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

IN THE
UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

RICHARDS ENOS; et al.,
Plaintiffs - Appellants,

vs.

ERIC HOLDER; et al.,
Defendants - Appellees.

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

APPELLANTS' OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

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

The MADISON SOCIETY has provided significant funding of this suit.

Dated: July 9, 2012

/s/ Donald Kilmer

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INTRODUCTION

The LAUTENBERG AMENDMENT is a set of federal statutes[1] that suspends the SECOND AMENDMENT rights of anyone convicted of a misdemeanor crime of domestic violence (MCDV). It also prohibits federally licensed firearm dealers from selling firearms to anyone convicted of such a crime.[2]

The LAUTENBERG AMENDMENT also contains a provision for restoration of SECOND AMENDMENT rights:

> [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.[3]

The Supreme Court's decisions in *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. Chicago* 561 US ___, 130 S Ct 3020 (2010) confirmed that the pre-existing rights secured by the SECOND AMENDMENT are fundamental-individual rights. This means that a presumption of liberty attaches to the activities protected by this right.

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[1] 18 U.S.C. §§ 921(a)(33), 922(d)(9), 922(g)(9)

[2] 18 U.S.C. § 922(d)(9)

[3] 18 U.S.C. § 921(a)(33)(B)(ii)

This necessarily means, any pre-*Heller* interpretations of federal law (agency or judicial) that relied upon erroneous understandings of the SECOND AMENDMENT are now subject to reconsideration, if not outright overruled.

The plain language of the LAUTENBERG AMENDMENT contemplates some 'state sponsored' mechanism for reinstating SECOND AMENDMENT rights after a misdemeanor conviction for domestic violence by having the conviction: (1) set aside, (2) expunged, (3) pardoned, or (4) by having one's civil rights restored. 18 U.S.C. § 921(a)(33)(B)(ii).

The California procedure for having a misdemeanor conviction set-aside and/or expunged is embodied in California Penal Code §§ 1203.4 and 1203.4a. Upon completing probation the defendant is allowed to withdraw their guilty plea and have the accusatory pleading dismissed. Thus the person is returned to the status of being 'law-abiding.' By their plain language these statutes, do not by themselves, reinstate firearm rights. But there is nothing in California law that prevents the operation of any other statute, procedure or legal status from reinstating those rights.

California's procedures for obtaining a certificate of rehabilitation and/or a governor's pardon appear to be limited to persons convicted of

felonies and/or misdemeanor sex offences that require registration. California Penal Code § 4852.01.

That leaves only California's statutory restoration of rights procedures if a domestic violence misdemeanant is to regain his/her SECOND AMENDMENT rights under the LAUTENBERG definition. California Penal Code § 12021 [29800-29875][4].

The controversy before this Court is caused by the federal government's untenable interpretation of the LAUTENBERG AMENDMENT'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 those civil rights.
- The only civil rights recognized by federal law that can be suspended 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

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

right to hold public office – as result of an MCDV conviction; no civil rights were lost, ergo – there are no 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 while the misdemeanant is actually incarcerated (and in most states {including California} not even then) the LAUTENBERG restoration of rights provision that relies upon state restoration of civil rights procedures is rendered a dead letter by the government's interpretation.

This tautology is not unlike 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)
> By Lewis Carroll

Plaintiff-Appellants do not challenge the LAUTENBERG AMENDMENT'S initial suspension of their SECOND AMENDMENT rights. After all, the

jurisdiction (CA) that convicted them also suspends those same rights and then restores them by operation of law ten years plus a day after their conviction. But due to the federal government's interpretation of LAUTENBERG, that day never comes.

The federal government's application of LAUTENBERG'S state-dependent restoration procedures trenches on the intent of two legislative bodies. It prevents California's ten-year suspension and restoration by operation of law from meaning anything. And it nullifies Congress's clear intent to provide a restoration procedure based on the states' homegrown policies for addressing rehabilitation of misdemeanants. To prevent a constitutional challenge, this Court should decree that California's statutory restoration of rights procedures satisfy LAUTENBERG'S requirements and that Plaintiff-Appellants are entitled to rejoin the ranks of persons authorized to exercise their SECOND AMENDMENT rights.

JURISDICTIONAL STATEMENT

The trial court's federal question jurisdiction arose under 18 U.S.C. §§ 921 *et seq*., 922 *et seq*. and 925A. As the Plaintiff-Appellants are seeking declaratory relief, both the trial court and this appellate court have jurisdiction pursuant to 28 U.S.C. §§ 2201 and 2202. Finally, as

this action arises under the United States Constitution the trial court and this court also have jurisdiction pursuant to 28 U.S.C. § 1331.

Appellate jurisdiction is based on 28 U.S.C. § 1291. The order and/or judgment appealed from filed on February 28, 2012. A timely Notice of Appeal was filed on February 29, 2012.

STATEMENT OF ISSUES

1. Does the plain language of the LAUTENBERG AMENDMENT require the federal government to recognize California' various procedures for restoring the SECOND AMENDMENT rights of those convicted of MCDV?
2. Does the federal government have the power to retroactively impose, as a collateral consequences of a misdemeanor conviction from a state court proceeding, the loss/suspension of the "right to keep and bear arms" – against a person when it was impossible for them to be apprized of that consequence at the time of their plea, therefore making impossible to make a knowing and intelligent waiver of their trial rights?
3. Does LAUTENBERG violate the Tenth Amendment by failing to recognize California's restoration of rights procedures?

4. Assuming no statutory remedy for restoration of rights exists for those convicted of a MCDV, and assuming the act does not violate the Tenth Amendment, does the LAUTENBERG AMENDMENT violate the SECOND AMENDMENT, because, under the federal government's interpretation, it is a lifetime ban on the exercise of a fundamental right – regardless of an individual's risk for recidivist violence – and it is not a long standing regulation of a fundamental right that existed in 1791?

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 (FAC) and the entire Second Amended Complaint (SAC).

The Plaintiff-Appellants' Tenth Amendment claim was dismissed with prejudice in an order filed July 8, 2011 (Document #24). [ER, Tab 5, pages 046-059]

The Plaintiff-Appellants' Declaratory Relief and Injunctive Relief claims based on 18 U.S.C. § 925A and the SECOND AMENDMENT were dismissed in an order filed February 28, 2012 (Document #63). [ER, Tab 3, pages 007-028]

A judgment in favor of the Defendant-Appellees was filed February 28, 2012 (Document #64). [ER, Tab 2, page 006]

A notice of appeal was filed February 29, 2012. (Document #65). [ER, Tab 1, page 001-005]

STATEMENT OF FACTS[5]

The particular facts of each Plaintiff-Appellants' circumstances regarding his conviction and the state-sanctioned restoration of rights is set forth in the SAC. [ER, Tab 4, pages 029-045]

Because this appeal arises out of a trial court's order granting a motion to dismiss under FRCP 12, this Court must accept as true those factual allegations, and construe those facts in the light most favorable to the Plaintiff-Appellants. *Manzarek v. St. Paul Fire & Marine Ins. Co.*, supra, 519 F.3d at 1030-1031; *Leadsinger, Inc. v. BMG Music Publishing*, supra, 512 F.3d at 526; see also: *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508, 122 S.Ct. 992, 995, fn. 1 (2002).

Briefly, the substantive facts from the SAC [6] are:

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[5] Statements of the predicate state laws, and federal definitions will be recited as facts for context.

[6] Though this appeal also challenges orders made by the court that dismissed portions of the FAC, the substantive facts for this appeal are the same in both the FAC and SAC.

1. In 1993 the California Legislature amended Penal Code § 12021 [29800-29875] and added domestic violence to the list of misdemeanors which prohibit a person from acquiring or possessing a firearm for 10 years after the date of conviction. [ER, Tab 4, 034:5, 035:19, 037:8, 038:24, 040:3]

2. On September 13, 1994, the Congress passed the Violence Against Women Act, and in 1996 Congress amended the act to impose a lifetime prohibition against the acquisition/possession of firearms by misdemeanants convicted of Domestic Violence. See: 18 U.S.C. §§ 921(a)(33), 922(d)(9), 922(g)(9). This latter amendment became known as the LAUTENBERG AMENDMENT. [ER, Tab 4, 034:9, 035:23, 037:12, 038:28, 040:7]

3. All Plaintiff-Appellants have been convicted under California law of a MCDV by way of plea agreement rather than trial. [ER, Tab 4, 034:2, 035:15, 037:4, 038:20, 039:28, 041:3, 041:23]

4. As a collateral consequence of their conviction for a MCDV under California law, each and every Plaintiff-Appellant had their "right to keep and bear arms" revoked for a statutory ten (10) years; and thus restored by operation of law after the lapse of those ten (10) years. California Penal Code § 12021. [29800-29875]

5. More than ten (10) years have lapsed since the date of conviction for each and every Plaintiff-Appellant. [ER, Tab 4, 034:2, 035:15, 037:4, 038:20, 039:28, 041:3, 041:23]

6. Though it does not restore firearm rights *per se*, each and every Plaintiff-Appellant has had a California Superior Court Judge make a finding under Penal Code § 1203.4, that they successfully completed probation, paid all fines and were entitled to have their pleas withdrawn and the case dismissed. Thus permitting them to truthfully allege that they are now 'law-abiding' citizens. [ER, Tab 4, 034:14, 035:28, 037:17, 039:5, 041:6, 041:26]

7. Six of the seven Plaintiff-Appellants: ENOS, BASTASINI, MERCADO, GROVES, MONTEIRO and ERICKSON – were all convicted (upon a plea of no-contest/guilty) of a California MCDV prior to the LAUTENBERG AMENDMENT becoming law in 1996. In other words, it was impossible for them to be apprized of a federally mandated collateral consequence of their conviction (i.e., loss of a fundamental right) when that collateral consequence did not yet exist. Furthermore the non-existence of this collateral consequence at the time of their plea and conviction means that they were deprived of making a knowing and intelligent waiver of

their right to a jury trial – regardless of whether they were represented by counsel. [ER, Tab 4, 034:2, 035:15, 037:4, 038:20, 039:28, 041:3, 041:23]

8. Plaintiff-Appellant 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 10-year rule and the defective-waiver rule, but he is the only Plaintiff who applied for – and was granted – relief under California's specific statutory remedy for judicial restoration of his firearms rights. See: Penal Code § 12021(c)(3) [29860]. [ER, Tab 4, 032:23, 034:20]

    a. Indeed, as of today (July 9, 2012), that remedy is no longer available to any person as it only applied to defendants who were convicted (or plead out) 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. See Penal Code § 12021(c)(3) [29860].

    b. Misdemeanants convicted of a California MCDV after 1993 were presumably on notice that the charges against them would result in the 10-year loss of the

right to acquire/possess firearms. Meaning that they are presumed to have made a knowing and intelligent waiver of any state law collateral consequences of their conviction. And since 2003, misdemeanants under California law have already had their rights restored by the passage of time and operation of law, this remedy is no longer available to anyone.

9. The federal definition of Misdemeanor Crimes of Domestic Violence 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.

10. It is a federal crime for any person, including a federally licensed firearm dealer, to sell or dispose of any firearm to a person who has been convicted of an MCDV. 18 U.S.C. § 922(d)(9).

11. It is federal crime for any person who has been convicted of an MCDV to possess a firearm. 18 U.S.C. § 922(g)(9).

12. Thus Federal Law imposes a lifetime ban on the "right to keep and bear arms" for persons convicted of an MCDV, subject to the individual states' power to restore these fundamental civil rights under state law.

13. Federal Law provides a means for disqualified persons to have their "right to keep and bear arms" restored under procedures

promulgated and implemented by the Attorney General. 18 U.S.C. § 925(c). That remedy is currently unavailable as Congress refuses to fund the program. *U.S. v. Bean*, 537 U.S. 71 (2002).

14. Even though The State of California has a policy of restoring the "right to keep and bear arms" through a hearing process and by operation of law (through the passage of time), sometime in 2004 the Federal Government began refusing to recognize California's restoration of rights and rehabilitation policies and began to deny firearms purchases and possession of firearms and ammunition to all persons convicted of an MCDV under the supremacy clause of the Constitution and the Federal Government's interpretation of the 18 U.S.C. §§ 921, 922 *et seq*. [ER, Tab 4, 033:3]

15. As a direct consequence of the federal government's interpretation of the LAUTENBERG AMENDMENT, i.e., the refusal to recognize that their rights were restored under state law – the Plaintiff-Appellants are being denied, for the rest of their lives and regardless of their rehabilitation, the ability to exercise a fundamental "right to keep and bear arms" as protected by the SECOND AMENDMENT. [ER, Tab 4, 033:10]

SUMMARY OF ARGUMENT

A set of federal statutes collectively known as the LAUTENBERG AMENDMENT, suspended (in some cases retroactively) the SECOND AMENDMENT rights of persons convicted in any state courts of a MCDV. In this case, the constitutional validity of LAUTENBERG may be in jeopardy due to the federal government's obtuse interpretation of California's statutes and procedures for restoring firearm rights for persons convicted of misdemeanors.

Enacted in 1996, LAUTENBERG is not a long standing regulation of the "right to keep and bear arms." As it is a federal law, the government's burden should be to cite some historically significant and commonly understood law, that was in effect in 1791, that deprived anybody convicted of a misdemeanor – without any possibility of restoration – of their SECOND AMENDMENTS rights.

However, because LAUTENBERG can be saved from constitutional jeopardy by its own terms, this Court need not reach the constitutional question. LAUTENBERG relies on state law remedies for the restoration of the rights it suspends. If this Court gives this federal statute the correct interpretation, then the constitutional issues of this case become moot.

However if this Court continues to indulge the federal government in its nonsensical interpretation of LAUTENBERG, then it must extend its analysis and take up the constitutional issues. This will require the Court to develop a standard of review that will not offend the way Article III courts have traditionally interpreted fundamental rights.

As a threshold matter, this Court has a duty to construe federal statutes so as "to avoid serious doubt as to their constitutionality." *Stern v. Marshall*, __ U.S. __, 131 S.Ct. 2594, 2605 (2011), citing text from: *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 841 (1986). That is why the former approach to this case is doctrinally preferable to the latter, as it addresses Plaintiff-Appellants' claims and saves the LAUTENBERG AMENDMENT from potential constitutional infirmity.

STANDARD OF REVIEW

A district court's conclusions regarding the interpretation and application of federal law are generally reviewed ***de novo***. Including:

- The Constitution. *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 435-436, 121 S.Ct. 1678, 1685 (2001) (8th Amendment issue); *United States v. Wunsch*, 84 F.3d 1110, 1114 (9th Cir. 1996) (1st Amendment issue));

- And, federal statutes. *City of Los Angeles v. United States Dept. of Commerce*, 307 F.3d 859, 868 (9th Cir. 2002); *Seariver Maritime Fin'l Holdings, Inc. v. Mineta*, 309 F.3d 662, 668 (9th Cir. 2002) (constitutionality of federal statute)).

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

An order granting (or denying) a FRCP Rule 12(b)(6) motion to dismiss for failure to state a claim is reviewed ***de novo***. *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1030 (9th Cir. 2008); *Leadsinger, Inc. v. BMG Music Publishing*, 512 F.3d 522, 526 (9th Cir. 2008); *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 979 (9th Cir. 2007). Review ordinarily is limited to the contents of the complaint. All well-pleaded allegations of material fact are accepted as true and construed in the light most favorable to the nonmoving party (plaintiff in the proceedings below). *Manzarek v. St. Paul Fire & Marine Ins. Co.*, supra, 519 F.3d at 1030-1031; *Leadsinger, Inc. v. BMG Music*

Publishing, supra, 512 F.3d at 526; see also: *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508, 122 S.Ct. 992, 995, fn. 1 (2002).

ARGUMENT

I. The Lautenberg Amendment Requires the Federal Government to Honor California's Remedies for Restoration of Firearm Rights.

The SECOND AMENDMENT does not protect the "right to keep and bear arms" of an individual who has been convicted of a felony. *District of Columbia v. Heller,* 554 U.S. 570, 626-627 (2008). Yet even felons may still use a firearm in self-defense when the threat is immediate. *U.S. v. Gomez*, 81 F.3d 846 (9th Cir. 1996), opinion amended and superceded on denial of reh'g, 92 F.3d 770 (9th Cir. 1996). Felons can even seek to have their SECOND AMENDMENT rights restored under federal law. 18 U.S.C. § 925(c).

But this is not a case about felons. It is about individuals who may have run afoul of the law only once in their life. They probably 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?

Appellants all plead guilty or 'no contest' to a misdemeanor crime of domestic violence under California law. Some were jailed. Some were sentenced to probation. Many were made to attend anger management classes and suffer other penalties and consequences of their transgressions.

One collateral consequence that Appellants suffered was the suspension (sometimes retroactively) under California and federal law of their "right to keep and bear arms." This case does not challenge this recent (federal and state) policy of suspending the SECOND AMENDMENT rights of individuals convicted of a MCDV – unless that right can never be restored.

Four preliminary points.

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

> § 927. 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.

This appears to express an intent on the part of Congress to defer to states on firearm regulations in which federal and state laws appear to act concurrently and the federal relies in some way on state law.

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

Second, it is simply the wrong approach for the federal government (and this Court) to graft case law interpreting the restoration of rights for felons into an interpretation of the restoration of rights for misdemeanants. If Congress had intended those convicted of a MCDV to be treated like felons under any federal laws dealing with firearms, they could have said exactly that.

The LAUTENBERG AMENDMENT does not say that any conviction for a MCDV should be treated for federal purposes like a *"crime punishable by imprisonment for a term exceeding one year"* as set forth in 18 U.S.C. § 921(a)(20). Instead Congress created a separate and distinct definition for MCDV at § 921(a)(33).

Third, 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).

This means that Congress is presumed to have known that there were no states that suspend 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. 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. Other states may also suspend firearm rights upon conviction of an MCDV, but California's law banning domestic violence misdemeanants from possessing firearms was passed in 1993. The LAUTENBERG AMENDMENT was passed in 1996.

Fourth (and the final preliminary point), 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 suspended 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 LAUTENBERG that negates state-sponsored restoration of rights would be an injustice against Plaintiff-Appellants and a transgression against standard canons of statutory interpretation.

A. All of the Plaintiff-Appellants Have Had Their Firearms Rights Restored by Operation of Law and the Passage of Time under California Law.

This Court has a duty to construe federal statutes so as "to avoid serious doubt as to their constitutionality." *Stern v. Marshall*, __ U.S. __, 131 S.Ct. 2594, 2605 (2011), citing text from: *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 841 (1986). An opinion from this Court providing a post-*Heller/McDonald*[7], judicial correction to the government's interpretation 18 U.S.C. § 921(a)(33) will fulfill that duty

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

and avoid having the constitutionality of the entire LAUTENBERG AMENDMENT brought into question.

In statutory interpretation cases, the inquiry begins with a determination of whether the language of the statute is unambiguous and whether the statutory scheme is consistent and coherent. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438 (2002). See also: *Salinas v. United States*, 522 U.S. 52 (1997).

The statutory language this Court must interpret regarding Plaintiffs' claims that their civil rights ("to keep and bear arms") were both lost and restored under California law is set forth at 18 U.S.C. § 921(a)(33)(B)(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. ***[Emphasis added]***

In *Logan v. United States*, 552 U.S. 23 (2007), a unanimous court took up the anomalies that arise from statutes that purport to restore rights that were never taken away. The Supreme Court placed some

weight on whether the offender's post-conviction status was unaltered by any dispensation of the jurisdiction where the conviction occurred. *Logan* at 26. The Court cited with approval language from the Circuit Court which held that "*an offender whose civil rights have been neither diminished nor returned is not a person who 'has had civil rights restored.'" United States v. Logan,* 453 F.3d 804, 805 (7th Cir. 2006).

District of Columbia v. Heller, 554 U.S. 570 (2008) and *McDonald v. City of Chicago*, 561 US ___, 130 S. Ct. 3020 (2010) affirmed the status of the rights secured by the SECOND AMENDMENT as individual, fundamental civil rights. Unlike Mr. Logan, the Plaintiffs in this action lost their civil rights to "keep and bear arms" for 10 years under the laws of the jurisdiction that convicted them of an MCDV. That same jurisdiction subsequently restored those rights by operation of law (i.e., the passage of a decade).

The *Logan* Court also cited with approval a prior case in which the Supreme Court acknowledged that federal law regarding restoration of rights must give way to a state's broad rules that restore rights by operation of law, and that states need not restore rights on a case-by-case basis. *Logan* at 28 citing: *Caron v. United States*, (1998) 524 U.S. 308, 313-316. At issue in *Caron* was the 'unless clause' of 18 U.S.C. §

921(a)(20). In that case the defendant was subject to a harsher sentence because while Massachusetts law restored his right to possess shotguns and rifles, it did not restore his right to possess handguns. It was the qualified restoration of rights under Massachusetts law that triggered the 'unless clause' that led to the harsher result.

In contrast, California Penal Code § 12021(c)(1) [29805] restored – without qualification – the Plaintiff-Appellants' "right to keep and bear arms" once 10 years had lapsed following their conviction for a California MCDV.

The plain language of 18 U.S.C. § 921(a)(33)(B)(ii) contemplates some state law procedure for restoration of any civil rights forfeited under state law by a MCDV conviction. Appellee-Defendants keep veering off into familiar pre-*Heller/McDonald* territory with their mantra that a conviction must result in the loss of the right to vote, to hold public office and to sit on a jury – and that only restoration of those rights resurrects the 'right to keep and bear arms' – while ignoring that the 'right to keep and bear arms' are also civil rights.

The LAUTENBERG AMENDMENT's language is clear. It is necessary to look to the jurisdiction of the conviction to determine what rights are lost and what rights are regained under state law. California made the

public policy decision – at least three years before the U.S. Congress – to impose a revocation of the bundle of rights inherent in the "right to keep and bear arms" for any person convicted of an MCDV.

Defendants would have this Court interpret the LAUTENBERG AMENDMENT as imposing a federal mandate **requiring** that states revoke the right to vote, hold public office or sit on a jury for any MCDV conviction in order to give any effect to the statute's restoration provision. That interpretation would bring into serious doubt the constitutionality of the LAUTENBERG AMENDMENT.

The fact that California chooses not to suspend the right to vote, hold public office or sit on a jury for an MCDV conviction is beside the point. All of the Plaintiffs in this action lost their civil rights "to keep and bear arms" upon their MCDV convictions under state law. Then they had those rights restored under the applicable laws of the same jurisdiction where they were convicted. This Court should find that Plaintiff-Appellants are no longer subject LAUTENBERG'S prohibition on exercising their SECOND AMENDMENT rights.

B. Plaintiff-Appellant Enos Had His Rights Judicially Restored and The Federal Government must Honor That Restoration.

Plaintiff-Appellant ENOS applied for judicial relief under Penal Code § 12021(c)(3) [29860] and his petition for restoration of civil rights

was granted in an order signed by a Superior Court Judge on June 16, 2000. [See ER, Tab 4, 034:20-24]

In addition to the ten (10) year revocation and restoration by operation of law, California clearly intended to provide a means for restoration of those rights for persons convicted of an MCDV prior to the legislature enacting this *ex post facto* collateral consequence of conviction. Which means that California, exercising its power as a sovereign jurisdiction, has expressed its own policy of revoking and restoring various civil rights for MCDV convictions. California Penal Code § 12021(c)(3) [29860].

A plain reading of LAUTENBERG and the case of *Caron v. United States*, (1998) 524 U.S. 308 compels a determination that ENOS has a separate and distinct claim for restoration of this rights under California law.

II. LAUTENBERG Cannot Be Retroactively Applied Because That Application Would Deprive a Criminal Defendant of Making an Knowing and Intelligent Waiver of His Trial Rights.

Because it was impossible for the Plaintiff-Appellants to be apprized of a collateral consequence effecting a fundamental individual right, a consequence that did not exist at the time of their pleas, some of the

Plaintiffs' convictions cannot meet the definition of MCDV under 18 U.S.C. § 921(a)(33)(B)(i), which reads:

> 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.

In 1996, Congress extended the federal prohibition on firearms to include persons convicted of "a misdemeanor crime of domestic violence." *United States v. Hayes*, 555 U.S. 415, 418 (2009).

Plaintiffs ENOS and BASTASINI entered their no-contest/guilty pleas in 1991. Plaintiffs MERCADO and GROVES entered their no-contest/guilty pleas in 1990. Plaintiff MONTEIRO in 1992. Thus all these Plaintiffs plead out in lieu of trial prior to **both** California's firearm prohibition for MCDV (1993) and the passage of LAUTENBERG (1996). Plaintiff ERIKSON plead no-contest/guilty in 1996, after California's prohibition, but before LAUTENBERG became law. [ER, Tab 4, 034:2, 035:15, 037:4, 038:20, 039:28, 041:3]

During the same term that the Supreme Court gave us *McDonald v. City of Chicago*, 561 US ___, 130 S. Ct. 3020 (2010); the High Court also handed down *Padilla v. Kentucky*, ___ U.S. ___, 130 S. Ct. 1473 (2010). In that opinion the Court found that a criminal defendant who was not apprized of the collateral consequence of his conviction (deportation) may have been denied constitutionally adequate assistance of counsel under the SIXTH AMENDMENT, following the line of case arising from *Strickland v. Washington*, 466 U.S. 668 (1984). In coming to that conclusion the Court took note of the fact that deportation, though "civil in nature, see *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038, (1984), [...] is nevertheless intimately related to the criminal process. Our law has enmeshed criminal convictions and the penalty of deportation for nearly a century, [...]." *Padilla* at 1481.

With the Supreme Court's recognition of the rights secured by the SECOND AMENDMENT are fundamental civil rights, in *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago*, 561 US ___, 130 S. Ct. 3020 (2010); Plaintiffs herein contend that the collateral consequence of losing those rights is at least equal to or greater than mere deportation. Hence this Court must apply the *Padilla* rationale to whether Plaintiffs made a knowing and intelligent

waiver of their right to a jury trial (and attendant other trial rights) when they stood in the dock charged with a MCDV and accepted a plea agreement in lieu of trial.

Since it is existentially impossible for a criminal defendant to be apprized of a collateral consequence (loss of a fundamental rights) that doesn't exist at the time of his plea in lieu of a jury trial, this Court should find that Plaintiffs ENOS, BASTASINI, MERCADO, GROVES, MONTEIRO and ERIKSON count **not** have made a knowing and intelligent waiver of their right to jury trial. Hence their convictions do not qualify as a MCDV under the plain language of 18 U.S.C. § 921(a)(33)(B)(i).

III. The Federal Government's Interpretation of LAUTENBERG'S Restoration Provisions Violates the 10th Amendment.

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.

As noted above, 18 U.S.C. § 927 is a statutory restatement of the Tenth Amendment, at least with respect to the regulation of firearm rights where both state and federal law speak to the same subject.

Furthermore, it makes sense that any restoration of rights procedures would have to be based on local policies where state and local jurisdictions are in the best place to determine if a particular misdemeanant (or class of misdemeanants) has demonstrated the characteristics necessary to have their SECOND AMENDMENT rights restored. Exactly this point was made by the Supreme Court in *Bond v. United States*, 131 S.Ct. 2355 (2011) (per Kennedy, J.)(Ginsburg, J. and Breyer, J. concurring):

> Federalism has more than one dynamic. It is true that the federal structure serves to grant and delimit the prerogatives and responsibilities of the States and the National Government *vis-a-vis* one another. The allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States. The federal balance is, in part, an end in itself, to ensure that States function as political entities in their own right.
>
> But that is not its exclusive sphere of operation. Federalism is more than an exercise in setting the boundary between different institutions of government for their own integrity. "State sovereignty is not just an end in itself: 'Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.' *New York v. United States*, 505 U.S. 144, 181, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (1992) (quoting *Coleman v. Thompson*, 501 U.S. 722, 759, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991) (Blackmun, J., dissenting)).
>
> Some of these liberties are of a political character. The federal structure allows local policies "more sensitive to the diverse needs of a heterogeneous society," permits "innovation and experimentation," enables greater citizen "involvement in democratic processes," and makes government "more responsive by putting the States in competition for a mobile citizenry." *Gregory v. Ashcroft*, 501 U.S. 452, 458, 111 S. Ct.

> 2395, 115 L. Ed. 2d 410 (1991). Federalism secures the freedom of the individual. It allows States to respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power. True, of course, these objects cannot be vindicated by the Judiciary in the absence of a proper case or controversy; but the individual liberty secured by federalism is not simply derivative of the rights of the States.
>
> Federalism also protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions. See ibid. By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power. When government acts in excess of its lawful powers, that liberty is at stake.

To reiterate, Plaintiff-Appellants are not making a direct Tenth Amendment challenge to LAUTENBERG. Their claim is that the federal government's interpretation of the restoration provisions of that statute invades powers that are reserved to the States.

IV. If LAUTENBERG Has No Effective Means for Restoring The Rights it Suspends it violates the SECOND AMENDMENT.

The Supreme Court in *District of Columbia v. Heller*, 554 U.S. 570 (2008) gave assurances that "[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings,

or laws imposing conditions and qualifications on the commercial sale of arms." *Heller* at 626-27.

As noted earlier, the LAUTENBERG AMENDMENT is a recent creature of statute having been attached to an appropriations bill during the 104th Congress in September of 1996. Therefore it is **not** a longstanding doctrine of American jurisprudence that a MCDV should disqualify someone from exercising a fundamental, enumerated right under our Constitution.

It is only the federal government's insistence on an obtuse reading of 18 U.S.C. § 921(a)(33) *et seq.*, that propels this Court toward a constitutional analysis of the LAUTENBERG AMENDMENT in light of *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. Chicago* 561 US ___, 130 S Ct 3020 (2010).

Because the trial court dismissed this action pursuant to Defendant-Appellees' FRCP 12 Motion, they never filed an answer, or submitted evidence that LAUTENBERG serves a compelling or even important state interest. There certainly was no analysis of any means/ends testing to make sure this policy would address that interest.

If this Court pursues a constitutional analysis of LAUTENBERG in the shadow of the SECOND AMENDMENT, it will be required to classify

Plaintiff-Appellants as 'law-abiding' citizens. Therefore it should adopt (almost) strict scrutiny and require the government to bear the burden of producing evidence that forbidding rehabilitated misdemeanants with a 10-year (or more) history of law-abiding conduct from exercising SECOND AMENDMENT rights serves a compelling government interest, and that the means used (a complete lifetime ban on exercising the right) is necessary to achieve that interest. See: *U.S. v. Chester* (4th Cir. 2010) 628 F.3d 673 and *Ezell v. City of Chicago* (7th Cir. 2011) 651 F.3d 684.

In the context of the lesser, intermediate scrutiny analysis under the First Amendment, the Seventh Circuit opined:

> [...] [B]ecause books (even of the "adult" variety) have a constitutional status different from granola and wine, and laws requiring the closure of bookstores at night and on Sunday are likely to curtail sales, the public benefits of the restrictions must be established by evidence, and not just asserted. The evidence need not be local; Indianapolis is entitled to rely on findings from Milwaukee or Memphis (provided that a suitable effort is made to control for other variables). See *Andy's Restaurant*, 466 F.3d at 554-55. **But there must be evidence; lawyers' talk is insufficient.** (Emphasis added.)
>
> *Annex Books v. City of Indianapolis*,
> 581 F.3d 460, 463 (7th Cir. 2009)

If the government cannot produce that evidence upon remand, Plaintiff-Appellants should prevail on their SECOND AMENDMENT claim

that LAUTENBERG is unconstitutional to the extent it fails to provide a means for restoration of SECOND AMENDMENT rights after a misdemeanor conviction.

This was exactly the reason given by an *en banc* panel Seventh Circuit when it upheld LAUTENBERG against a SECOND AMENDMENT challenge. *See United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010, *en banc*), *cert. denied, Skoien v. United States*, 2011 U.S. LEXIS 2138 (2011).

In upholding a conviction for 18 U.S.C. § 922(g)(9), the Seventh Circuit emphasized that Mr. Skoien was a recent, multiple offender having been convicted of domestic violence against his wife in 2003 and his fiancé in 2006, and that is why the Court found that he was "*poorly situated to contend that the statute creates a lifetime ban for someone who does not pose any risk of further offenses.*" *Skoien* at 645. In contrast, Plaintiff-Appellants herein have been law-abiding for more than ten years.

The Seventh Circuit's *en banc* panel also placed great weight on the fact that LAUTENBERG did not impose a perpetual disqualification for persons convicted of domestic violence. *Skoien* at 644. In fact California was held out as an example of a state that restores rights

upon successful completion of probation. (Ironically it is entirely possible that the Seventh Circuit misinterpreted the specific provision of California law that it cited. {Penal Code § 1203.4a, instead of § 12021 [29800-29875] working in conjunction with §§ 1203.4 and 1203.4a} However, the argument remains – restoration procedures that address the potential for recidivism and insure that reinstatement of the 'right to keep and bear arms' does not endanger victims or the public, may be essential to upholding LAUTENBERG.) *Skoien* at 644-645.

That is the argument that Plaintiff-Appellants herein make. That to uphold LAUTENBERG, this Court must interpret its restoration of rights procedures, that are dependent on state created remedies, as fully operative and thus entitling Plaintiff-Appellants to the relief requested in their Second Amended Complaint.

CONCLUSION

After fulfilling all of California's requirements for restoration of their "right to keep and bear arms" after a conviction for a misdemeanor crime of domestic violence, Plaintiff-Appellants' SECOND AMENDMENT rights should also be restored under federal law.

The federal government's current interpretation of LAUTENBERG treats misdemeanants like (or worse than) felons without

constitutionally valid justification. In fact, the government's argument mirrors another tautology from Alice's Adventures in Wonderland:

> The executioner's argument was, that you couldn't cut off a head unless there was a body to cut it off from: that he had never had to do such a thing before, and he wasn't going to begin at his time of life.
>
> The King's argument was that anything that had a head could be beheaded, and that you weren't to talk nonsense.
>
> The Queen's argument was that, if something wasn't done about it in less than no time, she'd have everybody executed, all round.
>
> *Alice's Adventures in Wonderland* 8.67-69
> By Lewis Carroll

This Court can and should inject some common sense into the debate. This Court should compel the federal government to honor California's restoration of rights procedures so that the Plaintiff-Appellants can go on to exercise their SECOND AMENDMENT rights after proving up their rehabilitation to the satisfaction of California – by doing this, the Court can also insure LAUTENBERG'S continued viability.

Respectfully Submitted on July 9, 2012.

/s/ Donald Kilmer

Donald Kilmer for Plaintiff-Appellants

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed.R.App.P. Rule 32(a)(7)(B). It contains 7,710 words using WordPerfect Version X5 in Century Schoolbook 14 point font.

Date: July 9, 2012

/s/ Donald Kilmer

Donald Kilmer, Attorney for Appellants

CERTIFICATE OF SERVICE

On July 9, 2012, I served the foregoing APPELLANTS' OPENING BRIEF by electronically filing it with the Court's ECF/CM system, which generated a Notice of Filing and effects service upon counsel for all parties in the case.

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

Executed July 9, 2012 in San Jose, California.

/s/ Donald Kilmer

Attorney of Record for Appellants