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6 UNITED STATES DISTRICT COURT
7 SOUTHERN DISTRICT OF CALIFORNIA
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9 JAMES MILLER, et al.,

10 Plaintiffs,

11 v.

12 California Attorney General Xavier
13 Becerra, et al.,

14 Defendants.

Case No.: 19-cv-1537-BEN (JLB)

**ORDER DENYING DEFENDANTS'
MOTION TO DISMISS**

15 In this challenge to California's regulation of firearms deemed to be "assault
16 weapons," Defendants move to dismiss claims about seven statutes based on Plaintiffs'
17 lack of Article III standing and for failure to state a claim for relief. Plaintiffs concede
18 and withdraw one of their claims for relief (attacking Cal. Penal Code section 30925).
19 For the reasons that follow, the remainder of the motion is denied.

20 **BACKGROUND¹**

21 Plaintiffs are a group of individuals who may lawfully possess firearms protected
22 by the Second Amendment. In addition to the individual Plaintiffs, there are Plaintiffs
23 that are firearm businesses, special interest groups, two foundations, and a political action
24 committee, all which support the lawful exercise of Second Amendment rights. These
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27 ¹ The following overview of the facts are drawn from the allegations of Plaintiffs'
28 First Amended Complaint, which the Court assumes true for purposes of evaluating
Defendants' motion. The Court is not making factual findings.

1 Plaintiffs challenge a net of interlocking criminal statutes which impose strict regulations
 2 on a variety of firearms that fall under California’s complex statutory definition of an
 3 “assault weapon.” Firearms that are labeled as “assault weapons” by state statute and
 4 regulation are not rare museum pieces nor limited edition collector’s items. They are
 5 popular guns owned and kept by numerous law-abiding citizens for manifold lawful
 6 purposes. In many respects, these firearms which are statutorily-deemed “assault
 7 weapons” are like commonplace rifles and pistols.

8 **LEGAL STANDARD**

9 To address the merits of a case, a federal court must have jurisdiction. *Virginia*
 10 *House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1950–51 (2019). “One essential
 11 aspect of this requirement is that any person invoking the power of a federal court must
 12 demonstrate standing to do so.” *Id.* (quoting *Hollingsworth v. Perry*, 570 U.S. 693, 704,
 13 (2013)). Defendants challenge Plaintiffs’ Article III standing at the outset of their suit.
 14 “Although rulings on standing often turn on a plaintiff’s stake in initially filing suit,
 15 ‘Article III demands that an actual controversy persist throughout all stages of
 16 litigation.’” *Id.* Because it is a jurisdictional requirement, standing cannot be waived or
 17 forfeited. *Id.* “And when standing is questioned by a court or an opposing party, the
 18 litigant invoking the court’s jurisdiction must do more than simply allege a nonobvious
 19 harm. To cross the standing threshold, the litigant must explain how the elements
 20 essential to standing are met.” *Id.* (citation omitted).

21 A lack of Article III standing requires dismissal for lack of subject matter
 22 jurisdiction under Federal Rule of Civil Procedure 12(b)(1). *Maya v. Centex Corp.*, 658
 23 F.3d 1060, 1067 (9th Cir. 2011). “For the purposes of ruling on a motion to dismiss for
 24 want of standing,” the court “must accept as true all material allegations of the complaint,
 25 and must construe the complaint in favor of the complaining party.” *Warth v. Seldin*, 422
 26 U.S. 490, 501 (1975).

27 “To establish standing under Article III of the Constitution, a plaintiff must
 28 demonstrate (1) that he or she suffered an injury in fact that is concrete, particularized,

1 and actual or imminent, (2) that the injury was caused by the defendant, and (3) that the
 2 injury would likely be redressed by the requested judicial relief.” *Thole v. U. S. Bank*
 3 *N.A.*, 140 S. Ct. 1615, 1618 (2020) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555,
 4 560–561 (1992)). The Rule 12(b)(1) motion to dismiss in this case focuses on the first
 5 element.

6 Under Federal Rule of Civil Procedure 12(b)(6), a court also may dismiss a
 7 complaint if, taking all factual allegations as true, the complaint fails to state a plausible
 8 claim for relief on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v.*
 9 *Twombly*, 550 U.S. 544, 556–57 (2007). Dismissal is appropriate if the complaint fails to
 10 state enough facts to raise a reasonable expectation that discovery will reveal evidence of
 11 the matter complained of, or if the complaint lacks a cognizable legal theory under which
 12 relief may be granted. *Twombly*, 550 U.S. at 556. “A claim is facially plausible ‘when
 13 the plaintiff pleads factual content that allows the court to draw the reasonable inference
 14 that the defendant is liable for the misconduct alleged.’” *Zixiang Li v. Kerry*, 710 F.3d
 15 995, 999 (9th Cir. 2013) (quoting *Iqbal*, 556 U.S. at 678).

16 DISCUSSION

17 Defendants argue that plaintiffs lack standing to challenge California Penal Code
 18 sections 30800 (deeming certain “assault weapons” a public nuisance), 30915 (regulating
 19 “assault weapons” obtained by bequest or inheritance), 30925 (restricting importation of
 20 “assault weapons” by new residents), 30945 (restricting use of registered “assault
 21 weapons”), 30950 (prohibiting possession of “assault weapons” by minors and prohibited
 22 persons), 31000 (authorizing additional uses of registered “assault weapons” with a
 23 permit), and 31005 (authorizing the sale of “assault weapons” to exempt recipients with a
 24 permit). Plaintiffs consent to dismissal of their challenge to section 30925 and the
 25 motion to dismiss is hereby granted with respect to that claim. With respect to their other
 26 claims, Plaintiffs disagree.

27 The Court finds Plaintiffs have standing on all claims in large part flowing from
 28 the criminal penalties they could face. California Penal Code section 30600 imposes a

felony criminal penalty for anyone who manufactures, distributes, imports, keeps for sale, offers for sale, or lends an “assault weapon.” The prescribed prison sentences are four, six, or eight years. *See* California Penal Code section 30600(a). One who merely possesses an “assault weapon” in California is guilty of a misdemeanor under section 30605(a) or a felony pursuant to California Penal Code section 1170(h)(1) (“a felony punishable pursuant to this subdivision where the term is not specified in the underlying offense shall be punishable by a term of imprisonment in a county jail for 16 months, or two or three years”). In other words, the criminal sanction for possession of any gun deemed an “assault weapon” is a wobbler and can be sentenced as either a felony or a misdemeanor.² The result is that any law-abiding citizen may lose his liberty, and (not ironically) his Second Amendment rights, as a result of exercising his constitutional right to keep and bear arms if the arm falls within the complicated legal definition of an “assault weapon.” If ever the existence of a state statute had a chilling effect on the exercise of a constitutional right, this is it.

It has long been the case that a plaintiff possesses Article III standing to bring a pre-enforcement challenge to a state statute which regulates the exercise of a federal constitutional right and threatens a criminal penalty. “When the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he ‘should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.’” *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 298 (1979)

² The variety of punishments that a defendant can receive for being convicted for possession under § 30605 through the application of § 1170(h) demonstrate that the statute is a wobbler. “In the parlance of California law enforcement, a violation of the statute is a ‘wobbler’ that may be punished either as a felony or as a misdemeanor.” *United States v. Diaz-Argueta*, 564 F.3d 1047, 1049 (9th Cir. 2009). “Under California law, a ‘wobbler’ is presumptively a felony and ‘remains a felony except when the discretion is actually exercised’ to make the crime a misdemeanor.” *Ewing v. California*, 538 U.S. 11, 16 (2003) (quoting *People v. Williams*, 27 Cal.2d 220 (1945)).

(quoting *Doe v. Bolton*, 410 U.S. 179, 188 (1973)). “[I]t is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights.” *Steffel v. Thompson*, 415 U.S. 452, 459 (1974). “In *Virginia v. American Booksellers Assn. Inc.*, 484 U.S. 383 (1988), we held that booksellers could seek preenforcement review of a law making it a crime to ‘knowingly display for commercial purpose’ material that is ‘harmful to juveniles’ as defined by the statute.” *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 160 (2014). Of course, “[s]uch challenges can proceed only when the plaintiff ‘faces a realistic danger of sustaining a direct injury as a result of the law’s operation or enforcement.’” *Skyline Wesleyan Church v. California Dep’t of Managed Health Care*, 968 F.3d 738 (9th Cir. 2020) (citations omitted). But the simple continued existence of the criminal penalty provision together with an absence of a defendant’s disavowal of prosecution satisfies the requirement of a credible threat of prosecution. *Susan B. Anthony List*, 573 U.S. at 164 (threat of future enforcement of the false statement statute is substantial with history of past enforcement). “We have observed that past enforcement against the same conduct is good evidence that the threat of enforcement is not ‘chimerical.’” *Id.* (quoting *Steffel*, 415 U.S. at 459); *see also MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128–129 (2007) (“Where threatened action by government is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat.”).

The Plaintiffs allege that they wish to have, acquire, possess, and lawfully use these firearms deemed to be assault weapons. First Amended Complaint, at para. 37. Specifically, for example, Miller and Russ allege that they want to exercise their Second Amendment rights by using lawfully acquired high capacity magazines with their lawfully possessed semi-automatic, fixed magazine, centerfire rifles, but for the State’s laws and fear of arrest, prosecution, and loss of liberty and property. *Id.* at paras. 58 and 62. Similarly, Hauffen alleges she lawfully owns and possesses a lawful semiautomatic, centerfire rifle without a fixed magazine. She wants to add to the rifle a feature such as a

1 pistol grip, a collapsible stock, or a flash hider, or change its length to between 26 and 30
2 inches, but will not because of the fear of arrest, prosecution, and loss of liberty and
3 property under the state’s laws. *Id.* at para. 64. These are examples from among the
4 many more Plaintiffs who similarly allege “an intention to engage in a course of conduct
5 arguably affected with a constitutional interest, but proscribed by a statute,” and have
6 standing because there exists a credible threat of criminal prosecution and punishment
7 thereunder. *Babbitt*, 442 U.S. at 289.

8 Some of the Plaintiffs are associations of individuals who share a common interest
9 in the preservation and exercise of Second Amendment rights. One example is the
10 California Gun Rights Foundation with tens of thousands of members and supporters in
11 California. First Amended Complaint, at para. 11. “An organization can assert Article
12 III standing on behalf of either its members or the organization itself.” *E. Bay Sanctuary*
13 *Covenant v. Barr*, 964 F.3d 832, 844 (9th Cir. 2020) (citing *Havens Realty Corp. v.*
14 *Coleman*, 455 U.S. 363, 378–79 (1982)). An organization may establish standing on its
15 own behalf by showing that the defendant’s conduct resulted in ‘a diversion of its
16 resources and frustration of its mission,’ or caused a substantial loss in organizational
17 funding.” *Id.* (citations omitted). The California Gun Rights Foundation says that the
18 laws, policies, practices, and customs challenged in this case along with Defendants’
19 actions “have caused GFC to dedicate resources that would otherwise be available for
20 other purposes to protect the rights and property of its members, supporters, and the
21 general public.” First Amended Complaint, at para. 11. Moreover, the organization’s
22 members and supporters have been adversely affected by Defendants’ enforcement of
23 these laws. *Id.* This is sufficient to support an organization’s standing at this juncture of
24 the case. “The presence in a suit of even one party with standing suffices to make a claim
25 justiciable.” *Mont. Shooting Sports Ass’n v. Holder*, 727 F.3d 975, 981 (9th Cir. 2013)
26 (quoting *Brown v. City of Los Angeles*, 521 F.3d 1238, 1240 n.1 (9th Cir. 2008)).

27 The bar for standing is not particularly high. For example, organizations that have
28 been “perceptibly impaired” by a government rule “in their ability to perform the services

1 they were formed to provide” is sufficient for organizational standing. *E. Bay Sanctuary*
 2 *Covenant v. Trump*, 950 F.3d 1242, 1266–67 (9th Cir. 2020) (“The Organizations are not
 3 required to demonstrate some threshold magnitude of their injuries; one less client that
 4 they may have had but-for the Rule’s issuance is enough. In other words, plaintiffs who
 5 suffer concrete, redressable harms that amount to pennies are still entitled to relief.”). An
 6 organization has standing to sue on behalf of its members when “the interests it seeks to
 7 protect are germane to the organization’s purpose.” *Sierra Club v. Trump*, 963 F.3d 874,
 8 883 (9th Cir. 2020) (also noting individual’s standing to challenge border wall
 9 construction based on: “concern[] that the wall ‘would disrupt the desert views and
 10 inhibit him from fully appreciating the area,’ and that the additional presence of U.S.
 11 Customs and Border Protection agents ‘would further diminish his enjoyment of these
 12 areas’ and ‘deter him from further exploring certain areas’ [while] worrie[d] that
 13 ‘construction and maintenance of the border wall will limit or entirely cut off his access
 14 to fishing spots’ along the border, where he has fished for more than 50 years.”).

15 In *City & Cty. of San Francisco v. United States Citizenship & Immigration Servs.*,
 16 944 F.3d 773, 787 (9th Cir. 2019), municipal and county plaintiffs had standing. The
 17 plaintiffs argued that a federal rule would encourage aliens to disenroll from public
 18 benefits programs, which they predicted would result in a reduction of Medicaid
 19 reimbursement payment to the State and increase administrative expenses. The Court
 20 dismissed the argument that “predictions of future financial harm are based on an
 21 attenuated chain of possibilities.” Instead, it explained that the injuries are not entirely
 22 speculative and that “this type of ‘predictable effect of Government action on the
 23 decisions of third parties’ is sufficient to establish injury in fact.” *Id.* (citations omitted).

24 In *Sierra Club v. Trump*, 929 F.3d 670 (9th Cir. 2019), organizations challenged
 25 the reprogramming and expenditure of funds to build a border wall. The organizations
 26 alleged that use of the reprogrammed funds would “injure their members because the
 27 noise of construction, additional personnel, visual blight, and negative ecological effects
 28 that would accompany a border barrier and its construction would detract from their

1 ability to hike, fish, enjoy the desert landscapes, and observe and study a diverse range of
 2 wildlife in areas near the U.S.-Mexico border.” *Id.* at 682-83. The plaintiff organizations
 3 also alleged that “they participated in the legislative process by ‘devoting substantial staff
 4 and other resources towards legislative advocacy leading up to the appropriations bill
 5 passed by Congress in February 2019, specifically directed towards securing Congress’s
 6 denial of substantial funding to the border wall.” *Id.* This satisfied the requirements for
 7 standing. *Id.* at 685-86.

8 Similarly, in *Hawaii v. Trump*, 859 F.3d 741, 765 (9th Cir.), *vacated and*
 9 *remanded*, 138 S. Ct. 377 (2017), the Ninth Circuit found that Hawaii had standing to
 10 challenge a federal no-fly list policy because Hawaii as operator of its university alleged
 11 that “(1) students and faculty suspended from entry are deterred from studying or
 12 teaching at the University; and (2) students who are unable to attend the University will
 13 not pay tuition or contribute to a diverse student body.”

14 In environmental cases, plaintiffs generally satisfy the injury-in-fact requirement
 15 by alleging that they are less able to use land affected by a defendant’s conduct. *Gingery*
 16 *v. City of Glendale*, 831 F.3d 1222, 1227 (9th Cir. 2016) (citation omitted); *Nat. Res. Def.*
 17 *Council v. EPA*, 542 F.3d 1235, 1245 (9th Cir. 2008) (injury in fact established where
 18 plaintiffs alleged that their “use and enjoyment” of certain waterways “has been
 19 diminished” due to pollution). For standing, it was enough that an individual alleged
 20 “both that he avoids public land that he would like to use again, and that his enjoyment of
 21 the park and the park’s facilities has been ‘diminished.’” *Id.* at 1227. In *White v. Univ.*
 22 *of California*, 765 F.3d 1010, 1023 (9th Cir. 2014), scientists had Article III standing to
 23 seek a declaration that ancient skeletal remains known as the La Jolla remains were not
 24 “Native American” and allowing them to study the remains. In *California v. Trump*, 963
 25 F.3d 926 (9th Cir. 2020), a state had standing to allege that a border wall project would
 26 have an adverse effect on environmental resources including direct and indirect impacts
 27 to endangered or threatened wildlife such as the peninsular desert bighorn sheep and the
 28 flat-tailed horned lizard. In particular, the state alleged that “the construction of the

1 border wall will also greatly increase the predation rate of lizards adjacent to the wall by
 2 providing a perch for birds of prey and will effectively sever the linkage that currently
 3 exists between populations on both sides of the border.” *Id.* at 935-37.

4 In abortion cases physicians often seek relief not on the basis of their own right to
 5 perform abortions, however, but on the basis of the constitutional right of their patients.
 6 “Recognizing the confidential nature of the physician-patient relationship and the
 7 difficulty for patients of directly vindicating their rights without compromising their
 8 privacy, the Supreme Court has entertained both broad facial challenges and pre-
 9 enforcement as-applied challenges to abortion laws brought by physicians on behalf of
 10 their patients.” *Isaacson v. Horne*, 716 F.3d 1213, 1221 (9th Cir. 2013) (citations
 11 omitted).

12 Aliens who have left the United States, have been held to have Article III standing.
 13 *Ibrahim v. Dep’t of Homeland Sec.*, 669 F.3d 983, 994 (9th Cir. 2012) (rejecting
 14 argument that Ibrahim has no right to assert claims under the First and Fifth Amendments
 15 because she is an alien who voluntarily left the United States); *see also Innovation Law*
 16 *Lab v. Wolf*, 951 F.3d 1073, 1078 (9th Cir. 2020) (“The individual plaintiffs, all of whom
 17 have been returned to Mexico under the MPP, obviously have Article III standing.”).

18 In *Southcentral Found. v. Alaska Native Tribal Health Consortium*, No. 18-35868,
 19 2020 WL 5509742, at *7 (9th Cir. Sept. 14, 2020), an organization was found to have
 20 standing to bring “an informational injury claim.”

21 In other cases, the actual or imminent injury prong of Article III standing is
 22 virtually eliminated. The “deterrent effect doctrine” affords a plaintiff standing.
 23 “[W]hen a plaintiff who is disabled within the meaning of the ADA has actual knowledge
 24 of illegal barriers at a public accommodation to which he or she desires access, that
 25 plaintiff need not engage in the ‘futile gesture’ of attempting to gain access in order to
 26 show actual injury.” *Namisnak v. Uber Techs., Inc.*, No. 18-15860, 2020 WL 4930650,
 27 at *3 (9th Cir. Aug. 24, 2020) (quoting *Civil Rights Educ. and Enforcement Ctr. v.*
 28 *Hospitality Props. Tr.*, 867 F.3d 1093, 1098–99 (9th Cir. 2017)). *Namisnak* explains that

1 “[t]his doctrine was first set out in *Teamsters v. United States*, 431 U.S. 324 (1977), in
 2 which the Supreme Court held that an employment-discrimination plaintiff need not take
 3 ‘futile gestures’—like applying for a job he knows he will not get due to the employer’s
 4 discrimination—that would merely subject him to the ‘humiliation of explicit and certain
 5 rejection.’” *Id.*

6 As noted at the outset, Defendants argue that Plaintiffs lack standing to challenge
 7 seven particular statutes among all of the various interlocking statutes affecting the
 8 regulation of guns deemed assault weapons. The Court finds to the contrary, that at least
 9 one and perhaps all of the Plaintiffs have Article III standing to challenge each of the
 10 statutes -- whether singly or as an entire regulatory scheme. To sum up, the Court finds
 11 that the individual Plaintiffs and the organizational Plaintiffs have standing to challenge
 12 the nuisance statute along with the rest of the statutory scheme which defines, identifies
 13 and restricts “assault weapons” which are alleged to be protected by the Second
 14 Amendment for possession and use by law-abiding citizens for lawful purposes.

15 Under Federal Rule of Civil Procedure 12(b)(6), Defendants also assert that
 16 Plaintiffs fail to state claims upon which relief can be granted with respect to the seven
 17 cited provisions. Unlike Article III standing, the test for a sufficiently-stated claim
 18 requires only a short and plain statement and plausibility. Plaintiffs’ claims meet this
 19 test. Defendants do not separately discuss the seven claims but generally argue that the
 20 Complaint lacks particularized factual allegations as to each. However, the claims are
 21 particularized enough, at least at the pleading stage, to permit the case to move forward.


22 The single claim Defendants specifically do discuss is the challenge to California
 23 Penal Code section 30950 which prohibits possession of an “assault weapon” by one
 24 under the age of 18. Defendants assert that this provision is constitutional on its face and
 25 that therefore, the claim must be dismissed. Defs’ Mem. of Points and Auth’s in Support
 26 of Mot. to Dismiss, at 16. This is based on Defendants’ argument that a prohibition
 27 aimed at juveniles is a presumptively lawful and longstanding prohibition falling outside
 28 Second Amendment protection. On summary judgment, at least one court recently

1 agreed. *See Mitchell v. Atkins*, No. C19-5106-RBL, 2020 WL 5106723, at *5 (W.D.
 2 Wash. Aug. 31, 2020) (“There is no reason why a restriction on sale and possession of
 3 SARs [semiautomatic assault rifles] —powerful weapons that can be wielded against the
 4 public—constitutes a break from this pattern. The Age Provision does not burden Second
 5 Amendment rights.”). While the *Mitchell* court so held, it did so persuaded by the
 6 reasoning of the Fifth Circuit Court of Appeals (*id.* at *4 citing *Nat’l Rifle Ass’n of Am.,*
 7 *Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 201 (5th Cir.
 8 2012)), federal district courts in West Virginia and Massachusetts and an Illinois state
 9 court. There are no decisions from the Supreme Court or the Ninth Circuit Court of
 10 Appeals that would be binding on this Court. Consequently, while the *Mitchell* decision
 11 may or may not ultimately be persuasive authority, it is not binding authority. And this is
 12 not summary judgment. At this stage of the proceedings, the claim that the California
 13 “assault weapon” restrictions on citizens under the age of 18 impinges on Second
 14 Amendment rights states a sufficient claim upon which relief can be granted.

15 CONCLUSION

16 For the reasons stated above, the Court denies Defendants’ motion to dismiss.
 17 Plaintiff’s concession and withdrawal of its claim challenging California Penal Code
 18 section 30925 is accepted.

19 DATED: September 23, 2020

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 21 Hon. Roger T. Benitez
 22 United States District Judge
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