
No. 08-15773

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID MEHL, LOK T. LAU, FRANK FLORES

Plaintiffs-Appellants

v.

LOU BLANAS, COUNTY OF SACRAMENTO, ET AL.

Defendants-Appellees

APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF CALIFORNIA
Hon. Morrison C. England, District Judge
Case No. D.C. NO. CV S-03-02682 MCE KJM

CALIFORNIA RIFLE AND PISTOL ASSOCIATION FOUNDATION
***AMICUS* BRIEF IN SUPPORT OF NEITHER PARTY**

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CORPORATE DISCLOSURE STATEMENT

The California Rifle and Pistol Association Foundation has no parent corporations. It has no stock, thus no publicly held company owns 10% or more of its stock.

Date: August 17, 2012

Respectfully Submitted,

/s C. D. Michel
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INTEREST OF THE AMICUS CURIAE

The California Rifle and Pistol Association Foundation (“CRPA Foundation”) is a 501(c)(3) non-profit entity incorporated under California law, with headquarters in Fullerton, California. Contributions to the CRPA Foundation are used for the direct benefit of Californians. Funds contributed to and granted by CRPA Foundation benefit a wide variety of gun owning constituencies throughout California, including gun collectors, hunters, target shooters, law enforcement, and those who choose to own a firearm to defend themselves and their families.

Amicus the CRPA Foundation has a strong interest in this case because the outcome will directly affect the right of its supporters who reside in Sacramento County, and potentially all of California, to exercise their fundamental right to bear arms. Amicus has significant expertise in the area of the Second Amendment that will aid the Court in determining the issues before it. Amicus is a plaintiff-appellant in the pending Ninth Circuit appeal *Peruta v. County of San Diego*, No.10-56971, raising similar challenges to this case.

RULE 29(c)(5) STATEMENT

No party’s counsel has authored this brief in whole or in part. No person or entity other than amicus, its contributors, and its counsel has made a monetary contribution to the preparation and submission of this brief.

INTRODUCTION

As a plaintiff-appellant in a case before this Court involving substantially similar issues to those raised in the present appeal, *Peruta v. County of San Diego*, No.10-56971 (“*Peruta*”), and an amicus in another similar appeal pending before this Court, *Richards v. Prieto* (“*Richards*”), No. 11-16255, and as an organization dedicated to educating gun owners on, and protecting them from unconstitutional aspects of, California firearms laws, Amicus is uniquely suited to provide this Court with a perspective on this case it has not received from the parties’ briefing.

Specifically, Amicus believes that (assuming Appellant Mehl does not have standing)¹ a proper Second Amendment analysis of Appellant Lau’s claims (who *may* have standing) cannot be properly performed by this Court without further factual development of why he was denied a license to publicly carry a handgun (a “CCW”). As such, this case should be remanded to the district court.

If this Court thinks the Second Amendment claim here warrants substantive

¹ Amicus assumes Attorney General Kamala Harris cannot be subject to Appellants’ section 1983 claim since she is not authorized to grant or deny CCWs. *NAACP v. State of California*, 511 F. Supp. 1244, 1261 (E.D. Cal. 1981) (A plaintiff who cannot establish causation between the allegedly offending conduct and the defendant lacks standing to bring the claim). Accordingly, Amicus does not address the merits of those claims, and contends neither should this Court. Amicus does dispute, however, the characterization of the Second Amendment right in her brief, and addresses it herein.

analysis at this time, Amicus alternatively offers for the Court's consideration a discussion of the standard of review *McDonald v. City of Chicago*, 130 S. Ct. 2030, 3025 (2010), confirms as appropriate for Second Amendments claims.² Concomitantly, Amicus explains why that standard supports a right to publicly carry a handgun for self-defense. Finally, Amicus explains there are better cases than the present one pending in this Court to serve as vehicles to resolve these very important constitutional questions.

ARGUMENT

I. This Court Should Remand this Case Because it Cannot Properly Assess Lau's Second Amendment Claim Without Knowing What Criterion for Issuance of a CCW Sacramento Asserts He Failed

The statutory criterion Sacramento asserts Mr. Lau failed to meet for a CCW was not clearly established in the district court. The record only shows that he was denied because he had "too many issues." Memorandum and Order at 5, *Mehl v. Blanas*, No. 03-2682 (Feb. 05, 2008). But, determining the statutory basis for which he was denied a CCW is critical for this Court's purposes, since it necessarily informs what Second Amendment analysis applies here. Specifically, whether he was denied for lack of "good cause" or lack of "good moral character,"

² Though the Court requested briefing on the impact of *Nordyke v. King*, 681 F.3d 1041 (9th Cir. 2012) (en banc) too, Amicus does not see it as relevant here.

see Cal. Pen. Code § 26150, will change the nature of the Second Amendment analysis.

This is because, as explained below, the Second Amendment mandates that “self defense” be recognized as “good cause” *per se* for a CCW to exercise the right to publicly carry a handgun, while restricting carry for other reasons, such as lacking the character or trustworthiness to do so, is not clearly prohibited by the Second Amendment, and likely must be evaluated case-by-case, generally.

The district court’s overlooking of the specific criterion for which Mr. Lau was denied a CCW was likely the result of that fact not being relevant at the time. The case was an equal protection challenge at that point. Mr. Lau was comparing his particular case with others who were issued a CCW, not asserting that the Second Amendment forbids Sacramento from denying him for any specific reason.

II. *McDonald* Reaffirmed *Heller*’s Historical Scope-Based Approach to Second Amendment Claims and Its Rejection of Means-End Review

Preliminarily, *Heller* did not “implicitly” reject rational basis review for Second Amendment claims as Appellants argue, Appellants’ Supp. Br. at 3, *Mehl v. Blanas*, No. 03-2682 (Aug. 10, 2012), but explicitly did so. *District of Columbia v. Heller*, 554 U.S. 570, 628 n.27 (2008). *Heller* also rejected Justice Breyer’s “interest-balancing” approach (which is just intermediate scrutiny by another

name). *Id.* at 634; *McDonald*, 130 S. Ct. at 3050.

McDonald further underscored the notion expressed in *Heller* that history and tradition, rather than burdens and benefits, guide analyses of the Second Amendment's scope. Like *Heller*, *McDonald* did not use balancing tests, and it expressly rejected judicial assessment of "the costs and benefits of firearms restrictions," stating that courts should not make "difficult empirical judgments" about the efficacy of particular gun regulations. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3050 (2010). This language is compelling. Means-end tests, like strict or intermediate scrutiny, and especially the "undue burden" test advocated by Attorney General Harris, Supp. Br. of Appellee Atty. Gen. of Cal. in Resp. to Ct. Order of July 20, 2012 at 5, *Mehl v. Blanas*, No. 03-2682 (Aug. 10, 2012), necessarily require assessing the "costs and benefits" of regulations, as well as "difficult empirical judgments" about their effectiveness.

Notably absent from *McDonald*'s (or *Heller*'s) analysis is any discussion of "compelling interests," "narrowly tailored" laws, or any other mean-ends standard of review jargon. Nor were there discussions of "legislative findings" purporting to justify the invalidated restrictions. Instead, *McDonald*, like *Heller*, focused on whether the challenged laws restricted the right to arms as it was understood by those who drafted and enacted both the Second and Fourteenth Amendments.

Heller, 554 U.S. at 626-34; *McDonald*, 130 Sup. Ct. at 3037.

As such, means-end tests are inappropriate here.³ This court should evaluate Sacramento's policy choice to deny Lau a CCW using the same scope-based, historical analysis employed by the Court in both *Heller* and *McDonald*.

III. *McDonald* Does Not Limit the Right of Armed Self-Defense to Within the Home; Neither Does This Nation's Historical Tradition

Recall that *Heller* described the Second Amendment as guaranteeing “the individual right to possess *and carry* weapons in case of confrontation.” *Heller*, 554 U.S. at 592 (emphasis added). *McDonald* explained that “Self-defense is a basic right, . . . and in *Heller*, we held that individual self-defense is ‘the central component’ of the Second Amendment right”, and that “[*Heller*] concluded that citizens must be permitted to use handguns for the core lawful purpose of self-defense.” *McDonald*, 130 S. Ct. at 3036.

Neither *Heller* nor *McDonald* (nor the text of the Second Amendment itself) expressly limit or even suggest that the fundamental right to armed self-defense is confined to the home. Nor has this nation historically accepted such limitations.

In fact, firearms carried for self-defense have historically been ubiquitous in

³ Of course, since core conduct of a fundamental right is being restricted (carrying arms for self-defense as explained below), if this Court finds a means-end approach is warranted, then strict scrutiny must apply. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16 (1973).

American public life. *See Judy v. Lashley*, 50 W.Va. 628, 41 S.E. 197, 200 (1902) (citing 5 Am. & Eng. Enc. Law (2d Ed.) 729) (“So remote from a breach of the peace is the carrying of weapons, that at common law it was not an indictable offense, nor any offense at all.”). As the *Heller* Court noted “the right [to arms] secured in 1689 as a result of the Stuarts’ abuses was by the time of the founding understood to be an individual right protecting against both *public* and *private* violence.” *Heller*, 554 U.S. at 594 (emphasis added).

The *McDonald* Court embraced this view when it cited as an example of laws that would be nullified by the 14th Amendment, a statute providing “no freedman, free negro or mulatto, not in the military service of the United States government, and not licensed so to do by the board of police of his or her county, shall keep *or carry* fire-arms of any kind.” *McDonald*, 130 S. Ct. at 3038 (emphasis added). *McDonald* likewise condemned “Regulations for Freedman in Louisiana” which stated no freedman “shall be allowed to carry firearms, or any kind of weapons, within the parish, without the written special permission of his employers, approved and indorsed by the nearest and most convenient chief of patrol.” 1 Walter L. Fleming, *Documentary of History of Reconstruction* 279-80 (1906).

In short , there is a right to carry a handgun for self-defense outside the

home, except perhaps in certain “sensitive places.” *Heller*, 554 U.S. at 627 n.26.

IV. Government Can Likely Regulate Firearm Carriage by Requiring a License to Do So, But Cannot Arbitrarily Deny Those Licenses

Since California bars the unlicensed carry of handguns in most public places, Cal. Pen. Code §§ 25400, 25850, 26350, a CCW is required to go about armed for self-defense publicly. As such, it is the protected form of bearing arms publicly in California. And, while the Second Amendment likely tolerates denying certain people a CCW, a denial cannot be based on the person’s inability to prove a “need” beyond a general desire for self-defense. Because that is the core of the Amendment’s guarantee (“self-defense is ‘the central component’ of the Second Amendment right,” *McDonald* , 130 S. Ct. at 3020, there can be no better “good cause.”

Whether Lau was denied arbitrarily is somewhat beyond Amicus’ purpose in this brief. But, this Court should evaluate any Second Amendment claim with the above in mind.⁴

V. Alternatively, This Case Should Be Deferred Because Other Cases Pending Before This Court Serve as Better Vehicles for Deciding the Important Constitutional Questions Raised Here

Much has happened in Second Amendment jurisprudence since this case

⁴ If, however, Lau was denied for lack of “good cause” for being unable to show a “need” beyond general self-defense, such is per se unconstitutional.

was last submitted. Scores of instructive cases have since been decided but are unaddressed here. This case could impact everyone in California who wishes to obtain a CCW. It thus deserves significant additional briefing that it frankly has not received, and should have received, from Appellants.

Amicus' above Second Amendment analysis is quite superficial due to space limitations. But, thorough and current briefing has been provided in other CCW cases pending before this Court, such as *Peruta* and *Richards*. Moreover, neither *Peruta* nor *Richards* is bogged down by the problematic procedural issues, such as standing and ripeness for appeal, as the current case is. Rather than attempting to address this case, now, with its incomplete factual record and incomplete legal briefing, justice and judicial economy would be better served if the Court deferred resolution of this matter until submission of *Peruta* or *Richards* pursuant to Circuit Court Advisory Committee Note to Rules 34-1 to 34-3.

CONCLUSION

In sum, because the factual record in this case appears incomplete and, at the very least, needs to be revisited in light of recent legal developments, a remand is warranted. If this Court feels remand is not warranted, justice would be better served by deferring resolution of this matter until other similar, fully-briefed appeals are heard. Or, if the Court insists on deciding this matter on the merits

with the current briefing, it should employ the analysis Amicus articulates above.

Date: August 17, 2012

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I certify pursuant to the Federal Rules of Appellate Procedure 32(a)(7)(c) that the foregoing brief is in 14-point, proportionately spaced Times New Roman font. According to the word processing software used to prepare this brief Word Perfect, the word count of the brief is exactly 6869 words, excluding the cover, corporate disclosure statement, table of contents, table of authorities, certificate of service, and this certificate of compliance.

Date: August 17, 2012

Respectfully Submitted,

/s/ C. D. Michel

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CERTIFICATE OF SERVICE

I hereby certify that on August 17, 2012, an electronic PDF of
CALIFORNIA RIFLE AND PISTOL ASSOCIATION FOUNDATION
AMICUS BRIEF IN SUPPORT OF NEITHER PARTY 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.

Date: August 17, 2012

/s/ C. D. Michel

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