IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

01-15098

SEAN SILVEIRA, *et al.*,
Appellants

v.

BILL LOCKYER, *et al.*,
Appellees

AMICUS CURIAE BRIEF OF THE CALIFORNIA RIFLE &PISTOL ASSOCIATION, INC., IN SUPPORT OF NEITHER PARTY, IN SUPPORT OF THE PETITION FOR REHEARING EN BANC, AND IN SUPPORT OF AFFIRMANCE ON OTHER GROUNDS

Appeal from the U.S. District Court
for the Eastern District of California
D.C. No. CIV S 00 411 WBS/JFM

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CORPORATE DISCLOSURE STATEMENT

The California Rifle & Pistol Association, Inc., has no parent corporations. Since it has no stock, no publicly held company owns 10% or more of its stock.

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IDENTITY OF THE AMICUS CURIAE

The California Rifle and Pistol Association, Inc. ("CRPA") is a California not-for-profit corporation founded in 1875. The CRPA, which has almost 70,000 members, is dedicated to representing the interests of all sportsmen, sportswomen, and firearm owners in California. The CRPA sponsors legislation on behalf of its members to guarantee the right of law-abiding persons to have and use firearms for sporting purposes, hunting, collecting, and lawful self defense. It conducts outreach programs and provides educational material to the public regarding the safe and proper use of firearms, wildlife preservation and management, and the Second Amendment right of the people to keep and bear arms. The CRPA actively promotes the shooting sports, providing education, training, and organized competition in adult and junior venues. It also sponsors local and state adult and junior shooting teams which compete in national competitions each year.

CRPA's interest in this case stems from the fact that its membership resides in California and are subject to the stringent legal requirements of the laws in question, are adversely affected by the panel opinion at issue, and will be affected by any other decision of this Court concerning the nature of the Second Amendment.

Appellants object to the filing of this amicus curiae brief. Appellees consent to the filing of this amicus curiae brief.

ARGUMENT: THE PANEL RENDERED AN ADVISORY OPINION NOT ARISING OUT OF A CONCRETE "CASE OR CONTROVERSY" UNDER ARTICLE III

Amicus Curiae CRPA suggests that the petition for rehearing be granted by the panel or, alternatively, that the petition for rehearing en banc be granted; that the panel opinion be vacated; and that the judgment of dismissal be affirmed based on the failure of the complaint to allege sufficient injury to plaintiffs and the consequent lack of standing and ripeness to decide this case.[1]

The panel decision is an advisory opinion that was not the result of a concrete "case or controversy" under Article III of the U.S. Constitution between parties with a genuine dispute. The complaint in this case fails to allege with particularly that

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[1] 28 U.S.C. § 2106 provides:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

specific plaintiffs possess specific firearms that are subject to the laws at issue and that they are individually injured by the enforcement thereof. The panel decision conflicts with the general principles of standing and ripeness set forth in *San Diego County Gun Rights Committee v. Reno*, 98 F.3d 1121 (9th Cir. 1996), and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions. The panel decision conflicts with the authoritative decision of another United States court of appeals that addressed the issue, *Emerson v. United States*, 270 F.3d 203 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 2362 (2002), but this conflict should not be resolved in this case in that it fails to present a genuine case or controversy under Article III.

The panel unnecessarily decided a complex constitutional issue and expanded this Circuit's precedents on the Second Amendment based on an action in which plaintiffs suffered no injury, did not have ordinary Article III standing, and which was never ripe for decision.

The complaint woefully fails the minimal tests for standing and ripeness. The only specificity alleged about the plaintiffs is that each one is a resident of California, has an identified background and employment, and that seven of the nine plaintiffs are identified as a "model citizen." First Amended Complaint ¶s 33-41. No allegation exists that any specific plaintiff possesses a specific firearm subject to the Act and

how the Act and defendants' enforcement thereof is the proximate cause of harm to such specific plaintiff.[2]

[2] The "Act" as used herein refers to California's Roberti-Roos Assault Weapons Control Act of 1989, as amended in 1991 (S.B. 263) and 1999 (S.B. 23). Its core provision is P.C. § 12280, which provides criminal penalties for the transfer, possession, and other activities with "assault weapons." However, the complaint also refers to various other provisions of California law.

Instead, the complaint makes the single, vague allegation that: "Plaintiffs *own, or would like to own*, semi-automatic rifles and/or pistols subject to the terms of the statute which prohibits and/or restricts possession, use, transfer and/or sale of semi-automatic rifles and/or pistols." ¶ 31 (emphasis added). This equivocates on whether any plaintiffs actually and presently "own" such items or whether they would merely "like to own" them in some indefinite future.[3] Saying that one would "like to own" something is a far cry from saying that such person would expeditiously obtain such item but for the existence of some barrier (such as the law), and that the person is injured by not being allowed to obtain it.

Moreover, the Act does not regulate "ownership" of specified firearms – instead, it regulates unregistered possession, transportation, and other acts. P.C. § 12280. Plaintiffs are free to "own" such firearms – ownership means legal title

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[3] **Plaintiffs' counsel in this case "filed the challenge on behalf of nine plaintiffs -- most of them rugby buddies. . . . Marcus Davis, one of the rugby-playing plaintiffs . . . said he owns a few deer rifles and shotguns but has no assault weapons himself. Most of the other plaintiffs also own guns, but some don't, Gorski said." "A Lonely Fight for Gun Rights," *San Francisco Chronicle*, Dec. 23, 2002, A1 (attached herewith).**

and knows no State boundaries – it is the possession and use thereof in California which are restricted.

And what do plaintiffs wish to "own"? As noted, firearms "subject to the terms of the statute." Since no specific firearm is identified, it is unclear that any firearm any plaintiff wishes to own is even subject to the Act, or that such plaintiff even knows the difference.[4] **Is it that plaintiffs would like to own firearms "subject to the terms of the statute," but would not like to own the very same firearms if they are *not* "subject to the terms of the statute"? This vague allegation was obviously inserted to make a superficial showing of standing, but instead it suggests lack of any injury.**

As to injury, the complaint alleges: "Plaintiffs have been harmed according

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[4] For instance, P.C. § 12276 defines "assault weapon" by model name, but does not include firearms which may be functionally indistinguishable. Left unregulated, and requiring legal action by the Attorney General and the courts to become regulated, is "another model by the same manufacturer" of a weapon listed in § 12276 "which is identical to one of the assault weapons listed in those subdivisions except for slight modifications or enhancements." § 12276.5. For all one knows from the complaint, the plaintiffs wish to own one of the latter, unregulated firearms. *See Harrott v. County of Kings*, 25 Cal.4th 1138, 108 Cal. Rptr.2d 445, 449, 25 P.3d 649 (2001) (unlisted firearm may be regulated only after judicial action and publication).

Moreover, § 12276.1 defines "assault weapon" to include generic features such as "a flash suppressor" or "a forward pistol grip." The complaint fails to allege that the firearms plaintiffs wish to own have any of these features – they might well wish to own firearms with similar (but unregulated) features or no such features at all.

to proof." ¶ 32. Perhaps it is too much to ask what the "proof" consists of, as the complaint fails to allege any concrete, relevant harm about any particular plaintiff.

Although the complaint contains nothing pertinent about the specific plaintiffs or what specifically they would like to own, it is filled with political arguments. The opening paragraph is an alleged quotation from "Adolph [*sic*] Hitler" (lacking any citation to a source and of questionable authenticity), followed by several more paragraphs of quotations from historical American figures.[5] ¶s 1-5. There follows three pages labeled "The Underlying Facts" but consisting of policy arguments based on mortality statistics from a variety of causes. (Pages 3-6) Devoid of facts showing personal standing, injury, and ripeness, the complaint has all the earmarks of an action seeking an advisory opinion.

The petition for rehearing concerns only the First Cause of Action, which relates to the Second Amendment but which is inadequate on its face in that it fails to allege any facts that would establish standing or ripeness. It alleges: "Plaintiffs are

[5] Similarly, the Petition for Rehearing (p. 2) includes a quotation attributed to "James Maddison" [*sic*] and other quotations without citing references.

now prohibited from arming themselves with standard firearms under California law." ¶ 66. It alleges that defendants are "enforcing numerous statutes which infringe upon Plaintiffs' rights," "requiring Plaintiffs to register firearms," and "regulating and controlling firearms . . . in a way which obviously infringes upon Plaintiffs' rights . . . ." ¶ 76. The allegations fail to articulate with particularity how the specific Act here (not "numerous statutes") concretely harms their current possession (not future "arming themselves") of specific firearms subject to the Act (not "standard firearms").

There is not a single allegation that a specific plaintiff possesses a specific firearm subject to the Act and that such plaintiff faces the threat of either prosecution or compliance which entails economic loss or other injury.

It is the view of CRPA and its members that the Act does indeed violate the Second and Fourteenth Amendments to the U.S. Constitution. It is also their view that advisory opinions on this weighty issue should not be issued based on ill-prepared actions brought by plaintiffs who fail elementary standing and ripeness requirements.

The complaint in this case should have been dismissed based on the traditional standing and ripeness concerns such as those set forth in *San Diego County Gun Rights Committee v. Reno*, 98 F.3d 1121 (9th Cir. 1996),[6] **which is not even cited in**

[6] To be sure, that decision itself transforms the substantive Second Amendment issue into a standing issue, but its broader holding regarding personal standing and ripeness represents the view that actions brought by parties without concrete injury

the panel opinion. In that case, the plaintiffs challenged the federal assault weapon ban but failed to allege that they even possessed such items. Thus, "plaintiffs allege that they 'wish and intend' to engage in unspecified conduct prohibited by the Act."[7] *Id*. at 1124. Indeed, "plaintiffs' counsel represented that none of the plaintiffs are under any threat of prosecution." *Id*. at 1127. Of course, threat of prosecution is not the only form of injury. "Economic injury is clearly a sufficient basis for standing." *Id*. at 1130.

To demonstrate standing under Article III of the Constitution, three elements must be found:

> First, plaintiffs must have suffered an "injury-in-fact" to a legally protected interest that is both "concrete and particularized" and "actual or imminent," as opposed to "'conjectural' or 'hypothetical.'" Second,

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should not give rise to decisions on the merits of weighty constitutional issues.

[7] Like the "wish to obtain" allegation here, in that case:

> The complaint does not specify any particular time or date on which plaintiffs intend to violate the Act. As the Supreme Court has observed, "such 'some day' intentions – without any description of concrete plans, or indeed even any specification of when the some day will be – do not support a finding of the 'actual or imminent' injury that our cases require."

Id. at 1127, citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992).

> there must be a causal connection between their injury and the conduct complained of. Third, it must be "likely" – not merely "speculative" – that their injury will be "redressed by a favorable decision."

Id. at 1126, citing *Lujan*, 504 U.S. at 560-61.

The lack of specificity in the complaint in *San Diego County Gun Rights* also sufficed to dismiss the action for lack of ripeness. First, "a concrete factual situation is necessary to delineate the boundaries of what conduct the government may or may not regulate without running afoul of the Commerce Clause. . . . As we have previously observed, 'the District Court should not be forced to decide . . . constitutional questions in a vacuum.'" *Id*. at 1132 (citation omitted). "With regard to the second prong of the ripeness test, we have previously considered a threat of criminal penalty to be hardship. . . . Nor do plaintiffs face a credible threat of prosecution." *Id.*

This Court's conclusion in *San Diego County Gun Rights* is particularly applicable here:

> Plaintiffs have not met their burden of establishing a "concrete and particularized" and "actual or imminent" injury caused by the Crime Control Act. . . . Indeed, it would be difficult to imagine a circumstance under which plaintiffs could have made a more feeble showing of

> injury-in-fact. To grant plaintiffs standing to challenge the constitutionality of the Crime Control Act in the circumstances of this case would eviscerate the core standing requirements of Article III and throw all prudential caution to the wind. Likewise, to hold that their claims are ripe for adjudication in the absence of any factual context would essentially transform district courts into the general repository of citizen complaints against every legislative action.

Id. at 1133.

This traditional standing and ripeness analysis was applied in the above decision in regard to constitutional challenges other than the Second Amendment. On the Second Amendment issue, the Court applied a lack of standing for lack of cause of action analysis such as the panel applied here.[8] ***Id*. at 1125. But as the case at bar highlights, that puts the cart before the horse. A complex decision like that rendered here should arise from a real case or controversy brought by parties with a personal stake and injury, not by litigants who merely disagree with a law**

[8] Ordinary Article III standing relates to whether the action is brought by a person with an actual stake in a controversy and over whose action the court thereby has jurisdiction. A person without such a stake and whose case is not ripe cannot survive a motion to dismiss for want of jurisdiction under F.R.Civ.P. 12(b)(1). What could be called "'cause of action' standing" is in reality a question not of standing but of whether a recognizable claim has been brought which can withstand dismissal for failure to state a claim under F.R.Civ.P. 12(b)(6).

that they have not shown adversely affects them.

By contrast, *Peoples Rights Organization, Inc. v. City of Columbus*, 152 F.3d 522, 528 (6th Cir. 1998), held that plaintiffs demonstrated standing and ripeness where they "face a clear Hobson's choice. They can either possess their firearms in Columbus and risk prosecution under the City's law, or, alternatively, they can store their weapons outside the City, depriving themselves of the use and possession of the weapons." *Id*. at 529. The plaintiffs described with specificity the nature of the firearms possessed and how the law and its enforcement injured them. The court concluded:

> [T]his matter presents a justiciable controversy under Article III. Plaintiffs Smolak and Walker have shown the significant possibility of future harm which is necessary to establish standing in a declaratory judgment action . . . . In addition, the matter is currently ripe for judicial review. Plaintiffs Smolak and Walker have demonstrated the requisite hardship they and other similarly situated members of P.R.O. will suffer if judicial review is denied at the pre-enforcement stage, the likelihood that the harm alleged will come to pass, and the fitness of the issues raised for judicial review.

***Id*. at 530-31. No comparable allegations appear in the complaint here.**

Standing and ripeness are routinely found or assumed in other meritorious

actions brought by persons subject to various firearms laws, and the courts should be open to such claims.[9] But absent the requisite standing and ripeness, allowing cases to go forward by parties with an insufficient stake to litigate the issues can only result in advisory opinions.

[9] ***E.g.*, *Doe v. San Francisco*, 136 Cal. App.3d 509, 186 Cal. Rptr. 380 (1982);** *National Rifle Ass'n v. City of South Miami*, 812 So. 2d 504 (2002)**; *Coalition of New Jersey Sportsmen v. Whitman*, 44 F. Supp.2d 666, 673 n.10 (D. N.J. 1999), *aff'd* 263 F.3d 157 (3d Cir. 2001), *cert. denied*, 122 S. Ct. 613 (2001); *Citizens for a Safer Community v. Rochester*, 627 N.Y.S.2d 193, 203-04, 206 (Sup. 1994).**

The panel decision is the end result of more than one advisory opinion, none of which were necessary based on the precedent of *Fresno Rifle & Pistol Club v. Van de Kamp*, 965 F.2d 723 (9th Cir. 1992). A challenge to the Roberti-Roos Act, *Fresno Rifle* held that the Second Amendment is not incorporated into the Fourteenth Amendment so as to protect the right to keep and bear arms from State infringement. That conclusion was flawed in two respects. First, while the Bill of Rights does not *directly* apply to the States, the Supreme Court left open the question whether the Fourteenth Amendment incorporates the Second Amendment.[10] **Second, it ignores the fact that over two-thirds of the same Congress that passed the Fourteenth Amendment declared that the rights to "personal liberty" and "personal security" include "the constitutional right to bear arms."[11]**

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[10] *Miller v. Texas*, 153 U.S. 535, 538-39 (1894) ("if the Fourteenth Amendment limited the power of the States as to such rights [the rights to bear arms and against warrantless searches] as pertaining to citizens of the United States, we think it was fatal to this claim that it was not set up in the trial court"). Contrary to *Fresno Rifle*, 965 F.2d at 730, that issue was not resolved in earlier decisions, which in any event predate the incorporation of Bill of Rights guarantees through the due process clause of the Fourteenth Amendment. *See Emerson*, 270 F.3d at 221 n.13; *accord*, *Silveira*, 312 F.3d at 1067 n.17.

[11] Freedmen's Bureau Act, §14, 14 Stat. 176 (1866). *See Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 397-98 (1978) (opinion of Marshall, J.) (Freedmen's Bureau Act dispositive of Congress' intent in Amend. XIV); *Griswold v. Connecticut*, 381 U.S. 479, 485 n. (1965) (Amend. XIV protects "indefeasible right of personal security, personal liberty and private property"). *Fresno Rifle*, 965 F.2d at 730, rejected reliance on the Framers' intent.

Even so, given that *Fresno Rifle* was binding circuit precedent, it was unnecessary to determine, as did *Hickman v. Block*, 81 F.3d 98 (9th Cir. 1996), *cert. denied*, 519 U.S. 912 (1996), whether a Second Amendment challenge existed to another State law. But the *Hickman* holding was limited to the right to "bear" arms, and did not consider the status of the right to "keep" arms. Officials had "denied Hickman a concealed weapons permit. He complains . . . that the appellees' permit issuance policy violated his Second Amendment right to bear arms." 81 F.3d at 99.

Hickman avers that "the Second Amendment guarantees the right of the states to maintain armed militia . . . ."[12] *Id*. at 102. *Hickman* then endorses the entirely different view that the Second Amendment "guarantee[s] the right to bear arms as a member of a militia."[13] *Id*. at 103 (citation omitted). **The argument that the right to**

[12] To the contrary, governments have "powers" and only "the people" have "rights." *Compare* U.S. Const. Amends. I, II, IV ("the right of the people" to assemble, have arms, and be free from unreasonable searches) *with* Art. I, § 8 ("Congress shall have power . . . to provide for organizing . . . the militia, . . . reserving to the states respectively, the appointment of the officers") & Amend. X ("the powers not delegated to the United States . . . are reserved to the states").

[13] *But see Muscarello v. United States*, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting) ("Surely a most familiar meaning [of carrying a firearm] is [in] the Constitution's Second Amendment ('keep and *bear* Arms')"). Moreover, no there is no "right" to bear arms in a militia, the composition of which is based on professional military judgment. *Hickman*, 81 F.3d at 103 (citation omitted).

"bear arms" refers only to militia service, does not apply to the right to "keep" (or possess) arms.[14] In any event, *Hickman*'s actual holding is limited to the meaning of the right to bear arms, and is not precedent on the right to keep arms.[15] The panel decision unnecessarily pushes beyond *Hickman* in deciding that the right to "keep" arms is not infringed by a prohibition on mere possession of a firearm.

The panel gives several reasons as to why it must issue a far-reaching, comprehensive analysis of the Second Amendment, but these reasons relate to other parties and other cases, not this one:

> In light of the United States government's recent change in position on the meaning of the amendment, the resultant flood of Second Amendment challenges in the district courts, the Fifth Circuit's extensive study and analysis of the amendment and its conclusion that *Miller* does

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[14] Samuel Adams proposed a bill of rights provision that the Constitution could not be construed "to prevent the people of the United States, who are peaceable citizens, from keeping their own arms." *Documentary History of the Ratification of the Constitution* (2000), vol. 6, at 1453.

[15] **"The Second Amendment embodies the right to defend oneself and one's home against physical attack." *United States v. Gomez*, 92 F.3d 770, 774 n.7 (9th Cir. 1996). *See id.* at 779 ("an interesting and difficult question I would leave for another day") (Hawkins, J., concurring); *id.* at 778 (arguing conflict with *Hickman*) (Hall, J., concurring). The two cases may be reconciled with the conclusion that *Hickman* is limited to the bearing of arms, but that *Gomez* is limited to the keeping of arms.**

not mean what we and other courts have assumed it to mean,[16] **the proliferation of gun control statutes both state and federal, and the active scholarly debate that is being waged across this nation, we believe it prudent to explore Appellants' Second Amendment arguments in some depth, and to address the merits of the issue** . . . .

312 F.3d at 1066.

[16] ***United States v. Miller*, 307 U.S. 174, 178 (1939), held that the Second Amendment protects an arm that "is any part of the ordinary military equipment or that its use could contribute to the common defense." It did not question defendant's standing but remanded the case for the taking of evidence because "it is not within judicial notice" that a short-barreled shotgun was a militia arm. *Id.***

This "flood of litigation" is taking place in criminal prosecutions in actual cases and controversies involving parties with genuine stakes – defendants alleged to possess specific restricted firearms and facing substantial prison sentences, not civil litigants who may "wish to obtain" at some indefinite time a firearm, but only if it is a restricted firearm so that the Act may be challenged. The panel states that this litigation flood resulted from the government's "recent change in position,"[17] **but neither the United States nor those it is prosecuting are parties in this litigation which the panel asserts gives rise to the compelling need to resolve definitively the meaning of the Second Amendment.**

The panel explains that its definitive opinion on the Second Amendment was more appropriate in the present civil challenge than in criminal cases brought before the circuit in part because the Second Amendment's scope "has been thoroughly briefed and argued by the parties." 312 F.3d at 1065 n.12. Yet the docket sheet reveals that the *appellants failed even to file a reply brief* before the

[17] The Justice Department's recent acknowledgment that the Second Amendment protects individual rights is the long-standing position of the United States. *See* Firearms Owners' Protection Act, §1(b), P.L. 99-308, 100 Stat. 449 (1986) ("the rights of citizens – (A) to keep and bear arms under the second amendment to the United States Constitution"); Property Requisition Act, P.L. 274, 55 Stat. 742 (1941) (may not construe law "to impair or infringe in any manner the right of any individual to keep and bear arms"); Freedmen's Bureau Act, §14, 14 Stat. 176 (1866) ("personal liberty, personal security, and . . . estate, . . . including the constitutional right to bear arms").

panel, buttressing the fact that they do not have a sufficient stake in this controversy.

CONCLUSION

This Court should grant the petition for rehearing or alternatively the petition for rehearing en banc, vacate the panel opinion, and affirm the judgment of dismissal based on the failure of the plaintiffs to allege sufficient concrete injury to themselves to establish standing and ripeness.

Dated: January 8, 2003

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CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached amicus curiae brief is proportionately spaced, has a typeface of 14 points and contains 4117 words.

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