IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHRISTOPHER BAKER,

Plaintiff/Appellant,

vs.

LOUIS KEALOHA, as an individual and in his official capacity as Honolulu Chief of Police, *et al*.,

Defendants/Appellees.

No. 12-16258

Before O'SCANNLAIN, THOMAS, and CALLAHAN, Circuit Judges

Memorandum Disposition Filed March 20, 2014

PETITION FOR REHEARING OR REHEARING EN BANC
CERTIFICATE OF COMPLIANCE
ADDENDUM
CERTIFICATE OF SERVICE

On Appeal from the United States District Court
for the Northern District of California

The Honorable Alan C. Kay
U.S. District Court No. Civil No. CV11-00528 ACK/KSC

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INTRODUCTION AND RULE 35 STATEMENT

In *Peruta v. County of San Diego*, a divided panel of this Circuit held that the Second Amendment affords a right to carry loaded firearms in urban areas and elsewhere in public places. 742 F.3d 1144, 1178-79 (9th Cir. 2014). Writing for the majority, Judge O'Scannlain held that the policy of San Diego's sheriff to issue a concealed-carry license only upon a showing of good cause, when coupled with California's regulatory scheme forbidding the open carrying of firearms in many circumstances, "destroyed" the Second Amendment right so completely that it was invalid regardless of what justifications the sheriff might offer for it. *Id.* at 1170. The present case challenges Honolulu Chief of Police Louis Kealoha's denial of a concealed-carry license to plaintiff-appellant Christopher Baker pursuant to a Hawai'i statute requiring an applicant to demonstrate good cause.[1] The same panel that decided *Peruta* applied that holding to vacate the district court's determination that Baker was not entitled to a preliminary injunction. *Baker v. Kealoha*, __ Fed.Appx. __, 2014 WL 1087765, *1-2 (9th Cir. 2014). Over Judge Thomas's dissent, the panel remanded the case for further proceedings consistent with *Peruta*. *Ibid*. In order to revisit *Peruta*, the defendants-appellees in this case request panel rehearing or rehearing en banc.

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[1] The statute actually requires an applicant to show "reason to fear injury to the applicant's person or property." Haw. Rev. Stat. § 134-9(a).

In the event the panel denies rehearing, rehearing en banc is appropriate for three reasons pursuant to Federal Rule of Appellate Procedure 35 and Ninth Circuit Rule 35-1.

First, *Peruta* contravenes the Supreme Court's opinion in *District of Columbia v. Heller*, 554 U.S. 570 (2008); *see* FED. R. APP. P. 35(b)(1)(A), because it disregards the guidance of that decision, not least in its disregard for the Supreme Court's recognition that concealed-carry prohibitions are presumptively lawful because they have long been upheld. *Heller*, 554 U.S. at 626.

Second, *Peruta* poses "a question of exceptional importance" since it "involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue." FED. R. APP. P. 35(b)(1)(B). Indeed, the *Peruta* panel's far-reaching interpretation of the right to carry firearms publicly conflicts with other courts of appeals. Specifically, *Peruta* directly conflicts with decisions from the Second, Third, and Fourth Circuits, which have all upheld regulations requiring individuals to show good cause before being allowed to carry a handgun outside the home. *Peruta* also goes farther than the Seventh Circuit's case law on this issue. That Circuit has struck down an Illinois law that (1) banned the carriage of *all* firearms outside the home and (2) did not allow for any permits under any circumstances. *Moore v. Madigan*, 702 F.3d 933, 940 (7th Cir. 2012). Unlike the Illinois law at issue in

Moore, however, the California law at issue in *Peruta*, and the Hawai'i law at issue here, do allow for licenses to carry. Thus, *Peruta* is the first and only decision to invalidate a state regulation requiring "good cause" before a carrying license may issue.

Third, in the event the panel denies rehearing, rehearing en banc is necessary to "secure or maintain uniformity of [this] court's decisions." FED. R. APP. P. 35(a)(1). *Peruta* conflicts with *United States v. Chovan*, in which a previous panel of this Circuit emphasized that the "core" of the Second Amendment is the right to carry a firearm in the home. 735 F.3d 1127, 1137-38 (9th Cir. 2013). *Peruta* disregarded that holding and instead determined that the rights afforded by the Second Amendment are functionally identical inside and outside of the home. 742 F.3d at 1153. As detailed below, this intracircuit conflict has already contributed to significant confusion among lawyers and judges in the Ninth Circuit.

FACTUAL AND PROCEDURAL BACKGROUND

Hawai'i prohibits the possession of firearms outside the home in most circumstances, but it allows individuals to secure a license to carry a concealed firearm in public if they can "show[] reason to fear injury to [their] person or property." Haw. Rev. Stat. § 134-9(a), (c).[2] These licenses are renewable and are

[2] Hawai'i also allows individuals who are "engaged" in the protection of life and property to apply for open-carry licenses and requires a showing of sufficient

issued by the chief of police. *Id.* Other portions of Hawai'i's regulatory scheme allow for licensed sportsmen to carry firearms for game hunting and for all permit holders to carry to and from target ranges and to use firearms there. Haw. Rev. Stat. § 134-5.

Plaintiff-Appellant Christopher Baker ("Baker") filed an application for a concealed carry license in August of 2010. ER 198. His petition was considered and denied by Honolulu's Chief of Police. ER 124, 251. Baker then filed suit in the District of Hawai'i, seeking declaratory and injunctive relief on the theory that Hawai'i's laws violate the Second Amendment. ER 1. Baker also filed a Motion for a Preliminary Injunction ("Motion"). ER 2-4. The district court denied the Motion in a detailed sixty-four (64) paged order that spurned Baker's complaint as "prolix and repetitive." ER 190-256. Baker timely filed an interlocutory appeal. ER 259-73.

On December 6, 2012, Judges O'Scannlain, Thomas, and Callahan heard argument in three cases concerning the carrying of firearms outside the home: *Peruta*, this case, and *Richards v. Prieto* (No. 11-16255). *Peruta* was decided first, on February 13, 2014. With citation to *Peruta*, *Richards* was resolved by memorandum disposition on March 4, 2014. The panel's opinion in this case was released on March 20, 2013. That opinion vacated the district court's denial of the

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"urgency or need". *See* Haw. Rev. Stat. § 134-9(a). That provision is not at issue in this case.

Motion and remanded for further proceedings in light of *Peruta*. Judge Thomas dissented, both in light of his disagreement with *Peruta* and because, in his view, Baker had failed to meet the standards for securing a preliminary injunction.

GROUNDS FOR REHEARING

I. *Peruta* Contravenes *Heller*

In the landmark decision of *District of Columbia v. Heller*, the Supreme Court held that a ban "on handgun possession *in the home* violates the Second Amendment." 554 U.S. 570, 635 (2008) (emphasis added). *Heller* repeatedly emphasized that the core of the Second Amendment was the right to carry in the home. Indeed, the opinion uses the word "home" more than twenty times, and states in plain language that the Second Amendment, "surely elevates above all other interests the right of law-abiding, responsible citizens to use arms *in defense of hearth and home*." *Id.* at 635 (emphasis added).

Heller was careful to note that the Second Amendment does not protect a right to carry arms "in any manner whatsoever," *id.* at 626, or "for any sort of confrontation," *id.* at 595. It also signaled that reasonable, longstanding regulations that do not implicate the right to carry in the home are "presumptively lawful." *Id.* at 627 n.26; *see id.* at 626-27 (expressly approving "prohibitions on the possession of firearms by felons and the mentally ill" and "laws forbidding the carrying of firearms in sensitive places such as schools and government

buildings"). Finally, *Heller* noted that "the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues." *Id.* at 626. This is especially significant in light of *Heller*'s reliance on the decisions of those same 19th-century courts to understand the scope of the Second Amendment's protections. *Accord Robertson v. Baldwin*, 165 U.S. 275, 281-82 (1897) ("[T]he right of the people to keep and bear arms . . . is not infringed by laws prohibiting the carrying of concealed weapons.").

Courts and commentators have interpreted *Heller* as establishing a spectrum of constitutional protections for individuals who possess firearms. While the right to keep and bear arms within the home receives robust protection under the Second Amendment, and a law prohibiting exercise of that right is invalid "[u]nder any of the standards of scrutiny that [courts] have applied to enumerated constitutional rights," *id.* at 628, the bearing of arms outside the home cannot receive the same degree of protection under *Heller* without eroding that decision's emphasis on the home as the zenith of Second Amendment protections.

The central error of the *Peruta* majority was its failure to appreciate this distinction. While the *Peruta* majority noted the fact that *Heller* did not speak clearly "to the scope of the Second Amendment right outside the home", 742 F.3d at 1150, it went astray by ignoring *Heller*'s repeated emphasis of the importance of

the home to its analysis. Thus, *Peruta* comes into direct conflict with *Heller*'s reasoning. Moreover, *Peruta* conflicts not merely with *Heller*'s implications but with its language. *Peruta*, for example, holds that the Second Amendment confers a "right to carry *in case of public confrontation*." 742 F.3d at 1169. But *Heller* expressly approved bans on carrying within "sensitive places such as schools and government buildings," 554 U.S. at 627, meaning that at least some laws prohibiting the carry of firearms in places outside the home must be valid.

Moreover, *Peruta* conflicts with *Heller* in its recognition not merely of a broad right to carry firearms in public but of the right to carry those firearms concealed—while *Heller* itself indicates that laws prohibiting concealed carry are "presumptively lawful" in light of their long history. 554 U.S. at 626-27 & n.26. *Peruta* takes note of California's restrictions on the open carrying of firearms in finding justification to strike down the San Diego sheriff's policy concerning concealed firearms permits, 742 F.3d at 1168-70, but it does not strike down California's open-carry restrictions, which were not challenged in the case. Instead, it strikes a kind of restriction on carrying that *Heller* expressly singles out for approval. *See id*. at 1179 (Thomas, J., dissenting).

II. *Peruta* Created a Conflict Among The Circuits

The *Peruta* opinion created a new conflict among the circuits by departing from the three courts of appeals that previously upheld state regulations requiring

individuals to show "good cause" before securing a right to carry a firearm outside the home. Each of these three courts had held the singular "core" of the Second Amendment is the right to carry *inside the home*. *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 89 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 1806 (U.S. 2013) (holding that "Second Amendment guarantees are at their zenith within the home"); *Drake v. Filko*, *cert. filed*, 724 F.3d 426, 431 (3d Cir. 2013); *United States v. Masciandaro*, 638 F.3d 458, 467 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 756 (U.S. 2011).

These courts therefore applied intermediate scrutiny when analyzing schemes that regulate carriage *outside the home*. *Kachalsky*, 701 F.3d at 96; *Drake*, 724 F.3d at 436; *Masciandaro*, 638 F.3d at 460. In all three cases, these courts upheld regulations that prohibited individuals from carrying outside the home unless they had secured a handgun permit by showing a special need to carry. *Kachalsky*, 701 F.3d at 95-100 (upholding "proper cause" standard); *Drake*, 724 F.3d at 434 (upholding "justifiable need" standard); *Woollard v. Gallagher*, 712 F.3d 865, 882 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 422 (U.S. 2013) (upholding "good and substantial reason" standard). And, in a related case, the Tenth Circuit has held that the Second Amendment does not provide a right to carry a concealed firearm outside the home. *Peterson v. Martinez*, 707 F.3d 1197, 1209 (10th Cir. 2013).

Parting ways with these courts, the *Peruta* panel held, in essence, that the rights protected by the Second Amendment are the same in the home and the public. The panel derived this conclusion from a "historical analysis" of the Second Amendment,[3] which it held revealed the right to carry arms in public for the purpose of self-defense. 742 F.3d at 1175. It further held that this right is "central to the Second Amendment," and thus that intermediate scrutiny is too deferential a standard in cases concerning regulations of the right to carry in public. *Id.* at 1167.

No other court of appeals has held that "good cause" permitting schemes violate the Second Amendment. Indeed, while *Peruta* suggested that it was "joining an existing circuit split" in so holding, 742 F.3d at 1173, that is not the case. While the Seventh Circuit has held that the Second Amendment "implies a right to carry a loaded gun outside the home," and has invalidated an Illinois law prohibiting "carrying ready-to-use guns outside the home," the issue of "good cause" to carry outside the home has never been addressed in the Seventh Circuit. *Moore*, 702 F.3d at 936, 940. In fact, *Moore* devoted significant attention to

[3] The "historical analysis" that *Peruta* engaged in to derive its understanding of the scope of Second Amendment rights in public is sharply disputed by prominent academics and historians. *See, e.g.*, Patrick J. Charles, *The Faces of the Second Amendment Outside the Home: History Versus Ahistorical Standards of Review*, 60 CLEV. ST. L. REV. 1, 43 (2012); Darrell A.H. Miller, *Guns As Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278 (2009); Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 FORDHAM L. REV. 487, 501 (2004).

distinguishing Illinois's blanket scheme from the more moderate "good cause" regimes in use in other states. *Id.* at 941. *Peruta* thus does not join an existing circuit conflict but instead stakes out a position alone among the circuits.

Peruta also stands alone in suggesting that a limit on the right to carry firearms in public, such as a permitting regulation, invariably "destroys" the Second Amendment, such that neither intermediate scrutiny nor strict scrutiny should apply. 742 F.3d at 1168. Instead, under *Peruta*'s approach, a regulation that "destroys" the Second Amendment right must be analyzed under "an alternative approach" that apparently does not permit the government to offer any justification whatsoever in support of the measure, since any such measure is categorically invalid. *Id.* Before *Peruta*, only one dissenting circuit judge urged such an approach in a published opinion. *See Heller v. District of Columbia*, 670 F.3d 1244, 1271 (D.C. Cir 2011) (Kavanagh, J., dissenting).[4] Now that approach is the law of this Circuit.

III. *Peruta* Conflicts with *Chovan*, and That Conflict Urgently Requires Resolution

Near the end of its opinion in *Heller*, the Supreme Court noted that the core of the Second Amendment is the right of "responsible citizens to use arms *in*

[4] A dissenting judge in the Fifth Circuit also endorsed this approach, but that panel's opinion was subsequently withdrawn. *See Houston v. City of New Orleans*, 675 F.3d 441, 451-52 (5th Cir. 2012) (Elrod, J., dissenting), *withdrawn and superseded on rehearing by* 682 F.3d 681.

defense of hearth and home." 554 U.S. at 635 (emphasis added). This key passage was not cited or discussed by the *Peruta* majority. This language did, however, provide the basis for the Ninth Circuit's recent opinion in *United States v. Chovan*, which twice cited it in an opinion that unanimously upheld a federal statute banning persons convicted of domestic violence from possessing firearms. 735 F.3d 1127, 1139-40 (9th Cir. 2013); *see id.* at 1133, 1138. Relying on *Heller*, the *Chovan* panel drew a proper distinction between regulations implicating the "core" of the Second Amendment (such as those that bar possession of firearms inside the home by law-abiding citizens) and other regulations on firearms. *See id.* at 1138. *Chovan* held that while regulations that severely burden the core Second Amendment right must survive strict scrutiny, regulations that do not implicate the core right—even when they lay severe burdens on those they affect—are subject only to intermediate scrutiny. *Id.* at 1138.

Peruta conflicts with *Chovan* in two respects. First, *Peruta* does not acknowledge *Chovan*'s holding that the core of the Second Amendment right is confined to the home. Second, *Peruta* bypasses *Chovan*'s instruction about applying tiers of scrutiny by instead selecting an "alternative approach": the categorical invalidation of any law that "destroys" the Second Amendment right to keep and bear arms. 742 F.3d at 1168, 1170. The confusion *Peruta* created by ignoring *Chovan*'s guidance about how to apply the tiers of scrutiny in Second

Amendment cases is compounded by *Peruta*'s determination, without explanation, that Second Amendment rights are "destroyed," rather than merely regulated, by a regime that allows firearms to be openly carried in many unincorporated places and carried concealed by lawful permit holders.

Over the course of the last two months, the co-existence of *Chovan* and *Peruta* has created confusion in the lower courts. One district judge has noted that *Peruta* seems to "cast doubt on the continuing use of intermediate scrutiny in" gun-related cases "[n]otwithstanding the earlier holding by our court of appeals in *Chovan*." *San Francisco Veteran Police Officers Ass'n v. City & Cnty. of San Francisco*, __ F. Supp. 2d __, 2014 WL 644395, at *6 (N.D. Cal. 2014); *see also Fyock v. City of Sunnyvale*, __ F.Supp.2d __, 2014 WL 984162, at *3 (N.D. Cal. 2014). Another judge, understandably confused by the interplay between these two binding Circuit opinions, recently requested the submission of additional briefing discussing the *Chovan*/*Peruta* conflict. *See Silvester v. Harris*, slip copy, 2014 WL 972252, at *2 & n.1 (E.D. Cal. 2014).

IV. Plaintiff-Appellant Failed to Adequately Demonstrate Irreparable Harm

Notwithstanding the effect of the *Peruta* decision on the instant one, the panel's decision here still merits reconsideration in light of the posture in which it was considered. Specifically, this case was brought as an interlocutory appeal on Plaintiff-Appellant's motion for a preliminary injunction. "A preliminary

injunction is an extraordinary remedy never awarded as a matter of right." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). "Preliminary injunctions can be prohibitory or mandatory," the hallmark of the latter being that they "go well beyond maintaining the status quo and order responsible parties to 'take action'." *Ariz. Dream Act Coalition v. Brewer*, 945 F.Supp.2d 1049, 1055 (D.Ariz. 2013) (*quoting Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 879 (9th Cir. 2009)). Moreover, mandatory injunctions 'require a higher level of proof[,] … are "particularly disfavored," are not granted unless "extreme or very serious damage will result," and are "not issued in doubtful cases."' *Brewer* at 1055 (*quoting Park Village Apt. Tenants Ass'n v. Mortimer Howard Trust*, 636 F.3d 1150, 1160 (9th Cir. 2011)).

The instant case is one in which Plaintiff-Appellant seeks a mandatory injunction. Specifically, at the very least he asks the Court to force Chief Kealoha to issue him a concealed carry permit, or at the most, to stop the Chief and his police officers from enforcing various provisions of the State of Hawai'i's gun laws, which have been in effect for nearly ninety (90) years—specifically, most of Chapter 134 of the Hawai'i Revised Statutes ("Firearms, Ammunition and Dangerous Weapons"). ER 233, ¶¶ 2-3.

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The District Court below considered both relevant tests in ruling against Plaintiff-Appellant—the four factored *Winter* test and the three pronged *Cottrell*[5] test—and determined that Baker failed each test on all factors. ER 255, ¶ 4. Admittedly, and importantly, the District Court believed that Plaintiff-Appellant's motion did not involve a fundamental right—a rationale which *Peruta* has since overruled. However, the District Court's analysis with respect to irreparable harm—an element common to both the *Winter* and *Cottrell* tests—relied little on this reasoning and went unaddressed in the majority's March 20, 2014 Memorandum Opinion. *See Baker*, 2014 WL 1087765, at *1.

The District Court analyzed Baker's purported "irreparable liberty" and "property interest[s]" and found that Plaintiff-Appellant, "came up short." ER 248, ¶ 2. More specifically, the Court found that, contrary to Plaintiff's assertions, his lost "property interest" was of his own making, due to the fact that he "voluntarily" stopped working at his part-time process server job and Plaintiff's claim that he might be attacked in the future was speculative and inadequate to establish irreparable harm. ER 249, ¶ 3 (*citing Winter*, 555 U.S. at 8; *and Goldie's Bookstore, Inc. v. Superior Court of the State of Cal.*, 739 F.2d 466, 472 (9th Cir. 1984)). Moreover, with respect to Plaintiff-Appellant's contention that "deprivation of his liberty, standing alone, merits issuance of the injunction"

[5] *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127 (9th Cir. 2011).

federal courts have more recently been hesitant to issue mandatory injunctions simply because any right, deemed fundamental, is involved. *See*, *e.g.*, *Dish Network Corp. v. FCC*, 653 F.3d 771, 776 (9th Cir. 2011) ("While a First Amendment claim "certainly raises the specter" of irreparable harm …., proving the likelihood of such a claim is not enough to satisfy *Winter*"); *cf.*, *Ne. Fla. Chapter of the Ass'n of Gen. Contractors of Am. v. City of Jacksonville*, 896 F.2d 1283, 1285-86 (11th Cir. 1990) ("No authority from the Supreme Court or the Eleventh Circuit has been cited to us for the proposition that the irreparable injury needed for a preliminary injunction can properly be presumed from a substantially likely equal protection violation."). Furthermore, this particular Court has been more stringent in requiring an actual showing of irreparable injury. *See Flexibile Lifeline Systems, Inc. v. Precision Lift, Inc.*, 654 F.3d 989, 997 (9th Cir. 2011) ("surely a standard which presumes irreparable harm without requiring any showing at all is… too lenient." [quotes omitted]). *See also Sampson v. Murray*, 415 U.S. 61, 90, 94 S.Ct. 937, 39 L.Ed.2d 166 (1974) ("The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.").

Here, Plaintiff-Appellant has not shown that he is entitled to preliminary injunctive relief because he has not proven an entitlement to this extraordinary

remedy by meeting either of the tests available to him. As the Supreme Court recently clarified, a showing that "irreparable injury is *likely* in the absence of an injunction" is a mandatory showing for plaintiffs seeking preliminary injunctive relief. *Winter*, 555 U.S. at 22 (emphasis in original). Plaintiff-Appellant here must prove that he is likely to face irreparable injury in the absence of an injunction. As the District Court held in the sound exercise of its discretion, he cannot. Consequently, the District Court's order, even if deemed erroneous in its analysis of the Second Amendment, remains correct, and should not be disturbed.

V. Rehearing or Rehearing En Banc Is Warranted

Because the *Peruta* decision is so sharply at odds with Supreme Court and circuit authority, and because *Baker* relies entirely on *Peruta* for its holding, both *Peruta* and *Baker* are in error. This panel should rehear them pursuant to FED. R. APP. P. 40 and correct the errors of law identified above. In the event the panel does not rehear them, the en banc Ninth Circuit should correct the *Peruta*/*Baker* panel's errors and resolve these important legal questions.

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CONCLUSION

Based on the foregoing argument and the authorities cited in support thereof, this Honorable Court should grant panel rehearing of the instant appeal or rehearing en banc.

Dated: April 17, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 14 point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains three-thousand, six-hundred and twenty-three (3,623) words, not including the signature lines that follow the brief's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on April 17, 2014.

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ADDENDUM

FILED

MAR 20 2014

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHRISTOPHER BAKER, Plaintiff - Appellant, v. LOUIS KEALOHA, as an individual and in his official capacity as Honolulu Chief of Police; et al., Defendants - Appellees.	No. 12-16258 D.C. No. 1:11-cv-00528-ACK-KSC MEMORANDUM*

Appeal from the United States District Court
for the District of Hawaii
Alan C. Kay, Senior District Judge, Presiding

Argued and Submitted December 6, 2012
San Francisco, California

Before: O'SCANNLAIN, THOMAS, and CALLAHAN, Circuit Judges.

Christopher Baker appeals the district court's denial of his motion for a preliminary injunction against several state and local governmental entities and officials. Baker sought an order enjoining the enforcement of a number of

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Hawaii's firearms statutes or, alternatively, directing the defendants to issue a license to Baker allowing him to carry (either concealed or openly) operable firearms. The district court denied the motion, concluding in part that Baker was not likely to establish that Hawaii's restrictions on carrying firearms in public were unconstitutional under the Second Amendment, and therefore, Baker was not likely to succeed on the merits. We have jurisdiction pursuant to 28 U.S.C. § 1292, and we vacate and remand.

"We review the district court's decision to grant or deny a preliminary injunction for abuse of discretion." *Shell Offshore, Inc. v. Greenpeace, Inc.*, 709 F.3d 1281, 1286 (9th Cir. 2013) (citation omitted). Although our review is generally "limited and deferential," we review the underlying legal principles de novo "and a district court abuses its discretion when it makes an error of law." *Id.* In *Peruta v. County of San Diego*,— F.3d —, No. 10-56971, 2014 WL 555862, at *18 (9th Cir. Feb. 13, 2014), we concluded that the Second Amendment provides a responsible, law-abiding citizen with a right to carry an operable handgun outside the home for the purpose of self-defense. In light of our holding in *Peruta*, the district court made an error of law when it concluded that the Hawaii statutes did not implicate protected Second Amendment activity. Accordingly, we vacate the

district court's decision denying Baker's motion for a preliminary injunction and remand for further proceedings consistent with *Peruta*.[1]

As for Baker's claim that certain Hawaii statutes forbid the use of handguns at firing ranges, Baker's counsel conceded at oral argument that "Mr. Baker has used those ranges and uses them regularly and does fire handguns" and that "there is no imminent threat of prosecution" of Baker for his use of handguns at firing ranges. We may not ignore these concessions. *See Hilao v. Estate of Marcos*, 393 F.3d 987, 993 (9th Cir. 2004) ("A party . . . is bound by concessions made in its brief or at oral argument."). Defendants contend that the use of handguns at these ranges is common and that there is no reason for Baker to fear prosecution in this regard. Assuming—without deciding—that Hawaii's statutes forbid the use of handguns at firing ranges, Baker has not alleged any injury that would provide him with standing to challenge such prohibition. *See Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990) ("Allegations of possible future injury do not satisfy the requirements of Art. III. A threatened injury must be certainly impending to

[1] The district court also granted a motion for judgment on the pleadings as to all claims against the State of Hawaii and Governor Neil Abercrombie. Baker does not contest that decision on appeal. On remand, the state attorney general should be formally notified of, and given an opportunity to intervene in, further proceedings implicating the constitutionality of the state statutes. *See* 28 U.S.C. § 2403(b).

constitute injury in fact." (internal quotation marks omitted)); *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298–99 (1979). On remand, the district court must dismiss Baker's motion for a preliminary injunction with respect to his allegation that Hawaii's statutes forbid the use of handguns at firing ranges.

VACATED and REMANDED.

Each side shall bear its own costs.

FILED

MAR 20 2014

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

Baker v. Kealoha, No. 12-16258

THOMAS, Circuit Judge, dissenting:

I respectfully dissent. I agree that, if unaltered by an *en banc* panel or by the Supreme Court, *Peruta v. County of San Diego*, No. 10-56971, — F.3d—, 2014 WL 555862 (9th Cir. Feb. 13, 2014), affects the district court's analysis of the likelihood of success as to the merits of Baker's claims that are founded on the Second Amendment. However, that does not end the inquiry.

This appeal comes to us in a different posture than *Peruta*'s. It is an interlocutory appeal from the district court's denial of a motion for a preliminary injunction. *Peruta* was an appeal from a grant of summary judgment that terminated the case.

In order to prevail on a motion for a preliminary injunction, the moving party must establish that: (1) he is likely to succeed on the merits; (2) that he is likely to suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in his favor; and (4) that an injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Our review of a preliminary injunction decision is not *de novo*, as it would be if we were reviewing a grant of summary judgment as we did in *Peruta*. Rather, we engage in limited review of preliminary injunction decisions under the deferential

abuse of discretion standard. *Sports Form, Inc. v. United Press Int'l, Inc.*, 686 F.2d 750, 752–53 (9th Cir. 1982). Our review of preliminary injunction decisions is "limited and deferential." *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003).

Here, in a sixty-four page, extremely thorough, detailed, and well-reasoned order, the district court concluded that the plaintiff was not entitled to a preliminary injunction. The complaint was, in the words of the district court, "prolix and repetitive" and "at times unclear." The district court not only rejected the motion for a preliminary injunction on the basis that Baker was unlikely to prevail, but also concluded that he had utterly failed to establish irreparable harm. Baker's claimed irreparable harm was that he needed a weapon to defend himself in his job as a process server. However, as the district court pointed out, he had already voluntarily abandoned that position and was no longer in that business. His other claimed fear was the possibility of future confrontations. The district court concluded that Baker had "not shown that any of the alleged harm is likely to be anything more than mere speculation, which is inadequate to establish irreparable harm." That showing, of course, is precisely what the Supreme Court required in *Winter*. 555 U.S. at 21-22. The record more than amply supports the district court's conclusion that Baker had not shown irreparable harm.

The district court also concluded that Baker had failed to establish that the balance of equities tipped in his favor and that an injunction was in the public interest. Thus, even assuming that the district court's preliminary analysis of the likelihood of success must be re-evaluated in light of *Peruta*, the district court's conclusions as to the three remaining preliminary injunction requirements are clearly supported by the record.

Further, the preliminary injunction sought by the plaintiff was sweeping in scope, seeking a prohibition on the enforcement of multiple sections of the Hawaii Revised Statutes. Even assuming application of *Peruta*, there is simply no justification for a broadside interference with state law enforcement. As the Supreme Court has reminded us: "Where, as here, the exercise of authority by state officials is attacked, federal courts must be constantly mindful of the 'special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law.'" *Rizzo v. Goode*, 423 U.S. 362, 375 (1976) (quoting *Stefanelli v. Minard*, 342 U.S. 117, 120 (1951)).

Thus, I would hold, even with the new guidance of *Peruta*, that the district court did not abuse its discretion in denying the preliminary injunction. It considered and weighed the appropriate factors. Even if *Peruta* required a reassessment of one of the factors, the bottom line would be unaffected.

I also note that *Peruta* and this case were argued and submitted on the same date. Absent *Peruta*, I would also hold that the district court also did not abuse its discretion in concluding that Baker was not likely to succeed on the merits of his claim that Hawaii's state statutes, and the city of Honolulu's enforcement of them, violate a Second Amendment right to carry a firearm outside the home and his due process rights.

In sum, the district court was entirely correct in its denial of the preliminary injunction motion. I agree completely with Judge Kay's thorough and insightful order. I would affirm the district court, and allow it to proceed to the merits of the case, now perhaps newly armed with the guidance of *Peruta*, if it survives further review.

For these reasons, I respectfully dissent.

9th Circuit Case Number(s) 12-16258

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