Nos. 10-56971 & 11-16255

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EDWARD PERUTA, et al.,
Plaintiffs-Appellants,
v.
COUNTY OF SAN DIEGO, et al,
Defendants-Appellees.

No. 10-56971
Appeal from the United States District Court for the
Southern District of California, No. 3:09-cv-02371-IEG-BGS
(Hon. Irma E. Gonzalez, District Judge)

ADAM RICHARDS, et al.,
Plaintiffs-Appellants,
v.
ED PRIETO, et al,
Defendants-Appellees.

No. 11-16255
Appeal from the United States District Court for the
Eastern District of California, No 2:09-cv-01235-MCE-DAD
(Hon. Morrison C. England, District Judge)

AMICUS CURIAE CHARLES NICHOLS' MOTION FOR LEAVE TO PARTICIPATE IN ORAL ARGUMENT

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AMICUS CURIAE CHARLES NICHOLS' MOTION FOR LEAVE TO PARTICIPATE IN ORAL ARGUMENT

Amicus Charles Nichols respectfully moves for leave to participate in oral argument in support of neither party in these consolidated en banc appeals.

Amicus Nichols' has a related case on appeal, *Charles Nichols v. Edmund Brown Jr., et al* No.: 14-55873 which seeks to overturn the 1967 Black Panther ban on openly* carrying loaded firearms (former California Penal Code ("PC") section 12031, now PC 25850 in part) as well as seeking to overturn California's ban on openly carrying *modern* concealable firearms (e.g., handguns) PC 26350 and California's ban on *openly carrying modern* unloaded firearms which are not concealable (e.g., rifles and shotguns) PC 26400 which went into effect on January 1, 2012 & 2013, respectively. *Under current California law a person can be only be punished for violating one law for the same act or same continuous act. Although PC 25850 does not differentiate in wording between concealed and open carry, a person who carries a loaded, concealed firearm cannot be punished for both carrying an unlicensed, loaded concealed weapon AND punished for carrying a loaded firearm in violation of PC 25850.

As California law does not have a law specifically prohibiting the Open Carry of a loaded firearm, a person who openly carries a loaded firearm can ONLY be punished for violating PC 25850 assuming that he is not in some place, committing some act, or carrying some type of firearm in violation of California

law which carries a greater penalty than does PC 25850. See *People v. Jones*, 278 P. 3d 821 - Cal: Supreme Court (2012).

It is an undisputed, uncontroverted fact in *Nichols v. Brown* that concealed carry substantially burdens Charles Nichols' ability to defend himself even if he lived in a jurisdiction which issues concealed carry permits and he had a concealed carry permit.

Amicus Nichols had hoped to file a petition for his appeal to be initially heard en banc, for it to be fully briefed, and for it to be argued before this en banc panel. Unfortunately, his case was (and is) stayed because of *Richards* and *Peruta*.

As Amicus Nichols predicted in his motion to file an Amicus Brief in Support of Neither Party, his brief is the only one filed which defends the Second Amendment Open Carry right. Open Carry has always been the right in California common law and has always been the right under Article I, Section 1 of the California Bill of Rights as interpreted by the California courts. Moreover, Open Carry is clearly stated to be the Second Amendment right in *District of Columbia v. Heller*, 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008). Even the minority in *Heller* read the majority to say that Open Carry is the right guaranteed by the Second Amendment of the Constitution and that concealed carry, subject to limited exceptions such as in the home and for travelers while actually on a journey, is not a right.

Contrary to the majority opinion in the now vacated, sharply divided three judge panel decision in *Peruta,* California has never expressed a "preference" for concealed carry. Just the opposite. The California courts have always recognized Open Carry as the right both pre- and post-*Heller* and the California courts have always considered concealed carry to be a privilege, both pre- and post-*Heller*.

Notwithstanding the fact that the State of California does not have the right to prefer concealed carry over Open Carry as that would be violative of both the Federal and California State Constitutions, by default Open Carry is legal everywhere in the State of California and by default, concealed carry is prohibited everywhere in the state of California under California law. Indeed, the two recently enacted bans on the Open Carry of *modern*, unloaded firearms in incorporated cities are the only two laws which specifically ban Open Carry and did so for the first time in California's history. It would be an abuse of the English language to construe laws enacted in 2011 and 2012 as "longstanding."

The two recently enacted bans on openly carrying *modern* firearms in incorporated cities exempt antique firearms as defined by Federal law ("Section 921(a)(16) of Title 18 of the United States Code" e.g., firearms manufactured prior to January 1, 1899) and exempt modern firing reproductions of muzzle-loading antiques despite the *Heller* decision's admonition that its definition of arms extends prima facie to ***all*** *modern*, bearable arms. Id at 2792.

For example, it is legal for Amicus Charles Nichols to openly carry in public places in incorporated cities a Model 1873 Colt Peacemaker revolver and a Model 1873 Winchester repeating rifle. It is legal for him to openly carry these iconic firearms of the old west, unloaded with matching ammunition in his possession, including in incorporated cities provided that they were manufactured in or before 1898. How a ban on openly carrying firearms manufactured from January 1, 1899 onwards which are identical in form and function to those manufactured before this date survives even rational basis review is a question to be decided in the *Nichols v. Brown* appeal as it is a certainty it will not be raised before this en banc court by any of the parties now participating in oral argument.

The majority in the vacated *Peruta* decision made no mention regarding the Open Carry of long guns, antique or modern, loaded or unloaded and clearly did not understand California's current "regulatory" scheme regarding the Open Carry of firearms, either historically or presently, nor will this en banc court if Amicus Charles Nichols is denied leave to participate in the combined en banc oral argument of *Peruta* and *Richards*.

All of the plaintiffs, all of the defendants and all of the Amici except for Amicus Nichols have taken the position that California can ban firearms from being openly carried, in case of confrontation, for the purpose of self-defense.

Every participant in the oral arguments has also taken the position that there isn't any right to carry a firearm concealed in public. The plaintiffs' argument that because California can prohibit concealed carry that the defendants must issue concealed carry permits is a logical contradiction. If concealed carry can be prohibited as the plaintiffs claim then no set of facts, including their claim that Open Carry can constitutionally be banned, can logically require the issuing of permits to carry weapons concealed.

The State of California has been granted leave to participate in oral arguments with its time coming from the time allotted to the defendants as they see fit. The State will not be arguing for the Second Amendment right recognized in *Heller*. In all of Attorney General Harris' filings in the related case of *Charles Nichols v. Edmund Brown, Jr., et al* (No.: 14-55873) Attorney General Harris has not once conceded even an individual right *to keep* firearms in the home, let alone *to bear* firearms in public. She has, in fact, stated that the *Heller* decision was wrongly decided and joined in an Amicus brief arguing against the Second Amendment being incorporated to all states and local governments via the *McDonald* decision.

Attorney General Harris, representing the State of California, argued in her Opposition to the motion of Charles Nichols for partial summary judgment in the case of *Nichols v. Brown* "[T]hat the Founding Fathers championed the Second

Amendment, which Nichols invokes as a weapon against allegedly racist laws, to try to legitimize Southern citizen "slave patrols" that terrorized enslaved African-Americans, and thereby to entice Southern states to support the U.S. Constitution." *Nichols v. Brown* Dkt #140, pg 8, lines 13-16.

Charles Nichols appeal also challenges the Constitutionality of a permit requirement to openly carry loaded handguns PC 26150 & PC 26155 and their ancillary statutes including the restriction on the issuance of these handgun open carry licenses to persons who live in predominantly White counties with a population of fewer than 200,000 people and restricting the validity of these licenses to the county of issuance.

Because Amicus Nichols lives in an incorporated city and because the California courts have construed that one can have, but not carry a loaded firearm on his private residential property, Amicus Nichols can't so much as carry a loaded flintlock rifle in the curtilage of his home and the interior parts of the structures on his property which fall within California's interpretation of "public place."

The State will not argue that California's "preference" under both its state constitution and common law is for Open Carry as that would undermine her case in *Nichols v. Brown* as that case also appeals the dismissal with prejudice of his state law claims under the California Constitution.

Counsel for the *Peruta* defendants has ceded the time allotted to him for oral argument to the State. Counsel for the *Richards* defendants has ceded half of his time to the state. The Brady Campaign has ceded any time that might be allotted to it to argue on the merits to the state. See Peruta Dkt #297 [fn 1].

Given that none of the parties, or the State, will be arguing to defend the Open Carry right under either of the Federal or State Constitutions, neither *Peruta* nor *Richards* is the proper vehicle for this court to decide the scope of the right to bear arms.

The *Richards* Complaint is incapable of amendment. It is problematic that the *Peruta* Complaint is capable of amendment but this court should remand *Peruta* back to the district court with leave to amend his Complaint to challenge the two state statutes he sought to "constitutionally avoid" overturning. As the State would replace Sheriff Gore as the defendant by naming California Attorney General Harris as a defendant in her official capacity on remand, the question of intervention by the State of California would become moot.

The *Heller* decision with bright lines and a broad brush defined the Second Amendment with sufficient clarity for the en banc court to conclude that Open Carry is the right guaranteed by the Constitution and that concealed carry, with limited exceptions such as the longstanding exception for travelers to carry weapons concealed *while actually on a journey*, is not a right in public.

If this motion is denied and if this court publishes a decision casting doubt on the clearly established Open Carry right before *Nichols v. Brown* is decided then it will be an historic tragedy that it did so with nobody arguing in defense of the right to openly carry firearms for the purpose of self-defense which applies: in the home, in the curtilage of one's home, on his private residential property, in and on his motor vehicles including any attached camper or trailer and in non-sensitive public places. All of these places, including an in-home nexus which is absent in both *Peruta* and *Richards* are at issue in *Nichols v. Brown* but were not raised by the *Peruta* and *Richards* plaintiffs.

Counsel for the defendants in *Richards v. Prieto* consents to the filing of this motion provided that any time allotted to Amicus Nichols does not come from him. Counsel for the *Richards* plaintiffs does not consent. Counsel for the *Peruta* defendants does not consent. Counsel for the *Peruta* Plaintiffs was sent an email on May 13, 2015 asking consent but no response was ever received.

CONCLUSION

Given that there is no hearing scheduled after in the courtroom where the en banc oral argument is to take place in the combined case of *Peruta* and *Richards*, it would be ideal if this court were to extend the hearing by 15 minutes and allot that time to Amicus Charles Nichols. In the alternative, and given that counsel for the *Richards* defendants did not oppose this motion on the condition that time allotted

to Amicus Nichols does not come out of the 15 minutes allotted to him (he has ceded half of his time to the state) and given that ALL of the parties in this case have taken the position that there is no right to openly carry a firearm in public for the purpose of self-defense, Amicus Charles Nichols should be allotted time taken evenly from all of the plaintiffs and the state and Amicus Brady Campaign and any others this court grants leave to participate in oral arguments (except for defense counsel in *Richards*). Ideally, that time would be 15 minutes, and if not, then at least 8 minutes. Alternatively, this court should allot time to Amicus Charles Nichols in an amount it deems fit taken from the parties it deems fit.

For the foregoing reasons, Amicus Charles Nichols respectfully requests leave to participate in oral argument in these consolidated appeals.

Dated: May 20, 2015

Respectfully submitted,

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