No. 10-56971

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EDWARD PERUTA, et al,

Plaintiffs-Appellants,

v.

COUNTY OF SAN DIEGO, et al,

Defendants-Appellees.

On Appeal from the United States District Court
For the Southern District of California
Case No. 09-CV-2371

BRIEF OF *AMICI CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE, DOCTORS FOR RESPONSIBLE GUN OWNERSHIP, AND LAW ENFORCEMENT ALLIANCE OF AMERICA

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CORPORATE DISCLOSURE STATEMENT

The Center for Constitutional Jurisprudence and Doctors for Responsible Gun Ownership are both projects of The Claremont Institute, a 501(c)(3) non-profit organization, which has no parent corporation. It issues no stock, and therefore, no publicly held company owns 10% or more of its stock.

Law Enforcement Alliance of America, Inc. is a 501(c)(4) non-profit organization, which has no parent corporation. It issues no stock, and therefore, no publicly held company owns 10% or more of its stock.

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Dated: May 31, 2011

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INTEREST OF AMICI CURIAE

The Center for Constitutional Jurisprudence was founded in 1999 as the public interest legal arm of The Claremont Institute, a public policy think tank devoted to restoring the principles of the American founding to their rightful and preeminent authority in our national life. The Center advances this mission by representing clients or appearing as *amicus curiae* in cases of constitutional significance, including *McDonald v. City of Chicago*, 130 S.Ct. 3020 (2010).

Doctors for Responsible Gun Ownership ("DRGO") is also a project of The Claremont Institute, launched in 1994. Headed by Dr. Timothy Wheeler, a southern California surgeon, DRGO is now a nationwide network of physicians, allied health professionals, and others who support the safe and lawful use of firearms.

Founded in 1991, the Law Enforcement Alliance of America's 65,000 members and supporters are comprised of law enforcements officers, crime victims, and concerned citizens. LEAA's interest in the case is the advancement of public safety, based on the experience of the large majority of states, where law-abiding, trained adults are allowed to carry firearms for lawful protection.

Pursuant to Federal Rule of Appellate Procedure 29, *amici curiae* certifies that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than *amici*, its members, and its counsel has made a

monetary contribution to the preparation and submission of this brief. All parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

No standard of review analysis is needed. A government action which forbids almost the entire population from exercising a constitutional right is *per se* unconstitutional. Banning almost everyone from exercising the right to bear arms is as facially unconstitutional as forbidding almost everyone from speaking in public places. As the Supreme Court made clear in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago, Ill.*, 130 S. Ct. 3020 (2010), make clear, self-defense is by definition a "good cause" for exercising the right to keep and bear arms; indeed it is the best possible cause, the core of the right.

The state court decisions which *Heller* quoted and cited as authoritative and accurate descriptions of the right to keep and bear arms directly show that public bearing of arms may not be effectively banned. *Heller* thus rejected defendants' theory that the Second Amendment applies only to the home.

ARGUMENT

I. The case can be decided without resolving the standard of review, because total prohibition of a constitutional right is never constitutional.

This is an easy case. There is no need to resolve the open issue about the appropriate standard of review that should be applied, because the complete ban on

the exercise of a constitutional right at issue here fails under even the most deferential standard of review.

In the analogous context of the First Amendment, it is certainly true that the courts have recognized that the constitutional right to the freedom of speech is not absolute. A legislature may impose certain limited restrictions on the exercise of the right, as long as they qualify under the applicable standard of review. For example, "government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'" *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). Some narrow categories of speech, such as revealing the movement of troops during wartime, may even be prohibited outright. *New York Times Co. v. United States*, 403 U.S. 713, 726 (1971). But a legislature cannot prohibit almost all persons from speaking out loud in public. Similarly, a legislature could, if meeting the appropriate standards of scrutiny, impose some regulations on exercise of the right of assembly. But no legislature could forbid almost all persons from assembling in public.

The same is true for the rights protected by the Second Amendment. The Supreme Court in *Heller* declared the obvious: The right to "keep and bear arms" is "the individual right to possess and carry weapons in case of confrontation." *Heller*, 554 U.S. at 592. Thus, while some restrictions may well be permissible – "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings," for example, *id.* at 626 – a restriction that effectively prohibits the exercise of the constitutional right to keep and bear arms at its core, as this one does, "would be clearly unconstitutional." *Id.* at 629 (citing with approval *State v. Reid*, 1 Ala. 612, 616-617 (1840)). The obvious and inescapable implication of the Supreme Court's recognition in *Heller* that restrictions on the carrying of firearms in *sensitive places* may be valid is that there must be a right to carry firearms in places which are not "sensitive" if the right is to have any substance at all.

San Diego County asserted below, and the district court upheld, that it has the power to prohibit entirely the defensive carrying of arms by almost the entire public – that is, everyone who cannot point to an imminent and identifiable particular threat. Under *Heller*, this is plainly wrong. Nothing in the *Heller* decision asserted that Richard Heller would have Second Amendment rights only if he could point out a specific threat. Nothing in *Heller* asserted that the right to

"bear" arms by carrying them for purposes of defense, in places which are not "sensitive," was contingent on a specific threat.

San Diego County's admission below, that its licensing policy prohibits nearly all people from carrying firearms in public places for lawful self-defense, is therefore dispositive. The comprehensive prohibition on the exercise of a constitutional right is necessarily unconstitutional.

Thus, while it would be necessary to determine the appropriate standard of review to determine whether various other aspects of California's licensing system, such as the training requirement, the application fee, and so on, were constitutional, the complete prohibition on "bearing" arms for all citizens who do not face a documented "good cause," which places them in a more serious or imminent harm's way than is faced by the general public, is "clearly unconstitutional." The Second Amendment is not limited only to those who could qualify for a restraining order!

The California statute authorizes concealed carry permits to qualified persons who have "good cause." That statute can be interpreted in a constitutional manner by defining "good cause" coextensively with "the core lawful purpose of self-defense" that the Supreme Court in *Heller* held to be the Second Amendment's purpose. 554 U.S. at 630. The restrictive definition given to the California statutory scheme by the Court below and by Defendants, on the other

hand, so severely limits the exercise of the rights protected by the Second Amendment as to be unconstitutional even under the most deferential standard of review.

II. The state court cases approvingly cited in *Heller* expressly affirm the right to carry, or "bear", outside the home (in addition to the right to possess, or "keep", inside the home).

Defendants contended below that *Heller* is limited to possession of guns in the home, and the district court at least implicitly agreed. *Peruta v. County of San Diego*, 758 F.Supp.2d 1106, 1113 (S.D. Cal. 2010). That proposition is not an accurate reading of *Heller*.

Significantly, *Heller* cited with approval several antebellum state court decisions, applying either the Second Amendment or parallel state constitutional provisions. Directly on point is *State v. Reid*, in which, during the course of upholding a ban on carrying a *concealed* weapon, the Supreme Court of Alabama noted: "A statute which, under the pretence of regulating, amounts to a destruction of the right, *or which requires arms to be so borne as to render them wholly useless for the purpose of defence*, would be clearly unconstitutional." *Reid*, 1 Ala. at 616-17 (emphasis added). This sentence is quoted in *Heller* as an accurate expression of the right to bear arms. *Heller*, 554 U.S. at 629.

Also cited by the U.S. Supreme Court in *Heller* as an accurate reading of the Second Amendment was *Nunn v. State*, 1 Ga. 243 (1846). Applying the Second

Amendment itself, the Georgia Supreme Court struck down a general ban on openly carrying handguns in public for protection, only holding that the provisions of the statute banning "carrying certain weapons *secretly*" was valid because it did not "deprive the citizen of his *natural* right of self-defense, or of his constitutional right to keep and bear arms." *Id.* at 251. *Nunn* too is approvingly cited in *Heller* for having "perfectly captured" a correct understanding of the Second Amendment. *Heller*, 544 U.S. at 612.

The *Heller* Court also cited *State v. Chandler*, 5 La. Ann. 489 (1850), for correctly expressing that the Second Amendment guarantees a right to carry, but that the legislature may determine whether the carry is to be open or concealed. *Heller*, 554 U.S. at 629. To the exact same effect is *Andrews v. State*, where the Tennessee Supreme Court equated the state constitutional provision to the Second Amendment, and struck down a law against carrying handguns "publicly or privately, without regard to time or place, or circumstances." 50 Tenn. 165, 187 (1871). Again, the legislature had the power to determine the mode of carry, but no legislature (let alone a sheriff misapplying a statute) could ban public carry altogether. *Andrews*, too, is cited approvingly in *Heller*. 554 U.S. at 608, 614.

Reid, *Nunn*, *Chandler*, and *Andrews*, all cited by the *Heller* Court as correct interpretations of the Second Amendment or parallel state constitutional provisions, provide the controlling guidance in the instant case. They demonstrate

beyond peradventure that the right to "keep and bear arms" protected by the Second Amendment is more than a right to "keep" a museum piece on one's mantle at home. Rather, they demonstrate that the right extends also to "bear[ing] arms," as the text clearly indicates, so as not to render possession of firearms "wholly useless for the purpose of defence." *Reid*, 1 Ala. at 617 (cited approvingly in *Heller*, 554 U.S. at 629.

III. Twentieth century state court decisions affirm the general right to carry for lawful self-defense.

The *Heller* Court relied on the antebellum state cases in its odyssey to determine the meaning of the Second Amendment as it was understood by the early generations of American jurists. But the idea that the right to keep and bear arms for lawful self-defense is a fundamental right that includes the right to carry is also evident in twentieth century state court decisions. Invalidating an ordinance which prohibited firearms from being transported or possessed in a vehicle or place of business for self defense, for example, the Supreme Court of Colorado reasoned:

> A governmental purpose to control or prevent certain activities, which may be constitutionally subject to state or municipal regulation under the police power, may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms. . . . Even though the governmental purpose may be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.

City of Lakewood v. Pillow, 180 Colo. 20, 23, 501 P.2d 744 (1972) (quoting *Aptheker v. Secretary of State*, 378 U.S. 500 (1963) (First and Fifth Amendments, and right to travel); *NAACP v. Alabama*, 377 U.S. 288 (1958) (First Amendment rights of assembly and association)).[1]

The West Virginia Supreme Court invalidated a statute that prohibited carrying a handgun without a license, because the statute operated "to impermissibly infringe upon this constitutionally protected right to bear arms for defensive purposes." *State ex rel. City of Princeton v. Buckner*, 180 W.Va. 457, 462, 377 S.E.2d 139 (1988). Following and citing the Colorado Supreme Court's decision in *Pillow*, the court explained that "the legitimate governmental purpose in regulating the right to bear arms cannot be pursued by means that broadly stifle the exercise of this right where the governmental purpose can be more narrowly achieved." *Id.* at 464. Carrying concealed weapons may be regulated, but not "by means which sweep unnecessarily broadly . . . ." *Id.* at 467. The West Virginia legislature remedied the constitutional problem by enacting a statute for the

[1] Defendants and their *amici* below preferred a different case from the Colorado Supreme Court, which upheld a ban on some firearms, affirmed its adherence to *Lakewood v. Pillow*, but said that "this case does not require us to determine whether that right is fundamental." *Robertson v. City & County of Denver*, 874 P.2d 325, 328 (Colo. 1994). That position is, of course, precluded here by the Supreme Court's holding in *McDonald* that the Second Amendment right to keep and bear arms is fundamental.[2] *Robertson* upheld the gun law simply because it was based on the police power. The *Robertson* approach is plainly invalid for the Second Amendment, because the D.C. handgun ban was also based on the police power, but was ruled unconstitutional in *Heller*.

issuance of concealed carry permits to law-abiding qualified citizens, thereby eliminating the risks of wholesale denial, such as those manifest in the instant case. David B. Kopel & Clayton Cramer, *State Court Standards of Review for the Right to Keep and Bear Arms*, 50 SANTA CLARA L. REV. 1113, 1207-08 (2010).

Similarly, a Connecticut Superior Court held in a case involving a license to carry a handgun: "It appears that a Connecticut citizen, under the language of the Connecticut constitution, has a fundamental right to bear arms in self-defense, a liberty interest which must be protected by procedural due process."[2] The New Mexico Court of Appeals has held that "an ordinance may not deny the people the constitutionally guaranteed right to bear arms" found in the New Mexico Constitution by generally banning the carrying of arms. *City of Las Vegas v. Moberg*, 82 N.M. 626, 485 P.2d 737 (N.M. App. 1971). The Vermont Supreme Court invalidated a local ordinance that prohibited the carrying of a weapon without written permission of mayor or chief of police as repugnant to the right of the people "to bear arms for the defense of themselves and the state" found in Chapter 1, Article 16 of the Vermont Constitution. *State v. Rosenthal*, 75 Vt. 295, 55 A. 610, 611 (1903). And in *State v. Kerner*, 181 N.C. 574, 107 S.E. 222, 225

[2] The existence of a later decision which ignored that principle does not help defendants. *Benjamin v. Bailey*, 662 A.2d 1226, 1232 (Conn. 1995), adopted the very reasoning *Heller* rejected: If "some types of weapons" are available, "other weapons" may be banned. More importantly, the effect of defendants' policy here is not to narrow the types of firearms which may be carried for lawful self-defense; it is to prohibit defensive carry by almost everyone.

(1921), the North Carolina Supreme Court invalidated a requirement of a license to carry a handgun because "the right to bear such arms unconcealed cannot be infringed." The court elaborated: "As a regulation, even, this is void because an unreasonable regulation, and, besides, it would be void because for all practical purposes it is a prohibition of the constitutional right to bear arms. There would be no time or opportunity to get such permit . . . on an emergency." *Id.* at 225.

This Court does not have to go as far as the North Carolina and Vermont Supreme Courts did in interpreting their state constitutions, of course, but it must go as far as the U.S. Supreme Court has mandated for the United States Constitution: protecting the right to bear arms (while allowing legislative choice about open or concealed), and enforcing the requirements that restrictions on the right to carry be narrowly tailored. The constitutional problems inherent in San Diego's application of the California permit system can be remedied with a fairly-administered permit system which recognizes that the concern for self-defense constitutes "good cause."

San Diego's application of the California permit system is anything but narrowly tailored, however. Rather, the effect of San Diego County's misuse of the "good cause" standard is to forbid almost all the law-abiding citizens of San Diego County from the exercise of their Second Amendment right to bear firearms for lawful self-defense in public. As such, it is not an acceptable, narrowly-

tailored *regulation* of that right. California's licensing scheme itself – which requires applicants to pass a background check, as well as training for the safety and legal aspects of carrying a handgun – may be an acceptable regulation of the right. But, San Diego County's policy implementing that scheme, by disqualifying the vast majority of people from obtaining the required license to carry a loaded firearm for self-defense, is an unconstitutional ban on peoples' right to carry.

CONCLUSION

For the reasons stated above, this Court should reverse the district court's decision to grant summary judgment for San Diego County, and instead grant Plaintiffs' partial summary judgment and require the County to issue carry permits to all qualified applicants who wish to bear arms for the eminently good cause of lawful self-defense.

Respectfully submitted,

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Dated: May 31, 2011

CERTIFICATE OF COMPLIANCE

The undersigned certifies under Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure and ninth Circuit Rule 32-1, that the attached amicus brief is proportionally spaced, has a type face of 14 points or more and, pursuant to the word count feature of the word processing program used to prepare this brief, contains 2,869 words, exclusive of the matters that may be omitted under Rule 32(a)(7)(B)(iii).

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Dated: May 31, 2011

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 May 31, 2011. All participants in this case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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