Charles Nichols
PO Box 1302
Redondo Beach, CA 90278
Tel. No. (424) 634-7381
e-mail: CharlesNichols@Pykrete.info
In Pro Per

June 21, 2017
by cm/ecf

Ms. Molly C. Dwyer
Clerk, United States Court of Appeals
for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103

RE: *Charles Nichols v. Edmund Brown, Jr., et al* 9th Cir. No.: 14-55873;
Rule 28(j) letter

Dear Ms. Dwyer:

Plaintiff-Appellant Nichols submits *McCALIP v. TED CONFERENCES, LLC, Court of Appeals,* No. 16-55510 (9th Cir. May 10, 2017) as supplemental authority (FRAP 28(j) and 32.1).

Appellees Governor Brown and Attorney General Becerra seek to submit new evidence on appeal in their Answering Brief at 39-43 and in their Addendum in which nearly all of the 280 page Addendum constitutes new evidence (except for the California Code sections).

> "We do not consider evidence, allegations, or arguments raised for the first time on appeal. See *Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009); *Lowry v. Barnhart*, 329 F.3d 1019, 1025 (9th Cir. 2003) ("The appellate process is for addressing the legal issues a case presents, not for generating new evidence to parry an opponent's arguments."); *United States v. Elias*, 921 F.2d 870, 874 (9th Cir. 1990) ("Documents or facts not presented to the district court are not part of the record on appeal."). Slip Op. at 2-3.

Even if this were a trial court and the "evidence" were admissible under the Federal Rules of Evidence (doubtful), it is inapposite.

For example, they claim in their Answering Brief at 39-40 that sufficient scholarship supports the legislative bans on Open Carry. Not forgetting the fact that the Constitution controls this case, their evidence fails.

> "The evidence for laws restricting guns in public places and leniency in gun carrying was mixed." ADD267.
>
> "3 studies...examined firearm laws regulating permits for open carry along with other firearm laws. None of these studies found an association between these laws and firearm homicide rates." ADD278.

The Appellees changed their argument on appeal. In the district court it was the Open Carry right defined in *Heller* does not apply to the states until the Supreme Court decides an Open Carry case. Now, on appeal, they argue there is no Second Amendment Open Carry right. They argue that *Heller*, *McDonald* and *Caetano* were wrongly decided. Reply Brief at 10.

The danger that concealed carry presents to the public is not in dispute. Opening Brief at 59 (*People v. Mitchell*).

Open Carry enhances public safety. *Mitchell* at 1371.

The body of this letter contains 349 words.

Sincerely,

s/ Charles Nichols

Charles Nichols
Plaintiff-Appellant in Pro Per

cc: counsel of record (by cm/ecf)

NOT FOR PUBLICATION

FILED

MAY 10 2017

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GEO EDWARD McCALIP, Plaintiff-Appellant, v. TED CONFERENCES, LLC; SAPLING FOUNDATION, Defendants-Appellees.	No. 16-55510 D.C. No. 2:15-cv-01121-AB-GJS MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Andre Birotte, Jr., District Judge, Presiding

Submitted May 8, 2017**

Before: REINHARDT, LEAVY, and NGUYEN, Circuit Judges.

Geo Edward McCalip appeals pro se from the district court's judgment dismissing his 42 U.S.C. § 1983 action alleging various federal and state law claims. We have jurisdiction under 28 U.S.C. § 1291. We review de novo a dismissal for failure to state a claim under Fed. R. Civ. P. 12(b)(6). *Hebbe v.*

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Pliler, 627 F.3d 338, 341 (9th Cir. 2010). We affirm.

The district court properly dismissed McCalip's 42 U.S.C. § 1983 and Cal. Civ. Code § 52.1 claims because McCalip failed to allege facts sufficient to show that defendants acted under the color of state law. *See Chudacoff v. Univ. Med. Ctr. of S. Nev.*, 649 F.3d 1143, 1149 (9th Cir. 2011) (elements of § 1983 action); *Dietrich v. John Ascuaga's Nugget*, 548 F.3d 892, 900 (9th Cir. 2008) ("Merely complaining to the police does not convert a private party into a state actor." (citation and internal quotation marks omitted)); *Jones v. Kmart Corp.*, 949 P.2d 941, 943-44 (Cal. 1998) (private individual cannot be liable under § 52.1 for alleged direct violation of federal constitutional right).

The district court properly dismissed McCalip's Cal. Civ. Code § 3294 claim because McCalip did not allege facts demonstrating malice, oppression, or fraud. *See* Cal. Civ. Code § 3294 (requirements for punitive damages under California law).

We reject as unsupported by the record McCalip's contentions regarding defendants misleading the district court.

We do not consider evidence, allegations, or arguments raised for the first time on appeal. *See Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009);

Lowry v. Barnhart, 329 F.3d 1019, 1025 (9th Cir. 2003) ("The appellate process is for addressing the legal issues a case presents, not for generating new evidence to parry an opponent's arguments."); *United States v. Elias*, 921 F.2d 870, 874 (9th Cir. 1990) ("Documents or facts not presented to the district court are not part of the record on appeal."). To the extent McCalip requests in his opening brief that we vacate and remand so that he may introduce allegations and evidence related to contracts between defendants and the City of Long Beach that were in McCalip's possession, but not introduced, during the underlying proceedings, we deny the request.

AFFIRMED.

9th Circuit Case Number(s) 14-55873

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Signature (use "s/" format) s/ Charles Nichols

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