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 EXCEED TYPE-VOLUME LIMITATION

DECLARATION OF CHARLES NICHOLS

OPENING BRIEF (including word count certification)

CERTIFICATE OF SERVICE

Charles Nichols
PO Box 1302
Redondo Beach, CA 90278
Tel. No. (424) 634-7381
e-mail: CharlesNichols@Pykrete.info
Plaintiff-Appellant In Pro Per

APPELLANT'S MOTION TO EXCEED TYPE-VOLUME LIMITATION

Pursuant to Circuit Rule 32-2, Plaintiff-Appellant Charles Nichols hereby moves for leave to file the attached Opening Brief that exceeds the 14,000 word type-volume limitation set forth in Federal Rule of Appellate Procedure 32(a)(7)(B). Specifically, I seek leave of the Court to file a 46,823 word brief. This word count is listed on the Certificate of Compliance contained within the brief. A copy of my brief is attached to this motion. See Circuit Rule 32-2 ("Any such motion shall be accompanied by a single copy of the brief the applicant proposes to file and a Form 8 certification as required by Circuit Rule 32-1 as to the line or word count.").

This motion is supported by the declaration of pro se Plaintiff-Appellant Charles Nichols, which demonstrates his **diligence** in reducing the volume of the brief, and sets forth his **substantial need**.

Dated: November 30, 2014

Respectfully submitted,
Charles Nichols

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

DECLARATION OF CHARLES NICHOLS

Pursuant to 28 U.S.C. § 1746, I, Girard D. Lau, hereby declare that:

1. I am the Plaintiff-Appellant proceeding pro se in the above-entitled case.

2. Pursuant to Circuit Rule 32-2 I move for leave to file the attached opening brief that exceeds the 14,000 word type-volume limitation set forth in FRAP 32. Specifically, I seek to file a 46,823 word opening brief.

3. This motion is timely filed, pursuant to Circuit Rule 32-2, because it is filed on or before December 2, 2014, the due date for the Opening Brief, pursuant to this Court's granting my streamlined request to extend time to file my opening brief on October 16, 2014 to December 2, 2014. Pursuant to Circuit Rule 32-2, I have attached a copy of my 46,823 word opening brief to this motion. See Circuit Rule 32-2 ("Any such motion shall be accompanied by a single copy of the brief the applicant proposes to file ….").

4. This motion is predicated on my **substantial need** for extra words. I acknowledge that a motion seeking leave to file a brief that exceeds the type-volume limitation is generally disfavored and, ordinarily, parties are very often able to comply with the 14,000 word limit governing opening and answering briefs. I thus regret having to make this motion, but this is an extraordinary case. This is a landmark civil rights case addressing the constitutionality of state laws

prohibiting the carrying of loaded firearms and modern unloaded firearms *for the purpose of self-defense*: In the home, in and on personal motor vehicles including any attached camper or trailer, and in non-sensitive public places where hunters and a myriad of individuals who fall within a special interest exemption (e.g., lawyers) are exempt from the bans, and in places, such as one's home and in non-sensitive public places, where one must surrender his Fourth Amendment rights (under California law) in order to exercise his Second Amendment Rights. Challenges to these bans are made facially and as-applied under the Second, Fourth, and Fourteenth Amendments as well as challenged based on facial and as-applied vagueness.

What should have been simple questions of Constitutional law now involves multiple complex legal issues and sub-issues. For example, the district court withheld my Declaration of mixed race and then held that I cannot challenge the 1967 Black Panther Loaded Open Carry Ban (now PC 25850 in part) regardless of my race citing a case involving a prisoner who complained about not receiving vegetarian meals because he failed to allege that his meals were withheld because of his beliefs. I, by contrast, extensively argued that the sole motivation for enacting the ban was racial discrimination and provided more than a preponderance of proof that the law is disproportionately enforced against minorities by a factor of three to one. Given that the proof was contained in

Defendant-Appellee Harris' own Department of Justice records she countered that the Second Amendment condones racially discriminatory gun bans.

Pursuant to *Hunter v. Underwood*, 471 US 222 - Supreme Court (1985) and this Circuit's interpretation in *PACIFIC SHORES PROPERTIES v. City of Newport Beach*, 730 F. 3d 1142 - Court of Appeals, 9th Circuit (2013), *PACIFIC SHORES PROPERTIES v. City of Newport Beach*, 746 F.3d 936 (2014) and *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 - Supreme Court (2013) the 1967 ban (PC 25850) should have been struck down regardless of my race as well as the two recently enacted bans on openly carrying modern, unloaded firearms because the legislative intent was to "close the loophole" in the racist 1967 ban.

Likewise, the district court held that firearms fall completely outside the scope of Fourth Amendment protection everywhere in the state, even in the home, contrary to the California courts holding that possession of a firearm is in itself an innocent act in People v. Jones, 278 P. 3d 821 - Cal: Supreme Court (2012) and well over 100 years of California case law which has held that Open Carry, but not concealed carry, is the right under Article I, Section 1 of the California Constitution. For this preposterous conclusion the district court relied on a 1970 California marijuana case *People v. DeLong*, 11 Cal. App. 3d 786 - Cal: Court of Appeal, 1st Appellate Dist., 4th Div. (1970) which itself acknowledged that the ban should be struck down if proof had been provided that the law was enforced

unequally. Id at 793. I provided that proof, though such proof is no longer required under *PACIFIC SHORES PROPERTIES.*

Contrary to *US v. Chovan*, 735 F. 3d 1127 - Court of Appeals, 9th Circuit (2013), *Peruta v. County of San Diego*, 742 F. 3d 1144 - Court of Appeals, 9th Circuit (2014), and *Jackson v. City and County of San Francisco*, 746 F. 3d 953 – Court of Appeals, 9th Circuit (2014) the district court held that Second Amendment challenges must satisfy the *Salerno*-Test and having failed to satisfy the *Salerno*-test, are subject to rational basis review. Even the Second Circuit which used the *Salerno*-test in *Kachalsky v. County of Westchester*, 701 F. 3d 81 - Court of Appeals, 2nd Circuit (2012), a test this Circuit has explicitly rejected in *Chovan*, then applied intermediate scrutiny to the challenged *concealed carry* law. Not only is the Second Amendment contrived "Framework" of the district court in violation of Chovan, it is unique among all of the circuits which otherwise applied intermediate scrutiny to conduct (concealed carry) which falls outside the scope of the Second Amendment. In the related case of *Peruta* there was NO constitutional challenge to ANY state law. The only thing challenged was the "good cause" interpretation of a state statute by San Diego Sheriff Gore and a weak 14th Amendment residency claim. The Peruta appellant opening brief was 62 pages long. Similarly, in the unpublished related case of *Richards v. Prieto* No.: 11-16255 there was but a single, one sentence issue raised on appeal challenging the

Yolo County Sheriff's interpretation of "good cause" and a facial challenge to the "good moral character" requirement of the state statute (a challenge which was subsequently retracted). That brief was 59 pages long. By contrast, my opening brief raises thirty-four (34) issues on appeal which translates to just 5.5 pages per issue, a far leaner brief than was field in either *Peruta* or *Richards*. These issues are:

- Do California's bans on carrying loaded firearms and California's bans on openly carrying unloaded modern firearms *for the purpose of self-defense* violate the Second, Fourth and Fourteenth Amendments to the United States Constitution?
- Do the Second, Fourth and Fourteenth Amendments secure the right to carry fully functional loaded firearms in public *for the purpose of self-defense*?
- Do the Second, Fourth and Fourteenth Amendments historically guarantee the individual right of the individual to keep and bear loaded and modern unloaded firearms openly *for the purpose of self-defense*: in one's home and in non-sensitive public places, where hunters are exempt from the bans, and while in or on a motor vehicle; and in or on any attached camper or trailer? ("Step 1" of *Chovan*)

- Do these three bans on carrying loaded firearms and modern unloaded firearms (PC 25850, PC 26350, and 26400) burden Second Amendment conduct? ("Step 2" of *Chovan*).
- Are these three bans subject to per se invalidation pursuant to *Heller* and *McDonald*?
- Are these three bans facially invalid under the Second, Fourth and Fourteenth Amendments?
- Are these three bans invalid as-applied to Plaintiff Nichols and similarly situated individuals who fall within the scope of the Second Amendment but are denied their Second Amendment right to keep and bear firearms *for the purpose of self-defense* in the aforementioned private and non-sensitive public places under the Second, Fourth and Fourteenth Amendments?
- Are these three bans invalid as-applied to Plaintiff Nichols in the aforementioned places under the Second, Fourth and Fourteenth Amendments?
- Does, as Defendant Harris claims, the Second Amendment condone racially motivated criminal firearm bans?
- Does the Fourteenth Amendment condone racially motivated criminal firearm bans?
- Are these bans facially and/or as-applied unconstitutionally vague?

- Must a person give up his Fourth Amendment rights in order to exercise his rights under the Second and Fourteenth Amendments?
- Can Plaintiff Nichols be denied Fourteenth Amendment equal protection under the law given that the Second Amendment was applied to the states via the Fourteenth Amendment?
- Can Plaintiff Nichols and similarly situated individuals who fall within the scope of the Second Amendment be denied Fourteenth Amendment equal protection under the law in conjunction with the Second Amendment given that similarly situated persons are exempt from the bans?
- Can Plaintiff Nichols be denied Fourteenth Amendment equal protection under the law given that similarly situated persons are exempt from the bans?
- Is it constitutional for California to restrict handgun Open Carry licenses to similarly situated persons who reside in counties with a population of fewer than 200,000 people but deny them to Plaintiff Nichols and/or other similarly situated persons who fall within the scope of the Second Amendment who reside in a county with a population of more than 200,000 people?
- If these three bans are not facially invalid, is it possible for this court to "liberally construe" Plaintiff Nichols operative Second Amended Complaint

(SAC) to grant him as-applied relief given that he is pro se and is an unrepresented litigant in a civil rights case challenging criminal laws and to do so without a remand to the district court for further proceedings?

- If not, was it proper for the district court to deny Plaintiff Nichols' leave to amend his complaint and to dismiss his case entirely, with prejudice?
- Is it constitutional for the State of California to ban the carrying of non/less lethal stun guns *for the purpose of self-defense*?
- Did the district court incorrectly dismiss with prejudice Plaintiff Nichols' claims under the California Constitution?
- Did the district court incorrectly dismiss with prejudice Appellee-Defendant Brown in his official capacity as governor?
- Have the Appellees met their evidentiary burden required under heightened scrutiny?
- Did the district court err in concluding that whites and/or minorities cannot challenge racially discriminatory criminal laws until they have been arrested for violating the laws?
- Did the district court err in concluding that firearms fall outside the scope of Fourth Amendment protections?

- Did the district court err in concluding that there is no right to openly carry firearms for the purpose of self-defense in non-sensitive public places, in or on a motor vehicle and any attached camper or trailer and in the home?
- Did the district court err in concluding that there is no right to openly carry firearms for the purpose of self-defense in non-sensitive public places, in or on a motor vehicle and any attached camper or trailer and in the home where it is legal for similarly situated individuals to openly carry firearms for purposes other than self-defense?
- Did the district court err in concluding that there is no right to openly carry firearms for the purpose of self-defense in non-sensitive public places, in or on a motor vehicle and any attached camper or trailer and in the home where it is legal for similarly situated individuals to openly carry firearms for the purpose of self-defense?
- Does a firearm with an empty firing chamber in and of itself constitute an unloaded firearm?
- If a County has an ordinance exempting the discharge of a firearm for the purpose of self-defense, are the places in the county where the discharge of a firearm is prohibited for purposes other than self-defense still "prohibited places" under California law? What about incorporated cities which do not

allow hunting but exempt the discharge of a firearm for the purpose of self-defense?

- If a person does not have a tall, sturdy fence or other barrier fully enclosing his property and a door to his house, where he resides, does not have a lock or is otherwise left open; does this make the inside of his house a "public place" under California law and if so, is the state prohibition on Plaintiff Nichols's right to keep and bear arms inside of his house constitutional?
- If members of the public are allowed inside of Plaintiff Nichols's house, where he resides, does that make his house a "public place" under California law and if so, is the state prohibition on Plaintiff Nichols's right to keep and bear arms inside of his house constitutional?
- Do the laws at issue in this appeal survive the rational basis test?
- Does the Second Amendment, as claimed by Appellee-Harris, condone racially motivated and discriminatory criminal gun laws?
- If so, does the incorporation of the Second Amendment via the Fourteenth Amendment prohibit racially motivated and discriminatory criminal gun laws?

5. I am the primary care-giver of my 88 year old mother and disabled brother. This summer my mother's condition grew progressively worse requiring me to devote more and more time to her care. Eventually she had to undergo an

emergency, life-saving, operation and was discharged from the hospital to home care which required my full time attention thus preventing me from preparing a smaller sized Opening Brief. Providing care for my family members who require assistance with their medical needs and personal needs took time away from my preparing my Opening Brief. Time which was essential given that I am proceeding pro se, unrepresented by counsel and without the vast resources at the disposal of the Appellees. Despite the above obstacles, **I diligently worked on preparing the attached opening brief** to be as concise as it could be given my constraints, the relatively vast district court record, the procedural hand grenades tossed my way and the procedural landmines laid in my path by the district court; and did so without sacrificing the arguments I am required to make on appeal lest I forfeit them by not "adequately" arguing the issues on appeal.

6. For the above reasons, and based on the **diligence and substantial need demonstrated** I respectfully request leave to file the attached 46,823 word opening brief.

I declare under penalty of perjury that the foregoing is true and correct.

Executed in Lawndale California, on November 30, 2014.

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