No. 14-55873 [DC 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., in his official capacity as the Governor of California
and
Xavier Becerra in his official capacity as the Attorney General of California

Defendants-Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
[DC 2:11-cv-09916-SJO-SS]

PLAINTIFF-APPELLANT NICHOLS' REPLY BRIEF

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STATEMENT REGARDING ORAL ARGUMENT

Under California law, it is illegal to openly carry a loaded firearm for the purpose of self-defense in the curtilage of one's home unless his residential property is fully enclosed by a tall non-cosmetic fence or other substantial barrier to entry by the public (which Plaintiff-Appellant Nichols does not have). *People v. Strider*, 177 Cal. App. 4th 1393 (2009).

California Penal Code section ("PC") 25850(a) states:

> "A person is guilty of carrying a loaded firearm when the person carries a loaded firearm on the person or in a vehicle while in any public place or on any public street in an incorporated city or in any public place or on any public street in a prohibited area of unincorporated territory." Which includes motor vehicles and attached campers or trailers regardless of whether or not it is used as a permanent or temporary residence. "As used in this part, "prohibited area" means any place where it is unlawful to discharge a weapon." PC17030.

Under California law, refusal to consent to a police officer's demand to inspect the firearm constitutes "probable cause" for an arrest. PC25850(b).

In these same places, it is illegal to openly carry a modern, unloaded handgun for the purpose of self-defense. PC26350.

In incorporated cities, it is illegal to openly carry a modern, unloaded long gun outside of a motor vehicle. PC26400.

Within 1,000 feet of a K-12 public or private school it is illegal to possess a handgun (antique or modern) unless it is unloaded and in a fully enclosed, locked container with certain exceptions such as one's residential property or place of

business PC626.9 unless one has a license to carry a handgun (other exceptions not relevant here). This section applies only to concealable firearms, not long guns. This section does not prohibit the discharge of a firearm other than the reckless discharge or reckless attempt to discharge a handgun.

Under a plain text reading of the law, someone who lives adjacent to a school may discharge a firearm on his private property, place of residence, or place of business.

Licenses to openly carry a loaded handgun are prohibited from being issued in counties with a population of 200,000 or more people and are valid only within the county in which they are issued. PC26150 and PC26155.

Plaintiff-Appellant Nichols lives in Los Angeles County and is therefore prohibited under California law from obtaining a license. Nonetheless, he asked for an application and license to openly carry a loaded handgun but was denied both, not because he does not have good cause (he has a well documented death threat against him) or because he is not of good moral character but simply because of the population of the county in which he lives.

Contrary to the argument of Appellees Brown and Becerra, the prohibition is not based on population density or ratio of urban to residential land. The prohibition is based solely on the population of a county according to the previous census.

Under California law, persons who are prohibited from possessing a firearm or persons who use a firearm to commit a crime which is punishable by more than what is punishable by PC25850 cannot be punished for violating the laws at issue in this appeal. *People v. Jones*, 278 P. 3d 821 (Cal. Supreme Court 2012).

Peruta v. County of San Diego, 824 F. 3d 919 (9th Circ. 2016) shows why oral arguments are necessary in this case. For example, *District of Columbia v. Heller*, 128 S. Ct. 2783 (Supreme Court 2008) said "See also *State v. Reid*, 1 Ala. 612, 616-617 (1840) ("A statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would be clearly unconstitutional")." *Id* at 2818.

Reid was cited three times by the majority and three times by the dissents in *Peruta* (en banc). All six citations missed the important fact that the *Reid* court had considered the hypothetical case where concealed carry was permitted but Open Carry banned. *Reid* held that would still result in the destruction of the right to bear arms because "[I]t is only when carried openly, that they [firearms] can be efficiently used for defence. *Id* at 619.

Similarly, the dissent cited Eugene Volokh, Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and A Research Agenda, 56 UCLA L. Rev. 1443, 1521 (2009) but failed to note that Professor

Volokh was stating his personal preference. Two pages later he stated: "I must acknowledge, though, that longstanding American tradition is contrary to this functional view that I outline. For over 150 years, the right to bear arms has generally been seen as limited in its scope to exclude concealed carry."

The en banc majority in *Peruta* correctly pointed out that prohibitions on concealed carry go back far more than 150 years.

But the en banc majority missed the mark as well. Prohibitions on concealed carry (which are not at issue here) extend to everyone, including law enforcement (*Reid* was a Sheriff). And the en banc court failed to recognize that the 19th Century prohibitions on concealed carry, which *Heller* embraced, exempted travelers and persons on a journey. Id at 2812.

This court will soon decide the related case of *Baker v. Kealoha*. Whichever way it goes it will almost certainly go before an en banc court. During the oral arguments, *Baker's* attorney admitted he had shot himself in the foot for seeking a preliminary injunction and then appealing its denial.

Given the myriad of defects in his appeal (not present in Nichols' appeal), not the least being that *Baker* never applied for a handgun Open Carry permit but instead applied for a *concealed carry* permit for a job he no longer works at, *Baker* should not be the case which decides whether or not the Second Amendment right to keep and bear arms is confined to the interior of one's home in this circuit.

Governor Brown and Attorney General Becerra concede that there are no standing issues in Nichols' appeal. The facts are not in dispute. Nichols' appeal involves solely pure questions of law. Simple questions to be sure, but also vitally important questions, the answers to which will affect everyone in this circuit.

For the reasons stated above and argued in the briefs, this Court should grant oral arguments in this case. At the time of this writing, there are en banc petitions pending both in *Nichols* appeal and in *Baker*.

INTRODUCTION

"So off went the Emperor in procession under his splendid canopy. Everyone in the streets and the windows said, "Oh, how fine are the Emperor's new clothes! Don't they fit him to perfection? And see his long train!" Nobody would confess that he couldn't see anything, for that would prove him either unfit for his position, or a fool. No costume the Emperor had worn before was ever such a complete success.

"But he hasn't got anything on," a little child said.

"Did you ever hear such innocent prattle?" said its father. And one person whispered to another what the child had said, "He hasn't anything on. A child says he hasn't anything on."

"But he hasn't got anything on!" the whole town cried out at last.

The Emperor shivered, for he suspected they were right. But he thought, "This procession has got to go on." So he walked more proudly than ever, as his noblemen held high the train that wasn't there at all." - The Emperor's New Clothes by Hans Christian Andersen

ARGUMENT

The State Defendants-Appellees Governor Brown and Attorney General Becerra ("Brown-Becerra") come before this court draped in all their finery and ask you, with a wink and a nod, to affirm the indefensible judgment of the district court.

Brown-Becerra's Answering Brief is a brief which makes no real attempt to defend the judgment of the court below (Brown makes no defense at all).

There is one consistent theme, in three parts, the Appellees make in regards to Nichols' Federal Constitutional claims: 1) Nichols cannot challenge California's bans on openly carrying firearms both facially and as-applied in Federal court, 2) Nichols must wait until he has been charged and prosecuted in state criminal court to bring an as-applied challenge, 3) A law is only facially invalid if it is invalid in all applications. *Salerno*, 481 U.S., at 745, 107 S.Ct. 2095.

Shortly before final judgment was entered in this case, Nichols cited *Jackson v. City and County of San Francisco*, 746 F. 3d 953, 961-962 (9th Circ. 2014) which held that one can bring both an as-applied and facial challenge under the Second Amendment. The district court said it could not understand why the citation was relevant and then refused to consider Nichols' as-applied challenge. See *Nichols v. Harris*, 17 F. Supp. 3d 989, 993-994 (CD California 2014). ASER36-42.

The US Supreme Court and this Court have repeatedly rejected the "*Salerno* Test" with respect to First Amendment, Second Amendment, Fourth Amendment and the Fourteenth Amendment Due Process Clause. See *City of L. A. v. Patel*, 135 S.Ct. 2443, (Supreme Court 2015) at 2449. Of course if the *Salerno* Test applied to the Fourteenth Amendment Equal Protection Clause then *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954) would have been decided the other way because one can nearly always contrive an application.

Neither Brown-Becerra nor the district court articulated even a single valid application of the challenged laws. The district court simply waved its judicial wand, said the laws were not invalid in all applications and therefore rational basis review applies even though the US Supreme Court explicitly took rational basis review (and judicial "interest balancing") off the table in *District of Columbia v. Heller*, 128 S. Ct. 2783 (Supreme Court 2008) at 2817-2818 and [fn 27]. "In *Heller*, however, we expressly rejected the argument that the scope of the Second Amendment right should be determined by judicial interest balancing…" *McDonald v. City of Chicago, Ill.*, 130 S. Ct. 3020, 3047 (Supreme Court 2010).

Instead of answering the seven questions raised in Appellant's Opening Brief (AOB) they self-servingly write their own questions in which they intentionally misstate the questions raised in the AOB not the least of which is that the laws at issue in this case are challenged both facially and as-applied to Nichols.

Which isn't to say that the challenged laws are not facially invalid, they are. Significantly, they do not dispute various claims made by Appellant Nichols such as the prohibition on carrying loaded firearms (PC25850) does not apply to unincorporated cities, towns and villages which this Court should construe as conceded by them.

I. The Second Amendment Protects the Right to Keep and Bear Arms in the Home and in Public for the Purpose of Self-Defense and for Other Lawful Purposes

State v. Reid, 1 Ala. 612 (1840), which *Heller* at 2818 cited for the destruction of the right, considered the hypothetical where the legislature had banned Open Carry in favor of concealed carry and held that hypothetical would result in the destruction of the right.

Neither *State v. Chandler*, 5 La. Ann. 489 (1850) *Id* at 2809, 2816 nor *Nunn v. State*, 1 Ga. 243 (1846) *Id* even remotely suggested that Open Carry could be banned in favor of concealed carry. *Reid*, *Chandler*, *Nunn*, all three expressed nothing but contempt for concealed carry. No court, not even *Bliss v. Commonwealth*, 12 Ky.(2 Litt.) 90 (1822), held or implied that Open Carry could be banned in favor of concealed carry.

Heller, citing *Nunn* and *Chandler*, did say that Open Carry perfectly captures the right guaranteed by the Constitution. *Id* at 1158. Moreover, no 19th

century court cited with approval (or disapproval) by *Heller* held that the Second Amendment is confined to the home. *Heller* and *McDonald* certainly did not say the right is homebound.

Brown-Becerra are correct in one important respect, this is purely an Open Carry case *and always has been*. Nichols has never sought to carry a weapon concealed, not even in the curtilage of his home and not as a traveler while actually on a journey, both of which fall within the scope of his Second Amendment right.

There are only two ways to carry a firearm, openly or concealed. Brown-Becerra imply that there is some defect in Nichols argument because he did not, and does not, seek to carry a firearm concealed in public, a right that he does not have under the Second Amendment. *Peruta v. County of San Diego*, 824 F. 3d 919, 924 (9th Circ. 2016) (en banc).

Nichols does not now, and never has, challenged any law prohibiting or restricting the carrying of a weapon concealed in public. When has this court, or any court, held that in order to challenge unconstitutional laws one must also challenge presumptively constitutional laws? Was Nichols required to challenge state and Federal laws prohibiting the possession of heroin? Of course not!

But even if the en banc court in *Peruta* had been mistaken that there is no right of the general public to carry a loaded, concealed handgun in public, Brown-Becerra do not dispute that concealed carry substantially burdens the ability of

Nichols to defend himself even if he lived in a jurisdiction which issues concealed carry permits (he does not) and even if he has a concealed carry permit (he does not). ER203-SUF132.

The Appellees now refer to California's Open Carry bans as "regulations." Prior to this appeal, they referred to the bans as bans. ASER19.

This should have been the longest section of the Reply Brief but Brown-Becerra do not claim that Nichols' effort to vindicate his Second Amendment right conflicts in the slightest degree with the Second Amendment Right defined in *Heller* or *McDonald* or *Caetano*, they seek to rewrite these decisions.

Heller conducted an in-depth examination of the right. *Id* at 2821. Nor do they dispute that *McDonald v. City of Chicago, Ill.,* 130 S. Ct. 3020 (Supreme Court 2010) fully incorporated the Second Amendment right against all state and local governments *as well as* explicitly incorporating the Second Amendment right defined in *Heller*.

Their Second Amendment argument is entirely dependent upon this Court "[E]ngag[ing] in another round of historical analysis to determine whether eighteenth-century America understood the Second Amendment to include a right to bear guns outside the home." They did! *Moore v. Madigan*, 702 F. 3d 933, 942 (7th Circ. 2012) *and* then conclude, in conflict with *Moore*, *Heller*, *McDonald* and *Caetano* that the Second Amendment right is confined to the home *and* that this

court conclude that the Second Amendment does not even protect the right to keep, let alone bear, arms in the curtilage of one's home for the purpose of self-defense. That is a lot of "ands."

They do not dispute that *McDonald* was a decision which struck down *citywide bans* on handguns which were not limited to the home, and which were limited only to the residents of the cities which had the local bans. They do not dispute that the dissent in *McDonald* lashed out at the decision because it went *beyond* the confines of the home.

And of course they make no mention of *Caetano v. Massachusetts*, 136 S. Ct. 1027 (Supreme Court 2016) which unanimously reversed and remanded a unanimous decision of the State of Massachusetts high court simply for conflicting with the *Heller* decision. *Caetano* was a homeless woman carrying a stun gun *outside of the home*.

II. California's Open Carry Bans Infringe Upon the Second Amendment Right and are Therefore Unconstitutional

The Second Amendment says that the right *shall not be infringed*. A law need merely encroach upon the periphery of the right to infringe the right and therefore be unconstitutional.

The laws at issue here do more than encroach on the right to keep and bear arms for the purpose of self-defense, they destroy the right. *Infringement* should be the one-step framework this circuit should adopt.

The current framework of this circuit is the two-step inquiry adopted by most circuits and by this circuit in *US v. Chovan*, 735 F. 3d 1127, 1136-1141 (9th Circ. 2013). Brown-Becerra do not dispute the finding of the lower court that Nichols is in violation of the law should he merely step outside of his home carrying a loaded firearm.

Nor do they dispute that Nichols is in violation of the law should he step outside the door his home openly carry a modern, unloaded firearm. Nor do they dispute that California law does not allow him to obtain a license to openly carry a handgun or that the statutory prohibition is the sole reason Nichols was denied a license to openly carry a loaded handgun or that California does not provide for licenses to openly carry long guns (loaded or unloaded, antique or modern).

The "governmental interest" in enacting the ban on openly carrying loaded firearms was racial animus. As such, the state made no attempt to defend that governmental interest in the court below. Instead, its argument was that the Open Carry right defined in *Heller* and applied against all states and local governments in *McDonald* does not exist until the US Supreme Court decides an Open Carry case.

The "governmental interest" according to the legislative record of the unloaded Open Carry bans is to keep police from killing people who openly carry unloaded firearms, which the Fourth Amendment already prohibits. No court has ever held that *anything* can be banned or "regulated" because of the speculative, hypothetical and unlawful action of police officers. To do so would make this a police state.

The legislative intent alone means that the laws at issue here fail even rational basis review. Of course a law which prohibits the "mere use, carriage, or possession of a firearm…run[s] afoul of the Second Amendment." *US v. Cureton*, 739 F. 3d 1032, 1043 (7th Circ. 2014).

Should this Court decide, in conflict with *Heller* and *McDonald*, that armed self-defense is not a fundamental right in the curtilage of one's home or in non-sensitive public places then its evaluation under rational basis requires it to look at the legislative intent to see if the law was arbitrarily or irrationally enacted and determine whether the justification for enacting the laws is still valid today.

III. California's Open Carry Bans are Unconstitutional under the Fourteenth Amendment

If this Court concludes that Nichols has a fundamental right to step outside the door of his home carrying a firearm for the purpose of self-defense then he has

properly made an equal protection claim under the Fourteenth Amendment. As these are bans, strict scrutiny (at a minimum) applies. ASER1-5, 14, 19.

"The Equal Protection Clause commands that no state shall deny any person the equal protection of the laws." *Stop H-3 Ass'n v. Dole*, 870 F.2d 1419, 1429 n.18 (9th Cir. 1989). The Equal Protection Clause "keeps governmental decision makers from treating differently persons who are in all relevant aspects alike." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (Supreme Court1992). "[I]n order for a state action to trigger equal protection review at all, that action must treat similarly situated persons disparately." *Barnes-Wallace v. City of San Diego* 704 F.3d 1067, 1084 (9th Cir. 2013). "When a statute burdens a fundamental right or targets a suspect class, that statute receives heightened scrutiny under the Fourteenth Amendment's Equal Protection Clause." *Silveira v. Lockyer* , 312 F.3d 1052, 1087 (9th Cir. 2002) (Abrogated on other grounds as recognized by *Barnes-Wallace*, 704 F.3d at 10 1084-85.).

Statutes which infringe on fundamental rights are subject to strict scrutiny review, which means that a regulation will be upheld only if it is suitably tailored to serve a compelling state interest. *Id*. at 1087.

Racially motivated bans and banning a fundamental right subject only to brief (and unreachable) “exigent circumstances” are neither suitably tailored nor serve any state interest, let alone a compelling interest. ASER6-14, 29, 34, 47

IV. The District Court Improperly Dismissed the Vagueness and Due Process Challenges

"It is hard to imagine a prosecutor exploiting the alleged ambiguities of such laws in pursuing a criminal case thereunder for arbitrary or discriminatory reasons..." AAB 54.

This claim by Brown-Becerra speaks for itself. In light of Nichols' already having been prosecuted for violating a City of Redondo Beach municipal ordinance to which that city would subsequently file a motion to dismiss his case before the district court based on the fact that their municipal ordinance was duplicative and thus preempted by state law (the district court had already published a finding of state preemption and yet they continued to prosecute). It is an outrageous claim. ASER44

Brown-Becerra do not defend the district court's conclusion that vagueness challenges are not cognizable outside of the First Amendment context ER49. Instead, they claim that the challenges regarding the law, which defines unloaded firearms as being loaded, is argued "only briefly" and his argument that "prohibited areas" of PC25850 is argued for the first time on appeal.

Two pages of the AOB (84-85) arguing that unloaded firearms are not *loaded* is more than adequately briefed on appeal. As for prohibited places being raised for the first time on appeal, it is clear from SAC¶¶9, 61 (alleges void for

vagueness *everywhere* outside the door of Nichols' home). Appellant's Supplemental Excerpts of Record ("ASER") shows that vagueness was raised and argued in the district court which the Appellees acknowledged in the court below saying "Third, the SAC asserts that Section 25850 is unconstitutionally vague in how it defines the places where open carrying is prohibited, as well has how the law defines whether a firearm is loaded." ASER14. See also ASER4, 5, 15, 16,

Nichols narrowed his void for vagueness challenge on appeal. That isn't the same thing as raising it for the first time on appeal.

Even if this were true, this Court has recognized an exception where "the issue presented is purely one of law and either does not depend on the factual record developed below, or the pertinent record has been fully developed." *Cold Mountain v. Garber*, 375 F.3d 884, 891 (9th Cir. 2004) (quoting *Bolker v. Comm'r*, 760 F.2d 1039, 1042 (9th Cir. 1985)) and "parties are not limited to the precise arguments they made below" *US v. Williams*, 837 F. 3d 1016 (9th Circ. 2016).

Brown-Becerra acknowledge that "Nichols has never been charged with violating any part of California's open-carry laws." AAB at 53. Incredibly, in the same paragraph they contend that there is an "insurmountable problem" in his challenge to the laws, the same fact that Nichols has not been charged or prosecuted with violating the laws at issue! Are not pre-enforcement challenges to criminal statutes under the Second Amendment allowed in this circuit?

Under Brown-Becerra's theory, Nichols cannot facially challenge the laws, he must wait until he is prosecuted for violating the law in order to establish a "fact pattern."

The Attorney General made this same frivolous "fact pattern" argument in the district court which even the lower court, despite its palpable dislike for Nichols' suit, would not go so far.

The district court held that "Plaintiff need only walk outside his home carrying a loaded firearm to effectuate his plan [to violate PC25850]." ER56. What more of a "fact pattern" does this Court need?

The Second Amended Complaint (SAC) ER216-256 alleges at ¶61 (ER243) that PC25850 is unconstitutionally vague. However, Nichols never argued in the district court or claimed in his AOB that PC25850(b) (the "chamber check") is vague.

There is no ambiguity in what that subsection of the law states, none at all. One either "consents" to the warrantless search and seizure in which there is neither a reasonable suspicion or probable cause to believe he has committed, is committing or is about to commit any crime, or he is subject to arrest, prosecution fine and imprisonment for his refusal.

On appeal, the vagueness challenge was narrowed somewhat so that this Court would be required to decide the Second Amendment questions.

Brown-Becerra flippantly assert at AAB 54 that the "prohibited areas" prohibition of PC25850 (which applies outside of incorporated cities, not inside) is not void for vagueness because "a person would know whether he or she is in a "prohibited area"—another term defined in statute, in California Penal Code section 17030—as a local government likely clearly marked the area by signs."

Unincorporated cities, towns and villages *do not have local governments* to post signs saying that the "discharge of firearms is prohibited here." Which invites the questions: Of the thousands of political subdivisions and special districts which do have governing bodies, which of these has the authority to post these signs? What if two or more political subdivisions or special districts disagree? And what about the question raised but never answered in the district court and raised again on appeal - What about counties (like Los Angeles County) which prohibit the discharge of a firearm for a particular purpose, such as hunting, but not for self-defense? One million people in Los Angeles County live outside of incorporated cities. If they can carry loaded and unloaded firearms for the purpose of self-defense but Nichols can't, that fails rational basis review for everyone but police officers. *Silveira* at 1088. ASER1-3

Statutes that infringe on fundamental rights are subject to strict scrutiny review, which means that a regulation will be upheld only if it is suitably tailored to serve a compelling state interest. *Id*. at 1087. Nichols submits that self-defense,

the central component of the Second Amendment right, was incorporated against the State of California by *McDonald*.

As Brown-Becerra do not dispute the citations Nichols made in his AOB that PC25850 (and by extension the Unloaded Open Carry bans) do not apply to unincorporated cities, towns and villages, this court should accept that as a concession by them.

It is unclear as to what point is made by their citation to *People v. Clark*, 53 Cal. Rptr. 2d 99, 102-03 (Cal. Ct. App. 1996) AAB at 53-54. That court rejected the state's assertion that PC16840(a) which was then codified as PC12031(g) is not vague and rejected the Attorney General's insistence that the law be literally interpreted.

Clark construed the law more narrowly than the state wanted it to be construed, and this Court should do so again here. This Court should go all the way and interpret *loaded* to mean *only* an unexpended cartridge in the firing chamber. If it can't then the law must be struck down as void for vagueness.

Regardless of whether or not Appellees are now conceding that a firearm is not loaded unless there is an unexpended cartridge in the firing chamber, which is what the law was prior to enactment of former Penal Code section 12031 (now PC25850 in part) SAC¶61 ASER21 and that the firearm is capable of being fired, this Court should accept the construction that *Clark* alludes to in that: 1) A

revolver is not loaded unless there is an unexpended round in the firing chamber, 2) Firearms which take magazines or clips and which contain ammunition do not make a firearm loaded when attached to the firearm simply because they are attached and, 3) That the mere possession of ammunition does not make an unloaded handgun or long gun "loaded" SAC¶62-63.

Given that the AAB does not dispute the argument made in the AOB that PC25850 does not apply to unincorporated cities, towns and villages, this Court should accept that as being conceded by Brown-Becerra and say so in its decision.

This state has had nearly 50 years to clarify that an unloaded firearm is not loaded and to clearly define what is a "prohibited place" under PC25850 but failed to do so. It is long past time for the Federal courts to do what the state has failed to do.

Brown-Becerra's citation to *US v. Iverson*, 162 F.3d 1015, 1021 (9th Cir. 1998) fails. It has already been shown in the AOB that Due Process challenges do not have to be invalid in all applications (*Salerno*). Their citation to *US v. Parker*, 761 F.3d 986, 991 (9th Cir. 2014) doesn't help them either.

Either this Court concludes that an unloaded firearm is not loaded, in which case this court construes the law as such, or this Court finds that it is incapable of construing the law and it invalidates it. *See Johnson v. US*, 135 S.Ct. 2551 (2015).

The clause in PC25850 "prohibited area of unincorporated territory" defined as "any place where it is unlawful to discharge a weapon" PC17030 ADD111 is incapable of a limiting construction without this Court rewriting the statutes and Brown-Becerra make no meaningful argument to dispute this.

Instead they say imaginary signs exist or that local governments (including non-existent local governments) could put up signs and even then they say this to contrive an application in support of their unsupportable position that if a law is not vague in all applications then it fails the *Salerno* Test and is therefore constitutional. A "test" which does not apply to any Federal Constitutional challenge including the ones raised in the district court and again here, on appeal.

Their citation to *US v. Tabacca*, 924 F.2d 906, 912 (9th Cir. 1991) is bewildering. The court said in *Tabacca* that "A statute is void for vagueness if it fails to give adequate notice to people of ordinary intelligence of what conduct is prohibited, *or if it invites arbitrary and discriminatory enforcement*. *Doremus*, 888 F.2d at 634." (italics added).

Given that the legislative intent of PC25850 was to invite *arbitrary and discriminatory enforcement* by police and prosecutors, it would seem that Brown-Becerra are surreptitiously inviting the court to invalidate PC25850 as void for vagueness in its entirety without ever reaching the Second Amendment question in particular.

Were this Court to do so then the state would reenact the ban within months and then claim that there is no arbitrary and discriminatory intent on the part of the legislature because the Black Panther Party for Self-Defense disbanded decades ago.

Not forgetting that the new law would invite the same arbitrary and discriminatory enforcement by which the current law has been employed from enactment to date. ASER27.

V. PC25850(b) ("Chamber Check") Violates the Fourth Amendment

If this were a law which gave police the unbridled discretion to stop people simply walking down the street, or driving, or sitting on a park bench, or for no reason, to see if they are in this country illegally with the threat of arrest, prosecution, fine and imprisonment if they don't provide proof that they are in this country illegally then there isn't a judge in this circuit who wouldn't facially invalidate the law.

But this is a case where Nichols argues that he should not have to give up his Fourth Amendment right in order to exercise his Second Amendment right, no matter how narrowly this Court construes his Second Amendment right. If the Second Amendment does not exist outside the door of one's home, the Fourth Amendment protection still fully applies everywhere it is legal for Nichols to openly carry a firearm.

"We hold facial challenges can be brought under the Fourth Amendment." *City of L. A. v. Patel*, 135 S.Ct. 2443, (U.S. Supreme Court 2015) at 2443. "We first clarify that facial challenges under the Fourth Amendment are not categorically barred or especially disfavored." "Fourth Amendment challenges to statutes authorizing warrantless searches are no exception." *Id* at 2449. Appellees here, and throughout their AAB take the same position as the petitioners in *Patel*:

> "Petitioner principally contends that facial challenges to statutes authorizing warrantless searches must fail because such searches will never be unconstitutional in all applications. Cf. Salerno, 481 U.S., at 745, 107 S.Ct. 2095…***For this reason alone, the City's argument must fail***…" *Id* at 2451 (emphasis and italics added).

The Supreme Court's decision to reject the petitioner's argument in *Patel* did not turn on "reasonableness" or "expectations of privacy." The petitioner's argument failed at the threshold as must Brown-Becerra's argument here.

Brown-Becerra still maintain that persons carrying firearms and their firearms fall entirely outside the protection of the Fourth Amendment. This Court recently had this very question presented to it in *USA v. Robert Lafon* No.: 16-10044 (9th Circ. Dec. 12, 2016) Before: HAWKINS, BERZON, and MURGUIA, Circuit Judges (FRAP 32.1).

This Court *affirmed* the grant of *Lafon's* motion to suppress. "Although *Lafon* had been observed with a gun in his car, it is legal under Nevada law to

carry a gun in a car as long as the gun is not loaded. See Nev. Rev. Stat. §503.165" Slip Op., at 2. And that was that.

Had the long gun been loaded then *Lafon* would have been in violation of Nevada law. It is, of course, impossible to know if a firearm is loaded simply by looking at it. A police officer must first detain a person (which constitutes a seizure of that person). The police officer must then take the firearm from the detained person and then open the firearm and inspect the inside of the firing chamber for an unexpended cartridge.

Unless a person freely and voluntarily consents to the search, the Fourth Amendment applies, unless there is a well recognized exception to the warrant requirement.

Note that Brown-Becerra do not even pretend that a person openly carrying a firearm where the laws at issue here apply justify even a *Terry* Stop under *Terry v. Ohio*, 392 US 1 (Supreme Court 1968). Brown-Becerra's argument is that people who carry firearms openly, even in places where it is legal to openly carry a firearm, fall completely outside the scope of the Fourth Amendment.

Brown-Becerra have placed all of their chips on the bet that this Court will hold that the Fourth Amendment does not protect persons who carry firearms and that there is no Second Amendment right to carry a firearm openly in the curtilage of one's home and in motor vehicles including any attached camper or trailer

regardless of whether or not it is used as a temporary or permanent residence and in non-sensitive public places, resulting in multiple circuit splits and conflicts with the US Supreme Court.

NRS 503.165 states in relevant part:

> ”Carrying loaded *rifle or shotgun* in or on vehicle on or along public way unlawful; exceptions.
>
> 1. It is unlawful to carry a loaded rifle or loaded shotgun in or on any vehicle which is standing on or along, or is being driven on or along, any public highway or any other way open to the public.
> 2. A rifle or shotgun is loaded, for the purposes of this section, when there is an unexpended cartridge or shell in the firing chamber, *but not when the only cartridges or shells are in the magazine.*” Italics added.

Similarly, PC26400(a) (the California unloaded long gun Open Carry ban ADD146) exempts unloaded long guns inside of a motor vehicle and exempts unloaded long guns openly carried outside of a motor vehicle when not in an incorporated city.

Neither does California ban the Unloaded Open Carry of antique firearms be they carried inside or outside of an incorporated city (PC 626.9 prohibition on handguns, but not long guns, notwithstanding ADD100).

Brown-Becerra are correct in one important respect. A firearm is a container. But a firearm which is merely carried openly does not establish either reasonable suspicion or probable cause that it is loaded in violation of the law or it is permissible under the Fourth Amendment to detain a person and search and seize

him and his property in violation of the Fourth Amendment in order to see if the firearm is loaded in violation of PC25850 any more than it did in *Lafon*.

Given the courts' case law on the Fourth Amendment and firearms these past 30 years and more, whatever favor the California Courts and this Court may have found with the notion that people who possess firearms, legally or illegally, fall outside the scope of the Fourth Amendment can no longer be justified.

Not unless this Court wishes to overturn decades of its own case law on the Fourth Amendment and decades of California case law, not forgetting the conflicts this court would create with the US Supreme Court and every other Federal circuit.

Brown-Becerra urge this Court to be the first to create an automatic firearms exception to the warrant requirement which would create a cascade of Federal circuit splits not forgetting creating a split with the California Court's current interpretation of the Fourth Amendment.

PC25850(b) does not say that the mere carriage of a firearm constitutes either reasonable suspicion or probable cause. It states that mere "refusal" constitutes *probable cause* for an arrest for a violation of this section.

The California courts have long since implicitly and emphatically rejected the discredited *DeLong* decision (AAB45) which Brown-Becerra hang their hat on. See *In re HH*, 174 Cal. App. 4th 653, 658 (2009) concluding that mere refusal to consent to a search does not constitute probable cause or reasonable suspicion.

The California and Federal Courts have held that once one has been detained, either explicitly or implicitly, the Fourth Amendment is fully applicable.

What might otherwise have been a voluntary admission that one is carrying a loaded firearm or a consent to search is inadmissible if the encounter is not consensual.

“"[T]he crucial test is whether ... the police conduct would `have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.'" (*Florida v. Bostick*, at p. 437.)” *In re JG*, 228 Cal. App. 4th 402, 409 (Cal Court of Appeal 2014).

The court reversed the denial of the suppression motion that JG was carrying a loaded firearm in violation of PC25850.

This Court has held in *US v. Vongxay*, 594 F. 3d 1111, 1120 (9th Circ 2010) which involved carrying a firearm and the Fourth Amendment, that one must *voluntarily consent* (explicitly or implicitly).

Brown-Becerra cite three Federal Circuit cases purportedly in support of their claim that firearms and the people who carry firearms fall completely outside the scope of the Fourth Amendment protection. All three are inapposite to their position.

The first is, *US v. Werle*, 815 F. 3d 614, 617 n.1 (9th Circ. 2016). This court held, in [fn1] that the stop and frisk was justified because, under the totality of the

circumstances, the defendant was *both* armed *and* dangerous coupled with other "specific and articulable facts" which justified the *Terry* Stop.

The second is *US v. Smith*, 633 F. 3d 889, 892 (9th Circ. 2011). Not only is it inapposite to Brown-Becerra's position, it is fatal. Judge Gould held "If Smith was seized, and if the seizure was not constitutional, then the recovered firearm should be suppressed as the fruit of the poisonous tree." *Id* at 891. "Without reasonable suspicion, a person may not be detained even momentarily." *Id* at 892.

Brown-Becerra's final citation to *US v. Banks*, 514 F. 3d 769 774-775 (8th Circ. 2008) is likewise inapposite. The probable cause was not based solely on the courts conclusion that the container was a gun case. Probable cause was based on the "collective knowledge doctrine" that *Banks* was a felon and fugitive. *Id* at 776. "Being a felon in possession of a firearm is not the default status." *US v. Black*, 707 F. 3d 531, 540 (4th Circ. 2013).

It is legal in California to carry an unloaded firearm in a gun case. Indeed, California law requires that unless one falls within the exceptions to PC25850 ADD120, PC26350 ADD144, PC26400 ADD146 (such as hunting) that the firearm be carried unloaded (in a fully enclosed locked container if a handgun) or fully encased outside of a motor vehicle in an incorporated city (if a long gun).

In California, had a police officer known that *Banks* was a person prohibited from possessing a firearm and saw him carrying any firearm, including those

firearms it is generally illegal to possess, this still would not constitute probable cause or reasonable suspicion that a firearm is loaded under PC25850.

It would constitute reasonable suspicion or probable cause that *Banks* was violating California law prohibiting possession of a firearm, but not any of the Open Carry bans. See *People v. Muniz*, 4 Cal.App.3d 562, 567 (Cal. App. 1970) which held that seeing a firearm, in this case a machine-gun, does not constitute probable cause that a person is carrying a loaded firearm in violation of former PC12031 now PC25850 in part.

Although PC25850(b) cannot survive a plain text interpretation, it likewise fails should this Court look at the legislative intent of the subsection – to harass persons openly carrying firearms the police and government did not want to be armed. ASER27.

Appellees citations to *US v. Mohamud*, 843 F.3d 420, 438 n. 21 (9th Cir. 2016) and *Alphonsus v. Holder*, 705 F.3d 1031, 1042 (9th Cir. 2013) are without merit. *Mohamud* could not, and did not, claim to overturn *Patel*. Brown-Becerra's citation to *Alphonsus* is bizarre. *Alphonsus* wasn't even a Fourth Amendment case so its citation to *Salerno* fails at the threshold as it did in *Patel*.

Although PC25850(b) is invalid right down to the core, Nichols does not challenge that subsection of the statute on vagueness grounds. He argues that it is a violation of the Fourth Amendment.

There is no ambiguity in what PC25850(b) says but if ever there were an example of a law which is invalid in all applications it is PC25850(b).

VI. Defendant-Appellee Governor Brown Does Not Have Eleventh Amendment Immunity

Defendant-Appellee Governor Brown has chosen not to defend either the judgment or the laws at issue both in the district court and here on appeal.

As he did in the district court, he simply repeats his bald-faced assertion that he is immune from being sued in his official capacity as Governor of California.

He does not deny that the burden of proof regarding Eleventh Amendment immunity lies with him AOB at 30-31 nor does he provide an excerpt from the record showing where he proved that he is immune from suit because there isn't one. Neither does he present any proof on appeal that the Eleventh Amendment bars suit against him for purely prospective injunctive and declaratory relief.

On the other hand, even though the burden was not upon Nichols to show that the Governor is not immune from suit under the Eleventh Amendment, Nichols did so in his AOB at pgs 34-37.

Bald-face assertions of Eleventh immunity are not proof. Nor does Governor Brown deny that if this court were to affirm the district court's grant of immunity a clear circuit split would arise with the 10th circuit court of appeals AOB at 36-37, and not forgetting that an affirmation of his dismissal would

conflict with the law of this circuit on Eleventh Amendment immunity. See *Los Angeles County Bar Ass'n v. Eu*, 979 F. 2d 697, (9th Circ. 1992) at 704.

Governor Brown does not respond in his AAB to the argument made in the AOB that the Governor has more than a general duty to enforce the laws at issue here and that he has more than a general supervisory role. His silence is deafening. Instead, he simply cites two cases, neither of which involves his undeniable direct connection to the enforcement of the laws at issue here.

Ex Parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908) allows citizens to sue state officers in their official capacities for prospective declaratory or injunctive relief for their alleged violations of federal law. The enforcement power and authority of Governor Brown has been shown by Nichols to be more than "fairly direct" *Los Angeles County Bar Ass'n v. Eu*, 979 F. 2d 697 (9th Circ. 1992) at 704.

Given that Defendant-Appellant Brown, who is sued solely in his official capacity as Governor of California and who is sued solely for prospective injunctive and declaratory relief has decided not to defend the laws at issue in this case (nor has he promised not to enforce them) and because he cannot prove that there is an Eleventh Amendment bar to his being sued for this relief (because there isn't one); this Court should issue judgment against the Governor in full and grant the relief requested in Nichols AOB in full against the Governor.

As the Attorney General derives his power and authority to prosecute these laws from the Governor (California Constitution Article V Section 13) judgment against the Governor is likewise judgment against the Attorney General.

This Court should not take this as an invitation for it to avoid the Second Amendment questions raised in this case.

VII. The District Court Improperly Dismissed the State Law Claims with Prejudice

Similarly, the AAB misstates the relief asked for in the AOB regarding the dismissal of the claims under the California Constitution. The district court did not dismiss the state constitutional claims *without leave to amend*. The district court dismissed the state constitutional claims *with prejudice* thus preventing Nichols from raising a separate challenge in state court on his state claims under California law.

The state law claims were never given a chance to be argued on the merits in the district court (let alone be tried). This Court should not decide them on the merits for the first time on appeal. Leave the state law claims for the state courts to decide.

The only thing the AOB seeks in regard to the state law claims is to reverse the dismissal *with prejudice* so that Nichols may pursue a challenge in state court

under state law should he ultimately fail to prevail on his Federal claims in Federal court.

As the Defendants-Appellees do not dispute the fact that the district court did not have the authority to dismiss with prejudice the state law claims, this court should deem that question as having been conceded by Brown-Becerra and reverse the dismissal with prejudice of the state claims.

The citation as to why the district court did not have jurisdiction to dismiss the state law claims *with prejudice* is in the AOB pgs 33. There are others but the one should be sufficient for this particular point.

Nichols Opposes a Remand - None is Warranted

The questions raised in the AOB are pure questions of law to be reviewed *de novo* AOB at 30. The state defendants do not dispute this. This is the appeal of a final judgment on the pleadings. The facts are not in dispute. This case was filed in the district court in November of 2011. Final judgment was issued on May 1, 2014.

The state defendants had more than ample opportunity to defend the indefensible laws at issue here. They failed to do so. This Court should reject the suggestion in Brown-Becerra's Answering Brief (AAB) [fn 26] at page 39 that they be given another bite at the apple. A remand would serve no valid purpose. It would severely prejudice Nichols in his suit to vindicate his rights under the

Federal Constitution. It would further deny his right to "the just, speedy, and inexpensive determination of every action and proceeding." FRCP 1.

CONCLUSION

Nichols does not seek confrontation, he seeks to defend himself when confronted ASER50 as is his right under the Second Amendment *Heller* at 2793, 2796-2797, 2799 without surrendering his Fourth Amendment right. He seeks to openly carry firearms in defense of self which similarly situated persons are permitted to do but not he.

For the foregoing reasons, and for those stated in the opening brief, the judgment of the district court should be reversed.

Dated: February 28, 2017

Respectfully submitted,

/s/ Charles Nichols
CHARLES NICHOLS
Plaintiff-Appellant In Pro Per

STATEMENT OF RELATED CASES

The only two related cases Nichols is aware of are:

Christopher Baker v. Louis Kealoha, et al No.: 12-16258

George Young, Jr. v. State of Hawaii, et al No.: 12-17808

Both are out of Hawaii. *Young* was stayed pending the mandate in *Baker*. *Young* is an appeal of a final judgment. *Baker* is the appeal of a preliminary injunction in a case in which he was denied an employment related concealed carry permit *for which he is no longer employed*. *Baker* does not challenge Hawaii's ban on the Open Carry of long guns. *Young* seeks a license to carry a handgun. It is unclear whether or not he applied for a handgun Open Carry license. *Young* raises, for the first time on appeal, a challenge to Hawaii's ban on openly carrying long guns in public.