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9  
 10 IN THE UNITED STATES DISTRICT COURT  
 11 FOR THE CENTRAL DISTRICT OF CALIFORNIA  
 12 WESTERN DIVISION

13  
 14 **CHARLES NICHOLS,**  
 15  
 Plaintiff,  
 16  
 v.  
 17 **EDMUND G. BROWN, Jr., in his  
 official capacity as Governor of  
 18 California, KAMALA D. HARRIS,  
 Attorney General, in her official  
 19 capacity as Attorney General of  
 California, CITY OF REDONDO  
 20 BEACH, CITY OF REDONDO  
 BEACH POLICE DEPARTMENT,  
 21 CITY OF REDONDO BEACH  
 POLICE CHIEF JOSEPH  
 22 LEONARDI and DOES 1 to 10,**  
 23  
 Defendants.

CV-11-09916 SJO (SS)

**MEMORANDUM OF POINTS AND  
 AUTHORITIES IN SUPPORT OF  
 MOTION TO DISMISS ACTION  
 UNDER FED. R. CIV. P. 12(B)(1)**

Date: March 6, 2012  
 Time: 10:00 a.m.  
 Crtrm.: 23 – 3<sup>rd</sup> Flr.  
 Judge: Hon. Suzanne H.  
 Segal  
 Trial Date: Not Yet Set  
 Action Filed: Nov. 30, 2011

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1 **I. INTRODUCTION AND SUMMARY**

2 *Pro Se* Plaintiff Charles Nichols (“Nichols”) filed the complaint in this case to  
3 challenge the constitutionality of California Penal Code section 25850 (“Section  
4 25850”), which bans people from openly carrying loaded firearms in public places  
5 (but is subject to certain exceptions). Notably, Nichols does not allege that he has  
6 violated or made any plans to violate Section 25850, or that any defendant herein  
7 has threatened or taken any action to enforce this law against Nichols. Instead,  
8 Nichols claims that he has been thwarted from exercising his purported U.S. and  
9 California constitutional right openly to carry a loaded handgun in a public place  
10 simply by the mere existence of the statute.

11 While Nichols’s pre-enforcement challenge to Section 25850 would not be  
12 ripe as to any public-authority defendant, the challenge is particularly defective as  
13 to moving Defendant Kamala D. Harris, Attorney General of the State of California  
14 (the “Attorney General”), who is sued based solely on her California state  
15 constitutional supervisory powers over law enforcement, not on any action or  
16 threatened action of Harris. Nichols’s claims should be dismissed based on both the  
17 constitutional and jurisprudential doctrines requiring that federal courts hear only  
18 actual, live controversies. Similarly, the case warrants dismissal in that Nichols  
19 cannot legitimately invoke the “*Ex Parte Young*” exception to the Attorney  
20 General’s immunity from suit under the U.S. Constitution’s Eleventh Amendment  
21 (the “Eleventh Amendment”), because Nichols has not alleged any threat of  
22 enforcement against him of Section 25850 by the Attorney General. Finally,  
23 Nichols’s state-law claim against the Attorney General is also squarely barred by  
24 the Eleventh Amendment.

25 Moreover, various circumstances could render Section 25850 inapplicable to  
26 Nichols, if and when he ever carries a loaded firearm in a public place. For  
27 instance, the statute has an express self-defense exception that might apply to  
28

1 Nichols. Until Nichols so acts, and there is a concrete fact pattern to evaluate, it is  
2 prudent for the Court to defer considering this case.

3 In sum, the Court should dismiss this hypothetical case at this time, before the  
4 case wastes the time and resources of Nichols, the Attorney General, the other  
5 defendants, the attorneys, and the Court itself.

## 6 **II. BACKGROUND FACTS**

7 Nichols asserts that he resides in the City of Lawndale (Compl. ¶3) and  
8 “would openly carry a loaded and fully functional handgun in public for self-  
9 defense, but he refrains from doing so because he fears arrest, prosecution, fine, and  
10 imprisonment, as he understands it is unlawful to openly carry a handgun in  
11 California for the purpose of self-defense.” (Compl. ¶¶4, 15.) Nichols apparently  
12 wants to carry openly a loaded gun not in Lawndale but in another location, the  
13 City of Redondo Beach, and has sued that city, its police department, and its chief  
14 of police, to be able to do so. (Compl., ¶¶ 7-9.)

15 Nichols also names as a defendant the Attorney General, in her official  
16 capacity. (Compl. ¶ 6.) Nichols sues the Attorney General based solely on her role  
17 as the chief state law officer in California, her supervision over California district  
18 attorneys, sheriffs, and other law enforcement offices, and her other general state  
19 constitutional authority, and not for any action or threatened action. (Compl. ¶ 6.)<sup>1</sup>

20 Nichols claims the need to carry openly a loaded firearm both [1] because an  
21 unnamed person allegedly sent him a single “veiled” death threat a few months ago  
22 (Compl. ¶15), and [2] to prevent generic “vicious attacks at the hands of criminals  
23

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24 <sup>1</sup> Nichols delivered to the Attorney General’s Los Angeles office a summons  
25 also naming as a defendant herein Edmund G. Brown Jr., in his official capacity as  
26 Governor of the State of California (the “Governor”). The Attorney General  
27 typically represents the Governor in such litigation. Yet the Attorney General was  
28 not authorized to accept service of a summons and complaint for the Governor in  
this action. Thus, service on the Governor was not effective. See Fed. R. Civ. P.  
4(j)(2); Cal. Code Civ. Proc., § 416.50. In any event, like the Attorney General, the  
Governor is being sued solely because of his general California constitutional role  
as supreme executive of the state. (Compl. ¶ 5.)

1 and other predators.” (Compl. ¶¶51, 61-62, 70, 85.) Based on these alleged  
2 concerns and the purported authority of the U.S. and California Constitutions,  
3 Nichols requests that this Court invalidate and enjoin enforcement of Section 25850  
4 under the Second Amendment and on other grounds. (Compl., ¶¶ 60-89.)

5 Pertinent sub-section (a) of Section 25850 states:

6 A person is guilty of carrying a loaded firearm when the person carries a  
7 loaded firearm on the person or in a vehicle while in any public place or on  
8 any public street in an incorporated city or in any public place or on any public  
9 street in a prohibited area of unincorporated territory.

10 The statute has various exceptions, including self-defense (*see* Cal. Penal Code, §  
11 26045); also, people may apply for concealed weapons permits (*see id.*, §§ 25655,  
12 26150) -- but Nichols apparently has not done so.

13 Nichols challenges the Fourth Amendment constitutionality of Section  
14 25850’s sub-section (b), which states:

15 In order to determine whether or not a firearm is loaded for the purpose of  
16 enforcing this section, peace officers are authorized to examine any firearm  
17 carried by anyone on the person or in a vehicle while in any public place or on  
18 any public street in an incorporated city or prohibited area of an  
19 unincorporated territory. Refusal to allow a peace officer to inspect a firearm  
20 pursuant to this section constitutes probable cause for arrest for violation of  
21 this section.

22 (See the second and fourth claims in the complaint.)

23 Importantly, Nichols has not alleged that he is currently violating any portion  
24 of Section 25850 or that any public official, including the Attorney General, has  
25 threatened to enforce this statute against Nichols. Rather, as Nichols expressly  
26 alleges, Nichols’s purported harm is that he cannot legally openly carry a loaded  
27 handgun in public places, because of the existence of Section 25850.

28



1 Nichols's complaint also contains a lengthy discussion of the Second  
2 Amendment and recent court decisions on the "right to bear arms." (Compl., ¶¶ 22-  
3 47.) Nichols complains that California state courts are supposedly failing to  
4 recognize the U.S. Supreme Court's recent decisions on this federal constitutional  
5 issue. (Compl., ¶¶ 58-59.) The Attorney General can only surmise that Nichols  
6 includes these allegations because, if he ever actually carries a loaded gun in a  
7 public place, and if he ever suffers any actual prosecution for that offense, Nichols  
8 believes that California state courts cannot be trusted to recognize his asserted  
9 federal constitutional defenses.

10 Nichols also makes extensive allegations on other subjects, the relevance of  
11 which allegations are not clear.

- 12 • According to Nichols, California's ban on people carrying loaded  
13 firearms in public places originated in the 1960s because of certain alleged  
14 activities of the Black Panthers, but that ban is being applied today more  
15 broadly than the California Legislature ever intended. (Compl., ¶¶ 19-21.)
- 16 • Nichols also mentions a statutory exception to Section 25850 for people  
17 carrying loaded guns while hunting, and further mentions that the City of  
18 Redondo Beach imposes "a minor fine" for illegally hunting. (Compl., ¶¶ 16,  
19 48.)
- 20 • Nichols also alleges that he is unable to apply for a permit to carry a  
21 *concealed* firearm in a public place, because such permits supposedly are  
22 available (and can be lawfully used) in only those counties with  
23 populations of under 200,000 people. (Compl., ¶ 13; Cal. Pen. Code, §  
24 26150(b)(2).) Nichols provides no explanation why he has not applied for  
25 such a permit, an option that is available in all California counties. (Cal.  
26 Pen. Code, § 26150(a), (b)(1).) Nichols disavows any attack on the  
27 restrictions on the carrying of concealed firearms. (Compl., ¶ 37.)  
28

- 1 • Finally, Nichols alleges that his injury has been compounded because, as  
2 of 2012, California has also restricted the open carrying of *unloaded*  
3 firearms in public places. (Compl., ¶¶ 54-56.)

4 Despite mentioning other California Penal Code sections in the complaint, Nichols  
5 clearly attacks the constitutionality of Section 25850 only.

### 6 **III. PERTINENT LAW**

#### 7 **A. Fed. R. Civ. P. 12(b)(1)**

8 Federal Rule of Civil Procedure 12(b)(1) (hereinafter, “Rule 12(b)(1)”)   
9 permits dismissal of a complaint for lack of subject-matter jurisdiction. *See Safe Air*  
10 *for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). A Rule 12(b)(1)  
11 motion may be a facial attack asserting “that the allegations in the complaint are  
12 insufficient on their face to invoke federal jurisdiction.” *Safe Air*, 373 F.3d at 1039.  
13 Even though a Rule 12(b)(1) motion is brought by a litigant seeking dismissal of an  
14 adverse complaint for lack of subject-matter jurisdiction, “[t]he [opposing] party  
15 asserting jurisdiction has the burden of proving all jurisdictional facts.” *Indus.*  
16 *Tectonics, Inc. v. Aero Alloy*, 912 F.2d 1090, 1092 (9th Cir. 1990) (*citing McNutt v.*  
17 *Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936)). In effect, the court  
18 presumes lack of jurisdiction until the party invoking the court’s jurisdiction proves  
19 otherwise. *Kokkoen v. Guardian Life Ins. Co. of Amer.*, 511 U.S. 375, 377 (1994).

#### 20 **B. Applications of Fed. R. Civ. P. 12(b)(1)**

21 A 12(b)(1) motion is appropriately used to resolve at least three kinds of  
22 subject-matter jurisdiction issues, based on (1) “Article III standing,” (2) the related  
23 issue of “ripeness,” and/or (3) immunity under the Eleventh Amendment to the U.S.  
24 Constitution.

##### 25 **1. Article III Standing**

26 The U.S. Constitution grants federal courts power to adjudicate only live  
27 “cases” and “controversies.” U.S. Const., art. III, sec. 2 (hereinafter, “Article III”);  
28 *Alaska Right to Life Political Action Comm. v. Feldman*, 504 F.3d 840, 848 (9th

1 Cir. 2007). Federal courts should not issue advisory opinions or declare rights in  
2 hypothetical cases. *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134,  
3 1138 (9th Cir. 2000) (*en banc*). A Rule 12(b)(1) motion is a proper means to obtain  
4 the dismissal of a lawsuit that is not a case or controversy under Article III.  
5 *Rhoades v. Avon Prods., Inc.*, 504 F.3d 1151, 1157 n.3 (9th Cir. 2007).

6 **2. The Ripeness Doctrine**

7 “The doctrines of standing and ripeness are closely related.” *Pac. Legal*  
8 *Found. v. State Energy Resources Conservation & Dev. Comm'n*, 659 F.2d 903,  
9 915 (9th Cir. 1982). A claim not only must present a live case or controversy but  
10 also must be ripe for adjudication in federal court. See *Potman v. Cty. of Santa*  
11 *Clara*, 995 F.2d 898, 902 (9th Cir. 1993). The ripeness doctrine precludes a federal  
12 court from exercising jurisdiction over an action that is filed before a concrete  
13 dispute exists between the adverse parties. *Poe v. Ullman*, 367 U.S. 497, 507  
14 (1961). “Ripeness is properly addressed in a Rule 12(b)(1) motion to dismiss  
15 because it concerns subject matter jurisdiction.” *Summer H. v. Fukino*, Civ. No. 09-  
16 00047 SOM/BMK, 2009 WL 1249306, at \*4 n.1 (D. Haw. May 6, 2009) (*citing*  
17 *Gemtel Corp. v. Cmty. Redevelopment Agency*, 23 F.3d 1542, 1544 (9th Cir.  
18 1994)); *accord, St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989).

19 **3. Eleventh Amendment Immunity**

20 The Eleventh Amendment generally bars lawsuits in federal courts against  
21 officials of U.S. states, without the officials’ consent. See *Cardenas v. Anzai*, 311  
22 F.3d 929, 934 (9th Cir. 1999); *Artichoke Joe’s v. Norton*, 216 F. Supp. 2d 1084,  
23 1110-11 (E.D. Cal. 2002). Eleventh Amendment immunity is properly determined  
24 on a 12(b)(1) motion. See *Sofamor Danek Group, Inc. v. Brown*, 124 F.3d 1179,  
25 1183 n.2 (9th Cir. 1997).

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1 **IV. ARGUMENT**

2 **A. The Court Should Dismiss this Case for Lack of Article III**  
3 **Standing**

4 To establish Article III case-or-controversy standing, a plaintiff must satisfy  
5 three elements: (1) the plaintiff must have suffered an injury in fact that is concrete  
6 and particularized and actual or imminent, not conjectural or hypothetical; (2) said  
7 injury must be fairly traceable to the challenged action of the defendant; and (3) it  
8 must be likely, not just speculative, that said injury will be redressed by a favorable  
9 decision. *Friends of the Earth, Inc. v. Laidlaw Env'tl Servs. (TOC), Inc.*, 528 U.S.  
10 167, 180-81 (2000); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992);  
11 *Alaska Right to Life*, 504 F.3d at 848. A plaintiff has not suffered an injury in fact  
12 merely by speculating that he, she, or it will be the subject of a law-enforcement  
13 action to which there will be a constitutional defense. *Anchorage Equal Rights*, 220  
14 F.3d at 1139. Furthermore, a court must consider whether the alleged injury is  
15 “more than a generalized grievance” among other factors. *Alaska Right to Life*, 504  
16 F.3d at 849; *accord, Thomas*, 220 F.3d at 1139.

17 In the present case, Nichols has only an imaginary injury to claim, and thus  
18 fails to satisfy the above-identified first element for Article III standing. As noted  
19 above, Nichols asserts that he merely wants to be able openly to carry a loaded,  
20 fully-functional handgun in public, to deter a feared physical attack by an unnamed  
21 person who allegedly made to Nichols one veiled death threat, a full two months  
22 before Nichols filed the present lawsuit. (Compl., ¶15.) Nichols has not alleged that  
23 he has taken other self-protective actions, but allegedly did report the death-threat  
24 incident to the local sheriff’s office. (Compl., ¶15.) As noted above, Nichols could  
25 apply for a permit to carry a loaded, concealed firearm (although it is uncertain  
26 whether Nichols would qualify for such a permit), and, obviously, there are many  
27 other actions that Nichols could take to protect himself from any real threat. In any  
28 event, the Attorney General has not threatened to enforce Section 25850 against

1 Nichols, and her conduct has not injured Nichols in any concrete, particularized,  
2 actual, or imminent way.

3 Nichols is like the plaintiff Democratic Committee in *Renne v. Geary*, 501  
4 U.S. 312 (1991), which committee challenged an election law under the First  
5 Amendment. *Id.* at 314. That committee averred (in an affidavit) that it declined to  
6 endorse candidates for non-partisan elective offices “solely out of concern that  
7 committee members may be criminally or civilly prosecuted for violation of” a  
8 pertinent California election statute. *Id.* at 317-18. The U.S. Supreme Court held  
9 that the committee’s inactivity meant that the committee lacked standing to  
10 challenge the election law in court; there was just no case or controversy for a court  
11 to adjudicate. Likewise, Nichols’s inaction with respect to his handgun, and the  
12 related inaction of the Attorney General on this point, cannot constitute an injury to  
13 Nichols for Article III purposes.

14 Without an injury, Nichols cannot satisfy the second or third prongs of the  
15 Article III standing test, either, because those prongs assume the injury. A non-  
16 existent injury can be neither traced anywhere nor redressed by a favorable court  
17 decision.<sup>2</sup>

18 **B. The Court Should Dismiss this Case as Unripe**

19 The ripeness doctrine is designed to “prevent the courts, through avoidance of  
20 premature adjudication, from entangling themselves in abstract disagreements.”  
21 *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967). Ripeness has “both a  
22 constitutional and a prudential component.” *Id.* The “constitutional component of  
23 ripeness is synonymous with the injury-in-fact prong of the standing inquiry.” *Cal.*  
24 *Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1094 n.2 (9th Cir. 2003). For the  
25 prudential component of ripeness, courts evaluate “the fitness of the issues for

26 <sup>2</sup> Should Nichols, in responding to the present motion, identify in the  
27 complaint a viable injury that the Attorney General presently cannot discern, the  
28 Attorney General reserves the right to carry out the second and third parts of Article  
III standing analysis, based on that injury, in the reply brief for this motion.

1 judicial decision and the hardship to the parties of withholding court consideration.”  
2 *Abbot Labs. v. Gardner*, 387 U.S. 136 (1967) (abrogated on other grounds by  
3 *Califano v. Sanders*, 430 U.S. 99, 105 (1977)).

4 It already has been shown that Nichols has no injury for Article III standing  
5 purposes. The same analysis and reasoning undermine any notion that the case at  
6 bar is ripe in a constitutional sense.

7 Meanwhile, the prudential concerns in this case echo the prudential concerns  
8 in *Anchorage Equal Rights* that led to a finding of unripeness. In *Anchorage Equal*  
9 *Rights*, some Alaska landlords, out of religious beliefs, vowed never to rent housing  
10 to unmarried couples, despite state and local laws banning marital-status  
11 discrimination in rental housing; so the landlords challenged the laws in court on  
12 First Amendment grounds. 220 F.3d at 1137-38. The *en banc* U.S. Court of  
13 Appeals, Ninth Circuit, was dismayed that:

14 the landlords ask us to declare Alaska laws unconstitutional, in the absence of  
15 any identifiable tenants and with no concrete factual scenario that  
16 demonstrates how the laws, as applied, infringe their constitutional rights. This  
17 case is a classic one for invoking the maxim that we do not decide  
constitutional questions in a vacuum.

18 *Id.* at 1141 (citations and internal punctuation omitted). Nichols’s case, so far, is  
19 just as skeletal factually as *Anchorage Equal Rights*. Indeed, it might turn out that  
20 Nichol’s actual conduct, if ever taken, comes under the above-described self-  
21 defense exception to Section 25850, such that Nichols is not prosecuted, or  
22 prosecuted but not convicted, under Section 25850.<sup>3</sup> For these reasons, it is prudent

23 <sup>3</sup> California Penal Code section 26045 provides, in part, as follows:

24 (a) Nothing in Section 25850 is intended to preclude the carrying of any  
25 loaded firearm, under circumstances where it would otherwise be lawful, by a  
26 person who reasonably believes that any person or the property of any person is in  
immediate, grave danger and that the carrying of the weapon is necessary for the  
preservation of that person or property.

27 (b) A violation of Section 25850 is justifiable when a person who possesses a  
firearm reasonably believes that person is in grave danger because of circumstances  
forming the basis of a current restraining order issued by a court against another

(continued...)

1 for this Court to await the development of a concrete factual record before  
2 considering making substantive constitutional rulings about Section 25850. In the  
3 meantime, given Nichols’s inability to identify any concrete harm that he is  
4 suffering presently, there is no hardship in deferring an improper, premature  
5 adjudication of Nichols’s desire openly to carry a loaded firearm generally.

6 **C. The Eleventh Amendment Bars All of Nichols’s Claims Against**  
7 **The Attorney General**

8 For a state official to be legitimately subject to a lawsuit in federal court  
9 challenging the official’s oversight of a state law (in the “*Ex Parte Young*”  
10 exception to the Eleventh Amendment), not only must the official have a “fairly  
11 direct” connection with the enforcement of the law, but also “there must be a real  
12 threat of enforcement... Absent a real likelihood that the state official will employ  
13 his [or her] powers against plaintiffs’ interests, the Eleventh Amendment bars  
14 federal court jurisdiction.” *Long v. Van de Kamp*, 961 F.2d 151, 152 (9th Cir.  
15 1992); *Snoeck v. Brussa*, 153 F.3d 984, 987 (9th Cir. 1998) (“[T]he officers of the  
16 state must... threaten or be about to commence civil or criminal proceedings to  
17 enforce an unconstitutional act”).

18 As noted above, Nichols has not made any allegations that the Attorney  
19 General has threatened Nichols with a law-enforcement action, or made any move  
20 to commence civil or criminal proceedings, in connection with Nichols’s alleged  
21 desire openly to carry a loaded and fully functional handgun in public for self-  
22 defense. For that simple reason, under the Eleventh Amendment jurisprudence cited  
23

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24 (...continued)  
25 person who has been found to pose a threat to the life or safety of the person who  
26 possesses the firearm. ... Upon trial for violating Section 25850, the trier of fact  
shall determine whether the defendant was acting out of a reasonable belief that the  
defendant was in grave danger.

27 (c) As used in this section, “immediate” means the brief interval before and  
28 after the local law enforcement agency, when reasonably possible, has been notified  
of the danger and before the arrival of its assistance.

1 above, the Attorney General is and should by this Court be deemed immune to  
2 Nichols's complaint.

3 A deeper analysis just leads to the same conclusion. "In evaluating the  
4 genuineness of a claimed threat of prosecution, [a court should] look to [1] whether  
5 the plaintiff[] ha[s] articulated a 'concrete plan' to violate the law in question, [2]  
6 whether the prosecuting authorities have communicated a specific warning or threat  
7 to initiate proceedings, and [3] the history of past prosecution or enforcement under  
8 the challenged statute." *Anchorage Equal Rights*, 220 F.3d at 1139.

9 [1] By a "concrete plan...the Constitution means something more than a  
10 hypothetical intent to violate the law." *Id.* Notably, Nichols admits that he does not  
11 even have such a hypothetical intent to violate Section 25850. (Compl. ¶¶4, 15.)

12 [2] "Although [courts] do not require [a] plaintiff[] to await arrest or  
13 prosecution before entertaining a challenge to the constitutionality of a statute...the  
14 threat of enforcement must at least be credible, not simply imaginary or  
15 speculative." *Anchorage Equal Rights*, 220 F.3d at 1140 (citation and internal  
16 punctuation omitted); *Snoeck v. Brussa*, 153 F.3d at 987(officers of the state must  
17 threaten or be about to commence civil or criminal proceedings to enforce an  
18 unconstitutional act). As noted above, in the present case, the threat of enforcement  
19 is simply imaginary and speculative at this time.

20 [3] Regarding the history of enforcement of Section 25850, the Attorney  
21 general will concede for purposes of this motion only that, statewide, law-  
22 enforcement authorities have appropriately enforced Section 25850 -- to the benefit  
23 of the health and safety of everyone in California. (This partial concession does not  
24 overcome the two other factors in the analysis, or otherwise render this case ripe for  
25 adjudication.)

26 As can be seen quickly or by a longer look, Nichols cannot bypass the  
27 Eleventh Amendment to reach the Attorney General in this case.

28



1           **D. The Eleventh Amendment Bars Nichols’s Claim Based on the**  
2           **California Constitution**

3           Nichols’s seventh count, asserting a violation of parts of the California  
4           Constitution (Compl. ¶¶83-89), is squarely barred by *Pennhurst State Schs. &*  
5           *Hosp. v. Halderman*, 465 U.S. 89 (1984). Applying the Eleventh Amendment,  
6           *Pennhurst* holds that a federal court may not grant relief against a state official on  
7           the basis of state law. *Id.* at 106. Indeed, *Pennhurst* states that “it is difficult to think  
8           of a greater intrusion on state sovereignty than when a federal court instructs state  
9           officials on how to conform their conduct to state law.” *Id.* Plainly, then, the Court  
10          should dismiss Nichols’s seventh count for improperly attempting to have a federal  
11          court dictate to state officials how to enforce, or to refrain from enforcing, a  
12          California statute, Section 25850.

13          Furthermore, *Pennhurst*’s “constitutional bar applied to pendent claims as  
14          well.” 465 U.S. at 119. The Court should not maintain jurisdiction over the claim on  
15          state-law-claim pendency grounds, either.

16          **V. CONCLUSION**

17          Nichols has brought this lawsuit based only on his belief that he has a  
18          constitutional right openly to carry loaded firearms in public places. That belief  
19          does not suffice to create a cognizable case or controversy here. The case is not ripe  
20          for adjudication. The Eleventh Amendment bars the case against the Attorney  
21          General and also bars the California-constitution-based claim. The Attorney

22          //  
23          //  
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25          //  
26          //  
27          //

28

1 General respectfully requests that, under 12(b)(1), the Court dismiss this action  
2 because Nichols has failed to establish subject-matter jurisdiction.

3 Dated: January 30, 2012

Respectfully submitted,

4 KAMALA D. HARRIS  
5 Attorney General of California  
6 PETER SOUTHWORTH  
7 Supervising Deputy Attorney General

8 */s/ Jonathan M. Eisenberg*  
9 JONATHAN M. EISENBERG  
10 Deputy Attorney General  
11 *Attorneys for Defendants Governor's*  
12 *Office*

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## CERTIFICATE OF SERVICE

Case Name: **Nichols, Charles v. Edmund G. Brown Jr.** No. **11-cv-09916-SJO-SS**

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I hereby certify that on January 30, 2012, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS ACTION UNDER FED. R. CIV. P. 12(B)(1)**

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

I further certify that some of the participants in the case are not registered CM/ECF users. On January 30, 2012, I have caused to be mailed in the Office of the Attorney General's internal mail system, the foregoing document(s) by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within three (3) calendar days to the following non-CM/ECF participants:

Michael W. Webb  
City Prosecutor  
Redondo Beach City Attorney's Office  
401 Diamond Street  
Redondo Beach, CA 90277

Nichols Charles  
P.O. Box 1302  
Redondo Beach, CA 90278

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on January 30, 2012, at Los Angeles, California.

---

R. Velasco  
Declarant

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Signature