

14-55873

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHARLES NICHOLS,

Plaintiff-Appellant,

v.

**KAMALA D. HARRIS, in her official
capacity as Attorney General of California,**

Defendant-Respondent.

On 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

**MOTION FOR 90-DAY STAY OF
PROCEEDINGS**

KAMALA D. HARRIS
Attorney General of California
DOUGLAS J. WOODS
Senior Assistant Attorney General
MARK R. BECKINGTON
Supervising Deputy Attorney General
JONATHAN M. EISENBERG
Deputy Attorney General
State Bar No. 184162
300 South Spring St., Ste. 1702
Los Angeles, CA 90013
Telephone: (213) 897-6505
Fax: (213) 897-5775
Email: Jonathan.Eisenberg@doj.ca.gov
*Attorneys for Defendant-Respondent
Kamala D. Harris, Attorney General of
California*

RELIEF REQUESTED

Defendant-Respondent Kamala D. Harris, Attorney General of California, moves for a 90-day stay of the proceedings in the present case, which concerns the constitutionality of California's firearm laws regulating open carry of firearms in public places. As discussed below, a stay in this appeal is warranted at least until the U.S. Court of Appeals, Ninth Circuit, decides whether to grant a pending petition for *en banc* review of *Richards v. Prieto*, Case No. 11-16255.

POSITION OF NON-MOVING PARTY

This motion is opposed by Plaintiff-Appellant Charles Nichols, the only other party to the appeal.

BACKGROUND

Nichols seeks the right to carry a firearm openly in most public places in California, by obtaining a permanent injunction against enforcement of California's open-carry laws¹ as an alleged violation of the Second Amendment to the U.S. Constitution. In the court below, Nichols unsuccessfully applied for a preliminary injunction to the same effect, and then he made an unsuccessful interlocutory appeal of the denial of the

¹ Cal. Penal Code, §§ 25850, 26150, 26155, 26350, and 26400.

application for a preliminary injunction. Later, the trial court entered final judgment in the Attorney General's favor and against Nichols. Presently, Nichols is appealing the final judgment.

The outcome of Nichols's pending appeal appears to be ineluctably intertwined with the outcome of the *Richards* case.

The significance of *Richards* is related to another case, *Peruta v. County of San Diego*, Case No. 10-56971, about which this Court issued a decision that addresses the interplay between California open-carry and concealed-carry firearm laws. 742 F.3d 1144 (9th Cir. 2014). This Court stayed Nichols's interlocutory appeal pending the initial outcome on appeal of *Peruta*. See *Nichols v. Brown*, Case No. 13-56203, Dkt. 27 (Oct. 15, 2013) (imposing stay). Also, the trial-court judgment in *Nichols* in favor of the Attorney General and against Nichols expressly relied on the *Peruta* decision, as follows:

Plaintiff further appears to misinterpret the import of the *Peruta* court's clarification in footnote 19 that it was not "ruling on the constitutionality of California statutes." (Obj. at 2) (quoting *Peruta*, 742 F.3d at 1173 n. 19). This footnote is part of the discussion in which the Ninth Circuit explained that because the Second Amendment does not protect any particular mode of carry, a claim that a state *must* permit a *specific* form of carry, such as open carry, fails as a matter of law. See *id.* at 1172-73 ("As the California legislature has limited its permitting scheme to concealed carry—and has thus expressed a preference for that manner of arms-bearing—a narrow challenge to the San

Diego County regulations on concealed carry, rather than a broad challenge to the state-wide ban on open carry, is permissible.”). Accordingly, *Peruta* did not rule on the overall constitutionality of California statutes because it accepted the lawfulness of California’s firearms regime, including the state’s preference for concealed carry over open carry. *Id.* at 1172.

Nichols v. Harris, No. CV 11-9916 SJO (SS), 2014 WL 1716135 at *1 (May 1, 2014). On November 12, 2014, the three-judge panel that issued the *Peruta* decision denied multiple requests from non-parties, including the Attorney General, to intervene in *Peruta* for the purpose of having the appeal reheard, including by an *en banc* panel of the Ninth Circuit.

As described by the Ninth Circuit, *Richards* concerns “the same issue” as *Peruta*, and followed that decision. *Richards*, 560 Fed. Appx. 681, 682 (9th Cir. 2014). This Court stayed Nichols’s interlocutory appeal pending the initial outcome on appeal of *Richards*, as well as *Peruta* (and a third case, *Baker v. Kealoha*, Case No. 12-16258). *See Nichols v. Brown*, Case No. 13-56203, Dkt. 27 (Oct. 15, 2013). There is an *en banc* petition pending in *Richards*.

ARGUMENT

The Attorney General requests that this Court stay the proceedings in the present case for 90 days, without prejudice to possible further such requests after the end of the 90 days. The primary reason for the request is

that the *Nichols* briefing, about the open carry of firearms, which Nichols and the Attorney General are expected to file herein in the next few months, surely will have to address the Court's decisions in *Richards* and also *Peruta*, covering the history and legality of concealed and open carry of firearms in the United States. Absent the stay requested here, the anticipated *Nichols* briefing may become irrelevant, unhelpful, and/or unnecessary, if *en banc* review of *Richards* occurs in response to the *Richards en banc* petition, as such review would consider the issue of public carry of firearms in California.²

If, at the end of the 90-day postponement requested here, the possibility of further review remains in either *Richards* or *Peruta*, then the Attorney General intends to renew the postponement request for an additional 90 days, for the reasons stated above. If, at the end of the 90-day postponement requested here, neither *Richards* nor *Peruta* are subject to further review, then the Attorney General intends *not* to renew this postponement request, and instead to brief the present appeal on the merits and then to prepare for oral argument.

² In addition, *en banc* review may be granted by order of the circuit judges in either *Richards* or *Peruta*. Fed. R. App. P. 35(a).

CONCLUSION

Postponement of the briefing and argument in the *Nichols* appeal, while the potential for further Ninth Circuit remains in either *Richards* or *Peruta*, will serve the best interests of the parties and the Court. The Attorney General therefore respectfully requests that the Court enter a 90-day postponement of the *Nichols* appeal (without prejudice to a possible additional postponement request at the end of the 90 days).

Dated: November 19, 2014 Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
DOUGLAS J. WOODS
Senior Assistant Attorney General
MARK R. BECKINGTON
Supervising Deputy Attorney General

/s/_____
JONATHAN M. EISENBERG
Deputy Attorney General
*Attorneys for Defendant-Respondent Kamala
D. Harris, Attorney General of California*

14-55873

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHARLES NICHOLS,

Plaintiff-Appellant,

v.

**KAMALA D. HARRIS, in her official
capacity as Attorney General of California,**

Defendant-Respondent.

STATEMENT OF RELATED CASES

The following related cases are pending:

Peruta v. County of San Diego, Case No. 10-56971

Richards v. Prieto, Case No. 11-16255

Baker v. Kealoha, Case No. 12-16258

These three cases address whether the Second Amendment to the U.S.

//

//

//

//

//

Constitution confers an individual right on people to carry firearms in public.

Dated: November 19, 2014

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
DOUGLAS J. WOODS
Senior Assistant Attorney General
MARK R. BECKINGTON
Supervising Deputy Attorney General

/s/_____
JONATHAN M. EISENBERG
Deputy Attorney General
*Attorneys for Defendant-Respondent Kamala
D. Harris, Attorney General of California*

9th Circuit Case Number(s) 14-55873

NOTE: To secure your input, you should print the filled-in form to PDF (File > Print > *PDF Printer/Creator*).

CERTIFICATE OF SERVICE

When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date)

November 19, 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.

Signature (use "s/" format)

CERTIFICATE OF SERVICE

When Not All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date)

November 19, 2014

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Charles Nichols
P.O. Box 1302
Redondo Beach, CA 90278

Signature (use "s/" format)

s/Jonathan M. Eisenberg