

No. 13-56454

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In the United States Court of Appeals  
for the Ninth Circuit

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EUGENE EVAN BAKER,

*Plaintiff-Appellant,*

v.

LORETTA E. LYNCH, et al.,

*Defendants-Appellees.*

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On Appeal from the United States District Court  
for the Central District of California  
(CV 10-3996-SVW (AJWx))

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**APPELLANT’S MOTION FOR FULL REMAND TO  
DISTRICT COURT FOR FURTHER PROCEEDINGS**

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## INTRODUCTION

18 U.S.C. § 922(g)(9) bars those convicted of a misdemeanor crime of domestic violence (“MCDV”) from possessing or acquiring firearms or ammunition for life. This case presents a challenge to the application of section 922(g)(9) to Appellant Eugene Baker as a violation of his Second Amendment right to bear arms and his right to equal protection under the law in the exercise of that fundamental right. Baker here appeals the district court’s dismissal of his lawsuit with prejudice for failure to state a claim. To conserve the resources of both the parties and this Court, Baker brings this motion seeking full remand in light of the district court’s clear errors below and two intervening Ninth Circuit decisions that invalidate the district court’s analysis and require reversal and remand.

In a previous appeal of this case, this Court expressly found that Baker had presented a viable as applied challenge to section 922(g)(9) on Second Amendment grounds. Notwithstanding that holding, the district court summarily dismissed Baker’s First Amended Complaint on remand without engaging in the as applied analysis this Court held Baker’s claim was entitled to. And it did so without providing notice of its intention to dismiss, a meaningful opportunity for Baker to oppose, a hearing on the merits, or an opportunity to amend. Dismissing Baker’s claims in this manner, the district court clearly erred.



What's more, intervening Ninth Circuit authority has removed any doubt that individuals seeking to challenge section 922(g)(9), as applied to their circumstances, *could* mount a claim sufficient to overcome a motion to dismiss. At the very least, it has not foreclosed such a claim. In other words, the as applied challenge to section 922(g)(9) is not barred in the Ninth Circuit, and Baker should be given the opportunity to present his case.

Baker thus respectfully moves this Court to reverse the district court's dismissal of the First Amended Complaint and remand for additional proceedings.

### **POSITIONS OF COUNSEL**

Pursuant to Circuit Rule 27-1(2), counsel for Baker contacted counsel of record for Appellees on September 15, 2015, and again on September 25, 2015, to ascertain Appellees' position regarding Baker's motion for full remand to the district court. Barvir Decl. ¶¶ 2-3. On September 28, 2015, counsel for both appellees responded that they would oppose Baker's motion. *Id.*

### **STATEMENT OF THE CASE**

#### **I. STATEMENT OF FACTS**

In 1997, Appellant Eugene Baker pleaded *nolo contendere* to a single count of violating California Penal Code section 273.5(a), and was sentenced to a three-year probationary sentence. First Amended Complaint at ¶ 14, *Baker v. Holder*,

No. 10-3996 (C.D. Cal. Oct. 11, 2012), ECF No. 23 (“Ex. A”).<sup>1</sup> California Penal Code section 273.5(a) qualifies as an MCDV under 18 U.S.C. § 921(a)(33)(A)(i). *Id.* Baker’s conviction thus resulted in a 10-year ban on the possession of firearms under state law, California Penal Code section 29805, and a lifetime ban under federal law, 18 U.S.C. § 922(g)(9).

Baker successfully completed the terms of his probation and, in 2002, applied to withdraw his plea and have the conviction set aside pursuant to California Penal Code section 1203.4. Ex. A at ¶ 15. The state court granted that relief and signed an order expunging Baker’s conviction, withdrawing the *nolo contendere* plea, entering a plea of not guilty, and dismissing the original criminal complaint. *Id.*; District Court Minute Order Re Motion to Dismiss at 2, *Baker*, No. 10-3996 (C.D. Cal. July 31, 2013), ECF No. 48 (hereinafter “Ex. B”).

Baker’s California-based ten-year suspension of firearm rights expired in 2007, and he currently faces no firearm restrictions under state law. Ex. A at ¶ 16. Since his 1997 arrest, Baker has never been convicted of or reported to have committed any other criminal behavior, including any crime which would disqualify him from receiving or possessing a firearm under federal or state law.

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<sup>1</sup> For the Court’s reference, all citations to documents on file with the Central District of California in *Baker v. Holder*, Case No. 10-3996, include the district court’s docket or ECF number.

*Id.* at ¶ 16. Baker has maintained a friendly relationship with his ex-wife, the victim of his 1997 MCDV, without incident for over thirteen years. *Id.*

In or around May 2009, with his California firearm restriction almost two years behind him and unaware of any other firearm restrictions, Baker attempted to purchase a firearm from a licensed California federal firearms dealer (“FFL”). *Id.* at ¶ 17. The FFL contacted the California Department of Justice regarding Baker’s request. In response, the Department informed the FFL that Baker was prohibited from possessing firearms and ordered the FFL not to release the firearm to him. *Id.*; Ex. B at 2. Baker later learned that the Department had blocked the transfer of his firearm because it had identified a record of an MCDV conviction disqualifying him from purchasing or possessing firearms. Ex. A at ¶ 18; Ex. B at 2-3.

On March 11, 2010, Baker appeared before the Ventura County Superior Court and moved for an order declaring that his right to purchase and own firearms had been restored under both state and federal law. Ex. A at ¶ 20. The court granted the order, declaring that Baker “is entitled to purchase, own and possess firearms consistent with the laws of the State of California.” *Id.*; Superior Court Order Restoring Second Amendment Rights to Eugene Evan Baker at 2, *People v. Baker*, No. 97C008304 (Cal. Super. Ct. Mar. 10, 2010) (“Ex. C”). Despite this declaration of his rights, Appellants continue to prohibit the sale or transfer of firearms to Baker.

Baker desires to obtain a firearm for his personal protection and the protection of his family. But if Baker attempts to exercise this Second Amendment right and is found to be in possession of a firearm, he would be at risk of being arrested, charged, convicted, and punished pursuant to section 922(g)(9).

## **II. PROCEEDINGS BELOW**

On May 27, 2010, Baker filed a complaint for declaratory judgment and injunctive relief against then United States Attorney General Eric Holder, in his official capacity, seeking a declaratory judgment that he is entitled to lawfully possess firearms under the laws of the United States. Complaint for Declaratory and Injunctive Relief, *Baker*, No. 10-3996 (C.D. Cal. May 27, 2010), ECF No. 1.

The government moved to dismiss Baker's complaint. On October 26, 2010, the district court granted the government's motion to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). *Baker v. Holder*, 475 Fed. Appx. 156, 157 (9th Cir. 2012). The district court ruled that Baker lacked standing to pursue the lawsuit and that Ninth Circuit case law pre-dating the Supreme Court's decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008) precluded his action. *Baker*, 475 Fed. Appx. at 157-58.

On appeal, this Court determined that Baker argued sufficient facts that, if alleged in an amended complaint, would establish standing. *Id.* at 157. The Court also rejected the application of pre-*Heller* case law to an evaluation of

section 922(g)(9)'s constitutionality, holding that Baker had presented a viable claim that, as applied to him, the law violated the Second Amendment. *Id.* at 157-58. The Court thus reversed the district court's dismissal for failure to state a claim and remanded the matter for further proceedings. *Id.* at 158.

On remand, Baker filed an amended complaint, naming then United States Attorney General Holder, California Attorney General Kamala Harris, and the California State Department of Justice as defendants. Ex. A at ¶¶ 10-12. Baker's First Amended Complaint sought declaratory and injunctive relief pursuant to the Second Amendment and the Equal Protection clause of the United States Constitution. *Id.* at ¶¶ 30-43.

The district court subsequently ordered the parties to file simultaneous briefs addressing the issues on remand. District Court Minute Order Re Status Conference, *Baker*, No. 10-3996 (C.D. Cal. Oct. 15, 2015), ECF No. 25. The parties filed their opening briefs on January 7, 2013.<sup>2</sup> Appellees, however, included with their brief an informal request that the complaint be dismissed. Federal Defendant's Opening Brief at 13-14, *Baker*, No. 10-3996 (C.D. Cal. Jan. 7, 2013),

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<sup>2</sup> On remand, Appellee Harris and the California Department of Justice, joined the briefs filed by Appellee Holder. Opening Brief by Defendants California Attorney General Kamala D. Harris and California Department of Justice at 1, *Baker*, No. 10-3996 (C.D. Cal. Jan. 7, 2013), ECF No. 37. The discussion of Appellees' briefs on remand thus refers to the substantive briefs filed by Appellee Holder on behalf of all defendants.

ECF No. 36. That request effectively transformed the informal, court-ordered issue briefing into an unnoticed Rule 12 motion.

Baker urged the court to refuse to consider Appellees' improper Rule 12 motion unless and until all notice and procedure requirements were met. Plaintiff's Reply to Federal Defendant's Opening Brief at 13-15, *Baker*, No. 10-3996 (C.D. Cal. Jan. 16, 2013), ECF No. 41. Despite the threat of prejudice to Baker, the district court construed Appellees' brief as a motion to dismiss and dismissed Baker's First Amended Complaint *with* prejudice and *without* a hearing. Ex. B at 9; District Court In Chambers Order-Text Only Entry, *Baker*, No. 10-3996 (C.D. Cal. Mar. 8, 2013) ("Upon review of the parties' briefs, the Court concludes that the Motion is suitable for determination without oral argument. Fed. R. Civ. P. 78(b); C.D. Cal. L. R. 7-15. The hearing scheduled for Monday, March 11, 2013, is VACATED.").

In granting the dismissal, the district court did not analyze the specific circumstances of the case. It instead dismissed Baker's as applied Second Amendment claim, citing a number of out-of-circuit appellate decisions and two district court cases, each of which generally upheld section 922(g)(9). Ex. B at 4-8. The district court similarly dismissed Baker's equal protection challenge, holding that pre-*Heller* case law rejecting a similar challenge to section 922(g)(9) controlled post-*Heller* and barred Baker's claim. *Id.* at 8-9 (citing *United States v.*

*Vongxay*, 594 F.3d 1111, 1118 (9th Cir. 2010); *United States v. Hancock*, 231 F.3d 557, 565-66 (9th Cir. 2000).

Baker filed a timely notice of appeal on August 20, 2013. Shortly thereafter, the Court granted Baker a handful of unopposed requests to stay appellate proceedings pending the resolution of the related cases, *United States v. Chovan*, 735 F.3d 1127 (9th Cir. 2013), *cert. denied*, 135 S. Ct. 187 (2014), and *Enos v. Holder*, 585 Fed. Appx. 447 (9th Cir. 2014) (unpublished), *cert. denied sub nom. Enos v. Lynch*, 135 S. Ct. 2919 (2015). *See* Ninth Cir. Order, May 6, 2014, ECF No. 9; Ninth Cir. Order, Oct. 10, 2014, ECF No. 11; Ninth Cir. Order 1, Nov. 17, 2014, ECF No. 13; Ninth Cir. Order, June 8, 2015, ECF No. 16. With those cases finally resolved, Baker now brings this motion for full remand.

## ARGUMENT

### **I. AFTER THIS COURT RULED THAT BAKER COULD PLEAD A SUFFICIENT SECOND AMENDMENT CHALLENGE TO SECTION 922(G)(9), IT WAS CLEAR ERROR FOR THE DISTRICT COURT TO DISMISS THAT SAME CLAIM WITH PREJUDICE ON REMAND**

This appeal deals with the district court's *second* dismissal of Baker's Second Amendment claim. When this case first came before the Ninth Circuit, the Court was asked to reverse an order dismissing Baker's complaint without prejudice for lack of standing and with prejudice for failure to state a claim. *Baker v. Holder*, 475 Fed. Appx. 156, 157-58. (9th Cir. 2012). The Court affirmed in part, reversed in part, and remanded for further proceedings. *Id.* at 158.

As is relevant here, the Court overturned the Rule 12(b)(6) dismissal of Baker's Second Amendment claim with prejudice, reasoning that Ninth Circuit precedent did not foreclose Baker's constitutional challenge. More specifically, it held that while *Jennings v. Mukasey*, 511 F.3d 894, 898-99 (9th Cir. 2007), barred a "statutory argument that [Baker's] state court order purporting to 'set aside' his misdemeanor domestic violence conviction renders § 922(g)(9) inapplicable," *Jennings* does *not* foreclose a constitutional argument because it was decided before *Heller* affirmed that the Second Amendment protects an individual right to arms and so did not address whether section 922(g)(9) infringes that right. *Id.* at 157-58 (citing *Heller v. District of Columbia*, 554 U.S. 570 (2008)).

On remand, the lower court surprisingly dismissed Baker's case for failure to state a Second Amendment claim again, this time *with* prejudice. Ex. B at 9. The second dismissal was based not on *Jennings*, but on a handful of out-of-circuit appellate decisions and two district court cases upholding section 922(g)(9)—all of which preceded this Court's July 2012 reversal of the first dismissal of Baker's as applied claim. *Id.* at 6-8 (citing *United States v. Booker*, 644 F.3d 12, 26 (1st Cir. 2011); *United States v. Staten*, 666 F.3d 154, 168 (4th Cir. 2011); *United States v. Skoien*, 614 F.3d 638, 642 (7th Cir. 2010); *United States v. White*, 592 F.3d 1199, 1206 (11th Cir. 2010); *In re United States*, 578 F.3d 1195, 1200 (10th Cir. 2009);



*Enos v. Holder*, 855 F. Supp. 2d 1088, 1099 (E.D. Cal. 2012); *United States v. Smith*, 742 F. Supp. 2d 855, 869 (S.D. W. Va. 2010)).

Because every one of the cases the lower court relied on pre-dates this Court's previous determination that Baker had brought a Second Amendment claim sufficient to overcome dismissal, the district court's subsequent use of those cases to reach the opposite result is clear error. Surely this Court was aware that other circuits had upheld section 922(g)(9) based on the law of those circuits and the facts of each case. Yet it *still* determined that unqualified dismissal of Baker's as applied challenge to that same law was improper. *Baker*, 475 Fed. Appx. at 157-58. That decision could have meant no less than that Baker *does* have some cognizable as applied Second Amendment challenge to section 922(g)(9) in the Ninth Circuit. In dismissing Baker's claim a second time, the district court disregarded that holding, and that error requires reversal and remand to the district court for further proceedings.

**II. INTERVENING COURT DECISIONS OF THE NINTH CIRCUIT CONFIRM THAT BAKER HAS PLEADED A SECOND AMENDMENT CLAIM THAT CAN SURVIVE A MOTION TO DISMISS**

Remand is appropriate where the relevant case law has changed during the pendency of the appeal. *See, e.g., Nat'l Org. for Reform of Marijuana Laws v. Mullen*, 796 F.2d 276 (9th Cir. 1986); *see also* Ninth Cir. Rule 3-6(a) (the Court may grant summary disposition of a civil appeal at any time prior to the

completion of briefing if an intervening court decision requires reversal or vacation of the judgment or remand for additional proceedings).

At the time dismissal was granted, there was no Ninth Circuit case directly on point, so the lower court relied on the reasoning of several out-of-circuit decisions and two district court opinions generally upholding section 922(g)(9) to dismiss Baker's as applied Second Amendment challenge for failure to state a claim. While Baker disputes that application of those cases to the case at bar justifies dismissal in the first place, intervening case law from this circuit has since removed any doubt that section 922(g)(9) cases *can* be handled on an as applied basis and that Baker is entitled to an opportunity to provide the evidence necessary to establish his claim.

Specifically, since the dismissal of Baker's claims, final decisions have been rendered in *United States v. Chovan*, 735 F.3d 1127 (9th Cir. 2013), *cert. denied*, 135 S. Ct. 187 (2014), and *Enos v. Holder*, 585 Fed. Appx. 447 (9th Cir. 2014) (unpublished), *cert. denied sub nom. Enos v. Lynch*, 135 S. Ct. 2919 (2015). Both cases presented challenges to section 922(g)(9) on Second Amendment grounds. And while the law was ultimately upheld in both cases based on the facts presented, the Court's reasoning is clear that as applied challenges to 922(g)(9) are not out of the question. *Chovan*, 735 F.3d at 1142; *Enos*, 585 Fed. Appx. 447-48.

Indeed, the *Chovan* decision points to the very sort of evidence that would be necessary to succeed on such a claim:

Chovan has not presented evidence to directly contradict the government's evidence that the rate of domestic violence recidivism is high. Nor has he directly proved that if a domestic abuser has not committed domestic violence for fifteen years, that abuser is highly unlikely to do so again.

*Chovan*, 735 F.3d at 1142. “In the absence of such evidence,” the Court continued, “we conclude that the application of § 922(g)(9) to Chovan is substantially related to the government's important interest of preventing domestic gun violence.” *Id.* The other side of the coin, of course, is that the presence of such evidence *could* establish that application of the law to an individual is not sufficiently related to the government's interest.

*Enos* tacitly reaffirmed this reasoning. 585 Fed. Appx. 447-48. There, the Court held that “[t]here is no evidence in *this* record demonstrating the statute is unconstitutional as applied to the [a]ppellants. Further, when questioned, counsel for [a]ppellants declined to suggest such evidence exists.” *Id.* (citing *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir.2003)) (emphasis added). Again, this Court's reasoning suggests that, properly pleaded and proved up, an as applied challenge to section 922(g)(9) *could* succeed.

In light of both *Chovan* and *Enos*, dismissal—*with prejudice*—is clearly improper where, as here, the challenger has had no opportunity to present the

evidence necessary to support his claim. If given the chance, Baker could allege facts and present evidence that, as applied to him, section 922(g)(9) is not sufficiently related to the government's interest in combatting domestic violence. The lower court summarily dismissed Baker's claim without fully considering whether he could proffer sufficient evidence on that point because it was not then clear that any viable Second Amendment challenge to section 922(g)(9) existed in the Ninth Circuit. Ex. B at 1-8. But since *Chovan* and *Enos* are controlling intervening authority, the lower court's reasoning can no longer hold in light of their analyses. In this case, because controlling intervening authority renders the district court's analysis and dismissal invalid, remand is not only proper, it is necessary.<sup>3</sup>

### **III. THE DISTRICT COURT CLEARLY ERRED WHEN IT DISMISSED BAKER'S COMPLAINT WITH PREJUDICE BECAUSE AMENDMENT WOULD NOT BE FUTILE**

When a motion to dismiss is granted for failure to state a claim, "leave to amend should be granted 'unless the court determines that the allegation of other

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<sup>3</sup> For the same reason, the dismissal of Baker's equal protection claim requires remand. Relying on out-of-circuit case law finding that possession of firearms by domestic violence misdemeanants is outside the scope of the Second Amendment or that restrictions on that conduct are otherwise "presumptively lawful," the lower court rejected Baker's argument that section 922(g)(9) must survive heightened scrutiny because the law creates a classification of persons and impacts the exercise of a fundamental right. Ex. B at 8-9. In light of *Chovan*'s express holding that such conduct is *not* outside the scope of the right, 735 F.3d at 1136, the lower court's decision cannot stand.

facts consistent with the challenged pleading could not possibly cure the deficiency.’ ” *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992) (quoting *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986)). In other words, the court may only deny leave to amend where amendment would be futile. *See id.* (citing *Reddy v. Litton Indus.*, 912 F.2d 291, 296 (9th Cir. 1990)).

While the district court recognized this well-established principle, Exhibit B at 4, the court never applied it to the facts of the case at hand. Indeed, nowhere in its opinion does the court discuss whether amendment would be futile in this case at all. And, having transformed the parties’ informal issue briefing into a Rule 12(b)(6) motion to dismiss and vacating the scheduled hearing on the same, the court never gave Baker an opportunity to respond to any concern it might have harbored regarding the futility of amendment.

What’s more, in light of the recent decisions in *Chovan* and *Enos*, the district court’s dismissal with prejudice can no longer stand. For those cases have made clear that there could be facts that, if sufficiently pleaded, would form the basis of a viable as applied challenge to section 922(g)(9). *Chovan*, 735 F.3d at 1142; *Enos*, 585 Fed. Appx. 447-48; *see also supra* Part II. Baker should be given the opportunity to amend his complaint in order to raise those facts now—with the benefit of this Court’s analyses in *Chovan* and *Enos* to guide him.

**IV. THE DISTRICT COURT CLEARLY ERRED WHEN IT TREATED INFORMAL ISSUE BRIEFING AS A MOTION TO DISMISS WITHOUT SUFFICIENT NOTICE, A HEARING, OR AN OPPORTUNITY TO AMEND**

After a panel of this Court first remanded this case to the district court for further proceedings, the district court ordered the parties to file opening and responsive briefs addressing the issues on remand. District Court Order Re Stipulation By All Parties at 2, *Baker*, No. 10-3996 (C.D. Cal. Nov. 30, 2012), ECF No. 34. On January 7, 2013, both parties filed their opening briefs in compliance with the court's order. However, Appellees included with their brief a request that the complaint be dismissed. Federal Defendant's Brief at 13-14, *Baker*, No. 10-3996, ECF No. 36. That request transformed the informal, court-ordered issue briefing into a quasi Rule 12 motion, but it did so without proper notice of the motion or the statutory basis for dismissal. Appellees' request was improper under the local rules of the Central District of California and the Federal Rules of Civil Procedure. And the district court's decision to seize this opportunity to dismiss Baker's claims without a hearing or an opportunity to amend was an abuse of the discretion the court is generally granted to dismiss claims sua sponte.

While Appellees were within their rights to bring a Rule 12(b) motion to dismiss, such motions must be made in conformance with notice requirements of Rule 6 of the Federal Rules of Civil Procedure and with Central District Local Rules 6-1 and 7-4. Unless the Federal Rules of Civil Procedure or a court order

sets a different time, Rule 6 demands the service of a written motion and notice of hearing at least 14 days in advance of the hearing. Fed. R. Civ. P. 6. Local Rule 6-1 dictates every motion must “be presented by written notice. . . filed with the Clerk not later than twenty-eight (28) days before the date set for hearing,” unless otherwise provided by rule or order of the Court. C.D. Cal. L.R. 6-1. Appellees’ brief was accompanied by no written notice of motion, much less one containing “a concise statement of the relief or Court action the movant seeks” as required by Central District Local Rule 7-4. Nor did it provide notice of the statutory basis for dismissal, unreasonably requiring Baker to address all the possible permutations of a Rule 12 motion in his opposition.<sup>4</sup>

Indeed, almost nothing about Appellees’ “motion to dismiss” conformed to the rules governing motions practice that provide for fair play and an equal playing field for the parties. As such, Baker was unduly prejudiced—facing a dismissal, the basis for which Appellees’ briefing never identified. Appellees’ “motion to dismiss” should have been denied for failure to comply with the most basic mandates of motions practice—particularly those federal notice requirements that serve to safeguard the constitutional right to due process.

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<sup>4</sup> Appellees’ “motion to dismiss” also failed to comply with important local requirements regarding meet and confer efforts with opposing counsel—i.e., Local Rule 7-3.

Setting aside the deficiencies of Appellees' motion, the district court may dismiss a claim sua sponte pursuant to Federal Rule 12(b)(6), *Omar v. Sea-Land Service, Inc.*, 813 F.2d 986, 991 (9th Cir. 1987), but "[t]he power is not absolute," *Cal. Diversified Promotions, Inc. v. Musick*, 505 F.2d 278, 280 (9th Cir. 1974) (citing *Beshear v. Weinzapfel*, 474 F.2d 127, 133 (7th Cir. 1973)). "This court has held that, when jurisdiction is present, it is error to dismiss a claim on the merits without *notice, a hearing, and an opportunity to respond*, unless the complaint could not be corrected by amendment." *Id.* (citing *Worley v. Cal. Dep't of Corrections*, 432 F.2d 769 (9th Cir. 1970) (emphasis added); *see also Harmon v. Super. Ct.*, 307 F.2d 796, 798 (9th Cir. 1962); *Clinton v. Los Angeles County*, 434 F.2d 1038 (9th Cir. 1970)).

As discussed above, the district court did not consider the futility of amendment in this case and, absent a finding that Baker's complaint could not be corrected, the court "should have given notice of [its] intention to dismiss, an opportunity to submit a written memorandum in opposition to such motion, a hearing, and an opportunity to amend the complaint to overcome the deficiencies raised by the court." *Cal. Diversified Promotions, Inc.*, 505 F.2d at 281 (citing *Potter v. McCall*, 433 F.2d 1087, 1088 (9th Cir. 1970); *Bertucelli v. Carreras*, 467 F.2d 214 (9th Cir. 1972)). The failure of the district court to provide those basic procedural safeguards is clear error demanding reversal and remand.



Further, in light of *Chovan* and *Enos*, it is now clear that sufficient amendment *is* possible. The Court should not compound the lower court's error and close the door to Baker's claims without at least the opportunity to amend.

### **CONCLUSION**

Based on the foregoing, Appellant Baker respectfully requests full remand of his claims to the district court for further proceedings.

Date: September 29, 2015

**MICHEL & ASSOCIATES, P.C.**

s/ C. D. Michel

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C. D. Michel

*Counsel for Plaintiff-Appellant*

**DECLARATION OF ANNA M. BARVIR**

I, Anna M. Barvir, declare as follows:

1. I am an attorney duly licensed to practice in the State of California and before the Ninth Circuit Court of Appeals. I am an Associate attorney at Michel & Associates, P.C., counsel for Plaintiff-Appellant. I am familiar with the facts and pleadings herein. The following is within my personal knowledge and if called and sworn as a witness, I could and would competently testify thereto.

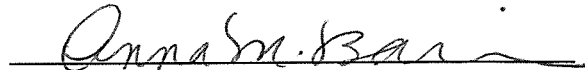
2. On or about September 15, 2015, I contacted Mr. David A. DeJute, counsel of record for Defendant-Appellee the United States Attorney General Loretta Lynch, asking whether his client would oppose Appellant's motion for full remand of this matter to the district court for further proceedings. Hearing no response, I emailed Mr. DeJute on or about September 25, 2015, asking again for his client's position. On or about September 28, 2015, Mr. DeJute informed me via email that his client would oppose remand.

3. On or about June 3, 2015, I contacted Mr. Anthony R. Hakl, counsel of record for Defendants-Appellees the California Attorney General Kamala Harris and the California Department of Justice, asking whether his clients would oppose Appellant's motion for full remand of this matter to the district court for further proceedings. Hearing no response, I emailed Mr. Hakl on or about September 25,

2015, asking again for his client's position. On or about September 28, 2015, Mr. Hakl informed me via email that his clients would oppose remand.

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

Executed this 29th day of September, 2015, at Long Beach, California.

  
Anna M. Barvir  
Declarant

**CERTIFICATE OF SERVICE**

I hereby certify that on September 29, 2015, an electronic PDF of APPELLANT’S MOTION FOR FULL REMAND TO DISTRICT COURT FOR FURTHER PROCEEDINGS was uploaded to the Court’s CM/ECF system, which will automatically generate and send by electronic mail a Notice of Docket Activity to all registered attorneys participating in the case. Such notice constitutes service on those registered attorneys.

Date: September 29, 2015

**MICHEL & ASSOCIATES, P.C.**

s/ C. D. Michel

\_\_\_\_\_  
C. D. Michel

*Counsel for Plaintiff-Appellant*

## **EXHIBIT A**

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CENTRAL DIST. OF CALIF.  
LOS ANGELES  
BY: \_\_\_\_\_

**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)  
  
**FIRST AMENDED COMPLAINT  
FOR:**  
  
(1) **VIOLATION OF FEDERAL  
DUE PROCESS CLAUSE AS  
TO APPLICATION OF  
FEDERAL STATUTE TO  
DENY CORE RIGHT;**  
  
**AND**  
  
(2) **VIOLATION OF FEDERAL  
EQUAL PROTECTION  
CLAUSE;**  
  
**DEMAND FOR JURY TRIAL**

**PRELIMINARY STATEMENT**

1. This is an action for declaratory and injunctive relief in order that Plaintiff EUGENE EVAN BAKER (hereinafter "Plaintiff" or "Baker") may lawfully receive, own and possess a firearm in the exercise of his rights under the Second Amendment to the Constitution of the United States although he was convicted in the State of California of a misdemeanor crime of domestic violence ("MCDV").

2. Plaintiff was convicted of an MCDV in 1997. In 2002, Plaintiff was

1 allowed to withdraw his prior guilty plea and have the conviction set aside under  
2 California Penal Code section 1204.3. In 2007, the effect of the conclusion in  
3 October of that year of a mandatory ten-year ban on Plaintiff's ownership and  
4 possession of firearms was that Plaintiff was considered by the state from that point  
5 forward to be able to receive, own and possess firearms. Plaintiff later received an  
6 order from a Ventura County Superior Court adjudging all of Plaintiff's firearms  
7 rights to have been restored in 2007 for purposes of state law.

8 3. Notwithstanding the effect of the state law restoring Plaintiff's right to  
9 receive, own and possess firearms, as well as an order of the state's judiciary  
10 affirming the restoration of Plaintiff's right to receive, own and possess firearms,  
11 the application of federal law, i.e., 18 U.S.C. §§921(a)(33)(A)(i) & 922(g)(9),  
12 prevents Plaintiff from receiving or possessing firearms.

13 4. In furtherance of enforcing 18 U.S.C. §§921(a)(33)(A)(i) & 922(g)(9),  
14 the State of California has expressly assumed the role of a "Point of Contact" of the  
15 U.S. Department of Justice for purposes of enforcing these sections against  
16 California firearms' purchasers. In this role, the state defendants have denied  
17 Plaintiff the opportunity to purchase firearms by these state defendants declaring  
18 Plaintiff a person prohibited to receive and possess firearms under Sections  
19 921(a)(33)(A)(i) & 922(g)(9), and instructing California firearms dealers to not  
20 release firearms to Plaintiff.

21 5. The effect of the application of these federal statutes by the federal and  
22 state defendants to deny Plaintiff the right to keep and bear arms for self-defense  
23 violates Plaintiff's Second Amendment right to self-defense.

#### 24 **JURISDICTION AND VENUE**

25 6. Jurisdiction of this action is founded on 28 U.S.C. §1331 in that this  
26 action arises under the Constitution and laws of the United States, and under 28  
27 U.S.C. §1343(3) in that this action seeks to redress the deprivation, under color of  
28 the laws, statute, ordinances, regulations, customs and usages of the United States,

1 the State of California, and political subdivisions thereof, of rights, privileges or  
 2 immunities secured by the United States Constitution and by Acts of Congress.

3 7. Plaintiffs' claims for declaratory and injunctive relief are authorized  
 4 by 28 U.S.C. §§2201 & 2202. Plaintiffs' claims for a writ of mandate directed to  
 5 Defendants are authorized pursuant to 28 U.S.C. §1651.

6 8. Venue in this judicial district is proper under 28 U.S.C. §1391(b)(1)-  
 7 (2), because Plaintiff Baker is a resident of this judicial district, all defendants have  
 8 offices within this judicial district, and the deprivation of rights and other conduct  
 9 alleged herein occurred within this judicial district.

### 10 PARTIES

11 9. Plaintiff Baker is a citizen of the United States and a resident of the  
 12 Somis, California.

13 10. Defendant Holder is the Attorney General of the United States, and as  
 14 the chief law enforcement officer of the government of the United States would be  
 15 responsible for the prosecution of Baker pursuant to 18 U.S.C. §922(g)(9) should  
 16 Baker be found to have received or possess a firearm in violation of Sections  
 17 921(a)(33)(A)(i) & 922(g)(9). On information and belief, were Baker to exercise  
 18 his Second Amendment rights by receiving, owning or possessing a firearm,  
 19 Defendant Holder, through his agents and employees, would arrest and prosecute  
 20 Plaintiff. Holder is being sued in his official capacity as U.S. Attorney General.

21 11. Defendant Kamala D. Harris is the elected Attorney General of the  
 22 State of California. In her role as the Attorney General, Defendant Harris is  
 23 responsible for interpreting, implementing and executing the policies and  
 24 procedures of the California Department of Justice ("Cal. DOJ") including the Cal.  
 25 DOJ's policies and procedures as a Point of Contact. As such, she is responsible  
 26 for formulating, executing and administering the laws, customs and practices that  
 27 Plaintiff challenges, and is in fact presently enforcing the challenged laws, customs,  
 28 and practices against Plaintiff. Defendant Harris is sued in her official capacity as



1 California Attorney General.

2 12. Defendant The State of California Department of Justice is a political  
3 subdivision of the State of California, and is the designated Point of Contact for  
4 California Federal Firearms Licensees ("FFL") to determine whether California  
5 purchasers, including Plaintiff, are prohibited persons under 18 U.S.C.  
6 §§921(a)(33)(A)(i) & 922(g)(9). Cal. DOJ is obligated under Sections  
7 921(a)(33)(A)(i) & 922(g)(9) and analogous California law to assess the criminal  
8 backgrounds of firearms purchasers, and is the final authority as to whether  
9 California FFLs can release purchased firearms to purchasers, including Plaintiff.  
10 As such, Cal. DOJ is responsible for formulating, executing and administering the  
11 laws, customs and practices that Plaintiff challenges, and is in fact presently  
12 enforcing the challenged laws, customs, and practices against Plaintiff.

13 13. On information and belief, Defendants DOES 1-100 are employees or  
14 agents of defendants Holder, Harris, or Cal. DOJ, or of local governmental  
15 agencies, who are responsible for formulating, executing and administering the  
16 laws, customs and practices that Plaintiff challenges, and are in fact presently  
17 enforcing the challenged laws, customs, and practices against Plaintiff. On  
18 information and belief, Defendants DOES 1-100 have facilitated, participated in, or  
19 otherwise furthered the denial of the receipt of, ownership of, and possession of  
20 firearms by Plaintiff. Plaintiff is unaware of the identities of Defendants DOES 1-  
21 100 at the time of the filing of this complaint, and shall seek leave of court to  
22 substitute the true names of such defendants when their identities are ascertained.

### 23 **FACTS APPLICABLE TO ALL CLAIMS**

24 14. On September 29, 1997, in the Ventura County Municipal Court,  
25 Plaintiff was convicted upon his plea of *nolo contendere* of violating California  
26 Penal Code §273.5(a), Infliction of Corporal Injury on Current or Former Spouse or  
27 Cohabitant. Such conviction was a MCDV for purposes of 18 U.S.C.  
28 §§921(a)(33)(A)(i) & 922(g)(9). On October 20, 1997, Plaintiff was sentenced to a

1 three-year probationary sentence with certain terms and conditions; among which  
2 was a condition that he “not own, possess, or have access to any firearm or  
3 dangerous weapon” for a period of ten years pursuant to former California Penal  
4 Code §12021(c)(1).

5 15. Plaintiff successfully completed all of the terms of his probation, and  
6 on February 24, 2002, submitted his application for expungement and set-aside  
7 pursuant to California Penal Code §1203.4. On June 19, 2002, the Ventura County  
8 Superior Court granted the motion under Section 1203.4 and signed an Order,  
9 thereby ordering Plaintiff’s 1997 conviction be set aside, the *nolo contendere* plea  
10 be withdrawn, a plea of not guilty be entered, and the original criminal complaint  
11 be deemed dismissed. The 2002 Order did not contain any language that Plaintiff  
12 was thereafter uniquely prohibited from personally shipping, transporting,  
13 possessing, or receiving firearms once the ten-year suspension of Plaintiff’s  
14 firearms’ ownership and possession rights pursuant to former Section 12021(c)(1)  
15 ended.

16 16. The ten-year suspension of Plaintiff’s firearm ownership and  
17 possession rights remained in force until it expired on October 20, 2007. From the  
18 date of his 1997 arrest to the present, including his probationary term and the entire  
19 ten-year term of former Section 12021(c)(1), Plaintiff has never been convicted of  
20 any other criminal behavior, including any crime which would disqualify Plaintiff  
21 from receiving, owning or possessing a firearm under federal or state law.

22 17. In or about May 2009, Plaintiff attempted to effect a firearms purchase  
23 at Ojai Valley Surplus, a federal firearms licensee (“FFL”) located in Ojai,  
24 California, Ojai Valley Surplus contacted Cal. DOJ to submit Plaintiff’s purchase.  
25 On June 8, 2009, Defendant Cal. DOJ sent a letter to Ojai Valley Surplus which  
26 stated that Plaintiff “is a person not eligible to posses (sic) a firearm.” Cal. DOJ  
27 further ordered Ojai Valley Surplus to not release the firearm to Plaintiff.

28 18. On August 25 , 2010, in response to an inquiry from Plaintiff’s

1 attorney, Defendant Cal. DOJ sent Plaintiff a letter explaining why Plaintiff's  
 2 attempted 2009 firearms purchase had been denied. The letter stated that Cal. DOJ  
 3 has "identified a record in a state or federal database which indicates that you are  
 4 prohibited by state and/or federal law from purchasing or possessing firearms." The  
 5 letter further states that the disqualifying record is a conviction for "Misdemeanor  
 6 domestic violence convictions (273.5PC, 243(E)(1)PC Convictions over 10 years  
 7 old)-Federal Brady Act, effected November 30, 1998."

8 19. On information and belief, Cal. DOJ's denial of Plaintiff's 2009  
 9 firearms purchase was due to Cal. DOJ fulfilling its role as a Point of Contact, and  
 10 adjudging that Plaintiff was prohibited receiving and possessing a firearm pursuant  
 11 to 18 U.S.C. §922(g)(9). On information and belief, as a Point of Contact, as part  
 12 of performing the above-mentioned check, Cal. DOJ submitted Plaintiff's name and  
 13 other identifying information to the U.S. Department of Justice's Federal Bureau of  
 14 Investigation ("FBI") to check whether Plaintiff was prohibited from receiving or  
 15 possessing a firearm based on information within the National Instant Criminal  
 16 Background Check System ("NICS")<sup>1</sup>.

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

22 21. Plaintiff desires to purchase one or more firearms for his personal  
 23 protection and the protection of his family and property but does not wish to run  
 24 the risk of being arrested, charged, convicted and punished pursuant to 18 U.S.C.

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26 <sup>1</sup> National Instant Criminal Background Check System (NICS)  
 27 Operations 2011. *See*  
 28 <<http://www.fbi.gov/about-us/cjis/nics/reports/2011-operations-report/operations-report-2011>>

§922(g)(9) in the attempted exercise of his Second Amendment rights.

### RELEVANT CALIFORNIA PENAL STATUTES

22. Plaintiff was convicted of violating California Penal Code §273.5(a) on October 29, 1997. Section 273.5(a), in relevant part, provides:

Any person who willfully inflicts 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, is guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not more than one year, or by a fine of up to six thousand dollars (\$6,000.00) or by both that fine and imprisonment.

23. All persons convicted of violating Section 273.5(a) are subject to a statutory ten-year ban on firearm possession pursuant to Penal Code §29805 (formerly Penal Code §12021(c)(1))<sup>2</sup>:

Except as provided in Section 29855 or subdivision (a) of Section 29800, any person who has been convicted of a misdemeanor violation of Section . . . 273.5, . . . and who, within 10 years of the conviction, owns, purchases, receives, or has in possession or under custody or control, any firearm is guilty of a public offense, which shall be punishable by imprisonment in a county jail not exceeding one year or in the state prison, by a fine not exceeding one thousand dollars (\$1,000), or by both that imprisonment and fine.

24. California Penal Code §1203.4 provides the means whereby those who have successfully completed a grant of probation after having been convicted of certain penal offenses may petition the court to grant expungement and set-aside relief. As to the effect of a Section 1203.4 motion on a firearms prohibition, Section 1203.4 provides in relevant part:

(a)(2) Dismissal of an accusation or information pursuant to this section does not permit a person to own, possess, or have in his or her custody or control any firearm or prevent his or her conviction under Chapter 2

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<sup>2</sup> Because prior to January 1, 2012, the text of Section 29805 was contained in Penal Code §12021., all references in Plaintiff's sentencing order are to former Section 12021. *See* Paragraph 14, *supra*.

(commencing with Section 29800) of Division 9 of Title 4 of Part 6.

25. An order granted under Section 1203.4 does not end or shorten the ten-year ban imposed under Section 29805. But an order granted under Section 1203.4 does not increase or make permanent the Section 29805 ban. Once the ten-year period under Section 29805 has ended, and assuming no further criminal behavior by the person during that period, by law California considers the MCDV convict to have been fully restored his or her rights under California law to receive, own or possess a firearm at the conclusion of the ten-year period.

### **RELEVANT FEDERAL & STATE FIREARMS LAWS**

26. The Second Amendment to the U.S. Constitution of the United States reads: "A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed." The Fourteenth Amendment to the U.S. Constitution incorporates the Second Amendment to the citizens of the states. The Fourteenth Amendment also guarantees states' citizens equal protection of the laws and that core rights of the citizens under the Constitution may not be infringed upon without, at a minimum, due process.

27. 18 U.S.C. §922(g)(9) reads: "It shall be unlawful for any person.. .who has been convicted in any court of a misdemeanor crime of domestic violence (MCDV), 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."

28. 18 U.S.C. §921(a)(33)(A)(i) defines an "MCDV." The California crime for which Plaintiff was convicted in 1997 is a disqualifying MCDV for purposes of that statute and Section 922(g)(9).

29. The Gun Control Act and the Brady Handgun Violence Prevention Act, of which 18 U.S.C. §§921(a)(33)(A)(i) & 922(g)(9) are a part, are implemented and interpreted by the U.S. Department of Justice through regulations



published at 28 C.F.R., Part 25. The U.S. Department of Justice has adopted regulations published at 28 C.F.R. §§25.1 & 25.6 which allow state law enforcement agencies to act as a Point of Contact for querying the federal NICS database to determine whether a firearm purchaser is prohibited from receiving or possessing a firearm, in lieu of the FBI conducting such searches. California's legislature has agreed to have Cal. DOJ act as the Point of Contact for all purchases and transfer of firearms by California residents, by its adoption of California Penal Code §28220(b).

**FIRST CLAIM FOR  
VIOLATION OF FEDERAL DUE PROCESS  
CLAUSE AS TO APPLICATION OF  
FEDERAL STATUTE TO DENY CORE RIGHT  
(Against All Defendants)**

30. Plaintiff fully reincorporates Paragraphs 1-29, *supra*, as though fully alleged hereinafter.

31. Without due process of law, Defendants, in applying and enforcing 18 U.S.C. §§921(a)(33)(A)(i) & 922(g)(9) as to Plaintiff to proscribe him from receiving or possessing firearms, have denied Plaintiff the exercise of his right to keep and bear arms under the Second Amendment to the Constitution, a core right.

32. On information and belief, Defendants, and each of them, have implemented and enforced 18 U.S.C. §§921(a)(33)(A)(i) & 922(g)(9) in the manner described herein for the governmental purpose of general crimefighting

33. The application and enforcement of 18 U.S.C. §§921(a)(33)(A)(i) & 922(g)(9) to proscribe Plaintiff from receiving or possessing a firearm does not comport with the historical scope of the Second Amendment at the time it was enacted. Alternatively, on information and belief the application and enforcement of 18 U.S.C. §§921(a)(33)(A)(i) & 922(g)(9) to proscribe Plaintiff from receiving or possessing a firearm does not further a compelling governmental interest,

1 insomuch as Defendants do not have a compelling interest in preventing Plaintiff, a  
2 person adjudged by California to be fit to own and possess a firearm, from  
3 receiving, owning or possessing a firearm. Alternatively, Defendants' proffered  
4 basis for implementing and enforcing Sections 921(a)(33)(A)(i) & 922(g)(9) is  
5 neither narrowly tailored nor the least restrictive means for achieving the  
6 government's general crimefighting interest.

7 34. Alternatively, on information and belief the application and  
8 enforcement of 18 U.S.C. §§921(a)(33)(A)(i) & 922(g)(9) to proscribe Plaintiff  
9 from receiving or possessing a firearm is not substantially related to achieving an  
10 important governmental interest, insomuch as Defendants do not have a important  
11 interest in preventing Plaintiff, a person adjudged by California to no longer be a  
12 danger such that California deems such person fit to receive, own and possess a  
13 firearm as a matter of law, from receiving, owning or possessing a firearm.

14 35. At all times, Defendants Holder, Harris and DOES 1-100 were acting  
15 pursuant to 18 U.S.C. §§921(a)(33)(A)(i) & 922(g)(9). On information and belief,  
16 Defendants, and each of them, will continue to implement and enforce 18 U.S.C.  
17 §§921(a)(33)(A)(i) & 922(g)(9) in a manner that infringes upon Plaintiff's exercise  
18 of his Second Amendment rights, absent the grant of the relief requested.

19 **SECOND CLAIM FOR**  
20 **VIOLATION OF FEDERAL EQUAL**  
21 **PROTECTION CLAUSE**  
22 **(Against All Defendants)**

23 36. Plaintiff fully reincorporates Paragraphs 1-29, *supra*, as though fully  
24 alleged hereinafter.

25 37. Plaintiff is of a class of firearms purchasers who have previously been  
26 convicted of an MCDV but have fulfilled the terms of their probation or have  
27 otherwise not been convicted of a crime for a period of ten years following their  
28 MCDV conviction.

1           38. By Defendants, and each of them, implementing and enforcing 18  
2 U.S.C. §§921(a)(33)(A)(i) & 922(g)(9) in a manner to deny Plaintiff the receipt,  
3 ownership or possession of firearms despite Plaintiff having been adjudged by  
4 California to be fit to receive, own and possess a firearm, Defendants have  
5 prevented Plaintiff, and all other California citizens of Plaintiff's class, from  
6 exercising their core right to keep and bear arms for self-defense under the Second  
7 Amendment. On information and belief, all California citizens of the same class as  
8 Plaintiff, i.e., who have fulfilled the requirements of Section 29805 for the requisite  
9 ten-year period, are, like Plaintiff, prevented from receiving, owning or possessing  
10 firearms, and, like Plaintiff, are subject to arrest should they receive, own or  
11 possess a firearm. As such, on information and belief, even if Plaintiff should be  
12 granted such relief as requested herein as to himself, unless Plaintiff is granted the  
13 relief requested as to the further implementation and enforcement of Sections  
14 921(a)(33)(A)(i) & 922(g)(9) against all California citizens by Defendants, the  
15 constitutional violations complained of herein are capable of repetition while  
16 evading review.

17           39. On information and belief, Defendants, and each of them, have  
18 implemented and enforced 18 U.S.C. §§921(a)(33)(A)(i) & 922(g)(9) in the manner  
19 described herein for the governmental purpose of general crimefighting. On  
20 information and belief, in no instance does Defendants' proffered basis for  
21 implementing and enforcing Sections 921(a)(33)(A)(i) & 922(g)(9) in such manner  
22 comport with the historical scope of the Second Amendment, in that as  
23 implemented Sections 921(a)(33)(A)(i) & 922(g)(9) unlawfully restrict the right to  
24 bear arms for self-defense as that right was understood by those who drafted and  
25 enacted both the Second and Fourteenth Amendments.

26           40. Alternatively, on information and belief, in no instance does  
27 Defendants' proffered basis implementing and enforcing 18 U.S.C.  
28 §§921(a)(33)(A)(i) & 922(g)(9) comply with the Fourteenth Amendment to the



1 United States Constitution, inasmuch as Defendants' proffered basis for  
2 implementing and enforcing Sections 921(a)(33)(A)(i) & 922(g)(9) in such manner  
3 does not further a compelling governmental interest. Alternatively, Defendants'  
4 proffered basis for implementing and enforcing Sections 921(a)(33)(A)(i) &  
5 922(g)(9) is neither narrowly tailored nor the least restrictive means for achieving  
6 the government's general crimefighting interest.

7 41. Alternatively, on information and belief, in no instance does  
8 Defendants' proffered basis implementing and enforcing 18 U.S.C.  
9 §§921(a)(33)(A)(i) & 922(g)(9) comply with the Fourteenth Amendment to the  
10 United States Constitution, inasmuch as Defendants' proffered basis for  
11 implementing and enforcing Sections 921(a)(33)(A)(i) & 922(g)(9) in such manner  
12 does not further an important governmental interest. Alternatively, Defendants'  
13 proffered basis for implementing and enforcing Sections 921(a)(33)(A)(i) &  
14 922(g)(9) is not substantially related to achieving the government's general  
15 crimefighting interest, inasmuch as Defendants do not have a important interest in  
16 preventing Plaintiff, a person adjudged by California to no longer be a danger such  
17 that California deems fit to receive, own and possess a firearm as a matter of law,  
18 from receiving or and possessing a firearm.

19 42. By reason of the Defendants' interpretation and implementation of 18  
20 U.S.C. §§921(a)(33)(A)(i) & 922(g)(9), and the resultant denial to Plaintiff of the  
21 receipt, ownership or possession of firearms for self-defense, Defendants have  
22 unlawfully interfered with Plaintiff's exercise of his core self-defense right under  
23 the Second Amendment to the United States Constitution, thereby denying Plaintiff  
24 the equal protection of the Second Amendment as is afforded to other citizens.

25 43. At all times, Defendants Holder, Harris and DOES 1-100 were acting  
26 pursuant to 18 U.S.C. §§921(a)(33)(A)(i) & 922(g)(9). On information and belief,  
27 Defendants, and each of them, will continue to implement and enforce Sections  
28 921(a)(33)(A)(i) & 922(g)(9) in a manner that infringes upon Plaintiff's exercise of

1 his Second Amendment rights, absent the grant of the relief requested.

2 **PRAYER FOR RELIEF**

3 WHEREFORE, Plaintiff respectfully asks that this Court enter a judgment in  
4 his favor and against the Defendants as follows:

5 1. For a declaration that Defendants' implementation and enforcement of  
6 Sections 921(a)(33)(A)(i) & 922(g)(9), as applied to Plaintiff, is unconstitutional;

7 2. That a writ of mandate be issued from this Court pursuant to 28 U.S.C.  
8 §1651 directing Defendants to cease implementation and enforcement of Sections  
9 921(a)(33)(A)(i) & 922(g)(9) in such manner as prevents Plaintiff, and all other  
10 California citizens who have fulfilled the requirements of California Penal Code  
11 §29805 and who do not otherwise labor under any other disqualifying  
12 circumstance, from receiving, owning or possessing firearms;

13 3. For a judicial declaration that since October 20, 2007, Eugene Evan  
14 Baker has been entitled to exercise his rights under the Second Amendment to the  
15 Constitution of the United States and that he is entitled under federal law to receive  
16 and possess firearms and ammunition without risk and threat of prosecution by  
17 Defendants and their representatives or agents;

18 3. For an order enjoining Defendants, and their representatives and  
19 agents, from arresting and prosecuting Eugene Evan Baker for any future alleged  
20 violation of 18 U.S.C. §922(g)(9) for so long as he remains free of any  
21 disqualifying conviction or circumstance;

22 4. For an order that all computers and other records relied upon by  
23 Defendants and their representatives or agents, concerning those persons allegedly  
24 prohibited from receiving, owning or possessing a firearm pursuant to 18 U.S.C.  
25 §922(g)(9), be purged of all information and content concerning the arrest,  
26 conviction and sentencing of Eugene Evan Baker, or, alternatively, for an order that  
27 all computers and other records relied upon by Defendants and their representatives  
28 or agents, concerning those persons allegedly prohibited from receiving, owning or

1 possessing a firearm pursuant to 18 U.S.C. §922(g)(9), include a notation that  
2 notwithstanding Plaintiff's arrest, conviction and sentencing in 1997 for an MCDV,  
3 Plaintiff is not disqualified thereby from receiving, owning or possessing a firearm;

4 5. For attorney's fees and costs of suit pursuant to 28 U.S.C. §2412; and

5 6. Any further relief as the Court deems just and proper.

6 Dated: October 11, 2012

**MICHEL & ASSOCIATES, P.C.**



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

12 **DEMAND FOR JURY TRIAL**

13 Plaintiff hereby demands a trial by a jury of his peers.

14 Dated: October 11, 2012

**MICHEL & ASSOCIATES, P.C.**



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 7 Eugene Evan Baker

FILED  
 2012 OCT 11 PM 3:10  
 U.S. DISTRICT COURT  
 CENTRAL DIST. OF CALIF.  
 LOS ANGELES  
 BY: \_\_\_\_\_

8 **UNITED STATES DISTRICT COURT**

9 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**

10 EUGENE EVAN BAKER,

11 Plaintiff,

12 vs.

13 ERIC H. HOLDER, JR., in his official  
 14 capacity as ATTORNEY GENERAL  
 OF THE UNITED STATES;  
 15 KAMALA D. HARRIS, in her  
 capacity as ATTORNEY GENERAL  
 16 FOR THE STATE OF  
 CALIFORNIA; THE STATE OF  
 17 CALIFORNIA DEPARTMENT OF  
 JUSTICE; and DOES 1 through 100,  
 Inclusive,

18  
 19 Defendants.

CASE NO. CV 10-3996-SVW(AJWx)

**FIRST AMENDED COMPLAINT  
 FOR:**

(1) **VIOLATION OF FEDERAL  
 DUE PROCESS CLAUSE AS  
 TO APPLICATION OF  
 FEDERAL STATUTE TO  
 DENY CORE RIGHT;**

**AND**

(2) **VIOLATION OF FEDERAL  
 EQUAL PROTECTION  
 CLAUSE;**

**DEMAND FOR JURY TRIAL**

20  
 21 **PRELIMINARY STATEMENT**

22 1. This is an action for declaratory and injunctive relief in order that  
 23 Plaintiff EUGENE EVAN BAKER (hereinafter "Plaintiff" or "Baker") may  
 24 lawfully receive, own and possess a firearm in the exercise of his rights under the  
 25 Second Amendment to the Constitution of the United States although he was  
 26 convicted in the State of California of a misdemeanor crime of domestic violence  
 27 ("MCDV").

28 2. Plaintiff was convicted of an MCDV in 1997. In 2002, Plaintiff was

1 allowed to withdraw his prior guilty plea and have the conviction set aside under  
2 California Penal Code section 1204.3. In 2007, the effect of the conclusion in  
3 October of that year of a mandatory ten-year ban on Plaintiff's ownership and  
4 possession of firearms was that Plaintiff was considered by the state from that point  
5 forward to be able to receive, own and possess firearms. Plaintiff later received an  
6 order from a Ventura County Superior Court adjudging all of Plaintiff's firearms  
7 rights to have been restored in 2007 for purposes of state law.

8 3. Notwithstanding the effect of the state law restoring Plaintiff's right to  
9 receive, own and possess firearms, as well as an order of the state's judiciary  
10 affirming the restoration of Plaintiff's right to receive, own and possess firearms,  
11 the application of federal law, i.e., 18 U.S.C. §§921(a)(33)(A)(i) & 922(g)(9),  
12 prevents Plaintiff from receiving or possessing firearms.

13 4. In furtherance of enforcing 18 U.S.C. §§921(a)(33)(A)(i) & 922(g)(9),  
14 the State of California has expressly assumed the role of a "Point of Contact" of the  
15 U.S. Department of Justice for purposes of enforcing these sections against  
16 California firearms' purchasers. In this role, the state defendants have denied  
17 Plaintiff the opportunity to purchase firearms by these state defendants declaring  
18 Plaintiff a person prohibited to receive and possess firearms under Sections  
19 921(a)(33)(A)(i) & 922(g)(9), and instructing California firearms dealers to not  
20 release firearms to Plaintiff.

21 5. The effect of the application of these federal statutes by the federal and  
22 state defendants to deny Plaintiff the right to keep and bear arms for self-defense  
23 violates Plaintiff's Second Amendment right to self-defense.

#### 24 **JURISDICTION AND VENUE**

25 6. Jurisdiction of this action is founded on 28 U.S.C. §1331 in that this  
26 action arises under the Constitution and laws of the United States, and under 28  
27 U.S.C. §1343(3) in that this action seeks to redress the deprivation, under color of  
28 the laws, statute, ordinances, regulations, customs and usages of the United States,

1 the State of California, and political subdivisions thereof, of rights, privileges or  
2 immunities secured by the United States Constitution and by Acts of Congress.

3 7. Plaintiffs' claims for declaratory and injunctive relief are authorized  
4 by 28 U.S.C. §§2201 & 2202. Plaintiffs' claims for a writ of mandate directed to  
5 Defendants are authorized pursuant to 28 U.S.C. §1651.

6 8. Venue in this judicial district is proper under 28 U.S.C. §1391(b)(1)-  
7 (2), because Plaintiff Baker is a resident of this judicial district, all defendants have  
8 offices within this judicial district, and the deprivation of rights and other conduct  
9 alleged herein occurred within this judicial district.

### 10 PARTIES

11 9. Plaintiff Baker is a citizen of the United States and a resident of the  
12 Somis, California.

13 10. Defendant Holder is the Attorney General of the United States, and as  
14 the chief law enforcement officer of the government of the United States would be  
15 responsible for the prosecution of Baker pursuant to 18 U.S.C. §922(g)(9) should  
16 Baker be found to have received or possess a firearm in violation of Sections  
17 921(a)(33)(A)(i) & 922(g)(9). On information and belief, were Baker to exercise  
18 his Second Amendment rights by receiving, owning or possessing a firearm,  
19 Defendant Holder, through his agents and employees, would arrest and prosecute  
20 Plaintiff. Holder is being sued in his official capacity as U.S. Attorney General.

21 11. Defendant Kamala D. Harris is the elected Attorney General of the  
22 State of California. In her role as the Attorney General, Defendant Harris is  
23 responsible for interpreting, implementing and executing the policies and  
24 procedures of the California Department of Justice ("Cal. DOJ") including the Cal.  
25 DOJ's policies and procedures as a Point of Contact. As such, she is responsible  
26 for formulating, executing and administering the laws, customs and practices that  
27 Plaintiff challenges, and is in fact presently enforcing the challenged laws, customs,  
28 and practices against Plaintiff. Defendant Harris is sued in her official capacity as



1 California Attorney General.

2 12. Defendant The State of California Department of Justice is a political  
3 subdivision of the State of California, and is the designated Point of Contact for  
4 California Federal Firearms Licensees ("FFL") to determine whether California  
5 purchasers, including Plaintiff, are prohibited persons under 18 U.S.C.  
6 §§921(a)(33)(A)(i) & 922(g)(9). Cal. DOJ is obligated under Sections  
7 921(a)(33)(A)(i) & 922(g)(9) and analogous California law to assess the criminal  
8 backgrounds of firearms purchasers, and is the final authority as to whether  
9 California FFLs can release purchased firearms to purchasers, including Plaintiff.  
10 As such, Cal. DOJ is responsible for formulating, executing and administering the  
11 laws, customs and practices that Plaintiff challenges, and is in fact presently  
12 enforcing the challenged laws, customs, and practices against Plaintiff.

13 13. On information and belief, Defendants DOES 1-100 are employees or  
14 agents of defendants Holder, Harris, or Cal. DOJ, or of local governmental  
15 agencies, who are responsible for formulating, executing and administering the  
16 laws, customs and practices that Plaintiff challenges, and are in fact presently  
17 enforcing the challenged laws, customs, and practices against Plaintiff. On  
18 information and belief, Defendants DOES 1-100 have facilitated, participated in, or  
19 otherwise furthered the denial of the receipt of, ownership of, and possession of  
20 firearms by Plaintiff. Plaintiff is unaware of the identities of Defendants DOES 1-  
21 100 at the time of the filing of this complaint, and shall seek leave of court to  
22 substitute the true names of such defendants when their identities are ascertained.

23 **FACTS APPLICABLE TO ALL CLAIMS**

24 14. On September 29, 1997, in the Ventura County Municipal Court,  
25 Plaintiff was convicted upon his plea of *nolo contendere* of violating California  
26 Penal Code §273.5(a), Infliction of Corporal Injury on Current or Former Spouse or  
27 Cohabitant. Such conviction was a MCDV for purposes of 18 U.S.C.  
28 §§921(a)(33)(A)(i) & 922(g)(9). On October 20, 1997, Plaintiff was sentenced to a

1 three-year probationary sentence with certain terms and conditions; among which  
2 was a condition that he “not own, possess, or have access to any firearm or  
3 dangerous weapon” for a period of ten years pursuant to former California Penal  
4 Code §12021(c)(1).

5 15. Plaintiff successfully completed all of the terms of his probation, and  
6 on February 24, 2002, submitted his application for expungement and set-aside  
7 pursuant to California Penal Code §1203.4. On June 19, 2002, the Ventura County  
8 Superior Court granted the motion under Section 1203.4 and signed an Order,  
9 thereby ordering Plaintiff’s 1997 conviction be set aside, the *nolo contendere* plea  
10 be withdrawn, a plea of not guilty be entered, and the original criminal complaint  
11 be deemed dismissed. The 2002 Order did not contain any language that Plaintiff  
12 was thereafter uniquely prohibited from personally shipping, transporting,  
13 possessing, or receiving firearms once the ten-year suspension of Plaintiff’s  
14 firearms’ ownership and possession rights pursuant to former Section 12021(c)(1)  
15 ended.

16 16. The ten-year suspension of Plaintiff’s firearm ownership and  
17 possession rights remained in force until it expired on October 20, 2007. From the  
18 date of his 1997 arrest to the present, including his probationary term and the entire  
19 ten-year term of former Section 12021(c)(1), Plaintiff has never been convicted of  
20 any other criminal behavior, including any crime which would disqualify Plaintiff  
21 from receiving, owning or possessing a firearm under federal or state law.

22 17. In or about May 2009, Plaintiff attempted to effect a firearms purchase  
23 at Ojai Valley Surplus, a federal firearms licensee (“FFL”) located in Ojai,  
24 California, Ojai Valley Surplus contacted Cal. DOJ to submit Plaintiff’s purchase.  
25 On June 8, 2009, Defendant Cal. DOJ sent a letter to Ojai Valley Surplus which  
26 stated that Plaintiff “is a person not eligible to posses (sic) a firearm.” Cal. DOJ  
27 further ordered Ojai Valley Surplus to not release the firearm to Plaintiff.

28 18. On August 25 , 2010, in response to an inquiry from Plaintiff’s



1 attorney, Defendant Cal. DOJ sent Plaintiff a letter explaining why Plaintiff's  
 2 attempted 2009 firearms purchase had been denied. The letter stated that Cal. DOJ  
 3 has "identified a record in a state or federal database which indicates that you are  
 4 prohibited by state and/or federal law from purchasing or possessing firearms." The  
 5 letter further states that the disqualifying record is a conviction for "Misdemeanor  
 6 domestic violence convictions (273.5PC, 243(E)(1)PC Convictions over 10 years  
 7 old)-Federal Brady Act, effected November 30, 1998."

8 19. On information and belief, Cal. DOJ's denial of Plaintiff's 2009  
 9 firearms purchase was due to Cal. DOJ fulfilling its role as a Point of Contact, and  
 10 adjudging that Plaintiff was prohibited receiving and possessing a firearm pursuant  
 11 to 18 U.S.C. §922(g)(9). On information and belief, as a Point of Contact, as part  
 12 of performing the above-mentioned check, Cal. DOJ submitted Plaintiff's name and  
 13 other identifying information to the U.S. Department of Justice's Federal Bureau of  
 14 Investigation ("FBI") to check whether Plaintiff was prohibited from receiving or  
 15 possessing a firearm based on information within the National Instant Criminal  
 16 Background Check System ("NICS")<sup>1</sup>.

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

22 21. Plaintiff desires to purchase one or more firearms for his personal  
 23 protection and the protection of his family and property but does not wish to run  
 24 the risk of being arrested, charged, convicted and punished pursuant to 18 U.S.C.  
 25

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26 <sup>1</sup> National Instant Criminal Background Check System (NICS)  
 27 Operations 2011. *See*  
 28 <<http://www.fbi.gov/about-us/cjis/nics/reports/2011-operations-report/operations-report-2011>>

§922(g)(9) in the attempted exercise of his Second Amendment rights.

### RELEVANT CALIFORNIA PENAL STATUTES

22. Plaintiff was convicted of violating California Penal Code §273.5(a) on October 29, 1997. Section 273.5(a), in relevant part, provides:

Any person who willfully inflicts 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, is guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not more than one year, or by a fine of up to six thousand dollars (\$6,000.00) or by both that fine and imprisonment.

23. All persons convicted of violating Section 273.5(a) are subject to a statutory ten-year ban on firearm possession pursuant to Penal Code §29805 (formerly Penal Code §12021(c)(1))<sup>2</sup>:

Except as provided in Section 29855 or subdivision (a) of Section 29800, any person who has been convicted of a misdemeanor violation of Section . . . 273.5, . . . and who, within 10 years of the conviction, owns, purchases, receives, or has in possession or under custody or control, any firearm is guilty of a public offense, which shall be punishable by imprisonment in a county jail not exceeding one year or in the state prison, by a fine not exceeding one thousand dollars (\$1,000), or by both that imprisonment and fine.

24. California Penal Code §1203.4 provides the means whereby those who have successfully completed a grant of probation after having been convicted of certain penal offenses may petition the court to grant expungement and set-aside relief. As to the effect of a Section 1203.4 motion on a firearms prohibition, Section 1203.4 provides in relevant part:

(a)(2) Dismissal of an accusation or information pursuant to this section does not permit a person to own, possess, or have in his or her custody or control any firearm or prevent his or her conviction under Chapter 2

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<sup>2</sup> Because prior to January 1, 2012, the text of Section 29805 was contained in Penal Code §12021., all references in Plaintiff's sentencing order are to former Section 12021. *See* Paragraph 14, *supra*.

(commencing with Section 29800) of Division 9 of Title 4 of Part 6.

25. An order granted under Section 1203.4 does not end or shorten the ten-year ban imposed under Section 29805. But an order granted under Section 1203.4 does not increase or make permanent the Section 29805 ban. Once the ten-year period under Section 29805 has ended, and assuming no further criminal behavior by the person during that period, by law California considers the MCDV convict to have been fully restored his or her rights under California law to receive, own or possess a firearm at the conclusion of the ten-year period.

### **RELEVANT FEDERAL & STATE FIREARMS LAWS**

26. The Second Amendment to the U.S. Constitution of the United States reads: "A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed." The Fourteenth Amendment to the U.S. Constitution incorporates the Second Amendment to the citizens of the states. The Fourteenth Amendment also guarantees states' citizens equal protection of the laws and that core rights of the citizens under the Constitution may not be infringed upon without, at a minimum, due process.

27. 18 U.S.C. §922(g)(9) reads: "It shall be unlawful for any person.. .who has been convicted in any court of a misdemeanor crime of domestic violence (MCDV), 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."

28. 18 U.S.C. §921(a)(33)(A)(i) defines an "MCDV." The California crime for which Plaintiff was convicted in 1997 is a disqualifying MCDV for purposes of that statute and Section 922(g)(9).

29. The Gun Control Act and the Brady Handgun Violence Prevention Act, of which 18 U.S.C. §§921(a)(33)(A)(i) & 922(g)(9) are a part, are implemented and interpreted by the U.S. Department of Justice through regulations

published at 28 C.F.R., Part 25. The U.S. Department of Justice has adopted regulations published at 28 C.F.R. §§25.1 & 25.6 which allow state law enforcement agencies to act as a Point of Contact for querying the federal NICS database to determine whether a firearm purchaser is prohibited from receiving or possessing a firearm, in lieu of the FBI conducting such searches. California's legislature has agreed to have Cal. DOJ act as the Point of Contact for all purchases and transfer of firearms by California residents, by its adoption of California Penal Code §28220(b).

**FIRST CLAIM FOR  
VIOLATION OF FEDERAL DUE PROCESS  
CLAUSE AS TO APPLICATION OF  
FEDERAL STATUTE TO DENY CORE RIGHT  
(Against All Defendants)**

30. Plaintiff fully reincorporates Paragraphs 1-29, *supra*, as though fully alleged hereinafter.

31. Without due process of law, Defendants, in applying and enforcing 18 U.S.C. §§921(a)(33)(A)(i) & 922(g)(9) as to Plaintiff to proscribe him from receiving or possessing firearms, have denied Plaintiff the exercise of his right to keep and bear arms under the Second Amendment to the Constitution, a core right.

32. On information and belief, Defendants, and each of them, have implemented and enforced 18 U.S.C. §§921(a)(33)(A)(i) & 922(g)(9) in the manner described herein for the governmental purpose of general crimefighting

33. The application and enforcement of 18 U.S.C. §§921(a)(33)(A)(i) & 922(g)(9) to proscribe Plaintiff from receiving or possessing a firearm does not comport with the historical scope of the Second Amendment at the time it was enacted. Alternatively, on information and belief the application and enforcement of 18 U.S.C. §§921(a)(33)(A)(i) & 922(g)(9) to proscribe Plaintiff from receiving or possessing a firearm does not further a compelling governmental interest,

1 insomuch as Defendants do not have a compelling interest in preventing Plaintiff, a  
2 person adjudged by California to be fit to own and possess a firearm, from  
3 receiving, owning or possessing a firearm. Alternatively, Defendants' proffered  
4 basis for implementing and enforcing Sections 921(a)(33)(A)(i) & 922(g)(9) is  
5 neither narrowly tailored nor the least restrictive means for achieving the  
6 government's general crimefighting interest.

7 34. Alternatively, on information and belief the application and  
8 enforcement of 18 U.S.C. §§921(a)(33)(A)(i) & 922(g)(9) to proscribe Plaintiff  
9 from receiving or possessing a firearm is not substantially related to achieving an  
10 important governmental interest, insomuch as Defendants do not have a important  
11 interest in preventing Plaintiff, a person adjudged by California to no longer be a  
12 danger such that California deems such person fit to receive, own and possess a  
13 firearm as a matter of law, from receiving, owning or possessing a firearm.

14 35. At all times, Defendants Holder, Harris and DOES 1-100 were acting  
15 pursuant to 18 U.S.C. §§921(a)(33)(A)(i) & 922(g)(9). On information and belief,  
16 Defendants, and each of them, will continue to implement and enforce 18 U.S.C.  
17 §§921(a)(33)(A)(i) & 922(g)(9) in a manner that infringes upon Plaintiff's exercise  
18 of his Second Amendment rights, absent the grant of the relief requested.

19 **SECOND CLAIM FOR**  
20 **VIOLATION OF FEDERAL EQUAL**  
21 **PROTECTION CLAUSE**  
22 **(Against All Defendants)**

23 36. Plaintiff fully reincorporates Paragraphs 1-29, *supra*, as though fully  
24 alleged hereinafter.

25 37. Plaintiff is of a class of firearms purchasers who have previously been  
26 convicted of an MCDV but have fulfilled the terms of their probation or have  
27 otherwise not been convicted of a crime for a period of ten years following their  
28 MCDV conviction.



1           38. By Defendants, and each of them, implementing and enforcing 18  
2 U.S.C. §§921(a)(33)(A)(i) & 922(g)(9) in a manner to deny Plaintiff the receipt,  
3 ownership or possession of firearms despite Plaintiff having been adjudged by  
4 California to be fit to receive, own and possess a firearm, Defendants have  
5 prevented Plaintiff, and all other California citizens of Plaintiff's class, from  
6 exercising their core right to keep and bear arms for self-defense under the Second  
7 Amendment. On information and belief, all California citizens of the same class as  
8 Plaintiff, i.e., who have fulfilled the requirements of Section 29805 for the requisite  
9 ten-year period, are, like Plaintiff, prevented from receiving, owning or possessing  
10 firearms, and, like Plaintiff, are subject to arrest should they receive, own or  
11 possess a firearm. As such, on information and belief, even if Plaintiff should be  
12 granted such relief as requested herein as to himself, unless Plaintiff is granted the  
13 relief requested as to the further implementation and enforcement of Sections  
14 921(a)(33)(A)(i) & 922(g)(9) against all California citizens by Defendants, the  
15 constitutional violations complained of herein are capable of repetition while  
16 evading review.

17           39. On information and belief, Defendants, and each of them, have  
18 implemented and enforced 18 U.S.C. §§921(a)(33)(A)(i) & 922(g)(9) in the manner  
19 described herein for the governmental purpose of general crimefighting. On  
20 information and belief, in no instance does Defendants' proffered basis for  
21 implementing and enforcing Sections 921(a)(33)(A)(i) & 922(g)(9) in such manner  
22 comport with the historical scope of the Second Amendment, in that as  
23 implemented Sections 921(a)(33)(A)(i) & 922(g)(9) unlawfully restrict the right to  
24 bear arms for self-defense as that right was understood by those who drafted and  
25 enacted both the Second and Fourteenth Amendments.

26           40. Alternatively, on information and belief, in no instance does  
27 Defendants' proffered basis implementing and enforcing 18 U.S.C.  
28 §§921(a)(33)(A)(i) & 922(g)(9) comply with the Fourteenth Amendment to the

1 United States Constitution, inasmuch as Defendants' proffered basis for  
2 implementing and enforcing Sections 921(a)(33)(A)(i) & 922(g)(9) in such manner  
3 does not further a compelling governmental interest. Alternatively, Defendants'  
4 proffered basis for implementing and enforcing Sections 921(a)(33)(A)(i) &  
5 922(g)(9) is neither narrowly tailored nor the least restrictive means for achieving  
6 the government's general crimefighting interest.

7 41. Alternatively, on information and belief, in no instance does  
8 Defendants' proffered basis implementing and enforcing 18 U.S.C.  
9 §§921(a)(33)(A)(i) & 922(g)(9) comply with the Fourteenth Amendment to the  
10 United States Constitution, inasmuch as Defendants' proffered basis for  
11 implementing and enforcing Sections 921(a)(33)(A)(i) & 922(g)(9) in such manner  
12 does not further an important governmental interest. Alternatively, Defendants'  
13 proffered basis for implementing and enforcing Sections 921(a)(33)(A)(i) &  
14 922(g)(9) is not substantially related to achieving the government's general  
15 crimefighting interest, inasmuch as Defendants do not have a important interest in  
16 preventing Plaintiff, a person adjudged by California to no longer be a danger such  
17 that California deems fit to receive, own and possess a firearm as a matter of law,  
18 from receiving or and possessing a firearm.

19 42. By reason of the Defendants' interpretation and implementation of 18  
20 U.S.C. §§921(a)(33)(A)(i) & 922(g)(9), and the resultant denial to Plaintiff of the  
21 receipt, ownership or possession of firearms for self-defense, Defendants have  
22 unlawfully interfered with Plaintiff's exercise of his core self-defense right under  
23 the Second Amendment to the United States Constitution, thereby denying Plaintiff  
24 the equal protection of the Second Amendment as is afforded to other citizens.

25 43. At all times, Defendants Holder, Harris and DOES 1-100 were acting  
26 pursuant to 18 U.S.C. §§921(a)(33)(A)(i) & 922(g)(9). On information and belief,  
27 Defendants, and each of them, will continue to implement and enforce Sections  
28 921(a)(33)(A)(i) & 922(g)(9) in a manner that infringes upon Plaintiff's exercise of

1 his Second Amendment rights, absent the grant of the relief requested.

2 **PRAYER FOR RELIEF**

3 WHEREFORE, Plaintiff respectfully asks that this Court enter a judgment in  
4 his favor and against the Defendants as follows:

5 1. For a declaration that Defendants' implementation and enforcement of  
6 Sections 921(a)(33)(A)(i) & 922(g)(9), as applied to Plaintiff, is unconstitutional;

7 2. That a writ of mandate be issued from this Court pursuant to 28 U.S.C.  
8 §1651 directing Defendants to cease implementation and enforcement of Sections  
9 921(a)(33)(A)(i) & 922(g)(9) in such manner as prevents Plaintiff, and all other  
10 California citizens who have fulfilled the requirements of California Penal Code  
11 §29805 and who do not otherwise labor under any other disqualifying  
12 circumstance, from receiving, owning or possessing firearms;

13 3. For a judicial declaration that since October 20, 2007, Eugene Evan  
14 Baker has been entitled to exercise his rights under the Second Amendment to the  
15 Constitution of the United States and that he is entitled under federal law to receive  
16 and possess firearms and ammunition without risk and threat of prosecution by  
17 Defendants and their representatives or agents;

18 3. For an order enjoining Defendants, and their representatives and  
19 agents, from arresting and prosecuting Eugene Evan Baker for any future alleged  
20 violation of 18 U.S.C. §922(g)(9) for so long as he remains free of any  
21 disqualifying conviction or circumstance;

22 4. For an order that all computers and other records relied upon by  
23 Defendants and their representatives or agents, concerning those persons allegedly  
24 prohibited from receiving, owning or possessing a firearm pursuant to 18 U.S.C.  
25 §922(g)(9), be purged of all information and content concerning the arrest,  
26 conviction and sentencing of Eugene Evan Baker, or, alternatively, for an order that  
27 all computers and other records relied upon by Defendants and their representatives  
28 or agents, concerning those persons allegedly prohibited from receiving, owning or



1 possessing a firearm pursuant to 18 U.S.C. §922(g)(9), include a notation that  
2 notwithstanding Plaintiff's arrest, conviction and sentencing in 1997 for an MCDV,  
3 Plaintiff is not disqualified thereby from receiving, owning or possessing a firearm;

4 5. For attorney's fees and costs of suit pursuant to 28 U.S.C. §2412; and

5 6. Any further relief as the Court deems just and proper.

6 Dated: October 11, 2012

**MICHEL & ASSOCIATES, P.C.**



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

12 **DEMAND FOR JURY TRIAL**

13 Plaintiff hereby demands a trial by a jury of his peers.

14 Dated: October 11, 2012

**MICHEL & ASSOCIATES, P.C.**



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FILED  
 2012 OCT 11 PM 3:10  
 CLERK U.S. DISTRICT COURT  
 CENTRAL DIST. OF CALIF.  
 LOS ANGELES  
 BY: \_\_\_\_\_

# 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)

### FIRST AMENDED COMPLAINT FOR:

(1) VIOLATION OF FEDERAL  
 DUE PROCESS CLAUSE AS  
 TO APPLICATION OF  
 FEDERAL STATUTE TO  
 DENY CORE RIGHT;

AND

(2) VIOLATION OF FEDERAL  
 EQUAL PROTECTION  
 CLAUSE;

DEMAND FOR JURY TRIAL

### PRELIMINARY STATEMENT

1. This is an action for declaratory and injunctive relief in order that Plaintiff EUGENE EVAN BAKER (hereinafter "Plaintiff" or "Baker") may lawfully receive, own and possess a firearm in the exercise of his rights under the Second Amendment to the Constitution of the United States although he was convicted in the State of California of a misdemeanor crime of domestic violence ("MCDV").

2. Plaintiff was convicted of an MCDV in 1997. In 2002, Plaintiff was

1 allowed to withdraw his prior guilty plea and have the conviction set aside under  
2 California Penal Code section 1204.3. In 2007, the effect of the conclusion in  
3 October of that year of a mandatory ten-year ban on Plaintiff's ownership and  
4 possession of firearms was that Plaintiff was considered by the state from that point  
5 forward to be able to receive, own and possess firearms. Plaintiff later received an  
6 order from a Ventura County Superior Court adjudging all of Plaintiff's firearms  
7 rights to have been restored in 2007 for purposes of state law.

8 3. Notwithstanding the effect of the state law restoring Plaintiff's right to  
9 receive, own and possess firearms, as well as an order of the state's judiciary  
10 affirming the restoration of Plaintiff's right to receive, own and possess firearms,  
11 the application of federal law, i.e., 18 U.S.C. §§921(a)(33)(A)(i) & 922(g)(9),  
12 prevents Plaintiff from receiving or possessing firearms.

13 4. In furtherance of enforcing 18 U.S.C. §§921(a)(33)(A)(i) & 922(g)(9),  
14 the State of California has expressly assumed the role of a "Point of Contact" of the  
15 U.S. Department of Justice for purposes of enforcing these sections against  
16 California firearms' purchasers. In this role, the state defendants have denied  
17 Plaintiff the opportunity to purchase firearms by these state defendants declaring  
18 Plaintiff a person prohibited to receive and possess firearms under Sections  
19 921(a)(33)(A)(i) & 922(g)(9), and instructing California firearms dealers to not  
20 release firearms to Plaintiff.

21 5. The effect of the application of these federal statutes by the federal and  
22 state defendants to deny Plaintiff the right to keep and bear arms for self-defense  
23 violates Plaintiff's Second Amendment right to self-defense.

#### 24 **JURISDICTION AND VENUE**

25 6. Jurisdiction of this action is founded on 28 U.S.C. §1331 in that this  
26 action arises under the Constitution and laws of the United States, and under 28  
27 U.S.C. §1343(3) in that this action seeks to redress the deprivation, under color of  
28 the laws, statute, ordinances, regulations, customs and usages of the United States,

1 the State of California, and political subdivisions thereof, of rights, privileges or  
2 immunities secured by the United States Constitution and by Acts of Congress.

3 7. Plaintiffs' claims for declaratory and injunctive relief are authorized  
4 by 28 U.S.C. §§2201 & 2202. Plaintiffs' claims for a writ of mandate directed to  
5 Defendants are authorized pursuant to 28 U.S.C. §1651.

6 8. Venue in this judicial district is proper under 28 U.S.C. §1391(b)(1)-  
7 (2), because Plaintiff Baker is a resident of this judicial district, all defendants have  
8 offices within this judicial district, and the deprivation of rights and other conduct  
9 alleged herein occurred within this judicial district.

### 10 PARTIES

11 9. Plaintiff Baker is a citizen of the United States and a resident of the  
12 Somis, California.

13 10. Defendant Holder is the Attorney General of the United States, and as  
14 the chief law enforcement officer of the government of the United States would be  
15 responsible for the prosecution of Baker pursuant to 18 U.S.C. §922(g)(9) should  
16 Baker be found to have received or possess a firearm in violation of Sections  
17 921(a)(33)(A)(i) & 922(g)(9). On information and belief, were Baker to exercise  
18 his Second Amendment rights by receiving, owning or possessing a firearm,  
19 Defendant Holder, through his agents and employees, would arrest and prosecute  
20 Plaintiff. Holder is being sued in his official capacity as U.S. Attorney General.

21 11. Defendant Kamala D. Harris is the elected Attorney General of the  
22 State of California. In her role as the Attorney General, Defendant Harris is  
23 responsible for interpreting, implementing and executing the policies and  
24 procedures of the California Department of Justice ("Cal. DOJ") including the Cal.  
25 DOJ's policies and procedures as a Point of Contact. As such, she is responsible  
26 for formulating, executing and administering the laws, customs and practices that  
27 Plaintiff challenges, and is in fact presently enforcing the challenged laws, customs,  
28 and practices against Plaintiff. Defendant Harris is sued in her official capacity as

1 California Attorney General.

2 12. Defendant The State of California Department of Justice is a political  
3 subdivision of the State of California, and is the designated Point of Contact for  
4 California Federal Firearms Licensees ("FFL") to determine whether California  
5 purchasers, including Plaintiff, are prohibited persons under 18 U.S.C.  
6 §§921(a)(33)(A)(i) & 922(g)(9). Cal. DOJ is obligated under Sections  
7 921(a)(33)(A)(i) & 922(g)(9) and analogous California law to assess the criminal  
8 backgrounds of firearms purchasers, and is the final authority as to whether  
9 California FFLs can release purchased firearms to purchasers, including Plaintiff.  
10 As such, Cal. DOJ is responsible for formulating, executing and administering the  
11 laws, customs and practices that Plaintiff challenges, and is in fact presently  
12 enforcing the challenged laws, customs, and practices against Plaintiff.

13 13. On information and belief, Defendants DOES 1-100 are employees or  
14 agents of defendants Holder, Harris, or Cal. DOJ, or of local governmental  
15 agencies, who are responsible for formulating, executing and administering the  
16 laws, customs and practices that Plaintiff challenges, and are in fact presently  
17 enforcing the challenged laws, customs, and practices against Plaintiff. On  
18 information and belief, Defendants DOES 1-100 have facilitated, participated in, or  
19 otherwise furthered the denial of the receipt of, ownership of, and possession of  
20 firearms by Plaintiff. Plaintiff is unaware of the identities of Defendants DOES 1-  
21 100 at the time of the filing of this complaint, and shall seek leave of court to  
22 substitute the true names of such defendants when their identities are ascertained.

23 **FACTS APPLICABLE TO ALL CLAIMS**

24 14. On September 29, 1997, in the Ventura County Municipal Court,  
25 Plaintiff was convicted upon his plea of *nolo contendere* of violating California  
26 Penal Code §273.5(a), Infliction of Corporal Injury on Current or Former Spouse or  
27 Cohabitant. Such conviction was a MCDV for purposes of 18 U.S.C.  
28 §§921(a)(33)(A)(i) & 922(g)(9). On October 20, 1997, Plaintiff was sentenced to a

1 three-year probationary sentence with certain terms and conditions; among which  
2 was a condition that he “not own, possess, or have access to any firearm or  
3 dangerous weapon” for a period of ten years pursuant to former California Penal  
4 Code §12021(c)(1).

5 15. Plaintiff successfully completed all of the terms of his probation, and  
6 on February 24, 2002, submitted his application for expungement and set-aside  
7 pursuant to California Penal Code §1203.4. On June 19, 2002, the Ventura County  
8 Superior Court granted the motion under Section 1203.4 and signed an Order,  
9 thereby ordering Plaintiff’s 1997 conviction be set aside, the *nolo contendere* plea  
10 be withdrawn, a plea of not guilty be entered, and the original criminal complaint  
11 be deemed dismissed. The 2002 Order did not contain any language that Plaintiff  
12 was thereafter uniquely prohibited from personally shipping, transporting,  
13 possessing, or receiving firearms once the ten-year suspension of Plaintiff’s  
14 firearms’ ownership and possession rights pursuant to former Section 12021(c)(1)  
15 ended.

16 16. The ten-year suspension of Plaintiff’s firearm ownership and  
17 possession rights remained in force until it expired on October 20, 2007. From the  
18 date of his 1997 arrest to the present, including his probationary term and the entire  
19 ten-year term of former Section 12021(c)(1), Plaintiff has never been convicted of  
20 any other criminal behavior, including any crime which would disqualify Plaintiff  
21 from receiving, owning or possessing a firearm under federal or state law.

22 17. In or about May 2009, Plaintiff attempted to effect a firearms purchase  
23 at Ojai Valley Surplus, a federal firearms licensee (“FFL”) located in Ojai,  
24 California, Ojai Valley Surplus contacted Cal. DOJ to submit Plaintiff’s purchase.  
25 On June 8, 2009, Defendant Cal. DOJ sent a letter to Ojai Valley Surplus which  
26 stated that Plaintiff “is a person not eligible to posses (sic) a firearm.” Cal. DOJ  
27 further ordered Ojai Valley Surplus to not release the firearm to Plaintiff.

28 18. On August 25 , 2010, in response to an inquiry from Plaintiff’s



1 attorney, Defendant Cal. DOJ sent Plaintiff a letter explaining why Plaintiff's  
2 attempted 2009 firearms purchase had been denied. The letter stated that Cal. DOJ  
3 has "identified a record in a state or federal database which indicates that you are  
4 prohibited by state and/or federal law from purchasing or possessing firearms." The  
5 letter further states that the disqualifying record is a conviction for "Misdemeanor  
6 domestic violence convictions (273.5PC, 243(E)(1)PC Convictions over 10 years  
7 old)-Federal Brady Act, effected November 30, 1998."

8 19. On information and belief, Cal. DOJ's denial of Plaintiff's 2009  
9 firearms purchase was due to Cal. DOJ fulfilling its role as a Point of Contact, and  
10 adjudging that Plaintiff was prohibited receiving and possessing a firearm pursuant  
11 to 18 U.S.C. §922(g)(9). On information and belief, as a Point of Contact, as part  
12 of performing the above-mentioned check, Cal. DOJ submitted Plaintiff's name and  
13 other identifying information to the U.S. Department of Justice's Federal Bureau of  
14 Investigation ("FBI") to check whether Plaintiff was prohibited from receiving or  
15 possessing a firearm based on information within the National Instant Criminal  
16 Background Check System ("NICS")<sup>1</sup>.

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

22 21. Plaintiff desires to purchase one or more firearms for his personal  
23 protection and the protection of his family and property but does not wish to run  
24 the risk of being arrested, charged, convicted and punished pursuant to 18 U.S.C.

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26 <sup>1</sup> National Instant Criminal Background Check System (NICS)  
27 Operations 2011. *See*  
28 <<http://www.fbi.gov/about-us/cjis/nics/reports/2011-operations-report/operations-report-2011>>

§922(g)(9) in the attempted exercise of his Second Amendment rights.

### **RELEVANT CALIFORNIA PENAL STATUTES**

22. Plaintiff was convicted of violating California Penal Code §273.5(a) on October 29, 1997. Section 273.5(a), in relevant part, provides:

Any person who willfully inflicts 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, is guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not more than one year, or by a fine of up to six thousand dollars (\$6,000.00) or by both that fine and imprisonment.

23. All persons convicted of violating Section 273.5(a) are subject to a statutory ten-year ban on firearm possession pursuant to Penal Code §29805 (formerly Penal Code §12021(c)(1))<sup>2</sup>:

Except as provided in Section 29855 or subdivision (a) of Section 29800, any person who has been convicted of a misdemeanor violation of Section . . . 273.5, . . . and who, within 10 years of the conviction, owns, purchases, receives, or has in possession or under custody or control, any firearm is guilty of a public offense, which shall be punishable by imprisonment in a county jail not exceeding one year or in the state prison, by a fine not exceeding one thousand dollars (\$1,000), or by both that imprisonment and fine.

24. California Penal Code §1203.4 provides the means whereby those who have successfully completed a grant of probation after having been convicted of certain penal offenses may petition the court to grant expungement and set-aside relief. As to the effect of a Section 1203.4 motion on a firearms prohibition, Section 1203.4 provides in relevant part:

(a)(2) Dismissal of an accusation or information pursuant to this section does not permit a person to own, possess, or have in his or her custody or control any firearm or prevent his or her conviction under Chapter 2

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<sup>2</sup> Because prior to January 1, 2012, the text of Section 29805 was contained in Penal Code §12021., all references in Plaintiff's sentencing order are to former Section 12021. *See* Paragraph 14, *supra*.



(commencing with Section 29800) of Division 9 of Title 4 of Part 6.

25. An order granted under Section 1203.4 does not end or shorten the ten-year ban imposed under Section 29805. But an order granted under Section 1203.4 does not increase or make permanent the Section 29805 ban. Once the ten-year period under Section 29805 has ended, and assuming no further criminal behavior by the person during that period, by law California considers the MCDV convict to have been fully restored his or her rights under California law to receive, own or possess a firearm at the conclusion of the ten-year period.

**RELEVANT FEDERAL & STATE FIREARMS LAWS**

26. The Second Amendment to the U.S. Constitution of the United States reads: "A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed." The Fourteenth Amendment to the U.S. Constitution incorporates the Second Amendment to the citizens of the states. The Fourteenth Amendment also guarantees states' citizens equal protection of the laws and that core rights of the citizens under the Constitution may not be infringed upon without, at a minimum, due process.

27. 18 U.S.C. §922(g)(9) reads: "It shall be unlawful for any person.. .who has been convicted in any court of a misdemeanor crime of domestic violence (MCDV), 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."

28. 18 U.S.C. §921(a)(33)(A)(i) defines an "MCDV." The California crime for which Plaintiff was convicted in 1997 is a disqualifying MCDV for purposes of that statute and Section 922(g)(9).

29. The Gun Control Act and the Brady Handgun Violence Prevention Act, of which 18 U.S.C. §§921(a)(33)(A)(i) & 922(g)(9) are a part, are implemented and interpreted by the U.S. Department of Justice through regulations

1 published at 28 C.F.R., Part 25. The U.S. Department of Justice has adopted  
2 regulations published at 28 C.F.R. §§25.1 & 25.6 which allow state law  
3 enforcement agencies to act as a Point of Contact for querying the federal NICS  
4 database to determine whether a firearm purchaser is prohibited from receiving or  
5 possessing a firearm, in lieu of the FBI conducting such searches. California's  
6 legislature has agreed to have Cal. DOJ act as the Point of Contact for all purchases  
7 and transfer of firearms by California residents, by its adoption of California Penal  
8 Code §28220(b).

9  
10 **FIRST CLAIM FOR**  
11 **VIOLATION OF FEDERAL DUE PROCESS**  
12 **CLAUSE AS TO APPLICATION OF**  
13 **FEDERAL STATUTE TO DENY CORE RIGHT**  
14 **(Against All Defendants)**

15 30. Plaintiff fully reincorporates Paragraphs 1-29, *supra*, as though fully  
16 alleged hereinafter.

17 31. Without due process of law, Defendants, in applying and enforcing 18  
18 U.S.C. §§921(a)(33)(A)(i) & 922(g)(9) as to Plaintiff to proscribe him from  
19 receiving or possessing firearms, have denied Plaintiff the exercise of his right to  
20 keep and bear arms under the Second Amendment to the Constitution, a core right.

21 32. On information and belief, Defendants, and each of them, have  
22 implemented and enforced 18 U.S.C. §§921(a)(33)(A)(i) & 922(g)(9) in the manner  
23 described herein for the governmental purpose of general crimefighting

24 33. The application and enforcement of 18 U.S.C. §§921(a)(33)(A)(i) &  
25 922(g)(9) to proscribe Plaintiff from receiving or possessing a firearm does not  
26 comport with the historical scope of the Second Amendment at the time it was  
27 enacted. Alternatively, on information and belief the application and enforcement  
28 of 18 U.S.C. §§921(a)(33)(A)(i) & 922(g)(9) to proscribe Plaintiff from receiving  
or possessing a firearm does not further a compelling governmental interest,

1 insomuch as Defendants do not have a compelling interest in preventing Plaintiff, a  
2 person adjudged by California to be fit to own and possess a firearm, from  
3 receiving, owning or possessing a firearm. Alternatively, Defendants' proffered  
4 basis for implementing and enforcing Sections 921(a)(33)(A)(i) & 922(g)(9) is  
5 neither narrowly tailored nor the least restrictive means for achieving the  
6 government's general crimefighting interest.

7 34. Alternatively, on information and belief the application and  
8 enforcement of 18 U.S.C. §§921(a)(33)(A)(i) & 922(g)(9) to proscribe Plaintiff  
9 from receiving or possessing a firearm is not substantially related to achieving an  
10 important governmental interest, insomuch as Defendants do not have a important  
11 interest in preventing Plaintiff, a person adjudged by California to no longer be a  
12 danger such that California deems such person fit to receive, own and possess a  
13 firearm as a matter of law, from receiving, owning or possessing a firearm.

14 35. At all times, Defendants Holder, Harris and DOES 1-100 were acting  
15 pursuant to 18 U.S.C. §§921(a)(33)(A)(i) & 922(g)(9). On information and belief,  
16 Defendants, and each of them, will continue to implement and enforce 18 U.S.C.  
17 §§921(a)(33)(A)(i) & 922(g)(9) in a manner that infringes upon Plaintiff's exercise  
18 of his Second Amendment rights, absent the grant of the relief requested.

19 **SECOND CLAIM FOR**  
20 **VIOLATION OF FEDERAL EQUAL**  
21 **PROTECTION CLAUSE**  
22 **(Against All Defendants)**

23 36. Plaintiff fully reincorporates Paragraphs 1-29, *supra*, as though fully  
24 alleged hereinafter.

25 37. Plaintiff is of a class of firearms purchasers who have previously been  
26 convicted of an MCDV but have fulfilled the terms of their probation or have  
27 otherwise not been convicted of a crime for a period of ten years following their  
28 MCDV conviction.

1           38. By Defendants, and each of them, implementing and enforcing 18  
2 U.S.C. §§921(a)(33)(A)(i) & 922(g)(9) in a manner to deny Plaintiff the receipt,  
3 ownership or possession of firearms despite Plaintiff having been adjudged by  
4 California to be fit to receive, own and possess a firearm, Defendants have  
5 prevented Plaintiff, and all other California citizens of Plaintiff's class, from  
6 exercising their core right to keep and bear arms for self-defense under the Second  
7 Amendment. On information and belief, all California citizens of the same class as  
8 Plaintiff, i.e., who have fulfilled the requirements of Section 29805 for the requisite  
9 ten-year period, are, like Plaintiff, prevented from receiving, owning or possessing  
10 firearms, and, like Plaintiff, are subject to arrest should they receive, own or  
11 possess a firearm. As such, on information and belief, even if Plaintiff should be  
12 granted such relief as requested herein as to himself, unless Plaintiff is granted the  
13 relief requested as to the further implementation and enforcement of Sections  
14 921(a)(33)(A)(i) & 922(g)(9) against all California citizens by Defendants, the  
15 constitutional violations complained of herein are capable of repetition while  
16 evading review.

17           39. On information and belief, Defendants, and each of them, have  
18 implemented and enforced 18 U.S.C. §§921(a)(33)(A)(i) & 922(g)(9) in the manner  
19 described herein for the governmental purpose of general crimefighting. On  
20 information and belief, in no instance does Defendants' proffered basis for  
21 implementing and enforcing Sections 921(a)(33)(A)(i) & 922(g)(9) in such manner  
22 comport with the historical scope of the Second Amendment, in that as  
23 implemented Sections 921(a)(33)(A)(i) & 922(g)(9) unlawfully restrict the right to  
24 bear arms for self-defense as that right was understood by those who drafted and  
25 enacted both the Second and Fourteenth Amendments.

26           40. Alternatively, on information and belief, in no instance does  
27 Defendants' proffered basis implementing and enforcing 18 U.S.C.  
28 §§921(a)(33)(A)(i) & 922(g)(9) comply with the Fourteenth Amendment to the

1 United States Constitution, inasmuch as Defendants' proffered basis for  
2 implementing and enforcing Sections 921(a)(33)(A)(i) & 922(g)(9) in such manner  
3 does not further a compelling governmental interest. Alternatively, Defendants'  
4 proffered basis for implementing and enforcing Sections 921(a)(33)(A)(i) &  
5 922(g)(9) is neither narrowly tailored nor the least restrictive means for achieving  
6 the government's general crimefighting interest.

7 41. Alternatively, on information and belief, in no instance does  
8 Defendants' proffered basis implementing and enforcing 18 U.S.C.  
9 §§921(a)(33)(A)(i) & 922(g)(9) comply with the Fourteenth Amendment to the  
10 United States Constitution, inasmuch as Defendants' proffered basis for  
11 implementing and enforcing Sections 921(a)(33)(A)(i) & 922(g)(9) in such manner  
12 does not further an important governmental interest. Alternatively, Defendants'  
13 proffered basis for implementing and enforcing Sections 921(a)(33)(A)(i) &  
14 922(g)(9) is not substantially related to achieving the government's general  
15 crimefighting interest, inasmuch as Defendants do not have a important interest in  
16 preventing Plaintiff, a person adjudged by California to no longer be a danger such  
17 that California deems fit to receive, own and possess a firearm as a matter of law,  
18 from receiving or and possessing a firearm.

19 42. By reason of the Defendants' interpretation and implementation of 18  
20 U.S.C. §§921(a)(33)(A)(i) & 922(g)(9), and the resultant denial to Plaintiff of the  
21 receipt, ownership or possession of firearms for self-defense, Defendants have  
22 unlawfully interfered with Plaintiff's exercise of his core self-defense right under  
23 the Second Amendment to the United States Constitution, thereby denying Plaintiff  
24 the equal protection of the Second Amendment as is afforded to other citizens.

25 43. At all times, Defendants Holder, Harris and DOES 1-100 were acting  
26 pursuant to 18 U.S.C. §§921(a)(33)(A)(i) & 922(g)(9). On information and belief,  
27 Defendants, and each of them, will continue to implement and enforce Sections  
28 921(a)(33)(A)(i) & 922(g)(9) in a manner that infringes upon Plaintiff's exercise of

1 his Second Amendment rights, absent the grant of the relief requested.

2 **PRAYER FOR RELIEF**

3 WHEREFORE, Plaintiff respectfully asks that this Court enter a judgment in  
4 his favor and against the Defendants as follows:

5 1. For a declaration that Defendants' implementation and enforcement of  
6 Sections 921(a)(33)(A)(i) & 922(g)(9), as applied to Plaintiff, is unconstitutional;

7 2. That a writ of mandate be issued from this Court pursuant to 28 U.S.C.  
8 §1651 directing Defendants to cease implementation and enforcement of Sections  
9 921(a)(33)(A)(i) & 922(g)(9) in such manner as prevents Plaintiff, and all other  
10 California citizens who have fulfilled the requirements of California Penal Code  
11 §29805 and who do not otherwise labor under any other disqualifying  
12 circumstance, from receiving, owning or possessing firearms;

13 3. For a judicial declaration that since October 20, 2007, Eugene Evan  
14 Baker has been entitled to exercise his rights under the Second Amendment to the  
15 Constitution of the United States and that he is entitled under federal law to receive  
16 and possess firearms and ammunition without risk and threat of prosecution by  
17 Defendants and their representatives or agents;

18 3. For an order enjoining Defendants, and their representatives and  
19 agents, from arresting and prosecuting Eugene Evan Baker for any future alleged  
20 violation of 18 U.S.C. §922(g)(9) for so long as he remains free of any  
21 disqualifying conviction or circumstance;

22 4. For an order that all computers and other records relied upon by  
23 Defendants and their representatives or agents, concerning those persons allegedly  
24 prohibited from receiving, owning or possessing a firearm pursuant to 18 U.S.C.  
25 §922(g)(9), be purged of all information and content concerning the arrest,  
26 conviction and sentencing of Eugene Evan Baker, or, alternatively, for an order that  
27 all computers and other records relied upon by Defendants and their representatives  
28 or agents, concerning those persons allegedly prohibited from receiving, owning or



1 possessing a firearm pursuant to 18 U.S.C. §922(g)(9), include a notation that  
2 notwithstanding Plaintiff's arrest, conviction and sentencing in 1997 for an MCDV,  
3 Plaintiff is not disqualified thereby from receiving, owning or possessing a firearm;

4 5. For attorney's fees and costs of suit pursuant to 28 U.S.C. §2412; and

5 6. Any further relief as the Court deems just and proper.

6 Dated: October 11, 2012

**MICHEL & ASSOCIATES, P.C.**



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Attorneys for Plaintiff  
Eugene Evan Baker

11  
12 **DEMAND FOR JURY TRIAL**

13 Plaintiff hereby demands a trial by a jury of his peers.

14 Dated: October 11, 2012

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**Signal**  
ATTORNEY SERVICE  
INCORPORATED

DATE 10/11/12 SECRETARY Chinshina ATTORNEY CSM ATTORNEY FILE # 1067391

DO TODAY RETURN TODAY

Mark X for special assignment(s). RUSH CHARGES APPLY

Long Beach 562-595-1337  
Torrance 310-316-1256  
Fax 562-595-6294

PLAINTIFF: Baker  
VS.  
DEFENDANT: Holder

COURT: USDC  
JUDICIAL DIST: Central  
CITY: LA

CASE #: 10-3996

APPROVED DIRECT BILLING:  
CARRIER NAME:  
ADDRESS:  
CITY, STATE, & ZIP:

ADJUSTER:  
INSURED:  
CLAIM NUMBER:  
DATE OF LOSS:

LIST ALL DOCUMENTS: HEARING DATE \_\_\_\_\_ FEES PAID/ DATE \_\_\_\_\_ FEES ATTACHED \_\_\_\_\_

- ① Amended Complaint  
② Amended Summons  
③ Certificate of Interested parties

INSTRUCTIONS: FILE BY \_\_\_\_\_ SERVE BY \_\_\_\_\_

DEPT. \_\_\_\_\_ CLERK \_\_\_\_\_

Please file. Call if there  
are any issues.  
Today is deadline to  
file.

IMPORTANT	<input checked="" type="checkbox"/>
FILE	<input checked="" type="checkbox"/>
SERVE	<input type="checkbox"/>
DELIVER	<input type="checkbox"/>
COPY	<input type="checkbox"/>
OTHER	<input type="checkbox"/>

☐ RESIDENCE☐ BUSINESS

MALE \_\_\_\_\_ FEMALE \_\_\_\_\_ RACE \_\_\_\_\_ AGE \_\_\_\_\_ HT \_\_\_\_\_ WT \_\_\_\_\_ HAIR \_\_\_\_\_

DATE <u>10/11/12</u>	ORIGINAL SUBMIT RUNNER <u>405</u>	DATE _____	2nd SUBMIT RUNNER _____
<u>10/11</u>	<u>218</u>		
OKAY <input type="checkbox"/>	BACK TO COURT <input type="checkbox"/>	OKAY <input type="checkbox"/>	BACK TO COURT <input type="checkbox"/>
NO CONFORM	SHERIFF	COURTESY	DROP C/W
			DROP DP
			RCV C/W
			RCV DP
			FILE C/W
			FILE DP
			ATTY CK
			OUR CK
			CASH

## OFFICE USE

COURT	<u>410</u>
PROCESS	
DELIVERY	
RETURN	
ADV FEE	
ADV CHG	
TIME	
G/S	

TOTAL 410  
SPECIAL ASSIGNMENT #

534485



## **EXHIBIT B**

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

**CIVIL MINUTES - GENERAL**

Case No.	2:10-cv-3996-SVW-AJW	Date	July 31, 2013
Title	Eugene Evan Baker v. Eric H. Holder, Jr., et al.		

JS-6

Present: The Honorable	STEPHEN V. WILSON, U.S. DISTRICT JUDGE		
Paul M. Cruz	N/A		
Deputy Clerk	Court Reporter / Recorder		Tape No.
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:		
N/A	N/A		
<b>Proceedings:</b>	IN CHAMBERS ORDER Re MOTION TO DISMISS [36]		

**I. INTRODUCTION AND FACTUAL BACKGROUND**

On September 29, 1997, Plaintiff pled *nolo contendere* to, and was convicted of, a single count of violating California Penal Code Section 273.5(a), Willful Infliction of Corporal Injury on Current or Former Spouse or Cohabitant.<sup>1</sup> FAC ¶ 14. Plaintiff was sentenced to a three-year probationary sentence with certain terms and conditions, including a condition that barred him from possessing, owning, or accessing a firearm or dangerous weapon for a period of ten years. *Id.*

In addition to the state-law bar on Plaintiff's ability to purchase a gun, Plaintiff's Section 273.5(a) conviction barred him from possessing or receiving a gun under federal law. Specifically, 18 U.S.C. § 922(g)(9) makes it unlawful

<sup>1</sup> Section 273.5(a) makes it a felony to "willfully inflict[] upon a person who is his or her spouse, former spouse, cohabitant, former cohabitation, or the mother or father of his or her child, corporal injury resulting in traumatic condition," and is punishable by "imprisonmen in the state prions for two, three of four years, or in a county jail for not more than one year, or by a fine of up to six thousand dollars (\$6,000) or by both that fine and imprisonment." Cal. Penal Code § 273.5(a).

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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

**CIVIL MINUTES - GENERAL**

Case No.	2:10-cv-3996-SVW-AJW	Date	July 31, 2013
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for any person . . . who has been convicted in any court 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.

18 U.S.C. § 922(g)(9). Under the statute, a person who has been convicted of California Penal Code Section 273.5(a) is been convicted of a “misdemeanor crime of domestic violence.” See 18 U.S.C. § 921 (a)(33)(A) (“[T]he term ‘misdemeanor crime of domestic violence’ means an offense that is a misdemeanor under Federal, State, or Tribal law; and has an element, the use or attempted use of physical force . . . committed against 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 cohabitating with or has cohabitated with the victim as a spouse, parent or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.”); see also Enos v. Holder, 855 F. Supp. 2d 1088, 1091 (E.D. Cal. 2012) (holding that a violation of Section 273.5(a) falls under the definition of misdemeanor crime of domestic violence).

Plaintiff completed his probation in 2002; at that time, he submitted an application to withdraw his plea and have the conviction set aside pursuant to California Penal Code § 1203.4.<sup>2</sup> On June 19, 2002, the Ventura County Superior Court granted his motion; however, the ten-year bar on owning a firearm remained in effect until October of 2007. FAC ¶¶ 15-16. Plaintiff has no criminal history other than his Section 273.5(a) conviction. FAC ¶ 16.

In May of 2009, Plaintiff attempted to purchase a firearm at Ojai Valley Surplus. FAC ¶17. Ojai Valley Surplus contacted the State of California’s Department of Justice (Cal. DOJ) regarding Plaintiff’s request; in response, Cal. DOJ sent a letter to Ojai Valley Surplus stating that Plaintiff is not a person eligible to possess a firearm,” and ordered Ojai Valley Surplus that it was not to “release” the firearm to Plaintiff. Id.

Plaintiff then contacted Cal. DOJ directly, asking for an explanation as to why it had prevented Ojai Valley Surplus from selling him a firearm. FAC ¶18. In response, Cal. DOJ sent Plaintiff a letter explaining that it had “identified a record in a state or federal database which indicates that you are

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<sup>2</sup> Section 1203.4 permits a court to allow a defendant to withdraw a plea of *nolo contendere* after he or she has fulfilled the conditions of probation for the entire period of probation; upon doing so, the defendant is “released from all penalties and disabilities resulting from the offense of which he or she has been convicted,” with certain listed exceptions. Cal. Penal Code § 1203.4(a).

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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

**CIVIL MINUTES - GENERAL**

Case No.	2:10-cv-3996-SVW-AJW	Date	July 31, 2013
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prohibited by state and/or federal law from purchasing or possessing firearms,” namely, Section 922(g)(9). Id.

In his FAC, Plaintiff asserts two causes of action against both the Cal. DOJ and the federal Department of Justice: first, that Section 922(g)(9), as-applied to him,<sup>3</sup> violates his Second Amendment rights under the Supreme Court’s decision in District of Columbia v. Heller, 554, U.S. 570 (2008). Second, Plaintiff alleges that Defendants denial of his request to own a gun violates the Equal Protection Clause of the Fifth Amendment.<sup>4</sup>

## II. LEGAL STANDARD<sup>5</sup>

A motion to dismiss under Rule 12(b)(6) challenges the legal sufficiency of the claims stated in the complaint. See Fed. R. Civ. Proc. 12(b)(6). To survive a motion to dismiss, the plaintiff’s complaint “must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its

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<sup>3</sup> In his opposition to Defendants’ motion to dismiss, Plaintiff clarified that he was *only* alleging an as-applied, and not facial, challenge to Section 922(g)(9).

<sup>4</sup> In his original complaint, Plaintiff asserted that he was entitled to possess a gun pursuant to 18 U.S.C. § 921(a)(33)(B)(ii), which provides that a person is *not* considered to have been convicted of an offense of domestic violence for purposes of Section 922(g)(9) if the operative conviction has been “expunged or set aside.” Plaintiff argued that the Ventura County Superior Court’s ruling that his conviction was to be set aside pursuant to California Penal Code § 1203.4 meant that his conviction was “expunged” within the meaning of the federal statute; however, as this Court ruled, and the Ninth Circuit affirmed, this argument is foreclosed by the Ninth Circuit’s decision in Jennings v. Mukasey, 511 F.3d 894, 899 (9th Cir. 2007) (“[A]lthough Jennings obtained relief under section 1203.4 by the 1999 State court order, that relief did not expunge his conviction for purposes of 18 U.S.C. § 922(g)(9).”). The Ninth Circuit specifically remanded this case to this Court to address Plaintiff’s Second Amendment argument; upon remand, Plaintiff filed his FAC in which he alleges both Second Amendment and Equal Protection claims.

<sup>5</sup> At this Court’s October 15, 2012 status conference, this Court ordered the parties to file simultaneous opening briefs and simultaneous responding briefs. The Court construes Defendants’ opening brief as a motion to dismiss. See Balistreri v. Pacifica Police Dep’t, 901 F.2d 696, 699 (9th Cir. 1988) (“Dismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory.”).

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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

**CIVIL MINUTES - GENERAL**

Case No.	2:10-cv-3996-SVW-AJW	Date	July 31, 2013
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face.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” Id. A complaint that offers mere “labels and conclusions” or “a formulaic recitation of the elements of a cause of action will not do.” Id.; see also Moss v. U.S. Secret Service, 572 F.3d 962, 969 (9th Cir. 2009) (citing Iqbal, 129 S. Ct. at 1951).

In reviewing a Rule 12(b)(6) motion, the Court must accept all allegations of material fact as true and construe the allegations in the light most favorable to the nonmoving party. Daniel v. County of Santa Barbara, 288 F.3d 375, 380 (9th Cir. 2002). Accordingly, while a court is not required to accept a pleader's legal conclusions as true, the court must “draw all reasonable inferences in favor of the plaintiff, accepting the complaint's [factual] allegations as true.” Knievel v. ESPN, 393 F.3d 1068, 1080 (9th Cir. 2005).

The court may grant a plaintiff leave to amend a deficient claim “when justice so requires.” Fed. R. Civ. P. 15(a)(2). “Five factors are frequently used to assess the propriety of a motion for leave to amend: (1) bad faith, (2) undue delay, (3) prejudice to the opposing party, (4) futility of amendment; and (5) whether plaintiff has previously amended his Complaint.” Allen v. City of Beverly Hills, 911 F.2d 367, 373 (9th Cir. 1990) (citing Ascon Properties, Inc. v. Mobil Oil Co., 866 F.2d 1149, 1160 (9th Cir. 1989)).

Where a motion to dismiss is granted, “leave to amend should be granted ‘unless the court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency.’” DeSoto v. Yellow Freight Sys., Inc., 957 F.2d 655, 658 (9th Cir. 1992) (quoting Schreiber Distrib. Co. v. Serv-Well Furniture Co., 806 F.2d 1393, 1401 (9th Cir. 1986)). In other words, where leave to amend would be futile, the Court may deny leave to amend. See Desoto, 957 F.2d at 658; Schreiber, 806 F.2d at 1401.

### III. THE SECOND AMENDMENT

#### A. Legal Standard

The Second Amendment to the United States Constitution provides: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” U.S. CONST. amend. II. In Heller, “the Supreme Court struck down the District of

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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

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Columbia's ban on handgun possession[.]” United States v. Henry, 688 F.3d 637, 639-40 (9th Cir. 2012). After conducting a thorough analysis of the Second Amendment’s history, “the Court held ‘that the Second Amendment conferred an individual right to keep and bear arms.’” United States v. Vongxay, 594 F.3d 1111, 1115 (9th Cir. 2010) (quoting Heller, 128 S.Ct. at 2799). Without articulating a level of scrutiny,<sup>6</sup> the Supreme Court found the two statutes at issue “fail[ed] to pass constitutional muster.” Heller, 554 U.S. at 629-630.

However, the Supreme Court noted that the Second Amendment

“leaves the District of Columbia a variety of tools for combating [the problem of handgun violence in this country], *including some measures regulating handguns*. But the enshrinement of constitutional rights necessarily takes certain policy choices off the table. These include the *absolute prohibition of handguns held and used for self-defense in the home.*”

Vongxay, 594 F.3d at 1115 (quoting Heller, 554 U.S. at 636). The Court expanded upon the “policy choices” that the Second Amendment left on the table, noting that

Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose . . . . Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, *nothing in our opinion should be taken to cast doubt on the longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.*

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<sup>6</sup> The Court noted only “[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights,” the statutes at issue failed to pass constitutional muster. Heller 554 U.S. at 628-629. In a footnote, the Court suggested that rational basis would *not* be the appropriate standard. Id. at 628 n. 27 (“Obviously, the [rational basis] test could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right, be it the freedom of speech, the guarantee against double jeopardy, the right to counsel, or the right to keep and bear arms.”).

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UNITED STATES DISTRICT COURT  
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Vongxay, 594 F.3d at 1115 (quoting Heller, 554 U.S. at 626-27). This list of “presumptively lawful regulatory measures” served only as examples; it “[did] not purport to be exhaustive.” Heller, 554 U.S. at 627 n. 26.

Since Heller, courts have addressed Second Amendment challenges to federal laws in two ways. Both begin by assessing whether or not the law at issue is “presumptively lawful.” For some courts, this question is the beginning and end of the constitutional inquiry: if the statute is “presumptively lawful,” it cannot be struck down under the Second Amendment. *See, e.g. Vongxay*, 594 F.3d at 1115, 1116 (finding a federal statute making it unlawful for any person convicted of a felony to possess, transport, or receive “any firearm or ammunition” presumptively constitutional under Heller, and upholding the constitutionality of the statute on that basis alone); United States v. White, 593 F.3d 1199, 1206 (11th Cir. 2010) (concluding that Section 922(g)(9) was “presumptively lawful” under Heller, and upholding a conviction for violating that provision without engaging in further scrutiny). Other courts, however, have applied a second step. After finding that the law at issue fell within the “presumptively constitutional” category, these courts have applied an additional layer of scrutiny. As the Seventh Circuit explained, applying such scrutiny is required by

Heller itself. Heller referred to felon disarmament bans only as ‘presumptively lawful,’ which, by implication, means that there must exist the possibility that the ban could be unconstitutional in the face of an as-applied challenge. Therefore, putting the government through its paces in proving the constitutionality of [the statute at issue] is only proper.

United States v. Williams, 616 F.3d 685, 692 (7th Cir. 2010). Those courts that have found that Heller requires a second step have applied “what some courts have called intermediate scrutiny.” *Id.* “To pass constitutional muster under intermediate scrutiny, the government has the burden of demonstrating that its objective is an important one and that its objective is advanced by means substantially related to that objective.” *Id.*

### B. Analysis

Turning to the statute at issue here—Section 922(g)(9)—this Court need not decide which of these two methodologies is correct: using *either* methodology, Plaintiff’s claim must be dismissed. *Every* single court that has ruled upon the constitutionality of Section 922(g)(9) has upheld it against Second Amendment challenges. The Tenth and Eleventh Circuits have found that the statute “presumptively constitutional,” and rejected arguments that the statute should be found constitutional without further analysis. *See White*, 593 F.3d at 1206; In re U.S., 578 F.3d 1195, 1200 (10th Cir. 2009). Similarly, the only California district court to rule on Section 922(9)’s constitutionality upheld the

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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

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statute as presumptively constitutional without engaging in further analysis. See Enos v. Holder, 855 F. Supp. 2d 1088, 1099 (E.D. Cal. 2012).

The other three Court of Appeals which have ruled upon the constitutionality of Section 922(g)(9)—the First, Fourth, and Seventh circuits—have all upheld the statute, concluding that the law is “presumptively constitutional” and survives intermediate scrutiny. See United States v. Staten, 666 F.3d 154, 168 (4th Cir. 2011) (“§ 922(g)(9) satisfies the intermediate scrutiny standard.”); United States v. Booker, 644 F.3d 12, 26 (1st Cir. 2011) (“[I]t is plain that § 922(g)(9) substantially promotes an important government interest in preventing domestic gun violence.”); United States v. Skoien, 614 F.3d 638, 642 (7th Cir. 2010) (“[N]o one doubts that the goal of § 922(g)(9), preventing armed mayhem, is an important governmental objective. Both logic and data establish a substantial relation between § 922(g)(9) and this objective.”).

Plaintiff attempts to evade these precedents by arguing that he is different from the typical Section 922(g)(9) offender. According to Plaintiff, he has committed no crimes other than the 1997 charge of domestic violence (either before or since), and has maintained a “peaceful and amicable relationship” with the victim of that incident. In short, Plaintiff avers that the Second Amendment requires that Section 922(g)(9) be ruled unconstitutional as applied to him because of his law-abiding record.

However, every court to consider a similar argument has rejected it. See In re U.S., 578 F.3d at 1200 (“We have already rejected the notion that Heller mandates an individualized inquiry concerning felons pursuant to § 922(g)(1). Furthermore, we have rejected, albeit in a slightly different context, the idea that § 922(g)(9) allows for individual assessments of the risk of violence.”) (internal citations and quotation marks omitted); Booker, 644 F.3d at 25 (holding that Section 992(g)(9) survived a Second Amendment challenge where the challenger’s act of domestic violence occurred ten years before his possession of a gun, and the record contained no other incidents of illegal behavior); see also Enos, 855 F. Supp. 2d at 1099 (holding that Section 922(9)(g) withstood constitutional scrutiny as-applied to seven plaintiffs, each of whom had been convicted of a misdemeanor crime more than ten years before their attempts to purchase a gun); United States v. Smith, 742 F. Supp. 2d 855, 869 (S.D.W. Va. 2010) (upholding Section 922(g)(9) against an as-applied challenge where the defendant’s domestic violence conviction occurred seven years before he was found in possession of a gun, and upholding the statute as constitutional “[e]ven assuming Defendant is permanently banned from future firearm possession”).<sup>7</sup> As

<sup>7</sup> In Skoien, the Seventh Circuit left open the possibility that a domestic violence misdemeanant “who has been law abiding for an extended period of time must be allowed to carry guns again[.]”

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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

**CIVIL MINUTES - GENERAL**

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the Tenth Circuit concluded, “a defendant whose background includes domestic violence which advances to a criminal conviction has a demonstrated propensity for the use of physical violence against others.” In re United States, 578 F.3d at 1200. Accordingly, Plaintiff’s Second Amendment claim must be dismissed.

#### IV. EQUAL PROTECTION

Plaintiff further argues that Section 922(g)(9) violates his equal protection right under the Due Process clause of the Fifth Amendment by classifying him into a “class of firearms purchasers who have previously been convicted of a [misdemeanor crime of domestic violence] but have fulfilled the terms of their probation or have otherwise not been convicted of a crime for a period of ten years following their [conviction].” FAC ¶ 37.

The Ninth Circuit recently rejected a similar argument in Vongxay, 594 F.3d at 1118. There, a convicted felon argued that Section 922(g)(1)—which makes it unlawful for any person who has been “convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year”—should be subject to strict scrutiny because the “right to bear arms is a fundamental right.” Id. While acknowledging that an equal protection claim can arise where a statute “unequal[ly] burden[ed] a fundamental right,” the Ninth Circuit concluded that the Supreme Court “purposefully differentiated the right to bear arms generally from the more limited right held by felons.” Id. As such, “whatever standard of review the Court implicitly applied to Heller’s right to keep arms in his home is inapplicable to Vongxay, a felon who was explicitly excluded from Heller’s holding.” Id. Accordingly, because the felon in Vongxay was not protected by Heller’s holding, the Ninth Circuit was “bound by pre-Heller case law involving equal protection challenges to § 922(g)[1],” which had upheld the statute against equal protection challenges. Id. at 1118-1119 (citing Lewis v. United States, 445 U.S. 55 (1980)).

Skoien, 614 F.3d at 645. However, Plaintiff has not identified—nor has this Court found—any case that has adopted Plaintiff’s argument that the Second Amendment demands that an individual who has been convicted of a crime of domestic violence be permitted to own a gun if he or she remains law abiding for a certain period of time thereafter. Rather, courts have routinely rejected this argument. See Booker, 644 F.3d at 25; Enos, 855 F. Supp. 2d at 1099; Smith, 742 F. Supp. 2d at 869; see also In re U.S., 578 F.3d at 1200 (rejecting the “notion that Heller mandates an individualized inquiry concerning felons pursuant” to Section 922(g)(9)).

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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

**CIVIL MINUTES - GENERAL**

Case No.	2:10-cv-3996-SVW-AJW	Date	July 31, 2013
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Similarly, as discussed above, *every* court that has ruled upon the constitutionality of Section 922(g)(9) has found that domestic violence misdemeanants are *not* protected by the Second Amendment's to bear arms. Accordingly, this Court is bound by the pre-Heller equal protection case law as to Section 922(g)(9)'s constitutionality, at least as applied to Plaintiff. In U.S. v. Hancock, the Ninth Circuit upheld Section 922(g)(9) against an equal protection challenge, concluding that the statute survived rational basis review. 231 F.3d 557, 565-566 (2000). Like the felon in Vongxay, because Plaintiff is "explicitly excluded from Heller's holding," this Court is bound by Hancock's holding.

**V. CONCLUSION**

For the reasons put forward in this Order, Plaintiff's FAC is DISMISSED WITH PREJUDICE.

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## **EXHIBIT C**

VENTURA  
SUPERIOR COURT  
FILED

MAR 10 2010

MICHAEL D. PLANET  
Executive Officer and Clerk  
*E. M. R. D. L. S.* Deputy

LAW OFFICES OF FRANKLIN S. ADLER  
State Bar Number: 056417  
424 South Beverly Drive  
Beverly Hills, California 90212  
(310) 553-8533

Attorney for Defendant  
EUGENE EVAN BAKER

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF VENTURA

THE PEOPLE OF THE STATE OF  
CALIFORNIA,

Plaintiff,

vs.

EUGENE EVAN BAKER,  
(Originally filed as  
EUGENE RYAN BAKER)

Defendant.

Case No: 97C008304

ORDER RESTORING SECOND  
AMENDMENT RIGHTS TO EUGENE  
EVAN BAKER

This matter came on regularly for hearing on 3-11-10,  
pursuant to a notice of motion filed herein by defendant. Counsel  
for the defendant and for the People both appeared. Counsel for  
the defendant moved in open court for an Order restoring the  
Second Amendment right to bear arms to defendant.

The Court, having read the moving papers submitted in this  
matter and having heard the arguments of counsel on the motion,  
and being advised in the premises;

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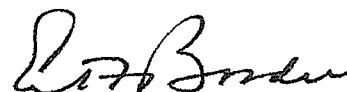
/ / /

ORDER RESTORING 2<sup>nd</sup> AMEND. RIGHTS TO EUGENE EVAN BAKER

1           GOOD CAUSE HAVING BEEN SHOWN, IT IS HEREBY ORDERED that Mr.  
2 EUGENE EVAN BAKER, ~~Second Amended Petition for Firearms~~  
3 ~~Restoration~~ is entitled to purchase, own and  
4 possess firearms consistent with the laws of the State of  
5 California.

6           A copy of this Order shall have the same force and effect as  
7 the original.

8 Dated: MARCH 11, 2010

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JUDGE OF THE SUPERIOR COURT

12 (Seal)  
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hereby certify that the annexed instrument  
is a true and correct copy of the original on file  
in my office. MICHAEL D. PLANET,  
Executive Officer and Clerk

Dated 3-11-10  
By Chris Sturtevant  
Deputy Clerk

