NOT FOR PUBLICATION

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| JOHNNY R. ANDOE,<br><br>Plaintiff-Appellant,<br><br>v.<br><br>JOE BIDEN; et al.,<br><br>Defendants-Appellees. | No. 19-35082<br><br>D.C. No. 1:16-cv-00395-BLW<br><br>MEMORANDUM* |

Appeal from the United States District Court
for the District of Idaho
B. Lynn Winmill, District Judge, Presiding

Submitted December 11, 2019**

Before: WALLACE, CANBY, and TASHIMA, Circuit Judges.

Johnny R. Andoe, an Idaho state prisoner, appeals pro se from the district court's judgment dismissing his action brought under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), challenging the constitutionality of various federal and state laws. We have jurisdiction under

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

28 U.S.C. § 1291. We review de novo. *Hamilton v. Brown*, 630 F.3d 889, 892 (9th Cir. 2011) (dismissal under 28 U.S.C. § 1915A); *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (order) (dismissal under 28 U.S.C. § 1915(e)(2)(B)(ii)). We affirm.

The district court properly dismissed Andoe's action because Andoe failed to allege facts sufficient to state any plausible claim. *See Hebbe v. Pliler*, 627 F.3d 338, 341-42 (9th Cir. 2010) (although pro se pleadings are to be construed liberally, a plaintiff must present factual allegations sufficient to state a plausible claim for relief); *Morgan v. United States*, 323 F.3d 776, 780 (9th Cir. 2003) (to state a *Bivens* claim for relief, a plaintiff must plausibly allege that the defendants, while acting under color of federal law, deprived the plaintiff of a federal constitutional right); *see, e.g., District of Columbia v. Heller*, 554 U.S. 570, 626 (2008) ("[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons . . . ."); *United States v. Vongxay*, 594 F.3d 1111, 1115 (9th Cir. 2010) ("[F]elons are categorically different from the individuals who have a fundamental right to bear arms [under the Second Amendment]".).

We do not consider matters not specifically and distinctly raised and argued in the opening brief, or arguments and allegations raised for the first time on appeal. *See Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009).

All pending motions are denied.

**AFFIRMED.**

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

JOHNNY R. ANDOE,

Plaintiff,

v.

DONALD J. TRUMP, JOE BIDEN, JOHN KERRY, and HILLARY CLINTON,

Defendants.

Case No. 1:16-cv-00395-BLW

**SUCCESSIVE REVIEW ORDER BY SCREENING JUDGE**

Plaintiff is a prisoner and convicted felon proceeding pro se in this civil rights action. Magistrate Judge Ronald E. Bush previously entered an Order dismissing this case, concluding that Plaintiff's claims were barred by *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994). The United States Court of Appeals for the Ninth Circuit later determined that the Court should view Plaintiff's claims not as an attempt to overturn his state criminal conviction, but as a constitutional challenge to state and federal statutes, primarily regarding gun control. The Circuit remanded the case, which was reassigned to the undersigned judge. (Dkt. 50.) This Court then instructed Plaintiff on filing an amended complaint. (Dkt. 55.)

Plaintiff has now filed his Amended Complaint. (Dkt. 57.) Having fully reviewed the record, the Court concludes that the Amended Complaint fails to state a claim upon which relief may be granted. Therefore, the Court will dismiss this case with prejudice.

## 1. Screening Requirement

The Court must review complaints filed by prisoners seeking relief against a governmental entity, or an officer or employee of a governmental entity, to determine whether summary dismissal is appropriate. The Court must dismiss a complaint or any portion thereof that states a frivolous or malicious claim, fails to state a claim upon which relief may be granted, or seeks monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b).

## 2. Pleading Standard

A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). A complaint fails to state a claim for relief under Rule 8 if the factual assertions in the complaint, taken as true, are insufficient for the reviewing court plausibly "to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* In other words, although Rule 8 "does not require detailed factual allegations, ... it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* (internal quotation marks omitted). If the facts pleaded are "merely consistent with a defendant's liability," or if there is an "obvious alternative explanation" that would not result in liability, the complaint has not stated a claim for relief that is plausible on its face. *Id.* at 678, 682 (internal quotation marks omitted).

As the Ninth Circuit recognized, Plaintiff brings his claims, all of which are asserted against individual federal defendants—specifically, the President of the United States and three former United States Senators—pursuant to *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). In *Bivens*, the United States Supreme Court recognized a cause of action that is essentially the federal analog to an action brought under 42 U.S.C. § 1983, the civil rights statute. To state a claim for relief under *Bivens*, a plaintiff must plausibly allege that the defendants, while acting under color of federal law, deprived the plaintiff of a right guaranteed by the United States Constitution. *Morgan v. United States*, 323 F.3d 776, 780 (9th Cir. 2003); *Cox v. Hellerstein*, 685 F.2d 1098, 1099 (9th Cir. 1982).

**3. Discussion**

***A. Claim 1: Challenge to National Firearms Act***

Plaintiff's first claim is that Title II of the federal firearms law, the National Firearms Act ("NFA"), first passed in 1934 and currently codified, as amended, at 26 U.S.C. § 5861, *et seq.* (a part of the Internal Revenue Code), is unconstitutional because it contravenes the Second Amendment of the United States Constitution. (Dkt. 57 at 2-4.) The NFA imposes a statutory excise tax and registration requirements on firearms dealers. Plaintiff alleges that the real intent behind the NFA is to prevent the general public from bearing arms.

However, the United States Supreme Court long ago upheld the NFA as a valid exercise of Congressional taxing power. *Sonzinsky v. United States*, 300 U.S. 506 (1937). Additionally, although individuals have a Second Amendment right to keep and bear

arms, those rights are "not unlimited." *District of Columbia v. Heller*, 554 U.S. 570 (2008). The Supreme Court stated clearly in *Heller* that nothing in that decision should be interpreted "to cast doubt on ... laws imposing conditions and qualifications on the commercial sale of arms." *Id.* at 626-27. Therefore, Claim 1 is implausible and subject to dismissal.

### *B. Claims 2, 3, and 4: Challenge to Felon-in-Possession Restrictions*

Plaintiff's second claim is that certain portions of the Gun Control Act of 1968, prohibiting felons from possessing firearms, violate various constitutional provisions, such as the Second Amendment, the bill of attainder clause, the Thirteenth Amendment's prohibition against involuntary servitude, and the Fifteenth Amendment. (Dkt. 57 at 4-6.) Plaintiff's third and fourth claims challenge certain additional restrictions, set forth in the Brady Handgun Violence Prevention Act, as violative of the Second Amendment and as ex post facto laws. Like Claim 2, Plaintiff bases Claims 3 and 4 on laws prohibiting firearm possession by felons—described by Plaintiff as those "convicted of a public offense." (*Id.* at 7-8 (internal quotation marks omitted).)[1]

The federal felon-in-possession statute is currently codified at 18 U.S.C. § 922(g)(1). That statute prohibits an individual from shipping, transporting, or possessing firearms or ammunition if that individual "has been convicted in any court[] of a crime punishable by imprisonment for a term exceeding one year." *Id.*

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[1] Although Plaintiff also claims that the Brady Act restrictions violate the rights of "all the people" (Dkt. 57 at 7)—meaning those who have not been convicted of a felony—Plaintiff, who is not an attorney, may not act as legal representative of, or make claims on behalf of, anyone but himself. *See C.E. Pope Equity Trust v. United States*, 818 F.2d 696, 697 (9th Cir. 1987); *Russell v. United States*, 308 F.2d 78, 79 (9th Cir. 1962) (per curiam). Thus, Plaintiff's claims based on injuries to other people are implausible.

Plaintiff's facial Second Amendment challenge to 922(g)(1) is foreclosed by *United States v. Vongxay*, 594 F.3d 1111 (9th Cir. 2010). In that case, the Ninth Circuit held that § 922(g)(1) was constitutional as it applied to the plaintiff, a convicted felon, because "felons are categorically different from the individuals who have a fundamental right to bear arms" under the Second Amendment. *Id.* at 1115; *see United States v. Chovan*, 735 F.3d 1127, 1138 (9th Cir. 2013) (applying intermediate scrutiny to 18 U.S.C. § 922(g)(9), which prohibits domestic violence misdemeanants from possessing firearms, because "the core of the Second Amendment is the right of *law-abiding, responsible* citizens to use arms in defense of hearth and home," and holding that the statute "does not implicate this core Second Amendment right because it regulates firearm possession for individuals with criminal convictions") (emphasis added) (internal quotation marks and citations omitted); *see also Heller*, 554 U.S. at 626 ("[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons ...."); *McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010) (same).

Additionally, although an as-applied Second Amendment challenge to § 922(g)(1) perhaps "theoretically could be made" in an appropriate case, Plaintiff has not come "remotely close" to plausibly asserting such a claim. *United States v. Moore*, 666 F.3d 313, 320 (4th Cir. 2012) ("Moore undoubtedly flunks the 'law-abiding responsible citizen' requirement. Moreover, Moore's proffered reason for possessing a firearm, 'his fear of being robbed, such robberies being prevalent in the neighborhood in which he lived' is far too vague and unsubstantiated to remove his case from the typical felon in

possession case. Accordingly, Moore has not rebutted the presumption that the presumptively lawful regulatory measure of the long standing prohibition on felon firearm possession is unconstitutional as applied to him.").

Plaintiff also invokes the federal bill of attainder clause of the U.S. Constitution. *See* U.S. Const., art. I, § 9, cl. 3. A bill of attainder is a law that legislatively determines guilt and inflicts punishment upon an identifiable individual or group of individuals—without provision of the protections of a judicial trial—whether that individual or group "is called by name or described in terms of conduct which, because it is past conduct, operates only as a designation of particular persons." *Selective Serv. Sys. v. Minnesota Pub. Interest Research Grp.*, 468 U.S. 841, 847, 851 (1984); *see also United States v. Brown*, 381 U.S. 437, 448–50 (1965) (holding that a law prohibiting members of the Communist Party from serving as officers or employees of labor unions was unconstitutional as a bill of attainder).

However, not every law that disables an individual or group based on past conduct is a bill of attainder:

> If a law merely designates a properly general characteristic ... and then *imposes upon all who have that characteristic a prophylactic measure reasonably calculated to achieve a nonpunitive purpose*, no attainder may be said to have resulted from the mere fact that the set of persons having the characteristic in question might in theory be enumerated in advance and that the set is in principle knowable at the time the law is passed.

*United States v. Munsterman*, 177 F.3d 1139, 1142 (9th Cir. 1999) (emphasis added) (quoting Laurence H. Tribe, *American Constitutional Law* § 10-4 at 643 (2d ed. 1988) (omission in original)).

Courts have uniformly held that statutes prohibiting felons from possessing firearms are not unconstitutional bills of attainder. "[A] legislature, in exercising its rule-making powers, may disqualify convicted felons from pursuing activities open to others without running afoul of the bill of attainder clause." *Cody v. United States*, 460 F.2d 34, 37 (8th Cir. 1972); *United States v. Donofrio*, 450 F.2d 1054, 1056 (5th Cir. 1971) (statute regulating "guns in the hands of those previously convicted of felonies" was not bill of attainder because it was "designed to accomplish a legitimate governmental purpose" other than punishment for the past commission of a felony for which a sentence had already been served); *United States v. Davis*, 27 F. App'x 592, 600 (6th Cir. 2001) (unpublished) ("[Section] 922(g)(1) does not punish individuals solely because of their status as felons. Rather, the statute seeks to impose punishment upon individuals who have been adjudicated in a court of law as dangerous *and* who have taken the additional step of increasing the risk of violence to society in general by possessing firearms.")

This Court agrees with those that have addressed the issue. Felon-in-possession prohibitions "are reasonably calculated to achieve a nonpunitive public purpose, i.e., to keep firearms out of the hands of persons who, having been [convicted of] felonies, may have a somewhat greater likelihood than other citizens to misuse firearms." *Munsterman*, 177 F.3d at 1142 (holding that federal law prohibiting individuals under indictment from possessing firearms are not bills of attainder) (internal quotation marks omitted).

Therefore, the statutes challenged by Plaintiff in Claims 2, 3, and 4 are not bills of attainder.

Plaintiff also asserts that felon-in-possession statutes are unconstitutional as ex post facto laws. *See* U.S. Const., Art. I, § 9, cl. 3; Art. I, § 10, cl. 1. The ex post facto provisions of the Constitution forbid Congress and the States from passing (1) any law "that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action"; (2) any law "that aggravates a crime, or makes it greater than it was, when committed"; (3) any law "that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed"; or (4) any law "that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender." *Collins v. Youngblood*, 497 U.S. 37, 42 (internal quotation marks, citation, and emphasis omitted). To constitute an ex post facto violation, the challenged law "must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it." *Weaver v. Graham*, 450 U.S. 24, 29 (1981) (footnote omitted).

However, if a law "is a bona fide regulation of conduct which the legislature has power to regulate," the law is not an unconstitutional ex post facto law "even though the right to engage in the conduct" depends on past behavior, such as the commission of a felony. *United States v. Huss*, 7 F.3d 1444, 1447 (9th Cir. 1993) (internal quotation marks omitted), *overruled on other grounds by United States v. Sanchez-Rodriguez*, 161 F.3d 556 (9th Cir. 1998) (en banc). "However, a legislature may not insulate itself from an ex

post facto challenge simply by asserting that a statute's purpose is to regulate present conduct rather than punish prior conduct. The overall design and effect of the statute must bear out the non-punitive intent." *Id.* at 1447-48.

The Court concludes that the challenged felon-in-possession prohibitions are not ex post facto laws because the relevant past conduct—committing a felony—"can reasonably be said to indicate unfitness to engage in the future activity of possessing firearms," and, therefore, shows that the legislatures' respective intents were "to provide for the safety of [their] citizens by restricting firearms possession from those likely to engage in dangerous conduct." *Id.* at 1448. Plaintiff's ex post facto challenges are implausible because the felon-in-possession bar "does not impose punishment for prior crimes, but rather furthers the substantial and legitimate safety interest in preventing the misuse of firearms." *Id.*

Plaintiff also claims that stripping convicted felons of their right to bear arms unlawfully strips them of their citizenship, making them aliens or slaves in their country of origin in violation of the Thirteenth Amendment. Plaintiff also alleges that the punishment of preventing felons from possessing firearms after they their complete sentences is the equivalent of slavery. These claims are frivolous and require no additional discussion.

Finally, Plaintiff alleges that the Fifteenth Amendment—which guarantees the right to vote regardless of race, color, or previous condition of servitude—also prohibits laws barring felons from possessing firearms. Because this claim appears to be based on the false premise that having been convicted of a felony, or being prohibited from

possessing a firearm, constitutes a "condition of servitude," it is frivolous. To the extent that this claim is based on any other premise, it will be addressed below along with Claim 6, Plaintiff's other felon-disenfranchisement claim.

### *C. Claim 5: Idaho Code §§ 18-310 and 18-3302*

Plaintiff's fifth claim challenges two Idaho statutes. (Dkt. 57 at 8-9.) Idaho Code § 18-310 governs the restoration of civil rights following incarceration; it also excludes individuals convicted of certain crimes from having their right to possess a firearm restored. Section 18-3302 governs concealed-carry licenses and excludes convicted felons from eligibility for such licenses.

Plaintiff appears to challenge the provisions of these statutes that prohibit him, as a felon convicted of a disqualifying crime, from having his firearms rights restored or from obtaining a concealed-carry license. These claims are implausible for the same reasons identified above with respect to Plaintiff's challenges to the federal felon-in-possession prohibition. The claims are also implausible for the additional reason that the federal defendants are not tasked with enforcing state statutes.

### *D. Claim 6: Felon Disenfranchisement*

Plaintiff's sixth claim challenges Idaho constitutional and statutory provisions disqualifying felons from voting unless their rights have been restored. *See* Idaho Const., Art. 6, § 3; Idaho Code § 34-403. However, the United States Supreme Court has held that states may permanently disenfranchise convicted felons—even those who, unlike Plaintiff, have fully served their sentences—without violating the Constitution.

*Richardson v. Ramirez*, 418 U.S. 24, 56 (1974). Therefore, Plaintiff's felon-disenfranchisement claims are implausible.

### *E. Claim 7:* Heck v. Humphrey *Disclaimer*

Plaintiff's seventh "claim" is not an actual claim at all. Rather, it is a denial that this lawsuit is designed to challenge Plaintiff's convictions or sentences; it also includes additional argument in support of Plaintiff's other claims. (Dkt. 57 at 9-13.) As such, this "claim" need not be separately addressed.

### *F. Claims 8 and 9: Sneak-and-Peek Warrants and Investigatory Detention*

Finally, Plaintiff challenges, on various grounds, a portion of the PATRIOT Act allowing "sneak-and-peek" warrants, as well as a federal law providing for investigative detention. (Dkt. 57 at 14-15.) However, Plaintiff does not even attempt to allege that he, as opposed to some other unnamed individual, was actually subjected to the official action permitted by these statutes. Therefore, the Amended Complaint does not allege a plausible claim of a violation of Plaintiff's constitutional rights.[2]

## 4. Conclusion

Although pro se pleadings must be liberally construed, "a liberal interpretation of a civil rights complaint may not supply essential elements of the claim that were not initially pled." *Ivey v. Bd. of Regents of Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir.

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[2] Part of Claim 9 also appears to challenge the ability of a prison to place an inmate on work detail. To the extent Plaintiff actually has been assigned to such a work detail, he still has not stated a constitutional claim. *Draper v. Rhay*, 315 F.2d 193, 197 (9th Cir. 1963) ("Where a person is duly tried, convicted, sentenced and imprisoned for crime in accordance with law, no issue of peonage or involuntary servitude arises. The Thirteenth Amendment has no application where a person is held to answer for a violation of a penal statute. It follows, therefore, that whether appellant is being held in the state penitentiary or the county jail, he may be required to work in accordance with institution rules.") (internal citations omitted).

1982). Because Plaintiff has already been given the opportunity to amend and yet has not stated a plausible claim for relief, the Court will dismiss the Amended Complaint with prejudice and without further leave to amend. *See Knapp v. Hogan*, 738 F.3d 1106, 1110 (9th Cir. 2013) ("When a litigant knowingly and repeatedly refuses to conform his pleadings to the requirements of the Federal Rules, it is reasonable to conclude that the litigant simply *cannot* state a claim.").

**ORDER**

**IT IS ORDERED:**

1. The Amended Complaint fails to state a claim upon which relief may be granted. Therefore, this entire case is DISMISSED with prejudice pursuant to 28 U.S.C. §§ 1915(e)(2)(B)(ii) & 1915A(b)(1).
2. Plaintiff's Motion for Court to Render Decision in Plaintiff's Favor for Failure of Response (Dkt. 59) is DENIED.
3. Plaintiff's Motion for Fed. R. Civ. P. 55, 56 Default Judgment Summary Judgment (Dkt. 60) is DENIED.

DATED: November 30, 2018

B. Lynn Winmill
Chief U.S. District Court Judge

NOT FOR PUBLICATION

FILED

JUL 18 2017

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| JOHNNY R. ANDOE,<br><br>Plaintiff-Appellant,<br><br>v.<br><br>DONALD J. TRUMP*, President; et al.,<br><br>Defendants-Appellees. | No. 17-35178<br><br>D.C. No. 1:16-cv-00395-REB<br><br>MEMORANDUM** |

Appeal from the United States District Court
for the District of Idaho
Ronald E. Bush, Magistrate Judge, Presiding***

Submitted July 11, 2017****

Before: CANBY, KOZINSKI, and HAWKINS, Circuit Judges.

Johnny R. Andoe, an Idaho state prisoner, appeals pro se from the district court's judgment dismissing his action brought under *Bivens v. Six Unknown*

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* Donald J. Trump has been substituted for his predecessor, Barack Obama, as President of the United States under Fed R. App. P. 43(c)(2).

** This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

*** Andoe consented to proceed before a magistrate judge. *See* 28 U.S.C. § 636(c).

**** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), challenging the constitutionality of various federal and state laws. We have jurisdiction under 28 U.S.C. § 1291. We review de novo. *Hamilton v. Brown*, 630 F.3d 889, 892 (9th Cir. 2011) (dismissal under 28 U.S.C. § 1915A); *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (order) (dismissal under 28 U.S.C. § 1915(e)(2)(B)(ii)). We reverse and remand.

The district court dismissed Andoe's action on the basis that it was barred by *Heck v. Humphrey*, 512 U.S. 477 (1994). However, we note that none of the statutes cited in the complaint are relevant to Andoe's criminal conviction or term of confinement. Thus, success on the merits of Andoe's constitutional challenge would not necessarily imply the invalidity of his conviction or sentence. *See id.* at 487 (explaining that if "a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence . . . the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated"). We reverse the judgment, and remand for the district court to consider the merits of Andoe's claims in the first instance, and to determine whether leave to amend would be appropriate. *See Lucas v. Dep't of Corr.*, 66 F.3d 245, 248 (9th Cir. 1995) ("[A] pro se litigant is entitled to notice of

the complaint's deficiencies and an opportunity to amend prior to dismissal of the action.").

**REVERSED and REMANDED.**

Additional material from this filing is available in the Clerk's Office.