No. 12-17808

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GEORGE K. YOUNG, JR.,
Plaintiff-Appellant,

v.

STATE OF HAWAII, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court
for the District of Hawaii
No. 1:12-cv-336-HG-BMK
Hon. Helen Gillmor, Judge

AMICUS BRIEF OF THE STATE OF CALIFORNIA IN SUPPORT OF APPELLEES

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INTEREST OF THE STATE OF CALIFORNIA

Like Hawaii, California has adopted common-sense restrictions on the carrying of firearms outside of the home. Californians may carry guns, without any special license, in their homes or businesses, on much other private property (with the permission of the owner), while hunting, fishing, and target-shooting, and in many less-populated areas of the State. *See generally Peruta v. Cty. of San Diego*, 824 F.3d 919, 925-926 (9th Cir. 2016) (en banc). They may also carry in emergencies, if they reasonably believe that doing so is necessary to protect persons or property from immediate and grave danger while, if possible, summoning public assistance. Cal. Penal Code § 26045. But when it comes to the carrying of firearms by private individuals in populated places such as the streets, parks, or shopping centers of cities and towns, California has delegated the authority to decide who may carry firearms to local law enforcement officials. *Id.* §§ 26150, 26155 ("[g]ood cause" licensing regime). This system of tailored rules, exceptions, and local control strikes a proper balance between individual rights and the public interest in order and safety.

Also like Hawaii, California is defending its public carry restrictions against Second Amendment challenges. In *Peruta*, an en banc panel of this Court rejected one such challenge to California's "policies governing concealed carry." 824 F.3d at 927. Following that decision, California faced another suit involving the

question left open by *Peruta*: whether the Second Amendment protects carrying firearms in public in some manner, either openly or concealed. *Flanagan v. Harris*, 2018 WL 2138462, at *1 (C.D. Cal. May 7, 2018). California litigated that case in the district court; developed a record; and successfully moved for summary judgment. *Id.* at *4-*8. In the pending appeal, California has explained why its public carry laws are constitutional: they accord with a centuries-long tradition of regulating firearms in public places and the record demonstrates that they are consistent with the Second Amendment under any level of heightened judicial scrutiny. *See Flanagan v. Becerra*, No. 18-55717, Dkt. 30 (9th Cir. Nov. 20, 2018) (Cal. *Flanagan* Br.).

This Court stayed the proceedings in *Flanagan* pending the outcome of the en banc proceeding in this case. While California's public carry regime differs from Hawaii's in certain respects, the outcome of this proceeding will surely influence the analysis in *Flanagan*. California thus has a strong interest in the proper resolution of this case.

ARGUMENT

For centuries, public authorities have had substantial latitude to regulate where and under what conditions individuals may carry firearms outside the home—including, in some instances, by banning the carry of firearms in certain public places altogether. Laws that allow individuals to obtain a license to publicly

carry a firearm based on a particular showing of need or good cause, like the ones at issue here, are a part of that tradition and are therefore presumptively constitutional. And if history alone is not sufficient to resolve the case, Hawaii's good-cause licensing regime should be assessed under intermediate scrutiny because it does not impinge upon the core Second Amendment right to defend the home. Plaintiff's argument that law-abiding individuals have a right to openly carry firearms in virtually any public place at any time has no basis in the text of the Second Amendment, history, or precedent.

I. THE CHALLENGED PUBLIC CARRY REGIME IS PART OF A LONGSTANDING TRADITION OF REGULATIONS AND IS PRESUMPTIVELY LAWFUL UNDER *HELLER*

A. Neither *Heller* nor the Text of the Second Amendment Recognizes a Sweeping Right to Public Carry

In *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008), the Supreme Court held that the Second Amendment protects an individual right to keep and bear arms—and that public authorities may nonetheless adopt a variety of reasonable gun-related regulations. While *Heller* did not "undertake an exhaustive historical analysis" of the "full scope of the Second Amendment," *id.* at 626, it did provide important guidance for determining what kinds of restrictions States may enact consistent with the Second Amendment.

First, *Heller* explains that "the most natural reading of 'keep Arms'" is "to 'have weapons,'" 554 U.S. at 582, and that "bear arms" is most naturally read to

mean "'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,'" *id.* at 584 (ellipses omitted).

Second, the right to bear arms must be construed and applied with careful attention to its "historical background." *Heller*, 554 U.S. at 592; *see id*. at 576-628. This is critical "because it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right," and "declares only that it 'shall not be infringed.'" *Id*. at 592. Thus, while the Second Amendment's inclusion in the Bill of Rights indicates that the right to keep and bear arms ranks as fundamental, nothing about its enumeration in the Constitution changed the right into anything more comprehensive or absolute than what would have been understood and expected by "ordinary citizens in the founding generation." *Id*. at 577.

Third, that commonly understood right was and is "not unlimited." *Heller*, 554 U.S. at 595, 626. It is not a right "to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose," *id.* at 626, or "to carry arms for *any sort* of confrontation," *id.* at 595. The core individual right recognized by *Heller* is the right to keep and bear arms "in defense of hearth and home." *Id.* at 635. That does not mean that the right to "bear" has no scope beyond the home or its immediate environs. It may, for example, require authorities to permit the

transportation of firearms "from the place of purchase" to one's home, Add. 15, or to and from a target range to maintain proficiency, *see Teixeira v. Cty. of Alameda*, 873 F.3d 670, 677 (9th Cir. 2017) (en banc). But nothing in *Heller* suggests that the Second Amendment applies in the same way in all places, so that a restriction on bearing arms in public must be treated just like a restriction on bearing in or around the home. And *Heller* certainly does not dictate that the Second Amendment embodies an individual right to carry a gun in almost any public place.

On the contrary, *Heller* makes clear that States may adopt many reasonable firearms regulations consistent with the Second Amendment. *See* 554 U.S. at 636. Indeed, it identified a list of "presumptively lawful regulatory measures," including "longstanding prohibitions" such as "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings." *Id.* at 626-627 & n.26; *see also id.* (listed measures are not "exhaustive"). In the same paragraph, the Court noted that "prohibitions on carrying concealed weapons" were held lawful by "the majority of the 19th-century courts to consider the question." *Id.* at 626.

The panel concluded differently, suggesting that *Heller* "points toward the conclusion" that the Second Amendment protects a right to "carry firearms publicly for self-defense." Add. 16. Quoting *Heller*, it reasoned that the right "to

'bear' arms" means to "'wear' or to 'carry'" weapons for the purpose of "'being armed and ready for offensive or defensive action in a case of conflict with another person.'" *Id.* at 14. Because confrontations may occur outside the home, it concluded that individuals are entitled to carry firearms with them almost anywhere they go outside their homes. *Id.* at 14-16.

That analysis over-reads *Heller*. No one disputes that self-defense is a central component of the Second Amendment right, or that a need for self-defense can "arise beyond as well as within the home." Add. 14. But *Heller* does not recognize any unfettered right to carry firearms in all public places—and especially crowded places in cities and towns—based solely on an individual's stated desire to be ready for offensive or defensive action in case a conflict arises. Rather, under *Heller*, plaintiff's challenge to Hawaii's restrictions on public carry must be evaluated, in the first instance, by examining "the historical understanding of the scope of the right." 554 U.S. at 625. And it cannot succeed if the challenged restrictions are a type of regulation that has long been considered consistent with the right to bear arms. *Cf. id.* at 626-627.

B. There Is a Long Anglo-American Tradition of Regulating Public Carry in Populated Areas

In assessing the scope of the Second Amendment, *Heller* considered evidence from various historical periods, *see* 554 U.S. at 592-595, 600-619, and courts addressing the constitutionality of public carry restrictions generally begin by

examining the same periods, *see, e.g.*, *Peruta*, 824 F.3d at 929-939. Few would dispute that these are "dense historical weeds." *Wrenn v. District of Columbia*, 864 F.3d 650, 659 (D.C. Cir. 2017). At times, reliance on a particular holding or comment from one source or another can seem akin to "entering a crowded cocktail party and looking over the heads of the guests for one's friends." *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring in the judgment).

In some respects, however, the history is not debatable. For nearly seven centuries, authorities in England, the American colonies, and the United States have restricted private parties from carrying firearms in public places—including, in some circumstances, by flatly prohibiting public carry. True, such restrictions were not universal. In a federal system, in particular, variation across States and localities is to be expected. And even within individual States, different restrictions have often been imposed in different areas or at different historical times. But as California explained in its brief in *Flanagan* (at 11-36), the persistent regulation of public carry in many populated places, across more than half a millennium of Anglo-American law, cannot be reconciled with the panel's sweeping conclusion (Add. 46-53) that the Second Amendment affords individuals a right to openly carry firearms in virtually any public place.

In England, the right to bear arms "has long been subject to substantial regulation." *Peruta*, 824 F.3d at 929. That tradition began as early as 1285, when

the Crown issued an edict making it a crime to wander "about the streets of [London], after Curfew" with weapons for "doing Mischief" or "in any other Manner." 13 Edw. 1, 102 (1285). Parliament built upon that restriction in 1328 by adopting the Statute of Northampton, which became the "foundation for firearms regulation in England for the next several centuries." *Peruta*, 824 F.3d at 930. Northampton prohibited individuals from "go[ing] []or rid[ing] armed" in "Fairs, Markets" or "part[s] elsewhere." 2 Edw. 3, 258, ch. 3 (1328). It reflected the general rule that, in populated places within the reach of the King's officials, "the authority to ensure the public peace rested with the local government authorities." Charles, *The Faces of the Second Amendment Outside the Home*, 60 Clev. St. L. Rev. 1, 20 (2012).

Similar restrictions were found in the United States in the period that "preceded and immediately followed adoption of the Second Amendment." *Heller*, 554 U.S. at 600-601. Some colonies adopted statutes modeled on Northampton nearly a century before the founding, *see, e.g.*, 1686 N.J. Law 289, 290, ch. 9; and several States followed suit around the time the Constitution was ratified, *see, e.g.*, 1786 Va. Acts 33, ch. 21. To be sure, it was common to carry firearms outside the home in some parts of the United States. Many early Americans lived and worked in rural or wilderness areas, far from towns and public officials who might protect them. They needed firearms to hunt and to fend

off dangerous strangers, animals, or "foreign enemies." Levy, *Origins of the Bill of Rights* 139 (1999). Early Americans also commonly carried firearms "when traveling on unprotected highways or through the unsettled frontier," or to the "town center for repair." Charles, *The Faces of the Second Amendment Outside the Home, Take Two*, 64 Clev. St. L. Rev. 373, 401 (2016). But once they reached the "great Concourse of the People," state and local authorities retained the ability to limit—and even flatly prohibit—the public carrying of firearms. Davis, *The Office and Authority of a Justice of the Peace* 13 (1774).

States continued to regulate the public carry of firearms during the period before the adoption of the Fourteenth Amendment. In 1836, Massachusetts amended its existing public carry restrictions to prohibit going "armed with a dirk, dagger, sword, pistol, or other offensive and dangerous weapon" absent "reasonable cause to fear" assault, injury, or violence to one's person, family, or property. 1836 Mass. Laws 748, 750, ch. 134, § 16. Seven other States adopted similar "reasonable cause" statutes during the same era. *See* Ruben & Cornell, *Firearm Regionalism and Public Carry*, 125 Yale L. J. Forum 121, 132 (2015).

Some southern States took a more permissive approach, prohibiting the carrying of concealed firearms but generally allowing open carry, *see*, *e.g.*, 1813 La. Acts 172, § 1, and the panel here relied almost entirely on state court decisions resolving challenges to those statutes, *see* Add. 19-28. Some of those decisions did

reflect a local preference for permissive open carry laws, *see, e.g.*, *Nunn v. State*, 1 Ga. 243, 251 (1846), while others suggested that legislatures could generally ban public carry consistent with state and federal constitutional protections, *see, e.g.*, *State v. Buzzard*, 4 Ark. 18, 27 (1842). What these decisions do not show is the "existence of a national consensus" about the Second Amendment's reach. *Gould v. Morgan*, 907 F.3d 659, 669 (1st Cir. 2018). Rather, they reflect local customs and concerns—including that firearms were necessary "as a protection against the slaves" or to be used "in quarrels between freemen." Hildreth, *Despotism in America* 90 (1854).

Finally, in the years surrounding the adoption of the Fourteenth Amendment, States and local governments adopted still more restrictions on the public carry of firearms. The post-Civil War constitutions of six States gave their "legislatures broad power to regulate the manner in which arms could be carried." *Peruta*, 824 F.3d at 937. Five others specified that legislatures could prohibit the carrying of concealed weapons. *Id.* at 936-937. Several States and territories proceeded to ban the carrying of firearms in any public place, *see, e.g.*, 1870 S.C. Laws 403, no. 288, § 4, while others made it illegal to carry firearms within the "limits of any city, town, or village," 1875 Wyo. Laws 352, ch. 52, § 1. Local governments likewise prohibited the carrying of firearms within (for example) a city's "corporate limits." Los Angeles, Cal., Ordinance nos. 35-36 (1878).

C. Good-Cause Regimes Continue the Tradition of Regulating Carry in Populated Areas

Reasonable people can debate how exactly the Statute of Northampton was understood in seventeenth-century England, or where exactly the colonists were allowed to carry firearms in eighteenth-century America. But no one can seriously dispute that restrictions on the public carrying of firearms were commonplace throughout each of the historical periods *Heller* considered in construing the Second Amendment. Those restrictions were particularly prevalent in populated places, where the routine carrying of firearms by private parties threatened public safety—and where local sheriffs and justices of the peace were generally available to provide protection. They were less prevalent in outlying areas, where firearms were more important, in part because public officials typically were not available to assist unarmed settlers or travelers. And local governments in America had substantial discretion to regulate the carrying of guns—or to ban it entirely—based on conditions and public preferences in their jurisdictions.

Modern good-cause licensing systems "fit[] comfortably within the longstanding tradition of regulating the public carrying of weapons for self-defense." *Drake v. Filko*, 724 F.3d 426, 433 (3d Cir. 2013). Indeed, many "do[] not go as far as some of the historical bans on public carrying." *Id.* They do not, for example, categorically ban the carry of "pocket pistols" in all parts of the State, 1821 Tenn. Pub. Acts 15, ch. 13, or ban all carry, whether "concealed or openly,"

within cities and towns, 1875 Wyo. Law 352, ch. 52, § 1. And even in crowded public places—such as "fairs" and "markets," *see* 1786 Va. Acts 33, ch. 21—qualified residents may carry a loaded firearm if local authorities agree that they have demonstrated "a need for protection that substantially exceeds that held by ordinary law-abiding citizens," 18-1 Op. Haw. Att'y Gen. 2 (Sept. 11, 2018), or "[g]ood cause," Cal. Penal Code §§ 26150, 26155. The historical record shows that the type of licensing system challenged here "is a longstanding regulation that enjoys presumptive constitutionality" under *Heller*. *Drake*, 724 F.3d at 434.[1]

To be sure, different States continue to take different approaches in this area. Indeed, there is variation even among States that have adopted good-cause licensing regimes. For example, while some require a license to carry in almost all public places, *see, e.g.*, Conn. Gen. Stat. § 29-35, California allows carrying without a license in many less-populated places, and in any place if the circumstances create an immediate and grave danger to person or property and law enforcement is unavailable, *see* Cal. Penal Code §§ 25850, 26045, 26350. Other States have decided to allow public carry generally, without any license requirement. *See, e.g.*, La. Rev. Stat. § 40:1379.3. That type of variation is to be

[1] To the extent there is any question about whether Hawaii's system operates in a manner consistent with other historical regulations, the appropriate course would be either to remand this case or to certify the question to the Hawaii Supreme Court. *Infra* pp. 20-21.

expected in a federal system that encourages state and local officials to make policy judgments in response to the particular needs of their jurisdictions. But while plaintiff (and some States) may prefer a policy that allows individuals to carry a firearm in almost any public place and at almost any time, the historical record makes clear that the pre-existing, common-law right to bear arms does not *require* that permissive approach.

II. IF THE TYPE OF LICENSING SCHEME CHALLENGED HERE IS NOT PRESUMPTIVELY LAWFUL, IT IS SUBJECT TO INTERMEDIATE SCRUTINY

A. Good-Cause Regimes Are Subject to Means-Ends Scrutiny

If history alone does not resolve this case, then the challenged law should be evaluated under the "'appropriate level of scrutiny.'" *Teixiera*, 873 F.3d at 682. The panel here, however, eschewed any application of means-ends scrutiny. Instead, it held that Hawaii's laws are "'unconstitutional under any level of scrutiny'" because they "'amount[] to a destruction' of the core Second Amendment right to carry a firearm openly for self-defense." Add. 51.

The conclusion that a court may not even consider the weighty public safety considerations supporting a good-cause licensing scheme cannot be squared with *Heller* or the Supreme Court's analysis of other constitutional rights. "No fundamental right—not even the First Amendment—is absolute." *McDonald v. City of Chicago*, 561 U.S. 742, 802 (2010) (Scalia, J., concurring). Rather, courts analyze constitutional text and history, and then if necessary apply an appropriate

level of scrutiny, in order to determine whether and to what extent the Constitution protects particular conduct. Sometimes that analysis will reveal that a particular policy choice is "off the table," *Heller*, 554 U.S. at 636—that no matter how compelling the public interest a challenged law might serve, the law cannot be sustained in view of a contrary choice reflected in the Constitution. But just as First Amendment analysis does not end with a determination that a law regulates speech, and Fourth Amendment analysis does not end with a determination that there has been a search, a Second Amendment inquiry does not end once a court concludes that a law touches upon an individual's ability to keep and bear arms. Indeed, defining the exact contours of the right to bear arms through careful judicial scrutiny is especially important in this context, where a "miscalculat[ion]" could lead to "unspeakably tragic act[s] of mayhem." *United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011) (Wilkinson, J.).

Heller does not suggest otherwise. True, the Court there rejected any "freestanding 'interest-balancing' approach" to enforcing the "core protection" of any enumerated right. 554 U.S. at 634. But it expressly contrasted that approach with the traditional approach to enforcing other enumerated rights, including the application of intermediate or strict scrutiny. *See id.* at 634-635; *see also id.* at 628-629 & n.27. It certainly did not indicate that Second Amendment rights are entitled to *more* protection than other fundamental rights. The right to bear arms is

not "a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees," *McDonald*, 561 U.S. at 780 (plurality op.); but just as surely it is not to be treated "more deferentially than other important constitutional rights," *Gould*, 907 F.3d at 670. There is no basis for according it "an unqualified status that the even more emphatic expressions in the First Amendment have not traditionally enjoyed." *Kolbe v. Hogan*, 849 F.3d 114, 150 (4th Cir. 2017) (en banc) (Wilkinson, J., concurring).

B. Intermediate Scrutiny Is the Appropriate Standard of Review

The level of scrutiny in a Second Amendment case "depend[s] on (1) 'how close the law comes to the core of the Second Amendment right,' and (2) 'the severity of the law's burden on the right.'" *United States v. Chovan*, 735 F.3d 1127, 1138 (9th Cir. 2013). This Court has held that the "core" of that right is limited to the one that *Heller* declared the Second Amendment elevates "above all other interests": the "right of law-abiding, responsible citizens to use arms in defense of hearth and home." 554 U.S. at 635; *see, e.g.*, *Chovan*, 735 F.3d at 1138. And every other court of appeals to consider the proper level of scrutiny for public carry regulations like the ones challenged here has agreed that "intermediate scrutiny is appropriate" because "the core Second Amendment right is limited to self-defense in the home." *Gould*, 907 F.3d at 671, 673; *see also id.* at 671 (collecting cases). *But see Wrenn*, 864 F.3d at 664 (refusing to apply the "tiers of

scrutiny familiar from other realms of constitutional law" when reviewing good-cause licensing regime).

The panel's conclusion that the right to openly carry firearms falls within the Second Amendment's core cannot be squared with this precedent—or with the "historical prevalence" of public carry restrictions similar to (and often more restrictive than) the laws challenged here. *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 96 (2d Cir. 2012). Because "[f]irearms have always been more heavily regulated in the public sphere," the right to bear arms "most certainly operates in a different manner" in that context than when evaluating restrictions that impinge directly on the core right to keep and carry guns in the home. *Drake*, 724 F.3d at 430 n.5.

That conclusion makes good functional sense. When individuals move outside their homes—and particularly when they move about in populated areas—their interest in carrying a firearm is much more likely to come into conflict with the public interest in order and safety. The "inherent" risk that firearms present when carried in public "distinguishes the Second Amendment right from other fundamental rights . . . such as the right to marry and the right to be free from viewpoint discrimination, which can be exercised without creating a direct risk to others." *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1126 (10th Cir. 2015). It "is not far-fetched to think" that *Heller*'s focus on the "core" right to protect the home

arose out of recognition that the danger of "tragic act[s]" of violence "would rise exponentially as one moved the right from the home to the public square." *Masciandaro*, 638 F.3d at 475-476 (Wilkinson, J.). At the same time, any individual need to carry is substantially reduced in many public places, especially in cities in towns, where local law enforcement, "security guards, and the watchful eyes of concerned citizens . . . mitigate threats." *Gould*, 907 F.3d at 671.

Limiting the core of the Second Amendment to the home is also consistent with how courts have analyzed analogous rights. Free speech is essential to our democratic society, and regulations on many types of speech are subject to the most demanding form of scrutiny. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 25-28 (2010). But some types of speech can harm the public, and States are not powerless to regulate such speech. States may, for example, adopt reasonable restrictions on the time, place, and manner of speech. *See Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989). Where public safety is implicated, States may ban certain types of speech altogether, including true threats, *Watts v. United States*, 394 U.S. 705, 707 (1969) (per curiam); "'fighting words,'" *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573-574 (1942); or speech that is intended to incite "imminent lawless action" and is likely to produce such action, *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam). Even the core right to speak on matters of intense public concern may properly be limited to protect

"the unique nature of the home." *Frisby v. Schultz*, 487 U.S. 474, 484 (1993); *see id.* at 488 (upholding ordinance that restricted protests "before or about the residence or dwelling of any individual").

Similarly, while the Fourth Amendment protects the privacy of "persons" no matter where they are, its application is most stringent inside the home. *See Florida v. Jardines*, 569 U.S. 1, 6 (2013). The Fourth Amendment right is no less fundamental because it varies depending on the place where a search or inspection occurs, *see Collins v. Virginia*, 138 S. Ct. 1663, 1669-1672 (2018), or on whether the circumstances indicate that public or officer safety may be at risk, *see Chimel v. California*, 395 U.S. 752, 763 (1969).

There is a legitimate role for public regulation touching on even our most fundamental rights—especially when there can be genuine tension between the exercise of the right and the safety of law enforcement officers or other members of the public. Surely that is true when society seeks to regulate the carrying of inherently dangerous weapons outside an individual's home and into the public squares, streets, or marketplaces of our cities and towns. It is only sensible that regulation of *public* carry should be subject to review under a less stringent standard than would apply to a regulation directly burdening the "core" right to keep or carry "in defense of hearth and home." *Heller*, 554 U.S. at 635.

C. Intermediate Scrutiny Recognizes the Legislature's Proper Role in Deciding How to Balance Individual Rights and Public Safety

Intermediate scrutiny asks whether a law promotes a "significant, substantial, or important" government objective and whether there is a "reasonable fit between the challenged [law] and the asserted objective." *Jackson v. City and Cty. of San Francisco*, 746 F.3d 953, 965 (9th Cir. 2014). While the State must show that the law "promotes a 'substantial government interest that would be achieved less effectively absent the regulation,'" it need not demonstrate that the regulation is the "least restrictive means of achieving its interest." *Fyock v. Sunnyvale*, 779 F.3d 991, 1000 (9th Cir. 2015). And when there is "conflicting legislative evidence," courts must allow legislatures "to select among reasonable alternatives" and "accord substantial deference to the[ir] predictive judgments." *Peña v. Lindley*, 898 F.3d 969, 979-980 (9th Cir. 2018) (citations and internal quotation marks omitted).

In conducting this analysis, a court must of course ascertain the precise scope of the challenged regime. California's system, for example, allows individuals to carry firearms in less-populated parts of the State and during emergencies. *See* Cal. *Flanagan* Br. 3-6. Those features of California's laws align closely with the historical tradition of limiting firearms in crowded places like fairs and markets while allowing carry in more remote areas. *See id.* at 31-36. And they are also

relevant to assessing the fit between California's laws and its public safety interests. *See id.* at 44-57.

Intermediate scrutiny also requires careful consideration of the record developed by the parties. *See Jackson*, 746 F.3d at 966. In *Flanagan*, for example, the district court granted California's motion for summary judgment after the parties introduced expert reports, deposition testimony, and other probative evidence. *See* Cal. *Flanagan* Br. 45-54. Among other things, that evidence included a report concluding that States adopting "right-to-carry laws" experienced a 13-15% increase in aggregate violent crime rates in the decade following the enactment of those laws, and a declaration from the former president of the California Police Chiefs Association attesting to the importance of California's public carry restrictions when law enforcement is responding to an active shooter situation. *Id.* at 45-48. The district weighed that evidence against the plaintiffs' evidentiary submission, considered objections to the State's evidence, and held that California's choices were based on reasonable inferences supported by substantial evidence. *Id.* at 52.

In this case, each member of the three-judge panel appeared to recognize the importance of these considerations to any means-ends analysis. *See, e.g.*, Add. 9 n.2; *id.* at 72 (Clifton, J., dissenting). But there may be outstanding questions about how Hawaii's public carry laws operate: the panel majority's holding rested

in large part on its understanding that Hawaii "restrict[s] open carry to those whose job entails protecting life or property," Add. 52, and Hawaii disputes that characterization. Moreover, the complaint was dismissed at the pleading stage, and Hawaii has not yet had an opportunity to develop an evidentiary record regarding the powerful public interests underlying its policies. If this Court concludes that a historical analysis alone does not resolve this case in Hawaii's favor, it should therefore remand this case so that the district court may assess the constitutional question based on an "an accurate understanding of Hawaii law," En Banc Pet. 3, and in light of a developed factual record specific to that law.

CONCLUSION

The judgment of the district court should be affirmed.

Dated: June 4, 2020

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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  - ○ a party or parties are filing a single brief in response to a longer joint brief.
- ◉ complies with the length limit designated by court order dated Apr 30, 2020.
- ○ is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature s/ Samuel P. Siegel **Date** Jun 4, 2020

*(use "*s/[typed name]*" to sign electronically-filed documents)*

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov