Nos. 10-56971 & 11-16255

In the United States Court of Appeals for the Ninth Circuit

EDWARD PERUTA; MICHELLE LAXSON; JAMES DODD; LESLIE BUNCHER, DR.; MARK CLEARY; CALIFORNIA RIFLE AND PISTOL ASSOCIATION FOUNDATION,

Plaintiffs-Appellants,

v.

COUNTY OF SAN DIEGO; WILLIAM D. GORE, individually and in his official capacity as Sheriff,

Defendants-Appellees.

On Appeal from the U.S. District Court for the Southern District of California, No. 3:09-cv-02371-IEG-BGS

AMICI CURIAE BRIEF FOR THE GOVERNORS OF TEXAS, LOUISIANA, MAINE, MISSISSIPPI, OKLAHOMA, AND SOUTH DAKOTA IN SUPPORT OF PLAINTIFFS-APPELLANTS

PHIL BRYANT
Governor of Mississippi

GREG ABBOTT
Governor of Texas

DENNIS DAUGAARD
Governor of South Dakota

JAMES D. BLACKLOCK
General Counsel

MARY FALLIN
Governor of Oklahoma

ANDREW S. OLDHAM
Deputy General Counsel

BOBBY JINDAL
Governor of Louisiana

OFFICE OF THE GOVERNOR
1100 San Jacinto Blvd.
Austin, Texas 78711
512-463-1788
Andrew.Oldham@gov.texas.gov
Counsel for Amici Governors

PAUL LEPAGE
Governor of Maine

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION, STATUTES, AND RULES

OTHER AUTHORITIES

IDENTITY AND INTEREST OF AMICI CURIAE

Amici curiae are the Governors of Texas, Louisiana, Maine, Mississippi, Oklahoma, and South Dakota ("*Amici* Governors").[1] *Amici* have two profound interests in the outcome of this case. First, citizens in the *Amici* Governors' States should not be forced to choose between exercising their constitutional rights to bear arms and exercising their constitutional rights to travel to California. The Supreme Court has said that "the 'constitutional right to travel from one State to another' is firmly embedded in our jurisprudence." *Saenz v. Roe*, 526 U.S. 489, 498 (1999) (quoting *United States v. Guest*, 383 U.S. 745, 757 (1966)). In fact, "the right is so important that it is 'assertable against private interference as well as governmental action . . . a virtually unconditional personal right, guaranteed by the Constitution to us all.'" *Ibid.* (quoting *Shapiro v. Thompson*, 394 U.S. 618, 643 (1969) (Stewart, J., concurring)). If citizens in a State like Texas need or want to travel

[1] Pursuant to Fed. R. App. P. 29(c)(5), *amici* state that no party's counsel authored the brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or submitting the brief, and no person—other than *amici* and *amici*'s counsel—contributed money that was intended to fund preparing or submitting this brief. All parties have consented to this filing.

to a State like California, they should not be forced to check their gun rights at the border.

Second, California bases its incapacious view of the right to bear arms on purported "public safety" concerns. But data from the *Amici* Governors' States proves that California's worries are unfounded. It is by now indisputable that concealed handgun license ("CHL") holders are disproportionately *less likely* to commit crimes. Therefore, California's "public safety" concerns should be rejected as pretextual.

ARGUMENT

The question presented is whether the State of California can single out one group of disfavored citizens—namely, gun owners—and impose unique burdens on their fundamental rights. If this were a case about speech, the right to counsel, or any of the myriad rights protected by the Fourteenth Amendment, every federal court in this country would reject California's arguments out of hand. Indeed, no other group of private citizens has to prove—to the satisfaction of a government official vested with unreviewable and boundless discretion—that they *really need* to exercise their fundamental constitutional freedoms.

California's only purported justification is that guns are somehow different because they pose unique "public safety" concerns. That blinks reality. It cannot be disputed that concealed-carry permit-holders are disproportionately less likely to pose threats to "public safety." And empirical evidence proves that concealed-carry laws either reduce crime or have no effect on it. Given that it cannot be justified by facts, California's efforts to ban the carriage of guns "raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." *Romer v. Evans*, 517 U.S. 620, 634 (1996).

That animus or irrational fear is no less unconstitutional here than it would be in any other area of constitutional law. As the Supreme Court has held, the Second Amendment does not create "a second-class right." *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010).

I. CALIFORNIA IS WRONG ON THE LAW

A. Outside of the context of guns, no federal court would countenance any effort by a State to condition the constitutional rights

of its citizens on the unreviewable discretion of a sheriff to find "good cause" for their exercise. Imagine if California did any of the following:

- No speech unless a sheriff finds "good cause" for it;
- No public assembly unless a sheriff finds "good cause" for it;
- No religious exercise unless a sheriff finds "good cause" for it;
- Compelled quartering of soldiers if a sheriff finds "good cause" for it;
- Compelled searches, seizures, and arrests if a sheriff exercises unreviewable discretion to find "good cause" for them;
- No grand juries unless a sheriff finds "good cause" for them;
- No protection against double jeopardy if a sheriff finds "good cause" for dispensing with it;
- Compelled taking of private property if a sheriff finds "good cause" for it;
- No speedy trials if a sheriff finds "good cause" for dispensing with them;
- No public trials if a sheriff finds "good cause" for dispensing with them;
- No impartial juries if a sheriff finds "good cause" for dispensing with them;
- No right to confront witnesses if a sheriff finds "good cause" for dispensing with it;
- No right to counsel if a sheriff finds "good cause" for dispensing with it;
- No right to avoid excessive bail if a sheriff finds "good cause" for dispensing with it;

- No right to avoid excessive fines if a sheriff finds "good cause" for dispensing with them;
- No right to avoid cruel and unusual punishment if a sheriff finds "good cause" for dispensing with it; or
- No right to anything protected by the Fourteenth Amendment if the sheriff finds "good cause" for dispensing with it.

Lawyers and non-lawyers alike would agree that those hypotheticals are absurd.

But when it comes to regulating gun rights, California thinks that the State can do things that would be unthinkable in other areas of constitutional law. To take just one of the examples above, it is well settled that the government cannot give public officials unbridled discretion to determine whether a would-be speaker has good cause to speak; that is because "unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship." *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 757 (1988); *see also Saia v. New York*, 334 U.S. 558 (1948); *Niemotko v. Maryland*, 340 U.S. 268 (1951); *Kunz v. New York*, 340 U.S. 290 (1951); *Staub v. City of Baxley*, 355 U.S. 313 (1958); *Freedman v. Maryland*, 380 U.S. 51 (1965); *Cox v. Louisiana*, 379 U.S. 536 (1965); *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969); *Secretary of State of*

Maryland v. Joseph H. Munson Co., 467 U.S. 947 (1984); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990); *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123 (1992). As the Supreme Court held more than a half-century ago:

> It is settled by a long line of recent decisions of this Court that an ordinance which . . . makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.

Staub, 355 U.S. at 322.

B. When it comes to gun freedoms, though, California gives its sheriffs the same unbridled discretion that is anathema to other areas of constitutional law. To get a permit to carry a firearm, a Californian first must prove to the sheriff that he or she has "good moral character"—a vacuous standard that has an ignominious pedigree. For example, "[i]n 1960 the Mississippi state constitution was amended to add a new voting qualification of 'good moral character,' an addition which it is charged was to serve as yet another device to give a registrar power to permit an applicant to vote or not, depending solely on the registrar's own whim or caprice, ungoverned by any legal standard."

United States v. Mississippi, 380 U.S. 128, 133 (1965) (footnote omitted).

Second, a Californian who wants to carry a gun also must prove to the sheriff's satisfaction "good cause" for exercising his or her constitutional rights.[2] Crucially, "concern for one's personal safety alone is *not* considered good cause." Panel Op. at 7 (emphasis added). Rather, to establish "good cause," the applicant must supply "supporting documentation" that proves that the applicant faces a "unique risk of harm." *Id.* at 49. Examples of such "supporting documentation" include "restraining orders, [and] letters from law enforcement agencies or the [district attorney] familiar with the case." *Id.* at 7. "If the applicant cannot demonstrate 'circumstances that

[2] The "good cause" standard that burdens Plaintiffs' rights in this case comes from a combination of California state law and San Diego local law. While sheriffs in other counties in California could interpret the standard differently, the State of California thinks that San Diego's particularly burdensome interpretation of the "good cause" standard is the lynchpin for the State's entire regulatory scheme. *See* State of California's Mot. to Intervene at 6, *Peruta v. County of San Diego*, No. 122-1 (9th Cir. Feb. 27, 2014) (striking down San Diego's interpretation of "good cause" would "necessarily call into question the constitutionality of California's statutory scheme"). Given California's view that its state laws are "necessarily" coterminous with San Diego's interpretation of "good cause," we refer throughout to California law as the source of the burden on Plaintiffs' constitutional rights.

distinguish [him] from the mainstream,' then he will not qualify for a concealed-carry permit." *Ibid.*

But that conception of "good cause" would turn the Constitution's text and meaning on its head. The Second Amendment reads: "A well regulated Militia, being necessary to the security of a free State, *the right of the people* to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. That is, the right belongs to "the people," not to some subset of "unique" people who can successfully convince a sheriff that they (unlike their more-common neighbors) *really need* to carry a firearm. *See also District of Columbia v. Heller*, 554 U.S. 570, 579-80 (2008). Thomas Cooley, the leading constitutional scholar after the Civil War, explained it this way:

> When the term 'the people' is made use of in constitutional law or discussions, it is often the case that those only are intended who have a share in the government through being clothed with the elective franchise. . . . But in all the enumerations and guaranties of rights the whole people are intended, because the rights of all are equal, and are meant to be equally protected.

THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 267-68 (1880; reprint 2000) (interpreting the First Amendment); *see also id.* at 270-71 (interpreting

the Second Amendment); THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE AMERICAN UNION 350 (1880) (same); *Heller*, 554 U.S. at 617-19 (same). California's approach to carrying firearms—that the right extends only to some, and only to those who are somehow "unique"—flagrantly violates these principles.

California offers only one justification for treating the Second Amendment differently from all other constitutional provisions: "public safety." But the Supreme Court has emphatically rejected the notion that the government can use "public safety" concerns as a pretense for discriminating against gun rights. *See McDonald*, 561 U.S. at 782-83 (rejecting Chicago's argument "that the Second Amendment differs from all of the other provisions of the Bill of Rights because it concerns the right to possess a deadly implement and thus has implications for public safety"). Thus, California is wrong to suggest that its public safety concerns give the State a legal basis to impose special and draconian burdens on Second Amendment rights.

II. CALIFORNIA IS WRONG ON THE FACTS

Not only is California wrong on the law; it is also wrong on the facts. The right to bear arms is a "fundamental" one, *see McDonald*, 561 U.S. at 767-80, which means it is the State's burden to put forward facts to prove that generally banning the carriage of firearms is narrowly tailored to serve a compelling interest, *e.g.*, *Dunn v. Blumstein*, 405 U.S. 330, 342-43 (1972). And where the State's asserted interest fails even the most cursory inquiry, the Court must presume that it is a pretext for irrational animus. *See Romer*, 517 U.S. at 634.

California cannot come close to carrying that heavy burden in this case because the facts squarely undermine its "public safety" justification. It is a well-documented fact that concealed-carry permit-holders are disproportionately less likely to commit crimes. For example, here are the data from the last 10 years in Texas:

Table 1: CHLs and Public Safety[3]

Year	CHLs	CHLs' Crime	CHL Crime Rate	Population	Total Crimes	Total Crime Rate	CHL Relative Safety
2013	708,048	158	0.0223%	18,336,567	50,869	0.2774%	12.43
2012	584,850	120	0.0205%	17,929,526	63,272	0.3529%	17.20
2011	518,625	120	0.0231%	17,534,860	63,679	0.3632%	15.70
2010	461,724	121	0.0262%	17,154,807	73,914	0.4309%	16.44
2009	402,914	101	0.0251%	17,074,479	65,561	0.3840%	15.32
2008	314,574	86	0.0273%	16,709,525	65,084	0.3895%	14.25
2007	288,909	160	0.0554%	16,370,817	61,260	0.3742%	6.76
2006	258,162	144	0.0558%	16,052,486	61,539	0.3834%	6.87
2005	248,874	154	0.0619%	15,568,595	60,873	0.3910%	6.32
2004	239,940	105	0.0438%	15,275,415	63,715	0.4171%	9.53
AVG			**0.0361%**			**0.3763%**	**10.41**

As illustrated by these data, CHL holders are *more than 10 times less likely* to commit a crime in Texas as compared to the general population.

And it is not just the overall crime rate. Even for crimes that often or always involve guns—such as aggravated assault with a deadly weapon, or deadly conduct involving discharge of a firearm—the crime

[3] Source: Texas Department of Public Safety Annual Reports, available at www.txdps.state.tx.us/rsd/chl/reports/convrates.htm. *N.b.*, "Population," "Total Crimes," and "Total Crime Rate" are limited to individuals over the age of 21 to ensure an apples-to-apples comparison with the CHL crime rate; in Texas, individuals under 21 generally are ineligible for CHLs. *See* TEX. GOV'T CODE §§ 411.047, 411.172(a)(2).

rate for CHL holders is dramatically smaller than for the general population.

Table 2: Aggravated Assault with a Deadly Weapon

Year	CHLs	CHLs' Crime	CHL Crime Rate	Population	Total Crimes	Total Crime Rate	CHL Relative Safety
2013	708,048	10	0.0014%	18,336,567	2,292	0.0125%	8.85
2012	584,850	6	0.0010%	17,929,526	2,852	0.0159%	15.51
2011	518,625	3	0.0006%	17,534,860	2,765	0.0158%	27.26
2010	461,724	3	0.0006%	17,154,807	3,079	0.0179%	27.62
2009	402,914	4	0.0010%	17,074,479	2,603	0.0152%	15.36
2008	314,574	0	0.0000%	16,709,525	2,600	0.0156%	∞
2007	288,909	7	0.0024%	16,370,817	2,513	0.0154%	6.34
2006	258,162	9	0.0035%	16,052,486	2,701	0.0168%	4.83
2005	248,874	5	0.0020%	15,568,595	2,632	0.0169%	8.41
2004	239,940	5	0.0021%	15,275,415	2,901	0.0190%	9.11
AVG			**0.0015%**			**0.0161%**	**10.98**

Table 3: Deadly Conduct Involving Discharge of a Firearm

Year	CHLs	CHLs' Crime	CHL Crime Rate	Population	Total Crimes	Total Crime Rate	CHL Relative Safety
2013	708,048	1	0.0001%	18,336,567	204	0.0011%	7.88
2012	584,850	1	0.0002%	17,929,526	266	0.0015%	8.68
2011	518,625	2	0.0004%	17,534,860	244	0.0014%	3.61
2010	461,724	2	0.0004%	17,154,807	389	0.0023%	5.23
2009	402,914	1	0.0002%	17,074,479	343	0.0020%	8.09
2008	314,574	0	0.0000%	16,709,525	244	0.0015%	∞
2007	288,909	0	0.0000%	16,370,817	203	0.0012%	∞
2006	258,162	1	0.0004%	16,052,486	177	0.0011%	2.85
2005	248,874	1	0.0004%	15,568,595	215	0.0014%	3.44
2004	239,940	0	0.0000%	15,275,415	201	0.0013%	∞
AVG			**0.0002%**			**0.0015%**	**6.81**

As illustrated by Table 2, a CHL holder in Texas is *11 times less likely* to commit aggravated assault with a deadly weapon. And as illustrated by Table 3, a CHL holder in Texas is *7 times less likely* to commit deadly conduct involving a firearm. And Texas is not unusual. *See, e.g.*, John R. Lott, Jr., *What A Balancing Test Will Show for Right-to-Carry Laws*, 71 MD. L. REV. 1205, 1212 (2012) ("The behavior of permit holders is the easiest question to answer. . . . The third edition of *More Guns, Less Crime* presents detailed data for 25 right-to-carry states, and any type of firearms-related violation is at hundredths or thousandths of one percent.") (citing JOHN R. LOTT, JR., MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN CONTROL LAWS (3d ed. 2010)). The

claim that CHL holders somehow create a "public safety" risk is manifestly contrary to the facts.

Not only are CHL holders dramatically less likely to commit crimes themselves, they also incentivize others to commit less crime. Would-be criminals are less likely to break the law when they know that their victims may be carrying firearms. Decades of empirical research prove this. *See, e.g.*, Lott, 71 MD. L. REV. at 1212 ("There have been five qualitatively different tests confirming that right-to-carry laws reduce violent crime. These studies show that violent crime falls after right-to-carry laws are adopted, with bigger drops the longer the right-to-carry laws are in effect."); *id.* at 1212-17 (collecting and analyzing studies). And while some have nitpicked that research in various ways, the most that the critics claim to show is that CHL laws have *no effect* on crime rates. *See, e.g.*, NATIONAL RESEARCH COUNCIL, FIREARMS AND VIOLENCE: A CRITICAL REVIEW 150 (2004) ("[T]he committee concludes that with 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."). *Amici* are aware of no research from any

source that suggests that CHL laws *increase* crime or otherwise threaten public safety.

It might be true that statewide elected officials in California have strong political incentives to infringe "the right of the people to keep and bear Arms." U.S. Const. amend. II. But the Constitution never was intended to disappear where policymakers in Sacramento find it inconvenient, nor was it intended to protect only those rights that enjoy popular support or universal acceptance. To the contrary, the whole point of the Constitution's text is to protect certain *unpopular* rights from the zeal of a government bent on squelching them. *See United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

PHIL BRYANT
Governor of Mississippi

DENNIS DAUGAARD
Governor of South Dakota

MARY FALLIN
Governor of Oklahoma

BOBBY JINDAL
Governor of Louisiana

PAUL LEPAGE
Governor of Maine

GREG ABBOTT
Governor of Texas

JAMES D. BLACKLOCK
General Counsel

/s/ Andrew S. Oldham
ANDREW S. OLDHAM
Deputy General Counsel

OFFICE OF THE GOVERNOR
1100 San Jacinto Blvd.
Austin, Texas 78711
512-463-1788
Andrew.Oldham@gov.texas.gov
Counsel for Amici Governors

CERTIFICATE OF COMPLIANCE

Certificate of Compliance With Type-Volume Limitation,
Type-Face Requirements, and Type-Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and 9th Cir. R. 29-2 because it contains 2,920 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the type-face requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Century Schoolbook.

/s/ Andrew S. Oldham
ANDREW S. OLDHAM
Counsel for Amici Governors

9th Circuit Case Number(s) Nos. 10-56971, 11-16255

NOTE: To secure your input, you should print the filled-in form to PDF (File > Print > *PDF Printer/Creator*).

****

CERTIFICATE OF SERVICE
When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) 04/30/2015 .

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature (use "s/" format) /s/ Andrew S. Oldham

****

CERTIFICATE OF SERVICE
When Not All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) .

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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:

Signature (use "s/" format)