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.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
(CV 09-02371-IEG)

APPELLANTS' MOTION FOR LEAVE TO FILE REPLY TO INTERVENOR STATE OF CALIFORNIA'S RESPONSE TO PLAINTIFFS-APPELLANTS' PETITIONS FOR FULL COURT REHEARING EN BANC; DECLARATION OF SEAN A. BRADY IN SUPPORT

C.D. Michel 144258
Clinton M. Monfort 255609
Sean A. Brady 262007
Anna M. Barvir 268728
MICHEL & ASSOCIATES, P.C.
180 E. Ocean Blvd.,
Suite 200
Long Beach, CA 90802
Tel. (562) 216-4444
Fax (562) 216-4445
cmichel@michellawyers.com

Paul D. Clement
Erin E. Murphy
Christopher G. Michel
BANCROFT PLLC
500 New Jersey Ave., N.W.
Suite 470
Washington, D.C. 20001
pclement@bancroftpllc.com

Paul Neuharth, Jr. 147073
PAUL NEUHARTH, JR., APC
1140 Union St., Suite 102
San Diego, CA 92101
Tel. (619) 231-0401
Fax (619) 231-8759
pneuharth@sbcglobal.net

Counsel for Plaintiffs-Appellants

Pursuant to Federal Rules of Appellate Procedure, rule 27, and Ninth Circuit Rules, rule 27-1, Appellants Edward Peruta, Michelle Laxson, James Dodd, Dr. Leslie Buncher, Mark Cleary, and California Rifle and Pistol Association Foundation ("Peruta") respectfully request leave to file the Reply to Intervenor State of California's Response to Plaintiffs-Appellants' Petitions for Full Court Rehearing En Banc filed concurrently herewith. This request is based on the attached Declaration of Sean A. Brady and the record to date in this matter.

While the Federal Rules of Appellate Procedure and the Ninth Circuit Rules do not expressly permit or prohibit a reply to responses to a petition for rehearing en banc,[1] this Court has granted leave for a party to do so. *See*, *e.g.*, *Frontline Processing Corp. v. First State Bank of Eldorado*, 399 Fed. Appx. 185 (9th Cir. 2010) (unpublished) (granting appellant's motion for leave to file a reply in support of petition for rehearing); *United States v. Robertson*, 977 F.2d 593 (9th Cir. 1992) (granting motion to permit filing a reply to the government's response to the petition for rehearing and suggestion for rehearing en banc); *cf. United States v. Shwayder*, 320 F.3d 889, 890 (9th Cir. 2003) (denying appellant's motion for leave to file a reply in support of the petition for rehearing on mootness grounds).

[1] *See*, Fed. R. App. P. 40 Advisory Committee Notes, 1967 Adoption (explaining that the Fourth, Sixth, and Eighth Circuits and the Supreme Court are the only courts that expressly prohibit filing a reply to a petition for en banc rehearing).

Peruta timely filed a Petition for Full Court En Banc Rehearing on June 23, 2016. The next day, this Court directed Appellees County of San Diego and William D. Gore ("Appellees"), and Intervenor State of California ("Intervenor") to file responses to Peruta's petition for full court rehearing en banc. On July 15, 2016, Intervenor filed its response. That response included various mischaracterizations of law. Peruta thus respectfully seeks leave to file a reply to address the falsehoods that Intervenor's briefing presents.

Pursuant to Ninth Circuit Rules, rule 27-1(2) and Circuit Advisory Committee Note 27-1(5), counsel for Peruta contacted counsel for Appellees and counsel for Intervenor on July 22, 2016. Declaration of Sean A. Brady ("Brady Decl."), ¶¶ 2-3. Appellees' attorney of record was not able to be reached due to being out of the office. Brady Decl. ¶ 2. And counsel for Intervenor responded that her client takes no position on Peruta's motion. Brady Decl. ¶ 3.

WHEREFORE, Peruta respectfully requests that this Court enter an order granting Peruta's Motion for Leave to File Reply to Intervenor State of California's Response to Plaintiffs-Appellants' Petitions for Full Court Rehearing En Banc.

Date: July 22, 2016

MICHEL & ASSOCIATES, P.C.

s/ C. D. Michel
C. D. Michel
Counsel for Plaintiffs-Appellants

DECLARATION OF SEAN A. BRADY

I, Sean A. Brady, declare as follows:

1. I am attorney at law duly licensed to practice in the State of California and before the Ninth Circuit Court of Appeals. I am an Associate attorney at Michel & Associates, P.C., attorneys of record for Plaintiffs-Appellants. I am familiar with the facts and pleadings in this case. The following is within my personal knowledge and if called and sworn as a witness, I could and would competently testify thereto.

2. On July 22, 2016, I e-mailed Mr. James Chapin, counsel for Appellees, regarding whether his clients opposed Peruta's Motion for Leave to File Reply to Intervenor State of California's Response to Plaintiffs-Appellants' Petitions for Full Court Rehearing En Banc. I immediately received an automatic response from Mr. Chapin's e-mail address, indicating that Mr. Chapin will be out of the office until August 1, 2016.

3. On July 22, 2016, I e-mailed Ms. Kathleen Boergers, counsel for Intervenor State of California, regarding whether her client opposed Peruta's Motion for Leave to File Reply to Intervenor State of California's Response to Plaintiffs-Appellants' Petitions for Full Court Rehearing En Banc. On the same day, Ms. Boergers

responded, stating that Intervenor State of California takes no position on Peruta's motion.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed the 22th day of July, 2016, at Long Beach, California.

s/ Sean A. Brady
Sean A. Brady
Declarant

CERTIFICATE OF SERVICE

I hereby certify that on July 22, 2016, an electronic PDF of Appellants' Motion for Leave to File Reply to Intervenor State Of California's Response to Plaintiffs-Appellants' Petitions for Full Court Rehearing En Banc; Declaration Of Sean A. Brady In Support was uploaded to the Court's CM/ECF system, which will automatically generate and send by electronic mail a Notice of Docket Activity to all registered attorneys participating in the case. Such notice constitutes service on those registered attorneys.

Date: July 22, 2016

MICHEL & ASSOCIATES, P.C.

s/ C. D. Michel
C. D. Michel
Counsel for Plaintiffs-Appellants

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.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
(CV 09-02371-IEG)

APPELLANTS' REPLY TO INTERVENOR STATE OF CALIFORNIA'S RESPONSE TO PLAINTIFFS-APPELLANTS' PETITIONS FOR FULL COURT REHEARING EN BANC

C.D. Michel 144258
Clinton M. Monfort 255609
Sean A. Brady 262007
Anna M. Barvir 268728
Michel & Associates, P.C.
180 East Ocean Blvd.,
Suite 200
Long Beach, CA 90802
Tel. (5620 216-4444
Fax (562) 216-4445
cmichel@michellawyers.com

Paul D. Clement
Erin E. Murphy
Christopher G. Michel
Bancroft PLLC
500 New Jersey Ave., N.W.
Seventh Floor
Washington, D.C. 20001
Tel. (202) 234-0090
pclement@bancroftpllc.com

Paul Neuharth, Jr.
147073
Paul Neuharth, Jr., APC
1140 Union St., Suite 102
San Diego, CA 92101
Tel. (619) 231-0401
Fax (619) 231-8759
pneuharth@sbcglobal.net

Counsel for Plaintiffs-Appellants

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES..ii

INTRODUCTION 1

REASONS FOR GRANTING REHEARING 2

I. The En Banc Panel Impermissibly Constricted Appellants' Claim and their Second Amendment Right. 2

II. By Allowing California to Prohibit All Typical, Law-Abiding Citizens From Bearing Arms for Self-Defense, the En Banc Panel Decision Sanctions a Second Amendment Violation.. 6

CERTIFICATE OF COMPLIANCE 11

CERTIFICATE OF SERVICE 12

TABLE OF AUTHORITIES

Page(s)

Cases

Cal-Almond, Inc. v. Dep't of Agric.,
67 F.3d 874 (9th Cir. 1995) 3

Citizens United v. FEC,
558 U.S. 310 (2010) 5

Clark v. Martinez,
543 U.S. 371 (2005) 6

District of Columbia v. Heller,
554 U.S. 570 (2008) .... *passim*

Jackson v. City and County of San Francisco,
746 F.3d 953 (9th Cir. 2014) 4, 5

McDonald v. City of Chicago,
561 U.S. 742 (2010) 1, 2, 5

Nunn v. State,
1 Ga. 243 (1846) 8

Obergefell v. Hodges,
135 S. Ct. 2584 (2015) 4

Peruta v. County of San Diego,
742 F.3d 1144 (9th Cir. 2014) 3

Peterson v. Martinez,
707 F.3d 1197 (10th Cir. 2013) 5,6

State v. Chandler,
5 La. Ann. 489 (1850) 8

Susan B. Anthony List v. Driehaus,
134 S. Ct. 2334 (2014) 5

Zivotofsky v. Clinton,
132 S. Ct. 1421 (2012) 5

Statutes

Cal. Fish & Game Code § 3004(a) 7

TABLE OF AUTHORITIES (cont.)

Page(s)

Statutes (Cont.)

Cal. Penal Code § 374c 7
Cal. Penal Code § 17030 7
Cal. Penal Code § 25505 7
Cal. Penal Code § 25850(a) 7
Cal. Penal Code § 26350(a) 7
Cal. Code Regs. tit. 14, §4313(a) 7
Cal. Code Regs. tit. 14, §551 7
Cal. Code Regs. tit. 14, §552 7
Cal. Code Regs. tit. 14, § 550(b)(10) 7
Cal. Code Regs. tit. 14, §1413 7

Other

4 Blackstone,
Commentaries on the Laws of England (1769) 9

INTRODUCTION

This Court granted rehearing en banc to resolve the exceptionally important question whether the Second Amendment protects the right of a typical, law-abiding adult to carry arms outside the home for self-defense. Instead of answering that question, the divided en banc panel held that Appellants have no right to carry *concealed* weapons—a right that they did not claim and that the original panel decision did not embrace. California does not seriously defend the en banc panel's approach, nor could it after intervening here specifically to defend its full statutory scheme. Instead, the State argues that it does not generally impose a ban on carrying. But the State's own recounting of the law's exceptions disprove that contention, and its frank admission that it seeks "to strike a reasonable balance" between "individual rights" enshrined in the Constitution and a contrary "legislative judgment," Resp. 4, is irreconcilable with *District of Columbia v. Heller*, 554 U.S. 570 (2008), *McDonald v. City of Chicago*, 561 U.S. 742 (2010), and the very concept of enumerated constitutional rights.

In short, the combination of the en banc panel decision and existing state laws prohibits a typical, law-abiding citizen from carrying a firearm for self-defense. Unless the words "bear arms" are to be read out of the Constitution, that result is impermissible. At a minimum, however, this weighty question should be decided by

the full Court, not evaded by a decision that misconstrues the core dispute in this long-running litigation and departs radically from settled principles of constitutional adjudication.

REASONS FOR GRANTING REHEARING

I. THE EN BANC PANEL IMPERMISSIBLY CONSTRICTED APPELLANTS' CLAIM AND THEIR SECOND AMENDMENT RIGHT.

The en banc panel began by misconstruing Appellants' claim and ended by impermissibly constricting their Second Amendment right. The parties here disagreed on much, but they agreed on the basic issue in dispute: whether the Second Amendment protects a right to carry arms outside the home for self-defense. As the district court explained in the first paragraph of the decision *affirmed* by the en banc panel, "the heart of the parties' dispute is whether the right recognized by the Supreme Court's rulings in [*Heller* and *McDonald*] … extends to the right asserted here: the right to carry a loaded handgun in public, *either openly or in a concealed manner*." E.R. I 1 (emphasis added). That basic issue never changed. At the en banc argument, Appellants explained that they sought only "a constitutional right *to some outlet* to exercise the right to bear, or carry, arms for purposes of self-defense." Oral Arg. Rec. 1:47-2:05 (emphasis added). And the en banc panel itself recognized that Appellants "do *not* contend that there is a free-

standing Second Amendment right to carry concealed firearms." Maj. Op. 19.

Inexplicably, however, the en banc panel resolved the case on the ground that "there is no Second Amendment right for members of the general public to carry concealed firearms in public." *Id.* As explained in the petition, the majority "confused the distinction between right and remedy," resolving the question of remedy without determining the scope of the right. *Cal-Almond, Inc. v. Dep't of Agric.*, 67 F.3d 874, 879 (9th Cir. 1995), *cert. granted and judgment vacated on other grounds*, 521 U.S. 1113 (1997). That inverted approach conflicts with settled principles of constitutional adjudication and with *Heller* itself, in which the Court devoted 50 pages of analysis to the right's scope before turning to the remedy for the right's violation. 554 U.S. at 574-628.[1]

The State does not seriously defend the en banc panel's approach, and for good reason. The State obtained leave to intervene only by arguing that the case implicated "the entirety of California's statutory scheme," including restrictions on concealed

[1] Appellants sought concealed carry permits because that was the "least intrusive remedy" consistent with the State's statutorily expressed preferences. *Peruta v. County of San Diego*, 742 F.3d 1144, 1171 (9th Cir. 2014), *vacated* 781 F.3d 1106 (9th Cir. 2015). But Appellants made clear from the outset that they also sought any "further relief as the Court deems just and proper." E.R. IV 1124-25.

and open carry alike. Maj. Op. 47; *see* Dkt. 122-1 at 5. Even now, the State asks the Court to remand to allow the State to decide whether to permit concealed *or* open carry if Appellants' position prevails. Resp. 13 n.8.

The en banc panel's mischaracterization of Appellants' claim warrants rehearing both in its own right and because that approach impermissibly narrowed the Second Amendment itself. Asking whether the Second Amendment protects a freestanding right to bear *concealed* arms is like asking only whether speakers have a freestanding right to "speak at particular times" or "distribute leaflets in the streets." Such an approach is self-evidently wrong and contrary to volumes of Supreme Court precedent. Indeed, the Court rejected just such an approach in holding that the Constitution protects a "right to marry," not a "right to interracial marriage" or a "right of inmates to marry" or any other definition cabined to the remedy requested in a particular case. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015).

This Court has rejected the en banc panel's approach in the specific context of the Second Amendment. In *Jackson v. City and County of San Francisco*, this Court refused to treat a challenge to a ban on the sale of certain ammunition as asserting a "right to purchase hollow-point ammunition," or even a "right to buy bullets," but instead explained that "without bullets, the *right to*

bear arms would be meaningless." 746 F.3d 953, 967 (9th Cir. 2014) (emphasis added). The en banc panel's reduction of the "right to bear arms" to the "right to bear *concealed* arms" is irreconcilable with *Jackson*, not to mention *Heller*, *McDonald*, and every other Court of Appeals decision addressing a similar challenge (*see* Pet. 14).

The State has no answer to this foundational flaw in the en banc panel's decision. The best it can muster is a suggestion that the decision was "reasonably focused" because it was broader than a resolution that "applied" only "to each individual plaintiff." Resp. 3. But a federal court has no discretion to craft its own "reasonably focused" way of deciding an Article III case or controversy. To the contrary, "a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging." *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2347 (2014). Failing to answer a properly presented constitutional question is not, as the State suggests, a prudent exercise of constitutional avoidance. Resp. 5. It is a form of "judicial abdication." *Citizens United v. FEC*, 558 U.S. 310, 375 (2010) (Roberts, C.J., concurring). "[T]he Judiciary has a responsibility to decide cases properly before it, even those it would gladly avoid." *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427 (2012).[2]

[2] The State invokes *Peterson v. Martinez*, 707 F.3d 1197 (10th Cir. 2013), but there—unlike here—the plaintiff expressly "waived any

The State's invocation of constitutional avoidance is especially misplaced here because the en banc panel accomplishes the proliferation, not the avoidance, of constitutional disputes. *But see Clark v. Martinez*, 543 U.S. 371, 381 (2005) ("one of the canon's chief justifications is that it allows courts to *avoid* the decision of constitutional questions"). The en banc panel did not avoid resolving a constitutional question. To the contrary, it resolved a constitutional question—albeit, the wrong one—and did so in a manner that *invites* another constitutional challenge to California's open carry restrictions. In short, the en banc panel evades the correct constitutional question that is squarely presented at the expense of necessitating a separate constitutional challenge. The full Court should grant rehearing to resolve the exceptionally important question that it voted to consider the first time around.

II. By Allowing California to Prohibit All Typical, Law-Abiding Citizens From Bearing Arms for Self-Defense, the En Banc Panel Decision Sanctions a Second Amendment Violation.

With little to say in defense of the en banc panel's approach, the State shifts gears to attempting to defend against the constitutional claim Appellants actually brought, insisting California does not really ban public carry by typical, law-abiding citizens without a license. Resp. 3-4. The State is mistaken.

… challenge" to the open carry restrictions, *id.* at 1208.

California prohibits its residents from carrying a firearm (loaded or unloaded) in any "public place" in an incorporated city or any "prohibited area" of an unincorporated territory, Cal. Penal Code §§ 25850(a), 26350(a), 17030—a sweeping designation that encompasses any public road or highway, any location within 150 yards of any building, and wide swaths of state and federal property, *see, e.g.*, *id.* §374c, Cal. Fish & Game Code § 3004(a), Cal. Code Regs. tit. 14, §§ 550(b)(10), 551, 552, 1413, 4313(a). Moreover, localities can and do designate additional "prohibited areas." These state and local prohibitions combine to practically render carrying a firearm outside the home illegal.

Disputing this, the State cites a handful of "exceptions" to these prohibitions, Resp. 4, but none allows a typical law-abiding citizen to carry outside the home for the "core lawful purpose of self-defense." *Heller*, 554 U.S. at 630. For example, the exemption for hunting and fishing applies only to the *concealed* carry restriction, and only while engaged in those activities. Likewise, the exception for carrying at a shooting facility is not *for self-defense.* And the provision dealing with transportation of firearms to and from those and other activities applies only to *unloaded* firearms, usually in a locked container. Cal. Penal Code § 25505.

California also permits firearms "at places of temporary residence," Resp. 4, but keeping a firearm at a "residence" is, by

definition, not carrying *outside the home*. Finally, the affirmative defense for individuals who are "in immediate, grave danger," Resp. 4, manifestly does not provide any meaningful outlet to carry for self-defense, as "immediate, grave danger" ordinarily arises only once is it too late to obtain the firearm that California otherwise prohibits an individual from carrying. Accordingly, if (as in San Diego County) a typical, law-abiding cannot obtain a concealed carry permit for self-defense, then he has no means of exercising his Second Amendment right to be "armed and ready for offensive or defensive action in a case of conflict with another person." *Heller*, 554 U.S. at 584.

Like the en banc panel, the State invokes history to support that result, Maj. Op. 23-46; Resp. 8-12, but the relevant history cuts in precisely the opposite direction. While *Heller* noted that most 19th-century courts upheld concealed carry prohibitions, 554 U.S. at 626, the precedents it cited upheld concealed carry bans *only where open carry was expressly permitted*. *See State v. Chandler*, 5 La. Ann. 489, 490 (1850); *Nunn v. State*, 1 Ga. 243, 251 (1846). And because the constitutionality of a concealed carry ban depends on the availability of open carry, *Heller* omitted concealed carry bans from its list of "presumptively lawful regulatory measures." 554 U.S. at 626-27 & n.26.

Even further afield, the en banc panel and the State invoke medieval England's Statute of Northampton. Maj. Op. 24-30; Resp. 12. But no less an authority than Blackstone explained that the Northampton statute applied only to "the offence of riding or going armed, with dangerous or unusual weapons," and thereby "terrifying the good people of the land." 4 W. Blackstone, Commentaries on the Laws of England 148 (1769). That was the same construction adopted by *Heller* and the sources it cited in responding to the identical argument. 554 U.S. at 627.

Ultimately, the State is left contending that its law "strike[s] a reasonable balance between recognizing and accommodating both individual rights … and implementing the State's legislative judgment." Resp. 4. That statement has the virtue of candor but the vice of contradicting the basic premise of constitutional rights. As *Heller* explained, the "very enumeration of" a constitutional "right takes out of the hands of government … power to decide on a case-by-case basis whether the right is *really worth* insisting upon." 554 U.S. at 634. When "individual rights" enshrined in the Constitution conflict with "the State's legislative judgment," it is the latter that must yield under the Second Amendment, as with every other incorporated provision of the Bill of Rights. The Second Amendment, no less than other enumerated rights, "is the very

product of an interest balancing by the people," and no legislature or court may conduct that balancing "for them anew." *Id.*

Because the en banc panel's decision contradicts that basic understanding of constitutional rights—and evades the exceptionally important question this Court voted to resolve—rehearing by the full Court is warranted.

July 22, 2016

Respectfully submitted,

s/ C. D. Michel
C. D. Michel
Clinton M. Monfort
Sean A. Brady
Anna M. Barvir
MICHEL & ASSOCIATES, P.C.
180 E. Ocean Boulevard, Suite 200
Long Beach, CA 90802

Paul D. Clement
Erin E. Murphy
Christopher G. Michel
BANCROFT PLLC
500 New Jersey Ave., N.W.
Suite 470
Washington, D.C. 20001

Paul Neuharth, Jr.
PAUL NEUHARTH, JR., APC
1140 Union St., Suite 102
San Diego, CA 92101

Counsel for Plaintiffs-Appellants

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Circuit Rules 35-4 and 40-1, the attached Appellants' Reply to Intervenor State of California's Response to Plaintiffs-Appellants' Petitions for Full Court Rehearing En Banc is proportionately spaced, has a typeface of 14 points or more, and contains 2,090 words.

Date: July 22, 2016

MICHEL & ASSOCIATES, P.C.

s/ C. D. Michel
C. D. Michel
Counsel for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I hereby certify that on July 22, 2016, an electronic PDF of Appellants' Reply to Intervenor State of California's Response to Plaintiffs-Appellants' Petitions for Full Court Rehearing En Banc was uploaded to the Court's CM/ECF system, which will automatically generate and send by electronic mail a Notice of Docket Activity to all registered attorneys participating in the case. Such notice constitutes service on those registered attorneys.

Date: July 22, 2016

MICHEL & ASSOCIATES, P.C.

s/ C. D. Michel
C. D. Michel
Counsel for Plaintiffs-Appellants