No.

In The
Supreme Court of the United States

RICHARD ENOS, JEFF BASTASINI, LOUIE MERCADO, WALTER GROVES, MANUEL MONTEIRO, EDWARD ERIKSON and VERNON NEWMAN,

Petitioners,

v.

ERIC HOLDER, as United States Attorney General, JAMES COMEY, as Director of the Federal Bureau of Investigations and the UNITED STATES,

Respondents.

On Petition for Writ of Certiorari To the United States Court of Appeals For the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the United States Government should be required to accept procedures adopted by the states for restoration of the "right to keep and bear arms" for those convicted of misdemeanor crimes of domestic violence, without reference to whether "other civil rights" have been revoked and restored?

Alternatively (in those states with such a policy), whether the "right to keep and bear arms" qualifies as a "civil right" that can be "revoked and thus restored" for state law misdemeanor convictions, for the purpose of restoring firearm rights under federal law?

Whether a misdemeanor defendants' plea bargain waivers must include a knowing and intelligent abandonment of the "right to keep and bear arms" before the government can permanently revoke that fundamental right as a collateral consequence of conviction?

PARTIES TO THE PROCEEDINGS

Petitioners RICHARD ENOS, JEFF BASTASINI, LOUIE MERCADO, WALTER GROVES, MANUEL MONTEIRO, EDWARD ERIKSON and VERNON NEWMAN initiated proceedings by filing a complaint in the United States District Court for the Eastern District of California.

Respondent ERIC HOLDER is the current United States Attorney General and was originally named in the operative complaint. Respondent JAMES COMEY, is the current Director of the Federal Bureau of Investigations, substituted in by operation of law for Robert Mueller, III., who was originally named in the operative complaint. The UNITED STATES was added by stipulation and is a necessary party under 18 U.S.C. § 925A.

CORPORATE DISCLOSURE

[Rule 29.6]

The Madison Society is not a party, but has provided significant funding for this suit. It is 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. The Madison Society is not a publicly traded corporation and no parent or publicly owned corporation owns 10% or more of any stock in The Madison Society.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

RULE 29.6 DISCLOSURE ii

TABLE OF AUTHORITIES v

PETITION FOR WRIT OF CERTIORARI 1

DECISION BELOW 1

JURISDICTION 1

RELEVANT CONSTITUTIONAL
AND STATUTORY PROVISIONS 1

STATEMENT OF THE CASE 3

STATEMENT OF FACTS 4

REASONS FOR GRANTING THE PETITION 9

I. The Federal Courts of Appeal 9
Have Inconsistently Interpreted
and the Highest Court of at
Least One State Repudiates
The Federal Government's
Artificially Limited Reading of
the "Rights Restored" Provisions
of Federal Firearm Laws.

II. The Ninth Circuit has Decided 11
an Important Question of
Federal Law that Conflicts
with Relevant Decisions of this Court.

III. Lautenberg Can be Reconciled 18
with the Constitution by
Appropriate Statutory Construction.

CONCLUSION 22

Decision by United States Court of . . . . . Pet. App. 1
Appeals for the Ninth Circuit,
2014 U.S. App. LEXIS 19798
(9th Cir. Cal. 2014)

Decision of the United States . . . . . .Pet. App. 5
District Court, 855 F. Supp. 2d 1088,
2012 U.S. Dist. LEXIS 73932
(E.D. Cal., 2012)

The prior decision of the District Court . . . Pet. App. 30
2011 U.S. Dist. LEXIS 73932
(E.D. Cal., 2011)

Decision of the New Hampshire . . . . . .Pet. App. 46
Supreme Court in *Dupont v.*
Nashua Police Department,
2015 N.H. LEXIS 19
[Supreme Court Rule 14.1(i)(iv)]

TABLE OF AUTHORITIES

FEDERAL CASES

Annex Books v. City of Indianapolis,
581 F.3d 460, 463 (7th Cir. 2009). 18

Caron v. United States, 524 U.S. 308 (1998) 11

District of Columbia v. Heller,
554 U.S. 570 (2008) 8, 11, 13, 14, 18

Goodyear Atomic Corp. v. Miller,
486 U.S. 174 (1988) 19

Hickman v. Block, 81 F.3d 98 (9th Cir. 1996) 14

Low v. SEC, 472 U.S. 181 (1985) 20

Nordyke v. King, 563 F.3d 439 (9th Cir. 2009). 14

Reiter v. Sonotone Corp., 442 U.S. 330 (1979) 20

Silveira v. Lockyer, 312 F.3d 1052 (9th Cir. 2002) . .14

South Dakota v. Yankton Sioux Tribe,
522 U.S. 329, 351 (1998) 19

U.S. v. Bean, 537 U.S. 71 (2002) 8, 22

United States v. Brailey,
408 F.3d 609 (9th Cir. 2005) 14, 16

United States v. Chovan,
735 F.3d 1127 (9th Cir. 2013) . 11, 12, 14, 16, 17

United States v. Vongxay,
594 F.3d 1111 (9th Cir. 2010). 14

STATE CASE

Dupont v. Nashua Police Department,
2015 N.H. LEXIS 19 . . . . . 10, 11, 17

FEDERAL STATUTES

18 U.S.C. § 921(a)(20) 9

18 U.S.C. § 921(a)(33) 2, 5, 7

18 U.S.C. § 921(a)(33)(B)(ii) 2, 17

18 U.S.C. § 922(d)(9) 5, 7

18 U.S.C. § 922(g)(9) 5, 7

18 U.S.C. § 925A 4

18 U.S.C. § 925(c) 8

18 U.S.C. § 927 . . . . . 3, 17

STATE STATUTES

CA Penal Code § 1203.4 5

CA Penal Code § 12021 . . . . . 4, 5, 6

CA Penal Code § 12021(c)(3) 6

CA Penal Code § 4852.01 6

CONSTITUTION

SECOND AMENDMENT . . . . . *passim*

TENTH AMENDMENT 2, 4, 18, 21

OTHER

Fed. R. Civil. Proc. 12 4

U.S. Supreme Court Rule 14.1(i)(iv) 9

Through the Looking Glass
by Lewis Carroll 19

PETITION FOR WRIT OF CERTIORARI

Petitioners RICHARD ENOS, JEFF BASTASINI, LOUIE MERCADO, WALTER GROVES, MANUEL MONTEIRO, EDWARD ERIKSON and VERNON NEWMAN, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

DECISIONS BELOW

The unpublished memorandum decision of the United States Court of Appeals for the Ninth Circuit, 2014 U.S. App. LEXIS 19798 (9th Cir. Cal. 2014) is reprinted in the Appendix (Pet. App.) at page 1.

The decision of the United States District Court, 855 F. Supp. 2d 1088, 2012 U.S. Dist. LEXIS 73932 (E.D. Cal., 2012) is reprinted at Pet. App. 5 The prior decision of the District Court, 2011 U.S. Dist. LEXIS 73932 (E.D. Cal., 2011), is reprinted at Pet. App. 30.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit denied a petition for *en banc* review on January 13, 2015. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The SECOND AMENDMENT to the United States Constitution provides: "A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

The TENTH AMENDMENT provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The statutory definition of Misdemeanor Crimes of Domestic Violence (MCDV) is found at 18 U.S.C. § 921(a)(33):

> (33)(A)Except as provided in subparagraph (C),the term "misdemeanor crime of domestic violence" means an offense that –
>
> > (i) is a misdemeanor under Federal or State law; and
> >
> > (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.
>
> (B) (i) A person shall not be considered to have been convicted of such an offense for purposes of this chapter [18 USCS §§ 921 et seq.], unless--
>
> > (I) the person was represented by counsel in the case, or knowingly and intelligently waived the right to counsel in the case; and
> >
> > (II) in the case of a prosecution for an offense described in this paragraph for which a person was entitled to a jury trial in

> the jurisdiction in which the case was tried, either
>
> > (aa) the case was tried by a jury, or
> >
> > (bb) the person knowingly and intelligently waived the right to have the case tried by a jury, by guilty plea or otherwise.
>
> (ii) A person shall not be considered to have been convicted of such an offense for purposes of this chapter [18 USCS §§ 921 et seq.] if the conviction has been expunged or set aside, or is an offense for which the person has been pardoned or has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense) unless the pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

18 U.S.C. § 927 provides: "Effect on State law – No provision of this chapter [18 USCS §§ 921 et seq.] shall be construed as indicating an intent on the part of the Congress to occupy the field in which such provision operates to the exclusion of the law of any State on the same subject matter, unless there is a direct and positive conflict between such provision and the law of the State so that the two cannot be reconciled or consistently stand together."

STATEMENT OF THE CASE

This case is on appeal from two orders and a judgment generated by the trial court granting the federal government's motion to dismiss a portion of the First Amended Complaint and the entire Second

Amended Complaint under Federal Rule of Civil Procedure 12. The Petitioners' TENTH AMENDMENT claim was dismissed in an order filed July 8, 2011. The Petitioners' Declaratory Relief and Injunctive Relief claims based on 18 U.S.C. § 925A and a SECOND AMENDMENT claim were dismissed in an order filed February 28, 2012. Petitioners timely appealed.

The Circuit Court issued an unpublished memorandum opinion filed on October 16, 2014. It is reported at 585 Fed. Appx. 447; 2014 U.S. LEXIS 19798. A petition for *en banc* review was denied in an order filed on January 13, 2015.

STATEMENT OF FACTS

The particular facts of each Petitioners' conviction and state-sanctioned restoration of rights is set forth in the First and Second Amended Complaints. Such facts must be accepted as true in a Rule 12 proceeding.

The common facts are: In 1993 California added domestic violence to an existing list of misdemeanors that prohibit a person from acquiring or possessing a firearm for a period of 10 years after the date of conviction. CA Penal Code § 12021 [29800-29875].[1]

In 1994, Congress passed the Violence Against Women Act. In 1996 the LAUTENBERG AMENDMENT (hereafter LAUTENBERG) added a provision prohibiting the acquisition and possession of firearms by any person convicted of a Misdemeanor Crime of Domestic

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[1] California renumbered its Weapon Control laws while this was case pending. Original statutes are cited, the renumbered statutes are bracketed.

Violence (hereafter: MCDV). 18 U.S.C. §§ 921(a)(33), 922(d)(9), 922(g)(9).

Curiously, the Federal Government initially recognized California's policy of restoring the "right to keep and bear arms" through a hearing process and the ten-year rule. Sometime in 2004 the Federal Government, without statutory amendment, changed its interpretation of LAUTENBERG and started refusing to recognize California's rehabilitation policies by denying firearms purchases and prosecuting possession of firearms by persons convicted of a MCDV under 18 U.S.C. §§ 921, 922 *et seq*.

All Petitioners have been convicted under California law of a MCDV by way of plea agreement rather than trial. As a consequence of their conviction under California law, each and every Petitioner had their "right to keep and bear arms" revoked for a statutory period of ten years, and thus restored by operation of law after the lapse of those ten years. CA Penal Code § 12021 [29800-29875].

Today, more than ten (for some more than twenty) years have lapsed since the date of conviction for each and every Petitioner.

Though the procedure by itself does not restore firearm rights, each and every Petitioner has had a California Superior Court Judge make a finding – in an adversarial proceeding – under Penal Code § 1203.4, that they successfully completed probation, paid all fines, and were entitled to have their pleas withdrawn and the accusatory pleading dismissed. Thus all Petitioners are conclusively entitled to the status 'law-abiding citizens.'

Six of the seven Petitioners: Enos, Bastasini, Mercado, Groves, Monteiro and Erickson – were all convicted of a MCDV upon a plea of no-contest/guilty and waiver of a jury trial prior to LAUTENBERG becoming law in 1996. It was existentially impossible for them to have notice of a federal consequence of their conviction (i.e., loss of a fundamental right) when that collateral consequence did not yet exist.

Petitioner Enos has an additional (third) reason he should be free from LAUTENBERG's prohibition. He not only qualifies for restoration of his rights under the ten-year rule and the defective-waiver rule, but he is the only Petitioner who applied for – and was granted – relief under California's specific statutory remedy for judicial restoration of his firearms rights. CA Penal Code § 12021(c)(3) [29860].

Indeed, as of today, that remedy is no longer available as it only applied to persons who were convicted prior to California's addition of a specified misdemeanor to the statute and who suffered the loss of their "right to keep and bear arms" due to the state statute's retroactive effect. CA Penal Code § 12021(c)(3) [29860].

California's procedures for obtaining a certificate of rehabilitation and a governor's pardon appear to be limited to felonies and misdemeanor sex offences that require registration. CA Penal Code § 4852.01. Furthermore, pardons would be just as ineffective for restoration of rights as California's other procedures, given the obtuse definition of rights restoration maintained by the government under LAUTENBERG and the Ninth Circuit in the opinion below.

As noted above, the federal definition of an MCDV is found at 18 U.S.C. § 921(a)(33). It is through this definition and 18 U.S.C. §§ 922(d)(9), 922(g)(9) that federal law imposes a ban on SECOND AMENDMENT rights for persons convicted of a MCDV, subject to the individual states' power under the TENTH AMENDMENT to restore those rights under state law.

The controversy is caused by the Federal Government's interpretation of the LAUTENBERG'S restoration of rights provisions, which goes something like this:

- The SECOND AMENDMENT rights suspended by the LAUTENBERG Amendment can only be restored if the state misdemeanor conviction suspends civil rights and then the jurisdiction restores all those civil rights.
- The only civil rights recognized by federal law that can be revoked and thus restored is (somewhat arbitrarily) limited to: (1) the right to vote, (2) the right to sit on a jury, and (3) the right to hold public office.
- Therefore, unless the domestic violence misdemeanant lost: (1) the right to vote, (2) the right to sit on a jury, and (3) the right to hold public office as result of an MCDV conviction, no civil rights were lost. Ergo there are no civil rights to restore.
- Therefore, the Federal Government need not honor ANY restoration of rights procedure by any state where a conviction for a MCVD does not result in the loss of: (1) the right to vote, (2)

> the right to sit on a jury, and (3) the right to hold public office.

This result begs the question. Since no state suspends these rights upon a misdemeanor conviction for domestic violence (except during actual incarceration), is LAUTENBERG's restoration of rights provision rendered a dead letter by the Federal Government's current interpretation? (Which was revised without statutory change sometime in 2004?)

As noted above, California revokes the fundamental "right to keep and bear arms" for 10 years upon a misdemeanor conviction for domestic violence, and then restores that right by operation of law.

As a direct consequence of the federal government's (re)interpretation of the rehabilitation procedures promulgated by the states, and in derogation of the power reserved to those states by the TENTH AMENDMENT, Petitioners are being denied, for the rest of their lives and regardless of their rehabilitation status, the ability to exercise a fundamental "right to keep and bear arms" that is protected by the SECOND AMENDMENT.

Finally, federal law permits a disqualified person to apply to have their "right to keep and bear arms" restored. 18 U.S.C. § 925(c). That remedy is currently unavailable as Congress refuses to fund the program and this Court endorsed that lack of process in the pre-*Heller*[2] case of *U.S. v. Bean*, 537 U.S. 71 (2002).

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[2] *District of Columbia v. Heller*, 554 U.S. 570 (2008).

REASONS FOR GRANTING THE PETITION

I. The Federal Courts of Appeal Have Inconsistently Interpreted and the Highest Court of at Least One State Repudiates The Federal Government's Artificially Limited Reading of the "Rights Restored" Provisions of Federal Firearm Laws.

Interpreting functionally identical language found at 18 U.S.C. § 921(a)(20), the Supreme Court of New Hampshire issued a decision on February 20, 2015 (alas, too late for citation to the Ninth Circuit) in *Dupont v. Nashua Police Department*, 2015 N.H. LEXIS 19.

That opinion is critical of the Ninth Circuit's reasoning in this case and is directly on point for the principal contention advanced by Petitioners. The New Hampshire justices catalogue the relevant inconsistencies in the Federal Circuits. The entire New Hampshire Supreme Court opinion is reprinted at Pet. App. 46. [Rule 14.1(i)(vi).]

The critical passage:

> We acknowledge that courts applying the § 921(a)(33)(B)(ii) exception for domestic violence misdemeanants, see 18 U.S.C. § 921(a)(33)(B)(ii) (2012), have declined to find restoration of gun rights, along with retention of the core civil rights, sufficient to bring a prior conviction within the exemption. See, e.g., *United States v. Brailey*, 408 F.3d

609, 613 (9th Cir. 2005); *United States v. Keeney*, 241 F.3d 1040, 1044 (8th Cir. 2001). In particular, the court in *Enos v. Holder*, 855 F. Supp. 2d 1088 (E.D. Cal. 2012), aff'd, 585 Fed. Appx. 447 (9th Cir. 2014), addressed the very argument presented here. Specifically, the plaintiffs in *Enos* "contend[ed] that following the Supreme Court's decisions" in *Heller* and *McDonald*, "which recognized the right to bear arms as a fundamental individual right, the Court should re-interpret the 'restoration of rights' provision as including cases such as Plaintiff[s'], where the only right that was taken away and then restored was the right to possess a firearm." *Enos*, 855 F. Supp. 2d at 1095. The court declined to interpret § 921(a)(33)(B)(ii) to "put restoration of an individual['s] right to possess a firearm within the purview of 'civil rights restored,' which courts have repeatedly classified as the right to vote, hold public office and sit on a jury." *Id*. at 1096.

We decline to follow those cases. We conclude that our interpretation of § 921(a) better fulfills Congress's purpose of "defer[ring] to a State's dispensation relieving an offender from disabling effects of a conviction." *Logan*, 552 U.S. at 37. Here, Massachusetts acted clearly and directly to remove the restriction the petitioner's 1998 conviction had placed

> upon his civil right to keep and bear arms. We hold that Massachusetts thereby restored the petitioner's civil rights within the meaning of § 921(a)(20). Accordingly, § 922(g)(1) does not prohibit the petitioner from possessing firearms.
>
> *Dupont*, 2015 N.H. LEXIS at 24-26

This Court should grant certiorari to address these conflicts and ambiguities relating to federal law.

II. The Ninth Circuit has Decided an Important Question of Federal Law that Conflicts with Relevant Decisions of this Court.

Petitioners contend that the Ninth Circuit decision conflicts with decisions of the Supreme Court. *District of Columbia v. Heller*, 554 U.S. 570 (2008) [analysis of regulations touching the SECOND AMENDMENT], and *Caron v. United States*, 524 U.S. 308 (1998) [whether the federal government must honor state restoration of civil rights procedures].

The Ninth Circuit panel in this case relied on *United States v. Chovan*, 735 F.3d 1127 (9th Cir. 2013), *cert. denied* 2014 U.S. LEXIS 6380 (U.S., Oct. 6, 2014). *Chovan* analyzed SECOND AMENDMENT rights by employing the discredited interest balancing test rejected by this Court in *Heller*. 554 U.S. at 634-636.

Furthermore, the *Enos* panel did not even put the government to its evidentiary "burden of proof" for "law-abiding citizens" claiming protection under the

SECOND AMENDMENT as set forth throughout *Chovan*. Judge Bea wrote separately in *Chovan* to point out that the defendant in that case had not availed himself of adversarial proceedings to restore his status as a "law-abiding responsible citizen." *Chovan at* 1143 *et seq*. The Petitioners in this case have availed themselves of that procedure ***and*** they waited the 10 years required by California law.

Petitioners also contend that the Ninth Circuit decision involves a question of exceptional importance because: (a) Domestic Violence itself is an important public policy issue, and (b) the fundamental civil rights of hundreds of thousands (and nationally perhaps more than a million) of rehabilitated offenders is at stake.

In April of 2014, the United States Department of Justice issued a Special Report on Nonfatal Domestic Violence, 2003 - 2012. The good news is that violence committed against immediate family members declined 52%, from 2.7 to 1.3 per 1,000. (Pg 3.)[3] Relevant to this case is the number of non-serious or simple assault crimes classified as Domestic Violence. Nationally that number is 910,110, or nearly a million persons whose rights were impacted by those misdemeanor convictions for domestic violence over that 10 year period. It is not difficult to imagine the number exceeding 1 million by including the period from the LAUTENBERG's effective date (1996) through the initial date of the study (2003).

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[3] Special Report: Nonfatal Domestic Violence. http://www.bjs.gov/content/pub/pdf/ndv0312.pdf. Last accessed March 24, 2015.

California tracks Domestic Violence-Related Calls for Assistance rather than convictions. For roughly the same years (2003-2013), the calls for assistance declined from a high of 194,288 (2003) to a low of 151,325 (2013).[4] Even if only one-tenth of those calls for assistance result in misdemeanor charges and convictions, then over the 20-year period of 1993[5] to 2013 (with an average of 15,000 misdemeanor crime of domestic violence conviction per year) 300,000 Californians are now permanently prohibited from exercising a fundamental civil right guaranteed by the United States Constitution, with no hope of having that right restored.

While California only imposes a 10-year revocation of that right, LAUTENBERG contemplated a life-time revocation of SECOND AMENDMENT rights, subject to state-sponsored restoration/rehabilitation procedures. As noted below, this case could be about whether these statutory remedies can be reconciled, rather than holding LAUTENBERG unconstitutional.

Prior to *District of Columbia v. Heller*, 554 U.S. 570 (2008), The Ninth Circuit issued opinions on the

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[4] Table 47 – Crime in California, Office of the Attorney General. http://oag.ca.gov/sites/all/files /agweb/pdfs/cjsc/publications/candd/cd13/cd13.pdf. Last accessed March 24, 2015.

[5] California enacted its ten-year prohibition for domestic violence misdemeanors in 1993. A lifetime ban under LAUTENBERG, with state-sponsored restoration procedures, was enacted in 1996.

SECOND AMENDMENT where a case with precedence, but weak analysis, bound a subsequent panel to a defective theory of that amendment's jurisprudence. The cursory analysis in *Hickman v. Block*, 81 F.3d 98 (9th Cir. 1996) may have preordained the result in *Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir. 2002), even as the latter case attempted to bolster the analytical framework for the ultimately flawed "collectivist theory" of the SECOND AMENDMENT.

Indeed, after this Court's decision in *Heller*, *Hickman* was abrogated in *Nordyke v. King*, 563 F.3d 439, 445 (9th Cir. 2009) and *Silveira* was abrogated (in part) in *United States v. Vongxay*, 594 F.3d 1111, 1116 (9th Cir. 2010).

There are parallels in this case. As noted above, the most recent Ninth Circuit opinion to take up the issue of restoration of SECOND AMENDMENT rights after a conviction for an MCDV is *United States v. Chovan*, 735 F.3d 1127 (9th Cir. 2013). In its three paragraph discussion of what constitutes a civil right for purposes of revocation and restoration, the *Chovan* court relied on a case arising out of Utah – *United States v. Brailey*, 408 F.3d 609 (9th Cir. 2005). Notably, the 5 page *Brailey* decision is itself pre-*Heller*. Its relevant passage is found at 612 (some internal citations omitted):

> [...][I]n states where civil rights are not divested for misdemeanor convictions, a person convicted of a misdemeanor crime of domestic violence cannot benefit from the federal restoration exception. See *United States v. Jennings*, 323 F.3d

> 263, (4th Cir.), [...]; *United States v. Barnes*, 353 U.S. App. D.C. 87, 295 F.3d 1354 (D.C. Cir. 2002); *United States v. Smith*, 171 F.3d 617 (8th Cir. 1999). As the Fourth Circuit noted in *Jennings*, the common definition of the word "restore" means "'to give back (as something lost or taken away).'" 323 F.3d at 267 (quoting *McGrath v. United States*, 60 F.3d 1005, 1007 (2d Cir. 1995)). When a defendant's "civil rights were never taken away, it is impossible for those civil rights to have been 'restored.'" *Id*. As these courts have also observed, misdemeanants whose civil rights are never revoked can still qualify for the exception of § 921(a)(33) by the other enumerated methods of absolution, such as expungement or pardon. *Barnes*, 295 F.3d at 1368; see also *Jennings*, 323 F.3d at 275 (stating that the defendant "has other avenues he can pursue to fall within the . . . exception of 18 U.S.C. § 921(a)(33)(B)(ii)"). Consequently, we agree with those circuits holding that, in states where civil rights are not removed for a misdemeanor conviction of a crime of domestic violence, an individual convicted of such a misdemeanor "cannot benefit from the federal restoration exception." *Smith*, 171 F.3d at 623.

Because misdemeanants rarely (if ever) lose the right to vote, sit on a jury or hold public office, in any jurisdiction, this tautology is like the argument

between the Queen and Alice over when jam can be served:

> "You couldn't have it if you did want it," the Queen said. "The rule is, jam tomorrow and jam yesterday – but never jam today."
>
> "It must come sometimes to 'jam today,'" Alice objected.
>
> "No, it can't," said the Queen. "It's jam every other day: today isn't any other day, you know."
>
> Through the Looking-Glass (5.16-18).
>
> Lewis Carroll

Furthermore, part of the rationale supporting this line of cases is the bare assertion that misdemeanants can simply avail themselves of other restoration procedures, e.g., expungement or pardon. *Brailey* at 612.

But Petitioners herein have alleged in their operative complaint that they have successfully exhausted their California state law procedures and that the federal government nullifies that process.

As noted above, in addition to California's 10-year operation-of-law rule (and unlike Defendant *Chovan*), all of the petitioners in this case have availed themselves of the adversarial procedure suggested by Judge Bea's concurrence. *Chovan* at 1142 *et seq*. Petitioner Enos has even availed himself of a second adversarial procedure to specifically restore his "right to keep and bear arms."

If the *Enos* panel had applied even the limited rule implied by Judge Bea's concurrence in *Chovan*, Petitioners could obtain the relief they requested.

Alternatively, a court might find that the "right to keep and bear arms" – which California has revoked for domestic violence misdemeanants since 1993 – is itself a civil right that qualifies as a "right revoked and restored" for purposes of federal firearms law. *See: Dupont v. Nashua Police Dept.*, 2015 N.H. LEXIS 19.

Finally, the *Enos* court might simply have applied the disfavored balancing test in *Chovan* for (almost) strict or (heightened) intermediate scrutiny and judicially amended LAUTENBERG, by striking the parenthetical qualifier of 18 U.S.C. § 921(a)(33)(B)(ii):

> [I]f the conviction has been expunged or set aside, or is an offense for which the person has been pardoned or has had civil rights restored **(~~if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense~~**) unless the pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.[6]

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[6] It should not be necessary to *add* language singling out the "right to keep and bear arms" as one of the "civil rights." The "unless" clause itself implies that "ship[ping], transport[ing], possess[ing] and receiv[ing] firearm[s]" as a civil right.

The struck language certainly has no rational basis unless states actually do revoke other civil rights upon misdemeanor conviction of domestic violence and then only if that obtuse revocation/restoration scheme serves some demonstrably important government interest that is backed up by evidence rather than speculation and academic articles. *Annex Books v. City of Indianapolis*, 581 F.3d 460, 463 (7th Cir. 2009).

III. LAUTENBERG Can be Reconciled with the Constitution by Appropriate Statutory Construction.

The SECOND AMENDMENT does not protect the "right to keep and bear arms" of felons. *District of Columbia v. Heller*, 554 U.S. 570, 626-627 (2008).[7]

This case is not about felons.

It is about citizens who may have run afoul of the law only once in their life. They may have lashed out in anger, pride, pain or stupidity during those periods of turmoil that attend many domestic relationships.

Never-the-less, they committed an act of violence against a family member or a loved one. This can never be condoned. The question is: Can it be forgiven?

Review by this Court can answer that question without reaching the SECOND and TENTH AMENDMENT constitutional claims. Three points bear emphasis:

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[7] *Cf. U.S. v. Bean*, 537 U.S. 71 (2002) for the status of statutory restoration of rights for felons.

First, 18 U.S.C. § 927, a single paragraph, says:

> Effect on State law – No provision of this chapter [18 USCS §§ 921 *et seq*.] shall be construed as indicating an intent on the part of the Congress to occupy the field in which such provision operates to the exclusion of the law of any State on the same subject matter, unless there is a direct and positive conflict between such provision and the law of the State so that the two cannot be reconciled or consistently stand together.

Is this an express intent on the part of Congress to defer to states on firearm regulations in which federal and state laws act concurrently and the federal law relies in some way on state law?

LAUTENBERG's own restoration provisions, which expressly rely upon state law restoration procedures, should be directly on point. Therefore, federal interpretations of restoration of rights procedures must give way to state law.

Second, Congress is presumed to be aware of existing state laws when it passes federal laws that are dependent on existing state law for definitions and other regulatory acts. The presumption that "Congress is aware of existing law when it passes legislation," *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 351 (1998) (citation omitted), is fully applicable in cases where, as here, Congress adopts (or defers to) state law as part of a definition in a federal statute. See also: *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185 (1988).

Thus Congress is presumed to have known that there were no states that suspended the 'civil rights' (1) to vote, (2) to sit on a jury, and (3) to hold public office as a collateral consequence of a conviction for a MCDV, and they were presumed to have known that California already revoked firearm rights for domestic violence misdemeanors.

By extension this necessarily means that Congress must have had some other civil right(s) in mind when it made the restoration of firearm rights under LAUTENBERG contingent upon the restoration of rights under state law. Was Congress trying to nudge states to adopt this policy? Other states might revoke firearm rights upon conviction of an MCDV, but California's law prohibiting domestic violence misdemeanants from possessing firearms was passed in 1993 and pre-dates LAUTENBERG by three years.

Third, Courts are required to give meaning to every word in a statute. This is especially important to prevent a provision of the law being reviewed from being rendered pointless. *See, e.g., Low v. SEC*, 472 U.S. 181, 207 n.53 (1985) (per Stevens, J.) ("[W]e must give effect to every word the Congress used in the statute."); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) (per Burger, C.J.) ("In construing a statute we are obliged to give effect, if possible, to every word Congress used.")

In-other-words, Congress intended for there to be some state sanctioned means of restoring the SECOND AMENDMENT rights that are revoked by LAUTENBERG. Those means are left to the various states, but must include: (1) set-aside of the conviction, (2) expungement

of the conviction, (3) pardon and (4) restoration of rights.

A reading of the LAUTENBERG that negates the specifically cited state-sponsored restoration of rights processes is an injustice against rehabilitated misdemeanants and a violation of standard canons of statutory interpretation. It amounts to legislative "Bait and Switch."

In a growing number of instances, policy in these United States is being set by a corrupt kind of seduction wherein the popular branches of government draft confusing and contradictory statutes; and then foist upon the judicial branch the task of delivering the bad news that the law does not perform as advertised.

The LAUTENBERG AMENDMENT is one such instance. If the public policy had been proposed as: "*Treat misdemeanor crimes of domestic violence exactly the same as felonies for purposes of owning/acquiring a firearm*." – it is unlikely that the bill would have become law owing to its overly harsh consequences.

As passed, LAUTENBERG contained a *post hoc* definition of domestic violence that excluded any convictions (and therefore the consequences) upon a showing that the state(s) where the conviction occurred deemed the misdemeanant rehabilitated in some way. That process is left up to the individual states.

As interpreted and applied by the Federal Government, the states' TENTH AMENDMENT power to promulgate their own rehabilitation procedures for misdemeanors is nullified, with the effect of imposing a life-time revocation of SECOND AMENDMENT rights.

If that was the policy objective, then why does the plain language of the statute say otherwise? Why defer to state-based remedies? Why not mandate application to federal authorities for relief from federal disabilities? *See: U.S. v. Bean*, 537 U.S. 71 (2002).

If this consequence was secretly intended by the authors of LAUTENBERG, then it has been achieved through a purposefully ambiguous drafting of a statute (the bait), and a remarkably coincidental enforcement of that statute (the switch). This is governance by legislative seduction compounded by a "wink and a nod" from the executive.

The permanent revocation of a fundamental right for a misdemeanor conviction was not part of the Constitutional landscape when the SECOND AMENDMENT was ratified. It should not be boot-strapped into existence through slight-of-hand or incoherent statutory construction.

CONCLUSION

Petitioners respectfully pray that this Court will grant their petition for certiorari.

Respectfully Submitted,

/s/ Donald Kilmer

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APPENDIX

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 12-15498

RICHARD ENOS; *et al., Plaintiffs - Appellants,*
v.
ERIC H. HOLDER, Jr., Attorney General; *et al., Defendants - Appellees*.

585 Fed. Appx. 447; 2014 U.S. App. LEXIS 19798

October 9, 2014, Argued and Submitted
October 16, 2014, Filed

NOTICE: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

PRIOR HISTORY: Appeal from the United States District Court for the Eastern District of California. D.C. No. 2:10-cv-02911-JAM-EFB. John A. Mendez, District Judge, Presiding. *Enos v. Holder*, 855 F. Supp. 2d 1088, 2012 U.S. Dist. LEXIS 25759 (E.D. Cal., 2012)

COUNSEL: For Richard Enos, Jeff Bastasini, Louie Mercado, Walter Groves, Manuel Monteiro, Edward Erikson, Vernon Newman, Plaintiffs - Appellants: Donald Kilmer Jr., Attorney, The Law Offices of Donald Kilmer, San Jose, CA.

For ERIC H. HOLDER, Jr., Attorney General, Defendant - Appellee: Edward Alan Olsen, Esquire,

Assistant U.S. Attorney, USSAC - Office of the US Attorney, Sacramento, CA; Michael Raab, U.S. Department of Justice, Civil Division - Appellate Staff, Washington, DC.

For ROBERT S. MUELLER, III, Director, FBI, United States of America, Defendants - Appellees: Edward Alan Olsen, Esquire, Assistant U.S. Attorney, USSAC - Office of the US Attorney, Sacramento, CA.

JUDGES: Before: IKUTA, N.R. SMITH, and MURGUIA, Circuit Judges.

MEMORANDUM OPINION*

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Appellants jointly appeal the district court's decision to dismiss their request for injunctive and declaratory relief from the firearm prohibition imposed by 18 U.S.C § 922(g)(9) ("Lautenberg Amendment"). We have jurisdiction under 28 U.S.C. § 1291. Reviewing de novo the district court's order granting the motion to dismiss, see *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005), we affirm.

The Lautenberg Amendment does not violate Appellants' Second Amendment rights. Under *Chovan* (decided after *District of Columbia v. Heller*, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008)), the Lautenberg Amendment is constitutional on its face, because the statute is substantially related to the

important government purpose of reducing domestic gun violence. *United States v. Chovan*, 735 F.3d 1127, 1139-41 (9th Cir. 2013). Additionally, there is no evidence in this record demonstrating the statute is unconstitutional as applied to the Appellants. Further, when questioned, counsel for Appellants declined to suggest such evidence exists. Therefore, the district court correctly held that amendment of the complaint would be futile. See *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F. 3d 1048, 1052 (9th Cir. 2003).

At the time each Appellant (except Newman) entered his plea, the Lautenberg Amendment was not federal law. However, as the district court properly determined, each Appellant's plea was made voluntarily, knowingly, and intelligently. See *United States v. Navarro-Botello*, 912 F.2d 318, 320-21 (9th Cir. 1990). The enactment of the Lautenberg Amendment did not change the validity of each Appellant's plea. "[A]bsent misrepresentation or other impermissible conduct by state agents, [Appellant's] voluntary plea . . . made in the light of the then applicable law" may not be withdrawn later, long after the plea has been accepted, "merely because [Appellant] discovers" that he miscalculated the likely penalties. *Brady v. United States*, 397 U.S. 742, 757, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970) (internal citation omitted).

The Lautenberg Amendment does not violate the Tenth Amendment. As a federal firearms law, the Lautenberg Amendment is a valid exercise of Congress's commerce power. See *United States v. Jones*, 231 F.3d 508, 515 (9th Cir. 2000). Although

California law no longer prevents Appellants from legally possessing firearms, Appellants are also subject to federal law. Appellants have not satisfied any of the Lautenberg Amendment exceptions, and therefore, cannot legally possess firearms under federal law.

The Appellants' civil rights (the right to vote, to sit as a juror, or to hold public office) were never lost under California law. See *United States v. Brailey*, 408 F.3d 609, 611-12 (9th Cir. 2005). Thus, Appellants' rights were not restored within the meaning of 18 U.S.C. § 921(a)(33)(B)(ii). See *Chovan*, 735 F.3d at 1131-33; *Brailey*, 408 F.3d at 611-13. Similarly, the relief provided to Appellants under California Penal Codes § 1203.4 and § 29805 did not satisfy the Lautenberg Amendment's exception for convictions expunged or set aside. See *Jennings v. Mukasey*, 511 F.3d 894, 898-99 (9th Cir. 2007).

AFFIRMED.

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF CALIFORNIA**

Case No. 2:10-CV-2911 JAM-EFB

RICHARD ENOS, JEFF BASTASINI, LOUIE MERCADO, WALTER GROVES, MANUEL MONTEIRO, EDWARD ERIKSON,and VERNON NEWMAN, Plaintiffs,

v.

ERIC HOLDER, as United States Attorney General, and ROBERT MUELLER, III, as Director of the Federal Bureau of Investigation, and UNITED STATES OF AMERICA, Defendants.

855 F. Supp. 2d 1088;
2012 U.S. Dist. LEXIS 25759

February 28, 2012, Decided
February 28, 2012, Filed

SUBSEQUENT HISTORY: Affirmed by *Enos v. Holder*, 2014 U.S. App. LEXIS 19798 (9th Cir. Cal., Oct. 16, 2014)

PRIOR HISTORY: *Enos v. Holder*, 2011 U.S. Dist. LEXIS 73932 (E.D. Cal., July 7, 2011)

COUNSEL: For Richard Enos, Jeff Bastasini, Louie Mercado, Walter Groves, Manuel Monteiro, Edward Erikson, Vernon Newman, Plaintiffs: Donald

E. J. Kilmer, Jr., LEAD ATTORNEY, Law Offices of Donald Kilmer, APC, San Jose, CA.

For Eric Holder, US Attorney General, Robert Mueller, III, Director FBI, United States, Defendants: Edward A Olsen, GOVT, LEAD ATTORNEY, United States Attorney's Office, Sacramento, CA.

JUDGES: JOHN A. MENDEZ, UNITED STATES DISTRICT JUDGE.

OPINION BY: JOHN A. MENDEZ

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

This matter is before the Court on Defendants' Eric Holder and Robert Mueller, III (collectively "Defendants") Motion to Dismiss (Doc. #32) Plaintiffs' Richard Enos ("Enos"), Jeff Bastasini ("Bastasini"), Louie Mercado ("Mercado"), Walter Groves ("Groves"), Manuel Monteiro ("Monteiro"), Edward Erickson ("Erickson"), and Vernon Newman ("Newman") Second Amended Complaint ("SAC") (Doc. #27). The Motion to Dismiss is brought pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). The above-named plaintiffs opposed the motion. A hearing on the motion to dismiss was held on January 25, 2012. For the reasons set forth below, the Court GRANTS the motion to dismiss.

I. FACTUAL ALLEGATIONS AND SUMMARY OF ARGUMENTS

Plaintiffs, each convicted in California of a misdemeanor crime of domestic violence over ten years ago, allege that they are allowed to possess a firearm under California law but are prohibited from possessing a firearm under federal law. Accordingly, they ask the Court for declaratory relief restoring their right to lawfully possess a firearm under federal law, and challenge the constitutionality of 18 U.S.C. § 922(g)(9), the federal statute which prohibits them from possessing a firearm.

Enos plead no contest to a misdemeanor charge under California Penal Code § 273.5(a) in 1991. In 1993 the California Legislature amended Penal Code § 12021 and added charges under Penal Code § 273.5(a) to the list of misdemeanors which prohibit a person from acquiring a firearm for ten years after the date of conviction. After ten years, the right to possess a firearm is restored under California Penal Code 12021(c)(1). [1] In 1996, Congress amended the Violence Against Women Act to include 18 U.S.C. § 922(g)(9), a prohibition against the possession of firearms by misdemeanants convicted of domestic violence. In 1999, Enos petitioned for and received a record clearance under California Penal Code § 1203.4. He also filed a petition for restoration of civil rights under Penal Code § 12021(c)(3), [2] which was granted by the Honorable Thang N. Barrett. Accordingly, Enos was permitted to own a firearm by the State of California at that time. However, when he attempted to purchase a gun in 2004, he was denied the purchase and advised that the denial was being maintained by the U.S. Department of Justice, Federal Bureau of Investigation, and the National Instant Criminal

Background Check System (NICS).

[1] Effective January 1, 2012, California Penal Code § 12021(c)(1) was repealed and reenacted without substantive change as California Penal Code § 29805. For purposes of clarity, this opinion will continue to refer to the statute as California Penal Code § 12021(c)(1).

[2] Effective January 1, 2012, California Penal Code § 12021(c)(3) was repealed and reenacted without substantive change as California Penal Code § 29860. For purposes of clarity, this opinion will continue to refer to the statute as California Penal Code § 12021(c)(3).

Bastasini, Mercado, Groves and Monteiro each plead no contest or guilty to a misdemeanor charge under California Penal Code 273.5, between 1990-1992. They later petitioned for and received record clearance under California Penal Code § 1203.4. They each attempted to purchase a gun in July 2011, and were prohibited from doing so by NICS, after answering "YES" to questions 11.i on ATF Form 4473, which asks if a person has been convicted of a misdemeanor crime of domestic violence.

Erickson and Newman were both convicted of misdemeanor crimes of domestic violence, in 1996 and 1997, respectively. They later petitioned for and received record clearance under California Penal Code § 1203.4. Edwards and Newman both attempted to purchase firearms in July 2011 and were prohibited from doing so after answering "YES" to question 11.i

on ATF Form 4473.

Plaintiffs allege that under California law they are permitted to own a firearm, but that they are prohibited from doing so by federal law. Accordingly, Plaintiffs seek declaratory relief from the Court to restore their right to possess a firearm under federal law. The SAC also challenges 18 U.S.C § 922(g)(9) and 18 U.S.C. § 922(d)(9) as unconstitutional under the Second Amendment, both facially and as applied to Plaintiffs.

Defendants' motion to dismiss raised a number of arguments in support of dismissing Plaintiffs' claims, several of which were resolved at the hearing. The parties reached a stipulation (Doc. #61) that Plaintiffs may add the United States of America as a defendant, to satisfy the requirements of 18 U.S.C. § 925A. Accordingly, "Defendants" in this order includes the United States of America. Plaintiffs conceded that they no longer seek to maintain their facial challenge to 18 U.S.C. § 922(g)(9), nor their facial and as-applied challenges to 18 U.S.C. § 922(d)(9). [3] Accordingly those allegations are dismissed from the SAC.

[3] 18 U.S.C. § 922(d)(9) makes it unlawful for any person to sell a firearm or ammunition to a person who has been convicted of misdemeanor domestic violence.

II. OPINION

A. Legal Standard

1. Rule 12(b)(1) dismissal

A party may move to dismiss an action for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). When a defendant brings a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), the plaintiff has the burden of establishing subject matter jurisdiction. *See Rattlesnake Coalition v. United States Envtl. Protection Agency*, 509 F.3d 1095, 1102, FN 1 (9th Cir. 2007).

2. Rule 12(b)(6) Dismissal

A party may move to dismiss an action for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6). In considering a motion to dismiss, the court must accept the allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiff. *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974), *overruled on other grounds by Davis v. Scherer*, 468 U.S. 183, 104 S. Ct. 3012, 82 L. Ed. 2d 139 (1984); *Cruz v. Beto*, 405 U.S. 319, 322, 92 S. Ct. 1079, 31 L. Ed. 2d 263 (1972). Assertions that are mere "legal conclusions," however, are not entitled to the assumption of truth. *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1950, 173 L. Ed. 2d 868 (2009), (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). To survive a motion to dismiss, a plaintiff needs to plead "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. Dismissal is appropriate where the plaintiff fails to state a claim supportable by a cognizable legal theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

Upon granting a motion to dismiss for failure to state a claim, the court has discretion to allow leave to amend the complaint pursuant to Federal Rule of Civil Procedure 15(a). "Absent prejudice, or a strong showing of any [other relevant] factor[], there exists a presumption under Rule 15(a) in favor of granting leave to amend." *Eminence Capital, L.L.C. v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003). "Dismissal with prejudice and without leave to amend is not appropriate unless it is clear . . . that the complaint could not be saved by amendment." *Id.*

3. Judicial Notice

Generally, the court may not consider material beyond the pleadings in ruling on a motion to dismiss for failure to state a claim. There are two exceptions: when material is attached to the complaint or relied on by the complaint, or when the court takes judicial notice of matters of public record, provided the facts are not subject to reasonable dispute. *Sherman v. Stryker Corp.*, 2009 U.S. Dist. LEXIS 34105, 2009 WL 2241664 at *2 (C.D. Cal. Mar. 30, 2009) (internal citations omitted). Here, Plaintiffs request judicial notice of the stay orders in several Second Amendment cases pending in the Ninth Circuit, as well as the opinion of the First Circuit in a recently decided Second Amendment case. The Court will take judicial notice of the orders and opinion as requested by Plaintiffs, as they are matters of public record.

B. Claims for Relief

1. Declaratory Relief Claims

The first, second and third claims for relief in the SAC seek declaratory relief that Plaintiffs satisfy the requirements of 18 U.S.C. § 921(a)(33)(B)(ii) to possess a firearm despite being convicted of a misdemeanor crime of domestic violence. 18 U.S.C. § 922(g)(9), also known as the Lautenberg Amendment, makes it unlawful for any person who has been convicted in any court of a misdemeanor crime of domestic violence to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce. Under 18 U.S.C. § 925A, any person who was not prohibited from receipt of a firearm pursuant to section 922(g) may bring an action against the State or political subdivision responsible for providing 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. 18 U.S.C. § 925A(2).

18 U.S.C. § 921(a)(33) defines a "misdemeanor crime of domestic violence" as a misdemeanor that has as an element the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse parent, or guardian of the victim. However, the statute provides that a person shall not be considered to have been convicted of such an offense

unless the person was represented by counsel in the case, or knowingly and intelligently waived the right to counsel in the case, and if the prosecution for an offense entitled the person to a jury trial, the case was tried by a jury or the person knowingly and intelligently waived the right to a jury trial, by guilty plea or otherwise. 18 U.S.C. § 921(a)(33)(B)(I).

18 U.S.C. § 921(a)(33)(B) further provides that "a person shall not be considered to have been convicted of such an offense for purposes of this chapter if the conviction has been expunged or set aside, or is an offense for which the person has been pardoned or has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense) unless the pardon, expungement, or restoration of civil rights, expressly provides that the person may not ship, transport, posses, or receive firearms." 18 U.S.C. § 921(a)(33)(B)(ii).

Plaintiffs argue that under federal law they should be considered as having had their civil rights restored, because by operation of law (the passage of ten years as provided for by Penal Code 12021) their right to possess a firearm has been restored by the State of California. Alternatively they argue that they were not convicted of misdemeanor domestic violence under 18 U.S.C. § 921(a)(33)(B)(i) because they were unable to make a knowing and intelligent waiver of their right to a jury trial at the time of their convictions, since 18 U.S.C. § 922(g)(9) had not yet been enacted.

Defendants moved to dismiss the declaratory relief claims, arguing that Plaintiffs were convicted of

misdemeanor domestic violence because they knowingly and intelligently waived their rights to a jury trial, and that restoration by operation of California law of Plaintiffs' right to possess a firearm does not qualify as restoration of civil right under 18 U.S.C. § 921(a)(33)(B)(ii).

a. Waiver of Right to Jury Trial

As an initial matter, Plaintiffs cited no authority for the proposition that, in a civil proceeding brought under 18 U.S.C. § 925A, the Court would have jurisdiction to determine that an individual's waiver of his or her right to a jury trial that was made in a state criminal proceeding was not knowing and intelligent. Even assuming the Court has jurisdiction, Plaintiffs' arguments lack merit because when a person enters a guilty or no contest plea, he or she must only be advised of all direct consequences of the conviction. *Bunnell v. Superior Court*, 13 Cal.3d 592, 605, 119 Cal. Rptr. 302, 531 P.2d 1086 (1975). This requirement relates to the primary and direct consequences involved in the criminal case itself and not secondary, indirect or collateral consequences. *People v. Arnold*, 33 Cal.4th 294, 309, 14 Cal. Rptr. 3d 840, 92 P.3d 335 (2004). The possible future use of a current conviction is not a direct consequence of the conviction. *People v. Gurule*, 28 Cal.4th 557, 634, 123 Cal. Rptr. 2d 345, 51 P.3d 224 (2002).

Plaintiffs contend that *Padilla v. Kentucky*, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010), in which the Supreme Court found that counsel had an obligation to advise his client that the offense to which he was

pleading guilty was a deportable offense, supports Plaintiffs' argument regarding knowing and intelligent waiver and collateral consequences. However, *Padilla* is not analogous, and does not support Plaintiffs' theory. Accordingly, the Court dismisses the allegations that at the time Plaintiffs plead to their convictions, they were unable to make a knowing and intelligent waiver of their right to a jury trial because they were not apprised of the possibility of losing their right to possess a firearm. Congress had not yet enacted 18 U.S.C. § 922(g)(9), and the law does not require Plaintiffs to be advised of future unanticipated changes in the law.

b. Restoration of Civil Rights

Defendants also argue that Plaintiffs have not had their civil rights restored, and have not otherwise satisfied the requirements of 18 U.S.C. § 921(a)(33)(B)(ii) to regain their right to possess a firearm. Though Plaintiffs sought relief under California Penal Code § 1203.4 to have their records cleared, the Ninth Circuit has already held that this does not qualify as expungement under 18 U.S.C. § 921(a)(33)(B)(ii). *Jennings v. Mukasey*, 511 F.3d 894 (2007). Likewise, Defendants contend that the passage of ten years from the date of the conviction, while restoring the right to possess a firearm under California law, does not restore Plaintiffs' right to possess a firearm under federal law.

Defendants assert that, as has been recognized by numerous courts, the test for whether civil rights have been restored is whether an individual's right to vote,

sit on a jury, or hold elected office has been restored. See *United States v. Andaverde*, 64 F.3d 1305, 1309 (1995) (stating that in considering whether an individual's civil rights have been restored, the "Ninth Circuit considers whether the felon has been restored the right to vote, to sit on a jury and hold public office"); *United States v. Dahms*, 938 F.2d 131, 133 (9th Cir. 1991) (stating that an individual "who, having first lost them upon conviction, regains the right to vote, sit on a jury, and hold public office in the state in which he was originally convicted has had his civil rights restore . . ."); *United States v. Gomez*, 911 F.2d 219, 220 (9th Cir. 1990) (stating that the intent of Congress in using the phrase "civil rights restored" under 18 U.S.C. § 921(a)(20) was to give effect to state reforms with respect to the status of an ex-convict).

Because Plaintiffs do not allege they lost the right to vote, sit on a jury or hold public office, Defendants argue they cannot allege that their rights have been restored within the meaning of the statute. See *Logan v. United States*, 552 U.S. 23, 36, 128 S. Ct. 475, 169 L. Ed. 2d 432 (2007) ("the words 'civil rights restored' do not cover a person whose civil rights were never taken away"); *United States v. Brailey*, 408 F.3d 609, 613 (9th Cir. 2005) ("Because Brailey's misdemeanor conviction did not remove Brailey's core civil rights of voting, serving as a juror, or holding public office, his civil rights have not been restored within the meaning of federal law by Utah's 2000 amendment permitting him to possess a firearm"). Restoration of the right to bear arms is insufficient to qualify as 'restoration of rights,' as restoration must be substantial, not de minimus. *Andaverde*, 64 F.3d at 1309 (analyzing restoration of

rights in the context of a felon-in-possession).

Plaintiffs contend that following the Supreme Court's decisions in *District of Columbia v. Heller*, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008), and *McDonald v. City of Chicago*, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010), which recognized the right to bear arms as a fundamental individual right, the Court should re-interpret the "restoration of rights" provision as including cases such as Plaintiffs, where the only right that was taken away and then restored was the right to possess a firearm. Plaintiffs argue that the Court should disregard cases decided pre-Heller, such as *Brailey*. Further, Plaintiffs assert that because few, if any, states take away a misdemeanants right to vote, sit on a jury, or hold elected office, interpreting "civil rights" to include only these three rights, and not firearm rights, makes little sense and can result in a lifetime ban on firearms possession. Plaintiffs allege that they are facing such a lifetime ban, as they have no means under state law to have their convictions expunged, set aside, or pardoned, and their rights to vote, sit on a jury or hold public office were never taken away and restored.

In response, Defendants argue that the Court should still follow *Brailey*; that its timing as a pre-*Heller* case is inconsequential for several reasons. First, the right to bear arms recognized by Heller is not among the cluster of rights (the right to vote, sit on a jury, and hold public office) typically recognized by courts when analyzing whether an individual's civil rights have been restored. *See e.g. Andaverde*, 64 F.3d at 1309; *Logan*, 552 U.S. at 36; *Dahms*, 938 F.2d at

133; *Gomez*, 911 F.2d at 220.

Second, Defendants note that 18 U.S.C. § 921(a)(33)(B)(ii) refers to civil rights in the plural, thus even if the right to possess a firearm was recognized under state law as having been restored, this would be insufficient to fulfill the restoration of rights contemplated by the statute. See e.g. *United States v. Keeney*, 241 F.3d 1040, 1044 (8th Cir. 2001) ("Significantly 921(a)(20) and 921(a)(33)(B)(ii) both refer to civil rights in the plural, thus suggesting that Congress intended to include a cluster of rights, as referenced in *McGrath*, within the meaning of the term "civil rights" as contained in these provisions") (citing *McGrath v. United States*, 60 F.3d 1005 (2d Cir. 1995); *United States v. Meeks*, 987 F.2d 575, 578 (9th Cir. 1993) (holding that an individual whose rights to vote and hold office had been restored, but not his right to serve on a jury, had not had his "civil rights restored"); *United States v. Valerio*, 441 F.3d 837, 843 (9th Cir. 2006) (noting that the individual's right to vote and right posses firearms had been restored, but holding that this is not enough). Even post-*Heller*, the Seventh Circuit in *United States v. Skoien*, 614 F.3d 638, 644-45 (7th Cir. 2010) (en banc) discussed "civil rights" under 18 U.S.C. § 921(a)(33)(B)(ii) as consisting of the right to vote, serve on a jury, and hold public office. [4]

[4] The Court notes however that the *Skoien* Court's subsequent statement, that California law provides a means for expungment of misdemeanor domestic violence convictions through California Penal Code 1203.4a, is a misstatement of California law. Additionally, the California legislature recently

amended 1203.4a foreclosing Plaintiffs' ability to seek relief through that statute. As discussed at oral argument, neither 1203.4 or 1203.4a are available to Plaintiffs to seek the equivalent of an expungment or set aside of their convictions under 18 U.S.C. § 921(a)(33)(B)(ii).

Plaintiffs countered this argument, both in their opposition papers and again at oral argument, with the theory that the Second Amendment protects multiple rights. Plaintiffs assert that the right to keep and the right to bear arms are different rights, making up part of a "bundle of rights" protected by the Second Amendment, and restored by the State of California. Plaintiffs contend that Heller and McDonald both recognized multiple rights as protected by the Second Amendment, but Defendants assert that both decisions refer to a singular right.

Having carefully reviewed the *Heller* and *McDonald* opinions, the Court notes that throughout both opinions the majority refers to a singular right to keep and bear arms protected by the Second Amendment. The *Heller* majority did note that Justice Stevens in his dissent "believes that the unitary meaning of "keep and bear Arms" is established by the Second Amendment's calling it a "right" (singular) rather than "rights" (plural). . . There is nothing to this. State constitutions of the founding period routinely grouped multiple (related) guarantees under a singular "right,". . ." *Heller* at 591. However, whether this Court views the Second Amendment as securing a singular right, plural rights, or "multiple related guarantees," it still finds that this does not put

restoration of an individuals' right to possess a firearm within the purview of "civil rights restored," which courts have repeatedly classified as the right to vote, hold public office and sit on a jury.

Lastly, Defendants urge the Court to look to congressional intent, reasoning that Congress, when enacting § 922(g)(9) and § 921 and in 1996, did not intend for the right to bear arms to be included as a "civil right" for purposes of restoration under 18 U.S.C. § 921(a)(33)(B)(ii). Indeed, as Defendants argue, common sense dictates that the Legislature in 1996 could not have intended "civil rights" to include a right that the Supreme Court did not recognize until Heller in 2008.

Plaintiffs were unable to cite to any case supporting their argument that the restoration of an individual's right to possess a firearm constitutes a restoration of "civil rights" under 18 U.S.C. § 921(a)(33)(B)(ii). To find that Plaintiffs have stated a claim for the declaratory relief that they seek, this Court would be required to interpret 18 U.S.C. § (921)(a)(33)(B)(ii) in a way that no other court has, thus far, interpreted this statute. Likewise, Plaintiffs were unable to cite to any case law in support of their argument that *Brailey* and the cases cited above regarding the meaning of "civil rights restored" should no longer be followed because they were decided prior to *Heller*. The Court finds that as a matter of law, Plaintiffs have not alleged facts showing that their civil rights have been restored. Even Enos, whose record clearance was granted by a Superior Court judge, has not shown that he meets the requirements

of 18 U.S.C. § 921(a)(33)(B)(ii).

Though Plaintiffs ask the Court to base a new interpretation of the statute on the Supreme Court's holdings in *Heller* and *McDonald*, this Court finds greater merit in Defendants argument that it is the role of the legislature, not this Court, to change or re-write the statute at issue in this case. As was discussed at the hearing, nothing prevents Plaintiffs from petitioning Congress to change the law, as citizens often do when they are unhappy with the way a bill is written. Defendants argued that Plaintiffs are free to ask their legislator(s) to sponsor a bill before Congress to change the language of 18 U.S.C. § 921(a)(33)(B)(ii), and raise before Congress the same arguments that Plaintiffs raise before this Court.

In light of the extensive case law holding otherwise, and looking to Congress' intent when creating this exception to § 922(g)(9), this Court refuses Plaintiffs' invitation to create a new interpretation of "civil rights restored" under 18 U.S.C. § 921(a)(33)(B)(ii). The SAC fails to plead facts showing that Plaintiffs' civil rights have been restored within the meaning of 18 U.S.C. § 921(a)(33)(B)(ii), or that they have otherwise fulfilled the requirements of the statute, and further amendment would be futile. Accordingly, the motion to dismiss Plaintiffs' claims for declaratory relief is granted, and the claims are dismissed with prejudice.

2. Second Amendment Constitutional Claim

Plaintiffs' fourth claim for relief argues that absent

declaratory relief from the Court finding that they have satisfied the requirements of 18 U.S.C. § 921(a)(33)(B)(ii), 18 U.S.C. § 922(g)(9) amounts to a lifetime ban on their right to own a firearm, in violation of the Second Amendment. Defendants contend that the SAC fails to state a claim, because 18 U.S.C. § 922(g)(9) is constitutional, even when, as alleged by Plaintiffs, it results in a lifetime ban on firearm possession.

In *United States v. Vongxay*, 594 F.3d 1111 (9th Cir. 2010), the Ninth Circuit analyzed the constitutionality of 18 U.S.C. § 922(g)(1), which prohibits persons with felony convictions from possessing firearms. The Ninth Circuit found that § 922(g)(1) remained constitutional under the Second Amendment, despite the *Heller* decision, as denying felons the right to bear arms is consistent with the explicit purpose of the Second Amendment to maintain the security of a free State. *Id.* at 1117. The Ninth Circuit noted that the Court in *Heller* specifically stated that, "nothing in our opinion should be taken to cast doubt on the longstanding prohibitions on the possession of firearms by felons and the mentally ill . . . we identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive." *Vongxay*, 594 F.3d at 1115 (citing *Heller*, 128 S. Ct. at 2817, n. 26). After discussing the extensive case law upholding § 922(g)(1), the Ninth Circuit found that § 921(g)(1) does not violate the Second Amendment as it applied to Mr. Vongxay, a convicted felon. Accordingly, Defendants urge this Court to grant the motion to dismiss, extending the Ninth Circuit's holding in *Vongxay* to find that that §

922(g)(9) is lawful under *Heller*, and does not violate the Second Amendment as applied to Plaintiffs' convicted domestic violence misdemeanants.

The Ninth Circuit did not apply any level of scrutiny in reaching their decision on the constitutionality of § 922(g)(1) under the Second Amendment. It was not until the Court analyzed the accompanying equal protection claim that they applied constitutional scrutiny. No equal protection claim is alleged in the SAC, and Defendants urge this Court to follow the Ninth Circuit by deciding the Second Amendment claims without applying constitutional scrutiny. Though the parties argued at length during oral argument about the appropriate level of scrutiny to apply to a Second Amendment challenge, the appropriate level of scrutiny has not been designated by the Supreme Court or the Ninth Circuit, and this Court need not reach that question in order to decide this motion.

Numerous courts have found 18 U.S.C. § 922(g)(9) to be presumptively lawful under *District of Columbia v. Heller*, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008). *See e.g. United States v. White*, 593 F.3d 1199, 1206 (11th Cir. 2010) ("we now explicitly hold that 922(g)(9) is a presumptively lawful longstanding prohibition on the possession of firearms"); *United States v. Booker*, 644 F. 3d 12, 24 (1st Cir. 2011) ("indeed, 922(g)(9) fits comfortably among the categories of regulations that *Heller* suggested would be presumptively lawful"); *In re United States*, 578 F.3d 1195 (10th Cir. 2009) ("nothing suggests that the *Heller* dictum, which we must follow, is not inclusive of

§ 922(g)(9) involving those convicted of misdemeanor domestic violence"); *United States v. Smith*, 742 F.Supp.2d 855, 863 (S.D. W. Va. 2010) ("therefore, 922(g)(9) should be considered presumptively lawful, and it is the opinion of this Court that the statute may be upheld on that basis alone").

Defendants argue that the Ninth Circuit has already held that felons are not protected by the Second Amendment in *Vongxay*, and the Court should extend similar reasoning to domestic violence misdemeanants. All felons, whether violent or not, are disqualified from protection under the Second Amendment. *Vongxay*, 594 F.3d at 1116. However, § 922(g)(9) does not apply to all misdemeanants; it singles out only those who have committed violent acts against their intimate partners, children or other family members. See *United States v. Hayes*, 555 U.S. 415, 129 S. Ct. 1079, 1087, 172 L. Ed. 2d 816 (2009) (noting that Congress enacted § 922(g)(9) out of concern that existing felon-in-possession laws were not keeping firearms out of the hands of domestic abusers, because many people who engage in serious spousal or child abuse ultimately are not charged with or convicted of felonies).

Plaintiffs have argued that unless the Court agrees to reinterpret § 921(a)(33)(B)(ii) and grant Plaintiffs' the declaratory relief that they seek, then § 921(a)(33)(B)(ii) along with § 922(g)(9) results in an unconstitutional lifetime ban on Plaintiffs' ability to possess firearms. Plaintiffs did not cite to any cases which have found § 922(g)(9) to be constitutionally suspect, but argue that without a means to restore

their rights or have their convictions set aside or otherwise pardoned or expunged, § 922(g)(9) cannot pass constitutional muster.

Defendants note that courts have said that for the same reasons the Supreme Court articulated for stating that the long standing prohibitions referred to in *Heller* remain presumptively lawful (i.e., the prohibitions pertaining to felons and the mentally ill), there is an even stronger reason for finding that persons convicted of misdemeanor crimes of domestic violence should not be protected by the Second Amendment. *See e.g. Smith*, 742 F.Supp.2d at 863 (stating that the definitional net of § 922(g)(9) is more narrowly crafted than that of § 922(g)(1), another compelling reason to uphold § 922(g)(9) by analogy to § 922(g)(1)); *White*, 593 F.3d at 1206 (noting that in contrast to a felon, who could be convicted of a violent or non-violent act, a person convicted under § 922(g)(9) must have first acted violently toward a family member or domestic partner).

Thus, even if § 922(g)(9) imposes a lifetime ban on a domestic violence misdemeanant's ability to possess a firearm, Defendants argue that such a result is constitutional due to the nature of the specific crime committed. Defendants cite *Skoien*, 614 F.3d at 645 and *Smith*, 742 F.Supp.2d at 869 in support of the argument that § 922(g)(9) is not necessarily a lifetime ban as § 921(a)(33)(B)(ii) provides relief to some individuals, but even if it is, it remains constitutional. The court in *Skoien* acknowledged that the statute tolerates different outcomes for persons convicted in different states, but noted that this is true of all

situations in which a firearms disability or other adverse consequence depends on state law and this variability does not call into question federal firearms limits based on state convictions that have been left in place under the states' widely disparate approaches to restoring civil rights. The court in *Smith* reasoned that:

> It is clear from the federal law that the majority of domestic violence offenders will not regain their firearms possession right. However, there are procedures for the restoration of the right . . . It is up to state legislatures to constrict or expand the ease with which convicted misdemeanants may apply for a receive relief under these measures.

The Court finds Defendants' arguments, and the case law, to be persuasive that § 922(g)(9) is a presumptively lawful categorical ban on firearm possession. Keeping guns out of the hands of those convicted of domestic violence fits squarely into the prohibitions noted by *Heller*. Plaintiffs, as convicted domestic violence misdemeanants, fall within that categorical ban, thus the Second Amendment does not apply to them. Indeed, Plaintiffs themselves do not argue against the extensive case law that has found § 922(g)(9) to be presumptively lawful.

Upon determining that the statute is presumptively lawful, a court may end its inquiry there. *See e.g. White*, 593 F.3d at 1206 (holding 922(g)(9) to be presumptively lawful and ending its inquiry there); *Smith*, 742 F. Supp. 2d at 859

(discussing how some courts have found 922(g)(9) to be presumptively constitutional and end their analysis there, while other courts conduct an individual analysis of the statutory section at issue, determine the appropriate level of constitutional scrutiny to apply, and then scrutinize the statute in light of the facts before the court). Thus because this Court finds that § 922(g)(9) warrants inclusion on *Heller's* list of presumptively lawful longstanding prohibitions on the right to bear arms, no further constitutional scrutiny is required.

The SAC also attempts to plead an as-applied challenge. To raise a successful as-applied challenge, a plaintiff must present facts about himself and his background that distinguish his circumstances from those of persons historically barred from Second Amendment protections. *United States v. Barton*, 633 F.3d 168, 174 (3rd Cir. 2011). The SAC describes Plaintiffs' convictions as "minor," yet domestic violence misdemeanants are, by statutory definition, violent criminals. *Smith*, 742 F.Supp.2d at 869. Defendants argue that Plaintiffs have not alleged facts about themselves and their backgrounds that distinguish their circumstances from other domestic violence misdemeanants who are disqualified from firearm possession under § 922(g)(9).

The Court notes that at oral argument, for the first time, Defendants raised the issue that Plaintiffs' Second Amendment "as-applied" challenge could actually be characterized as a facial overbreadth challenge, because § 922(g)(9) has not been "applied" to Plaintiffs. Defendants argue that it has not been

applied because Plaintiffs have not been arrested and charged with possession of a firearm in violation of § 922(g)(9), which is the route by which challenges to § 922(g)(9) typically reach courts. Defendants stated that Plaintiffs would have standing to bring an overbreadth challenge, but did not explicitly argue that Plaintiffs lack standing to bring an "as-applied" challenge. Plaintiffs for their part did not dispute the characterization of their challenge as being one of overbreadth, though the SAC pleads that the statute is unconstitutional as applied to them, not that Congress overreached by creating a perpetual disqualification for persons convicted of misdemeanor domestic violence.

Such an overbreadth argument was advanced by the defendant in *Skoien*, 614 F.3d at 644-45. The Seventh Circuit ultimately declined to reach this argument because it found that the statute was properly applied to the defendant, and thus he was not able to obtain relief based on arguments that a differently situated person might present. *Id.* at 645. Likewise, the defendant in *Smith*, 742 F.Supp.2d at 868-69, argued that the difficulty of securing a pardon or expungement under either state or federal law, § 922(g)(9) operates as a complete ban on firearm ownership in perpetuity. The *Smith* court held that even assuming the defendant was permanently banned from future firearm possession, § 922(g)(9) was reasonably tailored to accomplish a compelling government interest.

Here, the parties did not engage in extensive argument over whether the SAC presents an overbreadth or as-applied challenge, and Defendants

did not brief the issue in their motion to dismiss or reply briefs. However, in the Court's view the characterization of the precise nature of Plaintiffs' Second Amendment challenge does not change the outcome. Whether this Court views the SAC as bringing an as-applied challenge or an overbreadth challenge, the Court does not find that Plaintiffs have stated a claim for violation of the Second Amendment. The Court finds that § 922(g)(9) is a presumptively lawful categorical ban under *Heller*, and extends the Ninth Circuit's ruling in *Vongxay* to hold that § 922(g)(9) does not violate the Second Amendment as applied to Plaintiffs, convicted domestic violence misdemeanants. Plaintiffs have not set forth facts to rebut that presumption of lawfulness, distinguishing them from other domestic violence misdemeanants sufficiently to state an as-applied or overbreadth challenge. Accordingly, Plaintiffs' have not stated a claim for violation of the Second Amendment. Plaintiffs have already amended the complaint twice and further amendment would be futile. Accordingly the dismissal is with prejudice.

III. ORDER

The Motion to Dismiss is GRANTED, and Plaintiffs' SAC is DISMISSED, WITH PREJUDICE. The March 21, 2012 hearing on Plaintiffs motion for summary judgment is vacated.

IT IS SO ORDERED. Dated: February 28, 2012
/s/ John A. Mendez
JOHN A. MENDEZ, UNITED STATES DISTRICT JUDGE

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF CALIFORNIA**

Case No. 2:10-CV-2911-JAM-EFB

RICHARD ENOS, JEFF BASTASINI, LOUIE MERCADO, WALTER GROVES, MANUEL MONTEIRO, EDWARD ERIKSON, VERNON NEWMAN, JEFF LOUGHRAN and WILLIAM EDWARDS, Plaintiffs,

v.

ERIC HOLDER, as United States Attorney General, and ROBERT MUELLER, III, as Director of the Federal Bureau of Investigation, Defendants.

2011 U.S. Dist. LEXIS 73932
July 7, 2011, Decided – July 8, 2011, Filed

SUBSEQUENT HISTORY: Motion granted by, Complaint dismissed at *Enos v. Holder*, 2012 U.S. Dist. LEXIS 25759 (E.D. Cal., Feb. 28, 2012)

COUNSEL: For Richard Enos, Jeff Bastasini, Louie Mercado, Walter Groves, Manuel Monteiro, Edward Erikson, Vernon Newman, Plaintiffs: Donald E. J. Kilmer, Jr., LEAD ATTORNEY, Law Offices of Donald Kilmer, APC, San Jose, CA.

For Eric Holder, US Attorney General, Robert Mueller, III, Director FBI, Defendants: Edward A Olsen, GOVT, LEAD ATTORNEY, United States

Attorney's Office, Sacramento, CA.

JUDGES: JOHN A. MENDEZ, UNITED STATES DISTRICT JUDGE.

OPINION BY: JOHN A. MENDEZ

OPINION

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS

This matter is before the Court on Defendants' Eric Holder and Robert Mueller, III (collectively "Defendants") Motion to Dismiss (Doc. #11) Plaintiffs' Richard Enos ("Enos"), Jeff Bastasini ("Bastasini"), Louie Mercado ("Mercado"), Walter Groves ("Groves"), Manuel Monteiro ("Monteiro"), Edward Erickson ("Erickson"), Vernon Newman ("Newman"), Jeff Loughran ("Loughran") and William Edwards ("Edwards") First Amended Complaint ("FAC") (Doc. #8). The above-named plaintiffs opposed the motion. A hearing on the motion to dismiss was held on May 4, 2011. At the close of the hearing, the Court dismissed plaintiffs Edwards and Loughran, for improper joinder and venue (Doc. #20) and ordered further briefing on Defendants' supplemental authorities. Having reviewed the additional briefing, and based on the moving papers and oral argument, the Court GRANTS in part and DENIES in part the motion to dismiss.

I. FACTUAL AND PROCEDURAL BACKGROUND

Enos, Bastasini, Mercado, Groves, Monteiro, Erickson, and Newman (collectively "Plaintiffs") have each been convicted of misdemeanor domestic violence in California, and allege that they wish to purchase a gun but are prevented from doing so by federal law. Plaintiffs challenge the government's interpretation of 18 U.S.C. § 922(g)(9), which makes it a federal offense for any person who has been convicted of a misdemeanor crime of domestic violence to possess a firearm, and the government's interpretation of 18 U.S.C. § 922(d)(9), which makes it unlawful to sell a firearm or ammunition to a person who has been convicted of misdemeanor domestic violence. Though California law allows for the restoration of gun rights after a period of ten years from the misdemeanor domestic violence conviction, (see CA Penal Code § 12021(c)(1) and (3)), the FAC alleges that federal law only provides for the restoration of gun rights for those with felony convictions. Accordingly, Plaintiffs allege that federal law creates a lifetime ban on gun ownership for those with misdemeanor domestic violence convictions.

Plaintiffs allege that they were each convicted of misdemeanor domestic violence over ten years ago, and under California law their gun rights have been restored. Accordingly, they argue that the federal law barring them from gun ownership is a violation of their constitutional rights. Plaintiffs allege that 18 U.S.C. § 922(g)(9) and (d)(9) violate their Second, First, Tenth, and Fifth Amendment rights. Plaintiffs also seek declaratory and injunctive relief that they are not subject to the prohibitions set forth in 18 U.S.C. § 922(d)(9) and 922(g)(9) and that these two statutes are

unconstitutional on their face and as applied to Plaintiffs. Defendants argue that most of the plaintiffs lack standing to challenge the law, and should be dismissed pursuant to Federal Rules of Civil Procedure 12(b)(1). Defendants further argue that the constitutional claims fail under Federal Rules of Civil Procedure 12(b)(6), for failure to state a claim.

II. OPINION

A. Legal Standard

1. Rule 12(b)(1) dismissal

A party may move to dismiss an action for lack of subject matter jurisdiction pursuant to Federal Rules of Civil Procedure 12(b)(1). When a defendant brings a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), the plaintiff has the burden of establishing subject matter jurisdiction. *See Rattlesnake Coalition v. United States Envtl. Protection Agency*, 509 F.3d 1095, 1102, FN 1 (9th Cir. 2007).

2. Rule 12(b)(6) dismissal

A party may move to dismiss an action for failure to state a claim upon which relief can be granted pursuant to Federal Rules of Civil Procedure 12(b)(6). In considering a motion to dismiss, the court must accept the allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiff. *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974), *overruled on other grounds by Davis v. Scherer*, 468 U.S. 183, 104 S. Ct. 3012, 82 L.

Ed. 2d 139 (1984); *Cruz v. Beto*, 405 U.S. 319, 322, 92 S. Ct. 1079, 31 L. Ed. 2d 263 (1972). Assertions that are mere "legal conclusions," however, are not entitled to the assumption of truth. *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1950, 173 L. Ed. 2d 868 (2009), citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). To survive a motion to dismiss, a plaintiff needs to plead "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. Dismissal is appropriate where the plaintiff fails to state a claim supportable by a cognizable legal theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

Upon granting a motion to dismiss for failure to state a claim, the court has discretion to allow leave to amend the complaint pursuant to Federal Rules of Civil Procedure 15(a). "Absent prejudice, or a strong showing of any [other relevant] factor[], there exists a presumption under Rule 15(a) in favor of granting leave to amend." *Eminence Capital, L.L.C. v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003). "Dismissal with prejudice and without leave to amend is not appropriate unless it is clear . . . that the complaint could not be saved by amendment." *Id.*

Generally, the court may not consider material beyond the pleadings in ruling on a motion to dismiss for failure to state a claim. There are two exceptions: when material is attached to the complaint or relied on by the complaint, or when the court takes judicial notice of matters of public record, provided the facts are not subject to reasonable dispute. *Sherman v. Stryker Corp.*, 2009 U.S. Dist. LEXIS 34105, 2009 WL

2241664 at *2 (C.D. Cal. Mar. 30, 2009)(internal citations omitted). Here, Plaintiffs request judicial notice of ATF Form 4473, the form that must be completed when applying to purchase a gun. The Court will take judicial notice of this form, as it is a matter of public record.

B. Claims for Relief

As threshold matters, Defendants challenge the Court's jurisdiction and Plaintiffs' standing. Defendants argue that the FAC fails to set forth the jurisdictional basis for seeking a declaration from the Court that their convictions are not misdemeanor crimes of domestic violence under 18 U.S.C. § 921(a)(33). Section 921(a)(33) defines a "misdemeanor crime of domestic violence" as

> a misdemeanor that has as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse parent, or guardian of the victim.

However, the statute provides that a person shall not be considered to have been convicted of such an offense unless the person was represented by counsel in the case, or knowingly and intelligently waived the

right to counsel in the case, and if the prosecution for an offense entitled the person to a jury trial, the case was tried by a jury or the person knowingly and intelligently waived the right to a jury trial, by guilty plea or otherwise. 18 U.S.C. § 921(a)(33)(B)(I).

The statute further provides that

> a person shall not be considered to have been convicted of such an offense for purposes of this chapter if the conviction has been expunged or set aside, or is an offense for which the person has been pardoned or has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense) unless the pardon, expungement, or restoration of civil rights, expressly provides that the person may not ship, transport, posses, or receive firearms.
>
> 18 U.S.C. § 921(a) (33) (B) (ii).

18 U.S.C. § 922(s) and (t) govern the process for acquiring a firearms permit. Under 18 U.S.C. § 925A, any person denied a firearm pursuant to Sections 922(s) or (t), (1) due to the provision of erroneous information by any state or political subdivisions thereof, or by the National Instant Criminal Background Check System established under Section 103 of the Brady Handgun Violence Prevention Act; or (2) who was not prohibited from receipt of a firearm pursuant to subsection (g) or (n) of Section 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.

To the extent that Plaintiffs rely on 18 U.S.C. § 925A as the jurisdictional basis for the requested declaratory relief, Defendants argue that the statute would only apply to Enos, as he is the only plaintiff that the FAC alleges actually attempted to purchase a gun and was denied due to the National Instant Criminal Background Check System, maintained by the Department of Justice and the Federal Bureau of Investigation. The Declaratory Judgment Act, 28 USC 2201-02, on its own does not confer federal jurisdiction. See *Nationwide Mut. Ins. Co. v. Liberatore*, 408 F.3d 1158, 1161 (9th Cir. 2005).

At oral argument, counsel for Plaintiffs stated that Enos was not the only plaintiff to attempt to purchase a gun, and said he would present further evidence at summary judgment. However, the FAC is devoid of any such allegations pertaining to the other plaintiffs. Without allegations that the other plaintiffs attempted to purchase a gun and were denied a permit pursuant to Sections 922(s) or (t), this Court lacks jurisdiction over their claims for declaratory relief under 18 U.S.C. § 925A. No other jurisdictional basis was alleged in the FAC. Accordingly the declaratory relief claims brought by plaintiffs Bastasini, Mercado, Groves, Monteiro, Erickson, and Newman are DISMISSED,

WITH LEAVE TO AMEND.

Defendants argue that while the Court may have jurisdiction over Enos' claim for declaratory relief, the claim is without merit. The FAC alleges that because Enos may possess a gun without running afoul of CA Penal Code § 12021(c) (1), his civil rights have been restored within the meaning of 18 U.S.C. § 921(a) (33) (B) (ii). Defendants argue that the language in the statute "civil rights restored" denotes rights accorded to an individual by virtue of his citizenship in a particular state, comprising the right to vote, hold public office, and serve on a jury. See *United States v. Metzger*, 3 F.3d 756, 758 (4th Cir. 1993); *McGrath v. United States*, 60 F.3d 1005 (2d Cir. 1995); *United States v. Cassidy*, 899 F.2d 543, 549 (6th Cir.). According to Defendants, because none of these rights were taken away from Enos due to his misdemeanor conviction, none could be restored.

Enos argues that his civil right to possess a gun was taken away by the state of California, and restored after ten years. Though the Ninth Circuit has previously rejected the argument that a state's restoration of an individual's right to possess firearms constitutes a "restoration of rights" under 18 U.S.C. § 921(a) (33) (B) (ii), in *U.S. v. Brailey*, 408 F.3d 609 (9th Cir. 2005), Enos contends that *Brailey* and additional cases raised by Defendants should not be followed since they were decided before the Supreme Court's rulings in *District of Columbia v. Heller*, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008) (holding that the Second Amendment confers and individual right to keep and bear arms), and *McDonald v. City of Chicago*,

130 S.Ct. 3020, 177 L. Ed. 2d 894 (2010) (holding that the Fourteenth Amendment incorporates the Second Amendment right). Accordingly, Enos may be able to maintain a claim for declaratory relief in light of the shifting legal landscape after *Heller* and *McDonald*.

Even if the Court were to find that a civil right was restored, Defendants argue that the statute is written in the plural and only contemplates the restorations of "rights" not the restoration of one right. Enos in turn asserts that the Second Amendment protects multiple rights, the right to keep and the right to bear, firearms.

At this early stage of the pleadings, taking the allegations of the FAC as true, the Court finds that the FAC contains sufficient allegations to maintain Enos' claim for declaratory relief. Accordingly the motion to dismiss Enos' declaratory relief claim is DENIED.

Next, Defendants contest Plaintiffs' standing to challenge the constitutionality of the federal statutes at issue, arguing that Plaintiffs, with the possible exception of Enos, lack standing to challenge the constitutionality of 18 U.S.C. § 921(a) (33), § 922(d) (9) and § 922(g) (9).

Article III of the United States Constitution limits the jurisdiction of federal court to cases and controversies. See *San Diego County Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1126 (9th Cir. 1996). Federal courts are presumed to lack jurisdiction, unless the contrary appears affirmatively from the record. Id. Standing is an essential, core component of the case or controversy requirement. Id. (citing *Lujan*

v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). Plaintiffs, as the parties invoking federal jurisdiction, bear the burden of establishing their standing to sue. *Id*. To do so, they must demonstrate that they have suffered "an 'injury in fact' to a legally protected interest that is both 'concrete and particularized' and 'actual or imminent,' as opposed to "conjectural" or "hypothetical." *Id*.

The plaintiffs, other than Enos, lack standing for the same reasons as those discussed above in relation to the Court's jurisdiction. Without allegations in the FAC that Plaintiffs have attempted to purchase a gun and have been denied, or that they face imminent prosecution for possessing a gun, Plaintiffs lack standing. They have not alleged a concrete injury or an imminent threat of prosecution, as FAC merely alleges that Plaintiffs wish to purchase guns. The FAC lacks allegations that 18 U.S.C. § 921(a) (33), § 922(d) (9) and § 922(g) (9) have been applied to Plaintiffs. Accordingly, the Court finds that only Enos has standing to challenge the constitutionality of the aforementioned statutes, and the other plaintiffs claims are dismissed without prejudice.

1. Second Amendment

The FAC alleges that 18 U.S.C. §§ 921(a) (33), 922(d) (9), and 922(g) (9) violate Enos' Second Amendment right to keep and bear arms because together they impose a lifetime ban on gun ownership after a domestic violence misdemeanor conviction. Defendants argue that the FAC fails to state a claim for a Second Amendment violation, because statutes

prohibiting felons or misdemeanants from possessing firearms have been found lawful under the Second Amendment. See, e.g., *United States v. Vongxay*, 594 F.3d 1111 (9th Cir. 2010) (holding that 18 U.S.C. § 922(g) (1), statute prohibiting felons from possessing firearms, did not violate the Second Amendment); *United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010) (holding that 18 U.S.C. 922(g) is generally proper under the Second Amendment); *United States v. Booker*, 644 F.3d 12, 2011 U.S. App. LEXIS 8925, 2011 WL 1631947 that (1st Cir. 2011) (holding that 18 U.S.C. § 922(g) (9) is a presumptively lawful regulatory measure); *United States v. White*, 593 F.3d 1199 (11th Cir. 2010) (same). Enos distinguishes his claim from *Vongxay, Skoien, Booker, and White* in that he seeks to challenge 18 U.S.C. § 922(g) (9) (and 18 U.S.C. § 922(d) (9) and 18 U.S.C. § 921(a) (33)) only to the extent that they impose a lifetime ban on the right to own a gun without possibility of restoring the right, despite restoration of this right in California. Enos does not challenge the 18 U.S.C. § 922(g) (9)'s constitutionality insofar as it restricts his gun ownership for ten years following his misdemeanor domestic violence conviction.

The First Circuit recently held in *Booker*, 2011 U.S. App. LEXIS 8925, 2011 WL 1631947 that section 922(g) (9) "fits comfortably among the categories of regulations that *Heller* suggested would be presumptively lawful." 2011 U.S. App. LEXIS 8925, [WL] at *10. The First Circuit rejected Booker's arguments that section 922(g) (9) violates the Second Amendment, finding that there is a substantial relationship between section 922(g) (9)'s

disqualification of domestic violence misdemeanants from gun ownership and the governmental interest in preventing gun violence in the home. 2011 U.S. App. LEXIS 8925, [WL] at *11.

Though the First Circuit found section 922(g) (9) to be facially valid, Enos in his supplemental briefing urges the Court not to dismiss his Second Amendment claim at this stage, arguing that he brings an as-applied challenge. He only argues section 922(g) (9) is unconstitutional to the extent that it is interpreted, along with section 921(a) (33) (B) (ii) as a lifetime ban on gun ownership without the possibility of restoring gun rights. Based on the pleadings and oral argument, the Court will not dismiss Enos' Second Amendment claim at this stage, as he may be able to maintain a claim. Accordingly, the motion to dismiss Enos' Second Amendment claim is DENIED.

2. First Amendment

The FAC alleges that 18 U.S.C. § 922(g) (9), 18 U.S.C. § 922(d) (9) and 18 U.S.C. § 921 (a) (33) violate Enos' First Amendment rights, because they impose a lifetime ban on the exercise of a fundamental constitutional right for a minor crime without providing a statutory remedy to petition the government for restoration of that right. However, as Defendants argue, these allegations fail to state a claim. Defendants contend that the First Amendment claim is devoid of merit, because it contains no allegations that the government has restricted Plaintiffs right to speech and to petition the government for redress. Furthermore, gun possession

is not speech. See *Nordyke v. King* 319 F.3d 1185, 1190 (9th Cir. 2003). Plaintiffs conceded the weakness of this claim in the briefs and at oral argument, by admitting that they advanced the claim only in hopes of making new law. However, Enos has failed to state a claim for violation of the First Amendment, and his First Amendment claim is DISMISSED, WITH PREJUDICE.

3. Tenth Amendment

The FAC alleges that 18 U.S.C. § 922(g) (9) 18 U.S.C. § 922(d) (9) and 18 U.S.C. § 921 (a) (33) violate the Tenth Amendment, by usurping the States' powers to define and provide for the rehabilitation of minor public offenses. [1] Defendants move to dismiss the Tenth Amendment claim, arguing that the Ninth Circuit in *United States v. Andaverde*, 64 F.3d 1305 (9th Cir. 1995) held that Congress may regulate possession of firearms without violating the Tenth Amendment. Though *Andaverde* discussed 18 U.S.C. § 922(g) (1) (regulating the possession of firearms by felons), courts addressing 18 U.S.C. § 922(g)(9) have likewise found the statute to be constitutional under the Tenth Amendment. See, e.g., *Fraternal Order of Police v. United States*, 173 F. 3d 898, 335 U.S. App. D.C. 359 (D.C. Cir. 1999); *Hiley v. Barrett*, 155 F.3d 1276 (11th Cir. 1998). Accordingly, Enos' claim for violation of the Tenth Amendment is DISMISSED, WITH PREJUDICE.

[1] The Court has considered *Bond v. United States*, 131 S. Ct. 2355, 180 L. Ed. 2d 269, 2011 U.S. LEXIS 4558, 2011 WL 2369334 (2011), the

supplemental authority recently submitted by counsel for Plaintiffs (Doc. #23), and finds it unpersuasive. *Bond* is unrelated to the issue of firearms regulation under the Tenth Amendment, and to the extent that Plaintiffs' cite it in support of their argument for standing, it is entirely distinguishable from the case at hand, because the plaintiff in *Bond* was convicted and incarcerated under the law she challenged on Tenth Amendment grounds.

4. Fifth Amendment

The FAC alleges that 18 U.S.C. § 922(g)(9), 18 U.S.C. § 922(d)(9) and 18 U.S.C. § 921 (a)(33) violate the Fifth Amendment by imposing a lifetime ban on the right to own a gun without providing a statutory remedy for restoration of that right. Defendants' oppose this claim, arguing that 18 U.S.C. § 925(c) allows any person to apply for relief from the Attorney General. See *Palma v. United States*, 228 F.3d 323, 327-28 (3d Cir. 2000) (stating that persons convicted of a misdemeanor crime of domestic violence may apply for relief under 18 U.S.C. § 925(c)). Enos' opposition brief states that he is asserting an equal protection argument, but does not set forth allegations or argument in support of this claim or in opposition to Defendants' arguments. Accordingly, the Fifth Amendment claim is DISMISSED, WITH PREJUDICE.

III. ORDER

For the reasons set forth above, Defendants' motion to dismiss the FAC is GRANTED in part and DENIED

in part. Bastasini's, Mercado's, Groves', Monteiro's, Erickson's, and Newman's declaratory relief and constitutional claims are dismissed, with leave to amend. [2] Enos' First Amendment, Tenth Amendment and Fifth Amendment claims are dismissed, with prejudice. The motion to dismiss is denied as to dismissal of Enos' declaratory relief and Second Amendment claims. Plaintiffs must file a Second Amended Complaint within twenty (20) days of the date of this order.

[2] Because the Court found that as pled, Bastasini, Mercado, Groves, Monteiro, Erickson, and Newman lack standing to plead the constitutional claims, the Court only reached the merits of Enos' constitutional claims, and dismissed the remaining Plaintiffs' constitutional claims. However, remaining plaintiffs are advised that the Court will look with disfavor on any attempt to re-plead the First, Tenth and Fifth Amendment claims that were dismissed with prejudice as to Enos.

IT IS SO ORDERED.
Dated: July 7, 2011

/s/ John A. Mendez
JOHN A. MENDEZ,
UNITED STATES DISTRICT JUDGE

SUPREME COURT OF NEW HAMPSHIRE

Nos. 2013-513, 2014-017

GREG DUPONT
v.

NASHUA POLICE DEPARTMENT

Gregory Dupont v. Peter Mcdonough & a.

2015 N.H. LEXIS 19

June 26, 2014, Argued

February 20, 2015, Opinion Issued

PRIOR HISTORY: 9th Circuit Court - Nashua District Division Hillsborough-southern judicial district

DISPOSITION: Reversed and remanded.

COUNSEL: Penny S. Dean, of Concord, by brief and orally, and Jay Edward Simkin, non-attorney representative, by brief and orally, for the petitioner.

Stephen M. Bennett, corporation counsel, of Nashua, on the brief and orally, for respondent City of Nashua.

Joseph A. Foster, attorney general (Rebecca L. Woodard, assistant attorney general, on the memorandum of law and orally), for respondents Peter

McDonough, Christopher B. Casko, John J. Barthelmes, and Sean Haggerty.

JUDGES: HICKS, J. DALIANIS, C.J., and CONBOY, LYNN, and BASSETT, JJ., concurred.

OPINION BY: HICKS

OPINION

Hicks, J. In these consolidated cases, the petitioner, Gregory DuPont, appeals: (1) an order of the Circuit Court (Leary, J.) affirming the revocation by the respondent City of Nashua (City), through its chief of police, of his license to carry a loaded pistol or revolver; and (2) an order of the Superior Court (Nicolosi, J.) denying his motion for preliminary injunctive relief in a proceeding brought against the respondents Peter McDonough, Sean Haggerty, Christopher B. Casko, and John J. Barthelmes, challenging the denial of his request for an armed security guard license. We reverse and remand.

The following facts are taken from the trial courts' orders or are supported in the record. In 1998, the petitioner was convicted in Massachusetts of operating a motor vehicle under the influence of liquor (the 1998 conviction). That offense was a misdemeanor that carried a potential maximum prison sentence of two and a half years. Thus, the petitioner's 1998 conviction rendered him ineligible, under Massachusetts law, to possess or carry a firearm, at least as of the 1998 amendments to the Massachusetts firearms laws. *See Dupont v. Chief of Police of Pepperell*, 57 Mass. App. Ct.

690, 786 N.E.2d 396, 398-400 (Mass. App. Ct. 2003) (applying 1998 amendments where conviction predated them), Mass. Gen. Laws Ann. ch. 140 §§ 129B (West Supp. 1997) (amended 1998, 2000, 2002, 2003, 2004, 2010, 2011, 2014), 129C (West Supp. 1997) (amended 1998, 1999, 2010, 2014), 131 (West Supp. 1997) (amended 1998, 2002, 2003, 2004, 2008, 2010, 2011, 2014), Mass. Gen. Laws Ann. ch. 269 § 10(a) (West Supp. 1997) (amended 2006, 2014), (h) (West Supp. 1997) (amended 1998, 2006). In 2005, upon the petitioner's petition for review, the Massachusetts Firearm Licensing Review Board (FLRB) found that the petitioner was "a suitable person to possess a license to carry firearms, and his right to possess a firearm therefore is fully restored in the Commonwealth." The FLRB accordingly determined that, notwithstanding the 1998 conviction, the petitioner could apply to his licensing authority for a license to carry firearms.

In 2007, the City's chief of police issued the petitioner a license to carry a pistol or revolver, and that license was renewed in 2012. In 2009, the New Hampshire Department of Safety (DOS) issued the petitioner an armed security guard license.

Sometime prior to June 29, 2010, Sergeant Lobrano of DOS became aware of the 1998 conviction and determined that it disqualified the petitioner, under federal law, from possessing firearms. Accordingly, on June 29, 2010, Lobrano notified the petitioner that he was revoking the petitioner's armed security guard license. On the same day, Lobrano issued the petitioner an unarmed security guard

license.

The petitioner appealed Lobrano's decision to a hearings examiner, who upheld it. The petitioner then appealed the hearings examiner's decision to the superior court. On March 9, 2011, while the parties were awaiting decision on their cross-motions for summary judgment, DOS's attorney, respondent Casko, offered the petitioner the following settlement:

1. You will agree to the dismissal of your appeal of the hearings examiner's decision pending in the Hillsborough South Superior Court. To achieve such, I will file an Assented to Motion for Voluntary Nonsuit with Prejudice of the case.

2. In exchange, the Department of Safety will reissue your armed security guard license upon your signing and returning the agreement to me.

3. You agree to waive any claim for damages due to lost wages against the Department of Safety related to this matter.

4. The Department agrees not to use the conviction for Operating Under the Influence from Lowell District Court Docket #9811CR1032A as a basis to revoke or deny such license in the future.

5. If you agree, please verify same by signing below.

The petitioner agreed to the terms of the offer (the 2011 settlement) and the case was non-suited.

In February or March 2013, the petitioner applied to the Federal Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) for a Curios and Relics License. By apparent agreement with the ATF, local police departments conduct background checks on federal license applicants. Accordingly, the Nashua Police Department conducted a background check on the petitioner in 2013 and, in doing so, learned of the 1998 conviction. Why the City had not discovered the 1998 conviction previously, despite having conducted at least two prior background checks on the petitioner, is not explained in the record.

Nashua Police Lieutenant Michael Moushegian, who reviewed the petitioner's federal application, determined that the 1998 conviction disqualified the petitioner from both the federal license for which he had applied and his state license to carry. Moushegian advised the police chief that he should not only recommend that the ATF deny the petitioner his federal Curio and Relics license, but that he should also revoke his state license to carry. On March 28, 2013, Nashua Police Chief John Seusing revoked the petitioner's license to carry. The petitioner appealed the revocation to the circuit court, and, following that court's affirmance of Chief Seusing's decision, he appealed to this court.

In June 2013, the petitioner applied to renew his armed security guard license. New Hampshire State Police Sergeant Sean Haggerty notified the petitioner on July 8, 2013, that his application had been conditionally denied. The superior court found it implicit in Haggerty's decision that denial was based

upon the 1998 conviction. The petitioner filed a motion in superior court to bring forward and enforce [*6] the 2011 settlement agreement. Following denial of his motion for preliminary injunctive relief, the petitioner appealed to this court.

On appeal, the petitioner argues that the trial courts erred in: (1) upholding Chief Seusing's revocation of his license to carry; (2) upholding the DOS's decision to rescind the 2011 settlement; (3) failing to find that the City was bound by the 2011 settlement; (4) misinterpreting 18 U.S.C. §§ 921(a)(20) et seq.; (5) disregarding the findings and conclusions of the FLRB's decision restoring his right to possess firearms; and (6) failing to "give full faith and credit to the provisions of the public acts, records and judicial proceedings in Massachusetts."

[1] We first consider the applicable standards for reviewing each of the trial court orders the petitioner appeals. RSA 159:6-b, I, provides, in pertinent part, that "[t]he issuing authority may order a license to carry a loaded pistol or revolver issued to any person pursuant to RSA 159:6 to be ... revoked for just cause." RSA 159:6-b, I (2014). We held in *Bleiler v. Chief, Dover Police Dep't*, 155 N.H. 693, 927 A.2d 1216 (2007), that "'just cause' refers to a licensee's use of a weapon for an improper purpose or to the licensee's status as an unsuitable person." *Bleiler*, 155 N.H. at 702. That decision may be appealed to the circuit court pursuant to RSA 159:6-c. See RSA 159:6-c (2014); RSA 490-F:3 (Supp. 2014) (providing, in part, that "[t]he circuit court shall have the jurisdiction, powers, and duties conferred upon the former ... district courts").

We have held, with respect to such an appeal, "that the statute contemplates that the [trial] court will hear evidence and make its own determination whether the petitioner is entitled to a license." *Silverstein v. Town of Alexandria*, 150 N.H. 679, 681, 843 A.2d 963 (2004) (quotation and brackets omitted). In our review of the trial court's decision, we defer to the court's factual findings, provided there is evidence in the record to support them. *Cf. Jacobs v. Director, N.H. Div. of Motor Vehicles*, 149 N.H. 502, 503, 823 A.2d 752 (2003) (review of superior court decision on appeal from an administrative license suspension by the department of motor vehicles). We review the trial court's application of the law to the facts de novo. *Cf. id.* at 504.

"A preliminary injunction is a provisional remedy that preserves the status quo pending a final determination of the case on the merits." *N.H. Dep't of Envtl. Servs. v. Mottolo*, 155 N.H. 57, 63, 917 A.2d 1277 (2007). "[A] party seeking an injunction must show," among other things, "that it would likely succeed on the merits." Id. "[T]he granting of an injunction is a matter within the sound discretion of the Court exercised upon a consideration of all the circumstances of each case and controlled by established principles of equity." *UniFirst Corp. v. City of Nashua*, 130 N.H. 11, 14, 533 A.2d 372 (1987) (quotation and ellipsis omitted). "We will uphold the decision of the trial court with regard to the issuance of an injunction absent an error of law, [unsustainable exercise] of discretion, or clearly erroneous findings of fact." *Id.*; *State v. Lambert*, 147 N.H. 295, 296, 787 A.2d 175 (2001) (explaining unsustainable exercise of discretion

standard).

Both of the trial courts' decisions involved, in part, an interpretation of federal law governing firearms possession. In affirming Chief Seusing's revocation of the petitioner's license to carry, the trial court reasoned that the petitioner could not "be deemed suitable to possess a license to carry a pistol or revolver" because, "[u]nder applicable federal law, which New Hampshire must follow under the Supremacy Clause of the U.S. Constitution, [the petitioner] cannot possess a firearm." Similarly, with respect to the petitioner's motion for preliminary injunctive relief in the proceeding to enforce the settlement agreement, the trial court concluded that the petitioner had failed to show a likelihood of success on the merits because it appeared that the settlement agreement was unenforceable as violative of federal law. Accordingly, we address the petitioner's first, second, and fourth arguments together, and we begin by examining the relevant federal statutes and their application to the petitioner.

Under federal law, it is unlawful for any person "who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year" to possess any firearm. 18 U.S.C. § 922(g)(1) (2012). Without more, it would appear that the petitioner falls under this prohibition. 18 U.S.C. § 921(a)(20), however, provides, in pertinent part:

> The term "crime punishable by imprisonment for a term exceeding one year" does not include --

> ...
> (B) any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.
>
> What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned *or has had civil rights restored* shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

18 U.S.C. § 921(a)(20) (2012) (emphasis added).

Although classified as a misdemeanor, the petitioner's 1998 conviction carried a potential maximum prison sentence of two and a half years. Thus, that offense does not fall within the exclusion of § 921(a)(20)(B). Nevertheless, the petitioner contends that the 1998 conviction is one that "has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored." 18 U.S.C. § 921(a)(20). This contention forms the crux of his appeal.

Because the meaning of § 921(a)(20) is a question

of federal law, we interpret it in accordance with federal policy and precedent. *Dube v. N.H. Dep't of Health & Human Servs.*, 166 N.H. 358, 364, 97 A.3d 241 (2014). "When interpreting a statute, we begin with the language of the statute itself, and, if possible, construe that language according to its plain and ordinary meaning." *Id.* "We do not read words or phrases in isolation, but in the context of the entire statutory scheme." *Pelkey v. Dan's City Used Cars*, 163 N.H. 483, 487, 44 A.3d 480 (2012), aff'd, 133 S. Ct. 1769, 185 L. Ed. 2d 909 (2013).

The Second Circuit Court of Appeals has concisely stated Congress's purpose in enacting § 921(a)(20). "The exemption at issue was passed in 1986 in response to a 1983 Supreme Court decision which held that the definition of a predicate offense under the Gun Control Act of 1968 was a matter of federal, not state law." *McGrath v. United States*, 60 F.3d 1005, 1009 (2d Cir. 1995); see *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 111-12, 103 S. Ct. 986, 74 L. Ed. 2d 845 (1983), superseded by statute, Firearms Owners' Protection Act, Pub. L. No. 99-308, 100 Stat. 449 (1986). "Section 921(a)(20) was expressly crafted to overrule *Dickerson's* federalization of a felon's status by allowing state law to define which crimes constitute a predicate offense under the statute, and thereby to determine which convicted persons should be subject to or exempt from federal prosecution for firearms possession." *McGrath*, 60 F.3d at 1009. "Calling its new legislation the 'Firearms Owners' Protection Act [FOPA],' Congress sought to accommodate a state's judgment that a particular person or class of persons is, despite a prior conviction, sufficiently trustworthy

to possess firearms." *Id.* Thus, the determination of "whether a person has had civil rights restored [for purposes of § 921(a)(20)] ... is governed by the law of the convicting jurisdiction." *Beecham v. United States*, 511 U.S. 368, 371, 114 S. Ct. 1669, 128 L. Ed. 2d 383 (1994).

The circuit court found that the petitioner's 1998 conviction "has not been expunged or set aside nor has he been pardoned." The petitioner does not challenge these findings. The circuit court also found, relying upon *Logan v. United States*, 552 U.S. 23, 128 S. Ct. 475, 169 L. Ed. 2d 432 (2007), that the petitioner "has not lost any civil right as a result of his conviction[,] for the right to carry a gun is a constitutional, not civil, right." The superior court found it to be "generally accepted" that the civil rights to which § 921(a)(20) refers are the rights to vote, hold public office, and serve on a jury. It concluded, also relying upon *Logan*, that because "the petitioner never lost any of these rights, ... [he] never had the opportunity to have them 'restored.'" The court therefore found that "the petitioner is not entitled to the exception under 18 U.S.C. § 921(a)(20)(B)."

The petitioner challenges both rulings, arguing that "[t]he right to keep and bear arms is a subset [of] and necessarily included [with]in [the term] civil rights" and that he "had that civil right ... taken away from him upon his 1998 conviction and restored to him." According to the petitioner, "[t]he question devolves to whether the FLRB's restoration under Massachusetts law of [the petitioner's] constitutional right to possess a firearm is considered a restoration of

civil rights within the meaning of 18 U.S.C. § 921(a)(20)(B)." That question contains three subsidiary inquiries: (1) are the civil rights contemplated by § 921(a)(20) limited to the rights to vote, hold public office, and serve on a jury; (2) if not, is the right to keep and bear arms included in the term "civil rights" as used in that section; and (3) if so, is restoration of that right alone sufficient to come within that statute's exemption. We address each inquiry in turn.

The City contends that the Supreme Court in *Logan* "determined that the term 'civil rights', in the context of 18 U.S.C. § 921(a)(20), referred to 'the rights to vote, hold office and serve on a jury.'" (Quoting *Logan*, 552 U.S. at 28). The petitioner, on the other hand, contends that *Logan's* "passing reference [to the rights of voting, office holding, and jury service] is mere dicta." We agree with the petitioner. The *Logan* Court noted that "[w]hile § 921(a)(20) does not define the term 'civil rights,' courts have held, and petitioner agrees, that the civil rights relevant under the above-quoted provision are the rights to vote, hold office, and serve on a jury." *Logan*, 552 U.S. at 28 (emphasis added). Because the petitioner in *Logan* conceded this issue, the Court was not called upon to, and did not, resolve what rights are "civil rights" for purposes of § 921(a)(20).

The petitioner notes that the seminal case on this issue is *United States v. Cassidy*, 899 F.2d 543 (6th Cir. 1990), which held that the rights encompassed in the term "civil rights," as used in § 921(a)(20), "include the right to vote, the right to seek and hold public office and the right to serve on a jury." *Cassidy*, 899 F.2d at

549 (emphasis added). Emphasizing the word "include," the petitioner argues that "*Cassidy* and its progeny, correctly read, do not mandate slavish devotion to the three identified rights."

Some federal circuits, including the First Circuit, appear to have limited § 921(a)(20) to the so-called "core" civil rights of voting, office holding, and jury service. See, e.g., *United States v. Caron*, 77 F.3d 1, 2 (1st Cir. 1996) (citing *Cassidy*, but changing the word "include" to "comprise"). The question is not settled, however, and the First Circuit itself has noted that other circuits "treat[] firearms privileges as one of the civil rights that must be restored to trigger section 921(a)(20)." *United States v. Estrella*, 104 F.3d 3, 8 (1st Cir. 1997) (identifying the Seventh and Eighth Circuits).

We find instructive the First Circuit's observation that "[a]lthough Congress did not specify which civil rights it had in mind, the plurality view among the circuits," including the First Circuit, "is that Congress had in mind the core cluster of 'citizen' rights that are typically lost by felons and restored by pardons, namely, the right to vote, to serve on a jury and to hold public office." *United States v. Indelicato*, 97 F.3d 627, 630 (1st Cir. 1996) (emphasis added), *abrogated on other grounds by Logan v. United States*, 552 U.S. 23, 128 S. Ct. 475, 169 L. Ed. 2d 432 (2007). We agree with the reasoning that Congress logically intended that the rights required to be restored are those rights typically lost upon a conviction. One of the rights typically lost by felons, however, is the right to possess a firearm. See, e.g., RSA 159:3 (2014) (criminalizing the

possession of firearms by convicted felons). Limiting the applicable rights to the so-called "core" civil rights, to the exclusion of other rights typically stripped from convicted felons, appears to be inconsistent with that reasoning.

The petitioner does not argue that firearm possession is a civil right under Massachusetts law, and, in any event, relevant case law appears to preclude that argument. See *United States v. Nazzaro*, 778 F. Supp. 1, 2 (D. Mass. 1991) (concluding that "possession of a firearm is not a civil right ... [under] Massachusetts law"), *aff'd,* 985 F.2d 552 (1st Cir. 1993); *Chief of Police of Shelburne v. Moyer*, 16 Mass. App. Ct. 543, 453 N.E.2d 461, 464 (Mass. App. Ct. 1983) (recognizing that "[t]here is no right under art. 17 of the Declaration of Rights of the Massachusetts Constitution for a private citizen to keep and bear arms"); *Commonwealth v. Davis*, 369 Mass. 886, 343 N.E.2d 847, 848-49 (Mass. 1976) (concluding that "the declared right [in Article 17] to keep and bear arms is that of the people, the aggregate of citizens; the right is related to the common defense" and holding that "[p]rovisions like art. 17 were not directed to guaranteeing individual ownership or possession of weapons"). Rather, the petitioner looks to the right to keep and bear arms guaranteed by the Second Amendment to the United States Constitution, and, in particular, relies upon two United States Supreme Court cases dealing with that guarantee.

In *District of Columbia v. Heller*, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008), the Supreme Court held that the District of Columbia's "ban on

handgun possession in the home ... [and] its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense" violated the Second Amendment. *Heller,* 554 U.S. at 635. In so holding, the Court found that the Second Amendment "conferred an individual right to keep and bear arms." *Id.* at 595. In *McDonald v. Chicago*, 561 U.S. 742, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010), the Court held that "the Second Amendment right is fully applicable to the States." *McDonald*, 561 U.S. at 750.

The Sixth Circuit has opined that Heller "suggests that a handgun possession ban ... might infringe a civil right." *United States v. Sanford*, 707 F.3d 594, 597 (6th Cir. 2012); *cf. Cassidy*, 899 F.2d at 549 n.12 (rejecting the argument that "a convicted felon cannot have a restoration of rights without a restoration of his state firearms 'rights'" on the basis "that there is no individual right to possess a firearm," a basis that no longer stands in light of *Heller* and *McDonald*). In addition, the Supreme Court has referred, in an unrelated context, to the loss of the right to bear arms as the deprivation of a civil right. See *Nat. Fedn. of Indep. Business v. Sebelius*, 132 S. Ct. 2566, 2600, 183 L. Ed. 2d 450 (2012) (noting that "[a]n individual who disobeys" a law passed under Congress's Commerce Clause power "may be subjected to criminal sanctions ... [which] can include not only fines and imprisonment, but all the attendant consequences of being branded a criminal: deprivation of otherwise protected civil rights, such as the right to bear arms or vote in elections").

More relevant to interpreting the statute before us

is what the First Circuit has recognized as "the rationale behind Congress' use of 'civil rights restored' as a touchstone: the notion that by reinvesting a person with core civic responsibilities, the state vouches for the trustworthiness of that person to possess firearms (unless that right is withheld)." *Estrella*, 104 F.3d at 7. Thus, as the petitioner puts it: "The right[s] to vote, hold office and sit on a jury are simply surrogates for an underlying state determination/vouching for a person's trustworthiness to possess a firearm." We find it unlikely that Congress intended to credit the restoration of "core rights" as indicative of trustworthiness, but exclude the restoration of the very right at issue -- the right to possess firearms -- from the trustworthiness calculus. *Cf. Coram v. State*, 2013 IL 113867, 996 N.E.2d 1057, 1077, 375 Ill. Dec. 1 (Ill. 2013) (Karmeier, J., writing separately) (opining that "whether a person previously convicted of an offense constitutes a present danger with a weapon going forward, and whether that individual's rights to keep and bear arms should be restored ... , logically, should be the core question" instead of "quibbling over what rights irrelevant to that question have been restored, or, as some cases would have it, how many of those rights").

Another perspective is suggested by the Sixth Circuit's observation that § 921(a)(20) reflects "the general intent of Congress to redirect enforcement efforts against firearms owners that have a demonstrated potential for serious unlawful activity." *Cassidy*, 899 F.2d at 549. In this light, the Ninth Circuit has recognized that "[b]y contrast to the right to vote, no civil right could be more relevant to a felon's

future dangerousness than the right to possess firearms." *United States v. Valerio*, 441 F.3d 837, 842 (9th Cir. 2006).

We conclude that the "civil rights" contemplated by § 921(a)(20) are not limited to the three "core" civil rights and that the Second Amendment right to keep and bear arms is a civil right within the statute's ambit. We must now determine whether restoration of that right alone brings a conviction within the § 921(a)(20) exemption.

Courts generally have not been receptive to the argument that restoration or retention of firearm rights is, without more, sufficient to trigger § 921(a)(20)'s exemption. In *Valerio*, for instance, despite having noted the relevance of the right, the court found that New Mexico's restoration of the defendant's "right to possess firearms ... [was] not enough" to fall under § 921(a)(20)'s exemption. *Id. at* 842-43. Similarly, the Fifth Circuit, in rejecting the contention that "Texas's failure to deny [a non-violent felon] the right to possess firearms is the functional equivalent of restoring his civil rights," stated that "'civil rights,' as used in § 921(a)(20), must mean much more than simply the single, narrow right to possess a firearm." *United States v. Thomas*, 991 F.2d 206, 214-15 (5th Cir. 1993). Other circuits have reached similar conclusions. *See, e.g., United States v. Molina*, 484 Fed. Appx. 276, 284 (10th Cir. 2012) (following *Valerio*, and noting, in response to a void for vagueness argument, that "the fact 'civil rights' is plural would alone put a reasonable person on fair notice that more than just his right to possess a firearm must be restored under [18 U.S.C.] §

921(a)(20)").

These cases generally follow the reasoning that "[i]n the absence of the restoration of essentially all civil rights of the convicted felon as defined for purposes of § 921(a)(20), the felon's isolated right to possess a firearm is of no import whatsoever." *Thomas,* 991 F.2d at 214. In each of these cases, the defendant's "core" civil rights had been lost and not substantially restored. See *id.* (finding that "Texas does not restore to any felon, whether violent or non-violent, the three [core] civil rights"); *Valerio,* 441 F.3d at 842 (observing that only the defendant's right to vote had been restored); *Molina,* 484 Fed. Appx. at 281 (noting that the defendant's rights to vote and serve on a jury had been restored, while his right to hold public office had not).

In the instant case, however, the petitioner never lost his core civil rights. Thus, the foregoing cases are, on that point, distinguishable. The question we must consider, then, is whether restoration of the right to possess firearms, along with retention of the three core civil rights, is enough to trigger the § 921(a)(20) exemption. Because the Supreme Court has addressed the retention and restoration of civil rights in the context of § 921(a)(20), we first look to the Court's holding on that issue.

In *Logan*, the Supreme Court considered the § 921(a)(20) exemption in the context of determining whether a conviction could be counted for purposes of sentence enhancement under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(1) (2012). The

case presented the following question: "Does the 'civil rights restored' exemption contained in § 921(a)(20) encompass, and therefore remove from ACCA's reach, state-court convictions that at no time deprived the offender of civil rights?" *Logan*, 552 U.S. at 26. The petitioner had argued in the District Court and on appeal that "[r]ights retained ... are functionally equivalent to rights revoked but later restored." *Id.* at 29. The Supreme Court, however, ruled to the contrary. *Id.* at 36.

Relying upon *Logan*, the superior court here ruled that because "the petitioner never lost any of [the core civil] rights, ... [he] never had the opportunity to have them 'restored' " and, therefore, was "not entitled to the exception under 18 U.S.C. § 921(a)(20)(B)." We do not agree that *Logan* compels that result. If *Logan* had definitively limited the "civil rights" relevant to § 921(a)(20) to the three core civil rights, it would bar the petitioner from that section's exemption because he, like the petitioner in *Logan*, at all times retained those rights. See *id.* at 29. However, as we previously noted, *Logan* did not decide the issue because the petitioner had agreed that the relevant rights were the rights to vote, hold office, and serve on a jury. *Id.* at 28.

Logan held that "the words 'civil rights restored' do not cover the case of an offender who lost no civil rights." *Id.* at 36 (emphasis added). The Court held that "an offender who retained civil rights at all times, and whose legal status, post[-]conviction, remained in all respects unaltered by any state dispensation" did not come within the exemption of § 921(a)(20). *Id.* at 26. The Court reasoned that "a defendant who retains

rights is simply left alone. He receives no status-altering dispensation, no token of forgiveness from the government." *Id.* at 32.

The petitioner here, however, did receive a "status-altering dispensation," *id.*, from Massachusetts through the FLRB's determination. As previously noted, the FLRB specifically found that the petitioner was "a suitable person to possess a license to carry firearms, and his right to possess a firearm therefore is fully restored in the Commonwealth." Given our conclusion that the right to keep and bear arms is a civil right for purposes of § 921(a)(20), the petitioner has had one civil right "restored" in the *Logan* sense. Accordingly, we conclude that *Logan* does not exclude the petitioner from § 921(a)(20)'s exemption.

We turn now to the ultimate question before us: whether the loss and restoration of one civil right -- the right to keep and bear arms -- in fact brings the petitioner's 1998 conviction within § 921(a)(20)'s exemption. *Cassidy* set forth an oft-cited standard, stating that "based on the general intent of Congress to redirect enforcement efforts against firearms owners that have a demonstrated potential for serious unlawful activity, [we are confident] that Congress envisioned a restoration of more than a de minimis quantity of civil rights." *Cassidy*, 899 F.2d at 549. The court "d[id] not read into the statutory language, however, a requirement that there be a 'full' restoration of rights." *Id.*

In *Caron*, the First Circuit addressed a case in which a defendant had two of the three core civil rights

restored by operation of law at some point post-conviction, while the third had never been taken away. *Caron*, 77 F.3d at 1. The court held that "at least where some civil rights are restored ... , the fact that one civil right was never lost does not prevent an individual from having 'had civil rights restored' within the meaning of" § 921(a)(20). *Id.* at 2; see also *Buchmeier v. United States*, 581 F.3d 561, 564-65 (7th Cir. 2009) (concluding, post-*Logan*, that where defendant had rights to vote and hold office restored, while right to serve on a jury was never suspended, his civil rights had been restored under § 921(a)(20)). The court "[left until] another day the question whether, when one civil right is restored but two were never taken away, the same answer would prevail." *Caron,* 77 F.3d at 6. The Sixth Circuit appears to have held, with respect to an exemption provision worded similarly to 18 U.S.C. § 921(a)(20) and applicable to domestic violence misdemeanants, that loss and restoration of a single civil right -- there, the right to vote -- was sufficient. *United States v. Wegrzyn*, 305 F.3d 593, 596 (6th Cir. 2002) (applying 18 U.S.C. § 921(a)(33)(B)(ii)).

The question before us is even further attenuated: where none of the three "core" civil rights were taken away, but the civil right to keep and bear arms was lost and expressly restored, has the petitioner had his civil rights restored for purposes of § 921(a)(20)? We hold that he has.

Looking to Congress's intent, we note that:

> The FOPA amendment ... exempted

> felons to whom the convicting jurisdiction extended a subsequent gesture of forgiveness, or partial forgiveness, by means of pardon, expungement, or restoration of civil rights. The theory was no doubt that such a subsequent forgiveness should be credited as an acknowledgment of rehabilitation or an affirmative gesture of goodwill that merited exemption from the firearms bar.

McGrath, 60 F.3d at 1007. We also again note that the ultimate question is whether the state, by its "gesture of forgiveness," has "vouche[d] for the trustworthiness of that person to possess firearms (unless that right is withheld)." *Estrella*, 104 F.3d at 7. The gesture of forgiveness here -- explicit restoration of firearm rights -- vouches for that trustworthiness more directly than any other.

We acknowledge that courts applying the § 921(a)(33)(B)(ii) exception for domestic violence misdemeanants, see 18 U.S.C. § 921(a)(33)(B)(ii) (2012), have declined to find restoration of gun rights, along with retention of the core civil rights, sufficient to bring a prior conviction within the exemption. *See, e.g., United States v. Brailey*, 408 F.3d 609, 613 (9th Cir. 2005); *United States v. Keeney*, 241 F.3d 1040, 1044 (8th Cir. 2001). In particular, the court in *Enos v. Holder*, 855 F. Supp. 2d 1088 (E.D. Cal. 2012), *aff'd,* 585 Fed. Appx. 447 (9th Cir. 2014), addressed the very argument presented here. Specifically, the plaintiffs in *Enos* "contend[ed] that following the Supreme Court's decisions" in *Heller* and *McDonald*, "which recognized

the right to bear arms as a fundamental individual right, the Court should re-interpret the 'restoration of rights' provision as including cases such as Plaintiff[s'], where the only right that was taken away and then restored was the right to possess a firearm." *Enos*, 855 F. Supp. 2d at 1095. The court declined to interpret § 921(a)(33)(B)(ii) to "put restoration of an individual['s] right to possess a firearm within the purview of 'civil rights restored,' which courts have repeatedly classified as the right to vote, hold public office and sit on a jury." *Id.* at 1096.

We decline to follow those cases. We conclude that our interpretation of § 921(a) better fulfills Congress's purpose of "defer[ring] to a State's dispensation relieving an offender from disabling effects of a conviction." *Logan*, 552 U.S. at 37. Here, Massachusetts acted clearly and directly to remove the restriction the petitioner's 1998 conviction had placed upon his civil right to keep and bear arms. We hold that Massachusetts thereby restored the petitioner's civil rights within the meaning of § 921(a)(20). Accordingly, § 922(g)(1) does not prohibit the petitioner from possessing firearms. We reverse both trial courts' decisions resting upon the contrary conclusion and remand for further proceedings. In light of our holding on this issue, we need not address the petitioner's additional arguments.

Reversed and remanded.

Dalianis, C.J., and Conboy, Lynn, and Bassett, JJ., concurred.