No. 11-16255

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ADAM RICHARDS, et al.,

Plaintiffs-Appellants,

v.

ED PRIETO, et al.,

Defendants-Appellees.

APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF CALIFORNIA
Hon. Morrison C. England, District Judge
Case No. 09-CV-01235

CALIFORNIA RIFLE AND PISTOL ASSOCIATION FOUNDATION *AMICUS* BRIEF IN SUPPORT OF APPELLANTS AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

The California Rifle and Pistol Association Foundation has no parent corporations. It has no stock, thus no publicly held company owns 10% or more of its stock.___

Date: August 31, 2011

Respectfully Submitted,

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IDENTITY OF THE AMICUS CURIAE

The California Rifle and Pistol Association Foundation ("CRPA Foundation") is a 501(c)(3) non-profit entity incorporated under California law, with headquarters in Fullerton, California. Contributions to the CRPA Foundation are used for the direct benefit of Californians. Funds contributed to and granted by CRPA Foundation benefit a wide variety of constituencies throughout California, including gun collectors, hunters, target shooters, law enforcement, and those who choose to own a firearm to defend themselves and their families.

The CRPA Foundation seeks to: raise awareness about unconstitutional laws, defend and expand the legal recognition of the rights protected by the Second Amendment, promote firearms and hunting safety, protect hunting rights, enhance marksmanship skills of those participating in shooting sports, and educate the general public about firearms. The CRPA Foundation supports law enforcement and various charitable, educational, scientific, and other firearms-related public interest activities that support and defend the Second Amendment rights of all law-abiding Americans.

INTEREST OF THE AMICUS CURIAE

The CRPA Foundation has a strong interest in this case because the outcome will directly affect the right of its supporters who reside in Yolo County

to exercise their fundamental right to carry a firearm. The CRPA Foundation has significant expertise in the area of the Second Amendment that will aid the Court in determining the issues before it. Amicus is an Appellant in the pending Ninth Circuit appeal, *Peruta v. County of San Diego*, No.10-56971, challenging aspects of San Diego County's policy for issuing permits to carry firearms.

CONSENT TO FILE

All parties have consented to the filing of this *amicus curiae* brief.

RULE 29(c)(5) STATEMENT

No party's counsel has authored this brief in whole or in part. No person or entity other than amicus, its members, and its counsel has made a monetary contribution to the preparation and submission of this brief.

INTRODUCTION

The CRPA Foundation represents the interests of many individuals who, like Plaintiffs-Appellants ("Plaintiffs"), are legally qualified to possess a firearm and who, but for the policies of Defendant-Appellee County of Yolo ("County"), would carry operable firearms in public for personal protection. County's firearm carry permit policies at issue in this case are unconstitutional because they deny law-abiding Yolo County residents the only lawful means of exercising their right to bear operable handguns for self-defense anywhere in the State, despite the

United States Supreme Court's declaration that armed self-defense is a "central component" of our Second Amendment rights.

Amicus offers for the Court's consideration a detailed historical analysis of the right to keep and bear arms, which conclusively establishes that such broad prohibitions on the carriage of loaded, operable firearms for self-defense are categorically unconstitutional and, at a minimum, fail to satisfy the heightened scrutiny required of regulations that so severely burden the right as to eliminate it altogether.

ARGUMENT

I. The Core Second Amendment Right to Carry Firearms For Self-Defense Is Not Limited to the Home

The Second Amendment provides that "the right of the people to keep and bear Arms shall not be infringed." As the Supreme Court explained in *Heller*, "[a]t the time of the Founding, as now, to 'bear' meant to 'carry.' " *District of Columbia v. Heller*, 554 U.S. 570, 584 (2008). Consequently, the Second Amendment "guarantee[s] the individual right to . . . carry weapons in case of confrontation." *Id.* at 592. Both *Heller* and the textual and historical mode of analysis it employed refute any argument that this guarantee is limited to the home. Moreover, the Ninth Circuit has already recognized the right to carry arms

extends beyond the home. *See Nordyke v. King*, 644 F.3d 776 (9th Cir. 2011); *United States v. Vongxay*, 594 F.3d 1111 (9th Cir. 2010).

At its core, the Second Amendment protects the right of law-abiding citizens to keep and carry operable firearms for self-defense. *See, e.g., Heller*, 554 U.S. at 584 ("bear arms" means to be "armed and ready for offensive or defensive action in a case of conflict with another person"); *id.* at 599 ("self-defense" is the "*central component* of the right itself") (original emphasis); *id.* at 628 ("the inherent right of self-defense has been central to the Second Amendment right"); *id.* at 630 ("core lawful purpose of self-defense"); *McDonald v. City of Chicago*, __ U.S. __, 130 S. Ct. 3020, 3036 (2010) ("[*Heller*] concluded that citizens must be permitted to use handguns for the core lawful purpose of self-defense") (brackets and quotation marks omitted). It was this understanding that led the *Heller* Court to invalidate the District of Columbia's handgun ban, for "the Court . . . conclude[d] that the Second Amendment secures a pre-existing natural right to keep and bear arms; that the right is personal . . . ; and that the 'central component of the right' is the right of armed self-defense, most notably in the home." *Ezell v. City of Chicago*, __ F.3d __, 2011 WL 2623511, at *11 (7th Cir. July 6, 2011). Thus, while the core right of "armed self-defense" may be "most notable" in the home, the Supreme Court's use of that phrase precludes the district court's reading

of *Heller* as limiting the right to the home.

And, because the need to defend oneself extends to public spaces, the right to do so with arms necessarily does as well. 3 William Blackstone, *Commentaries* *4 ("Self-defense . . . is justly called the primary law of nature, so it is not, neither can it be in fact, taken away by the law of society. In the English law particularly it is held an excuse for breaches of the peace, nay even for homicide itself"); 1 William Hawkins, *A Treatise of the Pleas of the Crown* 72 (1716) (there is "no Reason why a Person, who without Provocation, is assaulted by another *in any Place whatsoever*, in such a Manner as plainly shews an Intent to murder him, . . . may not justify killing such an Assailant") (emphasis added).

This conclusion is obvious from the Second Amendment's plain text. Limiting the right to carry arms to the home would effectively read the term "bear" out of the Constitution, for the Second Amendment also protects the right to "keep" arms – that is, to "have weapons." *Heller*, 554 U.S. at 582; *see also id*. at 615 ("the founding generation 'were for every man bearing his arms about him *and* keeping them in his house, his castle, for his own defense' ") (emphasis added) (*quoting* Cong. Globe, 39th Cong., 1st Sess., 362, 371 (1866), statement of Sen. Davis regarding the Freedmen's Bureau Act). The explicit textual guarantee of the right to "bear" arms would mean little if it did not protect the right to "bear"

arms outside of the home where they are "kept." The most fundamental canons of construction forbid any interpretation that would relegate this language to the status of meaningless surplusage. *See, e.g., Wright v. United States*, 302 U.S. 583, 588 (1938). The Third Amendment confirms the authors of the Bill of Rights could draft a constitutional right limited to the home; they did not write that limited scope into the Second Amendment. *See* U.S. Const. amend. III ("No soldier shall, in time of peace, be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law."); E. Volokh, *The First and Second Amendments*, 109 Colum. L. Rev. Sidebar 97, 100 (2009).

It is essential to keep in mind the Second Amendment did not create a new right – it "codified a *pre-existing*" one. *Heller*, 554 U.S. at 592 (original emphasis). The "right . . . long . . . understood to be the predecessor to our Second Amendment" was the provision in the English Bill of Rights stating that individuals " 'may have arms for their defense suitable to their conditions and as allowed by law.' " *Id*. at 593 (*quoting* 1 W. & M., c. 2, § 7, *in* 3 Eng. Stat. at Large 441 (1689)). By the time our Constitution was written, the right to bear arms "had become fundamental for English subjects" and was "understood to be an individual right protecting against both public and private violence." *Id*. at 593-94. It is equally clear this right extended to carrying arms for protection against

violence in public.

This is apparent from Blackstone's discussion of the right to arms. Blackstone classified the right of British subjects "of having arms for their defence" as among "auxiliary" rights "which serve principally as barriers to protect and maintain inviolate the three great and primary rights, of personal security, personal liberty, and private property." 1 William Blackstone, *Commentaries* *136, *139. The right to arms, Blackstone explained, "is indeed a public allowance . . . of the natural right of resistance and self-preservation; when the sanctions of society and laws are found insufficient to restrain the violence of oppression." 1 William Blackstone, *Commentaries* 139; *id.* at *140 ("the subjects of England are entitled . . . to the right of having and using arms for self-preservation and defence"). Inasmuch as threats to liberty, security, and property know no bounds, a right to arms limited to the home plainly would have been insufficient to meet its high purposes.

Other British sources confirm that the right to carry arms for self-defense was not limited to the home. By the late 17th century, the English courts recognized that it was the practice and privilege of "gentlemen to ride armed for their security." *Rex v. Knight*, 90 Eng. Rep. 330 (1686). In the early 1790's, Edward Christian, a lawyer and professor of the laws of England at the University

of Cambridge, published an edition of Blackstone's *Commentaries* in which he noted that "every one is at liberty to keep or carry a gun." 2 William Blackstone, *Commentaries* *411-12 n.2 (Christian ed., 1794). And in 1820, an English court explained that a "man has a clear right to protect himself [with arms] when he is going singly or in a small party upon the road where he is traveling or going for the ordinary purposes of business." *King v. Dewhurst*, 1 St. Tr. 529, 601-02 (Lancaster Assize 1820).

The right to bear arms was understood by the Framers of our Constitution to have similar scope. In *Heller*, the Court noted a wealth of historical support for the public right to bear arms. "The most prominent examples are those most relevant to the Second Amendment: Nine state constitutional provisions written in the 18th century or the first two decades of the 19th, which enshrined a right of citizens to 'bear arms in defense of themselves and the state' or 'bear arms in defense of himself and the state.' " *Heller*, 554 U.S. at 584-85 & n.8. Just as "it is clear from those formulations that 'bear arms' did not refer only to carrying a weapon in an organized military unit," *id*. at 585, it is likewise clear that "bear arms" did not refer only to toting a weapon from room to room in one's house. Citizens could not effectively bear arms either in defense of themselves or in defense of the state if they were not free to carry their weapons where they were needed for both

purposes.

"Justice James Wilson interpreted the Pennsylvania Constitution's arms-bearing right . . . as a recognition of the natural right of defense 'of one's person or house,' " demonstrating that the right of "bearing arms" in defense of the person was understood to extend beyond the home. *Heller*, 554 U.S. at 585 (*quoting* 2 *Collected Works of James Wilson* 1142 & n.x (K. Hall & M. Hall eds., 2007)). And in defending British soldiers against murder charges in the Boston Massacre, John Adams recognized that "here every private person is authorized to arm himself; and on the strength of this authority I do not deny the inhabitants had a right to arm themselves at that time for their defence." John Adams, First Day's Speech in Defence of the British Soldiers Accused of Murdering Attucks, Gray and Others, in the Boston Riot of 1770, in 6 *Masterpieces of Eloquence* 2569, 2578 (Hazeltine et al. eds., 1905). In other words, even while defending the British soldiers, Adams acknowledged the understanding that the inhabitants of Boston had the right to carry arms publicly for their own defense.

The practices of the Founding generation confirm that the right to carry a firearm was well-established. Judge St. George Tucker observed, "In many parts of the United States, a man no more thinks, of going out of his house on any occasion, without his rifle or musket in his hand, than an European fine gentleman

without his sword by his side." 5 William Blackstone, *Commentaries* App. n.B, at 19 (St. George Tucker ed., 1803).[1] As the Court noted in *Heller*, "[m]any colonial statutes *required* individual arms-bearing for public-safety reasons." 554 U.S. at 601 (emphasis added).[2]

Those who wrote and ratified the 14th Amendment in 1868 understood the right to bear arms in precisely the same way. An 1866 report to Congress from the Freedmen's Bureau stated: "There must be 'no distinction of color' in the right to carry arms, any more than in any other right." Ex. Doc. No. 70, House of Representatives, 39th Cong., 1st Sess., at 297 (1866). A Mississippi court recognized this in 1866 when it struck down a state ban on carrying a firearm

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[1] And the Founders regularly exercised their right. For example, George Washington carried a pistol for self-defense and is said to have drawn one to fend off a "desperado" who threatened to shoot him on his ride from Mt. Vernon to Alexandria shortly after the Revolutionary War. *See* Benjamin Ogle Tayloe, *In Memoriam: Benjamin Ogle Tayloe* 95 (1872), *available at* http://www.archive.org/details/inmemoriambenjam00wats (last visited Aug. 30, 2011). John Adams brought a pistol with him when he sailed to France in 1778. *See* David McCullough, *John Adams* 177 (2001). Thomas Jefferson wrote his nephew, "Let your gun therefore be the constant companion of your walks." *See* Thomas Jefferson, *Writings* 816–17 (letter of August 19, 1785) (Merrill D. Peterson ed., 1984). And Dr. Joseph Warren, a prominent Boston patriot, carried pistols when making his rounds. Richard Frothingham, *Life and Times of Joseph Warren* 452 (Little, Brown, & Co., 1865).

[2] *See, e.g.*, *A Digest of the Laws of the State of Georgia* 157-58 (1800); *see also* Joyce Lee Malcolm, *To Keep and Bear Arms* 139 (1994) (citing several examples of laws that "required colonists to carry weapons").

without a license: "While, therefore, the citizens of the State and other white persons are allowed to carry arms, the freedmen can have no adequate protection against acts of violence unless they are allowed the same privilege." *State v. Wash Lowe*, reprinted in New York Times, Oct. 26, 1866, at 2 (quoted in Stephen P. Halbrook, *Freedmen, the Fourteenth Amendment, and the Right to Bear Arms, 1866-1876*, at 57-58 (1998)). Thus, bearing arms included carrying them for personal self-defense. The Supreme Court embraced this understanding in *McDonald* when it cited, as examples of laws that would be nullified by the 14th Amendment, a statute providing that "no freedman, free negro or mulatto, not in the military service of the United States government, and not licensed so to do by the board of police of his or her county, shall keep *or carry* fire-arms of any kind." 130 S. Ct. at 3038 (emphasis added). *McDonald* likewise condemned "Regulations for Freedman in Louisiana" which stated that no freedman "shall be allowed to carry firearms, or any kind of weapons, within the parish, without the written special permission of his employers, approved and indorsed by the nearest and most convenient chief of patrol." 1 Walter L. Fleming, *Documentary of History of Reconstruction* 279-80 (1906).

The Second Amendment's "prefatory" clause cements the interpretation of the right to carry protected by its operative clause. The prefatory clause

"announces the purpose for which the right was codified: to prevent elimination of the militia." *Heller*, 554 U.S. at 599. Indeed, "it was understood across the political spectrum that the right helped to secure the ideal of a citizen militia, which might be necessary to oppose an oppressive military force if the constitutional order broke down." *Id.* In *Nunn v. State*, the Georgia Supreme Court "perfectly captured the way in which the operative clause of the Second Amendment furthers the purpose announced in the prefatory clause," *Heller*, 554 U.S. at 612-13:

> [T]he right of the whole people, old and young, men, women and boys, and not militia only, to keep and bear arms of every description, and not such merely as are used by the militia, shall not be infringed, curtailed, or broken in upon, in the smallest degree; and all this for the important end to be attained: the rearing up and qualifying a well-regulated militia, so vitally necessary to the security of a free State.

Nunn v. State, 1 Ga. 243, 251 (1846) (emphasis omitted). A right to bear arms limited to the home plainly would be ill-suited to the purpose of "the rearing up and qualifying a well-regulated militia," for if citizens could be prohibited from carrying arms in public they simply could not act as the militia at all.

Of course, "the militia was not the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense

and hunting." *Heller*, 554 U.S. at 599. Hunting, like self-defense from assailants at large, cannot be conducted by those bearing arms only within their homes.

II. Limitations That Have Historically Been Understood as Consistent with the Second Amendment Further Support the Existence of Such Rights Beyond the Home

The potential limits on public firearms carriage mentioned by *Heller* also underscore the impermissible infringement wrought on Second Amendment rights by County's policies.

First, the Court cautioned that its decision should not "be taken to cast doubt on longstanding prohibitions on . . . laws forbidding the carrying of firearms in sensitive places such as schools and government buildings." *Id.* at 626. But it would make no sense for the Court to carve out this narrow limitation if the Second Amendment allowed states to ban the carrying of firearms in all public spaces, not just particularly sensitive ones.

Second, the Court distinguished between laws regulating the manner in which firearms may be borne for self-defense purposes and those prohibiting carriage, implying that the latter are plainly illegitimate.[3] Indeed, the Court

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[3] *Compare 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") (emphasis added), *with id.* at 629 (" 'A statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them

characterized laws broadly prohibiting public handgun carriage as among the "few" that "come close to the severe restriction of the District's handgun ban" the Court struck down. *Id.* Amicus, like Plaintiffs, asserts no constitutional right to carry *concealed* weapons; although Amicus contends that bearing firearms outside the home for purposes of self-defense is at the core of the Second Amendment right identified in *Heller*, the choice of loaded concealed or loaded unconcealed carry is left to California, because either facilitates the right of armed self-defense.

Because *Heller* did not purport to map "the full scope of the Second Amendment," these potential limits on the scope of the Second Amendment for the most part are only that: *potential* limits, subject to revision following the necessary "historical analysis." *Id.* at 626. Unlike County's policy, however, at least these limits arguably find support in history and tradition. As William Hawkins explained in his "widely read Treatise of the Pleas of the Crown," *Atwater v. City of Lago Vista*, 532 U.S. 318, 331 (2001), published in 1716, "no wearing of Arms is within the meaning of this Statute, unless it be accompanied with such Circumstances as are apt to terrify the People." 1 Hawkins, *supra*, *A*

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wholly useless for the purpose of defence, would be clearly unconstitutional.' ") (*quoting State v. Reid*, 1 Ala. 612, 616-17 (1840)).

Treatise of the Pleas of the Crown at 136.[4] While this prohibition on bearing arms to terrify may therefore be understood as an antecedent to the potential exceptions on the right to bear arms mentioned by the Court in *Heller*, it actually militates against the validity of policies like County's that broadly prohibit law-abiding citizens from peaceably carrying operable firearms for any purpose, including most importantly, their own protection.

This understanding was echoed in early America. No person fell within this narrow exception to the right to bear arms "unless such wearing [of a firearm] be accompanied with such circumstances as are apt to terrify the people; consequently the wearing of common weapons, or having the usual number of attendants, merely for ornament or defence, where it is customary to make use of them, will not subject a person to the penalties of this act." William W. Hening, The New Virginia Justice, *in The Commonwealth of Virginia* 49-50 (2d ed. 1810). Thus, although "going armed with dangerous or unusual weapons, is a crime against the public peace, by terrifying the people of the land . . . it should be

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[4] *See* C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 Harv. J. L. & Pub. Pol'y 695, 716 (2009) ("English law in the 1700s depended on just one common-law rule for the regulation of arms: a prohibition against going armed so as to terrify the people."); 4 William Blackstone, *Commentaries* *148-49 ("The offense of riding or going armed, with dangerous or unusual weapons, is a crime against the public peace, by terrifying the good people of the land, and is particularly prohibited by the statute of Northampton, 2 Edw. III. c. 3.").

remembered, that in this country the constitution guaranties to all persons the right to bear arms; then it can only be a crime to exercise this right in such a manner, as to terrify the people unnecessarily." Charles Humphreys, *A Compendium of the Common Law in Force in Kentucky* 482 (1822).[5] Indeed, the Tennessee Supreme Court went so far as to hold that the common-law offense could not be carried over from England due to the State's guarantee of the right to bear arms: "after so solemn an instrument hath said the people may carry arms," the Court explained, it could not "be permitted to impute to the acts thus licensed such a necessarily consequent operation as terror to the people to be incurred thereby." *Simpson v. State*, 13 Tenn. 356, 360 (1833).

Nor do statutes in effect during the founding era support County's restrictive policies. To the contrary, typical regulations of arms-bearing at that time were narrowly framed for specific purposes, such as laws codifying the common-law offense of carrying unusual arms to the terror of the people,[6]

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[5] *See also State v. Huntly*, 25 N.C. (3 Ired.) 418, 422-23 (1843) ("[I]t is to be remembered that the carrying of a gun *per se* constitutes no offence. For any lawful purpose . . . the citizen is at perfect liberty to carry his gun. It is the wicked purpose – and the mischievous result – which essentially constitute the crime.").

[6] *See* An Act Forbidding and Punishing Affrays (Va. 1786), *in A Collection of All Such Acts of the General Assembly of Virginia* 33 (Augustine Davis ed., 1794).

regulating the carrying of guns in certain locations to protect wildlife,[7] and prohibiting slaves from bearing arms.[8] In fact, as *Heller* explained, many jurisdictions "*required* individual arms-bearing for public-safety reasons." 554 U.S. at 601 (emphasis added).

Finally, although such laws were not in place when the Second Amendment was ratified, later in the 19th century some state legislatures started to ban the carrying of *concealed* firearms. The first state high court to consider such a ban struck it down under the state constitution's right-to-arms provision, *see Bliss v. Commonwealth*, 12 Ky. 90 (1822), but by the end of the 19th century, a "majority of the . . . courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues." *Heller*, 554 U.S. at 626. In upholding bans on concealed arms, 19th century courts

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[7] *See, e.g.*, An Act for the Protection and Security of the Sheep and Other Stock on Tarpaulin-Cove-Island, Otherwise Called Naushon-Islands, and on Nennemesset-Island; and Several Small Islands Contiguous, Situated in the County of Dukes'-County, *in Laws of the Commonwealth of Massachusetts* 34 (Mass. 1790) (restricting gun carriage on parts of named islands absent a "special licence" or "sufficient reason" for such carriage).

[8] *See, e.g.*, An Act for the Better Ordering and Governing Negroes and Other Slaves in this Province, and to Prevent the Inveigling or Carrying Away Slaves from Their Masters or Employers (Ga. 1765), *in Acts Passed by the General Assembly of Georgia* 256 (1765) (making it unlawful for "any slave, unless in the presence of some white person, to carry and make use of fire-arms," subject to limited exceptions).

emphasized that such laws "do[] not deprive the citizen of his natural right of self-defence, or of his constitutional right to keep and bear arms," *Nunn v. State*, 1 Ga. 243, 251 (1846), because such laws merely regulate "the manner in which arms shall be borne," *Reid*, 1 Ala. at 616. *See also State v. Chandler*, 5 La. Ann. 489 (1850). The same is not true, of course, of regulations like County's that generally prohibit law-abiding individuals from carrying an operable firearm for self-defense in toto; and 19th century courts were accordingly much less receptive to such laws. *See Nunn*, 1 Ga. at 251 (striking down ban on carrying pistols openly while upholding ban on carrying concealed weapons); *Andrews v. State,* 50 Tenn. 165, 187 (1871) (striking down law prohibiting carrying a pistol in any manner); *Reid*, 1 Ala. at 616-17 ("A statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would be clearly unconstitutional.").

III. The Second Amendment Protects a Right to Bear Functional Firearms for Self-Defense; Unloaded Firearms, by Definition, Are Inoperable

The right to bear arms protects the right to be "*armed and ready* for offensive or defensive action in a case of conflict with another person." *Heller*, 554 U.S. at 584 (citation omitted) (emphasis added). Individuals are not "armed

and ready" for defensive action when carrying an unloaded firearm. This seemingly obvious deduction is supported by the plain meaning of the terms chosen by the Supreme Court in *Heller*, by the Court's own analysis of the right to bear arms, and as a matter of common sense.

The Oxford English Dictionary defines the term "armed" as "equipped with or carry a firearm or firearms." Merriam-Webster defines "armed" as "furnished with weapons . . . using or involving a weapon." And "ready" is defined by Oxford as "in a suitable state for an action or situation; fully prepared . . . made suitable and available for immediate use." Webster defines it as "prepared mentally or physically for some experience or action . . . prepared for immediate use." Make no mistake, to "use" a firearm is to discharge it. An unloaded firearm is not fully prepared, or even prepared at all, for immediate discharge.

In line with the reasoning that a firearm is not ready to be used if it is not in a position to be discharged, the Supreme Court struck down a requirement that firearms in the home be rendered inoperable, as that "makes it impossible for citizens to *use* [firearms] for the core lawful purpose of self-defense." *Heller*, 554 U.S. at 630 (emphasis added). Amicus' contention is not that County's policies prohibit one from lawfully discharging a firearm in self-defense, but that they preclude one from being *ready* to so discharge it.

The *Heller* Court also notably engaged in a seven-page, in-depth analysis of the meaning of the term "bear" when used in conjunction with the term "arms," before reaching its conclusion that these terms "guarantee the individual right to possess and carry weapons in case of confrontation." *Id*. at 592. Nowhere in that extensive analysis did the Court consider bearing *unloaded* arms. To be sure, the notion that the right to bear arms extends only to *unloaded* arms was so foreign that it was not even considered by the Court.

Finally, common sense dictates that the ability to effectively defend one's self with a firearm would permit the law-abiding citizen to carry a firearm in a state suitable for immediate use *before* the individual finds himself in impending grave danger. And the Supreme Court's own choice of wording, i.e., the right to bear arms is to be "armed and *ready for* offensive or defensive action in a case of conflict" supports this line of reasoning. *Id.* at 584 (emphasis added). Criminal attacks, by nature, are generally unpredictable; they come unannounced. Individuals prohibited from converting their firearms into an operable state until a grave threat is immediately upon them are not "ready" for defensive action in a case of conflict with an unannounced, surprise attacker.

The ability to carry an unloaded firearm does not comport with the Second Amendment's guarantee to bear operable arms for self-defense. To find otherwise

ignores the plain meaning of the phrase "armed and ready for" and the parameters of the right so thoroughly examined and described in both *Heller* and *McDonald*.

IV. Framework for Review of County's Policy

Based on the 19th century cases cited in *Heller*, the right to carry arms in public in case of confrontation can be regulated, but not generally banned. For example, the *Heller* Court cited *Nunn*, wherein a concealed carry restriction was allowed to stand only because open carry was unrestricted. *See Heller*, 554 U.S. at 629 (*citing Nunn*, 1 Ga. at 521). More recently, this Court provided guidance in analyzing regulations of Second Amendment rights to determine their constitutionality, finding that "regulations which substantially burden the right to keep and to bear arms trigger heightened scrutiny under the Second Amendment." *Nordyke*, 644 F.3d at 786.

Here, unlike *Nunn*, even *unconcealed* loaded carry is generally prohibited outright. And concealed loaded carry is rarely authorized by County, which denies otherwise qualified applicants who wish to carry for self-defense. County's carriage policy places preconditions on the right to bear arms in public that the vast majority of law-abiding adults cannot meet. As such, County's policy does not just burden the right to carry an operable firearm, it broadly *denies* it.

For evaluations of "broadly prohibitory laws restricting the core Second

Amendment right," the analysis is a simple one, as "[b]oth *Heller* and *McDonald* suggest that" such laws "are categorically unconstitutional." *Ezell*, 2011 WL 2623511, at *13 (*citing Heller*, 554 U.S. at 628-35; *McDonald*, 130 S. Ct. at 3047-48). Here, County's policies broadly prohibit the public carriage of operable firearms. Accordingly, they do not require further analysis beyond the categorical approach outlined in *Heller*, *McDonald*, and *Ezell*. But even if this Court were to find that a policy that prohibits the overwhelming majority of law-abiding individuals from carrying an operable firearm for immediate self-defense does not "broadly prohibit" the exercise of the right, at a minimum, it severely burdens that right and thus triggers heightened scrutiny. *See Nordyke*, 644 F.3d at 786; *see also Ezell*, 2011 WL 2623511, at *17 ("a severe burden on the core Second Amendment right of armed self-defense will require an *extremely strong* public-interest justification and a *close fit* between the government's means and its end") (emphasis added). Either way, it is unconstitutional.

V. County's Policy Widely Prohibiting the Carriage of Operable Firearms for Self-Defense Is Unconstitutional

The foregoing textual and historical analysis demonstrates that County's carriage policy, which effectively prohibits nearly all its law-abiding residents from carrying operable firearms for self-defense, is a "broadly prohibitory

[regulation] restricting the core Second Amendment right" and is thus "categorically unconstitutional" – period. *See Ezell*, 2011 WL 2623511, at *13; *see also Heller*, 554 U.S. at 628-35, *McDonald*, 130 S. Ct. at 3047-48. As such, the Court need not delve into any further examination of County's policy. Regardless, the end result is the same under either a "levels of scrutiny" or "undue burdens" analysis.

County's carriage policies impose a severe burden on the right to carry an operable firearm for self-defense because it effectively denies that right to most law-abiding citizens pursuant to County's unfettered discretion. Accordingly, only "an extremely strong public interest justification and a close fit between the government's means and its end" could sustain it. *Ezell*, 2011 WL 262354, at *17.

This burden is not met here. As an initial matter, when the great majority of states allow for some form of carrying of operable firearms for self-defense,[9] it

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[9] Thirty-five States have statues that require officials to issue licenses to applicants who meet non-discretionary standards. *See* Ark. Code Ann. § 5-73-309(a); Colo. Rev. Stat. Ann. § 18-12-203(1); Fla. Stat. Ann. § 790.06(2); Ga. Code Ann. § 16-11-129; Idaho Code Ann. § 18-3302(1); Ind. Code Ann. § 35-47-2-3(e), Iowa Code Ann. § 724.7; Kansas Stat. Ann. § 75-7c03; Ky. Rev. Stat. Ann. § 237.110(2); La. Rev. Stat. Ann. § 40:1379(A)(1); Me. Rev. Stat. Ann. tit. 25, § 2003; Mich. Comp. Laws Ann. § 28.422(2)(3); Minn. Stat. § 624.714, subdiv. 2(b); Miss. Code Ann. § 45-9-101(2); Mo. Ann. Stat. § 571.090(1); Mont. Code Ann. § 45-8-321(1); Neb. Rev. Stat. § 28-1202; Nev. Rev. Stat. Ann. § 202.3657(2); N.H. Rev. Stat. Ann. § 159.6; N.M. Stat. Ann. § 29-19-4 ; N.C. Gen. Stat. § 14-415.11(b); N.D. Cent. Code § 62.1-04-03; Ohio Rev. Code Ann. §

strains credulity to claim that *licensed* public carriage of operable firearms by law-abiding individuals creates such genuine and serious risks to public safety that prohibiting the activity is justified. And, as a panel of this Court recently recognized, it is very difficult to predict the effectiveness of gun control laws in strengthening public safety. Rejecting the argument that the government's interest in crime reduction alone is sufficient to justify a significant burden on Second Amendment activity, that panel stated that "[n]owhere did [*Heller*] suggest that some regulations might be permissible based on the extent to which the regulation furthered the government's interest in preventing crime." *Nordyke*, 644 F.3d at 784. And so, at the very least, there is no "close fit" between the government's interest in reducing violent crime and the carriage of operable firearms by law-abiding citizens.

Avoiding the difficulty of applying the means-ends scrutiny alluded to in *Nordyke*, and instead applying doctrines relied on by the Ninth Circuit panel that

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2923.125(D)(1); Okla. Stat. Ann. tit. 21, § 1290.12(12); Or. Rev. Stat. Ann. § 166.291; 18 Pa. Cons. Stat. Ann. § 6109(e); S.C. Code Ann. § 23-31-215(A); S.D. Codified Laws § 23-7-7; Tenn. Code Ann. § 39-17- 1351(b); Tex. Gov't Code Ann. § 411.177(a); Utah Code Ann. § 53-5-704(1)(a); Va. Code Ann. § 18.2-308(D); Wash. Rev. Code Ann. § 9.41.070(1); W. Va. Code Ann. § 61-7-4(f); Wyo. Stat. Ann. § 6-8-104(b).

Three States – Alaska, Arizona, and Vermont – do not require permits to carry loaded handguns.

were generated in the context of abortion regulations and time, place, or manner restrictions, County's policy continues to fall far short of passing constitutional muster.

In *Nordyke*, the Court suggested that "we should ask whether the restriction leaves law-abiding citizens with reasonable alternative means for obtaining firearms sufficient for self-defense purposes." *Id.* at 787. The panel went on to provide support for its substantial-burden based test by pointing to inquiries as to whether the regulation imposes an undue burden on the right and whether it leaves open alternative channels by which to exercise that right. *Id.* at 787-88 (*discussing Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (holding that pre-viability abortion regulations are unconstitutional if they impose an "undue burden" on a woman's right to terminate her pregnancy); *Frisby v. Schultz*, 487 U.S. 474 (1988) (upholding a ban on picketing before or about an individual's residence because it left open ample alternative channels of communication)).

Here, the right is to carry an operable firearm ready for immediate use in case of conflict. The County's policy is an impermissible burden on that right under this Court's suggested substantial burden framework.

The County's arbitrary policy of denying the majority of law-abiding citizens a license to carry an operable firearm for self-defense, unless they can

prove a previous history of violence or threats to their life, is about as severe a burden as Amicus can imagine. For, as Plaintiffs note, the right to self-defense at the core of the Second Amendment does not depend on a history of previous victimization. And, as Amicus explain (supported by the plain meaning of the terms chosen by the *Heller* Court, by the Court's analysis of the right to bear arms, and as a matter of common sense), individuals do not exercise their right to be "armed and ready" for defensive action when carrying an unloaded, inoperable firearm. *See* Section I, *supra*. County's policy thus imposes a severe burden, if not blanket prohibition, on the carriage of functional firearms for self-defense.

Accordingly, the analysis under the Court's substantial burden framework then turns to whether County's policy leaves open reasonable alternative means to exercise this right. It does not.

In *Nordyke*, the panel found that plaintiffs failed to state a sufficient Second Amendment claim because they alleged no facts establishing whether the "gun show ordinance" at issue there imposed a "substantial burden" on their Second Amendment rights. Specifically, the plaintiffs failed to allege the ordinance did not allow for sufficient alternative avenues to engage in commerce of firearms or make it materially more difficult to obtain them. *Nordyke*, 644 F.3d at 788. In so holding, the panel relied in part on *Frisby v. Schultz*, 487 U.S. 474 (1988), which

upheld an ordinance banning picketing in a neighborhood because the would-be picketers were still permitted to march, go door-to-door, distribute literature, and call residents via telephone to circulate their message, providing sufficient avenues for First Amendment activity. *Nordyke* also relied on *Gonzalez v. Carhart*, 550 U.S. 124, 164 (2007), which held a ban on a method of abortion did not constitute an undue burden because "[a]lternatives [were] available" that were methods "commonly used and generally accepted." *Id.* at 787 (internal citation and quotation marks omitted).

Unlike the activities restricted in *Nordyke*, *Frisby*, and *Carhart*, California provides no reasonable alternatives to public carriage of operable firearms for self-defense. The limited ability to carry an unloaded, inoperable firearm and the extremely limited exception found in California Penal Code section 12031(j), which allows one to load a firearm only when faced with "grave and immediate danger," does not provide a reasonable alternative to carrying pursuant to a permit issued under Penal Code section 12050. A requirement that one load a firearm only after he or she is under attack is not only an unreasonable alternative, it is extremely dangerous, and it does not allow an individual to be "*armed and ready* for offensive or defensive action in a case of conflict with another person," *Heller*, 554 U.S. at 584.

The statutory allowance for an individual to carry an inoperable firearm is also severely restricted geographically, to the point of being practically useless for effective self-defense. Cal. Penal Code § 626.9; 18 U.S.C. §§ 921(a)(25), 922(q), 924(a). For instance, those who openly carry an unloaded firearm must learn the location of every school in their route, determine what areas are within 1,000 feet thereof, and either plan to travel around them (which in urban areas is virtually impossible), or stop and place the firearm in a locked container each time they enter such a zone, *see* Cal. Penal Code § 626.9(c)(2), or risk felony prosecution. While following their serpentine route through the city to avoid prohibited areas, those who dare to openly carry an unloaded firearm may also be stopped and subjected to a search of their firearm by each officer they come into contact with. *See* Cal. Penal Code § 12031(e).

Each of these limitations alone is a substantial burden on the right to bear arms, but their aggregate is undoubtedly so. Such a scheme is not a reasonable alternative to public carriage of an operable firearm pursuant to a permit issued under Penal Code section 12050.

For each of the foregoing reasons, County's broad prohibition on the public carriage of operable firearms for self-defense is unconstitutional.

CONCLUSION

At its core, the Second Amendment protects the right of law-abiding citizens to keep and carry firearms for self-defense. Naturally, law-abiding citizens have a right to be armed and ready to protect themselves "in a case of conflict with another person," even if those confrontations happen to occur beyond the bounds of one's property. It will not do to suggest that the restricted form of unloaded carry available in California, or any form of unloaded carry for that matter, sufficiently protects the right. A person is not "armed and ready" for self-defense with a firearm that is, by definition, not "ready" to be operated. The historical analysis provided herein supports this understanding.

And because the right to carry an operable firearm for self-defense extends beyond the home, County's policy, which generally denies virtually all of its residents the exercise of that right, violates the Second Amendment.

For the foregoing reasons, this Court should reverse the district court's judgment.

Date: August 31, 2011

Respectfully Submitted,

/s C. D. Michel
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Attorney for *Amicus*

CERTIFICATE OF COMPLIANCE

I certify pursuant to the Federal Rules of Appellate Procedure 32(a)(7)(c) that the foregoing brief is in 14-point, proportionately spaced Times New Roman font. According to the word processing software used to prepare this brief Word Perfect, the word count of the brief is exactly 6869 words, excluding the cover, corporate disclosure statement, table of contents, table of authorities, certificate of service, and this certificate of compliance.

Date: August 31, 2011

Respectfully Submitted,

/s/ C. D. Michel
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CERTIFICATE OF SERVICE

I hereby certify that on August 31, 2011, an electronic PDF of this amicus brief was uploaded to the Court's CM/ECF system, which will automatically generate and send by electronic mail a Notice of Docket Activity to all registered attorneys participating in the case. Such notice constitutes service on those registered attorneys.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

/s/ C. D. Michel
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