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**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA**

**JEFF SILVESTER, BRANDON  
COMBS, THE CALGUNS  
FOUNDATION, INC., a non-profit  
organization, and THE SECOND  
AMENDMENT FOUNDATION,  
INC., a non-profit organization,**

**Plaintiffs,**

**v.**

**KAMALA HARRIS, Attorney  
General of California (in her  
official capacity), and DOES 1 to  
20.**

**Defendants.**

**Case No. 1:11-cv-02137-AWI-SKO**

**PLAINTIFFS' SUPPLEMENTAL  
BRIEF IN OPPOSITION TO  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGEMENT**

1     **I.     INTRODUCTION**

2             Plaintiffs Jeff Silvester, Brandon Combs, The Calguns Foundation, Inc., and  
3     The Second Amendment Foundation, Inc. submit this supplemental brief in support  
4     of their Opposition to Defendant's Motion for Summary Judgment to bring the  
5     court's attention to a pivotal case recently decided by the Ninth Circuit, U.S. v.  
6     Chovan, No. 11-50107, 2013 WL 6050914 (C.A. 9 (Cal.) Nov. 18, 2013).

7             As stated in the prior briefs submitted by the parties, at the time of the  
8     briefing, the 9th Circuit had not yet decided on the form of scrutiny to apply to  
9     restrictions on the right to keep and bear arms. In Chovan, the 9th Circuit Court  
10    adopts the two step Second Amendment inquiry undertaken by the Third, Fourth,  
11    Seventh, Tenth, and D.C. Circuits. Id. at \*8. First, it must be determined whether  
12    the challenged law burdens conduct protected by the Second Amendment, and  
13    second, if it does, the district court is directed to apply an appropriate level of  
14    scrutiny. Id. The Chovan court opines that if a challenged law burdens Second  
15    Amendment rights, "some sort of heightened scrutiny must apply." Id. at \*9. An  
16    intermediate level of scrutiny is applied in Chovan. Id. at \*10.

17            As described below, Plaintiffs request this court apply this case in connection  
18    with its ruling on Defendant's Motion for Summary Judgment.

19    **II.    FACTS IN CHOVAN**

20            Daniel Chovan was convicted of corporal injury on a spouse in 1996. In  
21    2009, he attempted to buy a gun and was denied. Although at the time he applied,  
22    Chovan could legally possess a firearm under California law (as ten years had  
23    passed since his domestic violence conviction), he was barred for life under 18  
24    U.S.C. § 922(g)(9). Id. at \*1.

25            Upon further investigation, the FBI found videos depicting Chovan and  
26    others shooting rifles and conducting mock "border controls" near the United  
27    States—Mexico border. Id. at \*2. The FBI ultimately found and confiscated four  
28    firearms from Chovan's home, and he was arrested and charged with knowingly



1 possessing a firearm in violation of § 922(g) and making a false statement in the  
 2 acquisition of a firearm. Id. Chovan moved to dismiss the first count contending,  
 3 in part, that § 922(g)(9) is an unconstitutional violation of the Second Amendment.<sup>1</sup>  
 4 Id.

### 5 **III. COURT'S ANALYSIS AND HOLDING IN CHOVAN**

6 The Chovan court acknowledges that the constitutionality of § 922(g)(9) is a  
 7 question of first impression for the Ninth Circuit. Id. at \*5. The court begins by  
 8 analyzing the different approaches taken by other Circuits in upholding § 922(g)(9),  
 9 and ultimately adopts the two-step Second Amendment inquiry undertaken by the  
 10 Third, Fourth, Seventh, Tenth, and D.C. Circuits. Id. at \*8. The court states:  
 11 “[t]he two-step Second Amendment inquiry we adopt (1) asks whether the  
 12 challenged law burdens conduct protected by the Second Amendment and (2) if so,  
 13 directs courts to apply an appropriate level of scrutiny.” Id. citing U.S. v. Chester,  
 14 628 F.3d 673, 680 (4th Cir. 2010), U.S. v. Marzzarella, 614 F.3d 85, 89 (3d Cir.  
 15 2010).

#### 16 **A. Step One of the Inquiry**

17 As for the first step of the inquiry, the Chovan court concludes that by  
 18 prohibiting domestic violence misdemeanants from possessing firearms,  
 19 § 922(g)(9) burdens rights protected by the Second Amendment. Id. The court  
 20 states, “Section 922(g)(9) is not mentioned in Heller. The government argues that  
 21 § 922(g)(9) is a presumptively lawful regulatory measure and does not burden  
 22 rights historically understood to be protected by the Second Amendment.  
 23 According to the government, § 922(g)(9) is part of a ‘long line of prohibitions and  
 24 restrictions on the right to possess firearms by people perceived as dangerous or  
 25 violent’.” Id.

26 The court disagrees noting that “it is not clear that such prohibitions are so  
 27 longstanding.” Id. The first federal firearm restrictions regarding violent offenders

28 <sup>1</sup> Chovan challenged the charge on other grounds which are not relevant here and therefore will not be discussed.

1 were not passed until 1938, as part of the Federal Firearms Act. Domestic violence  
2 misdemeanants would not be restricted from possessing firearms under the Federal  
3 Firearms Act. Domestic violence misdemeanants were not restricted from  
4 possessing firearms until 1996, with the passage of the Lautenberg Amendment to  
5 the Gun Control Act of 1968. Id.

6 The court states:

7 Because of “the lack of historical evidence in the record before us, we  
8 are certainly not able to say that the Second Amendment, as  
9 historically understood, did not apply to persons convicted of  
10 domestic violence misdemeanors. We must assume, therefore, that  
11 [Chovan]'s Second Amendment rights are intact and that he is entitled  
12 to some measure of Second Amendment protection to keep and  
13 possess firearms in his home for self-defense.” Id. \*9 citing Chester,  
14 628 F.3d at 681–82.

15 The court moves on to the second step of the inquiry determining the first step has  
16 been met.

17 **A. Step Two of the Inquiry**

18 The Chovan court states, “[i]n Heller, the Supreme Court did not specify  
19 what level of scrutiny courts must apply to a statute challenged under the Second  
20 Amendment. The Heller Court did, however, indicate that rational basis review is  
21 not appropriate.” Id. citing District of Columbia v. Heller, 554 U.S. 570, 628 n. 27  
22 (2008). The Chovan court goes on to conclude that as 922(g)(9) burdens Second  
23 Amendment rights, “some sort of heightened scrutiny must apply. Id.

24 The court then looks to the First Amendment as a guide stating, “the level of  
25 scrutiny in the Second Amendment context should depend on ‘the nature of the  
26 conduct being regulated and the degree to which the challenged law burdens the  
27 right.’” Id. quoting Chester, 628 F.3d at 682. “ More specifically, the level of  
28 scrutiny should depend on (1) ‘how close the law comes to the core of the Second



1 Amendment right,' and (2) 'the severity of the law's burden on the right.' *Id.*  
 2 quoting Ezell v. City of Chicago, 651 F.3d 684, 701–04 (7th Cir. 2011).

3 The court determines that Chovan's right to possess a firearm in the home for  
 4 self-defense is not within the core rights identified in Heller—*the right of law-*  
 5 *abiding, responsible citizens to possess and carry firearms*—by virtue of his  
 6 criminal history as a domestic violence misdemeanor. *Id.* The court, does,  
 7 however determine the burden on domestic violence misdemeanants' rights as  
 8 substantial. *Id.* at 10. Thus the Chovan court concludes intermediate scrutiny  
 9 is the proper standard to apply in connection with § 922(g). *Id.*

10 The court goes on to apply the intermediate scrutiny standard, holding that  
 11 § 922(g) survives intermediate scrutiny both on its face and as applied to Chovan.  
 12 *Id.*

#### 13 **IV. APPLICABILITY OF CHOVAN TO THE INSTANT CASE**

14 Plaintiffs here were all subject to a ten day waiting period under Penal Code  
 15 sections 26815 and 27510. Plaintiffs contend that under Chovan and the Chovan  
 16 court's application of Heller, the first prong of the inquiry has been met as the state  
 17 laws burden rights protected by the Second Amendment.

18 Under the second prong of the inquiry, *the minimal level* of scrutiny this  
 19 court must apply here is an intermediate level of scrutiny. Unlike the defendant in  
 20 Chovan, however, Plaintiffs here ARE law abiding responsible citizens as defined  
 21 by Heller—not domestic violence misdemeanants. Plaintiffs have all previously  
 22 purchased firearms or possess a state license. To that extent, a core right is  
 23 involved. Therefore, as argued in detail in Plaintiff's Opposition, the strict scrutiny  
 24 level of review should be imposed.

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1 **V. CONCLUSION**

2 Based on the foregoing, Plaintiffs request this court apply the holding in  
3 Chovan to the facts in this case in considering Defendant's Motion for Summary  
4 Judgment.

5 DATED: November 22, 2013

6 OTTEN & JOYCE, LLP

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