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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

LARRY C. FLYNT; HAIG
KELEGIAN, SR.; and HAIG T.
KELEGIAN, JR.,

Plaintiffs,

v.

XAVIER BECERRA, et al.,
Defendants.

No. 2:16-cv-02831-JAM-EFB

**ORDER GRANTING DEFENDANTS'
MOTION TO DISMISS**

Three card club owners want more than a one-percent interest in out-of-state casinos, which California's gambling laws prohibit. Larry C. Flynt, Haig Kelegian, Sr., and Haig T. Kelegian, Jr. (collectively "Plaintiffs") sue both the Bureau of Gambling Control and California officials (collectively "Defendants"), alleging these laws violate the U.S. Constitution's dormant commerce and substantive due process clauses. Compl., ECF No. 1. Earlier this year, this Court granted the Defendants' motion to dismiss, without prejudice, based on Plaintiffs' failure to bring suit within the statute of limitations. Order, ECF No. 31. Defendants again move to dismiss Plaintiffs' First Amended Complaint, ECF No. 32 (the

1 "FAC"). Mot., ECF No. 33. Plaintiffs oppose. Opp'n, ECF No.
2 35. For reasons explained below, the Court grants Defendants'
3 motion—this time with prejudice.¹

4
5 I. BACKGROUND

6 Card clubs pervade California. Patrons frequent these
7 establishments to play card games. FAC ¶ 17. With a gaming
8 license, California residents may own card clubs. Id.
9 Plaintiffs Larry C. Flynt, Haig Kelegian, Sr., and Haig T.
10 Kelegian, Jr. each own gaming licenses. Id. ¶¶ 8-10.

11 But Plaintiffs want more than ownership: they also want to
12 substantially invest in out-of-state casinos. Id. ¶ 4.
13 California forbids this. California's gambling laws empower the
14 state to revoke card club owners' gaming licenses if they have
15 more than a one-percent interest in an out-of-state, casino-style
16 gambling entity. Cal. Bus. & Prof. Code §§ 19858, 19858.5.
17 Flynt and Kelegian, Sr. allege these laws made them forego
18 lucrative business opportunities, including opportunities to
19 purchase out-of-state casinos in 2014 and 2015. FAC ¶¶ 49-77.
20 Kelegian, Jr. owned more than a one-percent interest in an out-
21 of-state casino and the state made him divest it and fined him.
22 See FAC ¶¶ 67-71.

23 As a result of the State's decision and enforcement of
24 §§ 19858 and 19858.5, Plaintiffs filed this action against the
25 Bureau of Gambling Control and state officials. Through facial

26
27 ¹ This motion was determined to be suitable for decision without
28 oral argument. E.D. Cal. L.R. 230(g). The hearing was
scheduled for Oct. 3, 2017. In deciding this motion, the Court
takes as true all well-pleaded facts in the FAC.

1 and as-applied challenges, Plaintiffs argue these statutes
2 violate the U.S. Constitution's dormant commerce and substantive
3 due process clauses. FAC ¶¶ 1-7. After the Court granted
4 Defendants' motion to dismiss the initial complaint without
5 prejudice, Plaintiffs filed the FAC. Defendants again move to
6 dismiss this case as untimely. Mem., ECF No. 33-1, at 5-6.

7
8 II. OPINION

9 A. Statute of Limitations

10 Section 1983 claims brought in California's federal courts
11 have a two-year statute of limitations. See Butler v. Nat'l
12 Cnty. Renaissance of Cal., 766 F.3d 1191, 1198 (9th Cir. 2014)
13 (citing Cal. Civ. Proc. Code § 335.1). Although state law
14 defines the limitations period, federal law determines the claim
15 accrues "when a plaintiff knows or has reason to know of the
16 actual injury." See Scheer v. Kelly, 817 F.3d 1183, 1188 (9th
17 Cir. 2016); Knox v. Davis, 260 F.3d 1009, 1013 (9th Cir. 2001).
18 Statutes of limitations may bar facial challenges against laws
19 deemed to violate constitutional provisions. See Scheer v.
20 Kelly, 817 F.3d 1183, 1188 (9th Cir. 2016) (Section 1983's two-
21 year statute of limitations applied to plaintiff's facial First
22 Amendment and Fourteenth Amendment challenges to California's
23 attorney discipline system); Levald, Inc. v. City of Palm
24 Desert, 998 F.2d 680, 688-89 (9th Cir. 1993) (facial Fifth
25 Amendment Takings challenge for declaratory relief was time
26 barred).

27 Plaintiffs filed their original complaint on November 30,
28 2016. See generally Compl. The parties dispute whether this

1 was timely. Defendants contend it was not because Plaintiffs'
2 injuries occurred more than two years earlier. See Mem. at 5.
3 But Plaintiffs argue their filing was timely because the statute
4 of limitations does not apply to their claims and, even if it
5 does, their injuries are ongoing. See Opp'n at 2-3.

6 Plaintiffs cite Maldonado v. Harris in support of their
7 argument that the statute of limitations does not apply to their
8 facial constitutional challenges. Opp'n at 2-3 (citing Maldonado
9 v. Harris, 370 F.3d 945 (9th Cir. 2004)). But Plaintiffs'
10 argument misrepresents the holding in Maldonado and ignores the
11 rule enunciated in Scheer v. Kelly, supra at 1188. The Maldonado
12 Court questioned—in dicta—the application of a limitations period
13 to a First Amendment facial challenge. Maldonado, 370 F.3d at
14 955. Almost twelve years later, in Scheer, the Ninth Circuit
15 ruled that the limitations period to bring a facial challenge
16 under § 1983, even based on the First Amendment, begins to run
17 when a plaintiff "knows or has reason to know of the actual
18 injury." 817 F.3d at 1186, 1188. Plaintiffs cannot avoid the
19 § 1983 statute of limitations by asserting facial challenges.

20 To bolster their statute-of-limitations defense, Defendants
21 cite June 12, 2014—the day the California Gambling Control
22 Commission ("Commission") ordered Kelegian, Jr. to divest his
23 illegal interest² and fined him \$200,000 for violating §§ 19858
24 and 19858.5. See Mem. at 5. See also Commission Decision

25 _____
26 ² Kelegian, Jr. opened Kelco Gaming, LLC, a casino-style gambling
27 entity in Seattle, Washington. FAC ¶¶ 68-69. He owned a 1%
28 interest and his wife owned a 99% interest. Id. ¶ 69. He
reported his interest, but California's marital property law
deemed it "vastly in excess of one percent." Id. ¶ 70.

1 (attached to FAC as Ex. F). The Commission's decision applies
2 only to Kelegian, Jr. But Defendants argue, and Plaintiffs do
3 not contest, that it also put Flynt and Kelegian, Sr. on notice
4 about the injury underlying this suit. See Mem. at 1; see
5 generally FAC and Opp'n. So the date of the Commission's
6 decision is the operative date for all Plaintiffs' alleged
7 injuries. All claims accrued on that date—June 12, 2014—more
8 than two years before Plaintiffs filed suit. See generally
9 Compl. Their complaint is time barred unless they pled a
10 continuing harm. See Knox, 260 F.3d at 1013.

11 Plaintiffs have not pled a continuing harm. A continuing
12 harm is one that first occurs beyond the statute of limitations
13 but continues to occur within the statutory period. See id.
14 Claims based on alleged continuing harm may be timely even though
15 they technically accrued outside the statute of limitations. See
16 id. But to be a continuing harm, the alleged wrongdoing and
17 resultant injury must truly be ongoing or reoccurring; a "mere
18 continuing impact from past violations" does not suffice. See
19 id. (original emphasis) (internal citations and quotation marks
20 omitted).

21 Plaintiffs argue they allege ongoing, continuous harm. See
22 Opp'n at 3-4. First, they cite Flynt's and Kelegian, Sr.'s lost
23 business opportunities: California's gambling laws made Flynt and
24 Kelegian, Sr. forfeit lucrative opportunities to invest in out-
25 of-state casinos. See FAC ¶¶ 49-63. The Court requested more
26 specific information about these foregone opportunities in its
27 prior order. Order at 4. In response, Plaintiffs detailed the
28 casinos that Mr. Flynn passed on the chance to buy and explained

1 that Mr. Flynn may lose his minority interest in an adult
2 establishment if the majority owner adds gambling there. See FAC
3 ¶¶ 49-66. But these specifics only constitute "a mere continuing
4 impact from" the June 12, 2014 decision and are not enough to
5 plead a continuing harm. See Knox, 260 F.3d at 1013.

6 Second, Plaintiffs cite the Commission's decision as an
7 ongoing, continuous injury because of a "continuing enforcement"
8 of the statutes. See Opp'n at 3. It is not. The Commission
9 fined Kelegian, Jr. for violating California's gambling
10 prohibition, see Ex. F at 5, which he paid, FAC ¶ 71. This is a
11 single harm. In opposition, Plaintiffs manufacture an ongoing,
12 continuous harm theory by characterizing the Commission decision
13 as a "continuing enforcement" akin to the permanent injunction in
14 Maldonado. See Opp'n at 2-3 (citing Maldonado, 370 F.3d at 955-
15 56). Not so. The Commission stayed (for five years) \$125,000 of
16 Kelegian, Jr.'s fine, see Ex. F at 5, conditioned on his §§ 19858
17 and 19858.5 compliance. See id. at 6. In other words, the
18 Commission made a one-time decision with a lasting impact. That
19 continuing impact (precluding Plaintiffs from substantially
20 investing in out-of-state casinos) is not actionable. See Knox,
21 260 F.3d at 1013.

22 Plaintiffs also argue that they are subject to a continuing
23 violation by the state due to: (1) the requirement that they
24 file declarations of compliance with §§ 19858 and 19858.5 when
25 applying to renew their licenses and (2) the state's
26 investigation of those declarations. See Opp'n at 4-5. These
27 facts are not in the FAC. See generally FAC. Still, the
28 Plaintiffs' obligation to comply with the June 12, 2014 decision

1 and the state's related investigations are a continuing impact
2 of that June 2014 decision. They are not a new action by the
3 state. Plaintiffs have not alleged a continuous harm, so their
4 claims are time barred. The Court also finds that any further
5 amendment would be futile and, therefore, grants Defendants'
6 motion to dismiss with prejudice. Finally, the Court need not,
7 and does not, reach the parties' arguments regarding the dormant
8 commerce clause and substantive due process claims brought by
9 Plaintiffs given the Court's finding regarding the statute of
10 limitations.

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12 III. ORDER

13 For the reasons above, the Court GRANTS Defendants' motion
14 to dismiss with prejudice.

15 IT IS SO ORDERED.

16 Dated: October 26, 2017

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19 JOHN A. MENDEZ,
20 UNITED STATES DISTRICT JUDGE
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