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.

Before O'SCANNLAIN, THOMAS, and CALLAHAN, Circuit Judges

Opinion Filed Feb. 13, 2014
Order Filed Nov. 12, 2014

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

PETITION FOR REHEARING OR REHEARING EN BANC

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

TABLE OF AUTHORITIES
(continued)

Page

RULE 35 STATEMENT

A divided panel of this Court has issued a published order holding that the State of California may not intervene in this appeal to seek rehearing en banc or certiorari, even though (1) the panel's underlying published opinion draws into question California's entire statutory scheme governing the public carrying of guns; (2) no existing party will seek further review to protect the State's interests; and (3) plaintiffs do not object to the State being permitted to intervene. The panel's order warrants en banc review.

This case is one of exceptional importance. The panel's opinion appears to hold that the Second Amendment forbids California from authorizing local authorities to impose a meaningful "good cause" requirement for the issuance of a permit to carry a concealed handgun so long as the State also prohibits the open carrying of guns in incorporated areas of the State. If allowed to stand, it would take important public safety decisions concerning the carrying of guns in public places out of the hands of the local officials charged by the California Legislature with making such decisions. Requiring local officials to issue concealed-carry permits to any otherwise qualified person based on a bare assertion of a desire to carry a gun in public for self protection would effectively nullify state law allowing

local officials to determine what constitutes "good cause" for the issuance of such permits in the context of their respective jurisdictions.

The panel's decision on the merits should not be allowed to become final without affording the State an opportunity to seek further review. In addition to *Peruta*, there is a second pending case, decided by the same panel, presenting essentially the same legal issue. *See Richards v. Prieto*, No. 11-16255. The Court has deferred disposition of a fully briefed petition for rehearing en banc in *Richards* pending resolution of post-opinion matters in the present case. As the State has pointed out in its amicus brief supporting the petition in *Richards*, this Court could appropriately use either case as a vehicle for en banc review—but in either case the State would seek to participate in further proceedings as a party.

The State's motion to intervene in the present case is consistent with the law and with this Court's precedents. The plaintiffs-appellants do not oppose it.[1] Granting it would allow the Court to review the important questions presented by the case en banc, should it decide to do so, in the case in which they were initially decided. And granting the motion in this case

[1] Plaintiffs objected to one of the grounds asserted by the State for intervention, but did not object to the State being permitted to intervene on other grounds. Appellants' Opposition to Motions for Leave to Intervene (Opp.) 2-3 (Dkt. 145).

would avoid any question that a denial here might otherwise raise concerning the State's ability to intervene in *Richards*, in which Sheriff Prieto has sought en banc review. Accordingly, the State respectfully requests that the en banc Court review and reverse the panel majority's denial of its motion to intervene.

BACKGROUND

1. In October 2009, plaintiffs-appellants sued San Diego County and its Sheriff to challenge the County's policy for implementing the "good cause" requirement for issuing concealed-carry permits under state law. Plaintiffs did not name the State or any state agency or official as a defendant, and the State did not participate in the district court proceedings. The district court entered summary judgment for the County, and the plaintiffs appealed.

On February 13, 2014, a divided panel of this Court issued an opinion that would reverse the judgment of the district court. The opinion would set precedent that draws into question the constitutionality of California's entire statutory scheme governing the public carrying of firearms. As the opinion states, plaintiffs' lawsuit "targets the constitutionality of the entire scheme" of gun-control regulation in California, slip op. 53, and the panel holds that "the Second Amendment does require that the states permit *some form* of

carry [i.e., either open- or concealed-carry] for self-defense outside the home," *id.* at 55. In the panel majority's view, because California generally bans the open carrying of handguns, *see* Cal. Penal Code §§ 25850, 26350, the Second Amendment requires the State to permit otherwise-qualified individuals to carry concealed firearms in public areas based on nothing more than an assertion of a desire to do so for the purpose of self-defense. Slip op. 47-52. The decision further holds that San Diego's interpretation of the state statutory "good cause" requirement for concealed-carry permits, requiring something more than a general desire to carry a gun for self-protection, not only burdens but "destroys" Second Amendment rights. *Id.* As the panel dissent notes, this effectively "eliminates the statutory 'good cause' requirement and transforms it into a 'no cause' limitation for the general public. Thus, Plaintiffs' complaint and theory necessarily specifically calls into question the constitutionality of state concealed carry law." *Id.* at 105 (Thomas, J., dissenting).

2. On February 21, 2014, the County and the Sheriff—the only defendants-appellees—announced that they would not seek further review of

the Court's decision.[2] Thus, unless the State of California or another proposed intervenor is allowed to intervene as a party, no petition for rehearing or rehearing en banc can be filed in this Court; it is not clear how the interests of the State could be protected even if the Court were to take the case en banc *sua sponte*; and no party will be in a position to ask the Supreme Court to consider whether to grant certiorari.

3. On February 27, 2014, California filed a motion to intervene in this appeal, a proposed petition for rehearing or rehearing en banc, and a motion to extend the time for filing the petition until the Court ruled on the motion to intervene. Dkt. 122. On February 28, the Court granted the motion to extend time, and stayed issuance of the mandate until further order of the Court. Dkt. 126.

California's motion to intervene argues that the State is entitled to intervene as of right under Federal Rule of Civil Procedure 24(a), or in any event should be granted leave to intervene under Rule 24(b). A copy of the State's motion is attached as Appendix B. Plaintiffs-appellants opposed the motion insofar as it sought intervention as of right under Rule 24(a)(1), but

[2] At the panel's request, the Sheriff later clarified that he has not changed his view of the appropriate "good cause" policy for San Diego County; he simply chose not to seek further review. Dkt. 153.

did not oppose either intervention as of right under Rule 24(a)(2) or permissive intervention under Rule 24(b), "under the limited and specific facts" of this case. Opp. 2-3 (Dkt. 145).

4. On November 12, 2014, the again-divided panel issued a published order denying California's motion to intervene. A copy of that order is attached as Appendix A.

a. The panel majority first reasons that the State's motion is untimely. Order 5-7. It looks to three factors: (1) the stage of the proceedings; (2) prejudice to other parties; and (3) the reason for and length of delay in seeking to intervene. *Id.* at 4. The majority acknowledges that the second factor weighs in favor of timeliness, because no party would face prejudice from intervention under the unusual circumstances of this case. *Id.* at 5. It concludes, however, that the first and third weigh against the State. *Id.* at 4-6.

As to the third factor, the majority suggests that the State "must have 'know[n]'" early on that the case might adversely affect its interests because it "originally thought that Sheriff Gore adequately protected [those] interests." *Id.* at 6. The majority insists that no California law has been "invalidated, 'drawn in question,' or placed 'in jeopardy' by the panel opinion"—while at the same time concluding that the State should have

intervened earlier because it should have been aware that state statutes (rather than simply local implementation decisions) were being challenged under the Constitution. *Id.* at 6, n.1.

The majority recognizes that in *Day v. Apoliona*, 505 F.3d 963, 966 (9th Cir. 2007)—another unusual case—this Court granted the State of Hawai'i's motion to intervene after a panel decision was published. Order 7. It distinguishes *Day* on the ground that here California did not "participate[] as an amicus below or before this Court." Order 7.

b. The majority would also hold that the State is not entitled to intervene under 28 U.S.C. § 2403(b) or Federal Rule of Civil Procedure 5.1, each of which requires notice to the State and an opportunity to intervene when "the constitutionality of any statute of that State affecting the public interest is drawn in question." 28 U.S.C. § 2403(b); *see also* Fed. R. Civ. P. 5.1. The majority asserts that these provisions do not apply because this case presents only "'a narrow challenge to the San Diego County regulations on concealed carry.'" Order 9 (quoting *Peruta v. County of San Diego*, 742 F.3d 1144, 1172-73 (9th Cir. 2014)). According to the majority, in this case "no California statute has been challenged, overturned, or had its constitutionality 'drawn into question.'" *Id.*

The panel's underlying merits opinion emphasizes that it considers "San Diego County policy in light of the California licensing scheme *as a whole*," slip op. 52-53; emphasizes that the plaintiffs' claim "targets the constitutionality of the entire scheme," *id.* at 53; and holds that any interpretation of "good cause" under the California concealed-carry permit scheme that requires more than bare assertion of a desire to carry a gun for self-defense is "per se invalid[]," *id.* at 47-51. Nonetheless, in denying intervention, the panel majority reasons that this holding does not technically "draw[] into question" any California statute, because the phrase "drawn in question" refers only to a direct challenge to the statute itself, and cannot refer to any challenge to an application of that statute—no matter how sweeping the potential effect of the Court's reasoning in ruling on that challenge. Order 8-12.

c. In dissent, Judge Thomas points out that the majority's order "conflicts with controlling circuit precedent and deprives one of the parties most affected by our decision the opportunity to even present an argument to us on an important constitutional question affecting millions of citizens." *Id.* at 13 (Thomas, J., dissenting). He emphasizes that the majority's underlying opinion "construed the plaintiffs' complaint as contending that 'the San Diego County policy in light of the California licensing scheme *as a whole*

violates the Second Amendment' and 'targets the constitutionality of the entire scheme.'" *Id.* (quoting *Peruta*, 742 F.3d at 1171). Under such circumstances, the fact "[t]hat the opinion primarily addressed state regulation of handguns could hardly be clearer." *Id.*

The dissent explains that "[g]iven the majority's opinion, the statutory command on intervention is direct" under § 2403(b), because "the constitutionality of a state statute is drawn into question." Order 14. Under these circumstances, California "should be afforded the right to intervene under Rule 24(a)." *Id.* at 15. Judge Thomas also explains that the State has a right to intervene under Rule 24(a)(2) because it has an interest that will be impeded by the majority's decision and no existing party adequately represents that interest. Order 15-16. Alternatively, the State "has satisfied the requirements for permissive intervention" under Rule 24(b), and plaintiffs do not oppose such intervention. Order 18-19. And he concludes that the majority is wrong to hold that the State's motion is untimely under the unusual circumstances of this case. *Id.* at 16-18.

ARGUMENT

1. This case is one of exceptional importance. The panel majority's underlying opinion on the merits would incorrectly hold that the Second Amendment forbids California from authorizing local authorities to impose

meaningful "good cause" requirements for the issuance of permits to carry concealed weapons in public places—at least so long as the State does not generally permit the open carrying of guns. As Judge Thomas's dissent points out, that holding would draw into question California's entire statutory scheme regulating the carrying of guns in public.

California should be permitted to seek further review of the panel's decision. As the State has explained, that review could come either in this case or in *Richards v. Prieto*, No. 11-16255. *See* Brief of the State of California as Amicus Curiae Supporting Rehearing En Banc 8, *Richards v. Prieto*, No. 11-16255 (filed Mar. 28, 2014). That case presents essentially the same issue. It was decided by the same divided panel, in an unpublished order based solely on the authority of the published panel decision in this case. And in that case, the defendant Sheriff has petitioned for en banc review. In either this case or in *Richards*, however, California should be able to participate in further proceedings as a party. The panel majority's denial of the State's motion to intervene in the present case would deny the State that right in *Peruta* and call into question whether it would be accorded in *Richards*. Under these circumstances, the State respectfully requests that the en banc Court review and reverse the panel majority's decision to deny the State's motion to intervene.

2. The majority's decision misapplies this Court's precedents governing intervention. The Court has previously followed a "liberal policy in favor of intervention" that "serves both efficient resolution of issues and broadened access to the courts." *United States v. City of Los Angeles*, 288 F.3d 391, 397-98 (9th Cir. 2002) (citation omitted). "By allowing parties with a *practical* interest in the outcome of a particular case to intervene, we often prevent or simplify future litigation involving related issues; at the same time, we allow an additional interested party to express its views before the court." *Id.* at 398 (citation omitted). Thus, in determining whether intervention is appropriate, "courts are guided primarily by practical and equitable considerations, and the requirements for intervention are broadly interpreted in favor of intervention." *United States v. Alisal Water Corp.*, 370 F.3d 915, 919 (9th Cir. 2004). Here, the majority's order denying intervention contravenes these principles, ignoring the practical and equitable considerations that overwhelmingly favor intervention under the unusual circumstances of this case. Indeed, the majority denies intervention when even the plaintiffs-appellants do not object to allowing the State to enter the case.

The majority's order is in considerable tension with *Day v. Apoliona*, 505 F.3d 963, 964-66 (9th Cir. 2007), in which this Court held that Hawai'i

could intervene post-decision for the purpose of seeking en banc review where the parties declined to seek en banc review and the appeal presented an important question of state law. *See id.* at 966. *Day* properly recognizes that where important state interests are at stake, a State should presumptively be allowed to intervene to protect those interests even if the intervention would otherwise be untimely, unless the State purposefully delayed to "gain [a] tactical advantage" or its intervention would "threaten to broaden the scope of the case going forward." *Id.* Here, as in *Day*, 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." *Id.* These are rare but compelling reasons to permit intervention by a State.

3. Denial of the State's motion to intervene in this case also warrants en banc review because of the immediate practical implications of the underlying legal issue for public safety in California. Currently, the Court has stayed the issuance of its mandate in *Peruta* pending further order of the Court. Dkt. 126. If that mandate issues on the basis of the panel majority's decision, it appears that local authorities in San Diego will be under effective judicial compulsion to stop complying with the County's longstanding written policy on implementation of the "good cause" requirement and

instead to issue a concealed-carry permit to any otherwise qualified applicant who requests one. Authorities in other localities, including in urban and residential areas, will be under similar pressure to conform their practice to the majority's reasoning or face legal action based on the majority's opinion. In effect, as Judge Thomas explains, the State's "good cause" requirement will have been transformed overnight into a "no cause" standard effective throughout the State. Slip op. 105. Those potential consequences of the panel majority's decision should not be put in motion until the Court has had an opportunity to decide whether or not to review the merits en banc, either in this case or in *Richards*.

These practical concerns highlight the desirability of maintaining the status quo until all of these matters can be fully considered by the Court. Accordingly, the State respectfully requests that the existing stay of the mandate in *Peruta* remain in place pending a decision by the Court on this petition and, as appropriate, the related petitions for rehearing en banc in this case and in *Richards*.

CONCLUSION

The Court should grant rehearing en banc and the State's motion to intervene.

Respectfully Submitted,

November 26, 2014

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CERTIFICATE OF COMPLIANCE
PURSUANT TO CIRCUIT RULES 35-4 AND 40-1
FOR 10-56971

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for rehearing or rehearing en banc is: (check (x) applicable option)

[X] Proportionately spaced, has a typeface of 14 points or more and contains 2,831 words (petitions and answers must not exceed 4,200 words).

or

[ ] In compliance with Fed.R.App.P. 32(c) and does not exceed 15 pages.

November 26, 2014
Dated

/s/ Gregory D. Brown
Gregory D. Brown
Deputy Attorney General

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EDWARD PERUTA; MICHELLE LAXSON; JAMES DODD; LESLIE BUNCHER, DR.; MARK CLEARY; CALIFORNIA RIFLE AND PISTOL ASSOCIATION FOUNDATION, *Plaintiffs-Appellants*, STATE OF CALIFORNIA, *Intervenor-Pending*, v. COUNTY OF SAN DIEGO; WILLIAM D. GORE, individually and in his capacity as Sheriff, *Defendants-Appellees*.	No. 10-56971 D.C. No. 3:09-cv-02371-IEG-BGS ORDER

Filed November 12, 2014

Before: Diarmuid F. O'Scannlain, Sidney R. Thomas, and Consuelo M. Callahan, Circuit Judges.

Order;
Dissent by Judge Thomas

SUMMARY*

Civil Rights

The panel denied motions to intervene, which were filed after the panel's opinion and judgment holding that a responsible, law-abiding citizen has a right under the Second Amendment to carry a firearm in public for self-defense.

The State of California and the Brady Campaign to Prevent Gun Violence moved to intervene under Federal Rule of Civil Procedure 24 after San Diego Sheriff William D. Gore declined to file a petition for rehearing en banc. The California Police Chiefs' Association and the California Peace Officers' Association, amici in this case, submitted a petition for rehearing en banc. Noting that amici cannot file petitions for rehearing en banc, the panel construed the petition as a motion to intervene.

The panel held that the movants did not meet the heavy burden of demonstrating imperative reasons in favor of intervention on appeal. Noting that the movants sought intervention more than four years after the case began, the panel stated that the stage of the proceedings, the length of the delay, and the reason for the delay all weighed against timeliness. In the absence of a timely motion, intervention was unavailable.

The panel further concluded that 28 U.S.C. § 2403 and Federal Rule of Civil Procedure 5.1 did not provide a basis

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

for intervention because the panel's opinion never drew into question the constitutionality of any California statute, but only questioned San Diego County's exercise of regulatory authority under the relevant state statutes, specifically the County's policy that an assertion of self-defense is insufficient to demonstrate "good cause" under the California statutory scheme.

Dissenting, Judge Thomas stated that the majority's decision to prevent the State of California from intervening in this case conflicted with controlling circuit precedent and deprived one of the parties most affected by the panel's decision the opportunity to even present an argument on an important constitutional question affecting millions of citizens.

ORDER

We must rule on motions to intervene in this Second Amendment case which were filed after our opinion and judgment reversing the District Court were filed.

I

When Sheriff William D. Gore declined to file a petition for rehearing en banc in this case, the State of California and the Brady Campaign to Prevent Gun Violence moved to intervene under Federal Rule of Civil Procedure 24. The California Police Chiefs' Association (CPCA) and the California Peace Officers' Association (CPOA), amici in this case, submitted a petition for rehearing en banc. However, amici cannot file petitions for rehearing en banc. *See Day v. Apoliona*, 505 F.3d 963, 964 (9th Cir. 2007). We therefore

construe CPCA and CPOA's petition as a motion to intervene. *See* CPCA & CPOA Pet. for Reh'g En Banc at 2 n.2 ("To the extent the Court finds that CPCA and CPOA must be a party in order to submit this petition, CPCA and CPOA request that this Court construe this petition to also be a request to intervene as parties.").

II

Intervention, both of right and by permission, can occur only "[o]n timely motion." Fed. R. Civ. P. 24(a)–(b). Timeliness is determined with reference to three factors: "(1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and length of the delay." *United States v. Alisal Water Corp.*, 370 F.3d 915, 921 (9th Cir. 2004) (quoting *Cal. Dep't of Toxic Substances Control v. Commercial Realty Projects, Inc.*, 309 F.3d 1113, 1119 (9th Cir. 2002)).

A

Regarding the first factor, the stage of the proceedings, the age of the case discourages us from declaring the motions timely. The movants sought intervention more than four years after this case began. *See id.* (affirming a district court's denial of a motion to intervene as untimely when it was filed four years into the proceedings).

That this case is now on appeal rather than in the district court further suggests that the motions to intervene are untimely. *See Bates v. Jones*, 127 F.3d 870, 873 (9th Cir. 1997); *Amalgamated Transit Union Int'l, AFL-CIO v. Donovan*, 771 F.2d 1551, 1552 (9th Cir. 1985) (per curiam) ("A court of appeals may allow intervention at the appellate

stage where none was sought in the district court only in an exceptional case for imperative reasons." (internal quotation marks omitted)). In this case, the movants filed motions to intervene after our opinion was filed. If intervention on appeal is limited to "exceptional case[s]," then, by the same logic, intervention after the publication of an appellate opinion must be extremely rare. The first factor, therefore, weighs against timeliness.

B

The second factor, on the other hand, weighs in favor of timeliness. The parties have not given us any reason to believe that they would face prejudice as a result of delayed intervention by the movants.

C

The third factor, the reasons for and length of the delay, suggests that the motions to intervene are untimely. Under our longstanding precedent, "[a] party seeking to intervene must act as soon as he 'knows or has reason to know that his interests might be adversely affected by the outcome of the litigation.'" *United States v. Oregon*, 913 F.2d 576, 589 (9th Cir. 1990) (quoting *United States v. City of Chicago*, 870 F.2d 1256, 1263 (7th Cir. 1989)); *accord Alisal Water*, 370 F.3d at 922–23; *Commercial Realty Projects*, 309 F.3d at 1120.

Both California and the Brady Campaign argue that their delay in moving to intervene was reasonable. They filed their motions shortly after learning that Sheriff Gore would not file a petition for rehearing en banc, which they contend was the moment they knew that Sheriff Gore would not adequately

protect their interests. Cal. Mot. to Intervene at 13; Brady Campaign Mot. to Intervene at 14. If the movants originally thought that Sheriff Gore adequately protected their interests, they must have "know[n] that [their] interests might be adversely affected by the outcome of the litigation." *Oregon*, 913 F.2d at 589. The movants do not deny that they have long been aware of this case.[1]

Although the movants may have avoided some inconvenience to themselves by waiting to seek intervention, such considerations do not justify delay. *See Alisal Water*, 370 F.3d at 923–24 ("An applicant's desire to save costs by waiting to intervene until a late stage in litigation is not a valid justification for delay."). A contrary rule "would encourage interested parties to impede litigation by waiting to intervene until the final stages of a case." *Id.* at 924.

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[1] The dissent claims that California's delay is justified because "until the majority opinion was issued, it was not apparent that any law or regulation other than the county-specific good cause requirement was in jeopardy." Dissent at 16–17 (citing *Peruta v. County of San Diego*, 758 F. Supp. 2d 1106, 1113–17 (S.D. Cal. Dec. 10, 2010)). However, the district court opinion itself cited by the dissent noted that the County of San Diego "maintains Plaintiffs are asserting a back door attack on the constitutionality of [the California statute]." *Peruta*, 758 F.Supp.2d at 1115 n.7. Thus, if "California's firearm regulatory framework" had been placed under "considera[tion]", dissent at 13, such consideration began in the district court long before issuance of our opinion, nearly three and a half years before, in fact.

Moreover, as explained in more detail below, *see* Part IV, *infra*, no law or regulation other than San Diego County's good cause policy has been invalidated, "drawn in question," or placed "in jeopardy" by the panel opinion – notwithstanding San Diego County's claim that state statutes were under "back door attack" or the dissent's insistence that California state law is "in jeopardy." Dissent at 15, 18.

D

California and the Brady Campaign rely on our order in *Day v. Apoliona*, in which we granted the State of Hawaii's motion to intervene even though it was filed after the panel opinion was published. 505 F.3d 963, 966 (9th Cir. 2007). *Day*'s reasoning makes clear that it represents the exception rather than the rule. The *Day* order expressly relied on the fact that Hawaii had not "ignored the litigation or held back from participation to gain tactical advantage." *Id.* Instead, Hawaii had "sought amicus status, and—singlehandedly—argued a potentially dispositive issue in this case to the district court and this panel." *Id.* Such participation was especially helpful because the existing defendants were "unwilling[] . . . to take a position on th[at] issue." *Id.* at 965.

This case is quite different. Neither California nor the Brady Campaign participated as an amicus below or before this Court. Brady Campaign Mot. to Intervene at 1 n.1 (distinguishing between the Brady Campaign and the Brady Center). Although CPCA and CPOA are amici, their participation has not been comparable to Hawaii's in *Day*. CPCA and CPOA did not, "singlehandedly" or otherwise, argue any issue that Sheriff Gore refused to litigate.

III

Considering each of the relevant factors, we conclude that the movants have not met the heavy burden of demonstrating "imperative reasons" in favor of intervention on appeal. *Bates*, 127 F.3d at 873. The stage of the proceedings, the length of the delay, and the reason for the delay all weigh against timeliness. In the absence of a timely motion, intervention is unavailable. Fed. R. Civ. P. 24(a)–(b).

IV

The dissent asserts that 28 U.S.C. § 2403 and Federal Rule of Civil Procedure 5.1 provide a basis for intervention. These assertions are incorrect.

28 U.S.C. § 2403(b) provides:

> In any action, suit, or proceeding in a court of the United States 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 for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The State shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

28 U.S.C. § 2403(b) (emphasis added). Similarly, Rule 5.1 requires "[a] party that files a pleading, written motion, or other paper *drawing into question* the constitutionality of a federal or *state statute*" to "file a notice of constitutional question" and serve such notice on the relevant sovereign's attorney general. Fed. R. Civ. P. 5.1 (emphasis added).

The dissent admits that no "law or regulation other than the county-specific good cause requirement was in jeopardy" when Peruta presented his challenge to the District Court, dissent at 16, but argues that "on appeal, the case morphed into another challenge entirely, as the majority opinion instead considered the constitutionality of California's firearm regulatory framework." Dissent at 13. But the dissent cannot assert that the case somehow "morphed" on appeal into a new challenge when the only law "drawn into question" on appeal was the law challenged at the District Court: the San Diego County policy.

Peruta's challenge is only to the San Diego County policy that "an assertion of self-defense is insufficient to demonstrate 'good cause'" under the California statutory scheme. *See Peruta v. County of San Diego*, 742 F.3d 1144, 1147–48, 1167–68, 1179 (9th Cir. 2014) (asking "whether San Diego County's 'good cause' permitting requirement 'infringe[s]' the right" to bear arms; assessing "the nature of the infringement that the San Diego County policy purportedly effects on the right to bear arms"). As the opinion states, this is "a narrow challenge to the San Diego County regulations on concealed carry, rather than a broad challenge to the state-wide ban on open carry[.]" *Id.* at 1172–73. Simply put, no California statute has been challenged, overturned, or had its constitutionality "drawn into question." Of course, analyzing the constitutionality of the San Diego County policy required "considering" the California statutory scheme, but only inasmuch as it established the "backdrop" for interpreting the "County's restrictive interpretation of 'good cause'." *Peruta*, 742 F.3d at 1171; *see also id*. at 1169–70 (considering the California scheme and its exemptions, in order to show that "it is as though *S*an Diego County banned all political speech, but

exempted from this restriction particular [people, places, and situations]" and that "the severe restrictions in effect in San Diego County" function as "a near total-prohibition on bearing [arms]").

Most importantly, the opinion never "draws into question" the "constitutionality" of any California statute—it only questions San Diego County's exercise of regulatory authority under such state statutes. *See* Mot. of CA to Intervene at 7 (admitting the Court's opinion does "not directly rul[e] on the constitutionality of state statutes" and only challenges the San Diego County policy regarding "good cause" (internal quotations omitted)). Though the Supreme Court authority interpreting the phrase "drawn in question" is not of recent vintage, it is clear:

> The validity of a statute is not drawn in question every time rights claimed under such statute are controverted, nor is the validity of an authority, every time an act done by such authority is disputed. The validity of a statute or the validity of an authority is drawn in question when the existence, or constitutionality, or legality of such statute or authority is denied, and the denial forms the subject of direct inquiry.

U.S. v. Lynch, 137 U.S. 280, 285 (1890) (per Fuller, C.J.), *cited in* 16B C. Wright, A. Miller, E. Cooper, & R. Freer, Federal Practice and Procedure § 4013 (3d ed.) (describing *Lynch*'s description of the phrase "drawn in question" as "[o]ne of the most frequently quoted" nineteenth century decisions which "established [the phrase's] meaning"); *see also Kennard v. State of Nebraska*, 186 U.S. 304, 308 (1902)

(explaining that no federal statute was "drawn in question" when such statutes were construed by the state court, as "the validity of a statute or treaty of the United States is not 'drawn in question,' within the meaning of § 709 [of the Judicial Code], every time rights claimed under a statute or treaty are controverted"), *cited in* 16B Wright & Miller, § 4013; Comment, *The Judiciary Act of 1937*, 51 Harv. L. Rev. 148, 148–49 (1937) ("The chief purpose of [adding § 2403 to the Judicial Code] is to remove the possibility of having a federal statute *declared unconstitutional* in a suit to which the United States was not a party . . . ." (emphasis added)).

Thus "[d]rawing in question the validity of a statute" requires more than "the mere objection to an exercise of authority under a statute, whose validity is not attacked." *Jett Bros. Distilling Co v. City of Carrollton*, 252 U.S. 1, 6 (1920); *see also Wilson v. Cook*, 327 U.S. 474, 480–82 (1946) (explaining that suit challenging official's interpretation of state statute as applying to timber collected from U.S. land did not challenge the validity of the statute and thus the statute's constitutionality was not "drawn in question") (citing *Jett Brothers*).[2] That the opinion engages in analysis

[2] *Jett Brothers* and *Wilson* interpreted § 237 of the Judicial Code, which conferred jurisdiction on the Supreme Court when a suit "draw[s], in question the validity of a statute of any State, on the ground of its being repugnant to Constitution, treaties, or laws of the United States." Judiciary Act of 1925, ch. 229, 43 Stat. 936 (enacting Judicial Code § 237).

More recent authority, from this circuit and others, also demonstrates that no state statute has been "drawn into question" here. Interpreting the accompanying provision of § 2403(a), identical to § 2403(b) except that it involves federal rather than state statutes, we have explained that

and interpretation of California statutes does not change that the only "objection" raised and decided is the exercise of authority under such statutes, not the statutes themselves. No right of intervention under § 2403 or Rule 5.1 exists here.

V

The State of California's Motion to Intervene is **DENIED**.

The Brady Campaign's Motion for Leave to Intervene is **DENIED**.

CPCA and CPOA's Petition for Rehearing En Banc, construed as a motion to intervene, is **DENIED**.

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§ 2403's purpose is "ensuring that courts not rule on the constitutionality of an Act of Congress without first receiving input from the United States." *Carrol v. Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003). Certainly ruling on the constitutionality of, say, a federal regulation would not constitute ruling on the constitutionality of an Act of Congress. Analogously, ruling on the constitutionality of a County policy does not constitute ruling on the constitutionality of a "statute of [a] State." *See Int'l Paper Co. v. Inhabitants of Town of Jay, ME.*, 887 F.2d 338, 341 (1st Cir. 1989) (explaining that "challenging a municipal ordinance" does not constitute "questioning the constitutionality of a state statute" under § 2403(b)); *Gillon v. Federal Bureau of Prisons*, 424 Fed. Appx. 722, 726 (10th Cir. 2011) (explaining that a challenge to a federal *agency policy* is not a challenge to a "a federal or state statute" under Rule 5.1); *cf. Schweir v. Cox*, 340 F.3d 1284, 1286 (11th Cir. 2003) (Federal intervention under 28 U.S.C. § 2403(a) was permissible because party argued that federal statute was itself unconstitutional); *Strong v. Bd. of Educ. of Uniondale Union Free Sch. Dist.*, 902 F.2d 208, 213 n.3 (2d Cir. 1990) (finding a statute's constitutionality "drawn into question" when the plaintiff explicitly argued it was unconstitutional); *Arizonans for Official English v. Arizona*, 520 U.S. 43, 74 (1997) (explaining the state Attorney General had a right to intervene under § 2403(b) when a state constitutional provision was directly challenged).

THOMAS, Circuit Judge, dissenting:

The majority's decision to prevent the State of California from intervening in this case conflicts with controlling circuit precedent and deprives one of the parties most affected by our decision the opportunity to even present an argument to us on an important constitutional question affecting millions of citizens. I respectfully dissent.

I

This case began with consideration of the narrow but important question of whether the scope of the Second Amendment extended to concealed carry of handguns in public and, if so, whether San Diego County's "good cause" requirement unconstitutionally infringed on that right. However, on appeal, the case morphed into another challenge entirely, as the majority opinion instead considered the constitutionality of California's firearm regulatory framework.

That the opinion primarily addressed state regulation of handguns could hardly be clearer. Although the majority stated that the plaintiffs "focus[] [their] challenge on the licensing scheme for concealed carry," it construed the plaintiffs' complaint as contending that "the San Diego County policy in light of the California licensing scheme *as a whole* violates the Second Amendment" and "targets the constitutionality of the entire scheme." *Peruta v. County of San Diego*, 742 F.3d 1144, 1171 (9th Cir. 2014) (emphasis in original). It reasoned that in order to resolve the plaintiffs' claims, "we must assess whether *the California scheme* deprives any individual of his constitutional rights." *Id.* at 1169 (emphasis added). Thus, in the majority's view, the

issue in the case is not the concealed carrying of a weapon but rather "whether [the California scheme] allows the typical responsible, law-abiding citizen to bear arms in public for the lawful purpose of self-defense." *Id.* The majority stated that "if self-defense outside the home is part of the core right to 'bear arms' and the California regulatory scheme prohibits the exercise of that right, no amount of interest-balancing under a heightened form of means-ends scrutiny can justify San Diego County's policy." *Id.* at 1167.

Given the majority's opinion, the statutory command on intervention is direct. If the constitutionality of a state statute is drawn into question, that state must be afforded the opportunity to intervene. 28 U.S.C. § 2403(b) provides:

> In any action, suit, or proceeding in a court of the United States 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 for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The State shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

Further, Federal Rule of Civil Procedure 24(a) provides, in relevant part, that "[o]n timely motion, the court must permit anyone to intervene who . . . is given an unconditional right to intervene by a federal statute." Given the clear language of 28 U.S.C. § 2403(b), California should be afforded the right to intervene under Rule 24(a).[1]

In addition, California also has the right to intervene under Federal Rule of Civil Procedure 24(a)(2), which provides that a court must permit anyone to intervene who

> claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Fed. R. Civ. P. 24(a)(2).

Generally, "Rule 24(a)(2) is construed broadly in favor of proposed intervenors." *United States ex rel. McGough v. Covington Tech. Co.*, 967 F.2d 1391, 1394 (9th Cir. 1992). The "liberal policy in favor of intervention serves both efficient resolution of issues and broadened access to the

[1] The majority concludes that "the constitutionality" of California's laws have not been "drawn in question," based on several cases from the Supreme Court. However, those cases are concerned with the appellate jurisdiction of the Supreme Court, not the proper standard for intervention. *See United States ex rel. Lisle v. Lynch*, 137 U.S. 280, 281 (1890); *Kennard v. State of Nebraska*, 186 U.S. 304, 308 (1902); *Jett Bros. Distilling Co. v. City of Carrollton*, 252 U.S. 1, 5–6 (1920); *Wilson v. Cook*, 327 U.S. 474, 480 (1946).

courts." *United States v. City of Los Angeles*, 288 F.3d 391, 397–98 (9th Cir. 2002) (citation omitted). As we have noted:

> By allowing parties with a practical interest in the outcome of a particular case to intervene, we often prevent or simplify future litigation involving related issues; at the same time, we allow an additional interested party to express its views before the court.

Id. at 398 (citation omitted).

The opinion at issue directly involves the entirety of California's handgun regulation scheme, and will greatly impact any future litigation pertaining to the scheme's constitutionality. However, because the County has elected not to pursue a petition for rehearing en banc, no existing party can adequately represent California's interests. Therefore, the requirements of Rule 24(a)(2) are also satisfied.

The majority concludes that California's motion is not timely, citing to the principle that "[a] party seeking to intervene must act as soon as he knows or has reason to know that his interests might be adversely affected by the outcome of the litigation." *United States v. State of Oregon*, 913 F.2d 576, 589 (9th Cir. 1990). Yet this is exactly what California has done. It was not until the majority decision was filed that San Diego County indicated it would no longer defend the case. More importantly, until the majority opinion was issued, it was not apparent that any law or regulation other than the county-specific good cause requirement was in jeopardy. The district court opinion focused solely on the good cause requirement, and the plaintiffs were careful to

argue that the case was about the County's policy, not state regulation. *See Peruta v. County of San Diego*, 758 F. Supp. 2d 1106, 1113–17 (S.D. Cal. 2010). California moved to intervene as soon as it was put on notice that its interests were at stake and would no longer be defended by the County.

As such, this case is similar to *Day v. Apoliona*, 505 F.3d 963 (9th Cir. 2007). *Day* involved a Section 1983 action against the Office of Hawaiian Affairs. The State of Hawaii, filing as amicus but without requesting to intervene, argued that the plaintiffs had no individual rights under the Hawaiian Admission Act that were enforceable under 42 U.S.C. § 1983 – a position that the defendants declined to support. *Id.* at 964. The district court agreed with Hawaii and dismissed the case. When we reversed, the State of Hawaii filed a motion to intervene to file a petition for rehearing en banc because the Office of Hawaiian Affairs had decided not to do so. We granted the motion to intervene, despite the fact that "Hawaii had the opportunity to intervene in this matter at any time during these proceedings, both before the district court and before this Court on appeal." *Id.*

The majority contends that *Day* is distinguishable from this case because California did not file an amicus brief. But California had no need to seek a role in this case until now. In this way, the case for intervention in *Day* was in fact weaker than the one presented here, because the defendants in *Day* had declined "from the beginning" to defend the State of Hawaii's position, while the plaintiffs clearly asserted a theory impacting the State. *Id.* at 965. Here, the County defended the policy in full before both this Court and the district court, and the plaintiffs attempted to craft a case that would avoid impacting California regulation.

There can be no doubt that California has a "significant protectable interest," *Donnelly v. Glickman*, 159 F.3d 405, 410 (9th Cir. 1998), in defending the constitutionality of its laws and regulations regarding handguns and the safety of its citizens. These laws and regulations have been placed in jeopardy by the majority opinion, and no party remains – for the first time in this case – that can adequately defend them. Given the circumstances of this case, California's motion is timely. The plaintiffs will not be prejudiced if California is permitted to intervene – indeed, the plaintiffs did not object to allowing California to intervene under Rule 24(a)(2). Therefore, California has a right to intervene under Rule 24(a).

II

Even if California did not have a right to intervene under Rule 24(a), we should grant the State's alternative request for permissive intervention under Federal Rule of Civil Procedure 24(b). Rule 24(b) permits permissive intervention on the part of a party "who has a claim or defense that shares with the main action a common question of law or fact." The rule requires (1) an independent ground for jurisdiction, (2) a timely motion, and (3) a common question of law or fact. *Blum v. Merrill Lynch Pierce Fenner & Smith Inc.*, 712 F.3d 1349, 1353 (9th Cir. 2013).

Federal question jurisdiction exists, and California is not raising any new claims. Therefore, the independent jurisdictional requirement is satisfied. *Freedom from Religion Found., Inc. v. Geithner*, 644 F.3d 836, 844 (9th Cir. 2011). As discussed, the motion is timely under the circumstances presented by the case, and there is no question that there are common issues of fact and law. Therefore,

California has satisfied the requirements for permissive intervention. Moreover, the plaintiffs (as well as the defendants) do not oppose permissive intervention. Given the stakes at issue in this case, we should grant permissive intervention upon denying intervention as of right.

III

Finally, there is an additional, independent ground for granting California's motion to intervene. In my dissent to the panel opinion, I expressed the view that the plaintiffs should have been required to comply with Federal Rule of Civil Procedure 5.1. *Peruta v. County of San Diego*, 742 F.3d 1144, 1196 (9th Cir. 2014) (Thomas, J., dissenting). "Under that rule, if the state or one of its agents is not a party to a federal court proceeding, '[a] party that files a pleading . . . drawing into question the constitutionality of a . . . state statute must promptly' serve the state's attorney general with notice of the pleading and the constitutional question it raises." *Id.* (quoting Fed. R. Civ. P. 5.1(a)). When constitutional issues are raised, the rule also requires the district court to certify to the state's attorney general that the constitutionality of the state statute has been questioned, and permit the state to intervene to defend it. Fed. R. Civ. P. 5.1(b), (c).

If proper certification to the attorney general is not made in the district court, then the remedy on appeal is either to allow intervention on appeal or vacate the decision and remand to the district court to allow intervention. *Oklahoma ex rel. Edmondson v. Pope*, 516 F.3d 1214, 1216 (10th Cir. 2008). Here, we do not need to go so far as to vacate the decision and remand the case, as the Tenth Circuit did.

Instead, the proper remedy is to allow California to intervene on appeal to defend its interest.

IV

In sum, California's motion is timely, and it should be afforded the right to intervene on appeal under Federal Rule of Civil Procedure 24(a). Alternatively, we should grant its motion for permissive intervention under Rule 24(b). Finally, the failures under Rule 5.1 of the plaintiffs to name the State and the district court to certify that constitutional questions were at issue require us to allow intervention on appeal to correct that error.

I respectfully dissent.[2]

[2] If California is granted intervention, I would also vote to grant the Brady Center to Prevent Gun Violence's motion for permissive intervention. I would also construe the petition for rehearing en banc filed by the California Police Chiefs' Association and the California Peace Officers' Association as a motion for permissive intervention and grant the motion.

APPENDIX B

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.

Before O'SCANNLAIN, THOMAS, and CALLAHAN, Circuit Judges

Opinion Filed Feb. 13, 2014

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

STATE OF CALIFORNIA'S MOTION TO INTERVENE

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

CONSTITUTIONAL PROVISIONS

COURT RULES

STATE OF CALIFORNIA'S MOTION TO INTERVENE

The State of California seeks leave to intervene in this action as a Defendant-Appellee for the purpose of seeking en banc review. The State should be permitted to intervene as of right, because this case draws into question the constitutionality of the State's statutory scheme regulating the public carrying of firearms, as it has been commonly understood and applied, and because it presents questions of exceptional importance to the State and existing parties will not adequately represent the State's interests. Alternatively, this Court should allow the State to intervene because the case will affect vital interests of the State.[1]

The State's motion to intervene is timely under the circumstances of this case. The State is seeking to intervene fourteen days after the Court issued an opinion adopting broad constitutional reasoning with significant implications for the State, and just six days after the existing Defendants-Appellees announced that they will not seek further review in this case.

[1] This Court generally applies the standards set forth in Federal Rule of Civil Procedure 24 when considering motions to intervene on appeal. *See*, *e.g.*, *Day v. Apoliona*, 505 F.3d 963, 964-66 (9th Cir. 2007) (permitting State of Hawai'i to intervene to seek rehearing en banc when existing party declined to do so); *Warren v. Comm'r of Internal Revenue*, 302 F.3d 1012, 1015 (9th Cir. 2002); *see also Int'l Union, UAW, AFL–CIO, Local 283 v. Scofield*, 382 U.S. 205, 217 n.10 (1965) (noting that "the policies underlying intervention [under Rule 24] may be applicable in appellate courts").

Plaintiffs will not be prejudiced by the State's intervention, as the State will not seek to raise any issues that could not have been raised by the existing Defendants-Appellees.

Finally, because the existing Defendants-Appellees have declined to pursue further review, the State's intervention is both necessary and appropriate to protect important interests of the State that are now at stake in this case. *See Day v. Apoliona*, 505 F.3d 963, 964-66 (9th Cir. 2007) (granting Hawai'i's motion to intervene post-decision for the purpose of seeking further review where existing party declined to do so). For these reasons, and those set forth below, the State of California respectfully requests that it be permitted to intervene in this action.[2]

FACTUAL AND PROCEDURAL BACKGROUND

On October 23, 2009, Plaintiffs sued the County of San Diego and its Sheriff to challenge the County's policy for implementing the "good cause" requirement for issuing concealed-carry permits under state law. Plaintiffs did not name the State or any state agency or official as a defendant, and the State has not previously sought to intervene or otherwise participate in this case.

[2] Plaintiffs-Appellants have informed the State that they intend to oppose this motion. *See* 9th Cir. R. 27-1 advisory committee note, § 5.

The district court entered summary judgment for Defendants on December 10, 2010, and Plaintiffs appealed. On February 13, 2014, a divided panel of this Court issued an opinion that would reverse the judgment of the district court. The opinion reasons that San Diego County's interpretation and application of two state statutes, California Penal Code sections 26150 and 26155, is unconstitutional under the Second Amendment. *See* slip op. 6 ("At issue in this appeal is [San Diego County's] policy's interpretation of the 'good cause' requirement found in [California Penal Code] sections 26150 and 26155."); *id.* at 47-52 (holding San Diego County's "good cause" policy unconstitutional because it "destroys" an otherwise-qualified applicant's "right to bear arms in public for the lawful purpose of self-defense").

The panel's opinion would set precedent that draws into question the constitutionality of California's entire statutory scheme governing the public carrying of firearms. As the opinion states, Plaintiffs' lawsuit "targets the constitutionality of the entire scheme" of gun-control regulation in California, slip op. 53; and the panel holds that "the Second Amendment does require that the states permit *some form* of carry [i.e., either open- or concealed-carry] for self-defense outside the home." Slip op. 55. In the panel majority's view, because California generally bans the open carrying

of handguns, *see* Cal. Penal Code §§ 25850, 26350, the Second Amendment requires the State to permit otherwise-qualified individuals to carry concealed firearms in public areas based on nothing more than an assertion of a desire to do so for the purpose of self-defense. Slip op. 47-52. The Court further holds that San Diego County's interpretation of the state statutory "good cause" requirement for concealed-carry permits, requiring something more than a general desire to carry a gun for self-protection, not only burdens but "destroys" Second Amendment rights, and thus is unconstitutional under any circumstances. *Id.* As the panel dissent notes, this effectively "eliminates the statutory 'good cause' requirement and transforms it into a 'no cause' limitation for the general public. Thus, Plaintiffs' complaint and theory necessarily specifically calls into question the constitutionality of state concealed carry law." *Id.* at 105 (Thomas, J., dissenting).

On February 21, 2014, the County of San Diego and the County Sheriff—the only existing Defendants-Appellees—announced that they will not seek further review of the Court's decision. Thus, unless the State of California is allowed to intervene as a party, no petition for rehearing or rehearing en banc can be filed in this Court; it is not clear how the interests of the State could be protected even if the Court were to take the case en

banc *sua sponte*; and no party will be in a position to ask the Supreme Court to consider whether to grant certiorari.

For these reasons, the State of California now seeks to intervene in this action for the purpose of seeking rehearing or en banc review.

ARGUMENT

In assessing motions to intervene in a proceeding on appeal, this Court has generally applied the standards set forth in Rule 24 of the Federal Rules of Civil Procedure. See *supra*, note 1. Here, California is entitled to intervene as of right under the standards of Rule 24(a). The Court's opinion calls into question the constitutionality of state statutes, and would impair the State's ability to protect several significant interests that are not adequately represented by any of the existing parties. In the alternative, the Court should exercise its discretion to allow the State to intervene under the standards of Rule 24(b).

I. THE STATE IS ENTITLED TO INTERVENE

A. The Court's Decision Calls into Question the Constitutionality of State Statutes.

Under the standards of Rule 24(a)(1), the State may intervene as of right because this appeal calls into question the constitutionality of the State's statutory scheme governing the carrying of firearms in public places.

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." Fed. R. Civ. P. 24(a)(1). The State's statutory right to intervene in this case is supplied by 28 U.S.C. § 2403, which states that in any "proceeding . . . wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court . . . shall permit the State to intervene for . . . argument on the question of constitutionality." 28 U.S.C. § 2403.

Here, the Court's holding and reasoning, in a precedential published opinion, necessarily call into question the constitutionality of California's statutory scheme governing the public carrying of concealed firearms as it has been commonly understood and applied by local authorities. Indeed, the Court's opinion directly strikes down, on an as-applied basis, San Diego County's interpretation and application of two state statutes, California Penal Code sections 26150 and 26155. *See* slip op. 6 ("At issue in this appeal is [San Diego County's] policy's interpretation of the 'good cause' requirement found in [California Penal Code] sections 26150 and 26155."). As both this Court and the Supreme Court have implicitly indicated, intervention as of right under Rule 24(a)(1) and § 2403 does not require a facial challenge, but is appropriate whenever a plaintiff raises either a facial

or an as-applied constitutional challenge to a state or federal statute. *See Bartnicki v. Vopper*, 532 U.S. 514, 521 (2001) (United States intervened in court of appeal under § 2403 "in order to defend the constitutionality of the federal statute" in an as-applied challenge); *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 178, 183 (1979) (state agency intervened in district court under § 2403 to defend against as-applied challenge); *In re Webber*, 674 F.2d 796, 799 (9th Cir. 1982) (United States intervened in bankruptcy court under § 2403 to defend against as-applied challenge). Accordingly, Plaintiffs' as-applied challenge to San Diego County's implementation of the "good cause" requirement of sections 26150 and 26155 is, by itself, sufficient to confer a right upon the State to intervene under Rule 24(a)(1) and § 2403 for the purpose of defending the constitutionality of these state statutes.

Moreover, although the Court's opinion may not directly "rul[e] on the constitutionality of state statutes," slip op. 56 n.19, its reasoning "draw[s] in question" the entire state statutory scheme governing the public carrying of firearms and invalidates a broad swath of heretofore permissible applications of these statutes. 28 U.S.C. § 2403. The Court holds that the Second Amendment secures the right to bear arms in public places, which "require[s] that the states permit *some form* of carry [i.e., either open- or concealed-

carry] for self-defense outside the home." Slip op. 55. Thus, the Court holds that because California generally bans open carrying, *see* Cal. Penal Code §§ 25850, 26350, the Second Amendment requires the State to permit otherwise-qualified individuals to carry concealed weapons in public for the purpose of self-defense. Slip op. 47-52. Further, it holds that any statutory requirement of "good cause" for a concealed-carry license cannot, under the Second Amendment, require anything more than an asserted desire to carry a gun in public for self protection. *Id.* These holdings, in a precedential opinion, necessarily call into question the State's statutory scheme governing the public carrying of concealable weapons. Accordingly, the State may intervene as of right under Rule 24(a)(1).

B. The State Has a Significant Interest in This Action That Will Not Be Protected by Existing Parties.

The State also is entitled to intervene as of right under Rule 24(a)(2), because the State has a significant interest in this case that is not adequately represented by existing parties. Rule 24(a)(2) provides that

> On timely motion, the court must permit anyone to intervene who:
>
> * * *
>
> (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical

> matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Fed. R. Civ. P. 24(a)(2).

To intervene under Rule 24(a)(2), the applicant must show that (1) "it 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 (4) "the existing parties may not adequately represent . . . [its] interest." *Day*, 505 F.3d at 965. In determining whether intervention is appropriate, "courts are guided primarily by practical and equitable considerations, and the requirements for intervention are broadly interpreted in favor of intervention." *United States v. Alisal Water Corp.*, 370 F.3d 915, 919 (9th Cir. 2004). This "liberal policy in favor of intervention serves both efficient resolution of issues and broadened access to the courts." *United States v. City of Los Angeles*, 288 F.3d 391, 397-98 (9th Cir. 2002). Indeed, "[b]y allowing parties with a *practical* interest in the outcome of a particular case to intervene, we often prevent or simplify future litigation involving related issues; at the same time, we allow an additional interested party to express its views before the court." *Id.* at 398.

Here, the State satisfies all four requirements of Rule 24(a)(2). First, the State has several "significant protectable interests" that are implicated by the Court's opinion, including the State's interests in upholding the constitutionality of its statutes governing the public carrying of firearms; in preserving and protecting public safety through the reasonable regulation of public carrying; and in protecting the discretion statutorily afforded to local licensing officials to determine the appropriate "good cause" standards for issuing concealed-carry permits in their respective locales. *See* Cal. Penal Code §§ 25850, 26150, 26155, 26160, 26350; *see also* Cal. Const. art. V, § 13 ("The Attorney General shall have direct supervision over every . . . sheriff . . . in all matters pertaining to the duties of their respective offices . . . ."). These interests satisfy the "significant protectable interests" test, which requires only "an interest that is protected under some law," and a "relationship" between that interest and the claims at issue. *City of Los Angeles*, 288 F.3d at 398. Moreover, "[t]he 'interest' test is not a clear-cut or bright-line rule, because '[n]o specific legal or equitable interest need be established.'" *Id.* "Instead, the 'interest' test directs courts to make a 'practical, threshold inquiry,' and 'is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process.'" *Id.* (citation omitted).

Second, the Court's opinion directly impairs the State's ability to protect these interests, as it calls into question the imposition of any meaningful "good cause" requirement for concealed carrying under the State's current statutory scheme. *See Day*, 505 F.3d at 965 (where an applicant seeks to intervene on appeal post-decision, the second prong of the Rule 24(a)(2) analysis may be satisfied by the opinion's "precedential impact" on the applicant's interest); *Green v. United States*, 996 F.2d 973, 977 (9th Cir. 1993) ("Intervention may be required when considerations of *stare decisis* indicate that an applicant's interest will be practically impaired.").

Third, the State's motion to intervene is timely. *See infra*, Part I.C.

Finally, the existing parties will not protect the State's interests in this case. The only existing Defendants-Appellees have publicly stated that they will not file a petition for rehearing en banc. *See Day*, 505 F.3d at 965 ("The unwillingness of the [parties] . . . to petition for rehearing, means that the [proposed intervenor's] interest is not adequately protected at this stage of the litigation."). Accordingly, the State is entitled to intervene as of right under the standards of Rule 24(a)(2).

C. The State's Motion to Intervene Is Timely Under the Circumstances of This Case.

The State's motion to intervene is also timely. The State is seeking to intervene just fourteen days after the issuance of a panel opinion calling into question the constitutionality of state statutes. This motion is also filed just six days after the only existing Defendants-Appellees announced that they would not petition for rehearing or rehearing en banc, so that there is no existing party that can represent the State's interest in this case.

Intervention may be permitted at any time, and the timeliness of a motion to intervene is assessed by considering "(1) 'the stage of the proceeding,' (2) 'the prejudice to other parties,' and (3) 'the reason for and length of the delay.'" *Day*, 505 F.3d at 965.

Each of these factors indicates that the State's motion in this case is timely. First, the State's intervention at this stage of the proceedings is appropriate under the circumstances of this case, where the Court's opinion would decide issues of exceptional importance to the State and the existing parties have declined to pursue further review. Indeed, the State's proposed intervention here is almost identical to the post-decision intervention that this Court granted the State of Hawai'i in *Day*. *See Day*, 505 F.3d at 964-66 (granting Hawai'i's motion to intervene post-decision in order to petition for

rehearing en banc because the panel's opinion impacted the State and the parties declined to seek further review).

Second, Plaintiffs will not be prejudiced if the State is allowed to intervene. The prejudice inquiry asks only whether the other parties will be prejudiced "from granting the motion *at this time rather than earlier*." *Day*, 505 F.3d at 966 (emphasis added). Here, as in *Day*, Plaintiffs will not be prejudiced because the State's intervention "will not create delay by 'inject[ing] new issues into the litigation,' but instead will ensure that [the court's] determination of an already existing issue is not insulated from review simply due to the posture of the parties." *Id.* at 965 (citation omitted); *see also id.* (finding no prejudice from the timing of intervention because "the practical result of [the State's] intervention—the filing of a petition for rehearing—would have occurred whenever the state joined the proceedings").

Third, the State's delay in seeking to intervene is reasonable, as there was no compelling reason for the State to directly intervene prior to the majority's sweeping decision, as the State only learned that its interests in this case could not be protected without intervention on February 21, 2014, when Defendants-Appellees announced that they would not seek further review. "In measuring any delay in seeking intervention, the inquiry looks

to when the intervenor first became aware that its interests would no longer be adequately protected by the parties." *San Jose Mercury News, Inc. v. United States Dist. Court - N. Dist.*, 187 F.3d 1096, 1101 (9th Cir. 1999); *see also Day*, 505 F.3d at 965 (stating that the "mere lapse of time, without more, is not necessarily a bar to intervention"); *United States v. Oregon*, 745 F.2d 550, 551-53 (9th Cir. 1984) (holding that a State could intervene in district court proceedings as of right fifteen years after the proceedings began).

Finally, even if the Court were to determine that the State should have intervened earlier, any such concerns should be outweighed by the consequences of denying the State's motion to intervene at this stage of this exceptionally important case. *See Day*, 505 F.3d at 966 ("[E]ven though Hawaii could have and should have intervened earlier, we will not foreclose further consideration of an important issue because of the positions of the original parties, despite the long term impact on the State of Hawaii."). Here, as in *Day*, 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." *Id.*

II. THE STATE ALSO SHOULD BE PERMITTED TO INTERVENE UNDER RULE 24(B)

In the alternative, the State of California should be permitted to intervene under the standards of Rule 24(b) because of the vital state interests that are at now at stake in this litigation.

Rule 24(b) grants courts broad discretion to allow permissive intervention under appropriate circumstances, providing that "[o]n timely motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1). Generally, permissive intervention under Rule 24(b) requires "(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).

The State meets all of these requirements. First, the jurisdictional requirement is satisfied because this case raises a federal question and the State is not raising any new claim. *See Freedom from Religion Found., Inc. v. Geithner*, 644 F.3d 836, 844 (9th Cir. 2011) ("We . . . clarify that the independent jurisdictional grounds requirement does not apply to proposed

intervenors in federal-question cases when the proposed intervenor is not raising new claims.").

Second, for the reasons set forth in Part I.C above, the State's intervention is timely. *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1308 (9th Cir. 1997) ("In determining timeliness under Rule 24(b)(2), we consider precisely the same three factors . . . that we have just considered in determining timeliness under Rule 24(a)(2).").

Third, there are common questions of law and fact. The State seeks to intervene precisely because the holding and reasoning of the panel majority's opinion have broad potential implications for the State's ability to defend and enforce existing state law in proceedings involving any city or county in the State.

Finally, the Court should exercise its equitable discretion to permit the State to intervene under Rule 24(b) because this case presents issues of exceptional importance to the State that existing parties cannot or will not adequately protect. Accordingly, the Court should permit the State to intervene.

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CONCLUSION

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

Respectfully submitted,

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February 27, 2014

9th Circuit Case Number(s) 10-56971

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