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8 United States District Court  
9 Central District of California  
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11 Charles Nichols,  
12 PLAINTIFF,  
13 vs.  
14 KAMALA D. HARRIS, Attorney  
15 General, in her official capacity as  
16 Attorney General of California  
17  
18 Defendant.  
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) Case No.: CV-11-9916 SJO (SS)

) **MEMORANDUM OF POINTS AND**  
) **AUTHORITIES IN SUPPORT OF**  
) **PLAINTIFF'S MOTION FOR**  
) **PARTIAL SUMMARY JUDGMENT**

) Date: December 17, 2013  
) Time: 10:00 am  
) Crtrm: 23 - 3rd Floor  
) Magistrate Judge: Suzanne H. Segal  
) District Judge: S. James Otero  
) Trial Date: None  
) Action Filed: November 30, 2011

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**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF**  
**PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT**  
**PRELIMINARY STATEMENT**

In "The Long Hot Summer of 1967," a period of race riots and social unrest, the California legislature arbitrarily and irrationally passed a series of laws including one which banned loaded firearms from being openly carried in public.

The law was intended to disarm minorities, particularly the Black Panther Party whose members had openly carried firearms in the State Capitol building to protest that very same Act which was introduced explicitly to disarm them.

California had already passed a law back in 1923 banning the carrying of concealed weapons without a permit. That law was also explicitly targeted towards the two largest minority groups in the state at that time; Latinos and Chinese. The California courts invalidated the ban on the possession of handguns contained in the 1923 Act on equal protection grounds back in 1972 but the permit requirement to carry a concealed weapon remains. On January 1<sup>st</sup> of last year, a ban on openly carrying unloaded handguns went into effect. On January 1<sup>st</sup> of this year, a ban on openly carrying unloaded firearms which are not handguns went into effect.

As-applied to Plaintiff Nichols, the moment he steps outside of his home carrying a loaded or unloaded firearm, openly or concealed, he is in violation of the law. Plaintiff Nichols does not seek to carry a concealed firearm or a concealed weapon of any kind in public. He does seek to carry a firearm in the Constitutionally protected manner of carry, which is openly carried, in non-sensitive public places, in his motor vehicle and in the curtilage of his own home without fear of arrest, prosecution, fine and imprisonment.

**STATEMENT OF FACTS**

California law bans the carrying of loaded firearms in incorporated cities and unincorporated county territory where the discharge of firearms is prohibited. SUF 1 & 4. Similarly, the carrying of unloaded firearms is banned. SUF 2, 3 & 4.

1 California law theoretically provides for the entirely discretionary issuance of a  
 2 license to carry loaded and exposed in only that county a pistol, revolver, or other  
 3 firearm capable of being concealed upon the person where the population of the  
 4 county is less than 200,000 persons according to the most recent federal decennial  
 5 census. SUF 5. And for the carrying of concealed weapons in all counties. SUF 6.  
 6 Absent permission, California law generally prohibits the possession of firearms  
 7 within 1,000 feet of a K-12 public or private school or on the grounds of a college  
 8 or university SUF 7, within the State Capitol or grounds of the Governor's  
 9 mansion SUF 8, within the sterile area of an airport or a passenger vessel terminal  
 10 SUF 9, within any state or local public building SUF 10, within the sterile area of a  
 11 public transit facility SUF 12. California law generally prohibits the possession of  
 12 firearms not immediately recognizable as a firearm. SUF 14. California law  
 13 generally prohibits the possession of any undetectable firearm. SUF 15. A license  
 14 to Carry A Pistol, Revolver, or Other Firearm Capable of Being Concealed Upon  
 15 the Person shall not be issued if the Department of Justice determines that the  
 16 person is prohibited by state or federal law from possessing, receiving, owning, or  
 17 purchasing a firearm. SUF 16. A license to carry loaded and exposed a pistol,  
 18 revolver, or other firearm capable of being concealed upon the person is revoked  
 19 immediately upon a change of the licensee's place of residence to another county.  
 20 SUF 17. A minor shall not possess a pistol, revolver, or other firearm capable of  
 21 being concealed upon the person. SUF 19. The Attorney General maintains an  
 22 online database known as the Prohibited Armed Persons File who fall within a  
 23 class of persons who are prohibited from owning or possessing a firearm. SUF 20.  
 24 California law generally prohibits the possession of "assault weapons" and .50  
 25 BMG rifles. SUF 21. California law generally prohibits the possession of  
 26 machineguns. SUF 22. California prohibits prisoners from possessing firearms.  
 27 SUF 23. California law generally prohibits possession of a firearm when the person  
 28 carries a firearm in a public place or on any public street while masked so as to



1 hide the person's identity. SUF 25. Persons who carry a loaded or unloaded firearm  
 2 on his or her person, or in a vehicle, during the commission or attempted  
 3 commission of certain street gang crimes is subject to additional terms of  
 4 imprisonment. SUF 35 & 36. Unless it is with the written permission of the school  
 5 district superintendent, the superintendent's designee, or equivalent school  
 6 authority, no person shall carry ammunition or reloaded ammunition onto school  
 7 grounds, except sworn law enforcement officers acting within the scope of their  
 8 duties or persons exempted under Section 25450. SUF 37. California Penal Code  
 9 section 25850(a) was formerly codified as PC 12031(a)(1). SUF 42. California  
 10 Penal Code section 25850(b) was formerly codified as PC 12031(e). SUF 43.  
 11 California Penal Code section 25850(c)(6) was formerly codified as PC 12031  
 12 (a)(2)(F). SUF 44. In 2011, 80.8 percent of homicide victims in California were  
 13 male, 19.2 percent were female, SUF 45, over half (54.5 percent) of white victims  
 14 were aged "40 and over," SUF 46, of the homicides where location was reported,  
 15 35.3 percent occurred on the street or sidewalk; 24.1 percent in the victim's  
 16 residence, and 13.5 percent in a residence other than the victim's, SUF 47, the  
 17 largest proportion of male victims (40.4 percent) were killed on the street or  
 18 sidewalk SUF 48. From 2002 to 2011, the overwhelming majority of homicide  
 19 arrestees and victims were male. SUF 49. When charged with PC section  
 20 12031, blacks were proportionately most likely to be filed on at the felony level,  
 21 followed by Hispanics, other race/ethnic groups, and whites. This pattern exists  
 22 throughout the period shown (2000-2003) SUF 57. In 2003: Whites accounted for  
 23 488 of the 1,973 arrests for violation of PC 12031, 190 of the 1,213 felony arrests  
 24 for violation of PC 12031 and 288 of the 760 misdemeanor arrests for violation of  
 25 PC 12031. SUF 58. In 2012, there were 20,521 felony weapons arrests in  
 26 California. 19,049 were male (92.8%), 1,472 were female (7.2%). 5,160 were  
 27 White (25.1%). 10,182 were Hispanic (49.6%). 4,143 were Black (20.2%). 1,036  
 28 were "Other" (5.0%). SUF 60. In 2012, there were 5,676 misdemeanor weapons



1 arrests in California. 5,136 were male (90.5%), 540 were female (9.5%). 1,933  
 2 were White (34.1%). 2,489 were Hispanic (43.9%). 885 were Black (15.6%). 369  
 3 were "Other" (6.5%). SUF 61. When charged with either PC section 12025 or PC  
 4 section 12031, blacks were proportionately the most likely race/ethnic group to be  
 5 filed on at the felony level; whites were proportionately the least likely race/ethnic  
 6 group to be filed on at the felony level. SUF 67. In 2012, 39.4% of the estimated  
 7 population of California is White (not Hispanic or Latino), 13.9% is Asian and  
 8 6.6% is Black or African-American and 3.6% is two or more races. SUF 69.  
 9 California counties with a population of fewer than 200,000 people are  
 10 predominantly White in race. SUF 70, 71 & 72. The Attorney General admits to  
 11 instructing all issuing authorities in California not to issue a license to openly carry  
 12 a handgun to PLAINTIFF and similarly situated individuals on page 1 of her  
 13 "STANDARD APPLICATION FOR LICENSE TO CARRY A CONCEALED  
 14 WEAPON (CCW)" prepared by the Attorney General pursuant to California Penal  
 15 Code section 26175 which also provides for her to revise the application form.  
 16 DEFENDANT HARRIS has refused to either create or revise the application form  
 17 to accommodate PLAINTIFF'S and similarly situated individuals Second  
 18 Amendment right to openly carry a loaded firearm in public for the purpose of self-  
 19 defense and other lawful purposes. SUF 78. The Attorney General has admitted to  
 20 enforcement of the laws enumerated in Plaintiff's operative complaint, Second  
 21 Amended Complaint (SAC), as well as to laws unspecified by code section in the  
 22 SAC. SUF 83. The Attorney General admits that Plaintiff Nichols obtained a Law  
 23 Enforcement Gun Release letter from the Attorney General's California  
 24 Department of Justice as required by California law. SUF 84 & 85 which requires  
 25 her to conduct an eligibility check to determine if Plaintiff Nichols is authorized to  
 26 possess a firearm SUF 86 and to issue the letter SUF 87 which stated that Plaintiff  
 27 Nichols is eligible to possess a firearm. SUF 88. The "good cause" requirement of  
 28 the Los Angeles Sheriff's Department is intended to dramatically restrict the

1 number of persons who are secretly armed within the county. In 2011, there was  
2 an average of approximately 400 existing concealed weapons permits that were  
3 issued by the LASD in a county of some 10 million people. SUF 89. Plaintiff  
4 Nichols is a resident of Los Angeles County SUF 91, who resides in an  
5 incorporated city within Los Angeles County which does not have a chief of  
6 police. SUF. 92. The front yard fence to Plaintiff Nichols' single-family residence  
7 facing the street is less than 3.5 feet in height. SUF 93. Plaintiff Nichols is a male.  
8 SUF 94. Plaintiff Nichols is 53 years of age. SUF 95. Since this action was first  
9 filed on November 30, 2011, Defendant Harris has issued to Plaintiff Nichols two  
10 Law Enforcement Gun Release letters authorizing the release of his single-shot  
11 shotgun then held by the City of Redondo Beach. SUF 96. Such letters authorizing  
12 the release of a firearm can only be issued to persons who are not prohibited from  
13 possessing a firearm. SUF 97. Plaintiff Nichols is not prohibited under either  
14 California State or Federal law from purchasing or possessing a firearm. SUF 98.  
15 Plaintiff Nichols seeks to exercise his Second Amendment right to openly carry  
16 handguns for the purpose of self-defense and for other lawful purposes, such  
17 handguns to be openly carried, not encased, both loaded and unloaded, in non-  
18 sensitive public places within incorporated cities and in non-sensitive places of  
19 unincorporated county territory where the Open Carry of handguns, both loaded  
20 and unloaded, is prohibited. SUF 99. Plaintiff Nichols seeks to exercise his Second  
21 Amendment right to openly carry long guns for the purpose of self-defense and for  
22 other lawful purposes, such long guns to be openly carried, not encased, both  
23 loaded and unloaded, in non-sensitive public places within incorporated cities and  
24 in non-sensitive places of unincorporated county territory where the Open Carry of  
25 handguns, both loaded and unloaded, is prohibited. SUF 100. Plaintiff Nichols seek  
26 to exercise his Second Amendment right to openly carry firearms for the purpose  
27 of self-defense and for other lawful purposes, such firearms to be openly carried,  
28 not encased, both loaded and unloaded, in, within and on his motor vehicles,

1 attached camper or trailer in non-sensitive public places within incorporated cities  
2 and in non-sensitive places of unincorporated county territory where the Open  
3 Carry of firearms, both loaded and unloaded, is prohibited in, within and on his  
4 motor vehicles, in non-sensitive public places within incorporated cities and in  
5 non-sensitive places of unincorporated counties. SUF 101. Plaintiff Nichols seeks  
6 to be free from warrantless searches and seizures of his person and property and to  
7 be free to refuse to voluntarily consent to unlawful searches and seizures of his  
8 person and property pursuant to the Fourth Amendment of the United States  
9 Constitution when in non-sensitive public places. SUF 102. Plaintiff Nichols seek  
10 to exercise his Second Amendment right to openly carry firearms for the purpose  
11 of self-defense and for other lawful purposes, such firearms to be openly carried,  
12 not encased, both loaded and unloaded, within the curtilage of his home. SUF 103.  
13 Plaintiff Nichols seeks to be free from warrantless searches and seizures of his  
14 person and property and to be free to refuse to voluntarily consent to unlawful  
15 searches and seizures of his person and property pursuant to the Fourth  
16 Amendment of the United States Constitution within the curtilage of his home.  
17 SUF 104. Prior to the enactment of the Mulford Act of 1967 which enacted, in  
18 part, former California Penal Code section 12031 which is now codified, in part, as  
19 California Penal Code section 25850 a firearm was considered to be loaded only if  
20 it had a live round in the firing chamber, or in the case of muzzle-loading firearms,  
21 if the firing chamber was uncapped or unprimed. SUF 114. Plaintiff Nichols  
22 received a death threat via email which was reported to both the Attorney General  
23 and the Los Angeles Sheriff's department. SUF 118. Plaintiff Nichols attempted to  
24 file the police report (Dkt. # 10) which was rejected by this court (Dkt. # 11). SUF  
25 119. Plaintiff Nichols requested both an application and license from the Redondo  
26 Beach Chief of Police through his then attorney, the Redondo Beach City  
27 Attorney, to openly carry a loaded handgun. SUF 120. The license was refused in  
28 an email from the City Attorney citing California law which precludes the issuance

1 of a license to counties with a population of more than 200,000 people. SUF 121.  
2 Los Angeles County has a population of more than 200,000 people. SUF 122. The  
3 conclusion of the Los Angeles Sheriff's Department Sergeant Inge was that  
4 someone who threatened to shoot Plaintiff Nichols and called upon others to track  
5 him down and do the same was not committing a criminal offense because the  
6 email did not use the word "kill." SUF 123. The Attorney General refused to  
7 prosecute. SUF 124. . Plaintiff Nichols fears arrest, prosecution, fine and  
8 imprisonment were Plaintiff Nichols to openly carry a firearm outside of his home.  
9 Plaintiff Nichols refrains from doing so but has not completely abstained from  
10 doing so. SUF 125. Beginning in January of 2015, Plaintiff Nichols plans on  
11 traveling through the state and to visit every incorporated city and every County  
12 within the State of California and to openly carry firearms, loaded and unloaded, in  
13 non-sensitive public places in those incorporated cities (including the city and  
14 county of San Francisco) and unincorporated county territory and to carry them in  
15 and on his motor vehicle and in and on an attached camper or trailer. SUF 126.  
16 Beginning in January of 2015, Plaintiff Nichols plans on openly carrying firearms,  
17 loaded and unloaded, in non-sensitive public places in non-sensitive  
18 unincorporated county territory (including the city and county of San Francisco)  
19 and to carry them in and on his motor vehicle and in and on an attached camper or  
20 trailer. SUF 127. Plaintiff Nichols plans on carrying loaded and unloaded firearms  
21 within the curtilage of his home for the purpose of self-defense and for other  
22 lawful purposes. It is impossible to predict when such a need will arise and  
23 therefore impossible to articulate a concrete plan. SUF 128. To Plaintiff Nichols'  
24 knowledge, there are no permits or licenses available to him to carry a loaded or  
25 unloaded firearm for the purpose of self-defense and police chiefs and county  
26 sheriffs are prevented by state law from issuing licenses to private citizens to  
27 openly carry a loaded or unloaded firearm in counties with a population of 200,000  
28 or more persons and such licenses are only theoretically available for handguns

1 and only in those counties with a population of fewer than 200,000 people and are  
 2 only available in those counties to residents of those counties and are invalid  
 3 outside of the county of issuance. SUF 129. To Plaintiff Nichols' knowledge, cities  
 4 and counties are free to enact local regulations restricting where and when persons  
 5 with a CCW license may carry a weapon pursuant to the license even if there is no  
 6 restriction placed on the license by the county sheriff or police chief that issued the  
 7 license. SUF 130. It is Plaintiff Nichols' understanding that except for certain  
 8 exceptions, such as travelers while on a journey, carrying a concealed weapon falls  
 9 outside the scope of the Second Amendment. SUF 131. It is Plaintiff Nichols'  
 10 understanding that Plaintiff Nichols does not satisfy the Los Angeles Sheriff's  
 11 Department "good cause" requirement for being issued a license to carry a loaded,  
 12 concealable firearm. SUF 132. Defendant Harris has never promised to not  
 13 enforce the laws at issue. SUF 133. The reason for the enactment of California's  
 14 ban on carrying loaded firearms in public is well documented in the filings. SUF  
 15 40 & 41. Under California law, there is no "duty to retreat" in public or in private.  
 16 SUF 134 & 135. 74% of homicides of White males occur outside of the victim's  
 17 residence. SUF 136.

### 18 SUMMARY OF ARGUMENT

19 To carry arms openly (Open Carry) is the right guaranteed by the  
 20 Constitution according to *Heller*. To carry arms secretly (concealed carry), with  
 21 limited exceptions such as for travelers on a journey, falls outside of the scope of  
 22 the Second Amendment right according to *Heller*. California has banned the Open  
 23 Carry of firearms, both loaded and unloaded, in non-sensitive public places of all  
 24 incorporated cities as well as in unincorporated county territory where the  
 25 discharge of a firearm is prohibited.

26 Nowhere in *Heller* did the US Supreme Court hold that the Second  
 27 Amendment Right evaporates the moment one steps outside of his home. The  
 28 *Heller* court held that the Second Amendment Right to keep and bear arms exists



1 except in certain public places the Court called “sensitive” and gave as examples  
2 schools and government buildings.

3 California has many laws regulating, restricting and prohibiting the  
4 possession and carrying of firearms in sensitive public places, in non-sensitive  
5 public places as well as the types of firearms that may be possessed and who may  
6 possess them. Those laws are not at issue in this case.

7 The statutes themselves at issue in this case contain no exceptions. To the  
8 extent that there are exceptions elsewhere in the penal code, they prohibit the  
9 carrying of a firearm for the purpose of self-defense except when a person is in  
10 “grave, immediate” danger. Unless that person falls outside of the scope of the  
11 Second Amendment, such as convicted felons. To arm themselves with a firearm,  
12 convicted felons need only reasonably believe that he (or someone else) is in  
13 imminent danger of suffering significant or substantial physical injury.

14 Both a person who falls within the scope of the Second Amendment  
15 (Plaintiff Nichols) and a person who doesn’t (e.g. a felon) must wait for a loaded  
16 firearm to be made available to him in those non-sensitive public places where the  
17 laws at issue in this case prohibit the carrying of weapons for the purpose of self-  
18 defense. And even then his temporary possession of that weapon is limited to a  
19 period no longer than the brief interval between having notified the police and their  
20 arrival.

21 Given that it is illegal to carry a loaded firearm in public (openly or  
22 concealed) until the point one finds himself in grave, immediate danger and it is  
23 illegal to carry an unloaded firearm (openly or concealed) in public, what  
24 divination, invocation or incantation is supposed to make the firearm miraculously  
25 appear when Plaintiff Nichols finds himself in grave, immediate danger?

26 The ban on openly carrying loaded firearms was enacted in July of 1967  
27 with the unmistakable purpose of disarming minorities and that ban is  
28 disproportionately enforced against minorities to this day.

1 The law contains a provision where the mere refusal to consent to a search  
 2 constitutes "probable cause" for an arrest. That provision is clearly a violation of  
 3 the Fourth Amendment not only as-applied to Plaintiff, say in the curtilage of his  
 4 home, but facially as well. See *US v. Fuentes*, 105 F. 3d 487 - Court of Appeals,  
 5 9th Circuit (1997) at 490.

6 The unloaded open carry bans were enacted not because persons who openly  
 7 carry unloaded firearms present a danger to others but because, the legislature  
 8 claims, there is a *potential* danger that police might overreact and shoot people. It  
 9 would be unprecedented to uphold a law banning anything, let alone banning a  
 10 fundamental, enumerated right because it is the police who are the danger to public  
 11 safety.

## 12 ARGUMENT

### 13 **I. The Second Amendment Right is Fully Applicable to the States.**

14 "[T]he Second Amendment right is fully applicable to the States."  
 15 *McDonald v. City of Chicago*, Ill., 130 S. Ct. 3020 - Supreme Court (2010) at  
 16 3026. "[T]he [Supreme] Court abandoned "the notion that the Fourteenth  
 17 Amendment applies to the States only a watered-down, subjective version of the  
 18 individual guarantees of the Bill of Rights," stating that it would be "incongruous"  
 19 to apply different standards "depending on whether the claim was asserted in a  
 20 state or federal court." *Malloy*, 378 U.S., at 10-11, 84 S.Ct. 1489 (internal  
 21 quotation marks omitted). Instead, the Court decisively held that incorporated Bill  
 22 of Rights protections "are all to be enforced against the States under the Fourteenth  
 23 Amendment according to the same standards that protect those personal rights  
 24 against federal encroachment." *McDonald* at 3035. "*Heller* makes it clear that  
 25 this right is "deeply rooted in this Nation's history and tradition." *McDonald* at  
 26 3036. "In sum, it is clear that the Framers and ratifiers of the Fourteenth  
 27 Amendment counted the right to keep and bear arms among those fundamental  
 28 rights necessary to our system of ordered liberty." *McDonald* at 3042. "The



1 relationship between the Bill of Rights' guarantees and the States must be governed  
 2 by a single, neutral principle. It is far too late to exhume what Justice Brennan,  
 3 writing for the Court 46 years ago, derided as "the notion that the Fourteenth  
 4 Amendment applies to the States only a watered-down, subjective version of the  
 5 individual guarantees of the Bill of Rights." *Malloy*, supra, at 10-11, 84 S.Ct. 1489  
 6 (internal quotation marks omitted)." *McDonald* at 3048.

## 7 **II. The Second Amendment Protects the Right to Keep and Bear Arms for** 8 **the Purpose of Self-Defense.**

9 "The Second Amendment protects the right to keep and bear arms for the  
 10 purpose of self-defense..." *McDonald* at 3026. "Self-defense is a basic right,  
 11 recognized by many legal systems from ancient times to the present day, and in  
 12 *Heller*, we held that individual self-defense is "the central component" of the  
 13 Second Amendment right." *McDonald* at 3036. "[W]e stressed that the right was  
 14 also valued because the possession of firearms was thought to be essential for self-  
 15 defense. As we put it, self-defense was "the central component of the right itself.""  
 16 *McDonald* at 3048.

## 17 **III. The Fourteenth Amendment does not Allow for Nondiscriminatory** 18 **Abridgments of Rights.**

19 "[W]hile § 1 of the Fourteenth Amendment contains "an antidiscrimination  
 20 rule," namely, the Equal Protection Clause, municipal respondents can hardly mean  
 21 that § 1 does no more than prohibit discrimination. If that were so, then the First  
 22 Amendment, as applied to the States, would not prohibit nondiscriminatory  
 23 abridgments of the rights to freedom of speech or freedom of religion; the Fourth  
 24 Amendment, as applied to the States, would not prohibit all unreasonable searches  
 25 and seizures but only discriminatory searches and seizures—and so on. We assume  
 26 that this is not municipal respondents' view, so what they must mean is that the  
 27 Second Amendment should be singled out for special—and specially  
 28 unfavorable—treatment. We reject that suggestion." *McDonald* at 3043. "It cannot

1 be doubted that the right to bear arms was regarded as a substantive guarantee, not  
 2 a prohibition that could be ignored so long as the States legislated in an  
 3 evenhanded manner.” *McDonald* at 3043-3044.

4 The “race neutral” language of the statutes at issue, even absent the racially  
 5 discriminatory motivation and enforcement of PC 25850, does not make them  
 6 Constitutional.

7 “Similarly, in *Hunter v. Underwood*, 471 U.S. 222 (1985), the Supreme  
 8 Court unanimously struck down a provision of the Alabama constitution that  
 9 disenfranchised individuals convicted of crimes involving moral turpitude. The  
 10 provision was facially neutral because it applied to persons of all races. *Id.* at 227.  
 11 However, there was compelling evidence that the provision was adopted at the turn  
 12 of the 20th century for the purpose of disenfranchising black voters who were  
 13 convicted of such crimes at a far higher rate than white voters. Assuming,  
 14 arguendo, that the disenfranchisement provision would be constitutional if it were  
 15 passed in modern times without the intent to discriminate against racial minorities,  
 16 the Court nonetheless held that because it had been enacted for a discriminatory  
 17 purpose it “violates equal protection under *Arlington Heights*.” *Id.* at 233. The  
 18 1903 Alabama legislature’s willingness (or intent) to also disenfranchise white  
 19 individuals convicted of crimes of moral turpitude was irrelevant; all that mattered  
 20 was that the act “would not have been adopted . . . in the absence of the racially  
 21 discriminatory motivation.”[24] *Id.* at 231.” *PACIFIC SHORES PROPERTIES,*  
 22 *LLC v. City of Newport Beach*, Court of Appeals, 9th Circuit No. 11-55460 (2013)  
 23 Slip Op., pg., 34.

24 “Moreover, in *Reitman v. Mulkey*, 387 U.S. 369, 87 S.Ct. 1627, 18 L.Ed.2d  
 25 830 (1967), the Supreme Court struck down a California housing law. The law was  
 26 facially neutral with respect to race: By its own terms, it simply protected certain  
 27 ownership and sale rights of property owners. But the Court concluded that, on the  
 28 basis of the context and circumstances of the law’s passage, it had the “design and

1 intent" of weakening the state's anti-discrimination laws. Id. at 374, 87 S.Ct. 1627."

2 *In re Golinski*, 587 F. 3d 901 - Court of Appeals, 9th Circuit (2009) at 903.

3 **IV. The Scope of the Second Amendment Right Cannot be Determined by**  
 4 **Judicial Interest Balancing.**

5 "[R]espondents assert that, although most state constitutions protect firearms  
 6 rights, state courts have held that these rights are subject to "interest-balancing"  
 7 and have sustained a variety of restrictions. Brief for Municipal Respondents 23-  
 8 31. In *Heller*, however, we expressly rejected the argument that the scope of the  
 9 Second Amendment right should be determined by judicial interest balancing, 554  
 10 U.S., at \_\_\_\_ - \_\_\_\_, 128 S.Ct., at 2820-2821, and this Court decades ago abandoned  
 11 "the notion that the Fourteenth Amendment applies to the States only a watered-  
 12 down, subjective version of the individual guarantees of the Bill of Rights,"  
 13 *Malloy*, supra, at 10-11, 84 S.Ct. 1489 (internal quotation marks omitted).  
 14 *McDonald* at 3047. "...Justice BREYER is incorrect that incorporation will require  
 15 judges to assess the costs and benefits of firearms restrictions and thus to make  
 16 difficult empirical judgments in an area in which they lack expertise. As we have  
 17 noted, while his opinion in *Heller* recommended an interest-balancing test, the  
 18 Court specifically rejected that suggestion. See supra, at 3046-3047. "The very  
 19 enumeration of the right takes out of the hands of government—even the Third  
 20 Branch of Government—the power to decide on a case-by-case basis whether the  
 21 right is really worth insisting upon." *Heller*, supra, at \_\_\_\_, 128 S.Ct., at 2821."  
 22 *McDonald* at 3050.

23 **V. The Second Amendment Right Recognized in *Heller*.**

24 "We therefore hold that the Due Process Clause of the Fourteenth  
 25 Amendment incorporates the Second Amendment right recognized in *Heller*."  
 26 *McDonald* at 3050.

27 *Held in Heller:*

1           1. The Second Amendment protects an individual right to possess a firearm  
2 unconnected with service in a militia, and to use that arm for traditionally lawful  
3 purposes, such as self-defense within the home. Slip Op., Pp. 2–53.

4 (a) The Amendment’s prefatory clause announces a purpose, but does not limit or  
5 expand the scope of the second part, the operative clause. The operative clause’s  
6 text and history demonstrate that it connotes an individual right to keep and bear  
7 arms. Slip Op., Pp. 2–22.

8 (b) The prefatory clause comports with the Court’s interpretation of the operative  
9 clause. The “militia” comprised all males physically capable of acting in concert  
10 for the common defense. The Antifederalists feared that the Federal Government  
11 would disarm the people in order to disable this citizens’ militia, enabling a  
12 politicized standing army or a select militia to rule. The response was to deny  
13 Congress power to abridge the ancient right of individuals to keep and bear arms,  
14 so that the ideal of a citizens’ militia would be preserved. Slip Op., Pp. 22–28.

15 (c) The Court’s interpretation is confirmed by analogous arms bearing rights in  
16 state constitutions that preceded and immediately followed the Second  
17 Amendment. Slip Op., Pp. 28–30.

18 (d) The Second Amendment’s drafting history, while of dubious interpretive  
19 worth, reveals three state Second Amendment proposals that unequivocally  
20 referred to an individual right to bear arms. Slip Op., Pp. 30–32.

21 (e) Interpretation of the Second Amendment by scholars, courts and legislators,  
22 from immediately after its ratification through the late 19th century also supports  
23 the Court’s conclusion. Slip Op., Pp. 32–47.

24 (f) None of the Court’s precedents forecloses the Court’s interpretation. Neither  
25 *United States v. Cruikshank*, 92 U. S. 542, 553, nor *Presser v. Illinois*, 116 U. S.  
26 252, 264–265, refutes the individual rights interpretation. *United States v. Miller*,  
27 307 U. S. 174, does not limit the right to keep and bear arms to militia purposes,  
28

1 but rather limits the type of weapon to which the right applies to those used by the  
2 militia, i.e., those in common use for lawful purposes. Slip Op., Pp. 47–54.

3 2. Like most rights, the Second Amendment right is not unlimited. It is not a  
4 right to keep and carry any weapon whatsoever in any manner whatsoever and for  
5 whatever purpose: For example, concealed weapons prohibitions have been upheld  
6 under the Amendment or state analogues. The Court’s opinion should not be taken  
7 to cast doubt on longstanding prohibitions on the possession of firearms by felons  
8 and the mentally ill, or laws forbidding the carrying of firearms in sensitive places  
9 such as schools and government buildings, or laws imposing conditions and  
10 qualifications on the commercial sale of arms. Miller’s holding that the sorts of  
11 weapons protected are those “in common use at the time” finds support in the  
12 historical tradition of prohibiting the carrying of dangerous and unusual weapons.  
13 Slip Op., Pp. 54–56.

14 3. The handgun ban and the trigger-lock requirement (as applied to self-  
15 defense) violate the Second Amendment. The District’s total ban on handgun  
16 possession in the home amounts to a prohibition on an entire class of “arms” that  
17 Americans overwhelmingly choose for the lawful purpose of self-defense. Under  
18 any of the standards of scrutiny the Court has applied to enumerated constitutional  
19 rights, this prohibition—in the place where the importance of the lawful defense of  
20 self, family, and property is most acute—would fail constitutional muster.  
21 Similarly, the requirement that any lawful firearm in the home be disassembled or  
22 bound by a trigger lock makes it impossible for citizens to use arms for the core  
23 lawful purpose of self-defense and is hence unconstitutional. Because Heller  
24 conceded at oral argument that the D. C. licensing law is permissible if it is not  
25 enforced arbitrarily and capriciously, the Court assumes that a license will satisfy  
26 his prayer for relief and does not address the licensing requirement. Assuming he is  
27 not disqualified from exercising Second Amendment rights, the District must  
28



1 permit Heller to register his handgun and must issue him a license to carry it in the  
2 home. Slip Op., Pp. 56–64.

### 3 **VI. California Law Does Not Impose a Duty to Retreat in Public.**

4 Under California law there is no “duty to retreat” either in public or in one’s  
5 home. There is no lesser right to self-defense in public.

6 “[W]hen a man without fault himself is suddenly attacked in a way that puts  
7 his life or bodily safety at imminent hazard, he is not compelled to fly or to  
8 consider the proposition of flying, but may stand his ground and defend himself to  
9 the extent of taking the life of the assailant, if that be reasonably necessary.”

10 *People v. Newcomer*, (1897) 118 Cal. 263, 273. See also CALCRIM 505 (SUF  
11 134) and CALCRIM 3470 (SUF 135).

12 Federal common law similarly recognizes that there is no duty to retreat.  
13 See *Gourko v. United States*, 153 U.S. 183 (1894), *Thompson v. United States*, 155  
14 U.S. 271 (1894), *Brown v. United States*, 256 U.S. 335 (1921) (Holmes, J.)  
15 (“Detached reflection cannot be demanded in the presence of an uplifted knife.”)  
16 and *Beard v. United States*, 158 U.S. 550 (1895).

### 17 **VII. Open Carry is the Right Guaranteed by the Constitution.**

18 “The act of firearm possession, by itself, is innocent.” *People v. Jones*, 278  
19 P. 3d 821 - Cal: Supreme Court (2012) at 356. A firearm can only be carried  
20 openly or concealed. Concealed carry falls outside of the scope of the Second  
21 Amendment, which leaves Open Carry as the only Constitutionally protected  
22 manner of carrying a firearm in public.

23 “Like most rights, the right secured by the Second Amendment is not  
24 unlimited. From Blackstone through the 19th-century cases, commentators and  
25 courts routinely explained that the right was not a right to keep and carry any  
26 weapon whatsoever in any manner whatsoever and for whatever purpose. See, e.g.,  
27 Sheldon, in 5 Blume 346; Rawle 123; Pomeroy 152-153; Abbott 333. For  
28 example, the majority of the 19th-century courts to consider the question held

1 **that prohibitions on carrying concealed weapons were lawful under the**  
 2 **Second Amendment or state analogues.** See, e.g., *State v. Chandler*, 5 La. Ann.,  
 3 at 489-490; *Nunn v. State*, 1 Ga., at 251..." *District of Columbia v. Heller*, 128 S.  
 4 Ct. 2783 - Supreme Court (2008) at 2816-2817. (emphasis added).

5 "In *Nunn v. State*, 1 Ga. 243, 251 (1846), the Georgia Supreme Court  
 6 construed the Second Amendment as protecting the "natural right of self-defence"  
 7 and therefore struck down a ban on carrying pistols openly. **Its opinion perfectly**  
 8 **captured the way in which the operative clause of the Second Amendment**  
 9 **furtheres the purpose announced in the prefatory clause**, in continuity with the  
 10 English right:

11 "The right of the whole people, old and young, men, women and boys,  
 12 and not militia only, to keep and bear arms of every description, and not such  
 13 merely as are used by the militia, shall not be infringed, curtailed, or broken  
 14 in upon, in the smallest degree; and all this for the important end to be attained:  
 15 the rearing up and qualifying a well-regulated militia, so vitally necessary to the  
 16 security of a free State. Our opinion is, that any law, State or Federal, is repugnant  
 17 to the Constitution, and void, which contravenes this right, originally belonging to  
 18 our forefathers, trampled under foot by Charles I. and his two wicked sons and  
 19 successors, re-established by the revolution of 1688, conveyed to this land of  
 20 liberty by the colonists, and finally incorporated conspicuously in our own Magna  
 21 Charta!" *District of Columbia v. Heller*, 128 S. Ct. 2783 - Supreme Court (2008)  
 22 at 2809. (emphasis added).

23 "We are of the opinion, then, that so far as the act of 1837 seeks to  
 24 suppress the practice of carrying certain weapons *secretly*, that it is valid,  
 25 inasmuch as it does not deprive the citizen of his *natural* right of self-defence, or  
 26 of his constitutional right to keep and bear arms. **But that so much of it, as**  
 27 **contains a prohibition against bearing arms *openly*, is in conflict with the**  
 28 **Constitution, and void;** and that, as the defendant has been indicted and convicted



1 for carrying a pistol, without charging that it was done in a concealed manner,  
 2 under that portion of the statute which entirely forbids its use, the judgment of the  
 3 court below must be reversed, and the proceeding quashed." *Nunn v. State*, 1 Ga.  
 4 (1 Kel.) 243 (1846) at 251. (emphasis added).

5 "Likewise, in *State v. Chandler*, 5 La. Ann. 489, 490 (1850), the Louisiana  
 6 Supreme Court held that citizens had a right to carry arms openly: "This is the right  
 7 guaranteed by the Constitution of the United States, and which is calculated to  
 8 incite men to a manly and noble defence of themselves, if necessary, and of their  
 9 country, without any tendency to secret advantages and unmanly assassinations.""  
 10 *District of Columbia v. Heller*, 128 S. Ct. 2783 - Supreme Court (2008) at 2809.

11 "The policy underlying the prohibition against concealed weapons is based  
 12 on the protection of those persons who may come into contact with a weapon  
 13 bearer. If a weapon is not concealed, one may take notice of the weapon and its  
 14 owner and govern oneself accordingly, but no such opportunity for cautious  
 15 behavior or self-preservation exists for one encountering the bearer of a concealed  
 16 weapon. In light of this policy, the question whether a particular weapon was  
 17 concealed should be considered from the point of view of one approaching the  
 18 location of the weapon, and the intent of the defendant as to concealment should  
 19 not be considered, since a defendant's innocent intent does not make a concealed  
 20 weapon any more visible." *People v. Mitchell*, 209 Cal. App. 4th 1364 (2012)  
 21 (01/23/2013 - Petition for review denied in Supreme Court.)

22 "However, the Supreme Court observed that the right is not unlimited.  
 23 (*Heller*, supra, 554 U.S. at pp. 595, 626.) The "right [is] not a right to keep and  
 24 carry any weapon whatsoever in any manner whatsoever and for whatever  
 25 purpose." (Ibid.) The court acknowledged that the majority of 19th-century courts  
 26 to consider the question held that prohibitions on carrying concealed weapons were  
 27 lawful under the Second Amendment. (554 U.S. at pp. 595, 626.)" *People v.*  
 28 *Ellison*, 196 Cal. App. 4th 1342 (2011) at 1348."

1 “In addition to the list of "presumptively lawful regulatory measures" noted  
 2 in our earlier discussion, the *Heller* opinion emphasizes, with apparent approval,  
 3 that "the majority of the 19th-century courts to consider the question held that  
 4 prohibitions on carrying concealed weapons were lawful under the Second  
 5 Amendment or state analogues."” *People v. Flores*, 169 Cal. App. 4th 568 (2008)  
 6 at 575.

7 “In *People v. Yarbrough* (2008) 169 Cal.App.4th 303, 312-314 [86  
 8 Cal.Rptr.3d 674] (Yarbrough), this court rejected a Second Amendment challenge  
 9 to the prohibition on carrying concealed firearms...” *People v. Delacy*, 192 Cal.  
 10 App. 4th 1481 (2011) at 1489.

11 “The high court's decision in *Heller* does not require us to conclude that  
 12 possession in a public place of a loaded, cocked, semiautomatic weapon with a  
 13 chambered round, concealed in a large glove and ready to fire, cannot be defined  
 14 as a crime under state law.” *People v. Dykes*, 46 Cal. 4th 731 - Cal: Supreme Court  
 15 (2009) at 778.

16 “In *Heller*, the Court explained that "the right secured by the Second  
 17 Amendment is not unlimited" and noted that "the majority of the 19th-century  
 18 courts to consider the question held that prohibitions on carrying concealed  
 19 weapons were lawful under Second Amendment or state analogues." 128 S.Ct. at  
 20 2816. We have interpreted this portion of *Heller* as stating that "laws prohibiting  
 21 the carrying of concealed weapons" are an "example[] of 'longstanding' restrictions  
 22 that [are] 'presumptively lawful' under the Second Amendment." *Hightower v. City*  
 23 *of Boston*, 693 F. 3d 61 - Court of Appeals, 1st Circuit (2012) at 73-74.

24 “In the nineteenth century, laws directly regulating concealable weapons for  
 25 public safety became commonplace and far more expansive in scope than  
 26 regulations during the Founding Era. Most states enacted laws banning the  
 27 carrying of concealed weapons.[21] And as *Heller* noted, "the majority of the 19th-  
 28 century courts to consider the question held that prohibitions on carrying concealed

1 weapons were lawful under the Second Amendment or state analogues." *Heller*,  
 2 554 U.S. at 626, 128 S.Ct. 2783. Indeed, the nineteenth century Supreme Court  
 3 agreed, noting that "the right of the people to keep and bear arms... is not infringed  
 4 by laws prohibiting the carrying of concealed weapons." *Robertson v. Baldwin*,  
 5 165 U.S. 275, 281-82, 17 S.Ct. 326, 41 L.Ed. 715 (1897)." *Kachalsky v. County of*  
 6 *Westchester*, 701 F. 3d 81 - Court of Appeals, 2nd Circuit (2012) at 95-96.

7 "[A] state may be able to require "open carry" — that is, require persons  
 8 who carry a gun in public to carry it in plain view rather than concealed. See  
 9 *District of Columbia v. Heller*, supra, 554 U.S. at 626, 128 S.Ct. 2783..." *Moore v.*  
 10 *Madigan*, 702 F. 3d 933 - Court of Appeals, 7th Circuit (2012)

11 "In light of our nation's extensive practice of restricting citizens' freedom to  
 12 carry firearms in a concealed manner, we hold that this activity does not fall within  
 13 the scope of the Second Amendment's protections." *Peterson v. Martinez*, 707 F.  
 14 3d 1197 - Court of Appeals, 10th Circuit (2013) at 1201.

### 15 CONCLUSION

16 California's bans on openly carrying firearms, loaded and unloaded are  
 17 unconstitutional both facially and as-applied to Plaintiff Nichols. The 7<sup>th</sup> Circuit  
 18 struck down virtually identically worded bans in Illinois. Unlike in *Moore*, this  
 19 court has the opportunity to preserve California's presumptively lawful concealed  
 20 carry regulations. Plaintiff's motion for summary judgment should be granted.

21  
 22 Dated: November 8, 2013

Respectfully submitted,

23 

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///

United States District Court  
Central District of California

Charles Nichols,

PLAINTIFF,

vs.

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

Defendant.

Case No.: CV-11-9916 SJO (SS)

**[PROPOSED] ORDER**

**[PROPOSED] ORDER**

This matter came before the Court on Plaintiff's motion for partial summary judgment. There being no dispute of material fact, and Plaintiff being entitled to summary judgment as a matter of law, the motion is granted.

Judgment shall be entered in favor of Plaintiff and against Defendant.

**[PROPOSED] ORDER**

1 The Court hereby declares that California Penal Code sections 25850, 26350  
2 and 26400 are unconstitutional on their face and as applied to Plaintiff and to  
3 persons who are otherwise legally qualified to possess firearms for the purpose of  
4 self-defense and for other lawful purposes.

5  
6 IT IS ORDERED that California Penal Code sections 25850, 26350 and  
7 26400 are declared unconstitutional on their face and as applied to Plaintiff and to  
8 persons who are otherwise legally qualified to possess firearms for the purpose of  
9 self-defense and for other lawful purposes.

10  
11 IT IS FURTHER ORDERED that California Penal Code sections 25850,  
12 26350 and 26400 are declared to infringe on the fundamental rights of Plaintiff and  
13 to persons who are otherwise legally qualified to possess firearms for the purpose  
14 of self-defense and for other lawful purposes and violate (a) The Second  
15 Amendment right to openly carry a firearm for the purpose of self-defense and for  
16 other lawful purposes; (b) The Fourth Amendment Right to be free from unlawful  
17 detention, arrest, prosecution, imprisonment or search of a person and seizure of a  
18 firearm when openly carried in non-sensitive public places; (c) The Substantive  
19 Due Process and Fourteenth Amendment rights to life, liberty and property and to  
20 equal protection.

21  
22 IT IS FURTHER ORDERED that the court declares that Penal Code section  
23 25850: produces disproportionate effects along racial lines; has a racially  
24 disproportionate impact and racially discriminatory intent or purpose; and that  
25 racial discrimination has been shown to have been a substantial or motivating  
26 factor behind enactment of the law and that Defendant has not met its burden to  
27 demonstrate that the law would have been enacted without this factor.

1 IT IS FURTHER ORDERED that the court declares that: Penal Code section  
2 25850 is invalid in that and to the extent that it is applied to prohibit private  
3 citizens who are otherwise qualified to possess firearms from openly carrying  
4 loaded firearms for the purpose of self-defense on their own property, in their  
5 vehicles and in non-sensitive public places.

6  
7 IT IS FURTHER ORDERED that the court declares that Penal Code section  
8 26350 is invalid in that and to the extent that it is applied to prohibit private  
9 citizens who are otherwise qualified to possess firearms from openly carrying  
10 unloaded handguns for the purpose of self-defense on their own property, in their  
11 vehicles and in non-sensitive public places.

12  
13 IT IS FURTHER ORDERED that the court declares that Penal Code section  
14 26400 is invalid in that and to the extent that it is applied to prohibit private  
15 citizens who are otherwise qualified to possess firearms from openly carrying  
16 unloaded firearms that are not handguns for the purpose of self-defense on their  
17 own property, in their vehicles and in non-sensitive public places.

18  
19 IT IS FURTHER ORDERED that the court declares that: unlicensed Open  
20 Carry for the purpose of self-defense in non-sensitive public places is the right  
21 guaranteed by the Constitution; that firearms openly carried which do not have live  
22 ammunition in the firing chamber are unloaded and that possession of matching  
23 ammunition with an openly carried unloaded firearm does not make the firearm  
24 "loaded" regardless of whether or not the ammunition is attached in any way to the  
25 firearm; that no license is required to openly carry a firearm for the purpose of self-  
26 defense in non-sensitive public places; that private residential property is not a  
27 public place and is not a sensitive public place regardless of whether or not the  
28 property is fully or partially enclosed by a fence or barrier, or completely



1 unenclosed; that a private motor vehicle and any attached campers or trailers are  
 2 not public places and that fully functional loaded firearms may be carried therein  
 3 and that they do not have to be encased or otherwise enclosed in a container,  
 4 locked or otherwise, nor must they be carried unloaded.

5  
 6 IT IS FURTHER ORDERED that Defendant, their agents, servants, officers,  
 7 employees, and attorneys, and all persons acting in participation or concert with  
 8 them or under their direction or command, who receive actual notice of the  
 9 injunction, are permanently enjoined from enforcing or applying California Penal  
 10 Code sections 25850, 26350 and 26400 including any implementing regulations  
 11 and/or statutes, against Plaintiff and against any person under their jurisdiction or  
 12 command, and from taking any actions whatsoever, or permitting any person or  
 13 entity to take any action whatsoever that in any way affects, impedes, interferes  
 14 with Plaintiff and any person who is legally able to possess a firearm and they are  
 15 further ORDERED to immediately suspend and discontinue any investigation, or  
 16 other proceeding, that may have been commenced under California Penal Code  
 17 sections 25850, 26350 and 26400 and/or their implementation on or prior to the  
 18 date of this order.

19 IT IS FURTHER ORDERED that Plaintiff shall recover his cost of suit  
 20 herein, including but not limited to attorney fees pursuant to 42 U.S.C. § 1988, to  
 21 the extent allowed by law.

22  
 23 **IT IS SO ORDERED.**

24  
 25  
 26 Dated: \_\_\_\_\_

HONORABLE JUDGE SAMUEL JAMES OTERO  
 UNITED STATES DISTRICT JUDGE



CERTIFICATE OF SERVICE

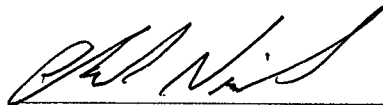
On this, the 8th day of November, 2013, I caused to be served a copy of the foregoing **Memorandum of Points and Authorities in Support of Plaintiff's Motion for Partial Summary Judgment** by US Mail on:

Jonathan Michael Eisenberg  
Office of the California Attorney General  
Government Law Section  
300 South Spring Street, Suite 1702  
Los Angeles, CA 90013  
213-897-6505  
213-897-1071 (fax)

jonathan.eisenberg@doj.ca.gov

LEAD ATTORNEY / ATTORNEY TO BE NOTICED representing Kamala D Harris  
(Defendant).

Executed this the 8th day of November, 2013 by:

A handwritten signature in black ink, appearing to read "Charles Nichols", written over a horizontal line.

Charles Nichols