10-56971

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EDWARD PERUTA, et. al.,

Plaintiffs-Appellants,

v.

COUNTY OF SAN DIEGO, et al.,

Defendants-Appellees,

STATE OF CALIFORNIA,

Proposed Intervenor-Appellee.

On Appeal from the United States District Court
for the Southern District of California
No. 3:09-cv-02371-IEG-BGS
The Honorable Irma E. Gonzalez, Judge

REPLY TO APPELLANT'S OPPOSITION TO MOTION FOR LEAVE TO INTERVENE BY THE STATE OF CALIFORNIA

KATHLEEN A. KENEALY
Chief Assistant Attorney General
DOUGLAS J. WOODS
Senior Assistant Attorney General
MARK R. BECKINGTON
Supervising Deputy Attorney General
ROSS C. MOODY
Deputy Attorney General

KAMALA D. HARRIS
Attorney General of California
EDWARD C. DUMONT
Solicitor General
GREGORY D. BROWN, SBN 219209
CRAIG KONNOTH, SBN 288602
Deputy Solicitors General
California Department of Justice
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-1617
Fax: (415) 703-1234
Email: Craig.Konnoth@doj.ca.gov
Attorneys for the State of California

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INTRODUCTION

Peruta does not oppose intervention by the State of California under the standards of Federal Rule of Civil Procedure 24(a)(2), which provides for intervention as of right, or Rule 24(b), which allows permissive intervention. Accordingly, the Court should grant the State's motion to intervene on one or both of these unopposed grounds, and need not address the State's alternative basis for intervention under Rule 24(a)(1).

In the event that the Court addresses the question of intervention under Rule 24(a)(1) and 28 U.S.C. § 2403(b), it should hold that the State is entitled to intervene under those provisions as well. Peruta contends that such intervention is improper because the Sheriff and the County of San Diego should be considered "agenc[ies], officer[s], or employee[s]" of the State under § 2403(b). But § 2403(b) contemplates that an "agency, officer, or employee" of the State will be a proper representative of the State's interests in defending the constitutionality of state statutes, and as a matter of California law neither the Sheriff nor the County represent the interests of the State for those purposes. Accordingly, their status as parties in this case does not preclude the State's intervention under Rule 24(a)(1) and 28 U.S.C. § 2403. In any event, neither the Sheriff nor the County has petitioned for rehearing en banc, and thus the State should be allowed to intervene for

purposes of filing such a petition, regardless of whether the Sheriff and County might be considered adequate representatives of state interests in some other context.

ARGUMENT

I. THE COURT SHOULD GRANT THE STATE'S UNOPPOSED MOTION TO INTERVENE UNDER RULE 24(A)(2) AND (B)(1)

Peruta does not oppose the State's motion to intervene under either Rule 24(a)(2), which provides for intervention as of right, or Rule 24(b), which allows permissive intervention.[1] See Appellants Opposition to Motions for Leave to Intervene (App. Opp.) 2, 6-7, 9. Accordingly, the Court should grant the State's motion on one or both of these undisputed grounds, and the Court need not address the State's alternative basis for intervention under Rule 24(a)(1).

Rule 24(a)(2) provides for intervention as of right when a party (1) "has a significant protectable interest relating to the subject of the action"; (2) "the disposition of the action may, as a practical matter, impair or impede … [its] ability to protect its interest"; (3) "the application is timely"; and

[1] Although Peruta appears to suggest that intervention under the standards of Rule 24(a)(2) would be granted as an exercise of this Court's discretion, Appellants Opposition to Motions for Leave to Intervene 9, as he recognizes elsewhere, that Rule permits intervention as of right, *id.* at 4.

(4) "the existing parties may not adequately represent … [its] interest." *Day v. Apolonia*, 505 F.3d 963, 965 (9th Cir. 2007). As Peruta appears to acknowledge, all these factors are met here: the "constitutionality of a particular application of a state statute has been called into question" and the defendants "have only recently announced that they do not intend to pursue rehearing en banc." App. Opp. at 9-10. Accordingly, Peruta appears to agree that California's position in this case is the same as that of the State of Hawai'i in *Day*, where this Court held that Hawai'i could intervene under Rule 24(a)(2) because of its important interests in that case. *See id.* at 10; State of California's Motion to Intervene (Motion to Intervene) 9-14. He therefore does not object to the State intervening "to pursue rehearing en banc and/or certiorari and litigate the merits of the constitutional issue." App. Opp. 10.

Peruta also does not object to this Court permitting intervention under Rule 24(b), which requires only "(1) an independent ground for jurisdiction; (2) a timely motion; and (3) a common question of law and fact between the movant's claim or defense and the main action." *Blum v. Merrill Lynch Pierce Fenner & Smith Inc.*, 712 F.3d 1349, 1353 (9th Cir. 2013). All these conditions are satisfied in this case. *See* Motion to Intervene 15-16.

II. SHOULD THE COURT REACH THE ISSUE, IT SHOULD GRANT THE STATE'S MOTION TO INTERVENE UNDER RULE 24(A)(1)

Because all parties agree that the State may intervene under Rules 24(a)(2) and 24(b), the Court need not decide whether the State also is entitled to intervene under Rule 24(a)(1). Should the Court reach that issue, however, it should hold that the State may intervene.

Rule 24(a)(1) provides that "[o]n timely motion, the court must permit anyone to intervene who … is given an unconditional right to intervene by a federal statute." The State's statutory right to intervene in this case is supplied by 28 U.S.C. § 2403(b), which states that in any "proceeding … to which a State or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene."

Peruta argues (App. Opp. 6-9) that the State may not intervene under Rule 24(a)(1) and 28 U.S.C. § 2403(b) because the County of San Diego and Sheriff Gore are agencies, officers, or employees of the state for the purpose of issuing concealed carry licenses, and § 2403(b) provides for intervention as of right only when a state "agency, officer, or employee" is not already a party to the suit.

But in examining whether the Sheriff and County represent the State for the purpose of issuing concealed-carry permits, Peruta asks the wrong question—the proper question is whether they represent the State for the purpose of defending the constitutionality of state statutes under § 2403(b). Regardless of whether a county sheriff represent the State for other purposes, he or she is not a state "agency, officer, or employee" for the purposes of § 2403(b). Section 2403(b) is concerned with ensuring that the State can have a proper representative before the court whenever "the constitutionality of any statute of that State affecting the public interest is drawn in question," and specifically requires that, when such questions arise, "the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene … for argument on the question of constitutionality."

As a matter of California law, local officials do not represent the State for the purpose of defending the constitutionality of state statutes. When such constitutional questions arise, California law contemplates that the interests of the State will be represented by the Attorney General. *See, e.g.*, Cal. Const. art. V, § 13 ("The Attorney General shall be the chief law officer of the State."); Cal. Rules of Court 8.29(c) (Attorney General must be notified when constitutionality of a state statute has been brought into

question). Further, the Attorney General is designated by statute to represent all state agencies, officers, and employees in legal proceedings relating to their official duties, subject to certain exceptions not relevant here. *See* Cal. Gov. Code § 11042 ("No state agency, commissioner, or officer shall employ any legal counsel other than the Attorney General, or one of his assistants or deputies, in any matter in which the agency, commissioner, or officer is interested, or is a party as a result of office or official duties."); *id.* § 11040(c) ("[T]he written consent of the Attorney General is required prior to employment of counsel [apart from the Attorney General] for representation of any state agency or employee in any judicial proceeding.").

Thus, when a state agency, officer, or employee is sued in a lawsuit challenging the constitutionality of a state statute, both California law and federal law contemplate that the state Attorney General will already be involved in the case, making notice and intervention under § 2403(b) unnecessary. Where, as here, the defendants are a local county and its sheriff, represented by county counsel, and the Attorney General is not otherwise involved in the case, the defendants do not represent the interests of the State for the purposes of § 2403(b).

Finally, in this case, the Sheriff has declined to further defend the statute. Whatever role he has played until now, going forward there will be

no state party actively involved to defend the statute, as § 2403 contemplates, unless the Attorney General is permitted to intervene. "Unless the State … is made a party to these proceedings, no petition for rehearing can be filed in this Court, and there will be no opportunity for the Supreme Court to consider whether to grant certiorari." *Day*, 505 F.3d at 966.

The Attorney General should be allowed to intervene in this suit to aid in the statute's defense. The panel's opinion sets precedent that draws into question not just the validity of San Diego's policies, but the constitutionality of California's entire statutory scheme governing the public carrying of firearms. Its ruling has already affected counties in California apart from San Diego. *See Richards v. Prieto*, No. 11-16255 (9th Cir. Mar. 5, 2014) (invalidating Yolo County's permitting scheme based on *Peruta*); Orange County Sherriff's Dep't, CCW License, http://ocsd.org/about/info/services/ccw (last visited Mar. 28, 2014) (indicating that Orange County will conform to the *Peruta* rule). Given the special role contemplated for the Attorney General under both state and federal law, the statewide effect of the panel's ruling, and the Sheriff's decision not to seek further review, intervention by the Attorney General as

of right is consistent with the text and purposes of Section 2403(b) and Rule 24(a)(1).

CONCLUSION

The State of California should be permitted to intervene as a Defendant-Appellee in this case for the purpose of seeking further review.

KAMALA D. HARRIS
Attorney General of California
EDWARD C. DUMONT
Solicitor General
GREGORY D. BROWN, SBN 219209
Deputy Solicitor General

KATHLEEN A. KENEALY
Chief Assistant Attorney General
DOUGLAS J. WOODS
Senior Assistant Attorney General
MARK R. BECKINGTON
Supervising Deputy Attorney General
ROSS C. MOODY
Deputy Attorney General

/s/ CRAIG J. KONNOTH
CRAIG J. KONNOTH, SBN 288602
Deputy Solicitor General
Attorneys for the State of California

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STATEMENT OF RELATED CASES

To the best of our knowledge, there are no related cases.

Dated: April 2, 2014

Respectfully Submitted,

KAMALA D. HARRIS
Attorney General of California

S/ CRAIG KONNOTH

CRAIG KONNOTH
Deputy Solicitor General
Attorneys for the State of California

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Dated

s/ Craig Konnoth
Craig Konnoth
Deputy Solicitor General

9th Circuit Case Number(s) 10-56971

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