IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Edward Peruta, et al.,	)	
Plaintiffs-Appellants,	)	No. 10-56971
v.	)	D.C. No. 3:09-cv-02371-IEG BGS
County of San Diego, et al.,	)	
Defendants-Appellees	)	

BRADY CAMPAIGN TO PREVENT GUN VIOLENCE'S MOTION TO JOIN PETITION FOR REHEARING WITH SUGGESTION OF REHEARING *EN BANC* FILED ON BEHALF OF THE STATE OF CALIFORNIA

Pursuant to Fed. R. App. P. 28(i) and 35(b), Proposed Intervenor Brady Campaign to Prevent Gun Violence ("Brady") moves to join in the petition for panel rehearing of the November 12, 2014 Order Denying Motions to Intervene [Dkt. 156], with suggestion of rehearing *en banc* filed on behalf of the State of California. Brady makes several additional points in support of rehearing.

The Panel majority's analysis of timeliness conflicts with Ninth Circuit and Supreme Court precedent and places interested third-parties into an inescapable bind – either moving for intervention too early or too late. The Panel held that Brady's intervention was untimely because Brady did not move to intervene as

soon as it became aware that its interests were the subject of this litigation. Id. at 5-6.

However, timeliness is just one factor in Rule 24(a)'s intervention as of right test. Fed. R. Civ. P. 24(a). Rule 24(a) also provides that intervention is proper only where there is no existing party that adequately represents the intervenor's interests. Id. at 24(a)(2). But the Panel's timeliness analysis reads the "lack of adequate representation" factor out of Rule 24(a)(2) entirely. This Circuit has expressly rejected that conclusion; in Officers for Justice v. Civil Service Co., 934 F.2d 1092, 1095 (9th Cir. 1991), the Court held that, "[i]n analyzing timeliness [ ] the focus is on the date the person attempting to intervene should have been aware his interests would no longer be protected adequately by the parties, **rather than the date the person learned of the litigation**." (emphasis added) (citations omitted).

At the time Brady's interests first were implicated, i.e. when the lawsuit was filed, Brady had no right to intervene because Sheriff Gore adequately represented Brady's interests. See Fed. R. Civ. P. 24(a)(2) (intervention is permitted "unless existing parties adequately represent that interest"); [see also Dkt. 156 at 6 (noting that "movants originally thought Sheriff Gore adequately protected their interests").] As a result, Brady was justified in intervening "as soon as it became clear . . . that [its] interests . . . would no longer be protected" by Sheriff Gore.

United Airlines, Inc. v. McDonald, 432 U.S. 385, 386 (1977). That is precisely what Brady did: Once Sheriff Gore decided not to continue his defense of the lawsuit, Brady realized that its interests were no longer adequately represented and immediately moved to intervene.

Notably, in coming to the erroneous conclusion that a potential litigant must move to intervene as soon as it knows that its interests might be adversely affected, the Panel majority relied on United States v. Oregon, 913 F.2d 576, 589 (9th Cir. 1990). [Dkt. 156 at 5-6]. However, Oregon based its timeliness discussion on U.S. v. Chicago, 870 F.2d 1256, 1263 (7th Cir. 1989), which held that intervention is timely where potential intervenors "could not at [the earlier] time have satisfied the additional requirement of showing that the representation of their interests by parties to the suit was inadequate," and thus supports Brady's intervention.

Legal Aid Soc. v. Dunlop, 618 F.2d 48 (9th Cir. 1980) is particularly instructive here. There, this Circuit held that the lower court "did not apply the correct legal standard" in holding that the motion to intervene was untimely. Id. at 50 (reversing denial where the proposed intervenor filed its motion once it became clear that the government-defendant was "no longer in a position to represent" the movant's interests). The Court emphasized that the lower court "should have considered the motion in light of the substantially different position that had then been assumed by the Government as the principal defendant. . . . In particular, the

relevant circumstance here for determining timeliness is when the intervenor **became aware that its interest would no longer be protected adequately by the parties**: this was the precise issue decided in United Airlines, Inc. v. McDonald, 432 U.S. 385, 394, 97 S.Ct. 2464, 2469, 53 L.Ed. 2d 423 (1977)." Id. (emphasis added).

The Panel implies that the State of California should have recognized the potential inadequacy sooner because (1) the State of California's interests are distinct from those of the County of San Diego and (2) the County of San Diego argued before the district court that the plaintiffs were actually challenging the State of California's firearm regulatory framework. [Dkt. 156 at 6 n.1 (citing Peruta v. Cnty. of San Diego, 758 F.Supp.2d 1106, 1115 n.7 (S.D. Cal. 2010)).] Brady disagrees with this point, but in any event the same cannot be said for Brady, which, like the County of San Diego before it, seeks to defend the constitutionality of San Diego's good cause policy. [See Dkt. 148 at 3 (explaining the differences in Brady's and the State of California's interests).]

The Panel majority compounded its error by glossing over controlling Ninth Circuit precedent in reaching its conclusion. Specifically, the Panel sought to distinguish this Court's prior ruling in Day v. Apoliona by noting that, unlike in that case, the proposed intervenors here were not involved as *amici* and did not "singlehandedly" argue an issue before the district court. [Dkt. 156 at 7 (citing 505

F.3d 963, 966 (9th Cir. 2007)).] But Brady *did* file an amicus brief with the district court and in this Circuit through its affiliate, the Brady Center, which is a sister organization that shares a President, website, and counsel with the Brady Campaign, but does not have members so did not seek to intervene. See Dkt. 37, Peruta v. Cnty of San Diego, 3:09-cv-02371-IEG-BGS (S.D. Cal.); [Dkt. 48.]

Moreover, the right to intervene should not turn on whether on a party's obfuscation forced the proposed intervenor to adopt a larger role before the lower court while acting as an *amicus*. [Dkt. 156 at 7 (noting that the parties were "unwilling[] . . . to take a position on [an] issue" in Day) (citing 505 F.3d at 965-56).] Day controls the intervention analysis and counsels in favor of rehearing.

Dated: November 26, 2014

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CERTIFICATE OF COMPLIANCE

This Motion complies with the page limitations of Rule 27(d)(2) because it does not exceed 20 pages. This Motion also complies with the typeface requirements of Rule 32(a)(5)(A) and the type style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 14-point font and in Times New Roman.

/s/ Neil R. O'Hanlon
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Attorney for Proposed Intervenor

Dated: November 26, 2014

CERTIFICATE OF SERVICE

I hereby certify that on November 26, 2014, I filed this Motion to Join Petition for Rehearing With Suggestion of Rehearing *En Banc* Filed on Behalf of the State of California with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system, which will electronically serve this brief on all parties and participants in this case.

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Dated: November 26, 2014