No. 10-56971

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EDWARD PERUTA, et al.,
Plaintiffs-Appellants,
v.
COUNTY OF SAN DIEGO, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the
Southern District of California, No. 3:09-cv-02371-IEG-BGS
(Hon. Irma E. Gonzalez, Judge)

BRIEF OF *AMICI CURIAE* FIREARMS POLICY COALITION, INC.; FIREARMS POLICY FOUNDATION, INC.; CALIFORNIA ASSOCIATION OF FEDERAL FIREARMS LICENSEES, INC.; PINK PISTOLS; GUN RIGHTS ACROSS AMERICA; LIBERAL GUN OWNERS ASSOCIATION; MADISON SOCIETY, INC.; HAWAII DEFENSE FOUNDATION; FLORIDA CARRY, INC.; ILLINOIS CARRY; KNIFE RIGHTS FOUNDATION, INC.; AND SECOND AMENDMENT PLAINTIFFS OPPOSING REHEARING *EN BANC*

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, each *amicus* certify that it has no parent corporation or subsidiaries, and no publicly held corporation holds 10% of more of its stock. Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission.

AUTHORITY TO FILE

This Court's December 3 order gave blanket leave to *amici curiae* to file briefs regarding whether this case should be heard en banc. (Dkt. 161.)

STATEMENT OF INTEREST OF *AMICI CURIAE*

The Firearms Policy Coalition, Inc. (FPC) is a non-profit organization that serves its members and the public through direct and grassroots advocacy, legal efforts, and education. The purposes of FPC include defending the United States Constitution and the People's rights, privileges and immunities deeply rooted in the Nation's history and tradition, especially the fundamental right to keep and bear arms.

The Firearms Policy Foundation, Inc. (FPF) is a non-profit organization that serves the public through charitable and educational purposes, with a focus on advancing the fundamental right to keep and bear arms.

The California Association of Federal Firearms Licensees, Inc. (CAL-FFL) is a non-profit association that serves its members and the public through direct lobbying, legal actions, education, and public outreach, all aimed at advancing the right to keep and bear arms. CAL-FFL's members include firearm dealers, training professionals, shooting ranges, collectors, consumers, and others who participate in the firearms ecosystem.

Pink Pistols is a shooting society that honors diversity and is open to all. It has chapters throughout the United States, including six chapters in California. Pink Pistols advocates the responsible and lawful use of firearms for self-defense. This issue is of particular concern to sexual minorities—whether gay, lesbian, bisexual, or transgender—because they are particularly subject to violence based on discriminatory animus. This case directly affects the ability of Pink Pistols members to defend themselves from harm using lawfully owned and carried firearms. If the availability of a concealed carry permit is restricted, so is the ability of Pink Pistols members to choose

an effective defensive tool, and to exercise their Second Amendment right to bear the arms.

Gun Rights Across America (GRAA) is a citizen-led grassroots effort to protect and promote the Second Amendment on a local, state, and federal level. Its goal is to educate citizens and elected officials regarding the Second Amendment, gun rights, and firearms in order to preserve freedoms and liberties in the United States.

The Liberal Gun Owners Association is a non-profit organization based in California. The organization's mission is to protect and secure Second Amendment rights and advocate for the rights of gun owners from a leftist perspective.

The Madison Society, Inc. is a membership organization whose purpose is preserving and protecting the legal and constitutional right to keep and bear arms for its members and all responsible law-abiding citizens. The organization spends time and resources on outreach, education and training related to assisting its members—and the law-abiding public in general—in obtaining and maintaining licenses to carry firearms for self-defense and for other Second Amendment purposes.

Hawaii Defense Foundation (HDF) is a non-profit organization formed to promote and defend the civil rights of the residents of Hawaii,

specifically Second Amendment rights. HDF is composed of over 2,500 members of the Hawaii community, and routinely participates in training, education, and litigation related to their efforts. Members of HDF have a significant interest in the outcome of *Peruta*, as citizens of Hawaii are currently subject to similar gun laws as the "good cause" restriction challenged in this case.

Illinois Carry is dedicated to the preservation of Second Amendment rights. Among Illinois Carry's purposes are educating the public about Illinois laws as well as laws throughout the Nation governing the purchase and transportation of firearms, and supporting and defending the people's right to keep and bear arms, including the right of its members and the public to purchase, possess, and carry firearms.

Florida Carry, Inc. is a non-profit, non-partisan, grassroots organization that seeks to protect the rights of law-abiding Floridians, as well as the state's visitors, to possess and use firearms and other weapons for lawful purposes including recreation and self-defense. These goals are accomplished through education, legislative initiatives, and litigation. Florida Carry has members who are residents of the state of California, and members who regularly visit the state of California. Florida Carry relies on decisions by the federal courts in litigation on behalf of its members. This

case was discussed extensively during recent oral argument before a Florida appellate court, and the outcome of this case may have a direct impact on law-abiding Floridians and members of Florida Carry who choose to exercise their right to possess and use firearms in accordance with state and federal law.

The Knife Rights Foundation, Inc. (KRF) is a non-profit organization that serves its members and the public through direct and grassroots advocacy, focused on protecting the Second Amendment right to keep and bear all lawful arms, including knives and edged tools. *See, e.g., State v. DeCiccio*, --- A.3d ----, 2014 WL 7156774 (Conn. 2014). The purposes of KRF include promoting education about state and federal knife laws, and defending and protecting the civil rights of knife owners.

Amici organizations seek to protect the rights of responsible, law-abiding citizens to keep and bear arms through direct advocacy, conducting research on state and federal firearms laws, and expending funds on firearms-related litigation. Many of their members are subject to California's firearms laws, and therefore have a particular interest in their ability to exercise rights secured by the Second Amendment, including the aspect of that right at issue in this case: the right to bear arms outside of the home for self-defense.

In addition to these organizations, this brief is joined by several individuals who are plaintiffs in lawsuits pending within the Ninth Circuit challenging different aspects of concealed-carry policies.[1] Because the outcome of this case will effect their pending litigation, they have a particular interest in the resolution of this case.

INTRODUCTION

Red flags should be raised when the office of an elected official seeks to intervene in a case after the appeal has been decided so that it can request rehearing en banc. Buzzers and alarms should go off when that same office has consistently advised the courts for years that it has no standing in the very type of case it is seeking to join. And so it is here.

Shortly after this Court's decision striking down as unconstitutional San Diego County's policy for issuing concealed carry licenses last February, Sheriff William D. Gore publicly stated that he would not pursue

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[1] The individual *amici* include: Christopher Baker, *Baker v. Kealoha*, 564 Fed. Appx. 903 (9th Cir. 2014); Jonathan W. Birdt, *Birdt v. Beck*, No. 2:10-cv-08377-JAK-JEM (C.D. Cal.), *appeal docketed*, No. 12-55115 (9th Cir.); Robert Thomson, *Thomson v. Los Angeles Cnty. Sheriffs Dep't*, 2:11-cv-06154-SJO-JC (C.D. Cal.), *appeal docketed*, No. 12-56236 (9th Cir.); Sigitas Raulinaitis and Rima Raulinaitis, *Raulinaitis v. Los Angeles Cnty. Sheriffs Dep't*, 2:11-cv-08026-MWF-JCG (C.D. Cal.), appeal docketed, No. 12-56508; Tom Scocca, *Scocca v. Smith*, No. CV-11-01318-EMC (N.D. Cal.); Christopher Anderson, Michael Dozier, David Marcinkus, Ari Friedman, and Ari Miller, *Anderson v. Scott*, 2:14-cv-05241-FFM (C.D. Cal.).

rehearing en banc and that he would comply with the decision once this case became final. As a result, there is no longer an active controversy before this Court. Although the state of California has now sought to intervene, the State lacks standing to defend the county's interest in this case because it has no authority to grant, deny or revoke the licenses at issue. Those functions are expressly assigned under the law to local officers.

Even if California is deemed to have standing under Article III, this Court should deny it standing for prudential reasons, including the general rule against third-party standing. The panel opinion should not be reheard en banc.

ARGUMENT

Article III, § 2, of the Constitution confines federal judicial power to deciding actual "cases" or "controversies," and "Article III demands that an 'actual controversy' persist throughout all stages of litigation." *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661 (2013) (quotation marks and citation omitted). The case-or-controversy requirement is "an essential limit" on the power of federal courts. *Id.* at 2659. As Chief Justice Roberts put it in *Hollingsworth*, "[i]t ensures that we act as judges, and do not engage in policymaking properly left to elected representatives." *Id.* "In light of this 'overriding and time-honored concern about keeping the Judiciary's power

within its proper constitutional sphere, [federal courts] must put aside the natural urge to proceed directly to the merits of [an] important dispute and to 'settle' it for the sake of convenience and efficiency.'" *Id.* at 2661 (quoting *Raines v. Byrd*, 521 U.S. 811, 820 (1997)). This Court has "a special obligation to satisfy itself … of its own jurisdiction ... even though the parties are prepared to concede it." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 73 (1997) (citation and internal quotation marks omitted).

"Standing to sue or defend is an aspect of the case-or-controversy requirement," *Arizonans for Official English*, 520 U.S. at 64, which "must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance." *Hollingsworth*, 133 S. Ct. at 2661 (internal quotation marks at citations omitted). "An intervenor cannot step into the shoes of the original party unless the intervenor independently 'fulfills the requirements of Article III.'" *Arizonans for Official English*, 520 U.S.at 65 (quoting *Diamond v. Charles*, 476 U.S. 54, 68 (1986)). *See also id.* at 64 ("Standing to defend on appeal in the place of an original defendant, no less than standing to sue, demands that the litigant possess a direct stake in the outcome") (internal quotation marks omitted).

To that end, "it is not enough that the party invoking the power of the court have a keen interest in the issue." *Hollingsworth*, 133 S. Ct. at 2659. Rather, a litigant must demonstrate that it has a "direct stake" in the outcome of the case—that it has "suffered a concrete and particularized injury" that can be redressed by a favorable judgment. *See id.* at 2661-63, 2666. These strict limitations ensure that standing is not "placed in the hands of 'concerned bystanders,' who will use it simply as a 'vehicle for the vindication of value interests.'" *Id.* at 2663 (quoting *Diamond*, 476 U.S. at 62). California does not meet these requirements.

A. California Does Not Have Standing To Defend This Appeal.

California lacks a sufficient interest to meet Article III's standing requirements because the State has no role in the enforcement of the challenged policy: under California law, the State has no statutory authority to grant, deny or revoke concealed carry licenses. The responsibility to issue and enforce San Diego's policy for issuing concealed carry licenses rests with the county sheriff's department alone. The case might be different had Peruta challenged the constitutionality of a state statute. *See, e.g.*, *Diamond*, 476 U.S. at 62 (state has standing to defend constitutionality of its statute). He did not. Peruta brought this lawsuit against San Diego County, over a county policy, enforced by county officials. *See, e.g.*, Amend. Compl. ¶¶ 80-

82 (outlining application of county policy) and ¶ 112 ("By refusing to issue CCWs to individuals, including Plaintiffs, based on their subjective and unconstitutional standard of 'good cause' that requires a showing beyond the need for self-defense, Defendants are abusing their discretion and propagating customs, policies, and practices that infringe" Plaintiffs' Second Amendment rights).

Don't just take our word for it that the State lacks standing in a case like this. The California Attorney General's office has long taken the position that plaintiffs who sue over a county's policy for issuing concealed-carry permits lack standing to sue the Attorney General because it "has no role in CCW license decisions." Answering Br. of Appellee Atty. Gen. of the State of Cal. at 3, *Mehl v. Blanas*, No. 08-15773 (9th Cir. Oct. 15, 2008), Dkt. Entry 6675648. In *Mehl*, the Attorney General argued—in a brief filed in this Court, concerning a constitutional challenge to the Sacramento County sheriff's handling of CCW license applications—that plaintiffs "lack[ed] standing as to the Attorney General because their alleged injuries are not traceable to any action or authority of the Attorney General." *Id.* at 40 (some capitalization omitted). That time, the Attorney General explained:

> [T]he Attorney General has no statutory authority to grant, deny or revoke CCW licenses. Only sheriffs and chiefs of police are authorized to perform these functions. Review of CCW license decisions by the sheriffs and chiefs of police is available from

> state courts. Contrary to [appellants'] implication, the Attorney General is not authorized by the CCW statutes to review the decisions of the sheriffs and chiefs of police. Because Applicants' alleged injury can occur only through the actions of the Sheriff, independent of the authority of the Attorney General, any ostensible harm cannot be traced to the Attorney General.

Id. at 41 (internal citations omitted); *see also id.* at 1-2 ("[A]ppellants' applications for CCW licenses were denied by appellee Sacramento County Sheriff's Office, not the Attorney General. Accordingly, appellants cannot establish federal jurisdiction to litigate the constitutionality of the CCW licensing statutes against the Attorney General.").

Indeed, the Attorney General's office confirmed in *Mehl v. Blanas* that the State role was so non-existent under the statutory scheme that *even a facial challenge* to the California Penal Code provisions would not support standing for the State: "Since only sheriffs and chiefs of police have authority under the CCW statutes to grant, deny or revoke licenses, Applicants cannot establish Article III jurisdiction over the Attorney General with regard to their facial challenges to the validity of the statutes or for review of the Sheriff's refusal to grant their CCW licenses." *Id*. at 42.

This Court did not address the Attorney General's argument in *Mehl* that the Attorney General should have nothing to do with constitutional litigation over a county's concealed carry policy. *Mehl v. Blanas*, 532 Fed.

Appx. 752 (9th Cir. 2013). The District Court in that case, however, accepted the Attorney General's argument:

> [T]he Court elects to follow the holdings of the Ninth Circuit and determine that the sheriff acts as the final policymaker for the county when issuing CCWs. Accordingly, Plaintiffs have failed to establish any connection between the Attorney General and a county sheriff insofar as the issuance of CCWs is concerned.

Mem. and Order Granting Atty. Gen. Lockyer's Mot. to Dismiss at 7:1-6, No. 2:03-cv-02682 (E.D. Cal. Sept. 3, 2004), Dkt. Entry 17.

The Attorney General's office made the same argument when it sought dismissal of another concealed-carry challenge. Memo. of Points & Authorities In Support Of Atty. Gen. Edmund G. Brown Jr.'s Mot. To Dismiss First Amended Complaint at 19:1-24, *Rothery v. Blanas*, No. 2:08-cv-02064-JAM-KJM (E.D. Cal. May 29, 2009), Dkt. Entry 32-1. There, the Attorney General emphasized that "[t]he Ninth Circuit has been very clear that suits cannot be brought in federal court against an attorney general to challenge the validity of statutes that he has no authority to enforce," and that this Court "has repeatedly rejected actions against attorney generals [sic] on these grounds." *Id.* at 19:25-28. Furthermore, the Attorney General argued, a judgment entered against it would not provide an "effective remedy" because the exercise of regulatory authority concerning concealed-

carry policies is "vested by law in the [county sheriff] exclusively." *Id.* at 21:1-21.

Fair enough. These very same arguments demonstrate why the Attorney General does not have standing to defend San Diego County's policy—the Attorney General played no role in the underlying injury and cannot redress it.[2]

Sheriff Gore has elected not to assert the rights of his office any further in this action. He weighed his options, considered the various forces at work in the jurisdiction actually at issue in the case, and decided to move on. As such, Mr. Gore is in the same position as the named defendants in *Hollingsworth* who chose not to appeal. *Hollingsworth*, 133 S. Ct. at 2662. And, under the reasoning previously employed by the Attorney General's office in the lawsuits noted above, the State's newfound interest in this case, no matter how "keen," suffices no more to confer standing than the interests of the Proposition 8 proponents. *Cf. Hollingsworth*, 133 S. Ct. at 2662 ("[A] 'generalized grievance,' no matter how sincere, is insufficient to confer standing.").

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[2] Of course, "a party's seeking to intervene merely to attack or thwart a remedy rather than participate in the future administration of the remedy is disfavored." *United States v. Oregon*, 913 F.2d 576, 588 (9th Cir. 1990).

The Constitution, not the policy priorities of elected officials, defines the limits of federal jurisdiction.

B. There Are Sound Prudential Reasons For This Court To Deny California Standing.

Even if California is deemed to have standing under Article III, this Court should deny it standing for prudential reasons, specifically, "the general prohibition on a litigant's raising another person's legal rights." *Allen v. Wright*, 468 U.S. 737, 751 (1984). "There are good and sufficient reasons for th[e] prudential limitation on standing when rights of third parties are implicated—the avoidance of the adjudication of rights which those not before the Court may not wish to assert, and the assurance that the most effective advocate of the rights at issue is present to champion them." *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 80 (1978). *See also Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 479 (2006) ("Injured parties 'usually will be the best proponents of their own rights,'" and when "'the holders of those rights do not wish to assert them,' third parties are not normally entitled to step into their shoes.") (quoting *Singleton v. Wulff*, 428 U.S. 106, 114, 113-14 (1976) (plurality opinion)) (ellipsis omitted).

Conferring standing on the Attorney General here would invite state officials to meddle in litigation at their leisure—potentially disrupting the legal rights of those who actually hold them. *See Singleton*, 428 U.S. at 114

("The holders of the rights may have a like preference [for courts to construe legal rights only when the most effective advocates of those rights are before them], to the extent they will be bound by the courts' decisions under the doctrine of stare decisis.").[3]

The Attorney General's office apparently decided that the State had a significant interest in this case only after reading the panel's decision. *Amici* have a strong interest in avoiding the creation of a "free option" for state officials to jump into litigation at what is normally considered the end of a case, rather than the beginning. *Amici* here include organizations that pursue federal litigation, on behalf of their members, against local officials charged by California law to administer firearms laws. Individual *amici* are currently pursuing litigation over concealed-carry policies. These parties have to

[3] Giving the State government free reign to assert standing even when no State action is being challenged provides at least two elected officials with the option to disrupt litigation, thereby inviting political mischief. Here, the Attorney General's office is seeking intervention on behalf of the State, but presumably the Governor could make the same arguments about the State's interest in defending State law. *See* Cal. Const., Art. 5, §§ 1 ("The Governor shall see that the law is faithfully executed."); Gov. Code §§ 12511-12 (California Attorney General "has charge, as attorney, of all legal matters in which the State is interested" and "shall … prosecute or defend all causes to which the State, or any State officer is a party in his official capacity."). *Cf. People ex rel. Deukmejian v. Brown*, 624 P.2d 1206 (Cal. 1981) (dispute between governor and attorney general over enforcement of state law); *City of Seattle v. McKenna*, 259 P.3d 1087, 1089 (Wash. 2011) (dispute between governor and attorney general over state's participation in lawsuit challenging Affordable Care Act).

budget and plan for that litigation. Until now, based in no small part on the past assertions of the Attorney General's office noted above, the notion of a new layer of review after a county throws in the towel on a federal case was completely foreign.[4] This case should not be the vehicle for creating a new rule of post-decision intervention for elected officials.

In sum, prudential concerns require that California not be permitted to disturb Sheriff Gore's decision to discontinue litigation of this case.

CONCLUSION

For the reasons stated above, the Court should not rehear this case en banc.

Respectfully submitted,

Dated: December 24, 2014

Benbrook Law Group, PC

By: */s/ Bradley A. Benbrook*
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[4] It is certainly not as if the State has no voice in litigation raising similar issues. The State is entitled to file *amicus* briefs in every one of them. Fed. R. App. P. 29(a). It can likewise request time at the podium for any future arguments in those cases. Fed. R. App. P. 29(g).

CERTIFICATE OF COMPLIANCE

1. This brief complies with the word limit of Ninth Circuit R. 29(c)(2) because it contains 3,424 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 and Times New Roman size 14 font.

Dated: December 24, 2014 Benbrook Law Group, PC

By: */s/ Bradley A. Benbrook*
Bradley A. Benbrook
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on December 23, 2014.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: December 24, 2014 Benbrook Law Group, PC

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