Case Number 10-56971

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EDWARD PERUTA, et al.,

Plaintiffs-Appellants,

vs.

COUNTY OF SAN DIEGO, et al.,

Defendants-Appellees.

On Appeal From:

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
Case No. 3:09-cv-02371-IEG-BGS
Irma E. Gonzalez, Chief District Judge, Presiding

BRIEF OF AMICI CURIAE SHERIFF ED PRIETO AND COUNTY OF YOLO IN SUPPORT OF REHEARING EN BANC

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I. CONSENT TO FILE

This Court's order filed December 3, 2014 (dkt. # 161) gave blanket leave to *amici curiae* wishing to file briefs concerning whether the panel decision should be reheard *en banc*. As a matter of professional courtesy, counsel for amici also sought consent from Plaintiffs/Appellants' counsel, but received no response.

II. STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici Sheriff Ed Prieto and County of Yolo are Defendants and Appellees in *Richards v. Prieto*, Case No. 11-16255, oral argument in which was heard concurrently with *Peruta* by the same panel, and which the panel decided wholly on the ground of its decision in *Peruta*. Last spring, Amici petitioned for rehearing *en banc* of *Richards*, and therefore of *Peruta*'s merits, the disposition of which petition the panel stayed pending its resolution of the State of California's request to intervene in *Peruta*. Amici have recently moved for relief from the stay order in *Richards*, but that motion has not yet been decided. Should the panel deny stay relief, or should this Court decline to rehear *Richards en banc*, Amici would lack a voice in

the Second Amendment issue debate that will immediately and directly impact Amici and all citizens in Yolo County. Because Amici have litigated since 2009 the same issue presented by *Peruta*, they present an especially informed view for the Court's consideration.

III. STATEMENT OF POSITION

The *Peruta* majority decided that the Second Amendment forbids Appellee William Gore, the Sheriff of San Diego County, from requiring applicants for concealed weapon permits to demonstrate a heightened need for personal protection. Sheriff Prieto supports *en banc* rehearing of the panel's decision reversing the district court's grant of summary judgment for Sheriff Gore on the grounds it: (a) contradicts the Supreme Court's decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008) by constitutionally equating any right to carry guns in urban public areas with the right to have arms in one's residence; (b) expressly conflicts with decisions from the Second, Third, and Fourth Circuits upholding similar gun control laws, creating a split on a matter of national significance where

uniformity should exist; and (c) directly contradicts another published panel decision of this Circuit (*United States v. Chovan*, 735 F.3d 1127 (9th Cir. 2013) concerning the identity of the "core" Second Amendment right to bear arms, and what constitutes destruction versus burdening of that right for the purpose of applying scrutiny analysis. See *Peruta*, 742 F.3d at 1179 [dissent stating majority op. conflicts with "Supreme Court authority, the decisions of our sister circuits, and our own circuit precedent]".)

IV. SUMMARY OF *PERUTA*

Peruta's majority opinion first addresses whether "a restriction on a responsible, law-abiding citizen's ability to carry a gun outside the home for self-defense . . . fall[s] within the Second Amendment right to keep and bear arms for the purpose of self-defense." 742 F.3d at 1150. The majority examined the Supreme Court's decisions in *Heller* and *McDonald v. City of Chicago*, 130 S.Ct. 3020 (2010) and determined that, since neither speaks explicitly on the scope of the Second Amendment outside the home, the Amendment must be interpreted in its historical context. 742 F.3d at 1149–1151. That

history, reasoned the majority, compels the conclusion the Second Amendment right encompasses carrying a firearm outside of the home for self-defense. *Id.*, at 1151–1166.

Rather than moving to a scrutiny analysis of the burden on public carry placed by San Diego's "good cause" policy, the panel adopted the "alternative approach" that a law "destroying" a right central to the Second Amendment must be struck down. *Id.*, at 1167–1168. Under this analysis, the majority assessed California's statutory scheme in its entirety, stating (at 1168–1170): (1) California has no permitting provision for open carry; and (2) concealed carry is acceptable with a proper permit or without a permit for particular groups, in particular locations, and at particular times. Despite acknowledging that California's scheme does not ban public handgun-carry, even concealed, in every instance, the majority found California's laws "destroy" the right to carry outside the home:

> the question is not whether the California scheme (in light of San Diego's policy) allows *some* people to bear arms outside of the home in *some* places at *some* tomes; instead the question is whether it allows the typical responsible, law-abiding citizen to bear arms in public for

> the lawful purpose of self-defense. The answer to the latter question is a resounding "no."

Id., at 1169. Because San Diego's "good cause" policy required an applicant to show a heightened need for personal protection,[1] it "forbids" a typical person from arming himself for purposes of self-defense in case of public confrontation, and is thus indistinguishable from the restrictions struck down in *Heller*. *Id.*, 1169–1170.

The majority opinion contains two other significant discussions: (1) it rejects that bans on concealed carry are *per se* presumptively lawful, notwithstanding the corresponding language in *Heller,* reasoning that presumption applies only where the state allows open public carry (*id.*, 1170–1172); and (2) it also critiques as incorrect or incomplete other circuits' intermediate scrutiny analysis of similar heightened need permit requirements (*Kachalsky v. County of*

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[1] The San Diego Sheriff defined "good cause" as a "set of circumstances that distinguish the applicant from the mainstream and cause him or her to be placed in harm's way . . . one's personal safety alone is not considered good cause."

Westchester, 701 F.3d 81, 86 (2d Cir. 2012), *cert. den.* 133 S.Ct. 1806; *Drake v. Filco*, 724 F.3d 426, 428 (3d Cir. 2013); and *Woollard v. Gahhagher*, 712 F.3d 865 (4th Cir. 2013), *cert. den.* 134 S.Ct. 422), deeming them "not particularly instructive." 742 F.3d at 1173–1175.

V. THE *PERUTA* DECISION IGNORES *HELLER*'S GRADUATED APPROACH

Although *Heller* directly addressed the constitutional right to possess handguns for self-defense inside one's dwelling, it also commented in several ways on the general scope of the Second Amendment right to carry arms: the right is not unlimited and does not allow citizens to carry arms "for any sort of confrontation" (*id.*, at 595) or in "any manner whatsoever" as might invalidate "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings" (at 626); most 19th century courts upheld concealed weapons bans (*ibid*);[2] the need for self-defense is "most acute" in the home (628); the right does not invalidate laws "regulating the storage of firearms to prevent accidents" (at 632);

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2 See e.g., *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").

colonial Americans also valued the right to carry arms for hunting (at 599); and colonial laws restricting the use of guns within city limits did not constrain self-defense (632–633). The majority opinion closed by saying that, whatever else the Second Amendment "leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Id.*, at 635.

Thus *Heller* describes the right to bear arms as a spectrum; at its brightest end is the possession of a weapon in the home, the destruction of which right can withstand no level of scrutiny, followed by hunting, whereas at the dimmer end lies weapons carried and munitions stored in urban areas, where even full prohibitions may be presumptively lawful. Yet other acts, such as carrying concealed arms, lie completely outside it. See further 742 F.3d at 1190–1191 [dissent].)

The *Peruta* majority uses *Heller's* illustrations of the Second Amendment's contours as an analytical springboard, stating such restrictions would not have warranted the Supreme Court's comment

unless the right to carry extends outside the home (*id.*, at 1152–1153), and leaps to the successive conclusions *Heller* really means that the core right is self-defense, *wherever* one happens to be, rather than *home* defense, and that the public carry aspect of the right deserves the *same* degree of protection from regulation: "[f]or if self-defense outside the home is part of the core right to "bear arms' and [California] prohibits the exercise of that right, no amount of interest-balancing . . . can justify San Diego County's policy." *Id.*, at 1167.

But *Peruta* fails to substantively harmonize its "ready for public confrontation" analysis with *Heller*'s illustrations of presumptively lawful bans on guns in "sensitive places" like schools and government buildings, where confrontations have occurred with tragic frequency. Accordingly *Peruta* contradicts *Heller* by saying that allowing "normal" citizens to carry guns in only "some" public places essentially destroys the right. Even *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012), which *Peruta* claims supports its conclusion, so respected *Heller* (*id.*, at 940): "In contrast, when a state bans guns merely in particular places, such as public schools, a person can

preserve an undiminished right of self-defense by not entering those places; since that's a lesser burden, the state doesn't need to prove so strong a need."

Because *Peruta* does not assess *why* bans on carrying guns in sensitive places comport with the Second Amendment, it does not attempt to ascertain whether the same rationale *Heller* used supports California's public carry restrictions by including as "sensitive places" airports, city streets, plazas, parks, malls, stadiums, depots, and other places where large numbers of people typically congregate in close proximity.

Peruta also hollows *Heller*'s reference to lawful concealed carry bans by reasoning such constitutionality pertains only where a state allows open carrying of firearms. Per *Peruta*, since California law renders openly carrying firearms in San Diego County illegal "in virtually all circumstances," and "elsewhere in California, without

exception,"[3] the historical *non*-right to concealed carry rises like a phoenix to take open carry's constitutional place – a dubious proposition for which the majority gives no analogous authority. See 742 F.3d at 1194 (dissent contending that, if the right to bear concealed weapons in public falls outside the Second Amendment, California's restrictions on open carry cannot "magically endow that conduct with Second Amendment protection" and noting the majority cannot cite supporting authority).

VI. *PERUTA* EXPRESSLY CONFLICTS WITH SEVERAL OTHER CIRCUITS' DECISIONS

Because of *Peruta*, the Ninth Circuit alone proclaims that limiting concealed carry permits to those with an articulable need for self-defense constitutes "near total destruction" of a core Second

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[3] This sweeping statement is largely incorrect because California's prohibition on open carry primarily pertains to the public area portions of *cities* (e.g., streets, parks, malls), and San Diego County is largely unincorporated. Nor would it pertain to Yolo County, which spans 1021 sq. miles, only 47 of which are incorporated. Even within incorporated cities, the open carry ban is inapplicable to residences, offices, and other property not open to the general public, and elsewhere subject to numerous exceptions, including when a need for imminent self-defense exists, which exceptions *Peruta* factually acknowledges but trivializes. *Id.*, 1147, fn. 1.

Amendment right. Before *Peruta,* three other Circuits rejected similar constitutional challenges to similar "good cause" licensing policies. *Kachalsky*, 701 F.3d at 86 (requiring an applicant for a full-carry license to "demonstrate a special need for self-protection distinguishable from that of the general community"); *Drake*, 724 F.3d at 428 (defining the "justifiable need" requirement for a public carry license as an "urgent necessity for self-protection, as evidenced by specific threats or previous attacks which demonstrate a special danger to the applicant's life"); *Woollard*, 712 F.3d 865 (eligibility for a handgun carry permit contingent on a finding that the permit is "necessary as a reasonable precaution against apprehended danger"; a vague threat is not sufficient).

The decision in *Peruta* departs from the analysis by sister circuits in three noteworthy ways. First, despite acknowledging California does not completely ban public handgun carry, even in a concealed manner, for self-defense, the majority deems that the requirement of a heightened self-defense need constitutes a *complete*

destruction of the right to public carry. 742 F.3d at 1168–1170.[4] No other circuit court, including the Seventh, has determined a Second Amendment right can be "totally destroyed" where there are available legal avenues for exactly that conduct. Nor has any other circuit stated that a right to concealed carry arises wherever no ability to openly carry exists.

Second, upon its determination the right to public carry for purposes of self-defense is destroyed for the "typical responsible, law-abiding citizen," *Peruta* applied an "alternative approach," purportedly adopted from *Heller*, instead of the intermediate scrutiny analysis applied by the Second, Third, and Fourth Circuits. But

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[4] Similar to the statutory scheme in California, the state laws evaluated in *Kachalsky*, *Drake*, and *Woolard* allowed for public carry, or the issuance of a permit, without extraordinary need, in specific places, by certain persons, and/or for enumerated purposes (e.g. for carry in one's place of business, by members of law enforcement or gun collectors participating in private exhibitions, or when transporting for hunting or target shooting). The *Peruta* majority fails to acknowledge that California's laws are actually less restrictive than those in *Kachalsky*, *Drake*, and *Woollard,* primarily because of California's exceptions for both imminent threats to the bearer (which *Woollard* alone shares) and landowner permission (Penal Code §§ 26383, 26388).

Heller stated that because the District of Columbia's laws could not withstand *any* level of scrutiny, it did not need to choose the appropriate level. 554 U.S. at 628–629. Thus *Peruta*'s eschewing of scrutiny strays, uninvited by *Heller*, from the framework applied by sister circuits and existing Ninth Circuit precedent (as discussed in greater detail below).

Third, *Peruta* criticizes its sister circuits' view of intermediate scrutiny as requiring only a reasonable balance between an individuals' interest in public carry for self-defense and the public interest in limiting the number of concealed handguns in densely-populated public spaces.[5] Instead, the *Peruta* majority defined intermediate scrutiny more like strict scrutiny and, consequently, dismissed the government's significant interests in public safety, the relationship of the policy to those interests, and deference to legislative policy decisions. *Id.*, at 1177 ("{i}n *Drake*, *Woollard*, and *Kachalsky*, the government failed to show that the gun regulations did

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[5] See *Kachalsky*, 701 F.3d at 98-99; *Drake*, 724 F.3d at 439; *Woollard*, 712 F.3d at 880-881.

not burden 'substantially more' of the Second Amendment right than was necessary to advance its aim of public safety"). See also *id.*, at 1192 (dissent identifying the public safety considerations enumerated by the Sheriff in support of an overall reduction of gun carry in public.) By discounting the sheriff's policy as arbitrary and overbroad, the *Peruta* majority overlooks his effort in crafting a policy that makes the "best prediction possible of who actually needs firearms for self-defense and grants concealed-carry licenses accordingly." *Id.*, at 1198 (dissent).

Purporting to join an *existent* circuit split, the *Peruta* majority likens its decision to the Seventh Circuit's in *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012). Although the Seventh Circuit also expressly recognized a right to public carry, *Moore* neither purports to create a circuit split, nor analytically supports *Peruta*'s ultimate holding. First, *Moore* expressly stated that Illinois was the only state that "maintains a flat ban on carrying ready to use guns outside the home." *Ibid. See further id.* at 940 ("[e]ven jurisdictions like New York State, where officials have broad discretion to deny applications for gun permits,

recognize that the interest in self-defense extends outside the home"). Next, *Moore* expressly distinguished Illinois' "flat ban" from the heightened need for defense concealed carry permitting scheme shared by New York and California that *Peruta* condemns. *Id.* at 941 (stating it instead disagreed with *Kachalsky* on the separate general question of the right to carry's importance outside the home). Thus, with respect to the "good cause" permitting issue, which *Moore* carefully states it does not address, *Peruta* alone creates a circuit split.[6]

VII. *PERUTA* ALSO CONFLICTS WITH A PREVIOUS DECISION BY A DIFFERENT PANEL OF THIS CIRCUIT

In *United States v. Chovan*, 735 F.3d 1127, a different Ninth Circuit panel addressed whether 18 U.S.C. § 922(g)(9)'s lifetime ban

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6 To worsen matters, *Peruta*'s progeny deepens the national split in authority. *Morris v. United States Army Corps of Eng'rs*, 2014 U.S. Dist. LEXIS 147541, *10 (D. Idaho 2014), held unconstitutional 36 C.F.R. § 327.13 for destroying a Second Amendment right to carry firearms on lands maintained by the U.S. Army Corps of Engineers, deeming *Peruta* to require the federal government to allow recreational users to carry weapons on federal lands, even though *GeorgiaCarry.Org v. United States Army Corps of Eng'rs*, 2014 U.S. Dist. LEXIS 116662 (N.D. Ga. 2014) had reached the opposite conclusion.

on firearm possession by those convicted of misdemeanor domestic violence violates the offender's right to bear arms in his home. *Chovan* expressly adopted the two-step inquiry used by five other circuits: "(1) asks whether the challenged law burdens conduct protected by the Second Amendment and (2) if so, directs courts to apply an appropriate level of scrutiny." *Id.*, at 1136. In the first step, *Chovan* found that §922(g)(9) burdened the Second Amendment right to bear arms in the home and did not qualify as a long-standing prohibition presumptively approved by *Heller*. *Id.*, at 1136–1137. In contrast to *Peruta*, *Chovan* described the "core of the Second Amendment" as the right of those without violent criminal records to use arms in defense of the *home*. *Id.*, at 1138.

Because the statute did not "implicate" the "core" *home defense* right held exclusively by law-abiding citizens, but instead substantially burdened a lesser right to bear arms, the *Chovan* court applied intermediate scrutiny, in acknowledged accordance with other circuits, and upheld the statute as advancing the important governmental interest of preventing domestic gun violence. *Id.*, at

1139–1141.[7] See 742 F.3d at 1196 (dissent stating *Peruta* majority opinion conflicts with *Chovan*).

In footnotes 2 and 15, the *Peruta* majority opinion summarily distinguishes *Chovan* as involving burden of a non-core right rather than full destruction of a core right. But *Peruta* makes no attempt to address *Chovan*'s narrower description of the core right as *home* defense. Nor does *Peruta* square *Chovan*'s statement, that the presence of limited exceptions[8] to disqualification from gun possession "lightens" the "quite substantial" burden of permanently so barring a class of individuals, with *Peruta*'s finding California's gun laws "destroy" the right. This silence is significant given *Peruta*'s admission California generally allows open carry except for public places in incorporated areas, and provides numerous exceptions even within those areas, which are far broader exceptions that those in

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[7] Judge Bea's concurring opinion agreed on all aspects of the analysis except that misdemeanants lack a core right to home defense, from which opposing view he derived the conclusion strict scrutiny should apply. *Id.*, 1143–1149.

[8] I.e., nullified/excused convictions, or restored voting and other civil rights.

§922(g)(9) that *Chovan* upheld.

VIII. CONCLUSION

The *Peruta* majority goes where no appellate court has yet ventured to hold all citizens not otherwise disqualified must be allowed to carry weapons in almost all public areas. This decision distorts *Heller*'s definition of the core right to carry arms and ignores its examples of presumptively lawful restrictions, expressly conflicts with *all* the other circuits addressing or discussing similar concealed carry permit requirements, and analytically departs from *Chovan*. As a direct and immediate result of *Peruta*, concealed carry permit

applications have drastically risen in number,[9] creating an urgent need for *en banc* review to establish both uniformity and temperance in what is quite literally a matter of life and death.

Dated: December 17, 2014

ANGELO, KILDAY & KILDUFF

/s/ John A. Whitesides

By:______________________________
JOHN A. WHITESIDES

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[9] Counties that had previously limited concealed-carry permits through similar "good cause" requirements as those at issue in *Peruta* and *Richards* are now being inundated with applications. See "Request to concealed-weapons permits surges in Calif.," NBC NEWS, March 12, 2014, available at: http://www.nbcnews.com/id/54657410/ns/local_news-sacramento_ca/#.UycO9c57TWU.

CERTIFICATE OF COMPLIANCE

Pursuant to Ninth Circuit Rules, I certify that **BRIEF OF AMICI CURIAE SHERIFF ED PRIETO AND COUNTY OF YOLO IN SUPPORT OF REHEARING EN BANC** is proportionately spaced and has a typeface of 14 points in Times-Roman font.

The brief has a word count of 3,285 words.

Respectfully submitted,

DATED: December 17, 2014

ANGELO, KILDAY & KILDUFF

/s/ John A. Whitesides
By: ______________________________
JOHN A. WHITESIDES

9th Circuit Case Number(s) 10-56971

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