

No. 12-15498 [Dist Ct. No.: 2:10-CV-02911-JAM-EFB  
Panel Decision Oct. 16, 2014, before Ikuta, N.R. Smith and Mungia, JJ.

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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RICHARDS ENOS; *et al.*,  
*Plaintiffs - Appellants*,

VS.

ERIC HOLDER; *et al.*,  
*Defendants - Appellees*.

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**AMICUS BRIEF OF NRA CIVIL RIGHTS DEFENSE  
FUND SUPPORTING PLAINTIFF/APPELLEES'  
MOTION FOR RECONSIDERATION EN BANC**

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David T. Hardy  
8987 E. Tanque Verde, No. 265  
Tucson, AZ 85749  
(520) 749-0241  
dthardy@mindspring.com

*Counsel for amicus  
NRA Civil Rights Defense Fund*

## Corporate Disclosure Statement

The NRA Civil Rights Defense Fund is a 501(c)(3) not-for-profit entity that has no parent corporation and no stockholders. No counsel for a party wrote this brief in whole or in part. No person other than *amicus* contributed financially to its preparation or filing.

## Table of Contents

Consent of the Parties . . . . .	1
Interests of the Amicus . . . . .	1
Argument. . . . .	2
Introduction. . . . .	2
I. Statutes Should Be Construed So As To Avoid Rather Than Create Constitutional Difficulties. . . . .	5
II. The Constitutional Ban on <i>Ex Post Facto</i> Laws Extends to Retrospective Deprivations of the Rights of Citizenship, Independent of its Ban on Retrospective Punishment. . . . .	5
III. The Construction Advanced by the Appellants Enables the Court to Avoid a Serious Question Involving the Constitutionality of the Statute as Applied to Those in Appellants' Positions. . . . .	10
Conclusion. . . . .	11
Certificate of Conformance. . . . .	12
Certificate of Service. . . . .	12

## Authorities Cited

### *Cases*

<i>Calder v. Bull</i> , 3 U.S. 386 (1798) .....	6-7, 8
<i>Carmell v. Texas</i> , 539 U.S. 513 (2003) .....	8
<i>Collins v. Youngblood</i> , 497 U.S. 37 (1990) .....	6
<i>Dickinson v. New Banner Institute</i> , 460 U.S. 103 (1983) .....	2
<i>Heller v. District of Columbia</i> , 554 U.S. 570 (2008) .....	7,10
<i>Hiss v. Hampton</i> , 338 F. Supp. 1141 (D.D.C. 1972) .....	10
<i>Kring v. Missouri</i> , 107 U.S. 221 (1883). ....	11
<i>Landgraf v. USI Film Products</i> , 511 U.S. 244 (1994). ....	5-6
<i>Louis Vuitton v. Spencer Handbags</i> , 765 F.2d 966 (2d Cir. 1985). ....	6-7
<i>McDonald v. Chicago</i> , 561 U.S. 742 (2010) .....	10
<i>Peugh v. United States</i> , 569 U.S. 1 (2013) .....	6
<i>Stogner v. California</i> , 539 U.S. 607 (2003) .....	6
<i>Thrall v. Wolfe</i> , 503 F.2d 313 (7 <sup>th</sup> Cir. 1974), <i>cert. denied</i> , 420 U.S. 972 (1975) .....	2
<i>United States v. \$814,254.76 in U.S. Currency</i> , 51 F.3d 207 (9 <sup>th</sup> Cir. 1995). ....	5
<i>United States v. Andrino</i> , 497 F.2d 1103 (9 <sup>th</sup> Cir.), <i>cert. denied</i> , 419 U.S. 1048 (1974) .....	2
<i>United States v. Colon-Munoz</i> , 192 F.3d 210 (1 <sup>st</sup> Cir. 1999) .....	9
<i>United States v. Gorkski</i> , U.S. Court of Appeals	

for the Armed Forces (1997) . . . . .	2
<i>United States v. Hemmings</i> , 258 F.3d 587 (7th Cir. 2001) . . . . .	7
<i>United States v. Matassini</i> , 565 F.2d 1297 (5 <sup>th</sup> Cir. 1978) . . . . .	2
<i>United States v. Mitchell</i> , 209 F.3d 319 (4th Cir. 2000) . . . . .	7
<i>United States v. Paskow</i> , 11 F.3d 873 (9 <sup>th</sup> Cir. 1993) . . . . .	6
<i>United States v. Security Industrial Bank</i> , 459 U.S. 70 (1982) . . . . .	5

*Statutes*

18 U.S.C. §921(a)(20). . . . .	2
18 U.S.C. §921(a)(33)(B)(ii) . . . . .	3

*Treatises*

JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (1833) . . . . .	6
RICHARD WOODDESSON, A SYSTEMATICAL VIEW OF THE LAWS OF ENGLAND (1792) . . . . .	8-9

### **Consent of the Parties**

All parties have consented to the filing of this brief, and it is filed without motion pursuant to Rule 29(a), FRAP.

### **Interests of the Amicus**

*Amicus curiae* the NRA Civil Rights Defense Fund (the “Fund”) was established in 1978 for purposes including assisting in the preservation and defense of the human, civil, and constitutional rights of the individual to keep and bear arms in a free society. To accomplish this, the Fund provides legal and financial assistance to individuals and organizations defending their right to keep and bear arms and advocates proven criminal justice reforms. Additionally, the Fund sponsors legal research and education on a wide variety of issues, including the extent of the Second and Fourteenth Amendments.

The Fund has a strong interest in this case because the arguments made by the Respondents, and accepted by the panel, create a retrospective and *ex post facto* forfeiture of constitutional rights in violation of the Article I, section nine, of the Constitution. That prohibition of *ex post facto* lawmaking most often is seen as having two aspects: retroactively criminalizing conduct, or retroactively increasing the “punishment” attached to it. But the ban actually has four aspects, one of which pertains to retroactively increasing the loss of legal rights incurred by a conviction.

## **Argument**

### **Introduction**

Prior to 1986, Federal law prohibited firearms possession by *all* persons convicted of a felony.<sup>1</sup> In the case of State convictions, this was construed to include defendants whose convictions had been expunged, *Dickinson v. New Banner Institute*, 460 U.S. 103 (1983); *United States v. Andrino*, 497 F.2d 1103 (9<sup>th</sup> Cir.), *cert. denied*, 419 U.S. 1048 (1974), and perhaps even those which had been pardoned. *Compare United States v. Matassini*, 565 F.2d 1297 (5<sup>th</sup> Cir. 1978) with *Thrall v. Wolfe*, 503 F.2d 313 (7<sup>th</sup> Cir. 1974), *cert. denied*, 420 U.S. 972 (1975). Thus, the Federal law would treat a person as convicted of a State felony, even though the State itself regarded the person as not so convicted.

It is not surprising then, that at this time few if any States had provisions for restoring firearm rights: any such restorations would have been futile. State restoration of rights statutes instead focused upon restoring civil rights such as voting and serving on juries.

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<sup>1</sup> We use “felony” here as shorthand for the classes affected – crimes punishable by imprisonment for more than a year, except for offenses expressly labeled misdemeanors and punishable by no more than two years of imprisonment. 18 U.S.C. §921(a)(20).

In 1986, the Firearm Owners Protection Act was enacted, which sought to remedy this anomaly. That statute added two provisos to the definition of felony in 18 U.S.C. §921(a)(20). The first provided that “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.” The second provided that any conviction which had been expunged, or set aside, or for which the person had been pardoned or had had civil rights restored would not count as a conviction, unless the expungement, pardon, or restoration of rights provided that the person may not possess firearms. In the years after 1986, the States which desired to apply different standards to the restoration of firearm rights vs. other civil rights adopted legal regimes to that effect. For those States that did not do so, restoration of general civil rights following a felony conviction worked to restore gun rights as well.

Finally, in 1994 Congress forbade firearm possession by those convicted of domestic violence misdemeanors. It included in the definition of the disabling offence the 1986 exception for cases in which civil rights had been restored. 18 U.S.C. §921(a)(33)(B)(ii). The problem is that misdemeanors leave non-firearm civil rights intact: as a generality, there is nothing for a State to restore. Thus, after the 1994 enactment, there was nothing for a State to restore except firearm rights, which California proceeded to do. Hence, the issue now before the Court.

Most of the Appellants entered pleas to domestic violence misdemeanors prior to the 1994 enactment, that is, at a time when a misdemeanor conviction would not have affected their firearm rights, and generally was punished with a modest fine. In such a setting, a decision to take a plea is often based on considerations such as the cost of retaining an attorney or of going to trial. When a retainer is several times the size of the potential fine, the average person may decide not to fight the misdemeanor charge. In this case, that calculus was upset, retroactively. Appellants took a plea at a time when it left their rights to firearms for self-defense intact; here the 1994 amendment is made applicable to them, retroactively, upsetting understanding and expectations they held at the time they chose to take a plea.

*Amicus* respectfully asks this Court to reconsider this outcome *en banc*, bearing in mind a factor implicit in the case but not considered by the panel. That consideration is the Article I, section nine ban on enactment of *ex post facto* laws. This, we will demonstrate, relates not only to retroactively criminalizing an act, or retroactively increasing its punishment, but to retroactively “aggravating” the nature of the offense, or retroactively attaching new “forfeitures” or legal “disabilities” to it. Under the panel result, these misdemeanants find themselves subject to a lifetime ban on exercise of a fundamental constitutional right, a



consequence unforeseeable to them at the time they accepted a misdemeanor plea bargain.

Reconsideration of the panel opinion will enable the Court to construe the statute so as to avoid this significant constitutional issue, and to reconcile State and Federal law.

**I. Statutes Should Be Construed So As To Avoid Rather Than Create Constitutional Difficulties.**

The principle that courts should construe statutes so as to avoid constitutional problems is particularly applicable when the constitutional problem is raised by the retrospective application of a statute. *United States v. Security Industrial Bank*, 459 U.S. 70, 78 (1982); *Louis Vuitton v. Spencer Handbags*, 765 F.2d 966, 971 (2d Cir. 1985) (“Resolution of the constitutional issue need not be certain; there need only be a ‘substantial doubt....’”). *See also United States v. \$814,254.76 in U.S. Currency*, 51 F.3d 207 (9<sup>th</sup> Cir. 1995). This heightened consideration is appropriate: the ban on *ex post facto* laws is, after all, one of only three prohibitions that the Constitution imposed upon both State and Federal governments.<sup>2</sup> Even outside the criminal context,

[R]etroactive statutes raise particular concerns. The Legislature’s unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration. Its responsiveness to political pressures poses a

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<sup>2</sup> The other two prohibitions were against bills of attainder and grants of nobility.

risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals.

*Landgraf v. USI Film Products*, 511 U.S. 244, 266 (1994).

## **II. The Constitutional Ban on *Ex Post Facto* Laws Extends to Retrospective Deprivations of the Rights of Citizenship, Independent of its Ban on Retrospective Punishment.**

Article one, section nine of the Constitution commands that “No Bill of Attainder or ex post facto Law shall be passed.” Justice Chase’s opinion in the early case of *Calder v. Bull*, 3 U.S. 386 (1798) defined *ex post facto* laws:

I will state *what laws* I consider *ex post facto laws*, within the *words* and the *intent* of the prohibition. 1st. Every law that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action. 2d. Every law that *aggravates a crime*, makes it *greater* than it was, when committed. 3d. Every law that *changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed. 4th. Every law that alters the *legal* rules of *evidence*, and receives less, or different, testimony, than the law required at the time of the commission of the offence, *in order to convict the offender*.

3 U.S. at 390 (Emphasis original). *Calder*’s definition remains good law two centuries later. *See, e.g., Collins v. Youngblood*, 497 U.S. 37, 41-42 (1990); *Stogner v. California*, 539 U.S. 607, 611-12 (2003) (repeating the *Calder* formulation, and describing it as “an authoritative account of the scope of the *Ex Post Facto* clause.”); *Peugh v. United States*, 569 U.S. 1 (2013); *United States v. Paskow*, 11 F.3d 873, 876-77 (9<sup>th</sup> Cir. 1993).

The early commentator Justice Joseph Story concurred in the view that retroactively “aggravating” the nature of an offence is forbidden, independent of its effect on punishment.

The general interpretation has been, and is, ... that the prohibition reaches every law, whereby an act is declared a crime, and made punishable as such, when it was not a crime, when done; or *whereby the act, if a crime, is aggravated in enormity, or punishment*; or whereby different, or less evidence, is required to convict an offender, than was required, when the act was committed.

3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 212, § 1339 (1833) (emphasis supplied).

When the *ex post facto* issue has been previously raised in the context of 18 U.S.C. §922(g)(9), it has been analyzed in terms of Justice Chase’s first or third categories – retrospective creation of an offense, or an increase in its punishment. *See, e.g., United States v. Hemmings*, 258 F.3d 587, 594 (7th Cir. 2001); *United States v. Mitchell*, 209 F.3d 319, 322-23 (4th Cir. 2000).

But Justice Chase’s second category – “Every law that *aggravates* a *crime*, makes it *greater* than it was, when committed” – is more applicable to the present case. As we shall see, the source from which Justice Chase drew (and the modern Court draws) that category saw it in the light of retrospective forfeiture of legal rights or retrospective creation of legal disabilities. That this second category of *ex post facto* laws was overlooked in prior case law is understandable: prior to *Heller v. District of Columbia*, 554 U.S. 570 (2008), most courts did not see the Second

Amendment as creating an individual constitutional right, and absent a right, there would be no concern about its forfeiture.

Justice Chase drew his four categories from a 1792 authority, Richard Wooddesson's *A SYSTEMATICAL VIEW OF THE LAWS OF ENGLAND*,<sup>3</sup> which he cites. 3 U.S. at 391. The modern Court has continued to rely upon Wooddesson's discussion of *ex post facto* laws. *See, e.g., Carmell v. Texas*, 539 U.S. 513, 522-23 (2003) (discussing Wooddesson's importance as an authority on the common law and on *ex post facto* laws in particular).

Wooddesson, in discussing the power of Parliament, explains how it extended to enacting bills of attainder (or the non-capital bills of pains and penalties) and *ex post facto* statutes.<sup>4</sup>

I proceed, thirdly, to acts of parliament, which principally affect the punishment, making therein some innovation, or creating some forfeiture or disability, not incurred in the ordinary course of law, and which are called *bills of pain and penalties*. Of this kind was the statute which doomed Lord Clarendon to *banishment*, on the ground of his leaving the kingdom, while he was under prosecution by the house of commons. The same sentence was pronounced against bishop Atterbury, the occasion of which parliamentary interposition is not so easy to discover. ... On the other hand, the legislature once imposed a sentence *more severe* than could have been awarded by the inferior courts. This act, I now mean, was passed in Charles the second's

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<sup>3</sup> Today largely forgotten, Wooddesson held the Vinerian Chair in law at Oxford, as a successor to Blackstone. "Although it was overshadowed by the literary merit of Blackstone's 'Commentaries,' it is probable that Wooddesson's 'Systematical View' is in many respects superior as a legal treatise." 62 *DICTIONARY OF NAT'L BIOGRAPHY* 388.

<sup>4</sup> That is, Wooddesson outlines the Parliamentary abuses that the framers of our Constitution meant to deny Congress.

reign, against the persons who assaulted and wounded sir John Coventry, and for their complicated guilt, were to surrender by a day prefixed, on pain of perpetual exile; in case of returning to the king's dominions they were to stand attainted of felony without benefit of clergy; and lastly they were made incapable of pardon....<sup>5</sup>

2 Richard Wooddeson at 638-39 (Emphasis original). Wooddeson goes on to discuss a case where Parliament enacted a statute forbidding 68 electors to vote, because they were suspected of bribery. *Id.* at 639-40.

Wooddeson's discussion of *ex post facto* laws "creating some forfeiture or disability, not incurred in the ordinary course of law" thus relates to loss of legal rights, especially those associated with citizenship. Those banished could not enter or remain in Britain, offenders could not seek pardon, the electors could not vote, none of which legal "disabilities" were applicable at the time they had allegedly broken the law.

The test is thus worded somewhat differently by each authority – by Justice Chase, "every law that aggravates a crime, makes it greater than it was, when committed," by Justice Story, every law "whereby the act, if a crime, is aggravated in enormity," by Wooddeson, every law newly "creating some forfeiture or disability." All these are *ex post facto* violations if applied retrospectively, and that is true whether or not the law changes the "punishment" for the offense.

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<sup>5</sup> Sir John Coventry was a member of Parliament who jested on the floor about Charles II's carnal escapades. Some toughs led by an officer of the King's Guard attacked him and slit his nose. Pardon was likely forbidden because the Merry Monarch was suspected of having ordered the attack.

Wooddeson, in turn, suggests that the “forfeiture or disability” relates to loss of legal rights.

While retrospective forfeitures of legal rights have been rare, where they have occurred courts have not hesitated to classify them as *ex post facto*. See *United States v. Colon-Munoz*, 192 F.3d 210, 229 (1<sup>st</sup> Cir. 1999) (forfeiture of realty); *Hiss v. Hampton*, 338 F. Supp. 1141 (D.D.C. 1972) (forfeiture of government pensions; the lead plaintiff was Alger Hiss); *United States v. Gorkski*, U.S. Court of Appeals for the Armed Forces (1997), online at <http://www.armfor.uscourts.gov/newcaaf/opinions/1997Term/97-0034.htm> (forfeiture of military pay and allowances).

**IV. The Construction Advanced by the Appellants Enables the Court to Avoid a Serious Question Involving the Constitutionality of the Statute as Applied to Those in Appellants’ Positions.**

By all these standards, the statutory construction advanced by the Appellants is necessary to avoid a serious constitutional issue. *District of Columbia v. Heller*, 554 U.S. 570 (2008) teaches that the Second Amendment is an individual constitutional right. *McDonald v. Chicago*, 561 U.S. 742 (2010), finds that it is a fundamental right of American citizens. To retroactively and permanently deprive Appellants of this core right attaches to a misdemeanor a disability or forfeiture

previously attached to felonies, and certainly “aggravates” and “makes greater” the offense.

That their convictions resulted from plea bargains reinforces this understanding. *Cf. Kring v. Missouri*, 107 U.S. 221 (1883). Several appellants waived their right to trial and entered pleas at a time when their firearm rights would not have been affected. The 1994 legislation retroactively changed the understandings and expectations that underlay their waiver of trial rights.

### **Conclusion**

For the reasons set forth above, this Court should grant Appellants’ motion for rehearing *en banc*.

s/David T. Hardy  
Attorney for Amicus  
NRA Civil Liberties Defense Fund

### **Certificate of Conformance**

I certify that this brief was prepared in a proportional font, Times New Roman, at 14 points. It meets the page limitations of Circuit Rule 29-2(c)(2).

s/David T. Hardy  
Attorney for Amicus

### **Certificate of Service**

I certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on December 18, 2014.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF System.

s/David T. Hardy  
Attorney for Amicus  
NRA Civil Liberties Defense Fund