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7  
8 UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA - SACRAMENTO  
9

10 RICHARD ENOS, JEFF BASTASINI,  
11 LOUIE MERCADO, WALTER  
GROVES, MANUEL MONTEIRO,  
12 EDWARD ERIKSON and VERNON  
NEWMAN,

13 Plaintiffs,

14 vs.

15  
16 ERIC HOLDER, as United States  
Attorney General, and ROBERT  
17 MUELLER, III, as Director of the  
Federal Bureau of Investigation,  
18

19 Defendants.  
20

CASE NO.: 2:10-CV-02911-JAM-EFB

OPPOSITION AND MEMORANDUM  
OF POINTS AND AUTHORITIES IN  
SUPPORT OF OPPOSITION TO  
DEFENDANTS' MOTION TO DISMISS  
THE SECOND (2<sup>nd</sup>) AMENDED  
COMPLAINT

Date: January 25, 2012  
Time: 1:30 p.m.  
Place: Courtroom 6, 14th Floor  
Judge: Hon. John A. Mendez

21 By and through undesigned counsel, Plaintiffs RICHARD ENOS, JEFF  
22 BASTASINI, LOUIE MERCADO, WALTER GROVES, MANUEL MONTEIRO,  
23 EDWARD ERIKSON, and VERNON NEWMAN hereby oppose Defendants' Motion  
24 to Dismiss the Second Amended Complaint and submit this memorandum in  
25 support of that opposition.

26 Date: January 11, 2012

27 /s/ Donald E. J. Kilmer, Jr.  
Attorney for the Plaintiffs  
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1 INTRODUCTION

2 To a large extent, the Defendants are merely rearguing some of the same points  
3 that were already addressed by this Court’s order filed July 8, 2011. (Dkt # 24) In  
4 that order the Court specifically denied the motion to dismiss Plaintiff ENOS’s  
5 claims for declaratory relief and Second Amendment claims. It granted the motion  
6 to dismiss, with leave to amend, the same claims plead by Plaintiffs BASTASINI,  
7 MERCADO, GROVES, MONTEIRO, ERICKSON and NEWMAN on ripeness  
8 grounds, as they had not alleged a denial of a firearm purchase. The Court also  
9 dismissed, with prejudice, all of the Plaintiffs’ First, Fifth and Tenth Amendment  
10 claims.

11 The Second Amended Complaint (SAC) cures the ripeness defects by alleging  
12 that Plaintiffs BASTASINI, MERCADO, GROVES, MONTEIRO, ERICKSON and  
13 NEWMAN have all been denied firearm purchases by a federally licensed firearm  
14 dealer due to their convictions for Misdemeanor Crimes of Domestic Violence  
15 (MCDV). Because these Plaintiffs now stand in the exact same position as Plaintiff  
16 ENOS, and because this Court has already found that the facts alleged by ENOS  
17 survive a Fed.R.Civ.P. 12 motion, this Court can (almost) summarily deny the  
18 Defendants’ Motion to Dismiss.

19 Furthermore, as the facts of this case are not in dispute, the Plaintiffs have filed  
20 their own Fed.R.Civ.P. 56 Motion, set for the same day as Defendants’ Motion to  
21 Dismiss. This Court can now dispose of this entire matter without the necessity of  
22 a trial.

23  
24 STATEMENT OF FACTS

25 Because Fed.R.Civ.P. 12 motions require the Court to accept as true the facts  
26 alleged in the complaint, the SAC is necessarily the Statement of the Facts for this  
27 proceeding. Plaintiffs theory of the case is that their “right to keep and bear arms”  
28 was restored by any one of three legal doctrines: (1) By operation of state law with

1 the lapse of ten (10) years; (2) By definition under a “defective waiver” rule set forth  
2 in the language of the federal statute; and/or (3) By affirmative relief from a state  
3 court under state law. Briefly, the (un-controverted) facts from the SAC are:

- 4 1. All of plaintiffs have been convicted under California law of a MCDV.
- 5 2. As a collateral consequence of their conviction for a MCDV under  
6 California law, each and every Plaintiff had their “right to keep and  
7 bear arms” revoked for a statutory ten (10) years; and thus restored by  
8 operation of law after the lapse of those ten (10) years.
- 9 3. More than ten (10) years have lapsed since the date of conviction for  
10 each and every Plaintiff.
- 11 4. Though it does not restore firearm rights *per se*, each and every  
12 Plaintiff has had a California Superior Court Judge make a finding  
13 under Penal Code § 1203.4, that they successfully completed probation,  
14 paid all fines and were entitled to have their pleas withdrawn and the  
15 case dismissed. Thus permitting them to truthfully allege that they  
16 are law-abiding citizens.<sup>1</sup>
- 17 5. Six of the seven Plaintiffs: ENOS, BASTASINI, MERCADO, GROVES,  
18 MONTEIRO and ERICKSON – were all convicted of a California  
19 MCDV prior to the LAUTENBERG AMENDMENT becoming law in 1996.  
20 In other words, it was impossible for them to be apprized of a federally  
21 mandated collateral consequence of their conviction (i.e., loss of a  
22 fundamental right) when that collateral consequence did not yet exist.  
23 Furthermore the non-existence of this collateral consequence at the  
24 time of their plea and conviction means that they were deprived of

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25  
26 <sup>1</sup> Defendants keep insisting that Plaintiffs are somehow trying to pull a fast  
27 one by alleging that they have obtained relief under CA Penal Code § 1203.4. (See  
28 Def’s Memo for their MTD the SAC at Page 9, lines 20-21 and fn. #9.) Plaintiffs  
have never alleged that this fact alone restores their rights, so it is hard see how we  
have “abandoned” a claim that we never made.

1 making a knowing and intelligent waiver of their right to a jury trial –  
2 regardless of whether they were represented by counsel.

3 6. Plaintiff ENOS is a triple threat. He not only qualifies for restoration  
4 of his rights under the 10-year rule and the defective-waiver rule, but  
5 he is the only Plaintiff who applied for – and was granted – relief  
6 under California’s specific statutory remedy for judicial restoration of  
7 his firearms rights. See: Penal Code § 12021(c)(3)<sup>2</sup> [29860]<sup>3</sup>.

8  
9 **LEGAL STANDARDS RE: FED.R.CIV.P. 12(b)(1) MOTIONS**

10 Defendants’ Rule 12(b)(1) subject matter jurisdiction challenge appears to be  
11 based solely on constitutional/procedural rules regarding standing and prudential  
12 considerations of abstention and/or exhaustion of administrative remedies. Courts  
13 disagree whether a motion to dismiss for lack of standing should be brought under  
14 Rule 12(b)(6) or 12(b)(1).

15 Some courts (including the Ninth Circuit) hold a motion to dismiss for failure to  
16 state a claim under Rule 12(b)(6) lies where the complaint reveals on its face that  
17 plaintiff lacks standing. *Sacks v. Office of Foreign Assets Control* (9th Cir. 2006)  
18 466 F.3d 764, 771; *Brereton v. Bountiful City Corp.* (10th Cir. 2006) 434 F.3d 1213,  
19 1216; *Ballentine v. United States* (3rd Cir. 2007) 486 F.3d 806, 810.

20  
21 <sup>2</sup> Indeed, as of the date of this motion, that remedy is no longer available to  
22 any person as it only applied to defendants who were convicted prior to California’s  
23 addition of a specified misdemeanor to the statute and who suffered the loss of their  
24 “right to keep and bear arms” due to the statute’s retroactive effect. See Penal Code  
25 § 12021(c)(3). Misdemeanants convicted of a California MCDV after 1993 were  
26 presumably on notice that the charges against them would result in the 10-year loss  
of the right to acquire/possess firearms. Meaning that they are presumed to have  
made a knowing and intelligent waiver of any state law collateral consequences  
when they disposed of their case via plea instead of trial.

27 <sup>3</sup> California has reorganized its Deadly Weapon Statutes with the new  
28 numbers taking effect January 1, 2012. The old provision is cited and the new  
provision is bracketed.

1 Other courts hold such motions should be brought under Rule 12(b)(1) because  
2 standing is a jurisdictional matter. *Alliance For Environmental Renewal, Inc. v.*  
3 *Pyramid Crossgates Co.* (2nd Cir. 2006) 436 F.3d 82, 88, fn. 6; see *Stalley ex rel.*  
4 *United States v. Orlando Regional Healthcare System, Inc.* (11th Cir. 2008) 524 F.3d  
5 1229, 1232 – dismissal for lack of standing treated as dismissal for lack of subject  
6 matter jurisdiction under FRCP Rule 12(b)(1); *Apex Digital, Inc. v. Sears, Roebuck*  
7 *& Co.* (7th Cir. 2009) 572 F.3d 440, 443.

8 Furthermore, under a Rule 12(b)(1) jurisdictional motion a defendant may make  
9 either: (1) a facial attack, which requires the court to accept the facts plead in the  
10 complaint as true, or (2) a factual attack (i.e., a speaking motion) based on extrinsic  
11 evidence. Moreover, if the jurisdictional facts are intertwined with substantive  
12 issues, then the Court should deny a request for dismissal under Fed.R.Civ.P.  
13 12(b)(1) and adjudicate the issue under Rule 12(b)(6) and/or Rule 56. See: *Safe Air*  
14 *for Everyone v. Meyer* (9<sup>th</sup> Cir. 2004) 373 F.3d 1045, 1039.

15 This is not an insignificant issue. A Rule 12(b)(6) motion based on extrinsic facts  
16 cannot be granted where there is a genuine issue as to any material fact. However,  
17 a Rule 12(b)(1) "speaking motion" may be granted notwithstanding disputed facts  
18 because the trial court has power to evaluate and decide conflicting facts in an  
19 evidentiary hearing and weigh competing evidence. *Rosales v. United States* (9th  
20 Cir. 1987) 824 F.2d 799, 803.

21 This threshold issue is easily resolved as the Defendants have not tendered any  
22 extrinsic evidence (e.g., requests for judicial notice, certified documents, affidavits,  
23 etc...) in support of a 'speaking motion' under Rule 12(b)(1); therefore the Court is  
24 required to adjudicate this motion under the rules and standards of Fed.R.Civ.P.  
25 12(b)(6), i.e., the Court must consider the allegations in the complaint as true and  
26 construe them in the light most favorable to the Plaintiffs. *Montez v. Department of*  
27 *Navy* (5th Cir. 2004) 392 F.3d 147, 149-150; *Safe Air for Everyone v. Meyer* (9th Cir.  
28 2004) 373 F.3d 1035, 1039.



1 this denial is caused by the Defendants' obdurate interpretation of the LAUTENBURG  
2 AMENDMENT'S definitions and/or restoration provision. Therefore Defendants'  
3 second bite at the apple – asking this court to dismiss all of the Plaintiffs' requests  
4 for declaratory relief and their constitutional claims (the only claims alleged) in the  
5 SAC – is nothing more than a thinly disguised motion for reconsideration of this  
6 Court's July 8, 2011 Order.

7 Absent highly unusual circumstances, motions for reconsideration will not be  
8 granted "unless the District Court is presented with *newly discovered evidence*,  
9 *committed clear error, or if there is an intervening change in the controlling law.*"  
10 See: *Kona Enterprises, Inc. v. Estate of Bishop* (9<sup>th</sup> Cir. 2000) 229 F.3d 877, 890  
11 (emphasis added; internal quotes omitted). See also: *Santamarina v. Sears*,  
12 *Roebuck & Co.* (7<sup>th</sup> Cir. 2006) 466 F.3d, 570, 572.

13 Defendants have introduced no new evidence, nor have they claimed that the  
14 Court made any error in its July 8, 2011 Order, nor have they set forth an  
15 intervening change in the law since that order. Summary denial of the Defendants'  
16 Motion to Dismiss the Second Amended Complaint is warranted and appropriate.

17  
18 **A. Plaintiffs' Claims for Declaratory Relief are Proper.**

19 "In a case of actual controversy within its jurisdiction (except specified federal  
20 tax actions and bankruptcy proceedings) . . . any court of the United States . . . may  
21 declare the rights and other legal relations of any interested party seeking such  
22 declaration, whether or not further relief is or could be sought." 28 USCA § 2201(a)  
23 (parentheses added). Furthermore, "The existence of another adequate remedy  
24 does not preclude a declaratory judgment that is otherwise appropriate."  
25 Fed.R.Civ.P. 57.

26 Declaratory relief is an equitable remedy. Its distinctive characteristic is that it  
27 allows adjudication of the parties' rights and obligations on a matter in dispute  
28 regardless of whether claims for damages or injunctive relief have yet arisen: "In

1 effect, it brings to the present a litigable controversy, which otherwise might only be  
2 tried in the future." *Societe de Conditionnement v. Hunter Eng. Co., Inc.* (9<sup>th</sup> Cir.  
3 1981) 655 F.2d 938, 943; see also *Dickinson v. Indiana State Election Board* (7th  
4 Cir. 1991) 933 F.2d 497.

5 The party seeking declaratory relief must show both: (1) an actual controversy,  
6 and (2) regarding a matter within federal court subject matter jurisdiction. 28  
7 U.S.C. § 2201, *Calderon v. Ashmus* (1998) 523 U.S. 740, 118 S.Ct. 1694.  
8 Furthermore, declaratory relief is certainly appropriate to resolve constitutional  
9 controversies, including the constitutionality of federal (and state) statutes. *Steffel*  
10 *v. Thompson, et al.*, (1974) 415 U.S. 452, 94 S. Ct. 1209; *Lake Carrier's Ass'n v.*  
11 *MacMullan* (1972) 406 U.S. 498, 92 S.Ct. 1749; *Doe v. Gallinot* (9<sup>th</sup> Cir. 1981) 657  
12 F.2d 1017.

13  
14 1. Plaintiffs Have Alleged Facts in the SAC Sufficient to Proceed Under  
15 Either or Both: 18 U.S.C. § 925A and 28 U.S.C. 2201.

16 The only new argument raised by the Defendants in this renewed Motion to  
17 Dismiss, is the novel assertion that only the United States can be a proper  
18 defendant in this case. This argument is without merit.

19 18 U.S.C. § 925A is a short statute, its entire text [emphasis added] is:

20 Any person denied a firearm pursuant to subsection (s) or (t) of section  
21 922 [18 USCS § 922] –

22 (1) due to the provision of erroneous information relating to the person  
23 by any State or political subdivision thereof, or by the national instant  
24 criminal background check system established under section 103 of the  
25 Brady Handgun Violence Prevention Act [18 USCS § 922 note] or

26 (2) who was not prohibited from receipt of a firearm pursuant to  
27 subsection (g) or (n) of section 922 [18 USCS § 922], may bring an action  
28 against the State or political subdivision responsible for providing the  
erroneous information, or responsible for denying the transfer, or against  
the United States, as the case may be, for an order directing that the  
erroneous information be corrected or that the transfer be approved, as  
the case may be. In any action under this section, the court, in its  
discretion, may allow the prevailing party a reasonable attorney's fee as  
part of the costs.

1 The plain language of the statute indicates that the list of potential defendants  
2 is disjunctive and contemplates bringing suit against the person or entity  
3 “responsible for denying the transfer.” Plaintiffs have just as plainly alleged that  
4 Attorney General HOLDER and/or FBI Director MUELLER, III, are the persons  
5 responsible for denying the transfer of firearms due to an obstinate insistence on an  
6 obtuse interpretation of 18 U.S.C. § 921(a)(33) *et seq.*

7 Defendants’ rely on two district court cases – one from Ohio and the other from  
8 Louisiana – for their assertion that only the United States can be a proper  
9 defendant. But the Defendants read too much into the holdings of these cases,  
10 which are only persuasive authority here in the Eastern District of California.

11 *Eibler v. Dep’t of Treasury*, 311 F. Supp. 2d 618 (N.D. Ohio 2004) is a district  
12 court opinion/order granting the government’s motion for summary judgment. The  
13 case turned on the definition of a qualifying victim for the purposes of defining  
14 domestic violence under the LAUTENBERG AMENDMENT. Plaintiff *Eibler* contested  
15 the denial of his firearm purchase by contending that his girlfriend of six years was  
16 outside the definitions set forth in 18 U.S.C. § 921(a)(33). The federal government  
17 disagreed and they prevailed. Except for footnote #1 where the court notes that  
18 various agents and other entities had been previously dismissed, this opinion/order  
19 says nothing on the issue of proper parties under 18 U.S.C. § 925A. Indeed the  
20 court’s ruling was made on the merits, rather than on some procedural technicality.

21 *Richardson v. FBI*, 124 F. Supp. 2d 429 (W.D. La. 2000) is of even less help to  
22 the Defendants in this action. There is not even a footnote alluding to previously  
23 dismissed defendants. The court, again, made its order on a straightforward legal  
24 analysis of the substantive law regarding the status of ex-felons *vis-à-vis* firearms.

25 In the final analysis this Court’s jurisdiction to render a declaratory judgment as  
26 to how 18 U.S.C. § 921(a)(33) *et seq.*, applies to the circumstances of the Plaintiffs in  
27 this matter can be derived from either (or both) 18 U.S.C. § 925A and/or 28 U.S.C. §  
28 2201. Section 925A is directly on point and jurisdiction is statutorily authorized

1 whether the United States is a named party or not. And since the government's  
2 wrongful interpretation of the LAUTENBERG AMENDMENT is a *de facto* barrier to the  
3 Plaintiffs exercising a fundamental constitutional right, a judicial determination of  
4 rights and duties of the parties under this federal law is also appropriate under the  
5 DECLARATORY RELIEF ACT, 28 U.S.C. §§ 2201, 2202. In the event this Court deems  
6 the United States a necessary party, Plaintiffs should be granted leave to amend.<sup>4</sup>

7  
8 2. Plaintiffs Have Not Only Alleged a Viable Claim for Relief, They Should Prevail  
9 on the Underlying Question Regarding the Restoration of Their Rights.

10 As argued in Plaintiffs' Summary Judgment Motion, this Court has a duty to  
11 construe federal statutes so as "to avoid serious doubt as to their constitutionality."  
12 *Stern v. Marshall*, \_\_ U.S. \_\_, 131 S.Ct. 2594, 2605 (2011), citing text from:  
13 *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 841 (1986). A  
14 declaratory judgment from this Court providing a post-*Heller/McDonald*<sup>5</sup>, judicial  
15 correction to the Government's interpretation 18 U.S.C. § 921(a)(33) will fulfill that  
16 duty – and may turn out to be the only way to avoid having the constitutionality of  
17 the entire LAUTENBERG AMENDMENT brought into question.

18 In statutory interpretation cases, the inquiry begins with a determination of  
19 whether the language of the statute is unambiguous and whether the statutory  
20 scheme is consistent and coherent. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438  
21 (2002). See also: *Salinas v. United States*, 522 U.S. 52 (1997).

22 The statutory language this Court must interpret regarding Plaintiffs' claims  
23 that their civil rights were both lost and restored under California law is set forth

24 \_\_\_\_\_  
25 <sup>4</sup> If the Court makes a determination that the United States is a necessary  
26 party for any reason, it would be helpful if it also indicated whether or not it would  
27 entertain another round of Rule 12 motions filed by the Defendants absent some  
28 new facts or intervening change in the law.

<sup>5</sup> *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago*, 561 U.S. 3025 (2010).

1 at 18 U.S.C. § 921(a)(33)(B)(ii):

2 A person shall not be considered to have been convicted of  
 3 such an offense for purposes of this chapter [18 USCS §§  
 4 921 et seq.] if the conviction has been expunged or set  
 5 aside, or is an offense for which the person has been  
 6 pardoned or **has had civil rights restored (if the law of the  
 applicable jurisdiction provides for the loss of civil  
 rights under such an offense)** unless the pardon,  
 expungement, or restoration of civil rights expressly provides  
 that the person may not ship, transport, possess, or receive  
 firearms. **[Emphasis added]**

7 In *Logan v. United States*, 552 U.S. 23 (2007), a unanimous court took up the  
 8 anomalies that arise from statutes that purport to restore rights that were never  
 9 taken away. That Court placed some weight on whether the offender's post-  
 10 conviction status was unaltered by any dispensation of the jurisdiction where the  
 11 conviction occurred. *Logan* at 26. That same Court went on to cite with approval  
 12 the language from the Circuit Court which held that "an offender whose civil rights  
 13 have been neither diminished nor returned is not a person who 'has had civil rights  
 14 restored.'" *United States v. Logan*, 453 F.3d 804, 805 (7<sup>th</sup> Cir. 2006).

15 *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of*  
 16 *Chicago*, 561 U.S. 3025 (2010) judicially recognized the status of the rights secured  
 17 by the SECOND AMENDMENT as individual, fundamental civil rights. Unlike Mr.  
 18 Logan, the Plaintiffs in this action lost their civil rights to "keep and bear arms" for  
 19 10 years under the laws of the jurisdiction that convicted them of an MCDV. That  
 20 same jurisdiction subsequently restored those rights by operation of law (i.e., the  
 21 passage of a decade).

22 The *Logan* Court also cited with approval a prior case in which the Supreme  
 23 Court acknowledged that federal law regarding restoration of rights must give way  
 24 to a state's broad rules that restore rights by operation of law, and that states need  
 25 not restore rights on a case-by-case basis. *Logan* at 28 citing: *Caron v. United*  
 26 *States*, (1998) 524 U.S. 308, 313-316. At issue in *Caron* was the 'unless clause' of 18  
 27 U.S.C. § 921(a)(20). In that case the defendant was subject to a harsher sentence  
 28

1 because while Massachusetts law restored his right to possess shotguns and rifles,  
2 it did not restore his right to possess handguns. It was the qualified restoration of  
3 rights under Massachusetts law that triggered the ‘unless clause’ that led to the  
4 harsher result.

5 In contrast, California Penal Code § 12021(c)(1) [29805] restores – without  
6 qualification – the Plaintiffs “right to keep and bear arms” once 10 years have  
7 lapsed following their conviction for a California MCDV.

8 Furthermore, Plaintiff ENOS applied for judicial relief under Penal Code §  
9 12021(c)(3) [29860] and his petition for restoration of civil rights was granted in an  
10 order signed by a Superior Court Judge on June 16, 2000. [See Declaration of  
11 Plaintiff ENOS submitted in support of Motion for Summary Judgment.]

12 The plain and unambiguous language of 18 U.S.C. § 921(a)(33)(B)(ii)  
13 contemplates some state law procedure for restoration of any civil rights forfeited  
14 under state law by a MCDV conviction. Defendants keep veering off into familiar  
15 pre-*Heller/McDonald* territory with their mantra that a conviction must result in  
16 the loss of the right to vote, to hold public office and to sit on a jury – and that only  
17 restoration of those rights resurrects the “right to keep and bear arms.”

18 But the LAUTENBERG AMENDMENT’s language is pretty clear. It is necessary to  
19 look to the jurisdiction of the conviction to determine what rights are lost and what  
20 rights are regained under state law. California made the public policy decision – at  
21 least three years before the U.S. Congress – to impose a revocation of the bundle of  
22 rights inherent in the “right to keep and bear arms” for a person convicted of an  
23 MCDV. In addition to the ten (10) year revocation, California clearly intended to  
24 provide a means for restoration of those rights for persons convicted of an MCDV  
25 prior to the legislature enacting this *ex post facto* collateral consequence of  
26 conviction. CA Penal Code § 12021(c)(3) [29860]. Which means that California,  
27 exercising its power as a sovereign jurisdiction, has expressed its own policy of  
28 revoking and restoring various civil rights for MCDV convictions.

1 Indeed, Defendants would have this Court interpret the LAUTENBERG  
2 AMENDMENT as imposing a federal mandate **requiring** that states revoke the right  
3 to vote, hold public office or sit on a jury for any MCDV conviction in order to give  
4 any effect to the statute's restoration provision. That interpretation would bring  
5 into serious doubt the constitutionality of the LAUTENBERG AMENDMENT.

6 The fact that California chooses not to suspend the right to vote, hold public  
7 office or sit on a jury for an MCDV conviction is beside the point. All of the Plaintiffs  
8 in this action lost their civil rights "to keep and bear arms" upon their MCDV  
9 convictions under state law. They then had those rights restored under the  
10 applicable laws of the same jurisdiction where they were convicted. This Court  
11 should find that there is no material dispute of fact on this issue and find as a  
12 matter of law that Plaintiffs are no longer subject to the LAUTENBERG AMENDMENT'S  
13 prohibition on exercising their rights under the SECOND AMENDMENT.

14  
15 3. Several of the Plaintiffs' Convictions Do Not Meet The  
16 LAUTENBERG AMENDMENT'S Definition of a MCDV.

17 Because it was impossible for the Plaintiffs to be apprized of a collateral  
18 consequence that had not yet existed at the time of their convictions, the Court can  
19 also partially adjudicate this case by interpreting the plain and unambiguous  
20 language of 18 U.S.C. § 921(a)(33)(B)(i):

21 A person shall not be considered to have been convicted of such an  
22 offense for purposes of this chapter [18 USCS § § 921 et seq.], unless--  
23 (I) the person was represented by counsel in the case, or  
24 knowingly and intelligently waived the right to counsel in the case; and  
25 (II) in the case of a prosecution for an offense described in this  
26 paragraph for which a person was entitled to a jury trial in the jurisdiction  
27 in which the case was tried, either  
28 (aa) the case was tried by a jury, or  
(bb) the person knowingly and intelligently waived the right to  
have the case tried by a jury, by guilty plea or otherwise.

26 In 1996, Congress extended the federal prohibition on firearms to include  
27 persons convicted of "a misdemeanor crime of domestic violence." *United States v.*  
28 *Hayes*, 555 U.S. 415, 418 (2009).

1 Plaintiffs ENOS and BASTASINI suffered their convictions in 1991. Plaintiffs  
2 MERCADO and GROVES were convicted in 1990. Plaintiff MONTEIRO in 1992.  
3 Thus all these Plaintiffs plead guilty to their crimes prior to **both** California’s  
4 firearm prohibition for MCDV (1993) and passage of the LAUTENBERG AMENDMENT  
5 (1996). Plaintiff ERIKSON plead to his MCDV in 1996, after California enacted its  
6 prohibition, but before the LAUTENBERG AMENDMENT passed into law.

7 During the same term that the Supreme Court gave us *McDonald v. City of*  
8 *Chicago*, 561 U.S. 3025 (2010); the High Court also handed down *Padilla v.*  
9 *Kentucky*, \_\_\_ U.S. \_\_\_, 130 S.Ct. 1473 (2010). In that opinion the Court found that  
10 a criminal defendant who was not apprized of the collateral consequence of his  
11 conviction (deportation) may have been denied constitutionally adequate assistance  
12 of counsel under the SIXTH AMENDMENT, following the line of case arising from  
13 *Strickland v. Washington*, 466 U.S. 668 (1984). In coming to that conclusion the  
14 Court took note of the fact that deportation, though “civil in nature, see *INS v.*  
15 *Lopez-Mendoza*, 468 U.S. 1032, 1038, (1984), [...] is nevertheless intimately related  
16 to the criminal process. Our law has enmeshed criminal convictions and the  
17 penalty of deportation for nearly a century, [...]” *Padilla* at 1481.

18 With the Supreme Court’s recognition of the rights secured by the SECOND  
19 AMENDMENT as fundamental civil rights, in *District of Columbia v. Heller*, 554 U.S.  
20 570 (2008) and *McDonald v. City of Chicago*, 561 U.S. 3025 (2010); Plaintiffs herein  
21 contend that the collateral consequence of losing those rights is at least equal to or  
22 greater than mere deportation. Hence this Court must apply the *Padilla* rationale  
23 to whether Plaintiffs made a knowing and intelligent waiver of their right to a jury  
24 trial when they stood in the dock charged with a MCDV.

25 Since it is existentially impossible for a criminal defendant to be apprized of a  
26 collateral consequence (loss of firearm rights) that doesn’t exist at the time of his  
27 plea in lieu of a jury trial, this Court should find that Plaintiffs ENOS, BASTASINI,  
28 MERCADO, GROVES, MONTEIRO and ERIKSON count **not** have made a

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1 knowing and intelligent waiver of their right to jury trial. Hence their convictions  
2 do not qualify as a MCDV under the plain language of 18 U.S.C. § 921(a)(33)(B)(I).

3  
4 4. Defendants' Citations to pre-*Heller/McDonald* Cases and  
5 *Felon-in-Possession* Cases are Not Controlling.

6 As Defendants have conceded, the primary cases<sup>6</sup> they are relying on were all  
7 decided prior to the Supreme Court issuing its paradigm-shifting opinions in  
8 *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago*,  
9 561 U.S. 3025 (2010). This development alone should be enough to compel this  
10 Court take a fresh look at the entire body of case law that attempts to conflate the  
11 collateral consequences of a conviction for a MCDV with a conviction for a felony.

12 The Supreme Court in its *Heller* opinion, 554 U.S. at 626, 627 assured us that:

13 Although we do not undertake an exhaustive historical analysis today of the  
14 full scope of the *Second Amendment*, nothing in our opinion should be taken  
15 to cast doubt on longstanding prohibitions on the possession of firearms by  
16 felons and the mentally ill, or laws forbidding the carrying of firearms in  
17 sensitive places such as schools and government buildings, or laws imposing  
18 conditions and qualifications on the commercial sale of arms.

19 The High Court repeated this assurance in *McDonald*, 130 S. Ct. at 3047. But in  
20 making that assurance in both cases the Court made it a point to qualify the  
21 validity of rules prohibiting firearm rights to *felons* and they included the modifier  
22 “longstanding.” And even though the Supreme Court has implicitly found in a post-  
23 *Heller* case that the LAUTENBERG AMENDMENT (which only purports to regulate  
24 those convicted of a MCDV) is a constitutionally valid exercise of federal power –  
25 see: *United States v. Hayes*, 555 U.S. 415 (2009) – it does not take writ of certiorari  
26 to that Court to conclude that felons should be treated differently from  
27 misdemeanants, especially when it comes to rehabilitation and restoration of rights.  
28 The evidence for this can be found in the federal statutes themselves.

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<sup>6</sup> *United States v. Andaverde*, 64 F.3d 1305 (9<sup>th</sup> Cir. 1995); *United States v. Valerio*, 441 F.3d 837 (9<sup>th</sup> Cir. 2006) and *United States v. Brailey*, 408 F.3d 609 (9<sup>th</sup> Cir. 2005).

1 First of all, if the authors of the LAUTENBERG AMENDMENT had wanted those  
2 convicted in state courts of MCDV to be treated exactly like felons, they could have  
3 just said so. Instead they provided a completely separate statutory scheme to  
4 define felonies that is distinct from MCDVs. Contrast 18 U.S.C. § 921(a)(20) with  
5 18 U.S.C. § 921(a)(33). Furthermore, after defining the elements, the authors of  
6 LAUTENBERG could have just mandated that those convicted of an MCDV should be  
7 treated like felons for purposes of 18 U.S.C. § 922 *et seq.*. Instead there are  
8 separate sub-sections dealing with felons which are distinct from those dealing with  
9 misdemeanants. See §§ 922(d)(1), 922(d)(9), 922(g)(1), 922(g)(9).

10 Congress has also differentiated between felons and misdemeanants when it  
11 comes to the rehabilitation and restoration of rights. The LAUTENBERG AMENDMENT  
12 (18 U.S.C. 921(a)(33) *et seq.*) – the law at issue in this case – contains its own  
13 provisions for rehabilitation and restoration of the rights of misdemeanants under  
14 the laws of the state where the conviction occurred. The comparable statute  
15 dealing with felons is 18 U.S.C. § 921(a)(20). The case law Defendants rely upon  
16 would lead to the obtuse result that **felons** (having lost the right to vote, sit on a  
17 jury and hold public office, along with their “right to keep and bear arms”) would  
18 qualify for restoration of their rights under any state law rehabilitation procedures  
19 – as long as all civil rights are restored under state law without qualification – but  
20 those convicted in California of a MCDV (having lost only their “right to keep and  
21 bear arms”) would still be prohibited persons under federal law because they didn’t  
22 also lose the right to vote, sit on a jury and hold public office. That is a nonsensical  
23 reading of the law. To uphold the constitutionality of the LAUTENBERG  
24 AMENDMENT, this Court should find that California’s restoration procedures are  
25 valid under any of the theories outlined above, and that Plaintiffs herein may be  
26 returned to status of citizens entitled to exercise all the rights, privileges and  
27 immunities afforded law-abiding citizens under our Constitution, including but not  
28 limited to those rights secured by the SECOND AMENDMENT.

1                    **B. Plaintiffs Have a Valid SECOND AMENDMENT Claim.**

2            Defendants keep misconstruing Plaintiffs' SECOND AMENDMENT claim as a facial  
3 challenge to the LAUTENBERG AMENDMENT. It is not. These Plaintiffs are not  
4 challenging the federal government's power to impose a collateral consequence for  
5 crimes of domestic violence that is consistent with the federal government's power  
6 to regulate the acquisition and possession of firearms in general. Their claim is  
7 clearly an "as applied" challenge because they are only asking this court to find  
8 LAUTENBERG unconstitutional to the extent that it imposes a lifetime ban on  
9 exercising a fundamental right for a minor crime.

10            As noted above, this Court has a duty to construe federal statutes so as "to avoid  
11 serious doubt as to their constitutionality." *Stern v. Marshall*, \_\_ U.S. \_\_, 131 S.Ct.  
12 2594, 2605 (2011), citing text from: *Commodity Futures Trading Comm'n v. Schor*,  
13 478 U.S. 833, 841 (1986). It is the Defendants who are forcing this 'nuclear option'  
14 on the Court by insisting on their Catch-22 interpretation of LAUTENBERG'S  
15 restoration provisions. (i.e., all rights must be revoked, before any rights can be  
16 restored; but since no jurisdictions revoke all rights for MCDV, tough luck.)

17            Defendants' citation to *United States v. Vongxay*, 594 F.3d 1111 (9<sup>th</sup> Cir.) (and  
18 the litany of other cases cited on page 19, lines 6-15) is not helpful because as they  
19 admit, these are cases construing federal prohibitions on **felons** and they were all  
20 facial attacks on SECOND AMENDMENT grounds.

21            The cases cited by Defendants that dealt with MCDV convictions<sup>7</sup> did not reach  
22 the "as applied" questions raised by the Plaintiffs in this case. They are not  
23 claiming that their convictions do not qualify because the victim was a live-in  
24 girlfriend instead of a wife (*White*). They are not making a facial challenge or asking  
25 for a "home defense" exception to LAUTENBERG (*In re United States* and *Booker*).

26 \_\_\_\_\_  
27            <sup>7</sup> *United States v. White*, 593 F.3d 1199 (11<sup>th</sup> Cir. 2010); *In re United States*,  
28 578 F.3d 1195 (10<sup>th</sup> Cir. 2009); and *United States v. Booker*, 644 F.3d 12 (1<sup>st</sup> Cir.  
2011).

1 What they are asking this Court to do is construe the restoration provisions of 18  
2 U.S.C. § 921(a)(33) *et seq.*, in light of *Heller* and *McDonald*. The rest of Defendants’  
3 public policy arguments about the dangerousness of MCDV and the need to regulate  
4 those convicted of these crimes is beside the point – because the Defendants have  
5 failed to produce any evidence<sup>8</sup> that someone who completes misdemeanor  
6 probation<sup>9</sup> and remains a law-abiding for 10 years still presents that kind of danger.

7 In a First Amendment context, using intermediate scrutiny and interpreting the  
8 rationale set forth in *City of Los Angeles v. Alameda Books, Inc.*, (2002) 535 U.S.  
9 425, the Seventh Circuit held:

10 [...] [B]ecause books (even of the "adult" variety) have a constitutional  
11 status different from granola and wine, and laws requiring the closure of  
12 bookstores at night and on Sunday are likely to curtail sales, the public  
13 benefits of the restrictions must be established by evidence, and not just  
14 asserted. The evidence need not be local; Indianapolis is entitled to rely  
15 on findings from Milwaukee or Memphis (provided that a suitable effort  
16 is made to control for other variables). See *Andy's Restaurant*, 466 F.3d  
17 at 554-55. **But there must be evidence; lawyers' talk is insufficient.**  
(Emphasis added.)

18 *Annex Books v. City of Indianapolis*,  
19 581 F.3d 460, 463 (7th Cir. 2009)

20 That state of California made exactly that kind of finding when they limited  
21 firearm restrictions for MCDV convictions in this state to 10 years. The Defendants  
22 should not be permitted to second-guess or countermand that finding by  
23 interpreting away the LAUTENBERG AMENDMENT’S restoration language.

24 Judicial Scrutiny of regulations infringing a law-abiding citizen’s “right to keep  
25 and bear arms” is far from settled law in the Ninth Circuit. The only appellate case  
26 to deal with this issue has been granted *en banc* review and will not be argued until

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27 <sup>8</sup> Plaintiffs hereby object to any proported “evidence” that the Defendants  
28 have attempted to boot-strap into this Fed.R.Civ.P. 12 motion in footnotes 7 and 8  
of their memorandum.

<sup>9</sup> The mandatory requirements to successfully complete probation upon  
conviction of a California MCDV is set forth at Penal Code § 1203.097. They  
include, but are not limited to: 36 months of probation, protective orders,  
mandatory fines, completion of batter’s program, etc...

1 the third week of March, 2012. *Nordyke v. King*, 2011 U.S. App. LEXIS 8906.<sup>10</sup>  
2 Therefore it is somewhat premature (and beside the point) for the Defendant's to  
3 argue that LAUTENBERG survives intermediate scrutiny.

4 If the Court is required to pursue the Constitutional analysis of LAUTENBERG'S  
5 restoration provisions, it should apply (almost) strict scrutiny and require the  
6 government to bear the burden of producing evidence that forbidding  
7 misdemeanants with a 10-year history of law-abiding citizenship from exercising  
8 SECOND AMENDMENT rights serves a compelling government interest, and that the  
9 means used (a complete lifetime ban on exercising the right) is necessary to achieve  
10 that interest. See: *U.S. v. Chester* (4<sup>th</sup> Cir. 2010) 628 F.3d 673 and *Ezell v. City of*  
11 *Chicago* (7<sup>th</sup> Cir. 2011) 651 F.3d 684.

12 Toward the end of their memo, the Defendants advance another, rather obtuse  
13 argument that LAUTENBERG doesn't impose a lifetime ban for MCDV. (Of course we  
14 agree.) They cite, with no apparent irony, some language from the case of *United*  
15 *States v. Skoien*, 614 F.3d 638 (7<sup>th</sup> Cir. 2010)(en banc) which purports to interpret  
16 California Penal Code § 1203.4a as an example of a state program that provides for  
17 the restoration of rights that would meet comport with 18 U.S.C. § 921(a)(33) *et seq.*  
18 There are two problems with that argument.

19 California Penal Code § 1203.4a is the sister statute to § 1203.4. The first one  
20 operates to rehabilitate misdemeanants who were not granted probation. The sister  
21 statute only applies to misdemeanants sentenced to probation. At the time of the  
22 *Skoien* opinion, it was a true statement that § 1203.4a did not contain the language  
23 that relief under this code section does not restore rights lost under Penal Code §  
24 12021 [29800-29875]. That is the language in § 1203.4 that Defendants keep  
25 accusing the Plaintiffs of obscuring. This produced an anomaly under California  
26 law that a misdemeanant rehabilitated under § 1203.4a had their firearms rights

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27  
28 <sup>10</sup> See Plaintiffs' Request for Judicial Notice of various cases stayed pending  
the outcome in *Nordyke v. King* to be filed forthwith.

1 restored, but misdemeanants rehabilitated under § 1203.4 could not have their  
2 firearm rights restored. Never-the-less, Defendants' admission that they approve of  
3 a state law procedure for restoring rights under any statute begs the question as to  
4 why they object to a restoration procedure under a different statute.

5 The second problem with Defendants' argument on this point is that as of  
6 January 1, 2012, Penal Code § 1203.4a was amended to mirror the language of §  
7 1203.4. In other words, neither of these procedures § 1203.4 or § 1203.4a by  
8 themselves restore a misdemeanant's "right to keep and bear arms." If you think  
9 about it, this makes sense because California did not want these post-conviction  
10 remedies to undermine the 10-year prohibition for various misdemeanors (including  
11 MCDV) set forth in Penal Code § 12021(c)(1) [29805].

12 Defendants' final argument that Plaintiffs lack standing to challenge 18 U.S.C. §  
13 922(g)(9) is without merit. The Court was not persuaded by this argument in the  
14 prior Rule 12 motion, it should not be moved to consider it in this round of pre-trial  
15 litigation. Specifically, Plaintiffs have alleged an active controversy arising under  
16 federal law. *Steffel v. Thompson, et al.*, (1974) 415 U.S. 452, 94 S. Ct. 1209.

## 17 18 CONCLUSION

19 Defendants' Motion to Dismiss any part (or in whole) the Second Amended  
20 Complaint should be denied. In the alternative, Plaintiffs should be granted leave  
21 to amend those parts of their complaint open to correction or plausible factual  
22 allegations. Furthermore, the Court should grant Plaintiffs' Cross-Motion for  
23 Summary Judgment by finding that California's restoration of rights by operation  
24 of law after 10 years for MCDV convictions is in harmony with a constitutionally  
25 valid LAUTENBERG AMENDMENT.

26 Respectfully Submitted on January 11, 2012

27 /s/ Donald Kilmer  
28 Donald Kilmer, Attorney for Plaintiffs.