No. 10-56971

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.

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

MOTION OF AMICUS CURIAE CHARLES NICHOLS, PRESIDENT OF CALIFORNIA RIGHT TO CARRY A CALIFORNIA NON-PROFIT ASSOCIATION, TO FILE AMICUS BRIEF IN SUPPORT OF NEITHER PARTY

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STATEMENT OF INTEREST OF AMICUS CURIAE

Charles Nichols is President of California Right To Carry, a California non-profit association of advocates for the Second Amendment right to openly carry firearms for the purpose of self-defense.

He 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* concealable firearms (e.g., handguns) PC 26350 and California's ban on *openly carrying* unloaded firearms which are not concealable (e.g., rifles and shotguns) PC 26400 which went into effect on January 1, 2012 & 2013, respectively.

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

Charles Nichols opposes the carrying of weapons concealed except for the limited exceptions recognized in *District of Columbia v. Heller,* 554 U.S. 570, 128

S.Ct. 2783, 171 L.Ed.2d 637 (2008) such as the home, and for travelers while actually on a journey.

MOTION

It is unclear whether the Order of December 3, 2014 (DKT161) and the Order of April 6, 2015 (DKT224) provides for a blanket authorization to file an Amicus brief without filing a motion in the absence of consent from both sides and so, in an abundance of caution, this motion is filed.

Counsel for the County of San Diego and San Diego Sheriff Gore consents to the filing of this Amicus brief. Counsel for the Peruta Plaintiffs was sent an email on April 8, 2015 asking consent but no response was ever received.

By the end of the filing deadline given in the Order of April 6, 2015 there will be multiple Amicus briefs filed by the usual suspects. The so called gun-rights groups will form a chorus singing the same old song that the US Supreme Court in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) really didn't mean it when it said that "[A] right to carry arms openly: "This is the right guaranteed by the Constitution of the United States, and which is calculated to incite men to a manly and noble defence of themselves, if necessary, and of their country, without any tendency to secret advantages and unmanly assassinations."" Id at 2809.

Curiously, nearly all of these groups are telling their memberships that they support the Second Amendment Open Carry right while at the same time arguing

in this case to uphold the 1967 Black Panther Ban on openly carrying loaded firearms (former Penal Code section 12031, now PC 25850 in part). The National Rifle Association (NRA) whose official state organization the California Rifle and Pistol Association is a Plaintiff in this case is not only funding the *Peruta* lawsuit but it, the NRA, helped write the 1967 Black Panther ban on openly carrying loaded firearms in public. Here we are, nearly 48 years after the racist Open Carry ban was enacted and the NRA is still defending its ban.

On the other side will be the Amicus briefs from those groups still drinking wine from the sour grapes of the vintage which believes that, contrary to *Heller*, the Second Amendment is not an individual right unconnected with service in the militia and, in their view, that government can ban the Second Amendment rights recognized in *Heller* everywhere and for any reason. They will tell the Court that this individual, pre-existing right codified in the Second Amendment, an individual right which they do not believe in, is confined to the home by the *Heller* decision.

What they won't do, and can't do, is point to any sentence, paragraph, or section of the *Heller* decision which limited its decision to the confines of one's home. Indeed, the home was mentioned but a scant twelve times in the *Heller* decision before the *Heller* Court "[T]urned finally to the law at issue…" Id at 2818 in Section IV of the decision and even there the home was mentioned but fifteen times.

In a case which could have a decades or more long impact on the Second Amendment in this vast Federal Circuit there is nobody arguing for "[T[he Second Amendment right recognized in *Heller*." *McDonald v. City of Chicago*, Ill., 130 S. Ct. 3020 - Supreme Court (2010) at 3050.

If intervention is granted to California Attorney General Harris, she will not be arguing for the Second Amendment right recognized in *Heller*. In all of her filings in the related case of *Charles Nichols v. Edmund Brown, Jr., et al* (No.: 14-55873) she has not once conceded even an individual right *to keep* firearms in the home, let alone *to bear* arms 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.

San Diego Sheriff Gore wants nothing more to do with this appeal and says he will comply with whatever the courts decide. He cannot be expected to put up much of a fight, if he puts up any fight at all. The *Peruta* Plaintiffs certainly aren't going to defend the fundamental, individual, enumerated Second Amendment Open Carry right recognized in *Heller*, their entire case fails as a matter of law if the en banc court reads the plain language of *Heller* to mean exactly what it says and not the opposite.

This Amicus brief is very likely to be the only one to argue that the Majority and Minority in the sharply divided decision in *Peruta* were both right and both wrong. This Amicus brief is the only one which will point out some of the areas where both the Majority and Minority were mistaken such as their shared belief that it is legal to carry a loaded firearm, openly or concealed, on one's residential property. The same year that the District of Columbia enacted its ban on handgun possession in the home and the carrying of firearms on one's residential property including the curtilage and interior of one's house, the California courts similarly held that one could "have" ***but not carry*** a loaded firearm on his private residential property. See *People v. Overturf*, 64 Cal. App. 3d 1 (1976).

The *Heller* decision with bright lines and a broad brush defined the Second Amendment sufficiently clear 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.

It is an historic tragedy that when the en banc Court convenes on June 16th to hear oral arguments in *Peruta* that none of the attorneys present will be arguing to defend the Second Amendment as defined by the *Heller* decision.

For that matter, they will not even be arguing in support of the Second Amendment as it was understood by the Framers when it was enacted in 1791.

One side might mention that there were no prohibitions on the carrying of weapons concealed in public but they will fail to mention that there were severe restrictions on the use of concealed weapons. One could carry a weapon concealed but if he used it to kill his opponent during the course of mutual combat then he was guilty of murder whereas if both parties entered into mutual combat equally, and openly armed and one killed his opponent then it was a case of manslaughter, which was pardonable, even if one could find a jury to convict someone who killed another in an "otherwise fair fight." Short of dispatching a would be assassin, rapist or robber there was no right to carry a weapon concealed "[I]n case of confrontation." There never has been.

CONCLUSION

For the foregoing reasons, Amicus respectfully asks that the Court grant his request to file the attached brief in support of neither party.

Dated: April 15, 2015

Respectfully submitted,

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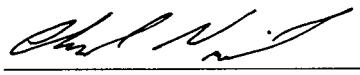
CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of 9th Cir. R. 29-2(c)(2), 32 and 35 because the brief does not exceed 15 pages, excluding material not counted under Fed. R. App. P. 32. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using MS-Word in 14-point Times New Roman font.

Dated: April 15, 2015

Charles Nichols
Amicus Curiae

By: 

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CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing with: The Clerk of the Court for the United States Court of Appeals for the Ninth Circuit, counsel for Appellants, and counsel for Appellees via US Mail on April 15, 2015. An original and three copies were filed with the court.

Name	**Address**	**Date Served**
Paul D. Clement Counsel for Appellants	Bancroft PLLC 1919 M Street, N.W. Suite 470 Washington, D.C. 20036	4/15/2015
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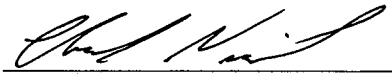
By: 

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