

No. 10-56971 [DC# CV 09-02371-IEG]

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UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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EDWARD PERUTA, et al.,

*Plaintiffs-Appellants,*

v.

COUNTY OF SAN DIEGO, et al.,

*Defendants-Appellees.*

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APPEAL FROM THE  
UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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**BRIEF OF *AMICUS CURIAE* INTERNATIONAL LAW  
ENFORCEMENT EDUCATORS AND TRAINERS ASSOCIATION,  
AND THE INDEPEDENCE INSTITUTE  
IN SUPPORT OF NEITHER PARTY**

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David B. Kopel  
*Counsel of record*  
INDEPENDENCE INSTITUTE  
13952 Denver West Pkwy., Suite 400  
Golden, CO 80401  
(303) 279-6536  
*Counsel for Amici Curiae*

## **CERTIFICATE OF INTERESTED PARTIES AND CORPORATE DISCLOSURE STATEMENT**

Pursuant to Rule 26.1, the undersigned counsel certifies that the International Law Enforcement Educators and Trainers Association (ILEETA) is a Subchapter S corporation incorporated in Wisconsin. The Independence Institute is a non-profit corporation, incorporated in Colorado. ILEETA and the Independence Institute have no parent corporation, issue no stock, and there is no publicly held corporation that has an ownership interest of more than 10% in them.

Undersigned counsel further certifies that to the best of his knowledge, the lists of persons and entities in the Briefs for Appellants and its amici, which may have an interest in the outcome of this case are complete, except to that list should be added the International Law Enforcement Educators and Trainers Association (ILEETA) and the Independence Institute.

/s David B. Kopel  
David B. Kopel

## TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PARTIES AND CORPORATE DISCLOSURE STATEMENT .....	ii
TABLE OF CONTENTS .....	iii
TABLE OF AUTHORITIES .....	v
STATEMENT OF AMICI INTEREST .....	vii
SUMMARY OF ARGUMENT .....	viii
ARGUMENT .....	1
I. Carrying an unloaded defensive firearm is far more dangerous than carrying a loaded firearm .....	2
<i>A. It may be difficult or impossible to load the firearm in time to save oneself from a sudden attack .....</i>	<i>3</i>
1. The Mechanics of Loading a Semi-automatic Handgun.....	4
2. The Mechanics of Loading a Revolver.....	7
3. Effect of the Time Delay caused by Loading.....	12
4. Effect of the Loss of Defensive Use of the Non-dominant Arm and Hand .....	14
5. Effects of the Attention Distraction Caused by Loading.....	15
<i>B. The loading of the firearm in a potentially dangerous situation may cause harmful or mistaken reactions by other persons.....</i>	<i>16</i>
<i>C. The requirement that defensive handguns be unloaded is irrational.....</i>	<i>17</i>

II. Particularly in the highly-urbanized portions of California, there may be public safety benefits to encouraging concealed carry, rather than open carry..... 20

*A. Deterrence* ..... 20

*B. Police reaction to open carry*..... 22

*C. Fearful or phobic civilians may react inappropriately to open carry, and cause the waste of police time*..... 24

CONCLUSION ..... 25

CERTIFICATE OF COMPLIANCE..... 27

CERTIFICATE OF SERVICE..... 28

## TABLE OF AUTHORITIES

### Cases

*Peruta v. County of San Diego*, --- F.Supp.2d ----, 2010 WL 5137137  
(S.D. Cal., 2010) .....3

### Statutes

CAL. PENAL CODE § 12031(j)(1)..... 2, 14  
Cal. Penal Code§ 12031(g).....3

### Books

CALIFORNIA DEPARTMENT OF JUSTICE, HANDGUN SAFETY CERTIFICATE  
(STUDY GUIDE) (2004), <http://ag.ca.gov/firearms/forms/pdf/hscsg.pdf>6, 8  
NINAN , PHILIP T. & W. DUNLOP BOADIE, CONTEMPORARY DIAGNOSIS AND  
MANAGEMENT OF ANXIETY DISORDERS (2006) ..... 24

### Articles

Gambacorta, David, *Man who clashed with cops over legal gun was also  
armed with audio recorder*, PHIL. DAILY NEWS, May 16, 2011 ..... 22  
Irwin, Bob, *Rethinking the 21-Foot Rule: You can't react to a knife  
attack as fast as you think you can*, POLICE, Oct. 1, 2007,  
[http://www.policemag.com/Channel/Patrol/Articles/2007/10/Rethinking-  
g-the-21-Foot-Rule.aspx](http://www.policemag.com/Channel/Patrol/Articles/2007/10/Rethinking-the-21-Foot-Rule.aspx)..... 4

Konttinen, N.; D.M. Landers & H. Lyytinen, *Aiming routines and their electrocortical concomitants among competitive rifle shooters*, 10 SCANDANAVIAN J. MED. & SCI. IN SPORT 169 (2000)..... 16

Lewinski, Bill, *Biomechanics of Lethal Forces Encounters—Officer Movements*, THE POLICE Marksman, Nov./Dec. 2002,..... 12

Lewinski, Bill, *Stress Reactions of Lethal Forces Encounters*, THE POLICE MARKSMAN, May/June 2002 ..... 16

*Sounds from the showdown over a legal gun*, PHIL. DAILY NEWS (Online), May 16, 2011, [http://articles.philly.com/2011-05-16/news/29548744\\_1\\_firearms-legal-gun-lethal-force](http://articles.philly.com/2011-05-16/news/29548744_1_firearms-legal-gun-lethal-force) ..... 23

Stossel, John, *Philly Police Harass, Threaten to Shoot Man Legally Carrying Gun*, FOX BUSINESS NEWS, May 16, 2011, <http://www.foxbusiness.com/on-air/stossel/blog/2011/05/16/philly-police-harass-threaten-shoot-man-legally-carrying-gun> ..... 23

## STATEMENT OF AMICI INTEREST

The International Law Enforcement Educators and Trainers Association (ILEETA) is a professional association for persons who provide training to law enforcement.<sup>1</sup> ILEETA members train law enforcement officers in the proper use of firearms, other use of force, and many other issues involving control and safety. ILEETA publishes four periodicals for its 4,000 members: *The ILEETA Digest* (training and education articles by members), *The ILEETA Review* (a quarterly review of training materials), *The ILEETA Use of Force Journal* (featuring longer articles), and *The ILEETA Chronicle* (covering a wide variety of subjects).

ILEETA wishes to provide this Court with expert perspective on the practical aspects of the defensive use and carry of unconcealed, unloaded firearms.

The Independence Institute is a public policy research organization created in 1984, and founded on the eternal truths of the Declaration of

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<sup>1</sup> Counsel to the parties have consented to the filing of this brief. Pursuant to Fed. R. App. P. 29(c)(5), amici affirm that no counsel for a party authored this brief in whole or in part and that no person other than amici and their counsel made a monetary contribution to its preparation or submission.

Independence. The Independence Institute has participated as an amicus or party in many constitutional cases in federal and state courts, including as a co-amicus with ILEETA in *District of Columbia v. Heller* and *McDonald v. Chicago*.

## SUMMARY OF ARGUMENT

The district court factually erred by claiming that carrying an unloaded firearm is an adequate means of self-defense. The process of loading either a semi-automatic handgun or a revolver will take at least a few seconds, and probably more, as this brief explains in detail. Added to the time that it takes to draw a handgun, aim it properly, and then fire, the crime victim would be unable to protect herself from a sudden attack—even an attack in which the assailant started from a distance.

Further, the process of loading the handgun will divert the victim's attention from the threat, and will make it more difficult for the victim to evaluate the situation and take appropriate action. Because loading requires two hands, the victim will be unable to use the second hand for self-defense or anything else.



In addition, the act of openly loading a handgun may provoke a faster attack from the assailant, or may be misinterpreted by someone else as preparation for an aggressive attack.

While the legislature has the policy discretion to require that defensive handguns be carried openly rather than concealed, police interests generally lie in favor of concealed carry. Among other reasons, concealed carry reduces the risk that police time will be wasted by fearful citizens calling to report someone who is engaged in lawful open carry.

## ARGUMENT

For the Court's convenience, ILEETA has produced a series of short demonstration videos related to various points in this brief. The videos show how handguns are loaded, and how a handgun might be deployed in various self-defense scenarios. In each section of this brief for which there is a video, the URL for the video is printed.<sup>2</sup> For each videos, the following formats are available: .mov (Apple Quicktime), .wmv (Windows Media), and .mp4 (Movie Picture).<sup>3</sup> In this brief, the cited

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<sup>2</sup> The participants in the video are Guy Rossi and Marie D'Amico. Mr. Rossi is a retired Police Sergeant of the Rochester, New York Police Department who specialized in patrol, recruit, field training and defensive tactics instruction. He has been a nationally recognized law enforcement trainer since 1982. His experiences in officer survival skills have been published in over two hundred magazine articles and chapters in books on training. Upon retiring from active duty he was employed as a Program Coordinator of Curriculum Development for the Public Safety Training Facility of Monroe Community College (MCC). Presently he is a Program Coordinator of Curriculum Development for the Homeland Security Management Institute of MCC. He is an Advisory Board Member of ILEETA, and editor of *The ILEETA Review*.

Mr. Rossi's company, Guy Rossi and Associates, LLC (<http://guyrossi.com/>) provides training to law enforcement, private security, and civilians.

Ms. D'Amico is an attorney and a firearms safety instructor. Among her practice and consulting areas are legal issues involving the use of force. She is also an instructor with Guy Rossi and Associates.

<sup>3</sup> Free players are available at:

<http://www.apple.com/quicktime/download/> (Apple Quicktime player,

URLs are to the .mov format. To use one of the alternate formats, simply replace the .mov at the end of the filename with .wmv or .mp4. Most video players can also play cross-platform, so a Windows Media Player may be able to play Apple Quicktime files, and so on.

## **I. Carrying an unloaded defensive firearm is far more dangerous than carrying a loaded firearm**

Police have neither the legal obligation nor the practical ability to rescue all crime victims. Hence, it is essential that law-abiding citizens be able to protect themselves.

In the decision below, the District Court suggested that current California law adequately vindicates the Second Amendment right to carry firearms for lawful protection. Under California law, a person may openly carry an unloaded handgun. The handgun may not be loaded until circumstances have become so dire that a call to 911 would be appropriate. CAL. PENAL CODE § 12031(j)(1) (“immediate, grave danger”; “‘immediate’ means the brief interval before and after the local law enforcement agency, when reasonably possible, has been notified of

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usable on Windows or Apple operating systems), and <http://windows.microsoft.com/en-US/windows/downloads/windows-media-player> (Windows Media Player).

the danger and before the arrival of its assistance.”). Part I of this brief explains the mechanics of loading handguns and using them for self-defense.

***A. It may be difficult or impossible to load the firearm in time to save oneself from a sudden attack***

Video: <http://davekopel.org/Briefs/Peruta/Loading-a-Semiautomatic-Pistol.mov>.

According to the district court, “As a practical matter, should the need for self-defense arise, nothing in section 12031 restricts the open carry of unloaded firearms and ammunition ready for instant loading. See Cal. Penal Code§ 12031(g).” *Peruta v. County of San Diego*, --- F.Supp.2d ----, 2010 WL 5137137, \*5 (S.D. Cal., 2010). The court’s factual statement about so-called “instant loading” is clearly erroneous.

Violent criminal attacks frequently occur suddenly and instantly, leaving the victim with no more than a second or two to fire the handgun to save herself. In the well-known Tueller Drill for police training, it is emphasized that an attacker who is 21 feet away can close the entire distance between himself and the victim in a second-and-a-half. If the victim is ready for a potential attack, it may be possible to

deploy a *loaded* handgun quickly enough for defense against a sudden attack.<sup>4</sup> It is impossible to do so with an unloaded handgun. If the victim is not expecting an attack, the fastest reaction time, even for a trained officer with a loaded firearm, is about 3.5 seconds. Bob Irwin, *Rethinking the 21-Foot Rule: You can't react to a knife attack as fast as you think you can*, POLICE, Oct. 1, 2007, <http://www.policemag.com/Channel/Patrol/Articles/2007/10/Rethinking-the-21-Foot-Rule.aspx>.

### **1. The Mechanics of Loading a Semi-automatic Handgun**

Loading a firearm requires two hands. The following is the procedure for loading a semi-automatic firearm. We assume that the crime victim is a right-handed person, who has done everything lawfully possible to optimize the loading process: namely, she is carrying the handgun in a belt holster on the right side of her hips, and is carrying a magazine (a

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<sup>4</sup> The Tueller Drill is performed by trained police with loaded guns. (Or more precisely, in the drill itself, guns which simulate being loaded, such as with special “ammunition” that “fires” a laser when the trigger is pulled.) The Tueller reaction times are for officers who already know that the aggressor is encroaching with a knife. Hence, the cognitive deadly force decision making has been virtually eliminated from the reaction time, and the officer’s gun is already loaded. Even then, fewer than 50 percent of officers were able to draw and fire if the attacker started from within 15 feet away.

rectangular or parallelogram box which holds the ammunition) in a magazine holster on her left side.

1. Grasp the grip (the butt) of the gun with the right hand, and pull it out of the holster.
2. Grasp the magazine with the left hand, and pull the magazine out of its holster.
3. Bring the gun and the magazine towards the center of one's body. Tilt the gun so that the butt is pointing towards one's left.
4. Use the left hand to insert the magazine into the grip of the gun. (In a semi-automatic, the grip is hollow, and contains a space to accommodate the magazine.)
5. Use the base of the left hand to push hard on the magazine, so that it clicks into place inside the handgun grip.
6. Turn the handgun so that it is in front of the body, with the muzzle pointing to the left. (Alternatively, hold the handgun so that the muzzle points forward.)
7. Continue to hold the handgun grip with the right hand. With the left hand, grasp the top of the handgun.

8. Move the top cartridge in the magazine into the handgun's firing chamber. (A "cartridge" is one unit of ammunition. A unit of ammunition is also called a "round.") Using the left hand, pull the slide of the handgun all the way to its maximum rear position. This requires moving the slide one or more inches against the force of a heavy spring. If the slide is moved even a fraction of an inch short of its maximum rear position, this step will fail, and the gun will not function. The slide is moved with the non-dominant hand. For people without strong upper bodies, including most women, pulling the slide all the way is not an easy maneuver.<sup>5</sup>
9. Now release the slide. The compressed spring pushes the slide forward. As the slide moves forward, it pushes the first cartridge from the magazine into the firing chamber.
10. Move the left hand to the grip of the gun so that it supports the right hand. Although one-handed shooting is possible, accuracy is substantially improved by a two-handed grip.

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<sup>5</sup> For some pictures labeling the main components of a semi-automatic handgun, and showing how to load the gun, see CALIFORNIA DEPARTMENT OF JUSTICE, HANDGUN SAFETY CERTIFICATE (STUDY GUIDE) 20-21 (2004), <http://ag.ca.gov/firearms/forms/pdf/hscsg.pdf>.

11. Finally, bring the handgun up to eye level, and point it at the target.<sup>6</sup> If the aggressor is within 15 feet, there will not be time to bring the gun to eye level, so the victim simply points the gun at the center of the aggressor's mass.

## **2. The Mechanics of Loading a Revolver**

Video: <http://davekopel.org/Briefs/Peruta/Revolver-Nomenclature-and-Loading.mov>.

Semi-automatics constitute about two-thirds of all handguns sold in the United States in a typical year. The other major type of handgun is a revolver. Unlike a semi-automatic, the revolver does not hold its ammunition in a detachable magazine; instead, the ammunition is held in a revolving cylinder which is permanently attached to the gun.

Most cylinders have five or six chambers; each chamber holds one cartridge. Usually a revolver is loaded by dropping the ammunition into

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<sup>6</sup> Pointing the handgun at the target may be all that time allows, if it allows that much. If there is time to use the handgun's sights, acquire a sight picture by aligning the front sight (which is a small vertical rectangle) within the rear sight (shaped like a "U", but angular), with the same amount of light showing on either side of the front sight, right and left. The top of the front sight should appear flush with top of the rear sight.



the cylinder, one cartridge at time. This takes a while, of course.<sup>7</sup> Most police officers would find one-at-a-time loading nearly impossible to perform while under threat and without the benefit of cover.

Adding to the difficulty is the fact that fine motor skills often deteriorate under stress. During high stress situations, blood is pumped away from the smaller muscles and arteries and redirected to the large muscle mass. This is true for humans and animals alike. The autonomic nervous system (not subject to conscious control) serves to help the person or animal fight with his or her gross muscles, or flee. The possible shaking of the victim's fingers due to reduced blood supply could significantly compromise fine motor actions such as holding onto a cartridge to load into a revolver, or inserting a magazine into a semi-automatic and then racking the slide. Dialing 911 from a tiny keypad would be even harder.

People under attack, including police officers, sometimes do overcome the difficulty of the nervous system directing blood away from finger

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<sup>7</sup> For some pictures labeling the main components of a revolver, and showing how to load the gun, see CALIFORNIA DEPARTMENT OF JUSTICE HANDGUN SAFETY CERTIFICATE (STUDY GUIDE) 17-18 (2004), <http://ag.ca.gov/firearms/forms/pdf/hscsg.pdf>.

muscles. But having to load the gun adds immensely to the problem. In contrast, drawing the gun and pointing it at a nearby aggressor are gross motor skills. In other words, the autonomic nervous system will *enhance* the victim's gross motor ability to draw and point quickly, while detracting from the victim's fine motor ability to load.<sup>8</sup>

Video: <http://davekopel.org/Briefs/Peruta/Loading-Manually-Requires-Fine-Motor-Skills.mov>.

Some, but not all, revolvers can be loaded faster with a “speedloader.” The speedloader is a ring-shaped piece of metal or plastic. The five or six cartridges are held in slots on the outer edge of the ring. The speedloader reduces but not does eliminate the problems caused by reduction of fine motor skills.

Video: <http://davekopel.org/Briefs/Peruta/Loading-a-Revolver-with-Speedloader.mov>.

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<sup>8</sup> Pulling the trigger is a fine motor skill, but one which requires vastly less fine motor coordination than does loading. (At least in a short-range self-defense scenario, as opposed to target shooting competitions at longer distances.)

Here is the procedure for loading a revolver, using a speedloader. Again, we assume that speed has been optimized by carrying the speedloader in a special holster.

Without extensive practice, speedloaders are difficult to use speedily and reliably. So for most revolver users, the more common way to load in an emergency would be to load the ammunition one cartridge at a time, a process that would take longer than the process described below.

1. Use the right hand to grasp the revolver by the grip, and draw the revolver out of its holster.
2. Turn the revolver flat, and hold it in a cup of both hands.
3. Use the right thumb the cylinder release, a button or lever that allows the cylinder to swing free from the revolver frame.
4. Use the middle fingers of the left hand to push the cylinder open.

During loading, continue to keep those fingers on the cylinder. All five or six chambers of the cylinder are now exposed.<sup>9</sup>

5. Keep holding the revolver in the left hand only, and use the right hand to pull the speedloader out of its holster.

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<sup>9</sup> For simplicity, we are presuming that the crime victim is carrying a modern revolver with a swinging cylinder. Some other types of revolvers have a different, more cumbersome loading process.

6. Hold the revolver at waist level with the left hand, and point it straight toward the ground.
7. With the right hand, position the speedloader above the cylinder.
8. With no wobbling, align the speedloader so that each cartridge is perfectly positioned above a cylinder chamber.
9. Insert the cartridges into the cylinder.
10. Turn the knob in the center of the speedloader, so that the speedloader releases its hold on the cartridges.<sup>10</sup>
11. Drop the speedloader.
12. With the left hand, push the cylinder back into the revolver frame. On some speedloaders, step 11 may be skipped; closing the cylinder will pop off the speedloader.
13. Bring the revolver to eye level, and aim at the target. Accuracy will be improved if, before firing, one first uses the right thumb to cock the hammer on the revolver.

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<sup>10</sup> Speedloaders vary in exactly how they are operated. For simplicity, we presume that the victim is using a fairly standard type.

### **3. Effect of the Time Delay caused by Loading**

Police and civilians who train in defensive handgun use learn to draw a loaded handgun, quickly acquire a sight picture, and place two shots on the attacker's upper center of mass. Optimally, all this can be accomplished in a little over two seconds. Bill Lewinski, *Biomechanics of Lethal Forces Encounters—Officer Movements*, THE POLICE MARKSMAN, Nov./Dec. 2002, at 19 (test of 68 Los Angeles Police Dept. officers; using already-loaded guns, they took an average of 1.71 seconds to draw a firearm from an unsnapped holster and fire one shot, with the hand already very near the holster; .38 seconds to fire second shot).

Quite obviously, the process of loading the handgun will take at least a few extra seconds. Extensive practice can reduce how long it takes a person to load a firearm under stress, but that time cannot be reduced to zero. Accordingly, the simple time delay of loading a firearm may result in the success of a violent attacker who otherwise could have been thwarted.

Carrying an unloaded firearm, even in a non-concealed condition, will often not provide a viable means of self-defense and would frequently result in a situation where the assailant has closed the

distance on the victim so that the assailant is on the person of the victim. The victim is left with a firearm she needs to retain so that she is not shot with her own gun. At best then, the firearm becomes a bludgeoning tool.

Videos: The drills demonstrated during the following scenes were repeated several times, so that in any particular scene the victim did not know whether the approaching man was only asking for the time, or was getting ready for an attack with a concealed knife.

[http://davekopel.org/Briefs/Peruta/15-foot-Assault-and-](http://davekopel.org/Briefs/Peruta/15-foot-Assault-and-Multitasking.mov)

[Multitasking.mov](http://davekopel.org/Briefs/Peruta/15-foot-Assault-and-Multitasking.mov) (attacker with closes quickly from 15 feet away;

victim cannot load in time); [http://davekopel.org/Briefs/Peruta/Unable-](http://davekopel.org/Briefs/Peruta/Unable-to-Load-Prior-to-Assault.mov)

[to-Load-Prior-to-Assault.mov](http://davekopel.org/Briefs/Peruta/Unable-to-Load-Prior-to-Assault.mov) (attacker closes at moderate speed; victim

does not have time to load); [http://davekopel.org/Briefs/Peruta>Loading-](http://davekopel.org/Briefs/Peruta>Loading-Under-Stress.mov)

[Under-Stress.mov](http://davekopel.org/Briefs/Peruta>Loading-Under-Stress.mov) (attacker is lackadaisical; victim has time to load, but

forgets to rack the slide).

It should be noted that the dangers of an unloaded defensive firearm are significantly magnified in public places, as opposed to the home. A home will have static barriers—such as locked doors, walls, or an alarm system—that may provide the victim with warning time before she is

face to face with the assailant. In contrast, in a public place, there may be no physical barrier to slow down the assailant and provide an opportunity to load the gun.

In the home, there may be time to call 911. In a public place, 911 calls tend to come from witnesses, if there are any, not from victims. In public, there is rarely sufficient time for the victim to telephone 911.<sup>11</sup>

#### **4. Effect of the Loss of Defensive Use of the Non-dominant Arm and Hand**

The delay in loading a firearm has additional deadly implications.

While the left arm and hand are being used to load the handgun, they cannot be used for anything else. The victim is more vulnerable because both hands are occupied. The non-gun hand becomes useless to fend off the attacker or to deflect the attacker's knife, stick, or other weapon.

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<sup>11</sup> It should be emphasized that the Penal Code's scenario of a victim under imminent threat in public place having time to call 911 *and* load a handgun is quite implausible under almost all realistic scenarios. *See* CAL. PENAL CODE § 12031(j)(1) (gun may only be loaded when victim is in "immediate, grave danger"; "immediate" means the brief interval before and after the local law enforcement agency, when reasonably possible, has been notified of the danger and before the arrival of its assistance.")

Further, if the victim were to be grabbed during the loading of the firearm, the sympathetic nervous system reaction of clenching one hand to retain the magazine, or simply tightening muscles under stress would further limit the victim's ability to complete the loading of the firearm.

### **5. Effects of the Attention Distraction Caused by Loading**

The unloaded firearm mandate forces the victim to focus her attention on the firearm in order to load and chamber the ammunition. As a result, the victim is impeded from focusing attention on the assailant and on the surroundings. Specifically, the need to load while under imminent threat:

- compromises and complicates decision making,
- limits perception of surroundings,
- limits ability to determine if retreat to safety is possible,
- limits ability to determine if there is another assailant, and
- limits ability to assess the level and nature of threat: has the aggressor drawn another weapon; engaged someone as an accomplice; given other pre-fight indicators, such as changing stance, glancing at the potential target, and so on.



Brain-wave research of Olympic shooters shows that the greater a shooter's distraction, the greater the possibility of a miss. Bill Lewinski, *Stress Reactions of Lethal Forces Encounters*, THE POLICE MARKSMAN, May/June 2002, at 27; N. Konttinen, D.M. Landers, & H. Lyytinen, *Aiming routines and their electrocortical concomitants among competitive rifle shooters*, 10 SCANDANAVIAN J. MED. & SCI. IN SPORT 169 (2000).

Videos: <http://davekopel.org/Briefs/Peruta/Multitasking-Fixation-and-Hicks-Law.mov>; <http://davekopel.org/Briefs/Peruta/Awareness-Attention-and-Fixation.mov>.

***B. The loading of the firearm in a potentially dangerous situation may cause harmful or mistaken reactions by other persons***

If the victim were to draw the firearm while evaluating the level of threat, to compensate for the delay caused by the necessity of loading the firearm, the assailant would, by his own necessity, accelerate his assault: rushing the victim to grab the gun before it could be loaded.

Alternatively, the lawful, unloaded carrier might be in a situation in which she *reasonably* (as defined by California law) perceived an imminent violent threat, but, despite the reasonableness of her belief,

there was no threat. The victim would unholster her gun to begin loading it. Her action could easily be misconstrued by another person in the area, and could unnecessarily provoke that person into launching what that person (also reasonably) believes to be a necessary use of force against an imminent attack.

In contrast, if the handgun in the holster is already loaded, then it can stay in the holster while the gun carrier further evaluates the developing situation. Thus, the risk of a mistaken provocation is greatly reduced.

***C. The requirement that defensive handguns be unloaded is irrational***

The ban on loading a gun until calling 911 would be appropriate is irrational. If a gun carrier intends to use the handgun in a crime, he will have the opportunity to load the gun shortly before the crime. There is no anti-crime benefit.

It might be asserted that the unloaded requirement would prevent firearms accidents, such as a negligent discharge. However, if a handgun is carried in a holster, the holster completely covers the

trigger and the trigger guard. Thus, it is impossible for the handgun to be fired.<sup>12</sup>

Besides, if the objective is to prevent accidental discharges, there are means which do not make the gun useless for self-defense. For a semi-automatics, the law could require that that gun's safety be engaged while the gun is in the holster.<sup>13</sup> For any handgun, the law could require that the handgun have a trigger block; a trigger block is a piece of plastic which is inserted inside the trigger guard, and which prevents

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<sup>12</sup> The only way in which an accidental discharge of a non-defective handgun can take place is if a person puts his finger on the trigger before he is ready to shoot. The mandatory safety class for handgun purchasers in California, like all reputable firearms classes, teaches that the finger never goes on the trigger until one is ready to shoot. Even when drawing a gun from a holster for instant self-defense, the finger stays outside the trigger guard until the gun is on target.

<sup>13</sup> Single-action semi-automatics (e.g., the ubiquitous Colt .45 and its variants) typically have external manual safeties. Double-action semi-automatics generally do not, but they do require a heavy trigger pull which reduces the possibility of the gun ever being fired unintentionally.

The vast majority of modern revolvers are also double-action, and likewise require a heavy trigger stroke. ("Double action" means that pulling the trigger performs two actions: first the hammer is pulled all the way back; second, the hammer is released so that it falls forward, hitting the firing pin, which in turn hits the cartridge. The firing pin strikes the cartridge's primer; the explosion in the primer ignites the gunpowder; then the expanding gas sends the bullet on its path down barrel.)

the trigger from moving. In a self-defense situation, the index finger can push the trigger block out of the way very quickly, while the gun is being drawn.

Finally, for revolvers, the unloaded requirement is very difficult to enforce. A holster entirely obscures a revolver's cylinder, so that no one can see if the cylinder contains ammunition. Thus, the only way for a law enforcement officer to verify that a holstered revolver is unloaded would be to confront the individual, and order him to hold still while the officer withdrew the revolver from the holster.<sup>14</sup>

While yielding no benefit, the unloaded mandate inflicts significant harm on crime victims. The victim is forced to attempt to load an unloaded firearm in close quarters, and defend herself while retaining the firearm. Deprived of an effective, *functional* firearm, the victim is unable to equalize what is typically a great disparity of force between the victim and the assailant: the victim is often smaller, weaker, elderly, or handicapped. The victim is isolated from immediate help, including from a police response that will arrive in time to stop attack.

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<sup>14</sup> Hypothesizing that the officer considered the individual to be a possible threat, the officer would of course not ask the individual himself to pull the revolver out of the holster.

The victim may face multiple attackers (especially typical in gay-bashing and other bias crimes, or gang attacks). The victim is caught by surprise, either by ambush, ruse, or guise. Without a loaded firearm for protection, the victim may suffer severe bodily harm, permanent disfigurement, rape, infection with a sexual disease, kidnapping, carjacking, or death.

## **II. Particularly in the highly-urbanized portions of California, there may be public safety benefits to encouraging concealed carry, rather than open carry**

Amici agree with the legal proposition that a legislature may ban concealed carry, or may effectively prohibit concealed carry via a highly discretionary licensing system such that almost no-one is granted a permit—so long as open carry is allowed.

However, amici do suggest that there are policy reasons, closely related to police interests, in favor of concealed carry, rather than open carry, being the standard mode of exercising the Second Amendment right to bear arms, particularly in urban areas of California.

### ***A. Deterrence***

First, there is the matter of deterrence. The police cannot be everywhere at once, so civilian actions which deter crime are, besides

being of tremendous benefit to the civilians themselves, also helpful to the police. The fewer crimes, the lesser the burden on already thinly-stretched police resources.

The open carry of a *loaded* firearm will create what criminologists call “specific deterrence.” The criminal will be much less willing to attack the particular victim. In contrast, concealed carry will create “general deterrence.” If criminals know that law-abiding, trained citizens can obtain handgun carry permits, then the criminals know that some people (in most states, less than 10 percent of the population) may be carrying, but the criminals will not know which ones. Thus, some criminals will desist from interpersonal attacks on strangers, for fear of the risk of encountering an armed victim.

However, for the reasons explained in Part I of this brief, *unloaded* carry is much less effective defensively, and accordingly, the deterrent effect will be significantly reduced—particularly for criminals in a position to launch a sudden attack before the victim can load the gun. Thus, there will be more crimes, more victims, and more strain on police resources.

***B. Police reaction to open carry***

In many rural counties of California, law enforcement officers are well aware of the lawfulness of open carry. They will not be particularly surprised to see a civilian carrying a handgun, and if the civilian is acting normally and lawfully, the officers will take no action. Such is the also case in many other states where open carry is lawful.

However, there are some jurisdictions, especially highly urban ones, where police may not have been fully trained regarding the lawfulness of open carry. As a result, an officer might inaccurately consider the lawful carrier to be an immediate threat, and might take swift, aggressive action against the carrier. In the worst case, a lawful open carrier might even be shot.

In a recent incident in Philadelphia, an officer who was apparently unaware of the lawfulness of open carry in Pennsylvania aggressively confronted an open carrier. Unfortunately, that situation has now become an Internet sensation, and has contributed to mutual distrust between police and civilians. David Gambacorta, *Man who clashed with cops over legal gun was also armed with audio recorder*, PHIL. DAILY NEWS, May 16, 2011 (“Our officers weren’t up to speed [because] we

never really addressed it,' said Lt. Francis Healy, the department's lawyer. 'In the last several weeks, we've done a lot of training and put out a lot of information about what is allowed and what's not allowed. Right now, our officers are better-versed on the subject matter.'");

*Sounds from the showdown over a legal gun*, PHIL. DAILY NEWS (Online), May 16, 2011, [http://articles.philly.com/2011-05-16/news/29548744\\_1\\_firearms-legal-gun-lethal-force](http://articles.philly.com/2011-05-16/news/29548744_1_firearms-legal-gun-lethal-force) (partial transcript of confrontation; full transcript available at <http://bit.ly/gmGsrI>); John Stossel, *Philly Police Harass, Threaten to Shoot Man Legally Carrying Gun*, FOX BUSINESS NEWS, May 16, 2011, <http://www.foxbusiness.com/on-air/stossel/blog/2011/05/16/philly-police-harass-threaten-shoot-man-legally-carrying-gun>.

Distrust is quite harmful, because effective policing depends on voluntary civilian cooperation.

This brief is not attempting to excuse police training which does not fully inform officers about the laws regarding firearms carrying in their jurisdiction. However, prudence does suggest that concealed carry, rather than open carry, would be less likely to contribute to mistakes.



***C. Fearful or phobic civilians may react inappropriately to open carry, and cause the waste of police time***

A great deal of law enforcement time is already wasted by sincere but mistaken civilian reports of perceived crime. Some civilians are firearms aficionados, while other civilians loathe firearms. For a small minority of the loathers, the aversion to guns may be so intense as to constitute, according to at least some experts, a type of phobia. See PHILIP T. NINAN & W. DUNLOP BOADIE, CONTEMPORARY DIAGNOSIS AND MANAGEMENT OF ANXIETY DISORDERS 107 (2006) (“Hoplophobia” is a phobic fear of firearms).<sup>15</sup>

When a civilian sees someone engaged in lawful open carry, the civilian may not know that open carry is lawful, or may be so emotionally over-stimulated by the sight of a gun that he may call 911 and report “a man with gun.” Such a report is likely to result in a swift and aggressive response by multiple police units. At the least, the

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<sup>15</sup> Hoplophobia is a type of “specific phobia,” that is, “a persistent and unreasonable fear of an object or situation coupled with a strong desire to avoid it.” A “common” specific phobia is “aviatophobia,” the fear of flying. Hoplophobia is an “unusual” specific phobia; examples of other unusual specific phobias include pyrophobia (fear of fire), iatrophobia (fear of doctors), and entomophobia (fear of insects.) *Id.* at 106-07.

response will be a tremendous waste of police time, and the worst, a mistake could lead to the shooting of an innocent civilian.

Finally, it should be noted that under current California law, unloaded open carry does not require training, whereas licensed, concealed carry does. While amici recognize that the police, who have to intervene in many diverse and complex situations, and therefore need much more training than do civilians who only wish to protect themselves while going about their daily routine, amici still believe that some firearms training for civilians is helpful and constructive. Accordingly, amici prefer to encourage civilians to adopt the form of carry which will result in them receiving training.

## **CONCLUSION**

The Court's decision should take into account the inadequacy of unloaded open carry as a means of exercising the constitutional right of self-defense.

Respectfully submitted,

David B. Kopel

Research Director, Independence

Institute  
Adjunct Professor of Advanced  
Constitutional Law, Denver  
University, Sturm College of Law  
13952 Denver West Pkwy., Suite 400  
Golden, CO 80401  
(303) 279-6536  
*Counsel for Amici Curiae*

## CERTIFICATE OF COMPLIANCE

I certify pursuant to the Federal Rules of Appellate Procedure 32(a)(7)(c) that the foregoing brief is in 14-point, proportionately spaced Century Schoolbook font. According to the word processing software used to prepare this brief (Microsoft Word), the word count of the brief is exactly 5,410 words, excluding the cover, corporate disclosure statement, table of contents, table of authorities, certificate of service, and this certificate of compliance.

/s David B. Kopel  
David B. Kopel

## **CERTIFICATE OF SERVICE**

I hereby certify that on May 30, 2011, an electronic PDF of this amicus brief was uploaded to the Court's CM/ECF system, which will automatically generate and send by electronic mail a Notice of Docket Activity to all registered attorneys participating in the case. Such notice constitutes service on those registered attorneys.

/s David B. Kopel  
David B. Kopel