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12  
13 **IN THE UNITED STATES DISTRICT COURT**  
14 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**  
**WESTERN DIVISION**

15 MICHELLE FLANAGAN, et al.,

16 Plaintiffs,

17 v.

18 CALIFORNIA ATTORNEY  
GENERAL XAVIER BECERRA, in  
his official capacity as Attorney  
19 General of the State of California, et  
al.,

20 Defendants.

2:16-cv-06164-JAK-AS

**BRIEF OF EVERYTOWN FOR  
GUN SAFETY AS AMICUS CURIAE  
IN SUPPORT OF DEFENDANTS**

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1                                   **INTRODUCTION AND INTEREST OF AMICUS CURIAE**

2           Everytown for Gun Safety is the largest gun-violence-prevention organization  
3 in the country, with supporters in every state, including thousands of California  
4 residents and the mayors of over 40 California cities. Everytown has drawn on its  
5 substantial research on historical firearms laws to file briefs in several recent Second  
6 Amendment cases, many of which involve public-carry regimes. *See Wrenn v. District*  
7 *of Columbia*, No. 16–7025 (D.C. Cir.); *Peruta v. San Diego*, No. 10–56971 (9th Cir.);  
8 *Silvester v. Harris*, No. 14–16840 (9th Cir.). As in those cases, Everytown seeks to  
9 assist this Court by providing relevant historical materials.<sup>1</sup>

10           This case is a constitutional challenge to California’s regulatory scheme for  
11 carrying handguns in public. California does not ban all public carry. Instead, it has  
12 taken an approach like that of seven other States and the District of Columbia,  
13 collectively expressing the popular will of more than a quarter of the American  
14 people. As implemented by Los Angeles County, California’s law has two important  
15 parts. First, it permits people to carry a concealed firearm upon a showing of “good  
16 cause,” which the County has interpreted to require more than a generalized fear  
17 for personal safety. Cal. Penal Code § 26170(a)(2). Second, although the state  
18 generally allows open carry in sparsely populated (*i.e.*, unincorporated) areas, it does

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19           <sup>1</sup> The historical gun laws cited in this brief may be found in the appendix  
20 accompanying Everytown's amicus brief in *Peruta v. San Diego*, No. 10-56971, ECF  
21 No. 257 (Apr. 30, 2015). In addition, the defendants consent to the filing of this  
22 brief, while the plaintiffs oppose, and no counsel for any party authored it in whole  
or part. Apart from amicus curiae, no person contributed money to fund the brief’s  
preparation and submission.

1 not permit open carry in populated (*i.e.*, incorporated) areas like Los Angeles. *Id.*  
2 §§ 25850(a), 26350(a).

3 Last year, the en banc Ninth Circuit upheld the concealed-carry component  
4 of California’s against a constitutional challenge. *Peruta v. San Diego*, 824 F.3d 919  
5 (9th Cir. 2016). Applying that precedent here, this Court dismissed the plaintiffs’  
6 Second Amendment challenge to the concealed-carry regime, leaving only their  
7 claim “based on the open carry limitations.” ECF No. 39, at 6.

8 That remaining claim should now be dismissed as well. As this Court has  
9 recognized, the constitutionality of California’s open-carry restrictions should “be  
10 measured in the context of the concealed carry restrictions.” *Id.* at 5; *see also Norman*  
11 *v. Florida*, 215 So. 3d 18, 21–22 (Fla. 2017) (“Because of the comprehensive nature  
12 of Florida’s regulatory scheme of firearms, we review the constitutionality of  
13 Florida’s Open Carry Law within the context of [that scheme].”). When viewed in  
14 light of the state’s public-carry regime as a whole, the historical record establishes  
15 that California’s law is sufficiently “longstanding” to qualify as constitutional under  
16 *District of Columbia v. Heller*, 554 U.S. 570 (2008). Despite the plaintiffs’ appeals to  
17 history (at 13–15), they ignore the Anglo-American tradition of restricting public  
18 carry in populated areas—a tradition that includes many early American laws that  
19 were *more* restrictive than California’s.

20 This brief provides an account of that tradition. For centuries, English law  
21 broadly prohibited anyone from carrying a dangerous weapon in public, either

1 openly or concealed, beginning with the Statute of Northampton in 1328, and  
2 continuing after the English Bill of Rights of 1689. This tradition took hold in  
3 America in the 17th and 18th centuries, when several colonies enacted similar  
4 restrictions. And it continued into the 19th century, when many states and  
5 municipalities broadly prohibited public carry in cities, towns, and villages, while  
6 many others did what California does today: allow some form of public carry by  
7 those with “reasonable cause to fear an assault or other injury.” Although a more  
8 permissive approach to public carry began emerging in the South around that time,  
9 these antebellum southern laws were motivated largely by the ever-present fear of  
10 slave rebellions, and they did not represent a majority approach.

11 Altogether, by the end of the 19th century, nearly 20 states and many cities  
12 had enacted laws that either prohibited both open and concealed carry in urban  
13 areas or required “good reason” to publicly carry a firearm. Because California’s  
14 law carries forward this longstanding tradition, it is constitutional under *Heller*. Such  
15 a robust historical pedigree is not necessary to satisfy the Second Amendment, but it  
16 is sufficient to do so. Whatever the Amendment’s precise contours, there can be no  
17 doubt that California’s public-carry regime is consistent with our “historical  
18 tradition,” *id.* at 627, and thus constitutional.

**ARGUMENT**

**CALIFORNIA’S PUBLIC-CARRY REGIME IS A “LONGSTANDING” AND CONSTITUTIONAL REGULATION UNDER *HELLER*.**

Contrary to the plaintiffs’ assertions, the question in this case is not whether the Second Amendment—which the Supreme Court held in *Heller* protects “the right of law-abiding, responsible citizens to use arms in defense of hearth and home,” *id.* at 635—has any application outside the home. Nor is it whether the Second Amendment “protect[s], to some degree, a right of a member of the general public to carry firearms in public.” *Peruta*, 824 F.3d at 927. Rather, the question is whether California’s public-carry regime—its decision to permit concealed carry in populated areas upon a showing of “good cause,” and to generally allow open carry in rural areas—is consistent with the Amendment’s protections.

To answer that question, the Ninth Circuit has adopted “a two-step inquiry,” first asking whether the law “burdens conduct protected by the Second Amendment,” and then determining, “if so,” whether the law satisfies “an appropriate level of scrutiny.” *Jackson v. City & Cnty. of San Francisco*, 746 F.3d 953, 960 (9th Cir. 2014). Although California’s public-carry regime would satisfy the appropriate level of scrutiny, this brief shows that the analysis should not get that far: This law survives at step one.

1 **A. “Longstanding” laws are deemed constitutional under *Heller***  
2 **because they are consistent with our “historical tradition.”**

3 One way to determine whether a law burdens the Second Amendment right  
4 is to assess the law based on a “historical understanding of the scope of the right,”  
5 *Heller*, 554 U.S. at 625, and consider whether the law is one of the “prohibitions that  
6 have been historically unprotected,” *Jackson*, 746 F.3d at 960. *Heller* identified  
7 several “examples” of such regulations, including “prohibitions on the possession of  
8 firearms by felons and the mentally ill” and “laws imposing conditions and  
9 qualifications on the commercial sale of arms,” which are “presum[ed]” not to  
10 violate the right because of their historical acceptance as consistent with its  
11 protections. 554 U.S. at 626-27 & n.26. Such “longstanding” laws, the Supreme  
12 Court explained, are treated as tradition-based “exceptions” by virtue of their  
13 “historical justifications.” *Id.* at 635; see *Fyock v. Sunnyvale*, 779 F.3d 991, 997 (9th Cir.  
14 2015) (“longstanding prohibitions” are “traditionally understood to be outside the  
15 scope of the Second Amendment”); *United States v. Marzzarella*, 614 F.3d 85, 91 (3d  
16 Cir. 2010) (“longstanding limitations are exceptions to the right to bear arms”).

17 What does it mean to be “longstanding” under *Heller*? It does not require that  
18 a law “mirror limits that were on the books in 1791.” *United States v. Skoien*, 614 F.3d  
19 638, 641 (7th Cir. 2010) (en banc). To the contrary, laws may qualify as  
20 longstanding even if they “cannot boast a precise founding-era analogue,” *NRA v.*  
21 *BATF*, 700 F.3d 185, 196 (5th Cir. 2012)—as was the case with the “early twentieth

1 century regulations” deemed longstanding in *Heller*, see *Fyock*, 779 F.3d at 997. But,  
2 as we now show, the law at issue in this case is no 20th-century creation; it embodies  
3 a tradition of regulation stretching back seven centuries—and is in fact *more permissive*  
4 of public carry than many of those historical regulations.

5 **B. California’s law is “longstanding” and thus constitutional under**  
6 ***Heller*.**

7 **1. English History**

8 ***Beginning in 1328, England broadly restricts public carry in***  
9 ***populated areas.*** Because “the Second Amendment” protects a “right inherited  
10 from our English ancestors,” *Peruta*, 824 F.3d at 929, we start with the English  
11 history. This history stretches back to at least 1328, when England enacted the  
12 Statute of Northampton, providing that “no Man great nor small” shall “go nor ride  
13 armed by night nor by day, in Fairs, Markets, nor in the presence of the Justices or  
14 other Ministers, nor in no part elsewhere.” 2 Edw. 3, 258, ch. 3 (1328) After this  
15 statute was enacted, King Edward III and his successors directed sheriffs and bailiffs  
16 to arrest “all those whom [they] shall find going armed.” Charles, *The Faces of the*  
17 *Second Amendment Outside the Home*, 60 Clev. St. L. Rev. 1, 13–25 (2012).

18 Over the ensuing decades, England repeatedly reenacted the Statute of  
19 Northampton’s public-carry restriction. See, e.g., 7 Ric. 2, 35, ch. 13 (1383); 20 Ric.  
20 2, 93, ch. 1 (1396). Because this restriction carried misdemeanor penalties, violators  
21 were usually required to forfeit their weapons and pay a fine. *Id.* A separate law  
22

1 went further, outlawing “rid[ing] armed covertly or secretly with Men of Arms  
2 against any other.” 25 Edw. 3, 320, ch. 2, § 13 (1351). This law had heavier  
3 penalties, *id.*, because it regulated threatening behavior rather than simply carrying  
4 weapons in public, the conduct prohibited by the Statute of Northampton.

5 ***In the 17th and 18th centuries, English authorities interpret the***  
6 ***Statute of Northampton to restrict public carry in populated areas.*** The  
7 general understanding of Northampton as broadly prohibiting public carry in  
8 populated places continued into the 17th and 18th centuries. See Charles, The  
9 Statute of Northampton by the Late Eighteenth Century, 41 Fordham Urb. L.J.  
10 1695 (2012). In 1644, for example, Lord Coke—“widely recognized by the  
11 American colonists as the greatest authority of his time on the laws of England,”  
12 *Payton v. New York*, 445 U.S. 573, 593-94 (1980)—described the Statute of  
13 Northampton as making it unlawful “to goe nor ride armed by night nor by day . . .  
14 in any place whatsoever.” Coke, *The Third Part of the Institutes of the Laws of*  
15 *England* 160 (1817 reprint).

16 One century later, Blackstone—“the preeminent authority on English law for  
17 the founding generation,” *Heller*, 554 U.S. at 593-94—described the statute  
18 similarly: “The offence of riding or going armed with dangerous or unusual  
19 weapons is a crime against the public peace, by terrifying the good people of the  
20 land; and is particularly prohibited by the statute of Northampton.” 4 Blackstone,  
21 *Commentaries on the Laws of England* 148-49 (1769). In other words, because carrying a

1 dangerous weapon (such as a firearm) in populated public places naturally terrified  
2 the people (particularly if done openly), it was a crime against the peace—even if  
3 unaccompanied by a threat, violence, or any additional breach of the peace. *See*  
4 *Chune v. Piott*, 80 Eng. Rep. 1161, 1162 (K.B. 1615) (“Without all question, the  
5 sheriffe hath power to commit . . . if contrary to the Statute of Northampton, he sees  
6 any one to carry weapons in the high-way, in terrorem populi Regis; he ought to  
7 take him, and arrest him, notwithstanding he doth not break the peace.”).

8 To carry out the Statute of Northampton’s prohibition, British constables,  
9 magistrates, and justices of the peace were instructed to “Arrest all such persons as  
10 they shall find to carry Daggers or Pistols” publicly. Keble, *An Assistance to the Justices*  
11 *of the Peace, for the Easier Performance of Their Duty* 224 (1683). This mandate was  
12 unmistakably broad: “[I]f any person whatsoever . . . shall be so bold as to go or  
13 ride Armed, by night or by day . . . then any Constable . . . may take such Armor  
14 from him for the Kings use, and may also commit him to the Gaol.” *Id.*

15 Heeding this instruction, one court issued an arrest warrant for a man who  
16 committed “outrageous misdemeanours” by going “armed” with “pistolls[] and  
17 other offensive weapons.” *Rex v. Harwood*, Quarter Sessions at Malton (Oct. 4-5,  
18 1608), reprinted in North Riding Record Society, *Quarter Sessions Records* 132 (1884).  
19 Another sentenced a man to prison because he “went armed under his garments,”  
20 even though he had not threatened anyone and had done so only to “safeguard . . .  
21 his life” after another man had “menaced him.” Coke, *Institutes* 161. And a jury

1 convicted a man “for going Armed with a Cutlass Contrary to the Statute,” for  
2 which he was sentenced to two years in prison plus fines. *Middlesex Sessions: Justices’*  
3 *Working Documents* (1751), available at <https://goo.gl/x7eX1g>.

4 The law’s narrow exceptions confirm this general public-carry prohibition. In  
5 addition to its focus on populated public places, the Statute of Northampton was  
6 understood to contain limited exceptions. One important exception was that the  
7 prohibition did not apply inside the home, in keeping with principles of self-defense  
8 law, which imposed a broad duty to retreat while in public but not in one’s home. 4  
9 Blackstone, *Commentaries* 185. As Lord Coke noted, using force at home “is by  
10 construction excepted out of this act[,] . . . for a man’s house is his castle.” *Institutes*  
11 162. But one “cannot assemble force”—including by carrying firearms—“to go with  
12 him to Church, or market, or any other place,” even if he is “extremely  
13 threatened.” *Id.*<sup>2</sup> William Hawkins likewise explained that “a man cannot excuse the  
14 wearing [of] such armour in public, by alleging that such a one threatened him, and  
15 he wears it for [his] safety,” but he may assemble force “in his own House, against  
16 those who threaten to do him any Violence therein, because a Man’s House is as his

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20 <sup>2</sup> See also 1 Hale, *History of the Pleas of the Crown* 547 (1800) (noting that armed  
21 self-defense was permitted at home, but not during “travel, or a journey”); *Semayne’s*  
22 *Case*, 77 Eng. Rep. 194, 195 (K.B. 1603) (“[E]very one may assemble his friends and  
neighbors to defend his house against violence: but he cannot assemble them to go  
with him to the market, or elsewhere for his safeguard against violence.”).

1 Castle.” 1 Hawkins, *A Treatise of the Pleas of the Crown* 489, 516 (1721) (1824 reprint);  
2 1 Russell, *A Treatise on Crimes & Misdemeanors* 589 (1826).<sup>3</sup>

3 There were two other important exceptions to the public-carry prohibition: a  
4 narrow (unwritten) exception permitting high-ranking nobles to wear fashionable  
5 swords and walk in public with armed servants, and a narrow (written) exception for  
6 the King’s officers. See Hawkins, *Treatise of the Pleas of the Crown* 489, 798 (explaining  
7 that noblemen could wear “weapons of fashion, as swords, &c., or privy coats of  
8 mail,” or “hav[e] their usual number of attendants with them for their ornament or  
9 defence,” for that would not “terrify the people”).<sup>4</sup>

10 Putting these exceptions together, “no one” could “carry arms, by day or by  
11 night, except the vadlets of the great lord of the land, carrying the swords of their  
12 masters in their presence, and the serjeants-at-arms [of the royal family],” as well as  
13 those responsible for “saving and maintaining the peace.” Carpenter & Whittington,  
14 *Liber Albus: The White Book of the City of London* 335 (1419).

15 ***The Statute of Northampton’s public-carry restriction remains***  
16 ***fully in effect following the English Bill of Rights of 1689.*** In the late 17th

17 <sup>3</sup> A contrary rule—permitting armed self-defense in public—would have  
18 suggested that “the King were not able or willing to protect his subjects.” *Sir John Knight’s Case*, 87 Eng. Rep. 75, 76 (K.B. 1686). Hence, the castle doctrine was confined to the home. Tucker, *Blackstone’s Commentaries* 225 (1803).

19 <sup>4</sup> See also Russell, *Treatise on Crimes & Misdemeanors* 588-89 (same); Charles,  
20 *Faces*, 60 Clev. St. L. Rev. at 26 n.123 (citing historical distinction between “go[ing]  
21 or rid[ing] armed” and nobleman “wear[ing] common Armour”); *Rex v. Sir John Knight*,  
22 90 Eng. Rep. 330 (K.B. 1686) (noting a “general connivance” for “gentlemen” to carry arms in this way, but declining to dismiss indictment for “walk[ing] about the streets armed with guns” against a defendant who was later acquitted); *Sir John Knight’s Case*, 87 Eng. Rep. at 76 (acquittal).

1 century, William and Mary enshrined the right to have arms in the Declaration of  
2 Rights, later codified in the English Bill of Rights in 1689. This right—which “has  
3 long been understood to be the predecessor to our Second Amendment,” *Heller*, 554  
4 U.S. at 593—ensured that subjects “may have arms for their defence suitable to  
5 their conditions, and as allowed by law.” 1 W. & M. st. 2. ch. 2. As Blackstone later  
6 wrote, this right was considered “a public allowance, under due restrictions[,] of the  
7 natural right of resistance and self-preservation, when the sanctions of society and  
8 laws are found insufficient to restrain the violence of oppression.” 1 Blackstone,  
9 *Commentaries* 144. One such “due restriction” was the Statute of Northampton,  
10 which remained in effect after the right to bear arms was codified in 1689. *See* 4  
11 Blackstone, *Commentaries* 148–49; Gardiner, *The Compleat Constable* 18 (1692);  
12 *Middlesex Sessions* (reporting conviction under law in 1751).

## 13 **2. Founding-Era American History**

14 ***The colonies begin adopting England’s tradition of public-carry***  
15 ***regulation.*** Around the time that the English Bill of Rights was adopted, America  
16 began its own public-carry regulation. The first step was a 1686 New Jersey law that  
17 sought to prevent the “great fear and quarrels” induced by “several persons wearing  
18 swords, daggers, pistols,” and “other unusual or unlawful weapons.” 1686 N.J. Laws  
19 289, 289–90, ch. 9. To combat this “great abuse,” the law provided that no person  
20 “shall presume privately to wear any pocket pistol” or “other unusual or unlawful  
21 weapons,” and “no planter shall ride or go armed with sword, pistol, or dagger,”

1 except for “strangers[] travelling” through. *Id.* This was only the start of a long  
2 history of regulation “limiting gun use for public safety reasons”—especially public  
3 carry in populated areas. Meltzer, *Open Carry for All*, 123 Yale L.J. 1486, 1523  
4 (2014). As against this history, “there are no examples from the Founding era of  
5 anyone espousing the concept of a general right to carry.” *Id.*

6 ***Many states enact laws mirroring the Statute of Northampton both***  
7 ***before and after the Constitution’s adoption.*** Eight years after New Jersey’s  
8 law, Massachusetts enacted its own version of the Statute of Northampton,  
9 authorizing justices of the peace to arrest anyone who “shall ride or go armed  
10 Offensively before any of Their Majesties Justices, or other [of] Their Officers or  
11 Ministers doing their Office, or elsewhere.” 1694 Mass. Laws 12, no. 6.

12 By using the word “offensively,” Massachusetts ensured that this prohibition  
13 applied only to “offensive weapons,” as it had in England—not *all* arms. Constable  
14 oaths of the 18th century described this law with similar language. *See* Charles, *Faces*,  
15 60 Clev. St. L. Rev. at 34 n.178. One treatise, for example, explained that “[a]  
16 person going or riding with offensive Arms may be arrested.” Bond, *A Compleat Guide*  
17 *for Justices of the Peace* 181 (1707). Thus, under the law, a person could publicly carry  
18 a hatchet or horsewhip, but not a pistol. *See* Hawkins, *Treatise of the Pleas of the Crown*  
19 665 (explaining that hatchets and horsewhips were not “offensive weapons,” while  
20  
21  
22

1 “guns, pistols, daggers, and instruments of war” were); *King v. Hutchinson*, 168 Eng.  
2 Rep. 273, 274 (1784) (explaining that firearms are offensive weapons).<sup>5</sup>

3 One century later, Massachusetts reenacted its law, this time as a state. 1795  
4 Mass. Laws 436, ch. 2. Because the prohibition had been on the books for so long, it  
5 was “well known to be an offence against law to ride or go with . . . firelocks, or  
6 other dangerous weapons,” as one newspaper later reported, so it “[could not] be  
7 doubted that the vigilant police officers” would arrest violators. Charles, *Faces*, 60  
8 Clev. St. L. Rev. at 33 n.176 (quoting *The Salem Gazette*, June 2, 1818, at 4).

9 Following Massachusetts’ lead, additional states enacted similar laws,  
10 including founding-era statutes in Virginia and North Carolina, a New Hampshire  
11 law passed five years after Massachusetts’ first enactment, and later enactments in  
12 states ranging from Maine to Tennessee. *See* 1699 N.H. Laws 1; 1786 Va. Laws 33,  
13 ch. 21; 1792 N.C. Laws 60, 61, ch. 3; 1801 Tenn. Laws 710, § 6; 1821 Me. Laws  
14 285, ch. 76, § 1; 1852 Del. Laws 330, 333, ch. 97, § 13. And still other states  
15 incorporated the Statute of Northampton through their common law.<sup>6</sup>

16 \_\_\_\_\_  
17 <sup>5</sup> American treatises said the same. *See* Bishop, *Commentaries on the Law of Statutory Crimes* 214 (1873); Russell, *Treatise on Crimes & Misdemeanors* 124.

18 <sup>6</sup> *See* A Bill for the Office of Coroner and Constable (Mar. 1, 1682), reprinted  
19 in *Grants, Concessions & Original Constitutions* 251 (N.J. constable oath) (“I will  
20 endeavour to arrest all such persons, as in my presence, shall ride or go arm’d  
21 offensively.”); Niles, *The Connecticut Civil Officer* 154 (1833) (noting crime of “go[ing]  
22 armed offensively,” even without threatening conduct); Dunlap, *The New York Justice*  
8 (1815); *Vermont Telegraph*, Feb. 7, 1838 (observing that “[t]he laws of New  
England” provided a self-defense right “to individuals, but forb[ade] their going armed  
for the purpose”). Northampton also applied in Maryland. Md. Const. of 1776, art.  
III, § 1.

1 To ensure that these laws were enforced, the constables, magistrates, and  
2 justices of the peace in these jurisdictions were required to “arrest all such persons as  
3 in your sight shall ride or go armed.” Haywood, *A Manual of the Laws of North-Carolina*  
4 pt. 2 at 40 (1814) (N.C. constable oath). That was because, as constables were  
5 informed, “riding or going armed with dangerous or unusual weapons, is a crime  
6 against the public peace, by terrifying the good people of the land, and is prohibited  
7 by statute.” Haywood, *The Duty and Office of Justices of the Peace, and of Sheriffs,*  
8 *Coronoers, Constables* 10 (1800); see also Haywood, *The Duty & Authority of Justices of the*  
9 *Peace, in the State of Tennessee* 176 (1810).

10 As with the English statute, prosecution under these laws did not require a  
11 “threat[] [to] any person in particular” or “any particular act of violence.” Ewing, *A*  
12 *Treatise on the Office & Duty of a Justice of the Peace* 546 (1805) ; see also Bishop,  
13 *Commentaries on the Law of Statutory Crimes* (noting that there was no requirement that  
14 “peace must actually be broken, to lay the foundation for a criminal proceeding”).  
15 Nor did these laws have a self-defense exception: No one could “excuse the wearing  
16 [of] such armor in public, by alleging that such a one threatened him.” Wharton, *A*  
17 *Treatise on the Criminal Law of the United States* 527–28 (1846).

### 18 **3. Early-19th-Century American History**

19 *Many states enact a variant of the Statute of Northampton,*  
20 *allowing public carry with “reasonable cause to fear an assault.”* In  
21 1836, Massachusetts amended its public-carry prohibition to provide a narrow

1 exception for those having “reasonable cause to fear an assault or other injury, or  
2 violence to his person, or to his family or property.” 1836 Mass. Laws 748, 750, ch.  
3 134, § 16. Absent such “reasonable cause,” no person could “go armed with a dirk,  
4 dagger, sword, pistol, or other offensive and dangerous weapon.” *Id.* Those who did  
5 so could be punished by being made to pay sureties for violating the statute, *id.*; if  
6 they did not do so, they could be imprisoned. *See id.* at 749.<sup>7</sup>

7 Although the legislature chose to trigger these penalties using a citizen-  
8 complaint mechanism (allowing “any person having reasonable cause to fear an  
9 injury, or breach of the peace” to file a complaint, *id.* at 750, § 16), the law was  
10 understood to restrict carrying a firearm in public without good cause. This was so  
11 even when the firearm was not used in any threatening or violent manner: The  
12 legislature placed the restriction in a section entitled “Persons who go armed may be  
13 required to find sureties for the peace,” and expressly cited the state’s previous  
14 enactment of the Statute of Northampton. *Id.* And elsewhere in the same statute the  
15 legislature separately punished “any person [who] threatened to commit an offence  
16 against the person or property of another.” *Id.* at 749, § 2. Thus, as one judge  
17 explained in a grand jury charge appearing in the contemporary press in 1837,  
18 there was little doubt at the time that “no person may go armed with a dirk, dagger,  
19 sword, pistol, or other offensive and dangerous weapon, without reasonable cause to

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20 <sup>7</sup> Sureties were a form of criminal punishment, like a bond. *See Punishments,*  
21 *The Proceedings of the Old Bailey, London’s Central Criminal Court, 1674 to*  
22 *1913*, <http://bit.ly/1ED5tC2>; 34 Edw. 3, 364, ch. 1 (1360). They continue to exist  
as a form of criminal punishment in some states. *See Mass. Gen. Laws ch. 275, § 4.*

1 apprehend an assault or violence to his person, family, or property.” Cornell, *The*  
2 *Right to Carry Firearms Outside of the Home*, 39 Fordham Urb. L.J. 1695, 1720 & n.134  
3 (2012); see Hammond, *A Practical Treatise; Or an Abridgement of the Law Appertaining to the*  
4 *Office of Justice of the Peace* 184–86 (1841).

5 Within a few decades, many states (all but one outside the slaveholding  
6 South) had adopted nearly identical laws.<sup>8</sup> Most copied the Massachusetts law  
7 verbatim—enforcing the public-carry prohibition through a citizen-complaint  
8 provision and permitting a narrow self-defense exception. *See, e.g.*, 1851 Minn. Laws  
9 at 527–28, §§ 2, 17, 18 (section entitled “Persons carrying offensive weapons, how  
10 punished”); 1873 Minn. Laws. 1025, § 17 (same after 14th Amendment’s  
11 ratification). At least one state (Virginia) used slightly different language. 1847 Va.  
12 Laws at 129, § 16 (“If any person shall go armed with any offensive or dangerous  
13 weapon, without reasonable cause to fear an assault or other injury, or violence to  
14 his person, or to his family or property, he may be required to find sureties for  
15 keeping the peace.”). Semantic differences aside, these laws were understood to do  
16 the same thing: broadly restrict public carry, while establishing a limited exception  
17 for those with a particular need for self-defense.

18 ***Taking a different approach, many southern states elect to permit***  
19 ***public carry, while regulating the manner of carry.*** In contrast to the

20 <sup>8</sup> *See, e.g.*, 1838 Wisc. Laws 381, § 16; 1841 Me. Laws 709, ch. 169, § 16; 1846  
21 Mich. Laws 690, 692, ch. 162, § 16; 1847 Va. Laws 127, 129, ch. 14, § 16; 1851  
22 Minn. Laws 526, 528, ch. 112, § 18; 1853 Or. Laws 218, 220, ch. 16, § 17; 1861 Pa.  
Laws 248, 250, § 6.

1 Northampton model and its good-cause variant, many—but not all—states in the  
2 slaveholding South were more permissive of public carry. They generally allowed  
3 white citizens to carry firearms in public so long as the weapons were not concealed.  
4 *See, e.g.*, 1854 Ala. Laws 588, § 3272; 1861 Ga. Laws 859, § 4413; *see generally*  
5 Cramer, *Concealed Weapon Laws of the Early Republic* (1999). It is this alternative (and  
6 minority) tradition on which the plaintiffs rely. *See* ECF No. 48-1, at 15.

7 This tradition owes itself to the South’s peculiar history and the prominent  
8 institution of slavery. *See generally* Ruben & Cornell, *Firearm Regionalism and Public*  
9 *Carry: Placing Southern Antebellum Case Law in Context*, 125 Yale L.J. Forum 121 (Sept.  
10 25, 2015), <https://goo.gl/3pUZHB>. It reflects “a time, place, and culture where  
11 slavery, honor, violence, and the public carrying of weapons were intertwined.” *Id.*  
12 at 125. Frederick Law Olmsted, for example, “attributed the need to keep slaves in  
13 submission as the reason that ‘every white stripling in the South may carry a dirk-  
14 knife in his pocket, and play with a revolver before he has learned to swim.’”  
15 Cramer, *Concealed Weapon Laws* 21 (quoting Olmsted, *A Journey in the Back Country* 447  
16 (1860)); *cf. McDonald v. City of Chicago*, 561 U.S. 742, 844 (2010) (Thomas, J.,  
17 concurring) (“[I]t is difficult to overstate the extent to which fear of a slave uprising  
18 gripped slaveholders and dictated the acts of Southern legislatures.”). And historians  
19 agree that “the South was substantially more violent than the North.” Cramer,  
20 *Concealed Weapon Laws* 18. One southern social scientist, who was “the first person to  
21 explore the issue of Southern violence in depth,” undertook an exhaustive study of

1 homicide rates in the 19th century and concluded that the rate in southern states  
2 was 18 times the rate in New England, and was “greater than any country on earth  
3 the population of which is rated as civilized.” Redfield, *Homicide, North and South* vii,  
4 10, 13 (1880) (2000 reprint).

5 Even within the South, however, courts and legislatures took varying stances  
6 toward public carry. Virginia, for instance, “home of many of the Founding  
7 Fathers,” *Edwards v. Aguillard*, 482 U.S. 578, 605 (1987) (Powell, J., concurring),  
8 prohibited public carry (with an exception for good cause) before ratification of the  
9 Fourteenth Amendment, after enacting a Northampton-style prohibition at the  
10 Founding. 1847 Va. Laws at 129, § 16 (making it illegal to “go armed with any  
11 offensive or dangerous weapon, without reasonable cause to fear an assault or other  
12 injury, or violence to his person, or to his family or property”); 1786 Va. Laws 33,  
13 ch. 21. South Carolina enacted a Northampton-style law during Reconstruction.  
14 1870 S.C. Laws 403, no. 288, § 4. Around the same time, Texas prohibited public  
15 carry with an exception for good cause—a prohibition enforced with possible jail  
16 time, and accompanied by narrow exceptions that confirmed the law’s breadth.  
17 1871 Tex. Laws 1322, art. 6512 (prohibiting public carry absent an “immediate and  
18 pressing” self-defense need, while exempting one’s “own premises” and “place of  
19 business, and travelers “carrying arms with their baggage”). And West Virginia,  
20 added to the Union during the Civil War, similarly allowed public carry only upon  
21 a showing of good cause. 1870 W. Va. Laws 702, 703, ch. 153, § 8.

1 Southern case law, too, reveals a lack of uniformity. Although a few pre-Civil-  
2 War decisions interpreted state constitutions in a way that can be read to support a  
3 right to carry openly, even in populated public places without good cause, several  
4 post-War cases held the opposite. The Texas Supreme Court, for instance, twice  
5 upheld that state’s good-cause requirement. *English v. State*, 35 Tex. 473 (1871); *State*  
6 *v. Duke*, 42 Tex. 455 (1874). The court remarked that the law—which prohibited  
7 carrying “any pistol” in public without good cause, 1871 Tex. Laws 1322, art.  
8 6512—“is nothing more than a legitimate and highly proper regulation” that  
9 “undertakes to regulate the place where, and the circumstances under which, a  
10 pistol may be carried; and in doing so, it appears to have respected the right to carry  
11 a pistol openly when needed for self-defense or in the public service, and the right to  
12 have one at the home or place of business,” *Duke*, 42 Tex. at 459. The court  
13 explained that the law thus made “all necessary exceptions,” and noted that it  
14 would be “little short of ridiculous” for a citizen to “claim the right to carry” a pistol  
15 in “place[s] where ladies and gentlemen are congregated together.” *English*, 35 Tex.  
16 at 477–79. Further, the court observed, the good-cause requirement was “not  
17 peculiar to our own state,” for nearly “every one of the states of this Union ha[d] a  
18 similar law upon their statute books,” and many had laws that were “more rigorous  
19 than the act under consideration.” *Id.* at 479.

20 When the U.S. Supreme Court considered Texas’s law in 1894, it took a  
21 similar view. After noting that the law “forbid[s] the carrying of weapons” absent  
22

1 good cause and “authoriz[es] the arrest without warrant of any person violating  
2 [it],” the Court determined that a person arrested under the law is not “denied the  
3 benefit” of the right to bear arms. *Miller v. Texas*, 153 U.S. 535, 538 (1894). Other  
4 courts upheld similar good-cause laws against constitutional attacks. *See, e.g., State v.*  
5 *Workman*, 35 W. Va. 367, 367 (1891) (upholding West Virginia’s good-cause  
6 requirement after previously interpreting it, in *State v. Barnett*, 34 W. Va. 74 (1890),  
7 to require specific, credible evidence of an actual threat of violence, not an “idle  
8 threat”). And even when a law wasn’t directly challenged as unconstitutional, like in  
9 Virginia, courts “administered the law, and consequently, by implication at least,  
10 affirmed its constitutionality.” *Id.* (referring to Virginia and West Virginia courts).

11 By contrast, the challengers have identified no historical case (Southern or  
12 otherwise) striking down a good-cause requirement as unconstitutional, let alone a  
13 law applying primarily to urban areas.<sup>9</sup> To be sure, a couple of cases, in the course  
14 of upholding concealed-carry prohibitions, expressed the view that the right to bear

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15 <sup>9</sup> Even *Andrews v. State*, 50 Tenn. 165 (1871), invoked by the challengers (at  
16 15), does not go so far. There, the court invalidated what “in effect [was] an  
17 absolute prohibition” on carrying a weapon “for any and all purposes,” whether  
18 “publicly or privately, without regard to time or place, or circumstances.” *Id.* at 187.  
19 “Under this statute,” the court explained, “if a man should carry such a weapon  
20 about his own home, or on his own premises, or should take it from his home to a  
21 gunsmith to be repaired, or return with it, should take it from his room into the  
22 street to shoot a rabid dog that threatened his child, he would be subjected to the  
severe penalties of fine and imprisonment prescribed in the statute.” *Id.* In striking  
down that prohibition, the court did not cast doubt on the constitutionality of a law  
like California’s, which does not prohibit carrying a firearm in all places, but  
requires only a showing of good cause to carry a firearm *publicly*, in populated areas.  
If anything, the court did the opposite: It reaffirmed that the legislature may  
“regulate the carrying of this weapon publicly.” *Id.* at 187–88. And although the  
court suggested that, under Tennessee law, the right to bear arms might protect  
public carry “where it was clearly shown that [the arms] were worn *bona fide* to ward  
off or meet imminent and threatened danger to life or limb, or great bodily harm,”  
*id.* at 192, California’s good-cause requirement allows for just that.

1 arms protects the right, under some circumstances, to openly carry a weapon in  
2 public. *See Nunn v. State*, 1 Ga. 243 (1846) (striking down the open-carry portion of a  
3 statewide prohibition on openly carrying weapons based on the erroneous view that  
4 the Second Amendment applied to the states before 1868). But even within the  
5 South, open carry was rare: The Louisiana Supreme Court, for example, referred to  
6 “the extremely unusual case of the carrying of such weapon in full open view.” *State*  
7 *v. Smith*, 11 La. Ann. 633, 634 (1856). And California’s law, of course, does not go  
8 nearly as far as the one struck down in *Nunn*, which prohibited *any* form of public  
9 carry, and banned most handguns. At any rate, isolated snippets from a few state-  
10 court decisions issued decades after the Framing cannot trump the considered  
11 judgments of countless courts and legislatures throughout our nation’s history.

#### 12 **4. Mid-to-Late-19th-Century American History**

13 ***States continue to restrict public carry both before and after the***  
14 ***14th Amendment’s ratification.*** As America entered the second half of the  
15 19th century, additional jurisdictions began enacting laws broadly restricting public  
16 carry, often subject to limited self-defense exceptions. Before the Civil War, New  
17 Mexico passed *An Act Prohibiting The Carrying Of Weapons, Concealed Or Otherwise*,  
18 making it unlawful for “any person [to] carry about his person, either concealed or  
19 otherwise, any deadly weapon,” and requiring repeat offenders to serve a jail term  
20 “of not less than three months.” 1859 N.M. Laws 94, § 2.

1 After the Civil War, several other states enacted similar laws notwithstanding  
2 the recent passage of the 14th Amendment. West Virginia and Texas enacted laws  
3 that broadly prohibited public carry without good cause. West Virginia’s law made  
4 clear that “[i]f any person go armed with a deadly or dangerous weapon, without  
5 reasonable cause to fear violence to his person, family, or property, he may be  
6 required to give a recognizance.” 1870 W. Va. Laws 702, 703, ch. 153, § 8.<sup>10</sup> Courts  
7 construed this self-defense exception narrowly to require specific evidence of a  
8 concrete, serious threat. *See, e.g., Barnett*, 34 W. Va. 74. Texas’s law contained a  
9 similarly circumscribed exception, barring anyone not acting in “lawful defense of  
10 the state” (“as a militiaman” or “policeman”) from “carrying on or about his person  
11 ... any pistol” without “reasonable grounds for fearing an unlawful attack on his  
12 person” that was “immediate and pressing.” 1871 Tex. Laws 1322, art. 6512.

13 And then there are the early-20th-century laws, also deemed “longstanding”  
14 under *Heller*. To mention just a few: In 1909, Alabama made it a crime for anyone  
15 “to carry a pistol about his person on premises not his own or under his control,”  
16 but allowed a defendant to “give evidence that at the time of carrying the pistol he  
17 had good reason to apprehend an attack.” 1909 Ala. Laws 258, no. 215, §§ 2, 4. In  
18 1913, New York prohibited all public carry without a permit, which required a

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19 <sup>10</sup> A later version reaffirmed the law’s breadth by clarifying that it didn’t  
20 “prevent any person from keeping or carrying about his dwelling house or premises,  
21 any such revolver or other pistol, or from carrying the same from the place of  
22 purchase to his dwelling house, or from his dwelling house to any place where  
repairing is done, to have it repaired and back again.” 1891 W. Va. Laws 915, 915-  
16, ch. 148, § 7. Violators could be fined or jailed. *Id.*

1 showing of “proper cause,” and Hawaii barred public carry without “good cause.”  
2 1913 N.Y. Laws 1627; 1913 Haw. Laws 25, act 22, § 1. A decade later, in 1923, the  
3 U.S. Revolver Association published a model law, which several states adopted,  
4 requiring a person to demonstrate a “good reason to fear an injury to his person or  
5 property” before obtaining a concealed-carry permit.<sup>11</sup> West Virginia and  
6 Massachusetts also enacted public-carry laws around this time, prohibiting all carry  
7 absent good cause. *See* 1927 Mass. Laws 413; 1925 W. Va. Laws 25. And other  
8 states went further, prohibiting all public carry with no exception for good cause.<sup>12</sup>

9 ***Beginning immediately after the 14th Amendment’s ratification,***  
10 ***many legislatures enact laws banning public carry in populated areas.***

11 Starting with New Mexico in 1869, many legislatures enacted Northampton-style  
12 prohibitions on public carry in cities and other populated areas. New Mexico made  
13 it “unlawful for any person to carry deadly weapons, either concealed or otherwise,  
14 on or about their persons within any of the settlements of this Territory,” while  
15 providing a narrow self-defense exception. 1869 N.M. Laws 312, *Deadly Weapons Act*  
16 *of 1869*, § 1. Violators could serve up to 50 days in jail. *Id.* § 3. Wyoming prohibited  
17 carrying firearms “concealed or openly” “within the limits of any city, town or

18 <sup>11</sup> *See* 1923 Cal. Laws 701, ch. 339; 1923 Conn. Laws 3707, ch. 252; 1923  
19 N.D. Laws 379, ch. 266; 1923 N.H. Laws 138, ch. 118; 1925 Mich. Laws 473, no.  
313; 1925 N.J. Laws 185, ch. 64; 1925 Ind. Laws 495, ch. 207; 1925 Or. Laws 468,  
ch. 260.

20 <sup>12</sup> *See* 1890 Okla. Laws 495, art. 47, §§ 2, 5 (making it a crime for anyone “to  
21 carry upon or about his person any pistol, revolver,” or “other offensive” weapon,  
except for carrying “shot-guns or rifles for the purpose of hunting, having them  
repaired, or for killing animals,” or to use in “military drills, or while travelling or  
removing from one place to another”); 1903 Okla. Laws 643, ch. 25, art. 45, § 584.

1 village.” 1875 Wyo. Laws 352, ch. 52, § 1. Idaho made it unlawful “to carry, exhibit  
2 or flourish any ... pistol, gun or other-deadly weapons, within the limits or confines  
3 of any city, town or village or in any public assembly.” 1889 Idaho Laws 23, § 1.  
4 Arizona banned “any person within any settlement, town, village or city within this  
5 Territory” from “carry[ing] on or about his person, saddle, or in his saddlebags, any  
6 pistol.” 1889 Ariz. Laws 16, ch. 13, § 1. And, at the turn of the century, Texas and  
7 Michigan granted cities the power to “prohibit and restrain the carrying of pistols.”  
8 1909 Tex. Laws 105; *see* 1901 Mich. Laws 687, § 8.

9 By this time, many cities had imposed such public-carry bans for decades.<sup>13</sup>  
10 “A visitor arriving in Wichita, Kansas, in 1873,” for example, “would have seen  
11 signs declaring, ‘LEAVE YOUR REVOLVERS AT POLICE HEADQUARTERS, AND GET A  
12 CHECK.’” Winkler, *Gunfight* 165 (2011). Dodge City was no different. A sign read:  
13 “THE CARRYING OF FIREARMS STRICTLY PROHIBITED.” *Id.* Even in Tombstone,  
14 Arizona, people “could not lawfully bring their firearms past city limits. In fact, the  
15 famed shootout at Tombstone’s O.K. Corral was sparked in part by Wyatt Earp  
16 pistol-whipping Tom McLaury for violating Tombstone’s gun control laws.”  
17 Blocher, *Firearm Localism*, 123 *Yale L.J.* 82, 84 (2013).

18 <sup>13</sup> *See, e.g.*, Washington, D.C., Ordinance ch. 5 (1857); Nebraska City, Neb.,  
19 Ordinance no. 7 (1872); Nashville, Tenn., Ordinance ch. 108 (1873); Los Angeles,  
20 Cal., Ordinance nos. 35-36 (1878); Salina, Kan., Ordinance no. 268 (1879); La  
21 Crosse, Wis., Ordinance no. 14, § 15 (1880); Syracuse, N.Y., Ordinances ch. 27  
(1885); Dallas, Tex., Ordinance (1887); New Haven, Conn., Ordinances § 192  
(1890); Checotah, Okla., Ordinance no. 11 (1890); Rawlins, Wyo., Ordinances art.  
22 7 (1893); Wichita, Kan., Ordinance no. 1641 (1899); San Antonio, Tex., Ordinance  
ch. 10 (1899); *When and Where May a Man Go Armed*, S.F. Bulletin, Oct. 26, 1866, at 5  
 (“[San Francisco] ordains that no person can carry deadly weapons”).

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In sum, a long tradition of American law makes clear that prohibitions on public carry—with or without a good-cause exception—were historically understood to be outside the scope of the Second Amendment. No historical evidence supports the contrary position that public carry was widely permitted in populous cities.

California’s law—requiring good cause before a person may carry a firearm on the crowded streets of Los Angeles and other populated places—fits squarely within our historical tradition, and is therefore constitutional. Were it otherwise, public-carry laws enacted by a majority of states and many cities by the early 20th century would have been unconstitutional. This Court should reject that untenable position, and instead uphold California’s law as a longstanding, constitutional regulation under *Heller*.

**CONCLUSION**

This Court should grant the defendants’ motion for summary judgment.

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Respectfully submitted,  
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