09-16852

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES ROTHERY and ANDREA HOFFMAN,

Plaintiffs - Appellants,

v.

COUNTY OF SACRAMENTO, et al.,

Defendants - Appellees.

On Appeal from the United States District Court
for the District of California

No. 2:08-cv-02064-JAM-KJM
The Honorable John A. Mendez, Judge

ANSWERING BRIEF OF APPELLEE KAMALA D. HARRIS

KAMALA D. HARRIS
Attorney General of California
DOUGLAS J. WOODS
Senior Assistant Attorney General
MARK R. BECKINGTON
Supervising Deputy Attorney General
GEORGE WATERS
Deputy Attorney General
State Bar No. 88295
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 323-8050
Fax: (916) 324-8835
Email: George.Waters@doj.ca.gov
Attorneys for Appellee Kamala D. Harris

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

COURT RULES

INTRODUCTION

This appeal involves a constitutional challenge to California's licensing scheme regulating the carry of concealed firearms and to county "good cause" requirements under that scheme. All claims were dismissed on the pleadings without leave to amend in 2009. The appeal was then stayed for more than six years pending other appeals presenting similar issues, particularly *Peruta v. County of San Diego*, 824 F.3d 919 (9th Cir. 2016) (en banc). In the en banc opinion in *Peruta*, issued on June 9, 2016, the Ninth Circuit held that the Second Amendment does not protect a right of a member of the general public to carry concealed firearms in public. Thus, any restriction a state may choose to impose on concealed carry is allowed under the Amendment. *Peruta* resolves this appeal, and requires that the district court's order of dismissal be affirmed.

JURISDICTIONAL STATEMENT

District court jurisdiction: The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1343(a). Plaintiffs' claims were based on the Fourteenth Amendment's Equal Protection and Privileges and Immunities Clauses, the Second Amendment, the Ninth Amendment, and 42 U.S.C. § 1983.

Appellate jurisdiction: This Court has jurisdiction under 28 U.S.C. § 1291.

Timeliness of appeal: Plaintiffs' appeal is timely under Federal Rule of Appellate Procedure 4(a)(2). The district court entered orders dismissing plaintiffs' first amended complaint with prejudice on July 27 and July 29, 2009. ER 13, ER 9. Notice of appeal from those orders was filed on August 24, 2009. ER 42. The Clerk's Judgment was entered four days later, on August 28, 2009. ER 41. A notice of appeal filed after announcement of an order, but before entry of judgment, is treated as filed on the date of and after the entry. Fed. R. App. P. 4(a)(2).

Appeal from final judgment: The appeal is treated as an appeal from a final judgment entered August 28, 2009. ER 41; Fed. R. App. P. 4(a)(2).

ISSUE PRESENTED

Whether the Second, Ninth, or Fourteenth Amendments protect the right to carry concealed weapons in public.

STATEMENT OF THE CASE

I. CALIFORNIA LAW REGARDING THE PUBLIC CARRY OF CONCEALED FIREARMS[1]

Handguns are firearms that are capable of being concealed on a person. Cal. Penal Code § 16640.[2] A California resident who is over 18 and not prohibited from possessing a firearm may keep a loaded handgun in his or her home or business, and transport the gun in a vehicle provided it is unloaded and in a locked container. §§ 25505, 25525, 25605, 25610. Under appropriate circumstances, an individual may carry a loaded firearm when he or she reasonably believes that any person or the property of any person is in immediate, grave danger and that the carrying of the weapon is necessary for the preservation of that person or property. § 26045. For reasons of public safety, however, state law generally prohibits the carrying

---

[1] California firearms laws were recodified during the pendency of this appeal. On January 1, 2012, the Deadly Weapons Recodification Act replaced the prior Control of Deadly Weapons Law. *See* Cal. Penal Code § 16000. The recodification "is intended to be entirely nonsubstantive in effect." *Id*. § 16001. This Answer Brief uses the new codification. Appellants' Opening Brief, filed in 2010, uses the old codification. The California Law Revision Commission has published a disposition table relating the old provisions to the new provisions. *See* http://www.clrc.ca.gov/pub/Misc-Report/M300-Tables/UpdatedDispoTable.pdf.

[2] Unless otherwise noted, all statutory references are to the California Penal Code.

of a loaded or unloaded handgun on the person, whether open or concealed, in public places in the state's incorporated cities and in unincorporated areas where discharging a firearm is prohibited. §§ 25400, 25850, 26350, 17030.[3] Still, state law recognizes that some persons, based on their particular circumstances, may have a need to carry a concealed weapon for self-defense. State law therefore also permits any resident of good moral character to seek a permit to carry a concealed handgun, even in an urban or residential area, for "[g]ood cause." §§ 26150, 26155.

The California Legislature has delegated to local licensing authorities (generally, county sheriffs or city police chiefs) the authority to make determinations concerning what constitutes "good cause" for obtaining a "concealed carry weapon," or "CCW," permit. §§ 26150, 26155, 26160. Good cause requirements strike a permissible balance between enabling private individuals to carry concealed handguns on the person, even in urban or residential areas, if they can establish a particular need to do so for purposes of self-defense, and a legislative judgment that allowing the

[3] There are exceptions for persons holding particular types of positions, such as peace officers, military personnel, and persons in private security. §§ 25450, 25620, 25630, 25650, 25900, 26030. There are also exceptions for persons engaged in particular activities, such as hunting. § 25640.

essentially unrestricted carrying of handguns in such areas makes the public, on balance, *less* safe.

Honorably retired peace officers are generally exempt from restrictions on carrying concealed firearms and loaded weapons. §§ 25450, 25900, 26300. At the time of retirement, such peace officers are issued an identification certificate by the agency that employed them. §§ 25455, 25905. The certificate is stamped with an endorsement stating that the holder is authorized to carry a concealed weapon. §§ 25460(c), 25905(c). Officers who retire due to a psychological disability are not eligible. § 26305(a). Every five years, the holder may petition the issuing agency for renewal. §§ 25465, 25915. The issuing agency may, at initial retirement or any time thereafter, revoke a retired officer's privileges for good cause. §§ 25470, 25920.

II. PLAINTIFFS' ALLEGATIONS

Plaintiffs appeal from an order dismissing their 78-page, 808-paragraph first amended complaint ("Complaint") for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). Despite the extraordinary length of the Complaint, described by the district court as "an example that more is not better" (ER 19:17-18), plaintiffs' material allegations can be briefly summarized. The allegations below are taken from the Complaint.

Plaintiffs James Rothery and Andrea Hoffman applied for CCW permits in Sacramento County. Plaintiffs allege they were qualified to receive CCW permits and they met the "good cause" standard for issuance of a permit, but nonetheless their applications were denied. ER 66, ¶¶ 1-4.

Between 2003 and 2006, Plaintiff Rothery applied for a CCW permit on three occasions. All were denied. He did not appeal the third denial because he knew that it would be futile. ER 67, ¶¶ 9-12.

Plaintiff Hoffman applied for a CCW permit in 2007 and was denied. Her appeal was denied in 2008. ER 66, ¶ 8.

Plaintiff Hoffman requested an Honorary Deputy Sheriff's Commission, and also requested to join the Sheriff's Posse and the Sheriff's Aero-Squadron. Membership in each is usually accompanied by a CCW permit. She alleges the requests were denied because membership was limited to close friends and supporters of the Sheriff. ER 66, ¶ 7; ER 71, ¶¶ 51-53; ER 72, ¶¶ 55-59. She alleges the County Defendants issued false and fraudulent denial letters stating that there was no "good cause" for issuance of a CCW permit. ER 70, ¶ 46.

Plaintiffs have applied for CCW permits but were denied the permits and ancillary benefits. Plaintiffs would like to carry concealed handguns for the protection of themselves, their families, and other citizens, just as retired

peace officers and the Sheriff's friends and supporters do. ER 130, ¶¶ 697-699.

Retired California Peace Officers obtain CCW authorization under a separate statute which does not require a showing of good cause. Plaintiffs allege there is no rational basis for this. ER 135, ¶¶ 738-743.

III. DISTRICT COURT PROCEEDINGS

Plaintiffs filed their original complaint on September 2, 2008, and filed the amended complaint on May 1, 2009. ER 146 [#2]; ER 148 [#24]; ER 65-142 [amended complaint]. Named as defendants are former Sacramento County Sheriff Lou Blanas, then-Sheriff John McGinnis, Detective Tim Sheehan, the Sacramento County Sheriff's Department, and the County of Sacramento (collectively the "County Defendants"), and the California Attorney General. ER 65.

The Complaint attempted to state seven claims challenging state statutes and county policies that require a showing of "good cause" for issuance of a CCW permit:

No.	¶¶	Description	Defendants
1.[4]	66-675; ER 73-127	Issuance of CCW permits to campaign contributors and friends violates RICO [Racketeer Influenced and Corrupt Organizations Act], 18 U.S.C. § 1961 et seq.	Former Sheriff Blanas and then-Sheriff McGinnis
2.	676-765; ER 127-138	42 U.S.C. § 1983— Preferential treatment of retired peace officers under CCW statutes and policies violates Equal Protection Clause of Fourteenth Amendment	Sacramento County, former-Sheriff Blanas, then-Sheriff McGinnis, and Attorney General
3.[5]	766-769; ER 138	42 U.S.C. § 1983— Issuance of CCW permits to campaign contributors and friends violates speech and association clauses of the First Amendment	All Defendants except Detective Sheehan and the Attorney General
4.	770-774; ER 138	42 U.S.C. § 1983— CCW good cause requirement violates Second Amendment	All Defendants except Detective Sheehan
5.	775-788; ER 139-140	42 U.S.C. § 1983—CCW good cause requirement violates Privileges and Immunities Clause of the Fourteenth Amendment	All Defendants except Detective Sheehan
6.	789-797; ER 140-141	42 U.S.C. § 1983—CCW good cause requirement violates Ninth Amendment	All Defendants except Detective Sheehan

[4] The first and third claims have been abandoned on appeal. Appellants' Opening Brief (AOB) at 4.

[5] See previous footnote.

No.	¶¶	Description	Defendants
7.	798-808; ER 141-142	42 U.S.C. § 1983—Declaratory and injunctive relief	All Defendants except Detective Sheehan

ER 65-142. As relief, plaintiffs sought an injunction that CCW permits be issued to plaintiffs, or that CCW statutes and the County's written policy be declared unconstitutional. ER 137, ¶ 759. Plaintiffs also sought general damages, special damages, attorney fees, and punitive damages against individually named defendants. ER 142.

Both the Attorney General and the County Defendants moved to dismiss, and both motions were granted. ER 9-12; ER 13-16. All claims were dismissed with prejudice pursuant to Federal Rule of Civil Procedure 12(b)(6). *Id*.

Five claims (the second, fourth, fifth, sixth, and seventh) were pled against the Attorney General. As to the second claim (preferential treatment of retired peace officers in the issuance of CCW permits violates the Equal Protection Clause), the district court found the rational basis test applied and that there was an obvious basis for the separate treatment of retired peace

officers: the need to protect them from enemies they may have made during their service. ER 26 [Transcript].[6] Thus no claim for relief was stated.

As to the fourth claim (denial of CCW permits violates the Second Amendment), the district court found that the Second Amendment does not protect the right to carry a concealed weapon in public. ER 10; ER 29-30. Thus no claim for relief was stated.

As to the fifth claim (denial of CCW permits violates the Privileges and Immunities clause of the Fourteenth Amendment), the district court found that the Privileges and Immunities Clause does not protect the right to carry a concealed weapon in public. ER 11; ER 33. Thus no claim for relief was stated.

As to the sixth claim (denial of CCW permits violates the natural right of self-preservation, as incorporated in the Ninth Amendment), the district court held that the Ninth Amendment does not encompass an unenumerated right to carry concealed weapons in public. ER 11; ER 34. Thus no claim for relief was stated.

[6] The district court's order of dismissal incorporates the Reporter's Transcript by reference "as though fully set forth herein." ER 10.

As to the seventh claim (declaratory and injunctive relief), the district court held that it is not a separate claim, rather it is a request for remedy in the event that plaintiffs succeeded on any of their preceding claims. ER 11; ER 35. Thus no claim for relief was stated.

Judgment for defendants was entered on August 28, 2009. ER 41.

IV. STAYS IN THE COURT OF APPEALS

This appeal was docketed in the Ninth Circuit on August 25, 2009. Appellate Docket ("App. Dkt.") 1. Plaintiffs' opening brief was filed on May 6, 2010. App. Dkt. 11. The Attorney General and the County Defendants then moved for a stay, which was granted for a period of 90 days. App. Dkt. 14, 15. That began a series of 25 consecutive stays, the last 23 of which were not opposed. App. Dkt. 15, 18, 20, 22, 25, 27, 35, 37, 39, 43, 45, 47, 49, 51, 53, 55, 57, 59, 61, 63, 65, 67, 71, 73, 75. In all, this appeal was stayed from May 24, 2010 to October 11, 2016.

The stays were necessary because more advanced Ninth Circuit appeals—particularly *Peruta v. County of San Diego*, No. 10-56971—posed similar issues. As stated in the most recent stay motion:

> There is good reason to stay the present appeal pending resolution of the *Peruta* appeal. There is considerable overlap between *Peruta* and the present case. Both cases present questions involving the constitutionality

> of Concealed Carry Weapon (CCW) statutes and policies.

App. Dkt. 76. The last stay lapsed on October 11, 2016, after *Peruta* had been resolved by an en banc panel of this Court. *See Peruta*, 824 F.3d 919.

STANDARD OF REVIEW

Dismissal for failure to state a claim under Rule 12(b)(6) is reviewed de novo. *Thompson v. Davis*, 295 F.3d 890, 895 (9th Cir.2002). "A Rule 12(b)(6) dismissal may be based on either a 'lack of a cognizable legal theory' or 'the absence of sufficient facts alleged under a cognizable legal theory.'" *Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1121-22 (9th Cir. 2008) (quoting *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990)). The Court accepts as true all material allegations in the complaint and construes those allegations in the light most favorable to the plaintiff. *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 588 (9th Cir. 2008). However, the Court need not accept as true legal conclusions, conclusory allegations, unwarranted deductions of fact, or unreasonable inferences. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988, *amended by* 275 F.3d 1187 (9th Cir. 2001); *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981).

SUMMARY OF ARGUMENT

California's concealed-carry licensing scheme and county "good cause" requirements under that scheme are constitutionally valid and do not violate the Second, Ninth, or Fourteenth Amendments.

Regarding plaintiffs' Equal Protection challenge to a separate licensing scheme for retired peace officers, the Second Amendment does not create a fundamental right to carry a concealed weapon in public. *Peruta*, 824 F.3d at 939. Thus the rational basis test applies to this challenge. Here the separate licensing scheme is rationally related to an important government interest: the protection and safety of retired peace officers.

Regarding plaintiffs' Second Amendment challenge to California's concealed-carry licensing scheme, the Second Amendment does not protect concealed carry. Thus any restriction—including a "good cause" requirement—is allowed. *Peruta*, 824 F.3d at 939.

Regarding plaintiffs' challenges under the Privileges and Immunities Clause of the Fourteenth Amendment and under the Ninth Amendment, plaintiffs cite no authority for the proposition that either amendment protects the right to carry concealed weapons in public. They do not.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DISMISSED THE SECOND CLAIM THAT THE SEPARATE CCW LICENSING SCHEME FOR RETIRED PEACE OFFICERS VIOLATES THE EQUAL PROTECTION CLAUSE.

The Equal Protection Clause of the Fourteenth Amendment states, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." In the district court, plaintiffs alleged that they were denied CCW permits pursuant to a statutory "good cause" standard, while retired peace officers generally receive CCW permits without having to demonstrate good cause. ER 135 ("Retired California Peace Officers obtain their concealed weapons authorization under a separate statute, which does not demand a showing of good cause."). Plaintiffs alleged that this difference in treatment violates the Equal Protection Clause. ER 24. The district court properly found that the rational basis test applied, and that there was a rational basis for the difference in treatment—the protection and safety of retired peace officers. ER 26.

Rational basis review is the appropriate level of scrutiny for examining laws that neither violate a fundamental right nor employ a suspect classification. *Romer v. Evans*, 517 U.S. 620, 631 (1996) ("if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the

legislative classification so long as it bears a rational relation to some legitimate end"). The Second Amendment does not create a fundamental right to carry a concealed weapon in public. *Peruta*, 824 F.3d at 939. Further, the legislative classification—between retired peace officers from the general public—does not target a suspect class. Thus the different treatment of the general public and retired peace officers with respect to the right to carry concealed weapons is subject to rational basis review.

The Equal Protection Clause guarantees that the government treats similar individuals in a similar manner. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). "[I]n order for a state action to trigger equal protection review at all, that action must treat similarly situated persons disparately." *Silveira v. Lockyer*, 312 F.3d 1052, 1089 (9th Cir. 2002), *abrogated on other grounds by Heller*, 554 U.S. 570. Under rational basis review, the legislative record need not contain empirical evidence to support the classification so long as the legislative choice is reasonable. *Id.* at 1088. "[T]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it[.]" *Heller*, 509 U.S. 320 (citation and quotation marks omitted).

The fundamental defect in plaintiffs' equal protection claim is that the general public and retired peace officers are not similarly situated with

respect to the right to carry concealed weapons. Retired peace officers may be at risk of retaliation from felons whom they have arrested and incarcerated. "The general law enforcement character of all California 'peace officers' is underscored by the fact that all have the power to make arrests, and all receive a course of training in the exercise of their respective arrest powers and in the use of firearms. " *Cabell v. Chavez-Salido*, 454 U.S. 432, 443-444 (1982) (citations omitted). Peace officers enforce "the sovereign's coercive police powers over the members of the community[.]" *Id*. at 444. Put simply, peace officers are not similarly situated to the public in general because peace officers are invested with the authority to arrest and incarcerate people. As the district court put it, "While an officer's duty to respond to the public's calls for help stops when he retires, the threat of danger from enemies he might have made during his service does not." ER 26.[7]

[7] Plaintiffs' reliance on *Silveira v. Lockyer* is misplaced. *See* AOB at 33-37. *Silveira* concerned a challenge to California's ban on assault rifles. 312 F.3d at 1056. The ban was upheld in every respect save one. As to that one respect, this Court found no rational basis for an exception that granted retired peace officers greater access to assault rifles than was granted to off-duty active peace officers. *Id*. at 1089-1090. In contrast, there is an obvious rational basis for allowing retired peace officers more access to concealed weapons than is granted to the general public.

In sum, retired peace officers are differently situated from the general public in that California has put them in harm's way during the course of their employment and they face a risk of retaliation during retirement. The different treatment of the general public and retired peace officers with respect to the right to carry concealed weapons is reasonably related to a legitimate government interest: the protection and safety of retired peace officers.[8] Thus the district court's dismissal of this claim should be affirmed.

II. THE DISTRICT COURT CORRECTLY DISMISSED THE FOURTH CLAIM THAT THE SECOND AMENDMENT PROTECTS THE RIGHT TO CARRY CONCEALED FIREARMS IN PUBLIC.

The Second Amendment states, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." Plaintiffs contended below that the Second Amendment protects their right to carry concealed weapons in public, and that state CCW laws and county policy violated that right. This contention was squarely rejected by the district court:

> This case involves an attempt to get a permit to carry a concealed weapon. In *Heller*, the Supreme Court found

[8] Significantly, retired peace officers are treated separately under federal law as well. *See* 18 U.S.C. § 926C (retired federal law enforcement officers may carry concealed weapons so long as they retired in good standing and meet active duty requirements to carry firearms).

> the right to use firearms in self-defense to protect one's home was guaranteed by the Constitution. On the other hand, the right to carry a concealed weapon is not guaranteed by the Constitution. And because plaintiffs do not have a Second Amendment right to carry a concealed weapon, and no court has so held, this claim also should be and will be denied.

ER 30.

The present appeal was later stayed for several years to allow the resolution of other appeals posing similar issues. Ultimately, an en banc panel of this Court reached the same conclusion as had the district court—the Second Amendment does not protect the right to carry a concealed weapon in public:

> Our holding that the Second Amendment does not protect the right of a member of the general public to carry concealed firearms in public fully answers the question before us. Because 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. There may or may not be a Second Amendment right for a member of the general public to carry a firearm openly in public. The Supreme Court has not answered that question, and we do not answer it here.

Peruta, 824 F.3d at 939. In light of *Peruta*, the district court's dismissal of plaintiffs' fourth claim is clearly correct.

Statements in Appellants' Opening Brief suggest that plaintiffs seek on appeal to assert a claim that the Second Amendment protects a right to carry firearms either concealed *or openly* in public. *See* AOB at pp. 19-32. No such claim was raised in the district court. Plaintiffs are precluded from introducing a broader claim on appeal by the "invited error doctrine." *Sovak v. Chugai Pharmaceutical Co.*, 280 F.3d 1266, 1270 (9th Cir. 2002) (under "invited error doctrine," a party may not complain on appeal "of errors below for which he is responsible").

The district court dismissal hearing was conducted under the shared understanding that plaintiffs asserted a right to carry concealed weapons in public. ER 32 (district court notes that "plaintiffs equate the right to keep and bear arms with the right to carry firearms concealed, without ever analyzing, or even acknowledging, a possible difference between the two"). Plaintiffs, whose counsel attended the dismissal hearing, did not assert a right to carry firearms openly. *See* ER 17-40. To be sure, throughout this litigation plaintiffs have filed lengthy, unstructured, wide-ranging papers.[9]

---

[9] As the district court observed:

> The complaint itself is an example that more is not better. It's 808 paragraphs. It's 78 pages long. And it is a mishmash of thoughts, legal argument, speculation,

(continued…)

But to the extent that plaintiffs now can find passages in their papers to support theories that were not argued below, they should not be allowed to benefit from ostensible misunderstandings that *they* created.

Under *Peruta*, the district court's dismissal of plaintiffs' Second Amendment claim should be affirmed.

III. THE DISTRICT COURT CORRECTLY DISMISSED THE FIFTH CLAIM THAT THE PRIVILEGES AND IMMUNITIES CLAUSE OF THE FOURTEENTH AMENDMENT PROTECTS THE RIGHT TO CARRY CONCEALED FIREARMS IN PUBLIC.

The Privileges and Immunities Clause of the Fourteenth Amendment states, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States[.]" Plaintiffs contended below that the Privileges and Immunities Clause of the Fourteenth Amendment protected their right to carry concealed weapons in public. This contention was rejected by the district court:

> [P]laintiffs equate the right to keep and bear arms with the right to carry firearms concealed, without ever

---

(…continued)

> with some allegations thrown in. Quite frankly, [counsel], it's Exhibit A of what you should not do in terms of pleading a complaint in federal court.

ER 19.

> analyzing, or even acknowledging, a possible difference between the two. In their opposition, plaintiffs do not even address the particular subject of their lawsuit, which is the denial of a permit to carry concealed weapons. Even if the Court were to assume that if plaintiffs were prevented from possessing firearms a privileges and immunities violation would be found, it does not follow that merely being denied a permit to carry those firearms concealed amounts to such a violation. Plaintiffs have done nothing to persuade, indeed, they have not attempted to persuade, the Court that possession of a firearm equates to carrying that firearm concealed.

ER 32.

In 2010, the U.S. Supreme Court rejected plaintiffs' proposed Constitutional interpretation of the Fourteenth Amendment's Privileges and Immunities Clause in *McDonald v. City of Chicago, Ill.*, 561 U.S. 742 (2010). The Court recognized that the question of the rights protected by the Fourteenth Amendment is analyzed under the Due Process Clause, not under the Privileges and Immunities Clause. *Id*. at 758. Furthermore, in *Peruta*, this Court established that prohibitions on carrying concealed weapons in public had a long history in the United States. *Peruta*, 824 F.3d at 929-939. Therefore, logically there could be no such right as a "privilege" of the citizens of the United States. In short, recent decisions by both U.S. Supreme Court and this Court sitting en banc foreclose plaintiffs' argument and the district court should be affirmed.

IV. THE DISTRICT COURT CORRECTLY DISMISSED THE SIXTH CLAIM THAT THE NINTH AMENDMENT PROTECTS THE RIGHT TO CARRY CONCEALED FIREARMS IN PUBLIC.

The Ninth Amendment states, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." Plaintiffs contended below that the Ninth Amendment protects a natural right to self-preservation, which encompasses the right to bear arms. ER 140-141. The district court rejected this theory, noting that it has been rejected by the Ninth Circuit. ER 34; *see San Diego County Gun Rights Committee v. Reno*, 98 F.3d 1121, 1125 (9th Cir. 1996) ("We join our sister circuits in holding that the Ninth Amendment does not encompass an unenumerated, fundamental, individual right to bear firearms.").

On appeal, plaintiffs' two-paragraph argument presents no precedent that supports their novel Ninth Amendment theory, and no reason to disapprove the clear holding of *Reno*. *See* AOB at p. 50. Accordingly, the district court's dismissal of this claim should be affirmed.

V. THE DISTRICT COURT CORRECTLY DISMISSED THE SEVENTH CLAIM FOR INJUNCTIVE AND DECLARATORY RELIEF.

The seventh claim sought declaratory and injunctive relief directed to statutes and policies concerning the public carry of concealed weapons by

the general public and by retired peace officers. ER 141-182 [Complaint ¶¶ 806]. The district court denied this claim, stating:

> The declaratory and injunctive relief claim is not a separate claim for relief upon which relief may be based. It is, in fact, nothing more than a request for a remedy based upon a favorable finding on the first six claims. It should have been included as part of the prayer for relief, not pled as a separate cause of action. And for those reasons, it should be dismissed.

ER 35.

The holding in *Peruta*—that the Second Amendment does not protect the right to carry concealed firearms in public—resolves any possible injunctive or declaratory relief claim. Indeed, *Peruta* itself was a claim for injunctive and declaratory relief. *Peruta v. County of San Diego*, 758 F. Supp. 2d 1106, 1109 (S.D. Cal. 2010), *rev'd and remanded*, 742 F.3d 1144 (9th Cir. 2014), *on reh'g en banc*, 824 F.3d 919 (9th Cir. 2016), and *aff'd*, 824 F.3d 919 (9th Cir. 2016).

In any event, plaintiffs have waived this issue by not raising it in their opening brief. *Tri-Valley CAREs v. U.S. Dept. of Energy*, 671 F.3d 1113, 1130 (9th Cir. 2012) (claims not made in an opening brief are deemed waived).

VI. SUGGESTION OF MOOTNESS

There is a possibility that this appeal has become moot. *See Chafin v. Chafin*, 133 S.Ct. 1017, 1023 (2013) ("The case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate.") (internal quotation marks and citations omitted). This appeal was stayed for more than six years. During that time, a new Sacramento County Sheriff instituted a CCW policy that loosened the "good cause" requirement for obtaining a concealed carry permit. As stated in the policy "[s]elf-defense may be considered good cause for the issuance of a permit…."[10] Under the revised policy, the number of permit holders increased from just over 300 to more than 7,600. *See* Phillip Reese, "Sacramento sheriff revokes dozens of concealed carry permits following arrests, gun crimes," *The Sacramento Bee*, September 28, 2016 (describing changes in Sacramento County CCW policy).[11] At the end of 2015, Sacramento County had the third highest number of CCW permit holders in California. *Id*. While the Attorney General has no involvement in the

[10] Available at http://www.sacsheriff.com/Pages/Organization/SIIB/documents/ccw_process.pdf .

[11] Available at http://www.sacbee.com/news/investigations/article104717046.html.

issuance of CCW permits, based on plaintiffs' allegations and on the new county policy, it appears that plaintiffs may now be eligible for CCW permits and that their claims may now be moot.

CONCLUSION

For the reasons set forth above, the judgment of the district court should be affirmed.

Dated: November 10, 2016

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
DOUGLAS J. WOODS
Senior Assistant Attorney General
MARK R. BECKINGTON
Supervising Deputy Attorney General

/S/ GEORGE WATERS
GEORGE WATERS
Deputy Attorney General
Attorneys for Appellee Kamala D. Harris

SA2009102233
12495122.doc

STATEMENT OF RELATED CASES

To the best of our knowledge, there are no related cases.

Dated: November 10, 2016

Respectfully Submitted,

KAMALA D. HARRIS
Attorney General of California
DOUGLAS J. WOODS
Senior Assistant Attorney General
MARK R. BECKINGTON
Supervising Deputy Attorney General

/S/ GEORGE WATERS
GEORGE WATERS
Deputy Attorney General
Attorneys for Appellee Kamala D. Harris

CERTIFICATE OF COMPLIANCE

PURSUANT TO FED.R.APP.P 32(a)(7)(C) AND CIRCUIT RULE 32-1 FOR 09-16852

I certify that: (check (x) appropriate option(s))

[X] 1. Pursuant to Fed.R.App.P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached **opening/answering/reply/cross-appeal** brief is

[X] Proportionately spaced, has a typeface of 14 points or more and contains 4,558 words (opening, answering and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words

or is

[ ] Monospaced, has 10.5 or fewer characters per inch and contains ____ words or ___ lines of text (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words or 1,300 lines of text; reply briefs must not exceed 7,000 words or 650 lines of text).

[ ] 2. The attached brief is **not** subject to the type-volume limitations of Fed.R.App.P. 32(a(7)(B) because

[ ] This brief complies with Fed.R.App.P 32(a)(1)-(7) and is a principal brief of no more than 30 pages or a reply brief of no more than 15 pages.

or

[ ] This brief complies with a page or size-volume limitation established by separate court order dated _____ and is

[ ] Proportionately spaced, has a typeface of 14 points or more and contains _____ words,

or is

[ ] Monospaced, has 10.5 or fewer characters per inch and contains __ pages or __ words or __ lines of text.

[ ] 3. Briefs in **Capital Cases**.
This brief is being filed in a capital case pursuant to the type-volume limitations set forth at Circuit Rule 32-4 and is

[ ] Proportionately spaced, has a typeface of 14 points or more and contains _____ words (opening, answering and the second and third briefs filed in cross-appeals must not exceed 21,000 words; reply briefs must not exceed 9,800 words).

or is

[ ] Monospaced, has 10.5 or fewer characters per inch and contains __ words or __ lines of text (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 75 pages or 1,950 lines of text; reply briefs must not exceed 35 pages or 910 lines of text).

☐ 4. **Amicus Briefs**.

☐ Pursuant to Fed.R.App.P 29(d) and 9th Cir.R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 7,000 words or less,

or is

☐ Monospaced, has 10.5 or few characters per inch and contains not more than either 7,000 words or 650 lines of text,

or is

☐ Not subject to the type-volume limitations because it is an amicus brief of no more than 15 pages and complies with Fed.R.App.P. 32 (a)(1)(5).

November 10, 2016
Dated

/s/ George Waters
George Waters
Deputy Attorney General

CERTIFICATE OF SERVICE

Case Name: **James Rothery, et al. v. Lou Blanas, et al. (on Appeal 9th COA)** No. **09-16852**

I hereby certify that on November 10, 2016, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

ANSWERING BRIEF OF APPELLEE KAMALA D. HARRIS

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

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

I further certify that some of the participants in the case are not registered CM/ECF users. On November 10, 2016, I have caused to be mailed in the Office of the Attorney General's internal mail system, the foregoing document(s) by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within three (3) calendar days to the following non-CM/ECF participants:

Honorable John A. Mendez
United States District Court
Eastern District – Courtroom 6
500 I Street, 14th Floor
Sacramento, CA 95814

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on November 10, 2016, at Sacramento, California.

Tracie L. Campbell
Declarant

/s/ Tracie Campbell
Signature

SA2009102233
12495602.doc12495602.doc