UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| EDWARD PERUTA, et. al.,<br><br>*Plaintiffs-Appellants*,<br><br>v.<br><br>COUNTY OF SAN DIEGO, et. al.,<br><br>*Defendants-Appellees*. | No. 10-56971<br><br>D.C. No. 3:09-cv-02371-IEG-BGS<br>U.S. District Court for Southern California, San Diego |

**_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**

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**TO THE COURT AND TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

Plaintiffs-Appellants in *Peruta v. County of San Diego*, Ninth Circuit Case No. 10-56971 ("*Peruta* Appellants"), pursuant to Fed. R. App. P. 27(1)1(3), hereby oppose the motion by Appellants in *Richards v. Prieto*, Ninth Circuit Case No. 11-16255, (hereafter, "*Richards* Appellants") to "align oral argument together with related case." The "motion to align"was filed in *Richards* Appellants' separate matter on May 31, 2011. The motion has been assigned initially to an attorney in the Clerk's Office for review. Because neither case has been assigned to a merits panel, *Peruta* Appellants file this opposition, here, under their own case number.

## INTRODUCTION

In their motion, the *Richards* Appellants seek to bind the *Peruta* and *Richards* matters together, now and into the foreseeable future, by asking this Court to assign both cases to the same merits panel and, more troubling, asking that the matters be heard *together* at oral argument. As discussed below, this motion is premature and granting it would be prejudicial. These matters can and should be addressed at a later date. In particular, the merits panel should be allowed to decide whether it wants to hear the cases together or separately, based

on conditions at the time and its assessment of the issues. While the cases involve similar facts, the legal theories presented and relief requested are significantly different – and purposefully so, on the part of *Peruta* Appellants. Combining the cases at this point defeats that purposeful approach. And it may seriously and unnecessarily delay relief sought by *Peruta* Appellants, relief concerning a fundamental, constitutional right.

## STATEMENT OF FACTS

### The *Peruta* Case

In November 2008, Plaintiff Edward Peruta sought to exercise his Second Amendment right to keep and bear arms via the only viable means available to him under California law: by seeking a license to carry a concealed firearm (a "CCW" permit) from the San Diego County Sheriff's License Division. *See Peruta* Appellants' Excerpts of Record (hereafter, "ER"), Volume V at 1253, ¶ 28.

Despite his being fully qualified and eligible to possess firearms, in March, 2009, San Diego County denied Mr. Peruta's CCW application, finding he did not have "good cause." *See Peruta* Appellants' ER, Vol. V at 1254, ¶ 36. San Diego deemed Mr. Peruta lacked "good cause" because he "only" sought to bear arms to defend himself and his family, and could not document a specific and demonstrable threat of harm or otherwise show any "need" to bear arms. *Id*.

Mr. Peruta, with assistance of his counsel Paul H. Neuharth, formally appealed this denial, administratively. In May, 2009, Mr. Peruta received a letter from the Sheriff's Department upholding the denial, and stating "there is no further appeal." *Peruta* Appellants' ER, Vol. IV at 896. And, on October 23, 2009, attorney Neuharth filed suit on behelf of Mr. Peruta.

On April 21, 2010, the law firm of Michel & Associates, P.C. associated into the case and filed a significantly revised First Amended Complaint (FAC). The FAC dropped some claims, and added four additional claims and five additional plaintiffs. See *Peruta* Appellants' ER, Vol. V at 1149-1185; Vol. IV at 1102-1131.

There are key differences between the *initial* Complaint filed in *Peruta* and the operative (FAC). Mr. Peruta initially brought a facial challenge to the "good moral character" and "good cause" provisions of California Penal Code section 12050, asking the federal court to declare them facially unconstitutional. The original Complaint also sought to enjoin San Diego from enforcing those allegedly unconstitutional statutory provisions against applicants asserting self-defense as their "good cause." In that respect, the *Richards* Appellants correctly note that the

initial complaints in both cases were nearly identical.[1]

But that is no longer the case. While the claims in *Richards* remain the same, in the First Amended Complaint the Second Amendment claims and relief sought in *Peruta* have been narrowed substantially in an effort to simplify the central issue – San Diego County's abuse of discretion in denying *Peruta* Appellants' right to bear arms – and to seek a remedy that directly addresses San Diego County's unconstitutional "good cause" policy and practice when it comes to issuing CCWs for self-defense. None of the *Peruta* Appellants were denied CCW permits for lacking "good moral character." *Peruta* now challenges and seeks relief only from San Diego County's *interpretation* of Penal Code section 12050's "good cause" provision, for it is that unconstitutional interpretation (and resultant abuse of discretion) that resulted in San Diego County denying CCW permits to otherwise qualified, law-abiding adults (including *Peruta* Appellants) for self-defense because they could not prove they are targets of specific threats.

As discussed below, the Complaint in *Richards* remains unchanged, and

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[1] Counsel for *Richards*, Appellants complain that Mr. Neuharth copied parts of the complaint in *Richards* without notice, but this is commonplace. No notice is required. Lawyers cannot copyright pleadings, nor claim them as "trade secrets." In any event, the *operative* complaints in *Peruta* and *Richards* present the federal court with two cases that differ in significant respects, and should be considered separately. That the initial complaints were copies, in part, is of little moment.

still focuses primarily on a facial challenge to invalidate state law(s) under the doctrine of prior restraint.

After *Peruta* Appellants prevailed against San Diego's Motion to Dismiss (see *Peruta* Appellants' ER, Vol. I at 81-98), the parties filed cross-motions for summary judgment. On December 10, 2010, the district court denied *Peruta* Appellants' Motion for Partial Summary Judgment and granted San Diego's Motion for Summary Judgment (see *Peruta* Appellants' ER, Vol. I at 1-17). *Peruta* Appellants timely appealed.

On May 23, 2011, *Peruta* Appellants' opening brief was filed. Six *amicus curiae* briefs were filed within the following week, including one from *Richards* Appellants. The briefing in *Peruta* should be complete with the filing of the Reply Brief on August 5, 2011. Briefing in *Richards* will not even *begin* until August 24, 2011, assuming neither party seeks extensions.

The *Richards* Case

As noted in the "motion to align," the operative Complaint in *Richards* and *initial* Complaint in *Peruta* are largely the same in terms of the Second Amendment and an Equal Protection claim. *Richards* Appellants, asked the federal court to declare significant portions of the *state's* CCW law unconstitutional through a facial challenge based primarily on the "prior restraint" doctrine, as

typically applied in First Amendment cases.

On May 16, 2011, the district court in *Richards* Appellants rejected the "prior restraint" analogy and entered judgment against the *Richards* Appellants on cross-motions for summary judgment. They appealed.

Shortly thereafter, counsel for *Richards* Appellants contacted counsel in *Peruta* to ask for consent to file an *amicus curiae* brief focusing on application of the "prior restraint" doctrine in Second Amendment cases. Though *Peruta* Appellants' raise the argument that section 12050 cannot be interpreted to give sheriffs wide discretion in determining "good cause" when it comes to issuing CCW permits for self-defense post-*Heller*, they welcomed the *Richards* Appellants' offer to make a prior restraint argument in detail in an *amicus* brief, and then focused on their primary legal theories in their opening brief.

The *Richards* Motion to "Align" Oral Argument

A few hours after filing the *amicus curiae* brief in the *Peruta* case, *Richards* Appellants filed a "Motion to Align Oral Argument Together With Related Case " in their own matter. The motion was made without notice to counsel for *Peruta,* despite counsel for *Richards* being in contact with them the same day it was filed.[2]

[2] Circuit Rule 27-1. Filing of Motions (2) Position of Opposing Counsel. If counsel for the moving party learns that a motion is unopposed, counsel shall so advise the court. [The implication, here, is that the party in a position to consent to

The *Richards* "motion to align" seeks to impact *Peruta* in a number of ways. The motion: (1) provides notice of *Peruta* as a potentially related case; (2) requests that *Richards* be assigned to the same panel as *Peruta*; (3) moves to effectively stay or otherwise attach itself to *Peruta* until *Richards* catches up, and (4) asks that oral arguments be heard together–not just heard by the same panel.

**ARGUMENT**

As a preliminary matter, the *Peruta* Appellants have no objection to these cases being considered as potentially "related" and possibly assigned to the same merits panel. But a motion at this stage to conclusively deem these cases "related," and effectively join them, delay *Peruta,* and have the cases heard together is premature and prejudicial.[3]

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or oppose the motion should be contacted, as noted in the Advisory Committee Note to Rule 27-1.]

Circuit Advisory Committee Note to Rule 27-1 (5) Position of Opposing Counsel. Unless precluded by extreme time urgency, counsel are to make every attempt to contact opposing counsel before filing any motion and to either inform the court of the position of opposing counsel or provide an explanation regarding the efforts made to obtain that position. [Counsel here did neither.]

[3] Although we recognize that these cases will be screened and may be "clustered" by the Court's clerks or case management attorneys.

### A. The Merits Panel Should Decide Whether the Cases Are Related and Will Be Joined for Purposes of Oral Argument

When *Peruta* is fully briefed and assigned to a merits panel, that panel can then decide whether the cases are formally "related," and whether it wants to hear arguments in the two cases together or separately, and in what order. This should depend on the status of each case and the panel's assessment of the issues presented. As set forth in the Advisory Committee Note cited as the only legal authority in support of the *Richards* motion, "[t]he first panel to whom the issue is submitted has the priority." Ninth Circuit Rules 34-1 to 34-3, Circuit Advisory Committee's Note at (1).

There is no pressing or even legitimate reason to decide in advance issues that should be decided by the merits panel in this case – and *Richards* Appellants provide none. Even if the cases are deemed related and assigned to the same panel, that panel should decide all matters concerning oral argument, as is customary.

It is our understanding that the Court's civil calendar is backed up and that neither case is likely to be heard soon. That is additional reason not to rush this decision. The two cases are approximately three months apart; briefing in *Peruta* will be *completed* August 5, 2011, almost three weeks before briefing in *Richards begins*. There could be additional delays, briefing extensions in *Richards*, or

unforseen events causing delays – in either case, for that matter. Tying the cases together so far in advance is ill-advised and unnecessary. Waiting for the merits panel to decide this question will not harm either party.

And, *Peruta* Appellants would prefer not to have their case heard with *Richards* – even if the two cases were on precisely the same track and guaranteed to stay that way. The timing issue and potentially extensive delays in obtaining relief is a real concern. But it is not the main one. Binding the cases together and hearing them together will prejudice the *Peruta* Appellants' case.

### B. *Peruta* Appellants Amended Their Complaint for the Distinct Purpose of Focusing on the *County's* Unconstitutional "Good Cause" Policy; Joining *Peruta* with *Richards,* Which Focuses Its Attack on *State* Laws, Defeats That Purpose

The *Peruta* Appellants narrowed the Second Amendment issues in their FAC in recognition of the avoidable difficulties inherent in any facial challenge to the constitutionality of a state law. Accordingly, they chose to challenge *one aspect* of a *specific County policy* that blocked *Peruta* Appellants' ability to bear arms for self-defense purposes.[4] In short, although they added some claims in the

[4] That specific aspect is the County's policy of rejecting "self-defense" as "good cause" for issuing a CCW permit. We do not challenge the Sheriff's discretion in issuing CCW permits for other "good causes," such as for commercial purposes (e.g., private security or investigators, bail agents, etc.). *Peruta* attacks that self-defense policy, directly and singularly. *Peruta* asks the federal court only to declare what should be painfully obvious: because "self-

alternative, for purpose of this lawsuit, *Peruta* Appellants chose to make their primary Second Amendment challenge simple and straightforward as noted in the summary to their opening brief on appeal:

> The reason for this lawsuit is that *County's policy* of denying concealed carry permits to almost all residents, in conjunction with the State's general ban on open carry of loaded firearms, effectively bans bearing arms in public for self-defense purposes. In light of the Supreme Court's ruling in *Dist. of Columbia v. Heller*, 554 U.S. 570 (2008), confirming that the Second Amendment secures an individual, fundamental right to keep and bear arms for self-defense, the general ban on bearing arms in San Diego is unconstitutional.
>
> The least intrusive and disruptive way to remedy this situation is to *force County to change its current local CCW policy* under which seeking a permit to generally protect oneself and one's family is insufficient [cause]. Because "bearing arms" is now acknowledged as a fundamental right, that restrictive policy is no longer valid. But the remedy is simple. "Self-defense" must be considered a "good cause."

*Peruta* Appellants' Opening Brief at 14-15 (emphasis added).[5]

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defense" is *the* "central component" of the Second Amendment right to keep and bear arms, *Heller*, 554 U.S. 570 (2008), "self-defense" must be considered "good cause" for purposes of issuing CCW permits. In other words, while the fundamental right to keep and bear arms for self-defense purposes outside the home undoubtedly is subject to *some* restrictions–one of those restrictions *cannot* be that "self-defense" is somehow insufficient cause to exercise that right.

[5] *Peruta* Appellants' decision is, in part, based on the federal courts' general reluctance to facially invalidate state regulatory schemes, especially where, as here, some counties implement that scheme constitutionally. As noted in their Motion for Partial Summary Judgment, *Peruta* Appellants chose to bring their challenge and seek relief in a way that comports with the doctrine of

The differences in the two cases can be seen in the different relief requested. *Peruta* asks the federal court to "enjoin" San Diego from enforcing the "good cause" provision of Penal Code section 12050 "*as currently applied*" against CCW applicants seeking a CCW for self-defense, and for:

> Declaratory relief that *Defendants' interpretation of the "good cause" provisions of California Penal Code § 12050 is unconstitutional* either on its face and/or as applied to applicants who are otherwise legally qualified to possess firearms and who assert self-defense as their "good cause" for seeking a license to carry a concealed weapon;

*Peruta* Appellants' ER, Vol. IV at ¶¶ 148 and 149 (emphasis added).

As more particularly set forth in the *Peruta* FAC and summary judgment motion, *Peruta* asks the federal court to invalidate only that portion of San Diego County's policy that rejects "general self-defense purposes" as sufficient "good cause" for issuing a CCW assuming the applicant is otherwise qualified. Peruta Appellants do not examine, nor do their claims require examination of, what else might constitute "good cause" or "bad," or what constitutes "good moral character." *Peruta* Appellants focus on San Diego County's unconstitutional decision to find "self-defense" insufficient cause for issuing a CCW.

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"constitutional avoidance, " *i.e.*, in a manner that provides *Peruta* Appellants and others relief while not requiring the federal court to strike down significant provisions of state law as unconstitutional. See *Peruta* Appellants' Opening Brief at 53; see also *Peruta* Appellants' ER, Vol. IV at 816-845.

Compare *Peruta*'s Prayer for Relief against San Diego County and its "good cause" policy and practice (above) to the relief requested in the *Richards* Second Amended (i.e., operative) Complaint, which seeks:

> 1. An order permanently *enjoining Defendants*, their officers, agents, servants, employees, and all persons in active concert or participation with them who receive actual notice of the injunction, *from enforcing the "good moral character" and "good cause" requirements of California Penal Code § 12050* against handgun carry permit applicants who seek the permit for self-defense and are otherwise qualified to obtain a handgun carry permit under that section;
>
> 2. *Declaratory relief that the "good moral character" and "good cause" provisions of California Penal Code § 12050 are unconstitutional* either on their face and/or as applied to bar applicants who are otherwise legally qualified to possess firearms and who assert self-defense as their "good cause" for seeking a handgun carry permit;

Pls.' Second Am. Compl., *Richards v. Prieto*, No. 09-01235 (E.D. Cal., filed Nov. 4, 2010) (Docket Entry No. 48).

In short, *Richards* attacks the State's CCW regulatory scheme, including both the "good cause" and "good moral character" provisions. *Peruta* attacks only a single aspect of San Diego County's "good cause" policy.

*Peruta* Appellants emphasized the essence of the County's unconstitutional policy and practice – the infringement resulting from rejecting "self-defense" as "good cause" for seeking a CCW – at the outset of their opening brief on appeal.

This was done in part because, in the district court, San Diego County attempted to "rewrite" *Peruta* Appellants' FAC, claiming it attacked State law on its face. County's motivation was obvious: it sought to make *Peruta* Appellants' case more difficult, and to distract the district court from the far less intrusive but equally effective remedy *Peruta* Appellants request – declare "self-defense" a "good cause" for a CCW permit. Doing so would result in restoring *Peruta* Appellants' right to bear arms for self-defense purposes.

The *Richards* Appellants' legal strategy is distinctly different, and based on a legal theory thus far apparently applied only in First Amendment cases. Counsel for *Richards* Appellants makes a persuasive case for its application to Second Amendment cases, as we assumed they would when consenting to the filing of their amicus brief. *Peruta* Appellants, however, decided to focus their legal challenge on those responsible for the policy – the County, not the State – that led to *Peruta* Appellants being denied the right to bear arms for self-defense purposes, to define the problem and solution clearly, and to rely on existing law. The Second Amendment and Equal Protection claims (the two claims on which *Peruta* Appellants moved for summary judgment) were crafted for resolution without having to rely on anything other than the text of the U.S. Constitution as interpreted through the rulings of the U.S. Supreme Court in *District of Columbia*

*v. Heller* and *McDonald v. City of Chicago*, 130 S.Ct. 3020 (2010).[6]

Having chosen to attack a single aspect of San Diego's "good cause" policy, rather than to invalidate the state's CCW regulatory scheme (and its similar provision regarding "good moral character"), *Peruta* Appellants should not be forced to join their case with *Richards* Appellants who have chosen a much broader approach. Both cases have merit. But contrary to *Richards* Appellants' assertions in their "motion to align," the cases raise decidedly different issues, take different approaches, and call for dramatically different judicial relief. Both the parties and the Court would be better served if the cases were heard separately, with *Peruta* heard first. *Peruta*'s focus on a single aspect of San Diego County's policy and practice presents a narrower set of issues and, in some ways, sets up for later consideration any potential broader challenge to the State's CCW statutes.

## CONCLUSION

The *Richards* Appellants' motion is premature, and granting it would prejudice *Peruta* Appellants. Most of the matters raised in the "motion to align"

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[6] *Peruta* Appellants do, of course, address the problems associated with unfettered discretion–the kind often stricken as a "prior restraint" on First Amendment rights, but do so without relying on that doctrine, *per se*. *Heller*, itself, noted that the District of Columbia had no discretion to deny Heller the license required to bear arms within the home, assuming he was not otherwise disqualified from exercising his Second Amendment right. And the Court did so without invoking the doctrine of "prior restraint." See *Heller*, 545 U.S. at 635.

are best left up to the merits panel after the *Peruta* case is assigned one. That panel will be in a better position to make a fully informed decision on how best to hear these two cases. At this stage of the appeal, the motion should be denied. There is no reason to do otherwise.[7]

Date: June 8, 2011

MICHEL & ASSOCIATES, P.C.

s/ C. D. Michel
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[7] To the extent counsel for *Richards* is concerned about its "prior restraint" argument not being heard, it has filed a 23-page *amicus* brief making its point.

**CERTIFICATE OF SERVICE**

I hereby certify that on June 8, 2011, an electronic PDF of this *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 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.

/s C. D. Michel
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