UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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No. 10-56971

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EDWARD PERUTA, et al.,
Plaintiffs-Appellants,

v.

COUNTY OF SAN DIEGO, et al.,
Defendants-Appellees.

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On appeal from District Court
Southern District of California, Honorable Irma E. Gonzalez
Case No. CV-02371-IEG (BGSx)

# PETITION FOR REHEARING *EN BANC* BY AMICI CURIAE CALIFORNIA POLICE CHIEFS' ASSOCIATION AND CALIFORNIA PEACE OFFICERS' ASSOCIATION

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**TO THE HONORABLE CHIEF JUDGE ALEX KOZINSKI AND CIRCUIT JUDGES:**

Amici Curiae, the California Police Chiefs' Association ("CPCA") and the California Peace Officers' Association ("CPOA"), respectfully submit the following petition for rehearing *en banc*:

**PETITION FOR REHEARING *EN BANC***

CPCA and CPOA[1] submitted an amici curiae brief in support of Respondent County of San Diego, and the San Diego County Sheriff Bill Gore, in the above-captioned matter and hereby submits, in its capacity as amici curiae, this Petition for Rehearing *En Banc*.[2] In the alternative, CPCA and CPOA request that this Court grant Rehearing *En Banc*, *Sua Sponte*.

There is adequate justification for rehearing *en banc*, as the issues in this matter are of exceptional importance and there are conflicts among the Circuits.

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[1] The California State Sheriffs' Association was part of Amici Curiae as to the brief submitted, but has declined to be included in support of this Petition.

[2] To the extent the Court finds that CPCA and CPOA must be a party in order to submit this petition, CPCA and CPOA request that this Court construe this petition to also be a request to intervene as parties. See, e.g., Fed. Rules Civ. Proc., Rule 24 (permissive intervention may be permitted to "a federal or state governmental officer or agency" when there is "(A) a statute or executive order administered by the officer or agency; or (B) any regulation, order, requirement, or agreement issued or made under the statute or executive order." The members of CPCA and CPOA include Police Chiefs and some Sheriffs within the State, who are charged with the statutory duty to evaluate and issue permits to carry concealed weapons pursuant to California law. Therefore, these Associations are directly affected in their administration and implementation of applicable State regulations, and intervention is justified.

## I. STATEMENT OF BASIS FOR PETITION

This Petition is specifically based upon the following: (A) the panel decision conflicts with a decision of the United States Supreme Court, as specifically cited herein – namely District of Columbia v. Heller, 554 U.S. 570 and McDonald v. City of Chicago, 130 S. Ct. 3020; 177 L. Ed. 2d 894 (2010); other Circuit decisions as cited herein; and this Court's opinion in United States v. Chovan, 735 F.3d 1127, 1138 (9th Cir. 2013), and other opinions of this Court as cited herein; and (B) the proceeding involves one or more questions of exceptional importance -- namely the parameters of Second Amendment rights as to California's requirement for the showing of "good cause" in the issuance of permits to carry concealed weapons – and the panel's opinion in this matter conflicts with decisions of other United States Courts of Appeals. Therefore, consideration by this Court *en banc* is necessary to secure and maintain uniformity of the Court's decisions.

## II. AUTHORITY FOR PETITION FOR REHEARING *EN BANC*

The Federal Rules of Appellate Procedure provide, in relevant part, that an en banc hearing or rehearing may be ordered when: "(1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." FRAP, Rule 35 (a). Specifically, "[a] majority of the circuit

judges who are in regular active service and who are not disqualified may order that an appeal or other proceeding be heard or reheard by the court of appeals *en banc*." Further, the Ninth Circuit's Rules provide that the following is an "appropriate ground" for a petition for rehearing *en banc* to be granted: "When the opinion of a panel directly conflicts with an existing opinion by another court of appeals and substantially affects a rule of national application in which there is an overriding need for national uniformity." These standards are met here, whether in response to this petition or by this Court's order for rehearing, *sua sponte*.

## III. PROCEDURAL BACKGROUND

This Court's panel issued its opinion in this matter, filed on February 13, 2014, a true and correct copy of which is attached hereto as Appendix A to this Petition ("Opinion" or "Op."). This Court's panel reversed the District Court's granting of the County of San Diego's motion for summary judgment, as to the validity of requirements for the issuance of permits to carry concealed weapons. At issue is the requirement under California law that an applicant must show "good cause" for the approval of a permit to carry a concealed weapon, along with interpretation of such showing by local Sheriffs or Chiefs of Police. (Op. at p. *5 (citing Cal. Penal Code §§ 26150 and 26155).

## IV. GROUNDS FOR REHEARING *EN BANC*

As set forth above, there are two grounds for this Court to appropriately grant rehearing *en banc*. First, the Opinion conflicts with the decisions of other courts. Second, rehearing is warranted due to questions of exceptional importance.

**A. The Constitutional Scope of the Second Amendment Right to Carry Concealed Weapons in Public is Subject to Conflicting Views Among the Circuit Courts.**

At issue in this matter is the requirement of the San Diego Sheriff that good cause cannot be established based only on a general safety concern, but must be based on individual circumstances presenting a particular risk of harm. (Op. pp. *5-6.) The Opinion concludes that there is a Second Amendment right to bear arms outside of the home. (Op., at pp. *80-81.) However, the Opinion explicitly recognizes that this conclusion of law is part of "an existent circuit split." (Op., at p. *81 citing Moore, 702 F.3d at 936-42; Drake, 724 F. 3d at 431-35; Woollard, 712 F.3d at 876, 879-82; Kachalsky, 701 F.3d at 89, 97-99.) The Opinion's analysis, given the acknowledged split of authority, warrants this Court's rehearing *en banc*, in order to ensure that the legal issues are most fully determined.

The United States Supreme Court has expressly recognized the right of the government to impose reasonable regulations on firearms, including

"prohibitions on carrying concealed weapons . . . ." Supreme Court in District of Columbia v. Heller, 554 U.S. 570, 626 (2008). The Court's panel recognized that the opinion in Heller "direct[ed] our analysis." (Op., at p. *8.) In contrast to the regulations at issue here, the regulation in Heller involved a ban on handguns and restrictions on firearms *in the home*. In fact, the Opinion explicitly recognizes that "straightforward application of the rule in *Heller* will not dispose of this case," because such opinion does not "speak[] explicitly or precisely to the scope of the *Second Amendment* right outside the home." (Op., at p. *11.) Indeed, this Court's opinion in United States v. Chovan, 735 F.3d 1127, 1138 (9th Cir. 2013), recognizes a contrary legal principle than stated in the Opinion, namely that "*Heller* tells us that the *core* of the Second Amendment is 'the right of law-abiding, responsible citizens to use arms in *defense of hearth and home,*'" not a more general right to bear arms generally in "self-defense." In fact, the right at issue here is not merely to bear arms in public, but the purported right to carry them in *public* in a *concealed* manner.

The District Court in Nichols v. Brown, 2013 U.S. Dist. LEXIS 96425 (C.D. Cal. 2013), recognized that "[l]ower courts have been cautious, however, in expanding the scope of this right beyond the contours delineated in *Heller*." The Nichols Court cited opinions from the Seventh and Fourth Circuits to the effect that Heller was *limited* to the right to have firearms for self-defense in the

*home*. Citing opinions from the Seventh and Second Districts, the Nichols Court specifically noted that "[c]ourts that have considered the meaning of *Heller* and *McDonald* in the context of open carry rights have found that these cases did not hold that the Second Amendment gives rise to an unfettered right to carry firearms in public." In footnote 6, the Nichols Court asserted that "[t]he Ninth Circuit has yet to address the issue of open carry with respect to the Second Amendment."

To the extent that the Court's Opinion in this matter has now done so, it conflicts with other court decisions. The Nichols Court recognized the conflict of authority, which is furthered by the Opinion: "Gonzalez v. Village of W. Milwaukee, 671 F.3d 649, 659 (7th Cir. 2012) ('Whatever the Supreme Court's decisions in *Heller* and *McDonald* might mean for future questions about open-carry rights, for now this is unsettled territory'); Kachalsky v. County of Westchester, 701 F.3d 81, 96 (2d Cir. 2012) (finding that 'our tradition . . . clearly indicates a substantial role for state regulation of the carrying of firearms in public' and applying intermediate scrutiny to concealed carry licensing program)." In fact, the Nichols Court relied upon the District Court opinion below in this matter as further support for the conclusion that "'the Second Amendment does *not* create a fundamental right to carry a . . . weapon in public.'" (Emphasis added).

The Opinion concludes, after significant discussion of historical context as to the right to "bear Arms," that "the carrying of an operable handgun outside the home for the lawful purpose of self-defense" is within the Second Amendment. (Op., at *61.) The Opinion finds that California's regulatory system does not "allow[] the typical responsible, law-abiding citizen to bear arms in public for the lawful purpose of self defense."[3] (Op., at *69.)

In Woollard v. Gallagher, 712 F.3d 865, 878 (4th Cir. 2013), the Fourth Circuit Court of Appeal *assumed* that there was a "Second Amendment right of law-abiding, responsible citizens to carry handguns in public for the purpose of self-defense," but cautioned that challengers of Maryland's restrictions on the public-carrying of weapons were urging the Court to "place the right to arm oneself in public on equal footing with the right to arm oneself at home." The Court recognized that Circuit's "'longstanding out-of-the-home/in-the-home distinction bear[ing] directly on the level of scrutiny applicable.'" Id. (change in original) (quoting United States v. Masciandaro, 638 F.3d 458, 470 (4th Cir. 2011)). The Woollard Court upheld Maryland's requirement of a "good and substantial reason" for the carrying of handguns in many public places, finding

[3] Notably, the District Court found that California's regulatory system (namely Penal Code sections 12025 and 12050) does permit the open carrying of loaded weapons for immediate self-defense. As recognized by this Court in United States v. Chovan, 735 F.3d 1127, 1138 (9th Cir. 2013), even a purportedly substantial burden on Second Amendment rights can be "lightened by these [kinds of] exceptions."

that intermediate scrutiny applied to the regulation and that "[t]he State has clearly demonstrated that the good-and-substantial-reason requirement advances the objectives of protecting public safety and preventing crime because it reduces the number of handguns carried in public." Id. at 879. More importantly, the Court found that the State's regulation in Woollard struck the "proper balance" between protecting public safety and permitting those with a need to carry such weapons. Id. at 880.

The Opinion is directly contrary to the standard of review employed by the Fourth Circuit in Woollard, as well as achieving a contrary result and concluding a completely different constitutional scope as to the purported right to bear concealed arms in *public*.

As a law review author recently recognized, "in the wake of *Heller* and *McDonald*, . . . lower courts have failed to settle on a standard of review. The emerging trend is toward intermediate scrutiny, but courts have also used strict scrutiny, a reasonableness standard, an undue burden standard, and a hybrid of strict and intermediate scrutiny." Kiehl, Stephen. Comment: *In Search Of A Standard: Gun Regulations After* Heller *and* McDonald, 70 Md. L. Rev. 1131, 1141-1142 (2011). However, "commentators have noted" that:

> "Regardless of the test used, challenged gun laws almost always survive." . . . The Fourth Circuit in particular noted its reluctance to extend gun rights beyond those explicitly granted by *Heller*, pointing to the toll exacted by gun violence: "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."

Kiehl, 70 Md. L. Rev. at, 1142 (quoting Mehr, Tina and Winkler, Adam. AMERICAN CONSTITUTION SOC'Y, *The Standardless Second Amendment* 1 (Oct. 2010), (noting that state and federal courts have ruled on more than 200 Second Amendment challenges since *Heller* was decided in 2008); United States v. Masciandaro, 638 F.3d 458, 475-476 (4th Cir. 2011)).

In addition, the author noted that

> courts have observed that *Heller* tacitly condoned concealed carry laws when it stated, in *dicta*, 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. The District Court for the District of Nebraska, for example, stated that states can prohibit the carrying of a concealed weapon without violating the Second Amendment. A federal court in West Virginia similarly found that the state's concealed carry prohibition continues to be a lawful exercise by the state of its regulatory authority notwithstanding the Second Amendment.

Kiehl, 70 Md. L. Rev. at 1150 (internal quotations omitted) (citing District of Columbia v. Heller, 554 U.S. 577, 626 (2008); Swait v. Univ. of Neb. at Omaha, 2008 U.S. Dist. LEXIS 96665, at 6-7 (D. Neb. 2008); United States v. Hall, 2008 U.S. Dist. LEXIS 59641, at 3 (S.D. W. Va. 2008), *aff'd per curiam*, 337 F. App'x 340 (4th Cir.), *cert. denied*, 130 S. Ct. 774 (2009)).

The law review author also recognized that a California Court in People v. Flores, 169 Cal. App. 4th 568, 575 (2008), "relied on the 1897 Supreme Court case *Robertson v. Baldwin*, which stated that concealed carry laws did not infringe the Second Amendment right to keep and bear arms." Kiehl, 70 Md. L. Rev. at 1150.

The Flores Court found that, since *Heller* "implicit[ly] approv[ed] of concealed firearm prohibitions, . . . [it did not] alter[]the courts' longstanding understanding that such prohibitions are constitutional." Flores, 169 Cal. App. 4th at 575 (citing Robertson v. Baldwin, 165 U.S. 275, 281–282 (1897) ("'the right of the people to keep and bear arms (art. 2) is not infringed by laws prohibiting the carrying of concealed weapons'"). This Court's opinion in United States v. Vongxay, 594 F.3d 1111, 1115 (9th Cir. 2010), explicitly recognized that the discussion as to "long-standing restrictions on gun possession" in the Heller Court's opinion was binding on this Court.

The Court in United States v. Masciandaro, 638 F.3d 458, 470 (4th Cir. 2011), applied intermediate scrutiny to a regulation prohibiting firearms in a national park, based on the fact that, "as we move outside the home, firearm rights have always been more limited, because public safety interests often outweigh individual interests in self-defense." The Masciandaro Court

specifically noted that "[w]ere we to require strict scrutiny in circumstances such as those presented here, we would likely foreclose an extraordinary number of regulatory measures, thus handcuffing lawmakers' ability to 'prevent[ ] armed mayhem' in public places, and depriving them of 'a variety of tools for combating that problem,' . . . ." Id. at 471 (internal citations omitted) (omission in original). The Masciandaro Court "conclude[ed] that a lesser showing is necessary with respect to laws that burden the right to keep and bear arms outside of the home," and that such a regulation is valid "if the government can demonstrate that [its regulation] is reasonably adapted to a substantial governmental interest." Id. The Court ultimately found the regulation satisfied intermediate scrutiny, in part because a prohibition against loaded firearms in a national park was "analogous to the litany of state concealed carry prohibitions specifically identified as valid in *Heller*." Id. at 473-474. The Court found that "permitting park patrons to carry unloaded firearms within their vehicles, . . . leaves largely intact the right to 'possess and carry weapons in case of confrontation.'" Id. at 474 (quoting Heller, 554 U.S. at 591).

However, as recognized by the District Court in Nichols v. Brown, 2013 U.S. Dist. LEXIS 96425 (C.D. Cal. 2013) (emphasis in original) (quoting Heller, 554 U.S. at 595), the Second Amendment "does not 'protect the right of

citizens to carry arms for *any* sort of confrontation.'" As the Court in Kachalsky v. Cacace, 817 F. Supp. 2d 235, 261 (S.D. N.Y. 2011) (internal quotations, omissions and citations omitted), recognized, some courts have found that there is no right to carry a *concealed* weapon:

> The *Dorr* court observed that the plaintiffs in that case failed to direct the court's attention to any contrary authority recognizing a right to carry a concealed weapon under the Second Amendment and the court's own research efforts revealed none. Accordingly, it concluded, a right to carry a concealed weapon under the Second Amendment has not been recognized to date.

Further, the Kachalsky Court cited to Mack v. United States, 6 A.3d 1224, 1236 (D.C. 2010), which it states, in turn, cited "*Robertson* and *Heller* and not[ed] 'it simply is not obvious that the Second Amendment secures a right to carry a concealed weapon.'" Id. The dissent also cites to the opinion of the Tenth Circuit in Peterson v. Martinez, 707 F.3d 1197, 1211 (10th Cir. 2013), noting that the Peterson Court "concluded that 'the *Second Amendment* does not confer a right to carry concealed weapons.'" (Op., at p. *134.)

The law in this area is widely regarded as being the subject of extensive debate and disagreement. The Opinion itself acknowledges that it disagrees with decisions of the Second, Third and Fourth Circuits. Even if the analysis for doing so is reasoned, such divergence warrants and requires rehearing *en banc* to ensure that this Court's Opinion, directly contrary to other Circuit Courts, is fully evaluated and reflects the reasoning of the full Court.

**B. The Constitutional Validity of California's "Good Cause" Showing for the Issuance of Permits to Carry Concealed Weapons in Public is an Issue of Exceptional Importance.**

There are significant questions of exceptional importance at issue in this matter, which warrant rehearing *en banc* by this Court. Specifically, the Opinion determines that California's requirement for a showing of "good cause" for the issuance of a permit to carry a concealed weapon in *public* violates the Second Amendment. This decision impairs the ability of Sheriffs and Police Chiefs throughout the entire State to implement California law in a manner specific to the needs of their particular region and jurisdiction. As CPCA and CPOA asserted in their amici curiae brief to the Court in this matter, the State of California is extremely diverse – both geographically and in terms of population density in varying regions. Therefore, the Legislature has purposefully and necessarily left the determination of "good cause" for the issuance of permits to carry concealed weapons to the discretion of Sheriffs and Police Chiefs. The needs of any particular jurisdiction, especially due to the density of a specific area's population, is a matter which requires individualized determination, and such discretion is not inconsistent with the scope of the Second Amendment right at issue in this matter. As the dissent recognized, "the 'right inherited from our English ancestors' did not include a right to carry

concealed weapons in public." (Op., at *109-110.) The purpose of such limitation was historically "to punish people who go armed to terrify the King's subjects." (Op., at *110 (internal quotations omitted).) In an age of increasing violence and dense public life in some areas, this concept rings true no less in current times than it did in times past. And whether one agrees with the historical analysis of the majority or the dissent, the scope of the Constitutional rights and impact on public safety that are implicated by the Opinion warrant this full Court's attention and consideration.

## V. CONCLUSION.

For all of the foregoing reasons, Amici Curiae CPCA and CPOA urge this Court to grant the within petition for rehearing *en banc*, or in the alternative, order rehearing *en banc*, *sua sponte*. There are both issues of exceptional importance as to Constitutional rights and public safety implicated in this matter, as well as conflicts in Circuit Courts on the right of individuals to carry concealed weapons in public, which require *en banc* review.

Respectfully submitted,

JONES & MAYER

By: /s/ Martin J. Mayer
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__X__ In compliance with Fed. R. App. 32(c) and does not exceed 15 pages.

/s/ Martin J. Mayer
Signature of Attorney or
Unrepresented Litigant

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9th Circuit Case Number(s) 10-56971

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10-56971

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,**

Proposed Intervenor-Appellee.

Before O'SCANNLAIN, THOMAS, and CALLAHAN, Circuit Judges

Opinion Filed Feb. 13, 2014
Order Filed Nov. 12, 2014

On Appeal from the United States District Court
for the Southern District of California
No. 3:09-cv-02371-IEG-BGS
Hon. Irma E. Gonzalez, Judge

**PETITION FOR REHEARING OR REHEARING EN BANC**

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## RULE 35 STATEMENT

A divided panel of this Court has issued a published order holding that the State of California may not intervene in this appeal to seek rehearing en banc or certiorari, even though (1) the panel's underlying published opinion draws into question California's entire statutory scheme governing the public carrying of guns; (2) no existing party will seek further review to protect the State's interests; and (3) plaintiffs do not object to the State being permitted to intervene. The panel's order warrants en banc review.

This case is one of exceptional importance. The panel's opinion appears to hold that the Second Amendment forbids California from authorizing local authorities to impose a meaningful "good cause" requirement for the issuance of a permit to carry a concealed handgun so long as the State also prohibits the open carrying of guns in incorporated areas of the State. If allowed to stand, it would take important public safety decisions concerning the carrying of guns in public places out of the hands of the local officials charged by the California Legislature with making such decisions. Requiring local officials to issue concealed-carry permits to any otherwise qualified person based on a bare assertion of a desire to carry a gun in public for self protection would effectively nullify state law allowing

local officials to determine what constitutes "good cause" for the issuance of such permits in the context of their respective jurisdictions.

The panel's decision on the merits should not be allowed to become final without affording the State an opportunity to seek further review. In addition to *Peruta*, there is a second pending case, decided by the same panel, presenting essentially the same legal issue. *See Richards v. Prieto*, No. 11-16255. The Court has deferred disposition of a fully briefed petition for rehearing en banc in *Richards* pending resolution of post-opinion matters in the present case. As the State has pointed out in its amicus brief supporting the petition in *Richards*, this Court could appropriately use either case as a vehicle for en banc review—but in either case the State would seek to participate in further proceedings as a party.

The State's motion to intervene in the present case is consistent with the law and with this Court's precedents. The plaintiffs-appellants do not oppose it.[1] Granting it would allow the Court to review the important questions presented by the case en banc, should it decide to do so, in the case in which they were initially decided. And granting the motion in this case

[1] Plaintiffs objected to one of the grounds asserted by the State for intervention, but did not object to the State being permitted to intervene on other grounds. Appellants' Opposition to Motions for Leave to Intervene (Opp.) 2-3 (Dkt. 145).

would avoid any question that a denial here might otherwise raise concerning the State's ability to intervene in *Richards*, in which Sheriff Prieto has sought en banc review. Accordingly, the State respectfully requests that the en banc Court review and reverse the panel majority's denial of its motion to intervene.

## BACKGROUND

1. In October 2009, plaintiffs-appellants sued San Diego County and its Sheriff to challenge the County's policy for implementing the "good cause" requirement for issuing concealed-carry permits under state law. Plaintiffs did not name the State or any state agency or official as a defendant, and the State did not participate in the district court proceedings. The district court entered summary judgment for the County, and the plaintiffs appealed.

On February 13, 2014, a divided panel of this Court issued an opinion that would reverse the judgment of the district court. The opinion would set precedent that draws into question the constitutionality of California's entire statutory scheme governing the public carrying of firearms. As the opinion states, plaintiffs' lawsuit "targets the constitutionality of the entire scheme" of gun-control regulation in California, slip op. 53, and the panel holds that "the Second Amendment does require that the states permit *some form* of

carry [i.e., either open- or concealed-carry] for self-defense outside the home," *id.* at 55. In the panel majority's view, because California generally bans the open carrying of handguns, *see* Cal. Penal Code §§ 25850, 26350, the Second Amendment requires the State to permit otherwise-qualified individuals to carry concealed firearms in public areas based on nothing more than an assertion of a desire to do so for the purpose of self-defense. Slip op. 47-52. The decision further holds that San Diego's interpretation of the state statutory "good cause" requirement for concealed-carry permits, requiring something more than a general desire to carry a gun for self-protection, not only burdens but "destroys" Second Amendment rights. *Id.* As the panel dissent notes, this effectively "eliminates the statutory 'good cause' requirement and transforms it into a 'no cause' limitation for the general public. Thus, Plaintiffs' complaint and theory necessarily specifically calls into question the constitutionality of state concealed carry law." *Id.* at 105 (Thomas, J., dissenting).

2. On February 21, 2014, the County and the Sheriff—the only defendants-appellees—announced that they would not seek further review of

the Court's decision.[2] Thus, unless the State of California or another proposed intervenor is allowed to intervene as a party, no petition for rehearing or rehearing en banc can be filed in this Court; it is not clear how the interests of the State could be protected even if the Court were to take the case en banc *sua sponte*; and no party will be in a position to ask the Supreme Court to consider whether to grant certiorari.

3. On February 27, 2014, California filed a motion to intervene in this appeal, a proposed petition for rehearing or rehearing en banc, and a motion to extend the time for filing the petition until the Court ruled on the motion to intervene. Dkt. 122. On February 28, the Court granted the motion to extend time, and stayed issuance of the mandate until further order of the Court. Dkt. 126.

California's motion to intervene argues that the State is entitled to intervene as of right under Federal Rule of Civil Procedure 24(a), or in any event should be granted leave to intervene under Rule 24(b). A copy of the State's motion is attached as Appendix B. Plaintiffs-appellants opposed the motion insofar as it sought intervention as of right under Rule 24(a)(1), but

[2] At the panel's request, the Sheriff later clarified that he has not changed his view of the appropriate "good cause" policy for San Diego County; he simply chose not to seek further review. Dkt. 153.

did not oppose either intervention as of right under Rule 24(a)(2) or permissive intervention under Rule 24(b), "under the limited and specific facts" of this case. Opp. 2-3 (Dkt. 145).

4. On November 12, 2014, the again-divided panel issued a published order denying California's motion to intervene. A copy of that order is attached as Appendix A.

a. The panel majority first reasons that the State's motion is untimely. Order 5-7. It looks to three factors: (1) the stage of the proceedings; (2) prejudice to other parties; and (3) the reason for and length of delay in seeking to intervene. *Id.* at 4. The majority acknowledges that the second factor weighs in favor of timeliness, because no party would face prejudice from intervention under the unusual circumstances of this case. *Id.* at 5. It concludes, however, that the first and third weigh against the State. *Id.* at 4-6.

As to the third factor, the majority suggests that the State "must have 'know[n]'" early on that the case might adversely affect its interests because it "originally thought that Sheriff Gore adequately protected [those] interests." *Id.* at 6. The majority insists that no California law has been "invalidated, 'drawn in question,' or placed 'in jeopardy' by the panel opinion"—while at the same time concluding that the State should have

intervened earlier because it should have been aware that state statutes (rather than simply local implementation decisions) were being challenged under the Constitution. *Id.* at 6, n.1.

The majority recognizes that in *Day v. Apoliona*, 505 F.3d 963, 966 (9th Cir. 2007)—another unusual case—this Court granted the State of Hawai‘i’s motion to intervene after a panel decision was published. Order 7. It distinguishes *Day* on the ground that here California did not “participate[] as an amicus below or before this Court.” Order 7.

b. The majority would also hold that the State is not entitled to intervene under 28 U.S.C. § 2403(b) or Federal Rule of Civil Procedure 5.1, each of which requires notice to the State and an opportunity to intervene when “the constitutionality of any statute of that State affecting the public interest is drawn in question.” 28 U.S.C. § 2403(b); *see also* Fed. R. Civ. P. 5.1. The majority asserts that these provisions do not apply because this case presents only “‘a narrow challenge to the San Diego County regulations on concealed carry.’” Order 9 (quoting *Peruta v. County of San Diego*, 742 F.3d 1144, 1172-73 (9th Cir. 2014)). According to the majority, in this case “no California statute has been challenged, overturned, or had its constitutionality ‘drawn into question.’” *Id.*

The panel's underlying merits opinion emphasizes that it considers "San Diego County policy in light of the California licensing scheme *as a whole*," slip op. 52-53; emphasizes that the plaintiffs' claim "targets the constitutionality of the entire scheme," *id.* at 53; and holds that any interpretation of "good cause" under the California concealed-carry permit scheme that requires more than bare assertion of a desire to carry a gun for self-defense is "per se invalid[]," *id.* at 47-51. Nonetheless, in denying intervention, the panel majority reasons that this holding does not technically "draw[] into question" any California statute, because the phrase "drawn in question" refers only to a direct challenge to the statute itself, and cannot refer to any challenge to an application of that statute—no matter how sweeping the potential effect of the Court's reasoning in ruling on that challenge. Order 8-12.

c. In dissent, Judge Thomas points out that the majority's order "conflicts with controlling circuit precedent and deprives one of the parties most affected by our decision the opportunity to even present an argument to us on an important constitutional question affecting millions of citizens." *Id.* at 13 (Thomas, J., dissenting). He emphasizes that the majority's underlying opinion "construed the plaintiffs' complaint as contending that 'the San Diego County policy in light of the California licensing scheme *as a whole*

violates the Second Amendment' and 'targets the constitutionality of the entire scheme.'" *Id.* (quoting *Peruta*, 742 F.3d at 1171). Under such circumstances, the fact "[t]hat the opinion primarily addressed state regulation of handguns could hardly be clearer." *Id.*

The dissent explains that "[g]iven the majority's opinion, the statutory command on intervention is direct" under § 2403(b), because "the constitutionality of a state statute is drawn into question." Order 14. Under these circumstances, California "should be afforded the right to intervene under Rule 24(a)." *Id.* at 15. Judge Thomas also explains that the State has a right to intervene under Rule 24(a)(2) because it has an interest that will be impeded by the majority's decision and no existing party adequately represents that interest. Order 15-16. Alternatively, the State "has satisfied the requirements for permissive intervention" under Rule 24(b), and plaintiffs do not oppose such intervention. Order 18-19. And he concludes that the majority is wrong to hold that the State's motion is untimely under the unusual circumstances of this case. *Id.* at 16-18.

## ARGUMENT

1. This case is one of exceptional importance. The panel majority's underlying opinion on the merits would incorrectly hold that the Second Amendment forbids California from authorizing local authorities to impose

meaningful "good cause" requirements for the issuance of permits to carry concealed weapons in public places—at least so long as the State does not generally permit the open carrying of guns. As Judge Thomas's dissent points out, that holding would draw into question California's entire statutory scheme regulating the carrying of guns in public.

California should be permitted to seek further review of the panel's decision. As the State has explained, that review could come either in this case or in *Richards v. Prieto*, No. 11-16255. *See* Brief of the State of California as Amicus Curiae Supporting Rehearing En Banc 8, *Richards v. Prieto*, No. 11-16255 (filed Mar. 28, 2014). That case presents essentially the same issue. It was decided by the same divided panel, in an unpublished order based solely on the authority of the published panel decision in this case. And in that case, the defendant Sheriff has petitioned for en banc review. In either this case or in *Richards*, however, California should be able to participate in further proceedings as a party. The panel majority's denial of the State's motion to intervene in the present case would deny the State that right in *Peruta* and call into question whether it would be accorded in *Richards*. Under these circumstances, the State respectfully requests that the en banc Court review and reverse the panel majority's decision to deny the State's motion to intervene.

2. The majority's decision misapplies this Court's precedents governing intervention. The Court has previously followed a "liberal policy in favor of intervention" that "serves both efficient resolution of issues and broadened access to the courts." *United States v. City of Los Angeles*, 288 F.3d 391, 397-98 (9th Cir. 2002) (citation omitted). "By allowing parties with a *practical* interest in the outcome of a particular case to intervene, we often prevent or simplify future litigation involving related issues; at the same time, we allow an additional interested party to express its views before the court." *Id.* at 398 (citation omitted). Thus, in determining whether intervention is appropriate, "courts are guided primarily by practical and equitable considerations, and the requirements for intervention are broadly interpreted in favor of intervention." *United States v. Alisal Water Corp.*, 370 F.3d 915, 919 (9th Cir. 2004). Here, the majority's order denying intervention contravenes these principles, ignoring the practical and equitable considerations that overwhelmingly favor intervention under the unusual circumstances of this case. Indeed, the majority denies intervention when even the plaintiffs-appellants do not object to allowing the State to enter the case.

The majority's order is in considerable tension with *Day v. Apoliona*, 505 F.3d 963, 964-66 (9th Cir. 2007), in which this Court held that Hawai‘i

could intervene post-decision for the purpose of seeking en banc review where the parties declined to seek en banc review and the appeal presented an important question of state law. *See id.* at 966. *Day* properly recognizes that where important state interests are at stake, a State should presumptively be allowed to intervene to protect those interests even if the intervention would otherwise be untimely, unless the State purposefully delayed to "gain [a] tactical advantage" or its intervention would "threaten to broaden the scope of the case going forward." *Id.* Here, as in *Day*, unless the State is made a party to these proceedings, "no petition for rehearing can be filed in this Court, and there will be no opportunity for the Supreme Court to consider whether to grant certiorari." *Id.* These are rare but compelling reasons to permit intervention by a State.

3. Denial of the State's motion to intervene in this case also warrants en banc review because of the immediate practical implications of the underlying legal issue for public safety in California. Currently, the Court has stayed the issuance of its mandate in *Peruta* pending further order of the Court. Dkt. 126. If that mandate issues on the basis of the panel majority's decision, it appears that local authorities in San Diego will be under effective judicial compulsion to stop complying with the County's longstanding written policy on implementation of the "good cause" requirement and

instead to issue a concealed-carry permit to any otherwise qualified applicant who requests one. Authorities in other localities, including in urban and residential areas, will be under similar pressure to conform their practice to the majority's reasoning or face legal action based on the majority's opinion. In effect, as Judge Thomas explains, the State's "good cause" requirement will have been transformed overnight into a "no cause" standard effective throughout the State. Slip op. 105. Those potential consequences of the panel majority's decision should not be put in motion until the Court has had an opportunity to decide whether or not to review the merits en banc, either in this case or in *Richards*.

These practical concerns highlight the desirability of maintaining the status quo until all of these matters can be fully considered by the Court. Accordingly, the State respectfully requests that the existing stay of the mandate in *Peruta* remain in place pending a decision by the Court on this petition and, as appropriate, the related petitions for rehearing en banc in this case and in *Richards*.

## CONCLUSION

The Court should grant rehearing en banc and the State's motion to intervene.

Respectfully Submitted,

November 26, 2014

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**CERTIFICATE OF COMPLIANCE**
**PURSUANT TO CIRCUIT RULES 35-4 AND 40-1**
**FOR 10-56971**

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for rehearing or rehearing en banc is: (check (x) applicable option)

[X] Proportionately spaced, has a typeface of 14 points or more and contains 2,831 words (petitions and answers must not exceed 4,200 words).

or

[ ] In compliance with Fed.R.App.P. 32(c) and does not exceed 15 pages.

November 26, 2014
Dated

/s/ Gregory D. Brown
Gregory D. Brown
Deputy Attorney General

No. 10-56971

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
(CV 09-02371-IEG)

# APPELLANT'S RESPONSE TO PETITION FOR REHEARING OR REHEARING EN BANC REGARDING INTERVENTION

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**STATUTES, RULES & REGULATIONS**

**RESPONSE TO PETITION FOR REHEARING OR REHEARING EN BANC**

Earlier this year, a panel of this Court concluded that the San Diego County Sheriff's policy of denying the vast majority of residents their constitutional right to carry a firearm outside the home for self-defense is unconstitutional. *Peruta v. County of San Diego*, 742 F.3d 1144, 1169 (9th Cir. 2014). Shortly thereafter, the Sheriff decided that, while he would not change his policy or issue the plaintiffs licenses to carry firearms unless and until the District Court orders him to do so on remand, he also would not pursue en banc or Supreme Court review of the panel's decision. At the thirteenth hour, the state of California, which until then had taken no part either in this case over its five-year span or in any other case raising a comparable issue—and, indeed, had successfully urged that it should be dismissed from similar cases in which it had been named as a party—moved to intervene, invoking 28 U.S.C. § 2403(b) and Federal Rules of Civil Procedure 24(a)(1), 24(a)(2), and 24(b). After the panel denied that request, the state renewed it to the en banc court, which called for this response.

The state does not have an unconditional statutory right to intervene in this litigation. That right arises only when, among other things, the constitutionality of a state statute has been called into question. Because this case challenges only the Sheriff's *policy* under a California statute—a policy that many California sheriffs did not follow before the panel decision and do not follow today—that condition is

not satisfied here. Accordingly, although California may have an interest in the resolution of the plaintiffs' challenge, it is not the kind of interest that gives rise a statutory right to intervene. That said, while the state's dilatory tactics hardly make this a strong case for granting discretionary intervention, as the plaintiffs explained to the panel, they do not object should this Court, in its discretion, decide to permit the state to intervene at this juncture pursuant to Rule 24(a)(2) or 24(b).

## STATEMENT OF THE FACTS

With few very limited exceptions, California generally has made it unlawful for the typical resident to openly carry a loaded firearm outside the home. *See* Cal. Penal Code §§25850, §26350, 26400, 26035, 26045, and 26055 (Addend. 1-2, 5-7). California allows an individual to carry a loaded handgun in a concealed fashion, but only if he or she has a license to do so issued by a sheriff or police chief. *Id.* §§ 26150, 26155 (Addend. 2-4). To obtain a concealed-carry license, the applicant must demonstrate, among other things, "good cause." that the Sheriff accepts. *Id.* Although the sheriffs in many California counties interpret "good cause" to include the desire to carry a firearm for self-defense, San Diego's sheriff does not. E.R. IV 0874. As a result, the typical law-abiding resident of San Diego has no right to carry a loaded handgun outside the home. Instead, he requires an individual to demonstrate some particularized need to carry a firearm, such as a documented threat to his or her safety.

Shortly after the Supreme Court recognized in *District of Columbia v. Heller*, 554 U.S. 570 (2008), that the Second Amendment protects an individual right to keep and bear arms, five individuals and the CRPA Foundation initiated this challenge to the Sheriff's policy, contending that it violates the Second Amendment. *Peruta*, 742 F.3d at 1148. Although the District Court rejected that argument, a divided panel of this Court reversed, reaching the "unsurprising" conclusion 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, and that the Sheriff may not flatly prohibit "the typical responsible, law-abiding citizen" from exercising that right, *id.* at 1169.

After the panel issued its opinion, the Sheriff announced that he did not intend to seek en banc or Supreme Court review, and the plaintiffs reasonably concluded that their litigation victory had been secured. Nevertheless, the sheriff also made clear that he will not change his policy or grant licenses to the plaintiffs or any other San Diego residents unless and until he is ordered to do so by the District Court on remand. *See* Appellee's Resp. Re. En Banc Pet. (May 14, 2014) (ECF 153-1) ("Appellee has not changed his policy or procedures for issuance of concealed carry licenses. All current applications that do no meet the existing policy are being held without action, pending final direction from the Court of the Legislature.").

At that remarkably late stage, California moved to intervene so that it could pursue en banc review itself. Mot. to Intervene, 4–5 (Feb. 27, 2014) (ECF 122-1) ("Mot."). Although the state has not participated in this case to date, and has sought to extract itself from comparable cases by claiming it is not a proper party to challenges to county "good cause" policies, the state claimed an unconditional right to intervene pursuant to 28 U.S.C. §2403(b) and Rule 24(a)(1), on the theory that this "appeal calls into question the constitutionality of the State's statutory scheme governing the carrying of firearms in public places." *Id.* at 5–6. The state alternatively sought to intervene pursuant to Rule 24(a)(2) or 24(b), arguing that its delay in seeking to join the case should be excused because it believed that its interests were being adequately represented by the county until the county decided not to pursue further review.

The panel denied the state's request, concluding that the reasons for and length of the state's delay in intervening were not excused by the county's actions. Order Denying Mot. to Intervene, 7 (Nov. 12, 2014) (ECF 156) ("Order"). Judge Thomas dissented and would have allowed the state to intervene and file a petition for en banc review. The state sought rehearing en banc of the order denying its intervention motion, and this Court requested this response.[1]

[1] The Brady Campaign to Prevent Gun Violence, the California Police Chiefs' Association, and the California Peace Officers' Association also filed petitions that the panel construed as requests to intervene and then denied. On November 26, 2014, the Brady Campaign moved to join the

## ARGUMENT

In support of its request to intervene, the state has invoked three different provisions: (1) Rule 24(a)(1), which allows for intervention as of right if the motion is timely and the applicant "is given an unconditional right to intervene by a federal statute"; (2) Rule 24(a)(2), which allows for intervention as of right if the motion is timely and the applicant has a "significantly protectable" interest that may be impaired or impeded by the litigation and is not adequately represented by an existing party; and (3) Rule 24(b), which allows for permissive intervention if the motion is timely and the applicant demonstrates an independent ground for jurisdiction and a common question of law and fact between its claim or defense and the case in which it seeks to intervene.

While the plaintiffs do not believe that the state has established any statutory right sufficient to justify intervention as of right under Rule 24(a)(1), they do not object to this Court permitting the state to intervene pursuant to Rule 24(a)(2) or Rule 24(b). Because the Sheriff continues to refuse to change his policy or issue licenses to the plaintiffs, it is clear that a live controversy remains. Accordingly,

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State's petition for rehearing or rehearing en banc. Because this Court has called for a response only to the State's intervention petition, this response does not address the propriety of permitting the Brady Center to intervene. But for all the reasons stated in plaintiffs' initial opposition to intervention, the Brady Campaign cannot intervene. *See* Appellants' Opposition to Motions for Leave to Intervene by the State Of California Pursuant to Frcp 24(A)(1) and by the Brady Campaign to Prevent Gun Violence; and Opposition to California Police Chiefs Association and California Peace Officers Association Footnote Request to Intervene at 10-20.

the plaintiffs consider it within the discretion of this Court to conclude that the state is an appropriate party to intervene and seek further review of the county's policy.[2]

## I. The State Does Not Have An Unconditional Statutory Right To Intervene In This Litigation.

Under Rule 24(a)(1), courts must grant any timely intervention request filed by any applicant who "is given an unconditional right to intervene by a federal statute." States are given such a right when, among other things, "the constitutionality of any statute of that State affecting the public interest is drawn in question." 28 U.S.C. §2403(b).[3] Although California initially relied upon section 2403(b) and Rule 24(a)(1) as a potential avenue for intervention in this appeal, the state appears to have abandoned that argument in its en banc petition. And with good reason, as this litigation is about the constitutionality of San Diego's *policy*, not the constitutionality of any California statute.

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[2] That said, for the reasons explained in their response to this Court's *sua sponte* request, the plaintiffs do not believe that en banc review is warranted.

[3] Section 2403(b) provides, in relevant part: "In any action, suit, or proceeding in a court of the United States to which a State or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality." Relatedly, Federal Rule of Appellate Procedure 44(b) requires that when "a party questions the constitutionality of a statute of a State in a proceeding in which that State or its agency, officer, or employee is not a party in an official capacity, the questioning party must give written notice to the circuit clerk immediately upon the filing of the record or as soon as the question is raised in the court of appeals. The clerk must then certify that fact to the attorney general of the State."

That much is clear from the panel decision itself, which confirms that the "only law 'drawn into question' on appeal was the law challenged at the District Court: the San Diego County policy." Order at 9. As the panel explained, "California law delegates to each city and county the power to issue a written policy setting forth the procedures for obtaining a concealed-carry license. San Diego County has issued such a policy. At issue in this appeal is *that policy's* interpretation of the 'good cause' requirement." *Peruta*, 742 F.3d at 1147 (emphasis added). As a result, there was only "one argument … at center stage" in this appeal: whether, "by defining 'good cause' in *San Diego County's* permitting scheme to exclude a general desire to carry for self-defense, *the County* impermissibly burdens [its residents] Second Amendment right to bear arms." *Id.* at 1149 (emphases added).

Although California now contends that the panel's decision "forbids California from authorizing local authorities to impose a meaningful 'good cause' requirement," Rehearing Request 1, that contention is belied by the fact that numerous sheriffs throughout the state already interpret "good cause" in precisely the same manner as the panel concluded the Second Amendment demands. California has never suggested that these sheriffs are violating state law; to the contrary, it has steadfastly insisted that it is up to each sheriff to determine for him or herself what constitutes "good cause." Indeed, when the state has been named

as a party in litigation involving counties with "good cause" policies like San Diego's, it has sought dismissal on the theory that it is not a property party to such challenges because it is up to each county to decide what constitutes "good cause." *See, e.g.*, Defs. Cross-Mot. Summ. J., at 3, *Pizzo v. San Francisco*, No. 09-04493 (N.D. Cal. July 2, 2012) (ECF 81); Mem. & Ord. Granting Mot. to Dismiss, at 4–7, *David K. Mehl et al. v. Lou Blanas et al.*, No. 2:03-cv-02682 (E.D. Cal. Sept. 3, 2004) (ECF 17).

At most, then, this litigation implicates state law only indirectly, which federal courts repeatedly have found insufficient to satisfy section 2403. *See, e.g.*, *Haspel & Davis Milling & Planting Co. v. Bd. of Levee Comm'rs of the Orleans Levee Dist. & La.*, 493 F.3d 570, 577–78 (5th Cir. 2007); *Blair v. Shanahan*, 38 F.3d 1514, 1516, 1522 (9th Cir. 1994). *Déjà vu of Cincinnati, L.L.C. v. Union Twp. Bd. of Trustees*, 411 F.3d 777, 796–97 (6th Cir. 2005). Courts likewise have rejected any suggestion that the fact that a county acts pursuant to a state statute necessarily means that "[t]he validity of [that] statute is … drawn in question." *United States v. Lynch*, 137 U.S. 280, 285 (1890); *see also Déjà vu of Cincinnati, L.L.C.*, 411 F.3d 777, 796–97.

Instead, section 2403 is implicated only when the constitutionality of a state or federal law is "squarely at issue." *Nat'l Collegiate Athletic Ass'n v. Governor of New Jersey*, 730 F.3d 208, 217 (3d Cir. 2013); *see also, e.g.*, *DeKalb Cnty. v. Fed.*

*Hous. Fin. Agency*, 741 F.3d 795, 797 (7th Cir. 2013); *CFCU Cmty. Credit Union v. Hayward*, 552 F.3d 253, 258 (2d Cir. 2009); *Gritchen v. Collier*, 254 F.3d 807, 810 (9th Cir. 2001). Because this litigation is about the constitutionality of a county policy, and a county policy is decidedly not a "statute of [the] State," *Int'l Paper Co. v. Inhabitants of Town of Jay, Me.*, 887 F.2d 338, 341–42 (1st Cir. 1989), that condition is not satisfied here.

## II. The Plaintiffs Do Not Oppose The State's Request To Intervene Under Rule 24(a)(2) or Rule 24(b)

Although the state does not have an unconditional statutory right to intervene in this appeal, the plaintiffs do not oppose the state's request to intervene pursuant to Rule 24(a)(2) or (b). While "intervention after the publication of an appellate opinion must be extremely rare," Order at 5, it is not unprecedented in this circuit where a state is concerned, *see Day v. Apoliona*, 505 F.3d 963 (9th Cir. 2007). Accordingly, the plaintiffs consider it within the discretion of this Court to conclude that this step is appropriate under the unusual circumstances of this case. While the state's dilatory tactics are certainly not to be commended, and have contributed to the delay in the plaintiffs' ability to exercise rights plainly guaranteed by the Second Amendment, aside from that delay, the plaintiffs have no reason to believe that allowing the state to intervene at this juncture would cause them any significant prejudice. The discretion this Court has to grant or deny permissive motions to intervene, including for reasons of undue delay, exists in

large measure to protect the integrity, finality, and predictability of the Court's own proceedings. According, the plaintiffs leave it to this Court to determine whether the state is an appropriate party to join this litigation at this time.

## CONCLUSION

For the foregoing reasons, the plaintiffs oppose any rehearing or rehearing en banc regarding the State's intervention as of right under Rule 24(a)(1), but do not object to the State's intervention under Rule 24(a)(2) or (b).

December 24, 2014

Respectfully submitted,

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# ADDENDUM

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**Cal. Penal Code § 25850**

(a) A person is guilty of carrying a loaded firearm when the person carries a loaded firearm on the person or in a vehicle while in any public place or on any public street in an incorporated city or in any public place or on any public street in a prohibited area of unincorporated territory.

(b) In order to determine whether or not a firearm is loaded for the purpose of enforcing this section, peace officers are authorized to examine any firearm carried by anyone on the person or in a vehicle while in any public place or on any public street in an incorporated city or prohibited area of an unincorporated territory. Refusal to allow a peace officer to inspect a firearm pursuant to this section constitutes probable cause for arrest for violation of this section.

(c) Carrying a loaded firearm in violation of this section is punishable, as follows:

(1) Where the person previously has been convicted of any felony, or of any crime made punishable by a provision listed in Section 16580, as a felony.

(2) Where the firearm is stolen and the person knew or had reasonable cause to believe that it was stolen, as a felony.

(3) Where the person is an active participant in a criminal street gang, as defined in subdivision (a) of Section 186.22, under the Street Terrorism Enforcement and Prevention Act (Chapter 11 (commencing with Section 186.20) of Title 7 of Part 1), as a felony.

(4) Where the person is not in lawful possession of the firearm, or is within a class of persons prohibited from possessing or acquiring a firearm pursuant to Chapter 2 (commencing with Section 29800) or Chapter 3 (commencing with Section 29900) of Division 9 of this title, or Section 8100 or 8103 of the Welfare and Institutions Code, as a felony.

(5) Where the person has been convicted of a crime against a person or property, or of a narcotics or dangerous drug violation, by imprisonment pursuant to subdivision (h) of Section 1170, or by imprisonment in a county jail not to exceed one year, by a fine not to exceed one thousand dollars ($1,000), or by both that imprisonment and fine.

(6) Where the person is not listed with the Department of Justice pursuant to Section 11106 as the registered owner of thehandgun, by imprisonment pursuant to subdivision (h) of Section 1170, or by imprisonment in a county jail not to exceed one year, or by a fine not to exceed one thousand dollars ($1,000), or both that fine and imprisonment.

(7) In all cases other than those specified in paragraphs (1) to (6), inclusive, as a misdemeanor, punishable by imprisonment in a county jail not to exceed one year, by a fine not to exceed one thousand dollars ($1,000), or by both that imprisonment and fine.

(d)(1) Every person convicted under this section who has previously been convicted of an offense enumerated in Section 23515, or of any crime made punishable under a provision listed in Section 16580, shall serve a term of at least three months in a county jail, or, if granted probation or if the execution or imposition of sentence is suspended, it shall be a condition thereof that the person be imprisoned for a period of at least three months.

(2) The court shall apply the three-month minimum sentence except in unusual cases where the interests of justice would best be served by granting probation or suspending the imposition or execution of sentence without the minimum imprisonment required in this section or by granting probation or suspending the imposition or execution of sentence with conditions other than those set forth in this section, in which case, the court shall specify on the record and shall enter on the minutes the circumstances indicating that the interests of justice would best be served by that disposition.

(e) A violation of this section that is punished by imprisonment in a county jail not exceeding one year shall not constitute a conviction of a crime punishable by imprisonment for a term exceeding one year for the purposes of determining federal firearms eligibility under Section 922(g)(1) of Title 18 of the United States Code.

(f) Nothing in this section, or in Article 3 (commencing with Section 25900) or Article 4 (commencing with Section 26000), shall preclude prosecution under Chapter 2 (commencing with Section 29800) or Chapter 3 (commencing with Section 29900) of Division 9 of this title, Section 8100 or 8103 of the Welfare and Institutions Code, or any other law with a greater penalty than this section.

(g) Notwithstanding paragraphs (2) and (3) of subdivision (a) of Section 836, a peace officer may make an arrest without a warrant:

(1) When the person arrested has violated this section, although not in the officer's presence.

(2) Whenever the officer has reasonable cause to believe that the person to be arrested has violated this section, whether or not this section has, in fact, been violated.

(h) A peace officer may arrest a person for a violation of paragraph (6) of subdivision (c), if the peace officer has probable cause to believe that the person is carrying a handgun in violation of this section and that person is not listed with the Department of Justice pursuant to paragraph (1) of subdivision (c) of Section 11106 as the registered owner of that handgun.

**Cal. Penal Code § 26150**

(a) When a person applies for a license to carry a pistol, revolver, or other firearm capable of being concealed upon the person, the sheriff of a county may issue a license to that person upon proof of all of the following:

(1) The applicant is of good moral character.

(2) Good cause exists for issuance of the license.

(3) The applicant is a resident of the county or a city within the county, or the applicant's principal place of employment or business is in the county or a city within the county and the applicant spends a substantial period of time in that place of employment or business.

(4) The applicant has completed a course of training as described in Section 26165.

(b) The sheriff may issue a license under subdivision (a) in either of the following formats:

(1) A license to carry concealed a pistol, revolver, or other firearm capable of being concealed upon the person.

(2) Where the population of the county is less than 200,000 persons according to the most recent federal decennial census, a license to carry loaded and exposed in only that county a pistol, revolver, or other firearm capable of being concealed upon the person.

**Cal. Penal Code § 26155**

(a) When a person applies for a license to carry a pistol, revolver, or other firearm capable of being concealed upon the person, the chief or other head of a municipal police department of any city or city and county may issue a license to that person upon proof of all of the following:

(1) The applicant is of good moral character.

(2) Good cause exists for issuance of the license.

(3) The applicant is a resident of that city.

(4) The applicant has completed a course of training as described in Section 26165.

(b) The chief or other head of a municipal police department may issue a license under subdivision (a) in either of the following formats:

(1) A license to carry concealed a pistol, revolver, or other firearm capable of being concealed upon the person.

(2) Where the population of the county in which the city is located is less than 200,000 persons according to the most recent federal decennial census, a license to carry loaded and exposed in only that county a pistol, revolver, or other firearm capable of being concealed upon the person.

(c) Nothing in this chapter shall preclude the chief or other head of a municipal police department of any city from entering an agreement with the sheriff of the county in which the city is located for the sheriff to process all applications for licenses, renewals of licenses, and amendments to licenses, pursuant to this chapter.

**Cal. Penal Code § 26350**

(a)(1) A person is guilty of openly carrying an unloaded handgun when that person carries upon his or her person an exposed and unloaded handgun outside a vehicle while in or on any of the following:

(A) A public place or public street in an incorporated city or city and county.

(B) A public street in a prohibited area of an unincorporated area of a county or city and county.

(C) A public place in a prohibited area of a county or city and county.

(2) A person is guilty of openly carrying an unloaded handgun when that person carries an exposed and unloaded handgun inside or on a vehicle, whether or not on his or her person, while in or on any of the following:

(A) A public place or public street in an incorporated city or city and county.

(B) A public street in a prohibited area of an unincorporated area of a county or city and county.

(C) A public place in a prohibited area of a county or city and county.

(b)(1) Except as specified in paragraph (2), a violation of this section is a misdemeanor.

(2) A violation of subparagraph (A) of paragraph (1) of subdivision (a) is punishable by imprisonment in a county jail not exceeding one year, or by a fine not to exceed one thousand dollars ($1,000), or by both that fine and imprisonment, if both of the following conditions exist:

(A) The handgun and unexpended ammunition capable of being discharged from that handgun are in the immediate possession of that person.

(B) The person is not in lawful possession of that handgun.

(c)(1) Nothing in this section shall preclude prosecution under Chapter 2 (commencing with Section 29800) or Chapter 3 (commencing with Section 29900) of Division 9, Section 8100 or 8103 of the Welfare and Institutions Code, or any other law with a penalty greater than is set forth in this section.

(2) The provisions of this section are cumulative and shall not be construed as restricting the application of any other law. However, an act or omission punishable in different ways by different provisions of law shall not be punished under more than one provision.

(d) Notwithstanding the fact that the term "an unloaded handgun" is used in this section, each handgun shall constitute a distinct and separate offense under this section.

**Cal. Penal Code § 26400**

(a) A person is guilty of carrying an unloaded firearm that is not a handgun in an incorporated city or city and county when that person carries upon his or her person an unloaded firearm that is not a handgun outside a vehicle while in the incorporated city or city and county.

(b)(1) Except as specified in paragraph (2), a violation of this section is a misdemeanor.

(2) A violation of subdivision (a) is punishable by imprisonment in a county jail not exceeding one year, or by a fine not to exceed one thousand dollars ($1,000), or by both that fine and imprisonment, if the firearm and unexpended ammunition capable of being discharged from that firearm are in the immediate possession of the person and the person is not in lawful possession of that firearm.

(c)(1) Nothing in this section shall preclude prosecution under Chapter 2 (commencing with Section 29800) or Chapter 3 (commencing with Section 29900) of Division 9, Section 8100 or 8103 of the Welfare and Institutions Code, or any other law with a penalty greater than is set forth in this section.

(2) The provisions of this section are cumulative and shall not be construed as restricting the application of any other law. However, an act or omission punishable in different ways by different provisions of law shall not be punished under more than one provision.

(d) Notwithstanding the fact that the term "an unloaded firearm that is not a handgun" is used in this section, each individual firearm shall constitute a distinct and separate offense under this section.

**Cal. Penal Code § 26035**

Nothing in Section 25850 shall prevent any person engaged in any lawful business, including a nonprofit organization, or any officer, employee, or agent authorized by that person for lawful purposes connected with that business, from having a loaded firearm within the person's place of business, or any person in lawful possession of private property from having a loaded firearm on that

property.

**Cal. Penal Code § 26055**

Nothing in Section 25850 shall prevent any person from having a loaded weapon, if it is otherwise lawful, at the person's place of residence, including any temporary residence or campsite.

**Form 11. Certificate of Compliance Pursuant to Circuit Rules 35-4 and 40-1**

**Form Must be Signed by Attorney or Unrepresented Litigant and Attached to the Back of Each Copy of the Petition or Answer**

**(signature block below)**

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/answer is: (check applicable option)

____ Proportionately spaced, has a typeface of 14 points or more and contains _____ words (petitions and answers must not exceed 4,200 words).

**or**

____ Monospaced, has 10.5 or fewer characters per inch and contains _____ words or _____ lines of text (petitions and answers must not exceed 4,200 words or 390 lines of text).

**or**

__X__ In compliance with Fed. R. App. 32(c) and does not exceed 15 pages.

s/C.D. Michel
Signature of Attorney or
Unrepresented Litigant

**(New Form 7/1/2000)**

## CERTIFICATE OF SERVICE

I hereby certify that on December 24, 2014, an electronic PDF of **APPELLANT'S RESPONSE TO PETITION FOR REHEARING OR REHEARING EN BANC REGARDING INTERVENTION** was uploaded to the Court's CM/ECF system, which will automatically generate and send by electronic mail a Notice of Docket Activity to all registered attorneys participating in the case. Such notice constitutes service on those registered attorneys.

Date: December 24, 2014

/s/ C. D. Michel
C. D. Michel
Attorneys for *Plaintiffs-Appellants*

C.A. No. 10-56971

**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

Honorable Irma E. Gonzalez

---

# APPELLEE WILLIAM D. GORE'S BRIEF IN SUPPORT OF REHEARING *EN BANC*

---

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## I

## INTRODUCTION

A split panel reversed the District Court deciding that the San Diego County Sheriff's implementation of the California statutory concealed carry licensing program violates the Second Amendment. The panel determined that the Sheriff's interpretation of the statutory "good cause" requirement in Penal Code sections 26150 and 26155 impermissibly burdens the right to bear arms after the enactment of California's recent legislation (primarily Penal Code sections 25850 and 26350) which regulates the carry of firearms in incorporated cities. Motions to Intervene are before the Court and the panel's decision is awaiting possible *en banc* review.

## II

## THE ATTORNEY GENERAL'S MOTION TO INTERVENE SHOULD BE GRANTED

The Attorney General should be granted permission to intervene. The Sheriff defers to the Attorney General to defend the constitutional validity of the statutes at issue. The Sheriff's sole interest is to ensure the statutes are implemented in a constitutionally lawful manner. As such, the Attorney General is in the best position to defend the statutory scheme as the Sheriff has had no involvement in its development and does not take a position on the recent changes.

DATE: December 23, 2014

Respectfully submitted,

THOMAS E. MONTGOMERY, County Counsel

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## CERTIFICATE OF COMPLIANCE

Case No. 10-56971

Pursuant to Ninth Circuit Rules, I certify that the attached Appellees' Brief is typed in Times New Roman, proportionally spaced 14-point typeface, and the brief contains 183 words of text as counted by the Microsoft Word 2010 word-processing program used to generate the brief.

DATE: December 23, 2014 THOMAS E. MONTGOMERY, County Counsel

By: /s/JAMES M. CHAPIN, Senior Deputy
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No. 10-56971

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
(CV 09-02371-IEG)

# APPELLANTS' OPPOSITION TO SUA SPONTE REHEARING EN BANC

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**OPPOSITION TO SUA SPONTE REHEARING EN BANC**

In the wake of the Supreme Court's landmark decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008), five individuals and one organization initiated this lawsuit seeking to vindicate the Second Amendment rights of San Diego residents to carry a firearm outside the home for self-defense. Specifically, the plaintiffs challenged the San Diego County Sheriff's policy of narrowly interpreting "good cause" in California's statute establishing the requirements to obtain a license to carry a handgun outside the home as requiring individuals to demonstrate some particularized need to do so. As the plaintiffs argued, this policy has the practical effect of denying the vast majority of law-abiding San Diego residents their constitutional right to carry a firearm outside the home for self-defense. The plaintiffs did not seek any sweeping or unusual expansion of the right to carry, but sought only to have the same ability to carry as already enjoyed by California residents in other counties, where the Sheriffs do not employ an unconstitutionally narrow conception of "good cause."

A panel of this Court agreed, reaching the "unsurprising" conclusions that "the right to bear arms includes the right to carry an operable firearm outside the home for the lawful purpose of self-defense," and that San Diego may not flatly prohibit "the typical responsible, law-abiding citizen" from exercising that right. *Peruta v. County of San Diego*, 742 F.3d 1144, 1169 (9th Cir. 2014). Shortly

thereafter, the Sheriff announced that, while he would not change his challenged policy or issue the plaintiffs licenses unless and until the District Court orders him to do so, he also would not pursue en banc or Supreme Court review of the panel's decision. But three weeks ago—months after the panel decision and more than five years after this litigation first began—this Court *sua sponte* called for the views of the parties on whether it should rehear the case en banc.

It should not. As the plain text and historical understanding of the Second Amendment confirm, the panel's conclusion that the right protected by the Second Amendment is not confined to the home is manifestly correct. Indeed, that conclusion is compelled by *Heller* itself, which plainly contemplated a right that was not homebound. The panel's conclusion that law-abiding citizens may not be denied that right is equally correct, and once again is compelled by *Heller* itself, which made crystal clear that law-abiding individuals may not be prohibited from exercising a right that the Second Amendment protects. While the question at stake is certainly of the utmost importance, because the panel's decision is consistent with both the Constitution and Supreme Court precedent, there is no need for this Court to reconsider it en banc. Five years is long enough for the plaintiffs to wait for their Second Amendment rights to be vindicated.

## STATEMENT OF THE FACTS

With few very limited exceptions, California generally has made it unlawful for the typical resident to openly carry a loaded firearm outside the home. *See* Cal. Penal Code §§ 25850, 26350, 26400, 26035, 26045, and 26055 (Addend. 1-2, 5-7). California allows an individual to carry a loaded handgun in a concealed fashion, but only if he or she has a license to do so issued by a sheriff or police chief. *Id.* §§ 26150, 26155 (Addend. 2-4).

To obtain such a license from a sheriff, an applicant must submit a written application showing that he or she is an adult who either resides in or spends substantial time at a business or principal place of employment in that county. *Id.* § 26150(a)(3) (Addend. 3). The applicant must also, among other things, pass a criminal background check and successfully complete a training course covering handgun safety and California firearm laws. *Id.* §§ 26165, 26185 (Addend. 4-5). Finally, the sheriff must conclude that the applicant is of "good moral character" and has "good cause" to carry a loaded handgun in public. *Id.* § 26150(a) (Addend. 2-3). The state has delegated to each sheriff or police chief the authority to issue a written policy within these parameters. *Id.* § 26160 (Addend. 4).

Although many sheriffs throughout California have adopted policies that treat the desire to carry a handgun for self-defense as "good cause," San Diego's has not. Instead, in San Diego, an applicant can establish good cause only by

demonstrating "circumstances which would make a person a specific target in contrast to a random one," such as a documented threat to his or her safety. E.R. IV 0874. And the Sheriff has made it quite clear that "Licenses are NOT issued based on 'fear' alone." E.R. IV 0874. As a result, the typical law-abiding resident of San Diego has no right to carry a loaded handgun outside the home.

Shortly after the Supreme Court recognized in *Heller* that the Second Amendment protects an individual right to keep and bear arms, five individuals and the CRPA Foundation initiated this challenge to the Sheriff's policy, contending that it violates the Second Amendment. Although the District Court rejected that argument, a divided panel of this Court reversed and concluded that the Sheriff's "'good cause' permitting requirement impermissibly infringes on the Second Amendment right." *Peruta*, 742 F.3d at 1179. The Sheriff subsequently announced that, while he will not comply with the panel's decision unless and until the District Court orders him to do so, he does not intend to seek reconsideration of that decision en banc or in Supreme Court. This Court has now *sua sponte* called for the parties' views on whether this case should be reheard en banc.

## ARGUMENT

This case boils down to one and only one question: whether the Second Amendment protects a right to carry a firearm outside the home for self-defense. If it does, then there can be no serious dispute that a policy that categorically denies

that right to law-abiding individuals is unconstitutional. While that question is certainly one of paramount importance, it is not a question that this Court needs to consider en banc because the panel has already correctly resolved it. As the panel's very thorough and well-reasoned decision explains, the Second Amendment does in fact protect a right to carry a firearm outside the home, and the Sheriff's policy does in fact unconstitutionally deny that right to law-abiding citizens. Indeed, both of those conclusions are compelled by binding Supreme Court precedent—not to mention the plain text of the Second Amendment itself.

The decision below does not conflict with any decision of this Court, and this is not a case in which the practical implications of the decision merit en banc consideration. Leaving the panel decision in place will simply mean that San Diego residents will receive the benefit of the same "good cause" standard that has long held sway in other California counties. There have been no practical problems in the counties that have operated with a good cause standard that is more compatible with the Second Amendment. And while there are material differences in the varying approaches of the Courts of Appeals, there is no way for this Court acting en banc to eliminate those differences. That being so, there is little to gain from rehearing en banc, which will only prolong the plaintiffs' five-year struggle to vindicate their constitutional rights.

## I. The Panel Correctly Concluded That the Second Amendment Is Not Confined to the Home.

"Constitutional rights are enshrined with the scope they were understood to have when the people adopted them." *Heller*, 554 U.S. at 634-35. The Supreme Court's extensive review of that historical understanding in *Heller* led it to the conclusion that the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation." *Id.* at 592; *see also id*. at 628 ("the inherent right of self-defense has been central to the Second Amendment"). Although the Court went on to note that "the *need* for [self-defense] is most acute" in the home, the Court found the right itself, not the place where one exercises it, "central to the Second Amendment." *Id.* (emphasis added).

As the panel correctly concluded, that "right 'could not rationally have been limited to the home.' " *Peruta*, 742 F.3d at 1153 (quoting *Moore v. Madigan*, 702 F.3d 933, 936 (7th Cir. 2012)). That much is clear from the plain text of the Constitution. "The Second Amendment secures the right not only to 'keep' arms but also to '*bear*' them." *Peruta*, 742 F.3d at 1151. The Supreme Court "already has supplied the . . . plain meaning" of "bear," *id.*, which is to "wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person." *Heller*, 554 U.S. at 584. "One needn't point to statistics to recognize that the prospect of conflict—at least, the sort of conflict for which one would wish to

be 'armed and ready'—is just as menacing (and likely more so) beyond the front porch as it is in the living room." *Peruta*, 742 F.3d at 1152; *see also Moore*, 702 F.3d at 937. Accordingly, the plain text of the Second Amendment alone forecloses any suggestion that the right it protects is confined to the home.

So, too, does "the original public understanding of the Second Amendment right." *Peruta*, 742 F.3d at 1153. As *Heller* noted, William Blackstone's *Commentaries on the Laws of England* confirm that, "by the time of the founding," "the right of having and using arms for self-preservation and defense" was "understood to be an individual right protecting against both *public* and private violence." 554 U.S. at 594 (emphasis added). Likewise, St. George Tucker "insisted" that "any law 'prohibiting any person from *bearing* arms' crossed the constitutional line." *Peruta*, 742 F.3d at 1154 (emphasis added). And although there were some early laws that restricted the right to bear arms outside the home, they generally were confined to the bearing of "dangerous or unusual weapons," not of the kinds of arms typically carried by law-abiding persons for the lawful purpose of self-defense. *Id.*

The Supreme Court's decision in *Heller* also plainly contemplates a right to carry a firearm outside the home. When the Court searched in vain for past restrictions as severe as D.C.'s handgun ban, it deemed restrictions that applied *outside* the home most analogous and noted with approval that "some of those

[restrictions] have been struck down." 554 U.S. at 629. In doing so, the Court placed particular emphasis on two cases in which courts concluded that states could not prohibit people from carrying pistols openly if they also prohibited them from carrying them concealed. *See id.* (discussing *Nunn v. State*, 1 Ga. 243 (1846), and *Andrews v. State*, 50 Tenn. 165 (1871)). Such laws could hardly "'amount[] to a destruction of the right'" to self-defense or represent "severe" restrictions on its exercise, *id.* at 629-30 (quoting *State v. Reid*, 1 Ala. 612, 616-17 (1840)), if the protections afforded by the Second Amendment stopped at one's property line. The same is clear from the Court's suggestion that laws forbidding firearms in schools and certain government buildings are "presumptively lawful." *Id.* at 626-27 & n.26. The Court would have had no need to single out these truly "sensitive places," *id.* at 626, if there were no right to keep and bear arms outside the home.

In short, "[t]o confine the right to be armed to the home is to divorce the Second Amendment from the right of self-defense described in *Heller* and *McDonald*." *Moore*, 702 F.3d at 937. It is therefore unsurprising that not a single Court of Appeals that has considered the question has reached that untenable conclusion. *See, e.g.*, *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 89 (2d Cir. 2012) (assuming without deciding that right extends outside home); *Drake v. Filko*, 724 F.3d 426, 431 (3d Cir. 2013) (same); *Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013) (same). Nor did the dissent reach that conclusion here; instead,

it mistakenly reconceptualized this case as concerning only whether "the Second Amendment . . . protect[s] the *concealed* carrying of handguns in public." *Peruta*, 742 F.3d at 1180 (Thomas, J. dissenting) (emphasis added). In fact, the only question at issue here is whether law-abiding citizens are entitled to carry a loaded firearm in *some* fashion outside the home for self-defense. Because the text of the Second Amendment, its original understanding, and its recent interpretation by the Supreme Court all confirm that the panel's affirmative answer to that question is correct, there is no need for this Court to reconsider the issue en banc.

## II. The Panel Correctly Concluded That Law-Abiding Citizens May Not Be Denied the Only Available Avenue for Exercising Their Constitutional Right To Carry a Firearm Outside the Home for Self-Defense.

Nor is there any need for this Court to reconsider en banc the panel's manifestly correct conclusion that the Sheriff may not deny law-abiding citizens the only available means for exercising their constitutional right to carry a firearm outside the home. The Sheriff's policy of denying licenses to all but those who can supply some particularized need for self-defense is not meaningfully different from "ban[ning] all political speech, but exempt[ing] from this restriction particular people (like current or former political figures), particular places (like private property), and particular situations (like the week before an election)." *Peruta*, 742 F.3d at 1169-70. "Although these exceptions might preserve small pockets of freedom, they would do little to prevent destruction of the right to free speech as a

whole." *Id.* at 1170. So, too, with a policy that confines exercise of Second Amendment rights "to a few people, in a few places, at a few times." *Id.*

Again, that follows directly from *Heller*. Once it was established that the Second Amendment protects an individual right to keep and use handguns for self-defense, it was clear that "a complete prohibition of their use is invalid." *Heller*, 554 U.S. at 629. And once it is established that the Second Amendment protects a right to carry outside the home, it is equally clear that a law that prohibits most individuals from doing so is invalid. Indeed, it is axiomatic that the government may not prohibit law-abiding individuals from exercising their constitutional rights. After all, "[t]he Constitution is not a document 'prescribing limits, and declaring that those limits may be passed at pleasure.' " *United States v. Stevens*, 559 U.S. 460, 470, 471 (2010) (quoting *Marbury v. Madison*, 1 Cranch 137, 178 (1803)). There is no exception to that principle for the Second Amendment.

That the panel invalidated the Sheriff's policy without resorting to a levels-of-scrutiny analysis does not render its decision inconsistent with other decisions of this Court. The panel did not eschew the "two-step approach" adopted in *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013); to the contrary, it expressly "appl[ied] that approach." *Peruta*, 742 F.3d at 1150. In doing so, however, it also recognized that there was no need to complete the second step because a restriction as "severe" as the Sheriff's on conduct at the "core" of the Second Amendment

necessarily fails *any* standard of scrutiny. *Id.* at 1170. That analysis is in keeping both with *Chovan*'s two-step approach and with *Heller,* which confirms that "[a] law effecting a '*destruction* of the right' rather than merely *burdening* it is . . . an infringement under any light." *Id.* at 1168 (quoting *Heller*, 554 U.S. at 629).

Indeed, even under intermediate scrutiny, a law still must be "closely drawn to avoid unnecessary abridgement" of constitutional rights. *McCutcheon v. FEC*, - - - U.S. - - -, 134 S. Ct. 1434, 1456-57 (2014). Yet, as the dissent was forced to acknowledge, the inevitable result of the Sheriff's policy is that "[n]ot everyone who may ultimately need the protection of a handgun may obtain a permit." *Id.* at 1193 (Thomas, J., dissenting). That alone ought to defeat any suggestion that it is sufficiently tailored. Likewise, the dissent's acknowledgement that the Sheriff's policy is, at bottom, a simple attempt at "reducing the number of guns in public circulation," *id.* at 1192, cannot be reconciled with the notion that individuals have a *constitutional right* to carry firearms outside their homes.

That does not mean that California's entire statutory scheme has now been thrown into disarray. In fact, many a county in California has long applied state law just as the panel's decision contemplates, treating a desire to carry a handgun for self-defense as "good cause." The state has never suggested that these counties are violating state law; to the contrary, it has steadfastly insisted that it is up to each sheriff to determine what constitutes "good cause." Nor has it ever been

suggested that there are serious practical problems in those counties that have a "good cause" standard more compatible with the Second Amendment. Thus, this is not a case in which the practical consequences of the panel's decision counsel in favor of en banc review. The panel's decision simply means that San Diego County will have the same "good cause" standard that has long applied unproblematically in many other counties in California.

Nor does the panel's decision establish—either explicitly or implicitly—a constitutional right to carry a *concealed* handgun in public. To be sure, the decision entitles law-abiding residents of San Diego who can satisfy all other requirements to obtain concealed-carry licenses. But that result is a product of *the state*'s preference for concealed carry, as reflected in its decision to flatly prohibit open carry but make concealed-carry licenses available for "good cause" shown. Nothing about the panel's decision prevents the state from altering that preference, and to the extent the Sheriff cannot do so himself, that is a consequence of state law, not the panel's decision. Accordingly, whether the Second Amendment permits limits on the *manner* in which the right it protects may be exercised outside the home is a question that the panel's decision correctly leaves for another day. The dissent, by contrast, would declare concealed carry outside the scope of the Second Amendment entirely, and in doing so force California to allow open carry. *See Peruta*, 742 F.3d at 1191 (Thomas, J., dissenting).

In sum, as the panel "conclude[d] by emphasizing," some "*regulation* of the right to bear arms is not only legitimate but quite appropriate." *Peruta*, 742 F.3d at 1178. But "the enshrinement of constitutional rights necessarily takes certain policy choices off the table," *Heller*, 554 U.S. at 634, and one of those is a near-total ban on the exercise of rights that the Second Amendment protects. Because that is precisely what the Sheriff's policy achieves, it is unconstitutional.

Of course, not all courts considering analogous licensing schemes have reached that conclusion. *See, e.g.*, *Kachalsky*, 701 F.3d at 100-01; *Drake*, 724 F.3d at 434; *Woollard*, 712 F.3d at 876. But the panel's decision is certainly no outlier, as other courts have agreed that *Heller* and *McDonald* demand a much more rigorous form of scrutiny than those courts applied. *See, e.g.*, *Moore*, 702 F.3d at 941-42; *Tyler v. Hillsdale County Sheriff's Dept.*, --- F.3d ---, 2014 WL 7181334 (6th Cir. Dec. 18, 2014). Accordingly, en banc review will not obviate the need for the Supreme Court to step back into the Second Amendment debate; instead, it will only delay that inevitable outcome. That is not a result that the plaintiffs should be forced to tolerate when they have already waited more than five years to vindicate their fundamental constitutional rights.

## CONCLUSION

For the foregoing reasons, the Court should not rehear this case en banc.

December 24, 2014

Respectfully submitted,

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# ADDENDUM

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**Cal. Penal Code § 25850**

(a) A person is guilty of carrying a loaded firearm when the person carries a loaded firearm on the person or in a vehicle while in any public place or on any public street in an incorporated city or in any public place or on any public street in a prohibited area of unincorporated territory.

(b) In order to determine whether or not a firearm is loaded for the purpose of enforcing this section, peace officers are authorized to examine any firearm carried by anyone on the person or in a vehicle while in any public place or on any public street in an incorporated city or prohibited area of an unincorporated territory. Refusal to allow a peace officer to inspect a firearm pursuant to this section constitutes probable cause for arrest for violation of this section.

(c) Carrying a loaded firearm in violation of this section is punishable, as follows:

(1) Where the person previously has been convicted of any felony, or of any crime made punishable by a provision listed in Section 16580, as a felony.

(2) Where the firearm is stolen and the person knew or had reasonable cause to believe that it was stolen, as a felony.

(3) Where the person is an active participant in a criminal street gang, as defined in subdivision (a) of Section 186.22, under the Street Terrorism Enforcement and Prevention Act (Chapter 11 (commencing with Section 186.20) of Title 7 of Part 1), as a felony.

(4) Where the person is not in lawful possession of the firearm, or is within a class of persons prohibited from possessing or acquiring a firearm pursuant to Chapter 2 (commencing with Section 29800) or Chapter 3 (commencing with Section 29900) of Division 9 of this title, or Section 8100 or 8103 of the Welfare and Institutions Code, as a felony.

(5) Where the person has been convicted of a crime against a person or property, or of a narcotics or dangerous drug violation, by imprisonment pursuant to subdivision (h) of Section 1170, or by imprisonment in a county jail not to exceed one year, by a fine not to exceed one thousand dollars ($1,000), or by both that imprisonment and fine.

(6) Where the person is not listed with the Department of Justice pursuant to Section 11106 as the registered owner of the handgun, by imprisonment pursuant to subdivision (h) of Section 1170, or by imprisonment in a county jail not to exceed one year, or by a fine not to exceed one thousand dollars ($1,000), or both that fine and imprisonment.

(7) In all cases other than those specified in paragraphs (1) to (6), inclusive, as a misdemeanor, punishable by imprisonment in a county jail not to exceed one year, by a fine not to exceed one thousand dollars ($1,000), or by both that imprisonment and fine.

(d)(1) Every person convicted under this section who has previously been convicted of an offense enumerated in Section 23515, or of any crime made punishable under a provision listed in Section 16580, shall serve a term of at least three months in a county jail, or, if granted probation or if the execution or imposition of sentence is suspended, it shall be a condition thereof that the person be imprisoned for a period of at least three months.

(2) The court shall apply the three-month minimum sentence except in unusual cases where the interests of justice would best be served by granting probation or suspending the imposition or execution of sentence without the minimum imprisonment required in this section or by granting probation or suspending the imposition or execution of sentence with conditions other than those set forth in this section, in which case, the court shall specify on the record and shall enter on the minutes the circumstances indicating that the interests of justice would best be served by that disposition.

(e) A violation of this section that is punished by imprisonment in a county jail not exceeding one year shall not constitute a conviction of a crime punishable by imprisonment for a term exceeding one year for the purposes of determining federal firearms eligibility under Section 922(g)(1) of Title 18 of the United States Code.

(f) Nothing in this section, or in Article 3 (commencing with Section 25900) or Article 4 (commencing with Section 26000), shall preclude prosecution under Chapter 2 (commencing with Section 29800) or Chapter 3 (commencing with Section 29900) of Division 9 of this title, Section 8100 or 8103 of the Welfare and Institutions Code, or any other law with a greater penalty than this section.

(g) Notwithstanding paragraphs (2) and (3) of subdivision (a) of Section 836, a peace officer may make an arrest without a warrant:

(1) When the person arrested has violated this section, although not in the officer's presence.

(2) Whenever the officer has reasonable cause to believe that the person to be arrested has violated this section, whether or not this section has, in fact, been violated.

(h) A peace officer may arrest a person for a violation of paragraph (6) of subdivision (c), if the peace officer has probable cause to believe that the person is carrying a handgun in violation of this section and that person is not listed with the Department of Justice pursuant to paragraph (1) of subdivision (c) of Section 11106 as the registered owner of that handgun.

**Cal. Penal Code § 26150**

(a) When a person applies for a license to carry a pistol, revolver, or other firearm capable of being concealed upon the person, the sheriff of a county may issue a license to that person upon proof of all of the following:

(1) The applicant is of good moral character.

(2) Good cause exists for issuance of the license.

(3) The applicant is a resident of the county or a city within the county, or the applicant's principal place of employment or business is in the county or a city within the county and the applicant spends a substantial period of time in that place of employment or business.

(4) The applicant has completed a course of training as described in Section 26165.

(b) The sheriff may issue a license under subdivision (a) in either of the following formats:

(1) A license to carry concealed a pistol, revolver, or other firearm capable of being concealed upon the person.

(2) Where the population of the county is less than 200,000 persons according to the most recent federal decennial census, a license to carry loaded and exposed in only that county a pistol, revolver, or other firearm capable of being concealed upon the person.

**Cal. Penal Code § 26155**

(a) When a person applies for a license to carry a pistol, revolver, or other firearm capable of being concealed upon the person, the chief or other head of a municipal police department of any city or city and county may issue a license to that person upon proof of all of the following:

(1) The applicant is of good moral character.

(2) Good cause exists for issuance of the license.

(3) The applicant is a resident of that city.

(4) The applicant has completed a course of training as described in Section 26165.

(b) The chief or other head of a municipal police department may issue a license under subdivision (a) in either of the following formats:

(1) A license to carry concealed a pistol, revolver, or other firearm capable of being concealed upon the person.

(2) Where the population of the county in which the city is located is less than 200,000 persons according to the most recent federal decennial census, a license to carry loaded and exposed in only that county a pistol, revolver, or other firearm capable of being concealed upon the person.

(c) Nothing in this chapter shall preclude the chief or other head of a municipal police department of any city from entering an agreement with the sheriff of the county in which the city is located for the sheriff to process all applications for licenses, renewals of licenses, and amendments to licenses, pursuant to this chapter.

**Cal. Penal Code § 26160**

Each licensing authority shall publish and make available a written policy summarizing the provisions of Section 26150 and subdivisions (a) and (b) of Section 26155.

**Cal. Penal Code § 26165**

(a) For new license applicants, the course of training for issuance of a license under Section 26150 or 26155 may be any course acceptable to the licensing authority, shall not exceed 16 hours, and shall include instruction on at least firearm safety and the law regarding the permissible use of a firearm.

(b) Notwithstanding subdivision (a), the licensing authority may require a community college course certified by the Commission on Peace Officer Standards and Training, up to a maximum of 24 hours, but only if required uniformly of all license applicants without exception.

(c) For license renewal applicants, the course of training may be any course acceptable to the licensing authority, shall be no less than four hours, and shall include instruction on at least firearm safety and the law regarding the permissible use of a firearm. No course of training shall be required for any person certified by the licensing authority as a trainer for purposes of this section, in order for that person to renew a license issued pursuant to this article.

(d) The applicant shall not be required to pay for any training courses prior to the determination of good cause being made pursuant to Section 26202.

**Cal. Penal Code § 26185**

(a)(1) The fingerprints of each applicant shall be taken and two copies on forms prescribed by the Department of Justice shall be forwarded to the department.

(2) Upon receipt of the fingerprints and the fee as prescribed in Section 26190, the department shall promptly furnish the forwarding licensing authority a report of all data and information pertaining to any applicant of which there is a record in its office, including information as to whether the person is prohibited by state or federal law from possessing, receiving, owning, or purchasing a firearm.

(3) No license shall be issued by any licensing authority until after receipt of the report from the department.

(b) Notwithstanding subdivision (a), if the license applicant has previously applied to the same licensing authority for a license to carry firearms pursuant to this article and the applicant's fingerprints and fee have been previously forwarded to the Department of Justice, as provided by this section, the licensing authority shall note the previous identification numbers and other data that would provide positive identification in the files of the Department of Justice on the copy of any subsequent license submitted to the department in conformance with Section 26225 and no additional application form or fingerprints shall be required.

(c) If the license applicant has a license issued pursuant to this article and the applicant's fingerprints have been previously forwarded to the Department of Justice, as provided in this section, the licensing authority shall note the previous identification numbers and other data that would provide positive identification in the files of the Department of Justice on the copy of any subsequent license submitted to the department in conformance with Section 26225 and no additional fingerprints shall be required.

**Cal. Penal Code § 26350**

(a)(1) A person is guilty of openly carrying an unloaded handgun when that person carries upon his or her person an exposed and unloaded handgun outside a vehicle while in or on any of the following:

(A) A public place or public street in an incorporated city or city and county.

(B) A public street in a prohibited area of an unincorporated area of a county or city and county.

(C) A public place in a prohibited area of a county or city and county.

(2) A person is guilty of openly carrying an unloaded handgun when that person carries an exposed and unloaded handgun inside or on a vehicle, whether or not on his or her person, while in or on any of the following:

(A) A public place or public street in an incorporated city or city and county.

(B) A public street in a prohibited area of an unincorporated area of a county or city and county.

(C) A public place in a prohibited area of a county or city and county.

(b)(1) Except as specified in paragraph (2), a violation of this section is a misdemeanor.

(2) A violation of subparagraph (A) of paragraph (1) of subdivision (a) is punishable by

imprisonment in a county jail not exceeding one year, or by a fine not to exceed one thousand dollars ($1,000), or by both that fine and imprisonment, if both of the following conditions exist:

(A) The handgun and unexpended ammunition capable of being discharged from that handgun are in the immediate possession of that person.

(B) The person is not in lawful possession of that handgun.

(c)(1) Nothing in this section shall preclude prosecution under Chapter 2 (commencing with Section 29800) or Chapter 3 (commencing with Section 29900) of Division 9, Section 8100 or 8103 of the Welfare and Institutions Code, or any other law with a penalty greater than is set forth in this section.

(2) The provisions of this section are cumulative and shall not be construed as restricting the application of any other law. However, an act or omission punishable in different ways by different provisions of law shall not be punished under more than one provision.

(d) Notwithstanding the fact that the term "an unloaded handgun" is used in this section, each handgun shall constitute a distinct and separate offense under this section.

**Cal. Penal Code § 26400**

(a) A person is guilty of carrying an unloaded firearm that is not a handgun in an incorporated city or city and county when that person carries upon his or her person an unloaded firearm that is not a handgun outside a vehicle while in the incorporated city or city and county.

(b)(1) Except as specified in paragraph (2), a violation of this section is a misdemeanor.

(2) A violation of subdivision (a) is punishable by imprisonment in a county jail not exceeding one year, or by a fine not to exceed one thousand dollars ($1,000), or by both that fine and imprisonment, if the firearm and unexpended ammunition capable of being discharged from that firearm are in the immediate possession of the person and the person is not in lawful possession of that firearm.

(c)(1) Nothing in this section shall preclude prosecution under Chapter 2 (commencing with Section 29800) or Chapter 3 (commencing with Section 29900) of Division 9, Section 8100 or 8103 of the Welfare and Institutions Code, or any other law with a penalty greater than is set forth in this section.

(2) The provisions of this section are cumulative and shall not be construed as restricting

the application of any other law. However, an act or omission punishable in different ways by different provisions of law shall not be punished under more than one provision.

(d) Notwithstanding the fact that the term "an unloaded firearm that is not a handgun" is used in this section, each individual firearm shall constitute a distinct and separate offense under this section.

**Cal. Penal Code § 26035**

Nothing in Section 25850 shall prevent any person engaged in any lawful business, including a nonprofit organization, or any officer, employee, or agent authorized by that person for lawful purposes connected with that business, from having a loaded firearm within the person's place of business, or any person in lawful possession of private property from having a loaded firearm on that property.

**Cal. Penal Code § 26055**

Nothing in Section 25850 shall prevent any person from having a loaded weapon, if it is otherwise lawful, at the person's place of residence, including any temporary residence or campsite.

**Form 11. Certificate of Compliance Pursuant to Circuit Rules 35-4 and 40-1**

**Form Must be Signed by Attorney or Unrepresented Litigant and Attached to the Back of Each Copy of the Petition or Answer**

**(signature block below)**

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/answer is: (check applicable option)

____ Proportionately spaced, has a typeface of 14 points or more and contains _____ words (petitions and answers must not exceed 4,200 words).

**or**

____ Monospaced, has 10.5 or fewer characters per inch and contains _____ words or _____ lines of text (petitions and answers must not exceed 4,200 words or 390 lines of text).

**or**

_X_ In compliance with Fed. R. App. 32(c) and does not exceed 15 pages.

/C.D. Michel
Signature of Attorney or
Unrepresented Litigant

**(New Form 7/1/2000)**

## CERTIFICATE OF SERVICE

I hereby certify that on December 24, 2014, an electronic PDF of **APPELLANTS' OPPOSITION TO SUA SPONTE REHEARING EN BANC** was uploaded to the Court's CM/ECF system, which will automatically generate and send by electronic mail a Notice of Docket Activity to all registered attorneys participating in the case. Such notice constitutes service on those registered attorneys.

Date: December 24, 2014

/s/ C. D. Michel
C. D. Michel
Attorneys for *Plaintiffs-Appellants*