

No. 11 - 16255 [DC# 2:09-CV-01235-MCE-DAD]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ADAM RICHARDS, BRETT STEWART, THE SECOND
AMENDMENT FOUNDATION, INC, and THE
CALGUNS FOUNDATION INC.,
Plaintiffs - Appellants,

vs.

ED PRIETO (Sheriff of Yolo County) and YOLO COUNTY,
Defendants - Appellees.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

**REPLY TO *Peruta v. San Diego* (10-56971) APPELLANTS'
OPPOSITION TO MOTION TO ALIGN ORAL ARGUMENTS
WITH RELATED CASE**

Alan Gura
Gura & Possessky, PLLC
101 N. Columbus Street, Suite 405
Alexandria, Virginia 22314
Vc: (703) 835-9085 Fx: (703) 997-7665
Email: Alan@gurapossessky.com

Counsel for Plaintiff - Appellants

Donald E. J. Kilmer, Jr.
Law Offices of Donald Kilmer
1645 Willow Street, Suite 150
San Jose, California 95125
Vc: 408/264-8489 Fx: 408/264-8487
Email: Don@DKLawOffice.com

Co-Counsel for Plaintiff - Appellants

INTRODUCTION

The Appellants in *Peruta v. County of San Diego*, No. 10-56971 (“*Peruta*”) substantially misrepresent the nature of this related case in an effort to influence the scheduling of this appeal—a matter on which they have no standing.

The relief sought by the Appellants in this case (“*Richards* Appellants”) cannot prejudice *Peruta* in any way. It is nothing more than an effort to flag for the Court something that the Court’s procedures normally call for—the concurrent consideration of obviously overlapping cases. *Peruta*’s opposition is not so much to *Richards*, but to the ordinary procedures of this Court.

Regardless of *Peruta*’s desire to be the *only* case that discusses these important constitutional issues, it is ultimately the Court that will decide who has the best argument (including, possibly, any of the Appellees). The Court can best do that if it hears from everyone, preferably at the same time, and then speaks with a single panel’s voice.

PROCEDURAL HISTORY

On May 31, 2011 Plaintiff-Appellants in this action – *Richards v. Prieto* filed a Motion to Align Oral Argument Together with Related Case.

On June 8, 2011, Plaintiff-Appellants in the related case of *Peruta v. San Diego* filed a document in their case (10-56971) titled: *Peruta v. San Diego* Appellants' Opposition to *Richards v. Prieto* Appellants' Motion to Align Oral Argument with Related Case, Filed in Case No. 11-16255.

On June 9, 2011 a letter was received by the Clerk of the Court and a copy was docketed in this case (DktEntry: 7) giving notice of the 'opposition' and setting forth a preview the contents of the motion. Presumably the *Peruta* appellants intend for the Court to consider their 'opposition' in reviewing the May 31 motion to align oral argument filed in the *Richards* action.

ARGUMENT

I. THE CASES ARE RELATED.

Peruta suggests that the cases are not related because *Richards* appellants focus on a facial challenge to California Penal Code § 12050 while *Peruta* challenges only its implementation.

This is false.

Leaving aside how we might characterize the *Peruta* case, the operative complaint below in *this* case (1) describes the requirements and implementation of Appellees' policies, Second Am. Complaint ¶¶ 19, 23; (2) challenges the "customs, practices, and policies" of the Appellees, *id.*, ¶¶ 26, 28; and (3) seeks relief declaring the contested statutory provisions "unconstitutional either on their face and/or as applied," *id.*, Prayer for Relief ¶ 2. The briefing, and the lower court's opinion, addressed application issues in some detail.

Definitively on this topic, the District Court in this case rejected *Peruta's* characterization of the *Richards* case:

Recognizing the close overlap [between the facial and as-applied challenges], this Court interprets Plaintiffs' arguments as those ultimately against Defendants, and not the state legislature or, by extension, the California Penal Code.

Dist. Ct. Opinion, at 3 n.2.

Of course, the *Peruta* and *Richards* arguments on equal protection are identical, and *Peruta*'s primary Second Amendment argument is *Richards*' secondary Second Amendment argument, in two cases that challenge the implementation of *the same* act by identically-situated institutional defendants, County Sheriffs.

Yet any hypothetical doubt that the cases might not be related is dispelled by *Peruta*'s adoption, on appeal, of *Richards*' main Second Amendment argument. *Peruta*'s brief plainly argues that Appellees are applying an unlawful prior restraint. Brief for Appellants, No. 10-56971 at 50-52. This argument never appeared in *Peruta*'s lower court pleadings, but it did, of course, form the centerpiece of *Richards*' claim in the District Court.

In other words, according to *Peruta* Appellants, the cases are sufficiently close that it is acceptable for them to liberally copy from *Richards*' original complaint, and adopt *Richards*' arguments—but *Peruta* must be heard separately (and presumably first) on appeal. Respectfully, if *Peruta* counsel does not wish to have argument in his case heard on the same day and in the same place as that in another case, he should refrain from creating related cases. *Richards*

Appellants never asked for *Peruta* to be filed, or for it to mimic their case, but what's done is done. The situation is of *Peruta's* making. The cases are plainly related and must be heard by the same panel.

II. *PERUTA* CANNOT BE PREJUDICED.

Richards Appellants have not sought any relief impacting the ordinary consideration of *Peruta*. We have *not* sought to alter the *Peruta* schedule, or to participate in or divide argument in that case in any manner.

Indeed, the relief sought is only something which might occur without any conscious intervention: that when the cases are argued, they be heard by the same panel on the same day. Parties can hardly object to the choice of *other* cases a panel might hear in the same argument session.

The *Peruta* Appellants concede that the two cases are “potentially related” and should “possibly [be] assigned to the same merits panel.” Their only objection appears to be a claim of prejudice to having oral arguments on the same day based on some inchoate claim of urgency.

The Court's Frequently Asked Questions web page answers the question of prejudice:

17. How long does it take from the time of the notice of appeal until oral argument?

For a civil appeal, approximately 12-20 months from the notice of appeal date. If briefing isn't delayed, approximately 9-12 months from completion of briefing.

http://www.ca9.uscourts.gov/content/view.php?pk_id=0000000084 (last visited June 16, 2011).

Of course the briefing in *Peruta* was already delayed—by the *Peruta* Appellants. Their claim that “time is of the essence” is somewhat disingenuous given that they applied for, and were granted a 60 day extension of time to file their opening briefs. (DkEntry 9, 10, 14 in Case No.: 10-56971).

The *Peruta* notice of appeal was filed December 14, 2010, and in *Richards*, the notice of appeal was filed only five months later, on May 16, 2011. That would suggest normal argument ranges of December, 2011-August 2012 for *Peruta*, and May, 2012-January, 2013 for *Richards*—which overlap for four months, *before* taking into account the additional two month delay sought and obtained by *Peruta* Appellants. There being no delays expected in *Richards*, the Court's ordinary procedures and timetables already have both cases normally overlapping for argument during a period of perhaps six months.

CERTIFICATE OF SERVICE

On June 16, 2011, I served the foregoing **REPLY TO *Peruta v. San Diego* (10-56971) APPELLANTS' OPPOSITION TO MOTION TO ALIGN ORAL ARGUMENTS WITH RELATED CASE** by electronically filing it with the Court's ECF/CM system, which generated a Notice of Filing and effects service upon counsel for all parties in this case.

I declare under penalty of perjury that the foregoing is true and correct and that his declaration was made on June 16, 2011 in San Jose, CA.

/s/ Donald Kilmer

Attorney of Record for Appellants