

Hello Madison Society! This is Brandon Kilian. I represented you in an amicus curae brief filed before the 9th Circuit Court of Appeals in the *Peruta v. County of San Diego* case. I followed up on that filing on June 16th by attending the oral argument in the case. I did not participate in the oral argument, but made sure to watch and see if I could figure out where the judges are going in their thoughts. If you're not familiar with it, "oral argument" is when the attorneys in an appeal are called before the judges to explain their positions a little more and answer questions the judges have about the submitted papers. It's commonly thought that watching the judges and what questions they ask is a good way to divine their votes on the upcoming decision. So that is what I did! I'll organize this judge by judge and offer a tally of where I think the total votes lie as I discuss each judge's behavior.

The case was heard before 11 judges of the 9th Circuit, including two of the three judges who issued the earlier opinion – the one we want to see upheld, clearly establishing a right to bear arms outside the home. One of those judges, Judge Sidney Thomas, wrote the dissent; the other, Judge Consuelo Callahan, joined the opinion. That makes the likely count to start 1 judge in favor of us, 1 judge against us.

Judge N. Randy Smith was pretty vocal, asking plenty of questions of the appellants (Mr. Peruta and Mr. Richards's lawyers) and respondents (the state of California, defending San Diego's sheriff, and Yolo County's lawyer). He was very focused on procedural matters, particularly asking everyone how it changes their case that the law on open carry is not the same today as it was when this case began, and what they believe the 9th Circuit is supposed to do if it decides the evidence underlying the district court decision (the decision that began this whole appeal process) is too weak. Because he asked so many questions to the respondents about the strength of their evidence, and seemed very focused on how open carry law today is stricter than the open carry law the district court upheld, I believe he is going to rule in our favor. However, I would not be surprised if he pushes for a remand to the district court where new evidence can be found instead of affirming the opinion outright. We'll call the tally 2-1.

Judge Carlos Bea only spoke up to ask some very sharp questions to California's attorney. He wanted to know ("yes or no," in his words) if California admitted that *Heller* applies outside the home – and the state's attorney had to say "yes," though he added qualifications. Judge Bea then asked if concealed carry bans combined with open carry bans would destroy the 2nd Amendment altogether, and asked what the state's attorney thought of Justice Scalia's praise in *Heller* for certain old cases supporting concealed carry. Given his pointed questions, I think we can bank Judge Bea to go to 3-1.

Judge William Fletcher was curious what limits the appellants would place on public arms-bearing, assuming, as he put it, that the "premise" that all law-abiding citizens can bear arms in public is correct. He asked Mr. Peruta's lawyer what he thought of the evidence in favor of restrictive carry schemes found in cases from other states as well. These questions, with none asked of the respondents, make me think we lost Judge Fletcher's vote. The tally then is 3-2.

Judge Susan Graber only had a few questions, and asked them all of the appellants. She wanted to know if counties could require a showing of need for a gun, and offered a counterpoint to Mr. Richards's argument that other rights do not have "heightened need" requirements. I expect her to vote against us. Current tally: 3-3.

Judge M. Margaret McKeown brought up the other Courts of Appeals across the United States that have made decisions in similar cases and (essentially) ruled against us here when speaking to both appellants. She also asked about historical precedents attacking concealed carry, calling them almost "black letter" – a bit of legal jargon used to mean "very clear" or "definitive." Though a later question indicated she believes there is some form of right to bear arms outside the home, I fully expect her to come down against us. That makes it 3-4.

Judge Richard Paez was primarily concerned with how the case would interact with the legal standard of "intermediate scrutiny," which asks if a law substantially relates to furthering some important government interest. He asked both sides whether they thought the San Diego policy should survive intermediate scrutiny on the evidence presented. He also brought up those same other circuit opinions as Judge McKeown, and asked California's attorney if the court could interpret the phrase "good cause" in a way that avoids a constitutional problem. To my mind this shows a great reluctance to oppose the district court and possibly upset California's laws. Judge Paez is most likely going down on the opposing side of our now 3-to-5 tally.

Judge Barry Silverman only asked one question the whole time: he asked Mr. Peruta's attorney if a sheriff could constitutionally require safety training certificates and the like before issuing concealed carry permits. Mr. Peruta's attorney said "yes." It's very hard to make a call from one question, but that one question seemed like kind of a softball and hinted Judge Silverman is comfortable with self-defense in general being "good cause" for a permit so long as sheriffs are not literally giving permits to any doofus on the street who asks for one. That would fit just fine with the earlier opinion, which said regulations on carry are fine in the general sense. I will predict he joins us to make the tally 4-5.

Judge Callahan asked a few questions. She was curious about why the state of California was intervening in this case when it was absent from a previous right-to-carry decision, and was a bit critical of California and Yolo County's reasoning at times. That's no surprise, given that she joined the opinion that we now want upheld. She's a safe vote for our side, but the tally doesn't change, because I counted her at the start. Perhaps by speaking up even when her vote is already decided she meant to persuade her colleagues.

Judges Thomas, Harry Pregerson, and John Owens were quiet throughout the argument. Judge Thomas is certainly against us because he dissented in the earlier proceedings, like I said. I cannot take anything away from oral argument about where those last two votes lie. We have to hope they are on our side, if my tally prediction was correct. More experienced court-watchers than me get these things wrong all the time, though – for example, maybe I misread Judge Paez, and he'll join the existing opinion because it doesn't necessarily strike down California's laws at all. We will watch and see.