No. 14-55873 [DC No.: 2:11-cv-09916-SJO-SS]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Charles Nichols,

Plaintiff-Appellant

v.

Edmund Brown, Jr., et al

Defendants-Appellees.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

APPELLANT'S MOTION TO FILE SUR-REPLY IN OPPOSITION TO DEFENDANT-APPELLEE KAMALA D. HARRIS' MOTION TO STAY PROCEEDINGS

URGENT MOTION UNDER CIRCUIT RULE 27-3(b)
Action Necessary Before: December 23, 2014

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Plaintiff-Appellant In Pro Per

Plaintiff-Appellant Charles Nichols respectively moves (this motion is opposed) for leave to file the attached Sur-Reply in order to address allegations newly raised in Appellees' Reply to Appellant Nichols' opposition to Appellees' motion to stay. Absent an opportunity to file his Sur-Reply, Plaintiff-Appellant Nichols will be unfairly denied the chance to respond to these new assertions.

The unfairness here is compounded by the fact that Plaintiff-Appellant Nichols has already filed his opening brief attached to his motion to file an oversized brief, a motion which was *unopposed* by Appellees.

This Motion is urgent because unless it is resolved quickly, Appellees have a de facto extension of time far beyond what they are allowed to study and prepare their Answering Brief to Plaintiff-Appellant Nichols' opening brief. If Appellees' motion to stay is granted, a stay which cites no rule or authority either in the motion to stay or in Appellees' Reply brief, Plaintiff-Appellants Nichols' will continue to be denied his Second Amendment right to carry firearms for the purpose of self-defense in his home, in and on his motor vehicles and in non-sensitive public places. For the foregoing reasons, Plaintiff-Appellant Nichols' faces irreparable harm if this motion is not resolved promptly.

Dated: December 15, 2014

Respectfully submitted,
Charles Nichols

By: s/ Charles Nichols
Plaintiff-Appellant
In Pro Per

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on December 15, 2014. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Charles Nichols

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Plaintiff-Appellant In Pro Per

Plaintiff-Appellant Nichols files this Sur-Reply in order to respond to the newly raised allegations in Appellees' Reply in Support of Motion (Dkt 7) which are misleading, incomplete and inconsistent.

Sur-Reply to Appellees' Relief Requested

As a preliminary matter, Defendant-Appellees' Reply (just as in their motion to stay) fails to cite any rule or authority under which they are entitled to a stay. Neither do they articulate any theory whereby any outcome in *Peruta v. County of San Diego*, 742 F. 3d 1144 - Court of Appeals, 9th Circuit (2014) or the *unpublished* memorandum in *Richards v. Prieto*, No. 11-16255 Court of Appeals, 9th Circuit (2014) would justify a stay. Appellees' assert in their Reply that a stay is warranted because:

> "[B]ecause of the ***possibility*** that the U.S. Court of Appeals, Ninth Circuit, ***may grant*** a pending petition for en banc review of the closely related case of *Richards v. Prieto*, Case No. 11-16255. A 90-day stay of the present appeal is now even more warranted, because the Ninth Circuit—at the sua sponte request of a judge of the Court—***is considering*** whether to grant a pending petition for en banc review in another related appeal, *Peruta v. County of San Diego*, Case No. 10-56791." Reply at 1, italics and emphasis added.

Appellees fail to argue *why* the outcome of either of these cases has any relevance to Plaintiff-Appellant Nichols' appeal. If both cases are affirmed, that outcome is irrelevant to this appeal. If both cases are reversed, that outcome is irrelevant to this appeal. Even if the petitions for en banc review were granted and the en banc court concluded that the scope of the Second Amendment is limited to

one's home, unlike the Plaintiffs in *Richards* and *Peruta*, Plaintiff-Appellant Nichols raised in the district court and again on appeal an in-home challenge. Moreover, Plaintiff-Appellant Nichols likewise raises a number of Fourteenth Amendment challenges not raised in either the *Richards* or *Peruta* appeals. Both *Richards* and *Peruta* are solely as-applied challenges to the "good cause" policy of the Sheriffs ("County") regarding the issuance of permits to carry weapons concealed and, coincidently, openly in places where Plaintiff-Appellant Nichols does not seek to carry firearms. And let us not forget Plaintiff-Appellant Nichols' Fourth Amendment and Vagueness challenges which are also unique to his appeal.

Sur-Reply to Appellees' Reply Argument I

On May 1, 2014 the Peruta Court issued an Order (Dkt 152) http://cdn.ca9.uscourts.gov/datastore/general/2014/05/01/10-56971%20-%20Order.pdf (last visited December 15, 2014) ordering:

> "Appellee William D. Gore is further ordered to respond within fourteen days of the date of this order to the suggestion that this case is moot. See Opp'n to Pet. for Reh'g En Banc 16, *Richards v. Prieto*, No. 11-16255 ("Even were Peruta vacated tomorrow, neither this Court nor the state could do anything to keep Gore from printing permits to all otherwise-qualified comers. The Peruta dispute is moot."). He shall explain any change in his policy that could affect this Court's jurisdiction over this case." Id at 1.

Mootness in Peruta was dependent upon whether or not Sheriff Gore had personally changed his policy. That is not the case in *People v. Pellecer*, 215 Cal. App. 4th 508, 155 Cal.Rptr.2d 477 (2013). Defendant-Appellee Harris appealed

the decision in *Pellecer* and lost, the remittitur was issued and the case closed on June 19, 2013. The *Pellecer* decision is binding upon her and every police officer, prosecutor, and judge in this state. Defendant-Appellees do not have a personal choice regarding *Pellecer*, it is published opinion which binds them.

Regardless of the outcome of: *Richards*, *Peruta*, every pending appeal seeking a California concealed carry permit, and every district court case seeking a concealed carry case en route to an appeal, the *Pellecer* decision is binding on the Appellees in this case, despite their personal preferences that it not.

> "Article III's "case-or-controversy" requirement precludes federal courts from deciding "questions that cannot affect the rights of litigants in the case before them." *DeFunis v. Odegaard*, 416 U.S. 312, 316, 94 S.Ct. 1704, 40 L.Ed.2d 164 (1974) (per curiam) (quoting *North Carolina v. Rice*, 404 U.S. 244, 246, 92 S.Ct. 402, 30 L.Ed.2d 413 (1971))." *Protectmarriage. com-Yes on 8 v. Bowen*, 752 F. 3d 827 - Court of Appeals, 9th Circuit (2014) at 834.

> "It is not enough that a case presents a live controversy when it is filed. *FEC v. Wisc. Right To Life, Inc*., 551 U.S. 449, 461, 127 S.Ct. 2652, 168 L.Ed.2d 329 (2007). An actual controversy must exist at all stages of federal court proceedings. *Spencer v. Kemna*, 523 U.S. 1, 7, 118 S.Ct. 978, 140 L.Ed.2d 43 (1998). This means that, at all stages of the litigation, the plaintiff "must have suffered, or be threatened with, an actual injury traceable to the defendant [that is] likely to be redressed by a favorable judicial decision." Id. (quoting *Lewis v. Cont'l Bank Corp*., 494 U.S. 472, 477, 110 S.Ct. 1249, 108 L.Ed.2d 400 (1990)). "[T]he judicial branch loses its power to render a decision on the merits of [a] claim," *Nome Eskimo Cmty. v. Babbitt*, 67 F.3d 813, 815 (9th Cir.1995), when a federal court can no longer effectively remedy a "present controversy" between the parties, *Doe*, 697 F.3d at 1238 (quoting *Feldman v. Bomar*, 518 F.3d 637, 642 (9th Cir.2008))." Id at 834.

> "Peruta and his fellow plaintiffs argue that the San Diego County policy in light of the California licensing scheme as a whole violates the Second Amendment because it precludes a responsible, law-abiding citizen from

> carrying a weapon in public for the purpose of lawful self-defense in any manner. True, Peruta focuses his challenge on the licensing scheme for concealed carry, but for good reason: acquiring such a license is the only practical avenue by which he may come lawfully to carry a gun for self-defense in San Diego County." *Peruta* at 1171.
>
> "Plaintiffs Adam Richards, Brett Stewart, the Second Amendment Foundation, and the Calguns Foundation (collectively, "Richards") brought an action under 42 U.S.C. § 1983 against Defendants Yolo County and its Sheriff, Ed Prieto (collectively, "Prieto"), alleging that the Yolo County policy for issuing concealed-carry permits violates the Second Amendment. Specifically, Richards argues that Yolo County's policy, in light of the California regulatory regime as a whole, abridges the Second Amendment right to bear arms because its definition of "good cause"[1] prevents a responsible, law-abiding citizen from carrying a handgun in public for the lawful purpose of self-defense. On cross-motions for summary judgment, the district court concluded that Yolo County's policy did not infringe Richard's Second Amendment rights. It thus denied Richard's motion for summary judgment and granted Prieto's.
>
> In light of our disposition of the same issue in *Peruta v. County of San Diego*, No. 10-56971, — F.3d — (Feb. 13, 2014), we conclude that the district court in this case erred in denying Richard's motion for summary judgment because the Yolo County policy impermissibly infringes on the Second Amendment right to bear arms in lawful self-defense." *Richards* unpublished memorandum.

According to the decisions in *Peruta* and *Richards* the *only thing* that was challenged was the "good cause" policies of their respective counties of residence. The Plaintiffs in those cases did not seek to carry loaded handguns in any particular time, manner or place nor did they challenge the constitutionality of any state law including California Penal section 26200(a) which reads:

> "A license issued pursuant to this article may include any reasonable restrictions or conditions that the issuing authority deems warranted, including restrictions as to the time, place, manner, and circumstances under

which the licensee may carry a pistol, revolver, or other firearm capable of being concealed upon the person.

Cal.Penal Code §§ 26150, 26155 are the two statues under which permits to carry weapons concealed may be issued. Pursuant to the decision in *Pellecer*, neither the *Richards* nor *Peruta* Plaintiffs now require a permit to carry a loaded handgun concealed in public so long as they do not conceal the loaded handguns beneath or within the clothing they are wearing.

Appellees do not deny this. Instead, they claim that "the panels hearing *Richards* and *Peruta*…*may* yet have occasion to examine the analysis, holding, and reasoning of such an opinion and its application to the issues in the two 9th Circuit cases." Reply at 2-3 italics added.

The *Richards* and *Peruta* panels may consider ***or they may not***. It is certain that neither the *Richards* nor *Peruta* Plaintiffs are going to voluntarily dismiss their appeals as moot and who is left to raise the issue of mootness in any possible en banc hearing? Defendant-Appellee Harris' motion to intervene was denied (Peruta Dkt 156) http://cdn.ca9.uscourts.gov/datastore/general/2014/11/12/10-56971%20Peruta%2011-12-14%20Order.pdf (last visited December 15, 2014) and she does not say that *she will* raise *Pellecer* before an en banc panel even if she had standing to raise *Pellecer* in either *Richards* or *Peruta*.

If this Court has any doubt as to whether or not *Pellecer* moots *Richards* or *Peruta*, or in the alternative is grounds for a rehearing, then the solution is not to stay this appeal but to submit the question to the *Peruta*/*Richards* three judge panel and/or circulate it to the active judges.

Sur-Reply to Appellees' Reply Argument II

Neither the motion to stay nor the Reply in Support of Motion to Stay lists Defendant-Appellee Edmund Brown, Jr in his official capacity which is required under Federal Rule of Appellate Procedure 27.

Sur-Reply to Appellees' Reply Argument III

Defendant-Appellees claim that the "four factors" for issuing a stay do not apply to them but rather Plaintiff-Appellant Nichols bears the burden for justifying why a stay should not be issued. They cite no rule or authority to support their position.

> "Different Rules of Procedure govern the power of district courts and courts of appeals to stay an order pending appeal. See Fed. Rule Civ. Proc. 62(c); Fed. Rule App. Proc. 8(a). Under both Rules, however, the factors regulating the issuance of a stay are generally the same: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. See, e. g., *Virginia Petroleum Jobbers Assn. v. FPC*, 104 U. S. App. D. C. 106, 110, 259 F. 2d 921, 925 (1958); *Washington Metropolitan Area Comm'n v. Holiday Tours, Inc.*, 182 U. S. App. D. C. 220, 221-222, 559 F. 2d 841, 842-844 (1977); *Garcia-Mir v. Meese*, 781 F. 2d 1450, 1453 (CA11 1986); *Accident Fund v. Baerwaldt*, 579 F. Supp. 724, 725 (WD Mich. 777*777 1984); see generally

11 C. Wright & A. Miller, Federal Practice and Procedure § 2904 (1973)." *Hilton v. Braunskill*, 481 US 770 - Supreme Court (1987) at 776-777.

CONCLUSION

If this court concludes that *Richards* and *Peruta* are more than potentially or tangentially related but are related pursuant to Ninth Circuit Rule 28-2.6 then the proper course is NOT to issue a stay but instead allow Plaintiff-Appellant Nichols to file a Federal Rule of Appellate Procedure 35 petition that his appeal *be heard initially en banc* (pursuant to FRAP 35(c) a petition that an appeal be heard initially en banc must be filed by the date when the appellee's brief is due. Such a petition can be timely filed as this Court has not set a due date for Appellees to file an answering brief).

In conjunction with a FRAP 35(c) petition that Plaintiff-Nichols appeal be heard initially en banc it would be appropriate for this appeal to be heard before the same en banc panel as *Peruta*/*Richards* and even aligned. This would give Defendant-Appellee Harris standing to argue before the en banc Peruta panel which is something she so desperately desires (see Peruta Dkt 157). Judicial economy and fairness dictates the latter as a stay will entail Plaintiff-Appellant Nichols file numerous motions and writs.

Dated: December 15, 2014

Respectfully submitted,
Charles Nichols

By: s/ Charles Nichols
Plaintiff-Appellant In Pro Per

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s/ Charles Nichols