisely because Chicago's ban struck at the core right recognized in *Heller* – the right to keep and bear arms in the home for self-defense. *Ezell* does not create a right heretofore unrecognized by the Supreme Court and does not support applying a more rigorous scrutiny in cases such as this.

(MAD/DRH), 2011 WL 1983340, at *10 (N.D.N.Y. May 20, 2011); *Heller II*, 698 F. Supp. 2d at 188. So have state courts for decades. *See, e.g.*, *Bleiler v. Chief, Dover Police Dep't*, 927 A.2d 1216, 1222 (N.H. 2007); *Robertson v. City & County of Denver*, 874 P.2d 325, 328, 333 n.10 (Colo. 1994); *State v. Comeau*, 448 N.W.2d 595, 599 (Neb. 1989); *Jackson v. State*, 68 So. 2d 850, 852 (Ala. Ct. App. 1953).

Indeed, the *Heller* Court implicitly rejected the strict scrutiny test. *See Heller II*, 698 F. Supp. 2d at 187 ("[S]trict scrutiny standard of review would not square with the [*Heller*] majority's references to 'presumptively lawful regulatory measures' . . . ."). The Supreme Court's reasoning also foreclosed any form of heightened scrutiny that would require the government to ensure that firearms legislation has a tight fit between means and ends, as *Heller* recognized that the Constitution provides legislatures with "a variety of tools for combating" the "problem of handgun violence," *Heller*, 554 U.S. at 636, and listed as examples a host of "presumptively lawful" existing firearms regulations without subjecting those laws to any analysis, much less heightened scrutiny. *Id.* at 626-27 & n.26.

But whatever type of heightened scrutiny applies, Section 12050's permitting process is constitutional. Courts have long recognized, and continue to recognize, that the government has a "compelling" "interest in preventing crime," *United States v. Salerno*, 481 U.S. 739, 754 (1987), that government has a

significant interest in having local law enforcement control concealed firearm permits, *Osterweil*, 2011 WL 1983340, at *10, and that the State of California has "an important and substantial interest in public safety and in reducing the rate of gun use in crime . . . . [and] the number of concealed weapons in public in order to reduce the risks to other members of the public who use the streets and go to public accommodations." *Peruta*, 758 F. Supp. 2d at 1117.

The public safety rationales for restricting guns in public are profound, as courts continue to recognize after *Heller*:

> Unlike possession of a gun for protection within a residence, carrying a concealed firearm presents a recognized threat to public order, and is prohibited as a means of preventing physical harm to persons other than the offender. A person who carries a concealed firearm on his person or in a vehicle, which permits him immediate access to the firearm but impedes others from detecting its presence, poses an imminent threat to public safety. . . .

People v. Yarbrough, 169 Cal. App. 4th 303, 314 (Cal. 2008) (internal quotation marks and citations omitted); *see also United States v. Walker*, 380 A.2d 1388, 1390 (D.C. 1977) (noting the "inherent risk of harm to the public of such dangerous instrumentality being carried about the community and away from the residence or business of the possessor"). The carrying of firearms in public poses a number of issues and challenges not presented by the possession of firearms in the home. Three issues, in particular, are worthy of note.

First, when firearms are carried out of the home and in public, the safety of a

broader range of individuals is threatened. While firearms kept in the home are primarily a threat to their owners, family members, friends, and houseguests,[11] firearms carried in public are a public threat to strangers, law enforcement officers, random passersby, and other private citizens. Guns in public expose all members of society to great risks, as guns are used "far more often to kill and wound innocent victims than to kill and wound criminals . . . [and] guns are also used far more often to intimidate and threaten than they are used to thwart crimes." David Hemenway & Deborah Azrael, *The Relative Frequency of Offensive and Defensive Gun Uses: Results From a National Survey*, 15 VIOLENCE & VICTIMS 257, 271 (2000). Another study has shown that in the last four years, concealed handgun permit holders have shot and killed at least eleven law enforcement officers and

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[11] *See, e.g.*, Matthew Miller *et al.*, *State-Level Homicide Victimization Rates in the US in Relation to Survey Measures of Household Firearm Ownership, 2001-2003*, 64 SOC. SCI. & MED. 656 (Feb. 2007) ("States with higher rates of firearm ownership had significantly higher homicide victimization rates"); Lisa M. Hepburn & David Hemenway, *Firearm Availability and Homicide: A Review of the Literature*, 9 AGGRESSION & VIOLENT BEHAV. 417 (2004) ("[H]ouseholds with firearms are at higher risk for homicide, and there is no net beneficial effect of firearm ownership"); Matthew Miller *et al.*, *Rates of Household Firearm Ownership and Homicide Across US Regions and States, 1988–1997*, 92 AM J. PUB. HEALTH 1988, 1988 (Dec. 2002) ("[I]n areas where household firearm ownership rates were higher, a disproportionately large number of people died from homicide."); Mark Duggan, *More Guns, More Crime*, 109 J. POL'Y. ECON. 1086 (2001); Matthew Miller *et al.*, *Firearm Availability and Unintentional Firearm Deaths*, 33 ACCIDENT ANALYSIS & PREVENTION 477 (Jul. 2000) ("A statistically significant and robust association exists between gun availability and unintentional firearm deaths.").

359 private citizens. *See* Violence Policy Center, *Concealed Carry Killers* (2011), http://vpc.org/ccwkillers.htm (last visited Sept. 27, 2011). States have a stronger need to protect their citizens from individuals carrying guns in public than they do from individuals carrying guns in their homes.

Second, carrying firearms in public is not an effective form of self-defense and, in fact, repeatedly has been shown to *increase* the chances that one will fall victim to violent crime. Most states that enact laws broadly allowing concealed carrying of firearms in public appear to "experience increases in violent crime, murder, and robbery when [those] laws are adopted." John J. Donohue, *The Impact of Concealed-Carry Laws*, *in* EVALUATING GUN POLICY EFFECTS ON CRIME AND VIOLENCE 289, 320 (2003). Laws broadly allowing concealed carrying of weapons "have resulted, if anything, in an *increase* in adult homicide rates." Jens Ludwig, *Concealed-Gun-Carrying Laws and Violent Crime: Evidence from State Panel Data*, 18 INT'L REV. L. & ECON. 239 (1998). Likewise, "firearms homicides increased in the aftermath of [enactment of these] laws," and may "raise levels of firearms murders" and "increase the frequency of homicide." David McDowall *et al.*, *Easing Concealed Firearms Laws: Effects on Homicide in Three States*, 86 J. CRIM. L. & CRIMINOLOGY 193, 202-203 (1995). Similarly, "[f]or robbery, many states experience increases in crime" after concealed carry laws are enacted. Hashem Dezhbakhsh & Paul Rubin, *Lives Saved or Lives Lost? The Effects of*

Concealed-Handgun Laws on Crime, 88 AM. ECON. REV. 468 (May 1998).

Several different statistical approaches to the question "indicate a rather substantial increase in robbery," while "policies to *discourage* firearms in public may help prevent violence." John Donohue, *Guns, Crime, and the Impact of State Right-To-Carry Laws*, 73 FORDHAM L. REV. 623 (2004). Another study found that "gun possession by urban adults was associated with a significantly increased risk of being shot in an assault," and that "guns did not seem to protect those who possessed them from being shot in an assault." Charles C. Branas *et al.*, *Investigating the Link Between Gun Possession and Gun Assault*, 99 AMER. J. PUB. HEALTH 2034 (Nov. 2009). Likewise, another study found that:

> Two-thirds of prisoners incarcerated for gun offenses reported that the chance of running into an armed victim was very or somewhat important in their own choice to use a gun. Currently, criminals use guns in only about 25 percent of noncommercial robberies and 5 percent of assaults. If increased gun carrying among potential victims causes criminals to carry guns more often themselves, or become quicker to use guns to avert armed self-defense, the end result could be that street crime becomes more lethal.

Philip Cook *et al.*, *Gun Control After Heller: Threats and Sideshows from a Social Welfare Perspective*, 56 UCLA L. REV. 1041, 1081 (2009).

Third, the carrying of firearms in public negatively implicates other social issues and portends societal ills unlike firearms in the home. When the carrying of guns in public is restricted, "possession of a concealed firearm by an individual in public is sufficient to create a reasonable suspicion that the individual may be

dangerous, such that an officer can approach the individual and briefly detain him in order to investigate whether the person is properly licensed." *Commonwealth v. Robinson*, 600 A.2d 957, 959 (Pa. Super. Ct. 1991); *accord Commonwealth v. Romero*, 673 A.2d 374, 377 (Pa. Super. Ct. 1996). Law enforcement's ability to protect themselves and the public could be greatly restricted if officers were required to effectively presume that a person carrying a firearm in public was doing so lawfully. Under such a legal regime, it is possible that an officer would not be deemed to have cause to arrest, search, or stop a person seen carrying a loaded gun, even though far less risky behavior could justify police intervention. Law enforcement should not have to wait for a gun to be fired before protecting the public. Further, if drivers are allowed to carry loaded guns, road rage can become a more serious and even potentially deadly phenomenon. David Hemenway, *Road Rage in Arizona: Armed and Dangerous*, 34 ACCIDENT ANALYSIS AND PREVENTION 807-14 (2002). And an increase in gun prevalence in public may cause an intensification of criminal violence. Philip Cook & Jens Ludwig, *The Social Costs of Gun Ownership*, 90 J. PUB. ECON. 379, 387 (2006).

States have significant interests in averting the spike in gun crimes and accidental shootings that will result from unrestricted public carrying. California has devised a regulatory scheme that is well tailored to accomplish its interests in fostering a safe place for all. Accordingly, this Court should uphold the decision

below.[12]

CONCLUSION

For all the foregoing reasons, the Court should hold that Section 12050's permitting process is constitutional.

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Respectfully submitted,

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[12] Appellants' argument that the First Amendment principle of "prior restraint" applies here lacks support. *See* Appellants' Opening Br. 47-52 (conceding that the concept of "prior restraint has never been applied to Second Amendment rights"). Although courts have drawn on the analytical framework found in First Amendment jurisprudence, they have not transferred substantive First Amendment rules—including the "prior restraint" concept—into the Second Amendment arena. *See Kachalsky v. Cacace*, No. 10-CV-5413 (CS), 2011 WL 3962550, at *25 n.32 (S.D.N.Y. Sept. 2, 2011) (declining to apply prior restraint principle).

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation Rule 29(d) and Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 6,244 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

This brief also complies with the typeface requirements of Rule 32(a)(5)(A) and the type style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in 14-point font and in Times New Roman.

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CERTIFICATE OF CONFERENCE

I hereby certify that on September 27, 2011, counsel for *Amici Curiae* conferenced with both Appellants and Appellees' counsel. Both counsel for Appellants and counsel for Appellees consented to filing this *Amici Curiae* brief.

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CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2011, I filed this *Amici Curiae* brief with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system, which will electronically serve this brief on all parties and participants in this case.

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