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12 **UNITED STATES DISTRICT COURT**

13 **NORTHERN DISTRICT OF CALIFORNIA**

14 CHAD LINTON, et al.,

15 Plaintiffs,

16 vs.

17 XAVIER BECERRA, in his official capacity as  
18 Attorney General of California, et al.,

19 Defendants.

Case No. 3:18-cv-07653-JD

**PLAINTIFFS' REPLY MEMORANDUM IN  
SUPPORT OF MOTION FOR PRELIMINARY  
INJUNCTION**

Date: February 13, 2020

Time: 10:00 a.m.

Courtroom 11, 19<sup>th</sup> Floor

Judge: Hon. James Donato

**SEILER EPSTEIN LLP**  
Attorneys at Law

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**I. ARGUMENT IN REPLY**

**A. PLAINTIFFS HAVE SHOWN A LIKELIHOOD OF SUCCESS ON THE MERITS.**

**1. Plaintiffs' As-Applied Second Amendment Challenge is Appropriate.**

Defendants' Opposition, which relies heavily on their characterization of Pen. Code sections 29800 and 30305 as "longstanding prohibitions," misses the nature of plaintiffs' claims. Firstly, plaintiffs seek to enjoin defendants' *policies and enforcement practices*<sup>1</sup> which prevent them from keeping firearms, for all lawful purposes including but not limited to self-defense in the home, on an as-applied basis, and not merely the statutes sitting alone. And such as-applied relief is both permissible and appropriate.

Plaintiffs are specifically bringing this motion as a necessary extension of their complaint challenging "the State of California's laws, policies, practices, and customs, as promulgated, implemented and enforced by the Defendants, which refuse to honor the judgments of other states that vacated or otherwise exonerated those disqualifying convictions, and which otherwise refuse to honor the out-of-state restoration of an individual's firearms rights, *and to the extent that it forms the basis of the Department's enforcement practices*, California Pen. Code §§ 29800 and 30305 *as applied*. (First Am. Complaint, ECF No. 36, ¶ 3, emphasis added.) The relief sought in this motion, likewise, is made on an as-applied basis. (See Plaintiffs' Memo. at 15:3-6; Proposed Order.)

Such as-applied relief is not foreclosed, even if it ultimately involves the purported "longstanding prohibitions on the possession of firearms by felons" as mentioned in dicta by *Heller*. See, *United States v. Torres*, 789 F. App'x 655, 657 (9th Cir. 2020) (Lee J., concurring) ("I do not believe either the Supreme Court or the Ninth Circuit has explicitly held that felons are categorically barred from bringing as-applied Second Amendment challenges to [18 U.S.C.] §

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<sup>1</sup>Plaintiffs requested the Department of Justice produce its written policies pertaining to the treatment of out-of-state felony convictions that have been set aside or vacated in their respective states of origin. (Lee Supp. Decl., ¶ 3.) The documents the defendants produced did not contain any express written policy, but only included a document entitled, "Background Clearance Unit [¶] DROS PROCEDURES" which the Department of Justice, Bureau of Firearms uses to process background checks in connection with firearms purchases and transfers generally. (Id., ¶ 4; Ex. B.) Defendants have otherwise taken the position that the Department's policy is simply a literal interpretation of Penal Code § 29800(a), and therefore, produced a copy of the statute itself.

1 922(g)(1). While facial challenges to § 922(g)(1) are foreclosed, the door appears to remain ajar  
 2 on whether someone can pursue an as-applied Second Amendment challenge in circumstances  
 3 where the underlying felony is so minor or regulatory in nature and has no analogue in the  
 4 Founding era.”) And in *United States v. Phillips*, 827 F.3d 1171 (9th Cir. 2016), the Ninth  
 5 Circuit recognized that “there are good reasons to be skeptical of the constitutional correctness of  
 6 categorical, lifetime bans on firearm possession by *all* felons.” 827 F.3d at 1174 (emphasis  
 7 original). In *Phillips*, the court affirmed the defendant’s conviction under section 922(g)(1), but  
 8 noted the scholarly disagreement over whether the practice of lifetime bans on firearm ownership  
 9 by felons was historically justified, and under what theory.<sup>2</sup> 827 F.3d at 1174 n.2. Ultimately,  
 10 though the court affirmed the conviction, it noted that “there may be some good reasons to be  
 11 skeptical about the correctness of the current framework of analyzing the Second Amendment  
 12 rights of felons.” *Id.* at 1176.

13 Defendants’ asserted justification for sections 29800 and 30305, framed as if this were a  
 14 facial challenge, misses the mark. The offenses constituting plaintiffs’ underlying convictions in  
 15 other states were non-violent, equivalent to “wobblers” in the State of California, and did not  
 16 involve the imposition of a prison sentence. Moreover, plaintiffs are not felons, as their  
 17 convictions were set aside, vacated and dismissed in their respective states of origin. But even  
 18 were they to be considered prior felons, plaintiffs have rebutted any presumptions in defendants’  
 19 favor and shown that defendants cannot unconstitutionally continue to restrict their fundamental  
 20 rights.

21 **2. Plaintiffs’ Underlying Convictions Were Vacated and Cannot be Used by**  
 22 **Defendants to Deny Plaintiffs’ Fundamental Rights.**

23 To the ultimate point of their Second Amendment claim, plaintiffs’ convictions were  
 24 adjudged to have been vacated, expunged, and/or set aside under the laws of those states by  
 25 courts of competent jurisdiction. Defendants’ Opposition claims that plaintiffs have cited *United*  
 26 *States v. Fowler*, 198 F.3d 808 (11th Cir. 1999) “for the proposition that they can [automatically]

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27  
 28 <sup>2</sup>See, Joseph Greenlee, *The Historical Justification for Prohibiting Dangerous Persons From Possessing Arms*, WYOMING LAW REVIEW, forthcoming (manuscript currently available online at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3509040](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3509040)).

1 possess firearms in California because federal law does not prohibit possession.” (Opp. at 11:16-  
 2 18). But plaintiffs clearly and expressly cited *Fowler* not for any implication that federal law  
 3 supersedes California law, but for the proposition that the felony conviction there was deemed to  
 4 have been *nullified*. And if nullified, in essence, it was voided or invalidated for purposes of  
 5 prohibiting the possession of firearms.

6 *Fowler* was a criminal case, in which the defendant had been convicted of the federal  
 7 felon-in-possession statute, 18 U.S.C. § 922(g)(1), a statute not at issue in the present case, but  
 8 after he had received a certificate granting him restoration of his civil rights. 198 F.3d at 809.  
 9 The Eleventh Circuit, following its precedent in *U.S. v. Swanson*, 947 F.2d 914 (11th Cir. 1991),  
 10 held that the *federal* prohibition did not apply, and reversed the conviction. See also, 18 U.S.C.  
 11 § 921(a)(20)(B). In examining Alabama law, the court in *Fowler* stated that a restoration of “all  
 12 civil and political rights,” without limitation, meant that it *nullified* “any and all legal  
 13 incapacities,” including the right to possess firearms.” *Fowler*, 198 F.3d at 809–10.

14 Most recently, the Ninth Circuit itself has touched upon this issue, indirectly. In *Roberts*  
 15 *v. City of Fairbanks*, --- F.3d ---, 2020 WL 356959, 20 Cal. Daily Op. Serv. 488 (9th Cir. No. 18-  
 16 35938, Jan. 22, 2020), the Court considered the specific question of whether plaintiffs in a §  
 17 1983 case may recover damages if the convictions underlying their claims were vacated pursuant  
 18 to a settlement agreement. According to the majority opinion, “[t]he answer depends on whether  
 19 such a vacatur serves to invalidate the convictions and thus renders the related § 1983 claims  
 20 actionable notwithstanding *Heck*.<sup>3</sup> The Court considered whether the plaintiffs’ convictions had  
 21 been “declared invalid by a state tribunal” by virtue of a settlement agreement which would thus  
 22 allow them to sue for damages under § 1983. 2020 WL 356959 at \*6. The Court stated:

23 “Because all convictions here were vacated and underlying indictments ordered dismissed, there  
 24 remains no outstanding criminal judgment nor any charges pending against Plaintiffs.” 2020 WL  
 25 356959, at \*6. And in so holding that the plaintiffs were not barred by *Heck* from pursuing §  
 26

27 \_\_\_\_\_  
 28 <sup>3</sup>*Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364 (1994). In *Heck*, the Supreme Court adopted  
 a version of the common law’s favorable-termination rule for § 1983 damages cases that “call  
 into question the lawfulness of conviction or confinement,” and stated that a plaintiff could

1 1983 claims, the Court observed: “According to Black's Law Dictionary, the definition of  
 2 ‘vacate’ is ‘to nullify or cancel; make void; *invalidate*.’ Black's Law Dictionary 1782 (10th ed.  
 3 2014)[.]” 2020 WL 356959, at \*6 (emphasis original).

4 These cases support plaintiffs’ contention here that their underlying convictions, having  
 5 been set aside and/or vacated, means they were nullified and invalidated.

6 Defendants have claimed that their policy is simply a straightforward and literal reading  
 7 of Cal. Penal Code § 29800(a) which states: “[a]ny person who has been convicted of . . . a  
 8 felony under the laws of the United States, the State of California, or any other state . . . and who  
 9 owns, purchases, receives, or has in possession or under custody or control any firearm is guilty  
 10 of a felony.” But to say that theirs is a literal reading of section 29800, and that “once convicted,  
 11 forever convicted,” ignores that the State itself disregards prior felony convictions under these  
 12 statutes, under certain circumstances. Certain felony convictions, i.e., “wobblers” suffered in the  
 13 State of California, upon the successful completion of probation, may subsequently be reduced to  
 14 misdemeanors pursuant to Penal Code § 17(b), and then dismissed. This is commonly done “on  
 15 application of the defendant.” Pen. Code § 17(b)(3). As the California Supreme Court explained  
 16 in *People v. Park*, 56 Cal.4th 782 (2013), in its present form, section 17(b)(3) allows the court to  
 17 reduce a wobbler felony conviction to a misdemeanor at the time probation is granted or at a  
 18 later time – for example, when the defendant has successfully completed probation. 56 Cal.4th  
 19 at 793. And thus, under the statutory language, a wobbler “becomes a misdemeanor” for all  
 20 purposes under section 17(b)(3), subject to the trial court’s discretion. *Id.*

21 The Department of Justice recognizes this post-conviction transmutation of a felony  
 22 conviction to a misdemeanor, by a court, to allow the purchase/possession of firearms. (See Lee  
 23 Supp. Decl., Exhibit B, p. 081: “A reduction to a misdemeanor pursuant to PC Section 17  
 24 restores the person’s right to possess a firearm.”) But to say that the felony conviction never  
 25 existed at all, and therefore does not bar firearms ownership, is simply to accept a legal fiction.  
 26 Perhaps the State is willing to accept this legal fiction because it is required to, under the plain  
 27

28 satisfy this requirement, among others, by showing that the conviction was “declared invalid by a  
 state tribunal authorized to make such determination.” 512 U.S. at 483.

1 language of section 17(b). Perhaps it does so begrudgingly. However, a California court’s  
 2 reduction of a felony conviction to a misdemeanor, and its subsequent dismissal, is not a denial  
 3 that a felony conviction existed in the first place, and it certainly merits no greater inherent  
 4 authority than another state’s court’s decision to subsequently vacate, set aside and dismiss a  
 5 felony conviction under its own laws. In both cases, the person “has been convicted” of a felony,  
 6 a metaphysical fact which the State cannot simply choose to deny when it chooses to.

7 Plaintiffs have thus established entitlement to relief from defendants’ enforcement of  
 8 Penal Code §§ 29800 and 30305 as applied to their individual circumstances. Defendants’  
 9 policies and enforcement practices are an absolute, total prohibition on the possession of firearms  
 10 and ammunition by persons convicted of certain crimes that were later vacated by the appropriate  
 11 courts in other states. As plaintiffs have demonstrated a likelihood of prevailing on the merits of  
 12 their Second Amendment claim, preliminary injunctive relief should be granted in their favor.

13  
 14 **B. DEFENDANTS HAVE NOT JUSTIFIED THE STATE’S REFUSAL TO PROVIDE FULL FAITH  
 15 AND CREDIT TO THE JUDGMENTS OF ANOTHER STATE’S COURTS.**

16 Plaintiffs have established that they will prevail on their claims under the Full Faith and  
 17 Credit Clause, art. IV § 1 of the Constitution, and its enabling statute, 28 U.S.C. § 1738. In  
 18 response, defendants claim that the state courts lacked jurisdiction, and that honoring those  
 19 judgments would somehow require California to “subordinate” its laws to the laws of other  
 20 states. Neither argument has merit.

21 **1. Defendants Have Not Established a Jurisdictional Challenge to the State  
 22 Court Judgments.**

23 Defendants’ Opposition, citing a trio of Supreme Court cases, suggests the “jurisdictional  
 24 exception” to the Full Faith and Credit Clause’s requirement that a state honor the judgments of  
 25 its sister states applies here. Defendants misstate what that exception is.

26 The jurisdictional question arises where a court calls into question whether the court from  
 27 which the judgment originated had subject matter or personal jurisdiction over the relevant  
 28 parties in the first place. See, *Underwriters Nat. Assur. Co. v. N. Carolina Life & Acc. & Health  
 Ins. Guar. Ass’n*, 455 U.S. 691, 705, 102 S.Ct. 1357, 1366 (1982) (“[B]efore a court is bound by

1 the judgment rendered in another State, it may inquire into the jurisdictional basis of the foreign  
 2 court's decree. If that court did not have jurisdiction over the subject matter or the relevant  
 3 parties, full faith and credit need not be given.”) And thus, “before a court is bound by [a]  
 4 judgment rendered in another State, it may inquire into the jurisdictional basis of the foreign  
 5 court's decree.” *V.L. v. E.L.*, --- U.S. --- 136 S.Ct. 1017, 1020 (2016) (citing *Adam v. Saenger*,  
 6 303 U.S. 59, 62, 58 S.Ct. 454 (1938)). But, the Court in *V.L.* continued, “[t]hat jurisdictional  
 7 inquiry [...] is a limited one. ‘[I]f the judgment on its face appears to be a ‘record of a court of  
 8 general jurisdiction, such jurisdiction over the cause and the parties is to be presumed unless  
 9 disproved by extrinsic evidence, or by the record itself.’” *V.L. v. E.L.*, 136 S.Ct at 1020 (citing  
 10 *Milliken v. Meyer*, 311 U.S. 457, 462, 61 S.Ct. 339, 342 (1940)). Thus, the Court has adopted a  
 11 presumption that when a court of general jurisdiction renders a judgment, it has jurisdiction to  
 12 render that judgment. *Milliken*, 311 U.S. at 462.

13 Here, there is no actual question that the courts of Washington, Arizona and Texas had  
 14 both subject matter and personal jurisdiction to render final judgments over their own criminal  
 15 proceedings. Defendants have not brought that into question, nor have they provided any  
 16 evidence calling their jurisdiction into question. The jurisdictional exception to the Full Faith  
 17 and Credit Clause simply does not apply.

18 **2. There is No Subordination to Another State’s Law by Honoring Foreign**  
 19 **Judgments.**

20 Defendants also assert that the Full Faith and Credit Clause does not compel a state to  
 21 subordinate its laws to the “conflicting” laws of another state. (Opp. at p. 14.) Yet,  
 22 confoundingly, defendants continue to support this claim by citing the same three cases which  
 23 pertain to the *legislative acts* of other states, and not court judgments. See, *Pac. Employers Ins.*  
 24 *Co. v. Indus. Accident Comm.*, 306 U.S. 493 (1939) (involving conflicting workers’  
 25 compensation statute); *Nevada v. Hall*, 440 U.S. 410 (1979) (the Clause did not require  
 26 California to apply a statutory defense limiting tort damages against the State of Nevada); *Alaska*  
 27 *Packers Ass’n v. Indus. Acc. Comm’n*, 294 U.S. 532, 548, 55 S.Ct. 518, 524 (1935) (“It follows  
 28 that not every statute of another state will override a conflicting statute of the forum by virtue of  
 the full faith and credit clause”) (all cited in defendants’ Opp. at 14.) And thus, defendants

1 continue to conflate the two concepts, wholly ignoring the recognized difference between  
2 legislative enactments and judgments. The challenge here involves the State’s refusal to honor  
3 the court *judgments* of other states, not their legislative enactments. *Baker v. Gen. Motors Corp.*,  
4 522 U.S. 222, 233, 118 S.Ct. 657 (1998) (“Regarding judgments, however, the full faith and  
5 credit obligation is exacting. A final judgment in one State, if rendered by a court with  
6 adjudicatory authority over the subject matter and persons governed by the judgment, qualifies  
7 for recognition throughout the land.”) *See also, Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430,  
8 437, 64 S.Ct. 208 (1943) (“The full faith and credit clause and the Act of Congress implementing  
9 it have, for most purposes, placed a judgment on a different footing from a statute of one state,  
10 judicial recognition of which is sought in another”).

11 The Supreme Court has expressly *rejected* any idea that a state may disregard the full  
12 faith and credit obligation simply because the state finds the policy behind the out-of-state  
13 judgment abhorrent to its own public policies. Again, there is no “roving public policy  
14 exception” to the full faith and credit due judgments. *Baker*, 522 U.S. at 233; *Estin v. Estin*, 334  
15 U.S. 541, 546 (1948); *Williams v. North Carolina*, 317 U.S. 287 (1942); *V.L. v. E.L.*, 136 S.Ct. at  
16 1020.

17 In *Finstuen v. Crutcher*, 496 F.3d 1139 (10th Cir. 2007), the Tenth Circuit held that  
18 Oklahoma’s refusal to recognize adoptions “by more than one individual of the same sex from  
19 any other state or foreign jurisdiction” was unconstitutional, and required Oklahoma to issue an  
20 amended birth certificate listing as parents both members of a California same-sex couple who  
21 legally adopted a child born in Oklahoma. *Id.* at 1141-42. The Tenth Circuit granted relief in an  
22 action brought under section 1983. The “public policy” codified by Oklahoma statute was  
23 plainly meant to prevent recognition of adoptions by same-sex couples. *Finstuen*, 496 F.3d at  
24 1148. And although the State of Oklahoma was understandably squeamish about expressly  
25 restating those “public policy” goals on appeal, it did contend “that requiring Oklahoma to  
26 recognize an out-of-state adoption judgment would be tantamount to giving the sister state  
27 control over the effect of its judgment in Oklahoma.” *Id.* at 1153. The court rejected that  
28 argument, and held that Oklahoma’s “refusal to recognize final adoption orders of other states

1 that permit adoption by same-sex couples” was unconstitutional. *Id. See also, V.L. v. E.L.*, 136  
 2 S.Ct. at 1020 (the Full Faith and Credit Clause required Alabama to recognize a same-sex  
 3 couple’s adoption order awarding the petitioner custody in Georgia).

4 Defendants here cast the State’s policy as an extension of its police power. (Opp. at  
 5 12:22-24.) But no matter how the State frames it, ultimately, it is attempting to cram a public  
 6 policy exception into a constitutional prohibition the Supreme Court has made very clear. Public  
 7 policy is simply not a reason to deny a person legal rights that have expressly been adjudicated  
 8 elsewhere, no matter how much California, Oklahoma, Alabama, or any other state might detest  
 9 the outcome. Defendants’ generalized complaint about the supposed subordination of the State’s  
 10 public policy is therefore and simply not relevant.

11 **3. The State Cannot Purport to “Punish” an Individual for Crimes Committed**  
 12 **in Another State.**

13 Defendants cite *Gamble v. United States*, 139 S.Ct. 1960 (2019) for the proposition that  
 14 different sovereigns have the right “to punish the same offense.” (Opp. at 12:25-27). Firstly, we  
 15 do not see how application of the dual sovereignty rule, as applied to the double jeopardy clause  
 16 of the Fifth Amendment, has anything to do with this case. *Gamble* addressed, exclusively, the  
 17 dual-sovereignty doctrine in its traditional context of an offense punished by both the national  
 18 and state governments, i.e., the “dual sovereigns” at issue, as a principle of federalism. There  
 19 was no consideration as to whether the two sovereigns at issue were wholly separate states. And  
 20 the one case that the majority opinion in *Gamble* cited that touches upon two states (or  
 21 territories) punishing a thief for the same offense of stealing a horse, *State v. Brown*, 2 N. C. 100,  
 22 101 (1794), seemed to actually *support* *Gamble*’s position, as that case seemingly rejected  
 23 concurrent state jurisdiction in concluding that successive prosecutions for the same offense was  
 24 against natural justice,’ and ““therefore [it could] not believe it to be law.”” *Gamble*, 139 S.Ct. at  
 25 2005 (Gorsuch, J., dissenting).

26 In their Opposition, defendants framed their laws, policies and enforcement practices as  
 27 *punitive* in nature, and concede that they seek to “*punish*” people like Messrs. Linton, Stewart  
 28 and Jones for crimes committed in other states. Indeed, the very words used by the Attorney  
 General are troubling: “even though a sister state may have chosen to set aside a conviction in

1 that state and restore an individual’s ability to possess a firearm in that state, California  
2 independently retains its lawful authority to draft its own criminal laws, regulate firearms, and  
3 provide for the protection of its citizens.” (Opp. at 13:22-25, citing *Gamble*, 139 S.Ct. at 1965.)  
4 Defendants appear to admit that their prohibition on the possession of firearms – a deprivation of  
5 an enumerated, fundamental constitutional right – is a form of retributive justice applied against  
6 plaintiffs and others like them for crimes committed (and vacated) long ago *in other*  
7 *jurisdictions*.

8 If we take defendants at their word, and they actually see their role in depriving an  
9 individual of an enumerated constitutional right as a justifiable “punishment” for crimes  
10 committed in other states, we must further ask: What is the adjudicative process that they use to  
11 separately “punish” these crimes? What tribunal, or even mere administrative process, or other  
12 fact-finding procedure is used to justify this continuing, separate punishment? What process is  
13 due to the presumed offender before important constitutional rights here can be categorically and  
14 totally denied?

15 If they are, indeed, punishing plaintiffs and others like them, then that startling reality  
16 even more begs the relief plaintiffs’ motion seeks. But even if defendants were being  
17 hyperbolic, and are not actually “punishing” plaintiffs and similarly situated individuals, they are  
18 relying solely on the fact of conviction, while wholly discarding the subsequent determinations  
19 setting aside, vacating or dismissing those convictions. If defendants are true to their own  
20 policies, that “[t]he laws of that particular state where the conviction occurred apply” in  
21 interpreting foreign criminal records (Lee Supp. Decl., Exhibit B, p. 1), then they cannot choose  
22 to accept the one fact of prior conviction while ignoring the fact that the convictions were  
23 vacated, set aside, and dismissed.

24 The right recognized in *Heller* is not a “second-class right, subject, subject to an entirely  
25 different body of rules than the other Bill of Rights guarantees[.]” *McDonald v. City of Chicago*,  
26 561 U.S. 742, 780, 130 S.Ct. 3020, 3044 (2010). The State of California cannot choose to accept  
27 another state’s judicial determination of guilt, and wholly ignore subsequent action that rendered  
28 the conviction nullified and void.

1 **C. DEFENDANTS HAVE PRESENTED NO CASE FOR HARM TO THE PUBLIC INTEREST IN**  
 2 **GRANTING AS-APPLIED RELIEF TO THESE INDIVIDUAL PLAINTIFFS.**

3 Defendants claim that granting plaintiffs the relief requested will harm the public interest.  
 4 (Opp. at 16.) Defendants specifically suggest that the State will be hampered and burdened by  
 5 requiring the Department of Justice to allow the purchase and possession of firearms by all  
 6 convicted felons “who [...] happened to convince some authority outside of California that he  
 7 ought to have access to firearms.” (Opp. at 16:21-22.) Defendants’ suggestion it will suffer such  
 8 hardships is imagined. Again, plaintiffs are quite clearly and expressly seeking *as-applied relief*  
 9 in this motion. (See Memo. in support of motion at 15:3; 11:26-28.) Plaintiffs were mindful of  
 10 the admonition of this Court at the hearing on defendants’ motion to dismiss on August 22, 2019  
 11 that it would be unlikely to grant relief on a class-wide basis. Accordingly, plaintiffs very  
 12 specifically sought and seek preliminary injunctive relief on an as-applied basis.

13 On the other hand – and putting aside defendants’ casual shrugging off well-established  
 14 authority supporting injunctive relief to prevent the threatened loss of Mr. Jones’s livelihood or  
 15 career – “it is always in the public interest to prevent the violation of a party’s constitutional  
 16 rights[.]” *Sammartano v. First Judicial Dist. Court, in & for Cty. of Carson City*, 303 F.3d 959,  
 17 974 (9th Cir. 2002) (quoting *G & V Lounge, Inc. v. Mich. Liquor Control Com’n*, 23 F.3d 1071,  
 18 1079 (6th Cir. 1994)); *Melendres v. Arpaio*, 965 F.3d 990, 1002 (9th Cir. 2012); *Preminger v.*  
 19 *Principi*, 422 F.3d 815, 826 (9th Cir. 2005) (“Generally, public interest concerns are implicated  
 20 when a constitutional right has been violated, because all citizens have a stake in upholding the  
 21 Constitution.”) Since important and fundamental constitutional rights are at stake, for all of the  
 22 plaintiffs, a preliminary injunction is in the public interest.

23 At the very least, plaintiffs have raised “serious questions” that go to the merits of their  
 24 claims, and the balance of hardships (i.e., the deprivation of rights for an extended period of  
 25 time, the possible loss of livelihood, career and liberty interests), as measured against the relative  
 26 hardships to the State in having to re-furnish the plaintiffs’ right to possess firearms and  
 27 ammunition, militates sharply in the plaintiffs’ favor under *Alliance for the Wild Rockies v.*  
 28 *Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011). *See also, Cascadia Wildlands v. Scott Timber*  
*Co.*, 715 F. App’x 621, 624 (9th Cir. 2017).

1 This Court should further dispense with the filing of a bond if it concludes that there is no  
2 realistic likelihood of harm to defendants from enjoining their conduct. *Jorgensen v. Cassidy*,  
3 320 F.3d 906, 919 (9th Cir. 2003); *Shuting Kang v. Harrison*, No. 3:18-CV-05399-JD, 2019 WL  
4 4645723, at \*2 (N.D. Cal. Aug. 13, 2019).

5  
6 **II. CONCLUSION**

7 For the foregoing reasons, and as set forth in their motion, this Court should grant  
8 plaintiffs’ motions.

9 Dated: February 3, 2020

**SEILER EPSTEIN LLP**

/s/ George M. Lee

George M. Lee

Attorneys for Plaintiffs

**SEILER EPSTEIN LLP**  
Attorneys at Law

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7 SECOND AMENDMENT FOUNDATION,  
THE CALGUNS FOUNDATION and MADISON  
8 SOCIETY FOUNDATION

9  
10 **UNITED STATES DISTRICT COURT**

11 **NORTHERN DISTRICT OF CALIFORNIA**

12 CHAD LINTON, et al.,

13  
14 Plaintiffs,

15 vs.

16 XAVIER BECERRA, in his official capacity as  
Attorney General of California, et al.,

17  
18 Defendants.

Case No. 3:18-cv-07653-JD

**SUPPLEMENTAL DECLARATION OF  
GEORGE M. LEE IN SUPPORT OF  
PLAINTIFFS' MOTION FOR PRELIMINARY  
INJUNCTION**

**[FRCP 65]**

Date: February 13, 2020  
Time: 10:00 a.m.  
Courtroom 11, 19<sup>th</sup> Floor  
Judge: Hon. James Donato

19  
20  
21  
22 SUPPLEMENTAL DECLARATION OF GEORGE M. LEE

23 I, George M. Lee, declare as follows:

24 1. I am an attorney at law, in good standing, duly licensed to practice law in this  
25 state and appear before its courts. I am admitted to practice and appear before the Northern  
26 District of California. I am counsel of record for plaintiffs Chad Linton et al. in this action. I  
27 have personal knowledge of the facts stated herein, and if called as a witness, could competently  
28 testify thereto.

2. This supplemental declaration is made in support of plaintiffs’ motion for issuance of a preliminary injunction. In this regard, this declaration authenticates the exhibit attached hereto.

**DEFENSE-PRODUCED DOCUMENTS**

3. On November 13, 2019, in response to plaintiffs’ document requests under FRCP in which plaintiffs requested, *inter alia*, “[a]ll DOCUMENTS constituting, referring or relating to the DEPARTMENT’s written policies in denying out-of-state former felons the ability to purchase and/or possess firearms in the State of California when those felony convictions have been set aside or vacated in their respective states of origin,” defendants produced its set of documents Bates labeled AGO\_LINTON\_001 through AGO\_LINTON\_113.

4. The documents did not contain any express written policy pertaining to the Department of Justice’s treatment of out-of-state felony convictions that have subsequently been set aside, vacated or dismissed. However, the documents did include a document entitled, “Background Clearance Unit [¶] DROS PROCEDURES” which the Department of Justice, Bureau of Firearms uses to process background checks in connection with firearms purchases and transfers generally. “DROS” stands for “Dealer Record of Sale.” *Bauer v. Becerra*, 858 F.3d 1216, 1218 (9th Cir. 2017).

5. Attached hereto as **Lee Exhibit B** are true and correct copies of pages AGO\_LINTON\_080 through AGO\_LINTON\_082, excerpted from the Department’s DROS Procedures document described above, and which purports to describe the Department’s interpretation of an individual’s criminal history regarding felony convictions.

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

Dated: February 3, 2020

  
GEORGE M. LEE

SEILER EPSTEIN LLP  
Attorneys at Law

**LEE EXHIBIT B**



# Background Clearance Unit DROS Procedures



## Interpreting Criminal Records

### Felony Convictions

A conviction constitutes a felony (PC 17) if the defendant received:

- State Prison
- State Prison suspended
- Proceedings suspended
- Probation
- Probation and jail, and jail was not suspended
- Sentencing to Youth Authority out of Superior Court and was later committed to State Prison; or
- If conviction is a straight felony or one of the prohibiting misdemeanors pursuant to 12021(c)(1) PC, a release from California Youth Authority (CYA) pursuant to W&I 1772 does not restore eligibility to purchase or possess a firearm

A "wobbler" is any offense punishable by the court's discretion as a misdemeanor or felony.

### **Conviction of a "wobbler" constitutes a misdemeanor if:**

- Judgment imposes a punishment other than State Prison
- Judgment imposes County Jail only
- Judgment imposes County Jail, suspended and probation is given
- Judgment imposes 365 days jail or subject received jail time and all or part of the jail time had been suspended
- Court commits defendant to the Youth Authority and declares offense to be a misdemeanor (person is still prohibited if misdemeanor offense listed in 12001.6 or 12021.1 PC)
- Court grants probation without imposition of sentence (actual sentencing) and at that time or thereafter, declares conviction to be a misdemeanor
- Probation is granted and court declared the conviction to be a misdemeanor
- Defendant is committed to Youth Authority and then paroled (still prohibited if misdemeanor offense is listed in 12001.6 or 12021.1 PC); or
- Juvenile court decided case. However, subject is prohibited if conviction is listed under 707(b) WIC, an offense described in Section 1203.073(b) PC or any offense enumerated in 12021(c)(1) OC and the person is under age 30

### **Conviction of a "wobbler" constitutes a felony if:**

- Defendant received probation only and the court did not declare offense to be a misdemeanor
- Defendant received probation and county jail as condition of probation; or
- Judgment imposes State Prison or State Prison suspended

### **Other States**

The laws of that particular state where the conviction occurred apply. If, for example, the conviction was a felony in a given state and at a given time, the DOJ considers it as a prohibition pursuant to PC Section 12021(a)(1). However, when in doubt, consult with a supervisor.



## Background Clearance Unit DROS Procedures



### Federal Law

Pursuant to Federal Law, an offense punishable by death or imprisonment exceeding one year is a felony (US Code, Title 18, Section 1). The actual sentence given does not alter this; however, PC 12021 firearms prohibition only applies if:

- A conviction of a like offense under California Law can only result in imposition of felony punishment;
- Or the defendant was sentenced to a Federal correctional facility for more than 30 days, received a fine of more than \$1,000, or received both such punishments (PC Sections 12021(b)(1) and (2)). However, when in doubt, consult with a supervisor.

### US Military Offenses

An offense punishable by death or imprisonment exceeding one year is a felony (Refer to Articles of War). The actual sentence given does not alter this.

Subjects with the following types of military discharges are firearms prohibited:

- Dishonorable Discharge
- A bad conduct discharge (BCD) would depend on the charge and the punishment for that offense. Consult with a supervisor for any subject with BCD.

### Other Countries

In the Supreme Court ruling of *US v. Bean*, foreign felony convictions cannot be used to prohibit firearm acquisition or possession.

### Subsequent Action – California Law

A dismissal pursuant to PC Section 1203.4 *does not restore* the right to possess firearms unless dated prior to 09/15/1961.

A dismissal action pursuant to PC Section 1203.4(a) restores the person's right to possess a firearm only if jail time was imposed on a misdemeanor conviction and the offense is not listed in PC Section 12021.1 or a misdemeanor conviction for domestic violence (273.5 or 243(e)(1) PC).

**A reduction to a misdemeanor pursuant to PC Section 17 restores the person's right to possess a firearm.** Exceptions are misdemeanor convictions listed under PC Sections 12001.6, 12021(c)(1) and 12021.1.

A straight felony conviction cannot be reduced to a misdemeanor pursuant to PC 17. If unsure about any PC 17 reductions, consult a supervisor.

A dismissal action pursuant to WIC Section 1772 granted after the release from CYA does not restore the right to possess firearms if the conviction was for a straight felony or a misdemeanor that would prohibit possession (California Court decision 12/87). **See Attachment 1**

A dismissal action granted pursuant to WIC Section 3200, does not restore the right to possess firearms (Opinion CR76/31/I/L, DAG Adler, 09/15/1976). **See Attachment 2**

Conviction of a felony, the record of which is subject to destruction pursuant to H&S Code Section 11361.5(b) does not bar firearm possession (Refer to Opinion No. 80-411, DAG Dobson, 06/10/1980). **See Attachment 3**

### Pardons – California Law

A California Governor's Pardon restores the right to possess firearms, but must include a Certificate of Rehabilitation pursuant to PC Section 4852.17 or Restoration of Firearms Rights pursuant to PC Section 4854.

Firearms rights are not restored if the felony involved the use of a Dangerous Weapon pursuant to PC Sections 4852.17 and 4854.



## Background Clearance Unit DROS Procedures



### Pardons / Civil Liability Relief – Other States

A person convicted of a felony in another state who has a governor's pardon from that state is prohibited from possessing a firearm in California, unless the pardon expressly restores the right to receive and possess firearms. Rights are not restored if the conviction involved the use of a dangerous weapon (AG Opinion No. 82-801, 10/13/1983). **See Attachment 4**

A person convicted of a felony in another state whose civil disabilities were removed under the laws of that state (similar to PC Section 12023.4) is prohibited from possessing handguns in California (AG Opinion No. 67-100. DAG Winkler, 07/26/1967). **See Attachment 5**

### Pardons and Grants of Relief – Federal

A person convicted of a felony under US statutes who has received a Presidential Pardon is eligible to possess firearms (Supreme Court decision Bradford v. Cardoza (19187) 195 Cal. App. 3d 361). **See Attachment 6**

A person convicted of a felony by the State of California, another state, or the Federal Government, who has received a grant of relief of disability from the BATF pursuant to Title 18, US Code, Section 925(c) is prohibited from possessing a firearm (Opinion No. CR72/63, DAG Chock, 04/03/1973). **See Attachment 7**

Under Title 18 US Code Section 5024, California is required to recognize expungement of a youthful offender's conviction pursuant to Title 18 US Code 5021. A person who has received such expungement may possess firearms in California (Opinion No. CR72/63, DAG Chock, 04/03/1973, also E. Bauer's Memo dated 02/28/1977). **See Attachment 8**

### Other Denial Categories By Department Policy

Department Policy is to deny firearm purchases to any person who:

- Has made threats against the President of the United States or another elected official.
- When the purchaser or receiver identified on the DROS form answers YES to any of the questions on the DROS form, that person is deemed ineligible to purchase or receive that firearm, even if no record exists. **See Attachment 9**

### Mental Health Denial Categories:

- A person in any of the following categories is statutorily prohibited from purchasing firearms if he or she is:
  - A mental patient in a hospital or institution (WIC 8103)
  - A mental patient on leave of absence from a hospital or institution (WIC 8103)
  - A person adjudicated by the court to be a danger to self or others as a result of mental disorder or mental illness, after 10/01/1955, and if the person was not issued a Certificate of Relief (WIC 8103)
  - A person placed under a conservatorship (WIC 8103)
  - A person who is a mentally disordered sex offender (WIC 8103 and 6300)
  - A person found by the court to be mentally incompetent to stand trial pursuant to PC Sections 1370 and 1370.1 or the law of any state or the United States
  - A person who was admitted or certified under WIC 5150 is firearms *prohibited for 5 years* from the date of release; and
  - A person who was admitted or certified under a WIC 5250, 5260, 5270.15 is firearms *prohibited for life* (pursuant to 18 USC, 922(d)(4))

### Persons in the following categories are prohibited from purchasing firearms pursuant to Department policy:

- A person who has threatened the President of the United States or another elected official. If the Background Clearance Unit has documents on file indicating a person is in this category, the individual will be denied a firearms purchase; and
- A person who was reported to the DOJ as a mental patient or former mental patient pursuant to WIC Section 8105.