C. D. Michel - Calif. SBN 144258
Joshua R. Dale - Calif. SBN 209942
Sean A. Brady - Calif. SBN 262007
Joseph A. Silvoso, III - Calif. SBN 248502
MICHEL & ASSOCIATES, P.C.
180 East Ocean Blvd., Suite 200
Long Beach, CA 90802
Telephone: (562) 216-4444
Fax: (562) 216-4445
cmichel@michellawyers.com
jdale@michellawyers.com

Attorneys for Plaintiff
Eugene Evan Baker

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 OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

TABLE OF CONTENTS

TABLE OF CONTENTS (CONT.)

TABLE OF AUTHORITIES

PAGE(S)

FEDERAL CASES

TABLE OF AUTHORITIES (CONT.)

PAGE(S)

FEDERAL CASES (CONT.)

TABLE OF AUTHORITIES (CONT.)

PAGE(S)

FEDERAL CASES (CONT.)

STATUTES, RULES & OTHER AUTHORITY

TABLE OF AUTHORITIES

PAGE(S)

STATUTES, RULES & OTHER AUTHORITY (CONT.)

INTRODUCTION

Although Defendant United States Attorney General Eric Holder ("Federal Defendant") failed to comply with the Federal Rules of Civil Procedure and Central District Local Rules in bringing his purported "motion to dismiss" Plaintiff's complaint,[1] by its order of February 1, 2013, rescheduling the hearing in this matter until February 25, 2013, the Court signaled that it intended to nonetheless treat that hearing as one for a motion to dismiss. Scheduling Notice, Feb. 1, 2013, (Doc. No. 43). In response to that February 1, 2013 order, Plaintiff hereby opposes Federal Defendant's Motion to Dismiss.[2]

ARGUMENT

In his Opening Brief / Motion to Dismiss ("Motion"), Federal Defendant misconstrues Plaintiff's claims on multiple levels. Mainly, he describes Plaintiff's claims as an attack on the facial validity of 18 U.S.C. § 922(g)(9). As made clear both in Plaintiff's amended complaint and in his opening brief, Plaintiff is *solely* challenging the constitutionality of 18 U.S.C. § 922(g)(9) *as applied* to him.

And, Plaintiff prevails under the very standard Federal Defendant advances in his Motion for evaluating the validity of 18 U.S.C. § 922(g)(9) as applied to

---

[1] Federal Defendant failed to comply with Rules 6 and 12 of the Federal Rules of Civil Procedure and Central District Local Rules 6-1 and 7-3 by failing to include a notice of motion filed with the Clerk no later than twenty-eight days before the scheduled hearing, failed to serve said notice on each of the parties, failed to provide a concise statement of the relief sought, failed to contact opposing counsel to discuss his intent to file a FRCP Rule 12 motion, failed to meet and confer with opposing counsel in an effort to obtain an out-of-court resolution on the Rule 12 motion, and failed to include a statement in his motion confirming the conference of counsel pursuant to Local Rule 7-3.

[2] Defendant California Attorney General Kamala D. Harris joins Federal Defendant's Motion. Opening Br. Def.'s Cal. Atty. Gen. Kamala D. Harris & Cal. Dept. of Justice, Jan. 1, 2013 (Doc. No. 37). This opposition applies equally to her brief, to the extent it is considered a motion.

Plaintiff, i.e., that Plaintiff's circumstances must be distinguishable from those of persons historically barred from Second Amendment protections. Federal Defendant attempts to relieve himself of his burden to show history supports him on this count by suggesting that misdemeanants like Plaintiff can simply be shoe-horned into *Heller*'s list of "presumptively lawful" restrictions on *felons*, but there is neither historical nor textual basis for doing so.

Federal Defendant does not dispute that 18 U.S.C. § 922(g)(9) results in a lifetime ban for Plaintiff to exercise his fundamental, Second Amendment rights. Federal Defendant cannot meet his burden to justify such a deprivation. Thus, his motion to dismiss must fail, and Plaintiff should prevail.

I. PLAINTIFF WILL PREVAIL ON HIS AS APPLIED CHALLENGE TO 18 U.S.C. § 922(g)(9) UNDER FEDERAL DEFENDANT'S OWN STANDARD

Plaintiff agrees with Federal Defendant's position that the success of Plaintiff's as applied claims depends on an historical analysis to determine whether Plaintiff is distinguishable from "persons historically barred from Second Amendment protections." Fed. Def.'s Opening Br. at 11, Jan. 7, 2013, (Doc. No. 36) [hereinafter Fed. Def.'s Br.] (citing *United States v. Barton*, 633 F.3d 168, 174 (3d Cir. 2011)). This is effectively the very position Plaintiff primarily advocates in this lawsuit. Plaintiff does not agree, however, with Federal Defendant's assertion that Plaintiff has failed "to allege any facts about himself and his background that distinguish his circumstances from other domestic violence misdemeanants who face the firearm prohibition under Section 922(g)(9)." Fed. Def.'s Br. at 12. There are at least three problems with Federal Defendant's assertion.

First, the burden is on Federal Defendant to prove that Plaintiff is among a class of people who have historically been barred from Second Amendment protections in the first place. But Federal Defendant makes it seem as though the burden is Plaintiff's by claiming Plaintiff failed to allege any facts. Secondly, Federal Defendant raises the bar set by the *Barton* Court by claiming Plaintiff must

distinguish himself from other *domestic violence misdemeanants* to prevail. That is not the case. It is *Defendant* who must prove Plaintiff is among those individuals who have been *historically* barred from possessing firearms, e.g., *felons*. Finally, Plaintiff satisfies even Federal Defendant's exaggerated standard because he is different than those persons historically barred, including many convicted of an MCDV.

A. The Burden Is on Federal Defendant to Show Plaintiff Belongs to a Class of People Historically Barred from Exercising Second Amendment Rights

The constitutional mandate being that Second Amendment rights "shall not be infringed," it is Federal Defendant's burden to prove that permanently barring Plaintiff from possessing firearms is not an infringement. *See United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010) (emphasis added) (upon finding that the historical record as to whether those convicted of an MCDV fall outside of the Second Amendment's protections is inconclusive, the Fourth Circuit held it "*must* assume" they are not and subject restrictions on persons with an MCDV conviction to heightened scrutiny); *see also Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 203 (5th Cir. 2012) ("considerable historical evidence" required to show regulation falls outside Second Amendment's protection); *Heller v. District of Columbia* (*Heller II*), 670 F.3d 1244, 1271-74 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

While the *Barton* Court placed the burden on the party challenging the law in that case and not the government, the challenger there was a felon. As such, per *District of Columbia v. Heller*, the burden had already been shifted to the challenger because the law is "presumed" to be valid. 544 U.S. 570, 620-27 & n. 26, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008). That is not the case here because Plaintiff is a misdemeanant. And, as explained in detail below, misdemeanants are not among those classes of people for whom firearm restrictions are "presumptively lawful." This means the burden remains on Federal Defendant.

B. Federal Defendant Did Not and Cannot Meet His Burden to Show People in Plaintiff's Position Have Historically Been Barred from Exercising Second Amendment Rights

1. Defendant provides no evidence whatsoever that people convicted of an MCDV have historically been barred from exercising Second Amendment rights at all, let alone permanently

Despite Federal Defendant agreeing that an historical analysis is the appropriate test here, he fails to provide *any* explanation for why he carries his burden to show Plaintiff is similarly situated to those historically barred from Second Amendment rights. Instead, Federal Defendant argues that California continues to treat Plaintiff's MCDV conviction as relevant for certain matters, despite being granted relief under California Penal Code section 1203.4. Fed. Def.'s Br. at 11-12. Plaintiff assumes (because it is unclear) Federal Defendant is asserting that Plaintiff is just like all other persons convicted of an MCDV, and so he is not different than those historically barred from Second Amendment rights. If that is Federal Defendant's argument, it is flawed for at least two reasons.

First, the test is whether one is distinguishable from "persons historically barred from Second Amendment protections"*Barton*, 633 F.3d at 174, not whether one has qualities unique from other persons *with an MCDV conviction*. Federal Defendant seems to assume that persons with an MCDV conviction have been historically barred, but that is not the case as discussed below.

Second, among the litany of lasting effects of Plaintiff's conviction cited by Federal Defendant, ironically absent is a restriction on firearm possession. That is because Plaintiff is entitled to possess firearms under California law. As such, even if he had to do so, Plaintiff *has* distinguished himself from other persons with MCDV convictions who are generally not able to regain their rights as a matter of course. Moreover, Plaintiff has not only shown that he may lawfully possess firearms under California law, but also that he no longer poses a threat of violence, having committed no violent offence in the fifteen plus years since his MCDV

conviction. Pl.'s Br. at 3 (showing Plaintiff meets with the complaining witness a few times a week for custody exchanges without incident and has even traveled abroad with her and his current wife).

2. Federal Defendant's assertion that Plaintiff is among those for whom firearm restrictions have been historically accepted and thus "presumptively lawful" under *Heller* is without merit

The Federal Defendant argues that *Heller* and its progeny validate a permanent prohibition on the possession of firearms by a person convicted of an MCDV. Fed. Def.'s Br. at 3-4. This argument relies exclusively on *Heller* dicta which notes that "longstanding prohibitions on the possession of firearms by felons" are "presumptively lawful regulatory measures," 554 U.S. at 626-27 & n.26, and the Ninth Circuit's ruling in *United States v. Vongxay*, 594 F.3d 1111, 1114-15 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 294 (2010), that "presumptively lawful" regulations require no further constitutional scrutiny. Fed. Def.'s Br. at 3-4.[3]

Although "certain longstanding prohibitions" on the possession of firearms may be presumed valid, *Heller*, 554 U.S. at 626-27, this does not remotely end our inquiry. Courts must independently evaluate whether regulations not specifically enumerated in *Heller* as "presumptively lawful" should nevertheless be included among them. *Chester*, 628 F.3d at 679-80. *Heller* and *Vongxay* speak to longstanding regulations on *felon* possession, not the starkly different case of firearms possession by one-time misdemeanants that this challenge presents. As detailed below, *Heller's* "presumptively lawful" language cannot be easily

[3] Plaintiff takes issue with the *Vongxay* analysis insofar as it categorically bars an entire class of persons from exercising a fundamental right without meaningful constitutional scrutiny based entirely on dicta. Plaintiff concedes, however, that should the Court consider prohibitions on the possession of firearms by those convicted of a MCDV to be "presumptively lawful," *Vongxay* controls.

manipulated to incorporate restrictions of recent vintage that extend beyond felons to misdemeanants – restrictions that are not sufficiently analogous to those contemplated by the *Heller* majority.

There is a long history of distinguishing between persons convicted of felonies and those convicted of lesser crimes seen as undeserving of severe punishment. The distinction between felonies and misdemeanors emerged in English law as early at the thirteenth century. Julius Goebel, Jr., *Felony and Misdemeanor: A Study in the History of Criminal Law* xxi-xxii (Common Wealth Fund, ed. 1937). Historically, " 'felony' is . . . 'as bad a word as you can give to man or thing.' " *Staples v. United States*, 511 U.S. 600, 618 (1994) (quoting Pollock & Maitland, *History of English Law* 456 (2d ed. 1899)). "In common usage, the word 'crimes' [felonies] is made to denote such offenses as are of a deeper and more atrocious dye; while smaller faults, and omissions of less consequence, are comprised under the gentler name of 'misdemeanors' only." Blackstone, *Commentaries on the Laws of England* *5 (1769).

While there is arguably a long history of limiting the rights of persons convicted of felonies, there is no similar history of limiting the rights of persons convicted of less serious offenses, like misdemeanors – violent or otherwise. The historical basis for holding that felon dispossession laws are "presumptively lawful" is absent – or at least inconclusive – in the case of an individual convicted of just a misdemeanor. *Chester*, 628 F.3d at 680-81.

Federal Defendant cites cases that have given the *Heller* "presumptively lawful" language a broad reading, validating firearms possession bans on persons other than felons, including those convicted of an MCDV, without applying further constitutional scrutiny. Fed. Def.'s Br. at 7-8 (citing *United States v. Booker*, 644 F.3d 12, 24 (1st Cir. 2011); *United States v. White*, 593 F.3d 1199, 1205-06 (11th Cir. 2010); *In re United States*, 578 F.3d 1195, 1200 (10th Cir. 2009)). These analyses are flawed, however, because they provide an unduly narrow

interpretation of the fundamental right at issue and make little, if any, attempt to establish whether persons convicted of an MCDV are sufficiently similar to felons, as a matter of history and legal tradition, to be included under the *Heller* "presumptively lawful" umbrella. *See, e.g.*, *Booker*, 644 F.3d at 24-25; *White*, 593 F.3d at 1205-06; *In re United States*, 578 F.3d at 1199-1200. In contrast, other circuits considering whether a restriction not explicitly listed in *Heller* should be presumed lawful has rejected attempts to shoehorn those laws into *Heller*'s list and thereby avoid constitutional scrutiny. See, e.g., *Chester*, 628 F.3d at 679-82; *United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010) (en banc), cert. denied, 131 S. Ct. 1674 (2011) ("We do not think it profitable to parse these passages of *Heller* as if they contained an answer to the question whether § 922(g)(9) is valid,"); and *Barton*, 633 F.3d at 173 (Third Circuit) ("By describing the felon disarmament ban as 'presumptively' lawful, . . . the Supreme Court implied that the presumption may be rebutted.").[4]

For instance, the Fourth Circuit rejected the notion that the ban on persons convicted of an MCDV could be upheld in the absence of heightened judicial review. *Id.* at 679-81. Finding the historical evidence on whether persons convicted of an MCDV enjoyed the right to possess and carry arms inconclusive (at best) and the challenged law not longstanding, the *Chester* court determined that some measure of Second Amendment protection attached to misdemeanants. *Id.* at 681-82. The court certainly did not *presume* the law's validity. To the contrary, in applying intermediate scrutiny, the court placed the burden squarely on the government to justify the prohibition. *Id.* at 683.

/ / /

---

[4] *See also United States v. Marzzarella*, 614 F.3d 85, 89-90 (3d Cir. 2010) (finding evidence inconclusive that ban on possession of handguns with obliterated serial numbers should be included within "presumptively lawful" category of "dangerous and unusual weapons").

Similarly, Judge Sykes' dissent in *Skoien* recognized that scholars disagree about the extent to which even *felons* were considered excluded from the right to bear arms during the founding era. 614 F.3d at 648-50 (Sykes, J., dissenting). As such, she reasoned, it cannot be said "with any certainty that persons convicted of a domestic-violence misdemeanor are wholly excluded from the Second Amendment right as originally understood." *Id.* at 651.

Moreover, the Federal Defendant assumes that "[b]ecause Section 922(g)(9) disarms individuals convicted of violent criminal conduct, the statute is 'presumptively lawful' under the reasoning of *Heller*" and that there is no difference between felon dispossession and misdemeanant dispossession for purposes of Second Amendment analysis. Fed. Def.'s Br. at 6. But nowhere does the *Heller* Court suggest that all "violent criminal conduct" spurs a "presumptively lawful" restriction on one's ability to possess firearms. Instead, it explicitly listed only "longstanding" restrictions on "felons." 554 U.S. at 626. The Supreme Court's failure to list misdemeanors within the class of "longstanding prohibitions on the possession of firearms," *id.*, does not appear to be accidental. Indeed, the *Heller* Court was acutely aware of Section 922(g)(9)[5] and the impact its decision would have on that section and others like it. The Court reasonably would have foreseen the controversy that excluding the bar on violent misdemeanants would raise. If the Court had intended to include persons convicted of an MCDV or even

---

[5] Indeed, several amici briefs submitted for the *Heller* Court's consideration *specifically* addressed section 922(g)(9). The American Bar Association even prophesied "years of litigation regarding the constitutionality" of section 922(g)(9) and other regulatory provisions. Brief of the American Bar Association as Amicus Curiae Supporting Petitioners, *Heller*, 554 U.S. 570, 2008 WL 136349, at *14-15; *see also* Brief for National Network to End Domestic Violence et al. as Amici Curiae Supporting Petitioners, *Heller*, 554 U.S. 570, 2008 WL 157199, at *19, 29-30; Brief for Former Department of Justice Officials as Amici Curiae Supporting Petitioners, *Heller*, 554 U.S. 570, 2008 WL 136350, at *15-16.

all violent offenders, for that matter, in the class of "presumptively lawful" categorical bans on firearms possession, it could have easily said so. It did not. *Id.* at 626.

Finally, Plaintiff is perplexed as to why Federal Defendant puts forth the notion that restrictions on misdemeanants are "presumptively lawful" when the federal government has repeatedly renounced this view in similar cases. *See e.g., Barton*, 633 F.3d at 173; *Chester*, 628 F.3d at 680 ("the government has not taken the position that persons convicted of misdemeanors involving domestic violence were altogether excluded from the Second Amendment as it was understood by the founding generation."); *Skoien*, 614 F.3d at 641 ("The United States concedes that some form of strong showing ('intermediate scrutiny,' many opinions say) is essential, and that § 922(g)(9) is valid only if substantially related to an important governmental objective.")

II. PLAINTIFF WILL PREVAIL ON HIS AS APPLIED CHALLENGE TO 18 U.S.C. § 922(G)(9) UNDER A HEIGHTENED SCRUTINY ANALYSIS

While Plaintiff recognizes that the majority of courts to have considered this issue have adopted intermediate scrutiny, none of those courts have sufficiently explained why the Second Amendment should be deserving of less protection than other fundamental rights when core conduct is restricted, as is the case here. Most base their decision to apply lesser scrutiny on the view that *Heller* held only the "law-abiding" are entitled to full Second Amendment protections and their assumption that those convicted of an MCDV fall outside of the Court's concept of "law-abiding." Fed. Def.'s Br. at 7-8. This cursory analysis has little, if any, basis in *Heller*, which merely stated "the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes," and is at best, inconclusive as to who is "law-abiding."*Heller*, 544 U.S. at 625.

Should this Court feel it necessary to adopt a means-end test here, strict scrutiny is the appropriate standard of review, 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. 3020, 3043 (2010). 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)).

It is ultimately irrelevant, however, 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). Federal Defendant has failed to carry his burden even under an intermediate scrutiny analysis. As such, this Court will not need to definitively adopt any particular level of scrutiny to resolve this case. Plaintiff prevails under any applicable one.

A. Federal Defendant Does Not Establish That Congress's *Actual* Interest in Adopting 18 U.S.C. § 922(g)(9) Was to Bar People like Plaintiff from Exercising Their Second Amendment Rights Forever Without Exception; Which Is Required to Survive Either Strict or Intermediate Scrutiny

As Federal Defendant correctly asserts in citing *United States v. Salerno*, the government has a compelling interest in preventing crime, including domestic violence. 481 U.S. 739, 749, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987). However, the government cannot simply come to court with ex post rationalizations for laws that impinge on the fundamental rights protected by the Second Amendment. To be

a compelling or even an important interest, the government "must show that its alleged objective was the legislature's 'actual purpose' " for infringing a constitutional right. *Shaw v. Hunt*, 517 U.S. 899, 908 n.4 (1996) (citation omitted), *rev'd on other grounds*, *Hunt v. Cromartie*, 529 U.S. 1014 (2000); s*ee United States v. Virginia*, 518 U.S. 515, 535-36, 116 S. Ct. 2264, 135 L. Ed. 2d 735 (1996) (holding in a case where intermediate scrutiny applied "that 'benign' justifications proffered in defense of categorical exclusions will not be accepted automatically; a tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded").

Federal Defendant has offered the Court no support for the view that the legislature's *actual* purpose in adopting 18 U.S.C. § 922(g)(9) was to *perpetually* prohibit *all* persons convicted of an MCDV from possessing a firearm *without exception*. In fact, Congress's adoption of 18 U.S.C. § 921(a)(33)(B)(ii), which allows persons convicted of an MCDV to restore their firearm rights pursuant to their respective State's laws, demonstrates that a perpetual ban on all people, despite their particular circumstances, was not Congress's intent.

B. To Be Valid, Congress's Actual Interest must Be Supported by Evidence

In addition to the requirement that the interest sought to be furthered is Congress's actual interest, Congress "must have had a strong basis in evidence to support that justification before it implements the classification" that infringes a constitutional right. *Shaw*, 517 U.S. at 908 n.4. Even under intermediate scrutiny, the government cannot "get away with shoddy data or reasoning" and "evidence must fairly support [its] rationale . . .." *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 426, 122 S. Ct. 1728, 152 L. Ed. 2d 670 (2002).

The only evidence of this sort that Federal Defendant points to is a single statement allegedly presented to the legislature that "many people who engage in serious spousal or child abuse ultimately are not charged with or convicted of

felonies." Fed. Def.'s Br. at 5-6 (citing *United States v. Hayes*, 55 U.S. 415, 426, 129 S. Ct. 1079, 172 L. Ed. 2d 816 (2009) (citing 142 Cong. Rec. 22985 (1996) (statement of Sen. Lautenberg))). While that "fact" and it its impact on this Court's analysis remain in dispute,[6] such evidence does not even "fairly support" *Alameda Books*, 535 U.S. at 426, let alone constitute the type of "strong basis" required under strict scrutiny *Shaw*, 517 U.S. at 909 (citations omitted), the notion that Congress intended *all* persons convicted of an MCDV to be banned *forever*. At best, it shows Congress's intent to bar persons convicted of an MCDV from firearm possession *initially*, i.e., as a default until a subsequent decision can be made on one's suitability to possess arms.

C. Federal Defendant Makes No Showing That Permanently Barring Plaintiff Furthers Congress's Actual Interest in Adopting 18 U.S.C. § 922(g)(9)

While Federal Defendant's Motion is replete with general platitudes about how barring those convicted of an MCDV furthers the interest of public safety, it provides no explanation as to how specifically it does so. Moreover, 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

---

[6] Only a single Senator articulated this view and "ordinarily even the contemporaneous remarks of a single legislator who sponsors a bill are not controlling in analyzing legislative history." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 100 S. Ct. 2051, 64 L. Ed. 2d 766 (1980).

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 regain his rights under its laws, Federal Defendant cannot credibly assert that continuing to deprive Plaintiff of his Second Amendment rights furthers any government interest, compelling or otherwise.

D. 18 U.S.C. § 922(g)(9)'s Application to Plaintiff Is Not Sufficiently Tailored

Under strict scrutiny, which Plaintiff believe applies here, the means to achieve the government's interest must be the least restrictive alternative. *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 666-70, 124 S. Ct. 2783, 159 L. Ed. 2d 690 (2004). But, to survive even intermediate scrutiny, a restriction must be "narrowly tailored," meaning it 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). Even assuming *arguendo* that Congress's actual interest is supported by evidence and is actually being furthered by permanently barring Plaintiff the exercise of his Second Amendment rights, Federal Defendant provides no defense for how 18 U.S.C. § 922(g)(9) is sufficiently tailored to achieve the government's interest in its application to Plaintiff. To the contrary, Federal Defendant relies on the alleged Congressional statement that 18 U.S.C. § 922(g)(9) was specifically intended to treat all persons convicted of crimes involving domestic violence as felons, regardless of the

circumstances, out of an abundance of caution. Fed. Def.'s Br. at 5-6 (citing *Hayes*, 55 U.S. at 426).

It is Federal Defendant's burden to show a restriction is sufficiently tailored under any level of heightened scrutiny. And if he cannot justify casting such a large net with 18 U.S.C. § 922(g)(9), it must be declared unconstitutional as applied to Plaintiff.

Based on the foregoing reasons, on the record that existed at the time of its congressional enactment, 18 U.S.C. § 922(g)(9) cannot pass heightened scrutiny as applied to Plaintiff. This does not mean that Congress cannot regulate firearm possession by those convicted of an MCDV. As made clear, Plaintiff does not challenge the facial validity of 18 U.S.C. § 922(g)(9). It merely means that Congress must recognize that when it passes legislation restricting people's fundamental rights, it must do the hard work of legislating with a scalpel and not a cleaver.

III. PLAINTIFF'S CLAIMS ARE NOT IDENTICAL AS FEDERAL DEFENDANT SUGGESTS

The Fourteenth Amendment's Due Process and Equal Protection clauses are "not mutually exclusive," nor "always interchangeable phrases." *Bolling v. Sharpe*, 347 U.S. 497, 499, 74 S. Ct. 693, 98 L. Ed. 884 (1954) *supplemental sub nom Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294, 75 S. Ct. 753, 99 L. Ed. 1083 (1955); *see also Ross v. Moffitt,* 417 U.S. 600, 609, 94 S.Ct. 2437, 41 L. Ed.2d 341 (1974) (distinguishing claims under those clauses). Although Plaintiff's claims are similar, they are not identical. While this case could be seen as primarily an Equal Protection case, since it is about a restricted person rather than a restricted act, Plaintiff's fundamental Second Amendment rights are nevertheless directly violated in violation of his substantive due process rights, and his classification as someone who is not entitled to exercise fundamental rights violates his right to equal protection.

IV. PLAINTIFF HAS STANDING TO BRING HIS EQUAL PROTECTION CLAIM

Contrary to Federal Defendant's assertion, Plaintiff is not bringing an Equal Protection claim on behalf of third parties. Rather, Plaintiff asserts that 18 U.S.C. § 922(g)(9) creates a class of people, which includes him, and impacts the class's fundamental rights, requiring strict scrutiny review. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985) (citations omitted). It is well settled that when fundamental rights are asserted under the Equal Protection Clause, an individual member of that class can bring suit. *See, e.g., Kramer v. Union Free School Dist.*, 395 U.S. 621, 633, 89 S. Ct. 1886, 1887, 23 L. Ed. 2d 583 (1969); *Village of Willowbrook v. Olech*, 528 U.S. 562, 120 S. Ct. 1073, 1075, 145 L. Ed. 2d 1060 (2000) (holding that an individual can bring an Equal Protection claim).

V. THE NINTH CIRCUIT COURT OF APPEALS HAS ALREADY HELD PLAINTIFF HAS A COGNIZABLE LEGAL THEORY; DEFENDANT'S MOTION TO DISMISS IS THEREFORE IMPROPER

Setting aside the detailed reasons provided above, Federal Defendant still cannot prevail on his Motion. While Federal Defendant does not expressly provide the precise statutory basis for his motion, Plaintiff assumes it is pursuant to FRCP Rule 12(b)(6), since Federal Defendant cites as the only support for his motion *Balistreri v. Pacifica Police Department*, 901 F.2d 696, 699 (9th Cir. 1990) (involving a granted 12(b)(6) motion for lack of a cognizable legal theory). Fed. Def.'s Br. 13.

Regardless of its statutory basis, Federal Defendant's motion to dismiss should not be granted. The Ninth Circuit Court of Appeals has already held that Plaintiff would have standing here if he amended his complaint to allege certain facts. Memorandum 3, July 25, 2012, (Doc. No. 27-1) ("These facts, if alleged in the complaint, are sufficient to confer standing, as the government conceded at oral

argument."). Civil Minutes, Sept. 21, 2012, (Doc. No. 21). Plaintiff has done so. First Am. Compl., Oct. 11, 2012, (Doc. No. 23). Additionally, in remanding this case here, the Ninth Circuit held that post-*Heller* Plaintiff has a cognizable legal theory to challenge section 922(g)(9) as applied to him. Memorandum 3. The Ninth Circuit did so when faced with essentially the same arguments as are before this Court. As such, the Ninth Circuit has foreclosed on Federal Defendant's motion before this court.

CONCLUSION

Based on the above, Defendant's motion to dismiss Plaintiff's complaint on any grounds should be denied. Should this Court nevertheless grant Defendant's motion, it should do so without prejudice, and Plaintiff should be given leave to amend his complaint.

Dated: February 4, 2013

MICHEL & ASSOCIATES, P.C.

s/C. D. Michel
C. D. Michel
E-mail:cmichel@michellawyers.com
Attorneys for Plaintiff
Eugene Evan Baker

IN 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 OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

IT IS HEREBY CERTIFIED THAT:

I, 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 OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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

David A DeJute
david.dejute@usdoj.gov
AUSA - Office of US Attorney
300 North Los Angeles Street
Room 7516
Los Angeles, CA 90012

Anthony R Hakl , III
anthony.hakl@doj.ca.gov
Office of the Attorney General
1300 I Street, 16th Floor
Sacramento, CA 95814
anthony.hakl@doj.ca.gov

I declare under penalty of perjury that the foregoing is true and correct. Executed on February 4, 2013.

MICHEL & ASSOCIATES, P.C.

s/C. D. Michel
C. D. Michel
E-mail:cmichel@michellawyers.com
Attorneys for Plaintiff
Eugene Evan Baker