

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

**REPLY IN SUPPORT OF 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 (“Respondent”), continues to move 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 in the opening brief in support of the present motion, and as is still the case, a stay in this appeal is warranted for 90 days (or longer), because of the possibility that the U.S. Court of Appeals, Ninth Circuit, may grant a pending petition for *en banc* review of the closely related case of *Richards v. Prieto*, Case No. 11-16255. A 90-day stay of the present appeal is now even more warranted, because the Ninth Circuit—at the *sua sponte* request of a judge of the Court—is considering whether to grant a pending petition for *en banc* review in another related appeal, *Peruta v. County of San Diego*, Case No. 10-56791.

## REPLY ARGUMENT

### **I. CONTRARY TO MR. NICHOLS’S FIRST CONTENTION IN OPPOSITION TO THE PRESENT MOTION, *PERUTA* AND *RICHARDS* HAVE NOT BEEN FINALLY RESOLVED OR MADE MOOT**

Plaintiff-Appellant Charles Nichols begins his opposition to the present motion with a dubious contention: “As a threshold matter, *Peruta* and *Richards* are now MOOT.” (Appellant’s Opp’n to Mtn. for 90-Day Stay of Proceedings (“Nichols Opposition”), Dkt. 5-1, at p. 1.)

In fact, both of those cases remain pending in this Court:

- The three-judge panel in *Richards* continues expressly to defer acting on the *en banc* petition in that case, as reflected in a May 1, 2014, order (Dkt. 87) that has not been withdrawn or superseded.
- On December 3, 2014, the three-judge panel in *Peruta* filed an order (Dkt. 161) stating, “A judge of this Court having made a *sua sponte* call for a vote on whether this case should be reheard *en banc*, the parties shall file, within 21 days from the date of this order, simultaneous briefs setting forth their respective positions on whether this case should be reheard *en banc*.” On that same day, that same panel of judges issued another order (Dkt. 160) directing the plaintiffs-appellees to file a response to a proposed intervenor-appellee’s petition for rehearing or rehearing *en banc*.<sup>1</sup> (The Ninth Circuit has posted PDF copies of these two orders online at [http://www.ca9.uscourts.gov/content/view.php?pk\\_id=0000000722](http://www.ca9.uscourts.gov/content/view.php?pk_id=0000000722).)

Therefore, to the extent that a recent California court of appeal opinion, *People v. Pellecer*, 215 Cal. App. 4th 508, 155 Cal.Rptr.2d 477 (2013), construes the same underlying statutes, or statutes similar to the statutes, at issue in *Richards*, *Peruta*, and the present case, the panels hearing *Richards* and *Peruta* (along with the panel that will hear the present appeal) may yet have occasion to examine the analysis,

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<sup>1</sup> Respondent herein is the potential intervenor-appellee in *Peruta*.

holding, and reasoning of such an opinion and its application to the issues in the two 9th Circuit cases. It follows that Mr. Nichols's contention that the underlying statutes relevant to the present appeal have been reinterpreted by another court in ways that bind the panels in *Richards* and/or *Peruta* going forward is not a valid basis to deny a temporary stay of the present matter. Nor does that contention demonstrate that a 90-day stay of the present case is unnecessary on mootness grounds. (Nichols Opposition at 1-2.)

Indeed, Respondent's argument that the present appeal should be stayed for 90 days pending the possible resolution of *Richards*—and now *Peruta*—not only remains valid but also has gained strength because of the recent events in *Peruta*, and has *not* become moot.

**II. CONTRARY TO MR. NICHOLS'S SECOND CONTENTION IN OPPOSITION TO THE PRESENT MOTION, THERE IS NO RESPONDENT HEREIN WHO OPPOSES THE PRESENT MOTION**

In response to Mr. Nichols's next contention that Respondent misstated the number of parties to the present appeal (Nichols Opposition at 2), Respondent acknowledges that the motion did not mention Edmund G. Brown Jr., Governor of California, named as a defendant in the case in the trial court and as a respondent herein.<sup>2</sup> Respondent and Gov. Brown are both represented here by the California

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<sup>2</sup> The District Court had dismissed with prejudice Gov. Brown as a defendant in the case by order dated May 7, 2012. *Nichols v. Brown*, U.S.D.C., (continued...)

Attorney General's Office, and Respondent is authorized to represent that Gov.

Brown does *not* oppose the present motion to stay proceedings. Therefore, there is no respondent herein who opposes the present motion.

**III. CONTRARY TO MR. NICHOLS'S THIRD CONTENTION IN OPPOSITION TO THE PRESENT MOTION, THE FOUR-FACTOR TEST FOR STAYS OF JUDGMENTS DOES NOT APPLY HERE**

Next, Mr. Nichols mistakenly faults Respondent for not citing and addressing the four factors in stay analysis set forth in *Nken v. Holder*, 556 U.S. 418 (2009). That four-factor analysis is prescribed for only those stay motions where the moving party seeks to *stay enforcement of an adverse judgment* of the court below. *See id.* at 421-22. Respondent prevailed in this matter before the District Court and so is *not* seeking to stay enforcement of, or otherwise to undermine, the favorable-to-Respondent judgment dismissing Mr. Nichols's claims on the merits. Respondent is seeking a different kind of stay here, and the four-factor *Nken* stay analysis does not apply.

**CONCLUSION**

Mr. Nichols spends the better part of five pages (7-11) of his opposition to the present motion analyzing the Ninth Circuit merits opinions in *Richards* and *Prieto*,

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(...continued)

C.D. Cal., Case No. 2:11-cv-09916-SJO-SS, "Order Accepting Findings, Conclusions and Recommendations of United States Magistrate Judge" (Dkt. 46), at 2:10-2:12.

thereby only underscoring how those cases relate to the present appeal.

Respondent therefore respectfully maintains her request 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, based on the open statuses of both *Richards* and *Peruta*.<sup>3</sup>

Dated: December 8, 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*

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<sup>3</sup> Mr. Nichols recently requested permission to file herein an oversized brief of nearly 47,000 words and nearly 200 pages, and submitted that brief to the Court. Respondent respectfully suggests that the Court decline to permit that brief to be filed and instead give Mr. Nichols extra time—which he had requested in his own stay motion (Dkt. 4-1)—to edit that brief down to conform to the word-length limits. Such relief, in conjunction with the relief sought in the present motion, may also cause Mr. Nichols to avoid having to analyze the recent merits opinions in *Richards* and *Peruta* that may be vacated, withdrawn, or otherwise modified.

9th Circuit Case Number(s)

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