No. 12-15498 [Dist Ct. No.: 2:10-CV-02911-JAM-EFB]
Panel Decision: October 16, 2014. Reported at 2014 U.S. LEXIS 19798
Before: IKUTA, N.R. SMITH, and MURGUIA, Circuit Judges.

IN THE
UNITED STATES COURT OF APPEALS
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' PETITION FOR REHEARING EN BANC

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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: December 15, 2014

/s/ Donald Kilmer

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Appellants contend that the panel decision conflicts with decisions of the Supreme Court. *District of Columbia v. Heller,* 554 U.S. 570 (2008) [analysis and scope 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]

Appellants also contend that the panel 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 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.[1] The good news is that violence committed against immediate family members declined 52%, from 2.7 to 1.3 per 1,000. (Pg.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 of domestic violence.

[1] http://www.bjs.gov/content/pub/pdf/ndv0312.pdf – Accessed December 14, 2014.

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).[2] Even if only one-tenth of those calls for assistance result in misdemeanor charges and convictions, then over the 20 year period of 1993[3] 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.

California only imposes a 10-year suspension of that right. The LAUTENBERG AMENDMENT contemplated a life-time revocation of SECOND AMENDMENT rights, subject to state-sponsored restoration procedures. This case is about whether these statutory remedies can be reconciled, rather than Constitutionally invalidated.

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[2] 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 – Accessed December 14, 2014.

[3] California enacted its ten-year prohibition for exercising firearm rights against domestic violence misdemeanants in 1993. A lifetime ban under LAUTENBERG, with state sponsored restoration procedures was enacted in 1996.

INTRODUCTION

The LAUTENBERG AMENDMENT is a set of federal statutes[4] that suspends the SECOND AMENDMENT rights of anyone convicted of a misdemeanor crime of domestic violence (MCDV). The LAUTENBERG AMENDMENT also contains a provision for restoration of SECOND AMENDMENT rights. 18 U.S.C. § 921(a)(33)(B)(ii). Thus the plain language of the LAUTENBERG contemplates some 'state sponsored' mechanism for reinstating SECOND AMENDMENT rights 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 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 a 'law-abiding' citizen. Standing alone these statutes do not reinstate firearm rights. But there is nothing in California law that prevents any other statute, procedure or legal status from reinstating those rights.

[4] 18 U.S.C. §§ 921(a)(33), 922(d)(9), 922(g)(9)

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. Penal Code § 4852.01. Furthermore, pardons are just as ineffective for restoration of rights as these other procedures, given the obtuse definition of rights under LAUTENBERG. That leaves only California's statutory restoration by operation-of-law and judicial hearing if a misdemeanant is to regain his/her SECOND AMENDMENT rights under LAUTENBERG'S definition. Penal Code § 12021 [29800-29875][5].

The controversy 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.

[5] California reorganized its weapons laws in 2012. The old provision is cited and the new provision is bracketed in this brief.

- 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 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) thus LAUTENBERG'S restoration of rights provision is rendered a dead letter by the federal government's (revised circa. 2004) interpretation.

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 Appellants' TENTH AMENDMENT claim was dismissed in an order filed July 8, 2011 (Doc #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]

The opinion was filed October 16, 2014 and is reported at 2014 U.S. LEXIS 19798. The matter was before Circuit Judges: IKUTA, N.R. SMITH, and MURGUIA. The three-judge panel reviewed *de novo* the district court's order granting the Appellee-Defendants' motion to dismiss, see *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005).

STATEMENT OF FACTS[6]

The particular facts of each Plaintiff-Appellants' circumstances regarding his conviction and the state-sanctioned restoration of rights is set forth in the Second Amended Complaint (SAC). [ER, Tab 4, pages 029-045] The substantive facts from the SAC [7] are:

In 1993 California added domestic violence to an existing list of misdemeanors that prohibit a person from acquiring or possessing a

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

[7] The substantive facts for this appeal are the same in both the FAC and the SAC.

firearm for 10 years after the date of conviction. CA Penal Code § 12021 [29800-29875] [ER, Tab 4, 034:5, 035:19, 037:8, 038:24, 040:3]

In 1994, the Congress passed the Violence Against Women Act, and in 1996 the LAUTENBERG AMENDMENT was added to impose a lifetime prohibition of exercising SECOND AMENDMENT Rights by any person convicted of Misdemeanor Domestic Violence. 18 U.S.C. §§ 921(a)(33), 922(d)(9), 922(g)(9). [ER, Tab 4, 034:9, 035:23, 037:12, 038:28, 040:7]

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

More than ten years (some are close to 20 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]

Though it does not restore firearm rights *per se*, each and every Plaintiff-Appellant has had a California Superior Court Judge make a finding – in and 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 case dismissed. Thus Plaintiffs are entitled to the presumption that they are 'law-abiding' citizens. [ER, Tab 4, 034:14, 035:28, 037:17, 039:5, 041:6, 041:26]

Six of the seven Plaintiff-Appellants: ENOS, BASTASINI, MERCADO, GROVES, MONTEIRO and ERICKSON – were all convicted (upon a plea of no-contest/guilty) of an MCDV prior to the LAUTENBERG AMENDMENT becoming law in 1996. It was impossible for them to receive notice of a federal consequence of their conviction (i.e., loss of a fundamental right) when that collateral consequence did not yet exist. This necessarily 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]

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: CA Penal Code § 12021(c)(3)

[29860]. [ER, Tab 4, 032:23, 034:20] Indeed, as of today (December 15, 2014), that remedy is no longer available to any person as it only applied to defendants who were convicted (or plead) 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 CA Penal Code § 12021(c)(3) [29860].

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.

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 those rights under state law.

Federal Law also provides an administrative procedure for disqualified persons to have their "right to keep and bear arms" restored. 18 U.S.C. § 925(c). That remedy is unavailable as Congress refuses to fund the program. *U.S. v. Bean*, 537 U.S. 71 (2002).

Initially recognizing California's 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 changed its interpretation of LAUTENBERG and started

refusing to recognize California's rehabilitation policies by denying firearms purchases and prosecuting possession of firearms by 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]

As a direct consequence of the federal government's interpretation of the LAUTENBERG AMENDMENT, 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" that is protected by the SECOND AMENDMENT. [ER, Tab 4, 033:10]

ARGUMENT FOR GRANTING PETITION

Since three-judge panels are bound by decisions of previous three-judge panels, it takes an en banc panel to reconsider an opinion on a "resolved" issue. *In re Gruntz*, 202 F.3d 1074, 1085, fn. 11 (9th Cir. 2000); see also *Espinosa v. United Student Aid Funds, Inc.*, 530 F.3d 895, 898 (9th Cir. 2008).

Prior to *District of Columbia v. Heller,* 554 U.S. 570 (2008), this circuit issued opinions on the 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 the Supreme 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. The most recent 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 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)
> By 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 Appellants herein have alleged in their operative complaint that they have exhausted their California state law procedures and that the federal government still refuses to recognize that process.

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

Applying the rule implied by Judge Bea's concurrence in *Chovan* would give the Plaintiff/Appellants the relief they request.

Alternatively, a court might simply apply the test in *Chovan* for (almost) strict or (heightened) intermediate scrutiny and strike the offending parenthetical qualifier from LAUTENBERG. It has no rational basis unless states actually do revoke other civil rights upon misdemeanor conviction of domestic violence and then only if that 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).

The judicially edited version of LAUTENBERG would read like this:

> [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.[8]

CONCLUSION

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).

This case is not 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?

An en banc panel of this Court can answer that question without reaching the pendant SECOND and TENTH AMENDMENT constitutional claims. Three points bear emphasis:

[8] 18 U.S.C. § 921(a)(33)(B)(ii)

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 is 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 relies in some way on state law. LAUTENBERG'S own restoration provisions, which expressly rely upon state law restoration procedures, is 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 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.

Third (and final statutory interpretation 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 is an injustice against rehabilitated misdemeanants and a violation of standard canons of statutory interpretation.

In his dissent (prophetic given how the Supreme Court ultimately resolved the question in *Heller*) from en banc review in *Silveira v. Lockyer,* 328 F.3d 567 (9th Cir. 2003), former Chief Judge Kozinski pulled back the curtain on judicial favoritism of certain rights:

> Judges know very well how to read the Constitution broadly when they are sympathetic to the right being asserted. We have held, without much ado, that "speech, or . . . the press" also means the Internet, see *Reno v. ACLU*, 521 U.S. 844, 138 L. Ed. 2d 874, 117 S. Ct. 2329 (1997), and that "persons, houses, papers, and effects" also means public telephone booths, see *Katz v. United States*, 389 U.S. 347, 19 L. Ed. 2d 576, 88 S. Ct. 507 (1967). When a particular right comports especially well with our notions of good social policy, we build magnificent legal edifices on elliptical constitutional phrases--or even the white spaces between lines of constitutional text. See, *e.g., Compassion in Dying v. Washington*, 79 F.3d 790 (9th Cir. 1996) (en banc), *rev'd sub nom. Washington v. Glucksberg*, 521 U.S. 702, 138 L. Ed. 2d 772, 117 S. Ct. 2258, 117 S. Ct. 2302 (1997). [...]
>
> It is wrong to use some constitutional provisions as spring-boards for major social change while treating others like senile relatives to be cooped up in a nursing home until they quit annoying us. As guardians of the Constitution, we must be consistent in interpreting its provisions. If we

> adopt a jurisprudence sympathetic to individual rights, we must give broad compass to all constitutional provisions that protect individuals from tyranny. If we take a more statist approach, we must give all such provisions narrow scope. Expanding some to gargantuan proportions while discarding others like a crumpled gum wrapper is not faithfully applying the Constitution; it's using our power as federal judges to constitutionalize our personal preferences.
>
> *Silveira v. Lockyer,* 328 F.3d 567, 568-69 (9th Cir. 2003) Circuit Judge Alex Kozinski Dissenting

Brailey and by extension *Chovan* read the restoration of rights provisions of LAUTENBERG too narrowly or unconstitutionally. An en banc rehearing can correct that.

The case should be reversed and remanded to the trial court with instructions to reinstate all statutory constructions claims as well as the SECOND and TENTH AMENDMENT claims from the FAC and SAC. Then the parties can conduct discovery for a full record and the case can proceed to motions for summary judgment or trial.

Respectfully Submitted on December 15, 2014,

/s/ Donald Kilmer
Attorney for Appellants

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed.R.App.P. Rule 35 and/or the alternative Circuit Rule 40-1(a). It contains less than 4,200 words using WordPerfect Version X5 in Century Schoolbook 14 point font.

NOTICE OF RELATED CASES

Plaintiff/Appellants are not aware of any pending cases in Northern District of California or the Ninth Circuit that could be related to this action.

CERTIFICATE OF SERVICE

On December 15, 2014, I served the foregoing APPELLANTS' PETITION FOR REHEARING EN BANC 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 December 15, 2014 in San Jose, California.

/s/ Donald Kilmer
Attorney of Record for Appellants

1 of 1 DOCUMENT

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

No. 12-15498

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

2014 U.S. App. LEXIS 19798

October 9, 2014, Argued and Submitted, San Francisco, California
October 16, 2014, Filed

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

PRIOR HISTORY: **[*1]** 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)

DISPOSITION: AFFIRMED.

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.

OPINION

MEMORANDUM*

* 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 **[*2]** 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 **[*3]** 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.