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8 UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
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10 RICHARD ENOS, JEFF BASTASINI,
11 LOUIE MERCADO, WALTER
GROVES, MANUEL MONTEIRO,
12 EDWARD ERIKSON, and VERNON
NEWMAN,

13
14 Plaintiffs,

15 vs.

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

19 Defendants.
20

Case No.: 2:10-CV-2911-JAM-EFB

PLAINTIFFS' REPLY
MEMORANDUM IN SUPPORT OF
THEIR MOTION FOR SUMMARY
JUDGMENT

Date: January 25, 2012
Time: 9:30 a.m.
Place: Courtroom 6, 14th Floor
501 "T" Street
Sacramento, CA 95814
Judge: Hon. John A. Mendez
Time Est.: 30 minutes

21 By and through undesigned counsel, Plaintiffs, hereby submit this Reply
22 Memorandum in support of their Motion for Summary Judgment.

23 Date: January 18, 2012

24 /s/ Donald E. J. Kilmer, Jr.
Attorney for the Plaintiffs
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1 **Introduction**

2 With no genuine dispute as to any material fact, this case is ripe for the Court to
3 adjudicate this matter under Fed.R.Civ.P. 56. Furthermore, the Court can (and
4 should) avoid the constitutional question of whether the LAUTENBERG AMENDMENT
5 violates the SECOND AMENDMENT in light of this amendment’s recent re-invigoration
6 by the Supreme Court in *District of Columbia v. Heller*, 554 U.S. 570 (2008) and
7 *McDonald v. City of Chicago*, 561 U.S. 3025 (2010).

8 **Factual Status of the Case**

9 Plaintiffs have submitted admissible evidence, which the Defendants have
10 conceded is material and undisputed to a resolution of the matter. Those facts are:

- 11 1. All of plaintiffs have been convicted under California law of a MCDV.
- 12 2. As a collateral consequence of their conviction for a MCDV under
13 California law, each and every Plaintiff had their “right to keep and
14 bear arms” revoked for a statutory ten (10) years; and thus restored by
15 operation of law after the lapse of those ten (10) years.
- 16 3. More than ten (10) years have lapsed since the date of conviction for
17 each and every Plaintiff.
- 18 4. Though it does not restore firearm rights *per se*, each and every
19 Plaintiff has had a California Superior Court Judge make a finding
20 under Penal Code § 1203.4, that they successfully completed probation,
21 paid all fines and were entitled to have their pleas withdrawn and the
22 case dismissed. Thus permitting them to truthfully allege that they
23 are law-abiding citizens.
- 24 5. Six of the seven Plaintiffs: ENOS, BASTASINI, MERCADO, GROVES,
25 MONTEIRO and ERICKSON – were all convicted of a California
26 MCDV prior to the LAUTENBERG AMENDMENT becoming law in 1996.
27 In other words, it was impossible for them to be apprized of a federally
28 mandated collateral consequence of their conviction (i.e., loss of a

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1 fundamental right) when that collateral consequence did not yet exist.
2 Furthermore the non-existence of this collateral consequence at the
3 time of their plea and conviction means that they were deprived of
4 making a knowing and intelligent waiver of their right to a jury trial –
5 regardless of whether they were represented by counsel.¹

6 6. Plaintiff ENOS is a triple threat. He not only qualifies for restoration
7 of his rights under the 10-year rule and the defective-waiver rule, but
8 he is the only Plaintiff who applied for – and was granted – relief
9 under California’s specific statutory remedy for judicial restoration of
10 his firearms rights. See: Penal Code § 12021(c)(3) [29860]².

11 As set forth in the Plaintiffs’ Evidentiary Objections (Dkt #52) to the material
12 submitted by the Defendants, this Court should strike the various “articles”
13 submitted by Defendants as defective evidence and make its findings and order
14 based solely on the evidence submitted by the Plaintiffs.

15 **Statutory Interpretation Can Resolve this Case.**

16 In a case remarkably similar to the approach urged by the Plaintiffs herein, the
17 First Circuit Court of Appeals eschewed placing the federal statute at issue in
18 constitutional jeopardy and instead reinterpreted the federal laws regulating the
19 possession of firearms by persons subject to *Heller’s* presumptively lawful
20 categories. *Id.*, at 626.³

21 _____
22 ¹ For some reason, the Defendants contend that Plaintiff ERIKSON’s
23 conviction does not predate LAUTENBERG AMENDMENT. However, based on the
24 Statement of Undisputed Facts regarding ERIKSON and the date when
25 LAUTENBERG became law, he clearly must be included in the temporal category of
26 his brother-plaintiffs: ENOS, BASTASINI, MERCADO, GROVES and MONTEIRO.

27 ² California has reorganized its Deadly Weapon Statutes with the new
28 numbers taking effect January 1, 2012. The old provision is cited and the new
provision is bracketed.

³ Plaintiffs herein still contend that as misdemeanants they do not fall into
these presumptively constitutional categories (i.e., felons), they only note that the

1 In the consolidated cases *United States v. Rehlander*, Case No.: 10-1812 and
2 *United States v. Small*, Case No.: 10-1831 from the First Circuit (See Dkt # 54) the
3 Court of Appeals invoked the doctrine of constitutional avoidance to (re)interpret
4 the interplay between state law (Maine’s statutes dealing with involuntary
5 commitments for mental health issues.) and 18 U.S.C. 922(g)(4) in light of the
6 Supreme Court’s decisions in *District of Columbia v. Heller*, 554 U.S. 570 (2008) and
7 *McDonald v. City of Chicago*, 561 U.S. 3025 (2010).

8 This is exactly the course of action that Plaintiffs in this matter urge this Court
9 to consider. It is not necessary for the Court to engage in any kind of constitutional
10 balancing test. Nor is it necessary for the Court to speculate as to what kind or
11 level of scrutiny to apply to this case. Instead the Court need only make the
12 following findings and order to terminate this case as to all Plaintiffs:

13 For any person convicted in the State of California of a misdemeanor
14 crime of domestic violence under that state’s law who has both: (1)
15 successfully completed probation as demonstrated by a finding under
16 California Penal Code §§ 1203.4, **and** (2) whose conviction is more than ten
17 (10) years old (i.e., full compliance with Penal Code § 12021 *et seq.*[29805
18 *et seq.*]); shall not be deemed as having been convicted of a misdemeanor
19 crime of domestic violence for federal purposes under 18 U.S.C.
20 921(a)(33)(B)(ii).

21 Though constitutionally more complicated (e.g., in addition to statutory
22 interpretation, the Court would have to take up constitutionally adequate notice of
23 collateral consequences of conviction under the SIXTH AMENDMENT) this Court can
24 resolve the case for six of the seven plaintiffs by a findings and order that states:

25 For any person convicted of a federally defined misdemeanor crime of
26 domestic violence prior to the date of the LAUTENBERG AMENDMENT becoming
27 law (September 30, 1996), they shall nevertheless be exempt from 18 U.S.C.
28 §§ 921(d)(9), and 921(g)(9) pursuant to 18 U.S.C. § (a)(33)(B)(i).

29 _____
30 *Rehlander* Court found that even long-standing classifications such as “mentally ill”
are subject to re-evaluation after *Heller*.

1 **Constitutional Disposition**

2 Although the Plaintiffs aver that a constitutional adjudication of this case is
3 unnecessary, the case is postured to permit the Court to resolve the matter on
4 straight SECOND AMENDMENT grounds. While the level of scrutiny for SECOND
5 AMENDMENT claims involving law-abiding persons has not been resolved yet in the
6 Ninth Circuit⁴, the Defendants' have failed to submit any competent evidence to
7 counter Plaintiffs' facts (law-abiding conduct for 10 years, compliance with state law
8 for restoration of rights, dismissal/expungement under Penal Code § 1203.4,
9 successful completion of probation, etc.) that a life-time ban on possession,
10 acquisition and/or ownership of firearms for persons convicted of minor crimes
11 violates the SECOND AMENDMENT. Furthermore the federal government's
12 interpretation of the LAUTENBERG AMENDMENT fails under any level of
13 constitutional scrutiny.

14 **Conclusion**

15 The Court should grant Plaintiffs' Motion for Summary Judgment and deny
16 Defendants' Motion to Dismiss (and/or grant Plaintiffs leave to amend).

17 Respectfully Submitted on January 18, 2012

18 /s/ Donald Kilmer

19 Donald Kilmer, Attorney for the Plaintiffs
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27 ⁴ Indeed several cases have been stayed pending an *en banc* hearing in
28 *Nordyke v. King*, No. 07-15763, 2011 WL 5928130 (9th Cir. Nov. 28,
2011) (granting rehearing en banc).