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

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

14 Plaintiffs,

15 vs.

16 ERIC HOLDER, as United States Attorney  
17 General, and ROBERT MUELLER, III, as  
18 Director of the Federal Bureau of  
Investigation,

19 Defendants.  
20

CASE NO.: 2:10-CV-02911-JAM-EFB

**PLAINTIFFS' SUPPLEMENTAL  
BRIEF RE: SUPPLEMENTAL  
AUTHORITY SUBMITTED BY  
DEFENDANTS**

Date: May 4, 2011  
Time: 9:30 a.m.  
Place: Courtroom 6, 14<sup>th</sup> Floor  
Judge: Hon. John A. Mendez

21  
22 Pursuant to an order of the Court during the hearing on May 4, 2011,  
23 Plaintiffs hereby submit this supplemental brief. Additional briefing was ordered  
24 by the Court to address the supplemental authority brought to the Court's attention  
25 by the Defendants shortly before the hearing. That supplemental authority is  
26 *Nordyke v. King*, 2011 WL 1632063 (C.A.9 (Cal.)) and *United States v. Booker*, 2011  
27 WL 1631947 (C.A.1 (Me.)). Both cases were filed on May 2, 2011. Neither case  
28 addresses points of law relevant to the issues before this Court.

1 1. *Nordyke v. King* is a civil action brought by gun show promoters to challenge  
2 a county ordinance that prohibits possession of guns on county property,  
3 making gun shows at the county fairgrounds impossible. The case is notable  
4 as the first in the country to establish that the Second Amendment is  
5 incorporated against state and local governments under the 14<sup>th</sup>  
6 Amendment’s due process clause. *Nordyke v. King*, 563 F.3d 439 (9<sup>th</sup> Cir.  
7 2009). That opinion was withdrawn and the case was stayed upon a sua  
8 sponte grant of *en banc* review. Then, the Supreme Court in *McDonald v.*  
9 *Chicago*, 130 S.Ct. 3020 (2010) basically affirmed the conclusions of the  
10 original panel. Supplemental briefing was ordered in that matter to address  
11 issues of scrutiny. The most recent opinion was filed on May 2, 2011.

12 A. The latest *Nordyke* decision deals almost exclusively with scrutiny and  
13 in so doing its engages in an analysis of ‘core’ vs. ‘non-core’ rights  
14 under the Second Amendment. The panel apparently sees possession  
15 of a gun in the home for self-defense as a core right that is subject to  
16 some form of heightened scrutiny – while ancillary rights (e.g.,  
17 hunting, possession for sale, possession for display, possession for  
18 instruction, etc..) are subject to some lesser form of scrutiny.

19 B. Because the panel did not reach the threshold issues of whether  
20 Plaintiffs in that case could plead the burdening of a ‘core’ right, the  
21 Court remanded the case to the trial court to give the *Nordyke*  
22 Plaintiffs an opportunity to amend their complaint.

23 C. *Nordyke* does not advance the discussion in *Enos v. Holder* because the  
24 federal statutes at issue impose a complete ban on all of the *Enos*  
25 Plaintiffs’ rights associated with the Second Amendment. In other  
26 words, 18 U.S.C. §§ 922(d)(9) and 922(g)(9) are not mere “burdens”  
27 that make gun ownership/possession more difficult or more expensive,  
28 these statutes (1) prevent the lawful transfer of a firearm at the point

1 of sale to any person convicted of misdemeanor crimes of domestic  
2 violence, and (2) if found in possession, these misdemeanants are  
3 subject to arrest, prosecution and felony conviction. This statutory  
4 scheme places the *Enos* Plaintiffs in the exact same position as the  
5 plaintiff in *District of Columbia v. Heller*, 554 U.S. 570 (2008), wherein  
6 the Supreme Court found that a complete ban offends the Second  
7 Amendment under any level of scrutiny. *Heller* at 628 *et seq.*

8 D. More to the point, the *Enos* Plaintiffs are not making a facial  
9 constitutional challenge of 18 U.S.C. § 922(d)(9) and/or § 922(g)(9),  
10 unless the rights restoration procedures under 18 U.S.C. § 921(a)(33)  
11 are definitively interpreted to mean that there is a life time ban on  
12 exercising the fundamental rights secured by the Second Amendment.

13 E. To put this another way, the *Enos* Plaintiffs are not (yet) complaining  
14 about any unconstitutional burdens that sections §§ 922(d)(9) and/or  
15 922(g)(9) place on their Second Amendment rights, they accepted those  
16 consequences upon conviction and/or plea.<sup>1</sup> But California imposed  
17 only a 10 year ban on exercising Second Amendment rights. The  
18 federal government imposes a life-time ban, but only if the state of  
19 conviction took away rights AND also restored rights, then – under  
20 federal law – the misdemeanants’ rights are also restored. [See 18  
21 U.S.C. § 921(a)(33)(B)(ii)] Those are the facts of this case.

22 F. Since this Court has a duty to dispose of non-constitutional questions  
23 (i.e., statutory interpretations) before reaching constitutional claims,  
24 *Nordyke’s* constitutional balancing tests are not dis-positive in a Rule  
25 12(b)(6) motion to dismiss. *Harmon v. Brucker*, 355 U.S. 579 (1958);  
26 *County Court v. Allen*, 442 U.S. 140 (1979).

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27  
28 <sup>1</sup> Though for most of the plaintiffs (*Enos*, *Bastasini*, *Mercado*, *Groves* and *Montiero*) the law was passed after their convictions and applied retroactively.

1 2. *United States v. Booker*, is a criminal case that addresses two issues: (1) the  
2 requisite *mens rea* necessary for a state crime to fit the federal definition of  
3 misdemeanor crime of domestic violence, and (2) whether – on its face – 18  
4 U.S.C. § 922(g) is unconstitutional in light of *District of Columbia v. Heller*.

5 A. Issue #1 is not relevant to this case. The *Enos* Plaintiffs concede that  
6 they were all convicted of misdemeanor crimes of domestic violence.

7 B. As for issue #2, even if the *Enos* Plaintiffs concede (which they do not  
8 because of the notice issues for those convicted before the enactments  
9 of the state and federal laws) that § 922(g) is facially constitutional the  
10 *Booker* case does not help the Defendants.

11 C. This is a case about the restoration of rights, it is not about the  
12 definition of misdemeanor crime of domestic violence – or the initial  
13 consequences (loss of gun rights) upon conviction of a misdemeanor  
14 crime of domestic violence.

15 D. This Court must first address the statutory restoration of rights issue  
16 under § 921(a)(33)(B)(ii). If the Court finds:

- 17 1. That the remaining plaintiffs all suffered California  
18 misdemeanor convictions for domestic violence,
- 19 2. That the state of California stripped those convicted of  
20 misdemeanor crimes of domestic violence of their Second  
21 Amendment rights for 10 years as a consequence of conviction,
- 22 3. That the state of California, by operation of law (lapse of 10  
23 years) restores Second Amendment rights,
- 24 4. That the misdemeanor crime of domestic violence convictions  
25 suffered by the *Enos* Plaintiffs are more than 10 years old and  
26 thus restored under California law.
- 27 5. **Then**, this Court must decide if 18 U.S.C. § 921(a)(33)(B)(ii)  
28 kicks in and the federal government must permit these

1 Plaintiffs to answer 'no' to question 11.i. on ATF Form 4473  
2 (5300.9) and furthermore that the federal government must  
3 clear these Plaintiffs for firearm purchases under the National  
4 Criminal Background Check System.

5 E. It is only if/when this Court makes a finding that 18 U.S.C. §  
6 921(a)(33)(B)(ii) does not provide relief for the *Enos* Plaintiffs that we  
7 reach the constitutional issues raised in *U.S. v. Booker*. In which case  
8 this Court may find *Booker* and similar appellate authorities  
9 persuasive as to a facial, constitutional, challenge.

10 F. However, in an 'as applied' challenge, based on the facts of this case,  
11 Plaintiffs would still maintain that a life-time infringement of a  
12 fundamental right, with no possibility of rehabilitation/restoration  
13 (under either state or federal law), for a misdemeanor crime, is an  
14 unconstitutional infringement of the Second Amendment under the  
15 analysis of the *Heller* and *McDonald* Supreme Court decisions.  
16 Especially when federal law provides for the restoration of the rights of  
17 convicted felons. [See 18 U.S.C. § 925(c)]  
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19 Respectfully Submitted on May 6, 2011,

20 \_\_\_\_\_ /s/

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