

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Charles Nichols,

Plaintiff-Appellant

v.

EDMUND G. BROWN, Jr., in his official
capacity as Governor of California and
KAMALA D. HARRIS, Attorney General,
in her official capacity as
Attorney General of California,

Defendants-Appellees.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
Case No. 2:11-cv-09916-SJO-SS
The Honorable S. James Otero, Judge

**UNOPPOSED MOTION TO EXTEND STAY PENDING THIS COURT'S
EN BANC RESOLUTION OF *PERUTA V. COUNTY OF SAN DIEGO*, NO.
10-56971 AND *RICHARDS V. PRIETO*, NO. 11-16255**

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

RELIEF REQUESTED

In response to this Court's November 9, 2015, ORDER, Plaintiff-Appellant Charles Nichols moves to extend the present stay until this Court's en banc resolution of *Peruta v. County Of San Diego*, No. 10-56971 "*Peruta*" and *Richards v. Prieto*, No. 11-16255 "*Richards*". All parties to this case prefer that, instead of 90 day stays, this case be stayed pending resolution of the en banc *Peruta/Richards* case at which time the court would set a new briefing schedule. See *McKay v. Hutchens* No.: 12-57049 Dkt #64.

This present case is a pure Open Carry case and always has been. Plaintiff-Appellant Nichols does not seek to carry a concealed weapon in any public place. This present case challenges the constitutionality of California laws which prohibit Plaintiff-Appellant Nichols from openly carry firearms for the purpose of self-defense and for other lawful purposes.

An extension to the existing stay which expires on February 8, 2016 is warranted because:

1. The *high probability* that the 9th Circuit Court of Appeals en banc decision in *Peruta* and/or *Richards* will issue a substantive opinion which may substantially affect or inform the outcome of this present case. Should the en banc panel accept the California Solicitor General's concession during the en banc oral arguments of *Peruta* and

Richards that the “core right” of the Second Amendment extends beyond the curtilage of one’s home, but not to concealed carry, then it is likely that this present case can be resolved with a dispositive motion in Plaintiff-Appellant Nichols’ favor without either side having to file briefs on the merits.

2. The California Supreme Court has agreed to hear *People v. Wade* No. B255894 (Supreme Court Case No.: S224599) in order to resolve the concealed carry split with *People v. Pellecer*, 215 Cal. App. 4th 508 (2013). If Wade prevails then it will be legal for the *Peruta/Richards* plaintiffs to carry loaded handguns concealed without a permit so long as the handguns are not concealed within or beneath the clothing they are wearing. This would likely render the *Peruta/Richards* en banc case moot. *People v. Wade* No.: S224599 is fully briefed as of 10/07/2015.
3. To the best of Plaintiff-Appellant Nichols knowledge every California Second Amendment civil carry case in this circuit is presently stayed with the exception of *Young v. State of Hawaii* No.: 12-17808.
4. Plaintiff-Appellant Nichols has worked diligently on his opening brief but each draft inevitably presents the same problem, the en banc decision in *Peruta/Richards* will substantially impact virtually all of

the opening brief and whether or not this appeal can be resolved with a dispositive motion or will require full briefing on the merits and possibly a petition for this case to be heard initially en banc given that the district court decision conflicts with this circuit, sister circuits, state and appellate supreme court decisions of California and High Court decisions on Federal issues in other states.

5. The en banc decision in Peruta/Richards will determine the size of the Excerpts of Records, which are potentially voluminous, should merit briefs be required.

POSITION OF NON-MOVING PARTIES

Defendants-Appellees Edmund G. Brown Jr., Governor of California, and Kamala D. Harris, Attorney General of California, the only other parties to this appeal do not oppose this present motion.

BACKGROUND

This present case challenges the constitutionality of California's 1967 ban (California Penal Code section "PC" 25850) on openly carrying loaded firearms for the purpose of self-defense in the curtilage of one's home, in and on one's motor vehicle including any attached camper or trailer regardless of whether they are being used as a residence and in non-sensitive public places in incorporated

cities, city and county, and in non-sensitive public places in unincorporated county territory where the discharge of a firearm is prohibited.

This present case also challenges the constitutionality of California's recently enacted bans on openly carrying unloaded firearms for the purpose of self-defense in substantially the same places (PC 26350 and PC 26400).

This present case also challenges the constitutionality of California's licensing scheme (PC 26150, PC 26155 and the ancillary statutes) as applied to openly carrying loaded firearms for the purpose of self-defense.

The district court case was not limited to the Second Amendment. Plaintiff-Appellant Nichols has made various challenges in the district court under the Second Amendment, Fourth Amendment, Fourteenth Amendment, as well as vagueness and due process challenges. This present case also appeals the dismissal, with prejudice, of Plaintiff-Appellant Nichols state law claims and the dismissal, with prejudice, of Governor Brown in his official capacity.

Contrary to the binding prior precedents of this Circuit and the United States Supreme Court, the district court held that Plaintiff-Appellant Nichols is barred from bringing both as-applied and facial challenges. That Plaintiff-Appellant Nichols can only bring facial challenges and that facial challenges must satisfy the "no set of circumstances" test pursuant to obiter dicta in *United States v. Salerno*, 481 U. S. 739, 745 (1987). Having failed to meet the Salerno Test, and not

allowing any as-applied challenges, the district court then held that Plaintiff-Appellant Nichols claims were subject to Rational Review. This term, the United States Supreme Court finally placed a stake through the heart of the *Salerno* Test in *Patel v. City of Los Angeles* 576 U. S. ____ (2015) which involved an en banc decision arising out of this circuit in which this circuit facially invalidated under the Fourth Amendment a City of Los Angeles ordinance which made it a crime for hotel operators to refuse to consent to a warrantless search of their records.

PC 25850(b) similarly requires persons to either consent to a search and seizure of their persons and property or, according to the statute, refusal constitutes “probable cause” to arrest a person for violating PC 25850(a). The California courts have held that the mere sight of an openly carried firearm in a public place does not constitute probable cause that a person has violated PC 25850(a).

Citing a 1970 drug case in which a California Court of Appeals compared a predecessor to PC 25850(b) in a case which involved someone who likewise refused to consent to a search (in that case it was drugs) and a 1987 Federal appellate court decision which also cited the same state court case, a decision which involved the concealed carry of a handgun in the trunk of an automobile prior to the State of California enacting a law which exempts handguns transported in the trunk of an automobile from falling within its concealed carry prohibition, the Circuit Court simply held that firearms fall completely outside the scope of the

Fourth Amendment, even in the curtilage of one's home which entails within one's house as well.

Neither this circuit nor the US Supreme Court recognizes a "firearm exception" to the Fourth Amendment and other than the obiter dicta in that lone drug case from 1970, neither does this state. Plaintiff-Appellant Nichols argued in the district court that he has a Fourth Amendment right independent of the Second Amendment. Indeed, this term the US Supreme Court, in a unanimous decision, held that even prohibited persons under the Second Amendment (a convicted felon) has a property right to firearms in *Henderson v. United States* 576 U. S. ____ (2015).

This term, the US Supreme Court in *Samuel James Johnson v. United States* 576 U. S. ____ (2015) provided yet another in a long list of decisions which supports Plaintiff-Nichols vagueness and Second Amendment challenges. Indeed the court said that the risk from a firearm does not arise from its possession but from the act of using it. None of the challenged laws are discharge statutes.

The 1967 California ban (PC 25850) was a racially motivated ban. Contrary to binding prior precedents by the US Supreme Court and in this circuit, the district court held that Plaintiff-Appellant Nichols cannot challenge a racially motivated criminal statute unless he pleads that it has been enforced against him because of his race. According to the California legislature the recently enacted Unloaded

Open Carry bans were to “close a loophole” in the 1967 ban thereby tarring them with the same racist brush.

This was just a “brief” survey of some of the background to this case but it highlights the fact that a decision from the *Peruta/Richards* en banc court could enable this case to be resolved with a dispositive motion simply on Second/Fourth Amendment grounds alone.

CONCLUSION

For the foregoing reasons, Plaintiff-Appellant Nichols respectfully requests that the present stay in this case be extended until there is an en banc decision in *Peruta/Richards* (or further order of this court) without prejudice to Plaintiff-Appellant Nichols filing a motion to terminate the extended stay should circumstances arise or become known to Plaintiff-Appellant Nichols which would warrant a lifting of the stay.

Dated: January 20, 2016

Respectfully submitted,

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

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