11-16255

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ADAM RICHARDS, et. al.,

Plaintiffs-Appellants,

v.

ED PRIETO; COUNTY OF YOLO,

Defendants-Appellees.

Before: O'SCANNLAIN, THOMAS, and CALLAHAN, Circuit Judges

Decision Filed Mar. 5, 2014

On Appeal from the United States District Court
for the Eastern District of California
No. 2:09-CV-01235-MCE-DAD
Hon. Morrison C. England, Jr., District Judge

BRIEF OF THE STATE OF CALIFORNIA AS AMICUS CURIAE SUPPORTING REHEARING EN BANC

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TABLE OF CONTENTS

Page

Interest of Amicus Curiae 1

Argument 2

I. The panel's decision conflicts with decisions of the Supreme Court, this Court, and three other circuits..... 2

II. This case presents a question of exceptional importance 6

III. The State will seek to participate directly in any en banc proceedings..... 8

Conclusion 9

TABLE OF AUTHORITIES

Page

CASES

District of Columbia v. Heller
554 U.S. 570 (2008) 2, 5

Drake v. Filko
724 F.3d 426 (3d Cir. 2013) 2, 3, 6

Jackson v. City & County of San Francisco
--- F.3d ---, 2014 WL 1193434 (9th Cir. Mar. 25, 2014) 4

Kachalsky v. County of Westchester
701 F.3d 81 (2d Cir. 2012) 3, 6

Moore v. Madigan
702 F.3d 933 (7th Cir. 2012) 6

Peruta v. County of San Diego
742 F.3d 1144 (9th Cir. 2014) ..... passim

Peterson v. Martinez
707 F.3d 1197 (10th Cir. 2013) 2

Robertson v. Baldwin
165 U.S. 275 (1897) 2

United States v. Chovan
735 F.3d 1127 (9th Cir. 2013) 3, 4, 5

Woollard v. Gallagher
712 F.3d 865 (4th Cir. 2013) 3, 6

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

Cal. Penal Code
§ 17030 4
§ 25850(a) 4
§ 25900 4
§ 26000 *et seq.* 4
§ 26045 4
§ 26350(a) 4
§ 26361 *et seq.* 4

CONSTITUTIONAL PROVISIONS

Second Amendment ..... passim

OTHER AUTHORITIES

Jill Cowan, *O.C. "Inundated" with Hundreds of Concealed Weapons Applications*, L.A. Times (Feb. 26, 2014) *available at* http://www.latimes.com/local/lanow/la-me-ln-oc-concealed-weapons-applications-20140225,0,1109507.story#ixzz2uYpPzV4S 7

Orange County Sherriff's Dep't, CCW License, http://ocsd.org/about/info/services/ccw 7

INTEREST OF AMICUS CURIAE

The State of California has a direct and compelling interest in defending the constitutional validity of its statutory scheme governing the public carrying of firearms. That scheme has been called into question by the recent decision of a divided panel of this Court in *Peruta v. County of San Diego*, 742 F.3d 1144 (9th Cir. 2014) (No. 10-56971), in which the State has sought to intervene for the purpose of seeking rehearing en banc. In this case, the same panel held that *Peruta* is dispositive of this appeal. Indeed, the panel's decision here, invalidating Yolo County's policy implementing California's statutory "good cause" requirement for concealed-carry permits, demonstrates *Peruta*'s potential sweep. Because this case raises the same issues as *Peruta*, the Court could properly address these issues by granting rehearing en banc in either case or in both. However the Court chooses to proceed, the State will seek to participate as a party in the en banc proceedings.

The State also has a compelling interest in upholding the police powers of the State and its counties to protect public safety by placing reasonable restrictions on the carrying of firearms in public places. The California Legislature has given local officials broad authority to determine what applicants must show to satisfy the "good cause" requirement for concealed-

carry permits in their particular localities. This is based in part on a determination that public safety, crime prevention, and other concerns relevant to concealed-carry restrictions are not uniform in all areas, and may vary significantly between, for example, urban and rural areas. The panel's decisions in this case and *Peruta* have sharply constrained state and local discretion to regulate the carrying of guns in public, removing important policy decisions affecting public safety from the hands of the state Legislature and designated local officials. The State accordingly has a strong interest in the en banc determination of the questions presented in *Peruta* and this case.

ARGUMENT

I. THE PANEL'S DECISION CONFLICTS WITH DECISIONS OF THE SUPREME COURT, THIS COURT, AND THREE OTHER CIRCUITS

1. Before the panel decision in *Peruta*, concealed-carry restrictions were generally considered to be the type of "longstanding prohibitions" on firearms that were "presumptively lawful." *District of Columbia v. Heller*, 554 U.S. 570, 626-27 & n.26 (2008); *Robertson v. Baldwin*, 165 U.S. 275, 281-82 (1897); *Drake v. Filko*, 724 F.3d 426, 429-34 (3d Cir. 2013); *Peterson v. Martinez*, 707 F.3d 1197, 1209-12 (10th Cir. 2013). Broader restrictions on public carrying, if assumed to implicate the Second

Amendment at all, were generally reviewed under intermediate scrutiny, with a high degree of deference given to legislative policy determinations. *See Drake*, 724 F.3d at 435-40; *Woollard v. Gallagher*, 712 F.3d 865, 876-82 (4th Cir. 2013); *Kachalsky v. County of Westchester*, 701 F.3d 81, 96-97 (2d Cir. 2012).[1] The "core" of the Second Amendment was recognized as "'the right of law-abiding, responsible citizens to use arms in defense of hearth and home.'" *United States v. Chovan*, 735 F.3d 1127, 1138 (9th Cir. 2013) (quoting *Heller*, 554 U.S. at 635); *see also Drake*, 724 F.3d at 436; *Woolard*, 712 F.3d at 874; *Kachalsky*, 701 F.3d at 93.

The *Peruta* panel decision departs from these principles and threatens to call into question longstanding and routine state and local regulation of the public carrying of handguns. Under *Peruta*, concealed-carry restrictions would no longer be "presumptively lawful." Their constitutional validity would instead hinge on whether, and to what extent, open carrying is permitted. App. 60-65. Where open carrying is widely restricted, many longstanding and reasonable "good cause" restrictions on concealed carrying—such as the individualized showings of need required by San

[1] As *Drake* notes, "[i]t remains unsettled whether the individual right to bear arms for the purpose of self-defense extends beyond the home." 724 F.3d at 430.

Diego County and Yolo County—would potentially become "per se invalid[]." App. 59.[2] Finally, under *Peruta*, the "core" Second Amendment right would include not only the defense of hearth and home, but a right to carry guns for asserted purposes of self-defense "'wherever [a] person happens to be.'" App. 18. This dramatic potential change in the nature and extent of Second Amendment rights warrants en banc review.

2. The panel's reliance on *Peruta* would also create an intra-circuit conflict in at least two respects. First, the panel majority's opinion departs from the "two-step Second Amendment inquiry" that this Court adopted in *Chovan*. That inquiry "(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." *Chovan*, 735 F.3d at 1136; *see also Jackson v. City & County of San Francisco*, --- F.3d ---, 2014 WL 1193434, at *3 (9th

[2] *Peruta* incorrectly states that open carry is "prohibited" in California "without exception." App. 61. While open carrying is largely prohibited in incorporated cities, it is generally permitted in unincorporated areas except where a statute or ordinance specifically prohibits the discharge of firearms. *See* Cal. Penal Code §§ 25850(a), 26350(a), 17030. Even in incorporated cities there are numerous exceptions to the open-carry ban, including for individuals keeping weapons in their homes, businesses, or other private property; hunters; appropriately trained and permitted private security services; situations in which individuals believe they must carry a weapon because they or their property are in immediate, grave danger; and the like. *See*, *e.g.*, *id.*, §§ 25900, 26000 *et seq.*, 26045, 26361 *et seq.*

Cir. Mar. 25, 2014). The *Peruta* panel dispensed with the second step, declining to evaluate San Diego's concealed-carry policy under any level of scrutiny, and instead creating an "alternative" test under which the panel held the policy "per se invalid[]." App. 54, 59. The panel cited *Heller*, but *Chovan* already determined that its two-step constitutional scrutiny inquiry "reflects the Supreme Court's holding in *Heller* that, while the Second Amendment protects an individual right to keep and bear arms, the scope of that right is not unlimited." *Chovan*, 735 F.3d at 1136. The panel's creation of a new, alternative test that in certain cases eliminates any potential for the justification of a particular gun restriction is at odds with *Chovan*.

Second, *Peruta* departs from *Chovan*'s understanding of the "core" of the Second Amendment right. *Chovan* held that "the core of the Second Amendment is 'the right of law-abiding, responsible citizens to use arms in defense of hearth and home.'" *Chovan*, 735 F.3d at 1138 (quoting *Heller*, 554 U.S. at 635). The "core" of the right is significant because the appropriate level of scrutiny under *Chovan*'s two-step inquiry depends upon "(1) 'how close the law comes to the core of the Second Amendment right,' and (2) 'the severity of the law's burden on the right.'" *Id.* (quoting *Ezell v. City of Chicago*, 651 F.3d 684, 703 (7th Cir. 2011)). The *Peruta* panel, however, did not assess how close San Diego's policy came to the core right

to defend "hearth and home," but instead redefined the "core" of the Second Amendment to include a right to be prepared for self-defense "'wherever [a] person happens to be.'" App. 18. *Peruta*'s recasting of the "core" of the Second Amendment right warrants en banc review.

3. Finally, the panel decision in *Peruta* creates an acknowledged conflict with decisions of the Second, Third, and Fourth Circuits. *See* App. 66-67 (acknowledging the conflict with *Drake*, 724 F.3d at 431-35, *Woollard*, 712 F.3d at 876, and *Kachalsky*, 701 F.3d at 89, 97-99). Further, as the Sherriff's petition for rehearing en banc points out, the Seventh Circuit's decision in *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012), is distinguishable from the Second, Third, and Fourth Circuit decisions—and also distinguishable from this case and *Peruta*—because of the unique nature of the "flat ban" on public carrying that was at issue in *Moore*. *See* Petition at 11-15. Accordingly, en banc review could eliminate the only direct conflict among the circuits on this issue, which the panel's decision in *Peruta*, and in turn the decision here, would otherwise create.

II. THIS CASE PRESENTS A QUESTION OF EXCEPTIONAL IMPORTANCE

The questions at issue in this case and *Peruta* also warrant en banc review because the panel's decisions will have an immediate practical effect

on public safety in California. If these decisions are allowed to stand, both San Diego and Yolo Counties will be required to abandon their longstanding "good cause" requirements, and potentially issue a concealed carry permit to any otherwise qualified citizen who requests one. *See* App. 61 (local officials "should be made to issue carry licenses to citizens whose only 'good cause' is the . . . desire for self-defense"). Authorities in other localities, including in urban and residential areas, will be under similar pressure to conform their practice to *Peruta*'s reasoning or face legal action based on the *Peruta* opinion. In effect, as Judge Thomas explains, the State's "good cause" requirement will have been transformed into a "no cause" standard effective throughout the State. App. 122. Indeed, news reports indicate that some local authorities have already begun to conform their practice to the panel majority's new "must issue" rule, and have been "inundated" by applications for concealed carry permits.[3]

[3] *See* Orange County Sherriff's Dep't, CCW License, http://ocsd.org/about/info/services/ccw (last visited Mar. 28, 2014); Jill Cowan, *O.C. "Inundated" with Hundreds of Concealed Weapons Applications*, L.A. Times (Feb. 26, 2014) *available at* http://www.latimes.com/local/lanow/la-me-ln-oc-concealed-weapons-applications-20140225,0,1109507.story#ixzz2uYpPzV4S.

This Court should not permit changes of this magnitude to take effect without further consideration by the en banc Court—including briefing and argument by the State.

III. THE STATE WILL SEEK TO PARTICIPATE DIRECTLY IN ANY EN BANC PROCEEDINGS

This case and *Peruta* present the same issues. The Court could choose to address those issues by granting rehearing en banc in either case or in both. If the Court grants review in both cases, it would appear to be appropriate to consolidate or coordinate the en banc proceedings. Because it is not clear how the Court will proceed, the State files this brief at the petition stage as an amicus, rather than seeking to intervene in this case as it has in *Peruta*. Should the Court choose, however, to grant review in one case or the other, or to grant review in both cases but not to consolidate them for further proceedings, the State will take whatever steps are appropriate to seek leave to participate as a party in all proceedings before the en banc Court.

CONCLUSION

The Court should grant rehearing en banc in this case, in *Peruta*, or in both.

Respectfully submitted,

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March 28, 2014

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FOR 11-16255

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March 28, 2014
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