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

BRIEF IN OPPOSITION FOR COUNTY OF SACRAMENTO, LOU BLANAS, JOHN MCGINNESS, AND TIM SHEEHAN

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QUESTION PRESENTED

This case does not present the broad questions posed in the petition. Fairly characterized, the only question presented is whether the Court should grant certiorari to consider whether the Ninth Circuit correctly dismissed Petitioners' case for failure to state a claim upon which relief could be granted.

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ADDITIONAL STATEMENT OF THE CASE

I. District Court Opinion

Petitioners James Rothery and Andrea Hoffman filed the underlying lawsuit in 2008 in the Eastern District Court of California alleging violations of their federal constitutional rights based on the denial of their respective applications for a license to carry a concealed weapon in Sacramento County. Their first amended complaint is 78-pages long and contains 808 paragraphs. As observed by the district court, "it is a mishmash of thoughts, legal argument, speculation, with some allegations thrown in." *See* Pet. App. 14a. Nowhere within those 808 paragraphs do Petitioners state a desire to openly carry a weapon nor do they directly challenge the California Penal Code section that addresses open carry within the state. Instead, they specifically state,

> "Plaintiffs own handguns which they would like to carry in their vehicles and/or on their persons, concealed for protection of themselves, their families, and other citizens, just as other privileged and well connected citizens, retired peace officers, and the sheriff's various cronies and campaign contributors are allowed to carry concealed handguns."

See D. Ct. Dkt. No. 24 at ¶ 699.[1]

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

Most of the allegations and legal theories therein were previously made and adjudicated in two prior lawsuits filed by Petitioners' counsel. The district court had the benefit of reviewing those prior records and decisions in evaluating Petitioners' claims. *See* D. Ct. Dkt. 28-2. After briefing and oral argument, the district court dismissed Petitioners' First Amended Complaint in its entirety without leave to amend.

II. Ninth Circuit Panel Opinion

A unanimous three-judge panel of the Ninth Circuit Court of Appeals affirmed the dismissal. Pet. App. 1a-3a. With respect to Petitioners' Second Amendment challenge, the Ninth Circuit concluded that "the Second Amendment does not protect, in any degree, the carrying of concealed firearms by members of the general public." *See Id.* at 2a (citing *Peruta v. County of San Diego*, 824 F.3d 919, 942 (9th Cir. 2016) (en banc)). The court of appeals further held that Petitioners' equal protection claim was properly dismissed because they failed to allege facts sufficient to state a plausible claim for relief. *See Id.* (citing *Romer v. Evans*, 517 U.S. 620, 631 (1996); *Silveira v. Lockyer*, 312 F.3d 1052, 1088 (9th Cir. 2002)). The same panel voted to deny the petition for panel rehearing. Pet. App. 32a. Not one judge in the Ninth Circuit requested a vote on whether to rehear the matter en banc. *Id.*

III. Additional Pertinent Facts

Petitioner James Rothery submitted his first application for a license to carry a concealed weapon in Sacramento County in 2003, which was denied. *See* D. Ct. Dkt. No. 24 at ¶¶ 9-10. He submitted a third application in 2006, which was also denied. *Id.* at ¶ 11. Petitioner Rothery did not submit an appeal of the

denial of the 2006 application to the Sheriff's Department. *Id.* at ¶ 12. In 2013, Petitioner Rothery applied for and was granted a concealed carry license by the Sacramento County Sheriff's Department. He renewed that license in 2017.

Petitioner Andrea Hoffman applied for a license to carry a concealed weapon in Sacramento County in 2007, which was denied. Her appeal of that decision was denied in 2008. *See Id.* at ¶ 8. She has not submitted any subsequent applications for a concealed carry license in the County of Sacramento.

Scott R. Jones is the current Sheriff in Sacramento County, and has held that position since 2010.

REASONS FOR DENYING THE PETITION

I. This case does not present the question that Petitioners ask this Court to decide.

Petitioners urge this Court to grant review to consider whether California's overall framework of regulations on public carry—either open or concealed—is consistent with the Second Amendment. *See* Pet. at i. However, Petitioners did not present that issue in their underlying complaint, nor was it addressed or decided by either the district court or court of appeals. *See* D. Ct. Dkt. No. 24; Pet. App. 1a-31a. Instead, Petitioners' complaint specifically stated the desire to "carry in their vehicles and/or on their persons, *concealed* for protection of themselves, their families, and other citizens," just as retired peace officers and the Sheriff's friends and supporters "are allowed to carry *concealed* handguns." *See* D. Ct. Dkt. No. 24 at ¶ 699 (emphasis added).

The only constitutional question answered by the decisions below is whether the Second Amendment protects a specific right to carry concealed weapons in public. *See* Pet. App. 1a-3a. While Petitioners seek to present different and broader questions, this Court normally does "not decide in the first instance issues not decided below." *NCAA v. Smith*, 525 U.S. 459, 470 (1999). This case does not present any basis to stray from that precedent. The court of appeals resolved this case by addressing only whether the Second Amendment protects the ability to carry concealed firearms in public. *See* Pet. App. at 1a-3a. Similarly, the district court's dismissal was based on Petitioners' assertion of the right to carry concealed weapons in public. *See* Pet. App. 13a-31a (district court notes that "[Petitioners] equate the right to keep and bear arms with the right to carry firearms concealed, without ever analyzing, or even acknowledging, a possible difference between the two"). At no time during the dismissal hearing did Petitioners assert a right to carry firearms openly or challenge California's regulations on public carry beyond those associated with issuance of concealed carry permits. *See id.*

II. Petitioner Rothery does not have standing to pursue his claims.

1. Petitioner Rothery did not fully complete the application process or exhaust administrative remedies as to his 2006 application in order to obtain a concealed carry license in Sacramento County. *See* D. Ct. Dkt. No. 24 at ¶ 12. Further, he did not apply to be a member of the organizations he claims to have been wrongfully denied membership. *See Ibid, passim*. In *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992), this Court held that to satisfy Article III's

standing requirements, a plaintiff must show (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Petitioner Rothery did not appeal the denial of his application in 2006 and therefore did not complete the administrative application process or exhaust his administrative remedies. As he did not complete the application process, it would be sheer speculation to guess at what the County's decision on Petitioner Rothery's 2006 application would have been or what policies (constitutional or otherwise) may have been implicated by the decision. Additionally, Petitioner Rothery never requested membership in the Sheriff's Aeroquadron or Posse, which he claims may have resulted in him receiving a concealed carry license. Since he never sought such membership, it is absolute speculation as to what the County's actions would have been in response thereto. In the absence of completing these processes, Petitioner Rothery cannot show that any unconstitutional policy played any role in the denial of a concealed carry license or membership in certain Sheriff's Department organizations. Based thereon, Petitioner Rothery's alleged injury is not fairly traceable to the actions of the County and he does not have standing to pursue his claims.

2. Petitioner Rothery has had a concealed carry license in Sacramento County for the last five (5) years, and therefore has no claim for the equitable and injunctive relief sought. In 2013, Petitioner Rothery re-applied

for and was granted a concealed carry license. He renewed that license in 2017 and is currently the holder of a concealed carry license in the County of Sacramento. A justiciable case or controversy must remain "extant at all stages of review, not merely at the time the complaint is filed." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997) (internal quotation marks omitted). It is not enough that there may have been a live case or controversy when the case was decided by the court whose judgment the Court is reviewing. No such case or controversy currently exists as to Petitioner Rothery.

III. Petitioners' characterization of the County's concealed carry licensing scheme is incorrect.

California law permits licensing authorities to issue a concealed carry license upon proof that the applicant is of good moral character, has good cause for the license, is a resident of the licensing authority's jurisdiction, and has completed firearms training. *See* Cal. Penal Code § 26150. Petitioners challenge Sacramento County's interpretation of the "good cause" requirement. Specifically, Petitioners assert that "as-written, only those related to law enforcement received permits" and "[a]s-applied, campaign contributors received their permits routinely; while others, like Petitioner Hoffman…are denied." *See* Pet. at 3.

Petitioners contend that the only means to bear arms in the County of Sacramento is to be active or retired law enforcement or to be a friend of and contributor to the Sheriff. The evidence in the record in this case clearly refutes this claim. Although this matter was dismissed at the pleading stage, both lower courts had the benefit of reviewing the record

developed in a similar case previously filed by Petitioners' counsel asserting the same allegations against the same defendants. *See Mehl v. Blanas*, 532 F. App'x 752, 754 (9th Cir. 2013). According to the evidence in the record in *Mehl* –the same evidence applicable to this matter– over 200 individuals that were not contributors to the respective campaigns of the County Sheriff received concealed carry licenses, while several campaign contributors had their applications denied. The evidence clearly established that issuance of a license was not correlated to one's status as a contributor to the Sheriff's campaign. Additionally, it revealed that individuals other than those related to or associated with law enforcement regularly received licenses to carry concealed in Sacramento County.

Petitioners' claim is further undercut by the fact that Petitioner Rothery currently has a concealed carry license issued by the Sacramento County Sheriff. Further, it has been widely publicized that since taking office in 2010, current Sacramento County Sheriff Scott Jones has issued more than 8,000 concealed carry licenses, which is more than most other sheriffs in the State of California. *See* California State Auditor, Concealed Carry Weapon Licenses (Dec. 2017).[2] Moreover, if the applicant is not otherwise prohibited, Sheriff Jones' practice is to accept as good cause for a license to carry a concealed weapon an applicant's stated desire to obtain a license for self-defense or for the defense of his or her family. There is no requirement, nor has there ever been, that an applicant be current or retired law enforcement, related to law enforcement, or a friend or campaign

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

contributor of the Sheriff.

Both the district court and the court of appeals had access to and reviewed a substantial record evidencing that neither one's status as a campaign contributor nor friend or family of the Sheriff played a role in receiving a concealed carry license. *See* Pet. App. 9a-31a.

IV. There is no relevant split among the lower courts regarding Petitioners' equal protection claim.

Petitioners' assertion that there is a split amongst the circuits as to whether retired peace officers are entitled to a presumptive right of self-defense under the Second Amendment is outright false. *See* Pet. 35-37. In a case asserting a similar equal protection argument, the Fourth Circuit held that retired law enforcement officers were not similarly situated to the general public for purposes of the ability to maintain assault weapons and large capacity magazines, as opposed to concealed carry licenses. *See Kolbe v. Hogan*, 849 F.3d 114, 147 (4th Cir. 2017). Nothing about the Fourth Circuit's holding in *Kolbe* or its statements in the footnote cited by Petitioners, is contrary to the decision of the Ninth Circuit in this case. The Fourth Circuit merely criticized the Ninth Circuit's failure to analyze whether there was differential treatment of similarly situated persons, an analysis not challenged by Petitioners and one that would ultimately be detrimental to their claim. *See Kolbe*, 849 F.3d at 147 fn. 18. The Fourth Circuit did not address or criticize the level of scrutiny applied by the Ninth Circuit and certainly did not conclude that retired law enforcement officers were or were not entitled to a presumptive right of self-defense under the Second

Amendment. *See id.* Petitioners do not raise any other circuit split in regard to their equal protection claim.

V. The lower court correctly determined that Petitioners failed to state an equal protection claim.

Petitioners' Equal Protection claim against the County of Sacramento challenges the County's application of California Penal Code sections that permit honorably retired peace officers to obtain a license to carry a concealed weapon without having to show good cause for the license. *See California Penal Code* §§ 25400, 25450, 25850, 25900. They contend that in applying those Penal Code sections, the County gave preferential treatment to honorably retired peace officers.

This Court has recognized that equal protection "is essentially a direction that all persons similarly situated should be treated alike." *See City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985). Thus, a plaintiff challenging a state statute on an equal protection basis must first demonstrate that he has been treated differently from others with whom he is similarly situated, and that the unequal treatment was the result of intentional or purposeful discrimination. *See id.* at 439-40. If that initial showing has been made, the court proceeds to determine whether the disparity in treatment can be justified under the requisite level of scrutiny. *Id*.

Petitioners do not argue they are similarly situated to retired peace officers, nor do they challenge any lower court determination that they are not. Instead, Petitioners assume they have satisfied the first step of the analysis and challenge only the lower courts' application of the rational basis test and

determination that the Petitioners did not have a fundamental right to carry a concealed weapon. For obvious reasons—reasons that are detrimental to Petitioners' equal protection claim—members of the general public and retired peace officers are not similarly situated with respect to the right to carry a concealed weapon. *See* Pet. App. 20a (district court noted that retired officers faced a heightened "threat of danger from enemies [they] might have made during [their] service…").

Neither the Penal Code nor the County's application thereof burdens a fundamental right nor targets a suspect class. "[I]f a law neither burdens a fundamental right nor targets a suspect class, [this Court] will uphold the legislative classification so long as it bears a rational relation to some legitimate end." *See Romer v. Evans*, 517 U.S. 620, 631 (1996). Petitioners assert without any supporting authority that the Second Amendment creates a fundamental right to carry a weapon concealed. Their contention is based upon the decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008), wherein this Court recognized that the Second Amendment right to keep and bear arms applied to individuals. Petitioners equate the individual right to keep and bear arms with a fundamental right to self-defense by means of carrying a weapon concealed. *See* Pet. at 33. In doing so, Petitioners overlook the portion of the *Heller* decision that clearly stated that the rights secured by the Second Amendment were not unlimited and distinguished and approved prohibitions on concealed carry. *See Heller*, 544 U.S. at 626. Moreover, Petitioners fail to identify any court that has recognized that an individual has a fundamental right to carry a weapon concealed.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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