UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 10-56971

EDWARD PERUTA, et al.,
Plaintiffs-Appellants,

v.

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

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

BRIEF IN SUPPORT OF 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 brief for rehearing *en banc* pursuant to the Court's order dated December 3, 2014:

PETITION FOR REHEARING *EN BANC*

CPCA and CPOA 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 Brief for Rehearing *En Banc*. There is adequate justification for rehearing *en banc*, as the issues in this case are of exceptional importance and there are conflicting decisions among the Circuits.

I. STATEMENT OF BASIS FOR REHEARING *EN BANC*

This brief is specifically based upon the following: (A) the panel decision conflicts with the United States Supreme Court decision 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. Moreover, 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. FRAP RULE 29(C)(5) STATEMENT

As required by FRAP Rule 29(c)(5), Amici herewith state that this brief was not authored by counsel for a party to this action, and this briefing was funded entirely by Applicants; no party or counsel to a party provided any financial support or funding hereto.

III. PROCEDURAL BACKGROUND

This Court's panel issued its opinion in this matter, filed on February 13, 2014 (the "Opinion"). The three-judge panel reversed the District Court's order granting 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. Peruta v. County of San Diego, 742 F.3d 1144, 1148 (9th Cir. 2014) (citing Cal. Penal Code §§ 26150 and 26155).

Amici Curiae CPCA and CPOA filed a Petition for Rehearing *En Banc* /Motion to Intervene on February 27, 2014. The three-judge panel denied amici curiae's Petition by order dated November 12, 2014. Amici curiae submit this brief in compliance with the Court's order dated December 3, 2014, inviting amici to file brief's setting forth their positions concerning whether the panel's decision should be heard *en banc*.

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 throughout the law enforcement community and society at large.

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. Peruta, 742 F.3d at 1148. The Opinion concludes that there is a Second Amendment right to bear arms outside of the home. Peruta, 742 F.3d at 1173. However, the Opinion explicitly recognizes that this conclusion of law is part of "an existent circuit split." Peruta, 742 F.3d at 1173, 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." Peruta, 742 F.3d at 1149. 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." Peruta, 742 F.3d at 1150. Indeed, this Court's opinion in United States v. Chovan, 735 F.3d 1127, 1138 (9th Cir. 2013), recognizes a contrary legal principle 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. Peruta, 742 F.3d at 1166. 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." Peruta, 742 F.3d at 1169.

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 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)).

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.'" Peruta, 742 F.3d at 1191.

The law review author, Stephen Kiehl, 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.

In sum, 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 on this issue that is critically important to

law enforcement.

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 other 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 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 prior 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 responsible for public safety in those diverse jurisdictions. The needs of any particular jurisdiction, especially due to the density of a specific

area's population, are matters which require individualized determination. For example, the chief law enforcement official in a more rural area of the state may weigh differently the particular criteria establishing good cause for issuance of a concealed carry permit in his or her jurisdiction, such as law enforcement response times, than a counterpart in an urban environment with a higher ratio of law enforcement officers to members of the public and a more densely populated geographic area.

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" and to prohibit conduct that promoted the sense that "[t]he King [was] not able or willing to protect his subjects." Peruta, 742 F.3d at 1183 (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 the impacts 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 rehear this matter *en banc*. There are both issues of exceptional importance as to constitutional rights and public safety implicated in this case, 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,

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