

No. 12-57049

United States Court of Appeals  
for the Ninth Circuit

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

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Brief of the  
International Law Enforcement Educators & Trainers Association,  
International Association of Law Enforcement Firearms Instructors,  
Inc., and the Independence Institute,  
as *Amici Curiae* in support of Appellees and in favor of reversal

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Caption: McKay v. Hutchens

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/s/ David B. Kopel

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Caption: McKay v. Hutchens

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/s/ David B. Kopel

Dec. 6, 2012

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## STATEMENT OF AMICUS INTEREST

Appellants have consented to the filing of this brief, and appellees have not. A motion filed with this brief provides reasons why this Court might choose to accept the brief.

This amicus brief provide this Court with the perspective of the nation's two major organizations of police trainers. The brief presents a balanced and accurate analysis of the social science research and government data on licensed carry, and on self-defense.

The police training organizations explain, based on their collective knowledge of practical law enforcement on the street, and based on research, that licensed carry, fairly administered (as Appellants seek) does not harm public safety. The issuance of more permits to law-abiding citizens does not interfere with police crackdowns on unlicensed carry. California's statutory licensing system, if applied fairly as Appellants wish, amply safeguards police interests and public safety, because it still would allow for police discretion to deny unsuitable applicants.

## **International Law Enforcement Educators & Trainers Association**

The International Law Enforcement Educators and Trainers Association (ILEETA) is a professional association for persons who provide training to law enforcement. ILEETA members train law enforcement officers in the proper use of firearms, other use of force, and many other issues involving situational control and safety.

ILEETA publishes four periodicals: *The ILEETA Digest*, *The ILEETA e-Bulletin*, *The ILEETA Journal*, and *The ILEETA Chronicle*.

ILEETA is participating to provide its expertise on interactions between police and law-abiding persons with a handgun carry license. Secondly, ILEETA is participating because law-abiding citizens with firearms, particularly with handguns, make an important contribution to public safety by deterring or thwarting crime. Indeed, lawful self-defense and deterrence by citizens with handgun carry permits conserve police resources, since there are fewer victimizations to investigate.

## **International Association of Law Enforcement Firearms Instructors**

The International Association of Law Enforcement Firearms Instructors, Inc., (IALEFI) is a non-profit 501(c)(3) education association founded in 1981 by police firearms instructors. IALEFI is dedicated to the development and operation of training programs for firearms instructors among law enforcement, security, criminal justice, and investigative agencies and organizations. IALEFI conducts training conferences to provide members with education in the latest techniques and technologies available to law enforcement firearms instructors. IALEFI publishes a quarterly magazine, *The Firearms Instructor*, which includes articles, training tips, reports and news of interest to the professional firearms instructor. Training manuals published by IALEFI also include *Firearms Training Standards for Law Enforcement Personnel*, *IALEFI Guidelines for Simulation Training Safety*, and *Standards & Practices Guide for Law Enforcement Firearms Instructors* (purchased by the U.S. Dept. of Justice and placed in the library of every federal district court).

IALEFI is participating for the same reasons as ILEETA.

## **Independence Institute**

Dedicated to the eternal truths of the Declaration of Independence, the Independence Institute is a 501(c)(3) educational organization based in Denver, Colorado. Founded in 1985, the Independence Institute is a nonpartisan, non-profit public policy research organization dedicated to providing information to concerned citizens, government officials, and public opinion leaders.

Independence Institute Research Director David Kopel has written over a dozen books and more than 80 law review and other scholarly articles, many of them on firearms law and policy. These include the only law school textbook on the subject: NICHOLAS J. JOHNSON, DAVID B. KOPEL, GEORGE MOCSARY & MICHAEL P. O'SHEA, FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS, AND POLICY (Aspen Publishers 2012).

The Independence Institute's amicus brief, in conjunction with ILEETA and IALEFI was cited in *District of Columbia v. Heller*, 554 U.S. 570, 700-01, 710 (2008) (Breyer, J., dissenting), and *McDonald v.*

Chicago, 130 S.Ct. 3020, 3026 n.2, 3115 (2010) (opinion of the Court) & 3106 n.31, 3115 (Stevens, J., dissenting).

Pursuant to Federal Rule of Appellate Procedure 29, amici curiae certifies that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than amicus, its members, and its counsel has made a monetary contribution to the preparation and submission of this brief.

### **SUMMARY OF ARGUMENT**

The balance of equities in this interlocutory appeal strongly favors Appellants. Requiring Orange County to comply with the Second Amendment poses no danger to public safety, and is of the highest importance to the safety of Appellants and other law-abiding citizens.

Strong protection of the constitutional right to the licensed carry of handguns for lawful self-defense does not interfere with police efficacy in cracking down on illegal gun carrying.

Data from law enforcement agencies shows that persons with carry permits are far more law-abiding than the general population.

Assertions that licensed carry harms public safety are based on false data from a gun prohibition group.

The case can be resolved without need for a standard of review, because the near-complete suppression of an enumerated constitutional right can never be constitutional.

California law, like the laws of states which generally comply with the Second Amendment, leaves ample discretion for denial of permits to unsuitable applicants, and allows denials for many reasons other than felony conviction.

Enforcing the Second Amendment right to bear arms would be consistent with precedent in other states protecting the constitutional right to bear arms.

## ARGUMENT

### I. Police Training and Police Stops

Amici are the two major professional associations of police trainers. ILEETA trains on all subjects, including firearms, while IALEFI specializes in firearms training, as well as certain other topics such as vehicle stops, subject control, and defensive tactics.

Forty-one states already have essentially the same kind handgun carry authorization system that Appellants correctly argue the Second Amendment requires. Every state in the Ninth Circuit, except Hawaii and some counties in California, has a fairly administered carry licensing statute, based on objective criteria. So do the large majority of all other states. The states with objective and fair licensing systems are called “Shall Issue” states. Two Ninth Circuit states (Alaska and Arizona), as well as Vermont, do not require a license. Alabama and Connecticut have licensing statutes which facially have more discretion than the Ninth Circuit norm; but in practice, licensing in Alabama and Connecticut is fairly administered, so that the wish to lawfully exercise

Second Amendment rights in public is considered good cause for a license.

Thus, the large majority of ILEETA and IALEFI trainers work in states where it is entirely normal for law-abiding adults to carry handguns for lawful protection. Licensed carry is not an untested novelty. Since 1995, over half the U.S. population (and thus, over half of police trainers) have lived in states where non-discriminatory licensed carry has been the law.

Many members of ILEETA and IALEFI association are representatives of law enforcement agencies amounting to hundreds, thousands, or in some cases even tens of thousands, of police officers. Thus, amici and their member trainers are fully aware of the issues faced on the street by the officers of their respective agencies.

Some persons worry that if ordinary law-abiding Californians who simply wish to exercise their constitutional right to bear arms for self-defense, are allowed to do so in public, the police will have a very

difficult time enforcing laws against illegal carrying. Experience shows otherwise.

For example, there have been well-known successful programs in Indianapolis and Pittsburgh where police made special efforts to crack down on illegal gun carrying in certain neighborhoods, and crime dropped significantly. Edmund F. McGarrell et al., *Reducing Firearms Violence through Directed Police Patrol*, 1 CRIMINOLOGY & PUB. POL'Y 119 (2001); Jacqueline Cohen & Jens Ludwig, *Policing Crime Guns*, in EVALUATING GUN POLICY 217, 220 (Jens Ludwig & Philip J. Cook eds., 2003). At the time those successful experiments were conducted, both Indiana and Pennsylvania were "Shall Issue." The Pittsburgh crackdown took place in 1998, and Pennsylvania has been Shall Issue since June 1989. 1988 Pa. Laws 1275 (P.L. No. 158; Dec. 19, effective in 180 days). The Indianapolis program took place in 1997, and Indiana has been Shall Issue since 1980. *See Schubert v. DeBard*, 398 N.E.2d 1339 (Ind. App. 1980) (self-defense is "constitutionally a 'proper reason' within the meaning of" Indiana's carry license statute).

Notably, the issuance of carry permits in accordance with the Second Amendment does not prevent an officer from making a reasonable inquiry when he sees a person carrying a firearm. As Pennsylvania, a Shall Issue state, has ruled, when an officer sees a person carrying a gun, the “officer can approach the individual and briefly detain him in order to investigate whether the person is properly licensed.”

*Commonwealth v. Robinson*, 600 A.2d 957, 959 (Pa. Super. Ct. 1991).

## **II. Experience in other states**

### **A. Changed views based on experience**

Forty-one states today generally comply with the Second Amendment’s right to bear arms. In many of those states, when the legislature was considering whether to reform the carry licensing system so as to make it fair, objective, and non-arbitrary, some opponents made hysterical predictions similar to the claims raised by Appellants and their amici in the instant case.

Supposedly, a fair system for licensing “would make public shoot-outs common and fill the streets with blood.”<sup>1</sup> There were many predictions that unlawful homicides would increase.<sup>2</sup> Based on experience, some of the worriers have frankly admitted that they were wrong.<sup>3</sup> For example, John B. Holmes, District Attorney of Harris County (which contains Houston) and Glenn White, President of the Dallas Police Association, were strong opponents of licensed carry in Texas. Both changed their minds after watching how it worked, and seeing that their worst fears were incorrect.

Holmes said, “I . . . [felt] that such legislation . . . present[ed] a clear and present danger to law-abiding citizens by placing more handguns on our streets. Boy was I wrong. Our experience in Harris County, and indeed statewide, has proven my initial fears absolutely groundless.” And White said, “All the horror stories I thought would come to pass didn’t happen. . . . I think it’s worked out well, and that says

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<sup>1</sup> Tom Skoch, *The Editor’s Column: Facts Top Feelings, Change Views On Gun Issues*, The Morning Journal (Feb. 6, 2011), <http://www.morningjournal.com/articles/2011/02/06/opinion/doc4d4e1b29419fe014211343.txt?viewmode=fullstory>.

<sup>2</sup> E.g., Joyce Price, *Pistol-Packin’ Population: Supporters of Right-to-Carry Laws Say The Measures Allow Honest Citizens to Protect Themselves in a Dangerous Society*, Insight on the News (Jan. 29, 1996), [http://findarticles.com/p/articles/mi\\_m1571/is\\_n4\\_v12/ai\\_17864715/](http://findarticles.com/p/articles/mi_m1571/is_n4_v12/ai_17864715/).

<sup>3</sup> Skoch, *supra* note 1.

good things about the citizens who have permits. I'm a convert."<sup>4</sup>

Florida state legislator Ron Silver, "the leading opponent" of that state's groundbreaking Shall Issue law in 1987, admitted in November 1990, "There are lots of people, including myself, who thought things would be a lot worse as far as that particular situation [carry reform] is concerned. I'm happy to say they're not." John Fuller, general counsel for the Florida Sheriffs Association, stated, "I haven't seen where we have had any instance of persons with permits causing violent crimes, and I'm constantly on the lookout."<sup>5</sup> The Metro Dade Police Department, out of concern with the risks of the new law, kept detailed records of every incident involving concealed weapon licensees from enactment of the new law in 1987 until August 31, 1992, when the rarity of problems caused the department to cease tracking such incidents.<sup>6</sup>

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<sup>4</sup> H. Sterling Burnett, *Texas Concealed Handgun Carriers: Law-abiding Public Benefactors*, Nat'l Center for Pol'y Analysis, (June 2, 2000), <http://www.ncpa.org/pub/ba324>.

<sup>5</sup> Clayton E. Cramer & David B. Kopel, "*Shall Issue*": *The New Wave of Concealed Handgun Permit Laws*, 62 *Tenn. L. Rev.* 679, 693 (1995).

<sup>6</sup> *Id.* at 692-03.

Michigan adopted a Shall Issue law in 2001. In 2004, the *Daily Oakland Press* reported on the first three years of the new law: the claims that the law “was surely a recipe for disaster” turned out to be wrong. “Law enforcement officers and local officials say Michigan’s streets are no safer—or more dangerous—than they were three years ago when the law went into effect. But there have been no major incidents involving people with the permits. No accidental discharges. No murders. No anarchy.”<sup>7</sup>

Significantly, the actual experience of licensed carry has not led *any* Shall Issue state to revert to either arbitrary licensing or a ban on licensed carry. It would be remarkable indeed if a policy that has worked so well for *every* adopting state would cause disaster in California.

## **B. Research on incidents of defensive use**

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<sup>7</sup> Jose Juarez, *Our Quiet Rise In Handguns*, Daily Oakland Pr. ., (June 27, 2004), <http://www.theoaklandpress.com/articles/2004/06/27/localnews/20040627-archive12.txt?viewmode=fullstory>.

Professor Clayton Cramer’s recent survey of defensive gun use by civilians in the United States examined 4,699 such incidents gathered from news accounts and law enforcement news releases. Of these, 285 incidents identified the defender as having a carry license—a number that would have been impossible before the adoption of shall-issue laws.<sup>8</sup>

For example, on December 10, 2007, a deranged young man entered the lobby of New Life Church in Colorado Springs, Colorado, carrying two handguns, a rifle, and more than a thousand rounds of ammunition. He had murdered four people in the previous twelve hours—two of them in the church parking lot minutes before. Jeanne Assam, a member of the church, drew and fired, preventing him from perpetrating what might otherwise have been the largest mass murder in U.S. history.<sup>9</sup> Colorado had become a Shall Issue state in 2003.

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<sup>8</sup> Clayton E. Cramer & David Burnett, *Tough Targets: When Criminals Face Armed Resistance from Citizens*, , CATO Inst., 11-12 (2012)<http://www.cato.org/pubs/wtpapers/WP-Tough-Targets.pdf>.

<sup>9</sup> Thomas Hendrick, *Security Guard: “God Guided Me and Protected Me,”* KMGH-TV Denver (Dec. 10, 2007), <http://www.thedenverChannel.com/news/14817480/detail.html>; Judy Keen & Andrea Stone, *This Month’s Mass Killings a Reminder of*

### C. Dishonest data from a gun prohibition group

In litigation involving the right to bear arms, it has been common for opponents to cite to the website of a gun prohibition organization, the Violence Policy Center. As of earlier this year, the organization claimed that since May 2007, twelve law enforcement officers and 428 private citizens have been “killed by concealed carry killers.”<sup>10</sup> The assertion borders on the fraudulent. A detailed analysis of the VPC claims is presented in Professor Cramer’s paper *Violence Policy Center’s Concealed Carry Killers: Less than it Appears*, <http://ssrn.com/abstract=2095754>.

Professor Cramer’s careful examination reveals many problems with VPC’s “data”:

1. At least 120 of these deaths were derived from state reports that aggregate and anonymize data, making it impossible to verify their accuracy or determine if they include incidents listed elsewhere in the VPC report. In some cases, the data are clearly wrong, listing a purported homicide of a police officer by

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*Vulnerability*, USA TODAY, Dec. 21, 2007. New Life Church is one of Colorado’s megachurches; there were thousands of worshippers present in the sanctuary when the killer entered the lobby.

<sup>10</sup> Violence Policy Center, *Concealed Carry Killers*, <http://www.vpc.org/ccwkillers.htm>.

- a licensee in Michigan in a period when *every* homicide of a police officer was by convicted felons (who are ineligible for carry licenses).
2. A total of 132 of these deaths were either suicides from these aggregate reports, or are known to be individual suicides, where the licensee killed himself without any criminal attack on others. Carry laws have no effect on whether a gun owner chooses to commit suicide.
  3. At least 8 of these incidents (25 deaths) were clearly *not* licensees. In several of these cases, VPC admits that these persons are not licensees.
  4. Of 174 incidents totaling 282 deaths (after removing the unverifiable state reports and at least one careless duplication in VPC's list), at least 25 incidents totaling 63 deaths involve persons whose concealed handgun license cannot be verified.
  5. A few cases involve persons whom the VPC lists as licensees because they appear to have had state permits to *purchase* a handgun—*not* a license to carry concealed.
  6. VPC included at least eight incidents (eight deaths), where the licensee was found innocent.
  7. VPC included 21 incidents (23 deaths) where the charges appear still to be pending. In some cases, these cases are more than four years old, and there is good reason to suspect that charges were quietly dropped, which explains the lack of news coverage.
  8. VPC includes at least one self-defense case, involving a licensee named Cleveland Anthony, whom it appears was not even *charged* with a crime.

9. VPC includes 10 incidents (19 deaths) which occurred in may-issue states. Many of these involved retired police officers, who by federal statute have a right to carry in all 50 states. 18 U.S.C. § 926B. Others involved persons who were licensed in their home state, but were unlawfully carrying in another state that did not recognize their license.
10. VPC includes a total of 38 incidents (72 deaths) which took place in the home or business of a licensee. Generally, states do not require a concealed carry license in one's own home or business. These cases are irrelevant to shall-issue laws.
11. VPC includes 10 incidents (15 deaths) where a licensee was already breaking the law by carrying a gun. Usually these involve carrying a gun while intoxicated, but others are clearly premeditated crimes where any concealed carry law is irrelevant. Someone who plans out a murder will not be discouraged by failure to get a concealed carry license.
12. VPC includes 36 incidents (96 deaths) where the killer engaged in a carefully planned premeditated crime. These are often mass murders, but sometimes they are individual acts of revenge, or domestic homicides. Shall-issue, may-issue, no-issue: none of these matter when the plan is murder.
13. VPC includes eight accidental deaths which took place in the licensee's home. Because a concealed carry license is not required to have a loaded firearm in one's home, they cannot be attributed to laws about public carry.
14. VPC includes two incidents (two deaths) where the licensee did not even use a gun, but strangled the victim instead. In one case, the licensee was armed, but chose strangulation. (Alcoholic blackouts make people do strange things.)

15. VPC includes 8 incidents (26 deaths) where either the only weapon, or the primary weapon used, was a long gun. A concealed handgun carry license is again irrelevant.

After excluding incidents where a concealed carry license is irrelevant, we find a total of 79 incidents, 92 deaths. Of these, we are unable to verify a license in 7 incidents, 13 deaths. In addition, in 14 incidents (involving 15 deaths) are either pending, or charges have been silently dropped.

In short, the VPC's "data" are a gross fabrication, compiled by labeling as "concealed carry killers" persons who engaged in lawful self-defense, people who committed suicide at home, people who did not have carry permits, and many other situations in which a carry permit was entirely irrelevant as a matter of law and of common sense.

#### **D. Carry licensees are a particularly law-abiding subset of the population**

While the 92 (or, perhaps, 68) deaths are sobering, compared to the number of licensees in the U.S., this is a tiny number. According to the Government Accountability Office, there were more than 8 million active concealed carry permits as of December 31, 2011, in the 45 states

that provided data.<sup>11</sup> Assuming that 92 is the correct figure, this would be 0.23 murders per 100,000 concealed weapon licensees per year (less than one murder per 400,000 licensees) since May of 2007. This rate is less than 1/22 of the overall U.S. murder rate of 5.23 per 100,000 people for the years 2007 through 2010.<sup>12</sup>

In several states which issue permits in a manner compliant with the Second Amendment, a state agency produces annual reports of all criminal justice incidents involving concealed handgun permittees. While the details of how the data are reported vary among the states, the reports unanimously show that almost all permittees are highly law-abiding. In particular:

- Minnesota: One handgun crime (broadly defined, such as driving while under the influence if a handgun is in the car) per 1,423 permittees.
- Michigan: 161 charges of misdeeds involving handguns (including duplicate charges for one event, and charges which did not result

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<sup>11</sup> Government Accountability Office, *States' Laws and Requirements for Concealed Carry Permits Vary across the Nation*, GAO-12-717 (July 17, 2012), <http://www.gao.gov/products/GAO-12-717>.

<sup>12</sup> FBI, CRIME IN THE UNITED STATES 2010, Table 1, <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/tables/10tbl01.xls>.

in a conviction) in 2007 and 2008 out of an approximate Michigan population of 190,000 permittees.

- Ohio: 142,732 permanent licenses issued since 2004, and 637 revocations for any reason, including moving out of state.
- Louisiana: Permittee gun misuse rate of less than 1 in 1,000.
- Texas: Concealed handgun licensees are 79 percent less likely to be convicted of crimes than the non-licensee population. Only 2/10 of 1 percent of licensees ever convicted of a violent crime or firearms regulation crime.
- Florida: The data show a rate of 27 firearms crimes per 100,000 licensed Florida residents.

In sum, people with licensed carry permits are *much more law-abiding* than the general population. The full data for the above figures are presented in David B. Kopel, *Pretend "Gun-Free" School Zones*, 42 CONN. L. REV. 515, 564-69 (2009).

### **E. Social science studies**

Appellees seem to imagine that a court can nullify the right to bear arms, if a court believes the selective and sometimes inaccurate collection of anti-gun information. In *Heller*, the Supreme Court

rejected the “interest balancing” test that Justice Breyer had urged in his dissent. The Court explained that

The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is really worth insisting upon. A constitutional guarantee subject to future judges’ assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad.

District of Columbia v. Heller, 554 U.S. 570, 634-35 (2008).

Nevertheless, in the District Court, Sheriff Hutchens presented a declaration from Professor Franklin Zimring, with the general theme that guns are bad, and Americans should not be allowed to carry them. Zimring Decl. 1-13; *see also* Defs.’ Opp’n to Pls.’ Mot. For Prelim. Inj. 15-16, 22. The underlying principle is that Americans are so unstable, crime-prone, and incompetent that they should not own guns. Zimring Decl. 4-13. Even if the fear-mongering about gun owners in general were correct, it is irrelevant to the particular subset of gun owners who are the subject of the instant litigation. In contrast to gun owners in general, in most states concealed handgun licensees in particular must

be over the age of 21, must pass a 10-point fingerprint-based background check, and must have passed a safety training class.

Research on people who actually use guns for protection shows the opposite of the morbid view of persons who believe that Americans cannot safely exercise their Second Amendment rights. Professors Gary Kleck and Jongyeon Tark examined data from the National Crime Victimization Survey, an annual study by the Census Bureau and the Department of Justice that asks individuals if they were crime victims in the last year and, if so, collects information about the circumstances. Of persons who used guns defensively, the Kleck and Tark study found only 2 percent were injured after they used guns. Gary Kleck & Jongyeon Tark, *Resisting Crime: The Effects of Victim Action on the Outcomes of Crimes*, 42 CRIMINOLOGY 861, 903 (2005).

These findings were consistent with previous studies of defensive gun use, which found such use does not increase the victim's risk of harm. Lawrence Southwick, *Self-Defense with Guns: The Consequences*, 28 J. CRIM. JUST. 351, 362, 367 (2000) (NCVS robbery data; if 10 percent more victims had guns, serious victim injury would fall 3-5 percent);

Gary Kleck & Miriam DeLone, *Victim Resistance and Offender Weapon Effects in Robbery*, 9 J. QUANTITATIVE CRIMINOL. 55, 73-77 (1993) (study of all NCVS robbery data from 1979-85; the most effective form of resistance, both for thwarting the crime, and for reducing the chance of victim injury, is resistance with a gun); William Wells, *The Nature and Circumstances of Defense Gun Use: A Content Analysis of Interpersonal Conflict Situations Involving Criminal Offenders*, 19 JUST. Q. 127, 152 (2002).

### **1. Number of defensive gun uses**

There have been 13 major surveys regarding the frequency of defensive gun use (DGU) in the modern United States. The results of the surveys range from a low of 760,000 annually to a high of 3 million. The more recent studies, which report higher numbers, are much more methodologically sophisticated. GARY KLECK, TARGETING GUNS: FIREARMS AND THEIR CONTROL 149-64, 187-89 (1997).

In contrast, much lower annual estimates come from the National Crime Victimization Survey (NCVS). NCVS would suggest about 108,000 DGUs annually.

A criticism of the NCVS figure is that it is too low because the NCVS never directly asks about DGUs, but instead asks open-ended questions about how the victim responded. Because the NCVS first asks if the respondent has been a victim of a crime, the NCVS results may overlook people who answer “no” because, thanks to successful armed self-defense, they do not consider themselves “victims.” KLECK, TARGETING GUNS, at 152-54 (1997).

Gary Kleck and Mark Gertz conducted an especially thorough survey in 1993, with stringent safeguards to weed out respondents who might misdescribe or misdate a DGU story. Kleck and Gertz found results indicating between 2.2 and 2.5 million DGUs annually. Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun*, 86 J. CRIM. L. & CRIMINOL. 150 (1995).

The Kleck/Gertz survey found that most defensive uses involved handguns, and the large majority of defensive uses do not involve firing the weapon, but merely displaying it to deter an attacker. *Id.* at 175 (80 percent of DGUs are handguns; 76 percent do not involve a shot being fired).

Marvin Wolfgang, one of the most eminent criminologists of the twentieth century, reviewed Kleck's findings. He wrote:

I am as strong a gun-control advocate as can be found among the criminologists in this country...I would eliminate all guns from the civilian population and maybe even from the police. I hate guns....

...

Nonetheless, the methodological soundness of the current Kleck and Gertz study is clear....

....

The Kleck and Gertz study impresses me for the caution the authors exercise and the elaborate nuances they examine methodologically. I do not like their conclusions that having a gun can be useful, but I cannot fault their methodology. They have tried earnestly to meet all objections in advance and have done exceedingly well.

Marvin Wolfgang, *A Tribute to a View I Have Opposed*, 86 J. CRIM. L. & CRIMINOL. 188, 191-92 (1995).

Philip Cook of Duke and Jens Ludwig of Georgetown were skeptical of Kleck's results, and so they conducted their own survey for the Police Foundation. That survey produced an estimate of 1.46 million DGUs.<sup>13</sup>

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<sup>13</sup> PHILIP COOK & JENS LUDWIG, GUNS IN AMERICA: RESULTS OF A COMPREHENSIVE NATIONAL SURVEY OF FIREARMS OWNERSHIP AND USE 62-63 (1996). Cook and Ludwig argue that their own study produced

The National Opinion Research Center argues that the figures from Kleck are probably too high, and from the NCVS too low; the Center argues that the actual annual DGU figure is somewhere in the range of 256,500 to 1,210,000. Tom W. Smith, *A Call for a Truce in the DGU War*, 87 J. CRIM. L. & CRIMINOL. 1462 (1997).

This Court need not resolve the particulars of the debate among social scientists. All social science research shows that defensive gun use is frequent in the United States.

## **2. A natural experiment**

In October 1966, the Orlando Police Department began conducting highly-publicized firearms safety training for women, after observing that many women were arming themselves in response to a dramatic increase in sexual assaults in the area. Orlando rapes fell by 88 percent from 1966 to 1967. Burglary fell by 25 percent. Not one of the 2,500 trained women actually ended up firing her weapon; the deterrent effect

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implausibly high numbers, and they prefer the NCVS estimate. *Id.* at 68-75. For a response to Cook and Ludwig, see Gary Kleck, *Has the gun deterrence hypothesis been discredited?* 10 J. FIREARMS & PUB. POL'Y 65 (1998), <http://saf.org/kleck1998.pdf>.

of the publicity and of brandishing sufficed. As Gary Kleck and David Bordua wrote:

It cannot be claimed that this was merely part of a general downward trend in rape, since the national rate was increasing at the time. No other U.S. city with a population over 100,000 experienced so large a percentage decrease in the number of rapes from 1966 to 1967....<sup>14</sup>

That same year, rape increased by 5 percent in Florida and by 7 percent nationally.<sup>15</sup>

### 3. Carry studies

John Lott's book *More Guns, Less Crime* (Univ. of Chicago Pr., 2d ed. 2000) included the results of a study he had conducted which found that allowing ordinary citizens to carry firearms for lawful self-defense

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<sup>14</sup> Gary Kleck & David Bordua, *The Factual Foundation for Certain Key Assumptions of Gun Control*, 5 L. & POL'Y Q. 271, 284 (1983); Gary Kleck, *Policy Lessons from Recent Gun Control Research*, 49 J.L. & CONTEMP. PROBS. 35, 47 (1986).

<sup>15</sup> See Don Kates, *The Value of Civilian Handgun Possession As a Deterrent to Crime or Defense Against Crime*, 18 AM. J. CRIM. L. 113, 153 (1991).

One article argued that the drop in Orlando rapes was statistically insignificant, and was within the range of possibly normal fluctuations. David McDowall et al., *General Deterrence through Civilian Gun Ownership*, 29 CRIMINOLOGY 541 (1991). However, the authors' statistical model was such that even if gun-based deterrence had entirely eliminated rape in Orlando, the model would have declared the result to be statistically insignificant. KLECK, TARGETING GUNS, at 181.

resulted in statistically significant reductions in homicide, robbery, rape, and aggravated assault. After Lott's research was published, some scholars wrote articles attempting to refute Lott, although none were particularly successful.

Several years ago, two research arms of the federal government conducted meta-studies on gun control issues, including licensed carry. Taking into account all the published research from Lott and his critics, both meta-studies came to an agnostic conclusion: the existing research did not demonstrate that licensed carry laws had a statistically significant effect on crime rates, for good or ill. See NATIONAL RESEARCH COUNCIL, FIREARMS AND VIOLENCE: A CRITICAL REVIEW (2005); Task Force on Community Preventive Services, Centers for Disease Control, *First Reports Evaluating the Effectiveness of Strategies for Preventing Violence: Firearms Laws*, 52 MORBIDITY & MORTALITY WEEKLY REP. 11 (Oct. 3, 2003).

The National Research Council panel had seven members, and the carry issue did result in a dissent, which is unusual for such studies. The eminent criminologist James Q. Wilson wrote that Lott's evidence

did show a statistically significant reduction in homicide. NAT'L RES. COUNCIL, at 269.

Since the meta-studies in the middle of the last decade, a few more articles have been published. One of them claimed to find small but statistically significant increases in rape and aggravated assaults. Abhay Aneja, *The Impact of Right-to –Carry Laws and the NRC Report*, 13 AM. L & ECON. REV. 565 (2011). The result is facially implausible. The state data, detailed in Part II of this brief, certainly do not indicate that carry licensees themselves are perpetrating rapes (or assaults). It seems rather unlikely that would-be rapists are *more* likely to attempt a rape if they live in a state where they know that the potential victim might be carrying a gun.

A follow-up article pointed out numerous data errors by Aneja, such as counting a single Alaska county 73 times in a single year, or providing the wrong years for when Shall Issue laws went into effect in some states. (For example, the Kansas statute was enacted in 2006, not 1996). Carlisle E. Moody et al., *Trust But Verify: Lessons for the Empirical Evaluation of Law and Policy* (Jan. 25, 2012), available at

<http://ssrn.com/abstract=2026957>; 2006 Kansas Sess. Laws 32 (S.B. 418) (“On and after January 1, 2007, the attorney general shall issue licenses to carry concealed weapons to persons qualified as provided by this act.”)

Another recent study found a large and statistically significant decrease in robbery. Carlisle E. Moody & Thomas B. Marvell, *The Debate on Shall-Issue Laws*, 5 ECON J. WATCH 269 (2008).

The Second Amendment rights of Californians do not depend on whether Moody or Aneja is the better econometrician. Or whether the National Research Council and the Centers for Disease Control would find that Moody or Aneja or anyone else provides a strong reason to change the conclusion that the social science literature, as a whole, has not convincingly shown statistically significant effects in any direction. The Second Amendment has already done the balancing, and it includes the right to “bear” arms. *Heller*, at 663-64.

**III. The case can be decided without a standard of review, because near-total prohibition of a constitutional right is never constitutional.**

This is an easy case. There is no need for a standard of review. It is certainly true that a legislature may, subject to strict scrutiny in many cases, or intermediate scrutiny in some others, impose limited restrictions on the exercise of a constitutional right. For example, a legislature may enact reasonable time, place, and manner controls on speech in public places. Some narrow categories of speech, such as revealing the movement of troops during wartime, may be prohibited. However, a legislature could not prohibit almost all persons from speaking out loud in public.

Similarly, a legislature could, if meeting the appropriate standards of scrutiny, impose some regulations on exercise of the right of assembly. But no legislature could forbid almost all persons from assembling in public.

Sheriff Hutchens' licensing policy prohibits nearly all people from carrying firearms in public places for lawful self-defense. The comprehensive prohibition of a constitutional right is necessarily unconstitutional.

Only 18 percent of violent victimizations take place at or in the victim's home. Bureau of Justice Statistics, *Criminal Victimization in the United States, 2008*, Statistical Tables, Table 61 (May 2011, NCJ 231173), <http://www.bjs.gov/content/pub/pdf/cvus0804.pdf>. In other words, Appellees prohibit Orange County citizens from exercising the Second Amendment right of self-defense 82 percent of the time when those citizens desperately need that right. Denying an enumerated right 82 percent of the time when the right is needed is a very extreme infringement.

It is no use for Appellees to point out, as they do via the Zimring Declaration, that while destroying the right to bear arms, they have not destroyed the right to keep arms. Zimring Decl. 7-8, 12-13. A government could not justify destruction of the freedom of the press (e.g., preventing most people from reading newspapers) by pointing out that the government had not destroyed the freedom of speech (since people could still speak out loud as much as they wanted).

Standard of review analysis *would* be appropriate for various aspects of California's statutory licensing system, such as the training

requirement, the application fee, and so on. However, none of these controls are being challenged; this instant case involves only the near-prohibition of the right to bear arms.

#### **IV. Enforcement of the Second Amendment does not mean the elimination of all licensing discretion.**

The Zimring declaration goes on at length about the dangers of Appellees issuing a carry permit to anyone who does not have a felony conviction. Zimring Decl. 10-13. No one is saying that they should. To start with, all of the 41 States which generally respect the right to bear arms comply with federal law, which bans gun possession (not just carrying) by nine categories of prohibited persons. 18 U.S.C. § 922(g). A felony conviction is only one of the disqualifying categories. Many of the 41 states add additional disqualifying categories for a carry permit.

The Second Amendment does not forbid all discretion in carry licensing. Notably, the California carry licensing statute allows for discretion, and Appellants have not challenged the constitutionality of that part of the statute, which requires that the applicant have “good moral character.” Cal. Penal Code § 26150(a)(1)(A). Properly applied so

that (unlike in Orange County) permits are not denied to decent, law-abiding citizens, this requirement is constitutional.

This portion of the California statute is similar to a provision in the laws of Colorado and many other Shall Issue states: an applicant with a clean record may still be denied if the licensing authority “has a reasonable belief that documented previous behavior by the applicant makes it likely the applicant will present a danger to self or others.” Colo. Rev. Stats. §18-12-203(2).

Similarly, Connecticut allows a permit to be denied or revoked if the person is “unsuitable.” Connecticut courts have held that an “unsuitable person . . . is one whose conduct indicates that he or she is potentially a danger to the public if entrusted with a handgun.” *Nicholson v. Board of Firearms Permit Examiners*, 1995 WL 584377, at \*3 (Conn. Super. Ct. Sept. 28, 1995), quoted with approval in *Kuck v. Danaher*, 822 F.Supp.2d 109, 128 (D.Conn. 2011). This standard is consistent with well-established in Connecticut that permits may not be denied to ordinary law-abiding persons who wish to carry for lawful self-defense. *See, e.g., Rabbitt v. Leonard*, 413 A.2d 489 (Conn. Super. Ct. 1979)

(Regarding the license to carry a handgun, “[i]t appears that a Connecticut citizen, under the language of the Connecticut constitution, has a fundamental right to bear arms in self-defense, a liberty interest which must be protected by procedural due process.”) At the same time and consistent with the Second Amendment, carry permits may be denied to persons about whom there is particular evidence of unsuitability, a category far broader than only felony convictions.

Likewise, California’s statute, if applied constitutionally, will still allow discretionary denials of permit applications when Appellees have solid evidence that a particular applicant does not have good moral character.

## **V. Upholding the Second Amendment rights of Appellants would be consistent with state constitutional cases on the right to bear arms.**

The instant case poses the same problem that the West Virginia Supreme Court faced a quarter century ago: a carry licensing statute which was being abused so that the constitutional right to bear arms was almost always infringed. The West Virginia Supreme Court found that the licensing statute violated the state constitution, because it

“operates to impermissibly infringe upon this constitutionally protected right to bear arms for defensive purposes.” *State ex rel. City of Princeton v. Buckner*, 377 S.E.2d 139 (W. Va. 1988). The court explained that “the legitimate governmental purpose in regulating the right to bear arms cannot be pursued by means that broadly stifle the exercise of this right where the governmental purpose can be more narrowly achieved.” *Id.* at 464. Carrying concealed weapons may be regulated, but not “by means which sweep unnecessarily broadly . . . .” *Id.* at 467.

The West Virginia legislature remedied the constitutional problem by enacting a statute for the issuance of concealed carry permits to law-abiding qualified citizens, thereby eliminating the risks of wholesale denial, such as those manifest in the instant case. David B. Kopel & Clayton E. Cramer, *State Court Standards of Review for the Right to Arms*, 50 SANTA CLARA L. REV. 1113, 1207-08 (2010).

Holding a law unconstitutional has also been the solution of other courts. *See City of Las Vegas v. Moberg*, 485 P.2d 737 (N.M. Ct. App. 1971) (“an ordinance may not deny the people the constitutionally

guaranteed right to bear arms” by generally banning the carrying of arms); State v. Rosenthal, 55 A. 610, 611 (Vt. 1903) (invalidating prohibition on carrying weapon without written permission of mayor or chief of police).

## CONCLUSION

Law enforcement experience, government data, and social science evidence confirm that fair application of a licensed carry statute does not lead to a parade of horrors. Widespread denial of the right to bear arms is facially unconstitutional. The decision of the District Court should be summarily reversed, or the appeal should be heard before this Circuit, preferably before an en banc panel.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH RULE 28.1(e) or 32(a)**  
Type-Volume Limitation, Typeface Requirements, and Type Style  
Requirements

1. **Type-Volume Limitation:** Any Reply or Amicus brief may not exceed 7,000 words or 650 lines. Counsel may rely on the word or line count of the word-processing program used to prepare the document. The word-processing program must be set to include footnotes in the count. Line count is used only with monospaced type.

This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or 32(a)(7)(B) because this brief contains 6,639 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. **Typeface and Type Style Requirements:** A proportionally spaced typeface (such as Times New Roman) must include serifs and must be 14-point or larger. A monospaced typeface (such as Courier New) must be 12-point or larger (at least 10½ characters per inch).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface with serifs included using Microsoft Word 2010 in 14 point Century Schoolbook.

*/s/ David B. Kopel*

Attorney for International Law Enforcement Educators & Trainers  
Association, et al.

Dated: Dec. 5, 2012

## CERTIFICATE OF SERVICE

The undersigned, attorney of record of amici the International Law Enforcement Educators & Trainers Association et al., hereby certifies that on December 6, 2012, an identical electronic copy of the foregoing amicus brief and Counsel of Record form were 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.

In addition, copies of the brief were sent via first class U.S. Mail, postage prepaid, on December 6, 2012:

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Dec. 6, 2012

Amendment:

A corrected copy of this brief, supplementing the F.R.A.P. Rule 29 disclosure (in the last paragraph of the Statement of Amici Interests), was submitted via the ECF system on December 12.

/s/ David B. Kopel

Dec. 12, 2012