No. 09-16852

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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JAMES ROTHERY, Esq. and ANDREA HOFFMAN
Appellants/Plaintiffs,

vs.

Former Sheriff LOU BLANAS; SHERIFF JOHN MCGINNIS; Detective TIM SHEEHAN; SACRAMENTO COUNTY SHERIFF'S DEPARTMENT, an independent branch of government of the COUNTY OF SACRAMENTO; COUNTY OF SACRAMENTO; and STATE OF CALIFORNIA ATTORNEY GENERAL KAMALA D. HARRIS
Appellees/Defendants.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

No. 2:08-cv-02064 JAM KJM

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# APPELLANTS' PETITION FOR *PANEL REHEARING* OR, IN THE ALTERNATIVE, *REHEARING EN BANC*

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**RULE 35 EN BANC STATEMENT and RULE 40 STATEMENT**

This Petition for Hearing En Banc is necessary to secure and maintain uniformity of the court's decision in *Peruta v. County of San Diego*, 824 F.3d 919, 925 (9th Cir. 2016), which clearly involves a question of exceptional importance regarding the scope of the Second Amendment, not only as it applies to personal self defense, but also the standard of review to be applied for a challenge made under the Equal Protection clause.

By any measure, this case is "of the utmost constitutional importance." *Compassion in Dying v. Washington*, 85 F.3d 1440, 1441 (9th Cir. 1996) (O'Scannlain, J., dissenting from denial of reh'g by full court), rev'd sub nom. *Washington v. Glucksberg*, 521 U.S. 702 (1997). The *Peruta* panel's decision, which was supported only by a bare majority of the 12 judges from this Court who have had the opportunity to consider this case, avoided the very issue that this case now squarely presents. Rehearing by the court is warranted.

Moreover, the Supreme Court have specifically pointed out the "exceptional importance" of the Second Amendment, and has in fact warned the Ninth Circuit of the Second Amendment's "exceptional importance."

In *Jackson v. City and County of San Francisco*, 576 U. S. ____ (2015), Justice Thomas, with whom Justice Scalia joined, published a dissent from the denial of certiorari. In Justice Thomas' scathing dissent addressing the Ninth Circuit, he states:

> "Self-defense is a basic right" and "the central component" of the Second Amendment's guarantee of an individual's right to keep and

> bear arms. *McDonald v. Chicago*, 561 U. S. 742, 767 (2010) (emphasis deleted). Less than a decade ago, we explained that an ordinance requiring firearms in the home to be kept inoperable, without an exception for self-defense, conflicted with the Second Amendment because it "ma[de] it impossible for citizens to use [their firearms] for the core lawful purpose of self-defense." *District of Columbia v. Heller*, 554 U. S. 570, 630 (2008). Despite the clarity with which we described the Second Amendment's core protection for the right of self-defense, lower courts, including the ones here, have failed to protect it. Because Second Amendment rights are no less protected by our Constitution than other rights enumerated in that document, I would have granted this petition. [emphasis added]

In *Friedman v. City of Highland Park*, 577 U. S. ____ (2015), Justice Thomas, with whom Justice Scalia published another dissent from the denial of certiorari.

> Despite these holdings, several Courts of Appeals- including the Court of Appeals for the Seventh Circuit in the decision below-have upheld categorical bans on firearms that millions of Americans commonly own for lawful purposes. See 784 F. 3d 406, 410-412 (2015). Because noncompliance with our Second Amendment precedents warrants this Court's attention as much as any of our precedents, I would grant certiorari in this case.
>
> ***
>
> The Court's refusal to review a decision that flouts two of our Second Amendment precedents stands in marked contrast to the Court's willingness to summarily reverse courts that disregard our other constitutional decisions. E.g., *Maryland v. Kulbicki*, ante, at 1 (per curiam) (summarily reversing because the court below applied *Strickland v. Washington*, 466 U. S. 668 (1984), "in name only"); *Grady v. North Carolina*, 575 U. S. ___ (2015) (per curiam) (summarily reversing a judgment inconsistent with this Court's recent Fourth Amendment precedents); *Martinez v. Illinois*, 572 U. S. ___, ___ (2014) (per curiam) (slip op., at 10) (summarily reversing judgment that rested on an "understandable" double jeopardy holding that nonetheless "r[an] directly counter to our precedents"). There is no basis for a different result when our Second Amendment precedents are at stake. I would grant certiorari to prevent the Seventh Circuit from relegating the Second Amendment to a second-class right.

[emphasis added]

Heeding the call to action in Justices Thomas and Scalia's scathing and highly unusual dissents in *Jackson* and *Friedman*, the Supreme Court reversed course and summarily, without argument, issued a *per curiam* decision in the case of *Jaime Caetano v. Massachusetts*, 577 U. S. ____ (2016). In the decision, it was the opinion of the Supreme Court that the lower court's attempt to reduce the Second Amendment to a "second-class right" was "bordering on the frivolous."

> This reasoning defies our decision in *Heller*, which rejected as "bordering on the frivolous" the argument "that only those arms in existence in the 18th century are protected by the Second Amendment." 554 U. S., at 582. The decision below also does a grave disservice to vulnerable individuals like Caetano who must defend themselves because the State will not.
>
> ***
>
> The state court repeatedly framed the question before it as whether a particular weapon was "'in common use at the time' of enactment of the Second Amendment." 470 Mass., at 781, 26 N. E. 3d, at 693; see also id., at 779, 780, 781, 26 N. E. 3d, at 692, 693, 694. In *Heller*, we emphatically rejected such a formulation. We found the argument "that only those arms in existence in the 18th century are protected by the Second Amendment" not merely wrong, but "bordering on the frivolous." 554 U. S., at 582. Instead, we held that "the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, *even those that were not in existence at the time of the founding*." *Ibid.* (emphasis added). It is hard to imagine language speaking more directly to the point. Yet the Supreme Judicial Court did not so much as mention it. [emphasis added]

Most recently, there should be no doubt as to the "exceptional importance" hearing this case en banc. The en banc panel's decision in *Peruta v. County of San Diego*, 824 F.3d 919, 925 (9th Cir. 2016) (en banc) has been seriously undermined with a scathing dissent by Justice Thomas, with whom Justice Gorsuch joined,

from the denial of certiorari. In Justice Thomas scathing dissent of the Ninth Circuit, he makes two very important points as to why this court should review this case en banc:

> Neither party disputes that the issue is one of national importance or that the courts of appeals have already weighed in extensively.
> ***
> The approach taken by the en banc court is indefensible, and the petition raises important questions that this Court should address. I see no reason to await another case.

*Peruta v. County of San Diego*, 582 U. S. ____ (2017).

In its cryptic ruling, the three-judge panel in this case deliberately avoided *Jaime Caetano v. Massachusetts*, as that case severely undermines the precedential weight, if any, to be afforded *Peruta*.

This case provides the facts and issues which were missing in *Peruta*, based on an operative pleading with very specific and undisputed facts as to the pay-to-play CCW scheme in California, and in particular, the County of Sacramento — no different than Rod Blagojevich's sweeping pay-to-play and influence peddling, including his solicitation of money in exchange for an appointment to the United States Senate as a replacement for President Barack Obama's, then vacated senate seat.

**1. The "open carry" issue left open by *Peruta v. County of San Diego*, 824 F.3d 919, 925 (9th Cir. 2016) (en banc) (constitutional issues) has resulted in a panel of this Circuit ignoring the protections afforded under the Second Amendment and the Equal Protection Clause of the Fourteenth Amendment.**

The basic question is, and always has been, whether a *de facto* ban on both open and concealed carry to ordinary, law-abiding citizens violates the fundamental

right to "bear arms", and whether issuing CCWs to campaign contributors and honorably retired peace officers denies them equal rights under the law.

The Order originally appealed from was filed July 29, 2009, (CR 45, ER9) on a First Amended Complaint filed on May 1, 2009, (CR 24, ER65). Because this is a de novo review, the First Amended Complaint (Vol. 2, ER 128) must be broadly construed when viewing the Second Amendment and Equal Protection claims (as-written and as-applied) to statues, written policy, and as-applied policy framework as follows:

> 679. California Penal Code § 12025 prohibits the carrying of a concealed weapon unless an individual applies for, and receives, permission to do so pursuant to § 12050(a)(1)(A). This gives Defendant Sheriff a great amount of discretion in choosing whom should be granted **a license to carry a handgun** in the State of California.
>
> 680. In addition to concealed carry permits, sheriffs have extremely broad discretion to issue permits to carry **"loaded and exposed"** weapons, but only in counties with a population less than 200,000.
>
> 681. Likewise, California Penal Code § 12031 **prohibits the carrying of any loaded weapon on Plaintiffs' persons or in their cars**.
>
> 682. Thus, by state law, the only place one may possess a loaded firearm in California **without prior authorization** from Defendants is in the home or place of business. [emphasis added]

However, the three-judge panel's decision does not mention open carry (i.e. "loaded and exposed" carry), and states the issue is only about a "denial of a license to carry concealed firearms in public." (Opinion page 2 of 3). The three-judge panel goes on to rule that "[t]he district court properly dismissed plaintiffs' Second Amendment claim because 'the Second Amendment does not protect, in

any degree, the carrying of concealed firearms by members of the general public.' *Peruta*, 824 F.3d at 942." (Opinion page 2 of 3)

The three-judge panel then states:

> The district court did not abuse its discretion by dismissing plaintiffs' action without leave to amend because leave to amend would have been futile." (Opinion page Page 3 of 3) "We do not consider matters not specifically and distinctly raised and argued in the <u>opening brief</u>, or arguments and allegations <u>raised for the first time on appeal</u>. See *Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009)." [emphasis added]

(Opinion page Page 3 of 3)

Contrary to the three-judge panel's innuendo that "open carry" was not an issue before the Court; Appellants Opening Brief filed on May 5, 2010, commencing at page 8 clearly refutes this assertion. In Appellants "STATEMENT OF ISSUES PRESENTED", the following is stated:

> 5. Whether a heightened standard of review should be applied to a State statute that specifically impacts fundamental rights expressly protected by the Second Amendment and incorporated into the Fourteenth for additional reasons of family, home, business, and community defense that further emerged after the Civil War with the forced disarming of the freedmen and oppression of their families, and of entire communities, based upon race, as in the Colfax and New Orleans massacres.
> 6. Whether the Court of Appeals erred in denying standing for Appellants to challenge under the Second and Fourteenth Amendments' State statutes restricting possession of firearms for self defense, where Appellants are: (A) seriously affected by the statutes, (B) in the zone of interests impacted, and (C) would risk prosecution by possessing said firearms **<u>openly</u>** or concealed on their persons or in their vehicles.
> 7. Whether the Second and Fourteenth Amendments protect the rights of individual persons to keep and bear arms for personal, family, business and community defense, **<u>without state-decreed monopolization</u>**.
> 8. Whether California's current statutory scheme unconstitutionally

infringes on an individual's constitutional right to keep and bear arms in light of the United States Supreme Court's holding that the right is an individual right.

9. Whether the absolute and **unbridled discretion** left to sheriffs and police chiefs by California Penal Code section 12050, et al. regarding the issuance of Carry Concealed Weapons (CCW) permits runs afoul of the United States Constitution.

10. Whether the **exemption** from the burdens of California Penal Code section 12050, et al. for honorably retired California peace officers as provided for by California Penal Code section 12027 violates the **Equal Protection Clause of the Fourteenth Amendment**.

11. Whether the **written prima facie good cause policy of the County of Sacramento violates the Equal Protection Clause** of the Fourteenth Amendment. (CR 24, ER133-4) FAC ¶s 727-728.

12. Whether Hickman v. Block, 81 F.3d 168 (9th Cir. (Cal.) 1996), Erdelyi v. O'Brien, 680 F.2d 61, 63 (9th Cir.1982), Guillory v. County of Orange, 731 F.2d 1379 (9th Cir. 1984) and San Diego County Gun Rights Committee v. Reno, 98 F.3d 1121 (9TH Cir. 1996) have been sufficiently undermined by recent holdings of the United States Supreme court whereby they no longer have any precedential weight.

13. Whether the District Court erred in granting Defendants' motion to dismiss, **without leave to amend, by relying on the case of Mehl v. Blanas Case No. 08-15773**, now pending before the Ninth Circuit (U.S. District Court for the Eastern District of California, No. CIV. S 03-2682 MCE KJM.) (See CR 45 ER10, 15; CR 41, ER24, 33-34)

14. Whether the challenged state statutes and county policies should be struck down as unconstitutional on their face before an answer is even filed, similar to how the State's weapon ban was declared unconstitutional at the pleading stage in Silveira v. Lockyer, 312 F.3d 1052, 1090 (9th Cir.) (Reinhardt, J), rehearing en banc denied, 328 F.3d 567 (9th Cir. 2003) (six dissents).

No reasonable jurist could conclude Appellants Opening Brief (AOB) failed to raise the issues of 1) prior restraint and 2) a complete prohibition on the carrying of a loaded firearm. For instance in the AOB: “prohibiting from possessing on their person or in their vehicle a functional firearm for personal self” (concealed not mentioned) p. 27, “license to carry a concealed weapon or an open and exposed weapon” p. 27.

Argument I.A., p. 28 is captioned:

A. Since the State of California has an absolute ban on both the **open carry** ....

Page 30,

Thus, by law, the only place one who did not retire from law enforcement may possess a loaded firearm in California without prior permission is in the home or place of business. Such a state decreed monopolization runs afoul of the Second Amendment.

Page 31,

....**openly carrying a loaded firearm in public places**. See Cal.Penal Code § 12031(a)(1).

More to the point at page 33:

.... (**whether in open in plain view or concealed under their seat**) (CR 24, ER68 ¶ 18)

**A. SECOND AMENDMENT.**

We do not reach the question whether the Second Amendment protects some ability to carry firearms in public, such as open carry. That question was left open by the Supreme Court in *Heller*, and we have no need to answer it here. Because Plaintiffs challenge only policies governing concealed carry, we reach only the question whether the Second Amendment protects, in any degree, the ability to carry concealed firearms in public.

The Second Amendment may or may not protect, to some degree, a right of a member of the general public to carry firearms in public. But the existence vel non of such a right, and the scope of such a right, are separate from and independent of the question presented here. We hold only that there is no Second Amendment right for members of the general public to carry concealed firearms in public.

*Peruta v. County of San Diego*, 824 F.3d 919, 925 (9th Cir. 2016) (en banc).

The three-judge panel's dodging of Appellants' challenge is no mere coincidence — *Peruta* allowed this to happen. By conflating two lower court

opinions into its own opinion, the three-judge panel not only diminished the scope of the Second Amendment itself, it completely rewrote the standard of review on Appellants equal protection claim

**B. EQUAL PROTECTION.**

As the dissent recognized in *Peruta* at 824 F.3d 919, 955,

> The Counties' Unfettered Discretion to Grant or Deny Concealed Weapons Licenses is Troubling
>
> Finally, while the majority and I would decide this case on Second Amendment grounds, Plaintiffs have raised non-frivolous concerns as to whether the counties' discretion as to who obtains a license violates the Equal Protection Clause and constitutes an unlawful prior restraint. The issues are not ripe for review, but I note that a discretionary licensing scheme that grants concealed weapons permits to only privileged individuals would be troubling.
>
> ***
> Whatever licensing scheme remains in place in California or in other states, the right to keep and bear arms must not become a right only for a privileged class of individuals.

Though *Peruta* may not have been a case "ripe for review" regarding the Equal Protection clause, this case is. The operative pleading is a template of the whose who in the pay-to-play scheme for issuing CCWs.

In *Fresno Rifle Club v. Van de Kamp*, 965 F.2d 723 (9th Cir. 1992), the Ninth Circuit has refused to address the level of scrutiny to be applied, and like the *Silveira* panel and the lower court, the panel here summarily dismisses the notion that a heightened level of scrutiny would apply to an equal protection analysis involving the Second Amendment.

On page 8, of the Bill Analysis for Assembly Bill 1154 before the Assembly

As stated in Appellants Opening Brief (hereinafter "AOB"), "Defendants cannot even justify a tangible and legitimate reason why an average law abiding citizen, trained in the use of arms, can be prohibiting from possessing on their person or in their vehicle a functional firearm for personal self defense." AOB Page: 27 of 65.

The controlling First Amended Complaint (FAC) clearly points this out – which challenges the offending statutes of their face, the Sheriff's "written" *prima facie good cause* policy for issuance of CCWS, and an Equal Protection claim under the Fourteenth Amendment for damages and injunctive relief for denial of both a CCW **and Honorary Deputy's Badge** since the Sheriff only issued these two government privileges to campaign contributors - ''class of one". The three-judge panel's decision.

If the CCW was replaced with a "widget", the panel would have had no problem finding an equal protection violation – that much is certain. Instead, the panel has ignored the clear Equal Protection Cause of Action and converted the claim into one only involving the Second Amendment, which then is rejected because of *Peruta* - a circular argument for sure, and a no-win scenario for Appellants.

**2. The right to amend the complaint to include open carry**.

Appellants' First Amended Complaint (FAC) and entire action were dismissed under Fed. R. Civ. P. 12(b)(6), for failure to state a claim. " A party does not need to plead specific legal theories in the complaint, as long as the opposing

party receives notice as to what is at issue in the lawsuit." *Electrical Constr. & Maint. Co. v. Maeda Pacific Corp*., 764 F.2d 619, 622 (9th Cir. 1985); accord *McCalden v. California Library Ass'n*, 919 F.2d 538, 546 (9th Cir. 1990)(9th Cir. 1990). "The complaint should not be dismissed merely because plaintiff's allegations do not support the legal theory he intends to proceed on, since the court is under a duty to examine the complaint to determine if the allegations provide for relief on any possible theory." *Pruitt v. Cheney*, 963 F.2d 1160 (9th Cir. 1992).

Appellants should have been given an opportunity to litigate their very substantial claims against Defendants in this matter. The motion to dismiss should be reversed, judgment as a matter of law should be enter or, in the alternative, the matter remanded to the District Court with leave to amend the complaint (if necessary) and to proceed to trial.

Dated this 11th day of November 2017.

Respectfully submitted,
THE LAW OFFICES OF GARY W. GORSKI
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**CERTIFICATE OF COMPLIANCE PURSUANT TO**

**FED. R. APP. P. 40 AND CIRCUIT RULE 32-1 FOR**

**CASE NUMBER 09-16852**

I certify that pursuant to Fed. R. App. 32 (a)(7) and Ninth Circuit Rule 40-1, the attached brief is proportionally spaced, has a typeface of 14 points or more and contains 3,824 words in total, and thereby not exceeding the 3,900 word limit. Corel WordPerfect X4 was used to compute the word count.

Dated this 11th day of November 2017.

Respectfully submitted,
THE LAW OFFICES OF GARY W. GORSKI

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## CERTIFICATE OF SERVICE

I hereby certify that on Dated this 11th day of November 2017., 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, and served and filed via Federal Express the Excerpts of Record on the Court and all parties to the action.

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

Dated this 11th day of November 2017.

Respectfully submitted,
THE LAW OFFICES OF GARY W. GORSKI

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U.S. COURT OF APPEALS

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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|---|---|
| JAMES ROTHERY; ANDREA HOFFMAN,<br><br>Plaintiffs-Appellants,<br><br>and<br><br>DEANNA SYKES; et al.,<br><br>Plaintiffs,<br><br>v.<br><br>COUNTY OF SACRAMENTO; et al.,<br><br>Defendants-Appellees. | No. 09-16852<br><br>D.C. No. 2:08-cv-02064-JAM-KJM<br><br>MEMORANDUM[*] |

Appeal from the United States District Court
for the Eastern District of California
John A. Mendez, District Judge, Presiding

Submitted October 23, 2017[**]

Before: McKEOWN, WATFORD, and FRIEDLAND, Circuit Judges

James Rothery and Andrea Hoffman appeal from the district court's

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[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

[**] The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

judgment dismissing their 42 U.S.C. § 1983 action alleging violations of their constitutional rights arising from the denial of a license to carry concealed firearms in public. We have jurisdiction under 28 U.S.C. § 1291. We review de novo. *Peruta v. County of San Diego*, 824 F.3d 919, 925 (9th Cir. 2016) (en banc) (constitutional issues); *Mashiri v. Epsten Grinnell & Howell*, 845 F.3d 984, 988 (9th Cir. 2017) (dismissal under Fed. R. Civ. P. 12(b)(6)). We affirm.

The district court properly dismissed plaintiffs' Second Amendment claim because "the Second Amendment does not protect, in any degree, the carrying of concealed firearms by members of the general public." *Peruta*, 824 F.3d at 942. The district court properly dismissed plaintiffs' derivative claim under the Privileges and Immunities Clause. *See Peruta*, 824 F.3d at 942 (holding that a derivative privilege and immunities claim was "necessarily resolve[d]" by the court's Second Amendment holding).

The district court properly dismissed plaintiffs' equal protection claim because plaintiffs failed to allege facts sufficient to state a plausible claim for relief. *See Romer v. Evans,* 517 U.S. 620, 631 (1996) ("[I]f a law neither burdens a fundamental right nor targets a suspect class, [the Supreme Court] will uphold the legislative classification so long as it bears a rational relation to some legitimate end."); *Silveira v. Lockyer*, 312 F.3d 1052, 1088 (9th Cir. 2002) ("[F]or a state action to trigger equal protection review at all, that action must treat similarly

situated persons disparately."), *abrogated on other grounds by District of Columbia v. Heller*, 554 U.S. 570 (2008); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("To survive a motion to dismiss, a plaintiff must aver in the complaint sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." (citation omitted)).

The district court properly dismissed plaintiffs' claim alleging a Ninth Amendment violation because "the Ninth Amendment does not encompass an unenumerated, fundamental, individual right to bear firearms." *San Diego Cty. Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1125 (9th Cir. 1996).

The district court did not abuse its discretion by dismissing plaintiffs' action without leave to amend because leave to amend would have been futile. *See Chappel v. Lab. Corp. of Am.*, 232 F.3d 719, 725-26 (9th Cir. 2000) ("A district court acts within its discretion to deny leave to amend when amendment would be futile[.]").

We do not consider matters not specifically and distinctly raised and argued in the opening brief, or arguments and allegations raised for the first time on appeal. *See Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009).

**AFFIRMED.**