No. 18-121

In the Supreme Court of the United States

JAMES ROTHERY & ANDREA HOFFMAN,

Petitioners,

v.

LOU BLANAS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE STATE RESPONDENT IN OPPOSITION

XAVIER BECERRA
Attorney General of California
EDWARD C. DUMONT
Solicitor General
THOMAS S. PATTERSON
Senior Assistant Attorney General
MICHAEL J. MONGAN
SAMUEL P. SIEGEL*
Deputy Solicitors General
GEORGE WATERS
Deputy Attorney General
STATE OF CALIFORNIA
DEPARTMENT OF JUSTICE
1300 I Street
Sacramento, CA 95814
(916) 210-6269
Sam.Siegel@doj.ca.gov
**Counsel of Record*

October 1, 2018

QUESTION PRESENTED

Whether the Sacramento County Sheriff's implementation of state law governing the issuance of permits to carry a handgun in public is consistent with the Second Amendment.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

TABLE OF AUTHORITIES
(continued)

Page

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

STATEMENT

1. In California, any resident who is over 18 and not otherwise prohibited from possessing firearms may generally keep or carry a loaded gun in his or her home or place of business. Cal. Penal Code §§ 25605, 26035. Related provisions authorize the transportation of a gun (unloaded and properly secured) to and from authorized places. *See id.* §§ 25505, 25525, 25610. In general, the State does not prohibit carrying a gun in non-public areas even within incorporated cities, or in unincorporated areas except in public places where it would be unlawful to discharge the weapon. *Id.* §§ 25850(a), 17030. Various provisions also allow specified categories of individuals, including active and honorably retired peace officers, to carry guns in public under certain circumstances. *Id.* §§ 25450, 25900.

California does restrict the carrying of firearms by most individuals in public spaces in cities and towns. State law generally prohibits carrying a gun, whether openly or concealed, in "any public place or on any public street" of incorporated cities. Cal. Penal Code § 25850(a); *see id.* §§ 25400, 26350(a), 26400. A similar restriction applies in public places or on public streets in "prohibited areas" of unincorporated territory—that is, areas where it would be unlawful to discharge a weapon. *Id.* §§ 25850(a), 26350(a), 26400; *see id.* § 17030. There is a general, although narrow, exception allowing anyone to carry a gun if he or she reasonably believes that doing so is necessary to preserve a person or property from an immediate, grave danger, while if possible notifying and awaiting local law enforcement. *Id.* § 26045.

California recognizes that some individuals may need or want to carry a gun in public in situations not otherwise provided for by law. State law permits otherwise qualified residents to seek a permit to carry a handgun (normally concealed, although in some circumstances openly) for "[g]ood cause." Cal. Penal Code §§ 26150, 26155. The Legislature has delegated the authority to determine what constitutes "good cause" for the issuance of such a permit in particular areas to local authorities, generally county sheriffs or city policy chiefs. *See id.* §§ 26150, 26155, 26160.

2. Petitioners are two individuals who sought concealed carry permits in Sacramento County more than 10 years ago. Petitioner Rothery applied for a permit on three occasions between 2003 and 2006, and petitioner Hoffman applied for one in 2007. D. Ct. Dkt. 24 at 2-3.[1] The Sacramento County Sheriff's Department denied each application, under "good cause" policies in place during the administrations of respondents Lou Blanas (who served as Sheriff from 1998 to 2006) and John McGinnis (who was elected Sheriff in 2006). *See id.* at 2-5. (As discussed below, current Sheriff Scott Jones succeeded Sheriff McGinnis in 2010 and adopted a materially different policy. *See* Pet. ii; *see also infra* 4-5.)

Petitioners filed the complaint in this case in September 2008. Pet. 5; D. Ct. Dkt. 2. Among other things, they alleged that California's "good cause" regime, as implemented at that time by the Sacramento County Sheriff's Department, violated the Second Amendment. Pet. App. 6a. They also alleged

---

[1] District court docket references are to the docket in Case No. 2:08-cv-2064 (E.D. Cal.).

a violation of the Equal Protection Clause because California allows retired police officers to obtain concealed carry permits without having to show "good cause." *Id.* at 5a, 18a. Petitioners sought injunctive relief allowing them to carry concealed weapons in their vehicles or on their persons. D. Ct. Dkt. 24 at 66-67.

The district court dismissed the complaint. Pet. App. 4a-12a. Interpreting this Court's decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008), the court held that the Second Amendment did not protect a right to carry a concealed weapon outside the home. Pet. App. 6a, 11a, 18a, 23a-24a.[2] It dismissed the equal protection claim on the ground that California had a rational basis for allowing retired peace officers to carry weapons in public because they face a heightened "threat of danger from enemies [they] might have made during [their] service." *Id.* at 20a; *see also id.* at 5a, 10a.[3]

---

[2] Although its decision pre-dated *McDonald v. City of Chicago*, 561 U.S. 742 (2010), the district court assumed for purposes of its decision that the Second Amendment applied to the States under the Fourteenth Amendment. Pet. App. 6a.

[3] The district court also dismissed plaintiffs' claims that the former sheriffs violated the First Amendment and the Equal Protection Clause by granting concealed carry permits to individuals who were campaign contributors while denying them to other individuals. Pet. App. 10a-12a, 18a-23a, 30a. The district court noted (*id.* at 12a) that these claims were "a rehash of" the claims in another case, *Mehl v. Blanas*, Case No. 2:03-cv-2682 (E.D. Cal.). The district court in *Mehl* dismissed the First Amendment and equal protection claims on standing grounds. 2008 WL 324019, at *6 (E.D. Cal. Feb. 5, 2008). The Ninth Circuit held that one of the plaintiffs had standing, but affirmed the dismissal of those claims on the ground that the record showed that "over 200 non-contributors received licenses

(continued…)

3. The court of appeals stayed petitioners' appeal pending its resolution of three others: *Nordyke v. King*, 681 F.3d 1041 (9th Cir. 2012) (en banc); *Mehl v. Blanas*, 532 Fed. App'x 752 (9th Cir. 2013) (*see supra* n. 3); and *Peruta v. County of San Diego*, 824 F.3d 919 (9th Cir. 2016) (en banc). After the decision in *Peruta* the court lifted the stay and the parties completed briefing.

The court of appeals affirmed the district court's dismissal of the case. Pet. App. 1a-3a. In an unpublished decision, it applied *Peruta*'s holding that "'the Second Amendment does not protect, in any degree, the carrying of concealed firearms by members of the general public.'" *Id*. at 2a (quoting *Peruta*, 824 F.3d at 942.) As to the equal protection claim, the court held that petitioners had "failed to allege facts sufficient to state a plausible claim for relief." *Id*.

ARGUMENT

Petitioners urge the Court to grant review to consider whether they have stated a claim that their Second Amendment (and equal protection) rights were violated when the Sacramento County Sheriff's Department refused to issue them concealed carry permits more than 10 years ago, under a "good cause" policy maintained by a previous Sheriff. *See, e.g.*, Pet. i, 5-8, 13 (relying on factual allegations in complaint). As the county respondents explain, however, in their brief in opposition, the circumstances rele-

---

(…continued)

during Blanas's tenure, while several Blanas donors had their [concealed carry permit] applications denied." *Mehl v. Blanas* 532 F. App'x 752, 754 (9th Cir. 2013).

vant to petitioners' ability to secure concealed carry permits have changed materially since that time. *See* County Opp. 3, 5-7. The current Sheriff, first elected in 2010, uses a definition of "good cause" that requires only a stated desire to have the ability to carry a weapon for purposes of self-defense or defense of family. *Id.* at 7. Under this revised policy, the Sheriff's Department has issued thousands of concealed carry permits. *See* California State Auditor, *Concealed Carry Weapon Licenses* 7 (Dec. 2017) (Sacramento County had 9,130 active licenses as of June 30, 2017).[4]

Indeed, we understand that petitioner Rothery currently holds a concealed carry permit, first issued in 2013 and since renewed. County Opp. 3, 5-6. While petitioner Hoffman does not appear to have a current permit, it also does not appear that she has sought one since the Sheriff's new policy went into effect. *See id.* at 3. Accordingly, it seems that petitioners are not presently being deprived of any right "to carry a handgun in some manner outside the home for self-defense." Pet. 14; *see id.* at 6. Indeed, it is far from clear that there is any present controversy among the parties concerning petitioners' particular legal rights. *See Alvarez v. Smith*, 558 U.S. 87, 93 (2009).

In any event, this case was resolved below on a motion to dismiss a now decade-old complaint. That age and posture, along with the intervening developments just noted, would make the case at best a poor vehicle for review by this Court. There is no

---

[4] *Available at* https://www.auditor.ca.gov/pdfs/reports/2017-101.pdf.

reason to think that considering this case on the premise that the allegations in the complaint are true (*see* Pet. 13) would be "conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982).

To be clear, California does not dispute that questions concerning how state and local authorities may regulate the carrying of guns in public places can be ones of exceptional importance—especially if they involve or threaten the invalidation of longstanding laws designed to protect public safety. *See, e.g.*, *Young v. Hawaii*, 896 F.3d 1044, 1074 (9th Cir. 2018) (invalidating restrictions on open carry in light of panel's understanding of restrictions on concealed carry), *pet. for rehearing en banc pending* (filed Sept. 14, 2018); *Flanagan v. Becerra*, No. 18-55717 (9th Cir.) (challenging California's regulation of public carry in light of Los Angeles Sheriff's implementation of state "good cause" requirement) (state respondent's petition for initial hearing en banc in light of *Young* filed Sep. 21, 2018). Nor do we deny the existence of disagreements among lower courts that may at some point warrant further consideration by this Court. *See, e.g.*, *Wrenn v. District of Columbia*, 864 F.3d 650, 665-667 (2017). The present case, however, does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

XAVIER BECERRA
Attorney General of California
EDWARD C. DUMONT
Solicitor General
THOMAS S. PATTERSON
Senior Assistant Attorney General
MICHAEL J. MONGAN
SAMUEL P. SIEGEL
Deputy Solicitors General
GEORGE WATERS
Deputy Attorney General

October 1, 2018