No. 10-56971

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EDWARD PERUTA, et al.,
Appellants

v.

COUNTY OF SAN DIEGO, et al.,
Appellees

On Appeal from the United States District Court for the Southern District of California, No. 09-CV-2371 (Gonzalez, J.)

BRIEF OF *AMICUS CURIAE* THE LAW CENTER TO PREVENT GUN VIOLENCE IN SUPPORT OF CALIFORNIA ATTORNEY GENERAL KAMALA HARRIS' PETITION FOR REHEARING OR REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, the Law Center to Prevent Gun Violence states that it has no parent corporations. It has no stock, and therefore no publicly held company owns 10% or more of its stock.

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INTEREST OF *AMICUS CURIAE*

Amicus the Law Center to Prevent Gun Violence (the "Law Center") is a national law center dedicated to preventing gun violence.[1] Founded after an assault weapon massacre at a San Francisco law firm in 1993, the Law Center provides legal and technical assistance in support of gun violence prevention. The Law Center tracks and analyzes federal, state, and local firearms legislation, as well as legal challenges to firearms laws. The Law Center filed an *amicus* brief in support of San Diego County in this case, and has also provided informed analysis as an *amicus* in a variety of other firearm-related cases, including *District of Columbia v. Heller* and *McDonald v. City of Chicago*.

INTRODUCTION

On February 13, 2014, a divided panel of this Court ruled that the Second Amendment requires every state in this Circuit to issue a permit to carry a hidden, loaded gun in public to virtually anyone who wants one. The panel's drastic expansion of the Second Amendment right is unprecedented in American history and contradicts the decisions of the Supreme Court, this Court, and at least four other circuits. The decision goes far beyond the original subject matter of the

[1] Counsel to the parties have consented to the filing of this brief. The Law Center was formerly known as Legal Community Against Violence. *Amicus* affirms, pursuant to Fed. R. App. P. 29(c)(5), that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission.

case—the manner in which the Sherriff of the County of San Diego exercised his discretion in granting concealed carry licenses—and, instead, holds that *any* interpretation of "good cause" under the California concealed-carry permit scheme that requires more than the bare assertion of a desire to carry a loaded gun in public for self-defense is "per se invalid[]." *See Peruta v. County of San Diego*, 742 F.3d 1144, 1167-70 (9th Cir. 2014).

The panel's decision transformed what had been a discrete challenge to the policies of one California county into a referendum on California's entire concealed-carry statutory scheme. Justifiably concerned about the far-reaching consequences of the panel's decision, the State of California sought to intervene and defend the constitutionality of its laws. Intervention is particularly critical in this case as the named Defendant, the Sheriff of San Diego County, announced that he would not seek rehearing of the panel's decision—that is, he would not continue to defend the constitutionality of the County's policies or (as implicated by the panel's decision) the constitutionality of California's laws.

On November 12, 2014, the again-divided panel issued a published order denying the State of California's motion to intervene. Both Judge Thomas' dissent from the panel's decision and the State of California's petition seeking rehearing of that decision aptly explain how the panel's decision conflicts with both the Federal Rules of Civil Procedure and controlling circuit precedent. For the reasons

discussed in those papers, California's petition for rehearing should be granted and this Court should rule that California may intervene. The Law Center submits this *amicus* brief to provide additional context concerning the importance of this issue to the State of California, both in terms of its right to defend its laws from constitutional attack as well as the practical realities of permitting the split-panel's decision to stand unchallenged by the State.[2]

ARGUMENT

I. Intervention by the State of California Is Particularly Warranted Here, Where the Law at Issue Arises From the Core of the State's Police Power, and Where Similar Laws Have Been Upheld for Centuries.

While the State of California should be permitted to intervene to defend the constitutionality of any of its laws, it has a uniquely strong justification to intervene to defend laws that arise from the "core" of its police power, like the regulation of firearms. As the U.S. Supreme Court has recognized, states are generally afforded "great latitude" in exercising "police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons."

[2] *Amicus* recognizes that the Court has now sought briefing on whether the Court should consider the panel's February 13, 2014 decision *en banc* and respectfully suggests that the Court should do so, given the important issues implicated by the panel's divided decision. *Amicus* also recognizes that there are other pending proceedings that would allow the Court to revisit *en banc* the divided panel's sweeping merits decision in this case. *See Baker v. Kealoha*, No. 12-16258; *Richards v. Prieto*, No. 11-16255. Regardless of the procedural avenue taken by the panel or the *en banc* Court, *Amicus* respectfully suggests that the Court should revisit the merits in this case, with California participating as a party to defend the constitutionality of its statutory scheme.

Gonzales v. Oregon, 546 U.S. 243, 270 (2006) (internal quotations and citation omitted); *see Kelley v. Johnson*, 425 U.S. 238, 247 (1976) ("promotion of safety of persons and property is unquestionably at the core of the State's police power"). "It is a well-recognized function of the legislature in the exercise of the police power to restrain dangerous practices and to regulate the carrying and use of firearms and other weapons in the interest of the public safety." *People v. Seale*, 274 Cal. App. 2d 107, 113 (1969).

The long history of courts upholding the constitutionality of concealed-carry laws also weighs in favor of permitting California to fully defend its statutory scheme in this case. For over two centuries, states have passed laws that ban the concealed carry of firearms and, to the extent such prohibitions have been challenged in court, they have overwhelmingly survived constitutional review. As *Heller* recognized, "the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues." *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008); *see also, e.g.*, *Aymette v. State*, 21 Tenn. 154, 159 (1840) (legislature must be able to "protect our citizens from . . . being endangered by desperadoes with concealed arms"); *State v. Reid*, 1 Ala. 612, 616 (1840) (concealed carry ban "dictated by the safety of the people and the advancement of public morals").

In light of this history, the divided panel's decision should not escape challenge by the State of California before it is put into effect. California has a substantial interest in defending the constitutionality of its laws, especially those that have historically been upheld as legitimate exercises of state governments' core legislative powers. The Court should permit the State of California to intervene.

II. California Should Be Permitted to Intervene to Help Resolve The Confusion Among California Counties that Has Resulted from the Split-Panel's Rulings.

There is also a particular reason here why the State of California should be allowed to intervene in the Court's further consideration of this case. As noted above, there is a tension between the divided panel's decision on the merits, which ruled any meaningful "good cause" requirement for receipt of a concealed carry permit to be "per se" invalid, *see Peruta*, 742 F.3d at 1170, and the panel's order denying California's petition to intervene on the ground that it did "not technically 'draw[] into question' any California statute," *see* Order 8-12. This tension highlights the uncertainty created by the divided panel's merits decision. California counties not directly involved in this litigation are understandably confused by the status of their practices for issuing concealed-carry permits in the wake of the panel's rulings. Sheriff's offices in eight counties aside from San Diego have issued press releases or published information on their websites that

discuss the panel's decision. Some sheriffs apparently feel bound to follow the panel's decision pending further proceedings, while others treat the panel's decision as not final at this time.[3]

For example, the Orange County Sheriff's Department has updated its website to explain that, given the split-panel's decision, it will accept applications with 'self-defense or personal safety' assertions as sufficient good cause, but that it may require supplementation if the "panel decision is withdrawn by a decision to

[3] Los Angeles County Sheriff's Department, Concealed Weapon Application (Feb. 20, 2014), http://sheriff.lacounty.gov/wps/portal/lasd/!ut/p/b0/04_SjzSzMDa0MLM0M9OP0I_KSyzLTE8syczPS8wB8aPM4i0NDAzcZ2CjdzNfC0NPJ1DzLzDTAIM_UPM9HOjHBUB9fuAmA!!/?1dmy&page=dept.lac.lasd.home.newsroom.detail.hidden&urile=wcm%3Apath%3A/lasd+content/lasd+site/home/home+top+stories/concealed+weapon+application (last visited Dec. 3, 2014); Orange County Sheriff's Dep't, CCW License, http://ocsd.org/about/info/services/ccw (last visited Dec. 3, 2014); Press Release: Sheriff Sniff's Observations on the Recent 9th Circuit Peruta Decision, Riverside County, (Nov. 13, 2014, 4:30 PM) http://www.riversidesheriff.org/press/admin14-1113-1.asp (last visited Dec. 3, 2014); San Benito County Sheriff, Concealed Weapon Permits, http://sbso.us/concealed-weapons-permits (last visited Dec. 4, 2014); County of San Mateo, Office of the Sheriff, "Carry Concealed Weapon Permit (CCW) Peruta v San Diego County" (Mar. 5, 2014) http://www.smcsheriff.com/sites/default/files/downloads/CCW%20Peruta%20number%20public%20message.pdf (last visited Dec. 3, 2014); Santa Clara County Sheriff's Office, "Concealed Carry Permits (CCW)," (Nov. 20, 2014, 11:16 PM), http://www.sccgov.org/sites/sheriff/Pages/ccw.aspx (last visited Dec. 3, 2014); Santa Cruz County Sheriff's Office, "CCW Update," http://www.scsheriff.com/Portals/1/County/sheriff/CCW.pdf (last visited Dec. 4, 2014); County of Ventura, Ventura County Sheriff's Office, License to Carry Weapons Policy, http://www.vcsd.org/pdf/26160_CCW_policy_ammended030714.pdf (last visited Dec. 3, 2014)

rehear the case *en banc* in the Ninth Circuit Court of Appeals, or a stay is issued by the Ninth Circuit Court of Appeals or the United States Supreme Court."[4] Similarly, the Ventura County Sheriff's Department's website states that, "[f]or purposes of this policy in reference to good cause, a need for personal safety or self-defense is currently satisfactory, depending on the ultimate appellate outcome of Peruta v. County of San Diego."[5] Sheriffs in other counties such as Santa Cruz and San Mateo, in contrast, appear not to have changed their CCW policies, asserting that the *Peruta* panel's decision is not effective until mandate issues.[6]

This confusion and inconsistency among Sheriff's Departments strongly militates in support of granting the State of California's petition to intervene, which will allow the litigants and the Court to grapple more comprehensively with the state-wide implications of the split panel's decision on the merits. Permitting California the opportunity to participate in the resolution of the concealed-carry

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[4] Orange County Sheriff's Dep't, CCW License, http://ocsd.org/about/info/services/ccw (last visited Dec. 3, 2014).

[5] County of Ventura, Ventura County Sheriff's Office, License to Carry Weapons Policy, http://www.vcsd.org/pdf/26160_CCW_policy_ammended030714.pdf (last visited Dec. 3, 2014).

[6] *See* County of San Mateo, Office of the Sheriff, "Carry Concealed Weapon Permit (CCW) Peruta v San Diego County" (Mar. 5, 2014) http://www.smcsheriff.com/sites/default/files/downloads/CCW%20Peruta%20number%20public%20message.pdf (last visited Dec. 3, 2014); Santa Cruz County Sheriff's Office, "CCW Update," http://www.scsheriff.com/Portals/1/County/sheriff/CCW.pdf (last visited Dec. 4, 2014).

issue, either in this case or in *Richards v. Prieto*, No. 11-16255, is necessary and appropriate to a full and fair defense of the statute.

CONCLUSION

For the foregoing reasons, *Amicus* respectfully suggests that the Court grant the State of California's petition and rehear its petition for intervention.

Dated: December 8, 2014

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE

This brief complies with the type-volume limitation of 9th Cir. R. 29-2(c)(2), 32 and 35 because the brief does not exceed 15 pages, excluding material not counted under Fed. R. App. P. 32.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using MS-Word in 14-point Times New Roman font.

Date: December 8, 2014 s/ Simon J. Frankel

Attorney Name

CERTIFICATE OF SERVICE

I hereby certify that on December 8, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Signature: s/ Simon J. Frankel