No. 12-15498

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD ENOS, et al.,

Plaintiffs-Appellants,

v.

ERIC J. HOLDER, JR., as United States Attorney General, et al.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
CASE NO. 10-2911

BRIEF FOR THE APPELLEES

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BRIEF FOR APPELLEES

STATEMENT OF JURISDICTION

Plaintiffs invoked the jurisdiction of the district court pursuant to 18 U.S.C. § 925A and 28 U.S.C. § 1331. The district court entered a final order granting the government's motion to dismiss on February 28, 2012. ER 28 (2/28/2012 Order.).[1] Plaintiffs filed a timely notice of appeal on February

[1] "ER" refers to the excerpts of record filed by plaintiffs-appellants.

29, 2012. ER 1; *see* Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

Federal law restricts the possession of firearms by a person "who has been convicted in any court of a misdemeanor crime of domestic violence." 18 U.S.C. § 922(g)(9). The issue presented is whether the district court correctly determined that plaintiffs have not stated a valid claim for relief from the restrictions of Section 922(g)(9).

STATEMENT OF THE CASE

This is an action for declaratory and injunctive relief filed by plaintiffs Richard Enos, Jeff Bastasini, Louie Mercado, Walter Groves, Manuel Monteiro, Edward Erickson, and Vernon Newman—seven individuals who have been convicted of misdemeanor crimes of domestic violence but nonetheless wish to purchase firearms. Plaintiffs challenge the applicability of 18 U.S.C. § 922(g)(9), which restricts the possession of firearms by a person "who has been convicted in any court of a misdemeanor crime of domestic violence," 18 U.S.C. § 922(g)(9), unless

"the conviction has been expunged or set aside," *id.* § 921(a)(33)(B)(ii), "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)," *ibid.*, or was a non-jury conviction for which there was an entitlement to a jury trial and the person did not "knowingly and intelligently waive[] the right to have the case tried by a jury," *id.* § 921(a)(33)(B)(i).

In July 2011, the district court granted in part defendants' motion to dismiss the claims alleged in plaintiffs' first amended complaint. ER 57-59. The claims dismissed with prejudice by the court included a claim for relief under the Tenth Amendment that plaintiffs renew on appeal. ER 57-59; Pl. Br. 6.

Plaintiffs subsequently filed a second amended complaint seeking relief under 18 U.S.C. § 925A and the Second Amendment. ER 29-45. Defendants moved to dismiss the second amended complaint, and plaintiffs cross-moved for summary judgment. ER 135-36 (docket sheet).

The district court on February 28, 2012, entered a final order dismissing the second amended complaint for failure to state a valid legal claim. ER 28.

Plaintiffs filed a timely appeal from the district court's orders of July 8, 2011 and February 28, 2012. ER 1. On appeal, plaintiffs press the claims for relief in their second amended complaint and the claim for relief under the Tenth Amendment from their first amended complaint. Pl. Br. 6-7.

STATEMENT OF FACTS

I. STATUTORY AND REGULATORY BACKGROUND

A. Federal Law

1. Following a multi-year inquiry into violent crime that included "field investigation and public hearings," S. Rep. No. 88-1340, at 1 (1964), Congress found "that the ease with which" handguns could be acquired by "criminals . . . and others whose possession of such weapons is similarly contrary to the public interest[,] is a significant factor in the prevalence of lawlessness and violent crime in the United States," Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, Title IV,

§ 901(a)(2), 82 Stat. 197, 225. Congress found "that there is a widespread traffic in firearms moving in or otherwise affecting interstate or foreign commerce, and that the existing Federal controls over such traffic do not adequately enable the States to control this traffic within their own borders through the exercise of their police power." *Id.* § 901(a)(1), 82 Stat. at 225. Congress determined "that only through adequate Federal control over interstate and foreign commerce in these weapons . . . can this grave problem be properly dealt with, and effective State and local regulation of this traffic be made possible." *Id.* § 901(a)(3), 82 Stat. at 225.

Congress's investigations revealed "a serious problem of firearms misuse in the United States," S. Rep. No. 89-1866, at 53 (1966), and a "relationship between the apparent easy availability of firearms and criminal behavior," *id.* at 3. Law enforcement officials testified to the "tragic results" of firearm misuse by persons with prior criminal convictions. S. Rep. No. 88-1340, at 12, 18. Statistical evidence showed "the terrible abuse and slaughter caused by virtually unrestricted access to

firearms by all individuals, regardless of their backgrounds." 114 Cong. Rec. 13219 (May 14, 1968) (statement of Sen. Tydings).

Congress accordingly aimed to "regulate more effectively interstate commerce in firearms so as to reduce the likelihood that they fall into the hands of the lawless or those who might misuse them," S. Rep. No. 89-1866, at 1. Congress thus included in both the Omnibus Crime Control Act and the Gun Control Act of 1968, Pub. L. No. 90-618, Title I, § 101, 82 Stat. 1213, statutory provisions limiting firearm access by persons with "criminal background[s]," S. Rep. No. 90-1097, at 28 (1968), and other "categories of potentially irresponsible persons," *Barrett v. United States*, 423 U.S. 212, 220 (1975). These restrictions are codified at 18 U.S.C. § 922(g). The restriction on firearm possession by persons who have been "convicted in any court of a misdemeanor crime of domestic violence," 18 U.S.C. § 922(g)(9), was added to the statute as part of the Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 658, 110 Stat. 3009, 3009-371 (Sept. 30. 1996).

"Existing felon-in-possession laws, Congress recognized, were not keeping firearms out of the hands of domestic abusers, because 'many people who engage in serious spousal or child abuse ultimately are not charged with or convicted of felonies.'" *United States v. Hayes*, 555 U.S. 415, 426 (2009) (quoting 142 Cong. Rec. 22985 (1996) (statement of Sen. Lautenberg)). "By extending the federal firearm prohibition to persons convicted of 'misdemeanor crime[s] of domestic violence,' proponents of § 922(g)(9) sought to 'close this dangerous loophole.'" *Ibid*. (quoting 142 Cong. Rec. 22985-86 (statement of Sen. Lautenberg)). Congress recognized that "[f]irearms and domestic strife are a potentially deadly combination nationwide." *Id.* at 427.

To that end, Congress restricted firearm possession by a person "who has been convicted in any court of a misdemeanor crime of domestic violence." 18 U.S.C. § 922(g)(9). "[A] 'misdemeanor crime of domestic violence' must have, 'as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon'" and "it must be

'committed by' a person who has a specified domestic relationship with the victim." *Hayes*, 555 U.S. at 421 (quoting 18 U.S.C. § 921(a)(33)(A)).

"A person shall not be considered to have been convicted of such an offense for purposes of [Section 922(g)(9)]," however, "if the conviction has been expunged or set aside," or is for "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." *Id.* § 921(a)(33)(B)(ii). Also excluded are non-jury convictions for which there was an entitlement to a jury trial and the person did not "knowingly and intelligently waive[] the right to have the case tried by a jury." *Id.* § 921(a)(33)(B)(i).

2. The Brady Handgun Violence Prevention Act of 1993 added, at 18 U.S.C. § 922(t), a requirement that the Attorney General "establish a 'national instant criminal background check system,' known as the NICS,

to search the backgrounds of prospective gun purchasers for criminal or other information that would disqualify them from possessing firearms," *Nat'l Rifle Ass'n of America, Inc. v. Reno*, 216 F.3d 122, 125 (D.C. Cir. 2000); Pub. L. No. 103-159, § 103(b), 107 Stat. 1536, 1541 (1993). "A computerized system operated by the FBI, the NICS searches for disqualifying information in three separate databases," including a database "containing criminal history records." 216 F.3d at 125. "Before selling a weapon, firearm dealers must submit the prospective purchaser's name, sex, race, date of birth, and state of residence to the NICS operations center at the FBI." *Ibid.*; 28 C.F.R. § 25.7. A dealer may not transfer a firearm to a person whose receipt of the firearm would violate 18 U.S.C. § 922(g) or State law. *See* 18 U.S.C. § 922(t)(5). If a search reveals that the prospective purchaser may not legally possess a firearm, the statute requires the NICS operations center to advise the dealer that the transaction has been "'denied.'" 216 F.3d at 125; 28 C.F.R. § 25.6(c)(1)(iv).

"Any person denied a firearm pursuant to [18 U.S.C. § 922(t)]" may bring an action under 18 U.S.C. § 925A if the person "was not prohibited from receipt of a firearm pursuant to [*inter alia,* 18 U.S.C. § 922(g)]" and the denial was "due to the provision of erroneous information relating to the person by any State or political subdivision thereof, or by the national instant criminal background check system established under section 103 of the Brady Handgun Violence Prevention Act." 18 U.S.C. § 925A. The court in that action may enter "an order directing that the erroneous information be corrected or that the transfer be approved, as the case may be." *Ibid.*

3. Regulations promulgated by the Bureau of Alcohol, Tobacco, Firearms, and Explosives provide that federally licensed firearm dealers "shall not sell or otherwise dispose, temporarily or permanently, of any firearm to any [transferee who is not federally licensed] unless the licensee records the transaction on a firearms transaction record, Form 4473." 27 C.F.R. § 478.124(a); *id*. § 478.96(b) (imposing same restrictions with respect to out-of-state and mail order sales). The Form 4473 establishes the

transferee's eligibility to possess a firearm by requiring, among other things, "certification by the transferee that the transferee is not prohibited by the Act from . . . receiving a firearm which has been shipped or transported in interstate or foreign commerce or possessing a firearm in or affecting commerce." *Id.* § 478.124(c)(1).[2]

B. California Law.

California law provides that persons convicted of certain misdemeanor violations, including California Penal Code § 243 (misdemeanor battery), may not purchase or possess firearms "within 10 years of the conviction." Cal. Penal Code § 12021(c)(1). In 1993, the California legislature extended these restrictions to persons convicted of misdemeanor violations of Cal. Penal Code § 273.5 (corporal injury to a

[2] Authority to enforce federal firearms laws was originally vested in the Secretary of the Treasury but was transferred to the Attorney General by the Homeland Security Act of 2002, Pub. L. No. 107-296, § 1111, 116 Stat. 2135, 2274. This authority has been delegated to the Bureau of Alcohol, Tobacco, Firearms, and Explosives (formerly the Bureau of Alcohol, Tobacco, and Firearms). Treasury Dep't Order No. 221, 37 Fed. Reg. 11,696 (June 10, 1972); 28 C.F.R. § 0.130(a)(1); *see also J&G Sales Ltd. v. Truscott*, 473 F.3d 1043, 1044 n.1 (9th Cir. 2007).

spouse/cohabitant). *In re David S.*, 133 Cal. App. 4th 1160, 1166-67 (Cal. App. 1st Dist. 2005). Persons whose convictions predate the addition of the restriction may petition the sentencing court for relief from the prohibition pursuant to California Penal Code § 12021(c)(3).[3]

California Penal Code § 1203.4 establishes procedures for ex-offenders to obtain relief from "penalties and disabilities resulting from the offense." *Jennings v. Mukasey*, 511 F.3d 894, 898 (9th Cir. 2007) (quotation marks omitted). "The limitations on this relief are numerous and substantial," *ibid.*, however, and include the reservation that "[d]ismissal of an accusation or information pursuant to this section does not permit a person to own, possess, or have in his or her custody or control any firearm," Cal. Penal Code § 1203.4(a)(2). *See also United States v. Hayden*, 255 F.3d 768, 772 (9th Cir. 2001). Thus, "Section 1203.4 does not, properly

[3] "Effective January 1, 2012, California Penal Code § 12021(c)(1) was repealed and reenacted without substantive change as California Penal Code § 29805," ER 8 & n.1 (2/28/2012 Op.), and "California Penal Code § 12021(c)(3) was repealed and reenacted without substantive change as California Penal Code § 29860," *id.* at 9 & n.2.

speaking, 'expunge' the prior conviction." *Jennings*, 511 F.3d at 898 (quoting *People v. Frawley*, 98 Cal. Rptr. 2d 555, 559-60 (Cal. Ct. App. 1st Dist. 2000) (quotation marks omitted)). A person "remain[s] convicted for [Gun Control Act] purposes" despite "receiv[ing] relief under section 1203.4." *Jennings*, 511 F.3d at 899.

II. FACTS AND PRIOR PROCEEDINGS

1. This is an action for declaratory relief and injunctive relief filed by Richard Enos, Jeff Bastasini, Louie Mercado, Walter Groves, Manuel Monteiro, Edward Erickson, and Vernon Newman. ER 29-30 (Second Amended Compl.). Plaintiffs challenge the applicability of 18 U.S.C. § 922(g)(9), a federal criminal statute limiting the possession of firearms by a person "who has been convicted in any court of a misdemeanor crime of domestic violence."[4]

The complaint states that plaintiffs are citizens and residents of California who wish to purchase firearms notwithstanding their prior

[4] Jeff Loughran and William Edwards were dismissed from the first amended complaint for improper joinder and venue, and they do not appeal that dismissal. ER 46-47 (7/8/2011 Order); Pl. Br. 6-7.

convictions for misdemeanor crimes of domestic violence. ER 29-30, 34-42. The defendants in this action are the Attorney General of the United States, the Federal Bureau of Investigation, and the United States of America. ER 10, 30.

According to the complaint, Enos, Bastasini, Mercado, Groves, and Monteiro pleaded no contest or guilty to misdemeanor charges of corporal injury to a spouse/cohabitant, Cal. Penal Code § 273.5, between 1990 and 1992—before California added this offense "to the list of misdemeanors which prohibit a person from acquiring/possessing a firearm for 10 years after the date of conviction." ER 32, 34-35, 37-40. Erickson pleaded no contest or guilty to a misdemeanor charge of corporal injury to a spouse/cohabitant, Cal. Penal Code § 273.5, in June 1996. ER 41. Newman pleaded no contest or guilty to a misdemeanor charge of battery against a spouse/cohabitant, Cal. Penal Code § 243(e), in September 1998. ER 41.

The complaint alleges that plaintiffs have attempted to purchase firearms but have had those purchases denied and have been advised that

the denial was based on federal law. ER 35-42. According to the complaint, plaintiffs are presently "permitted to acquire and possess firearms under the laws of the State of California." ER 34, 36-42 (emphasis omitted).

It is further alleged that all of the plaintiffs have obtained relief from their convictions under California Penal Code § 1203.4, *see* ER 34-37, 39-42, and that Enos has additionally obtained "restoration of civil rights (firearm possession)" under California Penal Code § 12021(c)(3), *see* ER 9, 34. The complaint also alleges that the plaintiffs who were convicted before 1993—Enos, Bastasini, Mercado, Groves, and Monteiro—"[were] not apprized [sic] of the possibility of losing their firearm rights . . . as there was no federal or state law prohibiting Domestic Violence misdemeanants from acquiring/possessing firearms upon conviction" and "[t]herefore [they] could not make a knowing/intelligent waiver of [their] right to a trial." ER 42-43.

Plaintiffs contend that they "have not been convicted of a crime of domestic violence" for purposes of 18 U.S.C. § 922(g)(9), or else that the federal restriction on their possession of firearms violates the Second Amendment. ER 43-44 (Second Amended Compl). Plaintiffs also allege that the restrictions in Section 922(g)(9) violate the Tenth Amendment. ER 74 (First Amended Compl.). Plaintiffs seek declaratory and injunctive relief, including relief under 18 U.S.C. § 925A, providing that "Plaintiffs are not subject to the prohibitions set forth in [18 U.S.C. § 922(g)(9)]." ER 45 (Second Amended Compl.); ER 75 (First Amended Compl.).[5]

2. The district court, in two separate orders, dismissed plaintiffs' suit for failure to state a valid legal claim. ER 15, 21, 28 (2/28/2012 Order); ER 58-59 (7/7/2011 Order).

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[5] In district court, "Plaintiffs conceded that they no longer seek to maintain their facial challenge to 18 U.S.C. § 922(g)(9)," nor their challenge to 18 U.S.C. § 922(d)(9), which "makes it unlawful for any person to sell a firearm or ammunition to a person who has been convicted of misdemeanor domestic violence." ER 10 & n.3 (2/28/2012 Order). On appeal, plaintiffs have abandoned their First Amendment and Fifth Amendment claims, which the district court dismissed with prejudice for failure to state a valid legal claim. Pl. Br. 6-7; ER 58-59 (7/7/2011 Order).

The court's order of July 7, 2011, granted in part defendants' motion to dismiss the claims alleged in plaintiffs' first amended complaint, including plaintiffs' claim for relief under the Tenth Amendment. ER 57-59. The court rested its analysis of the Tenth Amendment claim on this Court's observation that "Congress may regulate possession of firearms without violating the Tenth Amendment," 7/7/2011 Order at 12 (ER 57) (citing *United States v. Andaverde*, 64 F.3d 1305 (9th Cir 1995)). The court also noted that other "courts addressing 18 U.S.C. § 922(g)(9)" specifically "have likewise found the statute to be constitutional under the Tenth Amendment." *Ibid.* (citing *Fraternal Order of Police v. United States*, 173 F.3d 898 (D.C. Cir. 1999), and *Hiley v. Barrett*, 968 F. Supp. 1564 (N.D. Ga. 1997), *aff'd*, 155 F.3d 1276 (11th Cir. 1998)).

The court's final order of February 28, 2012, dismissed the claims in plaintiffs' second amended complaint, which sought relief from the disqualification at Section 922(g)(9) pursuant to 18 U.S.C. § 925A and the Second Amendment. The court concluded that plaintiffs "fail[ed] to plead

facts showing that [their] civil rights have been restored within the meaning of 18 U.S.C. § 921(a)(33)(B)(ii), or that they have otherwise fulfilled the requirements of the statute." ER 21.

The court rejected plaintiffs' contention that "restoration of an individual's right to possess a firearm constitutes a restoration of 'civil rights' under 18 U.S.C. § 921(a)(33)(B)(ii)." ER 20. "In light of the extensive case law holding otherwise, and looking to Congress' intent when creating this exception to § 922(g)(9)," the court "refuse[d] Plaintiffs' invitation to create a new interpretation of 'civil rights restored' under 18 U.S.C. § 921(a)(33)(B)(ii)." ER 21.

The court also rejected the argument that those plaintiffs who pled guilty or no contest to domestic violence misdemeanors before Congress added Section 922(g)(9)—Enos, Bastasini, Mercado, Groves, Monteiro, and Erickson— "were unable to make a knowing and intelligent waiver of their right to a jury trial." ER 15. The court reasoned that "the law does not

require Plaintiffs to be advised of future unanticipated changes in the law." *Ibid.*

In holding that plaintiffs failed to state a claim for relief from the applicability of Section 922(g)(9), the court also concluded that plaintiffs had not sufficiently alleged a "violation of the Second Amendment." ER 28. The court observed that "domestic violence misdemeanants are, by statutory definition, violent criminals," ER 26, that "[k]eeping guns out of the hands of those convicted of domestic violence fits squarely into the prohibitions noted by [*District of Columbia v. Heller*, 554 U.S. 570 (2008)]," ER 25, and that "Plaintiffs have not set forth facts to rebut that presumption of lawfulness, distinguishing them from other domestic violence misdemeanants," ER 28.[6]

SUMMARY OF ARGUMENT

Plaintiffs contend that they are entitled to purchase a firearm notwithstanding 18 U.S.C. § 922(g)(9), which restricts the possession of

[6] In dismissing plaintiffs' Second Amendment claims with prejudice, the district court observed that "Plaintiffs have already amended the complaint twice and further amendment would be futile." ER 28.

firearms by a person "who has been convicted in any court of a misdemeanor crime of domestic violence." 18 U.S.C. § 922(g)(9). Plaintiffs contend that they fit within the statute's exception for "an offense for which the person . . . has had civil rights restored," *id.* § 921(a)(33)(B)(ii), or its exception for a non-jury conviction for which there was an entitlement to a jury trial and the person did not "knowingly and intelligently waive[] the right to have the case tried by a jury," *id.* § 921(a)(33)(B)(i). Alternatively, they contend that the statute violates the Tenth Amendment and the Second Amendment. The district court properly rejected those arguments.

I. A. This Court's decision in *United States v. Brailey*, 408 F.3d 609 (9th Cir. 2005), forecloses plaintiffs' claim that their civil rights were restored for purposes of 18 U.S.C. § 921(a)(33)(B)(ii) when California removed the State law firearm disqualification triggered by their misdemeanor domestic violence convictions. In *Brailey*, this Court explained that the federal statute's "exception for one who has had 'civil rights restored,'" *id.* at 611,

applies when a State removes and then restores a domestic violence misdemeanant's "core civil rights of voting, serving as a juror, or holding public office." *Id.* at 613. The Court held that a domestic violence misdemeanant's "civil rights have not been 'restored' within the meaning of federal law by [a State law] permitting him to possess a firearm." *Ibid.*

Plaintiffs acknowledge that California did not divest their "core civil rights of voting, serving as a juror, or holding public office," *Brailey*, 408 F.3d at 613, as a result of their misdemeanor domestic violence convictions. Plaintiffs therefore "cannot benefit from the federal restoration exception," *id.* at 612, even if they may now lawfully possess firearms under California law.

B. Plaintiffs likewise fail to state a valid legal claim with respect to their allegation that those plaintiffs who pled guilty or no contest to a domestic violence misdemeanor before Congress's 1996 enactment of Section 922(g)(9) are excepted from the statute because they could not "knowingly and intelligently waive[] the right to have the case tried by a

jury," 18 U.S.C. § 921(a)(33)(B)(i). This Court has previously rejected the argument that a guilty plea "was involuntary because it is logically impossible to make a knowing and intelligent waiver of unknown rights . . ." *United States v. Navarro-Botello*, 912 F.2d 318, 320 (9th Cir. 1990). "[A]bsent misrepresentation or other impermissible conduct by state agents, a voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later [legal developments] indicate that the plea rested on a faulty premise." *Brady v. United States*, 397 U.S. 742, 757 (1970) (citation omitted).

II. A. Plaintiffs' constitutional challenges to Section 922(g)(9) also lack merit. Their Tenth Amendment claim fails as a matter of law because "the jurisdictional requirement in § 922(g) [is] sufficient to establish the statute's constitutionality under the Commerce Clause analysis set forth in [*United States v. Lopez*, 514 U.S. 549 (1995)]," *United States v. Nguyen*, 88 F.3d 812, 820-21 (9th Cir. 1996) (citing *United States v. Hanna*, 55 F.3d 1456, 1462 n.2 (9th Cir. 1995)), and "if Congress acts under one of its enumerated

powers, there can be no violation of the Tenth Amendment," *United States v. Jones*, 231 F.3d 508, 515 (9th Cir. 2000).

B. Plaintiffs also cannot state a valid claim for relief under the Second Amendment. Section 922(g)(9) applies solely to persons with convictions for "a misdemeanor crime of domestic violence," 18 U.S.C. § 922(g)(9), which Congress defined to require "as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon,'" *id.* § 921(a)(33)(A). The statute thus does not implicate the Second Amendment's protection of "the right of law-abiding, responsible citizens to use arms in defense of hearth and home," *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008), and "fits comfortably among the categories of regulations that *Heller* suggested would be 'presumptively lawful.'" *United States v. Booker*, 644 F.3d 12, 24 (1st Cir. 2011) (quoting *Heller*, 554 U.S. at 627 n.26).

In any event, even if this Court were to extend Heller by recognizing a Second Amendment right for persons who have been convicted of

misdemeanor crimes of domestic violence, plaintiffs have still shown no basis for relief under the Second Amendment. The application of Section 922(g)(9) to plaintiffs easily withstands heightened scrutiny.

In enacting Section 922(g)(9), Congress recognized that "[f]irearms and domestic strife are a potentially deadly combination nationwide." *United States v. Hayes*, 555 U.S. 415, 427 (2009). "Existing felon-in-possession laws, Congress recognized, were not keeping firearms out of the hands of domestic abusers, because 'many people who engage in serious spousal or child abuse ultimately are not charged with or convicted of felonies.'" *Id.* at 426 (quoting 142 Cong. Rec. 22985 (1996) (statement of Sen. Lautenberg)). "By extending the federal firearm prohibition to persons convicted of 'misdemeanor crime[s] of domestic violence,' proponents of § 922(g)(9) sought to 'close this dangerous loophole.'" *Ibid.* (quoting 142 Cong. Rec. 22986 (statement of Sen. Lautenberg)).

The First Circuit, noting that "nearly 52,000 individuals were murdered by a domestic intimate between 1976 and 1996, and the

perpetrator used a firearm in roughly 65% of the murders (33,500)," has concluded that "it is plain that § 922(g)(9) substantially promotes an important government interest in preventing domestic gun violence." *Booker*, 644 F.3d at 25-26. The Seventh Circuit has likewise determined that Section 922(g)(9) does not violate the Second Amendment, remarking that "no one doubts that the goal of § 922(g)(9), preventing armed mayhem, is an important governmental objective" and "[b]oth logic and data establish a substantial relation between § 922(g)(9) and this objective." *United States v. Skoien*, 614 F.3d 638, 642 (7th Cir. 2010) (en banc).

The Fourth Circuit—the most recent court of appeals to consider the issue—has stated that "[i]n accord with the unanimous view of our sister circuits who have addressed the issue, we have no trouble concluding" that there is "a reasonable fit between the substantial government objective of reducing domestic gun violence and keeping firearms out of the hands of [persons who have been convicted of misdemeanor crimes of domestic violence]." *United States v. Staten*, 666 F.3d 154, 167 (4th Cir. 2011).

Plaintiffs were convicted in California state court of offenses involving "the use or attempted use of physical force, or the threatened use of a deadly weapon," 18 U.S.C. § 921(a)(33)(A). Moreover, notwithstanding California's grant of relief under California Penal Code 1203.4, California continues to treat plaintiffs' convictions as relevant "in a variety of civil and evidentiary contexts." *United States v. Hayden*, 255 F.3d 768, 772 (9th Cir. 2001) (citing *Frawley*, *People v. Frawley*, 98 Cal. Rptr. 2d 555, 559-60 (Cal. Ct. App. 1st Dist. 2000)). Thus, the State in which plaintiffs were convicted has itself declined "to wipe out absolutely and for all purposes the dismissed proceeding as a relevant consideration and to place [plaintiffs] in the position which [they] would have occupied in all respects as . . . citizen[s] if no accusation or information had ever been presented against [them]." *Ibid.* (quoting *Meyer v. Bd. of Med. Examiners*, 206 P.2d 1085, 1088 (Cal. 1949)).

Applying Section 922(g)(9) in these circumstances is "substantially related," *Clark v. Jeter*, 486 U.S. 456, 461 (1988), to the governmental interest

in public safety, which the Supreme Court has recognized as "compelling," *United States v. Salerno*, 481 U.S. 739, 750 (1987). As the district court observed, "domestic violence misdemeanants are, by statutory definition, violent criminals," ER 26, and "Plaintiffs have not set forth facts . . . distinguishing them from other domestic violence misdemeanants," ER 28.

STANDARD OF REVIEW

This Court "review[s] *de novo* the district court's grant of a motion to dismiss[,] . . . accepting all factual allegations in the complaint as true and construing them in the light most favorable to the nonmoving party." *Skilstaf, Inc. v. CVS Caremark Corp.*, 669 F.3d 1005, 1014 (9th Cir. 2012).

ARGUMENT

BECAUSE 18 U.S.C. § 922(g)(9) PROPERLY APPLIES TO PLAINTIFFS, THE COMPLAINT FAILS TO STATE A VALID CLAIM FOR RELIEF.

A. PLAINTIFFS HAVE NOT ALLEGED FACTS SHOWING THAT THEIR MISDEMEANOR DOMESTIC VIOLENCE CONVICTIONS ARE STATUTORILY EXEMPTED FROM THE SCOPE OF 18 U.S.C. § 922(g)(9).

Plaintiffs Enos, Bastasini, Mercado, Groves, Monteiro, and Erickson were convicted of misdemeanor charges of corporal injury to a spouse/cohabitant, Cal. Penal Code § 273.5, after entering pleas of no contest or guilty in California state court. ER 32, 34-35, 37-41. Plaintiff Newman was convicted of a misdemeanor charge of battery against a spouse/cohabitant, Cal. Penal Code § 243(e), after entering a plea of no contest or guilty in California state court. ER 41. It is not disputed that these offenses "have, 'as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon'" and are by definition "'committed by' a person who has a specified domestic relationship with

the victim," *Hayes*, 555 U.S. at 421 (quoting 18 U.S.C. § 921(a)(33)(A)). *See* ER 88 (01/25/2012 Hearing on Defendants' Motion to Dismiss).[7]

Plaintiffs' offenses thus fall within the federal definition of a "misdemeanor crime of domestic violence." *See* 18 U.S.C. § 921(a)(33)(A). This places plaintiffs presumptively within the ambit of 18 U.S.C. § 922(g)(9), which applies to a person "who has been convicted in any court of a misdemeanor crime of domestic violence," unless, *inter alia*, the conviction "is an offense for which the person . . . has had civil rights restored," *id.* § 921(a)(33)(B)(ii), or was a non-jury conviction for which there was an entitlement to a jury trial and the person did not "knowingly and intelligently waive[] the right to have the case tried by a jury," *id.* § 921(a)(33)(B)(i).

Plaintiffs' claims to fit within these statutory exceptions to Section 922(g)(9) lack merit. As the district court concluded, plaintiffs' second

[7] The transcript's title page is incorrectly captioned with a reference to plaintiffs' motion for summary judgment. ER 76. As the district court explained (ER 78-79) the proceedings consisted of oral argument on defendants' motion to dismiss.

amended complaint "fails to plead facts showing that Plaintiffs' civil rights have been restored within the meaning of 18 U.S.C. § 921(a)(33)(B)(ii), or that they have otherwise fulfilled the requirements of the statute." ER 21.

1. This Court's decision in *United States v. Brailey*, 408 F.3d 609 (9th Cir. 2005), forecloses plaintiffs' claim (Pl. Br. 26-27) that their civil rights were restored for purposes of 18 U.S.C. § 921(a)(33)(B)(ii) when California removed the State law firearm disqualification triggered by their misdemeanor domestic violence convictions. In *Brailey*, this Court explained that the federal statute's "exception for one who has had 'civil rights restored,'" *id.* at 611, applies when a State removes and then restores a domestic violence misdemeanant's "core civil rights of voting, serving as a juror, or holding public office." *Id.* at 613. The Court held that a domestic violence misdemeanant's "civil rights have not been 'restored' within the meaning of federal law by [a State law] permitting him to possess a firearm." *Ibid.*

Brailey's analysis applies equally here. Plaintiffs acknowledge (Pl. Br. 26) that California did not divest their "core civil rights of voting, serving as a juror, or holding public office," *Brailey*, 408 F.3d at 613, as a result of their misdemeanor domestic violence convictions. Plaintiffs therefore "cannot benefit from the federal restoration exception," *id.* at 612, even if they may now lawfully possess firearms under California law.

Plaintiffs contend that this outcome is inconsistent with congressional intent (Pl. Br. 22). But the statute makes clear Congress's understanding that the exception for "an offense for which the person . . . has had civil rights restored," 18 U.S.C. § 921(a)(33)(B)(ii), might not be available in all jurisdictions. *See also United States v. Brown*, 235 F. Supp. 2d 931, 935 (S.D. Ind. 2002) ("civil rights restoration exception" to 922(g)(9) applies to domestic violence misdemeanant whose "right to vote and right to serve on a jury were lost and later restored" by operation of Indiana law).

In setting forth the exception, Congress included the qualification "*(if the law of the applicable jurisdiction provides for the loss of civil rights under such*

an offense)." *Logan v. United States*, 552 U.S. 23, 36 (2007) (quoting 18 U.S.C. § 921(a)(33)(B)(ii) (emphasis in quotation)). This qualifying language, the Supreme Court has observed, "shows that the words 'civil rights restored' do not cover a person whose civil rights were never taken away." *Logan*, 552 U.S. at 36. Thus "[m]ost of the other circuits to have addressed the question . . . have concluded," as has this Court, "that in 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." *Brailey*, 408 F.3d at 612.

In any event, the construction urged by plaintiffs cannot be squared with the language of the federal statute. In setting forth the exception for "an offense for which the person . . . has had civil rights restored," the statute includes the qualifying language "unless the . . . restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms." *Id.* § 921(a)(33)(B)(ii). The qualifying language establishes that removal of any State law firearm disability is required for

the exception to apply, *see Caron v. United States*, 524 U.S. 308, 316-17 (1998) (construing analogous language in 18 U.S.C. § 921(a)(20)), but the antecedent reference to "civil rights" *more broadly* shows that removal of the State law firearms disqualification is insufficient on its own. *See also United States v. Valerio*, 441 F.3d 837, 843 (9th Cir. 2006) ("[I]t simply does not matter what the state law provides concerning possession of firearms, in the absence of a more complete restoration of civil rights." (quotation marks omitted)). Plaintiffs' contention that removal of a State law firearms disability is enough to trigger the federal statutory exception is thus contrary to the terms of the statute itself.

Plaintiffs' construction would limit the federal statute to forbidding only activities that are "already criminal under state law." *Caron*, 524 U.S. at 315. But "[t]his limitation would contradict the intent of Congress." *Ibid.* (construing analogous language in 18 U.S.C. § 921(a)(20)). "Congress meant to keep guns away from all offenders who, the Federal Government feared, might cause harm, even if those persons were not deemed

dangerous by States," because "[i]n Congress' view, existing state laws provide less than positive assurance that the person in question no longer poses an unacceptable risk of dangerousness." *Ibid.* (quotation marks omitted). "If federal law is to provide the missing 'positive assurance,' it must reach primary conduct not covered by state law." *Ibid.* "Any other result," the Supreme Court has observed, "would reduce federal law to a sentence enhancement for some state-law violations, a result inconsistent with the congressional intent . . ." *Id.* at 316.

The statutory analysis is no way altered by the Supreme Court's recent holding that the Second Amendment protects "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008); *see also McDonald v. City of Chicago*, 130 S. Ct. 3020, 3105 (2010). Plaintiffs are thus mistaken in contending that their arguments for a statutory exception (Pl. Br. 22) find any support in *Heller* or *McDonald*.

2. Similarly foreclosed as a matter of law is plaintiffs' argument (Pl. Br. 30) that the plaintiffs who pled guilty or no contest to a domestic violence misdemeanor before Congress's 1996 enactment of Section 922(g)(9)—Enos, Bastasini, Mercado, Groves, Monteiro, and Erickson—are excepted from Section 922(g)(9) because they could not "knowingly and intelligently waive[] the right to have the case tried by a jury," 18 U.S.C. § 921(a)(33)(B)(i). As the district court observed when dismissing plaintiffs' claim, "the law does not require Plaintiffs to be advised of future unanticipated changes in the law." ER 15.

Indeed, this Court, in a sentencing appeal, rejected an offender's argument that his guilty plea "was involuntary because it is logically impossible to make a knowing and intelligent waiver of unknown rights . . ." *United States v. Navarro-Botello*, 912 F.2d 318, 320 (9th Cir. 1990). "Just because the choice looks different . . . with the benefit of hindsight," the Court noted, "does not make the choice involuntary." *Ibid.*

"A defendant, for example, may waive his right to remain silent, his right to a jury trial, or his right to counsel even if the defendant does not know the specific questions the authorities intend to ask, who will likely serve on the jury, or the particular lawyer the State might otherwise provide." *United States v. Ruiz*, 536 U.S. 622, 629-30 (2002). "Often the decision to plead guilty is heavily influenced by the defendant's appraisal of the prosecution's case against him and by the apparent likelihood of securing leniency should a guilty plea be offered and accepted." *Brady v. United States*, 397 U.S. 742, 756 (1970). "Considerations like these," the Supreme Court has observed, "frequently present imponderable questions for which there are no certain answers; judgments may be made that in the light of later events seem improvident, although they were perfectly sensible at the time." *Id.* at 756-57.

Thus, "[t]he rule that a plea must be intelligently made to be valid does not require that a plea be vulnerable to later attack if the defendant did not correctly assess every relevant factor entering into his decision." *Id.*

at 757. "A defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action." *Ibid.*

Plaintiffs are not aided by their reliance (Pl. Br. 29) on *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010). They do not explain the relevance to their circumstances of the Supreme Court's holding that "a criminal defendant who was not apprized [sic] of the collateral consequence of his conviction (deportation) may have been denied constitutionally adequate assistance of counsel under the SIXTH AMENDMENT, [sic] following the line of case [sic] arising from *Strickland v. Washington*, 466 U.S. 668 (1984)" (Pl. Br. 29).

Padilla, as the district court noted, "is not analogous, and does not support Plaintiffs' theory." ER 15. "[A]bsent misrepresentation or other impermissible conduct by state agents, a voluntary plea of guilty intelligently made in the light of the then applicable law does not become

vulnerable because later [legal developments] indicate that the plea rested on a faulty premise," *Brady*, 397 U.S. at 757.

B. PLAINTIFFS' CONSTITUTIONAL CHALLENGES TO THE APPLICABILITY OF SECTION 922(g)(9) LACK MERIT.

1. Application Of Section 922(g)(9) To Plaintiffs Does Not Implicate The Tenth Amendment.

Plaintiffs' Tenth Amendment challenge (ER 74; Pl. Br. 32) to the disqualification at Section 922(g)(9) fails to state a legally valid claim. In rejecting plaintiffs' Tenth Amendment arguments, the district court correctly noted this Court's observation that "Congress may regulate possession of firearms without violating the Tenth Amendment." ER 57 (citing *United States v. Andaverde*, 64 F.3d 1305 (9th Cir. 1995)). Every court of appeals, including this Court, has held that the restrictions at 18 U.S.C. § 922(g) are a valid exercise of Congress's authority under the Commerce Clause. *United States v. Nguyen*, 88 F.3d 812, 820-21 (9th Cir. 1996); *see also Fraternal Order of Police*, 173 F. 3d at 907 (listing cases). And "if Congress acts under one of its enumerated powers, there can be no violation of the Tenth Amendment." *United States v. Jones*, 231 F.3d 508, 516 (9th Cir. 2000);

see also Fraternal Order of Police, 173 F.3d at 906-07 (rejecting Tenth Amendment challenge to 18 U.S.C. § 922(g)(9)); *Hiley v. Barrett*, 968 F. Supp. 1564 (N.D. Ga. 1997), *aff'd*, 155 F.3d 1276 (11th Cir. 1998) (same).

Plaintiffs identify no authority whatsoever in support of their argument that "the federal government's interpretation of the restoration provisions of [18 U.S.C. § 922(g)(9)] invades powers that are reserved to the States" (Pl. Br. 32). Their reliance on *Bond v. United States*, 131 S. Ct. 2355 (2011), is misplaced. That case "presents the question whether a person indicted for violating a federal statute has standing to challenge its validity on grounds that, by enacting it, Congress exceeded its powers under the Constitution, thus intruding upon the sovereignty and authority of the States." 131 S. Ct. at 2360. As the district court noted, "*Bond* is unrelated to the issue of firearms regulation under the Tenth Amendment." ER 57 n.1.

2. Plaintiffs' Second Amendment Challenge To The Application Of Section 922(g)(9) Fails To State A Valid Claim For Relief.

The district court correctly dismissed plaintiffs' Second Amendment claims, noting that plaintiffs failed to sufficiently allege a "violation of the

Second Amendment." ER 28. As the court observed, "domestic violence misdemeanants are, by statutory definition, violent criminals," ER 26, "[k]eeping guns out of the hands of those convicted of domestic violence fits squarely into the prohibitions noted by [*District of Columbia v. Heller*, 554 U.S. 570 (2008)]," ER 25, and "Plaintiffs have not set forth facts to rebut that presumption of lawfulness, distinguishing them from other domestic violence misdemeanants," ER 28.

a. Application Of Section 922(g)(9) To Plaintiffs Does Not Implicate The Second Amendment.

i. "Like most rights, the right secured by the Second Amendment is not unlimited." *Heller*, 554 U.S. at 626. The Supreme Court's holding in *Heller* was limited to "the right of law-abiding, responsible citizens to use arms in defense of hearth and home," *id.* at 635, and the Court cautioned that "nothing in [its] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill," *id.* at 626. The Court further explained that "[w]e identify

these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive." *Id.* at 627 n.26.

Heller thus recognizes that "the Second Amendment permits categorical regulation of gun possession by classes of persons . . . rather than requiring that restrictions on the right be imposed only on an individualized, case-by-case basis," and it "signals that the legislative role did not end in 1791." *United States v. Booker*, 644 F.3d 12, 23 (1st Cir. 2011) (quotation marks omitted); *see also id.* at 23-24 ("[T]he modern federal felony firearm disqualification law, 18 U.S.C. § 922(g)(1), is firmly rooted in the twentieth century and likely bears little resemblance to laws in effect at the time the Second Amendment was ratified.").

"[Section] 922(g)(9) fits comfortably among the categories of regulations that *Heller* suggested would be 'presumptively lawful.'" *Booker*, 644 F.3d at 24 (quoting *Heller*, 554 U.S. at 627 n.26); *see also United States v. White*, 593 F.3d 1199, 1206 (11th Cir. 2010); *In re United States of America*, 578 F.3d 1195, 1200 (10th Cir. 2009) ("Nothing suggests that the

Heller dictum, which we must follow, is not inclusive of § 922(g)(9) involving those convicted of misdemeanor domestic *violence*."). The statute limits the possession of firearms by persons who have been "convicted in any court of a misdemeanor crime of domestic violence," 18 U.S.C. § 922(g)(9), which Congress defined to require "'as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon,'" *Hayes*, 555 U.S. at 421 (quoting 18 U.S.C. § 921(a)(33)(A)).

"Section 922(g)(9) is, historically and practically, a corollary outgrowth of the federal felon disqualification statute." *Booker*, 644 F.3d at 24. "Existing felon-in-possession laws, Congress recognized, were not keeping firearms out of the hands of domestic abusers, because 'many people who engage in serious spousal or child abuse ultimately are not charged with or convicted of felonies.'" *Hayes*, 555 U.S. at 426 (quoting 142 Cong. Rec. 22985-86 (statement of Sen. Lautenberg)). "By extending the federal firearm prohibition to persons convicted of 'misdemeanor crime[s] of domestic violence,' proponents of § 922(g)(9) sought to 'close this

dangerous loophole.'" *Ibid*. (quoting 142 Cong. Rec. 22986 (statement of Sen. Lautenberg)).

"Moreover, in covering only those with a record of violent crime, § 922(g)(9) is arguably more consistent with the historical regulation of firearms than § 922(g)(1), which extends to violent and nonviolent offenders alike." *Booker*, 644 F.3d at 24-25. As this Court has noted, "most scholars of the Second Amendment agree that the right to bear arms was inextricably tied to the concept of a virtuous citizenry" and that "the right to bear arms does not preclude laws disarming the unvirtuous citizens (i.e. criminals)." *Vongxay*, 594 F.3d at 1118 (quotation marks, brackets, and ellipsis omitted).

ii. Plaintiffs recognize (Pl. Br. 32) that *Heller* did not establish a Second Amendment right for persons who are not "law-abiding, responsible citizens," 554 U.S. at 635. Plaintiffs therefore attempt to justify their assertion of Second Amendment rights through the misguided claim

(Pl. Br. 33-34) that this Court is "required to classify Plaintiff-Appellants [sic] as 'law-abiding' citizens."

But plaintiffs are mistaken in contending (Pl. Br. 10) that California law, through the procedures of California Penal Code 1203.4, treats them as though their convictions never occurred. As this Court has previously noted, "[Section 1203.4] does not purport to render the conviction a legal nullity." *Jennings*, 511 F.3d at 898 (quoting *Frawley*, 98 Cal. Rptr. 2d at 559-60 (quotation marks omitted)). "[C]onvictions set aside pursuant to section 1203.4 may be used in a variety of civil and evidentiary contexts, and the California legislature has authorized these uses via statute." *Hayden*, 255 F.3d at 772. Thus, Section 1204.3 does not "obliterate the record of conviction against a defendant and purge him of the guilt inherent therein or . . . wipe out absolutely and for all purposes the dismissed proceeding as a relevant consideration and . . . place the defendant in the position which he would have occupied in all respects as a citizen if no accusation or

information had ever been presented against him." *Ibid.* (quoting *Meyer v. Bd. of Med. Examiners*, 206 P.2d 1085, 1088 (Cal. 1949)).[8]

If, counter to fact, California law did "wipe out absolutely and for all purposes the dismissed proceeding," *ibid.* (quoting *Meyer,* 206 P.2d at 1088), plaintiffs would not be restricted from possessing a firearm by Section 922(g)(9). *See* 18 U.S.C. § 921(a)(33)(B)(ii). Plaintiffs' argument thus fails on its own terms.

b. Even If Plaintiffs Can Claim Second Amendment Rights, The Challenged Restrictions Are Constitutional.

As explained above, *see supra* Section B.2.a., "*Heller* does not cast

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[8] *Compare* Cal. Penal Code 1203.4 *to* Ky. Stat. 431.078 (providing that "[a]ny person who has been convicted of a misdemeanor or a violation . . . may petition the court in which he was convicted for expungement of his misdemeanor or violation record" and "[u]pon the entry of an order to seal the records, and payment to the circuit clerk of one hundred dollars ($100), the proceedings in the case shall be deemed never to have occurred" such that "all index references shall be deleted; the persons and the court may properly reply that no record exists with respect to the persons upon any inquiry in the matter; and the person whose record is expunged shall not have to disclose the fact of the record or any matter relating thereto on an application for employment, credit, or other type of application").

doubt on the constitutionality of § 922(g)(9)," *White*, 593 F.3d at 1206, and persons convicted of misdemeanor crimes of domestic violence may not claim a Second Amendment right to own a firearm. But even assuming this Court were to apply some form of means-ends review in this case, plaintiffs' argument (Pl. Br. 34) that this Court "should adopt (almost) strict scrutiny)," is plainly without merit, and the restrictions at Section 922(g)(9) easily satisfy intermediate scrutiny.

i. "[C]ourts of appeals have generally applied intermediate scrutiny to uphold Congress' effort under § 922(g) to ban firearm possession by certain classes of non-law-abiding, non-responsible persons who fall outside the Second Amendment's core protections." *United States v. Mahin*, 668 F.3d 119, 123 (4th Cir. 2012). Section 922(g)(9)'s restriction on firearm possession by persons who have been "convicted in any court of a misdemeanor crime of domestic violence," 18 U.S.C. § 922(g)(9), was added to the statute "to remedy a failure of the felon disqualification scheme—namely, that it omitted from its sweep a class of criminals who posed a

significant and particularized danger to those around them," *Booker*, 644 F.3d at 25 n.16.

Plaintiffs' complaint acknowledges (ER 34-41) plaintiffs were convicted in California court of offenses involving "the use or attempted use of physical force, or the threatened use of a deadly weapon," 18 U.S.C. § 921(a)(33)(A). And the complaint fails to allege facts showing that California law treats plaintiffs as though their convictions never occurred. Thus, because plaintiffs are outside the core of the right recognized in *Heller*—"the right of law-abiding, responsible citizens to use arms in defense of hearth and home," 554 U.S. at 635—the application of 922(g)(9) to plaintiffs is subject to at most intermediate scrutiny.

ii. A law satisfies intermediate scrutiny if it is "substantially related to an important governmental objective." *Clark*, 486 U.S. at 461. Applying intermediate scrutiny here, plaintiffs' constitutional challenge fails to state a valid claim because the restriction at Section 922(g)(9) "promotes a substantial government interest that would be achieved less effectively

absent the regulation," *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989) (quotation marks omitted).

In enacting Section 922(g)(9), Congress recognized that "[f]irearms and domestic strife are a potentially deadly combination nationwide." *Hayes*, 555 U.S. at 427. The First Circuit, noting that "nearly 52,000 individuals were murdered by a domestic intimate between 1976 and 1996, and the perpetrator used a firearm in roughly 65% of the murders (33,500)," has concluded that "it is plain that § 922(g)(9) substantially promotes an important government interest in preventing domestic gun violence." *Booker*, 644 F.3d at 25-26.

The Seventh Circuit has likewise determined that Section 922(g)(9) does not violate the Second Amendment, remarking that "no one doubts that the goal of § 922(g)(9), preventing armed mayhem, is an important governmental objective" and that "[b]oth logic and data establish a substantial relation between § 922(g)(9) and this objective." *United States v. Skoien*, 614 F.3d 638, 642 (7th Cir. 2010) (en banc). The Seventh Circuit

observed that "[d]omestic assaults with firearms are approximately twelve times more likely to end in the victim's death than are assaults by knives or fists," *id.* at 643 (citing Linda E. Saltzman, James A. Mercy, Patrick W. O'Carroll, Mark L. Rosenberg & Philip H. Rhodes, *Weapon Involvement and Injury Outcomes in Family and Intimate Assaults,* 267 J. Am. Medical Ass'n 3043 (1992)), and that "[t]he presence of a gun in the home of a convicted domestic abuser is 'strongly and independently associated with an increased risk of homicide,'" *id.* at 643–44 (quoting Arthur L. Kellermann, et al., *Gun Ownership as a Risk Factor for Homicide in the Home,* 329 New Eng. J. Med. 1084, 1087 (1993)).

The Fourth Circuit—the most recent court of appeals to consider the issue—has stated that "[i]n accord with the unanimous view of our sister circuits who have addressed the issue, we have no trouble concluding" that there is "a reasonable fit between the substantial government objective of reducing domestic gun violence and keeping firearms out of the hands of: (1) persons who have been convicted of a crime in which the person used

or attempted to use force capable of causing physical pain or injury to another against a spouse, former spouse, or other person with whom such person had a domestic relationship specified in § 921(a)(33)(A); and (2) persons who have threatened the use of a deadly weapon against such a person." *United States v. Staten*, 666 F.3d 154, 167 (4th Cir. 2011).

Plaintiffs were convicted in California court of offenses involving "the use or attempted use of physical force, or the threatened use of a deadly weapon," 18 U.S.C. § 921(a)(33)(A). Notwithstanding California's grant of relief under California Penal Code 1203.4, California continues to treat plaintiffs' convictions as relevant "in a variety of civil and evidentiary contexts," even providing that "'in any subsequent prosecution . . . for any other offense, the prior conviction may be pleaded and proved and shall have the same effect as if'" relief under California Penal Code 1203.4 had not been granted. *Hayden*, 255 F.3d at 772 (quoting *Frawley*, 98 Cal. Rptr. 2d at 559-60). Thus, the State in which plaintiffs were convicted has itself declined "to wipe out absolutely and for all purposes the dismissed

proceeding as a relevant consideration and to place [plaintiffs] in the position which [they] would have occupied in all respects as a citizen if no accusation or information had ever been presented against [them]." *Ibid.* (quoting *Meyer*, 206 P.2d at 1088).

Applying Section 922(g)(9) in these circumstances is "substantially related," *Clark*, 486 U.S. at 461, to the governmental interest in public safety, which the Supreme Court has recognized as "compelling," *United States v. Salerno*, 481 U.S. 739, 750 (1987). As the district court observed, "domestic violence misdemeanants are, by statutory definition, violent criminals," ER 26, and "Plaintiffs have not set forth facts . . . distinguishing them from other domestic violence misdemeanants," ER 28.

C. PLAINTIFFS HAVE NOT STATED A CLAIM FOR RELIEF UNDER 18 U.S.C § 925A.

The district court noted that plaintiffs' claims were likely outside the bounds of 18 U.S.C. § 925A, but concluded that "[e]ven assuming the Court has jurisdiction, Plaintiffs' arguments lack merit." ER 14. Section 925A provides that "[a]ny person denied a firearm . . . due to the provision of

erroneous information" may bring an action "against the State or political subdivision responsible for providing the erroneous information, or responsible for denying the transfer, or against the United States, as the case may be." 18 U.S.C. § 925A. The court in that action may enter "an order directing that the erroneous information be corrected or that the transfer be approved, as the case may be." *Ibid.*

This action is not an appeal from any specific firearm denial, however. Plaintiffs instead bring, pursuant to 28 U.S.C. § 1331, a free-standing pre-enforcement challenge seeking declaratory and injunctive relief that 18 U.S.C. § 922(g)(9) may not properly be applied to plaintiffs. *See* ER 45. Indeed, in the cases of Mercado and Erickson, the only firearm "denial" alleged to have taken place is a firearm licensee's refusal to continue with a transaction, prior to undertaking a background check, in light of plaintiffs' self-reporting of their prior convictions. ER 38 (Mercado was informed by a federal firearm dealer "that answering 'YES' to question 11.i, on the ATF Form 4473 (5300.9) required the dealer to stop the

transaction and deny the purchase."); ER 41 ("Erickson was denied a firearm purchase when the dealer refused to process his application for a transfer due to his truthful answer of 'YES' to question 11.i, on ATF form 4473 (5300.9)."). As the statute's language makes clear, such action by a licensee is not a firearm "denial" for purposes of 18 U.S.C. § 925A. For these reasons, and because plaintiffs' substantive challenges to the applicability of 18 U.S.C. § 922(g)(9) fail to state a valid legal claim, plaintiffs have failed to state a claim for relief under 18 U.S.C. § 925A.

CONCLUSION

For the foregoing reasons, the district court's judgment should be affirmed.

Respectfully submitted,

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September 7, 2012

STATEMENT OF RELATED CASES

Counsel for appellees is not aware of any related cases as defined in Ninth Circuit Rule 28-2.6.

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(A) AND NINTH CIRCUIT RULE 32-1

Pursuant to Fed. R. App. P. 32(a)(7)(B) and (C) and Ninth Circuit Rule 32-1, I certify that the attached Brief for Appellees has been prepared in 14-point Palatino Linotype, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 9, 156 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

/s/ Anisha S. Dasgupta
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CERTIFICATE OF SERVICE

I hereby certify that on September 7, 2012, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system, which constitutes service on all parties under the Court's rules.

/s/ Anisha S. Dasgupta
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STATUTORY ADDENDUM

ADDENDUM CONTENTS

18 U.S.C. § 921

(a) As used in this chapter—

* * * *

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

* * * *

18 U.S.C. § 922(g)

It shall be unlawful for any person--

* * * *

(9) who has been convicted in any court of a misdemeanor crime of domestic violence,

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 925A

Any person denied a firearm pursuant to subsection (s) or (t) of section 922--

(1) due to the provision of erroneous information relating to the person by any State or political subdivision thereof, or by the national instant criminal background check system established under section 103 of the Brady Handgun Violence Prevention Act; or

(2) who was not prohibited from receipt of a firearm pursuant to subsection (g) or (n) of section 922,

may bring an action against the State or political subdivision responsible for providing the erroneous information, or responsible for denying the transfer, or against the United States, as the case may be, for an order directing that the erroneous information be corrected or that the transfer be approved, as the case may be. In any action under this section, the court, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs.