ORIGINAL

No. 23-526

IN THE

Supreme Court of the United States

Supreme Court, U.S.
FILED
NOV 15 2023
OFFICE OF THE CLERK

CHARLES NICHOLS,

Petitioner,

v.

GAVIN NEWSOM, in his official capacity as governor of California and ROB BONTA in his official capacity as attorney general of California,

Respondents.

On Petition for Writ of Certiorari Before Judgment to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

CHARLES NICHOLS
Pro Se
P.O. Box 1302
Redondo Beach, CA 90278
(424) 634-7381
CharlesNichols@Pykrete.info

Petitioner in pro per

November 15, 2023

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

QUESTIONS PRESENTED

The questions presented are:

1. Does the Second Amendment protect the keeping and bearing of loaded and unloaded rifles, shotguns, and handguns, in case of confrontation, for the purpose of lawful self-defense, and for other lawful purposes, outside the doors to petitioner's home, in the curtilage of his home, in and on his motor vehicle, including an attached camper or trailer, and in all nonsensitive places.

2. Should the court of appeals sub silentio affirmation, via The Mandate Rule, of the district court's final judgment regarding petitioners Fourth and Fourteenth Amendment claims, and the orders of the district court dismissing his claims under the California Constitution *with prejudice* at the initial pleading stage, and the dismissal of the governor pursuant to the Eleventh Amendment at the initial pleading stage and the governor's sua sponte dismissal on remand be reversed in favor of petitioner.

LIST OF PARTIES TO THE PROCEEDING

Petitioner in this Court (plaintiff-appellant below) is Charles Nichols. Respondents (defendants-appellees below) are California Governor Gavin Newsom and California Attorney General Rob Bonta, both in their official capacity as governor and attorney general, respectively. The original defendants were California Governor Edmund G. Brown Jr., and California Attorney General Kamala Harris, both in their official capacity. Governor Edmund G. Brown Jr. was substituted on appeal by Gavin Newsom. Kamala Harris was substituted on appeal by Xavier Becerra who was in turn substituted on appeal by Rob Bonta in their official capacity as California Attorney General.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, petitioner states as follows: Petitioner is an individual and therefore this Rule is not applicable to petitioner.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

Charles Nichols v. Gavin Newsom, et al., No: 14-55873 (9th Cir. 2023). Petition for rehearing and rehearing en banc denied on September 19, 2023. App. 1a.

Charles Nichols v. Gavin Newsom, et al., No: 14-55873 (9th Cir. 2022). Order vacating judgment of the district court and remanding. September 12, 2022. App. 3a.

Charles Nichols v. Kamala Harris, 17 F. Supp. 3d 989 (C.D. Cal. 2014). Final judgment of district court. Entered on May 1, 2014.

Charles Nichols v. Edmund G. Brown Jr., et al, 859 F.Supp.2d 1118 (C.D. Cal. 2012) Order dismissing the Governor and state law claims with prejudice. Entered on May 7, 2012.

There are no other proceedings in state or Federal trial or appellate courts, or in this Court, that Petitioner is aware of, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

CONSTITUTIONAL PROVISIONS

TABLE OF AUTHORITIES—Continued

OPINIONS AND ORDERS BELOW

The Ninth Circuit's September 19, 2023, order denying petitioner's petition for rehearing and rehearing en banc is unreported and reproduced at App. 1a-2a.

The Ninth Circuit's simultaneous order and mandate of September 12, 2022, is unreported and reproduced at App. 3a-4a

The May 1, 2014, final judgment of the district court is reported as *Charles Nichols v. Kamala Harris*, 17 F. Supp. 3d 989 (C.D. Cal. 2014).

The May 7, 2012, district court order dismissing the governor and claims under the California Constitution with prejudice at the initial pleading stage is reported as *Charles Nichols v. Edmund G. Brown Jr. et al.,* 859 F. Supp. 2d 1118 (C.D. Cal. 2012).

JURISDICTION

The district court entered its order dismissing with prejudice, at the initial pleading stage, plaintiff's claims under the California Constitution and the governor pursuant to the Eleventh Amendment on May 7, 2012, *Charles Nichols v. Edmund G. Brown Jr. et al.,* 859 F. Supp. 2d 1118 (C.D. Cal. 2012). The district court entered its final judgment on May 1, 2014, *Charles Nichols v. Kamala Harris*, 17 F. Supp. 3d 989 (C.D. Cal. 2014). The Court of Appeals issued its decision vacating the judgment of the district court on September 12, 2022, App. 3a-4a. The Court of Appealed issued its order denying en banc review on September 19, 2023, App. 3a-4a. This petition is filed under Supreme Court Rules 10 and 11. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) for Rule 10 and 28 U.S.C. §§ 1254(1) and 2101(e) for Rule 11.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. II

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

U.S. Const. amend. IV

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. XI

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XIV, § 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any

person within its jurisdiction the equal protection of the laws.

California Penal Code sections 25850(a) (prohibition on carrying loaded firearms) App.13a, 25850(b) (crime to assert Fourth Amendment right while carrying firearm) App.13a, 26350 (prohibition on openly carrying unloaded handguns) App.17a, 26400 (prohibition on openly carrying unloaded long guns) App.19a, 26150 et seq, (licenses to carry handguns, openly and concealed) App. 21a-27a, and 626.9 (prohibition on carrying, transporting, and possessing handguns within 1,000 feet of every K-12 public and private school) App. 5a are the statutes to which petitioner sought purely prospective injunctive and declarative relief as applied to petitioner, as applied to petitioner and similarly situated individuals, and facially. Effective January 1, 2024, a misdemeanor conviction for violating California Penal Code sections 25850, 26350, 26400, and 626.9 results in a ten-year long loss of one's right to possess firearms.

STATEMENT OF THE CASE

A. Statutory Background

California enacted a racially motivated and disproportionately enforced law in 1967 that prohibits the carrying of loaded rifles, shotguns, and handguns outside the doors to petitioner's home for the lawful purpose of self-defense. Originally enacted as California Penal Code section 12031, the pertinent sections were renumbered as PC25850 on January 1, 2012. App. 13a. After *District of Columbia v. Heller*, 554 U.S. 570 (2008) invalidated laws prohibiting the carrying of loaded rifles, shotguns, and handguns in the home, the curtilage of the home, and on private property, California restricted licenses to openly carry

a handgun to one's county of residence and only if the county has a population of fewer than 200,000 people. App. 21a, 23a. California does not provide for licenses to openly carry long guns, loaded or unloaded. After *McDonald v. Chicago*, 561 U.S. 742 (2010) applied the Second Amendment right in *Heller* and the Second Amendment in full against all state and local governments, California made it a crime to carry unloaded rifles, shotguns, and handguns outside the doors to petitioner's home App. 17a (PC26350), 19a (PC26400) and ceased providing applications for and issuing licenses to openly carry handguns. After *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S.Ct. 2134 (2022) held the right to keep and bear arms, including firearms, extends to all nonsensitive public places, respondents sponsored a bill (California Senate Bill No. 2) that makes it a crime for petitioner to transport an unloaded handgun, in a fully enclosed locked container, outside his home by amending California Penal Code section 626.9(c)(2) App. 5a., to require that the handguns be *inside his motor vehicle* "at all times." Petitioner resides 800 feet from a K-12 public school, which is within the "gun-free school zone" that extends 1,000 feet from every K-12 public and private school. Petitioner is unable to transport his handguns from his home to his motor vehicle as there is no parking on his property. He must carry his handguns on foot to his motor vehicle parked on the street and he can't do that without violating PC 626.9. Also, in response to *Bruen*, respondents' bill (S.B. 2) made it a crime to possess rifles, shotguns, and handguns in places respondents concede are not sensitive places. That prohibition only applies if one has a license to carry a handgun, openly or concealed. If one has a license to carry a handgun openly or concealed then he is prohibited from carrying and possessing

long guns in these newly prohibited places. Places where hunters would not otherwise be prohibited from openly carrying loaded and unloaded firearms (provided they do not have a license to carry a handgun, openly or concealed). Petitioner is statutorily prohibited from obtaining a license to openly carry a handgun because he does not reside in a county with fewer than 200,000 people, and licenses to openly carry a handgun have not been approved by the attorney general in over 12 years because the attorney general and his predecessors have refused to provide applications to openly carry a handgun. State law requires the attorney general to provide handgun Open Carry licenses and no license to carry a handgun, openly or concealed, can be granted without the attorney general first approving the license application. Petitioner asked for both an application and a license from the police chief of the City of Redondo Beach but was refused solely because state law prohibits the issuance of licenses to openly carry handguns to residents of a county with a population of fewer than 200,000 people. A misdemeanor conviction for violating these laws at issue here results in a ten year long loss of petitioner's right to possess all firearms.

The California Supreme Court held in 2012 that persons who are prohibited from possessing firearms or who use firearms to commit crimes punishable by more than one year of incarceration cannot be punished for violating these misdemeanor prohibitions under California law. California law also prohibits punishment for violating these laws when they are a lesser included offense. Under California law, more specific laws are controlling. For example, if one were to carry a loaded or unloaded rifle, shotgun or handgun into a government building or courthouse, he would not be in violation of California's bans on

carrying loaded and unloaded firearms, he would be in violation of separate laws prohibiting firearms in government buildings, and courthouses.

In short, the only persons who can be punished for violating California's bans on carrying loaded and unloaded rifles, shotguns, and handguns are persons who are not committing crimes while keeping and bearing those firearms in the curtilage of their home, their private residential property, in and on their motor vehicles, including an attached camper or trailer, and in non-sensitive places, including those non-sensitive places where the keeping and bearing of firearms is otherwise prohibited by law. Some jurists favor narrowing the application of a law over facially invalidating a law. Putting aside for the moment that petitioner also challenges these bans as applied to him and as applied to similarly situated individuals, if one where to narrow the application of these Open Carry bans to persons and places that fall outside the scope of the Second Amendment then they would not apply to anybody. In 12 years of litigation, the respondents never could identify a single application of California's Open Carry bans that did not violate the right to keep and bear arms as defined by the *Heller* opinion. Neither could the district court and neither could the Ninth Circuit Court of Appeals.

Respondents concede that petitioner did not seek any relief that conflicts with this Court's right to keep and bear arms as defined by *Heller*. Respondents conceded standing on all issues raised by petitioner on appeal.

B. Factual and procedural background

Petitioner filed his lawsuit on November 30, 2011 in the Federal Central District Court of California

naming as defendants the only two state officials who have the authority and power under *Ex parte Young*, 209 U.S. 123 (1908) to enforce the challenged laws, the governor and the attorney general (solely in their official capacity). Petitioner sought a preliminary and permanent injunction preventing the governor and attorney general, in their official capacity, from enforcing California's statewide ban on carrying loaded firearms, as it applies to openly carrying loaded firearms (this was before the unloaded Open Carry bans went into effect). The governor and attorney general argued that it was purely speculative and hypothetical that petitioner would be prosecuted for openly carrying a loaded firearm outside the doors to his home and unless the governor and attorney general personally threatened to enforce the law against petitioner, petitioner did not have standing to bring a pre-enforcement challenge. The governor argued, without the proof required by circuit precedent, that he has only a general duty to enforce the law and so is immune from suit pursuant to the Eleventh Amendment.

Ninth circuit binding precedents required, and require to this day, that a party claiming Eleventh Amendment immunity prove that he is immune, and judges have a sua sponte duty to examine such claims of immunity. Binding precedent also prohibited the dismissal of a party claiming Eleventh Amendment immunity from being dismissed at the initial pleading stage. Binding Supreme Court and Ninth circuit precedents also prohibited the dismissal of petitioner's claims under the California Constitution for lack of jurisdiction *with prejudice*. On May 7, 2012, the district court judge issued an order: 1) Dismissing the attorney general with leave to amend, 2) Dismissing the governor pursuant to the Eleventh Amendment,

with prejudice, 3) Dismissing petitioner's State Constitution claims *with prejudice*. Petitioner had initially challenged City of Redondo Beach ordinances. Petitioner would dismiss those claims against the City on August 5, 2013, *without prejudice* leaving only the Federal claims against California state laws and leaving only the governor and attorney general, in their official capacity, as defendants.

On appeal, the respondents conceded that neither the district court nor the court of appeals had or has the authority to dismiss petitioner's claims under the California Constitution *with prejudice*. The state conceded that the claims under the California Constitution should have been dismissed *without prejudice* so that petitioner may file a lawsuit in state court challenging California laws as a violation of the State Constitution. On appeal, the governor merely repeated, without proof, that he is immune from suit under the Eleventh Amendment.

On March 3, 2013, the district court judge issued an order denying the attorney general's motion to dismiss petitioner's First Amended Complaint but granted the City's motion to dismiss, with leave to amend. On March 12, 2013, Petitioner filed his Second Amended Complaint, his operative complaint, and stood on/by his Complaint, which is his right. On April 10, 2013, petitioner filed a motion for a preliminary injunction. On July 3, 2013, the district court denied petitioner's motion for a preliminary injunction. On July 8, 2013, Petitioner filed his timely notice of appeal to the denial of his preliminary injunction. On August 6, 2013, petitioner filed his opening brief in the appeal of the denial of his preliminary injunction. On September 4, 2013, the State of California filed its answering brief. On October 15, 2013, the court of appeals stayed

petitioner's Open Carry preliminary injunction appeal pending the decision in three *concealed carry* appeals. On May 1, 2014, the district court granted the State's motion for judgment on the pleadings. On May 27, 2014, petitioner filed his timely notice of appeal to the final judgment of the district court which included an appeal of the dismissal of the governor and petitioner's claims under the California Constitution with prejudice. On June 10, 2014, the court of appeals dismissed petitioner's preliminary injunction appeal as moot. On January 21, 2015, the court of appeals granted the State's *opposed* motion to stay petitioner's final judgment appeal pending the concealed carry appeal of Richards v. Prieto, No. 11–16255. On April 13, 2015, the court of appeals stayed petitioner's final judgment appeal pending the en banc resolution of two concealed carry appeals, Peruta v. County of San Diego, case no. 10–56971, and Richards v. Prieto, case no. 11–16255. On July 22, 2016, the court of appeals further stayed appellate proceedings pending disposition of the petitions for full court rehearing in Peruta v. County of San Diego, case no. 10–56971, and Richards v. Prieto, case no. 11–16255. On November 9, 2016, petitioner filed his timely opening brief in the appeal of the final judgment of the district court. On February 17, 2017, the respondents filed an *untimely* answering brief. On March 1, 2017, petitioner filed his timely reply brief. On February 15, 2018, oral argument took place before a three-judge panel of the Ninth Circuit Court of Appeals where the case was taken under submission for a decision. On February 27, 2018, submission of petitioner's case was vacated pending issuance of a decision in Young v. State of Hawai'i, No. 12-17808. On August 19, 2021, the court of appeals issued an order stating "Submission of this case remains vacated pending a decision by the

Supreme Court on the petition for a writ of certiorari in Young v. Hawai'i, No. 20-1639." On June 30, 2022, this Court granted, vacated, and remanded the Young v. Hawaii handgun Open Carry case back to the Ninth Circuit Court of Appeals en banc panel. On July 11, 2022, the court of appeals ordered supplemental briefing by petitioner due two weeks later, and supplemental briefing by the state, due four weeks later. Petitioner filed his supplemental brief one week later, on July 18, 2022. The State filed its supplemental brief four weeks later on August 8, 2022. On August 19, 2022, over a four-judge dissent, the en banc panel vacated and remanded the Young v. Hawaii handgun Open Carry case back "to the district court for further proceeding pursuant to the Supreme Court order." On August 29, 2022, the en banc panel in Young v. Hawaii issued its mandate. On September 12, 2022, the court of appeals in petitioner's case issued a simultaneous order and mandate stating, "The district court's judgment is VACATED, and this case is REMANDED to the district court for further proceedings consistent with the United States Supreme Court's decision in *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. ____ (2022). The parties shall bear their own attorney's fees, costs, and expenses. This order constitutes the mandate of this court. VACATED AND REMANDED." App. 3a. On September 14, 2022, Petitioner filed a timely motion to recall the mandate and for an extension of time to file a petition for rehearing and rehearing en banc which the panel sat on for nearly a year. On December 7, 2022, the district court on remand sua sponte dismissed the governor with prejudice.

On June 29, 2023, the related case (in the court of appeals) of Mark Baird et al., v. Rob Bonta No.: 23-15016 was argued and submitted for a decision. The

State of California did not challenge the *Peruta* en banc panel opinion in its answering brief and stated in oral argument that is it not challenging the en banc panel opinion in *Peruta*. An opinion that held there is no right to concealed carry but if there is a right to carry a firearm in public then the right is to Open Carry. After petitioner filed a letter with the Baird v. Bonta panel, the three-judge panel assigned to petitioner's appeal granted his motion on July 20, 2023 to recall the mandate and for an extension of time to August 18, 2023, to file his petition for rehearing and rehearing en banc. On August 18, 2023, petitioner filed his petition for rehearing and rehearing en banc. On September 22, 2023, petitioner's petition for rehearing and rehearing en banc was denied. On September 22, 2023, petitioner filed an application with Justice Kagan for an extension of time to file this petition for a writ of certiorari and certiorari before judgment. On October 2, 2023, the mandate issued and jurisdiction returned to the district court. As before, the mandate, pursuant to The Mandate Rule, sub silentio affirmed the dismissal of petitioner's claims that are independent of the Second Amendment. The mandate did not instruct the district court to comply with this Court's opinion in *Bruen* and to cease its proceedings to which it does not have jurisdiction, also pursuant to The Mandate Rule. On remand from the Ninth Circuit Court of Appeals, petitioner's suit was assigned to a district court in another county from where it was filed and more than 70 miles from where petitioner resides. Petitioner's request to have his case transferred back to Los Angeles County was denied. On October 6, 2023, the district court extended its stay of the district court proceedings until proceedings in the U.S. Supreme Court conclude. Pursuant to the scheduling order, the

respondents were required to file their motion for summary judgment by October 13, 2024. The district court vacated the deadlines in its order, and said it was going to consider reopening discovery, for a third time, in order to give the respondents the opportunity to again depose petitioner, force petitioner to answer more interrogatories, and give respondents even more time to make their case that *Heller*, *McDonald*, and *Bruen* should be overruled by the district court.

REASONS FOR GRANTING THE PETITION

For 12 years, petitioner has sought to enjoin the enforcement of California's bans on the carrying of firearms (rifles, shotguns, and handguns it is legal for him to possess under both state and Federal law) outside the doors to his home, in case of confrontation, for the purpose of lawful self-defense and for other lawful purposes. One of the challenged laws (PC 626.9) was amended this year to prohibit petitioner from removing his handguns from his home because he lives within 1,000 feet of a K-12 public school and the exception for transporting an unloaded handgun in a fully enclosed locked container outside of a motor vehicle (e.g., on foot) was removed. Prior to the amendment, petitioner was able to carry an unloaded handgun in a fully enclosed locked container from his home to his motor vehicle parked on the street (there is no parking on his property). The amended law now requires that his handguns be within a motor vehicle *at all times*. It is a crime to transport a handgun on foot or in any other type of vehicle. California Senate Bill No. 2 (S.B.2) was sponsored by the respondents who also helped write the law. S.B. 2 makes it a statewide crime, not just in school zones, to possess all firearms, including licensed firearms, in a "public transit system" which is defined as "including, but

not limited to, motor vehicles, streetcars, trackless trolleys, buses, light rail systems, rapid transit systems, subways, trains, or jitneys, that transport members of the public for hire." California law prohibits petitioner from openly carrying a loaded handgun within 1,000 feet of every K-12 public and private school absent a license which does not exist because state law prohibits the issuance of the license to petitioner, and similarly situated residents, of counties with a population of 200,000 or more people (the licenses are valid only in one's country of residence). Petitioner sought the remedy of a license to openly carry a handgun as a license is an exception to both the state and Federal Gun-Free School Zone laws. Petitioner also sought a declaration that no license is required to openly carry firearms. Petitioner challenged in his operative complaint as well: California's statewide prohibition on carrying loaded firearms but only as the prohibition applies to openly carried firearms, and California's statewide prohibitions on openly carrying unloaded rifles, shotguns, and handguns outside of his home. Petitioner also raised Fourth and Fourteenth Amendment claims independent and in conjunction with petitioner's Second Amendment claim.

The Ninth Court of Appeals vacated, in full, the judgment of the district court that had been entered in favor of the State as to all of petitioners claims but procedurally affirmed, sub silentio, the dismissal *with prejudice* of petitioner's claims independent of the Second Amendment, including his claims under the California Constitution because The Mandate Rule prohibits the district court and all subsequent panels of the court of appeals from revisiting those claims. Respondents concede petitioner's claims under the California Constitution should not have been dis-

missed *with prejudice*. On remand, the district court adopted the position of the respondents that it is not bound by this Courts opinions in *District of Columbia v. Heller*, 554 U.S. 570 (2008), *McDonald v. Chicago*, 561 U.S. 742 (2010), *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S.Ct. 2134 (2022) or bound by any of this Court's binding precedents or binding precedents of the Ninth Circuit Court of Appeals. On remand, the district court, in violation of The Mandate Rule, sua sponte dismissed the governor as a defendant, reopened discovery, and said it would give the state all the time it needs to prove that there is no right to openly carry firearms outside the doors to one's home.

Petitioner's letter to the Baird v. Bonta panel suggested that his timely filed motion to recall his mandate should be granted and the two Open Carry cases be reheard together before the court of appeals and explained that petitioner was left with no recourse other than to file a writ of mandamus with this Court because the district court was proceeding without jurisdiction and his motion to recall the mandate was still pending before the court of appeals nearly a year later. After petitioner filed his letter in the related case, petitioner's motion to recall the mandate and to file a petition for rehearing and rehearing en banc was granted a month later. Petitioner's petition for rehearing and rehearing en banc was denied. The Court of Appeals refused to instruct the district court to comply with The Mandate Rule or modify its order that, sub silentio, affirmed the dismissal of petitioner's claims independent of the Second Amendment.

Petitioner is once again without any recourse other than this Court.

The State of California in its Brief in Opposition to Peruta v. San Diego (United States Supreme Court Docket No.: 16-894, Page 15, "Nichols v. Harris"), invited this Court to deny the Peruta petition and to wait until petitioner's case came before this Court to answer the question as to whether or not the Second Amendment protects the right to openly carry loaded and unloaded firearms outside the doors to one's home. Petitioner's petition is now before this Court.

This Court should accept the State of California's invitation and grant this petition.

Twelve years after filing suit to vindicate his right to openly carry firearms outside the doors to his home and into nonsensitive public places, and after the Ninth Circuit Court of Appeals three times having jurisdiction to enjoin the respondents from enforcing California's bans on keeping and bearing firearms outside of the home, but refusing to do so (four times if Young v. Hawaii is counted), petitioner is once again before a hostile magistrate and district court judge who are proceeding without jurisdiction because the Ninth Circuit Court of Appeals does not like the manner of bearing arms that has always been recognized as protected by the Second Amendment — Open Carry. For over two hundred years, the disagreement between the state legislatures and courts was whether or not small firearms that are easily and ordinarily carried concealed are arms protected by the Second Amendment. This Court in *Bruen* left no doubt that they are protected regardless of whether they are medieval handguns three-feet in length or handguns small enough to fit in the palm of one's hand.

Respondents' position is that *Bruen*, 142 S. Ct. at 2150 overruled the right to openly carry loaded rifles, shotguns, and handguns from *Heller*.

If this Court did not overrule the Open Carry right from *Heller* then petitioner prevails. If this Court did overrule the Open Carry right from *Heller* then it should clearly say so, and explain where in *Bruen* this Court said that there is no right to openly carry arms. And this Court should explain *why* there is no right to openly carry arms. To hold that there is only a right to concealed carry would be adopting "The Alternate Wavelength Doctrine of Constitutional Interpretation" put forth by the petitioners in *Bruen*.

On June 16, 2015, the State of California stood before an en banc panel of the 9th circuit court of appeals where it conceded that the Second Amendment right to openly carry firearms, including handguns, extends beyond the curtilage of the home to public places and that California may lawfully restrict the carrying of concealed weapons as per the *Heller* opinion. The State of California prevailed in *Peruta v. County of San Diego*, 824 F. 3d 919 (9th Cir. 2016) "*Peruta*" cert denied No. 16–894 on June 26, 2017. Eight years later, this Court would unequivocally hold that:

"Nothing in the Second Amendment's text draws a home/public distinction with respect to the right to keep and bear arms." *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S.Ct. 2134 (2022).

"The Second Amendment guaranteed to "all Americans" the right to bear commonly used arms in public subject to certain reasonable, well-defined restrictions. *Heller*, 554 U.S. at 581, 128 S.Ct. 2783. Those restrictions, for example, limited the intent for which one could carry arms, the manner by which one carried arms, or the exceptional circumstances under which one could not carry arms, such as before justices of the peace and other government officials." *Bruen* at 2156.

Respondents do not dispute that rifles, shotguns, and handguns it is legal for petitioner to possess under state and Federal law are commonly used arms. What they dispute is that there is a right to carry them outside the doors to one's home.

Concealed carry was the only manner of carry that could be prohibited in *Heller* at 626, and *Bruen* at 2150 "States could lawfully eliminate one kind of public carry—concealed carry..." This is what two circuit court of appeals, favorably cited in *Bruen*, had previously held. The Seventh Circuit Court of Appeals invalidated State of Illinois bans that California has adopted and expanded upon that are at issue here: "[A] state may be able to require "open carry"—that is, require persons who carry a gun in public to carry it in plain view rather than concealed. See *District of Columbia v. Heller*" *Moore v. Madigan*, 702 F.3d 933, 938 (7th Cir. 2012) in striking down the State of Illinois prohibitions on openly carrying loaded and unloaded long guns and loaded and unloaded handguns (carried openly or concealed) in incorporated cities, towns and villages. Unlike California's bans, the Illinois State bans did not apply to private property. The second case was out of the United States Court of Appeals for the District of Columbia Circuit. "See *Heller* I , 554 U.S. at 611-14, 629, 128 S.Ct. 2783 (citing *State v. Reid*, 1 Ala. 612, 616-17 (1840) (allowing restrictions on the "manner of bearing arms" but not limits on carrying so severe "as to render [arms] wholly useless for the purpose of defence"); *Nunn v. State*, 1 Ga. 243, 251 (1846) (invalidating a ban on carrying insofar as it prohibited "bearing arms openly"); *State v. Chandler*, 5 La.Ann. 489 (1850) (observing that the Amendment shields a right to open carry)..." *Wrenn v. Dist. of Columbia*, 864 F.3d 650, 658 (D.C. Cir. 2017).

The Ninth Circuit Court of Appeals in *Peruta* held, there is no right to concealed carry. The court held that if there is a Second Amendment right of a member of the general public to carry a firearm in public then that right is to openly carry a firearm. *Peruta v. Cnty. of San Diego*, 824 F.3d 919, 942 (9th Cir. 2016). *Peruta*, like *Bruen*, argued that states can ban Open Carry. *Peruta* argued that the holding in *Heller* was that Open Carry can be banned. The petitioners in *Bruen* argued that Open Carry can be banned because New Yorkers today are on a different wavelength than those Americans who enacted the Second and Fourteenth amendments.

In upholding Florida's ban on openly carrying loaded, and unloaded, rifles, shotguns, and handguns, under what it purported to be intermediate scrutiny, the Florida Supreme Court acknowledged that *Heller* held that Open Carry is the right guaranteed by the Second Amendment but then held what *Heller* really said is that Open Carry can be banned. *Norman v. State*, 215 So. 3d 18 (2017) footnote 11 and contrary to *Heller*, *McDonald*, and *Bruen*, "Indeed, most states outside of the South in the mid-nineteenth century prohibited in most instances the carrying of firearms in public, whether carried concealed or openly..." *id* footnote 12. *Norman* is in direct conflict with *Heller*, *McDonald*, *Caetano*, and *Bruen*.

With that concession by the State of California coupled with it being the prevailing party, and the State's concession both in its answering brief and again in oral argument that petitioner's lawsuit does not conflict with the Second Amendment right defined in *Heller*, petitioner should have long since prevailed under the Doctrine of Judicial Estoppel. Doubly so given the Attorney General's prevailing position in the

post-*Bruen* case of *People v. Miller*, 94 Cal. App. 5th 935, 2023 Cal. App. LEXIS 642, 94 Cal. App. 5th 935, 2023 Cal. App. LEXIS 642 where respondent Bonta argued that there is absolutely no right to carry handguns concealed. Indeed, the *Miller* opinion, citing *Bruen and Peruta (en banc)*, held that the right is to openly carry firearms.

But no Second Amendment challenge has ever succeeded in the 9th circuit court of appeals. It is the extremely rare case that prevails before a three-judge panel but having prevailed, that decision is vacated and reheard en banc, where the Second Amendment challenge invariably fails. When, after ten years, the lone Open Carry petition in Young v. Hawaii was granted by this Court, vacated, and remanded, the Ninth Circuit en banc panel simply remanded back to the district court to start over from the beginning. *Young v. Hawaii*, 992 F.3d 765 (9th Cir. 2021).

To this date, the 9th circuit has not recognized the Second Amendment right to keep and bear arms. Not any type of arm, not anywhere, not even in the curtilage of petitioner's home (not even inside the doors to one's home), let alone on private residential property, in a motor vehicle, camper, trailer or in any nonsensitive place.

Despite being the prevailing party in *Peruta*, the respondents now take the position in this case (but not Baird or *Miller*) that *Bruen* held that so long as California does not require a "good cause" for the issuance of a license to carry a loaded handgun *concealed* then the State is free to ban the carrying and possession of *all other arms* protected by the Second Amendment, including handguns openly carried, and *especially arms that are not concealable* (e.g., long guns), and to ban the keeping and bearing of those

arms outside the doors to petitioner's home, in the curtilage of petitioner's home, on petitioner's private residential property, in his motor vehicles, and throughout the state, even in those remote places where petitioner is unlikely to encounter another human being. Places which the respondents in *Bruen* conceded the right to bear arms protected by the Second Amendment (including long guns) fully applies.

If *Bruen* had held there is no right to Open Carry, or that Open Carry can be banned if the state does not require a "good cause" for the issuance of a concealed carry permit then Justice Alito, in his concurrence, would not have mentioned the right to bear long guns in footnote 3.

If *Bruen* had held there is no right to Open Carry, or that Open Carry can be banned if the state does not require a "good cause" for the issuance of a concealed carry permit then there was no reason for this Court to have granted, vacated, and remanded *Young v. Hawaii*, 992 F.3d 765 (9th Cir. 2021) (en banc) No.: 20-1639 given that Mr. Young had long since abandoned his claim that he had a right to carry a handgun, or any arms, concealed. Mr. Young had forfeited his pursuit of a concealed carry permit in favor of an Open Carry permit in 2018 when he prevailed before his three-judge panel which held there is no right to concealed carry but there is a right to openly carry handguns. Mr. Young again forfeited his concealed carry challenge during his en banc oral argument in response to a direct question by a member of the en banc panel.

"While the concealed carry of firearms categorically falls outside such protection, see *Peruta II* , 824 F.3d at 939, we are satisfied that the Second Amendment

encompasses a right to carry a firearm openly in public for self-defense." *Young v. Hawaii,* 896 F.3d 1044, 1068 (9th Cir. 2018) (vacated and reheard en banc).

But *Bruen* did not hold that states are free to ban the Open Carry of arms protected by the Second Amendment, including the Open Carry of arms the State does not dispute are protected by the Second Amendment at issue in this case, e.g., rifles, shotguns, and handguns it is legal for petitioner to possess under both state and Federal law.

And so why is petitioner' still waiting for his purely prospective relief more than eight years after the State of California conceded that petitioner has the right to openly carry firearms beyond the curtilage of his home? The answer is found in Judge O'Scannlain's dissent to the remand of *Young* back to the district court (Joined by Ninth Circuit Court of Appeals Judges Callahan, Ikuta, and N.R. Nelson) – "Yet in its terse order and unwritten opinion, the majority seems to reveal a hidden rule in our Circuit: Second Amendment claims are not to be taken seriously."

With all due respect to the dissenters, it was never a *hidden rule*. Seventy Second Amendment challenges have gone before the Ninth Circuit Court of Appeals, every one of those challenges either lost (pre-*Bruen*) or were remanded (post-*Bruen*), with one exception that was dismissed as moot.

There are no facts at dispute in this case. The State of California has never disputed that rifles, shotguns, and handguns it is legal for petitioner to possess under both state and Federal law are arms protected by the Second Amendment. The State has never disputed that only petitioner and similarly situated persons who fall within the scope of the Second Amendment

can be punished for violating the bans at issue here. It is undisputed that persons prohibited from possessing firearms or who use firearms to commit a crime cannot be punished pursuant to California Penal Code section 654. "While a defendant may be properly convicted of different offenses based on the same act, he or she may be punished for only one of those offenses. (§ 654; *People v. Jones* (2012) 54 Cal.4th 350, 358 [142 Cal. Rptr. 3d 561, 278 P.3d 821] ["Section 654 prohibits multiple punishment for a single physical act that violates different provisions of law"].)" *People v. Aguayo*, 13 Cal. 5th 974, 515 P.3d 63, 297 Cal. Rptr. 3d 327, 2022 Cal. LEXIS 5013. *Jones* was a California Supreme Court opinion which held that persons prohibited from possessing firearms cannot be punished for carrying a loaded firearm in violation of PC25850. Not only has the State never disputed that the bans apply only to non-sensitive public places, but the State also conceded this in their answering brief on appeal.

Respondents argued on February 15, 2018, before a three-judge panel of the 9th circuit court of appeals in petitioner's appeal that *McDonald v. Chicago required* the three-judge panel to conduct its own historical analysis and then hold that the holding of the U.S. Supreme Court in *Heller* that Open Carry is the right guaranteed by the Constitution was wrongly decided, and argued that the English 1328 Statute of Northampton was the controlling law in the United States. It was a frivolous argument to make and one that should have been, but wasn't, rejected by petitioner's three-judge panel pursuant to *New Hampshire v. Maine*, 532 US 742, 750 (2001), and the Ninth circuit precedents applying that opinion, not to mention the plain text reading of *Heller* and *McDonald* and this Court's per curiam reversing an opinion of the Massachusetts high court for merely

conflicting with *Heller*. *Caetano v. Massachusetts*, 577 U.S. 411 (2016) (per curiam).

And yet the en banc panel in *Young* did exactly that. This Court repudiated *Young's* en banc panel rejection of *Heller's* historical determination of the right to keep and bear arms in *Bruen* at 2124, 2135, 2149, 2179, 2183.

The respondents' position today, but only in petitioner's case, is that this Court held in *Bruen* that so long as California does not require "good cause" for a license to carry a handgun concealed then it is constitutional for the state to ban the possession and carrying of all protected arms outside of the home, including rifles, shotguns, and handguns openly carried.

That was a very simple question, a pure question of law, for the Ninth Circuit Court of Appeals to decide. That is a very simple question, a pure question of law, which this Court has already decided. The respondents did not, and could not, cite to any section in *Bruen* where this Court overruled the Open Carry right from *Heller*. Indeed, the only citation to *Bruen* in its supplemental brief regarding the manner of carry was where this Court reiterated that the only manner of carry that could be prohibited was concealed carry. *Bruen* at 2150.

This court has granted Rule 11 petitions in *Dept. of Commerce v. New York*, 139 S. Ct. 2551 (2019) (discovery and deposition), and *Whole Woman's Health v. Jackson*, 142 S. Ct. 522 (2021) (Eleventh Amendment immunity)

I. THE IMPERATIVE PUBLIC IMPORTANCE OF THIS CASE JUSTIFIES IMMEDIATE REVIEW

A. Immediate Review Is Warranted Because Irreparable Harm Is Ongoing While Awaiting the Inferior Court's Judgment

Prior to *Bruen*, it was undisputed by the respondents in the court of appeals that petitioner has the right to bear firearms outside the door to his home, in his motor vehicle and in all nonsensitive public places. In their supplemental post-*Bruen* brief, respondents argued that petitioner only has a right to a concealed carry license. It is undisputed that even if petitioner has a concealed carry license, concealed carry substantially burdens his ability to defend himself.

Essentially, the dispositive question is whether or not this Court held in *Bruen* that there is no right to openly carry arms (or transport unloaded handguns in a fully enclosed locked container), particularly the Open Carry of rifles and shotguns and handguns outside the doors to petitioner's home, provided that California does not require "good cause" for a concealed carry permit and notwithstanding that California has consolidated and renamed its "good cause" and "good moral character" requirements into a "suitable person" requirement in S.B.2.

Respondent Bonta refuses to prepare and approve licenses to openly carry a handgun, licenses which are unavailable to petitioner by statute because he neither resides nor works in a county of fewer than 200,000 people. But even if the State where to remove the population and residency prohibitions, a license to openly carry a handgun would prevent petitioner from

even possessing, let alone carrying, rifles, shotguns and handguns in nearly every place petitioner is likely to encounter another human being and in many places he is unlikely to encounter any human being but is likely to encounter a bear or mountain lion. Security guards notwithstanding, there are no licenses available to petitioner and the general public to openly carry long guns, loaded or unloaded, for the core, lawful purpose of self-defense, and a license to openly carry a handgun would prohibit petitioner from possessing, let alone carrying, loaded and unloaded long guns outside the doors to his home.

B. This Case Presents a Fundamental Question About Federal Courts' Power and Unwillingness to Protect Constitutional Rights

Respondents conceded in oral argument before the court of appeals that neither the district court nor the court of appeals had jurisdiction to dismiss petitioner's claims under the California Constitution *with prejudice*. Respondents conceded petitioner's vagueness claim that unloaded firearms are not loaded if one possess ammunition or ammunition is attached in any manner to the firearm. Respondents conceded that if one openly carries a firearm into a place where it is illegal to carry a loaded firearm then there is no reasonable suspicion to stop that person or probable cause to arrest that person for violating PC25850. Respondents position is if that person merely asserts his Fourth Amendment right to refuse to consent to the search and seizure of his person and property then that mere assertion constitutes probable cause for an arrest. Respondents waived petitioner's vagueness claims by simply arguing that vagueness claims are not cognizable outside of the First Amendment,

contrary to this Court's and Ninth Circuit Court's binding precedents.

Respondents conceded all this and waived much more. And yet, despite the respondents' concessions in their answering brief and in oral argument, the court of appeals affirmed sub silentio, via The Mandate Rule, all of petitioner's claims independent of the Second Amendment contrary to this Court's binding precedents and its own binding precedents.

When petitioner's case was remanded to the district court in 2022, the respondents took the position that the district court was *not* bound by The Mandate Rule, any procedural rule, any 9th circuit court of appeals binding precedent, or bound by any binding precedent of this Court including *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S.Ct. 2134. The respondents took the position that the district court has jurisdiction to overrule *Heller*, *McDonald*, and *Bruen*. Pursuant to The Mandate Rule, the district court has no jurisdiction other than to strictly comply with the mandate. The magistrate judge adopted the position of the respondents and, as a bonus, sua sponte dismissed the governor as a defendant, *with prejudice*. The magistrate judge sua sponte reopened discovery, without a motion showing good cause, which was in violation of The Mandate Rule even if the respondents had filed a motion because the mandate did not give jurisdiction to the district court to reopen discovery, or to do anything else, including allowing a second deposition, and interrogatories, against petitioner. The magistrate judge issued a scheduling order pushing back a trial to 2024, at the earliest. Petitioner filed a timely objection. The district court judge overruled his objection without addressing his jurisdictional objections or any of his other objections aside

from the assignment of the magistrate judge. In its October 6, 2023, order staying the district court proceedings pending the disposition of this petition, the district court vacated its scheduling order and indicated that it was going to reopen discovery for a third time.

On May 31, 2023, respondents delivered to petitioner three, purportedly "expert" witness disclosures from three individuals who are not attorneys. Unsurprisingly, they did not make a legal case against Open Carry. For example, in the 53 page long "expert" report of Brennan Rivas, his "argument" is, *"The nineteenth-century tendency toward not specifically outlawing the open carrying of deadly weapons is more a byproduct of that era's persistent and torturous acceptance of a violent male honor culture than it is evidence of widespread acceptance of preemptive armed self-defense."* The 17 page report of Kim Raney is devoid of any legal argument. The 346 page report of Robert J. Spitzer "argues" *"Some of the laws did not specifically bar the carrying of every type of firearm, but included a phrase like "or any other dangerous or deadly weapon of like kind or character." One may reasonably assume that a long gun was and is a "dangerous or deadly weapon.""* Unsurprisingly, Mr. Spitzer conflates prohibitions on slaves, Native Americans, and concealed carry with prohibitions on Open Carry. None of these purported experts so much as cited anything from *Heller*, *McDonald*, and *Bruen* let alone in support of the respondents' position that *Bruen* overruled the right to Open Carry clearly stated in *Heller*. And not forgetting that the respondents concede that rifles, shotguns, and handguns are arms protected by the Second Amendment.

Under California law, the governor has the full police power of the state in every county in which he declares a state of emergency, regardless of the nature of the emergency. This Court enjoined Governor Newsom in *Tandon v. Newsom*, 141 S. Ct. 1294 (2021) and granted cert in *South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 2563 (2021). Both cases arose out of declarations of a state of emergency by the governor. The governor has the required enforcement power under *Ex parte Young*, 209 U.S. 123 (1908) independent of the California Emergency Services Act pursuant to the California Constitution and California Government Code. The respondents conceded that neither the district court nor the court of appeals has jurisdiction to dismiss petitioner's claims under the California Constitution for lack of jurisdiction *with* prejudice and that his claims under the California Constitution should have been dismissed *without* prejudice so that petitioner may raise them in state court. The respondents concede that there is neither reasonable suspicion nor probable cause that a firearm openly carried, or in a motor vehicle is loaded. Contrary to this Court's and Ninth Circuit binding precedents, the respondents insist that asserting one's Fourth Amendment right is probable cause for an arrest pursuant to PC25850(b). In oral argument, the respondents argued that *McDonald* required the three-judge panel to conduct its own historical analysis and then overrule *Heller* because the English Statute of Northampton was controlling law.

The Court of Appeals vacated the district courts final judgment as to all of petitioner's claims, including his vagueness claims independent of the Second Amendment, but procedurally barred the district court and subsequent appellate panels from

having jurisdiction to rule on anything other than petitioner's Second Amendment claims. By doing so, the Ninth Circuit Court of Appeals sub silentio affirmed the judgment of the district court via The Mandate Rule on those claims, and created splits with every circuit, including its own. Why? Because petitioner has, for 12 years, sought to vindicate his right to keep and bear arms outside the doors to his home. The Ninth Circuit Court of Appeals refuses to recognize the right to keep and bear arms anywhere, including the home. The Ninth Circuit Court of Appeals knows that neither it nor any district court has the power or authority to overrule any Supreme Court precedent and yet is allowing the district court, to proceed without jurisdiction, for the purpose of allowing the district court to overrule this Court's binding opinions in *Heller*, *McDonald* and *Bruen*.

C. The Questions Presented are Exceptionally Important.

This Court granted the *Heller* cert petition because the District of Columbia made it a crime to carry loaded and unloaded rifles, shotguns, and handguns in the home, generally banned the possession of modern handguns, and required firearms to be unloaded, locked up, or disassembled.

This Court granted the cert petition in *McDonald* to establish that the Second Amendment right from *Heller* and the Second Amendment in full applies against all state and local governments via the Fourteenth Amendment.

This Court granted the cert petition in *Caetano* because the unanimous opinion of the Massachusetts State high court conflicted with *Heller*.

This Court granted the cert petition in *New York State Rifle & Pistol Association, Inc. v. City of New York,* 140 S. Ct. 1525 (2020) because the City prohibited the transportation of unloaded handguns, in a fully enclosed locked container, outside city limits. California prohibits petitioner from likewise transporting a handgun outside of his *home*.

This Court granted the *Bruen* cert petition because a minority of jurisdictions, including the most populous states, refuse to recognize the Second Amendment and because "circuits...have stubbornly resisted the controlling decisions of this Court in *Heller* and *McDonald*." The Ninth Circuit was, and continues to be, one of those circuits and will remain so as will the district court judges in petitioner's case unless this Court grants petitioner's petition and exercises its supervisory power.

If this Court does not grant this petition then it would be futile for petitioner to proceed. In two or three years or more from now when the district court overrules this Court's decisions in *Heller*, *McDonald* and *Bruen*, or contrives some procedural obstacle to it issuing an opinion, the same reasons for granting petitioner's Rule 11 petition today will be present then. A Rule 11 petition denied then would leave petitioner's appeal once again before a hostile court of appeals which it would delay deciding again for an additional decade and then remand back to the district court until it is confident that there is a majority of this Court that will overrule, *Heller*, *McDonald* and *Bruen*.

Petitioner is the first and only person to file a Federal lawsuit seeking to enjoin the enforcement of California's bans on openly carrying loaded and unloaded rifles, shotguns, and handguns outside the

doors to the home. The self-described gun-rights groups tell the public that they support Open Carry and oppose gun-free school zones but when in court argue in support of Open Carry bans, gun-free school zones, and other laws they purport to be challenging.

CONCLUSION

This petition for a writ of certiorari and certiorari before judgment should be granted.

Respectfully submitted,

CHARLES NICHOLS
Pro Se
P.O. Box 1302
Redondo Beach, CA 90278
(424) 634-7381
CharlesNichols@Pykrete.info

Petitioner in pro per

November 15, 2023