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, **STATE OF CALIFORNIA,** Intervenor.	No. 10-56971 D.C. No. 3:09-cv-02371-IEG-BGS Southern District of California Hon. Irma E. Gonzalez District Judge
ADAM RICHARDS, et al., Plaintiffs-Appellants, **v.** **ED PRIETO, et al.,** Defendants-Appellees.	No. 11-16255 D.C. No. 2:09-cv-01235-MCE-DAD Eastern District of California Hon. Morrison C. England District Judge

INTERVENOR STATE OF CALIFORNIA'S RESPONSE TO PLAINTIFFS-APPELLANTS' PETITIONS FOR FULL COURT REHEARING EN BANC

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INTRODUCTION

The original panel decision in this case departed from this Court's precedents, created a direct and acknowledged conflict among the circuits, adopted a theory of the Second Amendment with sweeping implications for the constitutionality of previously routine regulation of the public carrying of dangerous weapons, and "upend[ed] the entire California firearm regulatory scheme."[1] The Court granted en banc review, and a duly constituted en banc panel held that the Second Amendment provides no basis for the only relief ever sought in this case: the compelled issuance of a permit to carry a concealed firearm in public. That holding is correct under the law; indeed, plaintiffs do not argue otherwise. It is sufficient to resolve the case before the Court. It eliminates the conflict created by the original panel opinion and allows state and local authorities to continue to enforce existing law, subject of course to any future challenge addressing other aspects of state or local regulation and seeking appropriate relief. Nothing about these circumstances calls for the unprecedented step of further review by the entire Court.

[1] *Peruta v. County of San Diego*, 742 F.3d 1144, 1179 (9th Cir. 2014) (Thomas, J., dissenting).

DISCUSSION

I. THE EN BANC DECISION PROPERLY RESOLVES THE CASE BEFORE THE COURT.

In pursuing full-court rehearing, plaintiffs describe their lawsuit as asking "whether the Constitution protects the right to carry a firearm for self-defense in some manner." Pet. 7.[2] They assert that the en banc decision "artificially constrain[s]" their constitutional challenge, Pet. 2, and "refus[es] to answer that question," Pet. 7. Plaintiffs both understate the scope of the en banc holding and overstate their constitutional claim.

The *Peruta* case challenges San Diego's implementation of California's "good cause" requirement for a concealed-carry permit. Plaintiffs "allege only that they have sought permits to carry concealed weapons, and they seek relief only against the policies requiring good cause for such permits." Slip Op. 19; *see also* Pet. 8 (requested remedy was issuance of concealed carry permits in San Diego County).[3] A narrow approach to the case might

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[2] Citations are to the petition in *Peruta*.

[3] Plaintiffs' claim that their complaints always sought court review of public carry in general disregards how the original panel opinion in *Peruta* effectively transformed that case from a narrow challenge to San Diego County's "good cause" requirement for issuing concealed-carry permits into an attack on California's entire firearms regulatory scheme. *See* Slip. Op. 47 ("While Plaintiffs' original challenge to the county policies did not appear to

(continued…)

have resolved only the challenge to San Diego's "good cause" requirement as applied to each individual plaintiff. The en banc opinion instead answers the larger, but reasonably focused, question of whether restrictions on the concealed carry of firearms in public fall, as a categorical matter, within the scope of the Second Amendment. The Court's holding that there is no Second Amendment right to concealed carry in public is sufficient to resolve the case. There was and is no need to reach any other issue.[4]

The en banc opinion's approach appropriately leaves for another day any analysis of other aspects of California's regulatory scheme—which is

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(…continued)
implicate the entirety of California's statutory scheme, the panel opinion unmistakably did."). Notably, the present regulations regarding open carry had not been enacted when plaintiffs presented their claims in the district court. Thus, there was no reason to offer evidence—and accordingly no record developed—at the trial court to establish the governmental interest in those regulations. Without such a record, the Court on appeal could not evaluate a general challenge to, and balance the governmental interest in, California's public carry laws, regardless of the standard of scrutiny.

[4] Rather than being a question "no one asked," Pet. 1, the concealed-carry question presented by this case was recognized by the dissenting panel judge, Intervenor, and at least one *amicus*. *See e.g.*, *Peruta*, 742 F.3d at 1179-1182, (Thomas, J., dissenting); State of California Brief on the Merits, Dkt. 261-1 at 11-13 ("California's concealed-carry licensing scheme does not burden conduct protected by the Second Amendment."); Brief of Amicus Curiae Everytown for Gun Safety, Dkt. 257 at 4-19 (establishing in detail the historical pedigree of concealed-carry restrictions, and thus that such restrictions do not implicate the Second Amendment).

hardly, as plaintiffs claim, a "total ban" on any type of public carry. *See* Pet. 4 ("A typical resident cannot carry outside the home at all.") State law restricts the public carrying of loaded firearms in populated areas; but there are "numerous exceptions" and other opportunities to carry and use arms. Slip Op. 14. For example, the law allows for carrying associated with hunting, fishing, shooting clubs, transportation to and from such activities, and transportation to and from private property where possession or use of firearms is allowed. *Id*. Loaded firearms are also permitted at places of temporary residence, such as a campsite. *Id*. at 15. In addition, California's restrictions do not apply to a person "who reasonably believes that any person or the property of any person is in immediate, grave danger and that the carrying of the weapon is necessary for the preservation of that person or property." *Id*.; *see also* State of California Brief on the Merits, Dkt. 261-1 at 2-4, 16-18 (detailing California's regulations). In sum, California seeks to strike a sensible balance between recognizing and accommodating both individual rights and reasonable gun use and implementing the State's legislative judgment that unrestricted carrying of handguns in cities, towns, or other populated areas makes the public less safe.

The plaintiffs in these cases sought particular relief from a particular aspect of this overall scheme; and the en banc decision appropriately holds

only that the Constitution gives them no right to that relief. It has long been established that the courts should not "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (quoting *Liverpool, New York & Philadelphia S.S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39 (1885)).

The en banc panel's approach is consistent with other principles of judicial restraint as well. For example, it is improper to "anticipate a question of constitutional law in advance of the necessity of deciding it." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450 (2008) (citations omitted). The Supreme Court implicitly applied this principle to its own Second Amendment analysis in *District of Columbia v. Heller*, 554 U.S. 570 (2008), when it declined to consider exceptions to the Second Amendment that were not before it. *See id*. at 635 ("And there will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us."). Accordingly, as plaintiffs neither challenged any of California's open-carry restrictions nor sought to carry openly, it was reasonable for the en banc panel to decline to consider whether or how the

Second Amendment might apply to any of the State's various open-carry regulations.

The en banc panel's restrained approach is also consistent with other circuit court decisions. In the context of firearm regulations, "[t]he specific constitutional challenge thus delineates the proper form of relief and clarifies the particular Second Amendment restriction that is before us." *Peterson v. Martinez*, 707 F.3d 1197, 1209 (10th Cir. 2013). And it is wise to tread lightly in this area because the question of the extent of the Second Amendment's reach beyond the home post-*Heller* is "a vast *terra incognita* that courts should enter only upon necessity and only then by small degree." *United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011).

There is no force to plaintiffs' assertion (*e.g.*, Pet. 1) that the en banc Court was bound to issue some broader ruling because it allowed the State to intervene at the en banc stage. California's intervention was necessitated by the original panel opinion's "sweeping judicial blow to the public safety discretion invested in local law enforcement officers and to California's carefully constructed firearm regulatory scheme," *Peruta*, 742 F.3d at 1199 (Thomas, J., dissenting), combined with "the void created by the late and unexpected departure of Sheriff Gore from the litigation," Slip Op. 49. The en banc decision, restoring as it does the legal *status quo ante*, fully satisfies

the purposes underlying the State's request to intervene and the Court's decision allowing it to do so.

Finally, while plaintiffs argue that their requested change was only a minor request to modify San Diego County's regulation to be consistent with state law, Pet. 2, 9, that is an inaccurate description of the effect of the remedy sought. California law is specifically designed to allow local authorities to determine what constitutes good cause. By requiring that all cities and counties interpret "good cause" in the same manner, no matter the local conditions, the panel decision would have effectively eviscerated California's legislative scheme. The en banc Court's decision correctly avoids that result.

II. THERE IS NO REASON FOR FURTHER REVIEW.

On the merits, plaintiffs, the panel majority, two centuries of case law, and the historical record all agree that there is no constitutional right to carry concealed weapons in public. The en banc Court's decision is consistent with Supreme Court precedent and it creates no conflict with other circuit courts. Indeed, it eliminates the conflict created by the panel opinion. At the same time, the decision leaves the Court free to consider future Second Amendment questions if and as they are properly presented. There is accordingly no reason for any extraordinary review by the full Court.

The en banc opinion's detailed historical analysis establishes without serious question that there is no right to concealed carry of guns in public under the Second Amendment.[5] As the en banc decision recognized, the historical materials bearing on the adoption of the Second and Fourteenth Amendments are remarkably consistent. Slip Op. 45. Under English law, the carrying of concealed weapons was specifically prohibited since at least 1541. *Id*. In the years after the adoption of the Second Amendment and before the adoption of the Fourteenth Amendment, the state courts that considered the question nearly universally concluded that laws forbidding concealed weapons were consistent with both the Second Amendment and their state constitutions. *Id.*

The en banc opinion is also consistent with Supreme Court precedent. First, the holding aligns with *Heller*, because that case did not address whether or how the Second Amendment applies outside the home, and specifically disclaimed any attempt to "clarify the entire field." *Id*. at 626-27, 635. Second, the en banc decision follows the direction of *Heller* and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), by conducting a historical analysis of concealed carry restrictions. And, the history relevant

[5] Plaintiffs do not contend that there is a free-standing Second Amendment right to carry concealed firearms. Slip Op. 19.

to both the Second Amendment and its incorporation by the Fourteenth Amendment lead to the same conclusion: The right of a member of the general public to carry a concealed firearm in public is not, and never has been, protected by the Second Amendment. Slip Op. 23-46.[6]

This Court and others have adopted a tiered framework for addressing Second Amendment claims. This approach first "asks whether the challenged law burdens conducted protected by the Second Amendment." *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013). If it does, the court applies an appropriate level of scrutiny. *Id*. But where, as here, the court concludes that the specific conduct at issue is not within the scope of the right protected by the Second Amendment, Slip Op. 46, the court's inquiry ends. As the Seventh Circuit stated, if "a challenged firearms law regulates activity falling outside the scope of the Second Amendment right as it was understood at the relevant historical moment . . . the analysis can

[6] This holding is also consistent with the US Supreme Court in *Robertson v. Baldwin*, 165 U.S. 275, 281-282 (1897) ("the right of the people to keep and bear arms (article 2) is not infringed by laws prohibiting the carrying of concealed weapons"), and in *Heller*, 554 U.S. at 626 ("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."); and also with the Tenth Circuit in *Peterson*, 707 F.3d at 1210-1211 (noting that "bans on the concealed carrying of firearms are longstanding" and "the Second Amendment does not confer a right to carry concealed weapons").

stop there; the regulated activity is categorically unprotected." *Ezell v. City of Chicago*, 651 F.3d 684, 702-703 (7th Cir. 2011).

Further, when addressing concealed carry restrictions, other circuits have either upheld the restrictions as outside the scope of the Second Amendment, *see Peterson*, 707 F.3d at 1211, or—assuming that the restrictions do implicate the Amendment—held that the restrictions were permissible. *See e.g.*, *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013) (Maryland requirement that handgun permits be issued only to individuals with "good and substantial reason" to wear, carry, or transport a handgun does not violate Second Amendment); *Drake v. Filko*, 724 F.3d 426, 429–30 (3d Cir. 2013) (New Jersey "justifiable need" restriction on carrying handguns in public "does not burden conduct within the scope of the Second Amendment's guarantee"); *Kachalsky v. Cty. of Westchester*, 701 F.3d 81 (2d Cir. 2012) (New York "proper cause" restriction on concealed carry does not violate Second Amendment). The panel decision in *Peruta* created a conflict with these decisions. The en banc decision correctly eliminates that conflict.

Finally, the en banc opinion is not inconsistent with the Seventh Circuit's decision in *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012), which held only that a flat ban on all public carry violated the Second Amendment.

California's permitting system is not a flat ban. As outlined previously, there are numerous ways that Californians may carry weapons in the State. *See supra*, at 4. And *Moore* itself recognized that Illinois' ban was unique among the States, and much harsher than restrictions such as New York's—which are essentially indistinguishable from California's. *Moore*, 702 F.3d at 940-41. Thus, the *Peruta* en banc opinion is consistent with all the circuits to have addressed this question.[7]

Plaintiffs argue that full court rehearing is necessary because the en banc panel should have followed the analysis of *Drake*, *Kachalsky*, and *Woollard* and "accepted the premise" that concealed carry restrictions burden a Second Amendment right, and then proceed to apply the pertinent scrutiny. Pet. 14. Plaintiffs nowhere acknowledge, however, that Judge Graber wrote separately specifically to state that, "even if we assume that the Second Amendment applied to the carrying of concealed weapons in public, the provisions at issue would be constitutional." Slip Op. 52. Judge Graber wrote that California's regulation of the carrying of concealed weapons in public survives intermediate scrutiny because it "promotes a substantial

[7] Plaintiffs argue that the en banc decision is at odds with other circuits, even though the panel decision acknowledged that it was in conflict with those same cases. *Compare* Pet. 2 *with Peruta*, 742 F.3d at 1167, 1173. As noted, the en banc opinion eliminates that conflict.

government interest that would be achieved less effectively absent the regulation." *Id*. at 58 (internal quotation marks omitted). The en banc majority noted that it would "entirely agree with the answer the concurrence provides" on that point. *Id*. at 52. There is no need for full-court rehearing to undertake any further consideration of the issue in this case.

Finally, plaintiffs' argument that the en banc panel somehow restricts a state's gun-regulation options is not well taken. Pet. 7, 17-19. The premise of plaintiffs' argument appears to be that governments will be limited in deciding what "manner of bearing arms is best for their residents." *Id* at 17-18. This curious contention does not explain how the en banc decision prevents a state or local government from *allowing* concealed carry or open carry, or both, or one as an alternative to the other if that is what a legislature actually decides to do. The en banc opinion only upholds, as historically permissible since the 13th century, the choice of a government to restrict concealed carry in public. It in no way limits the ability of a government to choose to allow concealed carry, either along with or as an alternative to open carry.

In contrast, it was the original panel decision—properly overturned by the en banc opinion—that would have limited state and local flexibility. California's concealed-carry permitting scheme is designed to allow

variation in local approaches, tailored to particular community needs. The California Legislature decided that local officials are best situated to determine what applicants must show to satisfy the "good cause" requirement for concealed-carry permits. This delegation recognizes that public safety, crime prevention, and other concerns are not uniform across the State, but may vary based on population size and density, proximity to other areas, and other factors. Under plaintiffs' legal theory, the State would lose the flexibility to defer to local authorities by allowing them to adopt different definitions of "good cause" that they deem suitable for their respective jurisdictions.[8]

In short, the Court's en banc decision is correct on the merits. It eliminates a circuit conflict created by the original panel opinion, and returns this Court's precedent to consistency with the decisions of other circuits and

[8] Further, to the extent that plaintiffs argue that the State has expressed a preference for concealed carry over open carry, *see, e.g.*, Pet. 9, the record does not reflect any such preference. The State argued to the en banc panel that granting plaintiffs' requested remedy—licenses to carry concealed weapons in public—would be improper. If the Court had ruled, as plaintiffs argue it should have, that the Constitution entitled them to some greater opportunity for public carry than is afforded by present state law taken as a whole, the proper remedy would have been to allow the Legislature to decide how to comply with any constitutional limitations identified by the Court—*not* to order local authorities to provide plaintiffs with concealed-carry permits. *See Moore*, 702 F.3d at 942.

the Supreme Court. It preserves the stability and flexibility of existing law, without prejudging any new Second Amendment challenge that might be brought in the future. These circumstances provide no basis for full-court review.

CONCLUSION

The petitions for full-court rehearing should be denied.

Dated: July 15, 2016

Respectfully Submitted,

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July 15, 2016
Dated

/s/ Kathleen Boergers
Kathleen Boergers
Deputy Solicitor General

CERTIFICATE OF SERVICE

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