No. 18-55717

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHELLE FLANAGAN, et al.,
Plaintiffs-Appellants,

v.

XAVIER BECERRA, et al.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Central District of California, No. 2:16-cv-6164 (Kronstadt, J.)

BRIEF OF *AMICUS CURIAE* GIFFORDS LAW CENTER TO PREVENT GUN VIOLENCE IN SUPPORT OF APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c)(1), Giffords Law Center to Prevent Gun Violence states that it has no parent corporations. It has no stock, and therefore no publicly held company owns 10% or more of its stock.

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Amicus curiae Giffords Law Center to Prevent Gun Violence ("Giffords Law Center") is a non-profit, national policy organization dedicated to researching, writing, enacting, and defending laws and programs proven to reduce gun violence and save lives. Giffords Law Center provides free assistance and expertise to lawmakers, advocates, legal professionals, law enforcement, and citizens who seek to make their communities safer from gun violence, and has a strong interest in supporting laws regulating the public possession and carrying of firearms. Giffords Law Center has provided informed analysis as an *amicus* in numerous important firearm-related cases nationwide, including *District of Columbia v. Heller*, 554 U.S. 570 (2008); *McDonald v. City of Chicago*, 561 U.S. 742 (2010); *Peruta v. Cty. of San Diego*, 824 F.3d 919 (9th Cir. 2016) (en banc); *Teixeira v. Cty. of Alameda*, 873 F.3d 670 (9th Cir. 2017) (en banc); and *Bauer v. Becerra*, 858 F.3d 1216 (9th Cir. 2017).[1]

[1] No counsel for a party authored this brief in whole or in part and no person other than *amicus curiae* and its counsel made a monetary contribution to its preparation or submission. All parties to this action have consented to the filing of this brief. Fed. R. App. P. 29; Ninth Cir. R. 29-2.

INTRODUCTION AND SUMMARY OF ARGUMENT

Individuals who carry guns in public may harbor good intentions, but can nonetheless create unacceptable risks to the public generally and law enforcement in particular. In July 2016, Americans witnessed the devastating truth of that statement when a gunman opened fire on police during a protest in Dallas.[2] Up to thirty civilians in attendance were lawfully carrying openly displayed rifles. The Dallas Police Chief described the deadly confusion that ensued: "We don't know who the good guy is versus the bad guy when everyone starts shooting." In the time it took to identify the gunman, twelve officers were shot, five of them fatally. To no surprise, studies confirm what the Dallas shooting suggests: more guns in public mean more deaths in public.

Through reasonable restrictions on carrying firearms in public, California sought to curb gun violence and the deadly confusion engendered by introducing deadly weapons into populated areas. It did so by adopting strong concealed-carry permitting standards and generally prohibiting open carry in incorporated areas, like Los Angeles, where the risk of gun violence is greatest, as well as in those portions of unincorporated areas where it is already unlawful to discharge a weapon. Cal. Penal Code §§ 25850, 17030 (open carry); *id.* §§ 25655, 26150(a)(2)

[2] Molly Hennessy-Fiske, *Dallas police chief: Open carry makes things confusing during mass shootings*, Los Angeles Times (July 11, 2016), http://www.latimes.com/nation/la-na-dallas-chief-20160711-snap-story.html.

(concealed carry). By all accounts, the state's efforts have been successful: Between 1993 and 2016, California's gun death rate fell by 55% and remains well below the national average today—7.9 deaths per 100,000, compared to the national average of 11.8.[3]

At the same time, California was careful not to place a substantial burden on the Second Amendment right to self-defense in public, such that its laws are appropriately reviewed under the intermediate scrutiny standard. *See Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 961 (9th Cir. 2014). Indeed, California's restrictions on public carry do not prevent citizens from carrying firearms when and where they are most likely to need them. Ordinary, law-abiding citizens may openly carry firearms whenever they are faced with an immediate, grave danger. Cal. Penal Code § 26045(a). And those same citizens may carry a firearm openly in more remote, unincorporated areas, where access to police services are limited, or carry a concealed firearm in less remote areas (after making a showing of good cause). *See id.* §§ 25850(a), 17030 (unincorporated areas); *id.* §§ 25655, 26150(a)(2) (concealed carry).

[3] Giffords Law Center, *California's Smart Gun Laws: A Blueprint for the Nation* (Nov. 20, 2018), http://lawcenter.giffords.org/californias-smart-gun-laws-a-blueprint-for-the-nation; Nat'l Ctr. for Health Stats., Stats of the State of California (2016), https://www.cdc.gov/nchs/pressroom/states/california/california.htm.

California's public-carry laws withstand intermediate scrutiny because substantial evidence demonstrates that its laws reasonably fit the undisputedly critical objective of promoting public safety. *See Fyock v. Sunnyvale*, 779 F.3d 991, 1000 (9th Cir. 2015). Studies confirm the common-sense conclusion that permissive public-carry laws place all parties involved at increased risk of gun violence. Moreover, in the absence of reasonable open-carry restrictions like those California has adopted, even well-intentioned gun carriers can throw the public and the police charged with protecting them into a state of potentially deadly confusion.

Taken together, substantial evidence shows that California's objective to promote public safety by mitigating gun violence and reducing deadly confusion "would be achieved less effectively absent the regulation[s]" on public carry, demonstrating the reasonable fit required. *Id.* This Court should affirm the decision below.

ARGUMENT

I. The Court Should Apply Intermediate Scrutiny to Review California's Public-Carry Laws.

Intermediate scrutiny applies to California's public-carry laws because they do not place a substantial burden on the Second Amendment right. *See Jackson*, 746 F.3d at 961. In determining the appropriate level of scrutiny, this Court considers the burden a state's laws place on the right. *Id.* When the state's laws

"leave open alternative channels for self-defense," the attendant burden placed on the right is "not substantial" and intermediate scrutiny is appropriate. *Id.* Because California's public-carry regime, and in particular its open-carry laws, leave open ample, alternative channels for self-defense, intermediate scrutiny is appropriate. *Id.*

Far from a wholesale ban on public carry, California's laws preserve the right to self-defense in public when the need is the greatest. For example, in the face of "immediate, grave danger" to any person or property, ordinary, law-abiding citizens may carry a visible, loaded firearm if they reasonably believe it is necessary to do so. Cal. Penal Code § 26045(a). When the danger is less immediate, but still grave, a restraining order may effectively serve as a license to do the same. *Id*. §§ 26045(b), 26405(d).

Not only is the right to self-defense in public preserved when it is most needed, but it is preserved in the public places where that need is most likely to arise. In more remote, unincorporated areas, where access to police services is limited, open carry remains unrestricted in any public place or street where it is not already unlawful to discharge a weapon. *Id.* §§ 25850(a), 17030. Even in heavily policed, incorporated areas, ordinary, law-abiding citizens may still carry a firearm in public, albeit concealed, after making a showing of good cause. *Id.* §§ 25655, 26150(a)(2). What is more, law-abiding citizens may carry encased firearms in

public when venturing between any private businesses or residences that permit open carry. *Id.* §§ 26405(c). And if that were not enough, those same citizens may exercise self-defense by obtaining and carrying less lethal weapons, such as stun guns and pepper spray, almost everywhere in public. *See* Cal. Penal Code §§ 22610, 22810.

Given these alternatives, the burden on any right to self-defense in public is "not substantial," and intermediate scrutiny therefore applies. *Jackson*, 746 F.3d at 961. Indeed, intermediate scrutiny makes particular sense for laws regulating guns in public. *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1126 (10th Cir. 2015). While other fundamental rights reviewed under a strict scrutiny test, like the right to marry, "can be exercised without creating a direct risk to others," the Second Amendment right cannot. *Id.* Any right to armed self-defense in public carries with it inherent, unavoidable risks to others because "[f]irearms may create or exacerbate accidents or deadly encounters." *Id.* The intermediate scrutiny test gives legislatures such as California's the appropriate degree of flexibility to craft reasonable restrictions to regulate the dangers firearms pose to the public—including restrictions that would be suspect if applied within the home. *See, e.g.*, *Gould v. Morgan*, 907 F.3d 659, 672 (1st Cir. 2018) ("Many constitutional rights are virtually unfettered inside the home but become subject to reasonable regulation outside the home.").

Intermediate scrutiny remains the correct test despite the divided panel decision in *Young v. Hawaii*, 896 F.3d 1044, 1071 (9th Cir. 2018), *petition for en banc reh'g filed*, No. 12-17808 (9th Cir. Sept. 14, 2018). The *Young* panel declined to apply intermediate scrutiny to a Hawaii state law it construed as limiting open carry to citizens engaged in certain professions because it concluded the law entirely foreclosed ordinary citizens from exercising their Second Amendment right. *Id.* at 1070–71. Far from foreclosing that right, California allows any ordinary, law-abiding citizen to carry a visible firearm in remote areas or exigent circumstances and to carry a concealed firearm after a showing of good cause. *Cf. Young*, 896 F.3d at 1071-72 (rejecting application of intermediate scrutiny to public-carry law that the panel determined was more restrictive than, and did not function like, a good-cause law); *see also id.* at 1071 n.21.

In sum, intermediate scrutiny applies because California's public-carry laws do not place a substantial burden on the Second Amendment right, but instead provide tailored exceptions that leave adequate alternatives for self-defense in public. *Jackson*, 746 F.3d at 961.

II. California's Public-Carry Laws Survive Intermediate Scrutiny Because They Reasonably Further California's Critical Public Safety Objectives.

California's public-carry laws survive intermediate scrutiny because substantial evidence demonstrates a "reasonable" fit between its restrictions and the undisputedly critical objective of promoting public safety. *See Fyock*, 779 F.3d

at 1000. A reasonable fit does not require the state to show that the law is "the least restrictive means of achieving its interest." *Id.* Instead, it requires the state to show that the law's objective "would be achieved less effectively absent the regulation," based on reasonable inferences drawn from evidence "reasonably believed to be relevant" to the problem addressed. *Id; see also*, *e.g.*, *Gould*, 907 F.3d at 673 (court may not "substitut[e] its own appraisal of the facts for a reasonable appraisal made by the legislature").

In the absence of California's restrictions on public carry, the public and the police charged with protecting them would be put at increased risk of gun violence and flung into a state of potentially deadly confusion. Substantial evidence confirms the wisdom of that conclusion—taking the form, as it may, of studies, anecdotes, and even common sense. *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995). Because California's objective to promote public safety by reducing those risks would be achieved less effectively in the absence of its public carry laws, California has demonstrated the reasonable fit necessary to survive intermediate scrutiny.[4]

[4] The tailored exceptions and alternatives available under California's public-carry laws confirm that the laws bear not only a reasonable fit, but a close fit to California's public safety goals. For this reason and the others presented in the State's brief, Giffords Law Center joins the State's argument that California's laws survive strict scrutiny. (State Appellee Br. at 54-57.)

A. California's Laws Reduce Overall Gun Violence.

California's public-carry laws promote public safety by reducing overall gun violence, whether caused by an individual with good intentions or perpetrated by one with more sinister motivations. In crafting its laws, California was careful to reserve its strongest restrictions for incorporated areas, where high population density increases the potential for a gunman to inflict casualties and regular policing by law enforcement maintains the public peace. *See McDonald v. City of Chicago*, 561 U.S. 742, 902 (2010); Cal. Penal Code §§ 25850, 17030. In the absence of those and other restrictions on public carry, there is little doubt that the public, police, and gun carriers themselves would be put at increased risk of gun violence.

Simple common sense tells us that more guns in public mean more gun violence. *See Went For It, Inc.*, 515 U.S. at 628 (common sense can justify regulations). Too many stories start with everyday disputes and end in fatal confrontations when someone pulls out a gun. Take the road rage killings of two former NFL players in Louisiana.[5] One of these incidents started with a minor car

[5] The Associated Press, *Trial Begins Monday for Man Accused of Killing Ex-NFLer in Louisiana Road-Rage Incident*, NBC News (Dec. 4, 2016), http://www.nbcnews.com/news/us-news/trial-begins-monday-man-accused-killing-ex-nfler-louisiana-road-n691701; CNN Wire, *Man Suspected of Shooting Former USC Running Back Joe McKnight Released from Custody*, KTLA 5 NEWS (Dec.

collision, and the other started when one driver possibly cut off the other in traffic; both ended with a fatal shooting.[6]

Studies readily confirm the common-sense conclusion that lax public-carry laws, like those in Louisiana, fuel violent crime and homicide. In a 2017 study revised this month, Stanford Professor John Donohue (and colleagues) identified persistent increases in rates of assault and other violent crimes after a state's adoption of more lenient "shall-issue" concealed-carry permitting laws. When compared to what would have been expected without shall-issue policies, the laws led to an approximately fourteen percent increase in violent crime within ten years.[7] Indeed, during the nationwide decline in violent crime over the nearly forty-year period analyzed, states that never adopted shall-issue laws, like California, experienced a decline in violent crime that was approximately four times greater than states that did adopt such laws.[8] The study attributed the higher

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2, 2016), http://ktla.com/2016/12/02/man-suspected-of-shooting-former-usc-running-back-joe-mcknight-released-from-custody/.

[6] *See, e.g.*, David Wright, *Road Rage Leads to Shooting, Suicide*, ABC News (June 19, 2018), https://abcnews.go.com/US/story?id=93070&page=1; *Freeway Shooter on the Loose in Apparent Case of Road Rage*, CBS LA, May 19, 2018, https://losangeles.cbslocal.com/2018/05/19/freeway-shooting-moreno-valley/.

[7] John J. Donohue et al., *Right-to-Carry Laws and Violent Crime: A Comprehensive Assessment Using Panel Data, the LASSO, and a State-Level Synthetic Controls Analysis*, Nat'l Bureau Econ. Res. 42 (June 2017, revised Nov. 2018), https://www.nber.org/papers/w23510.

[8] *Id.* at 16.

violent crime rates in shall-issue states to both otherwise law-abiding citizens with permits, who may end up committing crimes that they otherwise would not have, and criminals, who feel a greater need to carry a gun and have greater access to one in a state with more armed citizens.[9]

Not only does violent crime increase in general in states with lower standards for granting public-carry permits, but homicide increases in particular. In another recent study, researchers at Boston University and Duke University linked shall-issue laws to higher homicide rates. Between 1991 and 2015, shall-issue laws were significantly associated with 6.5% higher total homicide rates, 8.5% higher firearm homicide rates, and 10.6% higher handgun homicide rates.[10]

Just as lax gun regulations harm the public by increasing violent crime and homicide, so too do they harm the gun carriers themselves. One study of more than 600 shootings in Philadelphia led by researchers at Columbia University and the University of Pennsylvania, for example, concluded that carrying a firearm may increase a victim's risk of injury by more than four times.[11] Indeed, that

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[9] *Id.* at 5–16.

[10] *See* Michael Siegel, et al., *Easiness of Legal Access to Concealed Firearm Permits and Homicide Rates in the United States*, 107 Am. J. Pub. Health 1923, 1923–24 (Dec. 2017), https://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.2017.304057.

[11] *See* Charles C. Branas et al., *Investigating the Link Between Gun Possession and Gun Assault*, 99 Am. J. Pub. Health 2034, 2037 (Nov. 2009), https://ajph.aphapublications.org/doi/abs/10.2105/AJPH.2008.143099.

number jumps to five times when the gun-carrying victim has some chance at resistance. And that makes sense. Few possess the skills required to defend oneself with a gun in public. "Shooting accurately and making appropriate judgments about when and how to shoot in chaotic, high-stress situations requires a high level of familiarity with tactics and the ability to manage stress under intense pressure."[12] Unsurprisingly, victims of violent crimes use firearms in less than one percent of all criminal incidents,[13] and data from the National Crime Victimization Surveys provide little evidence that defensive gun use is beneficial in reducing the likelihood of injury or property loss.[14]

Taken together, the Stanford, Boston-Duke, and Columbia-Pennsylvania public-carry studies demonstrate a reasonable fit between California's laws and its important interest in reducing gun violence. *See Fyock*, 779 F.3d at 1000. The Stanford and Boston-Duke studies' conclusion that restrictions on publicly carried guns are associated with decreased crime supports California's reasonable

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[12] Daniel W. Webster et al., *Firearms on College Campuses: Research Evidence and Policy Implications* 10 (Oct. 15, 2016), https://www.jhsph.edu/research/centers-and-institutes/johns-hopkins-center-for-gun-policy-and-research/_pdfs/GunsOnCampus.pdf (explaining how inadequately trained gun carriers may end up "wounding or killing innocent victims" when attempting self-defense).

[13] David Hemenway & Sara J. Solnick, *The Epidemiology of Self-Defense Gun Use: Evidence from the National Crime Victimization Surveys 2007–2011*, 79 Preventive Med. 22, 23 (Oct. 2015).

[14] *See id.* at 23–24.

inference that its regulations would decrease overall gun violence. And the Columbia-Pennsylvania study's conclusion that carrying a firearm decreases a gun carrier's safety supports California's reasonable inference that its restrictions protect the public and gun carriers alike. *See Mahoney v. Sessions*, 871 F.3d 873, 883 (9th Cir. 2017) (crediting city's "reasonable inferences" that challenged policy would aid public safety).

California's success in limiting firearm deaths under its public-carry laws eliminates any doubt as to whether its inferences are reasonable. Between 1993 and 2016, California's firearm death rate fell by 55% and remains well below the national average today—7.9 deaths per 100,000, compared to the national average of 11.8.[15] Viewed alongside compelling research on the specific dangers of lenient public carry policies, the sustained improvements in California's gun death rate confirm that the state's public-carry laws represent an informed, reasonable, and constitutional policy choice. *See, e.g.*, *Gould*, 907 F.3d at 674–75 ("Massachusetts consistently has one of the lowest rates of gun-related deaths in the nation," bearing out state's evidence that its public carry law substantially furthers public

[15] Giffords Law Center, *California's Smart Gun Laws: A Blueprint for the Nation* (Nov. 20, 2018), http://lawcenter.giffords.org/californias-smart-gun-laws-a-blueprint-for-the-nation; Nat'l Ctr. for Health Stats., Stats of the State of California (2016), https://www.cdc.gov/nchs/pressroom/states/california/california.htm.

safety); *see also Young*, 896 F.3d at 1082 (Clifton, J., dissenting) ("Hawaii has a very low firearm death rate as compared to other states").

California's inferences are even more reasonable given the comparative dearth of reliable social science evidence in favor of deregulating public carry. The flawed hypothesis that crime rates are lower in states with lax public-carry laws can be traced back to a book published by John Lott in 1998.[16] But Lott's conclusion that lax laws are associated with lower crime rates has since been widely refuted, including by Professor John Donohue.[17] Lott's research is tainted by two fundamental methodological errors. First, Lott aggregated the impact of gun law passage for all the states studied. When researchers disaggregated the effects for each state, it became clear that crime increased more often after the passage of concealed-carry laws than it decreased.[18] Second, Lott used crime data at the county level and did not account for changing laws at the state level. When

[16] John R. Lott, Jr., *More Guns Less Crime* (1st ed. 1998).

[17] *See, e.g.*, Emily Badger, *More Guns, Less Crime? Not Exactly*, Wash. Post (July 29, 2014), https://www.washingtonpost.com/news/wonk/wp/2014/07/29/more-guns-less-crime-not-exactly/ ("Numerous studies have critiqued [Lott's] methodology.").

[18] Ian Ayres & John J. Donohue III, *Shooting Down the 'More Guns, Less Crime' Hypothesis*, 55 Stan. L. Rev. 1193, 1270-71 (2003), http://digitalcommons.law.yale.edu/fss_papers/1241.

researchers adjusted his analysis to account for this oversight, the results became statistically insignificant.[19]

While this Court need not arbitrate the accuracy of Lott's research compared to the State's evidence, the fact that Lott's research has been repeatedly discredited bolsters the reasonableness of California's choice to disregard his and other methodologically flawed research. (*E.g.*, State Appellee Br. at 53 & n.7.)

B. California's Laws Reduce Potentially Deadly Confusion Over Well-Intentioned Gun Carriers.

California's public-carry laws—and its restrictions on open carry in particular—also promote public safety by reducing potentially deadly confusion over well-intentioned gun carriers, especially in more populated areas where they are more likely to be spotted. *See* Cal. Penal Code §§ 25850, 17030. When unrestricted, open carry creates potentially deadly confusion because the intentions of gun carriers, even if they are innocent, are unknown to the public and law enforcement.

To the hapless citizens who happen upon individuals carrying visible guns in public or the police officers called to investigate, such confusion may be fatal. In

[19] *See* Mark Duggan, *More Guns, More Crime*, 109 J. Pol. Econ. 1086, 1109–10 (2001), https://www.kellogg.northwestern.edu/faculty/dranove/htm/dranove/coursepages/Mgmt%20469/guns.pdf.

most circumstances, deciphering the intentions of armed citizens falls on the shoulders of law enforcement. In fact, in adopting restrictions on the open carry of unloaded handguns, California was responding to the proliferation of "open-carry calls" to police made by citizens alarmed by public displays of firearms. S. Comm. Pub. Safety, Bill Analysis, A.B. 144 (Portantino), 2011-2012 Sess., at N (Cal. 2011) [hereinafter A.B. 144 Bill Analysis].

Former Covina Chief of Police Kim Raney warned against the inherent risks and confusion in responding to open-carry calls:

> [O]fficers typically are responding to a situation about which they have few details . . . . The officers may have no idea about the armed person's motives, intent, mental condition, or emotional stability. . . . Should the armed person fail to comply with an officer's instructions or move in a way that could be construed as threatening, the results could be deadly.

E.R. 2122 (Expert Witness Report); *see also* A.B. 144 Bill Analysis, at M-N. Further complicating the encounter is a Catch-22: temporarily seizing the citizen for questioning is contingent on some indication of wrongdoing, but the lawful authority to carry openly means that displaying visible firearms falls short of that requirement.[20]

[20] Geoffrey Corn, *Open-carry opens up series of constitutional issues for cops*, The Hill (Sept. 23, 2016), https://thehill.com/blogs/pundits-blog/civil-rights/297480-why-police-interactions-in-open-carry-states-are-so.

Potentially deadly confusion may arise not only in direct response to open-carry calls, but in response to any incident where open carriers are present. In responding to an active shooter in July 2016, the Dallas Police Chief explained it best: "We don't know who the good guy is versus the bad guy when everyone starts shooting."[21] Up to thirty civilians were carrying rifles in the area, but only one of them was the perpetrator. In the time it took to separate the "good guys with guns" from the bad, twelve officers were shot, five of them fatally.

In another deadly incident illustrating the dangers of open carry, a woman in Colorado Springs called 911 on a Saturday morning after spotting her neighbor openly carrying a rifle on the street.[22] Instead of promptly sending police to investigate, the dispatcher explained that such conduct was perfectly legal under Colorado's permissive open-carry laws. Only when the neighbor began shooting did his conduct become unlawful, and by then it was too late: before police ultimately did arrive, the neighbor killed a bicyclist and father of two, as well as two others.

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[21] Molly Hennessy-Fiske, *Dallas police chief: Open carry makes things confusing during mass shootings*, Los Angeles Times (July 11, 2016), http://www.latimes.com/nation/la-na-dallas-chief-20160711-snap-story.html.

[22] Jesse Paul, *Open carry becomes focus after Colorado Springs shooting rampage*, the Denver Post (Nov. 3, 2015), http://www.denverpost.com/2015/11/03/open-carry-becomes-focus-after-colorado-springs-shooting-rampage/.

Even when open-carry incidents do not end in shoot-outs, the confusion they cause poses a grave threat to public safety because open-carry calls siphon off limited law enforcement resources. If not for the calls, law enforcement could expend its finite resources protecting the public from other deadly hazards. Instead, in the words of a California legislator, open-carry calls "tax[] departments dealing with under-staffing and cut backs . . . preventing them from protecting the public in other ways." A.B. 144 Bill Analysis, at N.

Stories abound of law enforcement wasting resources to respond to public reports of lawful carrying citizens in more populated areas. For example, ten days after the 2012 mass shooting at an elementary school in Newtown, Connecticut, more than 65 residents called to report a man with a rifle walking around Portland, Maine.[23] Open carry is permitted in Maine, so the officers responding to the call could not inspect the man's weapon or even require him to identify himself. Instead, the officers wasted resources keeping him under surveillance for nearly four hours until he left the public area.

A few weeks later, a remarkably similar incident occurred in Oregon, another permissive open-carry state. With rifles flung over their shoulders, two

[23] Dennis Hoey, *Man with assault rifle prompts flurry of police calls in Portland*, Portland Press Herald (December 24, 2012), http://www.pressherald.com/2012/12/24/man-with-gun-attracts-attention-on-back-cove-trail/.

men strolled through a Portland neighborhood on a Wednesday afternoon, prompting a flurry of 911 calls and forcing a school to go into lockdown.[24] Incidents like this, a Portland police sergeant remarked, "take[] resources away from potentially more serious incidents." That risk is all the more grave because "[a]nyone walking around with a visible firearm is going to generate calls from concerned citizens that we have to respond to."

These, unfortunately, are not isolated incidents. Across the country, in states with laws more permissive than California's, individuals carrying openly visible guns have led alarmed grocery shoppers to flee stores and call 911,[25] sown panic at little league games,[26] and traumatized children by repeatedly forcing schools to go into lockdown,[27] among other incidents.

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[24] *Gun rights walk in Portland spurs 911 calls, lockdown*, The Columbian (Jan. 10, 2013), http://www.columbian.com/news/2013/jan/10/gun-rights-walk-spurs-911-calls-lockdown/.

[25] Sandy Hausman, *Unconcealed Guns Can Unsettle, But They're Often Legal*, NPR (Jan. 30, 2013), https://www.npr.org/2013/01/30/170652470/unconcealed-guns-can-unsettle-but-theyre-often-legal.

[26] *Man with gun causes scare during children's baseball game*, WSB-TV (Apr. 24, 2014), https://www.wsbtv.com/news/local/man-gun-causes-scare-during-childrens-baseball-gam/137105583.

[27] Bill Laitner, *Open-carry activist speaks out after school lockdown scare*, Detroit Free Press (Mar. 12, 2015), https://www.freep.com/story/news/local/michigan/2015/03/12/gun-rights-open-carry-michigan-school-property/70249066/.

For all the deadly confusion caused by open carry, it should come as no surprise that California's open-carry laws have been "actively supported by law enforcement groups" from the beginning. Vernon L. Sturgeon and Jack B. Lindsey, A.B. 1591, Bill Memorandum to Governor Reagan, at 1 (July 28, 1967). More than forty years after California's first law restricting the carry of loaded, visible firearms, law enforcement continues to register their support for further restrictions on open carry. A.B. 144 Bill Analysis, at A (noting support from California Police Chiefs Association and Peace Officer Research Association of California).

III. California's Public-Carry Laws, In the Alternative, Are Historically Longstanding and Do Not Implicate a "Core" Second Amendment Right

Should this Court grant rehearing en banc in *Young*, this panel may revisit the *Young* panel's holding that "the right to carry a firearm openly for self-defense falls within the core of the Second Amendment." 896 F.3d at 1070. Contrary to *Young*'s holding, carrying guns—whether visible or concealed—does not lie at the heart of the right because public-carry restrictions fit comfortably within a longstanding American tradition. Far from abridging a core Second Amendment right, California's public-carry laws are "presumptively lawful regulatory measures" falling outside the Second Amendment's historical scope. *Jackson*, 746 F.3d at 960.

Seven centuries of Anglo-American history provide "persuasive historical evidence" of longstanding public carry regulations. *See id.* at 960. This Court has already recognized as much, finding that some of the earliest firearm regulations in America prohibited the public carry of arms entirely, whether concealed or open. *See Peruta v. Cty. of San Diego*, 824 F.3d 919, 931 (9th Cir. 2016) (en banc). New research since then has only confirmed the limited scope of the right to "bear arms." Analyzing over 100,000 founding-era sources, researchers found that the "overwhelming majority of instances" in which the phrase "bear arms" was used involved a military context, not civilians carrying guns for self-defense in public.[28]

California's laws are consistent with the longstanding tradition of Anglo-American public carry regulation. Indeed, California's public-carry restrictions are even more modest than other, more stringent restrictions that could pass constitutional muster, because California residents may openly carry firearms in emergencies and in remote areas and may obtain concealed-carry permits with good cause. *See Heller*, 554 U.S. at 626 ("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").

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[28] Josh Blackman & James C. Phillips, *Corpus Linguistics and the Second Amendment*, Harv. L. Rev. Blog (Aug. 7, 2018), https://blog.harvardlawreview.org/corpus-linguistics-and-the-second-amendment/.

CONCLUSION

Through its public-carry laws and restrictions on open carry, California has sought to promote public safety by reducing gun violence and potentially deadly confusion over well-intentioned gun carriers. Substantial evidence demonstrates that this objective would be achieved less effectively in the laws' absence, and California has therefore demonstrated the reasonable fit required to survive intermediate scrutiny. For these reasons, California's laws are constitutional and should be upheld.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) and Ninth Circuit Rule 32-1 because this brief contains 4,662 words, excluding the portions exempted by Federal Rule of Appellate Procedure 32(f).

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

Dated: November 27, 2018

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CERTIFICATE OF SERVICE

I certify that on November 27, 2018, I electronically filed the foregoing document with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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