No. 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.

Appeal from the United States District Court for the

Southern District of California, No. 3:09-cv-02371-IEG-BGS

(Hon. Irma Gonzalez, Judge)

BRIEF OF *AMICUS CURAE* THE MADISON SOCIETY, INC. IN SUPPORT OF AFFIRMANCE OF THE THREE-JUDGE PANEL'S DECISION

Brandon M. Kilian

P.O. Box 160

La Grange, CA 95329

Tel: (925) 817-7505

bkilian@kilianlaw.com

Counsel for *amicus curae*

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CORPORATE DISCLOSURE STATEMENT

The Madison Society has no parent corporations. The Madison Society does not issue stock; therefore, no publicly traded corporation owns more than 10% of The Madison Society's stock.

Dated: April 30, 2015

Respectfully submitted,

The Madison Society

By: /s/ Brandon Kilian

Brandon Kilian

Counsel for *amicus curae*

INTERESTS OF *AMICUS CURAE*[1]

The Madison Society, Inc., is a membership organization the purpose of which is the preservation and protection of the constitutional right to keep and bear arms for its members and all responsible, law-abiding citizens. The organization spends time and resources on outreach, education, and training related to assisting its member and the general law-abiding public in obtaining and maintaining licenses to carry firearms for self-defense and other exercises of their Second Amendment rights.

AUTHORITY TO FILE

The Court authorized the filing of *amicus* briefs. Order, Dkt. 224.

INTRODUCTION

The majority opinion previously issued in this case is a correct analysis and application of legal precedent and history and should be affirmed.

The dissent's focus on the issue of whether the carrying of concealed weapons is conduct within the scope of the Second Amendment misunderstands the context of 19th-century caselaw. The precedents upholding concealed weapon

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

bans reflected the prevailing preference of the time. Modern California has elected to permit the exercise of the right to bear arms through concealed carrying instead of open carrying; the majority is correct to recognize that open and concealed arms-bearing have simply switched places in the public judgment and the constitutional protection of arms-bearing for self-defense remains the same. The majority ruling should be AFFIRMED.

ARGUMENT

The dissent's argument begins with a slight misstep in reading *District of Columbia v. Heller* 554 U.S. 570 (2008) (*Heller*), stating that the Supreme Court there held that "longstanding prohibitions" were "presumptively lawful" and should not now be doubted. *Peruta v. County of San Diego* 742 F.3d 1144, 1179 (9th Cir. 2014) (Thomas, J., dissenting.) (*Peruta*). The dissent then placed California's statutory restrictions on concealed weapons[2] in that category. *Ibid.* What *Heller* specifically said, however, was that doubt should not be cast on "longstanding prohibitions on the possession of firearms by felons and the mentally ill, *or* laws forbidding the carrying of firearms in sensitive places…*or* laws imposing conditions and qualifications on the commercial sale of arms." *Heller*, 554 U.S. at 626-627 (emphasis added). The *Heller* court actually listed

[2] The act of carrying a concealed weapon will be referred to as "concealed carry" and openly carrying a weapon "open carry" going forward.

three sorts of presumptively lawful regulatory measure as part of a list; "longstanding prohibitions on the possession of firearms by felons" were one sort and laws about sensitive places or commercial sales were others. The mention of concealed carry laws came before and was distinct from that list. Additionally, the word "longstanding" was a flourish. No legitimacy was given to prohibitions merely for being so describable, which is only sound. That something has been done incorrectly for a long time is no reason to continue doing it that way; for example, the very ban invalidated in *Heller*'s 2008 ruling had been in force since 1976. (Council of the District of Columbia, "Notice: D.C. Law 1-85 – 'Firearms Control Regulations Act of 1975'" (Washington, D.C., 24 Sept. 1976.)

This is a relevant point because the thrust of the dissent is that concealed carry is not the sort of conduct the Second Amendment to the United States Constitution protects. The dissent, in believing that California's concealed carry restrictions should be lumped together with laws banning weapons in sensitive places or the hands of felons, places the act of carrying a concealed weapon in public on analogous constitutional footing to child pornography, obscenity, and assistance to terrorists. *Peruta* at 1194. Much as the dissent erred in using *Heller* to connect concealed carry laws applied to the responsible public to those keeping weapons from criminals and the mentally ill, it erred in its reading and application of 19th-century precedent. As the majority correctly observed, those courts upheld

concealed carry restrictions in keeping with the prevailing social opinion of the times that open carrying of weapons was the preferable way to allow the exercise of the constitutionally protected right to bear arms. *Peruta* at 1172. Times have changed and California has made the opposite decision. *Amicus* will summarize relevant 19th-century caselaw and expand upon the note the majority made to demonstrate that the bearing of arms outside the home has always been constitutionally protected conduct.

We start with the odd case of *Bliss v. Commonwealth* 12 Ky. 90 (1822) (*Bliss*), the sole historical case to strike down a concealed weapons ban. The dissent is well familiar with *Bliss* and observes that its ruling, predicated on Kentucky's state constitution, was specifically overturned by amendment. Still in *Bliss*'s story and the cases that respond to it we see that bearing arms outside the home is protected conduct and concealed carry was selectively regulated for understandable but essentially arbitrary social reasons. What later cases responded to was *Bliss*'s extreme conclusion that no regulation of the right to bear arms was permissible, not its basic logic. "[I]n principle," *Bliss* says, "there is no difference between a law prohibiting the wearing concealed arms, and a law forbidding the wearing such as are exposed," and this statement is not later challenged; the conclusion that "if the former be unconstitutional, the latter must be so likewise" is. *Id.* at 92. *Bliss* shows confusion at the idea that a ban of one sort of arms-

bearing would be permissible if the alternative were allowed: "We may possibly be told, that although a law of either description may be enacted consistently with the constitution, it would be incompatible…to enact laws of both descriptions. But if either, when alone, be consistent with the constitution, which, it may be asked, would be incompatible…if both were enacted?" *Ibid.* From there that court decided that clarity demanded no regulation be allowed. We can see that *Bliss*'s mistake was in believing that the right to bear arms could be subdivided into a right to bear arms openly and a right to bear arms secretly. It is saying "if open arms-bearing is outside constitutional protection, and concealed arms-bearing is outside constitutional protection, then no arms-bearing is possible; therefore, both are constitutionally protected." The error was thinking that the conduct to be analyzed and weighed against the Second Amendment was open or concealed carry in particular, not public arms-bearing. In essence, its mistake was not following the *Peruta* majority.

State v. Buzzard, 4 Ark. 18 (1842) (*Buzzard*), flagged by the *Peruta* dissent as a repudiation of *Bliss*, is replete with language emphasizing the social discretion at play in regulating concealed carry. "[T]he Legislature possesses, and must necessarily exercise a discretion as to the means best calculated to attain the object [of general peace and welfare]…provided no right vested by the Constitution…be by their enactment infringed or divested." *Id.* at 20. The case states that

limitations on the right to bear arms, like limitations on the rights of free speech and travel, may exist to prevent disorder and anarchy. *Id.* at 21. This is all well and good and comports with the *Peruta* majority opinion that a state may prefer a particular method of bearing arms. It only rejects *Bliss*'s extremism. Nothing in *Buzzard* lays concealed carry outside of constitutional protection *per se* even as it takes an incorrectly restrictive view of the nature of the Second Amendment right.

Nunn v. State, 1 Ga. 243 (1846), also only rejects *Bliss*'s extremism. It does not subdivide the right to bear arms, instead recognizing a "natural right of self-defence." *Id.* at 251. The concealed-carry ban at issue there was valid because it did not deprive the citizen of that right. *Ibid*. The legislature was able to prohibit concealed carry, but was not generally competent to deny to one of its citizens the keeping of a weapon about his person. *Id.* at 247. *Stockdale v. State*, 32 Ga. 225, 227 (1861) (*Stockdale*), follows suit, stating the legislature has the right to prescribe the mode of carrying arms but cannot ban the practice entirely.

State v. Reid, 1 Ala. 612, 616 (1840) (*Reid*), in ruling on a statute that aims "to suppress the evil practice of carrying weapons secretly," similarly declares that the Legislature may "adopt such regulations of police, as may be dictated by the safety of the people and the advancement of public morals." The influence of social convention is clear: *Reid* says a law that "inhibits the wearing of certain weapons, in such a manner as is calculated to exert an unhappy influence upon the

moral feelings of the wearer," is sound. *Id.* at 617. Again the only ruling is that the state may ban one method of arms-bearing while leaving the other open: though the court ruled in favor of a concealed-carry ban, it stated that if "it should appear to be indispensable to the right of defense that arms should be carried concealed about the person," then concealed carry should not be prohibited. *Id.* at 622.

The *Reid* court could not envision how concealed carry might better protect citizen's rights and public order than open carry. *Reid*, 1 Ala. at 622. Modern-day California has proven more imaginative. In the legislative history of California Penal Code section 26350, which is part of the statutory scheme banning open carry, we see that the legislature found the following:

> "The absence of a prohibition on 'open carry' has created an increase in problematic instances of guns carried in public, alarming unsuspecting individuals and creating issues for law enforcement.
>
> Open carry creates a potentially dangerous situation. In most cases when a person is openly carrying a firearm, law enforcement is called to the scene with few details other than one or more people are present at a location and are armed.
>
> In these tense situations, the slightest wrong move by the gun carrier could be construed as threatening by the responding officer, who may feel compelled to respond in a manner that could be lethal. In this situation, the practice of 'open carry' creates an unsafe environment for all parties involved: the officer, the gun-carrying individual, and for any other individuals nearby as well.
>
> Additionally, the increase in 'open carry' calls placed to law enforcement has taxed departments dealing with under-staffing and cutbacks due to the

> current fiscal climate in California, preventing them from protecting the public in other ways."

(Sen. Com. On Public Safety, Analysis of A. B. No. 144 (2011-2012 Reg. Sess.), as amended Jun. 1, 2011, p. M-N.)

In today's California, open presentation of firearms is considered alarming and thought to spur unnecessary calls to police that tax the department's resources and put citizens and officers at risk of fatal misunderstandings. The state has accordingly sharply curtailed public open bearing of arms while allowing concealed bearing of arms. The 19th-century precedents supported legislatures that made the opposite choice, as those earlier societies thought concealed carry promoted "lawless aggression and violence," while open carry helped citizens avoid dangerous persons. *Reid*, 1 Ala. at 617; *Stockdale*, 32 Ga. at 226-227. Their choices do not mean that concealed carry must always lie outside the scope of the Second Amendment. Instead analysis of precedent shows that the majority opinion of the instant case is correct: the Second Amendment protects the conduct of carrying a weapon publicly for the purposes of self-defense, and while a state may regulate the details of that conduct it may not ban it entirely. The County of San Diego's application of California's concealed-carry permitting scheme effectively destroys the right to bear arms.

CONCLUSION

The majority opinion should be AFFIRMED because precedent shows that the Second Amendment protects public arms-bearing; the right cannot be subdivided into pieces that would independently lie outside the Amendment's scope.

CERTIFICATE OF COMPLIANCE

TYPE-VOLUME LIMITATIONS, TYPEFACE REQUIREMENTS,

AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) because its total word count is 2,335 words, as measured by the automatic word count feature of Microsoft Word 2013.
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Fed. R. App. P. 32(a)(6) because this brief was produced in Microsoft Word 2013 using proportionately spaced Times New Roman typeface in a 14-point size and set in a plain, roman style.

/s/ Brandon Kilian_____

Brandon Kilian

Counsel for *Amicus Curae*

Dated: April 30, 2015

CERTIFICATE OF SERVICE

On this, the 30th day of April, 2015, I served the foregoing *Amicus Curae* 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 30th day of April, 2015, at La Grange, California.

/s/ Brandon Kilian

Brandon Kilian