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7
8 **UNITED STATES DISTRICT COURT**
9 **DISTRICT OF NEVADA**

10 BARRY MICHAELS,)
)
11 Plaintiff,) Case No: 2:16-cv-00578-JAD-PAL
)
12 v.)
)
13 LORETTA E. LYNCH, Attorney General of) **REPLY BRIEF IN SUPPORT OF**
the United States, in her official capacity; and) **DEFENDANTS’ MOTION TO DISMISS**
14 THOMAS E. BRANDON, Deputy Director,)
Bureau of Alcohol, Tobacco, Firearms &) **AND**
15 Explosives, in his official capacity,)
) **RESPONSE TO MOTION TO AMEND**
16 Defendants.) **COMPLAINT**
)
17

18 Defendants Loretta E. Lynch, Attorney General of the United States, in her official
19 capacity; and Thomas E. Brandon, Deputy Director of the Bureau of Alcohol, Tobacco,
20 Firearms & Explosives, submit this reply to Plaintiff Barry Michaels’ response (ECF No. 35) to
21 Defendants’ Motion to Dismiss (ECF No. 19) and response to Plaintiff’s Motion to Amend
22 Complaint (ECF No. 36).

23 **I. INTRODUCTION**

24 Defendants’ opening brief explained that Plaintiff’s complaint should be dismissed in its
25 entirety for lack of Article III standing. Because Nevada state law prohibits felons from
26 possessing firearms, Plaintiff is unable to demonstrate that a favorable ruling on his behalf
27 regarding the federal prohibition against felons possessing firearms is likely to redress his
28 alleged injury, as is required under Article III of the Constitution in order for Plaintiff to

1 establish standing. The Court also lacks jurisdiction over the first two counts of Plaintiff's
2 complaint because he has failed to identify an applicable waiver of sovereign immunity by
3 which the United States has consented to suit.

4 Plaintiff's response to Defendants' opening brief essentially concedes that the Court
5 lacks subject matter jurisdiction over the complaint, and asks the Court for leave to amend the
6 complaint in order to cure these jurisdictional deficiencies. However, the Court should deny
7 this request for being futile. Even if Plaintiff could overcome these jurisdictional bars by
8 adding the Attorney General of the State of Nevada as a party to this case and by identifying the
9 Administrative Procedure Act as the applicable waiver of sovereign immunity, the fact remains
10 that every count of the complaint (as repeated in the proposed amended complaint) fails to state
11 a claim on which relief can be granted.

12 Thus, as Defendants have previously demonstrated, the heart of the complaint,
13 Plaintiff's Second Amendment claim, is legally invalid because the Ninth Circuit has squarely
14 held that felons such as Plaintiff do not fall within the scope of that Amendment's protection.
15 While Plaintiff argues that Ninth Circuit decisions on this point do not comport with
16 constitutional principles, this Court should decline Plaintiff's invitation for it not to comply with
17 binding circuit precedent. Established law similarly dooms Counts I and II of the complaint in
18 which Plaintiff attempts to fashion a statutory claim based on prefatory language from the
19 firearms statute in question. Contrary to Plaintiff's argument, there is no question that 18
20 U.S.C. § 922(g)(1) applies to Plaintiff and bars him from possessing a firearm. Plaintiff's Fifth
21 Amendment due process claim also fails as a matter of law because Plaintiff has failed to
22 identify a protected liberty or property interest, and because in any event, due process does not
23 require the government to provide a hearing where the results of such a hearing would have no
24 bearing on whether the firearms prohibition at issue applies to him. And the last two counts of
25 the complaint have no merit because the federal restriction on firearms possession by felons
26 does not violate the constitutional prohibitions against bills of attainder or cruel and unusual
27 punishment. The Court should therefore dismiss the complaint, and deny leave to amend the
28 complaint as futile.

1 **II. ARGUMENT**

2 **A. The Court Should Dismiss Plaintiff’s Complaint for Lack of Subject Matter**
3 **Jurisdiction.**

4 **1. Plaintiff Essentially Concedes That He Lacks Standing to Pursue the**
5 **Claims Alleged in the Complaint Unless It Is Amended.**

6 As explained in Defendants’ opening brief, the complaint should be dismissed in its
7 entirety because Plaintiff has not satisfied the redressability requirement of Article III standing.
8 Def. Mot. to Dismiss (“Def. Mot.”) at 6-8 [ECF No. 19]. Specifically, because Nevada law
9 independently prohibits possession of firearms by felons, granting Plaintiff his requested relief
10 by invalidating 18 U.S.C. § 922(g)(1) would not redress his alleged injury (the inability to
11 possess a firearm) because Nevada law would continue to bar his possession of a firearm. *Id.* at
12 7 (citing authorities). Therefore, the Court lacks subject matter jurisdiction over Plaintiff’s
13 claims.

14 Instead of contesting this conclusion, Plaintiff essentially concedes that Defendants are
15 correct that Plaintiff has no standing to sue. In lieu of challenging this conclusion, Plaintiff
16 moves for leave to amend his complaint to correct this jurisdictional deficiency by adding the
17 Attorney General of Nevada as a defendant in this action. Because Plaintiff concedes that he
18 lacks standing to pursue the claims alleged in the present complaint, at a bare minimum, the
19 Court should dismiss the complaint for lack of subject matter jurisdiction.

20 Furthermore, the Court should deny Plaintiff leave to amend the complaint because
21 amendment would be futile. “The general rule that parties are allowed to amend their pleadings
22 does not extend to cases in which any amendment would be an exercise in futility or where the
23 amended complaint would also be subject to dismissal.” *Novak v. United States*, 795 F.3d 1012,
24 1020 (9th Cir. 2015) (citation and internal punctuation omitted). “Futility alone can justify a
25 court’s refusal to grant leave to amend.” *Id.* (citation omitted); *see also Thinket Ink Info. Res.,*
26 *Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1061 (9th Cir. 2004) (“[A] district court does not
27 err in denying leave to amend where the amendment would be futile.”) (citation and internal
28 punctuation omitted).

1 Here, even if Plaintiff did possess standing to sue, all six counts of his complaint warrant
 2 dismissal for failure to state a valid claim. *See* Def. Mot. at 8-17 and *infra*. Consequently,
 3 Plaintiff’s proposed amendment to his complaint would be futile, and the Court should deny
 4 leave to amend. *See Novak*, 795 F.3d at 1020 (concluding that “amendment would be an
 5 exercise in futility because even if Plaintiffs established standing, they would still fail to state a
 6 claim”) (footnote omitted).

7 **2. Plaintiff Has Also Essentially Conceded That the Complaint Fails to**
 8 **Identify a Valid Waiver of Sovereign Immunity to Maintain Counts I**
 9 **and II.**

10 Defendants’ opening brief explained that Plaintiff cannot maintain the first two counts of
 11 his complaint because, *inter alia*, no waiver of sovereign immunity applies to these two counts.
 12 Def. Mot. at 8-9. Again, rather than contesting this conclusion, Plaintiff instead moves for leave
 13 to amend the complaint to identify the Administrative Procedure Act as the applicable waiver of
 14 sovereign immunity in an attempt to cure this jurisdictional deficiency. As explained below,
 15 however, leave to amend would be futile because these counts fail to state a claim on which
 16 relief can be granted. The Court, accordingly, should dismiss these two counts for lack of
 17 subject matter jurisdiction and deny Plaintiff’s motion to amend his complaint.

18 **B. None of Plaintiff’s Claims Are Valid as a Matter of Law.**

19 **1. Plaintiff Cannot State a Valid Claim Under Count III Because the**
 20 **Ninth Circuit Has Held That Felons Do Not Fall Within the**
 21 **Protections of the Second Amendment.**

22 As the Ninth Circuit has unmistakably held, felons such as Plaintiff fall outside the
 23 protections of the Second Amendment. *See United States v. Phillips*, 827 F.3d 1171, 1174 (9th
 24 Cir. 2016).¹ The Ninth Circuit “held in [*United States v.*] *Vongxay*[, 594 F.3d 1111, 1115 (9th
 25 Cir. 2010,)] that ‘felons are categorically different from the individuals who have a fundamental
 26 right to bear arms,’ and . . . accordingly upheld 18 U.S.C. § 922(g)(1) against a Second
 27 Amendment challenge.” *Phillips*, 827 F.3d at 1174; *see also Van Der Hule v. Holder*, 759 F.3d
 28 1043, 1050-51 (9th Cir. 2014) (relying on *Vongxay* to uphold Section § 922(g)(1) as
 constitutional). Like Plaintiff, the defendant in *Phillips* argued that permitting his “non-violent”

¹ Plaintiff’s opposition brief abandons Count III’s additional reliance on substantive due process principles. *See* Pl. Opp. at 11.

1 crime – misprision of a felony – to serve as a predicate for Section 922(g)(1)’s firearms
2 prohibition violated the Second Amendment. *Phillips*, 827 F.3d at 1173. But the Ninth Circuit
3 rejected this argument, and squarely held that “[o]ur decision in *Vongxay* forecloses Phillips’s
4 argument.” *Id.* at 1174. As shown in Defendants’ opening brief, these holdings by the Ninth
5 Circuit equally foreclose Plaintiff’s similar claim that as applied to him, Section 922(g)(1)
6 violates the Second Amendment. Def. Mot. at 10-12.

7 Plaintiff offers two arguments in response, neither of which is persuasive. Pl. Opp. at
8 12-16. First, Plaintiff expresses his disagreement on policy grounds with *Phillips* and *Vongxay*,
9 as well as Ninth Circuit decisions relied on in their holdings, such as *United States v. Chovan*,
10 735 F.3d 1127 (9th Cir. 2013), and *United States v. Younger*, 398 F.3d 1179 (9th Cir. 2005). *Id.*
11 at 12-15. Regardless of Plaintiff’s disagreement with the reasoning of the Ninth Circuit in
12 reaching its holdings in these cases, however, this Court remains bound by those holdings. *See*
13 *Hart v. Massanari*, 266 F.3d 1155, 1175 (9th Cir. 2001) (“A district court bound by circuit
14 authority. . . has no choice but to follow it, even if convinced that such authority was wrongly
15 decided”). Second, Plaintiff unsuccessfully attempts to distinguish the present case from
16 *Phillips*. Pl. Opp. at 15-16. While it is correct that the factual background portion of *Phillips*
17 related that the defendant in that case had, *inter alia*, both resisted arrest and fled from police,
18 the Ninth Circuit neither grounded its holding in those facts nor limited that holding to persons
19 to whom these particular factual conditions applied. Instead, the Court of Appeals reiterated the
20 holding from *Vongxay* that “‘felons are categorically different from the individuals who have a
21 fundamental right to bear arms,’” and explained that its “decision in *Vongxay* forecloses
22 Phillips’s argument” that permitting a “non-violent” crime to “serve as a predicate for his
23 § 922(g)(1) conviction violates the Second Amendment.” *Phillips*, 827 F.3d at 1173, 1174
24 (quoting *Vongxay*, 594 F.3d at 1115); *see also id.* at 1174 n.1 (rejecting argument that “*Vongxay*
25 is not good law”). That holding from *Phillips* applies here, and equally forecloses Plaintiff’s
26 claim that Section 922(g)(1) violates the Second Amendment as applied to him.

1 **2. Plaintiff Cannot Maintain a Statutory Claim That 18 U.S.C.**
2 **§ 922(g)(1) Does Not Apply to Non-Violent Felons, When the Ninth**
3 **Circuit Has Plainly Held Otherwise.**

4 Defendants explained in their opening brief that Plaintiff did not identify an applicable
5 waiver of federal sovereign immunity with respect to Counts I and II, Def. Mot. at 8-9, and that
6 these two counts furthermore failed to state valid claims. *Id.* at 9-10. In response, Plaintiff
7 seeks leave to amend his complaint to specify that the waiver contained in the Administrative
8 Procedure Act, 5 U.S.C. § 551 *et seq.* (“APA”), applies to these claims. However, amendment
9 would be futile because even if the APA provides an applicable waiver of sovereign immunity,
10 Plaintiff fails to state claims on which relief can be granted.

11 As explained above, the Ninth Circuit has clearly held that 18 U.S.C. § 922(g)(1) applies
12 to non-violent felons, and has upheld Section 922(g)(1) against a Second Amendment challenge
13 on that basis. Plaintiff, however, attempts to sidestep this clear holding by relying on prefatory
14 language from the Gun Control Act of 1968. In specific part, Count I of the complaint seeks a
15 declaration that “the *implicit* purpose” of the Act “was to prevent violent crimes,” Compl. ¶ 26
16 (emphasis in original), and Count II seeks a declaration that Plaintiff “enjoy[s] the same
17 *presumption* of being (a) ‘law-abiding’ citizen(s) as any *non-convicted* person(s) are.” *Id.* ¶ 29
18 (emphasis in original). In asking for this specific relief, Plaintiff relies on a statement of
19 congressional purpose issued when Congress enacted the Gun Control Act. *See* Compl. ¶¶ 21-29
20 (quoting and relying on Pub. L. No. 90-618, § 101, 82 Stat. 1213-14, which states in relevant
21 part: “The Congress hereby declares that the purpose of this title is to provide support to Federal,
22 State, and local law enforcement in their fight against crime and violence, and it is not the
23 purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-
24 abiding citizens with respect to the acquisition, possession, or use of firearms . . .”). However,
25 this cited text is not part of the Gun Control Act itself, *see* 18 U.S.C. § 921 *et seq.*, but merely a
26 preamble or “statement of Congress’ purpose.” *United States v. Lam*, 20 F.3d 999, 1001 (9th
27 Cir. 1994). As Defendants have shown, such a preamble or congressional declaration of purpose
28 creates no legal rights and has no legal effect. Def. Mot. at 10 (citing *Montes v. Bank of Am. NA*,
No. 2:13-cv-00660, 2014 WL 1494234, at *13 (D. Nev. Apr. 15, 2014) (dismissing claim based
on provision of U.S. Code carrying the title “Congressional findings and declaration of purpose,”

1 because “[t]here is simply no statutory basis for a cognizable cause of action” for such a
 2 provision)). Because no valid cause of action exists to enforce a provision that creates no rights
 3 and has no legal effect, Counts I and II have no legal validity.

4 Plaintiff’s proposed amendments to his complaint are of no help to him at all. The
 5 amended complaint would combine these two counts as a new Count I, and include the phrase
 6 “Violation of Second Amendment” under the heading of this new count. *Compare* Compl.
 7 ¶¶ 21-29 (Counts I & II) *with* Pl. Proposed Am. Compl. [ECF No. 35-1] ¶¶ 24-40 (new Count
 8 I). But the Second Amendment does not “entitle[]” Plaintiff to the relief he seeks under Counts
 9 I and II: namely, a “declaration by the Court” that (1) “the implicit purpose(s) of the [Gun
 10 Control Act]” was “to prevent violent crimes,” Compl. ¶ 26; and (2) Plaintiff “enjoy[s] the same
 11 *presumption* of being [a] “law-abiding” citizen[] as any *non-convicted* person [is].” *Id.* ¶ 29
 12 (emphasis in original). Rather, as explained above, the Ninth Circuit has unmistakably held that
 13 the Second Amendment does not apply to felons such as Plaintiff, and Plaintiff cannot evade
 14 this holding by seeking a declaratory judgment to the contrary. Because Counts I and II fail to
 15 state valid claims, amending the complaint to identify a sovereign immunity waiver would be
 16 futile because these counts are independently subject to dismissal under Fed. R. Civ. P.
 17 12(b)(6). *See McCartin v. Norton*, 674 F.2d 1317, 1319 (9th Cir. 1982) (while the APA “does
 18 waive the sovereign immunity of the United States for purposes of nonmonetary relief, it does
 19 not of itself create the substantive right upon which a claim for retroactive relief can be based”).
 20 Therefore, the Court should dismiss these counts for failure to state a claim on which relief can
 21 be granted, and deny leave to amend the complaint as futile.

22 **3. Count IV Does Not State a Valid Claim Because Plaintiff Fails to**
 23 **Identify a Protected Liberty or Property Interest, and Because Due**
 24 **Process Does Not Require a Hearing to Address a Fact Not Relevant**
 25 **to the Substantive Inquiry Here.**

26 Count IV of the complaint asserts a purported “procedural due process” claim under the
 27 Fifth Amendment. Compl. ¶¶ 41-51. However, Plaintiff has failed to demonstrate either “a
 28 deprivation of a constitutionally protected liberty or property interest” or a “denial of []
 procedural protections,” the two elements required to maintain such a claim. *Brewster v. Bd. of*

1 *Education of Lynwood*, 149 F.3d 971, 982 (9th Cir. 1998). As explained above and in
2 Defendants’ opening brief, because Plaintiff has been convicted of a felony, he can have no
3 constitutionally protected interest in possessing a firearm. Def. Mot. at 12-13. Moreover, as
4 that brief further demonstrated, Count IV also fails because Plaintiff has not identified any
5 constitutionally-required procedural due process that he has been denied. *Id.* at 13-15. Where
6 the requirements of a law protecting public safety “turn on an offender’s conviction alone – a
7 fact that a convicted offender has already had a procedurally safeguarded opportunity to
8 contest,” procedural due process does not require an individualized hearing on dangerousness.
9 *Connecticut Department of Public Safety v. Doe*, 538 U.S. 1, 7 (2003). And applying *Doe*,
10 courts have easily concluded that felons may be restricted from firearms possession without
11 individualized dangerousness hearings. *See* Def. Mot. at 13-14 (citing cases). “[D]ue process
12 does not require the opportunity to prove a fact that is not material to the State’s statutory
13 scheme,” *Doe*, 538 U.S. at 4, and here, the material fact is whether Plaintiff has been convicted
14 of a crime punishable by imprisonment of more than one year. Because Plaintiff has conceded
15 that he has been convicted of such a crime, his procedural due process claim cannot withstand a
16 motion to dismiss for failure to state a valid claim.

17 Plaintiff’s opposition brief fails to respond meaningfully to these arguments for
18 dismissal. Instead, Plaintiff simply reiterates that he believes, contrary to binding caselaw, that
19 the Second Amendment guarantees him the right to possess a firearm, despite the fact that he is
20 a felon. Because the Ninth Circuit has expressly held to the contrary, this argument holds no
21 weight.

22 **4. Count V Fails to State a Valid Claim Because Section 922(g)(1) Is Not**
23 **a Bill of Attainder.**

24 Defendants’ opening brief demonstrated that Count V of the complaint – alleging that as
25 applied to Plaintiff, Section 922(g)(1) constitutes a bill of attainder – has no merit. Def. Mot. at
26 15-16. “Section 922(g)(1) is not a bill of attainder because it does not determine guilt or
27 remove the protections of a trial.” *United States v. Stauffer*, 156 F.3d 1241 (9th Cir. 1998)
28 (table); *see also* Def. Mot. at 16 (citing other cases rejecting claims that Section 922(g)(1)

1 constitutes a bill of attainder). The Ninth Circuit has also held that a predecessor statute to
2 Section 922(g)(1) was not a bill of attainder, *see Williams v. United States*, 426 F.2d 253, 255
3 (9th Cir. 1970), and that analogous provisions of the Gun Control Act prohibiting the sale of
4 firearms to, or the shipping or transportation of firearms by, persons convicted of a crime
5 punishable by imprisonment exceeding one year do not constitute bills of attainder. *United*
6 *States v. Munsterman*, 177 F.3d 1139, 1142 (9th Cir. 1999).

7 In response, Plaintiff criticizes the Ninth Circuit’s observation in *Munsterman* that the
8 analogous Gun Control Act provisions at issue in that case were “reasonably calculated to
9 achieve a nonpunitive public purpose, i.e., to keep firearms out of the hands of persons who,
10 having been indicted for felonies, may have a somewhat greater likelihood than other citizens to
11 misuse firearms,” 177 F.3d at 1142 (citation and internal punctuation omitted), because the
12 Ninth Circuit did not utilize empirical evidence to support that observation. Pl. Opp. at 18.
13 However, Plaintiff cites no authority suggesting that a statute must rely on empirical evidence in
14 order not to be considered to be a bill of attainder, and Defendants are aware of none. It is well
15 settled that in other contexts, the choice of the legislature as embodied in a statute need not cite
16 empirical evidence. *See, e.g., Heller v. Doe*, 509 U.S. 312, 320 (1993) (explaining that under
17 rational-basis review, “a State . . . has no obligation to produce evidence to sustain the
18 rationality of a statutory classification”; that “a legislative choice is not subject to courtroom
19 factfinding and may be based on rational speculation unsupported by evidence or empirical
20 data”; and that “a statute is presumed constitutional, and the burden is on the one attacking the
21 legislative arrangement to negative every conceivable basis which might support it”) (citations
22 and internal punctuation omitted); *Waugh v. Nev. State Bd. of Cosmetology*, 36 F. Supp. 3d 991,
23 1014 (D. Nev. 2014) (in analyzing a substantive due process claim, a court “cannot overturn a
24 statute on the basis that no empirical evidence supports the assumptions underlying the
25 legislative choice”) (citation and internal punctuation omitted); *see also United States v. Dowis*,
26 644 F. App’x 882, 883 (11th Cir. 2016) (rejecting claim that no rational basis existed for
27 Section 922(g)(1) to restrict firearms possession by both violent and non-violent felons).
28 Plaintiff, accordingly, fails to state a claim on which relief can be granted in Count V of the

1 complaint.

2 **5. Count VI Does Not State a Valid Claim Because 18 U.S.C. § 922(g)(1)**
3 **Does Not Violate the Constitutional Prohibition Against Cruel and**
4 **Unusual Punishments.**

4 Finally, Count VI of the complaint alleges that as applied to Plaintiff, Section 922(g)(1)
5 violates the Cruel and Unusual Punishments Clause of the Eighth Amendment. Compl. ¶¶ 60-
6 63. This allegation is meritless because “Section 922(g)(1) does not punish a person solely for
7 his or her status as a convicted felon; the statute does not empower federal law enforcement
8 officials to arrest a person merely because that person was once convicted of a felony. Rather,
9 the statute is triggered only when the felon commits the volitional act of possessing a firearm
10 that has traveled in interstate commerce.” *United States v. Jester*, 139 F.3d 1168, 1170 (7th Cir.
11 1998). The Court should “therefore reject [Plaintiff’s] Eighth Amendment claim.” *Id.* at 1171.

12 **III. CONCLUSION**

13 For the reasons stated above and in Defendants’ opening brief, Defendants respectfully
14 request that the Court dismiss Plaintiff’s complaint for lack of subject matter jurisdiction and for
15 failure to state a claim on which relief can be granted, and deny Plaintiffs’ motion for leave to
16 amend his complaint as futile.

17 Dated this 16th day of December 2016.

18 JOHN R. TYLER
19 Assistant Branch Director
20 Civil Division, Federal Programs Branch
21 /s/ Daniel Riess
22 DANIEL RIESS
23 Trial Attorney
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PROOF OF SERVICE

I hereby certify that this **REPLY BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS AND RESPONSE TO MOTION TO AMEND COMPLAINT** was served this date on all parties via the Court's Electronic Case File system, unless specified otherwise below.

Dated this 16th day of December 2016.

/s/ Daniel Riess
DANIEL RIESS
Trial Attorney

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