No. 10-56971

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EDWARD PERUTA, et al.,
Plaintiffs-Appellants,
v.
COUNTY OF SAN DIEGO, et al,
Defendants-Appellees.

Appeal from the United States District Court for the
Southern District of California, No. 3:09-cv-02371-IEG-BGS
(Hon. Irma E. Gonzalez, Judge)

BRIEF OF AMICUS CURIAE CHARLES NICHOLS, PRESIDENT OF CALIFORNIA RIGHT TO CARRY A CALIFORNIA NON-PROFIT ASSOCIATION, IN SUPPORT OF NEITHER PARTY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

California Statutes

Other Authorities

CORPORATE DISCLOSURE STATEMENT

Not applicable.

AUTHORITY TO FILE

This Court's Order of April 6, 2015 gave blanket leave for: "Any amicus briefs, either pertaining to the merits of the case or the denial of the intervention motion, shall be filed within 35 days of the entry of the order granting rehearing en banc." Moreover, counsel for the County of San Diego and Sheriff Gore consents to the filing. Counsel for Peruta did not respond.

STATEMENT OF INTEREST OF AMICUS CURIAE

Charles Nichols is President of California Right To Carry, a California non-profit association of advocates for the Second Amendment right to openly carry firearms for the purpose of self-defense.

He has a related case on appeal, *Charles Nichols v. Edmund Brown Jr., et al* No.: 14-55873 which seeks to overturn the 1967 Black Panther ban on openly carrying loaded firearms (former California Penal Code ("PC") section 12031, now PC 25850 in part) as well as seeking to overturn California's ban on openly carrying concealable firearms (e.g., handguns) PC 26350 and California's ban on openly carrying unloaded firearms which are not concealable (e.g., rifles and

shotguns) PC 26400 which went into effect on January 1, 2012 & 2013, respectively.

His appeal also challenges the Constitutionality of a permit requirement to openly carry loaded handguns PC 26150 & PC 26155 and their ancillary statues including the restriction on the issuance of these handgun open carry licenses to persons who live in counties with a population of fewer than 200,000 people and restricting the validity of these licenses to the county of issuance.

Charles Nichols opposes the carrying of weapons concealed except for the limited exceptions recognized in *District of Columbia v. Heller,* 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008) such as the home, and for travelers while actually on a journey.

INTRODUCTION

To be sure, there is no fundamental right to carry a concealed weapon in public and state courts have upheld prohibitions on the carrying of weapons concealed dating back to at least 1813 (*State v. Chandler*, 5 La. Ann. 489, 52 Am. Dec. 599 (1850) and in *Nunn v. State*, 1 Ga. (1 Kel.) 243 (1846), the two cases which the *Heller* court said "perfectly captured" the meaning of the individual right to keep and bear arms under the Second Amendment of the US Constitution (*Heller* at 2809) and to which the *Heller* Court again cited when it said that there is

no right to carry a concealed weapon in public at 2817, a conclusion which the dissent in *Heller* understood the *Heller* Majority to say at 2851 and at 2869:

> "But the majority implicitly, and appropriately, rejects that suggestion by broadly approving a set of laws — prohibitions on concealed weapons..." *Heller* dissent at 2851. "I am similarly puzzled by the majority's list, in Part III of its opinion, of provisions that in its view would survive Second Amendment scrutiny. These consist of (1) "prohibitions on carrying concealed weapons"..." *Heller* dissent at 2869.

All nine justices were in agreement that the 19th century prohibitions on concealed carry are "presumptively lawful" (*Heller* [fn 26]) and the *Peruta* Plaintiffs did nothing to rebut that presumption. Instead, they advanced the bizarre legal theory that California has the right to ban the Open Carry of firearms in favor of concealed carry. A legal theory which asked the Court to misinterpret the clear, unambiguous language in *Heller* that:

"[A] right to carry arms openly: "This is the right guaranteed by the Constitution of the United States, and which is calculated to incite men to a manly and noble defence of themselves, if necessary, and of their country, without any tendency to secret advantages and unmanly assassinations."" *Heller* at 2809 to instead mean that states can ban the Second Amendment "right to carry arms openly…guaranteed by the Constitution of the United States."

Peruta argued that the Plaintiffs in his case should be granted the relief requested in order to "constitutionally avoid" invalidation of PC 12031 (now PC 25850 in part) and the California Gun Free School Zone Act of 1995 (PC 626.9).

The 1,000 foot prohibition in PC 626.9 and PC 25850 are unsalvageable but *Nichols v. Brown* (No.: 14-55873) does not challenge PC 626.9 and given that most inhabited places within the state fall within 1,000 feet of a K-12 public or private school, *Peruta* should be remanded back to the district court and the Plaintiffs given the opportunity to amend their Complaint to challenge them.

For an example of the ubiquitousness of these "gun free" zones extending 1,000 feet from a K-12 public or private school (PC 626.9) is the City and County of San Francisco's planning department map of "Areas Within 1,000 Feet of a School" at http://www.sf-planning.org/index.aspx?page=2337 (last visited April 7, 1015). Virtually all of San Francisco falls within 1,000 feet of a school.

ARGUMENT

Both the majority and minority in *Peruta* mistakenly believed that it is legal to carry a loaded firearm on one's private property or place of business. They are mistaken. In 1976 the California Courts construed the private property exemption to mean that one can "have" *but not carry* a loaded firearm on his property. See *People v. Overturf,* 64 Cal. App. 3d 1 (1976). California has broadly defined the meaning of "public place" to intrude past the curtilage of one's home even to the interior of one's home. Another California court has held that if a property is fully enclosed by a tall fence or other sturdy, non-cosmetic barrier to entry of unspecified height, but by inference in the 4.5 to 5.5 foot range, then one's private

residential property is not a "public place" within the meaning of PC12031/25850. See *People v. Strider*, 177 Cal. App. 4th 1393 (2009).

This qualified exception is of no use to the lead plaintiff, Edward Peruta, while he is living out of his motor home as California does not consider motor homes to be homes even if a person is living out of the motor home and nowhere else. See *Garber v. Superior Court*, 184 Cal. App. 4th 724 (2010).

Pursuant to *Garber*, a loaded handgun in the drawer of a trailer attached to a motor vehicle is a violation of both PC 25400 (carrying a concealed firearm in a vehicle) and PC 25850 (carrying a loaded firearm in a public place).

Similarly, a camper within which one is living does not fall within the residence exemption to PC 626.9 pursuant to *People v. Anson*, 129 Cal. Rptr. 2d 124 (2003). PC 626.9, PC 26350 and PC 25850 prohibit an entire class of firearms (handguns) from being carried for the purpose of self-defense in homes that are mobile within 1,000 feet of a K-12 public or private school leaving unloaded long guns as the only means for one to defend himself within a home that is mobile.

Notwithstanding the fact that an unloaded firearm, particularly under California's vague definition of a loaded firearm, is nigh on useless for self-defense in an actual public place, it is impossible to wield a long gun in the close confines of a motor vehicle, camper or motor home.

The Peruta Plaintiffs imperfect legal theory is not, in and of itself, grounds to deny them leave to amend their Complaint. See *Johnson v. City of Shelby, Miss.*, 135 S. Ct. 346 - Supreme Court (2014) at 347.

The Peruta Plaintiffs, assuming they fall within the scope of the Second Amendment right which does not appear to be in dispute, have a right to carry loaded firearms (openly and concealed) on their private property and within their homes, even mobile ones, for the purpose of self-defense. In non-sensitive public places they have a right to carry arms openly, "in case of confrontation" *US v. Henry*, 688 F. 3d 637 - Court of Appeals, 9th Circuit (2012) at 640 for the purpose of self-defense *US v. Chovan*, 735 F. 3d 1127 - Court of Appeals, 9th Circuit (2013) at 1138.

Sensitive public places, such as in schools and government buildings, are areas where the Second Amendment right can be presumptively restricted but the public and private places extending 1,000 feet from the grounds of a K-12 public or private school are not sensitive places.

The Peruta Plaintiffs are entitled to challenge the two laws they argued to avoid overturning under the theory of "Constitutional Avoidance" – PC 12031 (now PC 25850 in part) and PC 626.9 as well as California's handgun licensing statutes as-applied to handguns *openly carried*.

The dissent in *Peruta* made reference to certain laws which are inapposite to the two cases that the *Heller* decision said perfectly captured the meaning of the individual Second Amendment right to keep and bear arms, *Nunn* and *Chandler*, which warrant a closer look.

"In *Nunn v. State*, 1 Ga. 243, 251 (1846), the Georgia Supreme Court construed the Second Amendment as protecting the "natural right of self-defence" and therefore struck down a ban on carrying pistols openly. Its opinion perfectly captured the way in which the operative clause of the Second Amendment furthers the purpose announced in the prefatory clause, in continuity with the English right...Likewise, in *State v. Chandler*, 5 La. Ann. 489, 490 (1850), the Louisiana Supreme Court held that citizens had a right to carry arms openly: "This is the right guaranteed by the Constitution of the United States, and which is calculated to incite men to a manly and noble defence of themselves, if necessary, and of their country, without any tendency to secret advantages and unmanly assassinations."" *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) at 2809

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

the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues. See, e.g., *State v. Chandler*, 5 La. Ann., at 489-490; *Nunn v. State*, 1 Ga., at 251..." *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) at 2816

***Kachalsky v. County of Westchester – Pertua* dissent at 1189**

Kachalsky v. County of Westchester, 701 F. 3d 81 - Court of Appeals, 2nd Circuit (2012) was limited to a single issue – the concealed carry of handguns (*Kachalsky* at 84). New York does not prohibit the Open Carry of long guns, loaded or unloaded. Open Carry was simply not at issue in that case.

The four cited statutes in *Kachalsky* at 90 offer no support for a claim that bans on *openly* carrying firearms are presumptively constitutional. The Arkansas statute expressly permitted citizens to publicly carry "such pistols as are used in the army or navy of the United States." The Tennessee statute was upheld under the constitution of that state only when construed to allow the public carrying of "the usual arms of the citizen of the country, and the use of which will properly train and render him efficient in defense of his own liberties, as well as of the State." *Andrews v. State*, 50 Tenn. 165, 179 (1871). Significantly, *Andrews* had incorrectly held that the Second Amendment does not apply to Tennessee and therefore evaluated the case under its state constitution.

The Texas statute was construed to allow the carrying of ordinary military arms, including holster pistols and side arms. *English v. State*, 35 Tex. 473, 476-77 (1871). The courts of all three states upheld prohibitions on the public carry of certain weapons only after concluding that such weapons were not protected by the Second Amendment or its state analogue. Because *Heller* has established beyond dispute that handguns are protected by the Second Amendment, these statutes offer no support for California's Open Carry bans.

Moreover, these post Civil War laws directly conflict with two ante-bellum cases *Heller* says "perfectly capture[s]" the meaning of the individual right to keep and bear arms, *Nunn* and *Chandler* which *Kachalsky* acknowledges at [fn 13] – "But both *Chandler* and *Reid* suggest that open carrying *must* be permitted." It is not that a firearm is capable of concealment which removes it from the scope of the Second Amendment, it is *the act of concealment in public* which is generally outside the scope of the Second Amendment right.

The fourth statute was enacted by the territorial government of Wyoming, and it did not survive Wyoming's entry into the Union. Even under the somewhat far fetched assumption that the territorial government of Wyoming seriously tried for a time to prevent firearms from being carried in public, the State of Wyoming never seems to have adopted such a policy. The only thing that makes this assumption remotely plausible is that the 1876 statute applied only in a "city, town,

or village." Even so, it strains credulity to imagine that a statute forbidding citizens to carry "any fire arm or other deadly weapon" in public was consistently enforced during this period of Wyoming's history. In fact, "The law was not well enforced. The Wyoming Tribune in January, 1886, complained: "The law against this 'gun' carrying out to be more rigidly enforced."" Larson, T. A. (1990). History of Wyoming (Second Edition). U of Nebraska Press pg 230.

Unlike California's Open Carry bans, which are potentially a felony and for a misdemeanor conviction is punishable by up to a year in jail with a three month mandatory minimum if one is in possession of matching ammunition, the 1876 law carried a fine of five to fifty dollars or, in lieu of the fine, five to twenty days in jail. It was this type of law *Heller* was dismissive of at 2821. Likewise "Shooting in self-defense was the standard plea in murder cases, and juries regularly honored such pleas. There were only two legal executions in Wyoming before 1884." Larson pg 230. Both men were Native Americans of mixed race. Id.

A few months before Wyoming became a state in 1890, the territorial legislature adopted a different provision that prohibited only the concealed carry of weapons and the open carry of weapons with the "intent or avowed purpose of injuring [one's] fellow-man." L.1890, c.73, s. 96. When the new state legislature met for the first time later that year, it adopted the 1890 territorial statute of which

this provision was a part, and repealed all conflicting statutes. 1890 Wyo. Sess. Laws 157-58.

In any case, just as *Heller* did not stake its interpretation of the Second Amendment on the examples given by Justice Breyer in his dissent, neither should this court stake its decision on an outlier statute from the Wyoming territory. This court is bound by *Heller's* interpretation of the Second Amendment right in *Nunn* and succinctly enunciated in *Chandler* – "[A] right to carry arms openly: "This is the right guaranteed by the Constitution of the United States…" *Heller* at 2809.

This is, of course, fatal to the Plaintiffs case here. California may no more substitute the Open Carry right for concealed carry than it may substitute atheism for religion in a First Amendment case.

The Statute of Northampton – *Peruta* dissent at 1183

The dissent in *Peruta* seemed to place a great deal of stock in *The Statute of Northampton,* 2 Edw. 3, c. 3 (1328) which, like its more localized predecessor *Statuto sup' Arportam'to Armor* 7 Edw 2 (1313) which prohibited the wearing of armor in Parliament, was an act in which a monarchy sought to assert its power over his subjects, a power which the monarchy believed to be absolute and in a realm wherein whose subjects were considered to be chattel.

The Second Amendment not only guarantees the right of the individual to openly carry arms for the purpose of self-defense, it stands as a safeguard against tyranny and it serves as a restraint on both the Federal and State governments.

"No clause in the Constitution could by any rule of construction be conceived to give to congress a power to disarm the people. Such a flagitious attempt could only be made under some general pretence by a state legislature. But if in any blind pursuit of inordinate power, either should attempt it, this amendment may be appealed to as a restraint on both." William Rawle, A View of the Constitution of the United States 125--26 1829 (2d ed.).

The State of California forbids the carrying of firearms in public for the purpose of self-defense, and past the curtilage of the home into one's home. To limit the right to this extent destroys the lawful right of self-defense in the curtilage of one's home, his private property and in public. Furthermore, it grants the government a monopoly on armed force in public. The Framers of the Second Amendment intended the right to be a safeguard against tyranny. *Heller* at 2802.

Neither the district court, this court, nor any court has the authority to send us back to the Dark Ages. We are not ruled by kings, government is the servant and not the master. That issue has long since been settled.

Nevertheless, English courts did not understand the 1328 Statute of Northampton to ban the carrying of weapons per se, only the carrying of weapons

in a threatening manner. The 1328 Statute of Northampton, which, by the time of the American Revolution, had long been limited to prohibit the carrying of arms only with evil intent, "in order to preserve the common law principle of allowing 'Gentlemen to ride armed for their Security.'" David Caplan, The Right of the Individual to Bear Arms: A Recent Judicial Trend, 4 DET. C. L. REV. 789, 795 (1982) (citing *Rex v. Knight*, 90 Eng. Rep. 330 (K.B. 1686)).

"[N]o wearing of Arms is within the meaning of this Statute, unless it be accompanied with such circumstances as are apt to terrify the People; from whence it seems clearly to follow, that Persons of Quality are in no Danger of Offending against this Statute by wearing common Weapons . . . for their Ornament or Defence, in such Places, and upon such Occasions, in which it is the common Fashion to make use of them, without causing the least Suspicion of an intention to commit any Act of Violence or Disturbance of the Peace…" William Hawkins, 1 Treatise of the Pleas of the Crown, ch. 63, § 9 (1716).

The English Dark Ages are not a place and time we should try to return to today. In the two centuries leading up to the 1328 Statute, the English increasingly discriminated against the Jews culminating with their expulsion in 1290. The Assize of Arms of 1181 which required all freemen of England to possess and bear arms prohibited Jews from even possessing arms.

Property of Jews, upon their death escheated to the King. Prior to their expulsion, restrictions were placed on where they could live and they were prohibited from owning land. They were required to wear distinguishing marks on their clothing. In 1278 the whole English Jewry was imprisoned; and no less than 293 Jews were executed at London.

In the centuries following the expulsion of the Jews the English government would enact a series of laws dictating what English men and women could wear, what they could and could not eat based on his or her social class. It would enact a law forbidding traveling at night. The English Treason Act of 1351 made it a crime punishable by death, including death by drawing and quartering or drawing and burning for being disloyal to the King.

The *Heller* Court began its analysis of the Second Amendment with the English Bill of Rights of 1689. This was the starting point of its analysis and certainly not the end point. The *Heller* majority, all five of whom are Catholic, also noted that The English Bill of Rights of 1689 prohibited Catholics from keeping and bearing arms. Something our Constitution does not allow. The Second Amendment is not to be interpreted as it was understood in 1689 and certainly it is not to be interpreted based on laws which existed centuries prior to its enactment by people who believed in witchcraft and who executed people whom they believed to be witches or simply because they slept with a Jew.

The Second Amendment is to be interpreted as it was "historically understood" *Chovan* at 1137, 1145, and 1149 by the Framers of the Second Amendment "in 1791, the year the Second Amendment was ratified — the critical year for determining the amendment's historical meaning, according to *McDonald v. City of Chicago*, supra, 130 S.Ct. at 3035 and n. 14." *Moore v. Madigan*, 702 F. 3d 933 - Court of Appeals, 7th Circuit (2012) at 935.

CONCLUSION

For the aforementioned reasons, this case should be remanded back to the district court with leave for Plaintiffs to amend their complaint to challenge the California laws which infringe on their Second Amendment right to *openly carry* loaded firearms for the purpose of self-defense in public and to concealed carry in the home, private property, and for travelers while actually on a journey. A remand to the district court would also have the benefit of mooting the question of intervention by the State as the State would become the only defendant on remand.

Dated: April 15, 2015

Respectfully submitted,

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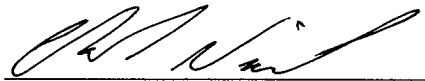
By: 

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the word limit of Ninth Circuit Rule 29 because it contains 3,592 words excluding the table of contents, table of authorities and excluding the certificates of compliance and service.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 and Times New Roman size 14 font.

Dated: April 15, 2015

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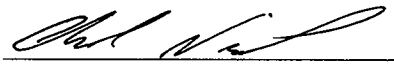
By: 

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CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing with: The Clerk of the Court for the United States Court of Appeals for the Ninth Circuit, counsel for Appellants, and counsel for Appellees via US Mail on April 15, 2015. An original and three copies were filed with the court.

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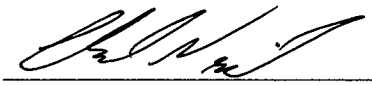
By: 

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