Nos. 10-56971 & 11-16255

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.

On Appeal from the
United States District Court for
the Southern District of California

Brief *Amicus Curiae* of Gun Owners of America, Inc., Gun Owners Foundation, U.S. Justice Foundation, The Lincoln Institute for Research and Education, The Abraham Lincoln Foundation for Public Policy Research, Inc., Policy Analysis Center, Institute on the Constitution, and Conservative Legal Defense and Education Fund in Support of Appellants and Reversal

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DISCLOSURE STATEMENT

The *amici curiae* herein, Gun Owners of America, Inc., Gun Owners Foundation, U.S. Justice Foundation, The Lincoln Institute for Research and Education, The Abraham Lincoln Foundation for Public Policy Research, Inc., Policy Analysis Center, Institute on the Constitution, and Conservative Legal Defense and Education Fund, through their undersigned counsel, submit this Disclosure Statement pursuant Federal Rules of Appellate Procedure 26.1, 29(c).

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INTEREST OF *AMICI CURIAE*[1]

Gun Owners of America, Inc., Gun Owners Foundation, U.S. Justice Foundation, The Lincoln Institute for Research and Education, The Abraham Lincoln Foundation for Public Policy Research, Inc., Policy Analysis Center, and Conservative Legal Defense and Education Fund are nonprofit organizations, exempt from federal taxation under sections 501(c)(3) or 501(c)(4) of the Internal Revenue Code. Institute on the Constitution is an educational organization. Each is dedicated, *inter alia*, to the correct construction, interpretation, and application of law. Several of these *amici* have filed *amicus curiae* briefs in other firearms-related and Second Amendment cases, including the following:

- U.S. v. Emerson, U.S.C.A. Fifth Cir., No. 99-10331 (Dec. 20, 1999)
- State of Wyoming v. U.S., District Court, Wyoming, No. 2:06-cv-00111-ABJ (Aug. 18, 2006)
- U.S. v. Stanko, U.S.C.A. Eighth Cir., No. 06-3157 (Nov. 2, 2006);
- Watson v. U.S., On Writ of Certiorari, U.S. Supreme Court, No. 06-571 (May 4, 2007);

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[1] All parties have consented to the filing of this brief *amicus curiae*. No party's counsel authored the brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief. No person other than these *amici curiae*, their members or their counsel contributed money that was intended to fund preparing or submitting this brief.

- State of Wyoming v. U.S., U.S.C.A. Tenth Cir., No. 07-8046 (Aug. 21, 2007);
- D.C. v. Heller, On Writ of Certiorari, U.S. Supreme Court, No. 07-290 (Feb. 11, 2008);
- U.S. v. Hayes, On Writ of Certiorari, U.S. Supreme Court, No. 07-608 (Sept. 26, 2008);
- Akins v. U.S., U.S.C.A. Eleventh Cir., No. 08-15640-FF (Nov. 26, 2008);
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- McDonald v. Chicago, On Writ of Certiorari, U.S. Supreme Court No. 08-1521 (Nov. 23, 2009);
- U.S. v. Skoien, U.S.C.A. Seventh Cir., No. 08-3770 (Apr. 2, 2010);
- Heller v. D.C., U.S.C.A. D.C. Cir., No. 10-7036 (July 30, 2010);
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- Abramski v. U.S., On Petition for Writ of Certiorari, U.S. Supreme Court, No. 12-1493 (July 25, 2013);
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- NRA v. BATFE, On Petition for Writ of Certiorari, U.S. Supreme Court, No. 13-137 (Aug. 30, 2013);
- Abramski v. U.S., On Writ of Certiorari, U.S. Supreme Court, No. 12-1493 (Dec. 3, 2013);
- U.S. v. Castleman, On Writ of Certiorari, U.S. Supreme Court, No. 12-1371 (Dec. 23, 2013);
- Drake v. Jerejian, On Petition for Writ of Certiorari, U.S. Supreme Court, No. 13-827 (Feb. 12, 2014);
- Shew v. Malloy, U.S.C.A. Second Cir., No. 14-319 (May 23, 2014);
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- Jackson v. City & County of San Francisco, U.S.C.A. Ninth Cir., No. 12-17803 (July 3, 2014);
- Heller v. D.C., U.S.C.A. D.C. Cir., No. 14-7071 (Sept. 9, 2014);
- Kolbe v. O'Malley, U.S.C.A. Fourth Cir., No. 14-1945 (Nov. 12, 2014);
- Henderson v. U.S., On Writ of Certiorari, U.S. Supreme Court, No. 13-1487 (December 15, 2014); and

- Jackson v. City & County of San Francisco, On Petition for Writ of Certiorari, U.S. Supreme Court, No. 13-765 (Jan. 15, 2015).

STATEMENT OF THE CASE

California law almost completely restricts the ability of "ordinary" Californians to carry firearms in public. *See* Peruta v. San Diego, 742 F.3d 1144, 1147 (2014). Concealed carry permits are processed under a "may issue" system,[2] in the discretion of the local sheriff or police chief. *Id.* at 6. As a practical matter, permits are rarely issued[3] and, even then, only to the rich,[4] politically powerful, and those associated with the government.[5] Previously,

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[2] "May issue" state laws grant discretion to government agents to issue permits to concealed carry applicants. In "shall issue" states, concealed carry permits must be issued if an applicant meets certain statutory criteria.

[3] As of 2012, California carry permits were in the hands of approximately 0.1 percent of its adult population. "Gun Control: States' Laws and Requirements for Concealed Carry Permits Vary Across the Nation," Government Accountability Office, GAO-12-717, July 2012, p. 75 http://www.gao.gov/assets/600/592552.pdf.

[4] *See* D. Codrea, "To Stallone and Schwarzenegger, Your Guns Are 'The Expendables,'" Examiner.com, August 12, 2010, http://www.examiner.com/article/to-stallone-and-schwarzenegger-your-guns-are-the-expendables.

[5] *See* Peruta Appellants' Opening Brief ("Peruta Br.") at 10-11; *see also* K. Picket, "Flashback: Sen. Dianne Feinstein Has Conceal Carry Permit," Brietbart.com, December 19, 2012, http://www.breitbart.com/big-government/2012/12/19/flashback-dianne-feinstein-s-own-conceal-carry-permit-story/.

California allowed a very limited exception for "unloaded open carry," whereby a person could (at some times and in some places) carry an unconcealed and unloaded firearm. However, during the pendency of this case, that too for the most part has been criminalized, thus prohibiting ordinary Californians from carrying handguns in public. *See* Cal. Penal Code 26350.

Several residents of San Diego County, California ("Peruta Plaintiffs") brought suit in federal district court, challenging the county's policies and practices requiring applicants to show "good cause" before they can obtain a permit. *See* Peruta, 758 F. Supp. 2d 1106, 1109 (2010). The Peruta Plaintiffs did not challenge the licensing of constitutional rights *per se*, seeking only to compel San Diego County to issue a permit based on a "self-defense" justification. Peruta Br. at 14-15. In a separate case, consolidated for *en banc* review, residents of Yolo County, California ("Yolo Plaintiffs") challenged that county's policy applying the "good cause" requirement to issue a license only to persons the Sheriff "feels" deserves one. *See* Yolo Appellants' Brief ("Yolo Br.") at 3-4, 8. The Yolo Plaintiffs, like the Peruta Plaintiffs, did not challenge the constitutionality of the licensing system itself, or "argue[] for a right to carry

handguns in, specifically, a concealed manner." Yolo Br. at 26 (emphasis added).

In federal district court, the Peruta Plaintiffs were unsuccessful. The district court applied "intermediate scrutiny" to the challenged policy, deciding that the right to bear arms must yield to the common good — the "government['s] important interest in reducing the number of concealed handguns in public…." Peruta v. San Diego, 758 F. Supp. 2d 1106, 1117 (S.D. Cal. 2010). A similar result obtained for the Yolo Plaintiffs, where the court opined "the scope of rights under the Second Amendment is ambiguous … subject to evolution over time." Richards v. County of Yolo, 821 F. Supp. 2d 1169, 1178 (E.D. Cal. 2011). On appeal, a panel of this Court determined that the counties' discretionary "may issue" policies violate the Second Amendment, reversing the district courts in both cases, and eventually leading to this Court granting rehearing *en banc*.

Despite the exhaustive briefing and analysis that these cases have received from the parties and courts, the central Second Amendment principle has gone unaddressed. This brief attempts to set out and apply the correct analytical framework for analyzing these Second Amendment challenges.

ARGUMENT

I. HELLER REQUIRES A CATEGORICAL AND HISTORIC TEXTUAL ANALYSIS IN ALL SECOND AMENDMENT CASES.

In District of Columbia v. Heller, 554 U.S. 570 (2008), the Supreme Court opened its opinion with a recitation of the text of the Second Amendment: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." *Id.* at 576. Unlike most constitutional cases, the Heller Court was writing on a nearly clean slate, drawing meaning from that text and its historical context, not just quoting the Amendment as a jumping-off point for a discussion and application of prior precedents.

At issue in every Second Amendment case is application of the Amendment's operative clause, identifying (i) a protected class of **persons** ("the people"), (ii) a protected class of **weapons** ("arms"), and (iii) specific types of protected **activities** ("keep" and "bear"). In the cases at issue here, it has not been disputed that Plaintiffs are members of "The People" protected by the Second Amendment. *See, e.g.*, Yolo Br. at 8. Second, it is undisputed that the handguns they wish to carry constitute protected "arms." Heller at 582, 629. That resolves the "who" and the "what." The "why" in Heller and the "why" in

this case are also the same — for purposes of self-defense. Plaintiffs have alleged they need a permit to carry a firearm for self-defense (*see* Peruta Br. at 12, *et seq.;* Yolo Br. at 8, *et seq*.), which the Supreme Court has determined to be a constitutionally protected "lawful purpose." Heller at 624-25.[6]

The only remaining question is whether carrying a concealed handgun in public is a protected activity. If self-protection via concealed carry were not a constitutionally protected activity, then the state would be free to regulate or ban it under its generalized police powers, if not barred by the state constitution. But if concealed carry is a protected Second Amendment activity, then it is completely immune from regulation which in any way "infringes" the people's ability to engage in that activity.

One need only consider the constitutional text, along with the Supreme Court's opinion in Heller, in order to ascertain the answer. The words "to keep and bear arms" include no words of limitation. They do not describe a right that is subject to "reasonable regulation." The Second Amendment could have stated

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[6] Of course, Heller did not limit the "why" of the Second Amendment to self-defense alone, but also explained that the Amendment's overarching textual purpose was to ensure the preservation of a "free state," by empowering citizens to assist the state "in repelling invasions and suppressing insurrections" and, also, should the need arise, "to resist tyranny." *Id.* at 597-98.

"bear arms openly," or "keep arms within the home," but it did not. Absent any such limitation, "keep and bear" must be given their broadest ordinary meaning. Heller explained, "[a]t the time of the founding, as now, to 'bear' meant to 'carry'" (Heller, 554 U.S. at 584), defining carrying as "'wear, bear, or carry … upon the person or **in** the clothing or **in** a pocket….'" *Id.* (emphasis added).

Heller also explains the "where." Heller states the right to bear arms was "understood to be an individual right protecting against both **public** and private violence." *Id.* at 594 (emphasis added). To ensure against contrary opinions of modern judges who might disagree with the Founders' principles that the right to bear arms applies inside and outside the home, Heller states unequivocally that this right is "'for the purpose … of being armed and ready for offensive or defensive action in a case of conflict with another person,'" without regard to place. *Id.* at 584.

A. The Peruta District Court Unconstitutionally Amended the Second Amendment to Uphold the California Carry Law.

U.S. District Judge Irma Gonzalez revealed the depth of her disregard for the constitutional text in her January 14, 2010 order denying the government's motion to dismiss. In it, she admitted that "by imposing a 'good cause' requirement before a concealed weapon's [sic] permit can be issued, the State

undoubtedly infringes Plaintiff's right to 'possess and carry weapons in case of confrontation.'" Peruta v. San Diego, 678 F. Supp. 2d 1046, 1055 (S.D. Cal. 2010) (emphasis added). One would think that, having found that the California statute "infringes" a right that the Constitution demands "shall not be infringed," the next order of business would be to strike down the statute. But Judge Gonzalez continued: "**For such infringement to pass constitutional muster**, Defendant must at the very least demonstrate that it is necessary…." *Id* (emphasis added).[7] This is the type of "logic" that appeals only to lawyers, whereby a constitutional text can be read to support the opposite of what it says.[8] If a judge is allowed to rule that the phrase "shall not be infringed" means "may be infringed," we have lost our written Constitution. Judges should know better.

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[7] The treatment of the constitutional text by Judge Gonzalez is reminiscent of the opinion of Judge Catherine Blake in Kolbe v. O'Malley, 42 F. Supp. 3d 768, 789 (D. Md. 2014) (after "assum[ing] the Firearm Safety Act **infringes** on the Second Amendment," Judge Blake then ruled that its **infringement** upon the right to keep and bear arms **could be justified** under intermediate scrutiny as a means to better ensure Maryland's public safety ends (emphasis added)).

[8] *See also* Humpty Dumpty: "[w]hen *I* use a word," Humpty Dumpty said in rather a scornful tone, "it means just what I choose it to mean—neither more nor less." "The question is," said Alice, "whether you CAN make words mean so many different things." "The question is," said Humpty Dumpty, "which is to be master—that's all.'" Lewis Carroll, Through the Looking Glass (1871).

It is the duty of the judiciary "to say what the law is,"[9] not to transform the law into what the judge would prefer the law to be.

In ruling on the government's Motion for Summary Judgement, Judge Gonzalez effortlessly concluded that the government's public safety concerns justified its discretionary licensing scheme, keeping the carrying of firearms in public under government control. Peruta, 758 F. Supp. 2d at 1117. To avoid leaving the fox in charge of the hen house, the legislature's reasons to infringe a constitutional right cannot be deferred to by the courts. It is not surprising that the government believes that the reasons for every law is "important," but the Constitution allows neither state legislators nor federal judges the latitude to discard a constitutional right placed into a written constitution precisely in order to defend people from the policy preferences of government officials. *See* Marbury at 178.

In issuing her dispositive order, Judge Gonzalez correctly observed that the Heller Court did not apply any atextual levels of scrutiny in deciding the case. *See* Peruta, 758 F. Supp. 2d at 1115. However, she quite incorrectly concluded that Heller "expressly declined to prescribe the appropriate level of judicial

[9] Marbury v. Madison, 5 U.S. 137, 177 (1803).

scrutiny" for Second Amendment cases. *Id.* Although this may be what many federal judges appear to believe, the analysis above demonstrates that it is simply absurd to suggest that the Heller Court "declined"[10] — in the sense of refused or neglected — to give the lower courts any guidance for evaluating future challenges to gun laws that the Court was well aware that its important decision would spark. On the contrary, Heller "declined" to adopt a judge-empowering standard of review because the Second Amendment contained its own standard of review — "shall not be infringed."[11]

Concluding that Heller gave her no guidance in resolving the issue before her, Judge Gonzalez freed herself to choose whatever level of scrutiny she preferred to analyze the issue. Selecting "intermediate scrutiny" as the

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[10] *See id.* at 1112.

[11] During oral argument, Chief Justice Roberts criticized the various tests being proposed for evaluating the constitutionality of firearms laws under the Second Amendment: "these various phrases under the **different standards** that are proposed, 'compelling interest,' 'significant interest,' 'narrowly tailored,' **none of them appear in the Constitution**; and I wonder why in this case we have to articulate an all-encompassing standard. **Isn't it enough to determine the scope of the existing right** that the amendment refers to…. [T]hese standards that apply in the **First Amendment** just kind of developed over the years as sort of **baggage** that the First Amendment picked up. But I don't know why when we are **starting afresh**, we would try to articulate a whole standard…." District of Columbia v. Heller Oral Argument (Mar. 18, 2008), p. 44, ll. 5-23 (emphasis added).

appropriate test to apply to the challenged policy, Judge Gonzalez determined that the government "has an important interest in reducing the number of concealed handguns in public…." *Id.* at 1117. This reason, Judge Gonzalez concluded, was sufficient to overcome the language of the Second Amendment. Such decisions diminish the respect of the people for the federal courts.

B. On Appeal, the Peruta Plaintiffs Went Beyond Heller's Categorical Test.

On appeal to the U.S. Court of Appeals for the Ninth Circuit, the Peruta Plaintiffs rightly noted that California's statutory scheme is extreme, "effectively ban[ning] bearing arms in public for self-defense purposes." Peruta Br. at 14. But the remedy they sought from this Court was limited — that "'[s]elf-defense' must be considered a 'good cause'" in the permitting process. *Id.* at 15.

The Peruta Plaintiffs rightly argue that California's concealed carry laws are "*in direct contravention of the Second Amendment's guarantee*." Peruta Br. at 16 (emphasis original). That being so, the conclusion would seem obvious: laws that infringe upon Second Amendment rights are unconstitutional according to the plain text. While the Peruta Plaintiffs urged the Court to employ what they call the "categorical approach used in Heller," they devote almost all of this

section of their brief to addressing burdens and standard of reviews rather than applying Heller's "categorical approach." Peruta Br. at 25.

The Peruta Plaintiffs do not contest the legitimacy of the "two step" balancing approach that has been used by the majority of the federal courts to uphold countless state firearm regulations. Under this judicial two-step, a court first determines how close the conduct at issue comes to the limited "core" Second Amendment right to possess a handgun in the home for self-defense. Second, the court selects which balancing test — strict or intermediate scrutiny — is to be applied, depending on the severity of the burden on that right.[12] This approach is in direct contravention of the "categorical/historical" approach adopted in Heller.

In their brief, the Peruta Plaintiffs concede that the state may prohibit either concealed carry, or open carry, but not both. Peruta Br. at 38-39. They concede that the need to bear arms outside the home "might be 'less acute'" than inside the home, and because of that alone, the right to bear arms outside the home is supposedly weaker. *Id.* at 19. This sort of balancing analysis is

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[12] Even though suggesting that strict scrutiny is appropriate, the Peruta Plaintiffs seemed to recommend some sort of undue or "substantial burden" test. Peruta Br. at 32.

anything but "categorical" — and it is most certainly not what the Supreme Court did in Heller.

C. On Appeal in Peruta, San Diego County Attempts to Minimize Both the Impact of Heller and the Severity of its Infringement on Second Amendment Rights.

San Diego's brief in the Peruta case adopts the technique of minimization. The county attempts to paint its concealed carry restrictions as insignificant — hardly worth mentioning. It claims that California law prohibits only concealed loaded carry, and that it is "melodramatic and dishonest" to claim that this amounts to a complete ban. *See* Appellees Brief ("SD Brief") at 15. San Diego claims there are "reasonable alternative means" to what it prohibits, since some limited and highly regulated version of unloaded open carry is permitted. SD Brief at 16. As noted in the Statement of the Case, *supra*, that right has since been rescinded, so presumably even San Diego would now admit that there are no "reasonable alternative means." *See* Cal. Penal Code 26350. Nevertheless, San Diego's argument should still be addressed.

Prior to the repeal of open carry, those who choose to exercise this "reasonable alternative" were routinely accosted by California law enforcement officers who were empowered to "verify" that the firearm was unloaded, and

who often detained them, cuffed them, and questioned them before either improperly arresting them or finally releasing them to go about their business.[13] To call this illusory alternative a "choice" is the real "dishonesty" or "melodrama" in this dispute.[14]

San Diego next claims that there are a "wealth of exceptions" to California's concealed carry restrictions, but those exceptions largely apply to persons associated with the government, such as retired police officers. *See* Peruta, 742 F.3d at 1168-69. For "ordinary" Californians, there are essentially no exceptions, and no reasonable ability to carry any sort of firearm in public. This is in direct conflict with Heller, which stated that "the Second Amendment right is exercised individually and belongs to **all Americans**." *Id.* at 581 (emphasis added).

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[13] *See, e.g.,* https://www.youtube.com/watch?v=tNOk4_QH21g; https://www.youtube.com/watch?v=ZFzH5Oe-YL4; https://www.youtube.com/watch?v=XxP9yaEcNm0; https://www.youtube.com/watch?v=NQDJdurpUsA; https://www.youtube.com/watch?v=NWwSKabgETM.

[14] The panel recognized that California state law denies to a "typical, responsible, law-abiding citizen" the right to "bear arms in public for the lawful purpose of self-defense." Peruta at 1169.

According to San Diego, then, the only option is to apply for a California "may issue" concealed carry permit — an application which, for "ordinary" persons, is almost certain to be denied. Before formally applying, applicants for a permit may choose to undergo a "voluntary" interview with law enforcement, at which time they are usually told whether their application is likely to be successful. SD Brief at 4. They must submit an application, pay various fees, "gather their documentation," be fingerprinted, photographed, and "have their weapons safety checked and [] complete a final qualify-shoot." *Id.* at 4. They are then subjected to a "background and verification process." *Id.* Only then are they eligible to even be **considered** to have the **privilege** of a carry license **bestowed** upon them for "good cause." Of course, the odds of an ordinary Californian actually obtaining a license are slim-to-none. *See* footnote 3, *supra*.

San Diego also attempts to minimize the ruling in Heller, as not applicable to the challenge under review. As San Diego would have it, Heller involved the narrow and discrete issue of possession of an operable handgun in the home for self-defense. *See* SD Brief at 8.[15] In San Diego's view, any attempt to apply the

[15] Various federal courts have expressed similar resistance to most of the Heller decision, attempting to confine Heller to its precise factual holding. But those courts have generally adopted a sliding scale approach by which they claim Second Amendment rights are "at their zenith" within the home, and afforded

principles enunciated in Heller to anything other than its exact set of facts is unwarranted. *Id.* at 10. In San Diego's view, the Second Amendment applies exclusively within the home, and has no application anywhere else. Thus, as San Diego puts it, California law "does not burden Second Amendment rights" — *i.e.*, **does not burden Second Amendment rights at all**, much less "substantially." *Id.* at 11, 15. To San Diego, the right to "bear arms" in public does not even flirt with the outer boundaries of any right protected by the Second Amendment. Any possession of arms in public, then, is nothing more than a privilege bestowed by a benevolent local sheriff or chief of police, rather than an individual right constitutionally secured to all Americans.

San Diego boldly represented to the Court that "[t]he prevailing judicial interpretation of the scope of the Second Amendment after *Heller* is limited to self-defense in the home," and that "Appellants … cite no cases post-Heller which adopt their view" that the Second Amendment applies outside the home. SD Br. at 10. But as the panel pointed out in this case, it is simply not the case that there are "no" cases supporting a right to carry arms outside the home.

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lesser degrees of protection outside the home. *See, e.g.*, Kachalsky v. Westchester, 701 F.3d 81, 89 (2nd Cir. 2012) ("[w]hat we know from these decisions is that Second Amendment guarantees are at their zenith within the home.")

Indeed, all courts to have considered the issue "have expressly held, or at the very least have assumed," that "the right to bear arms includes the right to carry an operable firearm outside the home for the lawful purpose of self-defense…." *See* Peruta, 742 F.3d at 1166.

D. On Appeal, the Peruta Panel Applied a Quasi-Categorical Analysis, Correctly Striking Down the California Law — But Only Because It Completely Destroys a Second Amendment Right.

A two-member majority of a three-judge panel of this Court overruled the district court in Peruta, and that decision was the basis for the same panel's overruling of the district court in Richards. The panel's opinion in Peruta began on the right path, looking first to the unambiguous text of Second Amendment. Peruta, 742 F.3d at 1152. The panel then conducted a version of the Supreme Court's text, history, and tradition analysis of the scope of the right to "bear arms" outside the home. *Id.* at 1151-1167. Based on these inquiries, the panel concluded that "the right to bear arms includes the right to carry an operable firearm outside the home for the lawful purpose of self-defense…." *Id.* at 1166. That should have been the end of its analysis and opinion — that San Diego's "may issue" carry structure clearly infringes the Second Amendment, and is therefore unconstitutional. Unfortunately, the panel opinion continued, and fell

into much the same trap that has ensnared many other federal courts subsequent to Heller.

The panel noted that Heller was an easy case, since the D.C. handgun ordinances completely "destroy[ed]" the right to keep a firearm in the home. Peruta, 742 F.3d at 1170. Springboarding off that single word, the panel created something akin to a "complete destruction test,"[16] where only laws which completely "destroy" the "core" right are per se invalid, and "no amount of interest-balancing … can justify" them. *Id.* at 1167. Apparently, then, laws which only "burden" — *i.e.*, infringe — Second Amendment rights might be constitutional. The panel concludes that laws which "merely burden" Second Amendment rights are subject to some form of review, but although giving some examples used by other courts, the panel never appears to have identified that standard. *Id.* at 1167-68. Furthermore, Heller never stated that its *per se* rule

[16] After favorably citing a decision of the Kentucky Supreme Court for the proposition that "[a]n act needn't amount to a 'complete destruction' of the right to be 'forbidden by the explicit language of the constitution,'" the panel completely reversed course and defined its task as one to determine whether the concealed carry laws "**burden** the right **or**, like in Heller … **destroy** the right altogether." Peruta, 742 F.3d at 1156, 1168 (emphasis added).

only applied to the "most severe cases," but rather only that the decision was clear because the D.C. ordinance was so severe. *See* Peruta at 1168.[17]

In the end, the panel determines that, under all the applicable laws, there is no reasonable way to lawfully carry a gun in public, either concealed or unconcealed. *Id.* at 1168. This, the panel announces, amounts to a "destr[uction]" of the Second Amendment right to bear arms, and thus is unconstitutional. *Id.* at 1170.

Immediately after striking down a state system which bans all reasonable forms of bearing arms, the panel limits its decision, stating that "we are not holding that the Second Amendment requires the states to permit concealed carry. But the Second Amendment does require that the states permit *some form* of carry for self-defense outside the home." *Id.* at 1172 (emphasis original). Thus, while the panel correctly strikes down the "good cause" policy, these latter portions of its analysis contain serious flaws. The panel's holding is essentially that the government is free to regulate — and thus "infringe" — all means and

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[17] *See* Heller at 629, citing with approval State v. Reid, 1 Ala. 612, 616-617 (1840) ("A statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would be **clearly** unconstitutional." (emphasis added.))

manner of keeping and bearing arms, so long as it does not go so far as to "completely destroy" the right. It appears that the panel would permit the state to regulate heavily many or most of "the people," many or most of the "arms," and much or most of the "keeping and bearing," so long as the right was not "completely destroyed." While the panel's opinion does reject the California law's exceptions for certain persons, saying that they do little more than "preserve small pockets of freedom," in reality the panel's decision disagrees with the County's position only by a matter of degree. Peruta, 742 F.3d at 1169-70. Indeed, it would appear that the language of the panel's opinion could be used to justify considerable regulation of Second Amendment activity.

Contrary to the understanding in the panel opinion, the Second Amendment protects all of "the people," all of the "arms," and all of the "keeping" and "bearing" of arms. Any law which infringes any aspect of that freedom is *per se* unconstitutional, regardless of how compelling the state feels its interests in regulation are, and no matter how some fearful federal judges may be at the prospect of permitting an armed citizenry.[18]

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[18] *See, e.g.,* Circuit Judge Wilkinson's statement that "[t]his is serious business. We do not wish to be even minutely responsible for some unspeakably tragic act of mayhem because in the peace of our judicial chambers we miscalculated as to Second Amendment rights." United States v. Masciandaro,

E. Judge Thomas's Dissent in Peruta Contradicts the Plain Meaning of "Keep" and "Bear" in the Second Amendment.

Chief Judge Thomas, writing in dissent in Peruta, characterizes Heller and McDonald v. City of Chicago, 561 U.S. 742 (2010), as "landmark" and "groundbreaking" decisions. Peruta, 742 F.3d at 1179-80. It is true that Heller and McDonald were vitally important decisions. However, there was nothing unusual about Heller and McDonald except that the Court started with a blank slate, and analyzed and decided the cases based on the constitutional text, unencumbered by prior erroneous judicial decisions. Neither decision employed any judge-created balancing tests and, properly understood, neither created any new law. Heller and McDonald are noteworthy mainly because they faithfully interpreted and applied the unambiguous words of the Second Amendment.

Judge Thomas decries "the danger to public safety of allowing unregulated, concealed weapons to be carried in public." Peruta at 1180. Without so much as even a reference to the text of the Second Amendment or summary of the analysis in Heller, Judge Thomas' dissent sets about to limit its reach, cherry picking every limiting word that he could find in Heller. *Id.* at 1179.

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638 F.3d 458, 475 (4th Cir. 2011).

Judge Thomas first cites various examples of concealed carry restrictions in historical England and then in the United States, concluding that "carrying a concealed weapon in public was not understood to be within the scope of the right protected by the Second Amendment at the time of ratification." *Id.* at 1191. Yet, Judge Thomas claims that "even if" bearing arms is at all protected by the Second Amendment, it is still not within the alleged "core" conduct of "keeping" arms discussed in Heller. *Id.* Since "bearing arms" is not within what he defines as the "core" of Second Amendment rights, Judge Thomas applies intermediate scrutiny to the challenged San Diego policy, finding that the law "easily survives intermediate scrutiny." *Id.* at 1193.

However, Judge Thomas never addresses what the word "bear" means, as it appears in the Second Amendment text, and never explains why it does not include the right to carry firearms in day-to-day activities both inside and outside one's home or business. Indeed, it would strain the English language to suppose that the plain meaning of "bear" is limited to carrying inside of one's home, and such a limitation would also make the word "keep" superfluous.

F. The Yolo District Court Mistakenly Limited Heller to its Facts, and Incorrectly Subjected the Constitutionality of the California Law to a Rational Basis Test.

Reviewing the California permit system, District Court Judge Morrison England, Jr. acknowledged that "the state grants each municipal or county authority **wide latitude** to determine both the appropriate criteria for issuing a license and the need to impose reasonable restrictions on the licensee." Richards v. County of Yolo, 821 F. Supp. 2d 1169, 1172 (E.D. Cal. 2011) (emphasis added). Indeed, as Judge England observes, under California law "[t]he issuance of a license ultimately bears on whether the 'Sheriff or his designee **feels** there is sufficient reason to grant the license.'" *Id.* (emphasis added).

With such a grant of discretionary power respecting a constitutional right, one would expect a court to exercise great care to ensure that the right is governed not by emotion and predilection, but by fixed objective principles as they are written in the nation's charter. Just the opposite treatment obtained in the Yolo County case under the deferential eye of Judge England.

First, Judge England rules that Heller is fact-bound, "extend[ing] only to the right to keep a firearm **in the home** for self-defense purposes." *Id.* at 1174, n. 4 (emphasis added). Therefore, Judge England dismissed, with a wave of the

judicial wand, any argument based upon "the [Heller] Court's interpretation of the historical significance of the Second Amendment's language," including its discussion of the meaning of "keep" and "bear." *Id.*

Second, having set himself free from the constitutional text, Judge England wandered through "Blackstone" and "19th-century cases" in search of a standard of review, settling upon "'mere rational basis scrutiny to laws that regulate, but do not significantly burden, fundamental rights.'" *Id.* at 1174-75. As to whether there was a "significant burden," Judge England saw no need for any inquiry whatsoever. Instead, he simply pontificated that "even if Plaintiffs are denied a concealed weapon license …, they are still **more than free** to keep an **unloaded** weapon nearby their person, load it, and use it for self-defense in circumstances that may occur in a public setting." *Id.* at 1175 (emphasis added). In Judge England's mind, there was no need for any discussion. Clearly the Yolo County officials have a rational basis "regulating concealed firearms [as] an essential part of [the county's] efforts to maintain public safety and prevent both gun-related crime and, most importantly, the death of its citizens." *Id.* Thus, Judge England concluded that "Yolo County's policy is **more than rationally** related to these legitimate government goals…." *Id.* (emphasis added.) Such deferential

review relegates the right to keep and bear arms to a privilege enjoyed at the behest of the state.

G. On Appeal, The Yolo Plaintiffs Unnecessarily Cede to the Government Regulatory Power over Second Amendment Rights.

The Yolo Plaintiffs open their brief by conceding that "[o]f course, Defendants have an interest in regulating firearms in the interest of public safety." Yolo Br. at 3. The Yolo Plaintiffs invert the Heller *dicta* which states that Second Amendment rights are "**not unlimited**," into the deferential notion that "the regulatory interest [over firearms] is **not absolute**." Heller at 626; Yolo Br. at 3.

Specifically, the Yolo Plaintiffs concede that they "have never argued for a right to carry [concealed] handguns." *Id.* at 26. But is that not what this case is all about — defending the right to carry concealed firearms in public? The Yolo Plaintiffs allege that the government has "broad leeway in prescribing the manner in which guns are carried." *Id.* To the Yolo Plaintiffs, like the Peruta Plaintiffs, the government may ban open carry, or it may ban concealed carry — but it cannot ban all forms of carry. *Id.*

In conceding reasonable regulations, the Yolo Plaintiffs forget that their argument shifts the touchstone, from the authorial intent of the Founders, to the

preferences of modern day government officials and judges. What one legislature, court, or set of plaintiffs may think is reasonable may be what others think is unreasonable. The Constitution must not be interpreted based upon the societal consensus of the day, but upon the intent and meaning given to the constitutional text by those who wrote, debated, and ratified them. The Yolo Plaintiffs read the Second Amendment as though the word "unreasonably" appeared between "shall not" and "be infringed."

The only meaningful principle on which to decide the issue is the actual text and original meaning of the Second Amendment itself, which protects "the right to keep and bear arms," without limitation. The Second Amendment does not protect "the right to bear arms, either openly or concealed, choose one."

CONCLUSION

The Second Amendment is not limited to the home. The need for self-protection is not limited to the home. On the contrary, Californians can be threatened and need firearms for their self-defense anywhere they may travel. The Second Amendment expressly protects the right to "bear arms" outside the home, in addition to "keep[ing] arms at home. To uphold the California

regulatory scheme would artificially limit Heller to its particular facts, with no textual basis for such a narrowing construction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

IT IS HEREBY CERTIFIED:

1. That the foregoing Brief *Amicus Curiae* complies with the word limitation set forth by Circuit Rule 29-2(c)(3), because this brief contains 6,286 words, excluding the parts of the brief exempted by Rule 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 a proportionally spaced typeface using WordPerfect version 14.0.0.756 in 14-point CG Times.

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Dated: April 30, 2015

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Brief *Amicus Curiae* of Gun Owners of America, Inc., *et al.*, in Support of Appellants and Reversal, was made, this 30th day of April 2015, by the Court's Case Management/Electronic Case Files system upon the attorneys for the parties.

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