No. 10-56971

In The United States Court of Appeals For The Ninth Circuit

EDWARD PERUTA, ET AL.
Plaintiffs-Appellants,

STATE OF CALIFORNIA,
Intervenor-Pending,

v.

COUNTY OF SAN DIEGO, ET AL.,
Defendants-Appellees.

Appeal from a Judgment of the United States District Court
for the Southern District of California
Hon. Irma E. Gonzalez
(CV-09-02371-IEG)

BRIEF OF ADAM RICHARDS, BRETT STEWART, SECOND AMENDMENT FOUNDATION, INC., AND THE CALGUNS FOUNDATION, INC., AS *AMICI CURIAE* IN OPPOSITION TO REHEARING EN BANC

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December 24, 2014

CORPORATE DISCLOSURE STATEMENT

The Second Amendment Foundation, Inc., and the Calguns Foundation, Inc., have no parent corporations. No publicly traded company owns 10% or more of *amici* corporations' stock.

Dated: December 24, 2014

Respectfully submitted,

Second Amendment Foundation, Inc.
The Calguns Foundation, Inc.
Amici Curiae

By: /s/ Alan Gura
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INTERESTS OF AMICI CURIAE[1]

Amici Curiae are the Appellants in the related case of *Richards* v. *Prieto*, No. 11-16255. Adam Richards and Brett Stewart, each barred from carrying handguns for self-defense by Yolo County Sheriff Ed Prieto for purported lack of "good cause," are joined by two organizations possessing substantial expertise in the Second Amendment field. The Second Amendment Foundation, Inc. ("SAF"), a non-profit educational foundation, seeks to preserve the effectiveness of the Second Amendment through educational and legal action programs. SAF has over 650,000 members and supporters residing in every State of the Union, including thousands in California.

Among its Second Amendment cases, SAF organized, and prevailed, in *McDonald* v. *City of Chicago*, 561 U.S. 742 (2010); *Moore* v. *Madigan*, 702 F.3d 933 (7th Cir. 2012); and *Palmer* v. *District of Columbia*, No. 09-CV-1482, 2014 U.S. Dist. LEXIS 101945 (D.D.C. July 24, 2014), *appeal pending*, No. 14-7180 (D.C. Cir. filed Nov. 17, 2014).

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[1]No party's counsel authored this brief in whole or in part. No party, party's counsel, or any other person other than *amici*, their members, and counsel, contributed money intended to fund preparation and submission of this brief.

The Calguns Foundation, Inc., is a non-profit organization dedicated to promoting education for all stakeholders about California and federal firearm laws, rights and privileges; and defending and protecting the civil rights of California gun owners.

In *Richards*, *amici* successfully challenged Yolo County, California's handgun carry license policies, which are, for all intents and purposes, practically identical to San Diego County's policies at issue in this case. *Richards* was argued immediately following argument in this case, to the same panel, which decided both cases along the same lines.

Unlike Appellee Gore, *Richards* Appellee Sheriff Prieto timely filed a petition for rehearing en banc, and appears committed to defending his restrictive "good cause" policy. Significantly, although the panel did not reach the matter, the operative complaint in *Richards* requests alternative relief declaring Cal. Penal Code § 26150's "good cause" requirement unconstitutional. See No. 11-16255 ER Vol. II at 71, Prayer for Relief, ¶ 2.[2]

[2]The Complaint references former Cal. Penal Code §12150, where the provision was then codified.

Following the filing of *amici*'s opposition to the *Richards* en banc petition, the panel stayed further proceedings in that matter pending this case's resolution. Sheriff Prieto has moved, with *amici*'s consent, to lift that stay. Moreover, the State of California has suggested that it would seek intervention in *Richards*, which it views as a suitable vehicle for en banc review of the matters decided by the panel here.

AUTHORITY TO FILE

The Court authorized the filing of amicus briefs. Order, Dkt. 161.

INTRODUCTION

Given that this case began as a carbon copy of *Richards*, all the reasons counseling denial of the petition to rehear *Richards* en banc apply equally well here. But the Court faces a more essential difficulty in rehearing the instant case: it might well lack jurisdiction to do so.

The strongest desire to continue this litigation cannot overcome the basic jurisdictional defects arising from Appellee Gore"s refusal to pursue the matter further. Indeed, the heroic efforts to resuscitate this case, with its reluctant Appellee, sleeping putative intervenors, and multi-layered en banc proceedings is mystifying considering the ready availability of a proper straightforward vehicle lacking these problems.

This Court "has a special obligation to satisfy itself . . . of its own jurisdiction . . . even though the parties are prepared to concede it." *Breed* v. *Hughes Aircraft Co.*, 253 F.3d 1173, 1177 (9th Cir. 2001) (quoting *Bender* v. *Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986)). Over and over again, including in landmark cases arising from this Court, the Supreme Court has held that intervenors seeking to perpetuate a case on appeal in lieu of an original party must demonstrate that jurisdiction persists. While neither the State nor the Brady Campaign can independently establish an Article III case or controversy—indeed, the State's briefing barely addresses jurisdiction at all—Appellants' argument that the original Article III controversy involving Sheriff Gore remains live is correct in light of Gore's subsequent representations to this Court.

But the parties have left unaddressed the critical distinction between "the jurisdictional requirements of Article III and the prudential limits on its exercise." *United States* v. *Windsor*, 133 S. Ct. 2675, 2685 (2013) (citing *Warth* v. *Seldin*, 422 U.S. 490, 498 (1975)).

> Even when Article III permits the exercise of federal jurisdiction, prudential considerations demand that the Court insist upon "that concrete adverseness which sharpens the presentation of issues

> upon which the court so largely depends for illumination of difficult constitutional questions."

Id. at 2687 (quoting *Baker* v. *Carr*, 369 U.S. 186, 204 (1962)).

The putative intervenors would doubtless be "concretely adverse" to Appellants, in the sense that they would forcefully resist Appellants' efforts. But "motivation is not a substitute" for the sort of sharpening established by an actual injury, and "evaluation of the quality of the presentation on the merits [is] a retrospective judgment that could . . . properly be[] arrived at only after standing [is] found so as to permit the court to consider the merits." *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 226 (1974). Intervenors are simply not "concretely adverse" to any San Diego County resident in the sense needed to sharpen the presentation of issues relating to Gore's policy. Issuance of a license per Gore's view of "good cause" is not a ministerial act, but a discretionary one, and neither would-be intervenor can authoritatively answer questions about the manner in which Gore exercises that discretion.

These issues might not arise immediately, should Gore actively participate in en banc proceedings. But that prospect appears unlikely, considering Gore's terse, one page responsive brief. See Dkt. 179-1.

Notwithstanding the fact that the panel based its decision on inadequacies it found in Gore's policy, disclaiming any intent to reach the constitutionality of California's "good cause" statute, Gore perceives any further proceedings as relating only to the statutory scheme's constitutionality—a topic on which he apparently takes no position. *Id.*; see also Response to Order of March 5, 2014, Dkt. 149 ("My client has directed me not to file anything further in this appeal."). This is not a posture likely to sharpen the presentation of issues relating to the challenged licensing policy.

Moreover, this Court could not compel Gore to petition for certiorari from another adverse ruling. And regardless of who might petition for certiorari, the en banc panel's work might prove to be for naught should this case reach the Supreme Court, as it apparently would, absent Gore's active participation.

This Court should continue paying meticulous attention to jurisdictional concerns. Notwithstanding this Court's expenditure of significant judicial resources, and the high degree of public interest, the Supreme Court twice vacated decisions in cases perpetuated on appeal by intervenors who either lacked Article III standing, *Hollingsworth* v.

Perry, 133 S. Ct. 2652 (2013), or whose standing was in "grave doubt," *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 66 (1997). The Supreme Court's "obligation to notice defects in a court of appeals' subject-matter jurisdiction assumes a special importance when a constitutional question is presented." *Bender*, 475 U.S. at 541-42. The Supreme Court is apparently policing its docket for vehicle problems more aggressively, relisting cases repeatedly before granting certiorari.[3]

Accordingly, this Court should not waste additional resources, let alone to the degree required to overcome two comprehensive panel opinions, only to produce an outcome potentially afflicted with a jurisdictional defect. As the State notes, this Court has a perfectly adequate defect-free vehicle for reviewing the panel decision en banc were it so inclined, and for safeguarding the Supreme Court's ability to effectively review whatever decision this Court ultimately reaches concerning the issues raised in this litigation.

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[3]See John Elwood, *Relist Watch: What Does the Court's Relist Streak Mean?*, SCOTUSblog (Apr. 23, 2014, 11:50 AM), http://www.scotusblog. com/2014/04/relist-watch-what-does-the-courts-relist-streak-mean/

ARGUMENT

I. INTERVENORS ON APPEAL MUST ESTABLISH ARTICLE III STANDING.

"[F]or a federal court to have authority under the Constitution to settle a dispute, the party before it must seek a remedy for a personal and tangible harm. 'The presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Art. III's requirements.'" *Hollingsworth*, 133 S. Ct. at 2661 (quoting *Diamond* v. *Charles*, 476 U.S. 54, 62 (1986)). "Article III demands that an 'actual controversy' persist throughout all stages of litigation." *Id.* (quotation omitted). "That means that standing 'must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance.'" *Id.* (quoting *Arizonans*, 520 U.S. at 64).

Accordingly, "an intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art. III." *Diamond*, 476 U.S. at 68 (citations omitted). "Standing to defend on appeal in the place of an original defendant, no less than standing to sue, demands that the litigant possess 'a direct stake in the outcome.'" *Arizonans*, 520 U.S. at 64 (quotation omitted).

"An intervenor cannot step into the shoes of the original party unless the intervenor independently 'fulfills the requirements of Article III.'" *Id.* (quoting *Diamond*, 476 U.S. at 68). While courts are split as to whether intervenors must establish independent standing where standing otherwise exists, see *Prete* v. *Bradury*, 438 F.3d 949, 955 n.8 (9th Cir. 2006) (collecting cases), intervenors must generally establish standing to displace a party. See, *e.g.*, *San Luis & Delta-Mendota Water Auth.* v. *Jewell*, 747 F.3d 581, 645 n.49 (9th Cir. 2014); *Western Watersheds Project* v. *Kraayenbrink*, 632 F.3d 472, 482 (9th Cir. 2011); *Cal. Dep't of Soc. Servs.* v. *Thompson*, 321 F.3d 835, 845-46 (9th Cir. 2003); *Beck* v. *United States Dep't of Commerce*, 982 F.2d 1332, 1337-38 (9th Cir. 1992).

II. APPELLEE GORE SUPPLIES THE ONLY SOURCE OF CONTINUING ARTICLE III JURISDICTION.

Gore's continuing refusal to issue permits supplies Article III jurisdiction notwithstanding his refusal to participate in the case. *Windsor*, 133 S. Ct. at 2686-87; *INS* v. *Chadha*, 462 U.S. 919 (1983). But it still merits observation that neither would-be intervenor has independent standing. As *amici* noted in opposing the petition for

rehearing en banc in *Richards*, the State has strenuously argued that no one has standing to sue it as part of disputes arising from a Sheriff's "good cause" policies. The issue might even be one of judicial estoppel, considering that California's Attorney General and Firearms Director both obtained dismissal from a previous "good cause" challenge for lack of standing. *Mehl* v. *Blanas*, No. Civ. S. 03-2682, Dkt. 17 (E.D.Cal. Sep. 3, 2004), *aff'd*, 532 Fed. Appx. 752 (9th Cir. 2013). See Opp'n to Pet. for Reh'g En Banc 15-19, *Richards* v. *Prieto*, No. 11-16255.

As the State once argued:

> [A]ppellants' applications for CCW licenses were denied by [the Sheriff], not the Attorney General. Accordingly, appellants . . . cannot establish federal jurisdiction to litigate the constitutionality of the CCW licensing statutes against the Attorney General.

Brief for Attorney General Lockyer, *Mehl* v. *Blanas*, No. 08-15773, Dkt. 16, at 1-2 (footnote omitted).[4] "[T]he Attorney General has no statutory authority to grant, deny or revoke CCW licenses. Only sheriffs and chiefs of police are authorized to perform these functions." *Id.* at 41 (citation omitted). While the State may be heard to defend its laws,

> [t]his Court has been very clear that suits cannot be brought in federal court against an attorney general to challenge the validity of

[4]Plaintiffs had dismissed an appeal against the Firearms Director.

> statutes that he has no authority to enforce because there is no Article III jurisdiction and because the action would be barred by the Eleventh Amendment.

Id. at 41-42.

> Since only sheriffs and chiefs of police have authority under the CCW statutes to grant, deny or revoke licenses, Applicants cannot establish Article III jurisdiction over the Attorney General with regard to their facial challenges to the validity of the statutes . . . .

Id. at 42.

> Applicants' alleged harm comes from exercise of prerogatives vested by law in the Sheriff exclusively, and thus the only effective remedy for any ostensible deprivation of rights would have to be directed to the Sheriff.

Id. at 43-44.

Amici do not question the legitimacy of Brady's feelings about this topic, but "the fact remains that a federal case is a limited affair, and not everyone with an opinion is invited to attend." *Mausolf* v. *Babbitt*, 85 F.3d 1295, 1301 (8th Cir. 1996).

> We have repeatedly held that . . . a "generalized grievance," no matter how sincere, is insufficient to confer standing. A litigant "raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy."

Hollingsworth, 133 S. Ct. at 2662 (quotation omitted). To be sure,

Brady's members are afraid of guns, and would prefer that others not carry handguns for self-defense. But mere discomfort with one's neighbor is not an Article III injury akin to an environmental hazard.

The science is settled that exposure to radiation and toxic waste is harmful, but whether liberalizing handgun carry laws makes for good or bad public policy remains the subject of intense debate among criminologists. Considering the extremely low crime rates of licensed handgun carriers, it is speculative and conjectural, in the extreme, for Brady members to suppose that they might be shot by a trained and licensed gun carrier.[5] This Court cannot *assume* that Brady's members would be injured by the exercise of Second Amendment rights. The Second Amendment does not "require judges to assess the costs and benefits of firearms restrictions and thus to make difficult empirical judgments in an area in which they lack expertise." *McDonald*, 561 U.S. at 790-91. For their part, Appellants and *amici* filed suit not to

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[5]Cf. *Dickens* v. *Ryan*, 688 F.3d 1054, 1085 (9th Cir. 2012) (Reinhardt, J., dissenting) ("Carrying a gun, which is a Second Amendment right . . . cannot legally lead to a finding that the individual is likely to murder someone; if it could, half or even more of the people in some of our states would qualify as likely murderers"), *vacated*, 704 F.3d 816 (2013).

prosecute their abstract, optimal public policy visions, but to secure an enumerated right.

A good way to test Brady's purported standing is to ask whether the group would have standing to bring suit against the laws of 44 states that enable "shall issue" handgun carrying, or the policies of those California Sheriffs and Police Chiefs who liberally issue concealed carry permits. Of course not. Any court would recognize such lawsuits as nothing more than the assertion of a generalized grievance.

"Article III standing 'is not to be placed in the hands of 'concerned bystanders,' who will use it simply as a 'vehicle for the vindication of value interests.'" *Hollingsworth*, 133 S. Ct. at 2663 (quoting *Diamond*, 476 U. S., at 62). "No matter how deeply committed" Brady "may be to upholding" Gore's policies, "or how zealous [their] advocacy, that is not a 'particularized' interest sufficient to create a case or controversy under Article III." *Id.* (quotation and citations omitted).

Thus, even were intervention allowed, Article III jurisdiction would remain only by virtue of Appellants' dispute with Gore. As neither intervenor has a personal stake in the outcome, the Court should pay meticulous attention to prudential standing concerns.

III. PRUDENTIAL CONCERNS COUNSEL AGAINST EXERCISING FURTHER JURISDICTION IN THIS CASE.

Each California handgun carry licensing authority determines its own policies. Cal. Penal. Code § 26160. Only Gore can authoritatively explain how he interprets and applies his policy at issue in this case. Neither prospective intervenor is in the business of issuing concealed handgun carry licenses, in San Diego County or elsewhere, nor do they have any experience doing so. But Gore is plainly not committed to meaningfully, let alone vigorously, participating any further in this litigation. If his latest one page brief is any indication, Gore may not even agree that his policy is truly at issue.

The issues in this case are simply too important to be decided absent the engaged participation of someone who is actually responsible for licensing the carrying of handguns, preferably, someone responsible for administering the policies at issue. This is a textbook case in which the Court should "insist upon that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Windsor*, 133 S. Ct. at 2687 (quotation omitted). When the Supreme Court heard a Second Amendment case argued by only one side, it led to decades of confusion,

and consensus only that the matter could have been more clearly determined. See *United States* v. *Miller*, 307 U.S. 174 (1939).

A "[c]oncrete injury . . . adds the essential dimension of specificity to the dispute . . . ." *Schlesinger*, 418 U.S. at 220-21.

> This personal stake is what the Court has consistently held enables a complainant authoritatively to present to a court a complete perspective upon the adverse consequences *flowing from the specific set of facts undergirding his grievance*. Such authoritative presentations are an integral part of the judicial process, for a court must rely on the parties' treatment of the facts and claims before it to develop its rules of law. Only concrete injury presents the factual context within which a court, *aided by parties who argue within the context*, is capable of making decisions.

Id. at 221 (emphasis added); see also *id.* n.10 (contrasting "inherently general" "legislative function" with judicial function "responsive to adversaries asserting specific claims or interests peculiar to themselves").

Indeed, this may well be a case in which the prospective intervenors are *too* adverse. The policies at issue may be restrictive, but they are not apparently absolute. "Sheriff Harris" or "Sheriff Brady" might well pursue very different policies.

If the panel's holding is to be revisited en banc, it might as well be revisited within the context of a truly concrete dispute between parties

with an actual stake in the litigation: *amici* and Sheriff Prieto, who has already moved for rehearing en banc and remains committed to defending his policy, which he apparently accepts as being at issue before this Court.

The availability of alternative vehicles is a factor to be considered in weighing prudential standing. For example, in *Windsor*, the Supreme Court found prudential standing in part because dismissing the case would leave the district courts "without precedential guidance . . . Rights and privileges of hundreds of thousands of persons would be adversely affected, pending a case in which all prudential concerns about justiciability are absent." *Windsor*, 133 S. Ct. at 2688.

In contrast, bypassing rehearing in this case, with all of its prudential difficulties, would not deprive this circuit's district courts and populace of relevant precedent. As the State offers, *Richards* "present[s] essentially the same legal issue," and "this Court could appropriately use either case as a vehicle for en banc review." Pet. for Reh'g or Reh'g En Banc, Dkt. 157-1, at 2. "[R]eview could come either in this case or in *Richards v. Prieto*, No. 11-16255." *Id.* at 10 (citation

omitted); see also Br. Amicus Curiae Law Center to Prevent Gun Violence, Dkt. 162, at 3 n.2, 8.

And while the mandate in this case would obviously not issue were the case to be reheard, the refusal to rehear this case en banc would not compel the mandate's immediate issuance, if en banc proceedings in *Richards* might impact the validity of the panel's holding. See *Henry* v. *Ryan*, 766 F.3d 1059, 1062-67 (9th Cir. 2014) (en banc) (W. Fletcher, J., concurring).

There is no guesswork as to whether the losing party in *Richards* would petition the Supreme Court, or whether complete Article III and prudential jurisdiction would persist at all phases of the litigation. And while *amici* maintain that the State cannot intervene in *Richards* so many years after having been indisputably given notice of the case, at least there is no dispute, unlike here, that the *Richards* complaint reaches the state law as well.

CONCLUSION

This Court has enough material to consider in evaluating the constitutionality of handgun carry licensing policies, without adding peculiar procedural complications and jurisdictional doubts that would

only jeopardize the validity of any en banc outcome. The panel correctly decided this case, and rehearing is unwarranted. But regardless of whether the panel's legal conclusions should be reconsidered, this case should end here, without rehearing en banc.

Dated: December 24, 2014

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CERTIFICATE OF COMPLIANCE
TYPE-VOLUME LIMITATIONS, TYPEFACE REQUIREMENTS,
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1. This brief complies with the type-volume limitation of Circuit Rule 29.2(c)(2) because this brief contains 3,428 words, excluding the parts of the brief excluded by Fed. R. App. P. 32(a)(7)(B)(iii).

2. 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 proportionately spaced typeface using WordPerfect X4 in 14 point Century Schoolbook font.

/s/ Alan Gura
Alan Gura
Counsel for Amici Curiae
Dated: December 24, 2014

CERTIFICATE OF SERVICE

On this, the 24th day of December, 2014, I served the foregoing Amicus Curiae Brief by electronically filing it with the Court's CM/ECF system, which generated a Notice of Filing and effects service upon counsel for all parties in the case.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this the 24th day of December, 2014

/s/ Alan Gura
Alan Gura