

Case No. 18-55717

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

MICHELLE FLANAGAN, ET AL.,

Plaintiffs-Appellants,

v.

XAVIER BECERRA, ET AL.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Central District of California
Case No. CV16-06164-JAK (ASx)
the Honorable John A. Kronstadt

**ANSWERING BRIEF OF DEFENDANT-APPELLEE
SHERIFF JAMES MCDONNELL**

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INTRODUCTION

There is no reason for Defendant-Appellee Sheriff James McDonnell to be a party in this case that addresses the sole question left open by this Court after its en banc decision in *Peruta v. County of San Diego*, 824 F.3d 919 (9th Cir. 2016) (en banc), *cert. denied*, 137 S.Ct. 1995 (2017) – whether California's laws regarding the open carry of firearms violate the Second Amendment. As Appellants themselves have acknowledged, California law prohibits the Sheriff from issuing permits to openly carry a firearm in Los Angeles County. Appellants' Complaint and Opening Brief, however, confirms that they have asserted concealed carry claims against the Sheriff that are precluded as a matter of law not only to try to re-litigate a matter that has already been decided, but to conflate the issues of concealed carry and open carry of firearms in an attempt to cobble together a Second Amendment claim where none exists. Appellants cannot invoke the Second Amendment to protect a right to carry a concealed weapon, as that right "does not exist under the Amendment." *Peruta*, 824 F.3d at 932. Because the right to carry a concealed weapon does not exist under the Second Amendment, Appellants' claims against the Sheriff fail as a matter of law, and the district court's dismissal of those claims should be affirmed.

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STANDARD OF REVIEW

A district court's order granting a motion to dismiss under Rule 12(b)(6) is reviewed *de novo*. *Villa v. Maricopa County*, 865 F.3d 1224, 1228 (9th Cir. 2017), *cert denied*, 138 S.Ct. 1696 (2018). To avoid dismissal, a plaintiff must allege facts showing that the right to relief [rises] above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A plaintiff must show "more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). While the Court must accept material factual allegations as true, pleadings that are "no more than conclusions, are not entitled to the assumption of truth." *Id.* at 679; *see also Pareto v. FDIC*, 139 F.3d 696, 699 (9th Cir. 1998) ("conclusory allegations . . . and unwarranted inferences" are insufficient). Furthermore, the Court need not accept the truth of any allegations that are contradicted by matters properly subject to judicial notice or by exhibits attached to the complaint. *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010). The Court "can affirm a 12(b)(6) dismissal on any ground supported by the record, even if the district court did not rely on the ground." *United States v. Corinthian Colls.*, 655 F.3d 984, 992 (9th Cir. 2011) (internal citations and quotations marks omitted).

COUNTER-STATEMENT OF ISSUES

Whether the district court properly dismissed Plaintiffs-Appellants' challenge to Defendant-Appellee Sheriff James McDonnell's policies regarding the issuance of concealed weapons permits in Los Angeles County as precluded as a matter of law by this Court's ruling in *Peruta v. County of San Diego*, 824 F.3d 919 (9th Cir. 2016) (en banc).

STATEMENT OF THE CASE

I. Legal and Factual Background

A. California Law and the Los Angeles County Sheriff's Department's Concealed Weapons Permit Policy

Consistent with California law, Appellee Sheriff James McDonnell (the "Sheriff" or "LASD") may issue concealed weapons permits in Los Angeles County upon a showing of "good cause" and "good moral character." California Penal Code §§ 26150(a), 26155(a). The Sheriff has the authority to define "good cause" for obtaining a concealed weapons permit. *Id.* LASD policy defines good cause as "convincing evidence of a clear and present danger to life or of great bodily harm to the applicant, his spouse, or dependent child, which cannot be adequately dealt with by existing law enforcement resources, and which danger cannot be reasonably avoided by alternative measures, and which danger would be significantly mitigated by the applicant's carrying of a concealed firearm." Appellants' Excerpts of Record ("E.R.") VII, 1374.

B. The Complaint's Allegations Against Sheriff McDonnell

Appellants are four individual residents of Los Angeles County and the California Rifle & Pistol Association ("CPRA"), an entity organized under Section 501(c)(4) of the Internal Revenue Code. The individual plaintiffs-appellants are members of CPRA. E.R. X, 2199-00.

The four individual Appellants all applied for and were denied concealed carry permits by the Sheriff for lack of "good cause." *Id.* These individual Appellants alleged that they "wish immediately to exercise their constitutional right to carry a firearm in public for self-defense, but they are precluded from doing so because they are unable to obtain a Carry License, which would allow them to carry a firearm in a concealed manner, and because California law prohibits them from carrying a firearm openly." E.R. X, 2199-00, 2201.

Appellants further alleged in their complaint that other members of Appellant CPRA have also been denied Carry Licenses by the Sheriff or "have refrained from applying for Carry Licenses because they know that applying will be futile based on Defendant McDonnell's official written 'good cause' policy, which they cannot satisfy, and in light of the Defendant's commonly known practice of enforcing his 'good cause' policy in a manner that denies all applicants other than those with evidence of the most specific and serious threats against them." E.R. X, 2208.

With respect to the open carry of firearms, Appellants alleged that "Issuing Authorities in counties with populations over 200,000, like Los Angeles County, can only issue licenses to carry a concealed firearm. California law prohibits them from issuing licenses to carry a loaded handgun in an exposed, open manner (e.g., in a visible hip holster)." E.R. X, 2207. As such, Appellants have not and cannot allege that the Sheriff is in any way responsible for California laws prohibiting open carry, as the Sheriff is prohibited by state law from issuing a license to openly carry a weapon in Los Angeles County.

II. Procedural History and the Orders on Appeal

In August 2016, Appellants filed a lawsuit in district court against the Sheriff and then-California Attorney General Kamala Harris, in her official capacity ("California"), seeking declaratory and equitable relief under both the Second Amendment and the Equal Protection Clause of the Fourteenth Amendment of the Constitution. E.R. X, 2218. The Sheriff moved to dismiss the claims in their entirety pursuant to Fed. R. Civ. P. 12(b)(6), as *Peruta v. County of San Diego*, 824 F.3d 919 (9th Cir. 2016) (en banc) barred the Second Amendment challenge to the Sheriff's policies regarding the issuance of concealed carry permits, and also because the Sheriff is not responsible for the adoption or implementation of California's open carry laws. E.R. X, 2220. California also moved to dismiss the claims based solely on concealed carry laws as barred by

Peruta. Id. Both the Sheriff and California moved to dismiss the Equal Protection claim as redundant of the Second Amendment claim and because it failed on the merits. *Id.*

After briefing by all parties and a hearing, the district court granted the Sheriff's Rule 12(b)(6) motion to dismiss in its entirety, and granted California's as to the claims based on concealed carry, holding that the claims based on concealed carry were foreclosed by *Peruta*. E.R. X, 2221. In dismissing the claims against the Sheriff, the district court further held that, "[b]ecause the LASD creates policies only as to the concealed carry of weapons, and has no responsibility for the enactment of the restrictions on open carry, it is not a proper party to this action. Thus, if Plaintiffs prevail on their claim, there is no corresponding remedy that would be imposed on the LASD." E.R. I, 38-39. The district court also granted the motions to dismiss the Equal Protection claim as redundant of the Second Amendment claim.¹ E.R. I, 39-40.

After the Sheriff was dismissed from the case, Appellants and California filed cross-motions for summary judgment on the Second Amendment challenge to California's restrictions on open carry. E.R. I, 2222. The district court granted

¹ Appellants appear not to be appealing the dismissal of their Equal Protection claim, as it is not presented in their Statement of Issues nor discussed anywhere in their Opening Brief.

summary judgment to California, holding that California's open carry scheme is subject to intermediate scrutiny and that California had demonstrated a "reasonable fit" between the open carry laws and the important State objectives of public safety, reducing violent crime, conserving law enforcement resources, and reducing the likelihood of dangerous law enforcement confrontations. E.R. I, 9-14; E.R. X, 2225.

ARGUMENT

I. The District Court's Dismissal of Appellants' Second Amendment Claim Against Appellee Sheriff James McDonnell Should Be Affirmed, as Appellants' Claim is Barred by this Court's En Banc Decision in *Peruta v. County of San Diego*.

As the district court held, this Court's en banc decision in *Peruta v. County of San Diego*, 824 F.3d 919 (9th Cir. 2016) completely forecloses Appellant's Second Amendment claim against the Sheriff. *Peruta* unequivocally held that a local law enforcement agency's requirement that a concealed weapons permit applicant demonstrate "good cause" does not violate the Second Amendment. *Id.* at 924. The facts of *Peruta* are nearly identical to Appellants' allegations in this case. Plaintiff Edward Peruta, a resident of San Diego County, and Plaintiff Adam Richards, a resident of Yolo County, each applied for a license to carry a concealed firearm. Both applications were denied because Plaintiff had not shown "good cause" as required under their respective county's policy. *Id.* at 924. Like the LASD, both San Diego and Yolo County policies define "good cause" as requiring

a particularized reason why an applicant needs a concealed firearm for self-defense. *Id.* And similarly, the individual Appellants' concealed weapons permit applications were denied because they failed to show "good cause" as defined by LASD policy.

Thus, as in *Peruta*, Appellants' challenge is to the Sheriff's policies governing concealed carry and the denial of their applications for concealed carry permits. E.R. X, 2207-08, 2211-12. As alleged in Appellants' district court complaint, LASD defines "good cause" as "convincing evidence of a clear and present danger to life, or of great bodily harm to the applicant, his spouse, or dependent child, which cannot be adequately dealt with by existing law enforcement resources, and which danger cannot be reasonably avoided by alternative measures, and which danger would be significantly mitigated by the applicant's carrying of a concealed firearm." E.R. X, 2207-08. And, as Appellants acknowledged, LASD's policy requiring that an applicant demonstrate good cause is nearly identical to the "similarly restrictive 'good cause' policy" upheld in *Peruta*. E.R. X, 2197-98. Finally, as in *Peruta*, the individual Appellants' concealed carry permit applications were denied because they failed to show "good cause" as defined by LASD policy. E.R. X, 2199-00, 2208.

After reviewing the history relevant to the Second Amendment and its applications to the States and localities via the Fourteenth Amendment, this Court

held: "We therefore conclude that the Second Amendment right to keep and bear arms does not include, in any degree, the right of a member of the general public to carry concealed firearms in public. In so holding, we join several of our sister circuits that have upheld the authority of states to prohibit entirely or to limit substantially the carrying of concealed or concealable firearms." *Peruta*, 824 F.3d at 939 (citing cases). This Court further held "[b]ecause the Second Amendment does not protect in any degree the right to carry concealed firearms in public, any prohibition or restriction a state may choose to impose on concealed carry – including a requirement of 'good cause,' however defined – is necessarily allowed by the Amendment." *Id.*

This holding "fully answered" the questions presented to the *Peruta* court, which are identical to those presented in this case. *Id.* at 939. The Second Amendment does *not* convey an absolute right to carry concealed weapons in public places. As such, a county's requirement that a concealed carry permit applicant show good cause for the issuance of that permit does *not* violate the Second Amendment. Appellants cannot invoke the Second Amendment to protect a right to carry a concealed weapon, as that right "does not exist under the Amendment." *Id.* at 932. Accordingly, the district court's dismissal of Appellants' Second Amendment claim against the Sheriff should be affirmed.

II. Because The Sheriff Only Has Jurisdiction Over the Concealed Carry of Firearms in Los Angeles County, The Sheriff Is Not a Proper Party to a Case Challenging the Constitutionality of California Laws Regarding the Open Carry of Firearms.

Because this Court has already established that the Second Amendment does not protect the right to concealed carry, Appellants' Second Amendment claim against the Sheriff makes no sense. Indeed, Appellants concede that their claim against the Sheriff is barred by *Peruta*, as they "accept [it] as binding precedent" on the question of concealed carry. Appellants' Opening Brief at 33, fn. 8. Thus, as the district court held, the Sheriff is not a proper party to this action challenging California laws regarding the open carry of firearms, because if plaintiffs prevailed, there is no corresponding remedy that could be imposed on the Sheriff. E.R. I, 38-39.

The only difference between this case and *Peruta* is that Appellants have also alleged that the California state statutes prohibiting open carry of firearms in populous counties such as Los Angeles County violate the Second Amendment. This does not, however, re-open the question of whether the statutes and policies governing concealed carry are unconstitutional. This Court clearly held that the Second Amendment "does not protect in any degree the right to carry concealed firearms in public" and that any "good cause" requirement is necessarily allowed by the Amendment. *Id.* at 93. By alleging the unconstitutionality of California

state statutes prohibiting open carry in the County of Los Angeles, Appellants have merely presented the question that was left open in *Peruta*.

Doing so, however, does not entitle Appellants to a second bite at the apple regarding concealed carry. This Court – knowing full well that the question of open carry was being left unanswered – held that there is no Second Amendment right to carry a concealed weapon. "Even construing the Second Amendment as protecting the right of a member of the general public to carry a firearm in public (an issue we do not decide), and even assuming that California's restrictions on public open carry violate the Second Amendment so construed (an issue we also do not decide), it does not follow that California's restrictions on public concealed carry violate the Amendment." *Id.* at 941-42. Because there is no constitutional right to concealed carry, statutes and policies addressing open carry and concealed carry cannot be considered in tandem in order to cobble together constitutional protections where none exist. As this Court held, "[i]f there is a Second Amendment right to carry a firearm openly in public, and *if* that right is violated, the cure is to apply the Second Amendment to protect *that right*." *Id.* at 942 (emphasis added). However, "[t]he cure is not to apply the Second Amendment to protect a right that does not exist under the Amendment." *Id.* at 942.

Accordingly, because there is no Second Amendment right to carry a concealed weapon in public, Appellants' Second Amendment challenge to

Appellees' statutes and policy governing the issuance of concealed carry permits is barred as a matter of law. The four individual Appellants all applied for and were denied concealed carry permits by the Sheriff for lack of "good cause" and allege that they "wish immediately to exercise their constitutional right to carry a firearm in public for self-defense, but they are precluded from doing so because they are unable to obtain a Carry License, which would allow them to carry a firearm in a concealed manner, and because California law prohibits them from carrying a firearm openly." E.R. X, 2199-00, 2201. The only claim Appellants could possibly allege is that California state statutes prohibiting open carry violate their Second Amendment rights. And with respect to the open carry of firearms, Appellants concede that California law prohibits the Sheriff from issuing licenses to openly carry a loaded handgun in Los Angeles County. E.R. X, 2207. As such, Appellants have not and cannot allege that the Sheriff is in any way responsible for California laws prohibiting open carry and therefore fail to state a cognizable claim against the Sheriff.

As noted above, the Sheriff's involvement in this litigation is an attempt by Appellants to muddy the question before this court – whether California's statutes regarding open carry violate the Second Amendment. The disingenuous claims against California and the Sheriff regarding concealed carry exist only to support Appellants' notion of a collective "restrictive carry scheme" that somehow invites a

different constitutional analysis than would apply to the question of open carry. Appellants' Opening Brief at 33. Appellants made this bizarre argument – that dismissing the concealed carry aspects of their complaint "could ultimately lead to the perverse result of confining the Court's available remedies for the Second Amendment violation that Plaintiffs allege" – below in opposition to the Appellee's Motions to Dismiss. E.R. X, 2188. There is nothing "perverse" about a court confining its available remedies for Appellants' Second Amendment violation; rather, that is exactly what a court is charged with in the face of a complaint alleging such a violation. The fact is that Appellants' only cognizable Second Amendment claim is whether California state laws regarding open carry violate the Second Amendment, and this Court must confine its available remedies to that claim.

Peruta has already established that a court cannot offer any remedy for alleged Second Amendment violations arising from concealed carry policies and restrictions, as the Second Amendment does not apply to concealed carry as a matter of law. Appellants' arguments that statutes and policies regarding concealed carry *combined with* statutes regarding open carry violate the Second Amendment does not entitle them to re-litigate *Peruta* and create a Second Amendment right where none exists. Because the right to carry a concealed weapon does not exist

under the Second Amendment, the district court's dismissal of the claims against the Sheriff should be affirmed.

CONCLUSION

The district court properly granted the Sheriff's Rule 12(b)(6) motion to dismiss plaintiffs' claims against the Sheriff in their entirety as a matter of law. First, Appellant's Second Amendment challenge to the Sheriff's policies regarding the issuance of concealed carry permits in Los Angeles County is barred as a matter of law by this Court's en banc decision in *Peruta v. County of San Diego*. And second, because the Sheriff only has jurisdiction to enforce the concealed carry of firearms, he is not responsible for the adoption or implementation of state laws regulating the open carry of firearms.

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For the foregoing reasons, this Court should affirm the district court's dismissal of Plaintiffs-Appellants' complaint against Defendant-Appellee Sheriff James McDonnell.

DATED: November 20, 2018

Respectfully submitted,

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By /s/ Lana Choi
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STATEMENT OF RELATED CASES

Defendant-Appellee Sheriff James McDonnell agrees with Plaintiffs-Appellants that *Young v. Hawaii, et al.*, 9th Cir. Case No. 12-17808 and *Nichols v. Edmund G. Brown, et al.*, 9th Cir. Case No. 14-55873, are related cases, as defined by Ninth Circuit Rule 28-2.6.

DATED: November 20, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Circuit Rule 32-1, this brief complies with Fed. R. App. P. 32(a)(7)(B)(i), is proportionately spaced, has a typeface of 14 points or more and contains less than 14,000 words, including footnotes. According to the Word program used to produce this brief, the word count is 3,224.

<u>/s/ Lana Choi</u>	Date <u>11/20/2018</u>
Lana Choi	
Deputy County Counsel	

9th Circuit Case Number 18-55717

CERTIFICATE OF SERVICE

I hereby certify that 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 on November 20, 2018.

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

/s/ Lana Choi