Simon J. Frankel (State Bar No. 171552)
sfrankel@cov.com
Samantha J. Choe (State Bar No. 252002)
schoe@cov.com
COVINGTON & BURLING LLP
One Front Street, 35th Floor
San Francisco, CA 94111
Telephone: (415) 591-6000
Facsimile: (415) 591-6091

Attorneys for *Amicus Curiae*
LEGAL COMMUNITY AGAINST VIOLENCE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

THERESE MARIE PIZZO,

Plaintiff,

v.

CITY AND COUNTY OF SAN FRANCISCO, KAMALA HARRIS in her official capacity as California Attorney General; EDWIN LEE, in his official capacity as Mayor of the City & County of San Francisco; GREG SUHR, in his official capacity as San Francisco Police Chief; and VICKI HENNESSY, in her official capacity as the Sheriff of San Francisco,

Defendants.

Civil Case No.: 09-cv-04493-CW

BRIEF OF AMICUS CURIAE LEGAL COMMUNITY AGAINST VIOLENCE IN SUPPORT OF DEFENDANTS' CROSS-MOTIONS FOR SUMMARY JUDGMENT

Date: August 9, 2012
Time: 2:00 p.m.
Judge: Hon. Claudia Wilken
Courtroom: 2, 4th Floor

Leave to file granted, July 2, 2012

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

INTEREST OF *AMICI CURIAE*

Amicus Curiae Legal Community Against Violence ("LCAV") is a national law center dedicated to preventing gun violence. Founded after an assault weapon massacre at a San Francisco law firm in 1993, LCAV provides legal and technical assistance in support of gun violence prevention. LCAV tracks and analyzes federal, state, and local firearms legislation, as well as legal challenges to firearms laws. As an *amicus*, LCAV has provided informed analysis in a variety of firearm-related cases, including *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010).

By order dated July 2, 2012 (Dkt. No. 70), the Court granted LCAV leave to file this brief.

INTRODUCTION

The State of California—like nearly all states—regulates the carrying of concealed firearms in public. In particular, California authorizes local law enforcement agencies to issue concealed weapon licenses to individuals who can demonstrate "good cause," among other requirements, for the issuance of the license. *See* Cal. Pen. Code § 26150 et seq. (formerly Cal. Pen. Code § 12050). Such laws are a legitimate exercise of the state's police power aimed at the threat that loaded and hidden firearms pose to public safety. Firearms cause over 30,000 deaths and almost 70,000 injuries in the United States each year.[1] In 2009, 2,972 people died from firearm-related injuries in California.[2] California has the right—indeed, the duty—to protect its citizens.

Because legislative efforts by pro-gun groups to weaken California's concealed carry laws have been largely unsuccessful, Plaintiff and her *amici* have now turned to the courts.

---

[1] *See* Centers for Disease Control and Prevention, WISQARS Injury Mortality Reports, 1999-2007, available at http://webappa.cdc.gov/sasweb/ncipc/mortrate10_sy.html; WISQARS Nonfatal Injury Reports, 2001-2010 available at http://www.cdc.gov/injury/wisqars/nonfatal.html.

[2] *See* LCAV California State Law Summary, available at http://smartgunlaws.org/california-state-law-summary/. LCAV is changing its name to Law Center to Prevent Gun Violence, and its new website is at www.smartgunlaws.com.

This Court should reject this endeavor because California's concealed carry law does not burden the Second Amendment right to possess a firearm in the home for self-defense, the only right articulated by the Supreme Court in *Heller* and *McDonald*. Courts in California and nationwide have limited *Heller* and *McDonald* to the home and this Court should follow suit.

Laws limiting or banning the carrying of guns in public have been widely accepted throughout American history, including at the time of the founding and the ratification of the Second Amendment, as well as in England prior to American independence. As the Supreme Court recognized in *Heller*, the Second Amendment was never intended to, and does not, invalidate these regulations. Plaintiff and her amici's attempt to undermine California's concealed carry law on Second Amendment grounds is overreaching, inconsistent with existing case law, and contrary to the long historical record in this area.

ARGUMENT

I. California's Public Carry Laws Are Not Within the Scope of the Second Amendment.

The Second Amendment does not guarantee a "right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008). The *Heller* Court made clear that it did not intend to undercut legislative efforts to confront gun violence where statutory measures did not touch upon the right of domestic self-defense, explaining that:

> Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. For example, *the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful* under the Second Amendment or state analogues . . . . [N]othing in our opinion should be taken to cast doubt on the longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

Id. at 626-27 (internal citations omitted) (emphasis added); *see also id.* n. 26 ("We identify these

presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive") (emphasis added). The Court's subsequent decision in *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), did not expand the Second Amendment beyond the domestic boundaries articulated in *Heller*. Like *Heller*, *McDonald* recognized that "the right to keep and bear arms" is not absolute, and confirmed that the Second Amendment protects the right to keep and bear arms for self-defense within the home. *McDonald*, 130 S. Ct. at 3044, 3047.

Public carry laws such as Sections 25850 and 26150 at issue here are the sort of regulations that have been widely accepted throughout American history, including at the time of the ratification of the Constitution. Accordingly, such statutes fall outside the Second Amendment's purview.

A. At the Time of its Ratification, the Second Amendment Was Not Understood to Protect Public Carry.

Because the Second Amendment "codified a *pre-existing* right," courts must examine the historical record to determine its meaning. *Heller*, 554 U.S. at 592. Indeed, *Heller* interpreted the meaning of the Second Amendment based on historical documents that reflected how the Framers understood the right to keep and bear arms at the time of ratification. *See id.* at 579-619; *see also United States v. Masciandaro*, 638 F.3d 458, 470 (4th Cir. 2011) ("[H]istorical meaning enjoys a privileged interpretative role in the Second Amendment context . . . ."). If, as *Heller* confirms, the Framers borrowed their understanding of the Second Amendment right from English law, they would have necessarily accepted England's practice of restricting such rights. *See* Patrick Charles, *The Faces of the Second Outside the Home: History versus Ahistorical Standards of Review*, 60 Clev. St. L. Rev. 1, 31 (2012) (citing *Heller*, 554 U.S. at 593, 599). The historical record, from England and early America, firmly establishes that the Framers did not understand the Second Amendment right to include public carry.

1. English Public Carry Laws.

English law prohibited the public carry of guns for centuries before the framing of the U.S. Constitution. For example, under the Statute of Northampton, drafted in 1328 by King Edward III and Parliament, no person was permitted to "go nor ride armed by Night nor by

Day, in Fairs, Markets, nor in the Presence of the justices or other Ministers, nor in no Part elsewhere . . . ." Statute of Northampton, 2 Edw. 3, c. 3 (1328) (Eng.) (an exception existed for those conducting the King's business). The Statute of Northampton was thus "an affirmance" of the common law rule that there is no right to carry weapons in public. *Sir Knight's Case*, 87 Eng. Rep. 75 (1686). Indeed, Queen Elizabeth I proclaimed public carry to be "to the terrour of all people professing to travel and live peaceably . . . ." Charles, 60 Clev. St. L. Rev. at 14-22 (citing *By the Quenne Elizabeth I: A Proclamation Against the Carriage of Dags, and For Reformation of Some Other Great Disorders* 1 (London, Christopher Barker 1594)).

Even after the 1689 *Declaration of Right* codified the right to bear arms under the English Bill of Rights, limitations on public carry remained in English law. *See Heller*, 554 U.S. at 593. A December 21, 1699 proclamation stated:

> [S]everal Persons not Qualified by the Laws of this Realm, to carry Arms, have nevertheless . . . taken on them to Ride and Go Armed, and for their so doing, have sometimes insisted on Licenses formerly Granted, which have been Re-called and made Void . . . and others have wholly Falsified and Counterfeited Licenses to carry Arms . . . We have for the Remedying the said Evil, thought fit to Re-call all Licenses whatsoever . . . and to Require all persons whatsoever having such Licenses, to bring in and Lodge the same with the Clerk of the Council . . . .

Charles, 60 Clev. St. L. Rev. at 27 (quoting *The Post Boy* at 1, col. 1 (London Dec. 221, 1699). Furthermore, urban constables in the early eighteenth century had authority not only to arrest persons who were "arm[ed] offensively" and "in affray of Her Majesties Subjects," but also to arrest anyone who publicly carried "Daggers, Guns or Pistols Charged." Robert Gardiner, *The Compleat Constable* 18 (3d ed. 1708). Restrictions on public carry were thus widely accepted at common law.

The writings and declarations of prominent English scholars prior to the adoption of the U.S. Constitution also show that there was no right to carry weapons for self-defense outside the home. William Blackstone, a "preeminent authority on English law for the founding generation," *Heller*, 554 U.S. at 593-94 (citation omitted), stated that "[t]he offense of riding or going armed, with dangerous or unusual weapons is a crime against the public peace . . . and is particularly prohibited by the [S]tatute of Northampton." William Blackstone, 4 *Commentaries*

on the Laws of England 148-49 (1769). Echoing Blackstone's restatement of public carry law, Lord Edward Coke, "the greatest authority of his time on the laws of England," *Payton v. New York*, 445 U.S. 573, 593-94 (1980) (citation omitted), declared one could not "goe nor ride armed by night nor by day . . . in any place whatsoever." Edward Coke, 3 *Institutes of the Law of England* 160 (1797). And, William Hawkins, an important English legal commentator familiar to lawyers during the Founding era, explained that although the Statute of Northampton allowed armed self-defense "in his House" because "a man's house is as his castle," it did not allow "the wearing of such Armour in Publick." William Hawkins, 1 *Treatise of the Pleas of the Crown*, ch. 63, Section 8 (1716). Therefore, even if self-defense was a valid reason to carry firearms in the home, English law made clear it was not a valid reason to carry them elsewhere. Public carry was lawfully restricted.

2. Founding Era Public Carry Laws.

The Founding generation likewise distinguished between firearm possession in and outside the home, adopting laws to allow such possession in the home, while restricting or even prohibiting carrying outside it. *See* Saul Cornell, *The Right to Carry Firearms Outside the Home: Separating Historical Myths from Historical Realities*, 14 (June 12, 2012) (unpublished manuscript) (on file with the Fordham Urban Law Journal). Indeed, Thomas Jefferson wrote a bill penalizing any person who "bear[ed] a gun out of his inclosed ground, unless whilst performing military duty." *Id.* (citing A Bill for Preservation of Deer (1785), *The Papers of Thomas Jefferson* 444 (Julian P. Boyd ed., 1950)). Massachusetts, North Carolina, and Virginia also expressly incorporated English law's restrictions on public carry into their own laws "immediately after the adoption of the Constitution." Charles, 60 Clev. St. L. Rev. at 31-32; *see also* Patrick J. Charles, *Scribble Scrabble, the Second Amendment, and Historical Guideposts*, 105 Nw. U.L. Rev. Colloquy 227, 237 (2011) (citations omitted).

In light of *Heller*'s historical approach, English law and its adoption in early America therefore confirm the limited scope of the Second Amendment right. While the Second Amendment indeed protects the right to carry a firearm in the home for self-defense purposes as recognized in *Heller*, it was never recognized as extending beyond the home to

protect public carry. Sections 25850 and 26150, which restrict public carry in various ways, thus parallel historical English laws restricting public carry and accordingly fall outside the scope of the Second Amendment.

B. State Laws Regulating Public Carry Are Part of a Longstanding Tradition in the United States and Thus Do Not Implicate the Second Amendment.

Consistent with this history, for over 200 years since the Founding era, the states have exercised their police power to restrict public carry. In the early nineteenth century, states began adopting carry restrictions in the English tradition in response to a rise in violence caused, in large part, by the increased use and popularity of concealable firearms. *See* Saul Cornell, A Well-Regulated Militia: The Founding Fathers and the Origins of Gun Control in America 131-40 (2006). Contemporaneous courts and scholars repeatedly affirmed the constitutionality of these antebellum laws, many of which bore a close resemblance to Sections 25850 and 26150. Moreover, the recognition in *Heller* and *McDonald* that the Second Amendment's reach is limited and that a wide array of firearm regulations would pass constitutional muster accords with much earlier Court reasoning. In 1897, the Court noted that the Bill of Rights was "subject to certain well recognized exceptions" from "time immemorial." *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897). With respect to the Second Amendment, the *Robertson* court commented that "the right of the people to keep and bear arms . . . is not infringed by laws prohibiting the carrying of concealed weapons." *Id.* at 281-82. Thus, Sections 25850 and 26150 are part of a longstanding tradition of similar restrictions, that are, under *Heller*, "presumptively lawful" and outside the purview of the Second Amendment. *Heller v. District of Columbia* ("*Heller II*"), 670 F.3d 1244, 1253 (D.C. Cir. 2011) ("activities covered by a longstanding regulation are presumptively not protected from regulation by the Second Amendment"); *United States v. Marzzarella*, 614 F.3d 85, 91-95 (3d Cir. 2010).

1. Pre-Civil War Era Public Carry Laws.

Before the Civil War, many states passed laws similar to Sections 25850 and

26150, and these statutes were generally upheld by the courts.[3] Oregon in 1853, for example, permitted only those with "reasonable cause to fear an assault, injury, or other violence to his person, or to his family or property" were permitted to carry firearms.[4] Likewise, Section 25850 prohibits "carrying a loaded firearm in public," but Section 26045 ensures Section 25850 does not preclude the carrying of a loaded firearm, under circumstances where it would otherwise be lawful, by a person who "reasonably believes that any person or the property of any person is in immediate, grave danger . . . ." Cal. Pen. Code § 26045 (2012). The California Penal Code's regulations of public carry thus accord with the longstanding tradition of early American laws.

Sections 25850 and 26150 also pale in comparison to the more stringent public carry laws passed in many states before the Civil War. New York, for example, prohibited the public carry of firearms by banning the discharge of firearms without exception in city streets, lanes, alleys, gardens, and "any other place where persons frequently walk." Laws of the State of New York, Vol. II, Ch. 43 (1886) (enacted 1786). Other states prohibited public carry but for

---

[3] *See, e.g.*, *Aymette v. State*, 21 Tenn. 154, 159, 1840 WL 1554, at *4 (1840) ("The Legislature . . . [has] a right to prohibit the wearing or keeping [of] weapons dangerous to peace and safety of the citizens . . . ."); *State v. Reid*, 1 Ala. 612, 616, 1840 WL 229, at *3 (1840) (noting the concealed carry ban was "dictated by the safety of the people and the advancement of public morals"); *State v. Buzzard*, 4 Ark. 18, 28, 1842 WL 331, at *6 (1842) ("It inhibits only the wearing of certain arms concealed. This is simply a regulation as to the manner of bearing such arms as are specified."); *Nunn v. State*, 1 Ga. 243, 251 (1846) (upholding prohibition on carrying concealed weapons); *State v. Jumel*, 13 La. Ann. 399, 400, 1858 WL 5151, at *1 (1858) (noting public carry is merely a "*particular mode* of bearing arms which is found dangerous to the peace of society") (emphasis in original); *Owen v. State*, 31 Ala. 387, 388, 1858 WL 340, at *1 (1858) (concealed carry bans are a "mere regulation of the manner in which certain weapons are to be borne . . . .").

[4] The Statutes of Oregon Enacted and Continued In Force By the Legislative Assembly, As The Session Commencing 5th December, 1853, ch. 16 § 17 (Asahel Bush, Oregon 1854). *See*, *e.g.*, Revised Statutes of the Commonwealth of Massachusetts Passed November 4, 1836 at 750 (Boston, 1836) ("If any person shall go armed with dirk, dagger, sword, pistol . . . he may . . . be required to find sureties for keeping the peace."); Cornell, Fordham Urban Law Journal Symposium Draft at 27, (declaring Maine, Delaware, The District of Columbia, Wisconsin, Pennsylvania, and Minnesota had adopted a similar stance by the era of the Fourteenth Amendment); Saul Cornell & Nathan DeDino, *The Second Amendment and the Future of Gun Regulation*, 73 Fordham L. Rev. 487, 515 (2004) (discussing Virginia's 1806 public carry licensing law).

extremely narrow exceptions.[5] In 1821, Tennessee passed a statute banning concealed carry subject only to an exception for a person who was "on a journey to any place out of his county or state." Cornell, 73 Fordham L. Rev. at 513. Unlike Section 26045, there was no exception for circumstances of "immediate, grave danger." Seven other states enacted laws similar to and even more stringent than Sections 25850 and 26150 in the decades that followed.[6] Tennessee and Georgia even banned the sale of concealable weapons outright. Cornell, 73 Fordham L. Rev. at 514. The Supreme Court of Tennessee upheld the Tennessee law against a challenge declaring that "the Legislature intended to abolish these most dangerous weapons entirely from use." *Day v. State*, 37 Tenn. 496, 500, 1858 WL 2780, at *2 (1857). If these statutes posed no constitutional issue, then *a fortiori* Sections 25850 and 26150 also do not.

2. Post-Civil War Era Public Carry Laws.

After the Civil War, firearms possession again increased as former soldiers retained personal possession of firearms intended for battle and firearm manufactures sought to remain solvent by manufacturing concealable weapons for civilian use. In response to this threat, states began adopting regulations on public carry analogous to Sections 25850 and 26150. *See* DeConde, Gun Violence in America at 79. From 1870 to 1900, at least fourteen states regulated the carrying of concealed weapons in public.[7] Several states went further,

---

[5] *See* Clayton E. Cramer, Concealed Weapon Laws of the Early Republic: Dueling, Southern Violence, and Moral Reform 143-146, 150-52 (1999); Cornell, A Well Regulated Militia at 131-40; Cornell, 73 Fordham L. Rev. at 513 (2004) ("[E]xceptions [during the antebellum period] from the concealed weapons law for self-defense were limited.").

[6] Louisiana (1813), Indiana (1820), Alabama (1837), Tennessee (1838), Virginia (1838), Georgia (1838) and Ohio (1859). *See* Cornell at 141-42; Cornell, 73 Fordham L. Rev. at 513 (citing Act of Mar. 18, 1859, 1859 Ohio Laws 56; Act of Oct. 19, 1821, ch. XIII, 1821 Tenn. Pub. Acts 15; Act of Feb. 2, 1838, 1838 Va. Acts ch. 101, at 76); Cramer, Concealed Weapon Laws of the Early Republic at 3 (citing Raymond Thorp, *Bowie Knife* (1948)); *State v. Reid*, 1 Ala. 612, 1840 WL 229 (1840); Alexander DeConde, Gun Violence In America 79 (2001).

[7] Colorado, Florida, Illinois, Kentucky, Nebraska, North Carolina, North Dakota, Oregon, South Carolina, South Dakota, Texas, Virginia, Washington, and West Virginia. *See* Colo. Rev. Stat. § 149, at 229 (1881); Fla. Act of Feb. 12, 1885, ch. 3620, § 1; Ill. Act of Apr. 16, 1881; Ky. Gen. Stat., ch. 29, § 1 (1880); Neb. Cons. Stat. § 5604 (1893); 1879 N.C. Sess. Laws, ch. 127; N.D. Pen. Code § 457 (1895); Act of Feb. 18, 1885, ch. 8, §§ 1-4, 1885 Or. Laws 33; 1880 S.C. Acts 448, § 1; S.D. Terr. Pen. Code § 457 (1877); Tex. Act of Apr. 12, 1871; 1869–1870 Va. Acts 510; Wash. Code § 929 (1881); W. Va. Code ch. 148, § 7 (1870).

completely banning the carrying of firearms in various ways.[8] Wyoming, for example, prohibited the carrying of firearms in any "city, town, or village." 1876 Wyo. Comp. Laws ch. 52, § 1. Even in the "Wild West," often recognized for its gun culture, cattle towns like Dodge City prohibited public carry. *See, e.g.*, Dodge City, Kan., Ordinance No. 16, § XI (Sept. 22, 1876).

To the extent such prohibitions on concealed weapons were challenged in court, they overwhelmingly survived constitutional review. As *Heller* recognized, "the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues." 554 U.S. at 626; *see also Baldwin*, 165 U.S. at 281-82 ("[T]he right of the people to keep and bear arms . . . is not infringed by laws prohibiting the carrying of concealed weapons").

For example, in *State v. Workman*, the West Virginia Supreme Court of Appeals affirmed the constitutionality of a licensing statute that restricted public carry of pistols and other weapons to those who "had good cause to believe, and did believe, that he was in danger of death or great bodily harm at the hands of another person, and that he was, in good faith, carrying such weapons for self-defense and for no other purpose . . . ." 14 S.E. 9, 10-11 (W.V. 1891) (quoting W. Va. Code ch. 148, § 7 (1870)). The court predicated its decision on the Statute of Northampton, declaring the Second Amendment "should be constructed with reference to the provisions of the common law." *Id*. at 11. The West Virginia licensing statute upheld in *Workman*, like Section 26150 at issue here, predicated issuance of a license on *good cause*. *See* Cal. Pen. Code § 26150 (2012) ("Good cause exists for issuance of the license."). Moreover, in *Fife v. State*, an Arkansas court held that a statute prohibiting the public carrying of pistols similar to Section 25850 was a lawful "exercise of the police power of the State." 31 Ark 455, 1876 WL 1562, at *4 (1876). Many other state courts followed suit in upholding

[8] *See* 1879 Tenn. Pub. Acts, ch. 186; 1876 Wyo. Laws ch. 52; Act of Apr. 1, 1881, No. 96, 1881 Ark. Acts 191; Tex. Act of Apr. 12, 1871..

statutes similar to those challenged here.[9]

Contemporaneous legal scholars also recognized the constitutionality and necessity of public carry restrictions similar to sections 25850 and 26150. An 1868 treatise cited in *Heller* as one of the several representative "post-Civil War 19th-century sources," 554 U.S. at 618, explained 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* 152-153 (1868). Judge John Dillon, one of the most eminent jurists of the day, wrote that the law must "strike some sort of balance between" the right to bear arms and "the peace of society and the safety of peaceable citizens [seeking] protection against the evils which results from permitting other citizens to go armed with dangerous weapons." John Dillon, *The Right to Keep and Bear Arms for Public and Private Defense (Part 3)*, 1 Cent. L.J. 259, 287 (1874); *see also* Ernst Freund, The Police Power: Public Police and Constitutional Rights 90-91 (1904) (noting the Second Amendment had "not prevented the very general enactment of statutes forbidding the carrying of concealed weapons").

Combined with two centuries of American statutes and case law, these authorities make clear that regulations governing public carry of firearms—and even outright bans on public carry—comprise a longstanding, historically accepted tradition in the United States.

C. States Have Enacted Similar Statutes Since the Early Twentieth Century.

The longstanding tradition of regulating public carry by statutes similar to Sections 25850 and 26150 continued into the twentieth century. Between 1903 and 1927, at

[9] *See, e.g.*, *English v. State*, 35 Tex. 473, 478, 1872 WL 7422, at *4 (1871) ("Our Constitution, however, confers upon the Legislature the power to regulate the [public carry] privilege."); *Andrews v. State*, 50 Tenn. 165, 182, 1871 WL 3579, at *8 (1871) ("[A] man may well be prohibited from carrying his arms to church, or other public assemblage, as the carrying them to such places is not an appropriate use of them."); *State v. Wilforth*, 74 Mo. 528, 531, 1881 WL 10279, at *1 (1881) ("[W]e must hold the act in question to be valid and binding, and as intending only to interdict the carrying of weapons concealed.").

least eleven states passed laws that, like Section 26150, prohibited the carrying of a concealed or concealable weapon without a permit or without the permission of law enforcement.[10] Early twentieth-century laws also granted broad discretion to law enforcement officers in their decisions whether to issue such permits. *See* Clayton E. Cramer & David B. Kopel, *Shall Issue: The New Wave of Concealed Handgun Permit Laws*, 62 Tenn. L. Rev. 679, 681 (1995). Like Section 26150, such laws required applicants to show they were "suitable" or of "good moral character" or to prove they had a "good reason," "good cause," or "proper reason" for the public carry license.[11]

In 1903, for example, law enforcement officers estimated that 20,000 people in New York City were carrying concealed handguns. DeConde, Gun Violence In America at 105. New York then passed the Sullivan Law in 1911, which, like Sections 25850 and 26150, created a discretionary licensing system and prohibited the unlicensed carrying of firearms. Cornell at 197; 1911 N.Y. Laws at 442. That statute prompted several other states to pass similar legislation. Deconde, Gun Violence In America at 110. By the 1930's, many states adopted the Uniform Act to Regulate the Sale and Possession of Firearms, which was drafted and promoted by the National Rifle Association, and prohibited the unlicensed carrying of concealed weapons in a manner similar to Sections 25850 and 26150. *See id.* at 131-132; Cramer & Kopel, 62 Tenn. L. Rev. at 681.

---

[10] Nevada (1903), New Hampshire (1909), Georgia (1910), New York (1911), Iowa (1913), California (1917), Connecticut (1917), Oregon (1917), West Virginia (1925), Hawaii (1927), and Michigan (1927). Act of May 4, 1917, ch. 145, 1917 Cal. Laws 221; Act of Apr. 10, 1917, ch. 129, 1917 Conn. Laws 98; Act of Aug. 12, 1910, No. 432, 1910 Ga. Laws 134; Small Arms Act, Act 206, 1927 Haw. Laws 209; 1913 Iowa Acts, 35th G.A., ch. 297, § 3; Act of June 2, 1927, No. 372, 1927 Mich. Laws 887; Act of Mar. 17, 1903, ch. 114, 1903 Nev. Laws 208; Act of Apr. 6, 1909, ch. 114, 1909 N.H. Laws 451; Act of May 25, 1911, ch. 195, 1911 N.Y. Laws 442; Act of Feb. 21, 1917, ch. 377, 1917 Or. Laws 804; and Act of Apr. 23, 1925, ch. 95, 1925 W.Va. Laws 389. These statutes generally exempted law enforcement personnel.

[11] *See, e.g.*, 1917 Cal. Laws at 222; 1927 Haw. Laws at 210; 1927 Mich. Laws at 889; 1909 N.H. Laws at 451-452; and 1925 W.Va. Laws at 390.

D. Many States Continue to Strongly Regulate Concealed Carrying of Firearms and Such Laws Have Been Held Constitutional.

Today, California and nearly all other states require residents to obtain a permit before carrying a firearm in public.[12] Illinois and the District of Columbia ban public carry outright.[13] Although licensing requirements vary, California and nine other states afford discretion to state or local officials to determine whether to issue a public carry permit.[14] Federal courts in these states have overwhelmingly rejected challenges to discretionary licensing laws like Section 26150.

1. California

Section 26150 (formerly Section 12050) has been upheld as constitutional under the Second Amendment by the Southern District of California, the Eastern District of California, and the California Court of Appeals. In *Peruta v. County of San Diego*, the Southern District of California, after reviewing historical case law endorsing public carry restrictions such as Section 25850, found no Second Amendment issue with Section 12050's public carry licensing restrictions. 758 F. Supp. 2d 1106, 1114-17 (S.D. Cal. 2010) (appeal pending). Although Section 12050 gave the San Diego Sheriff's Department discretion to reject applicants for public carry licenses who had failed to show good cause, the court held that the statute does not burden the "Second Amendment right announced in *Heller*—the right of law-abiding, responsible citizens to use arms in defense of hearth and home—to any significant degree." *Id.* at 1114 n.6.

Similarly, the Eastern District of California in *Richards v. County of Yolo*

---

[12] *See* LCAV, *Guns in Public Places: The Increasing Threat of Hidden Guns in America*, available at http://smartgunlaws.org/guns-in-public-places-the-increasing-threat-of-hidden-guns-in-america/.

[13] *See id*; *see also* Illinois State Law Summary, available at http://smartgunlaws.org/illinois-state-law-summary/; District of Columbia Law Summary, available at http://smartgunlaws.org/washington-d-c-law-summary/.

[14] Alabama, Connecticut, Delaware, Hawaii, Maryland, Massachusetts, New Jersey, New York, and Rhode Island also provide the agency issuing concealed handgun licenses with discretion to approve or deny a license application. *See* LCAV, *Guns in Public Places: The Increasing Threat of Hidden Guns in America*, available at http://smartgunlaws.org/guns-in-public-places-the-increasing-threat-of-hidden-guns-in-america/.

rejected a challenge to Section 12050's public carry licensing restrictions. 821 F. Supp. 2d 1169, 1174-77 (2011) (appeal pending). The court explained that the Supreme Court, "both in *Heller*, and subsequently in *McDonald*, took pain-staking effort to clearly enumerate that the scope of *Heller* extends only to the right to keep a firearm *in the home* for self-defense purposes." *Id*. at 1174, n.4. Accordingly, the court held that "the Second Amendment does not create a fundamental right to carry a concealed weapon in public." *Id*. at 1174. The court then refused to invalidate the "good cause" and "good moral" character provisions of Section 12050 (now Section 26150) as unconstitutional on their face because the plaintiffs could not demonstrate that there were no circumstances under which the Sheriff could clearly issue a concealed weapon permit. *Id.* at 1176.

California state courts have likewise rejected challenges to general restrictions and licensing-specific restrictions on public carry. In *People v. Yarbrough*, the California Court of Appeal remarked that carrying a concealed firearm "poses an imminent threat to public safety." 169 Cal. App. 4th 303, 314 (2008) (internal quotations and citations omitted). The court further declared that California's concealed carry law "does not broadly prohibit or even regulate the possession of a gun in the home for lawful purposes of confrontation or self-defense, as did the law declared constitutionally infirm in *Heller*." *Id.* at 313; *see also People v. Dykes*, 46 Cal. 4th 731, 778 (2009) ("[T]he court in *Heller* disapproved a statute that prohibited possession of an ordinary handgun *in the home*.") ; *People v. Ellison*, 196 Cal. App. 4th 1342 (2011) (similar).

2. New Jersey

As in California, New Jersey residents may obtain a public carry permit only after demonstrating a "justifiable need to carry a handgun." N.J. Stat. Sections 2C:39-5(b), 2C:58-4. Under this standard, applicants must show "an urgent necessity for self-protection" based on "specific threats or previous attacks demonstrating a special danger to the applicant's life that cannot be avoided by other means." *In re Preis*, 573 A.2d 148, 152 (1990). New Jersey's licensing restriction on public carry has been held constitutional. *Piszczatoski v. Filko*, No. 10-06110, 2012 U.S. Dist. LEXIS 4293, 2012 WL 104917, at *1 (D.N.J. Jan. 12, 2012).

The *Piszczatoski* Court rejected challenges to the law because it did not burden conduct protected by the Second Amendment and further found that, even if it did, the licensing law would survive intermediate scrutiny. *Id.* at *7, *21.

3. New York

As in California and New Jersey, applicants for concealed carry permits in New York must establish that "proper cause exists for the issuance thereof." N.Y. Penal Law Section 400.00(2)(f). To meet this standard, an applicant must establish "a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession." *Kachalsky v. Cacace*, 817 F. Supp. 2d. 235, 240 (S.D.N.Y. 2011) (citation omitted). The Southern District of New York upheld New York's law against a constitutional challenge, concluding that "the scope of the Second Amendment right in *Heller* does not extend to invalidate regulations . . . on carrying handguns." *Id.* at 260.

4. Hawaii

Hawaii, like California, New Jersey, and New York, requires a permit applicant to demonstrate a need to carry a handgun outside the home. Haw. Rev. Stat. Ann. § 134-9. In *Young v. Hawaii*, 2009 WL 1955749 (D. Haw. Jul. 2, 2009), the district court rejected a challenge to Hawaii's law, ruling that it could not "identify . . . the possession of an unconcealed firearm in public as a fundamental right." *Id.* at *9.

5. Other States

Finally, since *Heller*, the overwhelming majority of courts have limited the Second Amendment right to the home in evaluating licensing restrictions on public carry such as Section 26150, general restrictions on public carry such as Section 25850, or in discussing the Second Amendment generally. *See, e.g.*, *United States v. Mahin*, 668 F.3d 119, 124 (4th Cir. 2012) ("But the Supreme Court has not clarified, and we have not held, that the Second Amendment extends beyond the home . . . ."); *United States v. Vongxay*, 594 F.3d 1111, 1115 (9th Cir. 2010) (similar); *Shepard v. Madigan*, No. 11-cv-405-wds, 2012 U.S. Dist. LEXIS 44828, at *29 (S.D. Ill. Mar. 30, 2012) (appeal pending) ("The holding in *Heller* is narrow, and limited to the possession of firearms in one's home for the purpose of self-defense."); *Peterson*

v. LaCabe, 783 F. Supp. 2d 1167, 1174 (D. Colo. 2011) (appeal pending) ("[T]he [*Heller*] right may nonetheless be restricted to certain persons and is entitled to less protection outside the home."); *Gonzalez v. Village of West Milwaukee*, No. 09-cv-0384, 2010 U.S. Dist. LEXIS 46281, at *10 (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. Barrett*, No. 10-cr-36-wmc, 2010 U.S. Dist. LEXIS 99397, at *3-4 (W.D. Wis. June 30, 2010) ("*Heller* stands only for the proposition that the District of Columbia cannot constitutionally ban handgun possession in the home for use in self-defense by persons not otherwise prohibited from gun possession."); *United States v. Hart*, 726 F. Supp. 2d 56, 60 (D. Mass. 2010) (dismissing defendant's contention that *Heller* "extends to the possession of concealed handguns outside one's home"); *see also Moore v. Madigan*, No. 11-cv-03134, 2012 U.S. Dist. LEXIS 12967, at *19-32 (C.D. Ill. Feb. 3, 2012) (pending appeal) (surveying case law and noting "many courts in other jurisdictions have reached a similar conclusion regarding the [narrowness of] *Heller*").

This Court should follow suit by rejecting Plaintiff's challenges to Sections 25850 and 26150.

CONCLUSION

As described above, restrictions on public carry similar to California Penal Code Sections 25850 and 26150 have been enacted and upheld both before and since the Founding era. Such restrictions are consistent with hundreds of years of American law and do not implicate the Second Amendment as interpreted by the Supreme Court.

DATED: July 9, 2012

COVINGTON & BURLING LLP

By: /s/
Simon J. Frankel
Attorneys for Amicus Curiae
LEGAL COMMUNITY AGAINST VIOLENCE