Case Number 11-16255

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ADAM RICHARDS, et al.,

Plaintiffs/Appellants

vs.

ED PRIETO, et al.,

Defendants/Appellees

On Appeal From:

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
Case No. 2:09-CV-01235-MCE-DAD
Honorable Morrison C. England

APPELLEES' ANSWERING BRIEF

JOHN A. WHITESIDES, SBN 125611
PETER D. HALLORAN, SBN 184025
SERENA M. SANDERS, SBN 264799
ANGELO, KILDAY & KILDUFF, LLP
601 University Avenue, Suite 150
Sacramento, CA 95825
Telephone: (916) 564-6100
Facsimile: (916) 564-6263

Attorneys for Defendants/Appellees
ED PRIETO and COUNTY OF YOLO

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I. FUNDAMENTAL OVERVIEW OF APPEAL

Plaintiffs essentially seek to invalidate California's statutory restrictions on concealed weapons and the open carrying of loaded weapons in public. Although they expressly attack just one ancillary statute as conferring "unbridled discretion" on sheriffs to issue concealed weapons permits, Plaintiffs admit the Second Amendment does not directly confer upon them the right to carry a concealed weapon in public. Since federal law would thus lack any interest in who should be licensed to carry a concealed gun, Plaintiffs' actual challenge is to the California gun control scheme as a whole. Their analytical premise is that citizens have a constitutional right to carry a loaded gun at all times in public, with the State having the power merely to decide which method(s) of carry to allow. As California purportedly bars the open carrying of loaded pistols, Plaintiffs' "right" to carry a concealed weapon is given a delayed and indirect constitutional birth, much as Aphrodite sprang from the sea without any identifiable parent.

Outlined, Plaintiffs' argument is:

A. The Second Amendment gives us the right to publicly carry a loaded sidearm;

B. The Second Amendment does not compel the states to let us conceal our pistols;

C. The Second Amendment does not compel the states to let us openly carry our pistols in public places;

D. Thus a state may choose to forbid either open or concealed carrying, but not both;

E. California forbids open carrying of loaded pistols in public places;

F. Thus California must allow carrying of concealed weapons in public places (via issuance of a permit), subject to limited individual disqualifications;

G. California gives sheriffs overly broad discretion regarding issuance of concealed weapons permits, which discretion YOLO COUNTY and Sheriff PRIETO ("YOLO") have implemented by making issuance the exception rather than the rule.

Plaintiffs' logic is sound, but A is legally invalid and E is

factually incorrect. Accordingly, the threshold issues presented by this appeal are the scope of the Second Amendment (Premise A) and of California Penal Code § 12031 (Premise E). In contrast, the discretion granted sheriffs by Penal Code § 12050 and YOLO's implementation thereof (G) need not be addressed because, if A and E are so, YOLO must indeed issue concealed gun permits absent an individual disqualification. On the other hand, if either A or E are incorrect, no constitutional interest exists as to YOLO's issuance of such permits.

II. STATEMENT OF THE ISSUES

1. Does the right to "bear arms" preserved by the Second Amendment include the right to carry loaded guns in public places?

2. If a constitutional right to public carrying of loaded firearms generally exists, are the California Penal Code's corresponding limitations subject to strict, intermediate or rational scrutiny?

3. Upon scrutiny, do the California weapons laws pass

constitutional muster?[1]

III. SUMMARY OF ARGUMENT

Of paramount significance is that this case does not involve a state or local prohibition of gun possession in the home – absent is any alleged compulsory disarmament. Nor is there any blanket ban of carrying guns on one's person outside the home – state law generally allows both the public carrying of a visible, unloaded pistol and of loaded pistols outside city limits. Plaintiffs' position is that the ability to defend oneself within city limits (they are residents of Davis [ER 55]), which lies at the Second Amendment's core, is illusory unless one can beat a perceived attacker to the draw, much as the Earp brothers and Doc Holliday did to the Clantons at the OK Corral.

If this tribunal was reviewing the decision of a territorial court in the 1870's and Plaintiffs were residents of Tombstone protesting Marshal Earp's enforcement of an ordinance barring the wearing of loaded sidearms while traveling through hostile lands on the outskirts

[1] Plaintiffs do not challenge the District Court's adjudication of their second claim for relief, deprivation of Equal Protection.

of town, their position might warrant more favor.[2] However, in modern society, the average citizen's need to instantly respond with deadly force in public places is nil. Far higher is the risk of harm to both the gun carrier and those around him through accidental or impulsive discharge. As stated and reiterated by the Supreme Court, "the right to keep and bear arms is not 'a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.'"[3] Although those same Supreme Court decisions have established that neither Congress nor state governments may universally forbid citizens' possession of firearms for self-defense of their own premises, no precedent exists for extending the Second Amendment to bearing of arms in public places.

To the extent constitutional protection goes beyond home

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[2] Ordinance #9, passed in 1881, generally banned carrying of guns within Tombstone's city limits. The Law in Tombstone: Ordinances Relevant in the Preliminary Hearing in the Earp-Holliday Case, available at http://law2.umkc.edu/faculty/projects/ftrials/earp/ordinances.html.

[3] *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3047 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008).

defense and hunting on private property, it still stops short of loaded guns in public places. Plaintiffs concede that the Second Amendment does not normally extend to concealed weapons, yet contend that right is compelled into existence where the open carrying of loaded weapons is also banned. Here lies the appeal's greatest distortion, for California generally prohibits public carrying of loaded handguns only in cities and even there subject to many exceptions, including imminent danger. Moreover, the notion that an unloaded gun is a useless gun, such that the Second Amendment necessarily entails the right to bear be of loaded arms, is unsupported by any facts or common sense.

Even should this Court find the right to bear arms to encompass public carrying within city limits of loaded weapons, rational or intermediate, rather than strict, scrutiny of California's statutory scheme is the proper standard of evaluation. As restricting the carrying of loaded weapons in public to exceptional situations substantially relates to a crucial governmental objective – public safety – California's laws are constitutional and Plaintiffs' suit to

compel the issuance of concealed weapons permits fails. Moreover, because California's interest in public safety is compelling and its statutes are narrowly-tailored to meet that objective, they would also withstand strict scrutiny.

IV. EXPOSITION OF CALIFORNIA STATUTES

The parties agree that California law allows the open carrying of unloaded guns. They further agree California can and does largely prohibit the public carrying of concealed firearms (Penal Code §§ 12025, 12026), subject to various exceptions regarding transportation (§§ 12026.2, 12027) and for license holders (§ 12050).

In contrast, wrong are the sweeping characterizations by Plaintiffs and their amicus of section 12031 as "generally bar[ring]" (Plaintiffs) or "generally prohibiting" (California Rifle and Pistol Association Foundation, hereinafter "CRPAF") the open carrying of loaded firearms because such is allowed "only" in unincorporated areas or "select sparsely populated counties." *See* Opening Brief (hereinafter "OB") 5 – 6.

The actual scope of section 12031's prohibition on the open

carrying of loaded weapons is (1) "any public place or on any public street in an incorporated city" or (2) "in any public place or on any public street in a prohibited area of unincorporated territory," with "prohibited place" defined as anywhere it is unlawful to discharge a weapon (subd. (f)). As Plaintiffs wisely do not assert that California law substantially restricts the shooting of firearms on the public portions of unincorporated areas or that any such restriction is significant to them, the focus of their challenge is to the public places/streets of cities clause of the statute. In this regard, section 12031 further states that:

1. Permit holders are exempt. Residents of those counties with less than 200,000 total population may apply for a permit to also openly carry loaded guns in public areas of cities (§§ 12031(b)(6) and 12050(a)(1)(A)(ii));

2. One's permanent or temporary residences (including campsites) are not deemed "public areas" (§ 12031(l));

3. Also exempt are (a) people using target ranges, (b) business owners, their employees and agents while on business real property,

and (c) private property owners and possessors while on such private property (§ 12031(b)(5) and (h));

4. Further, exempt are certain occupations where a higher than normal need for self-defense exists (e.g., bank guards/couriers, armored car guards, security guards, private investigators) (§ 12031(d));

5. Excluded are hunters in any legal hunting areas within city limits (§ 12031(i));

6. Also excluded are those persons attempting to make a lawful citizen's arrest (§ 12031(k));

7. Significantly, excluded are those persons "who reasonably believe[s] that the person or property of himself or herself or of another is in immediate, grave danger and that the carrying of the weapon is necessary for the preservation of that person or property" (§ 12031(j)(1)); and

8. A defense against conviction is afforded one who "reasonably believes that he or she is in grave danger because of circumstances forming the basis of a current restraining order issued

by a court against another person (§ 12031(j)(2)).

See People v. Ellison, 196 Cal. App. 4th 1342, 1350 (2011) (noting "numerous exceptions" exist as to § 12031, rendering it constitutional); *People v. Flores*, 169 Cal. App. 4th 568, 576 (2008) (identifying "wealth of exceptions" to § 12031).

V. THE SECOND AMENDMENT IS INAPPLICABLE TO PUBLIC AREAS IN CITIES

Plaintiffs' ostensible position is that California Penal Code section 12050 violates the Second Amendment by conferring upon sheriffs unbridled discretion to refuse to issue concealed weapons permits, while constraining them from issuing open carry permits.[4] Since (a) Plaintiffs expressly concede that the Second Amendment does not protect public carrying of concealed weapons, and silently acknowledge (b) permits are generally unnecessary for open carrying of loaded handguns outside city limits, the attack on section 12050 is a red herring. The actual challenge is that sections 12025 and 12031,

[4] YOLO notes at the outset the irony of Plaintiffs' labeling of § 12050 as overly subjective despite initially protesting that it precludes sheriffs from issuing open carry permits for loaded guns in more populated counties.

as collectively applied, unconstitutionally restrict the public carrying of loaded firearms in cities.[5]

A. GOVERNING ANALYTICAL STANDARDS

In the wake of *District of Columbia v. Heller*, 554 U.S. 570 (2008), most circuit courts have adopted a two-part analysis of Second Amendment challenges to gun control statutes. The first step determines if the challenged statute impinges on protected conduct. If so, the court must evaluate the law under the appropriate level of means-end scrutiny and ascertain whether it is constitutional or invalid. *United States v. Reese*, 627 F.3d 792, 800 – 801 (10th Cir. 2010) (quoting *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010)); *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010). *See Ezell v. City of Chicago*, 2011 U.S. App. LEXIS 14108, *39 – 44 (7th Cir. 2011) (threshold inquiry is whether the restricted activity is

[5] Likely due to the deferential test applied to statutes asserted to be facially unconstitutional, i.e., that no set of circumstances exists under which the law would be valid, Plaintiffs concede that sections 12025 and 12031 are individually proper. *See United States v. Salerno*, 481 U.S. 739, 745 (1987).

protected by Second Amendment);[6] *GeorgiaCarry.Org, Inc. v. Georgia*, 764 F. Supp. 2d 1306, 1316 – 1317 (M.D. Ga. 2011) (cataloging various analytical approaches and deciding to initially address whether Second Amendment protection applies to conduct regulated before addressing means-end scrutiny). *See further People v. Delacy*, 192 Cal. App. 4th 1481, 1491 – 1492 (2011) (deeming *Heller* to limit scope of Second Amendment protection and declining to apply means-end scrutiny to such presumptively valid gun restrictions).

B. CALIFORNIA'S BAN ON PUBLIC CARRYING OF LOADED HANDGUNS IS LIMITED IN SCOPE

As previously shown, Plaintiffs considerably exaggerate the scope of California's handgun restrictions by treating section 12031 as if it restricts the open carrying of loaded pistols to a few remote areas

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[6] COUNTY reads no inconsistency between this principle and *Nordyke v. King*, 644 F.3d 776 (9th Cir. 2011) – whether the Second Amendment even applied to the ordinance there challenged was not addressed, presumably because the ban on guns was universal. Only the level of scrutiny and the outcome of that scrutiny were decided. See *Ezell*, at *46, fn. 12 (describing *Nordyke* as imposing a threshold test that the challenged law substantially burden Second Amendment rights before heightened scrutiny is employed.)

of the state where there is no real need for self-defense, whereas the contrary is so. As set forth at Section III, *ante*, section 12031 renders illegal carrying of loaded handguns only in public areas within city limits and those few shooting-prohibited areas (e.g., schools and playgrounds) of unincorporated lands. With the exception of the most densely-populated counties (e.g., Los Angeles and San Francisco), California consists of mostly unincorporated areas. For example, YOLO COUNTY, which ranks 28th of California's 58 counties in population (just over 200,000), is heavily unincorporated, i.e., everywhere except for the quite small city areas of Woodland, Davis, West Sacramento and Winters. *See* Illustration 1 and Table 1 attached. Thus, Plaintiffs may openly carry loaded pistols in the vast majority of YOLO COUNTY. Even Sacramento County, the state's 8th most populated, has far more unincorporated than incorporated land. *See* Illustration 2 and Table 1 attached; Sacramento County Cities Map, *available at* http://www.saccounty.net/coswcms/groups/public/@wcm/@pub/@cos/documents/webcontent/sac_021101.pdf.

Likewise trivialized by Plaintiffs is a citizen's ability under section 12050 to obtain a permit to openly carry a loaded weapon, even in cities, as to those counties having less that 200,000 residents. According to the 2010 U.S. Census, more than half (30) of California's 58 counties have populations of less than 200,000.[7]

In summary, truly prohibited is open carrying of loaded handguns in the (a) non-residential/public areas of cities (b) for less than half the counties in the state (c) as to those citizens neither hunting, nor at a target range, nor facing a higher than normal risk of attack due to their occupation or individual situations at the time in question.

Having placed the subject statutes in their proper linguistic,

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[7] Alpine; Amador; Calaveras; Colusa; Del Norte; El Dorado; Glenn; Humboldt; Imperial; Inyo; Kings; Lake; Lassen; Madera; Mariposa; Mendocino; Modoc; Mono; Napa; Nevada; Plumas; San Benito; Shasta; Sierra; Siskiyou; Sutter; Tehama; Trinity; Tuolumne; and Yuba. U.S. Census Bureau: Population and Housing Occupancy Status: 2010-State--County/CountyEquivalent, *available at* http://factfinder2.census.gov/faces/tableservices/jsf/pages/productivew.xhtml?pid=DEC_10_PL_GCTPL2.ST05&prodType=table. *See also* Table 1 attached.

social and geographic settings, YOLO will address the threshold issue of whether the Second Amendment pertains to public carrying of loaded weapons within cities.

C. EXISTING PRECEDENT DOES NOT MANDATE PUBLIC CARRYING OF LOADED PISTOLS

Asserting that the *Heller* decision "specifically held 'bear arms' means publicly-carrying arms for self-defense," Plaintiffs criticize as simplistic the District Court's limitation of *Heller* to home handgun possession. Though Plaintiffs' arguments wholly depend on the proposition that the Second Amendment preserves the right of all citizens to publicly bear loaded guns, they offer scant pertinent analysis. Their showing is limited to:

1. *United States v. Miller*, 307 U.S. 174 (1939) "indicates" that carrying weapons on public highways is a generally protected right;

2. *Heller*'s (a) equation of "bear arms" to "carry arms;" (b) listing as "presumptively lawful" proscriptions against carrying arms in sensitive places; (c) discussion of 19th century state law cases; and (d) statement that hunting and target practice are also within the Second Amendment, confirm that it is permissible only to restrict the

manner in which guns may be publicly carried and not to forbid such bearing altogether. Likewise, amicus CRPAF emphasizes the colonial practices of carrying arms while traveling and hunting;

3. The Georgia and Idaho Supreme Courts have held that the Second Amendment extends to public carrying of guns;

4. At least six state constitutions have been held to guarantee the right of at least some form of public weapon-bearing;

5. Some courts have refused to limit *Heller* to possession of guns in the home.

These arguments largely miss Plaintiffs' own mark. Although whether the Second Amendment is limited to defense of one's residential real property and hunting poses an interesting question, YOLO's position neither requests nor requires such a holding because California's laws permit, with relatively few exceptions, the open carrying of unloaded weapons and, outside city limits, even of loaded weapons. Nor do Plaintiffs attempt to analytically harmonize their broad reading of *Heller* with their concessions that how and where a gun may be carried in public places can be restricted, e.g., in courts,

schools, parks and other areas where large numbers of people may be present. Wherever the federal constitutional border lies,[8] it is well short of carrying loaded or concealed weapons on public property or in public places within city limits.

D. NO CASE SUPPORTS PLAINTIFFS' VIEW

Plaintiffs illogically elongate *Heller*/*McDonald*'s interpretation of "bear" meaning "carry" and references to hunting and target practice to encompass the general public carrying of handguns. That one has the rights to hunt certain animals in certain places at certain times and to go to shooting ranges fails to equate to one's entitlement to have a loaded pistol in his clothing while walking downtown. There is no constitutional right to hunt squirrels in Golden Gate Park or to shoot pigeons in city squares and target practice does not normally occur in open public places. On the other hand, hunting and target practice are quite frequently done on private property and such

[8] The scope of gun control currently provided by other states' constitutions is here irrelevant. The issue is whether California's scheme comports with the Second Amendment and not how many other states are relatively permissive regarding gun control.

was especially so in colonial times when publicly-owned land was limited to towns and cities.[9] *See* R. Norejko "From Metes and Bounds to Grids or a CliffsNotes History of Land Ownership in the United States, pp. 3–5, *available at* http://www.iaao.org/uploads/Norejko.pdf. Regardless, as section 12031 excepts hunting and shooting ranges from its prohibitory scope, this argument cannot far carry Plaintiffs.

Heller emphasized that its analysis was generally centered on the 18th century context of the Second Amendment and that its holding does not invalidate modern laws regarding gun safety or possession in sensitive areas. 554 U.S. at 581 – 583. *See also Marzzarella*, 614 F.3d at 89. Thus even Procrustes could not stretch *Heller* to implicitly hold the public carrying of loaded handguns throughout cities is protected. As stated by the Fourth Circuit in *U.S.*

[9] Plaintiffs' assertion to the District Court that hunting is not done inside the "home" was incorrect because "home" for the purpose of the Second Amendment means one's own residential property rather than "house." *Heller* cannot reasonably be read to address solely the inside of a home rather than also the adjacent yard or premises.

v. Masciandaro, 638 F.3d 458, 467 (2011) the upshot of *Heller* and *McDonald* is preservation of the right to home possession of guns for self-defense, "[b]ut a considerable degree of uncertainty remains as to the scope of that right beyond the home." The Third Circuit noted the same analytical dilemma and expressed its tentative belief the right to bear arms was circumscribed beyond possessing lawful weapons at home. *U.S. v. Marzzarella*, 614 F.3d 85, 91 (3d Cir. 2010). And the Court of Appeals of Maryland read *Heller* as consistent with state prohibition of "carrying . . . handguns in various public places outside of the home." *Williams v. Maryland*, 10 A.3d 1167, 1176 (Md. App. 2011) (citing similar cases from five other states in upholding statute criminalizing unpermitted carrying of handguns in public). *See further Kachalsky v. Cacace*, 2011 U.S. Dist. LEXIS 99837, *73 – 79 (S.D.N.Y. 2011) (citing numerous cases in rejecting same argument as here presented on grounds no right to public carrying of weapons is preserved by Second Amendment).

Indeed, Plaintiffs openly acknowledge that *Heller* cited with approval to cases upholding concealed weapon ban laws. 554 U.S. at

626. *See Robertson v. Baldwin*, 165 U.S. 275, 281–282 (1897) ("the right of the people to keep and bear arms [art. 2] is not infringed by laws prohibiting the carrying of concealed weapons"); *People v. Dykes*, 209 P.3d 1, 49 (Cal. 2009) (citing *Heller* as not inconsistent with validity of § 12025 banning concealed weapons); *State v. Knight*, 241 P.3d 120, 133 (Ks. App. 2009) (*modified* 2010) ("the *Heller* Court considered concealed firearms prohibitions to be presumptively constitutional"). And Plaintiffs do not dispute that *Heller* upholds various total bans on possession of handguns in "sensitive [public] places such as schools and government buildings." 554 U.S. at 626.

Nonetheless, Plaintiffs offer as precedent affirmatively holding the Second Amendment extends to public bearing of weapons the *Miller* decision, *Nunn v. State*, 1 Ga. 243 (1846) and *In re Brickey*, 70 P.2d 609 (Idaho 1902). *Miller* reversed the district court's decision that the National Firearms Act's registration requirement for certain types of guns moved in interstate commerce violated the Second Amendment. The Court stated that the right to carry arms clause was intended to "assure the continuation and render possible the

effectiveness of [militia]" and so had to be construed "with that end in view." 307 U.S. at 178. Since the type of gun in issue (short-barreled shotgun) bore no discernible relationship to military use, the Court found the law valid. Thus, *Miller* did not even mention the right to carry arms in public. As stated in *Heller*, 554 U.S. at 623, "*Miller* stands only for the proposition that the Second Amendment right, whatever its nature, extends only to certain types of weapons." *See id*. at 625 ("the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns"). *See generally Nordyke v. King*, 644 F.3d 776, 789, fn. 13 (9th Cir. 2011) ("[f]or years, several courts, including our own, read *Miller* to hold that the Second Amendment does not afford individuals the right to keep and to bear arms for self-defense). Hence *Miller* is here neutral – neither defeating nor supporting Plaintiffs' position.

Nunn and *Brickey* also fail to shed light. In *Nunn*, the Georgia Supreme Court declared unconstitutional a law forbidding the sale or possession anywhere of guns and weapon knives, subject to an

exception for the external wearing of knives. 1 Ga. at 246. Citing several cases regarding interpretation of other states' constitutions the court concluded the Georgia constitution should be construed similarly to the federal constitution and found that the law in question operated to disarm the people. *Id*. at 247 – 251. Accordingly, it was upheld as to concealed weapons, but deemed void regarding open bearing of arms. *Id*. at 251. The question of bearing weapons at home versus in public places was not expressly discussed.

Brickey, which spans a single paragraph devoid of precedent or analysis, similarly held that the Idaho and federal constitutions allowed the regulation of guns but not the total prohibition of bearing a weapon within city limits. In overturning the plaintiff's conviction for carrying a deadly weapon (whether he was in a public place is unstated), the court noted in contrast that prohibition of the "pernicious practice" of concealed weapons was proper. *Brickey*, 70 P.2d at 609.[10]

[10] That Plaintiffs emphasize cases which upheld bans on concealed weapons confirms their true attack is on section 12031.

E. RECENT CASE LAW HEAVILY FAVORS A NARROW VIEW OF THE SECOND AMENDMENT'S PURVIEW

Contradicting Plaintiffs' expansive and judicially unendorsed reading of *Heller* are the cases decided since it and *McDonald* which limit the Second Amendment to possession of guns either within the home for self-defense, or for hunting, or to use in private target practicing areas. *See Moreno v. New York City*, 2011 U.S. Dist. Lexis 76129, *8 (S.D.N.Y. 2011) (citing 3rd, 4th, 7th and 10th Circuit decisions in deeming Second Amendment inapplicable to home handgun permit requirement where applicant wanted gun for business reasons); *Williams*, 10 A.3d at 1176 – 1177 (Md. App. 2011) (Second Amendment inapplicable to carrying of gun on public highway); *People v. Aguilar*, 944 N.E.2d 816, 823 – 828 (Ill. App. 2011) ("[n]o reported cases have held that *Heller* or *McDonald* preclude states from prohibiting the possession of handguns outside of the home"); *Warden v. Nickels*, 697 F. Supp. 2d 1221, 1227 (W.D. Wash. 2010) (neither *Heller* nor case law suggests Second Amendment extends to possession of gun at city park); *Embody v. Ward*, 2011 U.S. Dist. LEXIS 79153, *27 – 30 (M.D. Tn. 2011) (citing *Nordyke* and finding

no Second Amendment right to carry loaded gun in state park). *See generally U.S. v. Marzzarella*, 614 F.3d at 91 – 92 (opining that *Heller* is best read as limiting Second Amendment protection to only some gun possession situations).

Additionally, Plaintiffs offer no explanation for how "presumptively lawful" statutes which they do not challenge yet which restrict the average citizen's ability to carry guns into certain "sensitive places," such as schools (18 U.S.C. § 922(q)(2)), national parks (36 C.F.R § 2.4(h)), public buildings (Cal. Penal Code § 171b) and playgrounds (Cal. Penal Code § 626.9), can be harmonized with their expansive view. Stated another way, if state and federal governments can lawfully bar loaded (or even unloaded) weapons from some public areas, how is the constitutional boundary drawn so to show those same guns must nonetheless be allowed in other public areas? Surely, Plaintiffs do not contend there is a qualitative difference between a county office and a restaurant, or between a playground or school and a residential street.

F. UNLOADED DOES NOT MEAN USELESS

Plaintiffs and amicus CRPAF expend considerable energy arguing that an unloaded pistol is inoperable, nonfunctional and thus inadequate to satisfy the right to self-defense. They reason that one is truly "armed" only if the gun can be immediately discharged. Unquestionably, a loaded pistol can be fired more quickly and thus is more defense-ready than an unloaded one. However, the huge leap from that fact to the notion that the Constitution thus protects the carrying of loaded pistols lands Plaintiffs in an analytical morass. The reasons are many:

1. With a colonial flintlock pistol, loading was a cumbersome process which included placing gunpowder down the barrel, ramming the ball wrapped in cloth down the barrel onto the powder, putting more gunpowder on the trigger pan, and cocking the hammer. *See e.g.*, How Flintlock Guns Work, *available at* http://science.howstuffworks.com/flintlock2.htm. Nonetheless, carrying in public as a matter of general habit a ready to fire flintlock gun was impracticable because rain, snow, fog and other ambient

moisture typical of the East Coast operated to nullify the powder charge. Also, the powder's exposure to air over time would produce sulfuric acid and foul/corrode the gun. *See e.g.*, Black Powder & Muzzleloading, http://www.gunnersden.com/blackpowder. Moreover, Plaintiffs cite to no evidence that flintlock pistols, which were essentially useless for hunting, were typically owned by the average citizen, much less often borne around town along with balls and powder. Thus there is no reason to believe the carrying of loaded and primed pistols, where a fight was unanticipated, was so common a practice in the late 1700's that there existed a corresponding "right" the framers would have intended the Second Amendment to preserve.

2. At the time of the Second Amendment's adoption in 1791, several cities had banned the carrying of loaded weapons. As explained by the Massachusetts Supreme Court in *Commonwealth v. Runyan*, 922 N.E.2d 794, 799 (2010):

> We also note that, even if a firearm were secured in the manner required by G. L. c. 140, § 131L (a), a gun owner threatened in his or her home today would be able to fire the weapon in self-defense at least as

> quickly as would a gun owner in 1791, when the Second Amendment was adopted. At that time, laws were in effect requiring that gunpowder be stored separately from firearms, which meant that a law-abiding homeowner acting in self-defense would need time to load and fire a musket or flintlock pistol. See *Heller*, *supra* at 2849-2850 (Breyer, J., dissenting). A skilled soldier of that time using specially prepared cartridges required a minimum of fifteen to twenty seconds to load and fire a musket; a less skilled soldier could fire no more quickly than once per minute. Hicks, United States Military Shoulder Arms, 1795-1935, 1 Am. Military Hist. Found. 23, 30-31 (1937).

In the same regard, Justice Breyer noted that the laws of colonial Boston and New York "would, as a practical matter, have prohibited the carrying of loaded firearms anywhere in the city" unless the carrier always stayed outside or unloaded the gun before entering any building. *Heller,* 554 U.S. at 684 – 686.[11] Thus colonial

[11] The majority's response included that Boston's prohibition on loaded guns in buildings was, if even applicable to a temporary loading to combat an attacker, far less burdensome than the total ban it was invalidating. *Id*. at 631 - 632. Perhaps even more significantly, the majority clarified that its analysis did not "suggest the invalidity of laws regulating the storage of firearms to prevent accidents," which

laws did not universally permit public carrying of loaded guns.[12]

3. For a semi-automatic pistol using a clip of bullets, loading the clip into the pistol body takes a few seconds at most. Modern revolvers can be loaded equally quickly with a "speedloader," which fills at once all six chambers. Hence the defensive need to have the gun already loaded is far from obvious. Again, modern cities are not Tombstone or Dodge City of the late 1800's where speed on the draw was paramount and loading of a Colt Peacemaker took more than a few seconds. Indeed, if speed of firing is the constitutional criterion, then citizens must also have a right to generally have the gun cocked and the trigger safety off, so as to save precious time. By Plaintiffs' own definition, an uncocked gun is "inoperable" as incapable of immediate shooting, as is one with an external safety device engaged.

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directly parallels the subject prohibition against the dangerous practice of carrying loaded weapons in public. *Id*. at 632. *See Nordyke*, 644 F.3d at 783 – 784 (discussing that part of *Heller* which explained the colonial restrictions on gunpowder storage did not burden the right to self-defense).

[12] As noted above, in 1881 Tombstone passed an ordinance generally banning the carrying of guns within city limits.

YOLO doubts any reputable gun organization or enthusiast would advocate such foolhardy practices.

4. The premise that an unloaded gun is useless as a defensive weapon and will simply be stolen by the attacker is incorrect.[13] As convincingly stated by amicus National Rifle Association (at pp. 8 – 9):

> Indeed, to prevent completion of a crime it is usually necessary only for the intended victim to display the firearm rather than pull the trigger. A national survey "indicates that about 95 percent of the time that people use guns defensively, they merely have to brandish a weapon to break off an attack." See Lott, MORE GUNS LESS CRIME, supra, at 3. Fewer than one in a thousand defensive gun uses results in a criminal being killed. See Kleck, TARGETING GUNS, supra at 178.4.

5. Courts have not recognized any Constitutional protection for public or vehicular carrying of <u>loaded</u> handguns. *See Masciandaro,* 638 F.3d at 474 ("[b]y permitting park patrons to carry unloaded

[13] Plaintiffs fail to explain how attackers would consistently divine that their victims' guns are actually unloaded.

firearms within their vehicles, § 2.4(b) leaves largely intact the right to 'possess and carry weapons in case of confrontation'); *People v. Flores*, 169 Cal. App. 4th 568, 575 – 577 (2008) (validity of § 12031 ban on carrying loaded weapons in public left undisturbed by *Heller*).

6. In *Flores*, the court of appeal described section 12031 as a "stark contrast" to the statutes invalidated by *Heller* due to § 12031's facial exclusion of weapons in the home and numerous exceptions, including for imminent need of self-defense. Under California's scheme, when serious peril looms, one does not have to wait until the last second to load one's pistol. This important exception was recognized by the District Court in its ruling. (Vol. I, ER 9 – 10.)

Plaintiffs' retorts are that "criminal attacks are frequently sudden" and that loading the gun in the imminent danger setting creates a risk of criminal prosecution. OB 34. Yet, NRA's statistics belie that thwarting attacks usually requires immediate shooting and the risk of prosecution is far higher (and for a much more serious crime) if the attacker is unnecessarily shot rather than simply shown that the victim is armed.

VI. ASSUMING THE SECOND AMENDMENT APPLIES, CALIFORNIA'S SCHEME IS VALID

Following a bewildering plea for application of First Amendment prior restraint doctrine to the concealed weapon permit process established by section 12050 (operation of which statute, as described above, is here a moot point), Plaintiffs argue for strict scrutiny of California's gun control scheme. Again, Plaintiffs sail into a headwind.

A. RATIONAL BASIS SCRUTINY IS APT

Should this Court find that a constitutional right to carry loaded handguns in public generally exists, it must then consider whether California's statutory scheme, particularly section 12031, is a valid restriction on that right. To the extent the need to keep one's handgun unloaded in certain public areas can be considered a burden on the right to self-defense, it is a minor one of a few seconds. This Court's analysis in *Nordyke* was that the level of scrutiny to be applied is a function of the amount of burden imposed on the rights to keep and bear arms for self-defense, with heightened scrutiny to be applied only where a substantial burden was imposed. 644 F.3d at 786. The

opinion noted that a constitutional right is not substantially burdened just because it is more difficult to exercise. *Id*., at 787 – 788.

A few second delay, with the ability to load when imminent trouble is anticipated, cannot even arguably be deemed a substantial burden on the general right to carry arms, just as the inability to buy guns at trade shows on county property was deemed insignificant in *Nordyke*. Since *Nordyke* held that heightened scrutiny applies only where a substantial burden is imposed, California's laws should be viewed under the normal standard of rational basis scrutiny. *Id*. at 785. *See DeLacy*, 192 Cal. App. 4th at 1495 (applying rational basis scrutiny to statutory prohibition against gun possession by certain misdemeanants).

A statute passes rational-basis scrutiny where it rationally relates to a legitimate state interest. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 (1976). As Plaintiffs concede that California has a legitimate interest in public safety and laws precluding loaded handguns in urban public areas logically serve that goal the existence of a rational relationship is manifest. *See* OB 56.

B. INTERMEDIATE SCRUTINY WOULD ALSO BE MET

Should the Court find sections 12031 and 12025 substantially burden Plaintiffs' right to publicly carry pistols, it must determine the proper level of scrutiny to employ, which question was left open by *Nordyke*. The overwhelming majority of other courts to consider the level of scrutiny to be employed to law restricting Second Amendment rights have adopted intermediate scrutiny – whether the law is reasonably related to a substantial government interest.[14] *Chester*, 628 F.3d at 683; *Reese*, 627 F.3d at 802; *Marazzella*, 614 F.3d at 97; *United States v. Skoien*, 614 F.3d 638, 639 (7th Cir. 2010) (*en banc*); *Osterweil*, 2011 U.S. Dist. LEXIS at *30 – 31; *Kachalsky v. Cacace*, 2011 U.S. Dist. LEXIS at 90; *Hall v. Garcia*, 2011 U.S.

[14] The Seventh Circuit's recent opinion in *Ezell* is not contrary. There, the court analogized to 1st Amendment cases, noting that the level of scrutiny varies with the types of speech and restriction involved, and reasoned that because Chicago's total ban on target ranges substantially impacted the core home self-defense right articulated in *Heller*, it warranted a higher than intermediate, though less than strict, level of scrutiny. 2011 U.S. App. LEXIS 14108, at * 60 – 61. Here, Plaintiffs do not contend that the core right of home defense is even being regulated, much less prohibited.

Dist. LEXIS 34081, *9 – 10 (N.D. Cal. 2011); *Ellison*, 196 Cal. App. 4th at 1347 (intermediate scrutiny apt since § 12025 does not totally bar possession of handguns). Outside of cases involving possession of guns in any place or manner by convicted criminals, this consensus view stems from most courts either (a) by explicitly or implicitly assuming the Second Amendment pertained to the law in question or (b) by extrapolating *Heller*'s rejection of rational basis scrutiny to gun control outside of the home. *See e.g.*, *Flores*, 169 Cal.App.4th at 577; *Patterson v. Lacabe*, 2011 U.S. Dist. LEXIS 23070, *24 – 25 (D. Colo. 2011).

Once again, indisputable is that public safety is an important government interest (indeed, perhaps the most vital) and that requiring handguns be kept unloaded in the public areas of population centers reasonably relates to that lofty objective. The threat of inadvertent discharge from a loaded gun infinitely exceeds that of an unloaded gun. Likewise, shootings are far more likely to stem from an argument or perceived insult/attack if the shooter need not delay just a few moments to load his weapon, during which time he might

reconsider the need for deadly force or his intended victim might be able to flee. Moreover, the threat to police trying to investigate a crime or make an arrest would rise exponentially if loaded handguns were allowed in public areas.[15]

As stated in *Masciandaro* in rejecting a strict scrutiny test: "But, as we move outside the home, firearm rights have always been more limited, because public safety interests often outweigh individual interests in self-defense." 638 F.3d at 470. Keying on the Supreme Court's blessing as presumptively valid laws prohibiting guns in "sensitive places," the Fourth Circuit upheld the ban against loaded guns in vehicles within national parks, explaining:

> In reaching this result, we conclude first that the government has a substantial interest in providing for the safety of individuals who visit and make use of the national parks, including Daingerfield Island. Although the

[15] Of the 536 law enforcement officers killed in the line of duty between 2000 and 2009 (including 47 in California), 490 were killed with firearms and of those, handguns were used by the perpetrator 73% of the time. *See* Fed. Bureau of Investigations, U.S. Dep't of Justice, Law Enforcement Officers Killed and Assaulted (2009), tables 1 and 27, available at http://www.fbi.gov/about-us/cjis/ucr/leoka/2009/leoka-2009.

government's interest need not be "compelling" under intermediate scrutiny, cases have sometimes described the government's interest in public safety in that fashion. See *Schenck v. Pro-Choice Network*, 519 U.S. 357, 376, 117 S. Ct. 855, 137 L. Ed. 2d 1 (1997) (referring to the "significant governmental interest in public safety"); *United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987) (commenting on the "Federal Government's compelling interests in public safety"). The government, after all, is invested with "plenary power" to protect the public from danger on federal lands under the Property Clause. [Citations.] As the district court noted, Daingerfield Island is a national park area where large numbers of people, including children, congregate for recreation. See *Masciandaro*, 648 F. Supp. 2d at 790. Such circumstances justify reasonable measures to secure public safety.

We also conclude that § 2.4(b)'s narrow prohibition is reasonably adapted to that substantial governmental interest. Under § 2.4(b), national parks patrons are prohibited from possessing loaded firearms, and only then within their motor vehicles. 36 C.F.R. § 2.4(b) ("Carrying or possessing a loaded weapon in a motor vehicle, vessel, or other mode of transportation is prohibited"). We have no occasion in this case to address a regulation of unloaded firearms. Loaded firearms are surely more dangerous than

unloaded firearms, as they could fire accidentally or be fired before a potential victim has the opportunity to flee. The Secretary could have reasonably concluded that, when concealed within a motor vehicle, a loaded weapon becomes even more dangerous. In this respect, § 2.4(b) is analogous to the litany of state concealed carry prohibitions specifically identified as valid in *Heller*. See 128 S. Ct. at 2816-17.

By permitting park patrons to carry unloaded firearms within their vehicles, § 2.4(b) leaves largely intact the right to "possess and carry weapons in case of confrontation." *Heller*, 128 S. Ct. at 2797. While it is true that the need to load a firearm impinges on the need for armed self-defense, see Volokh, Implementing the Right for Self-Defense, 56 U.C.L.A. L. Rev. at 1518-19, intermediate scrutiny does not require that a regulation be the least intrusive means of achieving the relevant government objective, or that there be no burden whatsoever on the individual right in question. See *United States v. Baker*, 45 F.3d 837, 847 (4th Cir. 1995). Moreover, because the United States Park Police patrol Daingerfield Island, the Secretary could conclude that the need for armed self-defense is less acute there than in the context of one's home.

> Accordingly, we hold that, on Masciandaro's as-applied challenge under the Second Amendment, § 2.4(b) satisfies the intermediate scrutiny standard.

Id. at 473 – 474.

The present situation is quite similar to that addressed in *Masciandaro*: the state has a compelling interest in public safety; sections 12025 and 12031 narrowly restrict solely concealed and loaded weapons, and even there outside the home; the prohibition on loaded weapons pertains only within city limits and in other "sensitive areas," where the Legislature could reasonably perceive a greater threat of harm exists; and the prohibition has an exception for the need to respond to a specific and immediate threat. Hence the slight intrusion on the right to self-defense via carrying a loaded weapon is permissible. As stated in *Flores*, section 12031 "is narrowly tailored to reduce the incidence of unlawful *public* shootings," while preserving the right to self-defense, and thus creates no significant burden to Second Amendment rights. 169 Cal.App.4th at 576 – 577 (emphasis in original); *Ellison*, 196 Cal.App.4th at 1350 – 1351

(rejecting argument that § 12031 eliminates alternate means of carrying loaded weapons so to render § 12025 invalid as unduly burdening right to bear arms).

The dangers of loaded guns in public places are quite real. Even experienced gunslinger Marshal Earp narrowly escaped death when his revolver fell out of its holster, hit the floor and discharged – the bullet passing through his coat.[16] Wyatt Earp: Dodge City, http://genealogytrails.com/ariz/wyattearp.html. Nor has the risk abated with time, as just several years ago New York Giants receiver Plaxico Burress inadvertently shot himself in the thigh with a Glock pistol while in a New York City nightclub. Mark Maske, *Giants Wide Receiver Burress Released from Hospital After Accidentally Shooting Himself in the Leg*, The Washington Post, Nov. 30, 2008, *available at*

[16] Once Tombstone bartender Frank "Buckskin" Leslie was not as lucky – the ball from his dropped revolver struck his knee and took off part of his ear. *See Accidentally Shot in Saloon*, The San Francisco Call, Nov. 26, 1902, *available at* http://chroniclingamerica.loc.gov/lccn/sn85066387/1902-11-26/ed-1/seq-10/ocr/.

http://www.washingtonpost.com/wp-dyn/content/article/2008/11/29/AR2008112902098.html?hpid=moreheadlines.

Even greater risk exists in the form of people who become intoxicated while carrying a loaded weapon. It takes little imagination to envision the rise in felony assault and murder crimes which would occur if we return to the Wild West days of men entering the saloon with loaded six guns at their sides. Plaintiffs will perhaps assert that this concern is unfounded because restaurants, taverns and bars are private establishments which could, and almost certainly would, simply prohibit possession of guns within the premises, as could any other business. Yet, even if there were "gun check" counters at the door or customers had to leave their guns in their vehicle, the retrieval of those guns as the inebriated patron left would still pose a serious safety risk to those persons on the sidewalk or in the parking lot, not to mention the police officers responding to the scene.

Moreover, Plaintiffs' putative need to be ready to shoot any attacker would be of little practical utility if the right to carry could

not normally be exercised in restaurants, schools, banks, stores, government buildings, parks and such other urban areas people often visit. In almost any city, other than in private residences, one's weapon would necessarily be unloaded or left in the car the vast majority of the time during one's daily travels.[17] The workplace would be the sole possible significant exception. However, most citizens whose occupations are routinely thus hazardous (e.g., jewelers) would be able to qualify for a concealed weapon permit. Otherwise, few employers would likely permit loaded weapons on the jobsite or in the office or shop (due to the demands of workers compensation and liability insurers, if nothing else).[18] Hence it is difficult to see how average citizens such as Plaintiffs could be carrying for any meaningful duration their loaded pistols while within

[17] As amicus CRPAF emphasizes, the number of school zones present within most cities alone renders imaginary one's practical ability to travel through town continuously carrying a loaded gun.

[18] Although some states permit employees to have guns in their cars while parked at work, California is not among them, nor does that exception satisfy Plaintiffs' desire to be always armed and ready.

the city and away from their homes.

C. SECTION 12031 IS CONSTITUTIONALLY VALID EVEN IF STRICT SCRUTINY APPLIED

Even if this Court were to make the unprecedented finding that strict scrutiny applied here, section 12031 would survive due to the government's compelling interest in public safety and the limited application of section 12031.

When strict scrutiny applies, a statute is constitutional only if it is necessary to achieve a compelling governmental interest. *See Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2984 fn.11 (2010) (quoting *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1132 (2009)). Courts have routinely acknowledged the government's compelling interest in public safety, which includes the regulation of handgun carry. *See e.g. Schenck v. Pro-Choice Network*, 519 U.S. 357, 376 (1997) (referring to the "significant governmental interest in public safety"); *United States v. Salerno*, 481 U.S. at 745 (federal government has "compelling interests in public safety"); *Masciandaro*, 638 F.3d at 473 – 474; *Kachalsky*, 2011 U.S. Dist. LEXIS at 94 - 96 (citing District Court's decision herein and

acknowledging connection between promoting compelling goal of public safety and regulating the carrying of concealed handguns).

Courts have also recognized that the government's significant interest in public safety is even more acute in cities than in rural areas due to population density. *Welch v. Swasey*, 214 U.S. 91 (1909) (highlighting the importance of regulation of building construction in densely populated areas in order to avoid fire and disease); *United States v. Terry-Crespo*, 356 F.3d 1170, 1178 (9th Cir. 2004) (emphasizing the serious potential risk of shooting at a building within city limits that is not equally present in rural communities); *McDonald*, *supra*, 130 S. Ct. at 3114 (J. Breyer dissent) (noting that population density "increases the potential for a gunman to inflict mass terror and casualties" and that urban centers "face significantly greater levels of firearm crime and homicide"); *Heller*, *supra*, 554 U.S. at 698 (J. Breyer dissent) ("urban areas . . . have different experiences with gun-related death, injury, and crime than do less densely populated rural areas"); *Kachalsky*, at *97 – 98 (as quoted, *ante*, re dangers of carrying loaded guns in public places). In light of

California's unquestionable interest in maintaining the safety of the public, specifically protection in the more densely populated areas from gun violence or injury from accidental gunfire, the only issue is whether section 12031 is narrowly tailored to achieve such compelling safety goals.

As discussed above, section 12031 is not a sweeping ban on open loaded carry but primarily addresses public places in cities. To put this into perspective, YOLO is approximately 1,021 square miles and contains only four incorporated cities: Davis, Woodland, West Sacramento, and Winters. *See* Yolo County Profile, *available at* http://www.yolocounty.org/Index.aspx?page=321; Illustration and Table 1 hereto. West Sacramento, the largest of the four incorporated cities in land area, covers 21 square miles. *See* West Sacramento, CA Profile, *available at* http://www.idcide.com/citydata/ca/west-sacramento.htm. Woodland covers 14.5 square miles. *See* Woodland, CA Overview & Statistics, *available at* http://www.cityofwoodland.org/visitors/stats.asp. Davis is only 9.91 square miles; and Winters covers a mere 2.3 square miles. *See* City of

Davis, CA, Location & Topography, *available at* http://cityofdavis.org/aboutdavis/cityprofile/index.cfm?topic=location; Winters, CA Profile, *available at* http://www.idcide.com/citydata/ca/winters.htm. Accordingly, section 12031's "public places" ban applies to substantially less than 47 of YOLO's 1,021 square miles (approximately 4.6% of YOLO's area), as excluded from that 47 sq. miles are private residences and businesses. Cal. Penal Code § 12031(h) and (l).

Furthermore, as chronicled above, section 12031's numerous exceptions serve to carefully tailor the already area-limited prohibition to include allowance for persons whose jobs or immediate circumstances create a heightened need for self-protection. Additionally, section 12050 allows the issuance of open carry permits in the majority of counties, i.e., those with a population under 200,000.

Thus, when the California statutory scheme is considered as a whole, the so-called "ban" on loaded carry is far from a ban at all. Rather, the statute limits its prohibition on loaded open carry to

persons without a heightened need for self-protection, who do not fall in any of the accepted use exceptions, while in public areas of cities in counties with a population over 200,000. Accordingly, the application of section 12031 is narrowly tailored to achieve California's compelling interest in public safety and thus, would pass strict scrutiny even if it applied here. *See Ellison*, 196 Cal. App. 4th at 1350 – 1351 (deeming §§ 12025 and 12031 as collectively applied narrowly tailored and thus constitutional).

VII. CONCLUSION

This case only indirectly concerns the non-right to carry concealed sidearms. The real issue is whether California can constitutionally restrict open carrying of loaded guns in certain public areas of cities. Neither colonial laws nor customs, nor modern case authority, nor common sense demonstrate that the Second Amendment compels public safety be thus sacrificed. Billy the Kid, Cole Younger, Butch Cassidy, Johnny Ringo and other desperados of the Old West no longer prowl the streets and saloons looking to draw at the slightest provocation, nor hide in the gully outside town waiting

to ambush the stagecoach. On the other hand, since violent urban crime still exists, California law allows the loading of a carried weapon to combat any immediate threat. A better balance between public safety and the right to self-defense would be hard to strike. Accordingly, the judgment of the District Court should be affirmed.

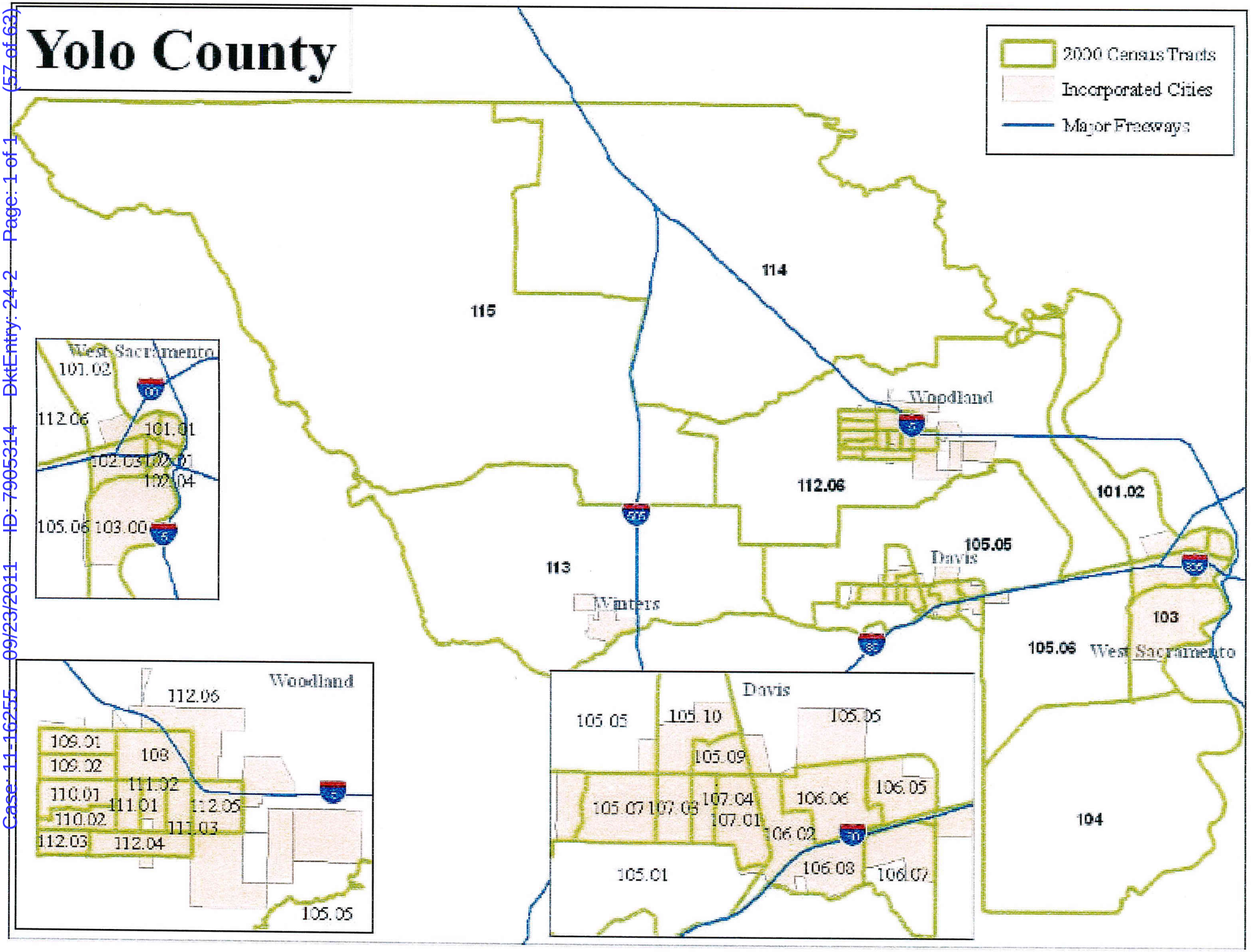
Dated: September 23, 2011 ANGELO, KILDAY & KILDUFF, LLP

/s/ John A. Whitesides
By:_____
JOHN A. WHITESIDES

Dated: September 23, 2011 ANGELO, KILDAY & KILDUFF, LLP

/s/ Serena M. Sanders
By:_____
SERENA M. SANDERS

Yolo County



SACRAMENTO COUNTY

CITIES

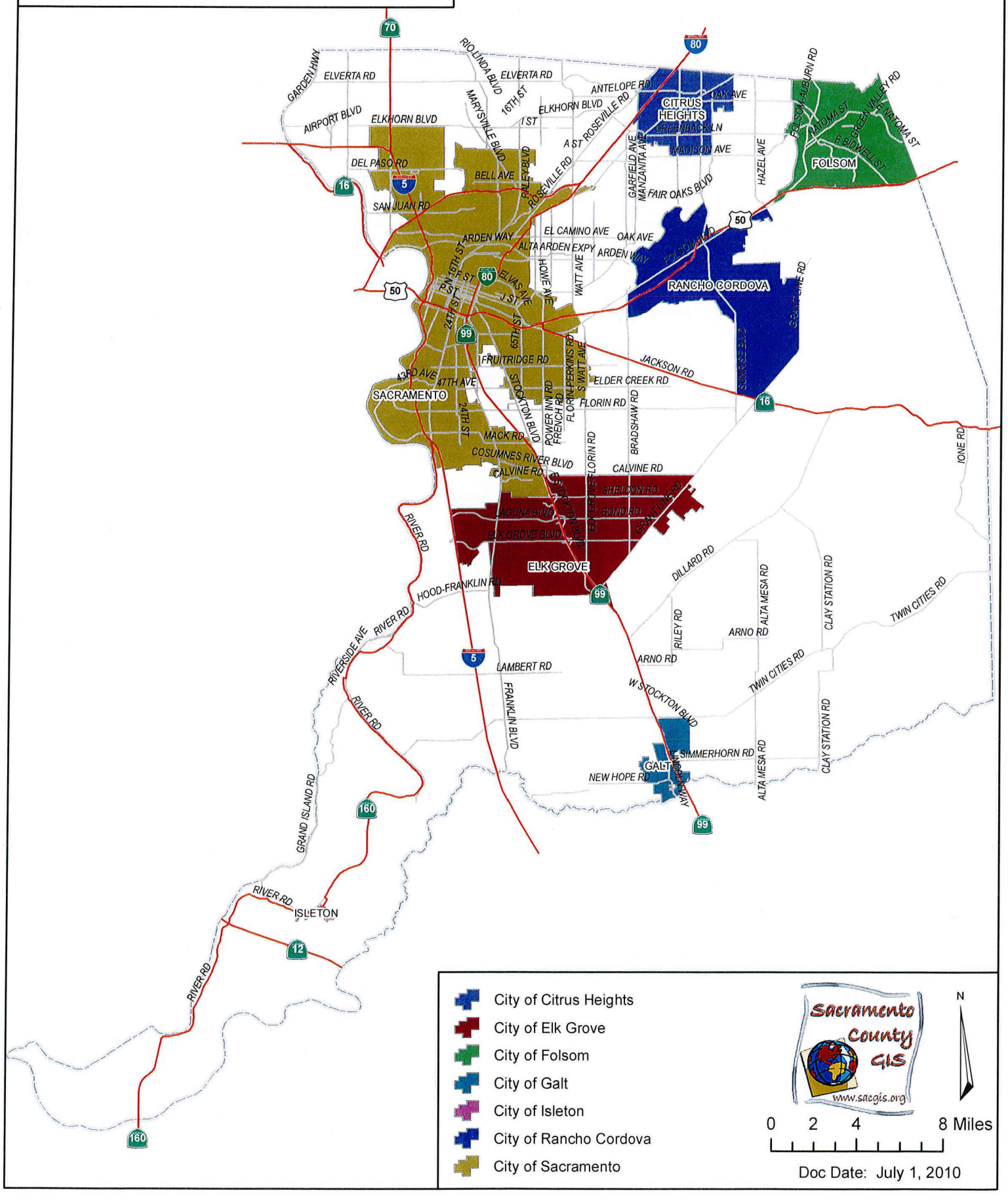


Table 1: California County Populations

Based on 2010 U.S. Census Data

County	Population Ranking	Total Population
Los Angeles	1	9,818,605
San Diego	2	3,095,313
Orange	3	3,010,232
Riverside	4	2,189,641
San Bernardino	5	2,035,210
Santa Clara	6	1,781,642
Alameda	7	1,510,271
Sacramento	8	1,418,788
Contra Costa	9	1,049,025
Fresno	10	930,450
Kern	11	839,631
Ventura	12	823,318
San Francisco	13	805,235
San Mateo	14	718,451
San Joaquin	15	685,306
Stanislaus	16	514,453
Sonoma	17	483,878
Tulare	18	442,179
Santa Barbara	19	423,895
Monterey	20	415,057
Solano	21	413,344
Placer	22	348,432
San Luis Obispo	23	269,637
Santa Cruz	24	262,382
Merced	25	255,793
Marin	26	252,409
Butte	27	220,000
Yolo	28	200,849
El Dorado	29	181,058
Shasta	30	177,223
Imperial	31	174,528
Kings	32	152,982
Madera	33	150,865
Napa	34	136,484
Humboldt	35	134,623
Sutter	36	94,737
Nevada	37	98,764

County	Population Ranking	Total Population
Mendocino	38	87,841
Yuba	39	72,155
Lake	40	64,665
Tehama	41	63,463
Tuolumne	42	55,365
San Benito	43	55,269
Calaveras	44	45,578
Siskiyou	45	44,900
Amador	46	38,091
Lassen	47	34,894
Del Norte	48	28,610
Glenn	49	28,122
Colusa	50	21,419
Plumas	51	20,007
Inyo	52	18,546
Mariposa	53	18,251
Mono	54	14,202
Trinity	55	13,786
Modoc	56	9,686
Sierra	57	3,240
Alpine	58	1,175

CERTIFICATE OF COMPLIANCE

Pursuant to Ninth Circuit Rules, I certify that Appellees' Answering Brief is proportionately spaced and has a typeface of 14 points in Times-Roman font.

The brief has a word count of 8,369 words.

Respectfully submitted,

DATED: September 23, 2011

ANGELO, KILDAY & KILDUFF, LLP

/s/ John A. Whitesides

By: _____

JOHN A. WHITESIDES

ANGELO, KILDAY & KILDUFF, LLP

/s/ Serena M. Sanders

By: _____

SERENA M. SANDERS

CERTIFICATE OF RELATED CASES

Peruta v. County of San Diego, 10-56971.

DATED: September 23, 2011

ANGELO, KILDAY & KILDUFF, LLP

/s/ John A. Whitesides

By: _____

JOHN A. WHITESIDES

ANGELO, KILDAY & KILDUFF, LLP

/s/ Serena M. Sanders

By: _____

SERENA M. SANDERS

CERTIFICATE OF SERVICE

I, the undersigned, declare: that I am a citizen of the United States and a resident of Sacramento County and employed in Sacramento, California; that my business address is 601 University Avenue, Suite 150, Sacramento, CA 95825; that I am over the age of eighteen years; that I am not a party to the above-entitled action.

On September 23, 2011, I served the foregoing document described as **APPELLEES' ANSWERING BRIEF** on the parties to this action by electronic filing through the appellate CM/ECF system.

I declare under penalty of perjury that the foregoing is true and correct. Executed on September 23, 2011 at Sacramento, California.

/s/ Holly Barto

Holly Barto