

No. 12-57049

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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DOROTHY MCKAY et. al.,

*Plaintiffs-Appellants,*

v.

SHERIFF SANDRA HUTCHENS, et. al.,

*Defendants-Appellees.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA  
(SACV 12-1458JVS)

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**MOTION FOR LEAVE TO FILE AMICUS BRIEF  
ON BEHALF OF THE GUN OWNERS OF CALIFORNIA  
& SENATOR H.L. RICHARDSON (RET.)**

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Pursuant to Circuit Rule 29-3, the movant has endeavored to obtain the consent of all parties to the filing of the brief prior to moving the Court for permission to file the proposed brief. Appellants consent to the filing of this brief. Respondents do not consent to the filing of this brief.

The Gun Owners of California and Senator H.L. Richardson (Ret.) respectfully move this Court, pursuant to Federal Rule of Appellate Procedure 29, for leave to file the concurrently submitted brief, as an amicus curiae in support of appellants.

### **INTERESTS OF THE AMICUS**

#### **AMICUS GUN OWNERS OF CALIFORNIA**

The Gun Owners of California (GOC) is a California non-profit corporation that was organized in 1974 by Senator H.L. Richardson. With offices in Sacramento, the GOC lobbies local government in favor of protecting Second Amendment rights. The GOC also monitors government activities at the national, state, and local levels that may affect the rights of Americans who choose to own firearms. The GOC supports the right to self-defense and to keep and bear arms as guaranteed by the Second Amendment to the United States Constitution.

#### **AMICUS SENATOR H.L. RICHARDSON (RET.)**

Senator H.L. Richardson (Ret.) Served in the California State Senate for 22

years, entering the Senate in 1966 and leaving the Senate in 1988. During his lengthy political career, he focused extensive effort on the preservation and protection of our Second Amendment rights. Moreover, he was involved in the passage of many of California's firearm laws, especially those protecting the fundamental right to self-defense with a firearm. Still today, Senator Richardson continues to be actively involved in state and national politics.

Senator Richardson founded Gun Owners of California in 1974. He is also an active hunter and outdoorsman. He maintains unique perspectives tempered with good humor, which keeps him in demand as both a speaker and a writer. He regularly provides media commentary on a range of issue and has written numerous national publications including political books, Western mysteries set in the American West, and a political comedy. He currently resides in the Sacramento area.

### **REASONS FOR FILING**

Amici have reviewed the briefs filed to date by the parties to this proceeding and are familiar with the issues before the Court. The accompanying amicus brief addresses Second Amendment issues that amici believe directly affect the people of California. The brief addresses an overview of California laws regulating public firearm possession and why no public interest is furthered by Sheriff Hutchens'

“good cause” policy at issue in this case. Moreover, this brief offers criminological information in direct retort to Respondent’s assertion that carry permits issued to law-abiding adults would imperil public safety.

Importantly, amici argue that the right to bear arms neither precludes state laws that regulate the particular bearing of a hand gun nor does it preclude the requirement of issuing a permit for persons desiring to bear arms outside the home. However, amici assert that the Second Amendment does preclude a policy like that implemented by Sheriff Hutchens that otherwise denies permits to ordinary, responsible, law-abiding adults.

Amici join Plaintiff’s position that the Second Amendment guarantees all responsible, law-abiding adults the right to obtain a license to carry a concealed handgun (a “CCW”), thereby allowing them to publicly carry firearms for self-defense.

Accordingly, the amici respectfully move that this Court grant leave to file the brief submitted concurrently with this motion.

Date: December 6, 2012

/s/ Don B. Kates  
Don B. Kates  
Attorney for *Amicus Curiae*

### **CERTIFICATE OF SERVICE**

I hereby certify that on December 6, 2012, an electronic PDF of this Motion for Leave to File Amicus Brief on Behalf of the Gun Owners of California & Senator H.I. Richardson (Ret.) 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  
Don B. Kates  
Attorney for *Amicus Curiae*

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

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**TABLE OF CONTENTS**

	<b>PAGE(S)</b>
<b>CORPORATE DISCLOSURE STATEMENT.</b> . . . . .	1
<b><u>IDENTITY OF THE <i>AMICI CURIAE</i>.</u></b> . . . . .	2
<b>SENATOR H. L. RICHARDSON (RETIRED).</b> . . . . .	2
<b>GUN OWNERS OF CALIFORNIA.</b> . . . . .	3
<b>INTRODUCTION.</b> . . . . .	4
<b>DISCUSSION.</b> . . . . .	5
<b>I. THE MYTH OF POLICE PROTECTION.</b> . . . . .	5
<b>II. THERE IS NO RIGHT TO BEAR ARMS IN CALIFORNIA EXCEPT FOR A CCW</b> . . . . .	7
<b>III. ALLOWING CARRY PERMITS TO LAW-ABIDING ADULTS DOES NOT IMPERIL PUBLIC SAFETY.</b> . . . . .	9
<b>A. Over 40 States Now Freely Permit Law-Abiding, Responsible Adults to Carry Concealed Handguns.</b> . . . . .	9
<b>B. Experience Has Dispelled Fears that Allowing Permits to Law Abiding Adults Would Fuel Crime.</b> . . . . .	10
<b>C. Some Criminological Studies Find Liberal CCW Issuance Reduces Violent Crime; Other Studies Just Find it Doesn't Increase Violent Crime; None Find Violent Crime Is Increased.</b> . . . . .	12

**TABLE OF CONTENTS**

	<b>PAGE(S)</b>
<b>D. The Declarations Relied on by Sheriff Hutchens are Irrelevant.....</b>	16
<b>CONCLUSION. ....</b>	18
<b>CERTIFICATE OF COMPLIANCE. ....</b>	20
<b>CERTIFICATE OF SERVICE. ....</b>	21



**TABLE OF AUTHORITIES**

**PAGE(S)**

**FEDERAL CASES**

*District of Columbia v. Heller*,  
554 U.S. 570, 628 (2008). . . . . 4

**STATE CASES**

*People v. Flores*,  
No. B211207, 2010 WL 2804361,  
at \*25-26 (Cal. Ct. App. July 19, 2010). . . . . 8

*People v. King*,  
22 Cal.3d 12, 24 (1978). . . . . 8

*Terry v. County of Los Angeles*,  
No. B222112, 2011 WL 490996,  
at \*3 (Cal. Ct. App. Feb. 14, 2011). . . . . 7

**STATUTES**

Cal. Gov't Code § 821. . . . . 6  
Cal. Gov't Code § 845. . . . . 6  
Cal. Gov't Code § 846. . . . . 6  
Cal. Penal Code § 12021. . . . . 8  
Cal. Penal Code § 12050. . . . . 11  
Cal. Penal Code § 25400. . . . . 7

**TABLE OF AUTHORITIES (CONT.)**

	<b>PAGE(S)</b>
 <b><u>STATUTES</u></b>	
Cal. Penal Code § 25505 - 25595.....	7
Cal. Penal Code § 25610. ....	7
Cal. Penal Code § 26045.....	7
Cal. Penal Code § 26350. ....	7
Alaska Stat. Ann. § 11.61.190.....	18
Alaska Stat. Ann. § 11.61.220.....	18
Ariz. Rev. Stat. Ann. § 13-3102. ....	18
Vt. Stat. Ann. tit. 13, § 4003. ....	18
2011 Wyoming Laws Ch. 84 (S.F. 47). ....	18
70 Am. Jur. 2d Sheriffs, Police, and Constables § 46 (2012).....	6
 <b><u>OTHER AUTHORITY</u></b>	
Abhay Aneja, John J. Donohue III, & Alexandria Zhang, <i>The Impact of Right-to-Carry Laws and the NRC Report: Lessons for the Empirical Evaluation of Law and Policy,</i> 5th Annual Conference on Empirical Legal Studies, Johns Hopkins University (2010).....	12
Albert W. Altschuler, <i>Two Guns, Four Guns, Six Guns, More: Does Arming the Public Reduce Crime,</i> 31 Valpairiso Univ. L. Rev. 309 (1997). ....	13

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*Rise of the Anti-Media: informing America’s Concealed Weapons  
 Movement* ch. 5 (2009)..... 9

Bruce L. Benson and Brent D. Mast,  
*Privately Produced General Deterrence*,  
 44 J. L. & Econ. 725 (2001). .... 13

Carlisle E. Moody,  
*Testing for the Effects of Concealed Weapons Laws: Specification  
 Errors and Robustness*, 44 J. L. & Econ. 799 (2001). .... 14

Cesare Beccaria,  
*An Essay on Crimes and Punishments*  
 87-88 (1764). .... 15, 16

Charles F. Wellford, John V. Pepper, and Carol V. Petrie eds.,  
*Firearms and Violence: A Critical Review–Committee to  
 Improve Research Information and Data on Firearms* (2004). .... 15

Daniel Black & Daniel Nagin,  
*Do Right-to-Carry Laws Deter Violent Crime*,  
 27 J. Legal Stud. 209 (1998)..... 13

David Kennedy, et al.,  
*Homicide in Minneapolis: Research for Problem Solving*,  
 2 Homicide Studies 263, 269 (1998). .... 11

David B. Kopel,  
*Pretend “Gun-free” School Zones: A Deadly Legal Fiction*,  
 42 Conn. L. Rev. 515, 546-583 (2009)..... 10

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**PAGE(S)**

**OTHER AUTHORITY (CONT.)**

David Kopel, Paul Gallant, and Joanne Eisen, *911 Is a Joke...or Is It? Let's Find Out*, Tech Central Station (Jan. 5, 2005)... 6

David B. Mustard,  
*Culture Affects Our Beliefs About Firearms, But Data Are Also Important*, 151 U. Penn. L. Rev. 1387, 1390-91 (2003). . . . . 10

David B. Mustard,  
*The Impact of Gun Laws on Police Deaths*,  
44 J. L. & Econ. 635 (2001). . . . . 13

David E. Olson and Michael D. Maltz,  
*Right-to-Carry Concealed Weapon Laws and homicide in Large U.S. Countries: The Effect of Weapon Types, Victim Characteristics, and Victim-Offender Relationships*,  
44 J. L. & Econ. 747 (2001). . . . . 13

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)... 12

Delbert S. Elliott,  
*Life Threatening Violence is Primarily a Crime Problem: A Focus on Prevention*, 69 Colo. L. Rev. 1081, 1081-1098 (1998). . . . . 11

Don B. Kates & Clayton Cramer,  
*Second Amendment Limitations and Criminological Considerations*,  
60 Hastings L. J. 1339, 1341-1344 (2009)... 11

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**PAGE(S)**

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*The Limits of Gun Control: A Criminological Perspective, in Suing the Firearms Industry: A Legal Battle at the Crossroads of Gun Control and Mass Torts* 70 (2005). . . . . 14

Florenz Plassman & John Whitley,  
*Confirming “More Guns, Less Crime,”*  
55 Stan. L. Rev. 1313 (2003). . . . . 14

Florence Plassmann and T. Nicolaus Tideman,  
*Does the Right to Carry Concealed Handguns Deter Countable Crimes? Only a Count Analysis Can Say*, 44 J. L. & Econ. 771 (2001). . . . . 13, 14

Franklin Zimring & Gordon Hawkins,  
*Concealed Handgun Permits: The Case of the Counterfeit Deterrent*,  
Vol. 7 Is. 2 The Responsive Community 46 (1997). . . . . 13

Ian Ayres & John J. Donohue,  
*Shooting Down the ‘More Guns, Less Crime’ Hypothesis*,  
55 Stan. L. Rev. 1193 (2003). . . . . 13

Jeffrey A. Miron,  
*Violence, Guns, and Drugs: A Cross-Country Analysis*,  
44 J. L. & Econ. 615 (2001). . . . . 13

Jeffrey S. Parker,  
*Guns, Crime, and Academics: Some Reflections on the Gun Control Debate*,  
44 J. L. & Econ. 715 (2001). . . . . 13

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 44 J. L. & Econ. 605 (2001). . . . . 13

John R. Lott, Jr.,  
*More Guns, Less Crime*  
 56-100 (3d ed. 2010). . . . . 9

John R. Lott and John E. Whitley,  
*Safe-Storage Gun Laws: Accidental Deaths, Suicides, and Crime*,  
 44 J. L. & Econ. 659 (2001). . . . . 13

John R. Lott,  
*The Bias Against Guns* (2003). . . . . 14

Robert A. Hahn et al.,  
*First Reports Evaluating the Effectiveness of Strategies  
 for Preventing Violence: Firearms Laws* (2003). . . . . 15

Stephen Halbrook,  
*The Founders Second Amendment* (2008). . . . . 16

Thomas B. Marvell,  
*The Impact of Banning Juvenile Gun Possession*,  
 44 J. L. & Econ. 691 (2001). . . . . 13

Tomislav V. Kovandzic et al.,  
*The Impact of “Shall-Issue” Concealed Handgun Laws on  
 Violent Crime Rates: Evidence from Panel Data for Large  
 Urban Cities*, 9 Homicide Studies 292 (2005). . . . . 5, 12

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*Calling the Police: Citizen Reporting of a Serious Crime*  
xxxiv (1981). . . . . 6

*Writings of Thomas Paine*  
56 (M. Conway ed. 1894). . . . . 16

## **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. During the ensuing 22 years, he bypassed three opportunities to run for Congress, choosing to remain in the GOP leadership of the California Senate. Richardson tackled his job with energy resulting in 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 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 by Senator Richardson. 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. A Motion for Leave To File Amicus Brief on Behalf of GOC and Senator H.L. Richardson (Ret.) has been filed concurrently with this brief. Although *Amici's* counsel is affiliated with Appellants' counsel as Of Counsel, no party's counsel authored this brief. Some funding for this brief was provided by the National Rifle Association, a rival

group to GOC, which is not a party to this matter.

## INTRODUCTION

The right to bear arms does not preclude laws requiring that handguns be borne in a particular manner. Neither does it preclude requiring a permit of persons desiring to bear arms outside the home. What it does preclude is a sheriff denying the license required to bear a handgun (i.e., CCW) to ordinary, responsible, law-abiding adults, simply because they have not proven compliance with the Sheriff's subjective "good cause" requirement for wanting to defend themselves.

In general, California denies responsible, law-abiding adults like the Plaintiffs the ability to bear arms if they do not have the CCW that the Sheriffs' policy denies them. Amici join in Plaintiffs' position that the Second Amendment guarantees all responsible, law-abiding adults the right to such a license, thereby allowing them to publicly 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.<sup>1</sup>

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<sup>1</sup> "[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

Sheriff Hutchens' fantasies of mayhem when ordinary people bear arms ill accord with the unanimous conclusion of criminological studies from the 19<sup>th</sup> Century to date. Issuing permits to such people does not menace public safety. Contrary to the misleading and evasive declarations provided by Sheriff Hutchens, the empirical fact is that criminal violence is virtually confined to people whose long criminal records preclude them from being licensed. *See Discussion Section infra*. The result has not been increasing gun crime because such people do not commit such crimes. *See, e.g., Tomislav V. Kovandzic et al., The Impact of "Shall-Issue" Concealed Handgun Laws on Violent Crime Rates: Evidence from Panel Data for Large Urban Cities, 9 Homicide Studies 292 (2005).*

## DISCUSSION

### I. THE MYTH OF POLICE PROTECTION

Ill-informed people think victims can rely on police protection. Yet it should be obvious that no matter how dedicated police may be, less than one million officers cannot personally protect more than 300 million Americans.

When police are sued for not protecting people, the response of Sheriff Hutchens and her colleagues in law enforcement is to invoke the universal American doctrine that police prevent crime *only* indirectly by patrolling the \_\_\_\_\_ or defensive action in a case of conflict with another person." *See id.* at 584.

streets and by apprehending criminals *after* their crimes.<sup>2</sup>

Police do intervene in crimes they observe – so criminals take care to strike when police aren't observing. In less than 3% of crimes do police arrive in time even to arrest felons, much less protect victims.<sup>3</sup> Because police cannot safeguard victims – and are not responsible for doing so – the laws of every state exonerate police from suit for non-protection. Typically, California's Government Tort Liability Act provides:

[A police department and its officers are] not liable for injury caused by failure to enforce any enactment [nor for] failure to provide police protection or to provide sufficient police protection [nor for] the failure to make an arrest or the failure to retain an arrested person in custody.<sup>4</sup>

Literally dozens of cases from the 50 states so hold as a matter of common law.<sup>5</sup>

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<sup>2</sup> David Kopel, Paul Gallant, and Joanne Eisen, *911 Is a Joke...or Is It? Let's Find Out*, Tech Central Station (2005), available at [http://www.ideasinactiontv.com/tcs\\_daily/2005/01/911-is-a-joke-or-is-it-lets-find-out.html](http://www.ideasinactiontv.com/tcs_daily/2005/01/911-is-a-joke-or-is-it-lets-find-out.html).

<sup>3</sup> *Id.* (citing William Spelman and Dale K. Brown, *Calling the Police: Citizen Reporting of a Serious Crime* xxxiv (1981)).

<sup>4</sup> Cal. Gov't Code §§821, 845-46.

<sup>5</sup> See 70 Am. Jur. 2d Sheriffs, Police, and Constables § 46 (2012)(citing cases).

## II. THE RIGHT TO BEAR ARMS CANNOT BE EXERCISED IN CALIFORNIA WITHOUT A CCW

California allows only one way for a citizen to carry arms in public—to obtain the permit that Sheriff Hutchens denies Plaintiffs. Indeed, it must be understood that the numerous exceptions to California’s general ban on loaded firearms in public are only to allow people to transport arms unloaded and in locked containers.<sup>6</sup>

It is true that California allows those being prosecuted for violating its prohibition on carrying loaded firearms in public to be exculpated if they can prove to the trier of fact that they “reasonably believe[.]” themselves to be in “immediate, grave danger and that the carrying of the weapon is necessary for preservation of that person or property.” Cal. Penal Code § 26045(a). But this is only allowed when the police have been called to deal with suspected crime and only for the period until police arrive. Moreover, the burden is on those asserting that affirmative defense to prove they are entitled to its protection. *See, e.g., Terry v. County of Los Angeles*, No. B222112, 2011 WL 490996, at \*3 (Cal. Ct. App.

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<sup>6</sup> Cal. Penal Code § 26350(a) (prohibiting openly carrying handguns in public generally); *id.* § 25400 (prohibiting the carrying of concealed handguns generally); *see generally id.* § 25610, §§25505-25595 (providing exceptions to the prohibition on concealed handguns in public if they are unloaded, in a locked container, and being transported within a vehicle or directly to or from certain locations).

Feb. 14, 2011) (finding defendant's belief that carrying a firearm was necessary to protect another was unreasonable); *see also People v. Flores*, No. B211207, 2010 WL 2804361, at \*25-26 (Cal. Ct. App. July 19, 2010).

Even assuming such an affirmative defense is sufficient to protect the Second Amendment rights of Californians, since there is no way to have a firearm legally present in public in the first place, it is merely theoretical, as it relies on a firearm being produced either magically or from someone else with a CCW. To say the theoretical availability of such an affirmative defense satisfies the mandates of the Second Amendment is to equate the rights of the law-abiding persons under that amendment with the rights of felons. *See People v. King*, 22 Cal.3d 12, 24 (1978) (holding "the prohibition of section 12021 [now sections 29800-29825] was not intended to affect a felon's right to use a concealable firearm in self-defense, but was intended only to prohibit members of the affected classes from arming themselves with concealable firearms or having such weapons in their custody or control in circumstances other than those in which the right to use deadly force in self-defense exists or reasonably appears to exist.")

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

#### **A. Over 40 States Now Freely Permit Law-Abiding, Responsible Adults to Carry Concealed Handguns**

From 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.<sup>7</sup>

Despite this dramatic shift toward liberalizing CCW issuance policies, the laws in California, New York, and a few other states still give law enforcement untrammelled 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 has continued endemic injustice and inequality.

In contrast to such abuses, the post-1980 state reforms have had startling effects on criminological opinion. As Professor David Mustard writes:

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<sup>7</sup> Brian Anse Patrick, *Rise of the Anti-Media: informing America's Concealed Weapons Movement* ch. 5 (2009); John R. Lott, Jr., *More Guns, Less Crime* 56-100 (3d ed. 2010).



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.<sup>8</sup>

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-plus reform states, opponents direly predicted that allowing responsible, law-abiding adults to carry handguns would cause endless bloodshed.<sup>9</sup> That these predictions nowhere came true in the first states adopting such policies was a major factor in other states later reforming their concealed carry requirements in favor of issuing more permits.<sup>10</sup> In fact, studies of these reforms show “[i]t would be difficult to find a significant demographic group in

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<sup>8</sup> 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).

<sup>9</sup> Patrick, *supra* note 7, at ch. 5; David B. Kopel, *Pretend “Gun-free” School Zones: A Deadly Legal Fiction*, 42 Conn. L. Rev. 515, 546-583 (2009).

<sup>10</sup> Kopel, *supra* note 9, Patrick, *supra* note 7.

the United States with a lower rate of handgun crimes” than CCW licensees.<sup>11</sup>

This is consistent with conclusions of homicide studies dating from the 19<sup>th</sup> Century to date. 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.<sup>12</sup> Professor Elliott summarizes these studies and their findings as follows: “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.”<sup>13</sup> It is so well documented that almost all murderers have prior criminal histories that criminologists deem it axiomatic.<sup>14</sup> Indeed, as Professor David Kopel writes: “[o]f course the vast majority of the general public does not perpetrate serious crimes. Only a tiny minority does so,

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<sup>11</sup> Kopel, *supra* note 9, at 565.

<sup>12</sup> See, e.g., Delbert S. Elliott, *Life Threatening Violence is Primarily a Crime Problem: A Focus on Prevention*, 69 Colo. L. Rev. 1081, 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).

<sup>13</sup> Elliot, *supra* note 12, at 1085 (emphasis added).

<sup>14</sup> David Kennedy, et al., *Homicide in Minneapolis: Research for Problem Solving*, 2 Homicide Studies 263, 269 (1998).

and among [CCW license] holders, the minority is even smaller.”<sup>15</sup>

**C. Some Criminological Studies Find Liberal CCW Issuance Reduces Violent Crime; Other Studies Just Find it Doesn’t Increase Violent Crime; None Find Violent Crime Is Increased**

Criminological evaluations are unanimous in finding no increased crime from widespread CCW issuance.<sup>16</sup> Unfortunately, this unanimity has been obscured by the related controversy over whether widespread CCW licensing has actually *reduced* violent crime in America.<sup>17</sup> This controversy arose from a 20-year University of Chicago study of all American counties, concluding that “when [liberalized] 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

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<sup>15</sup> Kopel, *supra* note 9, 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.”).

<sup>16</sup> *See, e.g.* Tomislav V. Kovandzic et al., *The Impact of “Shall-Issue” Concealed Handgun Laws on Violent Crime Rates: Evidence from Panel Data for Large Urban Cities*, 9 *Homicide Studies* 292 (2005); Abhay Aneja, John J. Donohue III, & Alexandria Zhang, *The Impact of Right-to-Carry Laws and the NRC Report: Lessons for the Empirical Evaluation of Law and Policy*, 5th Annual Conference on Empirical Legal Studies, Johns Hopkins University (2010) available at <http://ssrn.com/abstract=1632599> (hereinafter “The Impact of Right-to-Carry Laws and the NRC Report”).

<sup>17</sup> Lott, *supra* note 7; *see* Moody Decl. *supra* note 15, at ¶¶ 3-9.

percent.”<sup>18</sup>

While the study has been vehemently assailed by gun control advocates,<sup>19</sup> most non-political critics who replicated the study using additional or different data, further control variables, or new or different statistical techniques, reached the same conclusion: *more guns, less violent crime*.<sup>20</sup> Indeed, some found the

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<sup>18</sup> Lott, *supra* note 7, 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.

<sup>19</sup> *E.g.*, Franklin Zimring & Gordon Hawkins, *Concealed Handgun Permits: The Case of the Counterfeit Deterrent*, Vol. 7 Is. 2 The Responsive Community 46 (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); Ian Ayres & John J. Donohue, *Shooting Down the ‘More Guns, Less Crime’ Hypothesis*, 55 Stan. L. Rev. 1193 (2003).

<sup>20</sup> *See generally* John R. Lott, *Guns, Crime, and Safety: Introduction*, 44 J. L. & Econ. 605 (2001); Jeffrey A. Miron, *Violence, Guns, and Drugs: A Cross-Country Analysis*, 44 J. L. & Econ. 615 (2001); David B. Mustard, *The Impact of Gun Laws on Police Deaths*, 44 J. L. & Econ. 635 (2001); John R. Lott and John E. Whitley, *Safe-Storage Gun Laws: Accidental Deaths, Suicides, and Crime*, 44 J. L. & Econ. 659 (2001); Thomas B. Marvell, *The Impact of Banning Juvenile Gun Possession*, 44 J. L. & Econ. 691 (2001); Jeffrey S. Parker, *Guns, Crime, and Academics: Some Reflections on the Gun Control Debate*, 44 J. L. & Econ. 715 (2001); Bruce L. Benson and Brent D. Mast, *Privately Produced General Deterrence*, 44 J. L. & Econ. 725 (2001); David E. Olson and Michael D. Maltz, *Right-to-Carry Concealed Weapon Laws and homicide in Large U.S. Countries: The Effect of Weapon Types, Victim Characteristics, and Victim-Offender Relationships*, 44 J. L. & Econ. 747 (2001); Florence Plassmann and T. Nicolaus

University of Chicago study had *understated* the crime-reductive effects of widespread concealed carry.<sup>21</sup>

Sheriff Hutchens' choice to deprecate the research of Professor Lott in her opposition to Plaintiffs' motion before the district court is odd given the endorsement of that research by a number of criminologists, including three Nobel Prize winners, Milton Friedman, James M. Buchanan, and Vernon Smith, as can be seen by looking at the cover of John Lott's Book, *Bias Against Guns*.<sup>22</sup> But Amici's position does not rest on the controversial University of Chicago "more guns-less crime" results. 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 increasing violence or crime.<sup>23</sup>

This is also the view taken by the National Academy of Sciences' massive

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Tideman, *Does the Right to Carry Concealed Handguns Deter Countable Crimes? Only a Count Analysis Can Say*, 44 J. L. & Econ. 771 (2001); Carlisle E. Moody, *Testing for the Effects of Concealed Weapons Laws: Specification Errors and Robustness*, 44 J. L. & Econ. 799 (2001); see also Florenz Plassman & John Whitley, *Confirming "More Guns, Less Crime,"* 55 Stan. L. Rev. 1313 (2003).

<sup>21</sup> See Don B. Kates, *The Limits of Gun Control: A Criminological Perspective*, in *Suing the Firearms Industry: A Legal Battle at the Crossroads of Gun Control and Mass Torts* 70 (2005).

<sup>22</sup> See John R. Lott, *The Bias Against Guns* (2003).

<sup>23</sup> Kovandzic et al., *supra* note 16.

2004 study of gun control.<sup>24</sup> 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 gun control—or combination thereof—had *ever* verifiably reduced violence, suicide or gun accidents.<sup>25</sup> (The CDC, a long time gun-ban advocate, attributed its findings to inadequate research on gun control.)

A more realistic conclusion would reaffirm the view of the 18<sup>th</sup> Century “father of criminology,” Cesare Beccaria. He called arms controls the epitome of “False Ideas of Utility.” He denied that arms controls can reduce crime – 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

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<sup>24</sup> “The Impact of Right-to-Carry Laws and the NRC Report,” *supra* note 16 (“[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 quoted in “The Impact of Right-to-Carry Laws and the NRC Report”).

<sup>25</sup> *Firearms and Violence: A Critical Review—Committee to Improve Research Information and Data on Firearms* (Charles F. Wellford, John V. Pepper, and Carol V. Petrie eds., 2004); Robert A. Hahn et al., *First Reports Evaluating the Effectiveness of Strategies for Preventing Violence: Firearms Laws* (2003), available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/rr5214a2.htm>.

criminals or diminishing crime.<sup>26</sup> Beccaria’s view deserves attention at such length because Thomas Jefferson translated this passage and included it in his book of great quotations.<sup>27</sup> Likewise, Thomas Paine endorsed the same comments in paraphrase.<sup>28</sup>

#### **D. The Declarations Relied on by Sheriff Hutchens are 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 here because

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<sup>26</sup> Cesare 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.”

<sup>27</sup> Stephen Halbrook, *The Founders Second Amendment* (2008).

<sup>28</sup> *Writings of Thomas Paine* 56 (M. Conway ed. 1894)(Though making the same points, Paine does not explicitly mention Beccaria).

Professor Kopel has done so at length in his article cited above.<sup>29</sup> It turns out that these hundreds of “murders” either: a) were investigated by police who determined they were acts of lawful self-defense and filed no charges against the CCW licensee; or (b) were reviewed by grand or petit juries which determined they were acts of 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 the CCW was irrelevant to the gun’s presence.<sup>30</sup> 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 Sheriff Hutchens’ extremely limited CCW license issuance, the Sheriff depends on a declaration by academia’s leading gun control advocate, Professor Frank Zimring. Unfortunately for the Sheriff, as noted by another criminologist Professor Moody,<sup>31</sup> the Zimring declaration is almost entirely irrelevant because its focus is almost entirely on the dangers of guns *being carried*

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<sup>29</sup> See Kopel, *supra* note 9, at 569-573.

<sup>30</sup> Kopel, *supra* note 9, at 569.

<sup>31</sup> See Moody Decl., *supra* note 15.



*by criminals who are not eligible for CCWs.* These same predictions of dire consequences articulated by Professor Zimring 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.<sup>32</sup> In fact, some have repealed CCW prohibitions altogether.<sup>33</sup>

### CONCLUSION

If James Madison, and the Congress, and the States that ratified the Second Amendment had intended the right to bear arms to apply only to those individuals who could convince a sheriff they should be allowed to do so, the drafters would have so written it. Instead, the Second Amendment guarantees a right *of the People*, one that shall not be infringed.

Limiting the exercise of the fundamental right to bear arms for self-defense to only those who might be able to prove to the subjective satisfaction of a government official that they have a unique need to do so is antithetical to our understanding of a fundamental right. The People are entitled to exercise the right unless the government can prove there is a constitutionally sound reason for

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<sup>32</sup> *Id.* at ¶¶ 9-15.

<sup>33</sup> *See generally*, Lott, *supra* note 7; *see also* Ariz. Rev. Stat. Ann. § 13-3102; Vt. Stat. Ann. tit. 13, § 4003; 2011 Wyoming Laws Ch. 84 (S.F. 47); Alaska Stat. Ann. §§ 11.61.190-11.61.220.

preventing an individual, but not the public at large, from doing so.

And while the alleged “dangers” of allowing the People to carry firearms for self-defense asserted by Sheriff Hutchens are not relevant to the question of whether the People have the right to do so, even if they were, Plaintiffs have the statistics on their side. It is not theoretical that allowing law-abiding, competent adults to bear arms does not negatively affect public safety; for it has been proven repeatedly in the states that have allowed such for years.

Date: December 6, 2012

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 4205 words, excluding the cover, corporate disclosure statement, table of contents, table of authorities, certificate of service, and this certificate of compliance.

Date: December 6, 2012

Respectfully Submitted,

/s Don B. Kates

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### **CERTIFICATE OF SERVICE**

I hereby certify that on December 6, 2012, an electronic PDF of the Gun Owners of California Senator H. L. Richardson (Ret.) *Amicus* Brief in Support of Appellants 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  
Don B. Kates  
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# **EXHIBIT A**

## Uniform Crime Report Statistics: 2005-2009 Murder & Violent Crime Rates for Selected States

The data in these tables represent the crime rate per 100,000 population as based on Uniform Crime Report Statistics (available at <http://www.ucrdatatool.gov>)

### Estimated crime in California

Year	Population	Violent Crime rate	Murder and nonnegligent manslaughter rate	Forcible rape rate	Robbery rate	Aggravated assault rate
2005	36154147	526	6.9	26	176	317.1
2006	36457549	533.3	6.8	25.3	195	306.2
2007	36553215	522.6	6.2	24.7	193	298.8
2008	36580371	506.2	5.9	24.3	189.7	286.3
2009	36961664	472	5.3	23.6	173.4	269.7

### Estimated crime in Connecticut

Year	Population	Violent Crime rate	Murder and nonnegligent manslaughter rate	Forcible rape rate	Robbery rate	Aggravated assault rate
2005	3500701	273	3	20.3	112.3	136.9
2006	3504809	298.6	3.9	19.8	126.9	148
2007	3502309	301.1	3.2	19.7	122.9	155.4
2008	3502932	306.5	3.8	19.4	115.4	167.9
2009	3518288	298.7	3	18.5	113.4	163.7

### Estimated crime in North Carolina

Year	Population	Violent Crime rate	Murder and nonnegligent manslaughter rate	Forcible rape rate	Robbery rate	Aggravated assault rate
2005	8672459	469	6.7	26.5	145.7	289.7
2006	8856505	476.8	6.1	28.1	152.6	290
2007	9061032	470.1	6.5	26.4	150	287.2
2008	9247134	466.3	6.5	24.8	154.9	280.1
2009	9380884	404.3	5.3	24.6	126.1	248.4

**Estimated crime in Ohio**

Year	Population	Violent Crime rate	Murder and nonnegligent manslaughter rate	Forcible rape rate	Robbery rate	Aggravated assault rate
2005	11470685	350	5.1	40.7	162.8	141.5
2006	11478006	359.6	4.7	41	169.1	144.7
2007	11466917	348.3	4.6	40	159.8	143.9
2008	11528072	349.9	4.8	39.2	163.1	142.9
2009	11542645	332.1	4.5	34.8	154.1	138.7

**Estimated crime in Pennsylvania**

Year	Population	Violent Crime rate	Murder and nonnegligent manslaughter rate	Forcible rape rate	Robbery rate	Aggravated assault rate
2005	12405348	425	6.1	28.9	154.9	235.4
2006	12440621	442	6	29.1	169.4	237.5
2007	12432792	415.5	5.9	27.8	156.6	225.2
2008	12566368	406.2	5.6	27.7	150.2	222.7
2009	12604767	380.5	5.2	29	138.9	207.4

**Estimated crime in Virginia**

Year	Population	Violent Crime rate	Murder and nonnegligent manslaughter rate	Forcible rape rate	Robbery rate	Aggravated assault rate
2005	7564327	283	6.1	23.3	99.1	154.9
2006	7642884	282.8	5.3	23.8	101.5	152.3
2007	7712091	272.2	5.4	23.2	99.6	144
2008	7795424	257	4.7	23	95.8	133.5
2009	7882590	226.8	4.4	19.2	79.4	123.9