Appellate Case Nos.: 10-56971, 11-16255

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EDWARD PERUTA, et al.,
Appellants,

STATE OF CALIFORNIA
Intervenor - Pending

vs.

COUNTY OF SAN DIEGO, et al.,
Appellees;

ADAM RICHARDS, et al.,
Appellants,

vs.

ED PRIETO, et al.,
Appellees;

Appeals from the United States District Court for the

Southern and Eastern Districts of California

BRIEF OF AMICUS CURIAE LEAGUE OF CALIFORNIA CITIES IN SUPPORT OF APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to FED. R. APP. P. 26.1, *Amicus Curiae* League of California Cities states that it has no parent corporations and has no stock. Therefore, no publicly held corporation owns 10% or more of its stock.

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INTEREST OF AMICUS CURIAE

Amicus Curiae League of California Cities (the "League") is an association of 475 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys from all regions of the State. The League's Legal Advocacy Committee monitors litigation of concern to municipalities and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

FED. R. APP. P. 29(c)(5) STATEMENT

As required by Rule 29(c)(5) of the Federal Rules of Appellate Procedure, the League states that this brief was not authored by counsel for a party to this action, and this briefing

was funded entirely by the League. No other party, person, or counsel to a party provided any financial support or funding for preparing or submitting this brief.

FED. R. APP. P. 29(a) STATEMENT

Under Rule 29(a) of the Federal Rules of Appellate Procedure, all of the parties in these consolidated appeals have consented to the League's filing of this amicus brief.

PROCEDURAL BACKGROUND

This Court's panel filed its opinion in appeal no. 10-56971 (*Peruta*) on February 13, 2014 (the "Opinion"). The three-judge panel reversed the District Court's judgment as to the validity of requirements for the issuance of permits to carry concealed weapons. The Court has ordered that the case be reheard en banc and that that all amicus briefs be filed by April 30, 2015.

INTRODUCTION AND SUMMARY OF ARGUMENT

The en banc Court should affirm the District Court's judgment. The Opinion incorrectly reversed that judgment by contradicting the historical analysis required in *District of Columbia. v. Heller* (*Heller*), 554 U.S. 570 (2008). The Opinion also incorrectly redefined the scope of the Second Amendment by overlooking the historical tradition of local regulation of firearms. In addition, the Opinion deprives local officials and public agencies in California of the discretion to regulate firearms based on circumstances unique to their jurisdictions. The en banc Court, in keeping with *Heller*, should uphold the historical tradition of local public agencies exercising their discretion to regulate firearms.

Heller mandates a historical-categorical approach for determining the scope of the Second Amendment and the validity of regulations under the Second Amendment. Under this approach, the historical evidence shows that states and

local governments traditionally have exercised their discretion to enact and enforce firearms regulations tailored to local conditions. The Opinion abrogates this tradition and imposes a "one size fits all" model that deprives local law enforcement officials of any discretion in issuing concealed carry permits. That approach cannot be reconciled with *Heller*. The en banc Court should adopt the approach consistent with *Heller* and continue to recognize the discretion of local law enforcement officials to establish the criteria by which to measure good cause for issuing concealed carry permits.

ARGUMENT

I. *Heller* Requires that this Court Uphold the Historic and Traditional Discretion of Local Public Entities to Enact Gun Control Regulations Tailored to Local Conditions.

A. The Heller Framework Looks to the Historical Background of the Second Amendment.

Heller provides the framework for evaluating the constitutionality of firearms regulations based upon their

correlation with longstanding, historical restrictions and traditions. *Heller*, 554 U.S. at 595. Analyzing the validity of local firearms regulations begins with the text of the Constitution. *Id.* at 595 (a court must consult "both text and history"). "Constitutional rights are enshrined with the scope they were understood to have when the people adopted them . . . ." *Id.* at 634-35. Thus, in interpreting the text of the Second Amendment, "we are guided by the principle that '[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.'" *Id.* at 576 (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931)).

Under *Heller*, the "meaning [of the text] is strongly confirmed by the historical background of the Second Amendment." *Heller*, 554 U.S. at 592. Any historical analysis of the Second Amendment begins with the pre-ratification "historical background of the Second Amendment" because

"the Second Amendment . . . codified a preexisting right." *Id.* at 592 (emphasis omitted). The historical analysis then turns to sources that shed light on the "public understanding [of the Second Amendment] in the period after its enactment or ratification," including nineteenth-century judicial interpretations and legal commentary. *See id.* at 605-10 ("We now address how the Second Amendment was interpreted from immediately after its ratification through the end of the 19th century.") An analysis under the historical-categorical approach subsequently analyzes pre-civil war case law, post-civil war legislation, and post-civil war commentators. *Heller*, 554 U.S. at 610-19.

B. The Scope of the Second Amendment Right as Originally Understood, and as Articulated In Heller, is Consistent with Local Regulation.

The Supreme Court already has determined the basic textual contours of the Second Amendment: "[p]utting all of these textual elements together, we find that they guarantee the

individual right to possess and carry weapons in case of confrontation." *Heller*, 554 U.S. at 592. Although there is an individual right to bear arms, the high Court has not yet opined on whether the right extends outside of the home. The Court has recognized, however, that the right to bear arms is "not unlimited." *Id.* at 595. The Second Amendment right is subject to "traditional restrictions" that tend "to show the scope of the right." *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 802 (2010) (Scalia, J., concurring). Indeed, after analyzing the historical evidence on this issue, the Supreme Court determined that time and place restrictions on firearms are valid and do not violate the text of the Second Amendment: "the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Heller*, 554 U.S. at 626 (citations omitted).

For example, the Supreme Court specifically noted that "nothing in our opinion should be taken to cast doubt on

longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Heller*, 554 U.S. at 626-27. Accordingly, the Second Amendment right is subject to presumptively lawful regulatory measures, including the foregoing, non-exhaustive list of examples. *Id.* at 627 fn. 26. The presumptively lawful regulation of firearms in "sensitive places" closely parallels the longstanding tradition of local entities regulating firearms. *See also* Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82, 107-21 (2013) (also providing a detailed discussion of the historical tradition of local regulation of firearms). The League now examines that tradition.

C. The Pre-Ratification Historical Background of the Second Amendment Supports Local Firearms Regulation Tailored to Local Conditions.

The pre-ratification historical background of the Second Amendment shows that local public entities imposed a variety of firearms regulations tailored to local conditions.

In 1746, Boston prohibited the "discharge" of "any Gun or Pistol charged with Shot or Ball in the Town" on penalty of 40 shillings, and this law was reaffirmed in 1778. *See* Act of May 28, 1746, ch. X, Acts and Laws of Mass. Bay 208; *see also* An Act for Reviving and Continuing Sundry Laws that are Expired, and Near Expiring, 1778 Mass. Session Laws, ch. 5, pp. 193-94. Indeed, Boston's firearms regulations would subsequently become even more stringent by restricting loaded firearms in the city: "the depositing of loaded Arms in the Houses of the Town of Boston, is dangerous" and no loaded firearms were allowed in any "Dwelling-House, Stable, Barn, Out-house, Store, Ware-house, Shop or other Building." Act of Mar. 1,

1783, chap. XIII, 1783 Mass. Acts 218, *cited in Heller*, 554 U.S. at 631.

Under penalty of fine or imprisonment, Philadelphia similarly prohibited the discharge of a firearm in Philadelphia without a "governor's special license." *See* Act of Aug. 26, 1721, § 4, in 3 Mitchell, Statutes at Large of Pa. 253-54. Pennsylvania later prohibited the discharge of any firearm within any town or province in Pennsylvania. *See* An Act for the More Effectual Preventing Accidents Which May Happen by Fire, and for Suppressing Idleness, Drunkenness, and Other Debaucheries, Feb. 9, 1750 Pa. Laws 208 ("That if any person or persons whatsoever, within any county town, or within any other town or borough, in this province, already built and settled, or hereafter to be built and settled . . . shall fire any gun or other fire-arm . . . without the Governor's special license for the same, every such person or persons, so offending, shall be subject to the like penalties and forfeitures . . . .").

Rhode Island likewise prohibited firing any gun or pistol on any local street or in any tavern. *See* An Act for preventing Mischief being done in the Town of Newport, or in any other Town in this Government, R.I. Session Laws (1731).

The foregoing legal regulations are only a few examples of the pre-ratification history of regulating firearms in cities. Indeed, historical commentators have noted that "colonial and early state governments routinely exercised their police powers to restrict the time, place, and manner in which Americans used their guns." Robert H. Churchill, *Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 LAW & HIST. REV. 139, 162 (2007).

D. Nineteenth Century Historical Sources Reveal an Increasing Local Regulation of Firearms in Urban Settings.

Nineteenth-century authorities furthered the strong historical tradition of states and local governments enacting

firearms laws tailored to local conditions. Indeed, as functioning towns emerged from the frontier and cities became more developed, the need and tolerance for private gun use in urban cities decreased. This historical tradition is reflected in the laws of this era, as many states made it illegal to discharge firearms within the limits of a city or a town.

In 1820, Cleveland by local ordinance prohibited the discharge of firearms. Laws for the Regulation and Government of the Village of Cleveland, § 9, in Cleveland Herald, Aug. 15, 1820, at 1 *cited in* Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 FORDHAM L. REV. 487, 515 (2004). An Ohio statute also made it a crime to "shoot or fire a gun at a target within the limits of any recorded town plat in [the] state." § 6, 1831 Ohio Laws at 162 *cited in* Saul Cornell et al., *A Well Regulated Right: The Early American Origins of Gun Control*, 73 FORDHAM L. REV. 487, 515 (2004).

Tennessee authorized newly incorporated towns to "restrain and punish . . . shooting and carrying guns, and enact penalties and enforce the same" consistent with the constitution and laws of the state. Act of Dec. 3, 1825, ch. CCXCII, 1825 Tenn. Priv. Acts 307 (incorporating towns of Winchester and Reynoldsburgh). An 1821 Tennessee statute prohibited the "shoot[ing] at a mark within the bounds of any town, or within two hundred yards of any public road of the first or second class within [the] state." Act of Nov. 16, 1821, ch. LXLIII, 1821 Tenn. Pub. Acts 78-79.

Other states (and territories at the time) and cities adopted regulations of firearms use. *See* An Act Prohibiting the Firing of Guns and Other Fire Arms in the City of New Haven, 1845 Conn. Pub. Acts 10 ("[E]very person who shall fire any gun or other fire-arm of any kind whatever within the limits of the city of New Haven, except for military purposes, without permission first obtained from the mayor of said city, shall be

punished by fine not exceeding seven dollars, or by imprisonment in the county jail not more than thirty days."); An Act to Prevent the Discharging of Fire-Arms Within the Towns and Villages, and Other Places Within this State, and for Other Purposes, § 1, 4 Del. Laws 329 *cited in* Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82, 146 (2013); An Act to Incorporate the Town of Baltimore, Hickman County, § 10, 1856 Ky. Acts 139 ("Any person who shall shoot off a gun or pistol, or shall run or gallop a horse creature in said town, shall be liable to a fine of not less than two nor more than four dollars ...."); Act of Jan. 14, 1853, §1, N.M. Laws 67 ("That each and every person is prohibited from carrying short arms, such as pistols, daggers, knives, and other deadly weapons, about their persons concealed, within the settlements . . . .").

E. Local Regulation of Firearms Continued in the Post-Civil War Era.

After the Civil War, the local regulation of firearms in urban cities continued to expand and became even more

widespread.

For example, nineteenth-century visitors to Dodge City, Kansas could not lawfully bring firearms within city limits: "[A]ny person who shall in the City of Dodge City, carry concealed, or otherwise, about his or her person, any pistol . . . or other dangerous or deadly weapon . . . shall be fined . . . Seventy-Five Dollars." Dodge City, Kan., City Ordinances no. 16, § 11 (Sept. 22, 1876).

Georgia, Montana, and Nebraska also joined the ranks of states regulating firearms in towns and cities. *See* An Act to Prevent the Shooting or Firing of Guns or Pistols in the Village of Vineville, in the County of Bibb § 1, 1875 Ga. Laws 189 ("That from and after the passage of this Act it shall not be lawful for any person or persons to discharge, fire or shoot off any gun or guns, pistol or pistols . . . within three hundred yards . . . of the public road running through the village of Vineville . . . ."); An Act to Prevent Parties from Shooting

Within the Limits of Towns and Private Enclosures, § 1, 1873 Mont. Laws 46 ("That it shall be unlawful for any person to fire any gun, pistol or any fire-arm, of whatever description, within the limits of any town, city, or village in this territory, or within the limits of any private enclosure which shall contain a dwelling house."); Lincoln, Neb., Gen. Ordinances art. 26, § 1 (1895) ("No person, except an officer of the law in the discharge of his duty, shall fire or discharge any gun, pistol, fowling-piece, or other fire-arm, within the corporate limits of the city of Lincoln, under penalty of a fine of ten dollars for each offense").

Idaho, Texas, and Wyoming also adopted local restrictions on firearms within city limits. *See* An Act Regulating the Use and Carrying of Deadly Weapons in Idaho Territory, § 1, 1888 Idaho Sess. Laws 23 ("[I]t is unlawful for any person, except United States officials, officials of Idaho Territory, County officials, Peace officers, Guards of any jail, and officers or employees of any Express Company on duty, to

carry, exhibit, or flourish any . . . pistol, gun or other deadly weapons, within the limits or confines of any city, town or village or in any public assembly of Idaho Territory."); An Act to Regulate the Keeping and Bearing of Deadly Weapons, § 1, 1871 Tex. Gen. Laws 25 (forbidding, with exceptions for travelers and in one's home or place of business, any person but a law officer from carrying a "pistol, dirk, dagger, slung-shot, sword-cane, spear, brass-knuckles, bowie-knife, or any kind of knife manufactured or sold for the purposes of offense or defense" in a city "unless he has reasonable grounds for fearing an unlawful attack on his person, and that such ground of attack shall be immediate and pressing . . . ."); 1876 Wyo. Sess. Laws 352, § 1 cited in Saul Cornell & Justin Florence, *The Right to Bear Arms in the Era of the Fourteenth Amendment: Gun Rights or Gun Regulation?*, 50 SANTA CLARA L. REV. 1043, 1066 (2010) (forbidding anyone from bearing, "concealed or openly, any fire arm or other deadly weapon, within the limits of any city,

town or village").

Significantly, some of these post-Civil War regulations of firearms narrowly defined their geographic reach to include only the urban centers of cities. One 1866 Texas statute, for example, provided in part: "It shall not be lawful for any person to discharge any gun, pistol, or fire arms of any description whatever, on, or across any public square, street, or alley, in any city or town in this State; Provided, this Act shall not be so construed as to apply to the 'outer town,' or suburbs, of any city or town." An Act to Prohibit the Discharging of Fire Arms in Certain Places Therein Named, ch. 170, § 1, 1866 Tex. Gen. Laws 210.

Statutes in Arizona similarly regulated firearms on a narrow and specified geographic basis by prohibiting firearms in cities and towns, while allowing travelers and people leaving the city limits to carry firearms. Crimes Against the Public Peace, § 385, 1901 Ariz. Sess. Laws 1251-52 ("If any person

within any settlement, town, village or city within this territory shall carry on or about his person, saddle, or in saddlebags, any pistol . . . manufactured or sold for purposes of offense or defense, he shall be punished by a fine of not less than twenty-five nor more than one hundred dollars; and, in addition thereto, shall forfeit to the county in which he is convicted the weapon or weapons so carried."); *Cf id.* § 390 ("Persons traveling may be permitted to carry arms within settlements or towns of the territory, for one-half hour after arriving in such settlements or towns, and while going out of such towns or settlements . . . .").

Indeed, historical commentators have noted the rise in local firearms regulations within city centers and towns during this era: "Guns were widespread on the frontier, but so was gun regulation. Almost everyone carried firearms in the untamed wilderness, which was full of dangerous Natives, outlaws, and bears. In the frontier towns, however, where

people lived and businesses operated, the law often forbade people from toting their guns around." Adam Winkler, GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA 13 (W. W. Norton & Co., 1st ed. 2011). In fact, zealous enforcement of urban gun control laws occurred on the western frontier. Robert R. Dykstra, THE CATTLE TOWNS 137 (Alfred A. Knopf, Inc., 1968) (describing, for example, the nearly one-hundred arrests in 1873 alone in Ellsworth, Texas); *see also* Robert J. Spitzer, THE POLITICS OF GUN CONTROL 11 (Chatham House Pub, 1st ed. 1995) (footnote omitted) ("[e]ven in the most violence-prone towns, the western cattle towns, vigilantism and lawlessness were only briefly tolerated. . . . Prohibitions against carrying guns were strictly enforced, and there were few homicides").

In the twentieth-century, gun control has remained consistently stronger and more stringent in cities and towns than in rural areas. For example, in 1981, the Village of Morton

Grove, Illinois passed its own local handgun ban. Village of Morton Grove Ordinance No. 81-11; *see Quilici v. Morton Grove*, 695 F.2d 261, 263-264 (7th Cir. 1982). That ordinance was upheld under the Second Amendment. *Quilici*, 695 F.2d at 261, cert. denied, 464 U.S. 863 (1983).

Although some states have preempted certain aspects of gun control, the local regulation of firearms remains substantial and widespread under the current legal regime because the vast majority of gun control laws are still local. Nearly all of the 20,000 gun regulations in America are state and local regulations. *See* Spitzer, *supra*, at 181 ("America's 20,000 gun regulations belie the central, often ignored fact that nearly all these regulations exist at the state and local levels"); Jon S. Vernick & Lisa M. Hepburn, STATE AND FEDERAL GUN LAWS: TRENDS FOR 1970-99 IN EVALUATING GUN POLICY: EFFECTS ON CRIME AND VIOLENCE 345, 363 (Jens Ludwig & Philip J. Cook eds., 2003) ("The key to the 20,000 calculation, therefore, would

appear to be the contribution of local laws to the total"); *see also* Scott Medlock, *NRA = No Rational Argument? How the National Rifle Association Exploits Public Irrationality*, 11 TEX. J. C.L. & C.R. 39, 40 n.6 (2005) ("There are only five federal gun laws, most of which restrict who can purchase a firearm and provide for background checks to enforce those prohibitions").

F. The History of Local Regulation of Firearms Includes a Wide Variety of Approaches Tailored to Local Conditions.

The foregoing analysis shows a robust historical tradition of local governments regulating firearms based on local conditions. The regulations varied accordingly. Some cities and towns banned the discharge of all firearms. Some banned the discharge of firearms without a special license from law enforcement, or a permit from the mayor. Some prohibited the discharge in public areas such as town squares, streets (or within various distances of public roads), or taverns. Some

exempted law enforcement personnel from the local ban. Some exempted travelers altogether, and others exempted travelers for a short time after entering a city or immediately before departing a city. Some created an exception for discharge of firearms in the home or in one's place of business. Some created an exception for those reasonably fearing an unlawful attack. Some prohibited only concealed carry in public. The historical record reveals a wide variety of approaches tailored to local conditions. This is precisely the sort of historical evidence that drove the Supreme Court's decision in *Heller*.

Local regulation of firearms is consistent with the scope of the Second Amendment. Over 275 years of historical sources and regulations demonstrate the strong tradition of states and local public entities enacting firearms regulations tailored to local conditions. Indeed, as functioning towns emerged from the frontier and cities became more developed and densely populated, the need and tolerance for private gun use as a

means of self-defense in urban cities decreased. The copious historical evidence reflects a tradition of laws prohibiting the discharge or carrying of firearms within the limits of cities and towns.

II. Consistent with Heller, the En Banc Court Should Uphold California's Tradition of Authorizing Local Law Enforcement Officials To Establish the Criteria for Good Cause.

The en banc Court should recognize that California law, consistent with *Heller's* historical approach, authorizes local public officials to determine based on local conditions what constitutes good cause for issuing a concealed carry permit. Stripping local officials of that discretion would ignore the very historical traditions *Heller* embraces.

California statutes authorize local law enforcement officials to weigh factors such as good cause for issuing firearms permits. *See* Cal. Penal Code §§ 26150 and 26155. Much like their historical antecedents described above,

California's laws reposing discretion in local officials also harness the considered judgment and experience of those officials. The Opinion, by effectively eradicating that discretion, contradicts the longstanding historical tradition of local regulation tailored to local conditions.

The State of California is extremely diverse in both geography and population density. The Legislature accordingly has purposefully and necessarily left the determination of "good cause" for the issuance of firearm permits to the discretion of sheriffs and police chiefs responsible for public safety in those diverse jurisdictions. *See* Penal Code §§ 26150, 26155. The needs of any particular jurisdiction, especially due to the density of a specific area's population, are matters which require individualized determination. The chief law enforcement official in a more rural area of the state may establish criteria for determining good cause that differ from the criteria established by a chief

law enforcement official in an urban area. The different criteria might involve longer law enforcement response times in rural areas than in urban areas; a more densely populated geographic area in urban areas; and the high incidence of gun violence in urban areas as opposed to the relatively low incidence of gun violence in rural areas.

Judge Callahan properly observed during oral argument before the panel on December 6, 2012 that the nine western states comprising the Ninth Circuit have very different interests with respect to firearms regulation. Oral Argument at 6:00, *Peruta v. Cnty. of San Diego*, 742 F.3d 1144 (9th Cir. 2014). As Judge Callahan noted, California has a much higher crime rate and many more residents than does the far more rural State of Alaska. *Id.* These same considerations apply with equal force to the diverse communities within California.

Judge Callahan's remark echoes to some extent Judge Kozinski's observation almost twenty years ago in *United States*

v. Gomez, 92 F.3d 770 (9th Cir. 1996). Judge Kozinski observed the difference between regulating firearms in heavily-policed, urban cities as opposed to rural areas. 92 F.3d at 774 fn. 7, *citing* Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 656 (1989) ("[O]ne can argue that the rise of a professional police force to enforce the law has made irrelevant, and perhaps even counterproductive, the continuation of a strong notion of self-help as the remedy for crime.") Judge Kozinski logically concluded that "[t]he possession of firearms may therefore be regulated, even prohibited, because we are 'compensated' for the loss of that right by the availability of organized societal protection." *Id.*

California Penal Code §§ 26150 and 26155 appropriately leave to the discretion of local law enforcement officials the criteria with which to assess good cause for a concealed carry permit. That discretion is consistent with the historic tradition of local firearms regulation that informs the Second

Amendment right. Local regulation today provides the same flexible approach, tailored to local conditions, that was reflected in the numerous regulations adopted in the historical eras examined in *Heller*.

CONCLUSION

The en banc Court should uphold California's current permitting regime (1) authorizing local law enforcement officials to implement a good cause requirement for issuing concealed carry permits, and (2) affording those officials the discretion to establish the criteria by which good cause is measured. Any other outcome would lay waste to the historical record embraced in *Heller*.

Dated: April 29, 2015

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Executed on April 29, 2015

s/ T. Peter Pierce
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