No. 10-56971 [DC# CV 09-02371-IEG]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EDWARD PERUTA, et. al.,

Plaintiffs-Appellants,

v.

COUNTY OF SAN DIEGO, et. al.,

Defendants-Appellees.

APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF CALIFORNIA

GUN OWNERS OF CALIFORNIA
SENATOR H. L. RICHARDSON (RET.)
***AMICUS* BRIEF IN SUPPORT OF APPELLANTS**

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STATEMENT OF ADDENDUM

Filed concurrently with this Amicus Brief is an addendum containing relevant portions of documents cited to herein.

CORPORATE DISCLOSURE STATEMENT

The Gun Owners of California has no parent corporations. It has no stock, thus no publicly held company owns 10% or more of its stock.

IDENTITY OF THE *AMICI CURIAE*

SENATOR H. L. RICHARDSON (RETIRED)

Senator H. L. "Bill" Richardson first entered the California Senate in 1966 – the same year Ronald Reagan was elected governor. During the ensuing 22 years, he bypassed three opportunities to run for Congress, choosing to remain in the Senate and the GOP leadership. Richardson tackled his job with energy and good ideas. The result was a record of success, even in the face of partisan opposition. He left the Senate in 1988. California continues to feel his positive influence today.

Senator Richardson has focused much of his extensive political career on the preservation and protection of our Second Amendment rights. He is the Founder of Gun Owners of California. He was intimately involved in the passage of many of California's firearm laws, particularly those that protect the fundamental right to self-defense with a firearm.

An active hunter and outdoorsman, Senator Richardson continues to be actively involved in state and national politics. His unique perspective and use of humor keep him in demand as both a speaker and a writer. He regularly provides colorful media commentary on a host of issues and has written for numerous national publications. He is the author of several political books including,

Slightly to the Right, *Confrontational Politics*, and *What Makes You Think We Read the Bills?* The latter is used as a textbook in political science classes throughout California. Richardson has combined his love of writing and extensive knowledge of the American West to write a series of Western mysteries beginning with *The Devil's Eye*, followed by a sequel titled *The Shadows of Crazy Mountain*. For a change of pace he authored *Split Ticket*, a political comedy based in Sacramento, California.

Senator Richardson and his wife Barbara have three children and six grandchildren. They reside in the Sacramento area.

GUN OWNERS OF CALIFORNIA

Gun Owners of California (GOC), is a California non-profit corporation that was organized in 1974. It has offices in Sacramento, convenient to lobbying the government. GOC is a leading voice in California, supporting the right to self-defense and to keep and bear arms guaranteed by the Second Amendment to the United States Constitution. It monitors government activities at the national, state and local levels that may affect the rights of the American public to choose to own firearms. All parties have consented to the filing of this brief.

INTRODUCTION

As a general proposition, California law allows only one way for a law-abiding person to be armed for self-defense outside his or her own property: obtain a permit to carry a concealed handgun (a "CCW") pursuant to California Penal Code sections 12050 through 12054. This is the permit San Diego County denies responsible, law-abiding adults, like the Plaintiffs-Appellants ("Plaintiffs").

Amici join in Plaintiffs' position that the Second Amendment guarantees responsible, law-abiding adults the right to such a permit, thereby allowing them to carry firearms for self-defense. The *Heller* Court made this clear when it declared the "core" purpose of the Second Amendment is to secure the people's right to keep *and bear* arms for self defense.[1]

Ignoring this language, the district court held that California Penal Code section 12031 – which bans carrying loaded guns outside the home, but leaves lawful, by way of omission and the cobbling together of unrelated statutes, the ability to openly carry an *unloaded* firearm (a practice referred to as "unloaded

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[1] "[T]he inherent right of self-defense has been central to the Second Amendment right." *District of Columbia v. Heller*, 554 U.S. 570, 628 (2008).

As to bearing arms specifically, the *Heller* Court adopted an earlier case's recognition that "bear" meant to "wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person." *See id.* at 584.

open carry" or "UOC") – somehow preserves the right of law-abiding, responsible adults to bear arms for self-defense, including those unable to procure a CCW. This holding – the heart of the opinion below – contradicts the Legislature and California courts as to the purpose and effect of Penal Code section 12031.[2]

In fact, section 12031 was enacted to *preclude* even law-abiding adults from being "armed" outside of their own property. And contrary to the district court's opinion, the exception in section 12031(j)(1) does *not* allow – and was never intended to provide – for effective armed self-defense, nor satisfy the Second Amendment's mandate. It only allows victims to arm themselves in *response* to an actual attack – *after* faced with "imminent, grave danger." And then, only *if* they are in a public location that allows them to openly carry an unloaded gun, and *if* circumstances have provided sufficient warning for them to draw and load the handgun before the attacker is upon them. Obviously, many victims are not warned in time to so arm themselves. That is, after all, why California law provides that police officers and licensed civilians may be prepared for self-defense – with loaded firearms.

Requiring the issuance of CCWs for self-defense would not menace public

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[2] Of course, in construing state laws, the federal courts are bound by the construction state courts have put upon the law as "[s]tate courts are the ultimate expositors of state law." *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975).

safety. The empirical fact is that criminal violence is virtually confined to people whose long criminal records preclude them from being licensed. And in the 40 states that now have CCW issuance policies that respect the right to armed self-defense, there has been no accompanying increase in crime, but quite the opposite.

DISCUSSION

I. LEGISLATIVE HISTORY OF CALIFORNIA LAWS REGULATING FIREARM POSSESSION AND CARRYING

A. Early Gun Control Efforts [3]

From around 1875 to around 1935, assassins took or menaced the lives of the Russian Czar, the Empress of Austria, an Austrian Archduke (which led to World War I), and many other luminaries, including President McKinley, former President Theodore Roosevelt, Justice Oliver Wendell Holmes, Attorney General A. Mitchell Palmer, Henry Frick, J.P. Morgan, John D. Rockefeller, and the mayors of Chicago

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[3] In analyzing California's 1923 Uniform Firearms Act and the later enactment of California Penal Code section 12031, one begins with the California Supreme Court's admonition that understanding a statute requires "tak[ing] into account matters such as context, the object on view, the evils to be remedied, the history of the times and of legislation upon the same subject" (*Cossack v. City of Los Angeles*, 11 Cal. 3d 726, 733 (1974) (discussing *Alford v. Pierno*, 27 Cal.App.3d 682, 688 (1972)), and Justice Holmes' statement that "a page of history is worth a volume of logic." *Santa Clara Local Transp. Auth. v. Guardino*, 902 P. 2d 225, 234 (Cal. 1995) (quoting *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921)).

and New York.[4] Motivated by fears of political turmoil and labor unrest, laws requiring a permit or license to purchase or own firearms appeared in England, Canada, Australia, New Zealand, and throughout Europe. Germany and a few other nations banned civilian ownership of any kind of firearm.[5]

The first such twentieth-century American law was South Carolina's 1902 complete ban on handgun sales,[6] a policy the American Bar Association urged other states to follow.[7] In 1911, after an anarchist attempted to assassinate New York's Mayor, that state enacted the Sullivan Law, which required a license as a

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[4] RESTRICTING HANDGUNS: THE LIBERAL SKEPTICS SPEAK OUT 14-20, 29-30 (Don B. Kates ed., 1979); LEE KENNETT & JAMES LAVERNE ANDERSON, THE GUN IN AMERICA: THE ORIGINS OF A NATIONAL DILEMMA 213 (1975); DAVID B. KOPEL, THE SAMURAI, THE MOUNTIE, AND THE COWBOY: SHOULD AMERICA ADOPT THE GUN CONTROLS OF OTHER DEMOCRACIES? (1992); EDWARD LEDDY, MAGNUM FORCE LOBBY: THE NATIONAL RIFLE ASSOCIATION FIGHTS GUN CONTROL 85-89 (1987); JOYCE LEE MALCOLM, GUNS AND VIOLENCE: THE ENGLISH EXPERIENCE 141-47 (2002); Stephen P. Halbrook, *Nazi Firearms Law and the Disarming of the Original Meaning of the Second Amendment*, Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 17 Ariz. J. Int'l. & Comp. L. 483 (2000).

[5] *See* Kopel, *supra* note 4, at 141, 195, 237; Malcolm, *supra* note 4, at 141-47; Halbrook, *supra* note 4, at 484; Clayton E. Cramer and Joseph E. Olson, *Gun Control: Political Fears Trump Crime Control*, 61:1 Maine Law Review, 57-81 (2009).

[6] RESTRICTING HANDGUNS, *supra* note 4, at 15.

[7] *See* William B. Swaney, *For a Better Enforcement of the Law*, 8 A.B.A. 588, 591 (1922).

precondition to buy or own a handgun.[8] Historians have concluded the Sullivan Law was intended to allow whites to be armed, while minorities were denied arms.[9] Early Sullivan Law prosecutions were largely directed at Italians; the first man convicted was an Italian whose gun was carried for protection against threats from "The Black Hand" (*i.e.*, the Mafia). Notwithstanding his justification, the judge excoriated him for the pistol-carrying habits of "your kind."[10]

Over the next twenty years, at least six more states enacted permit requirements to buy or possess a handgun.[11] Across the nation, complete handgun bans or Sullivan-type laws were promoted under the slogan "[i]f nobody had a gun nobody would need a gun."[12]

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[8] Kennett & Anderson, *supra* note 4, at 174-75.

[9] L. KENNETT & J. ANDERSON, THE GUN IN AMERICA: THE ORIGINS OF A NATIONAL DILEMMA, ch. 7 (London, Greenwood, 1975).

[10] Clayton E. Cramer "The Sullivan Law: 'Modern' Gun Control," *America's First Freedom* (April 2011), providing detailed account of the law on its 100th Anniversary, and authorities cited therein, including "The Sullivan Pistol Law," 23 *The Green Bag* 608 (Nov. 1911).

[11] *See* RESTRICTING HANDGUNS, *supra* note 4, at 29.

[12] Kennett & Anderson, *supra* note 4, at 192.

B. Emergence of the Uniform Firearms Act

The Uniform Firearms Act (UFA)[13] emerged during this period when complete handgun bans and handgun purchase permit laws were being considered across the United States and the world.[14] To forestall such legislation, activist gun owners and the National Rifle Association promoted a package of legislative protections that came to be known as the UFA. The UFA was recommended as a set of moderate gun controls to be adopted by all states instead of the more severe regulations being circulated. As Professor Leddy writes:

> It soon became clear that if target shooters and other legal gun owners did not want to see the lawful uses of guns completely banned they must become active politically with a program of [less onerous] gun control laws which would both protect gun ownership and reduce crime. This program was the Uniform Firearms Act [aka, the Uniform Revolver Act].[15]

The UFA was endorsed by the National Conference of Commissioners on

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[13] The California version of the UFA is Stats. 1923, ch. 339. The UFA was also called the Uniform Revolver Act. Both names are misnomers. The UFA is not a "Uniform Firearms Act" because it applied only to handguns not to rifles or shotguns. Neither was it a "Uniform Revolver Act" because it applied to all handguns, not just revolvers.

[14] Kates, *supra* note 4, at 14-20, 29-30; Leddy, *supra* note 4, at 85-89; Joyce, *supra* note 4, at 141-47.

[15] Leddy, *supra* note 4, at 87 (emphasis added).

Uniform State Laws as an antidote to what it called "the wrong emphasis on more pistol legislation" – *i.e.*, laws "aimed at regulating pistols in the hands of law-abiding citizens."[16] The National Conference lauded the UFA alternative approach, which it described as "punishing severely criminals who use pistols" with "a program or laws which would both protect arms ownership and reduce crime."[17]

Laws prohibiting the unlicensed carrying of concealed weapons appeared in United States from the early 19th Century.[18] Such laws became almost universal in the period 1912-1935 via promotion and adoption of the UFA by most states. Theoretically, this approach requiring a permit to carry a concealed firearm applied to everyone, *i.e.*, whites and minorities equally. But this purported intention was quickly circumvented across most of the country by simply not enforcing concealed weapon statutes against whites. As a state supreme court justice noted in overturning a white man's conviction under such laws: "The Act was passed for the

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[16] *A Bill To Provide For Uniform Regulation of Revolver Sales* (The United States Revolver Association), *reprinted in* HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM SATE LAWS AND PROCEEDINGS OF THE THIRTY-FOURTH ANNUAL MEETING 728 (1924).

[17] Leddy, *supra* note 4, at 87-88.

[18] The first such laws were passed in 1813, for the purpose of suppressing violence associated with dueling. *See* CLAYTON E. CRAMER, CONCEALED WEAPON LAWS OF THE EARLY REPUBLIC: DUELING, SOUTHERN VIOLENCE, AND MORAL REFORM (Praeger, 1999).

purpose of disarming negro laborers . . . [it was] never intended to be applied to the white population."[19]

C. California Adopts the UFA

The version of the UFA as adopted by California in 1923 formed the basis of many current California firearm laws at issue in this matter. These include the laws prohibiting handgun possession by convicted felons, requiring firearms dealers to be licensed, requiring that handguns have serial numbers, and requiring that persons carrying firearms concealed be licensed (now Penal Code sections 12025 and 12050).[20] Like earlier laws, the UFA banned the carrying of concealed handguns except for permit holders.[21] It did not distinguish between loaded and unloaded carry, because open carry – loaded or unloaded – was not a concern at the time.

D. Penal Code Section 12031

Penal Code section 12031 was enacted in 1967 through Assembly Bill No.

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[19] *Watson v. Stone*, 4 So. 2d 700, 703 (1941) (Buford, J., concurring).

[20] See Stats. 1923, ch. 339.

[21] See *Galvan v. Superior Court of City & County of San Francisco*, 70 Cal. 2d 851, 858 (1969) (discussing California's firearms laws).

1591 (hereafter "AB 1591").[22] The immediacy with which AB 1591 was enacted was prompted by an armed protest march on the capital by the Black Panthers, who carried loaded firearms through Sacramento.[23]

AB 1591 was intended to prohibit the carrying of loaded firearms (both handguns and long guns) in public by *unlicensed* persons (*i.e.*, those without a CCW) – with exceptions for police officers, certain guards, members of the armed forces when on duty, and persons using target ranges. While recognizing certain limited classes of exempt persons, the urgency clause contained in AB 1591 expressly declares the law's purpose as preventing unlicensed persons from being "armed."[24] California courts have construed section 12031 in light of this express

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[22] "Assembly Bill No. 1591 prohibits the carrying of a loaded firearm on one's person or in a vehicle while in any public place or on any public street in an incorporated city or in any public place or on any public street in a prohibited area of unincorporated territory, except for specified law enforcement officers, military personnel, bank guards and messengers, sportsmen, private investigators and patrol operators, and persons authorized to carry concealable weapons." Vernon L. Sturgeon & Jack B. Lindsey, Bill Memorandum to Governor Reagan re Assem. Bill No. 1591 (1967 Reg. Sess. July 28, 1967). Addendum 47.

[23] See *Capitol Is Invaded*, SACRAMENTO BEE, May 2, 1967, at A10; *see also* Legislative Counsel's initial digest of AB 1591 (as amended May 10, 1967). Addend. 39.

[24] "The State of California has witnessed, in recent years, the increasing incidence of organized groups and individuals publicly arming themselves for purposes inimical to the peace and safety of the people of California. [¶] Existing laws are not adequate to protect the people of this state from either the use of such

statement of purpose. *See, e.g., People v. Zonver*, 132 Cal. App. 3d Supp. 1, 5-6 (Cal. App. Dep't Super. Ct. 1982) (examining legislative history of section 12031).

Section 12031 accomplishes its purpose of disarming any civilian in public lacking a CCW by generally precluding firearms from being loaded if they are being carried outside the owner's premises. There is nothing in the legislative history to indicate that carrying unloaded handguns openly (*i.e.*, UOC), was ever considered an alternate means of carrying arms for self-defense – or considered at all.

The reality is that, in adopting section 12031, the Legislature was not really concerned with unloaded guns, nor with protecting any purported utility (almost none) in carrying unloaded guns for self-defense. UOC was never mentioned. UOC as practiced by activist groups today (e.g., gathering in public with unloaded firearms and ammunition readily available) was not envisioned by the Legislature at the time.[25]

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weapons or from violent incidents arising from the mere presence of such armed individuals in public places." Stats. 1967, ch. 960, § 6, p. 2463. Addend. 46.

[25] In fact, a bill seeking to ban UOC was introduced on January 13, 2011 in the current California Legislature. Assembly Bill 144 has made its way through the Assembly, and is currently before the Senate Public Safety Committee. If enacted, this bill would make it a misdemeanor for any person to openly carry an unloaded handgun outside of a vehicle while in public.

Licensure under 12050 is and always has been recognized by the Legislature as the main – and in most cases, only – practical way civilians can "bear arms" for self-defense.

E. The Legislative History of Penal Code Section 12026.1 Confirms that 12031 Was Actually Meant to *Prevent* Carrying Firearms for Self-Defense

Although the legislative history of section 12031 is silent on the issue, the history of Penal Code section 12026.1 (which subsequently created a means to carry and transport an unloaded handgun in a locked container) suggests that the Legislature belatedly recognized the problems with UOC as a method of transportation, and certainly did not consider it an alternative means of self-defense carry. In fact, the Legislature wished to curtail UOC, finding it to be bad policy because it "invites suspicion and generates fear" as well as exposing firearms to theft.[26] And, according to the Senate Rules Committee's analysis, carrying a

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[26] "Both law enforcement agencies and gun owners have requested relief from some aspects of carrying concealable firearms in compliance with existing laws. Presently, for example, a citizen can carry such a weapon unloaded but exposed such as on the car seat. When stopping, however, the individual faces the dilemma of what to do with the gun. He or she can't carry it on the person concealed unless in possession of a license to carry a concealed firearm. *The law does permit the person to carry the firearm exposed in a belt holster or leave it exposed on the car seat. These are not reasonable alternatives because openly carrying a concealable firearm in public invites suspicion and generates fear or even a violent reaction while leaving a gun exposed on a car seat invites a break-in*. Also, the bill addresses the carrying of a concealable firearm from a vehicle

firearm in a locked container was a "safer and saner" method of transportation than UOC.[27]

Through section 12026.1, the Legislature wanted to provide people with an additional method of transporting handguns when driving home from places like a gun store or shooting range, traveling to and from one's place of business, or transporting handguns *directly* to or from a vehicle between any of those places

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into a home or business where it may be legally possessed or from a home or business to a vehicle by allowing persons to carry the firearm in a locked box. This would eliminate the fear produced by weapons carried exposed in a holster or in one's hand." Cal. Dept. of Justice, Div. Of Law Enforcement, Legislative Bill Analysis of Sen. Bill No. 1787 (1985-1986 Reg. Sess.) as amended Apr. 17, 1986. Addend. 7 (emphasis added).

[27] "Under existing law, any person who carries a concealable firearm upon the person or within any vehicle which is under the person's discretion, without having a license to carry that firearm, is guilty of a misdemeanor unless that firearm is within plain sight. [¶] This bill would make specified exemptions to these provisions. Specifically, it would allow the transporting or carrying of a concealable firearm without a license where:[¶]1. The firearm is transported within a motor vehicle and is locked in the vehicle's trunk or in a locked container, other than the utility or glove compartment; or [¶] 2. The firearm is carried within a locked container by the person directly to or from his car for any lawful purpose. . . . The proponent suggests that a safer and saner approach would be to permit the transport of the gun in a "locked container" when the firearm is being transported in a vehicle or is being carried by the person to or from the person's residence or business, or the place of purchase or repair, to a motor vehicle within 200 feet of that site." Sen. Rules Com., Off. of Sen. Floor Analyses, Third Reading Analysis of Sen. Bill No. 1787 (1985-1986 Reg. Sess.) as amended Aug. 12, 1986 Addend. 11.

because of the legal “quagmire for unwary citizens” created by UOC:

> The purpose of this bill is to allow persons to legally and safely transport firearms to, from, and within their vehicles . . . the author’s office states that the law relating to the legal carrying of a concealable firearm without a permit is a quagmire for unwary citizens . . . the present law literally requires the person to transport the weapon in open view . . . which may cause unnecessary alarm . . . a safer and sane approach would be to permit the transport of the gun in a ‘locked container.’

Third Reading Analysis of SB 1787, Cal. Sen. Rules Comm., Office of Senate Floor Analyses (S. 1985-86 Reg. Sess.) at 2. Addend. 13.[28]

Thus, the legislative history of 12026.1 shows the Legislature considers UOC a dangerous activity, *not* an alternative method of carry for self-defense.

In sum, section 12031 restricts, not protects, the right to bear arms; it prohibits generally carrying loaded arms. It is true that the statute, itself, does not prohibit carrying unloaded handguns, and when applied in conjunction with section 12025(f) (which expressly exempts guns carried openly in “belt holsters” from

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[28] The Assembly expressed similar concerns. In its third reading of the bill that ultimately created § 12026.1 (*i.e.*, Senate Bill 1787, Legislative Session 1986), the State Assembly Committee on Public Safety commented: “Under current law, the only way to transport an assembled handgun legally, except for specified purposes such as hunting or target practice, is to transport the weapon openly on the car dash or seat. The author hopes to encourage the transport of these weapons locked away from immediate access of the vehicle’s occupant.” Addend. 9.

being "concealed"), allows for legal UOC.[29] But to find the that Legislature intended UOC, under sections 12031 and 12025(f), as a form of armed self-defense carry, or that the legislation somehow operates to that effect, as the lower court does, flies in the face of 12031's express purpose of preventing certain groups from being "armed" in public. For while UOC is *ineffective* for victims defending against an imminent attack, it could be *effective* for criminals, *i.e.*, they still have the ability to become "armed" at their convenience. That was surely not the Legislature's intent.

The lower court's finding that a UOC regime somehow satisfies the right of ordinary, law-abiding adults to bear arms in self-defense thus conflicts with the text of the legislation and the intent of the Legislature.

F. The Legislature Created So Many "Gun Free Zones" Where Even Unloaded Firearms Cannot Be Possessed Without a CCW that it Could Not Have Intended UOC as a Method of Self-Defense Carry

The district court's holding is undermined by Penal Code section 626.9,

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[29] This history also shows by way of omission an underlying assumption by the Legislature: that someone carrying an unloaded handgun is *not* considered "armed," for while the purpose of the statute is to ban people in public from being "armed" (unless licensed), the statute does not prohibit openly carrying *unloaded* handguns, *i.e.*, UOC, because those people are not "armed." This supports the common understanding – one the lower court rejects – that when the Supreme Court speaks of the Second Amendment securing the right to be "armed and ready" for confrontation, *Heller*, 554 U.S. at 584, it is referring to *loaded* arms.

which the court apparently did not consider. Section 626.9 forbids unlicensed persons (*i.e.*, without a CCW) from carrying even unloaded firearms within 1,000 feet of a school zone. There is no self-defense exception for ordinary people without a CCW, but people with a CCW are exempted. So, unless a citizen has a CCW, they may not carry even an unloaded firearm within 1,000 feet of a school zone unless the firearm is in a locked container. As the map (found at Addend. 75 - 76 and also *available at* http://www.sf-planning.org/index.aspx?page=2337) illustrates, because of the prevalence of these zones, this effectively precludes bearing even unloaded arms within many cities.[30]

Section 626.9's extensive restrictions on even unloaded firearms further support the view that the Legislature never intended UOC as a method of bearing arms for self-defense. But only later recognized it as a means of transportation. *See*

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[30] Section 626.9 has the following additional exception to its prohibition on guns in Gun Free School Zones:

> (2) When the firearm is an unloaded pistol, revolver, or other firearm capable of being concealed on the person and is in a locked container or within the locked trunk of a motor vehicle. This section does not prohibit or limit the otherwise lawful transportation of any other firearm, other than a pistol, revolver, or other firearm capable of being concealed on the person, in accordance with state law.

This exception, useless for self-defense, merely provides a means for transportation of a firearm through a school zone.

Assem. Com. on Public Safety, Rep. on Assem. B. 2069, prepared by Dia S. Poole, consultant, for May 5, 1998 hearing at 3. Addend. 23.

II. CURRENT ABUSIVE CCW ISSUANCE PRACTICES

The kinds of abuses alleged by Plaintiffs in this case, concerning San Diego County's preferential treatment of "special people," specifically members of the Honorary Deputy Sheriff's Association, in issuing CCWs is not unique. Throughout much of California, CCWs have been (and still are) available only to public officials, wealthy, important and/or highly influential people, particularly major campaign contributors.

For example, the Los Angeles Sheriff's Office created a system for celebrities and politically influential people to become "executive reserves," allowing them to avoid the statutory requirement that one show "good cause" for a CCW.[31] The City of San Fernando gifted television stars Fred Dryer and James Darren with CCWs.[32] Actor James Caan also received a CCW, a fact that came to

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[31] Tina Daunt, *Sheriff Offering a Badge and a Gun to Celebrities*, L.A. TIMES, June 18, 1999, at Metro Part B, p. 1.

[32] David Freed, *9 File Suit to Force Granting of Permits for Concealed Guns*, L.A. TIMES, Sept. 26, 1992.

light when he was accused of brandishing his firearm.[33] Similarly, in Orange County, the Sheriff and Assistant Sheriff deputized and issued special CCW permits to 86 of their friends, relatives and political contributors without checking their backgrounds. Of the 86 appointees, 29 contributed to Sheriff Carona's campaigns in 1998 and 2002. Others hosted fund raisers for Carona or the Mike Carona Foundation, while others had ties to Assistant Sheriff Haidl, including a brother, sister, nephew and two other relatives, along with private pilots, a personal secretary and other employees of Haidl's auction company.[34]

Even the Office of Assembly Research for the California Legislature recognized the inequities resulting from Sheriffs being granted too much discretion in issuing CCWs, noting: "In many cases, the permit holder is personally known to

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[33] Josh Meyer, *James Caan Arrested, Released After Alleged Gun Incident*, L.A. TIMES [Valley Edition], Mar. 12, 2004, at Metro Part B, p.9.

[34] Christine Handley, *O.C. Sheriff Made Donors His Deputies*, L.A. Times, May 26, 2005. For further evidence of CCW abuses, *see also* Royal Calkins & Russell Clemings, *Sheriff denies politics with permits*, FRESNO BEE, at A20, explaining that permit holders at that time tended "to be older white men living in rural areas or relatively affluent north Fresno. The list of 2,441 people is dominated by professionals, correctional officers, farmers, businessmen and their relatives." And, in some years "permit holders accounted for more than half the $ 48,000 [the Sheriff] collected" for his campaign; and *see* Christina Jewett & Andrew McIntosh, *Sheriff donors get gun permits*, SACRAMENTO BEE, Dec. 23, 2007, explaining a Sacramento Sheriff received $250,000 in campaign contributions from 70 former or current CCW holders, and there were only 367 permits issued in total.

the local sheriff or chief of police. The overwhelming majority of permit holders are white males." California Assembly Office of Research, *Smoking Gun: The Case for Concealed Weapon Permit Reform* 6 (1986). Addend. 55.

III. ALLOWING CARRY PERMITS TO LAW-ABIDING ADULTS DOES NOT IMPERIL PUBLIC SAFETY

A. The Great Majority of States Now Freely Permit Law-Abiding, Responsible Adults to Carry Concealed Handguns

Since the 1980s, over 40 states acted to reform their Concealed Weapon Permit laws. As Professor Brian Patrick notes, this change was intended to stop abuses whereby CCW permits are denied to ordinary people who need them, but issued only to the wealthy and influential – with no proof of need. To prevent arbitrary, corrupt or otherwise wrongful permit denial, administrative discretion was minimized or concealed carry bans repealed altogether.[35]

Despite this dramatic shift toward liberalizing CCW issuance policies, the laws in California, New York, and a few other states still give law enforcement broad discretion to issue or deny carry licenses, ostensibly based on "special needs." In reality, the basis is often politics or money. The result of such discretion-cum judicial "hands off" attitude is continued endemic injustice and inequality.

[35] BRIAN ANSE PATRICK, RISE OF THE ANTI-MEDIA: INFORMING AMERICA'S CONCEALED WEAPONS MOVEMENT (Lexington Books, 2009) ch 5; JOHN R. LOTT, JR., MORE GUNS, LESS CRIME ch. 4 (3d ed. University of Chicago Press 2010).

The post-1980 state reforms have had startling effects on criminological opinion. As Professor David Mustard writes:

> When I started my research on guns [at the University of Chicago] in 1995, I passionately disliked firearms and fully accepted the conventional wisdom that increasing the gun-ownership rate would necessarily raise violent crime and accidental deaths. . . . It is now over six years since I became convinced otherwise and concluded that shall issue laws-- laws that require permits to be granted unless the applicant has a criminal record or a history of significant mental illness– *reduce violent crime* and have no impact on accidental deaths."[36]

In sum, this national trend toward more liberal CCW policies has not resulted in any increase – and has perhaps caused a decrease – in violent crime.

B. Experience Has Dispelled Fears that Allowing Permits to Law Abiding Adults Would Fuel Crime

In all 40+ reform states, opponents direly predicted that allowing responsible, law-abiding adults to carry handguns would cause endless bloodshed.[37] That these predictions nowhere came true was a major factor in other states reforming their concealed carry requirements.[38] In fact, studies of these

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[36] David B. Mustard, *Culture Affects Our Beliefs About Firearms, But Data Are Also Important,* 151 U. PENN. L. REV. 1387, 1390-91 (2003) (emphasis added).

[37] Patrick, s*upra* note 35, at ch. 5; David B. Kopel, *Pretend "Gun-free" School Zones: A Deadly Legal Fiction*, 42 CONN. L. REV. 515, 546-583 (2009).

[38] Kopel, *supra* note 37, Patrick, *supra* note 29.

reforms show "[i]t would be difficult to find a significant demographic group in the United States with a lower rate of handgun crimes" than CCW licensees.[39]

This is consistent with conclusions of homicide studies dating from the 19th Century. Such studies uniformly show murderers not to be ordinary people; rather, they are long time criminals, *i.e.*, people who could not pass the criminal records check required to receive a 12050 license.[40] Prof. Elliott summarizes these studies and their findings: "the use of life-threatening violence in this country is, in fact, largely *restricted to a criminal class* and embedded in a general pattern of criminal behavior."[41] It is so well documented that almost all murderers have prior criminal histories that criminologists deem it axiomatic.[42] Indeed, as Professor Dave Kopel writes: "Of course the vast majority of the general public does not perpetrate serious crimes. Only a tiny minority does so, and *among [CCW license] holders,*

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[39] Kopel, *supra* note 37, at p. 565.

[40] Delbert S. Elliott, *Life Threatening Violence is Primarily a Crime Problem: A Focus on Prevention*, 69 COLO. L. REV. 1081-1098 (1998) (collecting pre-1998 studies); Don B. Kates & Clayton Cramer, *Second Amendment Limitations and Criminological Considerations*, 60 HASTINGS L. J. 1339, 1341-1344 (2009) (collecting post-1998 studies).

[41] Elliot, *supra* note 40, at 1085 (emphasis added).

[42] David Kennedy, et al., *Homicide in Minneapolis: Research for Problem Solving*, 2 HOMICIDE STUDIES 263, 269 (1998).

the minority is even smaller."[43]

C. Some Criminological Studies Find Liberal CCW Issuance Greatly Reduces Crime; Other Studies Just Find it Doesn't Increase Crime

Criminological evaluations are unanimous in finding no increased crime from widespread CCW issuance.[44] Unfortunately, this unanimity has been obscured by the controversy over whether widespread CCW licensing has actually *reduced* violent crime in America.[45] This controversy arose from a 20-year University of Chicago study of all American counties, showing that "when [liberal] state concealed-handgun laws went into effect in a county, murders fell by about 8 percent, rapes fell by 5 percent, and aggravated assaults fell by 7 percent."[46]

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[43] Kopel, *supra* note 37, at 569 (emphasis added); see also, Declaration of Carlisle E. Moody Supp. Pls' Opp. to Def.'s Mot. Summ. J., *Peruta v. County of San Diego*, No. 09-02371 (S.D. Cal. 2010) at ¶¶ 16-18 (hereafter, "Moody Decl.").

[44] *See, e.g.* "The Impact of Right-to-Carry Laws and the NRC Report: Lessons for the Empirical Evaluation of Law and Policy," a paper presented at 5th Annual Conference on Empirical Legal Studies, Johns Hopkins University, June 29, 2010 (available at http://ssrn.com/abstract=1632599).

[45] Lott, *supra* note 35; *see* Moody Decl. at ¶¶ 3-9.

[46] Lott, *supra* note 35, at 59. Notably, California's violent crime statistics are substantially worse than five comparable high population states that have had widespread concealed carry for more than five years. Connecticut, North Carolina, Ohio, Pennsylvania and Virginia. *See* Exhibit A: Uniform Crime Report Statistics: 2005-2009 Murder and Violent Crime Rates for Selected States.

While the study has been vehemently assailed by gun control advocates,[47] most non-political critics who replicated the study using additional or different data, further control variables, or new or different statistical techniques they deemed superior, reached the same conclusion: *more guns, less violent crime.*[48] Indeed, some found the University of Chicago study had *understated* the crime-reductive effects of widespread concealed carry.[49]

But Amici's position does not rest on the controversial "more guns-less crime" theory. Instead, we take the position of the University of Chicago study's leading critics: the non-controversial *fact* that widespread concealed carry cannot be said to have had any effect – it did not increase, but neither did it reduce, murder

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[47] *E.g.*, Franklin Zimring & Gordon Hawkins, "Concealed Handgun Permits: The Case of the Counterfeit Deterrent," *The Responsive Community* (1997); Albert W. Altschuler, *Two Guns, Four Guns, Six Guns, More: Does Arming the Public Reduce Crime*, 31 VALPAIRISO UNIV. L. REV. 309 (1997); Daniel Black & Daniel Nagin, *Do Right-to-carry Laws Deter Violent Crime*, 27 J. LEGAL STUD. 209 (1998) 209, Ian Ayres & John J. Donohue, *Shooting Down the 'More Guns, Less Crime' Hypothesis*, 55 STAN L. REV. 1193 (2003).

[48] See the seven articles printed in the Oct. 2001 issue of the Journal of Law and Economics (v. 44); see also Florenz Plassman & John Whitley, *Confirming "More Guns, Less Crime,"* 55 STAN L. REV. 1313 (2003).

[49] See discussion in Don B. Kates, "The Limits of Gun Control: A Criminological Perspective" at 70ff. in Timothy Lytton, ed., SUING THE FIREARMS INDUSTRY: A LEGAL BATTLE AT THE CROSSROADS OF GUN CONTROL AND MASS TORTS (University of Michigan Press, 2005).

and other violent crimes.[50]

This is also the view taken by the National Academy of Sciences' massive 2004 study of gun control.[51] Moreover, the Academy study's general conclusion on gun control dovetails with the conclusion from the prior year's gun control study by the Centers for Disease Control (CDC): Neither study found any gun ban or control–or combination thereof–had *ever* verifiably reduced violence, suicide or gun accidents.[52] The CDC, a long time gun-ban advocate, attributed its disappointing findings to a lack of quality research on the value of gun control.

A more realistic conclusion would reaffirm the view of the 18th Century "father of criminology" Cesare Beccaria. He cited arms controls to exemplify "False Ideas of Utility." He concluded that arms controls cannot reduce crime –

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[50] The leading study advancing this view is Ian Ayres & John J. Donohue, III, *supra* note 47.

[51] "[W]ith the current evidence it is not possible to determine that there is a causal link between the passage of right-to-carry laws and crime rates." This conclusion of the National Academy of Sciences study was quoted with approval in the latest writing by opponents of the University of Chicago study, "The Impact of Right-to-Carry Laws and the NRC Report"quoted *supra* note 42.

[52] National Academy of Sciences: Charles F. Wellford, John V. Pepper, and Carol V. Petrie (eds.), FIREARMS AND VIOLENCE: A CRITICAL REVIEW (National Academy of Sciences, 2004); CDC: "First Reports Evaluating the Effectiveness of Strategies for Preventing Violence: Firearms Laws" (2003), *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/rr5214a2.htm.

because good people's arms don't need to be controlled and felons will not obey gun bans. In Beccaria's view, gun bans only disarm the law-abiding without hampering criminals or diminishing crime.[53] We address Beccaria's views at such length because Thomas Jefferson translated this passage and included it in his book of great quotations.[54] Likewise Thomas Paine endorsed the same comments in paraphrase.[55]

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[53] C. Beccaria, *An Essay on Crimes and Punishments* 87-88 (1764): "The laws that forbid the carrying of arms are laws of such a nature [false utility]. They disarm those only who are neither inclined nor determined to commit crimes. Can it be supposed that those who have the courage to violate the most sacred laws of humanity, the most important of the code, will respect the less important and arbitrary ones, which can be violated with ease and impunity, and which, if strictly obeyed, would put an end to personal liberty--so dear to men, so dear to the enlightened legislator – and subject innocent persons to all the vexations that the quality alone ought to suffer? Such laws make things worse for the assaulted and better for the assailants; they serve rather to encourage than to prevent homicides, for an unarmed man may be attacked with greater confidence than an armed man. They ought to be designated as laws not preventive but fearful of crimes, produced by the tumultuous impression of a few isolated facts, and not by thoughtful consideration of the inconveniences and advantages of a universal decree."

[54] STEPHEN HALBROOK, THE FOUNDERS' SECOND AMENDMENT 132 (2008).

[55] WRITINGS OF THOMAS PAINE 56 (M. Conway ed. 1894). Though making the same points, Paine does not explicitly mention Beccaria.

D. The Declaration Relied on by the District Court's Opinion Is Irrelevant

A gun control advocacy group, the Brady Center, publishes a monograph falsely claiming that there are hundreds of illegal shootings by CCW licensees. It is likely that the Brady Center will submit an amicus brief in this case with these false statistics. Amici do not analyze these falsehoods in detail because Prof. Kopel has done so at length in his article cited above (see Kopel, *supra* note 37, at 569-573). It turns out that these hundreds of "murders" either: a) were investigated by police who determined they were lawful self-defense and filed no charges against the CCW licensee; or (b) were reviewed by grand or petit juries who determined they were lawful self-defense and exonerated the CCW licensee; or (c) were, in a few cases, determined to have occurred in the licensee's home and so did not involve a CCW.[56] Of course some much smaller number of incidents will involve CCW holders misusing arms in public, but as noted above, as a group, CCW holders are *less* likely to do so than non-CCW holders–probably because they have been subjected to background checks and training in the safe and lawful use of firearms.

To justify San Diego's extremely limited CCW license issuance, defendants – and the opinion below – depend on a declaration by academia's leading gun

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[56] Kopel, *supra* note 37, at 569ff.

control advocate, Professor Frank Zimring. Unfortunately, as noted by Plaintiffs' expert criminologist and academician, Prof. Moody, the Zimring declaration is almost entirely irrelevant because its focus is almost entirely on the dangers of guns *being carried by criminals without CCW's.* These same predictions of dire consequences have been repeated in each state where liberalized CCW policies were enacted, and each time proven wrong.

Notably, none of the states adopting such liberalized CCW issuance laws has repealed them.[57] In fact, some have repealed CCW prohibitions altogether.[58]

CONCLUSION

The legislative history of the relevant statutes in this case shows that they are intended to (and do) prohibit most Californians from bearing arms for self-defense purposes, absent a state-required permit to carry. Because San Diego's policy denies such permits to Plaintiffs, and almost all residents, it likewise denies them their Constitutional right to bear arms. And it does so without justification, for

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[57] Moody Decl. at ¶¶ 9-15.

[58] See generally, Lott, *supra* note 35; *See also* Ariz. Rev. Stat. Ann. § 13-3102; Vt. Stat. Ann. tit. 13, § 4003; *See* 2011 Wyoming Laws Ch. 84 (S.F. 47).

criminological studies and evidence from 40+ states show that issuing permits to law-abiding, responsible adults does not increase violent crime. It does, however, enable people to exercise their Second Amendment rights.

Date: May 31, 2011

Respectfully Submitted,

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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 (Microsoft Word), the word count of the brief is exactly 6606 words, excluding the cover, corporate disclosure statement, table of contents, table of authorities, certificate of service, and this certificate of compliance.

Date: May 31, 2011

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 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.

/s Don B. Kates
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