

C.A. No. 10-56971 [ DC# CV 09-02371-IEG]

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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EDWARD PERUTA, et al,

Plaintiffs/Appellants,

V.

COUNTY OF SAN DIEGO, et al,

Defendants/Appellees,

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**APPEAL**

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**APPLICATION FOR LEAVE, AND PROPOSED BRIEF OF CALIFORNIA  
STATE SHERIFF'S ASSOCIATION, CALIFORNIA POLICE CHIEFS  
ASSOCIATION, AND CALIFORNIA PEACE OFFICERS ASSOCIATION  
AS AMICUS CURIAE ON BEHALF OF APPELLEES  
COUNTY OF SAN DIEGO, ET AL**

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**APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF**

The California State Sheriff's Association ("CSSA"), the California Police Chiefs Associations ("CPCA"), and the California Peace Officers Association ("CPOA") (collectively "Applicants") request leave to file the attached Amicus Curiae Brief in support of Appellees, to assist this Court in resolving the important issues of law presented in this matter.

CSSA represents each of the 58 elected Sheriffs in California. CPCA represents the more than 400 hundred municipal chiefs of police in California. CPOA represents more than four thousand peace officers, of all rank, throughout the State.

These Associations, both individually and collectively, are interested in this case because the issues presented have profound impact on the members thereof. The issues presented for treatment and resolution by this Court go directly to the public safety mission of the organizations and communities served by the members Applicants, particularly as relates to the unregulated proliferation of firearms in their communities and on their streets.

Applicants endeavor to provide this Court with a broad law enforcement perspective as to the issues in this matter, specifically the constitutional and statutory exercise of discretion by members of Applicants in determining the issuance or denial of permits to carry concealed firearms.

As required by FRAP Rule 29(c)(5), Applicants 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 nor counsel to a party provided any financial support or funding hereto.

Therefore, Applicants respectfully request leave to file the attached Amicus Curiae brief addressing the above issues.

Dated: August 18, 2011

Respectfully submitted,

JONES & MAYER

By: *s/:Paul R. Coble*

Paul R. Coble,  
Martin J. Mayer,  
Attorneys for Amicus Curiae,  
California State Sheriffs'  
Association; California Police  
Chiefs Association;  
California Peace Officers  
Association

**PROPOSED BRIEF**  
**OF AMICUS CURIAE ON BEHALF OF**  
**CALIFORNIA STATE SHERIFF'S ASSOCIATION, CALIFORNIA**  
**POLICE CHIEFS ASSOCIATION AND CALIFORNIA PEACE**  
**OFFICERS ASSOCIATION**

**I. STATEMENT OF JURISDICTION**

Your Amici, California State Sheriff's Association ("CSSA"), the California Police Chiefs Associations ("CPCA"), and the California Peace Officers Association ("CPOA") (hereinafter "Your Amici" or "Law Enforcement Associations"), join in Appellants' and Appellees' Statement of Jurisdiction.

**II. STATEMENT OF THE CASE**

Your Amici, Law Enforcement Associations, join in Appellee's Statement of the Case.

**III. STATEMENT OF FACTS**

Your Amici, Law Enforcement Associations, join in Appellee's Statement of Facts.

**IV. ARGUMENT**

Your Amici, Law Enforcement Associations, join in Appellee's arguments and authorities in support thereof.

Having done so, however, Your Amici wish to address the perspective of CSSA, CPCA and CPOA outside of the County of San Diego.

**A. AT ISSUE IN THIS CASE IS THE DISCRETION  
NECESSITATED BY THE SIZE AND DIVERSITY OF  
CALIFORNIA.**

It must be emphasized that the issue in this case pertains to having a permit to carry a concealed firearm in public. It does not relate to carrying or having a firearm, whether concealed or not, in one's home. It does not relate to hunters going hunting in the wild. It relates only to people who believe, albeit wrongly, that there is a constitutionally protected right to go about in public carrying a loaded and concealed firearm.

Alas, this is not the state of the law in the United States generally or in California specifically.

What is before this Court is the very necessary discretion vested by the California Legislature in the chief law enforcement executives of that State to determine for their respective communities the necessity for someone to carry about with them a concealed firearm.

Quite apart from Appellees County of San Diego, a largely urban and suburban setting, Your Amici represent law enforcement throughout the over 163,000 square miles which comprise this State, subdivided into the 58 counties served by the Sheriffs who make up CSSA and the over 400 municipalities served by the Chiefs comprising CPCA. It is readily observable that California is a geographically and demographically diverse state, spanning from the peaks of the Sierra Nevada Mountains to the Pacific Ocean, and from Oregon all the way to the international border with Mexico. The circumstances and balancing of community safety issues which might obtain in the issuance of a concealed gun permit by the Sheriff of remote and sparsely populated Alpine County (population 1,175, and 743

square miles) may be markedly different from the factors to be weighed by the Sheriff of Los Angeles County (population nearly 10 million and over 4,000 square miles), or that which the Chief of Police for the City and County of San Francisco (not quite 47 square miles and a population density estimated at over 171,000 people per square mile) would have to consider.

It is the tremendous diversity of our State which not only warrants, but requires the exercise of discretion by chief law enforcement executives in deciding whether, in the context and milieu of their jurisdiction, a concealed gun permit should issue.

**B. REASONABLE REGULATION DOES NOT UNDULY BURDEN ANY SECOND AMENDMENT RIGHTS.**

As has been noted by the Supreme Court in District of Columbia v. Heller, (2008) 554 U.S. 570, 626, the right to keep and bear arms does not include the right to keep and carry a firearm in any manner of one's choosing. In so stating, the Court went on to offer what it characterized as a "non-exclusive" list of permissible limitations which government may impose on firearm possession, expressly noting the longstanding holding of our nation's court that "prohibitions on carrying concealed weapons were lawful." *Ibid.* at 626-627. In a subsequent holding, the Supreme Court went to some lengths in stating that its holding in Heller applied only to the right to keep and bear arms *in the home for self-defense*. McDonald v. City of Chicago, (2010) 2010 Lexis 5523, 130 S.Ct. 3020, 177 L.Ed. 894.

The Ninth Circuit touched on the issue of regulation of concealed firearms in holding that under California's dangerous weapons control law there was no property interest in carrying a concealed firearm. Erdelyi v. O'Brien, (1982, 9<sup>th</sup> Cir) 680 F.2d 61, 63.

As has been furthermore observed by the Ninth Circuit, "To bring a successful facial challenge outside the context of the First Amendment, the challenger must establish that no set of circumstances exists under which the statute would be valid." (internal citations omitted.) Hotel & Motel Ass'n. of Oakland v. City of Oakland, (2003, 9<sup>th</sup> Cir) 344 F.3d 959, 971. This language was cited by the United States District Court for the Eastern District of California in rejecting a claim that California's regulatory scheme granting a sheriff discretion over the determination of good cause for issuance of a concealed firearm permit. Richards v. County of Yolo, (E.D. CASE:, 2011) 2011 U.S. Dist. LEXIS 51906. There, the District Court observed that to successfully challenge the exercise of discretion in the denial of the requested permit, the applicant would have to show that there was no possible set of circumstances under which a permit could be issued under the controlling statute (Calif. Penal Code §12050).

Thus, the state of the law is that reasonable regulation of concealed firearms is permissible under the Second Amendment.

### **C. THE DISCRETION OF A SHERIFF OR CHIEF IS SUBJECT TO REVIEW.**

While it is true that California's statutory scheme under Calif. Penal Code §12050, *et seq.*, vests discretion in a sheriff or chief of police, that discretion is neither final nor absolute.

Traditional mandamus (Calif. Code of Civil Procedure §1085) will lie to correct abuses of discretion. A party seeking review under traditional California mandamus must show the public official or agency invested with discretion acted arbitrarily, capriciously, fraudulently, or without due regard

for his rights, and that the action prejudiced him. Gordon v. Horsley, (2001) 86 Cal.App.4th 336.

A traditional writ of mandate under Code of Civil Procedure section 1085 is a method for compelling a public entity to perform a legal and usually ministerial duty. The trial court reviews an administrative action pursuant to Code of Civil Procedure section 1085 to determine whether the agency's action was arbitrary, capricious, or entirely lacking in evidentiary support, contrary to established public policy, unlawful, procedurally unfair, or whether the agency failed to follow the procedure and give the notices the law requires. Although mandate will not lie to control a public agency's discretion, which is to say, force the exercise of discretion in a particular manner, it will lie to correct abuses of discretion. In determining whether an agency has abused its discretion, the court may not substitute its judgment for that of the agency, and if reasonable minds may disagree as to the wisdom of the agency's action, its determination must be upheld. American Federation of State, County & Municipal Employees v. Metropolitan Water Dist., (2005) 126 Cal.App.4th 247, 261.

An applicant for a concealed firearm permit is not, therefore, without an avenue of relief if he or she believes that a denial or revocation of a permit is the product of unreasonable, arbitrary or capricious action by a sheriff or chief of police. Indeed, California's Supreme Court held some 25 years ago that much of the information about concealed firearm permit applications, the "good cause" shown, bases for denial, etc. is public information subject to disclosure upon demand. See, e.g., CBS v. Block, (1986) 42 Cal. 3d 646.



The means exist, therefore, for an unhappy applicant to challenge the exercise of discretion by a sheriff or chief, and to be able to obtain through California's Public Records Act (Calif. Govt. Code §6250, *et seq.*) information by which the official can be held to task *if* there is an abuse of discretion.

## V. CONCLUSION

Wherefore, Your Amici ask that this Honorable Court follow the holdings of the Supreme Court, find that the statutory scheme for concealed gun permits under California law does not violate any vested right under the Second Amendment, and sustain the judgment of the trial court below.

Dated: August 18, 2011

Respectfully submitted,

JONES & MAYER

By: *s/: Paul R. Coble*

Paul R. Coble,  
Martin J. Mayer,  
Attorneys for Amicus Curiae,  
California State Sheriffs' Association  
California Police Chiefs Association  
California Peace Officers Association

### **Certificate of Compliance**

I, Paul R. Coble, hereby certify that the attached application and proposed brief consist of 1746, including footnotes but exclusive of this Certificate of Compliance. I have relied on the word count of the computer program used to prepare the brief.

Dated: August 18, 2011

JONES & MAYER

BY: s/Paul R. Coble

Paul R. Coble,  
Martin J. Mayer,  
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California State Sheriffs'  
Association; California Police  
Chiefs Association;  
California Peace Officers  
Association

9th Circuit Case Number(s)

10-56971

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s/:Paul R. Coble

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