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.	Case No. 10-56971 MOTION FOR LEAVE TO INTERVENE AS PLAINTIFF D.C. No. 3:09-cv-02371-IEG BGS

MOTION FOR LEAVE TO INTERVENE AS PLAINTIFF BY MICHAEL J. VOGLER

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Dated April 22, 2015 Proposed Intervenor appearing Pro Se

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INTRODUCTION

In accordance with Federal Rule of Civil Procedure Procedure 24, Michael J. Vogler ("Vogler" or "Proposed Intervenor") hereby respectfully moves for leave to intervene in order to enforce his constitutional rights under the Second and Fourteenth Amendments of the Unites States Constitution.

In practical terms, The State of California's current unconstitutionally oppressive licensing scheme[1] has nullified Proposed Intervenor's natural rights described in the Second Amendment of the United States Constitution.

Vogler's intervention is necessary here because the Court's decision, following the en banc re-hearing order of March 26, 2015, will directly affect his Second Amendment right to right to keep and bear arms outside the home for lawful self-defense, and may adversely impact his ability to defend those rights in an on-going action against the Pasadena Police Chief and the City of Pasadena, involving the exact same question of law regarding "good cause" for the issuance of Concealed Carry Permit (CCW).

The Court should grant Proposed Intervenor's Motion because it is timely, the outcome of this case has a direct bearing on Proposed Intervenor's

[1] Under California law, open carry is prohibited in virtually all of the state, including open carry in Pasadena, regardless of whether the weapon is loaded or unloaded. See Cal. Penal Code §§ 26150, 26155. The only acceptable way a typical responsible, law-abiding citizen can carry a weapon in public for the lawful purpose of self-defense, and thereby exercise his Second Amendment right, is with a concealed carry permit. *Id.* §§ 26150, 26155.

constitutional rights and interests, and his ability to vindicate ongoing constitutional deprivations by the government (Pasadena) against him.

Pursuant to 9th Circuit Rule 27-1, Proposed Intervenor conferred with Appellees on April 21, 2015 who stated they will not oppose this motion.

FACTUAL AND PROCEDURAL BACKGROUND

On February 13, 2014, the Court issued a precedential and binding opinion in the case of *Peruta v. County of San Diego*, 742 F.3d 1144 (9th Cir. 2014) which concluded that the Second Amendment provides a responsible, law-abiding citizen with the right to carry an operable handgun outside the home for the purpose of self-defense, and that right establishes "good cause" for the purposes of applying for and the issuing of a license to carry a concealed handgun in California. (Dkt no. 116)

On February 28, 2014, the Court issued an order to Stay the Issuance of the Mandate. (Dkt no. 126)

On March 11, 2014, in consideration of the Court's *Peruta* decision, Plaintiff submitted an application for a license to carry a concealed handgun with the Pasadena Police Department for lawful self-defense. (Exhibit A). Over the following nine weeks Plaintiff completed all the statutory licensing requirements for the issuance of a concealed weapon permit under California Penal Code §§ 26155, 26165, 26185.

Despite meeting all statutory requirements, including "good cause", as defined in the Court's February 13, 2104 *Peruta* decision, on May 29, 2014, the Pasadena Chief of Police denied his application on the unconstitutional grounds that "Good cause was not demonstrated for the issuance of a concealed weapons permit" and the "applicant must show that they are dealing with circumstances that distinguish them from other members of the public", notwithstanding the issuance of mandate in *Peruta*. (Exhibit B)

Having no other available remedy to enforce his Second Amendment right and the binding law of the circuit, on September 23, 2015, Plaintiff filed a complaint with the United States Federal Court, Central District of California[2] (D.C. dkt no. 1) [2]

On September 24, 2014, Plaintiff filed an ex parte application requesting declaratory and injunctive relief from Pasadena's unconstitutional deprivation of his Second and Fourteenth Amendment right, and to process his application pursuant to law. (D.C. dkt no. 7) [2]

On October 20, 2014, ignoring Plaintiff's request for injunctive and declaratory relief, and before Pasadena even filed an answer, the district court wrongly stayed the case, indefinitely, pending the issuance of mandate in *Peruta,*

[2] D.C. 2:14-cv-07411-SJO-SS

despite having a non-discretionary duty to enforce binding Ninth Circuit precedent. (D.C. Dkt no. 33) [2]

On October 29, 2014, Proposed Intervenor filed an interlocutory appeal with this Court under 28 U.S.C. § 1291(a)(1)[3]. (9th Cir. Dkt. no 3) [3].

Meanwhile, on December 12, 2014, despite *Peruta*'s binding and non-discretionary effect on the District Court, the lower court continued a scheduled December 15, 2014 Status Conference regarding *Peruta* until April 13, 2015, without acting on Proposed Intervenor's motion for injunctive and declaratory relief from Pasadena's continuing constitutional deprivations (D.C. Dkt. no. 44) [2]

On February 26, 2015, this Court dismissed the interlocutory appeal by Proposed Intervenor's for lack of jurisdiction. (9th Cir. Dkt. no. 14) [3]

On March 10. 2015, Proposed Intervenor filed a motion for reconsideration and request to treat appeal as Writ of Mandamus (directing lower court to apply binding precedent of this court). (9th Cir. Dkt. no. 15) [3]

However, on March 26, 2015, the Court ordered *Peruta* to be reheard en banc, providing that the "three-judge panel opinion [*Peruta v. County of San Diego*, 742 F.3d 1144 (9th Cir. 2014)]..shall not be cited as precedent by or to any

[3] Ninth Circuit Docket 14-56722

court of the Ninth Circuit". (Dkt no. 194) and thereby dramatically and detrimentally altering Proposed Intervenor's legal position in the lower court.

Accordingly, citing the Court's March 26, 2015 no-citing order in *Peruta v. County of San Diego*, 10-56971, Proposed Intervenor withdrew his appellate motion for reconsideration and mandamus on April 1, 2015. (9th Cir. Dkt. no. 16) [3]

On April 10, 2014 the lower court again continued a scheduled April 13, 2015 Status Conference regarding *Peruta* until October 13, 2015. (D.C. Dkt. no. 52) [2]

As of the filing of this Motion to Intervene, Proposed Intervenor's Second and Fourteenth Amendment rights continue to unconstitutionally languish, and may continue to languish until this case is fully adjudicated.

ARGUMENT

Proposed Intervenor is entitled to intervene in this case because he meets the requirements for intervention as of right under Rule 24(a) of the Federal Rules of Civil Procedure.

Proposed Intervenor also satisfies the requirements for permissive intervention under Rule 24(b) of the Federal Rules of Civil Procedure.

I. Proposed Intervenor is Entitled to Intervene As of Right under Rule 24(a).

Rule 24(a) provides:

> On timely motion, the court must permit anyone to intervene who . . . claims an interest relating to the property or transaction that is the

> subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Fed. R. Civ. P. 24(a). The Ninth Circuit "construe[s] the Rule broadly in favor of proposed intervenors" in an analysis that is guided by "practical and equitable considerations." Wilderness Soc'y v. U.S. Forest Serv., 630 F.3d 1173, 1179 (9th Cir. 2011) (en banc) (internal quotations omitted). According to the Ninth Circuit, its "liberal policy in favor of intervention serves both efficient resolution of issues and broadened access to the courts." Id

The Ninth Circuit utilizes a four-part test to determine whether intervention as a matter of right is warranted:

> (1) the motion must be timely; (2) the applicant must claim a "significantly protectable" interest relating to the property or transaction which is the subject of the action; (3) the applicant must be so situated that disposition of the action may as a practical matter impair or impede his ability to protect that interest; and (4) the applicant's interest must be inadequately represented by the parties to the action.

Wilderness Soc'y, 630 F.3d at 117 (internal quotations omitted); Prete v. Bradbury, 438 F.3d 949, 954 (9th Cir. 2006) (internal quotations omitted). "[T]he requirements are broadly interpreted in favor of intervention". Prete, 438 F.3d at 954.

As the Ninth Circuit instructs, "allowing parties with a practical interest in the outcome of [the case] to intervene" reduces and eliminates "future litigation involving related issues," and enables "an additional interested party to express its views before the court." United States v. City of L.A., 288 F.3d 391, 398 (9th Cir. 2002). Where the rights of an applicant for intervention may be substantially affected by the disposition of the matter, "he should, as a general rule, be entitled to intervene." Sw. Ctr. for Biological Diversity v. Berg, 268 F.3d 810, 822 (quoting 15 Fed. R. Civ. P. Rule 24 Advisory Committee Notes). Courts should focus on the "future effect pending litigation will have" on the intervenor's interests. Syngenta Seeds, Inc. v. Cnty of Kauai, 2014 WL 1631830, at *5 (quoting Parker v. Nelson, 160 F.R.D. 118, 122 (D. Neb. 1994)).

a. Proposed Intervenor has significant protectable interests at stake.

The "significant protectable interests" test, which requires only "an interest that is protected under some law", and a "relationship" between that interest and the claims at issue. City of Los Angeles, 288 F.3d at 398. Moreover, "[t]he "interest" test in not a clear-cut or bright-line rule, because "[n]o specific legal or equitable interest need be established." *Id.* "Instead, the "interest" test directs courts to make a "practical, threshold inquiry" and "is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process" *Id.* (citation omitted).

Proposed Intervenor has significant protectable constitutional rights and interests under the Second and Fourteenth Amendments of the United States Constitution, which may be significantly impaired, or even deprived, by the *Peruta* outcome, because the standard for determining "good cause" for issuing a concealed carry permit may be left in the subjective and discretionary hands of local officials, with disparate application of that standard to individual applicants (or to selected "friends" or those officials), rather than a uniform and constitutionally objective standard applicable to all citizens.

Because Proposed Intervenor's Second Amendment rights are at issue, the significant protectable interests test it met.

b. The disposition of this action may as a practical matter impair or impede Proposed Intervenor's ability to protect his constitutional interest.

The Court's En Banc Rehearing Order of March 26, 2014, directly impairs Proposed Intervenor's ability to protect his constitutional interests because it effectively rescinded the non-discretionary objective standard of "good cause", which is required for concealed carrying under the State's statutory scheme, and Proposed Intervenor acted, over one year ago, in reliance on the *Peruta* decision of February 13, 2014. As a practical matter, en banc rehearing may make it impossible for Proposed Intervenor to defend his constitutional rights in the future.

No specific legal or equitable interest is required; an interest is "significantly protectable" so long as it is "'protectable under some law'" and "'there is a relationship between the legally protected interest and the [plaintiffs'] claims.'" Sw. Ctr. for Biological Diversity v. Berg, 268 F.3d 810, 818 (9th Cir. 2001) (quoting Sierra Club v. U. S. Envtl. Prot. Agency, 995 F.2d 1478, 1484 (9th Cir. 1993), and where applicants seeks to intervene on appeal post-decision, the second prong of the Rule 24(a)(2) analysis may be satisfied by the opinion's "precedential impact" on applicant's interest. Day v. Apolonia, 505 F.3d 963, 965 (9th Cir. 2007), 965; (see Green v. Unites States, 996 F.2d 973, 944 (9th Cir. 1993) ("Intervention may be required when considerations of *stare decisis* indicate that an applicant's interest will be practically impaired").

There is no doubt, because of political passions on both side of the concealed carry issue, that the en banc decision of the Court will result in a constitutional level, enforceable binding precedent; and whether Proposed Intervenor will be rightly allowed to exercise his Second Amendment right to keep and bear arms outside the home for lawful self-defenses, or continue to be deprived of his constitutional right by an disparately oppressive government.

c. Proposed Intervenor's Motion is Timely.

Third, Proposed Intervenor's Motion is Timely. The Ninth Circuit evaluates the timeliness of a motion to intervene under three criteria: (1) the stage of the

proceeding; (2) potential prejudice to other parties; and (3) the reason for any delay in moving to intervene. See, e.g., Nw. Forest Res. Council v. Glickman, 82 F.3d 825, 836-37 (9th Cir. 1996).

Proposed Intervenor's' Motion satisfies all criteria for timely intervention. This case is still in litigation: Proposed Intervenor filed the Motion to Intervene less only four weeks after the Court's March 26, 2015 order to rehear en banc, effectively rescinding its prior "good cause" precedent, resulting in continued deprivation of his constitutional rights by Pasadena without apparent end.

Further, Appellees will not be prejudiced if Proposed Intervenor is allowed to intervene because the prejudice inquiry asks only whether the parties will be prejudiced "from granting the motion *at this time rather than earlier*," Day, 505 F.3d at 966 (emphasis added) because Proposed Intervenor will not be injecting any new issues into the litigation, but will be ensuring the results of the litigation will be applied broadly. This may even result in a quick and efficient resolution of the Proposed Intervenor's current litigation, namely request for declaratory and injunctive relief from Pasadena's unconstitutional Second Amendment deprivation.

Proposed Intervenor agrees that, should the Court permit him to intervene, he will comply with the current docket schedule. Thus, no prejudice, delay, or inefficiency will result from allowing Proposed Intervenor to intervene at this time.

Finally, the Court should consider the reason for any delay. Nw. Forest Res. Council, 82 F.3d at 836-37. In measuring any delay in seeking intervention, the inquiry looks to when the intervenor first became aware that [his] interests would no longer be adequately protected by the parties" San Jose Mercury News, Inc. v. Unites States Dist. Court – N. Dist., 187 F.3d 1096, 1101 (9th Dir. 1999); see also Day, 505 F.3d (stating that the "mere lapse of time, without more, is not necessarily a bar to intervention")

Proposed Intervenor's position of enforcing his Second Amendment right to bear arms outside the home for self-defense was dramatically altered by the Court March 26, 2015 by ordering rehearing en banc. Accordingly Proposed Intervenor filed this Motion to Intervene as quickly as possible; less than 30 days after the Court's en banc order. The motion is timely.

Plaintiff's May Not Adequately Represent Proposed Intervenor's Interests.

The burden of showing inadequate representation is minimal, and the applicant need only show that representation of its interests by existing parties "'may be' inadequate." Sw. Ctr. for Biological Diversity, 268 F.3d at 823 (quoting Trbovich v. United Mine Workers, 404 U.S. 528, 538 n.10 (1972)); Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525, 528 (9th Cir. 1983) ("[T]he burden of making this showing is minimal.").

The Ninth Circuit has held that "[i]nadequate representation is most likely to be found when the applicant asserts a personal interest that does not belong to the general public." Forest Conservation Council v. U.S. Forrest Service, 66 F.3d 1489, 1499 (9th Cir. 1995).

Proposed Intervenor has a specific interest in the issuance of a CCW Permit which belongs uniquely to *him*, not the general public, because, but for the question of the definition of "good cause", he otherwise qualifies for issuance of the license. While the question before the Court is one that will have far reaching impacts on the constitutional rights of everyone within the Ninth Circuit, perhaps the nation, Proposed Intervenor's right to obtain a CCW permit from Pasadena is specific to him, and does determine that qualifications of others to be granted such permits, in Pasadena or elsewhere. Proposed Intervenor's interest belongs to him, exclusively. Consequently his rights may not be adequately represented by current plaintiffs, and he should be allowed to intervene.

Accordingly, he meets all of the requirements for intervention as of right under Rule 24(a) of the Federal Rules of Civil Procedure.

II. The Court Should Grant Permissive Intervention under Rule 24(b).

Proposed Intervenor also satisfies the requirements for permissive intervention under Rule 24(b) of the Federal Rules of Civil Procedure.

As with intervention of right, under Rule 24(b), "the Ninth Circuit upholds a liberal policy in favor of intervention." Nw. Envtl. Advocates v. U.S. Envtl. Prot. Agency, No. 3:12-cv-01751-AC, 2014 WL 1094981, at *2 (D. Or. Mar. 19, 2014); see, e.g., United States v. Alisal Water Corp., 370 F.3d 915, 919 (9th Cir. 2004) ("In determining whether intervention is appropriate, courts are guided primarily by practical and equitable considerations, and the requirements for intervention are to be broadly interpreted in favor of intervention."); Wilderness Soc'y, 630 F.3d at 1179; City of L.A., 288 F.3d at 397. This liberal policy favoring intervention allows for "both efficient resolution of issues and broadened access to the courts." Id. at 397-98.

Permissive intervention is appropriate where there is "(1) an independent ground for jurisdiction; (2) a timely motion; and (3) a common question of law and fact between the movant's claim or defense and the main action." Blum v. Merrill Lynch Pierce Fenner & Smith Inc., 712 F.3d 1349, 1353 (9th Cir. 2013). Courts also consider whether intervention would cause undue delay or prejudice. See Fed. R. Civ. P. 24(b)(3). Importantly, under Rule 24(b), a proposed intervenor need not demonstrate inadequate representation, or a direct interest in the subject matter of the challenged action. Kootenai Tribe of Idaho v. Veneman, 313 F.3d 1094, 1108 (9th Cir. 2002). Moreover, "[w]here the proposed intervenor in a federal-question

case brings no new claims, the jurisdictional concern drops away." Freedom from Religion Found., Inc. v. Geithner, 644 F.3d 836, 844 (9th Cir. 2011).

Here, Proposed Intervenor has "asserted an interest in" the challenged legislation of the "good cause" requirement under California's statutory CCW licensing scheme. supra pp. 9-11, and that interest is sufficient to establish an independent basis for jurisdiction. Further because Proposed Intervenor asserts federal-question jurisdiction, namely unconstitutional deprivation of his Second and Fourteenth Amendment rights, in relation to the State's CCW license scheme, the first criterion for permissive intervention plainly is met.

Also, Proposed Intervenor's Motion for Leave to Intervene is "timely,", because he filed this motion as quickly as possible following the Court's March 26 order to rehear *Peruta* en banc. Supra pp 11-13. Furthermore, Proposed Intervenor further agrees to abide by the current briefing schedule, if the Court concludes that the schedule is appropriate.

Finally, Proposed Intervenor undeniably shares "a common question of law or fact [with] the main action," Blum, 712 F.3d at 1353, because Plaintiff's seek to address precisely the legal and factual issues, namely what defines "good cause" raised in Plaintiffs' complaint (see Fed. R. Civ. P. 24(b)(1)(B) (permissive intervention is appropriate where an applicant "has a claim or defense that shares with the main action a common question of law or fact")).

By being allowed to intervene, Proposed Intervenor will significantly contribute to the Court's ability to effectively and efficiently understand the constitutional questions at issue and quickly resolve this case.

In sum, Proposed Intervenor's substantial interests in his constitutional right to bear arms outside the home for self-defense is directly threatened by an adverse ruling in this case. See Fed. R. Civ. P. 24, Advisory Committee Notes ("If an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene.").

CONCLUSION

Proposed Intervenor meets all the requirements to Intervene in this case. Accordingly, the Court should grant Proposed Intervenor's motion as of right under Rule 24(a) or, in the alternative, it should grant him permissive intervention under Rule 24(b).

Respectfully Submitted,

/s/ *Michael J. Vogler*
Michael J. Vogler
Proposed Intervenor
Attorney – Appearing Pro se

April 22, 2015

DECLARATION OF MICHAEL J. VOGLER

I, MICHAEL J. VOGLER, declare:

1. I am an attorney licensed to practice law in California, and am a sole practitioner appearing Pro se in this matter. I have personal knowledge of the following facts and if called upon to testify, would and could do so competently as follows. However, because the declaration is for a limited purpose, it does not include all facts I know about the matter.

2. Attached as Exhibit A hereto is a true and correct copy of plaintiff's application for License to Carry a Concealed Weapon, date March 11, 2014.

3. Attached as Exhibit B hereto is a true and correct copy of Defendant Sanchez's letter to Plaintiff dated May 29, 2014.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on April 21, 2015 in Pasadena, California.

/s/ Michael J. Vogler
Michael J. Vogler
Proposed Intervenor
Attorney – Appearing Pro se