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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

Case No. 2:16-cv-00578-JAD-PAL

BARRY MICHAELS on behalf of himself and all others similarly situated,

Plaintiffs,

vs.

LORETTA LYNCH, as Attorney General of THE UNITED STATES OF AMERICA and

THOMAS E. BRANDON, as DEPUTY DIRECTOR, HEAD OF THE BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES,

Defendants
_____/

PLAINTIFFS' RESPONSE TO MOTION TO DISMISS WITH CROSS-MOTION TO AMEND COMPLAINT

Plaintiff Barry Michaels on behalf of himself and all others similarly situated ("Plaintiff"), by and through his undersigned attorney(s) of record files this Response to

Defendants' Motion to Dismiss, with *Cross-Motion* to Amend Complaint pursuant to Federal Rules of Civil Procedure Rule 15(a)(2) and Local Rule 15-1, and respectfully supports the forgoing by the following Memorandum of Points and Authorities.

DATED: October 5, 2016

/s/ Michael E. Zapin

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DEFENDANT'S MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

No one starts out life as a felon. But *everyone* starts out with core, fundamental rights.

A wise professor once stood in front of her class and told her students, "you all start out with an 'A.' Now let's see how many of you can *keep* it." The criteria for the students were identical. The *results*, however, were quite varied. As one would expect.

The criteria or analysis to determine whether the core, fundamental Second Amendment right to bear arms *can be kept,* similarly, ought to be identical for every individual. Even individuals that later go on to become felons.

To suggest that the criteria for retaining an "A-grade" or retaining the core fundamental Second Amendment right is altered as to a particular student or individual because of a subsequent act of misconduct that will redefine his *status*, seems to pull the constitutional rug out from under his feet, sweeping the Second Amendment along with it.

It makes no sense to state that a felon does not have a core, fundamental Second Amendment right at the very instance that it is being ripped from him, in order to make it *easier* to do so. The express language of our Constitution would not have it.

Courts should look to the Constitution as the supreme authority and delineator of core fundamental rights; if the right implicated is a core, fundamental right, then strict scrutiny ought to apply, *regardless* of an individual's status. Though admittedly this is a minority view, and one not shared at present by our own Ninth Circuit (see e.g., *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013); *Peruta v. Cnty of San Diego*, 742 F.3D 1144 (9th Cir. 2014))

it is a view that signals a changing momentum in jurisprudence, and one worthy of this Court's reconsideration. See, e.g., *Tyler v. Hillsdale County Sheriff's Dept.*, 775 F.3d 308 (2014):

> … we prefer strict scrutiny over intermediate scrutiny. In choosing strict scrutiny, we join a significant, increasingly emergent though, as yet, minority view that concludes that **as between intermediate scrutiny and strict scrutiny** — the choice that [*United States v. Greeno*, 679 F.3d 510, 518 (6th Cir.2012)] requires —**the latter is more appropriate for assessing a challenge to an enumerated constitutional right,** especially in light of Heller's rejection of judicial interest-balancing. See *Chovan*, 735 F.3d at 1145-46, 1149-52 (Bea, J., concurring) ("**Categorical curtailment of constitutional rights based on an individual's status requires more rigorous analysis than intermediate scrutiny.**"); *NRA v. ATF* (NRA II), 714 F.3d 334, 336 (5th Cir.2013) (Jones, J., dissental,15 joined by Jolly, Smith, Clement, Owen, & Elrod, JJ.) ("[T]he level of scrutiny required [for the case] must be higher than [intermediate scrutiny]."); *Heller II*, 670 F.3d at 1284 (Kavanaugh, J., dissenting) ("Even if it were appropriate to apply one of the levels of scrutiny after Heller, **surely it would be strict scrutiny** rather than … intermediate scrutiny....").
>
> [all emphasis added]

As the *Heller* Court itself acknowledged in *District of Columbia v. Heller*, 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008):

> It has always been widely understood that the Second Amendment, like the First and Fourth Amendments, **codified a pre-existing right**. The very text of the Second Amendment implicitly recognizes the pre-existence of the right and declares only that it "shall not be infringed." As we said in United States v. Cruikshank, 92 U.S. 542, 553, 23 L.Ed. 588 (1876), **"[t]his is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence.** The Second amendment declares that it shall not be infringed ....
>
> [emph. added]

The Second Amendment contains no express *carve-out* for felons from this pre-existing core fundamental right, any more than the Constitution prescribes for a population of second-class citizenry.

The logic in demanding strict scrutiny in any instance of a core, fundamental Second Amendment challenge (*the right to bear arms in defense of hearth and home*), reveals itself through the observation of real-world and often bizarre results that occur when a *lesser* standard of scrutiny such as intermediate scrutiny, is utilized.

The Court need not look any further than the case *sub judice*, for a classic illustration of what such a bizarre result might look like. Plaintiff *has* political aspirations, having ran several times for Congress in Nevada's 3rd Congressional District, and has his eye on yet another run. The *permanency* of the civil ban contained in 18 U.S.C. §922(g)(1) (the "Statute") is irreconcilable with the fact that plaintiff, as a *present* law-abiding citizen, can become President of the United States and Commander-in-Chief, have his finger on the trigger of our nuclear arsenal, but *still* be prohibited by the Statute from having his finger on the trigger of a Colt-45.

That is a foreseeable consequence of the "reasonable fit" test of "intermediate scrutiny." *It will fit some better than others*. If only we were talking about clothing.

It is an elephant in the room. Why the courts refuse to resolve this kind of anomaly – while at the same time tacitly nodding in agreement that "it really *doesn't* make sense that Martha Stewart cannot have a gun," (see, e.g., *U.S. v. Vongxay*, 594 F.3d 1111 (9th Cir. 2010) - remains a mystery. Giving the core fundamental Second Amendment right the strict scrutiny analysis it deserves, irrespective of the *status* of the individual asserting it, would likely avoid the "Martha Stewart" or "Barry Michaels" syndrome.

There is no other federal fundamental right granted by the Bill of Rights, that *alters* such right based upon the *status* of the individual asserting it. *District of Columbia v. Heller*, 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008) (JJ.. Stevens, Souter, Ginsburg and Breyer dissenting:)

> The centerpiece of the Court's textual argument is its insistence that the words "the people" as used in the Second Amendment must have the same meaning, and protect the same class of individuals, as when they are used in the First and Fourth Amendments. According to the Court, in all three provisions—as well as the Constitution's preamble, section 2 of Article I, and the Tenth Amendment—"the term unambiguously refers to all members of the political community, not an unspecified subset." Ante, at 2790 – 2791.
>
> But the Court itself reads the Second Amendment to protect a "subset" significantly narrower than the class of persons protected by the First and Fourth Amendments; when it finally drills down on the substantive meaning of the Second Amendment, **the Court limits the protected class to "law-abiding, responsible citizens**," ante, at 2821. **But the class of persons protected by the First and Fourth Amendments is not so limited; for even felons (and presumably irresponsible citizens as well) may invoke the protections of those constitutional provisions**. The Court offers no way to harmonize its conflicting pronouncements.
>
> [all emph. added]

The above scathing criticism by the *Heller* dissent presented the majority with a can of worms. However, *Heller* was not a case grappling with a Second Amendment challenge being brought by a felon. One could only surmise that the majority felt that this was a *can* best kept *tightly-lidded*, in view of this fact.

Thus, at least for now, we do not allow laws to curb ex-felons[1] from speaking out where ordinary civilians[2] are free to do so, claiming that felons are somehow "outside of the core fundamental First Amendment right."

At least for now, we do not relax the laws of search and seizure simply because the subject individual is an ex-felon, claiming that she is "outside the core fundamental Fourth Amendment right."

---

[1] "ex-felon" used throughout to simply denote a felon that has *already* served his sentence

[2] "ordinary citizen" or "ordinary civilian" used throughout to denote one who has never been incarcerated

At least for now, we do not force ex-felons to testify against themselves any more than we would any other ordinary civilian, claiming that "the felon is outside the core fundamental Fifth Amendment right against self-incrimination."

At least for now, we do not allow instances to deprive an ex-felon of his right to counsel where ordinary civilians would *have* such right, claiming that it is permissible because "felons are outside the core fundamental Sixth Amendment right to counsel."

At least for now, we do not (*or should not*) impose punishments that amount to cruel and unusual treatment of ex-felons, where no such punishment would lie against an ordinary citizen, claiming that "felons are outside the scope of the core fundamental Eighth Amendment right against cruel and unusual punishment."

So why is the fundamental Second Amendment right, at its core, treated any differently?

Every court that has locked itself into a "status-based analysis" of the Second Amendment and the asserted infringement upon it by the Statute, engages in the same tenuous exercise. It reaches back in time. It grasps loosely at an antiquated and largely irrelevant notion of a "virtuous citizenry," in order to come to grips with what *Heller* meant when it limited the core, fundamental Second Amendment right to "law-abiding citizens."

If the term "law-abiding" with its *present* participle, condemns a felon for his historical past from which he can never recover, how is it that we can permit this felon who has served his sentence to return to a free society, run for political office, work in a myriad of other legitimate fields and professions as a productive member of society, but still label such a person as "*non*-law-abiding" simply because his past conduct may have been "traditionally" or "historically" considered "unvirtuous?"

Where the fundamental Second Amendment right is implicated, the term "law-abiding" ought to be used in its ordinary and practical "present-participle" sense, requiring observations to be made in the reasonable *present*, not in the historical past. Someone that breaks the law, serves his sentence, rejoins society and does not break the law again within a reasonable period of time thereafter, ought to be entitled to the same *presumption* of being "law-abiding" as any other ordinary civilian.

Yet, if this Court is constrained to agree that "virtuous citizenry" is the Second Amendment test for the core fundamental right and tested in its *historical* context, then surely this Court ought to define it. At the time the Bill of Rights was created, neither Martha Stewart nor Barry Michaels would have been labelled as "unvirtuous" since their respective crimes would not come into existence until a "hundred plus" years later.

U.S. v. Vongxay, 594 F.3d 1111 (9th Cir. 2010) :

> We recognize, however, that the historical question has not been definitively resolved. See C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 Harv. J.L. Pub. Pol'y 695, 714-28 (2009) (maintaining that bans on felon gun possession are neither long-standing nor supported by common law in the founding era).

If "virtuous citizenry" is the term and the test, then what about a husband who cheats on his wife? A woman who cheats on her taxes? A neighborhood gossiper that creates community discord? A person that finds a wallet full of money in the street, and chooses not to return it. It is a *sketchy* term at best, and best left to the halls of academia for historical study. Catalogue it next to the term "horsepower." Neither has any real place in a modern, evolving society.

II. BACKGROUND

For the sake of expediency, plaintiff agrees with and would reiterate the "Background" information ("18 USC § 922(g)" and "Plaintiff's Conviction") set forth in the defendants' motion to dismiss at pages 3 and 4, as though more fully set forth at length herein.

III. LEGAL STANDARDS

Similarly, plaintiff accepts the legal standards articulated by defendants at pages 4-5 of their motion to dismiss, as though more fully set forth at length herein.

IV. ARGUMENT

A. Defendants' Redressability Argument Concerning Article III Standing

Plaintiff admits that Nevada law prohibits the possession of firearms by a person who "[h]as been convicted of . . . a felony in violation of the laws of the United States of America." Nev. Rev. Stat. Ann. § 202.360(1)(b). The Nevada statute violates plaintiff's fundamental rights in similar fashion to the Statute. For this reason, plaintiff seeks leave of court (*as set forth below in the "Cross-Motion" prong of this Response*) to amend his complaint to name the appropriate State Officials and to articulate appropriate causes of action against such State Officials, in order to obtain complete legal redress. The Court is respectfully referred to the legal standards set forth in the Cross-Motion prong of this Response for the legal standards in permitting plaintiff leave to amended his pleading. The Court is also respectfully referred to plaintiff's proposed Amended Complaint, annexed hereto and made a part hereof as **EXHIBIT "A."**

In the event that this Court grants leave to plaintiff to amend plaintiff's complaint, the defendants' argument concerning the "redressability requirement" of Article III standing would

be rendered moot, and plaintiff would thereby request that defendant's motion to the extent it seeks dismissal of plaintiff's complaint based on Article III standing, be denied in its entirety.

B. Defendants' Lack of Subject Matter Jurisdiction Argument re Counts I & II

This Court can take judicial notice of 5 U.S.C. § 702, which sets forth the following:

> **A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.** The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, that any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.
>
> [emph. added]

5 U.S.C. § 703 describes the form of proceeding:

> The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute **or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments** or writs of prohibitory or mandatory injunction or habeas corpus, **in a court of competent jurisdiction**. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement."
>
> [emph. added]

Insofar as plaintiff's complaint does not seek money damages against the government, 5 U.S.C. § 702 and § 703 are applicable, and constitute a valid waiver of the government's

sovereign immunity. Plaintiff seeks leave of court to amend his complaint, to articulate 5 U.S.C. §§ 702 and 703 as a valid waiver of the government's sovereign immunity. If the Court is inclined to grant plaintiff leave of court to amend its complaint, then the Court should respectfully deny that prong of defendants' motion to dismiss seeking to dismiss plaintiff's Counts I and II for lack of subject matter jurisdiction.

C. (1) Defendants' Request to Dismiss Plaintiff's Counts I and II As Brought Under Declaratory Judgment Act, for Failure to State a Claim

Plaintiff's proposed amended complaint consolidates its present Counts I and II under its proposed modified Count III predicated on a core Second Amendment violation. Plaintiff still requests declaratory relief under its said proposed Count III, but has eliminated independent Counts based on the Declaratory Judgment Act. Thus, if the Court is inclined to grant plaintiff leave to amend its complaint, the issue as to plaintiff's present Counts I and II would be rendered moot. In such instance, plaintiff requests that the Court deny defendants' request to dismiss plaintiff's Counts I and II in its entirety.

C. (2) Defendants' Request to Dismiss Plaintiff's Count III for Failure to State a Claim ("Felons Do Not Fall Within Protections of Second Amendment")

Plaintiff's proposed amended complaint withdraws his Fifth Amendment claim on the basis asserted by defendants, under *Albright v. Oliver*, 510 U.S. 266,273 (1994) ("Where a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims.").

Plaintiff's core, fundamental Second Amendment challenge, is not so easily dispensed with, as defendants would have it ("felons do not fall within the protections of the Second Amendment").

As more fully detailed in plaintiff's Introduction ("No one starts out life as a felon") to which plaintiff would again refer this Court, there are *practical* reasons to reconsider the two-step inquiry adopted by our Ninth Circuit in *United States v. Chovan*, 735 F.3d 1127 (9th Cir. 2013), particularly as applied to non-violent law-abiding felons. There are no legitimate reasons to single out the Second Amendment from other fundamental rights, subjecting the Second Amendment to a *status-based* test of the holder.

The intermediate scrutiny routinely applied to a non-violent law-abiding felon that is subjected to a *status-based* analysis under the Statute, would deny such individual the right to bear arms in defense of hearth and home, regardless of whether such individual was a productive member of society, no matter how much he contributed to society, no matter how much he elevated himself in the process. Maybe he even designs a missile-defense system for the U.S. military.

The Statute not only sentences the non-violent felon to a life-time ban on owning a firearm- *perhaps endangering his life in the unfortunate instance of a life threatening situation* – but it sentences his loved ones, as well. *Where* in the analysis of intermediate scrutiny for the "status-based" non-violent felon holder, is the rationale to distinguish between protecting the children of a nonviolent law-abiding felon from the neighboring children of an ordinary civilian? Plaintiff does not believe that *that discussion* has ever been held, although the real-world consequences of such failure is certainly reasonably foreseeable.

In the instance of an armed attack in their home, it will offer the *children* of the non-violent law-abiding felon little solace to know that the reason their *formerly* felonious father or mother could not protect them was because a "hundred years or so ago," the felons that existed back then were considered "unvirtuous" and that's why Daddy or Mommy aren't able to save our lives today. There ought to be a remedy short of moving the kids in with the neighbors. But that *is*, in essence, the real-world remedy that intermediate scrutiny prescribes for the nonviolent law-abiding felons in this country – *and there are many of them*. Which is why class action certification in this lawsuit is being sought.

Yet, plaintiff is constrained to *not only* address the real-world consequences of applying intermediate scrutiny to the Statute in the event of a non-violent law-abiding felon who *challenges* it, but to address the methodology by which our Ninth Circuit and those around it, have been led to it.

In *United States v. Younger*, 398 F.3d 1179, 1192 (9th Cir. 2005), the Court held that § 922(g)(1) did not violate the Second Amendment rights of a convicted felon. However, in *United States v. Vongxay*, 594 F.3d I I I I (9th Cir. 2010), the Court emphasized that in *Younger*, it only performed a minimal analysis of the claim because, at the time, it was bound by *Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir. 2002), which held that the Second Amendment did not confer an individual right to possess arms. *Younger* was a "minimal analysis" case. *Younger* was also a case that was not dealing with a law-abiding non-violent felon. Younger was convicted for possession with intent to distribute cocaine, and for being a felon in possession of a firearm in violation of the Statute.

However, the analysis for refusing to distinguish between non-violent, law-abiding felons and violent felons, was extremely "light" in *Younger*. It amounted to a single citation to

a *Fifth* Circuit case, *United States v. Everist*, 368 F.3d 517, 519 (5th Cir. 2004) which rejected a Second Amendment challenge to the felon-firearm possession statute, holding that § 922(g)(1) "represents a limited and narrowly tailored exception to the freedom to possess firearms, reasonable in its purposes and consistent with the right to bear arms protected under the Second Amendment." *Everist* was a case, that dealt with a violent felon, and had *little* reason before it, to make a distinction between violent and non-violent law-abiding felons. There was no reason for the *Everist* court to question whether or not it needed to paint with such a broad brush.

The *Vongxay* court felt it was bound by *Younger*, and even revisited the Fifth Circuit *Everist* case. Reiterating the *Everist* sentiment, the *Vongxay* court stated, "a felon has shown manifest disregard for the rights of others. He may not justly complain of the limitation on his liberty when his possession of firearms would otherwise threaten the security of his fellow citizens."

Though it may be true that even a non-violent felon has "shown manifest disregard for the rights of others," presumably, that is *exactly* the reason why the non-violent felon was convicted and sentenced. *But now,* the non-violent felon has *served* his sentence. He is released from prison and allowed to mingle with society in an unlimited host of ways and continues to do so for many years – with the *exception* of purchasing a gun.

How exactly, does the nonviolent, law-abiding felon "threaten the security of his fellow citizens?" – the very rationale deployed by the Everist and Vongxay courts.

An intermediate scrutiny would not look too closely at this proposition. A *strict scrutiny*, however, would demand a closer look and would find that there was no such threat. A strict scrutiny would ask: is the *purpose* of applying the Statute to non-violent, law-abiding felons *really* to protect the "security" of the non-violent felon's fellow citizens? Or is it simply exacting

an *additional* punishment for such felons, on a "guilt by association" basis – a form of *overbreadth*.

The defendant in *United States v. Chovan*, 735 F.3d 1127 (9th Cir. 2013), may have been a *misdemeanant*, but if given a choice, most reasonable people would cross on over to Martha Stewart's side of the street from Daniel Chovan's, given his propensity to exact corporal punishment on his female counterpart. The "violent" nature of the charge did not go unnoticed by the *Chovan* court. It relied upon *United States v. Skoien*, 614 F.3d 638, 641 (7th Cir.2010), which observed:

> … firearms cause injury or death in domestic situations, and that [d]omestic assaults with firearms are approximately twelve times more likely to end in the victim's death than are assaults by knives or fists." (citing Linda E. Saltzman, James A. Mercy, Patrick W. O'Carroll, Mark L. Rosenberg & Philip H. Rhodes, *Weapon Involvement and Injury Outcomes in Family and Intimate Assaults*, 267 J. Am. Med. Ass'n 3043 (1992)).

Since *Chovan* was a violent offender, albeit a misdemeanant, the *Chovan* court had little reason to triumph the cause of the non-violent, law-abiding felon.

In a more recent case cited by defendants, *United States v. Phillips*,_ F.3d _, 2016 WL 3675450, at *3 (9th Cir. July 6, 2016), the defendant Phillips is also easily distinguishable from plaintiff at our case *subjudice*. Phillips was not law-abiding. He violently resisted arrest and fled from police officers requiring the police to "subdue him" before they were able to search his vehicle to find drugs, a scale and money. A few months later the revolving door of justice took another spin for Phillips. He again fled police officers, dropping a .45 caliber handgun, a high capacity magazine, and his wallet, complete with several forms of identification and his recent bail receipt. These are simply not the kinds of facts that make a court warm and fuzzy enough to want to parse the Statute in order to distinguish between violent and non-violent, law-

abiding felons. And of course the *Phillips* court declined to do so, finding itself "foreclosed" by "binding precedent."

Plaintiff submits that these are all very good reasons to distinguish plaintiff from the defendants in the cases cited by the government. These are compelling reasons to distinguish violent felons from the non-violent, law-abiding felons that the Statute snares without distinction.

Whether this learned Court revisits the issue of applying strict scrutiny in this case because the Constitution ought to require it, or because of the real world consequences of applying a *lesser* standard, or because the plaintiff in our case at bar is easily distinguishable from the defendants that have come before the Ninth Circuit, this is an opportunity for *this* Court to see that equity, in its grandest and most historical sense, ought to be done, and would demand no less.

Tyler v. Hillsdale County Sheriff's Department, 775 F.3d 308 (2014):

> The Supreme Court has suggested that there is a presumption in favor of strict scrutiny when a fundamental right is involved. See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 721, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997) (strict scrutiny applies to "fundamental" liberty interests); id. at 762, 117 S.Ct. 2258 (Souter, J., concurring in the judgment) (discussing "fundamental" rights and "the corresponding standard of `strict scrutiny'"); see also *Poe v. Ullman*, 367 U.S. 497, 548, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1961) (Harlan, J., dissenting) ("[E]nactment[s] involv[ing]... fundamental aspect[s] of `liberty' ... [are] subjec[t] to `strict scrutiny.'").

Plaintiff submits that it has a core, fundamental Second Amendment right that is unfairly infringed upon by the Statute, and that this Court should find as such, by denying that branch of defendants' motion that seeks to dismiss plaintiff's Count III predicated on the Second Amendment.

C. (3) Defendants' Request to Dismiss Plaintiff's Count IV for Failure to Identify a Protected Liberty

As set forth above, plaintiff maintains that it *does* in fact have a constitutionally protected liberty or property interest (i.e., a core, fundamental Second Amendment right to bear arms in defense of hearth and home), meeting the test of *Brewster v. Bd. of Education of Lynwood*, 149 F.3d 971,982 (9th Cir. 1998) cited to by defendants.

The cases cited to by defendants for its proposition that hearings on dangerousness are "a bootless exercise," (e.g., *Connecticut Department of Public Safety v. Doe*, 538 U.S. 1, 7 (2003)) underscore the fact that plaintiff's conviction was by its very terms, a non-violent or "non-dangerous" conviction.

Despite defendants' belief to the contrary, Congress does not save itself from the Constitution by attempting to "legislate away" fundamental constitutional rights (defendants' reliance upon *Black v. Snow*, 272 F. Supp. 2d21,34 (D.D.C. 2003), aff'd,ll0 F. App'x 130 (D.C. Cir.2004) at page 12 of defendants' motion to dismiss). The Second Amendment is a right that precedes the Constitution, *District of Columbia v. Heller*, 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008). Not even Congress should be able to infringe upon it, without a compelling reason to do so and a means that is narrowly tailored. Under a strict scrutiny analysis, the Court should find the Statute overbroad and unconstitutional as applied to plaintiff. The Court should recognize plaintiff's Second Amendment right as a protected liberty, and deny that branch of defendants' motion that seeks dismissal of plaintiff's Count IV.

C. (4) Defendants' Request to Dismiss Plaintiff's Count V Bill of Attainder Claim

None of the cases cited to by defendants that stand for the proposition that the Statute is *not* an unlawful bill of attainder, have actually observed or introduced any empirical proof that

a law-abiding, non-violent felon may "have a somewhat greater likelihood than other citizens to misuse firearms." *United States v. Munsterman*, 177 F.3d I 139, 1142 (9th Cir. 1999); see also *Williams v. United States*,426 F.2d 253,255 (9th Cir. 1970). The proposition paints *all* felons – violent and law-abiding nonviolent alike - with the same broad brush.

Thus, lack of empirical data notwithstanding, the Statute legislatively determines plaintiff's guilt that plaintiff *has* a "somewhat greater likelihood to misuse a firearm." It is the very essence of an unlawful bill of attainder – a legislative determination of plaintiff's guilt without the benefit of a trial. The fact that plaintiff *had* "a trial" ought not satisfy the safeguards of due process, since the subject matter of whether or not plaintiff had a "somewhat greater likelihood to misuse a firearm" was never in play. Plaintiff's trial was about a completely different subject matter. The implementation of the Statute has a certain "bait and switch" feel to it. *Be tried for one matter; be convicted of another.*

A strict scrutiny analysis of the Statute as applied to plaintiff, would result in the Statute being deemed an unlawful bill of attainder. It is for these reasons that the branch of defendants' motion that seeks to dismiss plaintiff's Count V, be dismissed in its entirety.

C. (5) Defendants' Request to Dismiss Plaintiff's Count VI for Cruel and Unusual Punishment

The cases defendant cites in support of its motion to dismiss plaintiff's Count VI are not very pursuasive. Defendants' reliance upon *United States v. Watkins*, 12 F.3d 1110 (9th Cir. 1993) is irrelevant to the issue before this Court. Watkins' Eighth Amendment challenge related to his *sentence* of life without parole for a serious drug crime; it had nothing to do with the Statute and its lifetime civil ban.

Defendants also rely upon *United States v. Jester*, 139 F.3d I 168, 1 170 (7th Cir. 1998), which it is submitted, had a flawed rationale. The *Jester* court:

> the statute does not empower federal law enforcement officials to arrest a person merely because that person was once convicted of a felony. Rather, the statute is triggered only when the felon commits the *volitional* act of possessing a firearm that has traveled in interstate commerce.

Thus, the Jester court took the position that the Statute could not constitute cruel and unusual punishment, since it was only triggered by a volitional act of possessing a firearm. The problem with this rationale is that it fails to consider that the Statute permanently deprives a law-abiding non-violent felon such as plaintiff from *ever* exercising his core, fundamental Second Amendment right, irrespective of how long he has been law-abiding, irrespective of the fact that he lives among and commingles in a civilized society, perhaps even enhancing it. It is not the volitional act of *possessing* the firearm that is dispositive on the cruel and unusual punishment issue; it is the permanent *deprivation* of the core, fundamental right – something the *Jester* court overlooked.

Equally unpersuasive is *United States v. Lewis*, 236 F.3d 948, 950 (8th Cir. 2001), which dealt with a violent misdemeanant. Plaintiff does not question that Congress has a compelling reason to restrict access to guns by individuals with violent propensities. On the other hand, Plaintiff, non-violent by nature and non-violent by charge, has little to protect the world from, by a permanent deprivation of his Second Amendment right. For these reasons, the Court should sustain plaintiff's Count VI and deny defendant's motion to dismiss same.

V. CROSS-MOTION TO AMEND COMPLAINT

Federal Rules of Civil Procedure Rule 15(a)(2), provides in pertinent part, that a party may amend its pleading upon leave of court, and that such leave should be freely given when the interests of justice so require it. Plaintiff has articulated cognizable claims based on fundamental constitutional rights, and its proposed amended complaint would resolve many of the issues raised by defendants' motion. There is enough as stake here for our individual plaintiff, to warrant the requested relief in this Cross-Motion; the Court can also consider that the issues facing plaintiff have a commonality with a very large class, for which class certification will be sought. In the interests of justice for plaintiff and those additional prospective plaintiffs, it is respectfully requested that the cross-motion to amend plaintiff's complaint in the form annexed hereto as **EXHIBIT "A"** be granted in its entirety.

WHEREFORE, for all of the forgoing reasons, it is requested that defendants' motion to dismiss be denied in its entirety, and that plaintiff's cross-motion to amend its complaint be granted in its entirety along with such other and further relief as the Court deems just and proper.

DATED: October 5, 2016 *<u>/s/ Michael E. Zapin</u>*

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

BARRY MICHAELS on behalf of himself and all others similarly situated,

Case No. 2:16-cv-00578-JAD-PAL

Plaintiffs,

vs.

AMENDED COMPLAINT

LORETTA LYNCH, as Attorney General of THE UNITED STATES OF AMERICA and

THOMAS E. BRANDON, as DEPUTY DIRECTOR, HEAD OF THE BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES,

ADAM PAUL LAXALT, as Attorney General of THE STATE OF NEVADA,

Defendants

_____/

BARRY MICHAELS, on his own behalf and on behalf of all others similarly situated, by his undersigned counsel, MICHAEL E. ZAPIN, ESQ. and HERMAN A. SAITZ, ESQ., files this **Amended** Complaint against the above captioned defendants, respectfully alleging as follows:

I. THE PARTIES

1. Plaintiff Barry Michaels ("plaintiff") is a natural person and citizen of the United States of America, residing in Las Vegas, Nevada. Plaintiff is a convicted *non-*

violent felon who completed his sentence more than five years ago, has not committed any crimes within such time, is not a fugitive from justice, has not been discharged from the Armed Forces under dishonorable conditions, is not an unlawful user of or addicted to any controlled substances, has not been adjudicated as a mental defective or committed to a mental institution, is not on parole or probation, is not under indictment or restraint, desires to purchase a firearm for lawful purposes, but refrains from doing so only because he reasonably fears criminal prosecution under 18 U.S.C. § 922(g)(1) as directed and enforced by the defendants, and is accordingly deprived of his Second Amendment right, due to enforcement of 18 U.S.C. § 922(g)(1), which is unconstitutional *as applied* against him.

2. Defendant Loretta Lynch ("defendant Lynch") is sued in her representative capacity as Attorney General of The United States of America, charged with the responsibilities of supervising and directing the administration and operation of the Department of Justice, including the Federal Bureau of Investigation, Drug Enforcement Administration, Bureau of Alcohol, Tobacco, Firearms and Explosives, Bureau of Prisons, Office of Justice Programs, and the U.S. Attorneys and U.S. Marshals Service, which are all within the Department of Justice.

3. Defendant Thomas E. Brandon ("defendant Brandon") is sued in his representative capacity as Deputy Director and Head of the Bureau of Alcohol,

Tobacco, Firearms & Explosives ("ATF"). As the Head of ATF, defendant Brandon is in charge of the Bureau and responsible for the unique law enforcement agency within the U.S. Department of Justice charged with enforcing firearms and explosives laws and regulations that protect communities from violent criminals and criminal organizations.

4. ***Defendant Adam Paul Laxalt, is sued in his representative capacity as Attorney General of the State of Nevada, who serves as the constitutional officer in the executive branch of the Nevada state government, and also as the State's Chief Legal Counsel.***

II. JURISDICTION

5. The Court has subject matter jurisdiction based on 28 U.S.C. §§ 1331, 1343(a)(1), 1346(a)(2), 2201(a) and 2202.

III. VENUE

6. Venue in the within Court is proper based on 28 U.S.C. §§ 1391 and 1402(a)(1).

IV. WAIVER OF SOVEREIGN IMMUNITY

7. ***The United States and/or its designated representatives named herein, have waived sovereign immunity pursuant to 5 U.S.C. § 702 and § 703.***

8. ***The State of Nevada and/or its designated representatives named herein, have waived sovereign immunity pursuant to NRS 41.03.***

IV. STATEMENT OF FACTS

A. Background

9. The Second Amendment to the United States Constitution ("Second Amendment") sets forth, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

10. The Second Amendment has been construed to confer an individual right to keep and bear arms, *Dist. Of Columbia V. Heller*, 554 U.S. 570 (2008).

11. On October 22, 1968, the United States Congress enacted *The Gun Control Act of 1968*, codified at 18 U.S.C. 922 ("the Act"). The express purpose of the Act was:

> … to provide support to Federal, State and Local law enforcement officials in their fight against crime and violence, and **it is not the purpose of this title to place any undue or unnecessary restrictions or burdens on law-abiding citizens** with respect to the acquisition, possession or use of firearms appropriate to the purpose of hunting, trapshooting, target shooting, personal protection, or any other lawful activity, and that **this title is not intended to discourage or eliminate the private ownership or use of firearms by law abiding citizens…**
>
> [emph. added]

18 U.S.C. § 922(g), sets forth, in pertinent part:

> It shall be unlawful for any person –

(1.) **who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year**; …

… to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or **to receive any firearm or ammunition** which has been shipped or transported in interstate or foreign commerce.

[emph. added]

12. The thrust of the Act and its amendments was intended to prevent or minimize the number of violent crimes committed in the United States, see e.g., the *Brady Handgun Violence Protection Act* of 1993, which implemented a waiting period before the purchase of a handgun, and the establishment of a national instant criminal background check system for firearms dealers before transferring any firearms, as additional safeguards to ward off handgun violence.

B. Class Action Allegations

13. Pursuant to the Federal Rules of Civil Procedure, Rule 23(a) and 23(b), Plaintiff brings this action on his own behalf ***and on behalf of a large class (the "Class Members")*** of similarly situated persons who plaintiff asserts is defined as follows:

> **Natural persons and citizens of the United States of America, *who reside in the State of Nevada*, who are convicted non-violent felons who completed their sentence(s) more than five years ago, have not committed any crimes within such time, are not fugitives from justice,**

have not been discharged from the Armed Forces under dishonorable conditions, are not unlawful users of or addicted to any controlled substances, have not been adjudicated as mental defectives or committed to a mental institution, are not on parole or probation, are not under indictment or restraint, desire to purchase a firearm for lawful purposes, but refrain from doing so only because they reasonably fear criminal prosecution under 18 U.S.C. § 922(g)(1) *and under Nev. Rev. Stat. Ann. § 202.360(1)(b)* as directed and enforced by the defendants, and are accordingly deprived of their fundamental Second Amendment right(s) due to enforcement of 18 U.S.C. § 922(g)(1), against them.

Plaintiff and Class Members jointly referred to as "plaintiffs" herein.

14. The plaintiffs seek certification of claims for declaratory relief pursuant to 28 U.S.C. 2201, injunctive relief pursuant to 28 U.S.C. 2202 and costs and reasonable counsel fees pursuant to 28 U.S.C. 2412.

15. This action is brought as a class action pursuant to the Federal Rules of Civil Procedure, Rule 23.

16. ***Numerosity of the Class:*** ***The Class*** is so numerous that the individual joinder of all members, in this or any action is impracticable. The exact number or identification of Class members is presently unknown to plaintiff, but is believed to be well in excess of ***one million***. [1] The identity of Class members and their

[1] As reported on 10-/24/2012 by Reuters, Christopher Uggen, a University of Minnesota sociologist, who co-authored a 2006 book, "Locked Out: Felony

last known addresses may be ascertained from defendants' records. Class Members may be informed of the pendency of this action by a combination of means including but not limited to direct mail, perhaps utilizing records possessed by defendants, public notice /legal advertisements including use of the internet, leading to registration on a website (e.g., www.americansforcivilrights.org/join-the-class-action is a webpage that plaintiff has set up for such purpose).

17. **Common Questions of Law**: Common legal questions shared by the Class that concern the United States Constitution include:

    a. Does 18 U.S.C. § 922(g)(1) and ***Nev. Rev. Stat. Ann. § 202.360(1)(b)*** *as applied* to the Class violate their fundamental Second Amendment right to bear arms?

    b. Are 18 U.S.C. § 922(g)(1) and ***Nev. Rev. Stat. Ann. § 202.360(1)(b)*** *as applied* to plaintiffs, ***unlawful bills of attainder*** under the U.S. Constitution, Article I, § 9, Clause 3, insofar as ***they*** amount to a legislative determination of guilt (i.e., "*non-violent* felons are essentially the same as *violent* felons" – stated another way: "guilt by association"),

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Disenfranchisement and American Democracy" participated in a 2010 study that found there were approximately 20 million felons in the United States, including 1.5 million that were then incarcerated. Of the 18.5 million that were no longer incarcerated as of 2010, and the additional numbers of felons that have been released since 2010, plaintiff submits that it is a reasonable assumption that the class of non-violent felons identified as Class members herein, exceeds five million.

and a legislative imposition of punishment upon plaintiffs who are affiliated with an easily ascertainable group (i.e., "felons") without a judicial trial, thereby usurping the role of judicial determination and sentence?

c. Should the Court determine that 18 U.S.C. §922(g)(1) as codified in the Criminal Code, and ***Nev. Rev. Stat. Ann. § 202.360(1)(b)*** which only affect convicted felons, and which *permanently* deprives the Class of their fundamental Second Amendment right to bear arms, ***are violations*** of the Eighth Amendment's safeguard against cruel and unusual punishment, *as applied* to the Class?

d. Are Class Members entitled to the same presumption of being "law-abiding citizens" under the Act, as ordinary citizens who have never been convicted of a crime?

e. Is there any basis to assume that a *non-violent* felony offender who has completed his/her sentence and has been law abiding for more than five years, will become a *violent* offender simply because (s)he is permitted to possess a firearm?

    i. If there *is* no such basis, shouldn't 18 U.S.C. § 922(g)(1) and ***Nev. Rev. Stat. Ann. § 202.360(1)(b)*** be deemed unconstitutional under the Second Amendment *as applied* to the Class?

f. Is there any basis to assume that a non-violent felony offender who has completed his/her sentence and has been law abiding for more than five years, will become a repeat non-violent offender simply because (s)he is permitted to possess a firearm?

i. If there *is* no basis shouldn't 18 U.S.C. § 922(g)(1) and ***Nev. Rev. Stat. Ann. § 202.360(1)(b)*** be deemed unconstitutional under the Second Amendment as applied to the Class?

18. **Typicality**: Plaintiff's claims are typical of the claims of the members of the Class because plaintiff and the Class Members ***are all residents of the State of Nevada***, non-violent felons who completed their sentences more than five years ago, have not committed any crimes within such time, are not fugitives from justice, have not been discharged from the Armed Forces under dishonorable conditions, are not unlawful users of or addicted to any controlled substances, have not been adjudicated as mental defectives or committed to a mental institution, are not on parole or probation, are not under indictment or restraint, and desire to purchase a firearm for lawful purposes, but refrain from doing so only because they reasonably fear criminal prosecution under 18 U.S.C. § 922(g)(1) and ***Nev. Rev. Stat. Ann. § 202.360(1)(b)*** as directed and enforced by the defendants, and are accordingly deprived of their fundamental Second Amendment right(s) due to enforcement of ***those statutes*** against them. Thus,

the asserted constitutional violations for both plaintiff and the Class Members are identical.

19. **Adequacy**: Plaintiff is an adequate representative of the Class because his interests do not conflict with the interests of the members of the Class he seeks to represent. Plaintiff intends to prosecute this action vigorously. Plaintiff will fairly and adequately protect the interest of the members of the Class.

20. This suit may also be maintained as a class action pursuant to Federal Rules of Civil Procedure 23(b)(2) because plaintiff and the Class seek declaratory and injunctive relief, and all of the above factors of numerosity, common questions of law, typicality and adequacy are present. Defendants have acted on grounds generally applicable to plaintiff and the Class as a whole, thereby making declaratory and/or injunctive relief proper.

21. **Predominance and Superiority**: This suit may also be maintained as a class action under Federal Rules of Civil Procedure 23(b)(3) because questions of law common to the Class predominate over the questions affecting only individual members of the Class and a class action is superior to other available means for the fair and efficient adjudication of this dispute.

22. Under Federal Rules of Civil Procedure Under Rule 23(b)(1)(A), there is also a risk that Class Members, who share *identical* characteristics as set forth in par. ***13*** above - *if relegated to filing individual actions to seek redress* - would see

those actions result in inconsistent or varying adjudications that would establish incompatible standards of conduct for the defendants.

23. Furthermore, it would be virtually impossible for the Class Members, on an individual basis, to obtain effective redress for the wrongs done to them. Moreover, even if Class Members themselves could afford such individual litigation, the court system could not. Individual litigation presents a potential for inconsistent or contradictory judgments. Individualized litigation increases the delay and expenses to all parties and the court system presented by the complex legal issues of the case. By contrast, the class action device presents far fewer management difficulties and provides the benefits of a single adjudication, economy of scale, and comprehensive supervision by a single court.

COUNT I

Violation of Second Amendment

24. Plaintiffs repeat paragraphs ***1 through 23*** above as though more fully set forth at length herein.

25. Although the express purpose of the Act states that its intention was "to provide support to…law enforcement officials in their fight against crime and violence," the statute as written, only provides support to law enforcement officials in their fight against violent crime.

26. The subject matter of each and every section of the Act deals specifically with firearms, ammunition and the controls and restrictions to be placed thereon, and excludes any reference to e.g., "white collar" crimes such as "insider trading" or "mortgage fraud," etc.

27. With respect to § 922(g)(1) of the Act, and with respect to ***Nev. Rev. Stat. Ann. § 202.360(1)(b),*** there is no empirical data available or any rational basis to suggest that prohibiting a non-violent felon from possessing a firearm would do anything to prevent him/her from committing another non-violent crime, nor is there anything ***in either statute*** to suggest otherwise.

28. Thus, the use of the conjunctive "and" in the stated purpose of the Act is ambiguous at best where the statute is inherently designed to safeguard against violent crimes and not all crimes generally.

29. Accordingly, plaintiffs are entitled to a declaration by this Court pursuant to 28 U.S.C. § 2201 that the implicit purpose(s) of the Act ***and Nev. Rev. Stat. Ann. § 202.360(1)(b),*** was/were to prevent violent crimes.

30. The characteristics of the Class as set forth in paragraph ***13*** above, to be proven upon the trial or earlier disposition of this action, establish that the plaintiffs are no more dangerous than ordinary "law-abiding" citizens who have never been convicted of any crime.

31. Accordingly, plaintiffs are entitled to a declaration by this Court pursuant to 28 U.S.C. § 2201 that they enjoy the same presumption of being (a) "law-abiding"

citizen(s) as any non-convicted person(s) are, and are entitled to enjoy the same fundamental Second Amendment right(s).

32. All core, fundamental rights spring from the Constitution itself, which is the very foundation for all laws in this nation. The Second Amendment contains no express or implied limitation on the right of *any* citizen, *including felons*, to keep and bear arms.

33. If Congress intended to limit such right, it could have done so, as it did with respect to the right to vote, under section 2 of the 14th amendment.

34. By virtue of the forgoing, plaintiffs are within the class of citizens that the Second Amendment was designed to protect.

35. Plaintiffs seek to purchase a firearm for lawful purposes and therefore the 18 U.S.C. § 922(g)(1) and ***Nev. Rev. Stat. Ann. § 202.360(1)(b)*** prohibitions *as applied* to the Class, deprive them of a core, fundamental liberty guaranteed to them by the Second Amendment.

36. Plaintiffs are no more dangerous than any other law-abiding citizens who have never been convicted of any crimes.

37. Inasmuch as plaintiffs' are deprived of a core fundamental liberty, 18 U.S.C. § 922(g)(1), and ***Nev. Rev. Stat. Ann. § 202.360(1)(b)*** *as applied* to plaintiffs, needed to be narrowly tailored to serve a compelling governmental interest. Under a *strict scrutiny* analysis, the burden of proof is on the defendants to show

that the means they used to affect the purpose of the statute was the *least* intrusive to plaintiffs.

38. Although the *compelling* governmental interests in 18 U.S.C. § 922(g)(1) and in ***Nev. Rev. Stat. Ann. § 202.360(1)(b)*** were to prevent violent crimes, the ***statutes*** *as applied* to plaintiffs ***are*** not *narrowly tailored* to serve ***those interests***, as ***they*** broadly sweep in a large class of *non-violent* felons within ***their prohibitions***, unlawfully encroaching upon plaintiffs' core, fundamental Second Amendment rights.

39. By virtue of the forgoing, ***18 U.S.C. § 922(g)(1) and in Nev. Rev. Stat. Ann. § 202.360(1)(b) deprive plaintiffs of their core fundamental Second Amendment rights.***

40. Plaintiffs are entitled to are also entitled to injunctive relief pursuant to 28 U.S.C. 2202 enjoining the defendants from enforcing 18 U.S.C. § 922(g)(1) and ***Nev. Rev. Stat. Ann. § 202.360(1)(b)*** against them.

COUNT II

Violation of U.S. Constitution Art. I § 9 Cl. 3

("Unlawful Bill of Attainder")

41. Plaintiffs repeat paragraphs 1 through 23 above, as though more fully set forth at length herein.

42. "The theory upon which our political institutions rest is, that all men have certain inalienable rights -- that among these are life, liberty, and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions, are alike open to everyone, and that in the protection of these rights all are equal before the law. Any deprivation or suspension of any of these rights for past conduct is punishment, and can be in no otherwise defined," *Cummings v. Mo.*, 71 U.S. 277, 18 L. Ed. 356, 1866 U.S. LEXIS 885, 4 Wall. 277 (U.S. 1867).

43. Defendants cannot avail of any pretext assertion that "18 U.S.C. § 922(g)(1) and ***Nev. Rev. Stat. Ann. § 202.360(1)(b) are*** *not* intended to punish but ***are*** intended to serve as a public safety measure in the prevention of violent crime," since "punishment" by definition includes several purposes: retributive, rehabilitative, deterrent and preventative, *United States v. Brown*, 381 U.S. 437, 85 S. Ct. 1707, 14 L. Ed. 2d 484, 1965 U.S. LEXIS 2206, 51 Lab. Cas. (CCH) P19,752, 59 L.R.R.M. 2353 (U.S. 1965).

44. 18 U.S.C. § 922(g)(1) and ***Nev. Rev. Stat. Ann. § 202.360(1)(b)*** *as applied* to plaintiffs, constitute *legislative* ***determinations*** of "guilt by association" (i.e., "*non-violent* felons such as plaintiffs, are essentially the same as *violent* felons" – no distinction drawn by the statutes), and *legislative* impositions of *life-long* punishments upon plaintiffs for their past felony offense(s), usurping the role of the judiciary to make such determination – *if any* - and imposition.

45. Plaintiffs are a *subset* of a specific group identity ("felons") that have a meaningful existence outside of 18 U.S.C. § 922(g)(1) and ***Nev. Rev. Stat. Ann. § 202.360(1)(b).***

46. By virtue of the forgoing, plaintiffs are entitled to a Declaratory Judgment under 28 U.S.C. 2201, that 18 U.S.C. § 922(g)(1) and ***Nev. Rev. Stat. Ann. § 202.360(1)(b)*** *as applied* to plaintiffs, constitute unlawful ***bills*** of attainder under the U.S. Constitution, Article I, § 9, Clause 3, that consequently violate plaintiffs' fundamental Second Amendment right(s) to bear arms.

47. Plaintiffs are also entitled to injunctive relief under 28 U.S.C. 2202, enjoining the defendants from enforcing 18 U.S.C. § 922(g)(1) and ***Nev. Rev. Stat. Ann. § 202.360(1)(b***) against them.

COUNT III

Violation of Eighth Amendment Right Against Cruel and Unusual Punishment

48. Plaintiffs repeat paragraphs 1 through 23 above, as though more fully set forth at length herein.

49. Plaintiffs dutifully served their sentences as prescribed by the judiciary in each of their given cases, but are now subjected to *additional punishment* meted out by Congress and the Nevada State legislators, and enforced by the defendants, in the form of a permanent or lifelong deprivation of a core, fundamental liberty (*plaintiffs' right to bear arms under the Second Amendment*), without any

substantive or procedural due process of law, notwithstanding the fact that by their very nature and essence, they are non-violent and have been law-abiding for a period greater than five years from the completion of their respective sentences.

50. That the permanency and nature of the deprivation, when viewed in the light and relation to the offense committed, constitutes a cruel and unusual punishment as a matter of law.

51. By virtue of the forgoing, plaintiffs are entitled to a Declaratory Judgment under 28 U.S.C. 2201, that 18 U.S.C. § 922(g)(1) and ***Nev. Rev. Stat. Ann. § 202.360(1)(b)*** *as applied* to plaintiffs, constitute violations of plaintiffs' Eighth Amendment right against cruel and unusual punishment.

52. Plaintiffs are also entitled to injunctive relief under 28 U.S.C. 2202, enjoining the defendants from enforcing 18 U.S.C. § 922(g)(1) and ***Nev. Rev. Stat. Ann. § 202.360(1)(b)*** against them.

WHEREFORE, plaintiffs respectfully demand judgment against defendants as follows:

a. On Count I, awarding plaintiffs a declaratory judgment against defendants pursuant to 28 U.S.C. 2201, that the *implicit* purposes of the Act and ***Nev. Rev. Stat. Ann. § 202.360(1)(b) were*** to prevent violent crimes; and awarding plaintiffs a declaratory judgment against defendants pursuant to 28 U.S.C. 2201 that plaintiffs enjoy the same *presumption* of being (a) "law-abiding" citizen(s) as any *non-convicted* person(s) are, and are entitled to enjoy the same fundamental Second Amendment right(s); and

awarding plaintiffs a declaratory judgment against defendants pursuant to 28 U.S.C. 2201, that plaintiffs' Second Amendment right(s) have also been equally violated; and

b. permanent injunctive relief under 28 U.S.C. 2202 enjoining the defendants from enforcing 18 U.S.C. § 922(g)(1) and ***Nev. Rev. Stat. Ann. § 202.360(1)(b)*** against them; and

2. On Count II:

a. awarding plaintiffs a declaratory judgment against defendants pursuant to 28 U.S.C. 2201, that 18 U.S.C. § 922(g)(1) and ***Nev. Rev. Stat. Ann. § 202.360(1)(b)*** *as applied* to plaintiffs, constitute unlawful bills of attainder under the U.S. Constitution, Article I, § 9, Clause 3, that consequently violate plaintiffs' fundamental Second Amendment right(s) to bear arms; and

b. permanent injunctive relief under 28 U.S.C. 2202 enjoining the defendants from enforcing 18 U.S.C. § 922(g)(1) and ***Nev. Rev. Stat. Ann. § 202.360(1)(b)*** against them; and

3. On Count III :

a. awarding plaintiffs a declaratory judgment against defendants pursuant to 28 U.S.C. 2201, that 18 U.S.C. § 922(g)(1) and ***Nev. Rev. Stat. Ann. § 202.360(1)(b)*** *as applied* to plaintiffs, constitute violations of plaintiffs' Eighth Amendment right against cruel and unusual punishment; and

b. permanent injunctive relief under 28 U.S.C. 2202 enjoining the defendants from enforcing 18 U.S.C. § 922(g)(1) and ***Nev. Rev. Stat. Ann. § 202.360(1)(b)*** against them; and

4. Awarding plaintiffs reasonable counsel fees, costs and disbursements pursuant to 28 U.S.C. 2412; and

5. Such other and further relief which the Court deems just and proper.

DATED: October 6, 2016

Yours, etc.

/s/ Michael E. Zapin
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