

In The
Supreme Court of the United States

JOHN M. DRAKE, GREGORY C. GALLAHER,
LENNY S. SALERNO, FINLEY FENTON,
SECOND AMENDMENT FOUNDATION, INC.,
AND ASSOCIATION OF NEW JERSEY
RIFLE & PISTOL CLUBS, INC.,

Petitioners,

v.

EDWARD A. JEREJIAN, THOMAS D. MANAHAN,
JOSEPH R. FUENTES, ROBERT JONES,
RICHARD COOK, AND JOHN JAY HOFFMAN,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit**

SUPPLEMENTAL BRIEF FOR PETITIONERS

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RULE 29.6 DISCLOSURE STATEMENT

No parent or publicly owned corporation owns 10% or more of the stock in Second Amendment Foundation, Inc. or Association of New Jersey Rifle & Pistol Clubs, Inc.

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SUPPLEMENTAL BRIEF

Pursuant to Rule 15.8, Petitioners bring to the Court's attention the Ninth Circuit's opinion in *Peruta v. County of San Diego*, No. 10-56971, 2014 U.S. App. LEXIS 2786 (9th Cir. Feb. 13, 2014), issued after the filing of the petition for certiorari.

Peruta deepens the circuit splits underlying this petition. The Ninth Circuit specifically and repeatedly rejected the opinion below, and instead followed Judge Hardiman's dissent, in striking down a substantially identical limitation on the issuance of permits to bear arms. In so doing, the Ninth Circuit largely adopted the same arguments Petitioners raised below. But it remains unclear when, if ever, the Ninth Circuit's opinion might come before this Court.

1. California law allows ordinary, responsible, law-abiding adult citizens to carry handguns for self-defense only upon a showing of "good cause." Cal. Penal Code §§ 26150(a)(2), 26155(a)(2), 26202. Each licensing authority – a county sheriff or municipal police department – is authorized to define and enforce its own concept of "good cause." Cal. Penal Code §§ 26160, 26202. *Peruta* concerned a challenge to San Diego County's definition of "good cause" as a "set of circumstances that distinguish the applicant from the mainstream and causes him or her to be placed in harm's way." *Peruta*, 2014 U.S. App. LEXIS 2786, at *5 (quotation omitted). "[C]oncern for 'one's personal safety alone is not considered good cause.'" *Id.* at *6 (quotation omitted in the source). *Peruta*

plaintiffs argued that “by defining ‘good cause’ . . . to exclude a general desire to carry [a handgun] for self-defense,” the County violated their Second Amendment rights. *Id.* at *8.¹

San Diego County’s policy is practically indistinguishable from New Jersey’s “justifiable need” requirement. N.J. Stat. Ann. § 2C:58-4(c). Echoing New Jersey’s demand that “justifiable need” be “evidenced by specific threats or previous attacks,” N.J. Admin. Code § 13:54-2.4(d)(1), San Diego County’s “good cause” policy demands that applicants “provide supporting documentation in order to demonstrate and elaborate good cause . . . such as restraining orders, letters from law enforcement agencies or the [district attorney] familiar with the case,” *Peruta*, 2014 U.S. App. LEXIS 2786, at *6 (quotation omitted; alteration in source), the same type of material that Petitioners could not produce to establish “justifiable need” in this action.

2. Following the familiar two-step Second Amendment framework adopted by the court below, *id.* at *11-*12, the Ninth Circuit first set out to determine whether “the restricted activity – here, a restriction on a responsible, law-abiding citizen’s

¹ The Ninth Circuit stressed that it struck down only San Diego County’s “good cause” policy. *Peruta*, at *80 & n.19. But it is difficult to imagine what would remain of the statutory requirement, as a check on licensing, were licensing authorities obligated to accept the constitutional self-defense interest as “good cause.”

ability to carry a gun outside the home for self-defense – fall[s] within the Second Amendment right to keep and bear arms for the purpose of self-defense[.]” *Id.* at *12 (footnote and citations omitted). While the court below was “not inclined to address [Petitioners’] contention” that carrying defensive handguns lies within the Second Amendment’s scope “by engaging in a round of full-blown historical analysis,” Pet. App. 11a, the Ninth Circuit did exactly that, launching into an exhaustive survey of the Second Amendment’s original public meaning and the historical understanding of what it means to “bear arms.” *Peruta*, 2014 U.S. App. LEXIS 2786, at *12-*61. Petitioners had raised essentially the same points below, citing many of the sources endorsed by the Ninth Circuit. See Pet. C.A. Br. 11-38; Pet. C.A. Reply Br. 10-18; see also Pet. 30-33.

The Ninth Circuit repeatedly rejected the majority below’s assertion, Pet. App. 12a, that determining whether the Second Amendment secures a right to carry defensive handguns is unnecessary:

[W]e must fully understand the historical scope of the right before we can determine whether and to what extent the San Diego County policy burdens the right or whether it goes even further and ‘amounts to a destruction of the right’ altogether. *Heller* instructs that text and history are our primary guides in that inquiry.

Peruta, 2014 U.S. App. LEXIS 2786, at *62 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 629 (2008)) (internal quotation omitted).

We thus disagree with those courts . . . that have taken the view that it is not necessary (and, thus, necessary *not*) to decide whether carrying a gun in public for the lawful purpose of self-defense is a constitutionally protected activity. Understanding the scope of the right is not just necessary, it is key to our analysis.

Id. at *63-*64 (citing *Drake v. Filko*, 724 F.3d 426, 431 (3d Cir. 2013); *Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013); *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 89 (2d Cir. 2012)) (other citation omitted).²

We are unpersuaded by the decisions of the Second, Third, and Fourth Circuits for several reasons. First, contrary to the approach in *Heller*, all three courts declined to undertake a complete historical analysis of the scope and nature of the Second Amendment right outside the home.

² This reference to the majority below addresses the latter's alternative "intermediate scrutiny" holding rather than its primary holding that the Second Amendment does not encompass carrying defensive handguns outside the home.

Peruta, 2014 U.S. App. LEXIS 2786, at *82 (comparing *Drake* unfavorably with *Heller*) (other citations omitted).

Indeed, the Ninth Circuit singled out the majority below for particularly strong criticism.³ While the Second, Third, and Fourth Circuits “erred in outright rejecting history and tradition as unhelpful and ambiguous,” *id.* at *86,

the Third Circuit went even further than that. It not only rejected history and tradition, but specifically relied on more recent mid-twentieth century developments to justify New Jersey’s permitting scheme.

Id. at *86 n.21.

We reject this analysis because it goes against the analysis of the Second Amendment’s scope employed in *Heller* and *McDonald* [v. *City of Chicago*, 130 S. Ct. 3020 (2010)]: those cases made clear that the scope of the Second Amendment right depends not on post-twentieth century developments, but instead on the understanding of the right that predominated from the time of ratification through the nineteenth century.

Id. at *87 n.21 (citations omitted).

³ In contrast, the Ninth Circuit favorably cited Judge Hardiman’s dissent eight times.

And in direct conflict with the majority below's decision that the carrying of a handgun for self-defense is not "conduct within the scope of the Second Amendment's guarantee," Pet. App. 8a; see also *id.* at 19a, the Ninth Circuit concluded that "the carrying of an operable handgun outside the home for the lawful purpose of self-defense, though subject to traditional restrictions, constitutes 'bear[ing] Arms' within the meaning of the Second Amendment." *Peruta*, 2014 U.S. App. LEXIS 2786, at *61 (alteration in source).

The decision below now stands alone against the weight of five other circuits that either explicitly hold⁴ or assume as appears necessary⁵ that the Second Amendment does not merely potentially apply outside the home in some manner, but applies specifically to the act of carrying a handgun outside the home for self-defense.⁶ Not counting the Fifth Circuit's decision in *Nat'l Rifle Ass'n of Am., Inc. v. McCraw*, 719 F.3d 338, 346 (5th Cir. 2013), which implied its assumption of the right's existence, see Pet. 17, the Ninth Circuit declared, "we are the fifth circuit court to opine expressly on the issue, joining an existent

⁴ *Peruta*; *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012).

⁵ *Kachalsky*, 701 F.3d at 93; *id.* at 89 & n.10; *Woollard*, 712 F.3d at 876; *Nat'l Rifle Ass'n of Am., Inc. v. McCraw*, 719 F.3d 338, 346 (5th Cir. 2013).

⁶ The Ninth Circuit referenced, but did not consider, other activities the Second Amendment might protect outside the home, including "recreation, hunting, or resisting government tyranny." *Peruta*, at *21 n.4 (quotation omitted).

circuit split.” *Peruta*, 2014 U.S. App. LEXIS 2786, at *81 (citing *Drake*, 724 F.3d at 431-35) (other citations omitted).

Moreover, unlike the Second and Fourth Circuits, and the Third Circuit’s alternative holding, which assumed the existence of a right to carry defensive handguns but ascribed it marginal importance, the Ninth Circuit followed the Seventh Circuit in declaring this right to be within the Second Amendment’s core.

By evading an in-depth analysis of history and tradition, the Second, Third, and Fourth Circuits missed a crucial piece of the Second Amendment analysis. They failed to comprehend that carrying weapons in public for the lawful purpose of self defense is a central component of the right to bear arms.

Id. at *88.⁷

⁷ Petitioner SAF has persistently urged that historical analysis of a right’s scope is essential to understanding the degree of protection that courts must afford the right. See Pet. for Cert. at 24, *Woollard v. Gallagher*, No. 13-42 (“many courts simply dispense with the first step of discerning a right through interpretation, only assuming that a right (of abstract dimension) is implicated, thus carefully avoiding any holding that the right has any substantive content scrutiny”); Brief of Second Amendment Foundation as Amicus Curiae at 24, *Nat’l Rifle Ass’n v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, No. 13-137 (“[o]nly upon concretely defining a right can that right’s values be weighed against regulatory interests and alternatives.”).

3. Having concluded that the Second Amendment secures a right to carry defensive handguns, the Ninth Circuit declined to apply any level of means-ends scrutiny to San Diego's "good cause" policy. Excluding the constitutional self-defense interest from the "good cause" required to carry handguns does not merely burden the Second Amendment right, but "destroys" it. *Peruta*, 2014 U.S. App. LEXIS 2786, at *72. This holding presents the inverse image of the lower court's decision to uphold New Jersey's "justifiable need" requirement simply upon concluding that carrying handguns for self-defense is not at all a right. Pet. App. 19a. Ironically, the majority below implicitly agreed that New Jersey's "justifiable need" standard destroys the Second Amendment right, citing that regulation's enactment as evidence of an allegedly "longstanding" view that constitutional protection cannot extend to the carrying of handguns for self-defense.

The Ninth Circuit's refusal to apply any means-ends standard of review to San Diego's discretionary licensing scheme tracks the arguments Petitioners advanced below. Under the heading, "New Jersey's 'Justifiable Need' Requirement Fails Any Level of Means-Ends Scrutiny," Petitioners argued that "the selection of a scrutiny standard may prove unimportant, because the 'justifiable need' standard plainly fails to advance any valid government interest. . . ." Pet. C.A. Br. 49. "The right to self-defense at the Second Amendment's core is enjoyed by everyone, not just by those whom officials believe are more likely to

require it, and the state cannot have a general interest in suppressing a fundamental right. . . .” *Id.* at 53.

But the Ninth Circuit, like the majority below, did not stop at “step one” of the Second Amendment analysis. *Peruta* continued, rejecting the majority below’s alternative holding that had followed the Second and Fourth Circuits in purportedly applying “intermediate” scrutiny.

This is not an appropriate application of intermediate scrutiny in at least two respects. First, the analysis in the Second, Third, and Fourth Circuit decisions is near-identical to the freestanding “interest-balancing inquiry” that Justice Breyer proposed – and that the majority explicitly rejected – in *Heller*.

Peruta, 2014 U.S. App. LEXIS 2786, at *91 (citations omitted).

The Ninth Circuit then assailed “the high degree of deference” that the majority below, among other courts, “afforded the state legislatures’ assessments of the fit between the challenged regulations and the asserted government interest they served.” *Id.* at *93. “In light of the states’ failure to demonstrate sufficient narrow tailoring in *Drake*, *Woollard*, and *Kachalsky*, the gun regulations at issue in those cases should have been struck down even under intermediate scrutiny.” *Id.* at *97.

4. As Petitioners predicted, Pet. 36, *Peruta*’s path to this Court remains uncertain. Although any Ninth Circuit judge may yet call for rehearing, San

Diego's Sheriff has announced that he will not seek rehearing en banc, and will follow the majority's decision should it become final. See San Diego Sheriff's Decision Regarding the Ninth Circuit's Opinion on CCWs, available at <http://apps.sdsheriff.net/press/Default.aspx?FileLink=fce6dc6b-e015-4c15-8d6c-4e38b4e212e1> (last visited Feb. 23, 2014). And any plans by California's Attorney General to intervene and seek rehearing might be complicated by the panel's belief that its decision did not implicate any state statutes. See note 1, *supra*.

In any event, the conflicts this case implicates, ripe for review before *Peruta*, are only more compelling in *Peruta*'s wake. For the foregoing reasons, and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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