No. 16-894

IN THE

Supreme Court of the United States

EDWARD PERUTA, *ET AL.*, *Petitioners*,
v.
STATE OF CALIFORNIA, *ET AL.*, *Respondents*.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

Brief *Amicus Curiae* of Gun Owners of America, Inc., Gun Owners Foundation, U.S. Justice Foundation, Conservative Legal Defense and Education Fund, Policy Analysis Center, Downsize DC Foundation, DownsizeDC.org, and The Heller Foundation in Support of Petitioners

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INTEREST OF THE *AMICI CURIAE*[1]

Gun Owners of America, Inc. and DownsizeDC.org are nonprofit social welfare organizations, exempt from federal income tax under Internal Revenue Code section 501(c)(4). Gun Owners Foundation, United States Justice Foundation, Conservative Legal Defense and Education Fund, Policy Analysis Center, Downsize DC Foundation, and The Heller Foundation are nonprofit educational organizations, exempt from federal income tax under IRC section 501(c)(3).

These legal and policy educational organizations were established, *inter alia*, for purposes related to participation in the public policy process, including conducting research and to inform and educate the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law. These *amici* have filed many *amicus curiae* briefs in this and other courts, including a brief in this case in the Ninth Circuit. *See* Gun Owners of Foundation, *et al.*, *amicus curiae* brief (April 30, 2015).

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[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that counsel of record for all parties received notice of the intention to file this brief at least 10 days prior to the filing of it; that no counsel for a party authored this brief in whole or in part; and that no person other than these amici curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

STATEMENT

The state of California is known to have some of the most draconian gun laws in the country.[2] California has done its very best to ensure that no one but the police, the wealthy, and the political elite are permitted to possess firearms in public.[3]

During the initial years of this litigation, California permitted (on the books but not on the street) a version of "open carry"[4] whereby a person could carry an unloaded handgun in public. Few Californians chose to carry in this manner, since the law also permitted the police to verify at will that a firearm was unloaded.[5] And, unhappy with open

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[2] *See* P. McGreevy, "California has toughest gun control laws in country, study finds," *Los Angeles Times* (Dec. 9, 2013). http://www.latimes.com/local/political/la-me-pc-california-has-toughest-gun-laws-in-country-study-finds-20131209-story.html.

[3] *See* "One law for us, another for you," *Washington Times* (June 6, 2011), http://www.washingtontimes.com/news/2011/jun/6/one-law-for-us-another-for-you/ ("The California state Senate voted 28-8 ... to exempt itself from the pointless gun-control laws that apply to the rest of the populace.").

[4] Generally, "open carry" describes carrying a firearm in a manner readily apparent to others, such as in a holster on the hip, while "concealed carry" describes carrying a firearm in a way that is hidden from common observation (such as under a shirt or in a pocket).

[5] The prior version of California Penal Code Section 25850(b) provided that "In order to determine whether or not a firearm is loaded ... peace officers are authorized to examine any firearm carried by anyone...." http://goo.gl/yGdsGO.

carry, far too many police in California used this statutory power to intimidate and dissuade those who dared to openly bear arms.[6] During the pendency of this case, however, California banned the open carry of unloaded firearms as well.[7]

In addition to its current ban on open carry, California also has a *de facto* ban on "concealed carry," refusing to issue such permits to all but a select few. Before a person is granted a permit to carry concealed, California requires the applicant to demonstrate that he has a "good cause" to do so — a discretionary determination left to local police chiefs and sheriffs. In San Diego County, where Petitioners reside, self-defense is not considered to be good cause.[8]

Under California's system, applications of ordinary, law-abiding citizens are almost universally denied,[9] while applications from politicians such as U.S. Senator Dianne Feinstein[10] — along with at least

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[6] *See, e.g.*, https://www.youtube.com/watch?v=tNOk4_QH21g; https://www.youtube.com/watch?v=ZFzH5Oe-YL4; https://www.youtube.com/watch?v=XxP9yaEcNm0; https://www.youtube.com/watch?v=NQDJdurpUsA; https://www.youtube.com/watch?v=NWwSKabgETM.

[7] *See* Cal. Penal Code Section 26350; *see also* Assembly Bill 144, http://goo.gl/I8xA6b.

[8] *See* Cal. Penal Code Section 26155(a)(2).

[9] *See* Petition for Certiorari ("Pet.") at 7.

[10] *See* "Dianne Feinstein has/had a concealed weapons permit," C-SPAN (Apr. 27, 1995), https://www.youtube.com/

300 judges statewide[11] — are routinely granted. Only about 0.2 percent of Californians have been granted the privilege to concealed carry (*id.*), compared to as high as 15 percent of residents in other states where permits are easier to obtain.[12]

Practically speaking, then, the bearing of arms is outlawed in California — at considerable variance from the Second Amendment's requirement that "the right of the people to ... bear arms shall not be infringed."

Petitioners' suit in the federal district court challenged California's *de facto* ban on concealed carry. Petitioners did not challenge: (i) the state's ban on open carry of loaded weapons; (ii) the concept of licensure itself; or (iii) the numerous hurdles associated with obtaining a license to concealed carry. Rather, Petitioners sought only a narrow ruling that "self-defense" must be considered "good cause" for purposes of obtaining a concealed carry permit.

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watch?v=B1EObqM9Z0s.

[11] *See* M. Drange, "Concealed weapons of California: The numbers," Reveal News (June 16, 2015), https://www.revealnews.org/article/concealed-weapons-of-california-the-numbers/.

[12] *See* "New Study: Over 14.5 Million Concealed Handgun Permits, Last Year Saw the Largest Increase Ever in the Number of Permits," Crime Prevention Research Center (July 26, 2016), https://goo.gl/64YwZO.

Before the district court in 2009, when unloaded open carry was still permitted in California, Petitioners asserted that "Plaintiff does not argue that all regulatory measures limiting his Second Amendment right to keep and bear arms are unlawful. In fact, Plaintiff **does not argue that a complete prohibition on carrying concealed weapons necessarily violates the Second Amendment**." Plaintiff's Memorandum of Points and Authorities in Opposition to Defendant Gore's Motion to Dismiss, ECF #4, at 3 (emphasis added). Petitioners sought only a ruling that **if** California banned open carry, **then** it must permit some form of concealed carry. *Id*. at 4. Although the district court denied Petitioners' challenge to the concealed carry ban, it **did so based on the same theory advanced by Petitioners** — that California may prohibit concealed carry because it permitted **unloaded** open carry. *See* Pet. at 8.

On appeal to a panel of the Ninth Circuit, Petitioners clarified that their central claim was that **unloaded** open carry was not a sufficient substitute for concealed carry. But, by the time the panel issued its decision in 2014, California had outlawed even unloaded open carry, thereby undermining the basis for the district court's decision. *See id.* at 9 n.5.

The panel's decision was similar to that of the district court. The panel concluded what the district court merely assumed — that the Second Amendment protects some ability to carry "an operable handgun outside the home" — but not necessarily concealed carry. *Id*. at 1166. But, since California had, by that time, completely banned open carry, the panel was

forced to conclude that the Second Amendment requires California to permit Petitioners some form of concealed carry. *Id.* at 1172.

Rehearing the case *en banc*, the Ninth Circuit decided simply that "there is no Second Amendment right ... to carry concealed firearms in public." Peruta v. County of San Diego, 824 F.3d 919, 927 (9th Cir. 2016 *en banc*). But, since this was precisely Petitioners' concession throughout, their claim on petition is only that the *en banc* court did not consider their either/or argument — that the state must permit concealed carry if it bans open carry, or *vice versa*. Pet at 12-13.

Before this Court, Petitioners' question presented is "Whether the Second Amendment entitles ordinary, law-abiding citizens to carry handguns outside the home for self-defense **in some manner**, including concealed carry when open carry is forbidden by state law." Pet. at i (emphasis added). However, for the reasons set out below, these *amici* urge this Court to consider instead a more fundamental constitutional question:

> Whether California's "good cause" requirement for concealed carry licenses violates the Second Amendment.

SUMMARY OF ARGUMENT

Petitioners brought this case to challenge some of the most restrictive gun laws in the nation governing the bearing of arms. Based on the venue for their case, the deck no doubt was stacked against them. To compensate, Petitioners attempted to justify their claims based on reasonableness — ignoring the Second Amendment's robust textual and historic protection.

Unsurprisingly, Petitioners' effort to argue from reasonableness failed before both courts below. The *en banc* court even went so far as to refuse to find any right at all of Californians to bear arms outside their own home — a holding about as far removed from the Second Amendment's text as one could imagine

Before this Court, Petitioners adhere to their same line of argument, seeking only a vague and indeterminable ruling that the Second Amendment protects the right to bear arms in some manner — perhaps concealed, perhaps openly — nothing in particular. That is simply not what the Second Amendment demands.

A proper textual, contextual, and historical Second Amendment analysis would be exceedingly simple in this case. No one would argue that the Second Amendment protects every person, every sort of weapon, or every sort of activity. However, the people, arms, and activities the Amendment does protect, it protects absolutely. The Petitioners are clearly part of "the People" to whom the Amendment refers, in that they are law-abiding, American citizens who are part

of the body politic which contributes to a free state. Next, the handguns they wish to carry concealed are most certainly "arms" under the protection of the Amendment. Finally, Heller made clear that to "bear" arms means "to carry" them on or about one's person, which is what Petitioners seek to do. Thus, California's statutory regime — which restricts such activity — is unconstitutional *per se*.

ARGUMENT

I. The Petition Asserts a Narrow Claim Based On a Flawed Reading of the Second Amendment.

Unfortunately, as framed by Petitioners, this case does not invoke the Second Amendment's robust protection of the right of the people to "bear arms." Petitioners make clear that they "are not asserting 'a constitutional right to concealed carry....'" *Id*. at 12. In fact, they submit that there is no constitutional right to concealed carry, and even concede that California could properly ban the concealed carry of firearms entirely. *Id*. at 26.

Rather, Petitioners seek only "'a constitutional right to **some outlet to exercise** the right....'" *Id*. at 12 (emphasis added).[13] Their argument is that, since

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[13] Below, Petitioners sought a "**reasonable** alternative means of exercising the right to bear arms," "in *some* manner **that serves the rights' core purposes**...." Appellants' Opening Brief at 39 (emphasis added). Now on petition, they seek just "some outlet." Pet. at 12.

California now bans open carry, it must permit "some manner" (Pet. at 1) of concealed carry, lest the Second Amendment be infringed **too much**.

It is one thing to frame a case so as to limit one's challenge to a narrow issue. It is quite another to concede issues that are not before a court, in order to appear reasonable. Indeed, the Petition itemizes all of the ways in which Petitioners concede governments **may** regulate the bearing of arms,[14] before arguing that the only thing governments cannot do is eliminate the bearing of arms completely.

A. The Petition Would Rewrite the Second Amendment.

The Petition seeks only "*some* means of bearing firearms outside the home for self-defense, whether it be open or concealed carrying." Pet. at 1. The Petition makes clear that "petitioners 'do *not* contend that there is a free-standing Second Amendment right to carry concealed firearms.'" *Id.* Petitioners seek only "the right to bear a handgun," and only for "self-defense." *Id.* at 2. And they concede that the right to carry is properly subject to "a host of eligibility requirements that are not challenged here...." *Id.* at 5-6. Finally, Petitioners do not challenge California's requirement that a person demonstrate to the state that he has "good cause" as a prerequisite to obtaining a permit to exercise his fundamental rights. Rather,

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[14] Below, Petitioners asserted that "the right to carry arms in public in case of confrontation can be regulated, but not generally banned." Appellants' Opening Brief at 38.

Petitioners only seek a declaration that "self-defense in case of confrontation qualifies as 'good cause.'" *Id.*

The positions taken by Petitioners compel these *amici curiae* to support the Petition, but to urge the Court to review a more fundamental issue, and reach a decision based on a very different understanding of the nature and the scope of the Second Amendment than that presented by the Petition.

The Second Amendment covenant between the People and their government promises that "the right of the people to ... bear arms shall not be infringed." Petitioners interpret that unequivocally broad language to mean the right of those people who the state deems deserving (but not anyone else) should generally be permitted to concealed carry (but not open carry) a handgun (but no other arm) outside the home (but only in certain places) for self-defense (but not for any other purpose) — and only after they have paid for and obtained a permit to do so. Below, Petitioners unnecessarily conceded that, although the right to keep arms in the home is fundamental, "it **might be 'less acute**'" outside the home.[15] Appellants' Opening

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[15] This is a startling statement, particularly because at least one circuit has held that the need for self-defense **outside** the home is at least as acute — if not **more acute** — as inside the home. *See, e.g.*, Moore v. Madigan, 702 F.3d 933, 935-37 (7th Cir. 2012) ("Both Heller and McDonald do say that 'the need for defense of self, family, and property is *most* acute' in the home ... but that doesn't mean it is not acute outside the home.... Confrontations are not limited to the home.... A woman who is being stalked ... has a stronger self-defense claim to be allowed to carry a gun in public than the resident of a fancy apartment building ... has a

Brief at 19 (emphasis added). The words "keep and bear arms" permit no such interpretation.

Petitioners treat Second Amendment liberties as being mere privileges that states bestow upon their residents, with the only requirement being that they must permit **something**. In other words, the Second Amendment does not bar just any "infringement" of the right to bear arms; it prohibits only infringements so severe as to constitute the wholesale elimination of the right to bear arms. While that argument may seem exceedingly reasonable to some, it would seem entirely unreasonable to the Framers, who included no "reasonableness" requirement in the Amendment. Indeed, the idea that there are various degrees of infringement which should receive differing levels of "interest-balancing" scrutiny by courts is incompatible with the Amendment's text and the Heller decision. There simply is no wiggle room in the Amendment for the states to "infringe" the "bearing" of "arms" in any way, even if doing so seems eminently "reasonable," and even if the government has an important — or even compelling — reason to do so.

Petitioners are clear to note that they have strategically crafted their case to provide the "least intrusive and disruptive way to remedy this situation," (Appellants' Opening Brief at 14), but that is not what

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claim to sleep with a loaded gun under her mattress. But Illinois wants to deny the former claim, while compelled by McDonald to honor the latter. That creates an arbitrary difference... divorce[d from] the Second Amendment from the right of self-defense described in Heller and McDonald.").

the Second Amendment requires. Because its laws have done great violence to the Second Amendment, California's onerous firearms regime may not be so easily repaired with mere tweaks here and there.

B. The Word "Bear" in the Second Amendment Cannot Be Artificially Bifurcated, So That Some Manners of "Bearing" Arms Must Be Permitted While Others May Be Banned.

If, as the Petition suggests, the Second Amendment protects only some unspecified ability to bear arms, but neither open carry nor concealed carry specifically, then it provides no fixed protection for American citizens. Yet that is precisely Petitioners' claim, that "bear" could mean "concealed carry" but not "open carry" in California, and "open carry" but not "concealed carry" in Oregon — with the Constitution being satisfied either way.[16]

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[16] This approach is reminiscent of arguments made unsuccessfully by the city of Chicago in McDonald v. City of Chicago, 561 U.S. 742, 783 (2010), and by the District of Columbia in Heller v. District of Columbia, 45 F. Supp. 3d 35, 50 (D.D.C. 2014), where the cities argued that their dense urban populations and high crime rates permitted them Second Amendment leeway to restrict activities that otherwise would be legal in other parts of the country. Petitioners correctly note that "the fundamental rights the Constitution protects cannot depend on the policy views of the city or state in which they live." Pet. at 19. Yet they also argue that a state can make the policy choice to allow open carry or concealed carry.

But as Heller noted, to "bear" means to "carry" (*id.* at 584) — and the Second Amendment does not restrict that term further. To "carry" means "to wear, hold, or have around one,"[17] and people commonly carry all sorts of things both visibly and hidden from view. A person might carry a cellular phone "concealed" in his pocket, or he might carry it "openly" in a "holster" on his hip. *See generally*, Appellants' Opening Brief before the panel below at 22-24. To say that the Second Amendment term "bear" requires only that a state permit only one form of carry is simply an argument designed to appeal to modern federal judges, at the expense of fidelity to the constitutional text.[18]

C. Petitioners Misinterpret Heller to Arrive at Their Position.

The Petition asserts that "[t]his Court has previously **recognized** that states historically have had flexibility to favor either open carry or concealed carry and have gotten themselves into constitutional trouble only when they banned both." Pet. at 15 (emphasis added). *Au contraire*.

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[17] The Random House Dictionary of the English Language, 1966.

[18] As these *amici* explained in their *amicus curiae* brief in the Ninth Circuit in Jackson v. San Francisco, "[s]ince the Second Amendment uses no limiting words, the verb 'keep' should be given its natural, broad meaning. It is therefore up to the individual to decide the manner in which he chooses to keep arms. It is not for the government to make such decisions for him. *See generally* Heller at 628-31." *See* Gun Owners of America, *et. al*, *amicus curiae* brief (July 3, 2014). As it is with "keeping" arms, so too it must be with "bearing" them.

For support of their claim, Petitioners incorrectly allege that Heller **"discuss[ed] with approval** cases establishing this proposition." *Id.* First, it is quite a stretch to say that a court "**discussing** [a case] with approval" in general is the same as affirmatively "**recognizing**" the truth of any particular statement contained therein.[19] But even so, that is not what Heller did. In the passage Petitioners cite for this claim, Heller actually stated that "[f]ew laws in the history of our Nation have come close to the severe restriction of the District's handgun ban. And some of those few have been struck down." *Id.* at 629. Heller then cited two state court cases that struck down such severe restrictions — Nunn v. State, 1 Ga. 243 (1846), and Andrews v. State, 50 Tenn. 165 (1871). Both of those opinions struck down state laws restricting the open carry of firearms.

Heller did note that the Nunn opinion reached its result on open carry "**even though** it upheld a prohibition on carrying concealed weapons...." *Id.* (emphasis added). But Heller never stated **that part** of the opinion (upholding a ban on concealed carry) was correct. Heller only stated that striking down a ban on open carry was correct. In this section of Heller, the Court was "discussing with approval" holdings that **struck down** restrictions on the bearing of arms, not holdings that **upheld** them.

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[19] In the district court below, Petitioners correctly acknowledged "the Court did not clearly affirm those 19th-Century court decisions." Plaintiff's Memorandum of Points and Authorities in Opposition to Defendant Gore's Motion to Dismiss, ECF #4, at 3.

To be fair, others also have misread Heller in this way. For example, some claim that Heller "singled out bans on the concealed carry of handguns as presumptively constitutional...." J. Bishop, "Hidden or on the Hip: The Right(s) to Carry After Heller," 97 CORNELL L. REV. 907, 909 (May 2012). To be sure, Heller stated that the Second Amendment is "not unlimited," and provided a few examples where state courts have, in the past, imposed various limitations on the right. But that is a far cry from the Court **embracing** those limitations. The Court never stated that all past limitations on concealed carry were **valid**; it only noted that some **existed**. And tellingly, in the very next sentence, the Court did not include bans on concealed carry in its list of "longstanding prohibitions" or ones that are "presumptively lawful regulatory measures." *Id.* at 626-27.

As many are so eager to point out, Heller's eventual holding was limited to the factual issue presented: "that the District's ban on handgun possession in the home violates the Second Amendment." *Id.* at 635. The Court never resolved the issue of bearing arms outside one's home, and it most certainly never called concealed carry bans "presumptively constitutional." There is simply no support to be found in Heller for the notion that bans on either open carry or concealed carry pass constitutional muster, or for Petitioners' position that the government may prohibit one or the other — but not both.

D. Heller Rejected the Notion that the Second Amendment Provides a Smorgasbord for States to Pick and Choose Which Freedoms to Permit and Which to Deny.

Heller rejected the notion that state legislatures have latitude in deciding the scope of Second Amendment rights, noting that "[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad." *Id.* at 634-35.

Ironically, Petitioners' concession (that states may prohibit either open or concealed carry) is reminiscent of the District's argument in Heller, that "it is permissible to ban the possession of handguns so long as the possession of other firearms (*i.e.*, long guns) is allowed." *Id.* at 629. The Heller majority, however, made clear that "It is enough to note ... that the American people have considered the handgun to be the quintessential self-defense weapon.... Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid." *Id.* at 629.

Likewise, these *amici* do not adopt the view that the states may outlaw the concealment of arms, so long as they permit open carry. The concealed carry of handguns is Americans' quintessential choice for the

bearing of arms for self-defense[20] and, "whatever the reason" for that, California cannot justify its regime where the concealed carry of arms is *de facto* illegal. Likewise, countless law-abiding Americans choose to open carry firearms — at various times and in various places — whether for self-defense — or even just to make a point, to the police and to the government, that this nation still contains an armed citizenry, capable of defending themselves from those who would threaten their liberty — be that a carjacker at the grocery store, or a tyrannical government.[21] And likewise, "whatever the reason," because of the choice of the citizenry to bear arms openly, California cannot justify its regime where the open carry of firearms is illegal.

E. Permitting California to Criminalize Either Open Carry or Concealed Carry Would Have Dangerous Repercussions for Gun Owners — No Matter Which System California Chooses.

It is important to understand how the rule postulated by Petitioners would operate if a state can outlaw open carrying of firearms while permitting concealed carry. The State of Texas for many years

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[20] *See* J. Bishop, "Hidden Or on the Hip," *supra*, noting the "stunning cultural sea-change [in concealed carry laws] that began in the early 1990s...." *Id.* at 910.

[21] Heller recognized the security of a free State required a robust Second Amendment: "[W]hen the able-bodied men of a nation are trained in arms and organized, they are better able to resist tyranny." *Id.* at 598.

had such a system, banning open carry of handguns, and even went so far as to make it a criminal offense for a concealed handgun to be "openly discernible to the ordinary observation of a reasonable person." Texas Government Code § 411.171(3) (2013). This meant that any law-abiding concealed carrier who accidentally exposed his gun was at risk of criminal offense. Fortunately, police in Texas were generally accustomed to people carrying guns, and so citations for this offense were rare.[22]

But Texas' firearm permissive environment would certainly not be the case in California, which is considered to be one of the most gun **un**friendly places in the nation. Under Petitioners' theory, California could permit concealed carry, but at the same time outlaw open carry — perhaps even making it a felony to carry openly. Next, California could interpret open carry as expansively as possible — such as any time a firearm is discernible through clothing.

Then, any time a bulge could be seen under a sweatshirt, in a jeans pocket, or any time a person

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[22] Even so, Texans eventually became fed up with their state's open carry ban, and literally took up arms (peacefully) to get rid of it. Since Texas law strangely permitted open carry of rifles and shotguns but prohibited open carry of handguns, many Texans simply strapped rifles on their backs to protest the open carry ban on handguns. *See* M. Muskal, "NRA apologizes for calling Texas open-carry gun demonstrators 'weird,'" *LA Times* (June 4, 2014) http://goo.gl/aX12Vq. In May of 2015, Texas legalized the open carry of handguns. *See* D. Costa-Roberts, "Texas approves open carry law for handguns," *PBS* (May 30, 2015) https://goo.gl/86W7iL.

reached for something high on a shelf in the supermarket and his jacket rode up, he would be at risk of arrest and felony prosecution. Quite literally, this would make every concealed carry holder in California at risk of being arrested for a felony any time he went out in public — unless he was wearing a puffy down jacket. California could announce that the Second Amendment is respected because concealed carry is perfectly legal, but then create a regime so oppressive that no law-abiding person would ever dare to carry concealed.

Alternatively, if California chose to ban concealed carry, but permit open carry, gun owners would fare no better. California could use cases such as the Tenth Circuit's opinion in United States v. Rodriguez, 739 F.3d 481 (10th Cir. 2013), and the Fourth Circuit's recent opinion in U.S. v. Robinson, 2017 U.S. App. LEXIS 1134 (4th Cir. Jan. 23, 2017 *en banc*), to its advantage. Both circuits have held that, whenever the police believe a person to be armed, they are justified in assuming he is committing a crime, and detaining and disarming him until they can determine if he is lawfully carrying. Rodriguez went a step further, stating that the police are justified in assuming that every law-abiding gun owner is an armed and dangerous criminal — until proven otherwise. *Id.* at 491.

How better to know that a person is armed, than when the only way for him to carry his arm is to display it openly on his hip for all to see? If California permits only open carry, then under the rule of Rodriguez and Robinson, police would be free to treat

each person seen open carrying as they would a dangerous felon — which could include pointing their service weapons at him, ordering him to the ground, slamming their knees onto his neck while handcuffing him — for "officer safety" of course. As these *amici* noted in their *amicus curiae* brief to the panel below:

> Prior to the repeal of open carry, those who choose to exercise this "reasonable alternative" were routinely accosted by California law enforcement officers who were empowered to "verify" that the firearm was unloaded, and who often detained them, cuffed them, and questioned them before either improperly arresting them or finally releasing them to go about their business. [Brief *amicus curiae* of Gun Owners of America, *et al.* at 15-16.[23]]

How many Californians would avail themselves of such a new open carry regime? Few to none.

II. The Government May Not Restrict Most of a Constitutional Right, So Long as It Leaves "Some Outlet to Exercise" the Right.

The Second Amendment is not a bundle of sticks, to be divided into piles by modern federal judges, saving some and discarding others.

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[23] *See* n.4, *supra*.

Petitioners argue that the states have significant public policy "flexibility" (Pet. at 15) to regulate the bearing of, so long as there is "some outlet" of expression left for the bearing of arms. This "some outlet" argument is similar to (or perhaps derived from) the "**alternative means of expression**" test employed in First Amendment cases. The "ample alternative channels" doctrine arose as part of Justice Harlan's concurrence in U.S. v. O'Brien, 391 U.S. 367 (1968), involving the burning of draft cards. In later cases, it was added to the court's multi-factor interest balancing test for content-neutral regulations which affect speech. *See, e.g.*, City of Erie v. Pap's A.M., 529 U.S. 277 (U.S. 2000). The idea is that government regulations are less constitutionally suspect if they touch only part of a person's ability to express his ideas, leaving him "ample alternative channels" to communicate his message.

Here, however, Petitioners do not even seek "ample alternative channels" to bear arms. Rather, they seek only "some outlet to exercise" their rights. These *amici* deny that the government may regulate the bearing of arms nearly out of existence, so long as it leaves them "some outlet to exercise" their rights. To *amici's* knowledge, this Court has never adopted such a narrow view of any constitutional right.

But perhaps even more importantly, this Court already has explicitly refused to import First Amendment doctrines in the Second Amendment context. During oral argument in Heller, Chief Justice Roberts criticized the use of First Amendment tests for

evaluating the constitutionality of firearms laws under the Second Amendment:

> Well, these various phrases under the **different standards** that are proposed, "compelling interest," "significant interest," "narrowly tailored," none of them appear in the Constitution.... Isn't it enough to determine the scope of the existing right that the amendment refers to?... [T]hese standards that apply in the First Amendment just kind of developed over the years as sort of **baggage** that the First Amendment picked up. [District of Columbia v. Heller Oral Argument (Mar. 18, 2008), p. 44, ll. 5-21 (emphasis added).]

Likewise, the Heller opinion did not import the First Amendment's "baggage" into the Second Amendment context. To be sure, the Court noted that the District of Columbia's ordinances would fail "[u]nder any of the [First Amendment] standards of scrutiny...." *Id*. at 628. Instead, though, the Court first examined the text of the Second Amendment, then looked to its history and traditions to determine its scope. Finding that the District's ordinance banning handguns in the home "infringed" the right that had been set forth, the Court's inquiry was at an end. Notably, the Court never asked whether the District had an important or compelling interest for its infringement, and the Court never engaged in any interest-balancing. Rather, the

Court read the Second Amendment as written, to protect a right which "shall not be infringed."

Moreover, Heller rejected the alternative channels argument in the Second Amendment context, refusing to permit a ban on handguns because the District permitted long guns.

Unfortunately, Petitioners fail to invoke Heller's teachings, and instead come to this Court invoking a form of interest-balancing, whereby certain infringements on the right to bear arms are deemed justifiable, so long as the states do not go too far, and still permit the People to maintain some semblance of their freedom.

III. Ironically, As More States Adopt "Constitutional Carry," Petitioners Advocate Against It Here.

Even as Petitioners ask this Court to accept the view that states may ban concealed carry, many states are moving in precisely the opposite direction.

In 1934, even "[t]he head of the NRA ... testified in Congress against what he described as the 'promiscuous toting of guns.' He said it has no place in everyday life."[24] However, since Florida's creation of a "shall-issue" permitting system in 1987, there has been a sea change in the United States regarding the carrying of arms in public. Currently, there are over

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[24] *See* "Handguns In America And The Rise Of The 'Concealed-Carry Lifestyle'," *NPR* (June 23, 2016) https://goo.gl/jWn5im.

14.5 million concealed carry permits in this country.[25] Simply put, the bearing of arms has gone mainstream.

Recognizing that the right of Americans to bear arms is not a privilege bestowed by the state, at least 41 states have adopted permissive regimes for concealed carry, such as a "shall issue" system. Of those, it appears that currently 12 states (up from only two just a few years ago) have moved to a "constitutional carry" system, whereby if a person is legally eligible to own a firearm, he is legally eligible to carry that firearm, without first obtaining a license from the state.[26] In approximately 17 additional states, there has been legislation introduced in favor of constitutional carry within the past year alone.[27] Additionally, the majority of states currently permit

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[25] *See* "New Study: Over 14.5 Million Concealed Handgun Permits, Last Year Saw the Largest Increase Ever in the Number of Permits," Crime Prevention Research Center (July 26, 2016) https://goo.gl/64YwZO.

[26] *See* Crime Prevention Research Center (Jan 14. 2017) http://goo.gl/aVnSCY.

[27] *See* Alabama https://goo.gl/DKVJ5W; Colorado https://goo.gl/tnAjSk; Georgia https://goo.gl/W7OZOB; Indiana https://goo.gl/MVunzo; Kentucky https://goo.gl/mUfUev; Louisiana https://goo.gl/rb6nxw; Michigan https://goo.gl/LF2nLo; Minnesota https://goo.gl/7yXSNs; New Hampshire https://goo.gl/1AY1iW; New Mexico https://goo.gl/iYnDbN; North Carolina https://goo.gl/pzQtrv; North Dakota https://goo.gl/hMVEnW; South Dakota https://goo.gl/8VAuUb; Tennessee https://goo.gl/B8usXM; Texas https://goo.gl/mIAjj6; Utah https://goo.gl/hO96Tl; Virginia https://goo.gl/a4ssOa.

open-carry of firearms without a permit.[28] Currently, only nine states are considered "may issue," whereby discretion for the granting of permits is left with the state or various local officials.[29]

Apparently, most state legislatures now believe that they must recognize their residents' right to carry arms both openly and concealed. And many are acknowledging that the Second Amendment does not allow states to require a person to obtain permission to do so. Yet even as there has been great strides across the nation to reduce the restraints on the constitutional bearing of arms by Americans, Petitioners come to this Court seeking to curtail it.

CONCLUSION

California has infringed the right of the People to bear arms. On the one hand, it has banned the open carry of firearms. That is *per se* an infringement of their right to bear arms. On the other hand, California has created a permit system for concealed carry so unbelievably restrictive that few ordinary law-abiding gun owners can obtain one. That also is *per se* an infringement of their right to bear arms. Because California's restrictive regime "infringes" rights that "shall not be infringed," both bans are unconstitutional. This case is not more complicated than that.

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[28] *See* http://goo.gl/NydguQ.

[29] *See* "Concealed Weapons Permitting," Law Center to Prevent Gun Violence, http://goo.gl/abzL3e.

For the reasons above, the Court should grant the petition, address the issue proposed in Section I, *supra*, and reverse the decision of the *en banc* circuit court.

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