

United States District Court
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MARK AARON HAYNIE, BRENDAN JOHN RICHARDS, THE CALGUNS FOUNDATION, INC. and THE SECOND AMENDMENT FOUNDATION, INC.

No. C 10-1255 SI and No. CV 11-2493 SI

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS AND GRANTING LEAVE TO AMEND

Plaintiffs,

v.

KAMALA HARRIS, ATTORNEY GENERAL OF CALIFORNIA and CALIFORNIA DEPARTMENT OF JUSTICE

Defendants.

Now before the Court is defendants' motion to dismiss plaintiffs' claims for prospective injunctive and declaratory relief in *Haynie v. Harris* and *Richards v. Harris*. In both cases, plaintiffs seek, *inter alia*, an order compelling the defendant California Department of Justice to issue appropriate memorandums and/or bulletins to the State's District Attorneys and law enforcement agencies to prevent wrongful arrests. For the reasons set forth below, the Court GRANTS defendants' motion to dismiss those claims for declaratory and prospective injunctive relief, and GRANTS plaintiffs leave to amend.

BACKGROUND

Plaintiffs Mark Aaron Haynie and Brendan John Richards filed separate lawsuits against California Attorney General Kamala Harris and the California Department of Justice ("DOJ") alleging that they were wrongfully arrested for lawful possession of certain weapons that were mistakenly identified by California law enforcement officials as assault weapons under the California Assault

1 Weapons Control Act (“AWCA”), Cal. Penal Code §§ 12275-12290. Both plaintiffs claim that, because
2 the DOJ will not issue a bulletin clarifying that weapons with a “bullet button” are legal to possess, they
3 fear similar wrongful arrests in the future. Haynie FAC (hereinafter “FAC”) ¶ 45; Richards Compl.
4 (hereinafter “Compl.”) ¶ 52. The Calguns Foundation and the Second Amendment Foundation are also
5 plaintiffs in both suits. The Calguns Foundation is a “non-profit organization” which “support[s] the
6 California firearms community by promoting education . . . about California and federal firearms laws,
7 rights and privileges, and defend[s] and protect[s] the civil rights of California gun owners.” FAC ¶ 3.
8 The purposes of the Second Amendment Foundation, a “non-profit membership organization,” include
9 “education, research, publishing and legal action focusing on the Constitutional right to privately owned
10 [sic] and possess firearms, and the consequences of gun control.” *Id.* ¶ 4. The Calguns Foundation
11 contributed funds for Haynie’s and Richards’ legal representation during their criminal proceedings.
12 FAC ¶¶ 3, 23; Compl. ¶ 39.

13
14 **I. Haynie**

15 Plaintiff Mark Aaron Haynie was arrested by officers of the Pleasanton Police Department on
16 February 7, 2009 for possession of an assault weapon under California Penal Code § 12280 *et seq.* FAC
17 ¶ 12. Haynie paid \$6,000 to a bail bondsman. *Id.* ¶ 13. Haynie’s rifle had a “bullet button” which
18 makes the magazine of the rifle non-detachable. *Id.* ¶ 15. His rifle was not listed in California Penal
19 Code § 12276 and could not be identified under Penal Code § 12276.1, the sections of the AWCA which
20 define “assault weapon.” *Id.* ¶¶ 14-15. The Alameda County District Attorney’s Office declined to file
21 an information against Haynie, and the matter was dropped from the Alameda County Superior Court
22 Criminal Docket on March 27, 2009. *Id.* ¶ 18. Haynie was released on that same date. *Id.* ¶ 19. Haynie
23 obtained a finding of factual innocence under California Penal Code § 851.8 on October 21, 2009. *Id.*
24 ¶ 22. The Calguns Foundation paid for Haynie’s legal representation. *Id.* ¶ 23.

25 Haynie originally brought suit against the City of Pleasanton, the City of Pleasanton Police
26 Department, and Doe defendants seeking damages, but the City and police department were dismissed
27 from the case after payment to Haynie of \$6,000 and a release of all other claims. *Id.* ¶ 25. Haynie
28 alleges that the DOJ is the state agency responsible for the training and education of law enforcement

1 agencies with respect to assault weapons, and that because the DOJ will not issue a statewide bulletin
2 regarding the bullet button, he “has a reasonable fear that he may suffer wrongful arrests in the future.”
3 *Id.* ¶¶ 26, 33, 35. Haynie also alleges that it would “not be unduly burdensome” for the DOJ to issue
4 a bulletin “regarding the technology of the bullet button and to develop a field test to insure state-wide
5 compliance with the law.” *Id.* ¶ 34.

6 In *Haynie*, plaintiffs seek (1) prospective injunctive relief under 42 U.S.C. § 1983 to prevent
7 future violations of Fourth Amendment rights; (2) prospective injunctive relief under 42 U.S.C. § 1983
8 to prevent future violations of Second Amendment rights; and (3) prospective injunctive relief requiring
9 the DOJ and Harris to comply with their duties under California Penal Code §§ 12276.5 and 12289.
10 FAC ¶¶ 37-44. Specifically, plaintiffs request that the Court issue a “declaratory judgment and/or
11 prospective injunctive relief” to compel Harris and the DOJ to “issue appropriate memorandums and/or
12 bulletins [regarding the bullet button] to the State’s District Attorneys and Law Enforcement Agencies
13 to prevent wrongful arrests.” FAC ¶ 45(A).

14
15 **II. Richards**

16 Plaintiff Brendan John Richards was arrested by Rohnert Park police officer Dean Becker on
17 May 20, 2010 for possession of an unregistered assault weapon under California Penal Code § 12280(b).
18 Richards Compl. ¶¶ 17, 27. Officer Becker also seized two pistols and one rifle from Richards on that
19 day. *Id.* ¶ 18. Richards spent six days in jail and was released after paying a \$1,400 non-refundable fee
20 to a bondsman. *Id.* ¶ 29. The Calguns Foundation paid approximately \$11,000 for Richards’ legal
21 representation. *Id.* ¶ 39. On September 9, 2010, the Sonoma County District Attorney’s Office
22 dismissed all charges against Richards. *Id.* ¶ 30. The dismissal was based on a report by the DOJ
23 Bureau of Forensic Services finding that none of the firearms confiscated from Richards were assault
24 weapons as defined by the California Penal Code or California regulations. *Id.* ¶ 31. One of the
25 firearms deemed to not be an assault weapon under the Penal Code “had a properly installed bullet
26 button, thus rendering the firearm incapable of accepting a detachable magazine that could only be
27 removed from the gun by the use of a tool.” *Id.* ¶ 31(a).

28 Richards’ claim for relief is broader than Haynie’s claim. Richards claims that because the DOJ

1 will not issue a bulletin to prevent future arrests, California Penal Code § 12276.1 is unconstitutionally
2 vague as it was applied to Richards, and Richards has a “continuing reasonable fear that he may suffer
3 wrongful arrests in the future.” *Id.* ¶ 51. Richards and the associational plaintiffs seek (1) a declaratory
4 judgment and/or injunctive relief that California Penal Code § 12276.1 is unconstitutional; (2) a
5 declaratory judgment and/or injunctive relief that California Penal Code § 12031(e) is unconstitutional
6 because “[m]ere possession of a firearm, . . . , when otherwise lawful, cannot support a finding of
7 probable cause to believe a crime has been committed, such that the Fourth Amendment’s warrant
8 requirement can be legislatively disregarded”; (3) a declaratory judgment and/or prospective injunctive
9 relief to compel Harris and the DOJ to “issue appropriate memorandums and/or bulletins to the State’s
10 District Attorneys and Law Enforcement Agencies to prevent wrongful arrests”; (4) injunctive relief
11 against the City of Rohnert Park and Officer Becker requiring amendments to policies and training to
12 address identification of assault weapons under California law and compliance with the Fourth
13 Amendment’s requirements for lawful searches; and (5) damages from the City of Rohnert Park and
14 Officer Becker. *See id.* ¶¶ 53-67.

15 On June 20, 2011, plaintiffs and defendants Harris and DOJ filed a stipulation and proposed
16 order consolidating *Haynie v. Harris* and *Richards v. Harris*. The parties stipulated that “[b]oth *Haynie*
17 and *Richards* present the same legal issues regarding California’s Assault Weapons Control Act and the
18 Department of Justice’s role in enforcing it.” Docket No. 38 in CV 10-1255 p. 2. The parties also
19 stipulated that “the legal defenses raised by the State Defendants in their Motion to Dismiss in the
20 *Haynie* matter are identical to those they would raise in a Motion to Dismiss in *Richards*, namely,
21 standing and subject matter jurisdiction.” *Id.* The parties further stipulated that the opposition and reply
22 in both *Haynie* and *Richards* would be “substantially identical” and that the facts alleged in the *Haynie*
23 FAC and the *Richards* Complaint “can be used to support arguments in either or both cases.” *Id.* On
24 June 21, 2011, the Court entered the stipulation and ordered the cases consolidated for hearing, pursuant
25 to Federal Rule of Civil Procedure 42(a). The pending motion to dismiss pertains only to plaintiffs’
26 claims against Harris and the DOJ.

1
2 **LEGAL STANDARDS**

3 **I. Federal Rule of Civil Procedure 12(b)(1)**

4 Federal Rule of Civil Procedure 12(b)(1) allows a party to challenge a federal court’s jurisdiction
5 over the subject matter of the complaint. *See* Fed. R. Civ. Pro. 12(b)(1). The party invoking the
6 jurisdiction of the federal court bears the burden of establishing that the court has the requisite subject
7 matter jurisdiction to grant the relief requested. *See Kokkonen v. Guardian Life Ins. Co. of America*, 511
8 U.S. 375, 377 (1994) (citation omitted). “In resolving a Rule 12(b)(1) factual attack on jurisdiction, the
9 district court may review evidence beyond the complaint without converting the motion to dismiss into
10 a motion for summary judgment.” *In re. Digimarc Corp. Derivative Litigation*, 549 F.3d 1223, 1236
11 (9th Cir. 2008) (citation omitted). A complaint will be dismissed if, looking at the complaint as a whole,
12 it appears to lack federal jurisdiction either “facially” or “factually.” *Thornhill Pub’g Co., Inc. v.*
13 *General Tel. & Elecs. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979). When the complaint is challenged for
14 lack of subject matter jurisdiction on its face, all material allegations in the complaint will be taken as
15 true and construed in the light most favorable to the plaintiff. *NL Indus. v. Kaplan*, 792 F.2d 896, 898
16 (9th Cir. 1986). In deciding a Rule 12(b)(1) motion which mounts a factual attack on jurisdiction, “no
17 presumption of truthfulness attaches to plaintiff’s allegations, and the existence of disputed material facts
18 will not preclude the trial court from evaluating for itself the merits of jurisdictional claims. Moreover,
19 the plaintiff will have the burden of proof that jurisdiction does in fact exist.” *Mortensen v. First Fed.*
20 *Savings & Loan Ass’n*, 549 F.2d 884, 891 (3d Cir. 1977).

21 **II. Federal Rule of Civil Procedure 12(b)(6)**

22 Under Federal Rule of Civil Procedure 12(b)(6), a district court must dismiss a complaint if it
23 fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). The question presented
24 by a motion to dismiss is not whether the plaintiff will prevail in the action, but whether the plaintiff is
25 entitled to offer evidence in support of the claim. *See Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974),
26 *overruled on other grounds by Davis v. Scherer*, 468 U.S. 183 (1984). Dismissal of a complaint may
27 be based “on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a
28 cognizable legal theory.” *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990). In

1 answering this question, the Court must assume that the plaintiff's allegations are true and must draw
2 all reasonable inferences in the plaintiff's favor. *See Usher v. City of Los Angeles*, 828 F.2d 556, 561
3 (9th Cir. 1987).

4 5 DISCUSSION

6 Defendants move to dismiss plaintiffs' claims for an order compelling the defendant California
7 Department of Justice to issue appropriate memorandums and/or bulletins to the State's District
8 Attorneys and law enforcement agencies to prevent wrongful arrests, arguing that plaintiffs do not meet
9 either of the required components of standing for prospective equitable relief.¹ Defendants contend that
10 plaintiffs (1) do not demonstrate a credible threat of future injury which is sufficiently concrete and
11 particularized to meet the case or controversy requirement of Article III and (2) do not demonstrate an
12 imminent threat of irreparable harm, a separate jurisdictional requirement plaintiffs must meet when
13 seeking equitable relief. In addition, defendants argue that plaintiffs' failure to establish a likelihood
14 of imminent injury requires dismissal of their related declaratory relief claim because plaintiffs must
15 establish a likelihood of imminent injury in order to present a ripe claim for declaratory relief.
16 Defendants also argue that plaintiffs fail to allege facts sufficient to justify injunctive relief against a
17 state official.

18 The DOJ has published an Assault Weapons Identification Guide indicating that weapons where
19 a tool, such as a bullet, is needed to remove the magazine, the weapon is not considered a banned gun
20 due to its detachable magazine. Defs' Mot. at 1. However, both Haynie and Richards claim that,
21 because the DOJ will not issue a bulletin specifically regarding the technology of the bullet button, they
22 have a reasonable fear that they may be wrongfully arrested in the future. FAC ¶ 35; Compl. ¶ 51. The
23 Calguns Foundation and the Second Amendment Foundation also claim that because the DOJ will not
24 issue a bulletin, they fear that their members will be subject to wrongful arrests. FAC ¶ 36; Compl. ¶ 52.

25
26 ¹ Defendants' motion does not contend that the *Richards* plaintiffs lack standing to challenge
27 the constitutionality of the statute, and those claims are not addressed in or affected by this order.
28 Instead, defendants' motion is more narrowly focused on whether plaintiffs in both cases have standing
to seek prospective injunctive relief in the form of an order compelling the defendant California
Department of Justice to issue appropriate memorandums and/or bulletins to the State's District
Attorneys and law enforcement agencies to prevent wrongful arrests.

1 Plaintiffs' opposition to defendants' motion does not address any of defendants' arguments about
2 standing to seek the prospective injunctive relief at issue. Rather, plaintiffs assert that the DOJ is
3 simultaneously advising California residents that possession of certain semi-automatic firearms is legal
4 and warning that any of the State's District Attorneys may come to a different conclusion and prosecute
5 them for possession of the firearms, resulting in "the chilling of a fundamental right." Pls' Opp'n at 1-2.
6 Plaintiffs claim that there have been "a half-dozen cases, related to bullet buttons or magazine locks, in
7 which Calguns Foundation Inc., assisted in the defense of people wrongfully accused of possessing legal
8 firearms." *Id.* One of the cases cited is *Richards*. *Id.* Plaintiffs argue that the Court has federal
9 question jurisdiction because they are seeking to vindicate a constitutional right. They assert that there
10 is confusion in the law enforcement community about the definition of detachable magazines and it is
11 therefore not unreasonable for Haynie, the Calguns Foundation, and the Second Amendment Foundation
12 to claim that there is a real threat of future illegal seizures of firearms. Plaintiffs set out "four separate
13 theories for injunctive relief," including alleged duties of defendants Harris and the DOJ to carry out
14 certain sections of the California Penal Code, provide training and outreach to law enforcement, avoid
15 filing of criminal charges not supported by probable cause and prevent wrongful arrests, and to "clear
16 up the confusion" about the AWCA. *Id.* at ¶. 9-10.

17 Calguns Foundation Chairman Gene Hoffman also filed a declaration in opposition to the motion
18 to dismiss. Attached to the declaration are seven letters from 2005 and 2006 on DOJ letterhead which
19 he claims "all follow a similar pattern of declaring a certain gun part (receiver) legal to import into
20 California and then warning the recipient that California's 58 District Attorneys may have a different
21 opinion that could result in prosecution." Hoffman Decl. ¶ 6; *see* Ex. A. Hoffman also attaches DOJ
22 notices which he claims contradict the California Penal Code, California regulations, and the DOJ's
23 Assault Weapons Identification Guide – which he says do not require permanent alteration of weapons
24 – because the notices "stat[e] that owners of a firearm with features had to, 'permanently alter the
25 firearm so that it cannot accept a detachable magazine.'" Hoffman Decl. ¶ 7 & Ex. B. The notices were
26 posted on the DOJ's website and detail the Department's policy regarding series-style weapons not
27 identified as assault weapons by the Department. *See id.* Ex. B. Hoffman attaches several other DOJ
28 and Office of Administrative Law (OAL) communications, including a DOJ e-mail, internal memo to

1 phone staff, Notice of Proposed Rulemaking, “Text of Modified Regulations,” 2008 letters from DOJ
2 indicating an inability to declare weapons with bullet buttons legal or illegal, and a 2007 letter from
3 OAL indicating suspension of its review of DOJ regulations, which Hoffman claims demonstrate
4 misinformation, confusion, and uncertainty about the legality of weapons with a bullet button. Hoffman
5 Decl. ¶¶ 8-18 & Ex. C, D, E, F, G, H, I, J, K. Finally, Hoffman documents six incidents, including
6 Richards’ experience, in which the Calguns Foundation defended alleged wrongful arrests, charges, or
7 seizure of weapons under the AWCA. *See* Hoffman Decl. ¶ 20.

8 Defendants respond, *inter alia*, that it is appropriate for the Attorney General’s staff to express
9 an informed opinion about the legality of certain weapons while warning the public that other
10 prosecutors may disagree. Defendants note that the DOJ letters from 2005 and 2006 attached to
11 Hoffman’s declaration “explicitly state they are expressing ‘an opinion’ about the legality of certain
12 weapons” and that the opinions of Attorneys General are not binding on the courts. *Id.* & Letter from
13 Alison Merrilees to Amanda Sitar (Dec. 12, 2005) in Ex. A; *see also Lucas v. Board of Trustees*, 18 Cal.
14 App. 3d 988, 991-92 (1971) (“The opinions of the Attorney General, of course, are not binding upon
15 the courts. They are, however, entitled to much weight.”) (internal citation omitted). Defendants also
16 cite Ninth Circuit case law indicating that the Attorney General does not have complete control over
17 District Attorneys in support of their argument that DOJ letters that express an opinion about the legality
18 of certain weapons but warn the public that other prosecutors may disagree are appropriate. *See*
19 *Brewster v. Shasta County*, 275 F.3d 803, 809 (9th Cir. 2001) (holding that the “general law
20 enforcement authority” provided to the Attorney General by Article 5, § 13 of the California
21 Constitution “‘does not contemplate absolute control and direction’ of the officials subject to the
22 Attorney General’s supervision.”) (internal citation omitted).

23

24 **I. Haynie and Richards lack standing to seek an order compelling DOJ to issue a**
25 **memorandum to prevent wrongful arrests**

26 The Constitution of the United States limits the jurisdiction of federal courts to “Cases” and
27 “Controversies.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559 (1992). Standing is an essential and
28 unchanging part of the case-or-controversy requirement of Article III. *Id.* at 560 (citation omitted).

1 Before a federal court can consider the merits of a legal claim, the party seeking to invoke the
2 jurisdiction of the court must establish the requisite standing to sue. *Whitmore v. Arkansas*, 495 U.S.
3 149, 154 (1990). The threshold inquiry into standing “in no way depends on the merits of the
4 [petitioner’s] contention that particular conduct is illegal” *Id.* at 155.

5 Over the years, Supreme Court cases have established that:

6 the irreducible constitutional minimum of standing contains three elements. First, the
7 plaintiff must have suffered an injury in fact – an invasion of a legally protected interest
8 which is (a) concrete and particularized and (b) actual or imminent, not conjectural or
9 hypothetical. Second, there must be a causal connection between the injury and the
10 conduct complained of -- the injury has to be fairly . . . trace[able] to the challenged
11 action of the defendant, and not . . . the result [of] the independent action of some third
12 party not before the court. Third, it must be likely, as opposed to merely speculative,
13 that the injury will be redressed by a favorable decision.

14 *Lujan*, 504 U.S. at 560-61 (internal citations and quotations omitted).

15 “The party invoking federal jurisdiction bears the burden of establishing these elements.” *Id.*
16 at 561. Each element “must be supported in the same way as any other matter on which the plaintiff
17 bears the burden of proof, i.e. with the manner and degree of evidence required at the successive stages
18 of the litigation.” *Id.* (internal citations omitted). “At the pleading stage, general factual allegations of
19 injury resulting from the defendant’s conduct may suffice,” for on a motion to dismiss, courts “presume
20 that general allegations embrace those specific facts that are necessary to support the claim.” *Id.*
21 (internal citations omitted). Plaintiffs seeking equitable relief must also show “irreparable injury, a
22 requirement that cannot be met where there is no showing of any real or immediate threat that the
23 plaintiff will be wronged again – a ‘likelihood of substantial and immediate irreparable injury.’” *City*
24 *of Los Angeles v. Lyons*, 461 U.S. 95, 111 (internal citation omitted).

25 Defendants rely primarily on *City of Los Angeles v. Lyons* to argue that plaintiffs lack standing
26 to seek the prospective injunctive relief at issue. In *Lyons*, the Supreme Court considered a complaint
27 seeking damages and injunctive and declaratory relief against the City of Los Angeles and four of its
28 police officers. The plaintiff had been placed in a chokehold by Los Angeles police after being stopped
for a vehicle code violation. *Id.* at 97-98. Lyons sought a preliminary and permanent injunction against
the city barring the use of the chokeholds. *Id.* at 98. Lyons alleged that, pursuant to the authorization
of the City, Los Angeles police officers “regularly and routinely” applied the challenged chokeholds

1 in “innumerable situations”; that “numerous” people had been injured as a result of the use of the
2 chokeholds; that he and other people were threatened with irreparable injury in the form of bodily injury
3 and death; and that he justifiably feared that any contact with Los Angeles police might result in him
4 being “choked and strangled to death without provocation, justification, or other legal excuse.” *Id.* at
5 98 (quoting Lyons’ complaint).

6 The Court found that Lyons had a claim for damages that appeared to meet all the Article III
7 standing requirements, but held that he did not meet the standard for seeking equitable relief in federal
8 court because there was no showing of any real or immediate threat that he would be wronged again.
9 “The equitable remedy is unavailable absent a showing of irreparable injury, a requirement that cannot
10 be met where there is no showing of any real or immediate threat that the plaintiff will be wronged again
11” *Id.* at 111. The Court reiterated a previous holding that “[p]ast exposure to illegal conduct does
12 not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any
13 continuing, present adverse effects.” *Id.* at 102 (internal citation and quotation marks omitted). The
14 Court stated that the allegations in the complaint that police in Los Angeles “routinely” applied the
15 chokeholds without provocation or other justification fell “far short” of the allegations that would be
16 necessary to establish a case or controversy between the parties. *Id.* at 105. In order to establish an
17 actual case or controversy, the Court stated that Lyons would “have had not only to allege that he would
18 have another encounter with police but also to make the incredible assertion either (1) that *all* police
19 officers in Los Angeles *always* choke any citizen with whom they happen to have an encounter . . . , or
20 (2) that the City ordered or authorized police officers to act in such manner.” *Id.* at 105-06 (emphasis
21 in original). The Court held that even though there may inevitably be “certain instances” in which
22 strangleholds will be illegally applied and injury and death unconstitutionally inflicted on the victim,
23 it was no more than “conjecture” to suggest that in every encounter between the police and a citizen,
24 the police would act unconstitutionally and inflict injury without provocation or legal excuse, and it was
25 “no more than speculation” to claim that Lyons himself would have a similar encounter with police in
26 the future. *Id.* at 108. “If Lyons has made no showing that he is realistically threatened by a repetition
27 of his experience of October 1976, then he has not met the requirements for seeking an injunction in a
28 federal court” *Id.* at 109. Because of the “speculative nature of Lyons’ claim of future injury,” the

1 prerequisite showing of “a ‘likelihood of substantial and immediate irreparable injury’” for equitable
2 relief was not fulfilled, and he did not have standing to seek an injunction in federal court. *Id.* at 111.

3 Under *Lyons*, plaintiffs’ allegations that they fear future wrongful arrests do not demonstrate a
4 case or controversy and fail to establish standing to seek an order compelling DOJ to issue a
5 memorandum to prevent wrongful arrests. *Lyons* holds that past exposure to illegal conduct without any
6 continuing, current adverse effects is not enough to show a case or controversy for injunctive relief, and
7 that even allegation of routine misconduct is not sufficient. *See Lyons*, 461 U.S. at 102, 105. Under the
8 *Lyons* standard, to show a real and immediate threat and demonstrate a case or controversy, Haynie and
9 Richards would have to allege either that *all* law enforcement officers in California *always* arrest any
10 citizen they come into contact with who is lawfully in possession of a weapon with a bullet button, or
11 that the DOJ has ordered or authorized California law enforcement officials to act in such a manner. *See*
12 *id.* at 105-06.

13 Plaintiffs’ opposition does not address any of defendants’ arguments about standing, nor do
14 plaintiffs attempt to distinguish *Lyons*. While detailing the past conduct of California law enforcement
15 officials, neither Haynie nor Richards alleges that he has had any similar experiences since the incidents
16 of February 7, 2009 and May 10, 2010, respectively, or that he has had any further contact with law
17 enforcement officers which would demonstrate continuing, present adverse effects. Similarly, plaintiffs’
18 assertion that there are “a half-dozen cases, related to bullet buttons or magazine locks, in which
19 Calguns Foundation Inc., assisted in the defense of people wrongfully accused of possessing legal
20 firearms,” does not amount to an allegation that *all* law enforcement officers in California *always*
21 wrongly arrest any citizen with whom they come into contact who is lawfully in possession of a weapon
22 with a bullet button. *See* Pls’ Opp’n ¶ 4(f).

23 Similarly, neither Haynie nor Richards alleges that Harris or the DOJ has ordered or authorized
24 California law enforcement officers to arrest people in lawful possession of firearms with bullet buttons.
25 Plaintiffs’ claims that the “DOJ has been simultaneously advising residents of California that their
26 possession of certain semi-automatic firearms is legal, while at the same time warning them that any one
27 of the 58 of the State’s District Attorneys might come to a different conclusion and prosecute them for
28 ownership/possession of these same firearms,” and that there is a “general state of confusion in the law

1 enforcement community about the definition of detachable magazines,”² is not tantamount to an
2 allegation that DOJ has ordered law enforcement officials to arrest citizens lawfully in possession of
3 weapons with bullet buttons.

4 Plaintiffs also fail to demonstrate a likelihood of substantial and immediate irreparable injury,
5 a prerequisite for the type of equitable relief sought. As in *Lyons*, where the individual alleging that
6 he had been choked by police five months earlier did “nothing to establish a real and immediate threat
7 that he would again” be stopped for a traffic violation or any other offense and subjected to the same
8 treatment, plaintiffs’ complaints do not establish a real and immediate threat that they will again have
9 an encounter with law enforcement officers who will wrongfully arrest them for lawful possession of
10 guns with a bullet button. Just as it was “no more than speculation” for *Lyons* to claim he would have
11 a similar encounter with police in the future, it is no more than speculation for Haynie and Richards to
12 claim that they will have future encounters with law enforcement officers similar to their previous
13 experiences. See *Lyons*, 461 U.S. at 108. These speculative claims do not show a likelihood of
14 substantial and immediate irreparable injury. See *id.* at 111. Because Haynie and Richards do not
15 demonstrate that they are “realistically threatened by a repetition” of their experiences, *Lyons*, 461 U.S.
16 at 109, they do not meet the requirements for standing to seek an order compelling DOJ to issue a
17 directive to prevent wrongful arrests. Accordingly, the Court GRANTS defendants’ motion to dismiss
18 plaintiffs’ claims seeking such relief.

19
20 **II. The Calguns Foundation and the Second Amendment Foundation lack associational**
21 **standing to sue Harris and the DOJ for the injunctive relief at issue**

22 Associations have standing to sue on behalf of their members “only if (a) their members would
23 otherwise have standing to sue in their own right; (b) the interests that the organizations seek to protect
24 are germane to their purpose; and (c) neither the claim asserted nor the relief requested requires the
25 participation of individual members in the lawsuit.” *San Diego Cnty. Gun Rights Comm. v. Reno*, 98
26 F.3d 1121, 1130-31 (9th Cir. 1996) (citing *Hunt v. Washington State Apple Advertising Comm’n*, 432
27 U.S. 333, 343 (1977), superseded in part by statute as stated in *United Food & Commer. Workers Union*

28

² Pls’ Opp’n at 1-2, 7.

1 *Local 751 v. Brown Group*, 517 U.S. 544 (1996)).

2 Because associations have standing to sue on behalf of their members “only if . . . their members
3 would otherwise have standing to sue in their own right . . .” and because, for the reasons discussed
4 above, Richards and Haynie fail to establish a case or controversy giving them standing to sue the
5 Attorney General and DOJ for injunctive relief, it appears at this time that the Calguns Foundation and
6 the Second Amendment Foundation similarly do not have standing to seek injunctive relief against
7 Harris and the DOJ in this Court.³ See *San Diego Cnty. Gun Rights Comm.*, 98 F.3d at 1130-31.
8 Accordingly, the Court dismisses the associational plaintiffs’ claims seeking an order compelling
9 defendants to issue a memorandum to prevent wrongful arrests.

10
11 **III. Plaintiffs’ related claims for declaratory relief are not ripe for adjudication**

12 “Ripeness doctrine protects against premature adjudication of suits in which declaratory relief
13 is sought.” *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037, 1044 (9th Cir. 1999) (internal citation
14 omitted). “In suits seeking both declaratory and injunctive relief against a defendant’s continuing
15 practices, the ripeness requirement serves the same function in limiting declaratory relief as the
16 imminent-harm requirement serves in limiting injunctive relief.” *Id.* In *Texas v. United States*, the
17 Supreme Court held that, “A claim is not ripe for adjudication if it rests upon contingent future events
18 that may not occur as anticipated, or indeed may not occur at all.” *Texas v. United States*, 523 U.S. 296,
19 300 (1998) (internal quotations omitted).

20 As discussed above, it is mere speculation that Haynie or Richards will have another encounter
21 with police and be unlawfully arrested as a result of such a hypothetical encounter. Because claims for
22 declaratory relief are not ripe for adjudication if they rest upon “contingent future events that may not
23 occur as anticipated, or indeed may not occur at all,” and because future wrongful arrests of Haynie or

24
25 ³ On August 5, 2011, plaintiffs filed a Notice of Supplemental Authority and attached *Ezell v.*
26 *City of Chicago*, 2011 U.S. App. LEXIS 14108 (7th Cir. July 6, 2011). Plaintiffs assert that this case
27 addresses “institutional standing.” Notice of Supplemental Authority p. 2. In *Ezell*, the Seventh Circuit
28 Court of Appeals held that organizational plaintiffs, including the Second Amendment Foundation, had
standing to seek a declaration that the City of Chicago’s ban on firing ranges was invalid and to seek
an injunction blocking the ban’s enforcement. However, unlike in the present case, in *Ezell* it was “clear
the individual plaintiffs have standing.” *Ezell*, U.S. App. LEXIS 14108 at *22-23 n. 7. *Ezell* does not
change the Court’s analysis of the associational plaintiffs’ lack of standing.


1 Richards may never occur or may not occur as plaintiffs “fear,” plaintiffs’ claims for declaratory relief,
2 to the extent they are concomitant with plaintiffs’ claims for injunctive relief discussed *supra*, are not
3 ripe for adjudication. *See Hodgers-Durgin*, 199 F.3d at 1044 (internal quotations and citations omitted).
4

5 **CONCLUSION**

6 For the foregoing reasons, the Court GRANTS defendants’ motion to dismiss plaintiffs’ claims
7 for prospective injunctive and declaratory relief regarding the issuance of a bulletin to prevent wrongful
8 arrests. Plaintiffs are directed to file a consolidated amended complaint by November 4, 2011. If
9 plaintiffs wish to pursue the dismissed claims for injunctive and declaratory relief, they should plead
10 facts demonstrating that they have standing to do so in the consolidated amended complaint. **The Case**
11 **Management Conference currently scheduled for November 4, 2011 is continued to January 13,**
12 **2012.**

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14 **IT IS SO ORDERED.**

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16 Dated: October 22, 2011

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19 SUSAN ILLSTON
20 United States District Judge
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