No. 11-16255

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ADAM RICHARDS, et al.,
Appellants

v.

ED PRIETO, et al.,
Appellees

On Appeal from the United States District Court for the Eastern District of California, No. 2:09-CV-01235-MCE-DAD (England, J.)

BRIEF OF *AMICI CURIAE* LAW CENTER TO PREVENT GUN VIOLENCE AND MARIN COUNTY SHERIFF ROBERT DOYLE IN SUPPORT OF APPELLEES' PETITION FOR REHEARING *EN BANC*

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Law Center to Prevent Gun Violence states that it has no parent corporations. It has no stock, and therefore no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

RULES

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

INTEREST OF AMICI CURIAE

Amicus Law Center to Prevent Gun Violence (the "Law Center") is a national law center dedicated to preventing gun violence.[1] Founded after an assault weapon massacre at a San Francisco law firm in 1993, the Law Center provides legal and technical assistance in support of gun violence prevention. The Law Center tracks and analyzes federal, state, and local firearms legislation, as well as legal challenges to firearms laws. The Law Center filed an *amicus* brief in support of Sheriff Ed Prieto and Yolo County in the above-captioned matter, and has provided informed analysis as an *amicus* in a variety of other firearm-related cases, including *District of Columbia v. Heller* and *McDonald v. City of Chicago*.

Amicus Sheriff Robert T. Doyle is Marin County, California's chief law enforcement officer, and his responsibilities include issuance of permits to carry concealed weapons in Marin County. Sheriff Doyle has a compelling interest in maintaining discretion over the issuance of such permits, which he believes is critical to public safety in Marin County.

INTRODUCTION

On March 5, 2014, this Court decided that the Second Amendment forbids

[1] Counsel to the parties have consented to the filing of this brief. The Law Center was formerly known as Legal Community Against Violence. *Amici* affirm, pursuant to Fed. R. App. P. 29(c)(5), that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission.

Appellee Ed Prieto, the Sheriff of Yolo County, from requiring applicants for concealed weapon permits to demonstrate a heightened need for personal protection.[2] The panel issued its memorandum disposition in light of its own recent split decision in the closely-related case of *Peruta v. County of San Diego*, which held that the Second Amendment requires every state in this Circuit to issue a permit to carry a hidden, loaded gun in public to virtually anyone who applies.[3] The panel's radical expansion of the Second Amendment right is unprecedented in American history and contradicts the decisions of the Supreme Court, this Court, and at least four other circuits. This disposition has profound implications for public safety in this Circuit, and it—along with the *Peruta* decision on which it relies—should be reviewed by this Court *en banc*.

The panel's *Peruta* decision effectively invalidated California's longstanding statutory scheme governing concealed carry permits, which requires applicants to demonstrate "good cause" for the issuance of such a permit.[4] The

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[2] *Richards v. Prieto*, No. 11-16255, 2014 U.S. App. LEXIS 4146, 2014 WL 843532 (9th Cir. Mar. 5, 2014). Citations herein are to the "not for publication" memorandum disposition (hereinafter, "Mem."), attached as Exh. A and available at http://cdn.ca9.uscourts.gov/datastore/memoranda/2014/03/05/11-16255.pdf.

[3] *See* Mem. at 2; *Peruta v. County of San Diego*, 742 F.3d 1144, 1179 (9th Cir. 2014); *see* 742 F.3d at 1179 (Thomas, J., dissenting).

[4] The panel reversed the district court, which found that the law survived intermediate scrutiny and explained that the county "has an important and substantial interest in public safety and in reducing the rate of gun use in crime. In particular, the government has an important interest in reducing the number of concealed weapons in public in order to reduce the risks to other members of the

panel held—contrary to every other circuit to have considered similar laws—that the "good cause" requirement is only valid if it can be satisfied by a general desire for self-defense. This decision eviscerates law enforcement's existing authority to restrict concealed weapons, and represents an unprecedented change to California law that will put thousands, if not millions, of additional guns on the streets.[5]

Accordingly, *Amici* respectfully ask that this Court grant Sheriff Ed Prieto and the County of Yolo's request and rehear this case, and the *Peruta* case, *en banc* for at least the following reasons:

- The analytical methods the *Peruta* opinion employs are in conflict with those prescribed by the Supreme Court, the Ninth Circuit, and other circuits.[6] Specifically, the *Peruta* opinion discards the two-part inquiry set forth in *Heller* and *Chovan*, substitutes a logically flawed and unsupported

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public who use the streets and go to public accommodations." *Peruta v. County of San Diego*, 758 F. Supp. 2d 1106, 1117 (S.D. Cal. 2010).

[5] Indeed, over 1000 concealed-weapon permit applications have flooded the Orange County Sheriff's Department in the weeks since the panel's opinion. Paul Elias, *Requests to Carry Concealed Guns Surges in Calif.*, ABC News, Mar. 12, 2014, http://abcnews.go.com/US/wireStory/requests-carry-concealed-guns-surges-calif-22885756. Yet despite the dramatic effect of its holding effectively invalidating a state law, neither the panel opinion nor the question presented on appeal were certified to California's Attorney General under Federal Rule Appellate Procedure 44 and Federal Rule Civil Procedure 5.1.

[6] *See District of Columbia v. Heller*, 554 U.S. 570 (2008); *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013); *see also Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 89-93 (2d Cir. 2012), *Drake v. Filko*, 724 F.3d 426, 429 (3d Cir. 2013); *Woollard v. Gallagher*, 712 F.3d 865, 875 (4th Cir. 2013); *Peterson v. Martinez*, 707 F.3d 1197, 1208-09 (10th Cir. 2013) (applying same two-step inquiry).

alternative methodology, and expands its analysis to encompass statutes not at issue, and questions not presented.

- In effectively finding that carrying loaded concealed weapons in public is constitutionally-protected conduct that may not be restricted by a "good cause" requirement, the *Peruta* opinion conflicts with decisions of the Second, Third, Fourth and Tenth Circuits in *Kachalsky, Drake, Woollard*, and *Peterson*.[7] It also conflicts with the Supreme Court's decision in *Robertson v. Baldwin*, which found that carrying concealed weapons is *not* protected conduct—a decision the panel fails to even acknowledge.[8] The *Peruta* opinion unnecessarily reaches far beyond *Heller* or any other opinion to date, and conflicts with a long history of "good cause" restrictions across the country.
- Whether the Second Amendment includes a right to carry a concealed loaded weapon in public, and whether any such right can properly be subject to a "good cause" restriction of the type applied in Yolo County, are questions of exceptional importance, with far-reaching implications for public safety and law enforcement.

Because of the importance of this case to public safety, to law enforcement, and to the vigorous national debate surrounding the Second Amendment, the Law

[7] *See supra*, note 6.
[8] *Robertson v. Baldwin*, 165 U.S. 275, 281-82 (1897).

Center and Sheriff Doyle respectfully suggest that this Court grant Sheriff Prieto and Yolo County's request and rehear this case *en banc*.[9]

ARGUMENT

I. This Court Should Grant Rehearing *En Banc* to Reconcile the Discrepancies Between the Panel's Analysis in *Peruta* and the Methodology Prescribed by *Heller* and *Chovan*.

A. The *Peruta* Opinion Failed to Apply the Two-Part Inquiry for Second Amendment Challenges Set Forth in *Heller* and *Chovan*.

The *Peruta* opinion explicitly disregards the two-part inquiry adopted by the Ninth Circuit and by other courts[10] reviewing Second Amendment challenges to firearm regulations.[11] As explained by this Court in *Chovan*, under *Heller* "[t]he first question is 'whether the *challenged law* imposes a burden on conduct falling within the scope of the Second Amendment's guarantee.'"[12] If the conduct at issue

[9] Within this circuit, Hawaii has a very similar law regulating the issuance of concealed carry permits. *See* Haw. Rev. Stat. Ann. § 134-9(a). That law's fate will likely be decided by the outcome of this case, further demonstrating the critical need for *en banc* review. *See Baker v. Kealoha*, No. 12-16258 (9th Cir. Mar. 20, 2014) (vacating district court's denial of a preliminary injunction requiring the issuance of permits without regard to individualized need and remanding for reconsideration in light of *Peruta*). Moreover, several other cases are pending which raise similar issues about California's laws. *See, e.g.*, *McKay v. Hutchens*,12-57049 (9th Cir. argued Oct. 7, 2013); *Thomas v. Torrance Police Dept.*, 12-56236 (9th Cir. filed Jul. 3, 2012).

[10] *See, e.g.*, *Woollard*, 712 F.3d at 869, 876; *Kachalsky*, 701 F.3d at 96.

[11] *See Peruta*, 742 F.3d at 1175 (noting that no standard of heightened scrutiny was applied).

[12] *Chovan*, 735 F.3d at 1134 (emphasis added) (citing *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010)).

is not within the scope of the Second Amendment, then the law is valid.[13] If the regulation burdens conduct within the scope of the Second Amendment, then the Court must apply the appropriate means-end scrutiny.[14]

As the *Peruta* dissent points out, the panel entirely ignores both steps of this straightforward analysis.[15] First, instead of examining the burden on the Second Amendment imposed *by the challenged law*—San Diego County's standard for issuing *concealed carry* permits—the panel reaches out to examine California's entire statewide scheme regulating both concealed and open carry.[16] Had the opinion properly applied the first step of the *Heller-Chovan* analysis,[17] it would have been forced to conclude that carrying a concealed weapon is *not* within the scope of the Second Amendment right. Its analysis should have ended there.

Second, after misconstruing the first inquiry, the *Peruta* panel fails to apply the second step of the *Chovan* analysis at all—"apply[ing] an appropriate level of scrutiny."[18] Instead, the majority decides that it will use "an alternative approach for the most severe cases" that involves "per se invalidation" with no scrutiny

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[13] *See id.*

[14] *Id.* (citing *Chester*, 628 F.3d at 680).

[15] *Peruta*, 742 F.3d at 1193-94 (Thomas, J., dissenting).

[16] *Id.* at 1168-72 (majority opinion).

[17] *See Peterson*, 707 F.3d at 1201, 1208-09 (discussing implications of plaintiff's decision to challenge only Colorado's concealed-carry statute but not Denver's open-carry ordinance, and holding that "the carrying of concealed firearms is not protected by the Second Amendment[.]").

[18] *Chovan*, 735 F.3d at 1136 (citing *Chester*, 628 F.3d at 680).

applied whatsoever.[19] The panel claims that this is "the approach used in *Heller* itself,"[20] but this disregards *Chovan's* holding that the two-step approach "reflects the Supreme Court's holding in *Heller*."[21] Thus, the panel's failure to apply any level of scrutiny directly conflicts with this Court's precedent in *Chovan* and warrants *en banc* review and correction.

B. The Panel's Radical Expansion of The Scope of the Second Amendment Is Based On Flawed Historical Analysis And Warrants *En Banc* Review.

Despite a lack of precedent for its approach, the *Peruta* panel nonetheless took it upon itself to contort the Second Amendment right not only to apply outside the home, but to apply with such force as to render unconstitutional virtually all regulations of firearms in public. The panel arrives at this conclusion by engaging in circular and flawed reasoning, which included at least three critical errors.

First, as the *Peruta* dissent points out,[22] the *Peruta* panel cites and relies on cases that *upheld* the restrictions on carrying concealed weapons in public for the proposition that in *this* case, the Second Amendment guarantees a right to carry concealed weapons in public.[23] This error alone calls into question the soundness

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[19] *Peruta*, 742 F.3d at 1168, 1170.
[20] *Id.* at 1168.
[21] *Chovan*, 735 F.3d at 1136.
[22] *Peruta*, 742 F.3d at 1187 & n.6 (Thomas, J., dissenting).
[23] *Id.* at 1157-60 & n.8 (majority opinion) (discussing, *e.g.*, *Aymette v. State*, 21 Tenn. 154 (1840), *State v. Reid*, 1 Ala. 612 (1840), *Nunn v. State*, 1 Ga. 243 (1846)).

of the panel's reasoning.

Second, the panel categorically dismisses any and all historical sources not addressing the Second Amendment as protecting an individual right—even crediting dissenting over majority opinions.[24] The Supreme Court in *Heller* did not reject historical sources in this sweeping manner.[25] Indeed, the Court in *Heller* assessed both favorable and unfavorable historical evidence; for instance, it analyzed and harmonized diverging provisions of state constitutions,[26] and carefully limited conflicting opinions to their precise holdings.[27] Nothing in *Heller* supports the selective historical inquiry engaged in by the panel in *Peruta*.

Third, the panel fundamentally misconstrues *Heller*, which describes the Second Amendment right as "the right of law-abiding, responsible citizens to use arms in defense of hearth and home."[28] *Heller* says nothing about the reach of the Second Amendment *outside* the home—as the *Peruta* majority concedes.[29] On the contrary, as the *Peruta* dissent points out, *Heller* made abundantly clear that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions" that are "presumptively lawful," and it cited several cases *upholding*

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[24] *Peruta*, 742 F.3d at 1159 & n.9.
[25] *See Heller*, 554 U.S. at 576-619.
[26] *See id.* at 601-05.
[27] *See, e.g.*, *id.* at 623-24 (describing the limited holding of *United States v. Miller*, 307 U.S. 174 (1939)).
[28] 554 U.S. at 635; *see, e.g.*, *Peruta*, 742 F.3d at 1166-68, 1170-72, 1174.
[29] *See Peruta*, 742 F.3d at 1149-50.

state restrictions on concealed carry.[30]

Only by ignoring the prescribed methods for Second Amendment analysis was the *Peruta* panel able to find absolute constitutional protection for public concealed carry. Supreme Court and Ninth Circuit precedent does not support this dramatic expansion of the Second Amendment—and dramatic contraction of the ability of legislatures and law enforcement to regulate the proliferation of guns in public.

II. This Court Should Grant Rehearing *En Banc* Because the Panel's *Peruta* Decision Conflicts with Decisions of the Supreme Court and of Four Other Circuits.

As the *Peruta* panel readily admits, its radical expansion of the Second Amendment to invalidate a "good cause" concealed carry law is in direct conflict with three circuits' decisions upholding such laws.[31] The *Peruta* majority's decision is also in conflict with a Tenth Circuit decision and with a decision of the Supreme Court, as discussed below.

A. The Panel's *Peruta* Opinion Conflicts with the Supreme Court's Decision in *Robertson* and with Decisions of the Second, Third, Fourth, and Tenth Circuits.

In *Robertson v. Baldwin*, the Supreme Court expressly declared "the right of the people to keep and bear arms . . . is not infringed by laws prohibiting the

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[30] *See id.* at 1179 (Thomas, J., dissenting) (citing *Heller*, 554 U.S. at 626-27 & n.26).

[31] *Id.* at 1173-74 (majority opinion) (discussing *Drake*, 724 F.3d at 431-35, *Woollard*, 712 F.3d at 876, and *Kachalsky*, 701 F.3d at 89, 97-99).

carrying of concealed weapons."[32] As the *Peruta* dissent notes, the Supreme Court's 2008 decision in *Heller* did not overrule this well-recognized exception to the Second Amendment right, and it remains binding on the Ninth Circuit.[33] The panel opinion does not even mention, much less seek to distinguish, the Supreme Court's decision in *Robertson*, which is directly contrary to the result reached by the majority. That failure alone warrants *en banc* review.

The *Peruta* decision (and, by necessity, the panel decision in this case) also directly conflicts with the conclusions of four other circuits. In *Kachalsky* and *Woollard*, the Second and Fourth Circuits considered regulatory schemes just like San Diego County's that require a particularized need for self-defense for the issuance of a license to carry a concealed firearm.[34] In both those cases, the courts expressed doubt that protected conduct was burdened by the laws at issue at all, and went on to uphold the laws under intermediate scrutiny. [35]

In *Drake*, the Third Circuit considered a New Jersey law requiring persons who wished to carry a handgun in public to show "justifiable need."[36] The Third Circuit held the requirement "qualifies as a 'presumptively lawful,' 'longstanding'

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[32] 165 U.S. 275, 281-82 (1897).

[33] *See Peruta*, 742 F.3d at 1190 (Thomas, J., dissenting).

[34] *Kachalsky*, 701 F.3d at 86; *Woollard*, 712 F. 3d at 869 (discussing, respectively, New York's and Maryland's concealed-carry regulations schemes).

[35] *Kachalsky*, 701 F.3d at 93-94 ("The proper cause requirement falls outside the core Second Amendment protections identified in *Heller*."); *Woollard*, 712 F. 3d at 876.

[36] *Drake*, 724 F.3d at 428-29.

regulation and therefore does not burden conduct within the scope of the Second Amendment's guarantee."[37]

And in *Peterson*, the Tenth Circuit considered Colorado's concealed-handgun licensing regime, and concluded that "bans on the concealed carrying of firearms are longstanding"[38] and that "the Second Amendment does not confer a right to carry concealed weapons."[39]

III. This Court Should Grant Rehearing *En Banc* Because This Case Raises Questions of Exceptional Importance.

California's legislature, like many others, has exercised its "predictive judgment" to determine that empowering law enforcement to prevent individuals who have no legitimate need to carry concealed loaded firearms in public will best

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[37] *Id.* at 429-30. Although the *Peruta* majority criticizes *Drake* for relying "on more recent mid-twentieth century developments to justify New Jersey's permitting scheme," *see* 742 F.3d at 1175 n.21, *Heller* itself relies on such developments to justify other "longstanding" restrictions that fall outside the scope of the Second Amendment. *See Drake*, 724 F.3d at 433-34.

[38] Indeed, such restrictions are nearly as old as the Republic. *See Peruta*, 742 F.3d at 1184-85 (Thomas, J., dissenting). In the decades before the Civil War, at least eight states outlawed the carrying of concealed weapons, and states continued to regulate concealed carry after the war. SAUL CORNELL, A WELL REGULATED MILITIA 131-40 (2006); ALEXANDER DECONDE, GUN VIOLENCE IN AMERICA at 79 (2001). To the extent these prohibitions were challenged in court, they overwhelmingly survived constitutional review—as the Supreme Court acknowledged in *Heller*. *See* 554 U.S. at 626. Between 1903 and 1927, at least eleven states passed new laws that prohibited the carrying of a concealed or concealable weapon without a permit, and many of those granted broad discretion to law enforcement officers deciding whether to issue such permits. *See Peruta*, No. 10-56971, Amicus Br. of Legal Community Against Violence, *et. al.* (Dkt. 56), at 28-30 & n.31 (citing statutes).

[39] 707 F.3d at 1210, 1211.

preserve public safety and prevent crime.[40] The decision of the *Peruta* and *Richards* panel to contravene that judgment, and to decree that the San Diego County Sheriff's Office and other California law enforcement, including *Appellee* Sheriff Prieto and *Amicus* Sheriff Doyle, *must* issue permits to carry loaded concealed handguns to anyone who applies and claims a generalized concern for personal safety, will have a dramatic impact on public safety and law enforcement.

A. These Decisions Have Far-Reaching Consequences for Both Public Safety and Law Enforcement.

California's Legislature made a judgment to empower counties to grant concealed carry permits *if* applicants demonstrate "good cause."[41] This standard allows counties to calibrate the issuance of concealed carry permits to the needs of their communities. San Diego County decided that the best way to implement this permitting framework for its dense urban county (the fifth most populous in the United States) was by requiring applicants to show "a set of circumstances that distinguish the applicant from the mainstream and causes him or her to be placed in harm's way."[42] The *Peruta* and *Richards* decisions strike down this requirement, and instead require San Diego County, Yolo County, and every jurisdiction in the entire Ninth Circuit to issue a concealed carry permit to virtually

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[40] *Turner Broad. Sys. Inc. v. FCC*, 520 U.S. 180, 195-96 (1997); *see also Kachalsky*, 701 F.3d at 97; *Drake*, 724 F.3d at 436-37.

[41] Cal. Penal Code §§ 26150, 26155.

[42] *Peruta*, 742 F.3d at 1148 (discussing San Diego County's policy).

anyone who wants one.[43]

One need look no further than the daily news to see that this decision places the public's safety in jeopardy. In Florida, which has a system nearly identical to the one that the panel decision would force on the entire Ninth Circuit, Chad Oulson was shot in a Florida movie theater on January 13, 2014 by a man with a concealed weapons permit after an argument over texting and popcorn.[44] Similarly, in 2012, concealed carry permit holder Michael Dunn pulled out a gun and fatally shot Jordan Davis after an argument over loud music in a gas station parking lot.[45] And in Arizona, another state with almost no limits on who may carry a concealed weapon,[46] Jared Lee Loughner shot Congresswoman Giffords and 18 others outside a Tucson supermarket in 2011.[47] These incidents are just a few examples of the grave dangers that necessarily accompany the proliferation of concealed weapons in public places. The data is clear: the more guns that are

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[43] *Id.* at 1178-79; *see id.* at 1179-80 (Thomas, J., dissenting).

[44] *See e.g.*, Frances Robles, *A Movie Date, a Text Message, and a Fatal Shot*, N.Y. Times, Jan. 21, 2014, http://www.nytimes.com/2014/01/22/us/a-movie-date-a-text-message-and-a-fatal-shot.html?_r=0.

[45] *See*, e.g., Lizette Alvarez, *Jury Reaches Partial Verdict in Florida Killing Over Loud Music*, N.Y. Times, Feb. 15, 2014, http://www.nytimes.com/2014/02/16/us/florida-killing-over-loud-music.html?_r=0.

[46] Arizona allows qualified individuals to carry a concealed handgun without a permit. *See* Ariz. Rev. Stat. § 3102.

[47] *See, e.g.*, James Grimaldi & Fredrick Kunkle, *Gun used in Tucson was purchased legally; Arizona laws among most lax in nation*, Wash. Post, Jan. 9, 2011,http://www.washingtonpost.com/wp-dyn/content/article/2011/01/09/AR2011010901912.html.

carried in public, the more likely that violent crimes and death will occur.[48] The spread of hidden guns in public also endangers the lives of law enforcement: firearms are the leading cause of death for law enforcement officers nationwide.[49]

Of course, the *Peruta* opinion did not examine this issue at all, since it applied an unprecedented categorical analysis[50] rather than the approach endorsed in *Chovan*, which would have taken into account the government's interest in preserving public safety and keeping concealed loaded guns out of the hands of people like Michael Dunn and Jared Lee Loughner.

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The panel's sweeping *Peruta* opinion perfectly illustrates the perils of venturing unnecessarily into the "vast terra incognita" of alleged Second Amendment rights in public.[51] For this reason and many others, other circuits have tread carefully when deciding Second Amendment challenges to these and other gun laws, recognizing that such decisions involve sensitive public policy issues and the balancing of important governmental and individual interests. In contrast, the *Peruta* opinion summarily dismisses the idea of judicial deference to either law

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[48] As the *Peruta* dissent points out. 742 F.3d at 1192.

[49] Although individuals carrying *illegally* perpetrate many crimes, concealed weapons carried by *licensees* have killed at least 14 officers since 2007. Violence Policy Center, *Concealed Carry Killers*, http://www.vpc.org/ccwkillers. htm.

[50] *See Peruta*, 742 F.3d at 1168.

[51] *United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011), *cert. denied*, —— U.S. ——, 132 S.Ct. 756 (2011).

enforcement or the legislature.[52] This Court should grant *en banc* review to put the power to protect public safety back where it belongs: with California's legislature and law enforcement officials.[53]

CONCLUSION

For the foregoing reasons, *Amici* respectfully suggest that the Court grant Yolo County and Sheriff Prieto's petition and rehear this case—and the *Peruta* case upon which it relies—*en banc*.

Dated: March 25, 2014 Respectfully submitted,

COVINGTON & BURLING LLP
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By: s/ Simon J. Frankel
SIMON J. FRANKEL

Attorneys for *Amici Curiae*

[52] *See* 742 F.3d at 1177-78; *compare Kachalsky*, 701 F.3d at 97; *Drake*, 724 F.3d at 436-37; *Woollard*, 712 F.3d at 881.

[53] Beyond the legal errors described above, the *Peruta* panel made several factual errors. First, San Diego *County* is not incorporated. Of the county's 4,261 square miles, 3,572 are *unincorporated*. http://www.sandag.org/resources/demographics _and_other_data/demographics/fastfacts/unin.htm. And the opinion incorrectly states that "open carry is prohibited in San Diego County, and elsewhere in California, without exception." 742 F.3d at 1171. One *can* carry unloaded firearms publicly in unincorporated areas, with certain exceptions, and loaded firearms can be carried publicly in less densely-populated areas. *See* Cal. Penal Code §§ 25850(a), 26350(a). The *Peruta* opinion thus assumes incorrectly that California "express[es] a preference for concealed rather than open carry," 742 F.3d at 1172.

CERTIFICATION OF COMPLIANCE

This brief complies with the type-volume limitation of 9th Cir. R. 29-2(c)(2), 32 and 35 because the brief does not exceed 15 pages, excluding material not counted under Fed. R. App. P. 32.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using MS-Word in 14-point Times New Roman font.

March 25, 2014	s/ Simon J. Frankel
Date	*Attorney Name*

CERTIFICATE OF SERVICE

I hereby certify that on March 25, 2014, 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.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Signature: s/ Simon J. Frankel

EXHIBIT A

FILED

MAR 05 2014

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ADAM RICHARDS; SECOND AMENDMENT FOUNDATION; CALGUNS FOUNDATION, INC.; BRETT STEWART, Plaintiffs - Appellants, v. ED PRIETO; COUNTY OF YOLO, Defendants - Appellees.	No. 11-16255 D.C. No. 2:09-cv-01235-MCE-DAD MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Morrison C. England, Chief District Judge, Presiding

Argued and Submitted December 6, 2012
San Francisco, California

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

Plaintiffs Adam Richards, Brett Stewart, the Second Amendment Foundation, and the Calguns Foundation (collectively, "Richards") brought an action under 42 U.S.C. § 1983 against Defendants Yolo County and its Sheriff, Ed

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Prieto (collectively, "Prieto"), alleging that the Yolo County policy for issuing concealed-carry permits violates the Second Amendment. Specifically, Richards argues that Yolo County's policy, in light of the California regulatory regime as a whole, abridges the Second Amendment right to bear arms because its definition of "good cause"[1] prevents a responsible, law-abiding citizen from carrying a handgun in public for the lawful purpose of self-defense. On cross-motions for summary judgment, the district court concluded that Yolo County's policy did not infringe Richard's Second Amendment rights. It thus denied Richard's motion for summary judgment and granted Prieto's.

In light of our disposition of the same issue in *Peruta v. County of San Diego*, No. 10-56971, — F.3d — (Feb. 13, 2014), we conclude that the district court in this case erred in denying Richard's motion for summary judgment because the Yolo County policy impermissibly infringes on the Second Amendment right to bear arms in lawful self-defense.

REVERSED and **REMANDED**.

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[1] Yolo County's policy provides that "self protection and protection of family (without credible threats of violence)" are "invalid reasons" for requesting a permit.

Richards v. Prieto, No. 11-16255

THOMAS, Circuit Judge, concurring in the judgment:

I agree that, if unaltered by an *en banc* panel or by the Supreme Court, *Peruta v. County of San Diego*, No. 10-56971,— F.3d—, 2014 WL 555862 (Feb. 13, 2014), requires reversing and remanding in this case. *Peruta* and this case were argued and submitted on the same date. Absent *Peruta*, I would hold that the Yolo County's "good cause" requirement is constitutional because carrying concealed weapons in public is not conduct protected by the Second Amendment. *See United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010). I also would have held, in the alternative, that even if the good cause requirement implicated the Second Amendment, the policy survives intermediate scrutiny.

Therefore, I concur in the judgment.