No. 12-15498 [Dist Ct. No.: 2:10-CV-02911-JAM-EFB]

IN THE
UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

RICHARDS ENOS; et al.,
Plaintiffs - Appellants,

vs.

ERIC HOLDER; et al.,
Defendants - Appellees.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

APPELLANTS' REPLY BRIEF

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CORPORATE DISCLOSURE STATEMENT

The MADISON SOCIETY, a not-for-profit Nevada Corporation with its registered place of business in Carson City, Nevada. The Madison Society has chapters throughout California. The society is a membership organization whose purpose is preserving and protecting the legal and constitutional right to keep and bear arms for its members and all responsible law-abiding citizens. It is not a publicly traded corporation.

The MADISON SOCIETY has provided significant funding of this suit.

Dated: September 21, 2012

/s/ Donald Kilmer

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SUMMARY OF REPLY

The Appellees' Brief fails to address the central and primary controversies of this case: (1) Did the U.S. Congress intend to create – in the LAUTENBERG AMENDMENT – some kind of state sponsored procedure for restoring the SECOND AMENDMENT rights of persons convicted of Misdemeanor Crimes of Domestic Violence (MCDV)? (2) If the federal law clearly provides for the restoration of those Constitutional rights, why does the executive branch of the federal government refuse to honor California's restoration procedures?

Appellees persistently mis-characterize Appellants' arguments regarding the TENTH and SECOND AMENDMENT infirmities of the LAUTENBERG AMENDMENT. Our argument is that LAUTENBERG is subject to constitutional challenge – if and only if – that statutory scheme results in a lifetime forfeiture of a fundamental constitutional right upon conviction of a misdemeanor, without **any** prospect of restoring those right. Appellants have consistently maintained that this Court can avoid the Constitutional controversy by interpreting the statutory language of LAUTENBERG AMENDMENT in the way the Appellants have advanced. That it is a potentially reasonable policy designed to mitigate the consequences of (even minor crimes involving)

domestic violence by disarming aggressors whose conduct does not warrant a felony conviction. But that LAUTENBERG also sets forth a policy recognizing that a misdemeanor conviction should not result in a lifetime forfeiture of fundamental rights.

Appellees also misconstrue Appellants' arguments regarding "expungement of a conviction" vs. "restoration of rights." Appellants have never advanced the argument that California's expungement statutes – Penal Code §§ 1203.4 and 1203.4a – work to restore their SECOND AMENDMENT rights. The plain language of those statutes speaks to that point. However, those statutes do permit the Appellants to truthfully allege that they are presently law-abiding citizens after having successfully completed probation, and after a judge overseeing their case vacated their plea and dismissed the accusatory pleading against them.

It is California Penal Code § 12021 [29800-29875][1] that **both** revoked the Plaintiffs' SECOND AMENDMENT rights upon conviction of a MCDV and then restored those rights after ten years of law-abiding conduct by operation of law.

[1] California has reorganized its Deadly Weapon Statutes with the new numbers taking effect January 1, 2012. The old provision is cited and the new provision is bracketed throughout this brief.

Appellees go on to make flawed arguments that equate felonies to misdemeanors. They cite cases that have necessarily been superceded by recent Supreme Court opinions. They even attempt to persuade this Court to adopt constitutional tests that have been explicitly rejected by the Supreme Court.

This Court of Appeals should vacate the judgment and remand the case to the trial court with instructions consistent with current interpretations of federal law in this field.

RE: APPELLEES' STATEMENT OF THE CASE

Appellees use a somewhat curious turn of phrase in their STATEMENT OF ISSUES [BFTA[2], p. 2] when they claim that 18 U.S.C. § 922(g)(9) only "restricts" the SECOND AMENDMENT rights of any person convicted of an MCDV. That 1996 statute, known as the LAUTENBERG AMENDMENT, operates as a lifetime ban unless the definition-based relief from that forfeiture found at 18 U.S.C. § 921(a)(33)(B) is realized under the laws of the state of conviction.

Appellees then go on to accurately set forth the procedural posture of the case. Except it bears repeating that Plaintiffs' Fed.R.Civ.P. 56

[2] Brief for the Appellees = BFTA. Appellants' Opening Brief = AOB.

Motion for Summary Judgment was mooted by the trial court's granting of the Defendants' rule 12(b)(1) and/or 12(b)(6) motions. That means that the only facts before this Appellate Court are the facts plead in the first and second amended complaints, which, along with reasonable inferences, must be accepted as true.

A district court order dismissing a complaint for lack of jurisdiction pursuant to FRCP Rule 12(b)(1) is reviewed de novo; and the appellate court must accept all uncontroverted factual assertions regarding jurisdiction as true. *McGraw v. United States*, 281 F.3d 997, 1001 (9th Cir. 2002), amended 298 F.3d 754; *King County v. Rasmussen*, 299 F.3d 1077, 1088 (9th Cir. 2002).

An order granting or denying a FRCP Rule 12(b)(6) motion to dismiss for failure to state a claim is also reviewed de novo; and all well-pleaded allegations of material fact are accepted as true and construed in the light most favorable to the nonmoving party (plaintiff in the proceedings below). *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1030-1031 (9th Cir. 2008); *Leadsinger, Inc. v. BMG Music Publishing*, 512 F.3d 522, 526 (9th Cir. 2008); *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 979 (9th Cir. 2007); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508, 122 S.Ct. 992, 995, fn. 1 (2002).

RE: APPELLEES' STATEMENT OF FACTS

The BFTA's section I.A.1. – fairly and accurately sets forth (from the government's perspective) the federal statutory and regulatory history of the 1968 Gun Control Act and the relevant 1996 revision known as the LAUTENBERG AMENDMENT. However any attempt to boot-strap congressional finding into the factual record in that section must be disregarded by this Court. At issue in this case is the plain language of the LAUTENBERG AMENDMENT, and the relevant facts plead in first and second amended complaints.

Appellees' section I.A.2. – also starts out to fairly characterize the federal government's interpretation of the statutes for preventing unauthorized persons from obtaining/purchasing firearms. However, in an apparent attempt to render 18 U.S.C. § 925A inapplicable to correcting an erroneous denial of a firearm purchase under federal law, they engage in the same kind of tautological fallacy at the heart of this case. (i.e., Federal law arbitrarily only recognizes the right to vote, to sit on a jury, and hold public office as civil rights. Since no state revokes these rights upon conviction for MCDV, {except while incarcerated} the federal government need not recognize **any** state-law restoration procedure.)

Rather than parsing the language of 18 USC § 925A, here is the entire text of that short statute:

> § 925A. Remedy for erroneous denial of firearm
>
> Any person denied a firearm pursuant to subsection (s) or (t) of section 922 [18 USCS § 922] –
>
> (1) due to the provision of erroneous information relating to the person by any State or political subdivision thereof, or by the national instant criminal background check system established under section 103 of the Brady Handgun Violence Prevention Act [18 USCS § 922 note] or
>
> (2) who was not prohibited from receipt of a firearm pursuant to subsection (g) or (n) of section 922 [18 USCS § 922], may bring an action against the State or political subdivision responsible for providing the erroneous information, or responsible for denying the transfer, or against the United States, as the case may be, for an order directing that the erroneous information be corrected or that the transfer be approved, as the case may be. In any action under this section, the court, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs.

As of the date of this brief, there does not appear to be any post-*Heller* or post-*McDonald*[3] cases cited in the annotations to this statute. Given that these cases definitively answered whether the "right to keep and bear arms" is a fundamental civil right, and as the *"United States"* is *"responsible for denying the transfer"* of a firearm – useful for exercising "the right to keep and bear arms" – to the Plaintiffs; and

[3] *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. Chicago* 561 US ___, 130 S Ct 3020 (2010)

given that Plaintiffs' theory of the case is that they are no longer "*prohibited from receipt of a firearm pursuant to subsection (g) or (n) of section 922 [18 USCS § 922]*" due to California's restoration procedures – it strains credulity for the Appellees to contend that 18 U.S.C. § 925A is inapplicable in this case. Besides, Plaintiffs have also requested declaratory relief under 28 U.S.C. § 2201, 2202 to vindicate their constitutional rights. *Steffel v. Thompson*, 415 U.S. 452 (1973).

Next, section I.B. of the BFTA sets forth an incomplete and wholly irrelevant understanding of California law and mis-characterizes (once again) Appellants' arguments regarding California Penal Code §§ 1203.4, 1203.4a. These code sections are only important to Appellants' argument that they have standing to assert SECOND AMENDMENT rights because they are now law-abiding citizens. *Heller, at* 635. Appellants have never contended that California's expungement statutes restore their firearm rights. Those rights were forfeit and restored under Penal Code § 12021 [29800-29875], and are completely unaffected one way or another by Penal Code §§ 1203.4, 1203.4a.

In section II.1. of the BFTA – under the heading FACTS AND PRIOR PROCEEDINGS, Appellees once again mis-characterize Appellants' arguments. Plaintiffs have not mounted a facial challenge

to 18 U.S.C. § 922(g)(9). They have mounted an as applied challenge based on whether – once suspended – by a presumptively valid federal statute – firearm rights can be restored. Appellants have framed their primary challenge asking this Court to determine the correct statutory construction of the definitions at 18 U.S.C. § 921(a)(33)(B) *et seq*.

The section goes on to mis-characterizes some facts by omission. Paragraph 25 of the SAC [ER, Tab 4, page 033] alleges that it was sometime in 2004 that the federal government stopped recognizing California's restoration procedures. An implied corollary to that fact is that between 1996 and 2004 the federal government cleared firearm purchases for California misdemeanants who had complied with that state's restoration process. Indeed the SAC alleges that Plaintiffs ENOS was cleared to purchase firearms from 2001 to 2004. [ER, Tab 4, page 034] Plaintiff BASTASINI was able to obtain a firearm permit as a security guard after his rights were restored under California law, until 2006 when he was informed that his guard permit was being revoked due to federal law. [ER, Tab 4, page 036] Plaintiff MERCADO's circumstances are similar (permit granted for a number of years and then revoked) to BASTASINI. [ER, Tab 4, pages 037-038]

In other words, it has been alleged that at one time the federal

government honored California's restoration procedures. Without the case proceeding to discovery and trial, it is impossible at this time to know how or why – without any change in statutory language – the federal government changed their interpretation. But is also an implied admission – which must be accepted as true – that the federal government at one time accepted California's restoration procedures as satisfying the LAUTENBERG definitions at 18 U.S.C. § 921(a)(33)(B).

Starting at section II.2., the BFTA again, misunderstands Appellants' arguments. Appellants do not contend that 18 U.S.C. § 922(g) facially offends the TENTH AMENDMENT. Our argument is that the LAUTENBERG AMENDMENT itself, 18 U.S.C. § 927, **and** the TENTH AMENDMENT, acting in concert or separately, reserves to the states the power to restore SECOND AMENDMENT rights after an MCDV conviction.

By refusing to acknowledge that this power is reserved to the states, the Federal Government is violating the federalism inherent in the TENTH AMENDMENT (and 18 U.S.C. § 927). Appellants have always conceded that 18 U.S.C. § 922(g)(9) can initially suspend the SECOND AMENDMENT rights of those convicted of MCDV, it just can not effect a lifetime forfeiture if the state jurisdiction restores them.

REPLY ARGUMENTS

Restoration by Operation of State Law

In section A.1. of the BFTA (pg. 30), Appellees cite *United States v. Brailey*, 408 F.3d 609 (9th Cir. 2005) and the district court case *United States v. Brown*, 235 F.Supp. 2d 931 (S.D. Ind. 2002) for the tautology that rights not revoked can never be restored. They also cite what they believe is favorable language from *Logan v. United States*, 552 U.S. 23 (2007).

All three cases predate *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. Chicago* 561 US ___, 130 S Ct 3020 (2010). Which means this Court is entitled to view them with a certain amount of skepticism in light of the Supreme Court's new opinions announcing that the "right to keep and bear arms" enshrined in the SECOND AMENDMENT are indeed fundamental civil rights. Ergo, the rights to vote, sit on a jury and hold public office are no longer the exclusive list of rights impacted by state court criminal convictions. "*[T]he issues decided by the higher court need not be identical in order to be controlling. Rather, the [Supreme Court] must have undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable.*" *Miller v. Gammie*, 335 F.3d 889

(9th Cir. 2003) Furthermore, the circuit courts are bound by the "*mode of analysis*" of the holdings of Supreme Court decisions. See: *In re Stern*, 345 F.3d 1036, 1043 (9th Cir. 2003).

Furthermore, neither *Brailey* or *Brown* are controlling or persuasive given the more complete context of the holding in *Logan* – which after all was a **felon** in possession case. Notwithstanding that this case is about misdemeanors, the *Logan* Court is instructive because it found that:

> In § 921(a)(20), the words "civil rights restored" appear in the company of the words "expunged," "set aside," and "pardoned." Each term describes a measure by which the government relieves an offender of some or all of the consequences of his conviction. In contrast, a defendant who retains rights is simply left alone. He receives no status-altering dispensation, no token of forgiveness from the government.
>
> *Logan v. United States*, 552 U.S. 23, 32 (2007)

In this case, the state of California did not leave the Plaintiffs alone. Their MCDV convictions altered their status when in 1993 (three years before LAUTENBERG was passed) California stripped those convicted of MCDVs of their "right to keep and bear arms." The same statute altered that dispensation in an unequivocal token of forgiveness by

restoring, without qualification, the "right to keep and bear arms" after 10 years. California Penal Code § 12021 [29800-29875].

Furthermore, the *Logan* Court cited with approval the case of *Caron v. United States*, 524 U.S. 308 (1998) for the proposition that the federal government must honor a state's mechanism for "automatic" restoration of rights such as California's Penal Code § 12021 [29800-29875]. *Logan* at 32.

Nor does Appellees' reliance on *United States v. Valerio*, 441 F.3d 837 (9th Cir. 2006) support their arguments. In *Valerio*, the defendant was a convicted felon under New Mexico law. The *Valerio* Court set up a 3-step process for determining whether a state conviction has been invalidated for purposes of the federal felon in possession statute, *Valerio* at 840.

i. Use state law to determine whether the defendant has a "conviction." If not, defendant is not guilty. If so, go to step 2.

ii. Determine whether the conviction was expunged, set aside, the defendant was pardoned, or the defendant's civil rights were restored. If not, the conviction stands. If so, go to step 3.

iii. Determine whether the pardon, expungement, or restoration of civil rights expressly provides that the

> defendant may not ship, transport, possess, or receive firearms. If so, the conviction stands. If not, the defendant is not guilty.

Presumably this test of guilty/not guilty (at least for felons) is equally valid for determining if the person is authorized to acquire a gun in the first place. The *Valerio* opinion is somewhat in tension with *Jennings v. Mukasey*, 511 F.3d 894 (9th Cir. 2007) on the issue of what California Penal Code § 1203.4 does. Conceivably California Penal Code § 1203.4 gets someone past step 1 of the *Valerio* test and then the 10-year restoration by operation of law arising out of Penal Code § 12021(c)(1) [29805] gets them past steps 2 and 3. Furthermore, the Plaintiffs in this case fall squarely within the "anti-mousetrapping" rule first articulated in *United States v. Laskie*, 258 F.3d 1047 (9th Cir. 2001), and explained in *Jennings* at 900-901; because the automatic restoration of gun rights after 10 years under California Penal Code § 12021(c)(1) [29805] contains no language limiting the restoration of rights once the 10 years have lapsed, therefore Appellants herein escape the same mousetrap.

Plaintiff/Appellants in this case have threaded the needle imposed by the LAUTENBERG AMENDMENT. The state where they suffered the MCDV conviction provides for the loss of civil rights and then the

restoration of those rights after 10 years of law-abiding conduct.[4] It is time for the federal government to honor California's token of forgiveness.

Defective Waiver

Fundamental fairness compels a conclusion that someone must know what substantive and procedural rights they are waiving by pleading guilty to a charge, rather than insisting on a trial by jury. This doctrine is recognized in the LAUTENBERG AMENDMENT at 18 U.S.C. § 921(a)(33)(B)(i). It was explicitly recognized and a remedy provided in California's Penal Code § 12021(c)(3) [29860], which sets forth a procedure for those convicted of MCDV prior to 1993 to have their rights restored. A procedure that Appellant ENOS availed himself of, and which the federal government initially approved and but now refuses to recognize. The small irony is that California's Constitution has no SECOND AMENDMENT counterpart[5], yet California provides for an *ad hoc* restoration of firearm rights due to the retroactive effect of its 1993 MCDV firearm disqualifications.

[4] For ENOS, BASTISINI, MERCADO, GROVES and MONTEIRO it is has been more than 20 years since their disqualifying convictions.

[5] *Kasler v. Lockyer*, 23 Cal.4th 472, 480 (2000)

While it is impossible to know what the U.S. Congress thought of the status of the federal SECOND AMENDMENT when LAUTENBERG was passed in 1996, it wasn't until 2008 that the Supreme Court definitively answered – in the affirmative – whether that amendment was a fundamental civil right. *District of Columbia v. Heller*, 554 U.S. 570 (2008).

Appellees' brief fails to answer the elephant-in-the-room question posed by this development. ***What other liberties protected by our Bill of Rights can be retroactively forfeit, without notice, based on an unknowing and unintelligent waiver of the right to a jury trial?*** Misdemeanor cases of Domestic Violence are fact-specific. Guilt or innocense turns on who was the aggressor. A defendant facing such charges in a post-LAUTENBERG world is presumed to take the loss of their gun rights into account in their calculus of whether to waive that jury trial and plead guilty. Appellants ENOS, BASTISINI, MERCADO, GROVES, MONTEIRO, and ERIKSON were denied the right decide if they wanted a jury to decide the facts of their case given that one-tenth of their Bill of Rights liberties were at stake. But this Court can apply the plain statutory language of LAUTENBERG to the facts of this case and relieve them of a federal firearm disability that they had no notice

of when they entered their pleas of guilty prior to 1996.

Constitutional Challenges

As already noted above, Appellees were arguing against TENTH AMENDMENT challenge that Appellants had not asserted. For purposes of this case, Appellants concede that LAUTENBERG's initial suspension of SECOND AMENDMENT rights does not offend that Amendment. Our argument is that LAUTENBERG itself, 18 U.S.C. § 927 and the TENTH AMENDMENT, compel the federal government to recognize the power reserved to the state of California regarding issues of restoration of the "right to keep and bear arms" for MCDV.

Furthermore, Appellant's SECOND AMENDMENT challenge is also a narrowly framed "as-applied" challenge – if and only if – LAUTENBERG turns out to be a lifetime forfeiture of a fundamental right. So assuming that the Court must reach that constitutional question, Appellees arguments are still untenable because they advance an approach to scrutinizing legislation impacting the SECOND AMENDMENT in a way specifically rejected by the Supreme Court.

The majority opinion in *District of Columbia v. Heller*, 554 U.S. 570 (2008) rejected the dissent's articulation of an intermediate scrutiny, or interest-balancing approach to the SECOND AMENDMENT. *Id., at* 634 *et*

seq. That opinion also expressly rejected a rational basis approach. *Id*., at 629, fn 27. And since this Court is bound by the "*mode of analysis*" of the holdings of Supreme Court decisions, [see: *In re Stern*, 345 F.3d 1036, 1043 (9th Cir. 2003)], that leaves only (or at the very least) the "almost strict" scrutiny articulated in *Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011).

There are any number of flaws to the Appellees' arguments against a SECOND AMENDMENT challenge to LAUTENBERG's lifetime forfeiture. (Which is the only challenge made by Appellants.) But for purposes of this appeal the two most devastating are: (1) The absence of any factual record regarding the propensity for persons convicted of MCDVs more than 10 years ago for repeat offense, and (2) the less restrictive means of controlling recidivism through domestic violence restraining orders, which also carry a federal firearm prohibition.

This case is on appeal from a successful FRCP 12 motion by the Defendants. There are no facts, other than what is set forth in the Plaintiffs' various complaints, that would permit this Court to engage in an interest-balancing test, even if it wanted to disregard the mode of analysis of the *Heller* decision. While the BFTA refers to the Seventh Circuit case of *United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010)(en

banc) and its citations to some sociological studies at page 48 *et seq.*, the *Skoien* case itself compels the result advanced by the Appellants herein. Namely that LAUTENBERG did not impose a perpetual disqualification for persons convicted of domestic violence. *Skoien* at 644. In fact California was held out as an example of a state that restores rights upon successful completion of probation. *Skoien* at 644-645. Furthermore, because of the procedural posture of the case Plaintiffs were never given an opportunity to test scientific validity of any sociological studies, even if any those studies had addressed domestic violence recidivism over ten, fifteen or twenty years. Nor were Plaintiffs permitted to tender their counter-studies showing that California's 10-year is a sufficient safe-guard to the public.

But the most powerful argument that Appellants can make that LAUTENBERG's lifetime forfeiture is not narrowly tailored to achieve a compelling (or even important) government interest, would be to point out that federal law also prohibits persons subject to domestic violence restraining orders from possessing firearms and ammunition. 18 U.S.C. § 922(g)(8). See also California Family Code § 6389, which permits the renewal of domestic violence restraining in perpetuity if necessary to protect victims of domestic violence even if the aggressor's

conduct does not rise to the level of a crime. This combined federal/state policy of protecting both the public at large and any individual victim by issuance of civil restraining orders (after notice and an opportunity to be heard) that also suspends "the right to keep and bear arms" does not offend the SECOND AMENDMENT. See *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001), but it is a less-restrictive means of achieving the policy objective of LAUTENBERG, without the lifetime forfeiture consequences for persons how have demonstrated more than a decade of rehabilitation and had their SECOND AMENDMENT rights restored under state law.

CONCLUSION

This Court need not reach the constitutional dimensions of this case. It can be resolved on a straightforward interpretation of the relevant federal statutes. However if the Court has to take up the constitutional questions posed by this case, the result should be the same – reversal and remand with an appropriate interpretation of the law in this bourgeoning field.

Respectfully Submitted on September 21, 2012,

/s/ Donald Kilmer
Donald Kilmer
Attorney for Appellants

STATEMENT OF RELATED CASES

Appellants's counsel is not aware of any related cases as defined by Rule 28-2.6.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed.R.App.P. Rule 32(a)(7)(B). It contains 3885 words using WordPerfect Version X5 in Century Schoolbook 14 point font.

Date: September 21, 2012

/s/ Donald Kilmer
Donald Kilmer, Attorney for Appellants

CERTIFICATE OF SERVICE

On September 21, 2012, I served the foregoing APPELLANTS' REPLY BRIEF by electronically filing it with the Court's ECF/CM system, which generated a Notice of Filing and effects service upon counsel for all parties in the case.

I declare under penalty of perjury that the foregoing is true and correct.

Executed September 21, 2012 in San Jose, California.

/s/ Donald Kilmer
Attorney of Record for Appellants