No. 11-16255

In The United States Court of Appeals For The Ninth Circuit

ADAM RICHARDS, BRETT STEWART, SECOND AMENDMENT FOUNDATION, INC., AND THE CALGUNS FOUNDATION, INC.,

Plaintiffs-Appellants,

v.

ED PRIETO AND COUNTY OF YOLO,

Defendants-Appellees.

Appeal from a Judgment of the United States District Court
for the Eastern District of California
Hon. Morrison C. England, District Judge
(2:09-CV-01235-MCE-DAD)

REPLY BRIEF

Donald E. J. Kilmer, Jr.
Law Offices of Donald Kilmer
1645 Willow Street, Suite 150
San Jose, CA 95125
408.264-8489/408.264-8487
don@dklawoffice.com

Alan Gura*
GURA & POSSESSKY, PLLC
101 N. Columbus Street, Suite 405
Alexandria, VA 22314
703.835.9085/703.997.7665
alan@gurapossessky.com

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Counsel for Appellants
*Counsel of Record

CORPORATE DISCLOSURE STATEMENT

The Second Amendment Foundation, Inc., and the Calguns Foundation, Inc., have no parent corporations. No publicly traded company owns 10% or more of appellant corporations' stock.

Dated: October 25, 2011

Respectfully submitted,
Second Amendment Foundation, Inc.
The Calguns Foundation, Inc.

By: /s/ Alan Gura
Alan Gura
Counsel for Appellants

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SUMMARY OF ARGUMENT

Licensing firearms pursuant to objective standards, rather than leaving such decisions to the total discretion of some official, would hardly end *all* of "California's statutory restrictions on concealed weapons and the open carrying of loaded weapons in public." Appellees' Br. 1. Nor would objective licensing standards implicate, let alone threaten, "the California gun control scheme as a whole." *Id.* California has many gun laws. Virtually all of them, for better or worse, employ objective standards distinguishing what is permitted from what is not.

Defendants' hyperbolic premise introduces a largely unserious brief. Its ultimate logic is that individuals do not need defensive arms because modern crime is less dangerous than that which existed historically—desperados "no longer prowl the streets and saloons looking to draw at the slightest provocation, nor hide in the gully outside town waiting to ambush the stagecoach." *Id.* 46-47. Whether crime today is better or worse than in times past is debatable (and

irrelevant); that the Second Amendment secures rights fixed in law, not by the grace of government officials, is settled.

Defendants invoke figures ranging from Aphrodite[1] to Procustes[2] to Johnny Ringo,[3] persistently tempting the line between clever and flip. Yet the answers to the questions posed by this litigation have always been found not in the mythology of Ancient Greece or the Wild West, but in the pages of the United States and Federal Reporter series, and California's Penal Code. To these texts, California's government added another since the filing of Defendants' brief. By Defendants' logic, this new legal text mandates reversal. Indeed, had more time remained in the briefing schedule, Plaintiffs could have moved for summary reversal.[4]

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[1]Appellees' Br. 1.

[2]Appellees' Br. 18.

[3]Appellees' Br. 46.

[4]*See* Ninth Cir. R. 3-6(a) (summary disposition "[a]t any time prior to the completion of briefing in a civil appeal if the court determines: (a) that . . . recent legislation requires reversal or vacation of the judgment or . . . a remand for additional proceedings. . .").

The case now stands fully briefed, but Plaintiffs respectfully suggest summary disposition is still appropriate in light of recent legislative developments, given Defendants' concession:

> Although whether the Second Amendment is limited to defense of one's residential real property and hunting poses an interesting question, *YOLO's position neither requests nor requires such a holding* because California's laws permit, with relatively few exceptions, the open carrying of unloaded weapons and, outside city limits, even of loaded weapons.

Appellees' Br. at 25 (emphasis added). As Defendants see it, "[t]he real issue is whether California can constitutionally restrict open carrying of loaded guns in certain public areas of cities." *Id.* at 46. The bulk of Defendants' brief thus argues that Second Amendment interests are adequately protected by the carrying of unloaded handguns, *id.* at 25-31, and that it is appropriate to regulate the right to bear arms by prohibiting handguns openly-carried in urban areas from being loaded. *Id.* at 31-46. Defendants' amici tread the same ground.

The lower court adopted this logic. Because Plaintiffs "[were] 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," ER 11, the lower court found that the handgun carry

licensing scheme did not substantially burden Second Amendment rights, and applied rational basis to uphold the law. *Id.*

Alas, on October 9, 2011, California's Governor signed into law Assembly Bill 144, criminalizing the unloaded open carrying of handguns in any incorporated portion of the state, or in any unincorporated area in which shooting is forbidden. Thus, Plaintiffs need not respond to the argument that openly carrying unloaded handguns is anything other than an invitation to robbery. Whatever its legal significance last month, that option is off the table effective January 1, 2012, and with it, the crux of Defendants' position as well as the rationale articulated by the court below.

The opposition's remaining arguments do not require much response. The Second Amendment right to carry handguns for self-defense is secured, like all others, by the federal courts' traditional prior restraint doctrine. The right applies throughout the state, including urban areas, and does not evaporate for all because it might be denied to some. Even to the limited extent the case is governed by means-ends scrutiny, required only to resolve Plaintiffs' Equal

Protection claim,[5] such balancing cannot sanction the court substituting its own policy choice for one the people ratified as constitutional text.

In any event, with enactment of Assembly Bill 144, the statutory landscape underpinning the lower court and Defendants' views have been repealed. Nothing remains for the Court to do but remand with instructions to grant Plaintiffs' motion for summary judgment. *See, e.g. Parker* v. *District of Columbia*, 478 F.3d 370, 401 (D.C. Cir. 2007), *aff'd sub nom District of Columbia* v. *Heller*, 554 U.S. 570 (2008).

ARGUMENT

I. CALIFORNIA LAW NOW FORBIDS *ALL* CARRYING OF HANDGUNS IN INCORPORATED AND MANY UNINCORPORATED AREAS ABSENT A PERMIT.

Defendants, their amici, and the Court below all believed it dispositive that individuals could openly carry *unloaded* handguns throughout the state, notwithstanding California's general prohibition of the unlicensed carrying of loaded, functional firearms in virtually all populated areas.

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[5]Defendants failed to comprehend that Plaintiffs indeed pursue their equal protection arguments on appeal. Appellees' Br. 4 n. 1; *contra* Appellants' Br. 13, 52-58.

Effective January 1, 2012, new Cal. Penal Code §§ 26350(a)(1) & (2) make it a crime to openly carry an unloaded handgun, on one's person, or in a vehicle, in

> (A) A public place or public street in an incorporated city or city and county.
>
> (B) A public street in a prohibited area of an unincorporated area of a county or city and county[, and]
>
> (C) A public place in a prohibited area of a county or city and county.

Supplemental Statutory Addendum 10; http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_0101-0150/ab_144_bill_20111009_chaptered.pdf (last visited October 23, 2011).[6] "'[P]ublic place' has the same meaning as in Section 25850." Cal. Penal Code § 17040.

> The phrase "public place" has not been used throughout the Penal Code with a clear and uniform legislative meaning . . . [it] generally means "a location readily accessible to all those who wish to go there." The key consideration is whether a member of the public can access the place without challenge.

People v. *Strider*, 177 Cal. App. 4th 1393, 1401 (2011) (citations and

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[6]Effective January 1, 2012, California's Penal Code will undergo non-substantive re-organization. 2010 Cal. Stats. ch. 711. The challenged provisions of current Penal Code § 12050 will be restated, with some alteration in format, at Penal Code § 26150.

internal punctuation omitted); *see also* Cal. Penal Code § 20170(b). "'[P]rohibited area' means any place where it is unlawful to discharge a weapon." Cal. Penal Code § 17030.

It bears repeating that the lower court applied rational basis, at least in large part, because of the availability of unloaded open carry. ER 11. And Defendants rested their entire case before this Court on that exception, explicitly disclaiming any request to find that the Second Amendment does not extend outside the threshold of one's home because Plaintiffs could carry unloaded handguns. Appellees' Br. 25.

The Court need no longer evaluate competing claims about the utility and constitutional sufficiency of unloaded open handgun carry. The practice is now banned. Plaintiffs do not lament the prohibition of unloaded open handgun carry, which they have consistently asserted is dangerous, useless, and in any event not constitutionally protected. It is now crystal clear that the only way to bear handguns for self-defense in those portions of the state where most people might actually be found is by having a license to do so, the issuance of which is improperly left to the licensing authority's complete discretion. Notably, the prohibition on the open carrying of unloaded handguns

exempts current or retired peace officers, Cal. Penal Code § 26361, and individuals licensed to openly carry loaded firearms in sparsely populated counties, Cal. Penal Code § 26362, but does not exempt individuals licensed to carry concealed handguns.

The people of California have spoken: they generally do not want to see openly-carried handguns, but they will accept the licensing of concealed handgun carrying. This is a valid choice under the Second Amendment. But having chosen this method of permitted handgun carrying, the licenses must be issued pursuant to objective standards.

II. THE AVAILABILITY OF LOADED OPEN HANDGUN CARRY IN REMOTE PARTS OF THE NATION'S THIRD LARGEST STATE IS IRRELEVANT.

It is within judicial notice that the bulk of California's population resides and works in urban areas, most of which are incorporated as cities, and that the discharge of firearms is prohibited in numerous unincorporated but urbanized county areas. These are the areas where the right to bear arms is most relevant. It is utterly irrelevant that "California consists of mostly unincorporated areas" where Plaintiffs might carry guns without a license. Appellees' Br. 13. Many of these regions—including vast mountains, forests, deserts, and agricultural

areas—are inaccessible to the public. Millions of acres are occupied by closed military reservations such as NAWS China Lake, Camp Pendleton, Chocolate Mountain Aerial Gunnery Range, Mountain Warfare Training Center, and Marine Corps Air Ground Combat Center Twentynine Palms.

Nor does it matter that residents of sparsely populated counties may apply for licenses to openly carry loaded firearms. Appellees' Br. 14. Even the residents of Alpine County are entitled to their rights when visiting Los Angeles, and Plaintiffs do not limit their claims to the need for self-defense while visiting rural counties. In any event, Richards and Stewart live in the incorporated City of Davis, within Defendant Yolo County—whose population is too large to permit licensed open carry. And since open carry permits are also issued pursuant to the licensing authorities' total discretion, it is hardly apparent that Defendant Prieto would issue these permits were they relevant, desired by Plaintiffs, and within Prieto's ability to issue.

In any event, it is unimportant that Plaintiffs might enjoy their constitutional rights on some remote hilltop or patch of desert, miles from civilization. The claim is a practical one: to carry handguns "for

the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person." *Heller*, 554 U.S. at 584 (citations omitted). There are few people in unincorporated, rural areas, and like most Californians, Plaintiffs spend little time in such places.

Individuals enjoy their constitutional rights where they live and travel. And the Bill of Rights, operative throughout the entire state of California—without exception—is most relevant in those places where the people are. Defendants' theory, that individuals may have their Second Amendment rights suppressed in some places because they might be enjoyed elsewhere, is "a profoundly mistaken assumption." *Ezell* v. *City of Chicago*, 651 F.3d 684, 2011 U.S. App. LEXIS 14108 at *25 (7th Cir. 2011).

> In the First Amendment context, the Supreme Court long ago made it clear that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place" . . . That sort of argument should be no less unimaginable in the Second Amendment context.

Id. at *25-*26 (*quoting Schad* v. *Borough of Mt. Ephraim*, 452 U.S. 61, 76-77 (1981) and *Schneider* v. *State of New Jersey*, 308 U.S. 147, 163 (1939)). In *Ezell*, the Seventh Circuit rejected the notion that Chicago

could ban gun ranges because its residents might exercise the right to train with firearms outside the city. Obviously, the right to self-defense against violent crime is even less portable. The ability to carry a gun in the middle of nowhere does not add to Adam Richards' sense of security in downtown Davis.

Yet Defendants devote twenty pages to an argument entitled "The Second Amendment is Inapplicable to Public Areas in Cities." Appellees' Br. 10. As examples of possible presumptively sensitive places, the Supreme Court did not offer "cities," but rather, the substantially narrower category of "schools and government buildings." *Heller*, 554 U.S. at 626. Indeed, Defendants' statement is remarkable in light of recent Supreme Court precedents named ***District of Columbia*** v. *Heller*, supra, and *McDonald* v. ***City of Chicago***, 130 S. Ct. 3020 (2010), turning back forceful arguments by governments vastly more urbanized than Yolo County as to why the Second Amendment should not apply in their territories.

McDonald put to rest the notion that urban areas are Second Amendment-free or reduced zones. "Municipal respondents point

out—quite correctly—that conditions and problems differ from locality to locality and that citizens in different jurisdictions have divergent views on the issue of gun control." *McDonald*, 130 S. Ct. at 3046. Nevertheless, that argument

> must be rejected. Under our precedents, if a Bill of Rights guarantee is fundamental from an American perspective, then, unless stare decisis counsels otherwise, that guarantee is *fully binding* on the States and thus *limits* (but by no means eliminates) their ability to devise solutions to social problems that suit local needs and values.

Id. (footnote omitted) (initial emphasis added).[7]

There is no such thing as a constitutional right that operates only at civilization's periphery, far from any population centers. The Second Amendment applies fully to public areas in cities. That some spaces, both within and without cities, might be sensitive off-limits places to gun carry is not an exception that swallows the entire rule. Indeed, Defendants offer a position incompatible with their "no cities" rule, in suggesting that there is no right to carry guns anywhere because all

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[7]Defendants disagree largely by invoking Justice Breyer's *Heller* and *McDonald* dissents. Appellees' Br. 43. Of course, Justice Breyer's positions were rejected by a majority of the Supreme Court—hence, they are dissents. That is not to say that Defendants' reliance on these opinions is unpersuasive, just that such reliance is not persuasive in the manner Defendants intended.

line-drawing is, in their view, impossible:

> if state and federal governments can lawfully bar loaded (or even unloaded) weapons from some public areas, how is the constitutional boundary drawn so to show those same guns must nonetheless be allowed in other public areas? Surely, Plaintiffs do not contend there is a qualitative difference between a county office and a restaurant, or between a playground or school and a residential street.

Appellees' Br. 24.

Plaintiffs would indeed contend—not here, but in an appropriate case raising the issue—that qualitative differences exist among various places. *Heller*'s admonition as to sensitive places confirms the common-sense notion that guns may be allowed in some places but barred from others—just like speech is regulated according to time, place and manner. Defendants would not be heard to claim that speech can be forbidden everywhere because it is too difficult to evaluate such distinctions. This case concerns a "place" restriction only in the sense that bearing arms is not recognized as a right in California.

III. PRIOR RESTRAINT DOCTRINE SECURES THE RIGHT TO BEAR ARMS.

Defendants fail to respond to the opening brief's main argument—the right to bear arms being a freedom secured by the Constitution, its licensing cannot be left to the unbridled discretion of

some official. Right or wrong, the argument is coherently laid out, and Defendants should have probably done more than dismiss it as "bewildering." Appellees' Br. 31.

Amicus Brady does little more, ending its brief with a footnote tersely offering that courts only apply the First Amendment's "analytical framework" to the Second Amendment, not the First Amendment's "substantive law." Brady Br. 25 n.12 (citation omitted).

That analysis is fundamentally wrong: prior restraint doctrine does not supply any "substantive First Amendment rules." It holds only that when rules are made, whatever they are, they must be objectively defined. The doctrine is the very model of an "analytical framework" in that it applies uniformly in a wide variety of different contexts. In the First Amendment field alone, it applies to regulations governing solicitation, *Gaudiya Vaishnava Soc.* v. *San Francisco*, 952 F.2d 1059 (9th Cir. 1991); public demonstrations, *Long Beach Area Peace Network* v. *City of Long Beach*, 574 F.3d 1011 (9th Cir. 2009); and the operation of bookstores, *Diamond* v. *City of Taft*, 29 F. Supp. 2d 633, 650 (C.D.

Cal. 1998), *aff'd*, 215 F.3d 1052 (9th Cir. 2000), to name just a few. The "substantive" rules for regulating these activities are plainly different.

Moreover, prior restraint is not exclusively a First Amendment doctrine. The prohibition on unbridled licensing discretion secures "the peaceful enjoyment of freedoms which the Constitution guarantees." *Staub* v. *City of Baxley*, 355 U.S. 313, 322 (1958). While First Amendment freedoms have historically been licensed far more than Second Amendment freedoms, prior restraint has long been demonstrated in non-First Amendment contexts. For example, in *Kent* v. *Dulles*, 357 U.S. 116 (1958), the Secretary of State purported to exercise his discretion to deny plaintiffs' passport applications based on their communist sympathies. The Supreme Court, recognizing that the Fifth Amendment's Due Process Clause secures a fundamental right to international travel,

> hesitate[d] to impute to Congress, when in 1952 it made a passport necessary for foreign travel and left its issuance to the discretion of the Secretary of State, a purpose to give him unbridled discretion to grant or withhold a passport from a citizen for any substantive reason he may choose.

Kent, 357 U.S. at 128; *Hernandez* v. *Cremer*, 913 F.2d 230, 237 (5th Cir.

1990); *but see Regan* v. *Wald*, 468 U.S. 222, 241-42 (1984) (passports may be restricted for foreign policy reasons).

> [T]he right of exit is a personal right included within the word 'liberty' as used in the Fifth Amendment. If that "liberty" is to be regulated, it must be pursuant to the law-making functions of the Congress. And if that power is delegated, the standards must be adequate to pass scrutiny by the accepted tests.

Kent, 357 U.S. at 129. The Supreme Court observed that historically, passports had been denied only to those who were not citizens of or sufficiently loyal to the United States, or to those fleeing the criminal justice system. Accordingly, the Court refused to accept that without more, the executive branch was authorized by Congress to deny passports for other reasons.

Of course, some "substantive" First Amendment law *has* been imported into the Second Amendment. *See, e.g. Ezell*, 2011 U.S. App. LEXIS 14108 at *32 (irreparable harm presumed where Second Amendment violated: right to arms protects "intangible and unquantifiable interests" similar to First Amendment). And in any event, even were Brady's critique correct (and it is not), that critique would be merely descriptive, not persuasive. If some reason exists why

First Amendment rights cannot be dispensed by unbridled discretion, but other rights can be, that reason is not readily apparent. Courts are in the business of making new law, and Second Amendment law is in its infancy. Until 2007, no federal appellate court had struck down a municipal handgun ban on Second Amendment grounds. Were there some actual, substantive reason to exclude the Second Amendment from the protection of the prior restraint doctrine, it was incumbent upon the Defendants, or perhaps their amici, to explain why.

IV. DEFENDANTS' AND AMICI'S POLICY ARGUMENTS ARE IRRELEVANT.

A. THE SECOND AMENDMENT ALREADY REFLECTS THE PEOPLE'S PUBLIC POLICY CHOICE.

This is not a constitutional convention. Regardless of whether Defendants think it a good idea or disaster, the Constitution is not silent on the question of a right to bear arms. As ratified today, the Constitution secures a "right to keep and carry" guns for self-defense. *Heller*, 554 U.S. at 604, 626 & 627.

Undaunted by the Constitution's plain text, Defendants' circular syllogism is: (1) carrying handguns is a social evil ("the carrying of firearms in public negatively implicates other social issues and

portends societal ills unlike firearms in the home," Brady Br. 23), (2) denying licenses to carry handguns eliminates the carrying of handguns (at least by law-abiding people), (3) therefore, presuming that handguns cannot be carried is justified. After all, as Defendants confidently assure, "in modern society, the average citizen's need to instantly respond with deadly force in public places is nil." Appellees' Br. 5. This is not constitutional analysis. It is the imposition of Defendants' personal policy preferences.

All of Defendants and their amici's various arguments by way of means-ends scrutiny seek to prove that the government's interest in limiting the carrying of handguns suffices to deny anyone the ability to do so. Whatever the label or purported test, these are nothing less than attempts to "balance" a right out of existence. However, just as in a Free Exercise Clause case, the question is not the validity or efficacy of the religious practice, the question here is not whether the carrying of arms is a good idea—the question is whether carrying arms is constitutionally protected.

Were courts able to affirm any governmental decision based upon social science or policy assessments, the Constitution would be a dead

letter. In a constitutional system, the people, not judges or government officials, make basic public policy decisions. Judicial assessment of what is more desirable can be a very poor substitute for recognizing rights based on our nation's historic traditions of liberty. *See, e.g. Buck* v. *Bell*, 274 U.S. 200 (1927). The Supreme Court has emphatically declared that the Second Amendment's content is not up to any court's evaluation of what makes for optimal public policy. The Second Amendment does not "require judges to assess the costs and benefits of firearms restrictions and thus to make difficult empirical judgments in an area in which they lack expertise." *McDonald*, 130 S. Ct. at 3050.

> We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding "interest-balancing" approach. The very enumeration of the right takes out of the hands of government--even the Third Branch of Government--the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all . . . Like the First, [the Second Amendment] is the very *product* of an interest-balancing by the people . . .

Heller, 554 U.S. at 635 (emphasis original). "[T]he enshrinement of constitutional rights necessarily takes certain policy choices off the table." *Id.* at 636.

"*Heller* specifically renounced an approach that would base the constitutionality of gun-control regulations on judicial estimations of the extent to which each regulation is likely to reduce such crime." *Nordyke* v. *King*, 644 F.3d 776, 784 (9th Cir. 2011). Courts may not "constrict the scope of the Second Amendment in situations where they believe the right is too dangerous." *Id.*

Defendants and amici are certainly entitled to believe that the Second Amendment right to bear arms is disastrously dangerous. They are also entitled to that same belief regarding the exclusionary rule or the right to counsel. Doubtless, virtually every aspect of the Constitution finds strong disagreement among some segment of society. But *McDonald*'s instructions bear repeating:

> Municipal respondents maintain that the Second Amendment differs from all of the other provisions of the Bill of Rights because it concerns the right to possess a deadly implement and thus has implications for public safety. And they note that there is intense disagreement on the question whether the private possession of guns in the home increases or decreases gun deaths and injuries. The right to keep and bear arms, however, is not the only constitutional right that has controversial public safety implications. All of the constitutional provisions that impose restrictions on law enforcement and on the prosecution of crimes fall into the same category.

McDonald, 130 S. Ct. at 3045 (citations omitted).

In *Heller* and *McDonald*, the Supreme Court was flooded with data regarding the alleged evils of gun possession, and the absolutely imperative need for local government officials to enjoy an unfettered hand in regulating firearms. None of this mattered. What mattered were the words of the Constitution, as understood by those who framed and ratified it. "In interpreting this text, we are guided by the principle that '[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.'" *Heller*, 554 U.S. at 576 (quoting *United States* v. *Sprague*, 282 U.S. 716, 731 (1931)) (other citation omitted). The question of what the Second Amendment secures is a matter of text and history, not an academic debate as to who has the best statistics.

Defendants and their amici do not seriously challenge the basic premise that the Second Amendment guarantees rights outside the home. They largely repeat that which Plaintiffs have already shown: historically, courts approved of legislative restrictions on the *manner* of

carrying guns, such that the concealed carrying of guns could be forbidden if only the open carrying of guns remained permitted (and, presumably, vice versa). *See, e.g.* LCAV Br. 26 ("concealed carry merely a '*particular mode* of bearing arms which is found dangerous to the peace of society,'" quoting *State* v. *Jumel*, 13 La. Ann. 399, 400 (1858), and "concealed carry bans 'a mere regulation of the manner in which certain weapons are to be borne,'" quoting *Owen* v. *State*, 31 Ala. 387, 388 (1858)).

LCAV's assertion that the right to bear arms should not be protected because it seems unpopular in a poll commissioned by an anti-gun rights group, conducted by a firm established "to advance progressive ideals," http://www.lakeresearch.com/people/ (last visited Oct. 24, 2011), is risible. LCAV Br. 18. "[W]e have never held that a provision of the Bill of Rights applies to the States only if there is a 'popular consensus' that the right is fundamental." *McDonald*, 130 S. Ct. at 3049. The courts' mission of upholding civil rights is advanced by checking the political branches, not by rubber-stamping the results of politicized opinion polls.

Amicus Brady comes closer to overturning history in citing nineteenth-century scholarship approving prohibitions on the carrying of "dangerous" weapons, Brady Br. 12, but that concern merely reflects "the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'" *Heller*, 554 U.S. at 627 (citations omitted). While all weapons are in some sense "dangerous" if they are to retain their basic function, the term connotes particular unacceptable arms or the manner of carrying them. *Heller* makes clear that handguns are not so classified, being generally a type of arm that may be kept—and carried.

As another source not fully quoted by Brady offered,

> society cannot justly require the individual to surrender and lay aside the means of self-protection in seasons of personal danger; and it will be in vain that the laws of society denounce penalties against the citizen for arming himself when his life is menaced by the attacks of wild beasts, of highwaymen, or of dangerous and persevering enemies.

John Dillon, *The Right to Keep and Bear Arms for Public and Private Defense (Part 3)*, 1 CENT. L. J. 259, 287 (1874). Dillon's Brady-excerpted concern regarding dangerous weapons follows, and thereafter, Dillon plead, "the utmost that the law can hope to do is to strike some sort of balance between these apparently conflicting rights." *Id.*

Of course there is no constitutionally-guaranteed positive right to protection from harm. *Town of Castle Rock* v. *Gonzales*, 545 U.S. 748 (2005). The balance that might be struck between the right to bear arms for self-defense, and the governmental interest in public safety, might include many restrictions: laws barring the carrying of guns into sensitive places, or licensing the carrying of guns pursuant to objective criteria. It does not include abolishing the right altogether such that its very exercise is left to the government's total discretion.

B. THE PROFFERED SOCIAL SCIENCE DATA IS FLAWED AND IRRELEVANT.

Although Defendants and their amici's various policy arguments are irrelevant, Plaintiffs are nonetheless constrained in the interest of completeness to respond to some of these claims.

While Defendants correctly note that violent crime is a serious problem, they are oddly insensitive to the very real need for effective self-defense by potential crime victims. Defendants exclusively present guns as a source of harm, as though nobody derives any benefit from gun ownership in either peace of mind or tangible protection. Yet the scholarship related to the impact of permitting law-abiding individuals

to carry handguns for self-defense shows the practice to be beneficial. "[T]here seems little legitimate scholarly reason to doubt that defensive gun use is very common in the U.S., and that it probably is substantially more common than criminal gun use." Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun,* 86 J. CRIM. L. & CRIMINOLOGY 150, 180 (1995). One recent study reveals that states which conformed their gun carry laws to constitutional standards reaped an average $2-$3 billion crime-reduction benefit within the first five years of constitutional compliance. Florenz Plassman & John Whitley, *Comment: Confirming "More Guns, Less Crime,"* 55 STANFORD L. REV. 1313, 1365 (2003).

In contrast, some of the "scholarship" invoked to demonstrate the supposed hazards of tolerating the right to bear arms is on its face absurd. Amici, for example, cite a study purportedly showing that "concealed handgun permit holders have shot and killed at least eleven law enforcement officers and 359 private citizens." Brady Br. 22-23 (citing Violence Policy Center, *Concealed Carry Killers* (2011), http://vpc.org/ccwkillers.htm); LCAV Br. 19. Even were this number

true, it would prove nothing absent knowing (1) whether any of these shootings were justified, (2) the lives saved by defensive gun uses, even without firing a shot, and (3) the violence rate of permit-holders as compared to that of non-permit holders.

Cursory examination of this "study" does not inspire confidence. Apparently comprised of tragedies somehow related to permit holders, it includes a shooting committed by a *relative* of a permit holder, 132 suicides (of which 100 do not even reveal the method of death, only that a permit holder, somehow, committed suicide), cases in which people were killed *at home* owing to accidents, inebriation, or functional defects in the gun, non-firearm and non-handgun homicides, and even various instances where the shooter was convicted only of non-homicide offenses. *See also* NRA Br. 16-19.

The study is similar in value to one that would argue against the issuance of drivers' licenses by linking deaths to licensed drivers, with only some regard to whether their faulty driving played a role in the incidents. The claims that some concealed carry license holders have killed law enforcement officers paints with a very broad brush. Three

and a half million Americans are licensed to carry concealed handguns. NRA Br. 16. Are they all incipient cop-killers?

More relevant data is available from some of the 44 states that generally license the carrying of handguns for self-defense. Michigan, for example, issued 66,446 permits for the year ending June 30, 2009. In that time frame, it revoked only 353 permits. *See* http://www.michigan.gov/documents/msp/CPL_Annual_Report_2008-2009_307251_7.pdf (last visited Oct. 25, 2011). Texas compiles detailed information tracking the proclivity of handgun carry license permit holders to commit crimes. Not surprisingly, the data shows that individuals who obtain a license before carrying a gun tend to be extremely law abiding. In 2009, of 65,561 serious criminal convictions in Texas (not necessarily involving guns), only 101— 0.1541%—could be attributed to individuals licensed to carry handguns. http://www.txdps.state.tx.us/administration/crime_records/chl/ConvictionRatesReport2009.pdf (last visited Oct. 25, 2011).

Perhaps the most comprehensive data comes from Florida, which reports having issued 2,060,214 handgun carry licenses since 1987. http://licgweb.doacs.state.fl.us/stats/cw_ monthly.html (last visited Oct.

25, 2011). To date, Florida has only revoked 168 licenses for gun crimes committed after licensure. *Id.*

Given the prevalence of constitutional handgun licensing regimes throughout the United States, there is simply no factual basis to support the violent fantasies imagined by Defendants and their amici, of law-abiding, responsible individuals spontaneously engaging in wild west shootouts merely because their right to engage in self-defense is respected. That is simply not the American experience. And if it were, the solution would be to repeal the Second Amendment, not ignore it.

V. OVERBREADTH IS A SECOND AMENDMENT DOCTRINE.

In a footnote, Defendants offer that "[l]ikely due to the deferential test applied to statutes asserted to be facially unconstitutional, i.e., that no set of circumstances exists under which the law would be valid, Plaintiffs concede that sections 12025 and 12031 are individually proper." Appellees' Br. 11 n.5 (citing *United States* v. *Salerno*, 481 U.S. 739, 745 (1987)).

This assertion misstates both Plaintiffs' position and the law. First, Plaintiffs have no issue with requiring a license to carry a loaded

firearm, nor do Plaintiffs object to prohibitions on the open carrying of firearms, loaded or unloaded. So long as the licensing regime is objective and meets constitutional standards, it would satisfy prior restraint doctrine, and as Plaintiffs explain at some length, they acknowledge that the government may regulate the manner of carrying handguns. These positions have nothing remotely to do with *Salerno*'s "no set of circumstances rule"—which does not apply, at least not exclusively, in Second Amendment cases, as two appellate courts have already determined.

At the outset, it bears noting that *Salerno*'s is not the only test for facial challenges. At times, the Supreme Court has required only that laws have "a plainly legitimate sweep," *Wash. State Grange* v. *Wash. State Repub. Party*, 552 U.S. 442, 450 (2008)—a more permissive standard. *See, e.g. Washington* v. *Glucksberg*, 521 U.S. 702, 739-40 & n.7 (1997) (Stevens, J., concurring in judgments) ("I do not believe the Court has ever actually applied such a strict standard, even in *Salerno* itself"); *United States* v. *Stevens*, 130 S. Ct. 1577, 1587 (2010) (noting neither standard is rooted in the First Amendment) (citations omitted).

By its terms, *Salerno* never applied to First Amendment cases. *Salerno*, 481 U.S. at 745. Nor did it apply in abortion cases, where laws were deemed facially invalid where they imposed undue burdens on abortion access—not in *all* cases, but "in a large fraction of the cases." *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U.S. 833, 895 (1992). And of course, the *Salerno* "no set of circumstances" standard did not apply in *Heller* or *McDonald*.

Heller sustained a facial challenge to three generally-applicable gun laws. The Supreme Court acknowledged that some individuals could be denied firearms, *Heller*, 554 U.S. at 626, and even cautioned that Mr. Heller, specifically, might not be entitled to relief: "*Assuming that Heller is not disqualified from the exercise of Second Amendment rights*, the District must permit him to register his handgun and must issue him a license to carry it in the home." *Heller*, 554 U.S. at 635 (emphasis added). *McDonald* rejected arguments for why a handgun ban might be available to state actors, even were it unavailable to federal actors, but reiterated the notion that at least some individuals could be denied access to handguns.

If *Salerno* exclusively governed the Second Amendment, the results in *Heller* and *McDonald* would have been impossible, as there remain individuals in Washington, D.C. and Chicago who may be barred from accessing functional handguns. As there will always be individuals who can, for some specific and obviously compelling reason (violent criminal history, mental illness, etc.), be totally disarmed, a "no set of circumstances" test is simply incompatible with the idea that gun laws might run afoul of the Second Amendment.

The Fourth Circuit recently confronted the issue. When a panel majority expressly adopted the First Amendment as a framework for examining Second Amendment rights, *United States* v. *Chester*, 628 F.3d 673, 682 (4th Cir. 2010), one judge dissented specifically out of a desire to impose *Salerno* in Second Amendment cases. *Id.* at 687-88 (Davis, J., concurring in judgment). Clearly the argument did not carry the majority. The Seventh Circuit's recent decision in *Ezell* explained in greater detail the *Salerno* standard's limited utility in questioning its use in that Second Amendment case. *Ezell*, 2011 U.S. App. LEXIS 14108 at *27-*30.

Ironically, while some valid Second Amendment claims would be untenable under *Salerno*, to the extent Plaintiffs assert a facial challenge to the good cause and moral character requirements, their challenge would pass such a test. Under no set of circumstances can a person be disarmed according to some official's unbridled discretion. The prior restraint doctrine forbids subjecting individuals to illusory, lawless "standards" in the exercise of fundamental rights, even if some license applicants could undeniably be rejected for failing to satisfy valid, objective criteria.

In any event, Plaintiffs' challenge to the "good moral character" and "good cause" requirements is not only facial, but also "as applied to bar applicants who are otherwise legally qualified to possess firearms and who assert self-defense as their 'good cause' for seeking a handgun carry permit." ER 71.

CONCLUSION

Plaintiffs enjoy mythology as much as anyone, but as Judge Wilkinson advised, "[t]his is serious business. We do not wish to be even minutely responsible for some unspeakably tragic act of mayhem because in the peace of our judicial chambers we miscalculated as to

Second Amendment rights." *United States* v. *Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011). Miscalculating as to Second Amendment rights deprived Plaintiffs of the sense of security to which they are constitutionally entitled, and could leave Plaintiffs vulnerable without adequate arms for their defense at a moment of great need.

What is true for judges is doubly so for Sheriff Prieto. He should not desire to be in the position of miscalculating as to Second Amendment rights, dispensing or withholding these according to his whims, with all the attendant risks to the public health, welfare, and safety. Fortunately, in guaranteeing a fundamental right to bear arms, the Constitution bars this practice. Reversal is mandatory.

Dated: October 25, 2011

Respectfully Submitted,

Donald E. J. Kilmer, Jr.
Law Offices of Donald Kilmer
1645 Willow Street, Suite 150
San Jose, CA 95125
408.264-8489/408.264-8487
don@dklawoffice.com

Alan Gura*
GURA & POSSESSKY, PLLC
101 N. Columbus Street, Suite 405
Alexandria, VA 22314
703.835.9085/703.997.7665
alan@gurapossessky.com

By: /s/ Alan Gura
Alan Gura

Counsel for Appellants

CERTIFICATE OF COMPLIANCE
TYPE-VOLUME LIMITATIONS, TYPEFACE REQUIREMENTS,
AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Circuit Rule 32-3(3) because this brief contains 6,264 words, excluding the parts of the brief excluded by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in proportionately spaced typeface using WordPerfect X4 in 14 point Century Schoolbook font.

/s/ Alan Gura
Alan Gura
Counsel for Appellants

Dated: October 25, 2011

CERTIFICATE OF SERVICE

On this, the 25th day of October, 2011, I served the foregoing Brief by electronically filing it with the Court's CM/ECF system, which generated a Notice of Filing and effects service upon counsel for all parties in the case.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this the 25th day of October, 2011

/s/ Alan Gura
Alan Gura

ADDENDUM – Assembly Bill 144

Assembly Bill No. 144

CHAPTER 725

An act to amend Sections 7574.14 and 7582.2 of the Business and Professions Code, and to amend Sections 16520, 16750, 16850, 25595, and 25605 of, to add Sections 626.92, 16950, 17040, 17295, 17512, and 25590 to, and to add Chapter 6 (commencing with Section 26350) to Division 5 of Title 4 of Part 6 of, the Penal Code, relating to firearms.

[Approved by Governor October 9, 2011. Filed with Secretary of State October 9, 2011.]

LEGISLATIVE COUNSEL'S DIGEST

AB 144, Portantino. Firearms.

Existing law, subject to certain exceptions, makes it an offense to carry a concealed handgun on the person or in a vehicle, as specified. Existing law provides that firearms carried openly in belt holsters are not concealed within the meaning of those provisions.

This bill would establish an exemption to the offense for transportation of a firearm between certain areas where the firearm may be carried concealed, or loaded, or openly carried unloaded, as specified.

Existing law prohibits, with exceptions, a person from possessing a firearm in a place that the person knows or reasonably should know is a school zone, as defined.

This bill would additionally exempt a security guard authorized to openly carry an unloaded handgun and an honorably retired peace officer authorized to openly carry an unloaded handgun from that prohibition.

Existing law, subject to certain exceptions, makes it an offense to carry a loaded firearm on the person or in a vehicle while in any public place or on any public street in an incorporated city or in any public place or on any public street in a prohibited area of unincorporated territory.

The bill would, subject to exceptions, make it a misdemeanor to openly carry an unloaded handgun on the person or openly and exposed in a motor vehicle in specified public areas and would make it a misdemeanor with specified penalties to openly carry an exposed handgun in a public place or public street, as specified, if the person at the same time possesses ammunition capable of being discharged from the handgun, and the person is not in lawful possession of the handgun, as specified.

Existing law makes it a misdemeanor for any driver or owner of a motor vehicle to allow a person to bring a loaded firearm into the motor vehicle in a public place, as specified.

This bill would expand the scope of that crime to include allowing a person to bring an open and exposed unloaded handgun into the vehicle, as specified.

By creating a new offense, and expanding the scope of existing crimes, this bill would impose a state-mandated local program.

The bill would make conforming and nonsubstantive technical changes.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

The people of the State of California do enact as follows:

SECTION 1. Section 7574.14 of the Business and Professions Code is amended to read:

7574.14. This chapter shall not apply to the following:

(a) An officer or employee of the United States of America, or of this state or a political subdivision thereof, while the officer or employee is engaged in the performance of his or her official duties, including uniformed peace officers employed part time by a public agency pursuant to a written agreement between a chief of police or sheriff and the public agency, provided the part-time employment does not exceed 50 hours in any calendar month.

(b) A person engaged exclusively in the business of obtaining and furnishing information as to the financial rating of persons.

(c) A charitable philanthropic society or association incorporated under the laws of this state that is organized and duly maintained for the public good and not for private profit.

(d) Patrol special police officers appointed by the police commission of any city, county, or city and county under the express terms of its charter who also under the express terms of the charter (1) are subject to suspension or dismissal after a hearing on charges duly filed with the commission after a fair and impartial trial, (2) must be not less than 18 years of age nor more than 40 years of age, (3) must possess physical qualifications prescribed by the commission, and (4) are designated by the police commission as the owners of a certain beat or territory as may be fixed from time to time by the police commission.

(e) An attorney at law in performing his or her duties as an attorney at law.

(f) A collection agency or an employee thereof while acting within the scope of his or her employment, while making an investigation incidental to the business of the agency, including an investigation of the location of a debtor or his or her property where the contract with an assignor creditor is for the collection of claims owed or due or asserted to be owed or due or the equivalent thereof.

(g) Admitted insurers and agents and insurance brokers licensed by the state, performing duties in connection with insurance transacted by them.

(h) Any bank subject to the jurisdiction of the Commissioner of Financial Institutions of the State of California under Division 1 (commencing with Section 99) of the Financial Code or the Comptroller of Currency of the United States.

(i) A person engaged solely in the business of securing information about persons or property from public records.

(j) A peace officer of this state or a political subdivision thereof while the peace officer is employed by a private employer to engage in off-duty employment in accordance with Section 1126 of the Government Code. However, nothing herein shall exempt such a peace officer who either contracts for his or her services or the services of others as a private patrol operator or contracts for his or her services as or is employed as an armed private security officer. For purposes of this subdivision, "armed security officer" means an individual who carries or uses a firearm in the course and scope of that contract or employment.

(k) A retired peace officer of the state or political subdivision thereof when the retired peace officer is employed by a private employer in employment approved by the chief law enforcement officer of the jurisdiction where the employment takes place, provided that the retired officer is in a uniform of a public law enforcement agency, has registered with the bureau on a form approved by the director, and has met any training requirements or their equivalent as established for security personnel under Section 7583.5. This officer may not carry an unloaded and exposed handgun unless he or she is exempted under the provisions of Article 2 (commencing with Section 26361) of Chapter 6 of Division 5 of Title 4 of Part 6 of the Penal Code, and may not carry a loaded or concealed firearm unless he or she is exempted under the provisions of Sections 25450 to 25475, inclusive, of the Penal Code or Sections 25900 to 25910, inclusive, of the Penal Code or has met the requirements set forth in subdivision (d) of Section 26030 of the Penal Code. However, nothing herein shall exempt the retired peace officer who contracts for his or her services or the services of others as a private patrol operator.

(*l*) A licensed insurance adjuster in performing his or her duties within the scope of his or her license as an insurance adjuster.

(m) Any savings association subject to the jurisdiction of the Commissioner of Financial Institutions or the Office of Thrift Supervision.

(n) Any secured creditor engaged in the repossession of the creditor's collateral and any lessor engaged in the repossession of leased property in which it claims an interest.

(o) A peace officer in his or her official police uniform acting in accordance with subdivisions (c) and (d) of Section 70 of the Penal Code.

(p) An unarmed, uniformed security person employed exclusively and regularly by a motion picture studio facility employer who does not provide contract security services for other entities or persons in connection with the affairs of that employer only and where there exists an employer-employee relationship if that person at no time carries or uses any deadly weapon, as defined in subdivision (a), in the performance of his or

her duties, which may include, but are not limited to, the following business purposes:

(1) The screening and monitoring access of employees of the same employer.

(2) The screening and monitoring access of prearranged and preauthorized invited guests.

(3) The screening and monitoring of vendors and suppliers.

(4) Patrolling the private property facilities for the safety and welfare of all who have been legitimately authorized to have access to the facility.

(q) An armored contract carrier operating armored vehicles pursuant to the authority of the Department of the California Highway Patrol or the Public Utilities Commission, or an armored vehicle guard employed by an armored contract carrier.

SEC. 2. Section 7582.2 of the Business and Professions Code is amended to read:

7582.2. This chapter does not apply to the following:

(a) A person who does not meet the requirements to be a proprietary private security officer, as defined in Section 7574.1, and is employed exclusively and regularly by any employer who does not provide contract security services for other entities or persons, in connection with the affairs of the employer only and where there exists an employer-employee relationship if that person at no time carries or uses any deadly weapon in the performance of his or her duties. For purposes of this subdivision, "deadly weapon" is defined to include any instrument or weapon of the kind commonly known as a blackjack, slungshot, billy, sandclub, sandbag, metal knuckles, any dirk, dagger, pistol, revolver, or any other firearm, any knife having a blade longer than five inches, any razor with an unguarded blade and any metal pipe or bar used or intended to be used as a club.

(b) An officer or employee of the United States of America, or of this state or a political subdivision thereof, while the officer or employee is engaged in the performance of his or her official duties, including uniformed peace officers employed part time by a public agency pursuant to a written agreement between a chief of police or sheriff and the public agency, provided the part-time employment does not exceed 50 hours in any calendar month.

(c) A person engaged exclusively in the business of obtaining and furnishing information as to the financial rating of persons.

(d) A charitable philanthropic society or association duly incorporated under the laws of this state that is organized and maintained for the public good and not for private profit.

(e) Patrol special police officers appointed by the police commission of any city, county, or city and county under the express terms of its charter who also under the express terms of the charter (1) are subject to suspension or dismissal after a hearing on charges duly filed with the commission after a fair and impartial trial, (2) must be not less than 18 years of age nor more than 40 years of age, (3) must possess physical qualifications prescribed by the commission, and (4) are designated by the police commission as the

owners of a certain beat or territory as may be fixed from time to time by the police commission.

(f) An attorney at law in performing his or her duties as an attorney at law.

(g) A collection agency or an employee thereof while acting within the scope of his or her employment, while making an investigation incidental to the business of the agency, including an investigation of the location of a debtor or his or her property where the contract with an assignor creditor is for the collection of claims owed or due or asserted to be owed or due or the equivalent thereof.

(h) Admitted insurers and agents and insurance brokers licensed by the state, performing duties in connection with insurance transacted by them.

(i) Any bank subject to the jurisdiction of the Commissioner of Financial Institutions of the State of California under Division 1 (commencing with Section 99) of the Financial Code or the Comptroller of Currency of the United States.

(j) A person engaged solely in the business of securing information about persons or property from public records.

(k) A peace officer of this state or a political subdivision thereof while the peace officer is employed by a private employer to engage in off-duty employment in accordance with Section 1126 of the Government Code. However, nothing herein shall exempt a peace officer who either contracts for his or her services or the services of others as a private patrol operator or contracts for his or her services as or is employed as an armed private security officer. For purposes of this subdivision, "armed security officer" means an individual who carries or uses a firearm in the course and scope of that contract or employment.

(*l*) A retired peace officer of the state or political subdivision thereof when the retired peace officer is employed by a private employer in employment approved by the chief law enforcement officer of the jurisdiction where the employment takes place, provided that the retired officer is in a uniform of a public law enforcement agency, has registered with the bureau on a form approved by the director, and has met any training requirements or their equivalent as established for security personnel under Section 7583.5. This officer may not carry an unloaded and exposed handgun unless he or she is exempted under the provisions of Article 2 (commencing with Section 26361) of Chapter 6 of Division 5 of Title 4 of Part 6 of the Penal Code, and may not carry a loaded or concealed firearm unless he or she is exempted under the provisions of Article 2 (commencing with Section 25450) of Chapter 2 of Division 5 of Title 4 of Part 6 of the Penal Code or Sections 25900 to 25910, inclusive, of the Penal Code or has met the requirements set forth in subdivision (d) of Section 26030 of the Penal Code. However, nothing herein shall exempt the retired peace officer who contracts for his or her services or the services of others as a private patrol operator.

(m) A licensed insurance adjuster in performing his or her duties within the scope of his or her license as an insurance adjuster.

(n) Any savings association subject to the jurisdiction of the Commissioner of Financial Institutions or the Office of Thrift Supervision.

(o) Any secured creditor engaged in the repossession of the creditor's collateral and any lessor engaged in the repossession of leased property in which it claims an interest.

(p) A peace officer in his or her official police uniform acting in accordance with subdivisions (c) and (d) of Section 70 of the Penal Code.

(q) An unarmed, uniformed security person employed exclusively and regularly by a motion picture studio facility employer who does not provide contract security services for other entities or persons in connection with the affairs of that employer only and where there exists an employer-employee relationship if that person at no time carries or uses any deadly weapon, as defined in subdivision (a), in the performance of his or her duties, which may include, but are not limited to, the following business purposes:

(1) The screening and monitoring access of employees of the same employer.

(2) The screening and monitoring access of prearranged and preauthorized invited guests.

(3) The screening and monitoring of vendors and suppliers.

(4) Patrolling the private property facilities for the safety and welfare of all who have been legitimately authorized to have access to the facility.

(r) The changes made to this section by the act adding this subdivision during the 2005–06 Regular Session of the Legislature shall apply as follows:

(1) On and after July 1, 2006, to a person hired as a security officer on and after January 1, 2006.

(2) On and after January 1, 2007, to a person hired as a security officer before January 1, 2006.

SEC. 3. Section 626.92 is added to the Penal Code, to read:

626.92. Section 626.9 does not apply to or affect any of the following:

(a) A security guard authorized to openly carry an unloaded handgun pursuant to Chapter 6 (commencing with Section 26350) of Division 5 of Title 4 of Part 6.

(b) An honorably retired peace officer authorized to openly carry an unloaded handgun pursuant to Section 26361.

SEC. 4. Section 16520 of the Penal Code is amended to read:

16520. (a) As used in this part, "firearm" means any device, designed to be used as a weapon, from which is expelled through a barrel, a projectile by the force of any explosion or other form of combustion.

(b) As used in the following provisions, "firearm" includes the frame or receiver of the weapon:

(1) Section 16550.

(2) Section 16730.

(3) Section 16960.

(4) Section 16990.

(5) Section 17070.

(6) Section 17310.

(7) Sections 26500 to 26588, inclusive.
(8) Sections 26600 to 27140, inclusive.
(9) Sections 27400 to 28000, inclusive.
(10) Section 28100.
(11) Sections 28400 to 28415, inclusive.
(12) Sections 29010 to 29150, inclusive.
(13) Sections 29610 to 29750, inclusive.
(14) Sections 29800 to 29905, inclusive.
(15) Sections 30150 to 30165, inclusive.
(16) Section 31615.
(17) Sections 31705 to 31830, inclusive.
(18) Sections 34355 to 34370, inclusive.
(19) Sections 8100, 8101, and 8103 of the Welfare and Institutions Code.

(c) As used in the following provisions, "firearm" also includes any rocket, rocket propelled projectile launcher, or similar device containing any explosive or incendiary material whether or not the device is designed for emergency or distress signaling purposes:
(1) Section 16750.
(2) Subdivision (b) of Section 16840.
(3) Section 25400.
(4) Sections 25850 to 26025, inclusive.
(5) Subdivisions (a), (b), and (c) of Section 26030.
(6) Sections 26035 to 26055, inclusive.

(d) As used in the following provisions, "firearm" does not include an unloaded antique firearm:
(1) Subdivisions (a) and (c) of Section 16730.
(2) Section 16550.
(3) Section 16960.
(4) Section 17310.
(5) Chapter 6 (commencing with Section 26350) of Division 5 of Title 4.
(6) Sections 26500 to 26588, inclusive.
(7) Sections 26700 to 26915, inclusive.
(8) Section 27510.
(9) Section 27530.
(10) Section 27540.
(11) Section 27545.
(12) Sections 27555 to 27570, inclusive.
(13) Sections 29010 to 29150, inclusive.

(e) As used in Sections 34005 and 34010, "firearm" does not include a destructive device.

(f) As used in Sections 17280 and 24680, "firearm" has the same meaning as in Section 922 of Title 18 of the United States Code.

(g) As used in Sections 29010 to 29150, inclusive, "firearm" includes the unfinished frame or receiver of a weapon that can be readily converted to the functional condition of a finished frame or receiver.

SEC. 5. Section 16750 of the Penal Code is amended to read:

16750. (a) As used in Section 25400, "lawful possession of the firearm" means that the person who has possession or custody of the firearm either lawfully owns the firearm or has the permission of the lawful owner or a person who otherwise has apparent authority to possess or have custody of the firearm. A person who takes a firearm without the permission of the lawful owner or without the permission of a person who has lawful custody of the firearm does not have lawful possession of the firearm.

(b) As used in Article 2 (commencing with Section 25850), Article 3 (commencing with Section 25900), and Article 4 (commencing with Section 26000) of Chapter 3 of Division 5 of Title 4, and Chapter 6 (commencing with Section 26350) of Division 5 of Title 4, "lawful possession of the firearm" means that the person who has possession or custody of the firearm either lawfully acquired and lawfully owns the firearm or has the permission of the lawful owner or person who otherwise has apparent authority to possess or have custody of the firearm. A person who takes a firearm without the permission of the lawful owner or without the permission of a person who has lawful custody of the firearm does not have lawful possession of the firearm.

SEC. 6. Section 16850 of the Penal Code is amended to read:

16850. As used in Sections 17740, 23925, 25105, 25205, and 25610, in Article 3 (commencing with Section 25505) of Chapter 2 of Division 5 of Title 4, and in Chapter 6 (commencing with Section 26350) of Division 5 of Title 4, "locked container" means a secure container that is fully enclosed and locked by a padlock, keylock, combination lock, or similar locking device. The term "locked container" does not include the utility or glove compartment of a motor vehicle.

SEC. 7. Section 16950 is added to the Penal Code, to read:

16950. As used in Chapter 6 (commencing with Section 26350) of Division 5 of Title 4, a handgun shall be deemed to be carried openly or exposed if the handgun is not carried concealed within the meaning of Section 25400.

SEC. 8. Section 17040 is added to the Penal Code, to read:

17040. As used in Chapter 6 (commencing with Section 26350) of Division 5 of Title 4, "public place" has the same meaning as in Section 25850.

SEC. 9. Section 17295 is added to the Penal Code, to read:

17295. For purposes of Chapter 6 (commencing with Section 26350) of Division 5 of Title 4, a handgun shall be deemed "unloaded" if it is not "loaded" within the meaning of subdivision (b) of Section 16840.

SEC. 10. Section 17512 is added to the Penal Code, to read:

17512. It is a misdemeanor for a driver of any motor vehicle or the owner of any motor vehicle, whether or not the owner of the vehicle is occupying the vehicle, to knowingly permit any other person to carry into or bring into the vehicle a firearm in violation of Section 26350.

SEC. 11. Section 25590 is added to the Penal Code, to read:

25590. Section 25400 does not apply to, or affect, the transportation of a firearm by a person if done directly between any of the places set forth below:

(a) A place where the person may carry that firearm pursuant to an exemption from the prohibition set forth in subdivision (a) of Section 25400.

(b) A place where that person may carry that firearm pursuant to an exemption from the prohibition set forth in subdivision (a) of Section 25850, or a place where the prohibition set forth in subdivision (a) of Section 25850 does not apply.

(c) A place where that person may carry a firearm pursuant to an exemption from the prohibition set forth in subdivision (a) of Section 26350, or a place where the prohibition set forth in subdivision (a) of Section 26350 does not apply.

SEC. 12. Section 25595 of the Penal Code is amended to read:

25595. This article does not prohibit or limit the otherwise lawful carrying or transportation of any handgun in accordance with the provisions listed in Section 16580.

SEC. 13. Section 25605 of the Penal Code is amended to read:

25605. (a) Section 25400 and Chapter 6 (commencing with Section 26350) of Division 5 shall not apply to or affect any citizen of the United States or legal resident over the age of 18 years who resides or is temporarily within this state, and who is not within the excepted classes prescribed by Chapter 2 (commencing with Section 29800) or Chapter 3 (commencing with Section 29900) of Division 9 of this title, or Section 8100 or 8103 of the Welfare and Institutions Code, who carries, either openly or concealed, anywhere within the citizen's or legal resident's place of residence, place of business, or on private property owned or lawfully possessed by the citizen or legal resident, any handgun.

(b) No permit or license to purchase, own, possess, keep, or carry, either openly or concealed, shall be required of any citizen of the United States or legal resident over the age of 18 years who resides or is temporarily within this state, and who is not within the excepted classes prescribed by Chapter 2 (commencing with Section 29800) or Chapter 3 (commencing with Section 29900) of Division 9 of this title, or Section 8100 or 8103 of the Welfare and Institutions Code, to purchase, own, possess, keep, or carry, either openly or concealed, a handgun within the citizen's or legal resident's place of residence, place of business, or on private property owned or lawfully possessed by the citizen or legal resident.

(c) Nothing in this section shall be construed as affecting the application of Sections 25850 to 26055, inclusive.

SEC. 14. Chapter 6 (commencing with Section 26350) is added to Division 5 of Title 4 of Part 6 of the Penal Code, to read:

Chapter 6. Openly Carrying an Unloaded Handgun

Article 1. Crime of Openly Carrying an Unloaded Handgun

26350. (a) (1) A person is guilty of openly carrying an unloaded handgun when that person carries upon his or her person an exposed and unloaded handgun outside a vehicle while in or on any of the following:

(A) A public place or public street in an incorporated city or city and county.

(B) A public street in a prohibited area of an unincorporated area of a county or city and county.

(C) A public place in a prohibited area of a county or city and county.

(2) A person is guilty of openly carrying an unloaded handgun when that person carries an exposed and unloaded handgun inside or on a vehicle, whether or not on his or her person, while in or on any of the following:

(A) A public place or public street in an incorporated city or city and county.

(B) A public street in a prohibited area of an unincorporated area of a county or city and county.

(C) A public place in a prohibited area of a county or city and county.

(b) (1) Except as specified in paragraph (2), a violation of this section is a misdemeanor.

(2) A violation of subparagraph (A) of paragraph (1) of subdivision (a) is punishable by imprisonment in a county jail not exceeding one year, or by a fine not to exceed one thousand dollars ($1,000), or by both that fine and imprisonment, if both of the following conditions exist:

(A) The handgun and unexpended ammunition capable of being discharged from that handgun are in the immediate possession of that person.

(B) The person is not in lawful possession of that handgun.

(c) (1) Nothing in this section shall preclude prosecution under Chapter 2 (commencing with Section 29800) or Chapter 3 (commencing with Section 29900) of Division 9, Section 8100 or 8103 of the Welfare and Institutions Code, or any other law with a penalty greater than is set forth in this section.

(2) The provisions of this section are cumulative and shall not be construed as restricting the application of any other law. However, an act or omission punishable in different ways by different provisions of law shall not be punished under more than one provision.

(d) Notwithstanding the fact that the term “an unloaded handgun” is used in this section, each handgun shall constitute a distinct and separate offense under this section.

Article 2. Exemptions

26361. Section 26350 does not apply to, or affect, the open carrying of an unloaded handgun by any peace officer or any honorably retired peace officer if that officer may carry a concealed firearm pursuant to Article 2

(commencing with Section 25450) of Chapter 2, or a loaded firearm pursuant to Article 3 (commencing with Section 25900) of Chapter 3.

26362. Section 26350 does not apply to, or affect, the open carrying of an unloaded handgun by any person to the extent that person may openly carry a loaded handgun pursuant to Article 4 (commencing with Section 26000) of Chapter 3.

26363. Section 26350 does not apply to, or affect, the open carrying of an unloaded handgun as merchandise by a person who is engaged in the business of manufacturing, importing, wholesaling, repairing, or dealing in firearms and who is licensed to engage in that business, or the authorized representative or authorized agent of that person, while engaged in the lawful course of the business.

26364. Section 26350 does not apply to, or affect, the open carrying of an unloaded handgun by a duly authorized military or civil organization, or the members thereof, while parading or while rehearsing or practicing parading, when at the meeting place of the organization.

26365. Paragraph (1) of subdivision (a) of Section 26350 does not apply to, or affect, the open carrying of an unloaded handgun by a member of any club or organization organized for the purpose of practicing shooting at targets upon established target ranges, whether public or private, while the members are using handguns upon the target ranges or incident to the use of a handgun at that target range.

26366. Section 26350 does not apply to, or affect, the open carrying of an unloaded handgun by a licensed hunter while engaged in hunting or while transporting that handgun when going to or returning from that hunting expedition.

26367. Section 26350 does not apply to, or affect, the open carrying of an unloaded handgun incident to transportation of a handgun by a person operating a licensed common carrier, or by an authorized agent or employee thereof, when transported in conformance with applicable federal law.

26368. Section 26350 does not apply to, or affect, the open carrying of an unloaded handgun by a member of an organization chartered by the Congress of the United States or a nonprofit mutual or public benefit corporation organized and recognized as a nonprofit tax-exempt organization by the Internal Revenue Service while on official parade duty or ceremonial occasions of that organization or while rehearsing or practicing for official parade duty or ceremonial occasions.

26369. Paragraph (1) of subdivision (a) of Section 26350 does not apply to, or affect, the open carrying of an unloaded handgun within a gun show conducted pursuant to Article 1 (commencing with Section 27200) and Article 2 (commencing with Section 27300) of Chapter 3 of Division 6.

26370. Section 26350 does not apply to, or affect, the open carrying of an unloaded handgun within a school zone, as defined in Section 626.9, with the written permission of the school district superintendent, the superintendent's designee, or equivalent school authority.

26371. Section 26350 does not apply to, or affect, the open carrying of an unloaded handgun when in accordance with the provisions of Section 171b.

26372. Section 26350 does not apply to, or affect, the open carrying of an unloaded handgun by any person while engaged in the act of making or attempting to make a lawful arrest.

26373. Section 26350 does not apply to, or affect, the open carrying of an unloaded handgun incident to loaning, selling, or transferring that handgun in accordance with Article 1 (commencing with Section 27500) of Chapter 4 of Division 6, or in accordance with any of the exemptions from Section 27545, so long as that handgun is possessed within private property and the possession and carrying is with the permission of the owner or lessee of that private property.

26374. Section 26350 does not apply to, or affect, the open carrying of an unloaded handgun by a person engaged in firearms-related activities, while on the premises of a fixed place of business that is licensed to conduct and conducts, as a regular course of its business, activities related to the sale, making, repair, transfer, pawn, or the use of firearms, or related to firearms training.

26375. Section 26350 does not apply to, or affect, the open carrying of an unloaded handgun by an authorized participant in, or an authorized employee or agent of a supplier of firearms for, a motion picture, television or video production, or entertainment event, when the participant lawfully uses the handgun as part of that production or event, as part of rehearsing or practicing for participation in that production or event, or while the participant or authorized employee or agent is at that production or event, or rehearsal or practice for that production or event.

26376. Paragraph (1) of subdivision (a) of Section 26350 does not apply to, or affect, the open carrying of an unloaded handgun incident to obtaining an identification number or mark assigned for that handgun from the Department of Justice pursuant to Section 23910.

26377. Paragraph (1) of subdivision (a) of Section 26350 does not apply to, or affect, the open carrying of an unloaded handgun at any established target range, whether public or private, while the person is using the handgun upon the target range.

26378. Section 26350 does not apply to, or affect, the open carrying of an unloaded handgun by a person when that person is summoned by a peace officer to assist in making arrests or preserving the peace, while the person is actually engaged in assisting that officer.

26379. Paragraph (1) of subdivision (a) of Section 26350 does not apply to, or affect, the open carrying of an unloaded handgun incident to any of the following:

(a) Complying with Section 27560 or 27565, as it pertains to that handgun.

(b) Section 28000, as it pertains to that handgun.

(c) Section 27850 or 31725, as it pertains to that handgun.

(d) Complying with Section 27870 or 27875, as it pertains to that handgun.

(e) Complying with Section 27915, 27920, or 27925, as it pertains to that handgun.

26380. Section 26350 does not apply to, or affect, the open carrying of an unloaded handgun incident to, and in the course and scope of, training of or by an individual to become a sworn peace officer as part of a course of study approved by the Commission on Peace Officer Standards and Training.

26381. Section 26350 does not apply to, or affect, the open carrying of an unloaded handgun incident to, and in the course and scope of, training of or by an individual to become licensed pursuant to Chapter 4 (commencing with Section 26150) as part of a course of study necessary or authorized by the person authorized to issue the license pursuant to that chapter.

26382. Section 26350 does not apply to, or affect, the open carrying of an unloaded handgun incident to and at the request of a sheriff or chief or other head of a municipal police department.

26383. Paragraph (1) of subdivision (a) of Section 26350 does not apply to, or affect, the open carrying of an unloaded handgun by a person when done within a place of business, a place of residence, or on private property, if done with the permission of a person who, by virtue of subdivision (a) of Section 25605, may carry openly an unloaded handgun within that place of business, place of residence, or on that private property owned or lawfully possessed by that person.

26384. Paragraph (1) of subdivision (a) of Section 26350 does not apply to, or affect, the open carrying of an unloaded handgun if all of the following conditions are satisfied:

(a) The open carrying occurs at an auction or similar event of a nonprofit public benefit or mutual benefit corporation, at which firearms are auctioned or otherwise sold to fund the activities of that corporation or the local chapters of that corporation.

(b) The unloaded handgun is to be auctioned or otherwise sold for that nonprofit public benefit or mutual benefit corporation.

(c) The unloaded handgun is to be delivered by a person licensed pursuant to, and operating in accordance with, Sections 26700 to 26925, inclusive.

26385. Section 26350 does not apply to, or affect, the open carrying of an unloaded handgun pursuant to paragraph (3) of subdivision (b) of Section 171c.

26386. Section 26350 does not apply to, or affect, the open carrying of an unloaded handgun pursuant to Section 171d.

26387. Section 26350 does not apply to, or affect, the open carrying of an unloaded handgun pursuant to subparagraph (F) of paragraph (1) subdivision (c) of Section 171.7.

26388. Section 26350 does not apply to, or affect, the open carrying of an unloaded handgun on publicly owned land, if the possession and use of

a handgun is specifically permitted by the managing agency of the land and the person carrying that handgun is in lawful possession of that handgun.

26389. Section 26350 does not apply to, or affect, the carrying of an unloaded handgun if the handgun is carried either in the locked trunk of a motor vehicle or in a locked container.

SEC. 15. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.

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