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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**  
**GOV. EDMUND G. BROWN JR.'S**  
**MOTION TO DISMISS ACTION**  
**UNDER FED. R. CIV. P. 12(B)(1)**  
 Date: April 10, 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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## TABLE OF CONTENTS

	<b>Page</b>
Introduction and Summary of Motion.....	1
Background Facts .....	2
Pertinent Law .....	5
Standards for FRCP 12(b)(1) Motions.....	5
I.    Eleventh Amendment Immunity .....	5
II.   Article III Standing.....	6
III.  The Ripeness Doctrine.....	6
Argument.....	6
I.    The Eleventh Amendment Bars all of Nichols’s Claims Against the Governor.....	7
A.  The Governor Lacks A Sufficient Connection to Enforcement of the Statute in Question.....	7
B.  The Governor Has Not Attempted to Enforce the Statute in Question Against Nichols.....	9
II.   The Court Should Dismiss this Case for Lack of Article III Standing .....	10
III.  The Court Should Dismiss this Case as Unripe.....	12
IV.  The Eleventh Amendment Bars Nichols’s Claim Based on the California Constitution .....	14
Conclusion.....	14

1  
2  
3  
4  
5  
6  
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## TABLE OF AUTHORITIES

**Page**

**CASES**

*Abbott Labs. v. Gardner*  
387 U.S. 136 (1967)..... 12

*Alaska Right to Life Political Action Comm. v. Feldman*  
504 F.3d 840 (9th Cir. 2007)..... 6, 11

*Artichoke Joe’s v. Norton*  
216 F. Supp. 2d 1084 (E.D. Cal. 2002)..... 5

*Cal. Pro-Life Council, Inc. v. Getman*  
328 F.3d 1088 (9th Cir. 2003)..... 12

*Califano v. Sanders*  
430 U.S. 99 (1977)..... 12

*Cardenas v. Anzai*  
311 F.3d 929 (9th Cir. 1999)..... 5

*Confederated Tribes & Bands of Yakama Indian Nation v. Locke*  
176 F.3d 467 (9<sup>th</sup> Cir. 1999)..... 8

*Dittman v. California*  
191 F.3d 1020 (9th Cir. 1999)..... 7

*Doe v. Lawrence Livermore Nat’l Lab.*  
131 F.3d 836 (9th Cir. 1997)..... 7

*Ex Parte Young*  
209 U.S. 123 (1908)..... 6

*Friends of the Earth, Inc. v. Laidlaw Env’tl Servs. (TOC), Inc.*  
528 U.S. 167 (2000)..... 10

*Gemtel Corp. v. Cmty. Redevelopment Agency*  
23 F.3d 1542 (9th Cir. 1994)..... 6

*Ibrahim v. Dep’t of Homeland Security*  
\_\_ F.3d \_\_, No. 10–15873, 2012 WL 390126 (9<sup>th</sup> Cir. 2012)..... 10

*Indus. Tectonics, Inc. v. Aero Alloy*  
912 F.2d 1090 (9th Cir. 1990)..... 5

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**TABLE OF AUTHORITIES**  
**(continued)**

	<b>Page</b>
<i>Kokkoen v. Guardian Life Ins. Co. of Amer.</i> 511 U.S. 375 (1994).....	5
<i>Long v. Van de Kamp</i> 961 F.2d 151 (9th Cir. 1992).....	7
<i>Los Angeles Cty. Bar Assn. v. Eu</i> 979 F.2d 697 (9th Cir. 1992).....	7-8
<i>Nat’l Audubon Soc’y, Inc. v. Davis</i> 307 F.3d 835 (9 <sup>th</sup> Cir. 2002).....	8
<i>Oil Co., Inc. v. Noel</i> 608 F.2d 208 (1st Cir. 1979).....	8
<i>Okpalabi v. Foster</i> 244 F.3d 405 (5 <sup>th</sup> Cir. 2001) ( <i>en banc</i> ) .....	8
<i>Pac. Legal Found. v. State Energy Resources Conservation &amp; Dev. Comm’n</i> 659 F.2d 903 (9th Cir. 1982).....	6
<i>Pac. Rivers Council v. U.S. Forest Serv.</i> ___ F.3d ___, No. 08-17565, 2012 WL336133 (9 <sup>th</sup> Cir. 2012) .....	10
<i>Pennhurst State Schs. &amp; Hosp. v. Halderman</i> 465 U.S. 89 (1984).....	14
<i>Poe v. Ullman</i> 367 U.S. 497 (1961).....	6
<i>Potman v. Cty. of Santa Clara</i> 995 F.2d 898 (9th Cir. 1993).....	6
<i>Renne v. Geary</i> 501 U.S. 312 (1991).....	11
<i>Rhoades v. Avon Prods., Inc.</i> 504 F.3d 1151 (9th Cir. 2007).....	6
<i>Safe Air for Everyone v. Meyer</i> 373 F.3d 1035 (9th Cir. 2004).....	5
<i>Snoeck v. Brussa</i> 153 F.3d 984 (9th Cir. 1998).....	7, 9

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**TABLE OF AUTHORITIES**  
**(continued)**

	<b>Page</b>
<i>Sofamor Danek Group, Inc. v. Brown</i> 124 F.3d 1179 (9th Cir. 1997).....	5
<i>St. Clair v. City of Chico</i> 880 F.2d 199 (9th Cir. 1989).....	6
<i>Thomas v. Anchorage Equal Rights Comm’n</i> 220 F.3d 1134 (9th Cir. 2000) ( <i>en banc</i> ) .....	passim
<i>Waste Mgmt. Holdings v. Gilmore</i> 252 F.3d 316 (4th Cir. 2001).....	8
<b>STATUTES</b>	
42 U.S.C. § 1983 .....	3, 7, 8
Cal. Pen. Code § 25850.....	passim
Cal. Pen. Code § 26045.....	2, 13
Cal. Pen. Code, § 26150(b)(2) .....	4
<b>CONSTITUTIONAL PROVISIONS</b>	
U.S. Const. Art. III Sect. 2 .....	5
U.S. Const. Amend. I .....	11, 13
U.S. Const. Amend. II.....	3, 4
U.S. Const. Amend. IV .....	3
U.S. Const. Amend. XI .....	passim
<b>COURT RULES</b>	
Fed. R. Civ. P. 12(b)(1).....	5, 6

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2  
3  
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**INTRODUCTION AND SUMMARY OF MOTION**

Defendant Edmund G. Brown Jr., Governor of the State of California (the “Governor”), files this motion to dismiss the complaint of *Pro Se* Plaintiff Charles Nichols (“Nichols”) in this matter. Nichols challenges the constitutionality of California Penal Code section 25850 (“Section 25850”), which generally bans people from openly carrying loaded firearms in public places in California, subject to certain express exceptions.

Defendant General Kamala D. Harris, Attorney General of the State of California, already has filed a motion to dismiss the case, and that motion is under submission. The present motion by the Governor makes similar arguments, except that the first argument, on immunity under the U.S. Constitution’s Eleventh Amendment (“Eleventh Amendment”; at pp. 6-8, *infra*), is tailored to the Governor’s circumstances. Nichols has erroneously named the Governor as a co-defendant solely because the Governor is the chief executive officer of California. The Governor does not enforce Section 25850. Given the Governor’s lack of sufficient connection to the enforcement of Section 25850, as well as the consequent lack of threats by the Governor to enforce the statute against Nichols, the Governor is immune from this suit under the Eleventh Amendment.

Assuming *arguendo* that the Court looks beyond the Eleventh Amendment barrier to the case against the Governor, Nichols lacks standing because he does not allege that he has violated or made any plans to violate Section 25850, or that any defendant in this case has threatened or taken any action to enforce this law against Nichols. Instead, Nichols claims that he has been thwarted from exercising his purported U.S. and California constitutional right openly to carry a loaded handgun in a public place in California, simply by the existence of the statute. Nichols’s claims should be dismissed as unripe under both the constitutional and jurisprudential doctrines requiring that federal courts hear only actual, live controversies. Moreover, various circumstances could render Section 25850

1 inapplicable to Nichols, if and when he ever carries a loaded firearm in a public  
2 place in California. For instance, the statute has an express self-defense exception,  
3 California Penal Code section 26045, that might apply to Nichols, should he ever  
4 do anything that actually risks prosecution under Section 25850. Until Nichols acts  
5 or makes concrete plans to act such that there is a real fact pattern to evaluate in this  
6 case, it is prudent for the Court to defer considering this case.

7 Finally, Nichols's state-law claim against the Governor is also squarely barred  
8 by the Eleventh Amendment.

### 9 STATEMENT OF FACTS

10 Nichols asserts that he resides in the City of Lawndale (Compl. ¶3) and  
11 "would openly carry a loaded and fully functional handgun in public for self-  
12 defense, but he refrains from doing so because he fears arrest, prosecution, fine, and  
13 imprisonment, as he understands it is unlawful to openly carry a handgun in  
14 California for the purpose of self-defense." (Compl. ¶¶4, 15.) Nichols apparently  
15 wants to carry openly a loaded handgun primarily or only in the City of *Redondo*  
16 *Beach*, and has sued *that* city, its police department, and its chief of police, to be  
17 able to do so. (Compl. ¶¶ 7-9.) For reasons that are not clear, Nichols has *not* sued  
18 his hometown of Lawndale or any of its departments or officials.

19 Nichols names as a defendant the Governor, in his official capacity. (Compl. ¶  
20 5.) Nichols sues the Governor based solely on his role as the supreme executive  
21 authority in California. (*Id.*)

22 Nichols claims the need to carry openly a loaded firearm both [1] because an  
23 unnamed person allegedly sent him a single "veiled" death threat on September 1,  
24 2011 (Compl. ¶15), and [2] to prevent generic "vicious attacks at the hands of  
25 criminals and other predators." (Compl. ¶¶51, 61-62, 70, 85.) Based on these  
26 alleged concerns and the purported authority of the U.S. and California  
27 Constitutions, Nichols requests that this Court invalidate and enjoin enforcement of  
28 Section 25850. (Compl. ¶¶ 60-89.)

1 Nichols's first and third claims for relief invoke 42 U.S.C. § 1983 and  
2 challenge the Second Amendment constitutionality of Section 25850's subdivision  
3 (a), which states:

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

8 The statute has various exceptions, including self-defense. (*See* Cal. Penal Code, §  
9 26045). Nichols's fifth and sixth claims for relief, also invoking 42 U.S.C. § 1983,  
10 challenge the same subdivision under the Fourteenth Amendment's equal protection  
11 and due process clauses.

12 Finally, the second and fourth claims for relief, likewise based on 42 U.S.C. §  
13 1983, challenge the Fourth Amendment constitutionality of Section 25850's sub-  
14 division (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 Notably, Nichols has not alleged that he is currently violating any portion of  
23 Section 25850, or even plans to do so, or that any public official, much less the  
24 Governor, has threatened to enforce this statute against Nichols. Rather, as Nichols  
25 expressly alleges, his purported harm is just that he cannot legally openly carry a  
26 loaded, functional handgun in public places, because of the existence of Section  
27 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 also makes extensive allegations on other subjects, the relevance of  
4 which are not clear.

- 5 • According to Nichols, California's ban on people carrying loaded  
6 firearms in public places originated in the 1960s because of certain alleged  
7 activities of the Black Panthers, but that ban is being applied today more  
8 broadly than the California Legislature ever intended. (Compl. ¶¶ 19-21.)
- 9 • Nichols mentions a statutory exception to Section 25850 for people  
10 carrying loaded guns while hunting, and further mentions that the City of  
11 Redondo Beach imposes "a minor fine" for illegally hunting. (Compl. ¶¶ 16,  
12 48.)
- 13 • Nichols alleges that he is unable to apply for a *permit* to carry openly a  
14 firearm in a public place in Los Angeles County, because such permits  
15 supposedly are available (and can be lawfully used) in only those counties  
16 with populations of under 200,000 people; this rule excludes the much more  
17 populous Los Angeles County, where Nichols lives. (Compl. ¶ 13; Cal. Pen.  
18 Code, § 26150(b)(2).)
- 19 • Nichols disavows any attack on the restrictions on the carrying of  
20 *concealed* firearms. (Compl. ¶ 37.)
- 21 • Finally, Nichols alleges that his injury has been compounded because, as  
22 of 2012, California has also restricted the open carrying of *unloaded* firearms  
23 in public places. (Compl. ¶¶ 54-56.)

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

1                   **STANDARDS FOR FRCP 12(B)(1) MOTIONS TO DISMISS**

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

14                   A 12(b)(1) motion is appropriately used to resolve at least three kinds of   
15 subject-matter jurisdiction issues, based on (1) immunity under the Eleventh   
16 Amendment; (2) “Article III standing”; and (3) the related issue of “ripeness.”

17                   **I.       ELEVENTH AMENDMENT IMMUNITY**

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

24                   **II.   ARTICLE III STANDING**

25                   The U.S. Constitution grants federal courts power to adjudicate only live   
26 “cases” and “controversies.” U.S. Const., art. III, sec. 2 (hereinafter, “Article III”);   
27 *Alaska Right to Life Political Action Comm. v. Feldman*, 504 F.3d 840, 848 (9th   
28 Cir. 2007). Federal courts should not issue advisory opinions or declare rights in

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

### 5 III. RIPENESS

6 “The doctrines of standing and ripeness are closely related.” *Pac. Legal*  
7 *Found. v. State Energy Resources Conservation & Dev. Comm'n*, 659 F.2d 903,  
8 915 (9th Cir. 1982). A claim not only must present a live case or controversy but  
9 also must be ripe for adjudication in federal court. *See Potman v. Cty. of Santa*  
10 *Clara*, 995 F.2d 898, 902 (9th Cir. 1993). The ripeness doctrine precludes a federal  
11 court from exercising jurisdiction over an action that is filed before a concrete  
12 dispute exists between the adverse parties. *Poe v. Ullman*, 367 U.S. 497, 507  
13 (1961). Ripeness is properly addressed in a Rule 12(b)(1) motion to dismiss  
14 because it concerns subject matter jurisdiction. *See Gemtel Corp. v. Cmty.*  
15 *Redevelopment Agency*, 23 F.3d 1542, 1544 (9th Cir. 1994); *accord, St. Clair v.*  
16 *City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989).

## 17 ARGUMENT

### 18 I. THE ELEVENTH AMENDMENT BARS ALL OF NICHOLS’S CLAIMS 19 AGAINST THE GOVERNOR

20 Under an exception to the Eleventh Amendment, a state official can  
21 sometimes be legitimately subject to a lawsuit in federal court challenging the  
22 official’s oversight of a state law. *See Ex Parte Young* 209 U.S. 123, 155-56, 159-  
23 60 (1908). For this doctrine to apply, however, the official must have a “fairly  
24 direct” connection with the enforcement of the law, *and* “there must be a real threat  
25 of enforcement... Absent a real likelihood that the state official will employ his [or  
26 her] powers against plaintiffs’ interests, the Eleventh Amendment bars federal court  
27 jurisdiction.” *Long v. Van de Kamp*, 961 F.2d 151, 152 (9th Cir. 1992); *Snoeck v.*  
28 *Brussa*, 153 F.3d 984, 987 (9th Cir. 1998) (“[T]he officers of the state

1 must... threaten or be about to commence civil or criminal proceedings to enforce  
2 an unconstitutional act”).

3 In the present case, the Governor has an insufficient connection to the  
4 enforcement of Section 25850 -- nothing more than being the Governor of  
5 California, which has this law -- and, consequently, has not attempted to enforce  
6 that statute. He should be dismissed from this action.

7 **A. The Governor Lacks A Sufficient Connection to Enforcement of**  
8 **the Statute in Question**

9 “Claims under [42 U.S.C.] § 1983 are limited by the scope of the Eleventh  
10 Amendment.” *Doe v. Lawrence Livermore Nat’l Lab.*, 131 F.3d 836, 839 (9th Cir.  
11 1997). “In the absence of a waiver by the state or a valid congressional override,  
12 ‘[u]nder the Eleventh Amendment, agencies of the state are immune from private  
13 damage actions or suits for injunctive relief brought in federal court.’” *Dittman v.*  
14 *California*, 191 F.3d 1020, 1025 (9th Cir. 1999). “The State of California has not  
15 waived its Eleventh Amendment immunity with respect to claims brought under §  
16 1983 in federal court” and “the Supreme Court has held that § 1983 was not  
17 intended to abrogate a State’s Eleventh Amendment immunity.” *Id.* at 1025-1026.

18 This immunity extends to a California state official, such as the Governor,  
19 sued in his official capacity: “A suit against a state official in his official capacity  
20 is no different from a suit against the State itself.” *Lawrence Livermore*, 131 F.3d  
21 at 839.

22 Federal courts have recognized one exception to the general rule treating state  
23 officials the same as the State: “When sued for prospective injunctive relief, a state  
24 official in his official capacity is considered a ‘person’ for § 1983 purposes” and  
25 potentially subject to suit. *Lawrence Livermore*, 131 F.3d at 839. However, “the  
26 state officer sued ‘must have some connection with the enforcement of the  
27 [allegedly unconstitutional] act.’” *Los Angeles Cty. Bar Assn. v. Eu*, 979 F.2d 697,  
28 704 (9th Cir. 1992) (original brackets). Indeed, “this connection must be fairly

1 direct; a generalized duty to enforce state law or general supervisory power over the  
2 persons responsible for enforcing the challenged provision will not subject an  
3 official to suit.” *Id.*; accord, *Nat’l Audubon Soc’y, Inc. v. Davis*, 307 F.3d 835, 847  
4 (9<sup>th</sup> Cir. 2002).

5 Nichols’s complaint does not allege any facts that would establish this  
6 connection. The Governor does not have a role in enforcing Section 25850.  
7 Consequently, Nichols alleges nothing more than that the Governor is the chief  
8 executive of the State. If such allegations were sufficient, then the Governor would  
9 be a proper defendant in every case in which a plaintiff seeks prospective injunctive  
10 relief against California under 42 U.S.C. § 1983. But numerous federal courts,  
11 including the Ninth Circuit on two occasions, have recognized that state governors  
12 cannot be legitimately named as defendants on prospective-relief claims on this  
13 basis. *See, e.g., Nat’l Audubon*, 307 F.3d at 847 (California governor dismissed  
14 from challenge to proposition banning use of certain traps and poisons against  
15 certain wildlife, for lack of enforcement ability); *Confederated Tribes & Bands of*  
16 *Yakama Indian Nation v. Locke*, 176 F.3d 467, 469-70 (9<sup>th</sup> Cir. 1999) (Washington  
17 governor dismissed from Native American tribes’ challenge to state lottery, because  
18 governor had no involvement with operation of lottery); *Waste Mgmt. Holdings v.*  
19 *Gilmore*, 252 F.3d 316, 331 (4<sup>th</sup> Cir. 2001) (Virginia governor, although under a  
20 general duty to enforce state laws, dismissed from action where he lacked a specific  
21 duty to enforce the challenged landfill-management statutes); *Okpalabi v. Foster*,  
22 244 F.3d 405, 416 (5<sup>th</sup> Cir. 2001) (*en banc*) (“general charge of the governor...to  
23 implement and enforce all of the laws of the state” insufficient to make Louisiana  
24 governor proper defendant in lawsuit challenging state tort statute); *Shell Oil Co.,*  
25 *Inc. v. Noel*, 608 F.2d 208, 211 (1<sup>st</sup> Cir. 1979) (“The mere fact that a governor is  
26 under a general duty to enforce state laws does not make him a proper defendant in  
27 every action attacking the constitutionality of a state statute”). On the facts and the  
28 law, the Governor should be dismissed as a defendant in this case.

1           **B. The Governor Has Not Attempted to Enforce the Statute in**  
2           **Question Against Nichols**

3           As noted above, Nichols has not made any allegations that the Governor has  
4 threatened Nichols with a law enforcement action, or made any move to commence  
5 civil or criminal proceedings, in connection with Nichols’s alleged desire openly to  
6 carry a loaded and fully functional handgun in public for self-defense. As noted  
7 above, the *Ex Parte Young* exception to Eleventh Amendment immunity requires  
8 both that an official have a connection to enforcement of the law *and* that there be a  
9 threat of enforcement. *Long v. Van de Kamp*, 961 F.2d 151, 152. Just as Nichols  
10 does not plead a sufficient connection between the Governor and Section 25805, he  
11 also fails to allege a sufficient threat of enforcement to establish an exception to the  
12 Governor’s Eleventh Amendment immunity.

13           “In evaluating the genuineness of a claimed threat of prosecution, [a court  
14 should] look to [1] whether the plaintiff[] ha[s] articulated a ‘concrete plan’ to  
15 violate the law in question, [2] whether the prosecuting authorities have  
16 communicated a specific warning or threat to initiate proceedings, and [3] the  
17 history of past prosecution or enforcement under the challenged statute.”  
18 *Anchorage Equal Rights*, 220 F.3d at 1139.

19           [1] By a “concrete plan...the Constitution means something more than a  
20 hypothetical intent to violate the law.” *Id.* Notably, Nichols admits that he does  
21 not even have such a hypothetical intent to violate Section 25850. (Compl. ¶¶4,  
22 15.)

23           [2] “Although [courts] do not require [a] plaintiff[] to await arrest or  
24 prosecution before entertaining a challenge to the constitutionality of a statute...the  
25 threat of enforcement must at least be credible, not simply imaginary or  
26 speculative.” *Anchorage Equal Rights*, 220 F.3d at 1140 (citation and internal  
27 punctuation omitted); *Snoeck v. Brussa*, 153 F.3d at 987(officers of the state must  
28 threaten or be about to commence civil or criminal proceedings to enforce an

1 unconstitutional act). As noted above, in the present case, the threat of enforcement  
2 by the Governor is simply imaginary and speculative at this time.

3 [3] Nichols has not alleged a history of enforcement of Section 25850 that  
4 could affect him. Of course, the Governor presumes that this part of the California  
5 Penal Code (as all parts) is being applied appropriately, fairly, and uniformly, but  
6 there is no concrete allegation helpful to Nichols with respect to this factor.

7 In sum, Nichols cannot bypass the Eleventh Amendment to reach the  
8 Governor in this case.

9 **II. THE COURT SHOULD DISMISS THIS CASE FOR LACK OF ARTICLE III**  
10 **STANDING**

11 Even if this action was not barred by the Eleventh Amendment, it is not  
12 justiciable in federal court because Nichols lacks standing.

13 To have standing under Article III, a plaintiff must establish that (1) it  
14 has suffered an “injury in fact” that is (a) concrete and particularized and  
15 (b) actual or imminent, not conjectural or hypothetical; (2) the injury is  
16 fairly traceable to the challenged action of the defendant; and (3) it is  
17 likely, as opposed to merely speculative, that the injury will be redressed  
18 by a favorable decision.

19 *Pac. Rivers Council v. U.S. Forest Serv.*, \_\_\_ F.3d \_\_\_, \_\_\_, No. 08-17565, 2012  
20 WL336133 at \*7 (Feb. 3, 2012); *see also Friends of the Earth, Inc. v. Laidlaw*  
21 *Env’tl Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000).

22 A plaintiff has not suffered an injury in fact merely by speculating (as Nichols  
23 does here) that he will be the subject of a law enforcement action to which there  
24 will be a constitutional defense. *Anchorage Equal Rights*, 220 F.3d at 1139. As  
25 recently reiterated by the U.S. Court of Appeals for the Ninth Circuit, a plaintiff  
26 does not have standing to challenge enforcement of a law based on “hypothetical  
27 some day intentions” to take actions that might run afoul of a law. *Ibrahim v. Dep’t*  
28 *of Homeland Security*, \_\_\_ F.3d \_\_\_, \_\_\_, No. 10–15873, 2012 WL 390126 at \*8 (9<sup>th</sup>

1 Cir. Feb. 8, 2012) (citation and internal punctuation omitted). Furthermore, a court  
2 must consider whether the alleged injury is “more than a generalized grievance”  
3 among other factors. *Alaska Right to Life*, 504 F.3d at 849; *accord*, *Thomas*, 220  
4 F.3d at 1139.

5 In the present case, Nichols has only an imaginary injury to claim, and thus  
6 fails to satisfy the above-identified first element for Article III standing. Nichols  
7 asserts that he merely *wants to be able* openly to carry a loaded, fully-functional  
8 handgun in public in California, to deter a feared physical attack by an unnamed  
9 person who allegedly made to Nichols one veiled death threat, a full two months  
10 before Nichols filed the present lawsuit. (Compl. ¶15.) Nichols has not alleged  
11 that he has taken other self-protective actions, but allegedly did report the death  
12 threat incident to the local sheriff’s office. (*Id.*) In any event, the Governor is not  
13 in a position to, and has not, threatened to enforce Section 25850 against Nichols,  
14 and the Governor’s conduct has not injured Nichols in any concrete, particularized,  
15 actual, or imminent way.

16 Nichols is like the plaintiff in *Renne v. Geary*, 501 U.S. 312 (1991); that  
17 plaintiff, a committee, unsuccessfully challenged an election law under the First  
18 Amendment. The committee averred (in an affidavit) that it declined to endorse  
19 candidates for non-partisan elective offices “solely out of concern that committee  
20 members may be criminally or civilly prosecuted for violation of” a pertinent  
21 California election statute. *Id.* at 314, 317-18. The U.S. Supreme Court held that  
22 the committee’s inactivity meant that the committee lacked standing to challenge  
23 the election law in court; there was just no case or controversy for a court to  
24 adjudicate. *Id.* Likewise, Nichols’s inaction with respect to his handgun cannot  
25 constitute an injury to Nichols for Article III purposes.

26 Without an injury, Nichols cannot satisfy the second or third prongs of the  
27 Article III standing test, either, because those prongs assume the injury. A non-  
28



1 existent injury can be neither traced anywhere nor redressed by a favorable court  
2 decision.<sup>1</sup>

3 **III. THE COURT SHOULD DISMISS THIS CASE AS UNRIPE**

4 Even if Nichols were able to overcome the Eleventh Amendment and standing  
5 prohibitions on the present action, it would still not be ripe for adjudication. The  
6 ripeness doctrine is designed to “prevent the courts, through avoidance of  
7 premature adjudication, from entangling themselves in abstract disagreements.”  
8 *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967) (abrogated on other grounds by  
9 *Califano v. Sanders*, 430 U.S. 99, 105 (1977)). Ripeness has “both a constitutional  
10 and a prudential component.” *Abbott Labs.*, 387 U.S. at 148. The “constitutional  
11 component of ripeness is synonymous with the injury-in-fact prong of the standing  
12 inquiry.” *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1094 n.2 (9th Cir.  
13 2003). For the prudential component of ripeness, courts evaluate “the fitness of the  
14 issues for judicial decision and the hardship to the parties of withholding court  
15 consideration.” *Abbott Labs.*, 387 U.S. at 149.

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

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

26 <sup>1</sup> Should Nichols, in responding to the present motion, identify in the  
27 complaint a viable injury that the Governor presently cannot discern, the Governor  
28 reserves the right to carry out the second and third parts of Article III standing  
analysis, based on that injury, in a reply filing on this motion.

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

6 *Id.* at 1141 (citations and internal punctuation omitted). Nichols’s case, so far, is  
7 just as skeletal factually as *Anchorage Equal Rights*. Indeed, it might turn out that  
8 Nichol’s actual conduct, if ever taken, comes under the above-described self-  
9 defense exception to Section 25850, such that Nichols is not prosecuted, or  
10 prosecuted but not convicted, under Section 25850.<sup>2</sup> For these reasons, it is prudent  
11 for this Court to await the development of a concrete factual record before  
12 considering making substantive constitutional rulings about Section 25850. In the  
13 meantime, given Nichols’s inability to identify any concrete harm that he is  
14 suffering presently, there is no hardship in deferring an improper, premature  
15 adjudication of Nichols’s desire openly to carry a loaded firearm generally.

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19 \_\_\_\_\_  
20 <sup>2</sup> California Penal Code section 26045 provides, in part, as follows:

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

26 (b) A violation of Section 25850 is justifiable when a person who possesses a  
27 firearm reasonably believes that person is in grave danger because of circumstances  
28 forming the basis of a current restraining order issued by a court against another  
person who has been found to pose a threat to the life or safety of the person who  
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.

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

1 **IV. 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  
8 think of a greater intrusion on state sovereignty than when a federal court instructs  
9 state officials on how to conform their conduct to state law.” *Id.* The Court should  
10 dismiss Nichols’s seventh count for improperly attempting to have a federal court  
11 dictate to state officials how to enforce, or to refrain from enforcing, a California  
12 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  
15 on state-law-claim pendency grounds, either.

16 **CONCLUSION**

17 The Governor’s lack of a fairly direct connection to the enforcement of  
18 Section 25850 precludes Nichols’s case against the Governor, under the Eleventh  
19 Amendment. The Governor is also immune because he has not threatened to  
20 enforce Section 25850 against Nichols. Nichols has not suffered any injury  
21 cognizable under the case-or-controversy subject-matter jurisdiction requirement in  
22 federal courts and therefore lacks standing. For many of the same reasons, this  
23 action is unripe and not justiciable. Finally, the Eleventh Amendment precludes  
24 Nichols’s state-law-based attack on Section 25850 from being adjudicated in this  
25 Court. The Governor therefore respectfully requests that, under FRCP 12(b)(1), the

26 //

27 //

28 //

1 Court dismiss this action because Nichols has failed to establish subject-matter  
2 jurisdiction.

3 Dated: March 8, 2012

Respectfully submitted,

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

8 */s/ Jonathan M. Eisenberg*  
9 JONATHAN M. EISENBERG  
10 Deputy Attorney General  
11 *Attorneys for Defendant California*  
12 *Governor Edmund G. Brown Jr.*

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## CERTIFICATE OF E-FILING AND SERVICE

Case Name: Nichols v. Brown No. U.S.D.C., C.D. Cal., 11-cv-09916-SJO-SS

I hereby certify that, on March 8, 2012, I caused to be electronically filed with the U.S. District Court, Central District of California, Clerk of the Court, through the CM/ECF system, the document(s) with the following title(s):

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF GOV. EDMUND G. BROWN JR.'S MOTION TO DISMISS ACTION UNDER FED. R. CIV. P. 12(B)(1)**

I certify that at least some of the participants in the above-entitled case are registered CM/ECF users.

I am employed in Los Angeles, California, in the Office of the Attorney General, Department of Justice, State of California ("OACG"), which is the office of a member of the California State Bar, at which member's direction the following service is made.

I am 18 years of age or older and not a party to this matter. I am familiar with the business practices at the OACG for collection and processing of correspondence for mailing with the U.S. Postal Service. In accordance with those practices, correspondence placed in the internal mail collection system at the OACG is deposited with the U.S. Postal Service, with postage thereon fully prepaid, that same day, in the ordinary course of business.

I further certify that at least some of the participants in the case are not registered CM/ECF users.

On March 8, 2012, I caused to be mailed, in the OACG's internal mail system, by First-Class Mail, postage prepaid, the foregoing document(s) to the following person(s) at the following address(es):

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

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on March 8, 2012, at Los Angeles, California.

R. Velasco  
Declarant

/s/ R. Velasco  
Signature