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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
	_____	)	

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 23 **FEDERAL DEFENDANT'S RESPONDING BRIEF**  
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1 **FEDERAL DEFENDANT'S RESPONDING BRIEF**

2 I.

3 **INTRODUCTION**

4 Nothing contained in Plaintiff's Brief re Issues on Remand  
5 should deter this Court from concluding, for the reasons set  
6 forth in Defendant's Opening Brief, that 18 U.S.C. § 922(g)(9) is  
7 a valid enactment of Congress consistent with the provisions of  
8 the Constitution. Indeed, Plaintiff cites *no authority* which has  
9 held this statute to be unconstitutional.

10 For the reasons set forth in Defendant's Opening Brief and  
11 in this Responding Brief, therefore, and consistent with every  
12 Circuit Court and the only California District Court to have  
13 considered the issue, this Court should uphold the validity of  
14 the statute by ruling that Section 922(g)(9) does not violate the  
15 Constitution.

16 II.

17 **PLAINTIFF CITES NO CONTRARY AUTHORITY**

18 Plaintiff cites no contrary authority to the proposition  
19 contained in Defendant's opening brief that every Circuit Court  
20 and the only California District Court to have considered the  
21 only issue presented by Plaintiff's complaint<sup>1</sup> have concluded  
22 that Section 922(g)(9) does not violate the Constitution. See  
23 United States v. White, 593 F.3d 1199, 1206 (11<sup>th</sup> Cir. 2010) ("We  
24 now explicitly hold that § 922(g)(9) is a presumptively lawful  
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27 <sup>1</sup> The only dispositive issue presented by Plaintiff's complaint  
28 is whether the statute violates the constitution. See  
Plaintiff's Opening Brief, 2:6-7 (Plaintiff "solely seeks to  
vindicate his Second Amendment rights against Defendants'  
application of § 922(g)(9)").

1 'longstanding prohibition on the possession of firearms'); In re  
2 United States, 578 F.3d 1195 (10<sup>th</sup> Cir. 2009) (order) ("Nothing  
3 suggests that the Heller dictum, which we must follow, is not  
4 inclusive of § 922(g)(9) involving those convicted of misdemeanor  
5 domestic violence"); United States v. Booker, 644 F.3d 12, 24  
6 (1<sup>st</sup> Cir. 2011) ("Indeed, § 922(g)(9) fits comfortably among the  
7 categories of regulations that Heller suggested would be  
8 'presumptively lawful.'" 554 U.S. at 627 n.26 Section 922(g)(9)  
9 is, historically and practically, a corollary outgrowth of the  
10 federal felon disqualification statute"); United States v.  
11 Staten, 666 F.3d 154, 168 (4<sup>th</sup> Cir. 2011) ("§ 922(g)(9) satisfies  
12 the intermediate scrutiny standard"); United States v. Skoien,  
13 614 F.3d 638 (7<sup>th</sup> Cir. 2010)(*en banc*) (concluding that Section  
14 922(g)(9) withstands intermediate scrutiny); Enos v. Holder, 855  
15 F.Supp.2d 1088, 1099 (E.D.Cal. 2012) ("§ 922(g)(9) is a  
16 presumptively lawful categorical ban on firearm possession.  
17 Keeping guns out of the hands of those convicted of domestic  
18 violence fits squarely into the prohibitions noted by Heller").

19 III.

20 **PLAINTIFF'S REMEDY LIES WITH THE CALIFORNIA LEGISLATURE,**

21 **OR WITH A GUBERNATORIAL PARDON, NOT WITH THIS COURT**

22 Plaintiff correctly notes that relief from a ban on firearm  
23 possession is available under federal law pursuant to 18 U.S.C.  
24 § 921(a)(33)(B)(ii) whenever the misdemeanant's state allows an  
25 expungement of the conviction for domestic violence. See  
26 Plaintiff's Opening Brief, 7: 5-13. Plaintiff further correctly  
27 notes that California's expungement statute does not qualify  
28 under federal law. See Plaintiff's Opening Brief, 7:15-8:13,

1 citing, among others, Jennings v. Mukasey, 511 F.3d 894, 898 (9<sup>th</sup>  
2 Cir. 2007). Other states, however, have chosen to pass  
3 legislation which does qualify under federal law, thereby  
4 providing an avenue of relief for their citizens to reacquire  
5 firearms after a misdemeanor conviction for domestic violence.  
6 See, e.g., United States v. Laskie, 258 F.3d 1047 (2001) (a  
7 qualifying expungement statute is provided under Nevada law);  
8 United States v. Herron, 45 F.3d 340 (9<sup>th</sup> Cir. 1995) (a  
9 qualifying expungement statute is provided under Washington law).  
10 That California does not provide its citizens with a qualifying  
11 expungement statute is a choice the California legislature has  
12 made and, in our system of government, is free to change based  
13 on, among other things, lobbying by Plaintiff and the votes he  
14 can muster.

15 Moreover, as Plaintiff also correctly notes, federal law  
16 further provides relief where the misdemeanant convicted of  
17 domestic violence obtains a pardon. See Plaintiff's Opening  
18 Brief, 8:19-9:2. California law provides for such relief and, if  
19 Plaintiff obtains a pardon, nothing contained in federal law  
20 would prohibit him from possessing a firearm. See Id. That  
21 Plaintiff believes such a result to be unlikely speaks more to  
22 California gubernatorial discretion than it does to the  
23 inflexibility of federal law.

24 In short, it is simply inaccurate to speak of a total ban  
25 created by federal law. The California legislature, if it so  
26 chose, could amend its laws consistent with those in Nevada and  
27 Washington to provide misdemeanants convicted of domestic  
28 violence the ability to reacquire firearms, and the California

1 governor could provide a pardon, either of which would restore  
2 Plaintiff's right to obtain a firearm.

3 IV.

4 **THIS COURT NEED NOT DETERMINE A STANDARD OF REVIEW**  
5 **TO UPHOLD THE STATUTE AS CONSTITUTIONAL**

6 As more fully set forth in Defendant's Opening Brief, and  
7 adhering to the Supreme Court's method of analysis in Heller,  
8 some courts have upheld Section 922(g)(9) as presumptively  
9 lawful, holding that no standard of review is necessary to  
10 determine the issue. See United States v. White, 593 F.3d 1199,  
11 1206 (11<sup>th</sup> Cir. 2010); In re United States, 578 F.3d 1195 (10<sup>th</sup>  
12 Cir. 2009) (order); Enos v. Holder, 855 F.Supp.2d 1088, 1099  
13 (E.D.Cal. 2012). Other courts have upheld the federal statute  
14 after adopting an intermediate level of scrutiny. See United  
15 States v. Booker, 644 F.3d 12, 24 (1<sup>st</sup> Cir. 2011); United States  
16 v. Staten, 666 F.3d 154, 168 (4<sup>th</sup> Cir. 2011); United States v.  
17 Skoiien, 614 F.3d 638 (7<sup>th</sup> Cir. 2010)(*en banc*). In either event,  
18 and contrary to Plaintiff's suggestion, no court has adopted a  
19 strict scrutiny standard to determine whether Section 922(g)(9)  
20 passes constitutional muster. See Plaintiff's Opening Brief,  
21 18:3-6.

22 Indeed, in upholding the ban on firearm possession for  
23 felons, the Ninth Circuit has held that no standard of review is  
24 required for Second Amendment analysis. United States v.  
25 Vongxay, 594 F.3d 1111 (9<sup>th</sup> Cir. 2010), *cert. denied*, 131 S.Ct.  
26 294 (2010). Instead, the Ninth Circuit concluded that Section  
27 922(g)(1) falls within Heller's list of presumptively lawful

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1 regulatory measures and, as such, does not require any further  
2 constitutional scrutiny. Vongxay, 594 F.3d at 1114-15.

3 Because "Section 922(g)(9) is, historically and practically,  
4 a corollary outgrowth of the federal felon disqualification  
5 statute," it "fits comfortably among the categories of  
6 regulations that Heller suggested would be 'presumptively  
7 lawful.'" United States v. Booker, 644 F.3d 12, 24 (1<sup>st</sup> Cir.  
8 2011). Accordingly, strict scrutiny is not required and the  
9 statute should be upheld as "presumptively lawful" or, at most,  
10 upheld after this Court has adopted a compelling interest  
11 standard.

12 v.

13 **THE STATUTE IS NARROWLY TAILORED**

14 Again as set forth in Defendant's Opening Brief, Section  
15 922(g)(9) is sufficiently narrowly tailored to pass  
16 constitutional muster; indeed, it is more narrowly tailored than  
17 the ban on possession of firearms by felons contained in Section  
18 922(g)(1), which has been upheld as presumptively lawful by the  
19 Ninth Circuit in Vongxay. See, e.g., United States v. Booker,  
20 570 F.Supp.2d 161, 164 (D.Me. 2008) ("the definitional net cast  
21 by § 922(g)(9) is tighter than the net cast by § 922(g)(1)").

22 Contrary to Plaintiff's assertion, however, no statute has  
23 to be so narrowly tailored as to particularly apply to each  
24 particular individual. See Plaintiff's Opening Brief, 22:17-19  
25 (there is no compelling governmental interest<sup>2</sup> which is "actually  
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28 <sup>2</sup> Plaintiff also misstates the relevant legal standard,  
confusing the intermediate level of scrutiny of demonstrating a  
compelling governmental interest with that of strict scrutiny.

1 furthered by continuing to bar Plaintiff's possession of firearms  
2 since he has proven himself non-violent and law-abiding for over  
3 15 years"). Without citation to any evidence or to any  
4 authority, Plaintiff incorrectly asserts both a substantive and  
5 procedural violation of the Constitution has occurred because  
6 Plaintiff has not (yet) become a recidivist. Despite conceding  
7 that "the means chosen to advance the government's purpose need  
8 not be the *least* restrictive alternative," Plaintiff seems to  
9 believe that, unless the recidivism rate is 100%, a ban on  
10 firearm possession violates the Second Amendment. See  
11 Plaintiff's Opening Brief, 19:1-2.

12 Plaintiff has acknowledged, however, that "protecting  
13 domestic violence victims is certainly a compelling governmental  
14 interest." See Plaintiff's Opening Brief, 22:16-17. As more  
15 fully set forth in Defendant's Opening Brief, that compelling  
16 governmental interest is substantially related to banning  
17 domestic abusers from obtaining firearms. See Booker, 644 F.3d  
18 at 25 ("Nor can there be any question that there is a substantial  
19 relationship between § 922(g)(9)'s disqualification of domestic  
20 violence misdemeanants from gun ownership and the governmental  
21 interest in preventing gun violence in the home"). "Firearms and  
22 domestic strife are a potentially deadly combination nationwide."  
23 Hayes, 555 U.S. at 427. As Judge Easterbrook explained,  
24 "Domestic assaults with firearms are approximately twelve times  
25 more likely to end in the victim's death than are assaults by  
26 knives or fists." Skoien, 614 F.3d at 643. Moreover, as he  
27 further explained, "the recidivism rate is high, implying that  
28 there are substantial benefits in keeping the most deadly weapons

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

10 Whether this Court finds that the firearm ban contained in  
11 Section 922(g)(9) is presumptively lawful under Heller and  
12 Vongxay, as did the Tenth and Eleventh Circuits as well as the  
13 Eastern District of California, or whether this Court upholds the  
14 statute after applying an intermediate level of scrutiny, as did  
15 the First, Fourth and Seventh Circuits, therefore, it should  
16 uphold the statute as a valid constitutional enactment of  
17 Congress.

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1 VI.

2 CONCLUSION

3 For the foregoing reasons as set forth above and in the  
4 opening brief, the Federal Defendant respectfully requests that  
5 this Court uphold the constitutionality of 18 U.S.C. § 922(g)(9)  
6 and, having done so, dismiss Plaintiff's complaint with  
7 prejudice.

8 Respectfully submitted,

9 DATED: January 16, 2012

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