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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

RICHARD ENOS, JEFF BASTASINI,)	Case No. 2:10-CV-2911-JAM-EFB
LOUIE MERCADO, WALTER GROVES,)	
MANUEL MONTEIRO, EDWARD ERIKSON,)	<u>ORDER GRANTING IN PART AND</u>
VERNON NEWMAN, JEFF LOUGHRAN and)	<u>DENYING IN PART DEFENDANTS'</u>
WILLIAM EDWARDS,)	<u>MOTION TO DISMISS</u>
)	
Plaintiffs,)	
)	
v.)	
)	
)	
ERIC HOLDER, as United States)	
Attorney General, and ROBERT)	
MUELLER, III, as Director of the)	
Federal Bureau of Investigation,)	
)	
Defendants.)	

This matter is before the Court on Defendants' Eric Holder and Robert Mueller, III (collectively "Defendants") Motion to Dismiss (Doc. #11) Plaintiffs' Richard Enos ("Enos"), Jeff Bastasini ("Bastasini"), Louie Mercado ("Mercado"), Walter Groves ("Groves"), Manuel Monteiro ("Monteiro"), Edward Erickson ("Erickson"), Vernon Newman ("Newman"), Jeff Loughran ("Loughran") and William Edwards ("Edwards") First Amended Complaint ("FAC") (Doc. #8). The above-named plaintiffs opposed the motion. A hearing on the motion to dismiss was held on May 4, 2011. At the close of the hearing, the

1 Court dismissed plaintiffs Edwards and Loughran, for improper
2 joinder and venue (Doc. #20) and ordered further briefing on
3 Defendants' supplemental authorities. Having reviewed the
4 additional briefing, and based on the moving papers and oral
5 argument, the Court GRANTS in part and DENIES in part the motion to
6 dismiss.

7
8 I. FACTUAL AND PROCEDURAL BACKGROUND

9 Enos, Bastasini, Mercado, Groves, Monteiro, Erickson, and
10 Newman (collectively "Plaintiffs") have each been convicted of
11 misdemeanor domestic violence in California, and allege that they
12 wish to purchase a gun but are prevented from doing so by federal
13 law. Plaintiffs challenge the government's interpretation of 18
14 U.S.C. § 922(g)(9), which makes it a federal offense for any person
15 who has been convicted of a misdemeanor crime of domestic violence
16 to possess a firearm, and the government's interpretation of 18
17 U.S.C. § 922(d)(9), which makes it unlawful to sell a firearm or
18 ammunition to a person who has been convicted of misdemeanor
19 domestic violence. Though California law allows for the
20 restoration of gun rights after a period of ten years from the
21 misdemeanor domestic violence conviction, (see CA Penal Code
22 § 12021(c)(1) and (3)), the FAC alleges that federal law only
23 provides for the restoration of gun rights for those with felony
24 convictions. Accordingly, Plaintiffs allege that federal law
25 creates a lifetime ban on gun ownership for those with misdemeanor
26 domestic violence convictions.

27 Plaintiffs allege that they were each convicted of misdemeanor
28 domestic violence over ten years ago, and under California law

1 their gun rights have been restored. Accordingly, they argue that
2 the federal law barring them from gun ownership is a violation of
3 their constitutional rights. Plaintiffs allege that 18 U.S.C.
4 § 922(g)(9) and (d)(9) violate their Second, First, Tenth, and
5 Fifth Amendment rights. Plaintiffs also seek declaratory and
6 injunctive relief that they are not subject to the prohibitions set
7 forth in 18 U.S.C. § 922(d)(9) and 922(g)(9) and that these two
8 statutes are unconstitutional on their face and as applied to
9 Plaintiffs. Defendants argue that most of the plaintiffs lack
10 standing to challenge the law, and should be dismissed pursuant to
11 Federal Rules of Civil Procedure 12(b)(1). Defendants further
12 argue that the constitutional claims fail under Federal Rules of
13 Civil Procedure 12(b)(6), for failure to state a claim.

14
15 II. OPINION

16 A. Legal Standard

17 1. Rule 12(b)(1) dismissal

18 A party may move to dismiss an action for lack of subject
19 matter jurisdiction pursuant to Federal Rules of Civil Procedure
20 12(b)(1). When a defendant brings a motion to dismiss for lack of
21 subject matter jurisdiction pursuant to Rule 12(b)(1), the
22 plaintiff has the burden of establishing subject matter
23 jurisdiction. See Rattlesnake Coalition v. United States Env'tl.
24 Protection Agency, 509 F.3d 1095, 1102, FN 1 (9th Cir. 2007).

25 2. Rule 12(b)(6) dismissal

26 A party may move to dismiss an action for failure to state a
27 claim upon which relief can be granted pursuant to Federal Rules of
28 Civil Procedure 12(b)(6). In considering a motion to dismiss, the

1 court must accept the allegations in the complaint as true and draw
2 all reasonable inferences in favor of the plaintiff. Scheuer v.
3 Rhodes, 416 U.S. 232, 236 (1974), overruled on other grounds by
4 Davis v. Scherer, 468 U.S. 183 (1984); Cruz v. Beto, 405 U.S. 319,
5 322 (1972). Assertions that are mere "legal conclusions," however,
6 are not entitled to the assumption of truth. Ashcroft v. Iqbal,
7 129 S. Ct. 1937, 1950 (2009), citing Bell Atl. Corp. v. Twombly,
8 550 U.S. 544, 555 (2007). To survive a motion to dismiss, a
9 plaintiff needs to plead "enough facts to state a claim to relief
10 that is plausible on its face." Twombly, 550 U.S. at 570.
11 Dismissal is appropriate where the plaintiff fails to state a claim
12 supportable by a cognizable legal theory. Balistreri v. Pacifica
13 Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990).

14 Upon granting a motion to dismiss for failure to state a
15 claim, the court has discretion to allow leave to amend the
16 complaint pursuant to Federal Rules of Civil Procedure 15(a).
17 "Absent prejudice, or a strong showing of any [other relevant]
18 factor[], there exists a presumption under Rule 15(a) in favor of
19 granting leave to amend." Eminence Capital, L.L.C. v. Aspeon,
20 Inc., 316 F.3d 1048, 1052 (9th Cir. 2003). "Dismissal with
21 prejudice and without leave to amend is not appropriate unless it
22 is clear . . . that the complaint could not be saved by amendment."
23 Id.

24 Generally, the court may not consider material beyond the
25 pleadings in ruling on a motion to dismiss for failure to state a
26 claim. There are two exceptions: when material is attached to the
27 complaint or relied on by the complaint, or when the court takes
28 judicial notice of matters of public record, provided the facts are

1 not subject to reasonable dispute. Sherman v. Stryker Corp., 2009
2 WL 2241664 at *2 (C.D. Cal. Mar. 30, 2009) (internal citations
3 omitted). Here, Plaintiffs request judicial notice of ATF Form
4 4473, the form that must be completed when applying to purchase a
5 gun. The Court will take judicial notice of this form, as it is a
6 matter of public record.

7 B. Claims for Relief

8 As threshold matters, Defendants challenge the Court's
9 jurisdiction and Plaintiffs' standing. Defendants argue that the
10 FAC fails to set forth the jurisdictional basis for seeking a
11 declaration from the Court that their convictions are not
12 misdemeanor crimes of domestic violence under 18 U.S.C.
13 § 921(a)(33). Section 921(a)(33) defines a "misdemeanor crime of
14 domestic violence" as

15 a misdemeanor that has as an element, the use or
16 attempted use of physical force, or the threatened use
17 of a deadly weapon, committed by a current or former
18 spouse, parent or guardian of the victim, by a person
19 with whom the victim shares a child in common, by a
20 person who is cohabiting with or has cohabited with
21 the victim as a spouse, parent, or guardian, or by a
22 person similarly situated to a spouse parent, or
23 guardian of the victim.

24 However, the statute provides that a person shall not be
25 considered to have been convicted of such an offense unless
26 the person was represented by counsel in the case, or
27 knowingly and intelligently waived the right to counsel in
28 the case, and if the prosecution for an offense entitled
the person to a jury trial, the case was tried by a jury or
the person knowingly and intelligently waived the right to
a jury trial, by guilty plea or otherwise. 18 U.S.C.

§ 921(a)(33)(B)(i).

1 The statute further provides that
2 a person shall not be considered to have been
3 convicted of such an offense for purposes of this
4 chapter if the conviction has been expunged or set
5 aside, or is an offense for which the person has been
6 pardoned or has had civil rights restored (if the law
7 of the applicable jurisdiction provides for the loss
8 of civil rights under such an offense) unless the
9 pardon, expungement, or restoration of civil rights,
10 expressly provides that the person may not ship,
11 transport, possess, or receive firearms.

12 18 U.S.C. § 921(a)(33)(B)(ii).

13 18 U.S.C. § 922(s) and (t) govern the process for acquiring a
14 firearms permit. Under 18 U.S.C. § 925A, any person denied a
15 firearm pursuant to Sections 922(s) or (t), (1) due to the
16 provision of erroneous information by any state or political
17 subdivisions thereof, or by the National Instant Criminal
18 Background Check System established under Section 103 of the Brady
19 Handgun Violence Prevention Act; or (2) who was not prohibited from
20 receipt of a firearm pursuant to subsection (g) or (n) of Section
21 922, may bring an action against the State or political subdivision
22 responsible for providing the erroneous information, or responsible
23 for denying the transfer, or against the United States, as the case
24 may be, for an order directing that the erroneous information be
25 corrected or that the transfer be approved, as the case may be.

26 To the extent that Plaintiffs rely on 18 U.S.C. § 925A as the
27 jurisdictional basis for the requested declaratory relief,
28 Defendants argue that the statute would only apply to Enos, as he
is the only plaintiff that the FAC alleges actually attempted to
purchase a gun and was denied due to the National Instant Criminal
Background Check System, maintained by the Department of Justice
and the Federal Bureau of Investigation. The Declaratory Judgment

1 Act, 28 USC 2201-02, on its own does not confer federal
2 jurisdiction. See Nationwide Mut. Ins. Co. v. Liberatore, 408 F.3d
3 1158, 1161 (9th Cir. 2005).

4 At oral argument, counsel for Plaintiffs stated that Enos was
5 not the only plaintiff to attempt to purchase a gun, and said he
6 would present further evidence at summary judgment. However, the
7 FAC is devoid of any such allegations pertaining to the other
8 plaintiffs. Without allegations that the other plaintiffs
9 attempted to purchase a gun and were denied a permit pursuant to
10 Sections 922(s) or (t), this Court lacks jurisdiction over their
11 claims for declaratory relief under 18 U.S.C. § 925A. No other
12 jurisdictional basis was alleged in the FAC. Accordingly the
13 declaratory relief claims brought by plaintiffs Bastasini, Mercado,
14 Groves, Monteiro, Erickson, and Newman are DISMISSED, WITH LEAVE TO
15 AMEND.

16 Defendants argue that while the Court may have jurisdiction
17 over Enos' claim for declaratory relief, the claim is without
18 merit. The FAC alleges that because Enos may possess a gun without
19 running afoul of CA Penal Code § 1201(c)(1), his civil rights have
20 been restored within the meaning of 18 U.S.C. § 921(a)(33)(B)(ii).
21 Defendants argue that the language in the statute "civil rights
22 restored" denotes rights accorded to an individual by virtue of his
23 citizenship in a particular state, comprising the right to vote,
24 hold public office, and serve on a jury. See Metzger v. United
25 States, 3, F.3d 756, 758 (4th Cir. 1993); McGrath v. United States,
26 60 F.3d 1005 (2d Cir. 1995); United States v. Cassidy, 899 F.2d
27 543, 549 (6th Cir.). According to Defendants, because none of
28 these rights were taken away from Enos due to his misdemeanor

1 conviction, none could be restored.

2 Enos argues that his civil right to possess a gun was taken
3 away by the state of California, and restored after ten years.
4 Though the Ninth Circuit has previously rejected the argument that
5 a state's restoration of an individual's right to possess firearms
6 constitutes a "restoration of rights" under 18 U.S.C. §
7 921(a)(33)(B)(ii), in U.S. v. Brailey, 408 F.3d 609 (9th Cir.
8 2005), Enos contends that Brailey and additional cases raised by
9 Defendants should not be followed since they were decided before
10 the Supreme Court's rulings in District of Columbia v. Heller, 554
11 U.S. 570 (2008) (holding that the Second Amendment confers and
12 individual right to keep and bear arms), and McDonald v. City of
13 Chicago, 130 S.Ct. 3020 (2010) (holding that the Fourteenth
14 Amendment incorporates the Second Amendment right). Accordingly,
15 Enos may be able to maintain a claim for declaratory relief in
16 light of the shifting legal landscape after Heller and McDonald.

17 Even if the Court were to find that a civil right was
18 restored, Defendants argue that the statute is written in the
19 plural and only contemplates the restorations of "rights" not the
20 restoration of one right. Enos in turn asserts that the Second
21 Amendment protects multiple rights, the right to keep and the right
22 to bear, firearms.

23 At this early stage of the pleadings, taking the allegations
24 of the FAC as true, the Court finds that the FAC contains
25 sufficient allegations to maintain Enos' claim for declaratory
26 relief. Accordingly the motion to dismiss Enos' declaratory relief
27 claim is DENIED.

28 Next, Defendants contest Plaintiffs' standing to challenge the

1 constitutional of the federal statutes at issue, arguing that
2 Plaintiffs, with the possible exception of Enos, lack standing to
3 challenge the constitutionality of 18 U.S.C. § 921(a)(33),
4 § 922(d)(9) and § 922(g)(9).

5 Article III of the United States Constitution limits the
6 jurisdiction of federal court to cases and controversies. See San
7 Diego County Gun Rights Comm. v. Reno, 98 F.3d 1121, 1126 (9th Cir.
8 1996). Federal courts are presumed to lack jurisdiction, unless
9 the contrary appears affirmatively from the record. Id. Standing
10 is an essential, core component of the case or controversy
11 requirement. Id. (citing Lujan v. Defenders of Wildlife, 504 U.S.
12 555, 560 (1992)). Plaintiffs, as the parties invoking federal
13 jurisdiction, bear the burden of establishing their standing to
14 sue. Id. To do so, they must demonstrate that they have suffered
15 "an 'injury in fact' to a legally protected interest that is both
16 'concrete and particularized' and 'actual or imminent,' as opposed
17 to "conjectural" or "hypothetical." Id.

18 The plaintiffs, other than Enos, lack standing for the same
19 reasons as those discussed above in relation to the Court's
20 jurisdiction. Without allegations in the FAC that Plaintiffs have
21 attempted to purchase a gun and have been denied, or that they face
22 imminent prosecution for possessing a gun, Plaintiffs lack
23 standing. They have not alleged a concrete injury or an imminent
24 threat of prosecution, as FAC merely alleges that Plaintiffs wish
25 to purchase guns. The FAC lacks allegations that 18 U.S.C.
26 § 921(a)(33), § 922(d)(9) and § 922(g)(9) have been applied to
27 Plaintiffs. Accordingly, the Court finds that only Enos has
28 standing to challenge the constitutionality of the aforementioned

1 statutes, and the other plaintiffs claims are dismissed without
2 prejudice.

3 1. Second Amendment

4 The FAC alleges that 18 U.S.C. §§ 921(a) (33), 922(d) (9), and
5 922(g) (9) violate Enos' Second Amendment right to keep and bear
6 arms because together they impose a lifetime ban on gun ownership
7 after a domestic violence misdemeanor conviction. Defendants argue
8 that the FAC fails to state a claim for a Second Amendment
9 violation, because statutes prohibiting felons or misdemeanants
10 from possessing firearms have been found lawful under the Second
11 Amendment. See, e.g., United States v. Vongxay, 594 F.3d 1111 (9th
12 Cir. 2010) (holding that 18 U.S.C. § 922(g) (1), statute prohibiting
13 felons from possessing firearms, did not violate the Second
14 Amendment); United States v. Skoien, 614 F.3d 638 (7th Cir. 2010)
15 (holding that 18 U.S.C. 922(g) is generally proper under the Second
16 Amendment); United States v. Booker, 2011 WL 1631947 that (1st Cir.
17 2011) (holding that 18 U.S.C. § 922(g) (9) is a presumptively lawful
18 regulatory measure); United States v. White, 593 F.3d 1199 (11th
19 Cir. 2010) (same). Enos distinguishes his claim from Vongxay,
20 Skoien, Booker, and White in that he seeks to challenge 18 U.S.C.
21 § 922(g) (9) (and 18 U.S.C. § 922(d) (9) and 18 U.S.C.
22 § 921(a) (33)) only to the extent that they impose a lifetime ban on
23 the right to own a gun without possibility of restoring the right,
24 despite restoration of this right in California. Enos does not
25 challenge the 18 U.S.C. § 922(g) (9)'s constitutionality insofar as
26 it restricts his gun ownership for ten years following his
27 misdemeanor domestic violence conviction.

28 The First Circuit recently held in Booker, 2011 WL 1631947

1 that section 922(g)(9) "fits comfortably among the categories of
2 regulations that Heller suggested would be presumptively lawful."
3 Id. at *10. The First Circuit rejected Booker's arguments that
4 section 922(g)(9) violates the Second Amendment, finding that there
5 is a substantial relationship between section 922(g)(9)'s
6 disqualification of domestic violence misdemeanants from gun
7 ownership and the governmental interest in preventing gun violence
8 in the home. Id. at *11.

9 Though the First Circuit found section 922(g)(9) to be
10 facially valid, Enos in his supplemental briefing urges the Court
11 not to dismiss his Second Amendment claim at this stage, arguing
12 that he brings an as-applied challenge. He only argues section
13 922(g)(9) is unconstitutional to the extent that it is interpreted,
14 along with section 921(a)(33)(B)(ii) as a lifetime ban on gun
15 ownership without the possibility of restoring gun rights. Based
16 on the pleadings and oral argument, the Court will not dismiss
17 Enos' Second Amendment claim at this stage, as he may be able to
18 maintain a claim. Accordingly, the motion to dismiss Enos' Second
19 Amendment claim is DENIED.

20 2. First Amendment

21 The FAC alleges that 18 U.S.C. § 922(g)(9), 18 U.S.C.
22 § 922(d)(9) and 18 U.S.C. § 921(a)(33) violate Enos' First
23 Amendment rights, because they impose a lifetime ban on the
24 exercise of a fundamental constitutional right for a minor crime
25 without providing a statutory remedy to petition the government for
26 restoration of that right. However, as Defendants argue, these
27 allegations fail to state a claim. Defendants contend that the
28 First Amendment claim is devoid of merit, because it contains no

1 allegations that the government has restricted Plaintiffs right to
2 speech and to petition the government for redress. Furthermore, gun
3 possession is not speech. See Nordyke v. King 319 F.3d 1185, 1190
4 (9th Cir. 2003). Plaintiffs conceded the weakness of this claim in
5 the briefs and at oral argument, by admitting that they advanced
6 the claim only in hopes of making new law. However, Enos has
7 failed to state a claim for violation of the First Amendment, and
8 his First Amendment claim is DISMISSED, WITH PREJUDICE.

9 3. Tenth Amendment

10 The FAC alleges that 18 U.S.C. § 922(g)(9) 18 U.S.C.
11 § 922(d)(9) and 18 U.S.C. § 921 (a)(33) violate the Tenth
12 Amendment, by usurping the States' powers to define and provide for
13 the rehabilitation of minor public offenses.¹ Defendants move to
14 dismiss the Tenth Amendment claim, arguing that the Ninth Circuit
15 in United States v. Andaverde, 64 F.3d 1305 (9th Cir. 1995) held
16 that Congress may regulate possession of firearms without violating
17 the Tenth Amendment. Though Andaverde discussed 18 U.S.C.
18 § 922(g)(1) (regulating the possession of firearms by felons),
19 courts addressing 18 U.S.C. § 922(g)(9) have likewise found the
20 statute to be constitutional under the Tenth Amendment. See, e.g.,
21 Fraternal Order of Police v. United States, 173 F. 3d 898 (D.C.
22 Cir. 1999); Hiley v. Barret, 155 F.3d 1276 (11th Cir. 1998).
23 Accordingly, Enos' claim for violation of the Tenth Amendment is

24 _____
25 ¹ The Court has considered Bond v. United States, 2011 WL 2369334
26 (2011), the supplemental authority recently submitted by counsel
27 for Plaintiffs (Doc. #23), and finds it unpersuasive. Bond is
28 unrelated to the issue of firearms regulation under the Tenth
Amendment, and to the extent that Plaintiffs' cite it in support of
their argument for standing, it is entirely distinguishable from
the case at hand, because the plaintiff in Bond was convicted and
incarcerated under the law she challenged on Tenth Amendment
grounds.

1 DISMISSED, WITH PREJUDICE.

2 4. Fifth Amendment

3 The FAC alleges that 18 U.S.C. § 922(g)(9), 18 U.S.C.
4 § 922(d)(9) and 18 U.S.C. § 921 (a)(33) violate the Fifth Amendment
5 by imposing a lifetime ban on the right to own a gun without
6 providing a statutory remedy for restoration of that right.
7 Defendants' oppose this claim, arguing that 18 U.S.C. § 925(c)
8 allows any person to apply for relief from the Attorney General.
9 See Palma v. United States, 228 F.3d 323, 327-28 (3d Cir. 2000)
10 (stating that persons convicted of a misdemeanor crime of domestic
11 violence may apply for relief under 18 U.S.C. § 925(c)). Enos'
12 opposition brief states that he is asserting an equal protection
13 argument, but does not set forth allegations or argument in support
14 of this claim or in opposition to Defendants' arguments.
15 Accordingly, the Fifth Amendment claim is DISMISSED, WITH
16 PREJUDICE.

17
18 III. ORDER

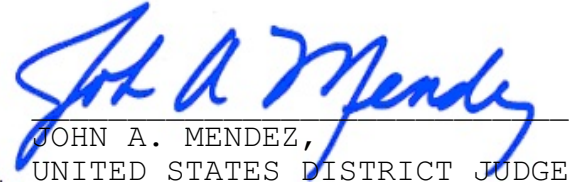
19 For the reasons set forth above, Defendants' motion to dismiss
20 the FAC is GRANTED in part and DENIED in part. Bastasini's,
21 Mercado's, Groves', Monteiro's, Erickson's, and Newman's
22 declaratory relief and constitutional claims are dismissed, with
23 leave to amend.² Enos' First Amendment, Tenth Amendment and Fifth

24 _____
25 ²Because the Court found that as pled, Bastasini, Mercado, Groves,
26 Monteiro, Erickson, and Newman lack standing to plead the
27 constitutional claims, the Court only reached the merits of Enos'
28 constitutional claims, and dismissed the remaining Plaintiffs'
constitutional claims. However, remaining plaintiffs are advised
that the Court will look with disfavor on any attempt to re-plead
the First, Tenth and Fifth Amendment claims that were dismissed
with prejudice as to Enos.

1 Amendment claims are dismissed, with prejudice. The motion to
2 dismiss is denied as to dismissal of Enos' declaratory relief and
3 Second Amendment claims. Plaintiffs must file a Second Amended
4 Complaint within twenty (20) days of the date of this order.

5
6 IT IS SO ORDERED.

7 Dated: July 7, 2011



JOHN A. MENDEZ,
UNITED STATES DISTRICT JUDGE

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