THE *PERUTA* OPINION ANSWERS A QUESTION

ASKED TO DENY CALIFORNIANS THEIR RIGHT TO CARRY

A full panel of the U.S. Court of Appeals for the Ninth Circuit today used shameful sophistry and sleight of hand to effectively deny millions of Californians their constitutional right to bear firearms in public for self-defense. The ruling came in the long-running case of *Peruta v. San Diego*, which challenged California's discretionary issuance of concealed carry permits, the only option Californians have to legally exercise this right. Ignoring that fact, the court held that concealed carry of firearms in public is not protected by the Second Amendment and

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that discretionary permitting for it therefore does not offend that provision.

We have been reporting on the saga of the *Peruta* case for a number of years The issue in the case is simple: Does the Second Amendment allow California officials to deny the state's residents the only effective means they have of carrying a firearm in public for self-defense, absent a showing of an extraordinary need to do so? The answer to that question is simple – no – and it was answered correctly in an opinion by a three judge panel of the Ninth Circuit back in 2014. The panel recognized that the question at the heart of the case was, "whether responsible, law-abiding citizen have a right under the Second Amendment to carry a firearm in public for self-defense."

Nevertheless, after that decision was issued, a majority of the full Ninth Circuit Court of Appeals took it upon itself to order the case to be reheard. In reversing the panel's decision, the full court deceptively recast the issue in the case as whether plaintiffs, who "wish to carry concealed firearms in public" but "do not satisfy the good cause requirements in their counties" nevertheless have a Second Amendment right to be issued concealed carry licenses.

The plaintiffs asserted because concealed carry licenses are the only means responsible, law-abiding Californians have to exercise their Second Amendment right to bear arms in California, they cannot be subject to issuance only on a showing of extraordinary need. It was the State of California, not the plaintiffs, that decided concealed carry would be the vehicle state residents had of protecting themselves from violent crime in public.

The plaintiffs' brief review of the previous decision makes this abundantly clear:

> Nor does the panel's decision establish—either explicitly or implicitly—a constitutional right to carry a concealed handgun in public. To be sure, the decision entitles law-abiding residents of San Diego who can satisfy all other requirements to obtain concealed-carry licenses. But that result is a product of the state's preference for concealed carry, as reflected in its decision to flatly prohibit open carry but make concealed-carry licenses available for "good cause" shown. Nothing about the panel's decision prevents the state from altering that preference, and to the extent the sheriff cannot do so himself, that is a consequence of state law, not the panel's decision. Accordingly, whether the Second Amendment permits limits on the manner in which the right it protects may be exercised outside the home is a question that the panel's decision correctly leaves for another day.

While a majority of the Ninth Circuit judges signed onto the decision to deny Californians their rights, three strongly-reasoned dissents, accounting for the opinions of four judges, called out the majority's chicanery. The dissents correctly point out that it was the state, not the plaintiffs, who established the "concealed carry" permitting context of the case. The dissenting judges also would have explicitly held that responsible, law-abiding Americans certainly do have a right to "bear" arms in public for self-defense, an issue on which the majority claimed to reserve judgement.

According to the dissent of Judge Conseulo M. Callahan (an appointee of President George W. Bush):

> Plaintiffs assert that the counties' concealed weapons licensing schemes, in the context of California's regulations on firearms, obliterate their right to bear arms for self-defense in public. The Supreme Court in *Heller* addressed concealed carry restrictions and instructed that those restrictions be evaluated in context with open-carry laws to ensure that the government does not deprive citizens of a constitutional right by imposing incremental burdens. *Heller*, 554 U.S. at 629. In the context of present-day California law, the Defendant counties' limited licensing of the right to carry concealed firearms is tantamount to a total ban on the right of an ordinary citizen to carry a firearm in public for self-defense. Thus, Plaintiffs' Second Amendment rights have been violated. While states may choose between different manners of bearing arms for self-defense, the right must be accommodated.

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She also called the majority's framing of the case "an elaborate straw man."

While the majority opinion blithely asserts that people who believe California's ban on open carry violates the Second Amendment have the option of challenging that ban, they ignore the fact that no provision of California law provides a means for law-abiding citizens to do so for self-defense. Thus, achieving proper standing to mount such a challenge would be difficult for anyone who does not commit a criminal violation of California's open carry ban.

In the final analysis, the majority opinion does perform one very important public service: It provides the clearest possible example of why liberty-loving Americans need to go to the polls this November and vote for those candidates who will preserve their Second Amendment rights. The consequences of failing to do so could not be clearer.

This case is not over!
Visit bit.ly/PerutaUpdate
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