

1 ANDRÉ BIROTTE JR.  
 United States Attorney  
 2 LEON W. WEIDMAN  
 Assistant United States Attorney  
 3 Chief, Civil Division  
 DAVID A. DeJUTE  
 4 Assistant United States Attorney  
 California Bar No. 153527  
 5 Room 7516, Federal Building  
 300 North Los Angeles Street  
 6 Los Angeles, California 90012  
 Telephone: (213) 894-2443  
 7 Facsimile: (213) 894-7819  
 email: david.dejute@usdoj.gov  
 8  
 Attorneys for Federal Defendant  
 9

10 UNITED STATES DISTRICT COURT  
 11 FOR THE CENTRAL DISTRICT OF CALIFORNIA  
 12 WESTERN DIVISION  
 13

14	EUGENE EVAN BAKER,	)	NO. CV 10-3996 SVW (AJWx)
		)	
15	Plaintiff,	)	
		)	
16	v.	)	DATE: February 4, 2013
		)	TIME: 1:30 p.m.
17	ERIC H. HOLDER, JR.,	)	CTRM: 6
	Attorney General of the	)	
18	United States, <i>et al</i> ,	)	
		)	
19	Defendants.	)	Hon. Stephen V. Wilson
	_____	)	

20  
 21  
 22  
 23 **FEDERAL DEFENDANT'S OPENING BRIEF**  
 24  
 25  
 26  
 27  
 28

TABLE OF CONTENTS

PAGE

FEDERAL DEFENDANT’S OPENING BRIEF . . . . . 1

I. INTRODUCTION . . . . . 1

II. FACTS AND PROCEDURAL HISTORY . . . . . 1

III. THE FEDERAL STATUTE SHOULD BE UPHeld . . . . . 3

    A. Section 922(g)(9) Should Be Upheld As Presumptively Lawful . . . . . 3

    B. If Constitutional Scrutiny Is Required, Section 922(g)(9) Should Be Upheld Under Intermediate Scrutiny . . . . . 7

    C. Section 922(g)(9) Should Be Upheld As Applied To Plaintiff . . . . . 11

IV. THE COMPLAINT SHOULD BE DISMISSED . . . . . 13

V. CONCLUSION . . . . . 14

**TABLE OF AUTHORITIES**

**FEDERAL CASES**

**PAGE**

Balistreri v. Pacifica Police Department,  
901 F.2d 696 (9th Cir. 1990) ..... 13

Carey v. Brown,  
447 U.S. 455, 100 S. Ct. 2286, (1980) ..... 10

Clark v. Jeter,  
486 U.S. 456, 108 S. Ct. 1910,(1988) ..... 9, 12

Darring v. Kincheloe,  
783 F.2d 874 (9th Cir. 1986) ..... 13

District of Columbia v. Heller,  
554 U.S. 570, 635,(2008) ..... 2, 3, 4, 5, 6, 7, 8

Enos v. Holder,  
855 F. Supp. 2d 1088 (E.D.Cal. 2012) ..... 5, 8

Florida Bar v. Went For It, Inc.,  
515 U.S. 618, 628, 115 S.Ct. 2371,(1995) ..... 10

Jennings v. Mukasey,  
511 F.3d 894 (9th Cir. 2007) ..... 2, 12

Nixon v. Shrink Missouri Government PAC,  
528 U.S. 377, 391, 120 S.Ct. 897,(2000) ..... 10

In re United States,  
578 F.3d 1195 (10th Cir. 2009) ..... 5, 8

United States v. Barton,  
633 F.3d 168 (3d Cir. 2011) ..... 11

United States v. Booker,  
570 F.Supp.2d 161 (D.Me. 2008), ..... 7

United States v. Booker,  
644 F.3d 12 (1st Cir. 2011) ..... 5, 8, 10

United States v. Chester,  
628 F.3d 673 (4th Cir. 2010) ..... 8, 11

United States v. Hayes,  
555 U.S. 415, 427, (2009) ..... 5, 6, 10

United States v. Salerno,  
481 U.S. 739, 750 107 S.Ct. 2095, (1987) ..... 9, 12

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

United States v. Skoien,  
614 F.3d 638 (7th Cir. 2010) ..... 6, 8, 9, 10, 11

United States v. Staten,  
666 F.3d 154 (4th Cir. 2011) ..... 8

United States v. Vongxay,  
594 F.3d 1111 (9th Cir. 2010), ..... 4, 7, 8

United States v. White,  
593 F.3d 1199 (11th Cir. 2010) ..... 5, 7, 8

U.S. v. Hayden,  
255 F.3d 768 (9th Cir. 2001) ..... 12

**STATE CASES**

Meyer v. Board of Medical Examiners,  
34 Cal.2d 62 (1949) ..... 12

People v. Flores,  
86 Cal.Rptr.3d 804 (Cal.Ct.App. 2008) ..... 7

People v. Frawley,  
82 Cal.App.4th 784 (1st Dist. 2000) ..... 12

**FEDERAL STATUTES**

18 U.S.C. § 921(a)(33)(A) ..... 11

18 U.S.C. § 922(g)(9) ..... passim

142 Cong. Rec. 22985 (1996) ..... 6

142 Cong. Rec. S8832 ..... 9

1 **FEDERAL DEFENDANT'S OPENING BRIEF**

2 I.

3 **INTRODUCTION**

4 The question presented to this Court is whether the federal  
5 statute at issue, 18 U.S.C. § 922(g)(9) - prohibiting the  
6 possession of a firearm by a misdemeanant convicted of domestic  
7 violence, should be struck down as an unlawful violation of the  
8 Second Amendment or upheld as a lawful enactment of Congress.  
9 Every circuit court to have considered this issue has upheld the  
10 statute as constitutional. The only district court within  
11 California to consider this issue has also upheld the statute as  
12 constitutional. This Court should likewise uphold the lawfulness  
13 of Section 922(g)(9) as a valid enactment of Congress.

14 II.

15 **FACTS AND PROCEDURAL HISTORY**

16 Plaintiff Eugene Evan Baker seeks a judgment from this  
17 Court declaring unconstitutional the federal statute codified at  
18 18 U.S.C. § 922(g)(9). See Docket No. 23. This statute makes it  
19 unlawful for any person convicted of a misdemeanor crime of  
20 domestic violence to possess a firearm. See 18 U.S.C. §  
21 922(g)(9). Baker claims that Section 922(g)(9) violates his  
22 rights under the Second Amendment. See Docket No. 23.

23 In his original complaint, filed in this Court on May 27,  
24 2010, Baker alleged that he was entitled to possess a firearm not  
25 only because Section 922(g)(9) was unconstitutional but also  
26 because his prior conviction had been expunged or set aside under  
27 California law. See Docket No. 1. This Court dismissed Baker's  
28 complaint on the ground that such an outcome was required under

1 binding Ninth Circuit precedent, citing Jennings v. Mukasey, 511  
2 F.3d 894 (9<sup>th</sup> Cir. 2007). See Docket No. 14.

3 The Ninth Circuit affirmed in part and reversed in part,  
4 holding:

5 Although Jennings v. Mukasey, 511 F.3d 894, 898-99 (9<sup>th</sup>  
6 Cir. 2007), forecloses Baker's statutory argument that  
7 his state court order purporting to "set aside" his  
8 misdemeanor domestic violence conviction renders §  
9 922(g)(9) inapplicable, Jennings does not foreclose  
10 Baker's Second Amendment argument. Jennings was  
11 decided before the Supreme Court announced that the  
12 Second Amendment "conferred an individual right to keep  
13 and bear arms." Dist. of Columbia v. Heller, 128 S.Ct.  
14 2783, 2799 (2008). The Jennings decision did not  
15 address the question of whether § 922(g)(9) violates  
16 the Second Amendment, and therefore does not control  
17 Baker's Second Amendment claim.

18 Baker v. Holder, No. 11-55067 (CV 10-3996-SVW), 3-4 (Exhibit A).

19 In his amended complaint, filed on October 11, 2012, Baker  
20 alleges the same facts as alleged in his original complaint;  
21 namely, that Plaintiff was convicted in 1997 of a misdemeanor  
22 crime of domestic violence; that this prior conviction has been  
23 set aside under state law; that, notwithstanding the set aside  
24 under state law, federal law prohibits his possession of a  
25 firearm; and, that the prohibition contained in Section 922(g)(9)  
26 violates Baker's rights under the Second Amendment.

27 Baker brings two nearly identical claims, the first to  
28 invalidate Section 922(g)(9) as violative of the Constitution as

1 applied to himself, and the second to invalidate that same  
2 statute as applied to himself as well as to all similarly  
3 situated individuals in California. See Docket No. 23.

4 **III.**

5 **THE FEDERAL STATUTE SHOULD BE UPHELD**

6 **A. Section 922(g)(9) Should Be Upheld As Presumptively Lawful**

7 The Second Amendment to the United States Constitution  
8 provides:

9 A well regulated Militia, being necessary to the  
10 security of a free State, the right of the people to  
11 keep and bear Arms, shall not be infringed.

12 U.S. Const. Amend. II. The Supreme Court recently announced that  
13 the Second Amendment protects an individual right of "law-  
14 abiding, responsible citizens to use arms in defense of hearth  
15 and home." District of Columbia v. Heller, 554 U.S. 570, 635,  
16 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008). Without needing to  
17 establish an appropriate level of scrutiny, the Court invalidated  
18 two statutes which entirely banned handgun possession in the home  
19 and required all other firearms within the home to be kept  
20 inoperable as presumptively unlawful violations of the Second  
21 Amendment. Id. at 634-35.

22 The Court held that some regulatory measures are, however,  
23 presumptively lawful restrictions on the Second Amendment, noting  
24 that:

25 Like most rights, the right secured by the Second  
26 Amendment is not unlimited. From Blackstone through  
27 the 19<sup>th</sup>-century cases, commentators and courts  
28 routinely explained that the right was not a right to

1 keep and carry any weapon whatsoever in any manner  
2 whatsoever and for whatever purpose.... Although we do  
3 not undertake an exhaustive historical analysis today  
4 of the full scope of the Second Amendment, nothing in  
5 our opinion should be taken to cast doubt on the  
6 longstanding prohibitions on the possession of firearms  
7 by felons and the mentally ill, or laws forbidding the  
8 carrying of firearms in sensitive places such as  
9 schools and government buildings, or laws imposing  
10 conditions and qualifications on the commercial sale of  
11 arms.

12 Heller, 554 U.S. at 626-27. The Court further cautioned, "We  
13 identify these *presumptively lawful* regulatory measures only as  
14 *examples*; our list does not purport to be exhaustive." Id. at  
15 627, n.26 (emphases added).

16 Relying on the above-quoted holding in Heller, the Ninth  
17 Circuit has concluded that 18 U.S.C. § 922(g)(1), which prohibits  
18 felons from possessing firearms, does not violate the Second  
19 Amendment. United States v. Vongxay, 594 F.3d 1111 (9<sup>th</sup> Cir.  
20 2010), *cert. denied*, 131 S.Ct. 294 (2010). The Ninth Circuit  
21 concluded that Section 922(g)(1) falls within Heller's list of  
22 *presumptively lawful* regulatory measures and, as such, does not  
23 require any further constitutional scrutiny. Vongxay, 594 F.3d  
24 at 1114-15.

25 Turning to Section 922(g)(9), every circuit court to  
26 consider this statute has held that it does not violate the  
27 Second Amendment. As with the ban on felons contained in Section  
28 922(g)(1), several circuit courts have upheld Section 922(g)(9)

1 as a presumptively lawful prohibition under Heller. See United  
2 States v. White, 593 F.3d 1199, 1206 (11<sup>th</sup> Cir. 2010) ("We now  
3 explicitly hold that § 922(g)(9) is a presumptively lawful  
4 'longstanding prohibition on the possession of firearms'"); In re  
5 United States, 578 F.3d 1195 (10<sup>th</sup> Cir. 2009) (order) ("Nothing  
6 suggests that the Heller dictum, which we must follow, is not  
7 inclusive of § 922(g)(9) involving those convicted of misdemeanor  
8 domestic violence"); United States v. Booker, 644 F.3d 12, 24  
9 (1<sup>st</sup> Cir. 2011) ("Indeed, § 922(g)(9) fits comfortably among the  
10 categories of regulations that Heller suggested would be  
11 'presumptively lawful.'" 554 U.S. at 627 n.26 Section 922(g)(9)  
12 is, historically and practically, a corollary outgrowth of the  
13 federal felon disqualification statute"). Similarly, the only  
14 district court to have addressed this issue in California has  
15 likewise upheld Section 922(g)(9) as presumptively lawful,  
16 without requiring any further scrutiny. See Enos v. Holder, 855  
17 F.Supp.2d 1088, 1099 (E.D.Cal. 2012)<sup>1</sup> ("§ 922(g)(9) is a  
18 presumptively lawful categorical ban on firearm possession.  
19 Keeping guns out of the hands of those convicted of domestic  
20 violence fits squarely into the prohibitions noted by Heller").

21 Section 922(g)(9) prohibits possession of firearms by  
22 persons who have been convicted of a "misdemeanor crime of  
23 domestic violence." The statute serves a vital role because, as  
24 the Supreme Court has observed, "Firearms and domestic strife are  
25 a potentially deadly combination nationwide." United States v.  
26 Hayes, 555 U.S. 415, 427, 129 S.Ct. 1079, 172 L.Ed.2d 816 (2009).

---

27  
28 <sup>1</sup> Enos is currently on appeal to the Ninth Circuit.

1 In Hayes, the Supreme Court explained why 18 U.S.C. § 922(g)(9)  
2 was enacted:

3 Existing felon-in-possession laws, Congress recognized,  
4 were not keeping firearms out of the hands of domestic  
5 abusers, because "many people who engage in serious  
6 spousal or child abuse ultimately are not charged with  
7 or convicted of felonies." 142 Cong. Rec. 22985 (1996)  
8 (statement of Sen. Lautenberg). By extending the  
9 federal firearm prohibition to persons convicted of  
10 "misdemeanor crime[s] of domestic violence," proponents  
11 of § 922(g)(9) sought to "close this dangerous  
12 loophole." Id., at 22986.

13 Construing § 922(g)(9) to exclude the domestic  
14 abuser convicted under a generic use-of-force statute  
15 (one that does not designate a domestic relationship as  
16 an element of the offense) would frustrate Congress'  
17 manifest purpose. Firearms and domestic strife are a  
18 potentially deadly combination nationwide.

19 Hayes, 555 U.S. at 427; see also United States v. Skoien, 614  
20 F.3d 638, 642 (7<sup>th</sup> Cir. 2010) (*en banc*) ("The belief underpinning  
21 § 922(g)(9) is that people who have been convicted of violence  
22 once - toward a spouse, child, or domestic partner, no less - are  
23 likely to use violence again").

24 Because Section 922(g)(9) disarms individuals convicted of  
25 violent criminal conduct, the statute is "presumptively lawful"  
26 under the reasoning of Heller. For purposes of Second Amendment  
27 analysis, there is no difference between Sections 922(g)(1) and  
28 922(g)(9). Although more recently enacted than Section

1 922(g)(1), Section 922(g)(9) "addresses the thorny problem of  
2 domestic violence," which "Congress recognized was not remedied  
3 by 'longstanding' felon-in-possession laws." White, 593 F.3d at  
4 1205-06.

5 Furthermore, Section 922(g)(9) should be deemed  
6 "presumptively lawful" because a person convicted under that  
7 statute must "have first acted violently toward a family member  
8 or domestic partner." White, 593 F.3d at 1205-06. "The public  
9 interest in a prohibition on firearms possession is at its apex  
10 in circumstances . . . where a statute disarms persons who have  
11 proven unable to control violent criminal impulses." People v.  
12 Flores, 86 Cal.Rptr.3d 804, 807 (Cal.Ct.App. 2008). Section  
13 922(g)(1), by comparison, "does not distinguish between the  
14 violent and non-violent offender." White, 593 F.3d at 1206.  
15 Accordingly, "as a predictor of firearm misuse, the definitional  
16 net cast by § 922(g)(9) is tighter than the net cast by §  
17 922(g)(1)." United States v. Booker, 570 F.Supp.2d 161, 164  
18 (D.Me. 2008), aff'd, 644 F.3d 12 (1<sup>st</sup> Cir. 2011).

19 This Court should therefore extend the presumption of  
20 lawfulness conferred upon Section 922(g)(1) by Heller, and  
21 acknowledged by the Ninth Circuit in Vongxay, to the ban on  
22 firearm possession by misdemeanants convicted of domestic  
23 violence codified in Section 922(g)(9).

24 **B. If Constitutional Scrutiny Is Required, Section 922(g)(9)**  
25 **Should Be Upheld Under Intermediate Scrutiny**

26 As discussed above, every circuit court to have considered  
27 the constitutional validity of Section 922(g)(9) has upheld the  
28 statute, and the Tenth and Eleventh Circuits have done so as a

1 presumptively lawful regulation under Heller without requiring  
2 any further scrutiny. See In re United States, 578 F.3d 1195  
3 (10<sup>th</sup> Cir. 2009); United States v. White, 593 F.3d 1199, 1206  
4 (11<sup>th</sup> Cir. 2010). Similarly, the only district court to have  
5 addressed this issue in California has likewise upheld Section  
6 922(g)(9) as presumptively lawful, without requiring any further  
7 scrutiny. See Enos v. Holder, 855 F.Supp.2d 1088, 1099 (E.D.Cal.  
8 2012).

9 The other circuit courts which have considered this issue  
10 after Heller, that is, the First, Fourth and Seventh Circuits,  
11 have upheld as constitutional the categorical ban on firearm  
12 possession of Section 922(g)(9) after applying intermediate  
13 scrutiny and finding that the statute is related to an important  
14 governmental interest.<sup>2</sup> See United States v. Booker, 644 F.3d  
15 12, 25 (1<sup>st</sup> Cir. 2011) ("It is plain that Section 922(g)(9)  
16 substantially promotes an important government interest in  
17 preventing domestic gun violence"); United States v. Staten, 666  
18 F.3d 154, 168 (4<sup>th</sup> Cir. 2011) ("§ 922(g)(9) satisfies the  
19 intermediate scrutiny standard"); United States v. Skoien, 614  
20 F.3d 638 (7<sup>th</sup> Cir. 2010)(*en banc*) (concluding that Section  
21 922(g)(9) withstands intermediate scrutiny).

---

22  
23  
24 <sup>2</sup>In Vongxay, 594 F.3d 1111 (9<sup>th</sup> Cir. 2010), the Ninth Circuit  
25 rejected the plaintiff's argument that his Equal Protection  
26 challenge to 18 U.S.C. § 922(g)(1) should be reviewed under  
27 strict scrutiny on the ground that the right to bear arms is a  
28 fundamental right. See Vongxay, 594 F.3d at 1118; see also Id.  
at 1118 n.5 ("Heller did not establish that Second Amendment  
restrictions must be reviewed under strict scrutiny."). If any  
scrutiny is warranted, it would therefore be intermediate  
scrutiny. See, e.g., United States v. Skoien, 614 F.3d 638, 641-  
45 (7<sup>th</sup> Cir. 2010); United States v. Chester, 628 F.3d 673, 683  
(4<sup>th</sup> Cir. 2010).

1 To pass constitutional muster under intermediate scrutiny,  
2 the government must typically establish that the challenged law  
3 is substantially related to an important governmental interest.  
4 See, e.g., Clark v. Jeter, 486 U.S. 456, 461, 108 S.Ct. 1910, 100  
5 L.Ed.2d 465 (1988). Here, it cannot be disputed that the goal of  
6 Section 922(g)(9), which is to prevent armed violence, is an  
7 important governmental interest. Congress's interest in  
8 protecting "the safety and indeed the lives of its citizens" is  
9 not merely "substantial" but "compelling." United States v.  
10 Salerno, 481 U.S. 739, 750 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987).  
11 The Seventh Circuit noted that "no one doubts that the goal of §  
12 922(g)(9), preventing armed mayhem, is an important governmental  
13 objective." Skoiien, 614 F.3d at 642.<sup>3</sup> Likewise, as the First  
14 Circuit explained:

15 Section 922(g)(9) finds its animating interest in  
16 keeping guns away from people who have been proven to  
17 engage in violence with those with whom they share a  
18 domestically intimate or familial relationship, or who  
19 live with them or the like. This interest, which  
20 appears plainly on the face of the statute and is borne  
21 out by its legislative history, see 142 Cong. Rec.  
22 S8832 (statement of Sen. Lautenberg), is undeniably  
23 important. See Skoiien, 614 F.3d at 642 ("no one doubts  
24 that the goal of § 922(g)(9), preventing armed mayhem,

---

25  
26 <sup>3</sup> A survey of 16,000 Americans released in 2000 reported that a  
27 staggering 22.1% of American women had been physically assaulted  
28 by an intimate partner at some point in their lifetime. United  
States Department of Justice, Extent, Nature and Consequences of  
Intimate Partner Violence, 11 (2000) (NVWS Report), available at  
<http://www.ncjrs.gov/pdffiles1/nij/181867.pdf>.

1 is an important governmental objective."); cf. Carey v.  
2 Brown, 447 U.S. 455, 271, 100 S. Ct. 2286, 65 L.Ed.2d  
3 263 (1980) ("The State's interest in protecting the  
4 well-being, tranquility, and privacy of the home is  
5 certainly of the highest order in a free and civilized  
6 society").

7 Booker, 644 F.3d at 25.

8 Moreover, keeping firearms out of the hands of domestic  
9 abusers is substantially related to that important governmental  
10 interest.<sup>4</sup> See Booker, 644 F.3d at 25 ("Nor can there be any  
11 question that there is a substantial relationship between §  
12 922(g)(9)'s disqualification of domestic violence misdemeanants  
13 from gun ownership and the governmental interest in preventing  
14 gun violence in the home"). "Firearms and domestic strife are a  
15 potentially deadly combination nationwide." Hayes, 555 U.S. at  
16 427. As Judge Easterbrook explained, "Domestic assaults with  
17 firearms are approximately twelve times more likely to end in the  
18 victim's death than are assaults by knives or fists." Skoien,  
19 614 F.3d at 643. Moreover, as he further explained, "the  
20 recidivism rate is high, implying that there are substantial  
21 benefits in keeping the most deadly weapons out of the hands of  
22 \_\_\_\_\_

23 <sup>4</sup> The government need not always produce empirical evidence to  
24 affirmatively establish the benefits of disarming criminals or  
25 other potentially dangerous individuals. See Nixon v. Shrink  
26 Missouri Government PAC, 528 U.S. 377, 391, 120 S.Ct. 897, 145  
27 L.Ed.2d 886 (2000) ("the quantum of empirical evidence needed to  
28 satisfy heightened judicial scrutiny of legislative judgments  
will vary up or down with the novelty and plausibility of the  
justification raised"). Even under strict scrutiny, the  
government may sometimes justify some restrictions on speech  
"based solely on history, consensus, and 'simple common sense.'" Florida Bar v. Went For It, Inc., 515 U.S. 618, 628, 115 S.Ct.  
2371, 132 L.Ed.2d 541 (1995).

1 domestic abusers." Id. at 644; see also Id. at 642 ("The belief  
2 underpinning § 922(g)(9) is that people who have been convicted  
3 of violence once - toward a spouse, child, or domestic partner,  
4 no less - are likely to use violence again"); United States v.  
5 Chester, 628 F.3d 673, 691 (4<sup>th</sup> Cir. 2010) (Davis, J.,  
6 concurring) ("Domestic violence misdemeanants, even more so than  
7 most convicted felons, have demonstrated a specific propensity  
8 for violence and thus pose an[] unacceptable risk of firearm  
9 misuse").

10 Even if this Court applies intermediate scrutiny, therefore,  
11 Section 922(g)(9) passes constitutional muster because it  
12 substantially promotes an important governmental interest in  
13 preventing domestic gun violence.

14 **C. Section 922(g)(9) Should Be Upheld As Applied To Plaintiff**

15 In addition to attacking the facial validity of Section  
16 922(g)(9), Plaintiff also appears to challenge the  
17 constitutionality of the statute as applied to himself. See  
18 Docket No. 23, Second Claim. This claim fails.

19 To raise a successful as-applied challenge, Plaintiff "must  
20 present facts about himself and his background that distinguish  
21 his circumstances from those of persons historically barred from  
22 Second Amendment protections." United States v. Barton, 633 F.3d  
23 168, 174 (3d Cir. 2011). Plaintiff was convicted in a state  
24 court of California of an offense involving "the use or attempted  
25 use of physical force, or the threatened use of a deadly weapon."  
26 See 18 U.S.C. § 921(a)(33)(A). Notwithstanding California's  
27 grant of relief under California Penal Code 1203.4, California  
28 continues to treat plaintiff's conviction as relevant "in a

1 variety of civil and evidentiary contexts," even providing that  
2 "'in any subsequent prosecution ... for any other offense, the  
3 prior conviction may be pleaded and proved and shall have the  
4 same effect as if'" relief under California Penal Code 1203.4 had  
5 not been granted. U.S. v. Hayden, 255 F.3d 768, 772 (9<sup>th</sup> Cir.  
6 2001) (quoting People v. Frawley, 82 Cal.App.4th 784, 791-92 (1<sup>st</sup>  
7 Dist. 2000); see also Jennings v. Mukasey, 511 F.3d 894, 898-99  
8 (9<sup>th</sup> Cir. 2007) (an expungement under California law does not  
9 qualify as a set aside for purposes of federal law). Thus, the  
10 State in which plaintiff was convicted has itself declined "to  
11 wipe out absolutely and for all purposes the dismissed proceeding  
12 as a relevant consideration and to place [plaintiff] in the  
13 position which he would have occupied in all respects as a  
14 citizen if no accusation or information had ever been presented  
15 against him." Hayden, 255 F.3d at 772 (quoting Meyer v. Board of  
16 Medical Examiners, 34 Cal.2d 62, 67 (1949)).

17 Applying Section 922(g)(9) in these circumstances is  
18 "substantially related," Clark, 486 U.S. at 461, to the  
19 governmental interest in public safety, which the Supreme Court  
20 has recognized as "compelling," United States v. Salerno, 481  
21 U.S. 739, 750 (1987). Domestic violence misdemeanants have, by  
22 statutory definition, committed a crime of violence, and Baker  
23 has failed to allege any facts about himself and his background  
24 that distinguish his circumstances from other domestic violence  
25 misdemeanants who face the firearm prohibition under Section  
26 922(g)(9). To the contrary, Baker has alleged that all persons  
27  
28

1 in California convicted of misdemeanor domestic violence are  
 2 *similarly* banned under Section 922(g)(9). See Docket No. 23, ¶  
 3 38.<sup>5</sup>

4 Having failed to allege any distinguishing facts between  
 5 himself and others similarly situated, Baker's "as-applied"  
 6 challenge to the statute lacks merit.

7 **IV.**

8 **THE COMPLAINT SHOULD BE DISMISSED**

9 Because 18 U.S.C. § 922(g)(9) is a valid enactment of  
 10 Congress, Plaintiff has no viable claim, and his complaint should  
 11 be dismissed. See Balistreri v. Pacifica Police Department, 901  
 12 F.2d 696, 699 (9<sup>th</sup> Cir. 1990) ("Dismissal can be based on the  
 13 lack of a cognizable legal theory or the absence of sufficient  
 14 facts alleged under a cognizable legal theory"). In addition,  
 15 Plaintiff lacks standing to bring an equal protection claim on  
 16 behalf of similarly situated third-party class members. See  
 17 Darring v. Kincheloe, 783 F.2d. 874, 877 (9<sup>th</sup>. Cir 1986) ("The  
 18 federal courts have historically been reluctant to recognize

19 \_\_\_\_\_  
 20 <sup>5</sup> In his complaint, for example, Baker alleges that:

21 all California citizens of the same class as Plaintiff,  
 22 i.e., who have fulfilled the requirements of Section  
 23 29805 for the requisite ten-year period, are, *like*  
 24 *Plaintiff*, prevented from receiving, owning or  
 possessing firearms, and, *like Plaintiff*, are subject  
 to arrest should they receive, own or possess a  
 firearm.

25 Docket No. 23, ¶ 38 (emphases added). It should further be noted  
 26 that alleging his similarity to all other Californians convicted  
 27 of misdemeanor domestic violence is not only fatal to his as-  
 applied challenge to the validity of Section 922(g)(9) under the  
 28 Second Amendment, but it is also fatal to his Second Claim for a  
 violation of the Equal Protection Clause, for the gravamen of an  
 Equal Protection claim is that similarly situated individuals are  
 treated *differently* not *similarly*.

1 third-party standing"). Moreover, the complaint should be  
2 dismissed with prejudice because amendment would be futile.

3 V.

4 CONCLUSION

5 For the foregoing reasons, the Federal Defendant  
6 respectfully requests this Court to uphold the constitutionality  
7 of 18 U.S.C. § 922(g)(9) and, having done so, to dismiss  
8 Plaintiff's complaint with prejudice.

9 Respectfully submitted,

10 DATED: January 7, 2012

ANDRÉ BIROTTE JR.  
United States Attorney  
LEON W. WEIDMAN  
Assistant United States Attorney  
Chief, Civil Division

13 /s/ David A. DeJute  
14 DAVID A. DeJUTE  
Assistant United States Attorney  
Attorneys for Federal Defendant

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EUGENE EVAN BAKER,

Plaintiff - Appellant,

v.

ERIC H. HOLDER, Jr., in his official  
capacity as Attorney General of the United  
States,

Defendant - Appellee.,

No. 11-55067

D.C. No. 2:10-cv-03996-SVW-  
AJW

MEMORANDUM\*

Appeal from the United States District Court  
for the Central District of California  
Stephen V. Wilson, District Judge, Presiding

Argued and Submitted June 6, 2012  
Pasadena, California

Before: B. FLETCHER, WARDLAW, and BYBEE, Circuit Judges.

Eugene Baker appeals from the district court's order dismissing his  
complaint under Federal Rules of Civil Procedure 12(b)(1) and (b)(6). We affirm  
in part, reverse in part, and remand for further proceedings.

---

\* This disposition is not appropriate for publication and is not precedent  
except as provided by 9th Cir. R. 36-3.

The district court dismissed the complaint without prejudice under Rule 12(b)(1), concluding that Baker's complaint fails to state facts sufficient to present a "case or controversy" under Article III, § 2 of the Constitution. At the outset, we note a disparity between the complaint as filed on the district court's electronic docket and the complaint as it appears in Baker's excerpts of record. The complaint found in the electronic docket consists of only the first and last pages of the complaint in Baker's excerpts. It is not clear from the record whether the district court had the opportunity to review the complaint in its entirety. The two pages of the complaint available on the electronic docket clearly fail to assert facts sufficient to satisfy the justiciability requirements of Article III, as they do not allege that Baker has taken any steps to acquire a firearm. It is unclear whether the full complaint is adequate.

It is apparent, however, that Baker is capable of amending his complaint to include additional facts that would confer standing. In his opposition to the motion to dismiss, Baker attached a letter from the California Department of Justice ("CA DOJ") informing him that his application to purchase a firearm had been denied because his prior conviction for a misdemeanor crime of domestic violence barred him from purchasing or possessing firearms under federal law. Baker also attached a letter sent by the CA DOJ to a firearms dealer, ordering the dealer not to release

firearms to Baker. These facts, if alleged in the complaint, are sufficient to confer standing, as the government conceded at oral argument. Therefore, the district court properly granted the 12(b)(1) motion without prejudice, and, upon remand, Baker should be allowed to amend his complaint to allege the additional jurisdictional facts. *See Polich v. Burlington N., Inc.*, 942 F.2d 1467, 1472 (9th Cir. 1991) (“Dismissal without leave to amend is improper unless it is clear, upon *de novo* review, that the complaint could not be saved by any amendment.”).

The district court erred by dismissing the complaint with prejudice under Rule 12(b)(6) for failure to state a claim. Baker’s complaint sets forth both a statutory and a constitutional argument as to the invalidity of applying the prohibition in 18 U.S.C. § 922(g)(9) to him. Although *Jennings v. Mukasey*, 511 F.3d 894, 898-99 (9th Cir. 2007), forecloses Baker’s statutory argument that his state court order purporting to “set aside” his misdemeanor domestic violence conviction renders § 922(g)(9) inapplicable, *Jennings* does not foreclose Baker’s Second Amendment argument. *Jennings* was decided before the Supreme Court announced that the Second Amendment “conferred an individual right to keep and bear arms.” *Dist. of Columbia v. Heller*, 128 S. Ct. 2783, 2799 (2008). The *Jennings* decision did not address the question of whether § 922(g)(9) violates the

Second Amendment, and therefore does not control Baker's Second Amendment claim.

We therefore affirm the Rule 12(b)(1) dismissal without prejudice, reverse the Rule 12(b)(6) dismissal, and remand with leave to amend the complaint.

Each party shall bear its own costs on appeal.

**AFFIRMED** in part; **REVERSED** in part; **REMANDED**.