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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

EUGENE EVAN BAKER, Plaintiff, vs. ERIC H. HOLDER, JR., in his official capacity as ATTORNEY GENERAL OF THE UNITED STATES; KAMALA D. HARRIS, in her capacity as ATTORNEY GENERAL FOR THE STATE OF CALIFORNIA; THE STATE OF CALIFORNIA DEPARTMENT OF JUSTICE; and DOES 1 through 100, Inclusive, Defendants.	CASE NO. CV 10-3996-SVW(AJWx) **PLAINTIFF'S BRIEF RE ISSUES ON REMAND**

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INTRODUCTION

Federal law prohibits anyone convicted of a misdemeanor crime of domestic violence ("MCDV") from possessing a firearm. 18 U.S.C. § 922(g)(9). While states are authorized under federal law to provide relief from that prohibition, via, e.g., an expungement of the conviction, California has no procedural mechanism in place for doing so. As such, unless they are able to secure a practically never-granted gubernatorial pardon, people with an MCDV conviction like Plaintiff EUGENE EVAN BAKER (hereinafter "Plaintiff" or "Baker") are permanently barred from exercising their fundamental Second Amendment rights to keep and bear arms, regardless of their individual circumstances.

Plaintiff contends that when a misdemeanor (as opposed to felony) conviction is the basis for denying one's Second Amendment rights, the burden is on the government to justify under heightened scrutiny that prohibiting the particular individual's exercise of those rights is warranted. This is not to say that categorical bars to certain misdemeanants, like that found in 18 U.S.C. § 922(g)(9), are necessarily unconstitutional. Plaintiff does not dispute the facial validity of 18 U.S.C. § 922(g)(9).

Rather, Plaintiff asserts that while the government may be able to meet its burden in barring those convicted of an MCDV from firearm possession for a period of time, the more remote in time the disqualifying event and the more evidence there is of the misdemeanant's peaceful demeanor subsequently (and prior), the lesser the government's interest is being furthered, and the higher the government's burden becomes. In Plaintiff's specific case, the government cannot meet its burden under whatever level of heightened scrutiny applies here. As such, because he is a law-abiding citizen who has proven over fifteen years that he poses no risk of violence, and, in fact, qualifies to possess firearms under California law, the application of 18 U.S.C. § 922(g)(9) to Plaintiff, based on his circumstances alone, violates the Second Amendment of the Constitution.

STATEMENT OF THE CASE

Following this Court's grant of a Motion to Dismiss the prior pleading, the Ninth Circuit Court of Appeals remanded the matter based on its determination that Plaintiff had standing to state viable causes of action for violations of Plaintiff's Second Amendment right to keep and bear arms. Plaintiff has amended his complaint accordingly, and now solely seeks to vindicate his Second Amendment rights against Defendants' application of 18 U.S.C. § 922(g)(9) to him.

STATEMENT OF FACTS

I. PLAINTIFF

Over fifteen years ago, in 1997, Plaintiff was convicted upon his plea of nolo contendere of violating California Penal Code section 273.5(a). Plaintiff was sentenced to a three-year probationary sentence. Since California Penal Code section 273.5(a) qualifies as an MCDV under 18 U.S.C. § 921(a)(33)(A)(i), Plaintiff's conviction meant he was barred from accessing firearms for life under federal law, 18 U.S.C. § 922(g)(9), and for a period of ten years under California law, California Penal Code section 29805.

Plaintiff successfully completed the terms of his probation, and in 2002, submitted his application for expungement of his conviction pursuant to California Penal Code section 1203.4. The Ventura County Superior Court granted that relief and signed an order that Plaintiff's 1997 conviction be expunged, the nolo contendere plea be withdrawn, a plea of not guilty be entered, and the original criminal complaint be deemed dismissed. The 2002 order did not contain any language that Plaintiff was thereafter uniquely prohibited from personally accessing firearms once the ten-year suspension of Plaintiff's firearms rights pursuant to California Penal Code section 29805 ended.

Plaintiff's California ten-year suspension of his firearm rights expired in 2007. Plaintiff currently faces no firearm restriction under California law. California would have no cause of action against Plaintiff were he found in possession of a

firearm.

From the date of his 1997 arrest to the present, Plaintiff has never been convicted of or reported to have committed any other criminal behavior, including any crime which would disqualify Plaintiff from receiving or possessing a firearm under federal or state law. Plaintiff has maintained a relationship with his ex-wife without incident for over thirteen years, which involves him meeting with her in person a couple of times a week for custody exchanges and even included a recent trip to another country with her, their son, and Plaintiff's current wife.

In or about May 2009, with his state firearm restriction almost two years behind him, and unaware of any other firearm restriction, Plaintiff attempted to purchase a firearm from a licensed California federal firearms dealer ("FFL"). In June of that year, the California Department of Justice ("Cal DOJ"), of which Defendant Attorney General KAMALA D. HARRIS is currently the head, informed the FFL that Plaintiff was prohibited from possessing firearms and ordered the FFL not to release the firearm to him. A letter was later sent to Plaintiff by Cal DOJ (in response to Plaintiff's attorney's inquiry about the nature of his firearm restriction) informing Plaintiff that the department "identified a record in a state or federal database which indicates that you are prohibited by state and/or federal law from purchasing or possessing firearms." The letter further states that the disqualifying record is a conviction for "[m]isdemeanor domestic violence convictions (273.5PC, 243(E)(1)PC Convictions over 10 years old)-Federal Brady Act, effected November 30, 1998."

On March 11, 2010, plaintiff appeared in the Ventura County Superior Court and moved for an order declaring that he was legally entitled under both state and federal law to purchase and own a firearm. The Honorable Judge Edward Brodie granted the order, declaring that Plaintiff "is entitled to purchase, own and possess firearms consistent with the laws of the State of California."

Plaintiff desires to obtain a firearm for his personal protection and the

protection of his family but does not wish to run the risk of being arrested, charged, convicted and punished pursuant to 18 U.S.C. § 922(g)(9) in the attempted exercise of his Second Amendment rights.

II. DEFENDANTS

Cal DOJ's denial of Plaintiff's 2009 firearm purchase was due to Cal DOJ fulfilling its role as the federal "Point of Contact" for background checks of firearms purchases. As described below, Cal DOJ has been expressly directed by the California Legislature to participate in the federal program and act as the Federal Bureau of Investigation's ("FBI") agent for the purpose of background checks that the FBI would normally conduct itself through its National Instant Criminal Background Check System ("NICS") database.

Thus, notwithstanding Plaintiff's firearm restriction from his conviction under California Penal Code section 273.5 expiring and the order of a California Superior Court affirming Plaintiff is eligible to possess a firearm, Cal DOJ has instead, applying federal law and acting in its role as a federal agent, denied Plaintiff the right to possess a firearm based on a federal prohibition, i.e., 18 U.S.C. § 922(g)(9). Consequently it is Defendant Attorney General HARRIS' Cal DOJ, acting on behalf of the federal government as the federal government's POC, who denied Plaintiff the acquisition of his firearm in California.

As such, Defendant HARRIS is a proper party to this action, as Plaintiff cannot obtain the relief he seeks without an injunction issued from this Court instructing Defendant HARRIS that, in her role as a POC for the federal government, she cannot restrict Plaintiff's firearm rights based on his 1997 conviction.

Conversely, Defendant U.S. Attorney General ERIC H. HOLDER, JR. is also a proper defendant. Foremost, as described above, Cal DOJ is expressly acting as a federal agent, applying federal law, and furthering a purported federal interest in denying Plaintiff the right to purchase and possess a firearm.

Thus, if Plaintiff were found to be in possession of a firearm in California in violation of 18 U.S.C. § 922(g), it would be federal agencies, i.e., the FBI or the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"), that would be responsible for the arrest and detention of Plaintiff, and the U.S. Attorney who would be responsible for the prosecution of Plaintiff for a violation of the federal firearm restriction. No California agency would have the authority to prosecute for a violation of California law, as there would be none.

So too, was Plaintiff to move to any other state and attempt to purchase a firearm as a resident there, Plaintiff's prior denial in California would be repeated and relied upon to deny Plaintiff's purchase and possession in that other state. This is true regardless of whether such other state does not conduct any background checks, but relies upon the FBI's NICS system, or, like California, acts as a POC for background checks. And there is no relief from an MCDV conviction that occurred in California, neither in state nor out of state.

As discussed below, neither Defendant HARRIS nor Defendant HOLDER can explain how any sufficient governmental interest is furthered by continuing to deny Plaintiff the right to possess a firearm. Both California's Legislature and California's courts have deemed Plaintiff trustworthy enough to possess a firearm. But for enforcing the federal law, Defendant HARRIS would be required to allow Plaintiff to purchase a firearm.

Neither Defendant HOLDER's reliance on California law, nor Defendant HARRIS' reliance on federal law, will provide the Court with a sufficient or compelling reason to justify the denial of the now-settled individual civil right to own and possess a firearm for self defense.

III. APPLICABLE FEDERAL AND CALIFORNIA LAWS

Under 18 U.S.C. § 922(g)(9), it is unlawful for a person convicted of a "misdemeanor crime of domestic violence" "to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition;

or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."

A "misdemeanor crime of domestic violence conviction" ("MCDV") is defined in 18 U.S.C. § 921(a)(33) as an offense that:

> (i) is a misdemeanor under Federal, State, or Tribal law; and
>
> (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim[.]"

18 U.S.C. § 921(a)(33)(A) (West 2012).

A conviction under California Penal Code section 273.5 requires a person to willfully inflict "upon a person who is his or her spouse, former spouse, cohabitant, former cohabitant, or the mother or father of his or her child, corporal injury resulting in a traumatic condition[1]. . ." A "traumatic condition" can be an injury as slight as a bruise or "minor injuries," caused by physical force. *United States. v. Hall*, 419 F.3d 980 (9th Cir. 2005); *People v. Wilkins*, 14 Cal. App. 4th 761, 771, 17 Cal. Rptr. 2d 743 (Ct. App. 1993); *People v. Gutierrez*, 171 Cal. App. 3d 944, 952, 217 Cal. Rptr. 616 (Ct. App. 1985). Nevertheless, the elements and the nature of the relationship required between the victim and defendant to qualify for a conviction under California Penal Code section 273.5 meet the definition of a federal MCDV, and a conviction under that Penal Code section inexorably leads to a lifetime firearm restriction under federal law.

Additionally, a California Penal Code section 273.5(a) conviction carries with it a ten-year firearm restriction under California law. Cal. Penal Code §

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[1] " '[T]raumatic condition' means a condition of the body, such as a wound, or external or internal injury, including, but not limited to, injury as a result of strangulation or suffocation, whether of a minor or serious nature, caused by a physical force." Cal. Penal Code § 273.5(c).

29805.[2] Federal and California law prohibit restricted individuals from possessing ammunition in addition to firearms. 18 U.S.C. § 922(g); Cal. Penal Code § 30305. For the sake of brevity, we discuss only the firearm restriction herein.

A. Federal Relief from Firearm Prohibitions

Under federal law, "[a] person shall not be considered to have been convicted of ... [an MCDV,] if the conviction has been expunged or set aside, or is an offense for which the person has been pardoned or has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense) unless the pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms." 18 U.S.C. § 921(a)(33)(B)(ii). These firearm rights restoration options (expungement, set aside, pardon, or restoration of civil rights) are either not available or are practically impossible to obtain for a California conviction.

1. Expungement and Set Aside

Whether an MCDV conviction is expunged or set aside for purposes of the federal firearm restriction is theoretically left to the states to decide. Under California Penal Code section 1203.4, a person who has successfully completed a grant of probation after having been convicted of certain penal offenses can "expunge" a conviction. However, it is an "expungement" in name only. It does not remove a conviction from an individual's record and does not restore firearm rights under state or federal law.

"Although 'a number of courts have used forms of the word 'expunge' to describe the relief' under Section 1203.4, 'the statute does not in fact produce such a dramatic result.' " *Jennings v. Mukasey*, 511 F.3d 894, 898 (9th Cir. 2007)

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[2] *See former* Cal. Penal Code § 12021(c)(1). On January 1, 2012, the dangerous weapons sections of the California Penal Code (which included former section 12021) were renumbered. This renumbering did not effect any of the substance of the renumbered code sections. Former Penal Code section 12021(c)(1) is now codified as section 29805.

(quoting *People v. Frawley*, 82 Cal. App. 4th 784, 790-91, 98 Cal. Rptr. 2d 555 (Ct. App. 2000) (citations omitted)). "Indeed, section 1203.4 contains a sweeping limitation on the relief it offers, stating that 'in any subsequent prosecution of the defendant for any other offense, the prior conviction may be pleaded and proved and shall have the same effect as if probation had not been granted or the accusation or information dismissed.' This provision alone precludes any notion that the term 'expungement' accurately describes the relief allowed by the statute." *United States v. Hayden*, 255 F.3d 768, 772 (9th Cir. 2001) (quoting *Frawley*, 82 Cal. App. 4th at 791-92 (citation and emphasis omitted)). Because Section 1203.4 does not "expunge" the conviction, it does not restore firearm rights for a federal firearm restriction. *Mukasey*, 511 F.3d at 899; *see also United States v. Andrino,* 497 F.2d 1103, 1106-07 (9th Cir. 1974) (stating that the section 1203.4 expungement does not remove a person's criminal conviction).

California offers a sealing of records for *juvenile* convictions for certain offenses. Cal. Welf. & Inst. § 781. Apart from this sealing of the record, California does not offer a true "expungement" or "set aside" for any other criminal conviction.

2. Pardons

A misdemeanant has no practical opportunity for a pardon in California. Since 1967, California governors have issued approximately 1,400 pardons. Between 1991 and 1999, Governor Wilson issued 13 pardons; between 1999 and 2003, Governor Davis issued none; Governor Schwarzenegger issued approximately 16, and current Governor Brown has issued approximately 100 for individuals who completed *felony* sentences.[3] Plaintiff is unaware of any MCDV

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[3] *See* Christopher Reinhart, *Pardon Statistics from Other States*, OLR Research Report (Jan. 14, 2005), http://www.cga.ct.gov/2005/rpt/2005-R-0065.htm; Anthony York, *California Gov. Jerry Brown Denies Parole for 71 Murderer*, PoltiCal (Feb. 7, 2012), http://latimesblogs.latimes.com/california-politics/2012/02/jerry-brown-grants-21-pardons-denies-parole-for-dozens-of-

misdemeanants having been pardoned by Governor Brown, or any of the previous governors (for that matter).

3. Restoration of Civil Rights

According to applicable case law, civil rights cannot be restored if they are never lost in the first place. *Logan v. United States*, 552 U.S. 23, 37, 128 S. Ct. 475, 169 L. Ed. 2d 432 (2007). Prior to *District of Columbia v. Heller*, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008) (finding that the Second Amendment guarantees an individual right to keep and bear arms for self defense) and *McDonald v. City of Chicago*, __ U.S. __,130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010) (incorporating the Second Amendment to the states), none of the cases addressing what constitutes a civil right for purposes of restoration found that the right to keep and bear arms was such a right to be restored. No significant case since *Heller* has re-weighed the issue.

There are two lines of cases dealing with restoration of civil rights in the context of firearm restrictions: those cases dealing with "crime[s] punishable by imprisonment for a term exceeding one year" ("felon in possession") and convictions for MCDV.[4] Both sets of cases narrowly construe what constitutes

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convicted-murderers.html; *Gov. Schwarzenegger Grants Eight Pardons and One Conditional Pardon*, Office of Governor Edmund G. Brown, Jr., http://gov.ca.gov/news.php?id=16864 (last visited Jan. 3, 2013), *California Gov. Jerry Brown Pardons 79 Convicted Felons*, Fox News (Dec. 25, 2012), http://www.foxnews.com/politics/2012/12/25/california-gov-jerry-brown-pardons-7-convicted-felons.

[4] The language used to restore firearm rights for those with an MCDV conviction was modeled after that of 18 U.S.C. § 921(a)(20), which allows for restoration of firearm rights for those who have a firearm restriction based on a conviction for a "crime punishable by imprisonment for a term exceeding one year." 18 U.S.C. § 922(g)(1); *United States v. Smith*, 171 F.3d 617, 625 (8th Cir. 1999).

18 U.S.C. § 921(a)(20) reads, "[a]ny conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored

"civil rights." And both sets of cases, antedating the *Heller* and *McDonald* cases, exclude from "civil rights" the right to keep and bear arms.

"Civil rights" have been determined to be "the right to vote, sit on a jury, and hold public office." *United States v. Andaverde*, 64 F.3d 1305, 1309 (9th Cir. 1995); *see also United States v. Meeks*, 987 F.2d 575, 578 (9th Cir. 1993); *United States v. Dahms*, 938 F.2d 131, 133 (9th Cir. 1991). The use of the phrase " 'civil rights,' . . . indicates that Congress intended to encompass those rights accorded to an individual by virtue of his citizenship in a particular state. These rights include the right to vote, the right to seek and hold public office and the right to serve on a jury." *United States v. Cassidy*, 899 F.2d 543, 549 (6th Cir. 1990).[5]

When the question turns on which rights must be restored to satisfy the firearm rights restoration requirement, . . . "[a] restoration of rights must be 'substantial,' not merely de minimis." *Andaverde*, 64 F.3d at (citations omitted). "In *Dahms*, we established a two-stage analysis for determining whether a state conviction is nullified for purposes of federal firearms law. We first ascertain whether a *felon's* civil rights are substantially restored under state law; if they are, only then do we determine whether state law expressly restricts his right to possess firearms." *Meeks*, 987 F.2d at 578 (citation omitted) (emphasis added).

In cases where the underlying conviction results in the loss of firearm rights (including misdemeanor convictions for MCDV), the restoration of these rights is not available under the "restoration of civil rights" process when no loss of the

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shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms."

[5] "The government also urges that a convicted felon cannot have a restoration of rights without a restoration of his state firearms 'rights.' *We note, however, that there is no individual right to possess a firearm*." *Cassidy*, 899 F.2d at 549 n.12 (emphasis added) (decided prior to *Heller*); *see also United States v. Warin*, 530 F.2d 103, 106 (6th Cir. 1976).

"traditional" civil rights – i.e., right to vote, the right to seek and hold public office and the right to serve on a jury – occurred. Courts have determined that when individuals do not lose their civil rights, they cannot avail themselves of the rights-restoration mechanism set forth in 18 U.S.C. § 921.[6]

An individual does not lose his or her traditional civil rights as a result of a misdemeanor conviction in California, and therefore, up until the present, there have been no traditional civil rights to restore. Thus, depending primarily on the jurisdiction, and not the offense or offender, a person may be denied the restoration of firearm rights via the restoration of civil rights exception.

This situation becomes more absurd considering that a felon may have all his or her rights restored following a loss thereof (and consequently have his or her firearm rights restored in the process), but a misdemeanant, who does not lose his or her "civil rights" upon conviction, cannot avail him or her self of the same procedure.

i. Federal statutory provision for restoration of firearm rights is not available to anyone.

The Firearm Owner Protection Act, 100 Stat. 449, included a "safety valve" provision under which persons subject to federal firearms restrictions may apply to the Attorney General for relief from their restriction. 18 U.S.C. § 925(c). Unfortunately, the remedy is unavailable because Congress has repeatedly barred the Attorney General from using appropriated funds "to investigate or act upon

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[6] *See United States v. Brailey*, 408 F.3d 609, 613 (9th Cir. 2005); *United States v. Jennings*, 323 F.3d 263, 275 (4th Cir. 2003); *United States v. Barnes*, 295 F.3d 1354, 1638 (D.C. Cir. 2002); *United States v. Keeney*, 241 F.3d 1040, 1043 (8th Cir. 2001); *United States v. Hancock*, 231 F.3d 557, 567 (9th Cir. 2000); *United States v. Smith*, 171 F.3d 617, 624 (8th Cir. 1999); *United States v. Stedt*, 324 F. Supp. 2d 116, 118 (D. Me. 2004); *In re Parsons*, 218 W. Va. 353, 357,624 S.E.2d 790 (W. Va. 2005).

Again, it must be emphasized that all of these cases antedate *Heller*, which found the Second Amendment right to keep and bear arms to be an individual civil right. *Heller*, 554 U.S. at 592.

[relief] applications." *United States v. Bean*, 537 U.S. 71, 73, 123 S. Ct. 584, 154 L. Ed. 2d 483 (2002) (internal quotation marks omitted). Because the ATF cannot act upon and deny the petitions to restore firearm rights under this remedy, individuals are barred from appealing to the court under 18 U.S.C. § 925(c). *Id.* at 75-76. This bar on funding is renewed every year,[7] continues to be renewed today, and such bar is proposed again in the pending 2013 appropriations act.[8]

ii. No common law mechanisms to vacate conviction in California.

Aside from post-conviction appeals and the limited use of the Writ of Habeas Corpus,[9] the use of common law writs is precluded in almost all situations.[10] The

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[7] *See Bean*, 537 U.S. at 75 n.3; Consolidated Appropriations Resolution, Pub. L. No. 108-7, 117 Stat. 433 (2003); Consolidated Appropriations Act, Pub. L. No. 108-199, 118 Stat. 3 (2004); Consolidated Appropriations Act, Pub. L. No. 108-447, 118 Stat. 2809 (2005); Science, State, Justice, Commerce, and Related Agencies Appropriations Act, Pub. L. No. 109-108, 119 Stat. 2290 (2006).

[8] *See* Bureau of Alcohol, Tobacco, Firearms and Explosives, U.S. Dep't of Justice, *Congressional Budget Submission, Fiscal Year 2013* at 11 (2012), http://www.justice.gov/jmd/2013justification/pdf/fy13-atf-justification. pdf.

[9] In order to avail oneself of a Writ of Habeas Corpus one must be in "custody." Under California law, the custody requirement is interpreted to mean actual physical detention, "constructive custody" (i.e. parole, probation, bail, or a sentenced prisoner released on his own recognizance pending hearing on the merits of his petition); a sentence of a fine or imprisonment (in the alternative) similarly suffices to meet the custody requirement for habeas corpus relief. *People v. Villa*, 45 Cal. 4th, 1063, 1068-69, 90 Cal. Rptr. 3d 344 (2009) (citations omitted). Plaintiff, and most residents of California with an MCDV conviction who have completed California Penal Code section 29805's 10-year firearm-rights restriction, would not qualify as in custody.

[10] The Writ of Error Coram Nobis is unavailable in California to set aside a conviction when a plea is entered by a defendant who did not know the consequences of the guilty or no contest plea. Nor can the writ be used to challenge

result is that there are no post-conviction "restoration" procedures for those persons facing a lifetime restriction of their firearm rights resulting from a conviction for a misdemeanor crime of domestic violence.

In sum, Plaintiff has no options available to restore his firearm rights (while leaving the conviction intact) or remove his conviction in order to restore his firearm rights.

B. Process for Legal Firearm Transactions

Whenever a person purchases a firearm from an FFL, the individual must submit certain information, including their name, date of birth, social security number (optional), and state of residence. 18 U.S.C. § 922(t)(1); 27 C.F.R. § 478.124. Using that information, the FFL is required (subject to minimal exceptions) to submit the purchaser's information to the NICS run by the FBI under Attorney General HOLDER. 18 U.S.C. § 922(t)(1); 28 C.F.R. §25.6.

When the FFL contacts NICS, the NICS analyst enters the purchaser's information and checks their identifying information against federal databases. 28 C.F.R. §25.6(c) (the system works similarly when the process is done electronically). If the purchaser has no past history of events that could prohibit him from possessing firearms, NICS provides a "proceed" response and the FFL may transfer the firearm pursuant to state and federal laws. 28 C.F.R. § 25.6(c). If there are potentially prohibiting events in that person's past, the information will be reviewed by the NICS employee to see if the event is prohibiting or not.[11] If the events are not prohibiting, the employee will provide a "proceed" response; if the event is prohibiting, the employee will provide a "deny" response, 28 C.F.R. §

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the constitutionality of a sentence, ineffective assistance of counsel, or improper admission of evidence. *People v. Kim*, 45 Cal. 4th 1078, 1095, 90 Cal. Rptr. 3d 355 (2009).

[11] *See* Fed. Bureau of Investigation, U.S. Dep't of Justice, *National Instant Criminal Background Check System (NICS)* (April 2012), http://www.fbi.gov/about-us/cjis/nics/general-information/nics_overview.pdf.

25.6(c)(1)(iv)(C); and if further information is needed, a "delay" response is provided, *id.* at § 25.6(c)(1)(iv)(B).

States have the option of being the gatekeepers for firearm background checks. 28 C.F.R. § 25.6(d). The states can opt to be "full participants" (meaning that they conduct background checks for both handgun and long gun transactions), "partial participants" (meaning states that conduct background checks for handgun permits/purchases and rely on NICS to do the background checks for long guns), or "non-participants" (where the state takes no part in the background check process, and NICS conducts the background checks as outlined above).[12]

Full-participant States designate a "Point of Contact" ("POC") whom the FFLs contact for background checks instead of NICS. 28 C.F.R. § 25.1. California is such a state. And in California, by legislative mandate the California Department of Justice, Bureau of Firearms ("California DOJ"), headed by Defendant Attorney General HARRIS, is the POC that conducts background checks for all firearm transactions through an FFL. Cal. Penal Code § 28220(b). In this capacity, the California DOJ, acting on behalf of the federal government, determines who may acquire firearms in California from an FFL. Consequently it is Defendant Attorney General HARRIS' California DOJ who denied Plaintiff the acquisition of his firearm in California pursuant to federal law.

ANALYSIS

I. PLAINTIFF IS ENTITLED TO EXERCISE HIS FUNDAMENTAL RIGHT TO KEEP AND BEAR ARMS

The United States Supreme Court has held that the Second Amendment guarantees an individual right to keep and bear arms. *Heller*, 554 U.S. at 592. The Court subsequently confirmed that such right is fundamental and its reach extends

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[12] Fed. Bureau of Investigation, Nat'l Instant Criminal Background Check Sys., *NICS Point of Contact States & Territories*, http://www.fbi.gov/about-us/cjis/nics/poc (last updated July 1, 2008).

to state and local governments via the Due Process Clause of the Fourteenth Amendment. *McDonald*, 130 S. Ct. at 3037; *accord id.* at 3042. Federal law, as confirmed by the Cal DOJ, prohibits Plaintiff from exercising that right.

The question thus presented to this Court is whether Plaintiff can be permanently denied the ability to exercise his fundamental Second Amendment rights due to a single MCDV conviction occurring over fifteen years ago, regardless of his having demonstrated since that event that he poses no risk of violence to himself or others and the fact the state in which he resides (California) would allow him to possess firearms under its laws but for the federal restriction.

As explained below, because there is neither historical support for nor any governmental interest furthered by barring Plaintiff from exercising his fundamental rights, the answer to that question is no. Accordingly, with this action, Plaintiff asks this Court to declare 18 U.S.C. § 922(g)(9) unconstitutional as applied to him and to enjoin the Attorneys General of both the United States and California from proscribing Plaintiff's exercise of his constitutional right to possess arms.

II. STANDARDS FOR REVIEWING SECOND AMENDMENT CHALLENGES

The *Heller* Court advances an analytical approach that first focuses on "examination of a variety of legal and other sources to determine *the public understanding* of [the] legal text," 554 U.S.. at 605, with particular focus on "the founding period," *id*. at 604, to determine whether a particular restriction affects conduct that falls within the scope of the Second Amendment. If it does not, then the restriction is valid. If it does, however, the burden is on the government to justify the restriction by resort to "history and tradition" or, alternatively, by satisfying its burden under an appropriate level of scrutiny, as described below. *See Heller v. District of Columbia* (*Heller II*), 670 F.3d 1244, 1271-74 (D.C. Cir. 2011) (Kavanaugh, J., dissenting); *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010).

Here, the conduct being restricted is Plaintiff's ability to obtain and possess firearms for self-defense, indisputably core activity under the Second Amendment as identified by the Supreme Court. *Heller*, 554 U.S. at 594; *McDonald*, 130 S. Ct. at 3036. So the question before this Court becomes "whether a person [Plaintiff], rather than the person's conduct, is unprotected by the Second Amendment." *Chester*, 628 F.3d at 680 (citing *United States v. Skoien*, 614 F.3d 638, 649 (7th Cir. 2010)(Sykes, J., dissenting) (framing the threshold question as "whether persons convicted of a domestic-violence misdemeanor are completely 'outside the reach' of the Second Amendment as a matter of founding-era history and background legal tradition")).

Plaintiff contends there is no historical support for the notion that misdemeanants, even ones convicted of crimes involving violence, are unprotected by the Second Amendment. At minimum, as noted by the Fourth Circuit in addressing this very issue, the history on this account is "inconclusive." *Id.* at 681 (noting that since "the historical evidence on whether felons enjoyed the right to possess and carry arms is inconclusive, it would likely be even more so with respect to domestic-violence misdemeanants.") Regardless, because Second Amendment-protected conduct (i.e., the ability to obtain and possess firearms) is undoubtedly being restricted here, it is Defendants' burden to either prove that misdemeanants as a category have historically been barred from exercising Second Amendment rights or meet their burden of justifying a restriction on Plaintiff's rights under the proper level of scrutiny for Second Amendment challenges.

A. *Heller* and *McDonald* Endorse a Scope-Based Standard of Review for Second Amendment Challenges

The Supreme Court, while not articulating a comprehensive framework for reviewing all Second Amendment challenges, has left little doubt that courts are to assess firearm restrictions based on "both text and history," *Heller*, 554 U.S. at 595,

and *not* by resorting to interest-balancing (i.e., means-ends) tests.[13] As described above, once a restriction has been determined to implicate the Second Amendment, as is the case here, *Heller* instructs courts to turn to "text and history," *id.*, to determine whether the particular restriction is nevertheless permissible because it is similar or analogous to restrictions historically understood as permissible limits on the right to bear arms, i.e., whether there is "historical justification for those regulations," *id.* at 635.

In this particular case, the question of whether misdemeanants are entitled to protections under the Second Amendment is inextricably linked to this follow-up question, i.e., whether *permanently* barring misdemeanants from exercising their rights, regardless of their personal circumstances, has been an historically accepted practice in our nation. Given the constitutional mandate that the right to arms "shall not be infringed," it is incumbent on Defendants to prove that proposition. Thought it is not his burden, Plaintiff also intends to offer evidence showing there is no such historical acceptance.

Because there is no historical support for permanently barring misdemeanants as a class from exercising their Second Amendment rights, especially where there is no assessment of their actual threat for committing future violence indefinitely, Plaintiff asserts that under *Heller*'s scope-based approach, his rights are being violated by the application of 18 U.S.C. § 922(g)(9) to him. As such, this Court need not adopt any particular level of scrutiny to balance Plaintiff's and Defendants' interests. As in *Heller*, history provides the answer to the question before this Court in favor of Plaintiff.

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[13] Notably absent from the *Heller* Court's analysis is any reference to "compelling interests," "narrowly tailored" laws, or any other means-ends scrutiny jargon.

B. Alternatively, Even if the Court Adopts a Means-Ends Test, the Burden Remains on Defendants to Justify Denying Plaintiff the Exercise of His Fundamental Rights

Plaintiff contends that strict scrutiny is required here because "strict scrutiny [is] applied when government action impinges upon a fundamental right protected by the Constitution." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 54, 103 S. Ct. 948, 74 L. Ed. 2d 794 (1983). And the Supreme Court has made clear that the Second Amendment is to be afforded the same status as other fundamental rights. *See McDonald*, 130 S. Ct. at 3043. Moreover, *Heller* rejected not only rational basis specifically, but also dissenting Justice Breyer's proposed "interest balancing" approach; this is a test which is merely intermediate scrutiny by another name as it relied on cases such as *Turner Broadcasting Systems, Inc. v. FCC*, 512 U.S. 622, 114 S. Ct. 2445, 129 L. Ed. 2d 497 (1994), and *Thompson v. Western States Medical Center*, 535 U.S. 357, 122 S. Ct. 1497, 152 L. Ed. 2d 563 (2002), which explicitly apply intermediate scrutiny. 554 U.S. at 628 n.27 (citing 554 U.S. at 687-90 (Breyer, J., dissenting)).

Some courts have held that restrictions on those with an MCDV conviction are only entitled to intermediate scrutiny, reasoning that a lesser standard is warranted because such people are not of the "law-abiding" sort mentioned by the *Heller* Court. *See Chester*, 628 F.3d at 680 (citing *Skoien*, 614 F.3d at 649). While Plaintiff respectfully disagrees with those courts' view for reasons he will explain in future briefing, it is ultimately irrelevant, since under heightened scrutiny, whether intermediate or strict, the presumption of validity is reversed, with the challenged law presumed unconstitutional and the burden on the government to justify the law. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 382, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992). Defendants cannot overcome that presumption.

Under intermediate scrutiny, Defendants must prove that denying Plaintiff his Second Amendment rights "is substantially related to achievement of an important governmental purpose." *Stop H-3 Ass'n v. Dole*, 870 F.2d 1419, 1429 n.20 (9th Cir.

1989). Although the means chosen to advance the government's purpose need not be the *least* restrictive alternative, they must nevertheless be "narrowly tailored" to the government's goal. *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989). And so, while protecting domestic violence victims from physical harm caused by firearms is undisputably a compelling interest of the government, the application of 18 U.S.C. § 922(g)(9) to Plaintiff, in order to be narrowly tailored, must "directly advance[] the governmental interest asserted, and . . . not [be] more extensive than is necessary to serve that interest." *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 566, 100 S. Ct. 2343, 65 l. Ed. 2d 341 (1980).

Here, Defendants are logically precluded from asserting that any interest is furthered by continuing to deny Plaintiff his Second Amendment rights. Federal law allows states to decide when a person with an MCDV conviction can regain his or her firearm rights. 18 U.S.C. § 921(a)(33)(B)(ii). Thus, if a state deems a person with an MCDV conviction to be eligible for firearm possession, the federal government's interest has been met. California law only bars those with an MCDV conviction from possessing firearms for 10 years. Cal. Penal Code § 29805. Plaintiff's mandatory 10-year ban on possession of firearms under California law expired in 2007, making Plaintiff eligible under state law from that point forward to be able to receive, own, and possess firearms. Additionally, in 2002, Plaintiff was allowed to withdraw his guilty plea and have the MCDV conviction "expunged" pursuant to California Penal Code section 1203.4. And, more importantly, Plaintiff later received an order from a Ventura County Superior Court adjudging all of Plaintiff's firearms rights to have been restored in 2007 for purposes of state law.

Because the federal government leaves it up to the states to determine whether those with an MCDV conviction should have their firearm rights restored under 18 U.S.C. § 921(a)(33)(B)(ii), and because California has determined that Plaintiff should regains his rights under its laws, Defendants cannot credibly assert that

continuing to deprive Plaintiff of his Second Amendment rights furthers any government interest, compelling or otherwise.

Moreover, no important governmental interest is in fact furthered by depriving Plaintiff of his Second Amendment rights. Plaintiff has a single misdemeanor conviction in his entire life, which occurred over 15 years ago, for which he received only probation with no jail time. During those fifteen years, he has maintained a peaceful and amicable relationship with the complaining witness (his ex-wife and mother of his child), who he sees on a weekly basis and with whom he has even traveled abroad. Further, he has committed *no* subsequent criminal act, nor has he committed any disqualifying acts of violence against his current spouse. He has proved that he poses no threat of violence to his current or former intimate partners and, as such, no governmental interest is furthered by continuing to deprive him of his fundamental rights based on an isolated incident occurring over 15 years ago that warranted only a misdemeanor charge with no jail time.

Defendants will also have to explain how the application of 18 U.S.C. § 922(g)(9) to Plaintiff, which permanently suspends his right to arms, is narrowly tailored to serve their asserted important or compelling interest. *See Ward*, 491 U.S. at 791. There are many alternatives to a complete and permanent ban on Plaintiff's firearm rights that would further the interest of protecting the complaining witness that already exist or that the government can adopt. For example, both federal and California law already allow for people to seek a restraining order against a person who poses a threat, the effect of which, if granted, prohibits the restrained person from receiving or possessing firearms, and which can be renewed if warranted. *See* Cal. Civ. Proc. §§ 527.6 and 527.8; *see also* Cal. Penal Code §§ 136.2 and 646.91. Barring firearm possession for those convicted of an MCDV while they continue to live with their victim, and even categorical bans for a fixed number of years while the misdemeanant is deemed a threat per se are more narrowly tailored than the law at issue here. Defendants will have to explain why these alternatives are not

sufficient and why it is necessary to impose such an extreme measure as a complete lifetime ban.

In sum, the application of 18 U.S.C. § 922(g)(9) to Plaintiff is neither substantially related nor narrowly tailored to furthering any governmental interest. As such, Defendants cannot meet their burden to justify applying its restriction to Plaintiff.

It is worth noting that a Ninth Circuit panel held in a now-vacated opinion that the proper test for reviewing Second Amendment challenges is a "substantial burden" test, which applies heightened scrutiny only where the restriction at issue substantially burdens the right to arms. *Nordyke v. King*, 644 F.3d 776, 786 (9th Cir. 2011), *vacated following rehearing en banc*, 681 F.3d 1041 (9th Cir. 2012). Plaintiff respectfully contends this test is inappropriate for evaluating fundamental rights because it makes the default standard of review rational basis, a standard expressly rejected in *Heller*. In any event, heightened scrutiny would still be warranted here because the burden on Plaintiff's right is beyond substantial – it constitutes a complete denial of the right. Thus, even under the "substantial burden" test, the result here would be the same. The law's application to Plaintiff would be subject to heightened scrutiny, with the burden on Defendants to show that a permanent forfeiture of Plaintiff's right to arms is justified. Defendants will not be able to make that showing for the reasons explained above.

III. CLASSIFYING PLAINTIFF AS BEING PERPETUALLY UNDESERVING TO EXERCISE HIS FUNDAMENTAL SECOND AMENDMENT RIGHTS BECAUSE OF A SINGLE, ISOLATED MISDEMEANOR CONVICTION OCCURRING OVER 15 YEARS AGO VIOLATES HIS RIGHT TO EQUAL PROTECTION UNDER THE LAW

As applied, 18 U.S.C. § 922(g)(9) not only directly infringes Plaintiff's substantive Due Process rights that are enshrined in the Second Amendment, but also his right to Equal Protection under the law. "Where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might

invade or restrain them must be closely scrutinized." *Hussey v. City of Portland*, 64 F.3d 1260, 1265 (9th Cir. 1995) (quoting *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 670, 865 S. Ct. 1079, 16 L. Ed. 2d 169 (1966), and citing *Kramer v. Union Free School Dist.*, 395 U.S. 621, 633 89 S. Ct. 1886, 23 L. Ed. 2d 583 (1969)). In short, classifications that "impinge on personal rights protected by the Constitution" "will be sustained only if they are suitably tailored to serve a compelling state interest," i.e., meet strict scrutiny. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985) (citations omitted).

Defendants cannot meet their burden under the strict scrutiny standard of review mandated here to justify their classifying individuals convicted of an MCDV as per se undeserving of their fundamental Second Amendment rights indefinitely.

First, where fundamental rights are concerned, the issue is not whether the legislative judgment and resulting classification of who is denied firearm rights had *some* basis, but whether they "do in fact sufficiently further a compelling state interest to justify denying the [right] to" members of the restricted class. *Kramer*, 395 U.S. at 633. As already explained above, while protecting domestic violence victims is certainly a compelling governmental interest, that interest is not actually furthered by continuing to bar Plaintiff's possession of firearms since he has proven himself non-violent and law-abiding for over 15 years. Federal law effectively concedes that permanently barring a person convicted of an MCDV does *not necessarily* further any interest, by its allowing states to relieve people of their convictions so they can possess firearms. California has so relieved Plaintiff.

And under strict scrutiny, the restriction must be narrowly tailored. Again, as explained above there are less intrusive but still effective means to protect domestic violence victims other than a permanent bar on *all* those convicted of an MCDV. Thus, 18 U.S.C. § 922(g)(9) is not narrowly tailored as applied to Plaintiff. This is not to say that 18 U.S.C. § 922(g)(9) is facially invalid. Plaintiff does not assert that classifying those convicted of an MCDV as being barred from firearm possession is

per se unconstitutional. Rather, Plaintiff asserts that putting him in a class of people who are *permanently* barred from exercising fundamental rights, regardless of whether he poses a threat to anyone, is not necessary to further any compelling governmental interest. As such, Plaintiff is entitled to relief from his firearm restriction.

CONCLUSION

In sum, a lifetime prohibition on exercise of Second Amendment rights by an entire category of misdemeanants, without regard to whether doing so is historically sanctioned or actually furthers a sufficiently important governmental interest, cannot withstand constitutional scrutiny. While whether the government may or may constitutionally bar misdemeanants from exercising their Second Amendment rights at all remains an uncertain question - but one that need not be answered here - what is clear is that 18 U.S.C. § 922(g)(9) as applied to Plaintiff – with its perpetual consequences and non-tailored approach – can survive neither the sui generis approach of *Heller* nor the more traditional strict or intermediate scrutinies.

As such, Plaintiff is entitled to the relief he seeks.

Dated: January 7, 2013

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PROOF OF SERVICE

IT IS HEREBY CERTIFIED THAT:

I, C.D. Michel, the undersigned, am a citizen of the United States and am at least eighteen years of age. My business address is 180 E. Ocean Blvd., Suite 200, Long Beach, California, 90802.

I am not a party to the above-entitled action. I have caused service of:

PLAINTIFF'S BRIEF RE ISSUES ON REMAND

on the following party by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

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I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 7, 2013

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