George M. Lee (SBN 172982)
SEILER EPSTEIN ZIEGLER & APPLEGATE LLP
601 Montgomery Street, Suite 2000
San Francisco, California 94111
Phone: (415) 979-0500
Fax: (415) 979-0511

Attorneys for Plaintiffs
CHAD LINTON, PAUL MCKINLEY STEWART,
FIREARMS POLICY FOUNDATION,
FIREARMS POLICY COALITION,
SECOND AMENDMENT FOUNDATION,
THE CALGUNS FOUNDATION and MADISON
SOCIETY FOUNDATION

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

CHAD LINTON, et al.,

Plaintiffs,

vs.

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

Defendants.

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

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Date: May 2, 2019
Time: 10:00 a.m.
Courtroom 11, 19th Floor
Judge: Hon. James Donato

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I. INTRODUCTION AND SUMMARY OF ISSUES

Plaintiffs' Complaint posed the question whether state officials, in their zeal to limit private firearm ownership in general, may simply "ignore the judgments and pronouncements of the courts of other states because they do not prefer the policy outcome[.]" (Complaint, ¶ 1.) This was somewhat of a rhetorical question, but the defendants' Motion answered it: Yes, they believe they can. And moreover, defendants' characterization of the plaintiffs' unassuming request to regain the full blessings of citizenship, including an important, fundamental right guaranteed by the Constitution as seeking some sort of "special treatment" (Def. Motion at 3:5) demonstrates that they *still* do not see the right to bear arms as a fundamental right, but a conditional privilege that they should be able to grant or deny at whim.

Plaintiffs here address the following issues: First, that defendants are not immune from suit under the Eleventh Amendment; second, that plaintiffs have stated a Second Amendment claim; third, that plaintiffs have stated a claim under the Full Faith and Credit Clause (Art. IV, § 1); and fourth, that plaintiffs have satisfied standing requirements by stating a claim under both the Privileges and Immunities Clause (Art. IV, § 2, cl. 1) of the Constitution, *and* the Privileges or Immunities Clause (§ 1) of the Fourteenth Amendment.

II. STATEMENT OF FACTS

A. CHAD LINTON

In 1987, while plaintiff Chad Linton was serving in the U.S. Navy, and stationed at NAS Whidbey Island, Washington, he tried – albeit briefly – to outrun a Washington State Police officer and make it back to base. He reconsidered the idea, and was arrested without resistance. (Complaint, ¶ 18.) Mr. Linton was charged and pled guilty to attempted evasion, a Class C felony under the Revised Code of Washington, and driving while intoxicated. (Id., ¶¶ 19-20.) In 1988, he successfully completed his probation and received a certificate of discharge. (Id.)

Mr. Linton moved back to California, where he has been and remains a law-abiding citizen. (Id., ¶¶ 21-22.) In 2015, he attempted to make a firearm purchase but was surprised to learn that he was denied by the California DOJ due to the Washington State conviction. (Id., ¶

23.) Mr. Linton hired a Washington attorney who re-opened the criminal proceedings, withdrew the guilty plea, and entered a retroactive not-guilty plea. (Id.) The court then issued its "Order on Motion Re: Vacating Record of Felony Conviction," in which it specifically found that the crime for which Mr. Linton was convicted was not a violent offense. (Complaint, ¶ 24; Exhibit A.) The court granted the motion to vacate the conviction, set aside the guilty plea, and released plaintiff from all penalties and disabilities resulting from the offense. On April 18, 2016, the Island County Superior Court also issued an Order Restoring Right to Possess Firearms pursuant to Revised Code of Washington 9.41.040(4). (Complaint, ¶ 25; Exhibit B.)

Mr. Linton underwent a Personal Firearms Eligibility Check ("PFEC"), pursuant to Cal. Pen. Code § 30105(a), to confirm his eligibility to purchase and/or possess a firearm, which indicated he was eligible both to possess and purchase firearms. (Complaint, ¶ 26; Exhibit C.) In 2018, Mr. Linton attempted to purchase a rifle, but was again denied. (Complaint, ¶ 27; Exhibit D.) Mr. Linton then underwent a "Live Scan" fingerprint-based background check request with the DOJ directly, which again showed the presence of no felony convictions. (Id., ¶ 28.)

Mr. Linton's counsel began discussions with the California DOJ to correct his status as a "prohibited person" here. Counsel provided the DOJ with the Washington court orders vacating the felony conviction and restoring plaintiff's firearm rights. (Complaint, ¶ 29.) In response, the DOJ informed plaintiff that "the [felony] entry in question cannot be found on your California criminal history record, therefore, no further investigation is required[,]" and that his fingerprints "did not identify any criminal history maintained by the Bureau of Criminal Information and Analysis." (Id., ¶ 30; Exhibits F and G.) Based upon these letters, Mr. Linton attempted to purchase a revolver in March 2018, but was again denied. (Id., ¶ 31.) Then, on April 3, 2018, DOJ agents of the Armed Prohibited Persons System (APPS) enforcement program, came to Mr. Linton's home, and seized several firearms that he had acquired and owned throughout the years, including an antique, family-heirloom shotgun that was once owned by his grandfather. (Id., ¶ 32.) All of these firearms were acquired through legal purchases or transfers, through federally-licensed firearm dealers (FFLs), and pursuant to DOJ background checks. Mr. Linton's wife

showed the DOJ agents the Washington State court orders that vacated the felony conviction, and restored Mr. Linton's gun rights. These agents sought guidance from defendant Wilson, who purportedly advised that the Washington court orders would have no effect here, and ordered seizure of the firearms. (Id., ¶¶ 31-33, 36.)

B. PAUL MCKINLEY STEWART

In 1976, when plaintiff Stewart was 18 years old, he succumbed to a crime of opportunity while he was living in the State of Arizona, and stole some lineman's tools from a telephone company truck. (Complaint, ¶ 39.) When the police came to his residence to investigate, Mr. Stewart gave up the tools and offered no resistance to his arrest. (Id.) Mr. Stewart was found guilty of first degree burglary, a felony, in the County of Yuma, Arizona. He was sentenced to three years of probation, and the Court imposed a suspended sentence. (Id., ¶ 40.) He successfully completed his probation in 1978, and believed that the felony conviction had been dismissed. (Id., ¶ 41.)

Since moving to California in 1988, Mr. Stewart has been a law-abiding citizen, and has remained steadily and gainfully employed. (Complaint, ¶ 42.) In 2015, he attempted to purchase a pistol for self defense in the home, which was denied due to the presence of a felony conviction. (Id., ¶ 44.) A Live Scan fingerprint background check showed a lingering conviction, but did not reflect whether it was a felony. It also stated that it was "undetermined" whether he was eligible to purchase firearms. (Id., ¶ 45.)

Mr. Stewart filed an application to restore his firearm rights and to set aside his judgment of guilt with the Superior Court of Yuma County, Arizona, which issued an order restoring his firearm rights, and specifically set aside the judgment of guilt. (Complaint, ¶ 46; Exhibit I.) Believing the matter would be automatically updated in any background search, Mr. Stewart attempted to make another firearm purchase on February 10, 2018, which the DOJ also denied. (Complaint, ¶ 48.) Mr. Stewart had several telephone conversations with DOJ officials, who informed him that the Arizona felony conviction disqualified him from possessing or purchasing firearms, notwithstanding the Arizona court's order. (Id., ¶ 50.)

III. ARGUMENT

A. DEFENDANTS ARE NOT IMMUNE FROM SUIT.

Defendants are not immune from suit under the Eleventh Amendment because of their direct connection to the plaintiffs' claims, in particular, the Attorney General's non-delegable processing of firearms background checks, his general duty to prosecute violations of firearms law, and his ability to assume the role of district attorney in any such prosecutions. *Ex Parte Young*, 209 U.S. 123 (1908) stands for the well-established proposition that citizens may sue state officials in their official capacities for prospective injunctive and declaratory relief arising from violations of federal laws. This exception to Eleventh Amendment immunity applies where the state official has "some connection with the enforcement of the act." *Ex Parte Young*, 209 U.S. at 157; *Coal. to Defend Affirmative Action v. Brown*, 674 F.3d 1128, 1134 (9th Cir. 2014).

In *Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 943 (9th Cir. 2013) ("*Quebec*"), the Ninth Circuit held that defendant Becerra's predecessor, Attorney General Harris, was not immune from suit where the combination of a statutory provision of enforcement power to district attorneys and the Attorney General's duty to prosecute as a district attorney established sufficient enforcement power for purposes of the *Ex Parte Young* exception. 729 F.3d at 943–944. In *Quebec*, producers and sellers of foie gras brought an action seeking to enjoin the California Attorney General from enforcing a ban on the sale of that product as unconstitutionally vague. The Ninth Circuit recognized that a generalized duty to enforce laws could not establish the "fairly direct" connection between the Attorney General and the challenged statute; however, the specific statute banning the sale of foie gras at issue also "expressly authorize[d] enforcement of the statute by district attorneys and city attorneys," in combination with "the Attorney General's duty to prosecute as a district attorney establishes sufficient enforcement power for *Ex Parte Young*." 729 F.3d at 943–44.

Here, plaintiffs' claims against the Attorney General and the DOJ actors who are specifically responsible for promulgating and enforcing the firearm policies at issue are even stronger and more directly connected to the Attorney General than the circumstances presented

in *Quebec*. Attorney General Becerra is, by state constitution and statute, the chief law enforcement officer of the state, and is the head of the Department of Justice. Cal. Gov. Code § 12510. And the Department of Justice is, by statute, the *exclusive* state agency or department charged with running background checks for firearm sales, utilizing its own records, as well as national records, to approve of or deny firearm sales. See Cal. Pen. Code § 28220. Indeed, the Attorney General's duty to run these criminal history checks is neither delegable nor discretionary, but is mandatory. *Braman v. State of California*, 28 Cal.App.4th 344, 353 (1994); *Bauer v. Becerra*, 858 F.3d 1216, 1219 (9th Cir. 2017). California regulates firearm sales and transfers through the Dealer's Record of Sale (DROS) system, which requires all sales or transfers to be made through a licensed dealer. *Id.* at 1218-1219 (citing Cal. Penal Code §§ 27545, 28050(a)). Citizens who want to purchase a firearm must pass a background check, which is electronically submitted to the California DOJ, *Silvester v. Harris*, 843 F.3d 816, 824–25 (9th Cir. 2016), and specifically conducted by the Department's Bureau of Firearms. *Silvester v. Harris*, 41 F.Supp.3d 927, 946–47 (E.D. Cal. 2014).

Therefore, all defendants here have a direct, non-delegable and statutorily-mandated connection to enforcement of the statutes in question, California Pen. Code §§ 29800 and 30305, as they are being applied to plaintiffs. More to the point, plaintiffs are specifically challenging the defendants' 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. (Complaint, ¶ 3). These are not just theoretical concerns, but plaintiffs are challenging the defendants' *direct enforcement* of these policies.

Attorney General Becerra has a battery of combined powers, including the background check approval system obligated to him, his general duty to prosecute violations of firearms law, and his ability to assume the role of district attorney in any such prosecutions, all of which would establish a sufficient connection under *Ex Parte Young*. *See also*, *Welchen v. Cty. of Sacramento*, No. 2:16-cv-0185-TLN-KJN, 2016 WL 5930563, at *5 (E.D. Cal. Oct. 11, 2016). Defendant

Horan is sued in his capacity as the Acting Chief of the BOF, and is further responsible for "the implementation and enforcement of the statutes, regulations and policies regarding prohibited persons, and the Armed Prohibited Persons System ("APPS") program." (Complaint, ¶ 12.) This is also a statutorily-mandated program that requires *the Attorney General* to identify persons who are prohibited from owning firearms but have previously passed background checks but still own firearms. *Bauer*, 858 F.3d at 1219; Cal. Pen. Code §§ 30000, 30005. Indeed, this is the enforcement unit which seized firearms from the home of plaintiff Linton. (Complaint, ¶ 32). And defendant Robert D. Wilson, also sued in his official capacity, is the DOJ official who made the determination that the Washington State restoration of plaintiff's firearm rights would not be honored in California, and ordered the seizure of his firearms. (Id., ¶¶ 32-33, 36; Exhibit H.)

In summary, the defendants' connection to the enforcement of their own policies, customs and practices which prohibit the possession of firearms by persons convicted of non-violent felonies in other states – *notwithstanding the restoration of their Second Amendment rights by courts in those jurisdictions* – is direct and specifically emanates from them. The plaintiffs' ongoing injuries here "are not the result of 'the independent action of some third party not before the court[,]' […] [n]or is the Attorney General's conduct simply a single link in an 'attenuated chain of possibilities.'" *Planned Parenthood Arizona, Inc. v. Brnovich*, 172 F.Supp.3d 1075, 1096 (D. Ariz. 2016). Their claims, in fact, arise from the direct and ongoing injury at the hands of defendants, which will continue unless the defendants are enjoined.

B. PLAINTIFFS HAVE STANDING TO BRING SUIT.

Defendants' motion asserts that all of the plaintiffs, including individual plaintiffs Linton and Stewart, lack standing to bring the third claim for relief under the Privileges and Immunities Clause of both Article IV and the Fourteenth Amendment. Because the plaintiffs' standing becomes manifest with their statement of the claim generally, based upon a constitutionally-protected right to travel, the standing argument is discussed below, at pp. 13-15.

"It is common ground that the respondent organizations can assert the standing of their members." *Summers v. Earth Island Inst.*, 555 U.S. 488, 494, 129 S.Ct. 1142, 1149 (2009). It is

also well recognized that civil rights advocacy organizations have been permitted to assert the constitutional rights of their members. *Washington v. Trump*, 847 F.3d 1151, 1160 (9th Cir. 2017). To establish associational standing, an organization must show: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Hunt v. Washington State Apple Advertising Comm'n*, 432 US 333, 343, 97 S.Ct. 2434, 2441 (1977). However, where at least one identified member of an organization is able to demonstrate that he or she has suffered harm, or would suffer harm, it is common to permit that organization's claims to go forward. *See*, *Assoc. Gen. Contractors of Am., San Diego Chapter, Inc. v. California Dep't of Transp.*, 713 F.3d 1187, 1194 (9th Cir. 2013) (citing *Summers*, 555 U.S. at 498); *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 483 (9th Cir. 2011); *Kaahumanu v. Hawaii*, 682 F.3d 789, 797 (9th Cir. 2012).

Here, plaintiffs Linton and Stewart, who have directly suffered injury and are suing for prospective relief, are members of FPF, FPC, CGF and SAF. (Complaint, ¶¶ 4-5.) Although they were not members of MSF at the time the complaint was filed, that issue will be cured by the time this matter is heard. However, it may not be necessary for adjudication of the issue, since "the presence in a suit of even one party with standing suffices to make a claim justiciable[.]" *Montana Shooting Sports Ass'n v. Holder*, 727 F.3d 975, 981 (9th Cir. 2013).

C. PLAINTIFFS STATE A CLAIM FOR VIOLATION OF THE SECOND AMENDMENT.

1. A "Presumptively Lawful Regulation" Does Not Simply End the Inquiry Required in As-Applied Second Amendment Claims.

Defendants cite both *District of Columbia v. Heller*, 554 U.S. 570, 128 S.Ct. 2783 (2008), and *United States v. Vongxay*, 594 F.3d 1111 (9th Cir. 2010) as cases which simply foreclose, "as a matter of law," the possession of firearms by felons, without further analysis without any further inquiry into the level of scrutiny required, or applying it. We think the matter bears more careful examination, and that plaintiffs' claims survive against such an extreme position. In *Vongxay*, a case in which the defendant appealed his conviction for being a felon in possession

of a firearm, in an apparent facial and as-applied challenge to the federal felon-in-possession statute, 18 U.S.C. § 922(g)(1). The Ninth Circuit held that section 922(g)(1) had not been brought into question by *Heller*. 594 F.3d at 1114. In so holding, *Vongxay* stated that "felons are categorically different from the individuals who have a fundamental right to bear arms." 594 F.3d at 1115. But *Vongxay* was decided before the various circuit courts began applying a common two-part test in considering Second Amendment claims, discussed below.

Defendants' reliance upon *Vongxay* in concluding that plaintiffs simply fall into a category of prohibited persons, forever, is no longer the proper analysis. Indeed, defendants expressly acknowledge that plaintiffs' Second Amendment claims are subject to a two-step inquiry (Motion at 12:20-21, citing *Jackson v. City and County of San Francisco*, 746 F.3d 953, 960 (9th Cir. 2014)), but simply presume that plaintiffs' claims would never pass the first step because the laws at issue are "presumptively lawful" regulations under *Heller*. In the first place, even if we were to engage in a lively debate as to whether the state statutes prohibiting firearm possession by felons, Cal. Pen. Code §§ 29800 (firearms) and 30305 (ammunition) are "longstanding prohibitions" – a conclusion that defendants do not support – those statutes are not really the issue. Instead, they are the defendants' policies which refuse to honor out-of-state judgments vacating or setting aside those felony convictions, and expressly restoring a person's Second Amendment rights in their states of origin. Defendants' motion does not cite or even mention these policies, which is really the crux of the matter. Moreover, even if defendants' policies amount to *presumptively* lawful regulations, it remains in doubt whether they could withstand the State's burden under either strict or intermediate scrutiny, an analysis which the defendants' motion likewise skips entirely.

2. Under the Two-Part Test in *Chovan*, Plaintiffs Have Stated a Claim.

"[T]here are good reasons to be skeptical of the constitutional correctness of categorical, lifetime bans on firearm possession by *all* felons." *United States v. Phillips*, 827 F.3d 1171, 1174 (9th Cir. 2016) (emphasis original). In *Phillips*, the court affirmed the defendant's conviction under section 922(g)(1), but noted the scholarly disagreement over whether the

practice of lifetime bans on firearm ownership by felons was historically justified, and under what theory. 827 F.3d at 1174 n.2.

Does the two-step approach now adopted by the Ninth Circuit, and its dicta in *Phillips*, expose the possibility that persons who have had their felony convictions set aside in their respective states may regain Second Amendment rights? This is the logical conclusion, and it is not without precedent. In *Binderup v Attorney General*, 836 F.3d 336 (3d Cir. 2016), *cert. denied* 137 S.Ct. 2323 (2017), the Third Circuit, sitting en banc, held that section 922(g)(1) could not bar the plaintiffs from firearm possession as a result of their earlier disqualifying state law misdemeanor convictions.[1] In a well-considered opinion, the en banc court held that section 922(g)(1) violated the Second Amendment as applied to those individual plaintiffs based on different triggering state law offenses. *Binderup*, 836 F.3d at 340-41. In that case, the plaintiffs' rights to possess firearms was expressly restored to them by a state court, but they continued to be barred under federal law, section 922(g)(1). *Id.* at 340. The Third Circuit applied the two-part test under *United States v. Marzzarella*, 614 F.3d 85 (3d Cir. 2010), a test now expressly adopted by this Circuit in *United States v. Chovan*, 735 F.3d 1127 (9th Cir. 2013). The first step put the burden on the plaintiffs to show that *a presumptively lawful regulation* burdened their Second Amendment rights. *Binderup* held that a challenger must clear two hurdles: "[H]e must (1) identify the traditional justifications for excluding from Second Amendment protections the class of which he appears to be a member, […] and then (2) present facts about himself and his background that distinguish his circumstances from those of persons in the historically barred class[.]" *Binderup*, 836 F.3d at 347. That burden lay upon the plaintiffs and was described as a necessarily strong showing. *Id.* The court held that if the plaintiff was able to distinguish the seriousness of his disqualifying federal conviction from "serious crimes" at this first step, the

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[1] *Binderup* left the door open to possible challenges based upon non-violent *felony* offenses as well, when it stated: "On the one hand, it is possible to read *Heller* to leave open the possibility, however remote, of a successful as-applied challenge by someone convicted of such an offense. At the same time, even if that were so, the individual's burden would be extraordinarily high—and perhaps even insurmountable." 836 F.3d at 353, n.6.

next step required the government to show that the regulation as applied satisfied intermediate scrutiny. *Id.* at 356.

Ultimately, *Binderup* concluded that the law was unconstitutional as applied, but the en banc court was split on the reasoning. The narrowest ground supporting the judgment held that those who committed serious crimes had "forfeited" their Second Amendment right to bear arms, 836 F.3d at 349, and that the "passage of time or evidence of rehabilitation" could not restore the lost right. Only the seriousness of the original crime was relevant to determine if a convicted person fell outside of the scope of the Second Amendment. *Id.* at 349-350. The majority thus held that the plaintiffs' crimes there were not sufficiently serious to warrant lifetime disarmament. *Id.* at 353.

The categorical approach taken in *Vongxay* can no longer be considered determinative of this issue. Instead, the Ninth Circuit's test is now articulated in *Chovan*, where the court considered the defendant's facial and as-applied challenge to a conviction under 18 U.S.C. § 922(g)(9), which prohibits persons convicted of domestic violence misdemeanors from possessing firearms for life. After surveying the law of other circuits, the court expressly adopted the test undertaken by the Third Circuit in *Marzzarella*, among others, which requires the court to examine whether the challenged law "burdens conduct protected by the Second Amendment," and if so, "directs courts to apply an appropriate level of scrutiny." *Chovan*, 735 F.3d at 1136. In so examining, *Chovan* found that although section 922(g)(9) did not implicate the "core Second Amendment right," it did place "a substantial burden on the right[,]" and thus applied intermediate scrutiny[2] to his claims. *Chovan*, 735 F.3d at 1138. The court ultimately rejected the defendant's argument that section 922(g)(9) could not constitutionally apply to him, but at least went through the analysis in determining that because section 922(g)(9) was

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[2] The court determined that intermediate, rather than strict scrutiny, was appropriate, in part, because the statute contained an exemption for those with expunged, pardoned, or set-aside convictions, or those who have had their civil rights restored, which exceptions "lightened" the burden on the right. 735 F.3d at 1138; *Fisher v. Kealoha*, 855 F.3d 1067, 1071 n.2 (9th Cir. 2017). *See also*, 18 U.S.C. § 921(a)(20)(B) (an expunged or set-aside conviction does not constitute a conviction for purposes of the federal felon in possession statute).

substantially related to an important government interest in preventing domestic gun violence, it passed scrutiny. 735 F.3d at 1141.

Chovan expressly held that a lifetime prohibition on firearm ownership by certain misdemeanants *did* substantially burden the Second Amendment right of the defendant, and at least put the government to the test to justify the burden using an appropriate level of scrutiny. This is not something that can be decided on a motion to dismiss, and in particular, where the defendants fail firstly to offer up their policies for examination as "long-standing prohibitions," and secondly, to engage in any analysis regarding *both* steps required under *Chovan*. Following the approach in *Binderup*, plaintiffs ought to bear the burden of demonstrating that their crimes were not serious enough to warrant a lifetime prohibition of an important right, particularly where those convictions were set aside in their respective states of origin. But under *Chovan*, if that burden is met, the burden would then shift to the defense under an appropriate heightened level of scrutiny. Here, plaintiffs have at least stated a Second Amendment claim worthy of inquiry under *both* prongs of the test.

D. PLAINTIFFS STATE A CLAIM UNDER THE FULL FAITH AND CREDIT CLAUSE.

The heart of this action is whether California is required to honor the judgments of courts in other states that have set aside or vacated the plaintiffs' underlying felony convictions, and expressly restored their Second Amendment rights to them. Defendants claim the Full Faith and Credit Clause does not prohibit California's prohibition, based on their policy concerns alone. But defendants completely miss the mark by citing cases applying the Clause to other states' legislative acts, and not involving court judgments. The latter types of cases are judged by different ("exacting") standards, and do not involve a "public policy" exception.

Article IV, § 1 of the United States Constitution provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." "That Clause requires each State to recognize and give effect to valid judgments rendered by the courts of its sister States." *V.L. v. E.L.*, 136 S.Ct. 1017, 1020 (2016). The Supreme Court has explained that the "animating purpose" of this Clause was:

> to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin.

Baker v. Gen. Motors Corp., 522 U.S. 222, 232, 118 S.Ct. 657, 663 (1998). *Baker* made it clear to distinguish the Clause's command as between legislative acts of other states, and state court judgments. Specifically, the Court stated that the Clause "does not compel 'a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.'" *Baker*, 522 U.S. at 232. The Court further clarified: "Regarding judgments, however, the full faith and credit obligation is exacting. A final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land." *Baker*, 522 U.S. at 233. Importantly, the Court held that there is no "roving public policy exception" to the full faith and credit due judgments, and that the Clause orders submission even to the hostile policies reflected in the judgment of another state. *Id*; *see also*, *Estin v. Estin*, 334 U.S. 541, 546 (1948); *Williams v. North Carolina*, 317 U.S. 287 (1942); *V.L. v. E.L.*, 136 S.Ct. at 1020 (a state may not disregard the judgment of a sister state because it deems it to be wrong on the merits).

Defendants' motion appears to recognize the distinction between the Clause's application to legislative acts, and the court judgments of the other states. However, their motion confoundingly cites three cases all of which pertain to legislative acts, not court judgments of sister states. (See Motion at 14:5-15.) And thus, when defendants conclude that plaintiffs "are asking this Court to give full faith and credit to foreign statutes that offend and stand in conflict with California firearms laws," (Motion at 14:27-28), they know that is simply incorrect. Plaintiffs are challenging the defendants' refusal to honor the court *judgments* of other states.

Defendants suggest that there is some generalized "public safety" concern in giving individuals with vacated out-of-state felony convictions the right to possess firearms in California. (Motion at 3:2-3). However, defendants never exactly state what the public policy is that should prevent citizens who have had felony convictions set aside, vacated, and their civil

rights expressly restored to them, from owing firearms. But ultimately, it does not matter, for public policy is not a reason to deny a person legal rights expressly adjudicated elsewhere. *See*, *Finstuen v. Crutcher*, 496 F.3d 1139, 1153 (10th Cir. 2007) (notwithstanding Oklahoma's public policy, its refusal to recognize final adoption orders of other states that permit adoption by same-sex couples was unconstitutional.) *See also*, *V.L. v. E.L.*, 136 S.Ct. at 1020. Defendants' generalized complaint about the supposed subordination of the State's unstated public policy is simply not relevant. Defendants' refusal to honor the judgments of other states violates the Full Faith and Credit Clause, and its enabling statute, 28 U.S.C. § 1738.

E. PLAINTIFFS STATE A CAUSE OF ACTION UNDER BOTH THE PRIVILEGES AND IMMUNITIES CLAUSE (ART. IV. § 2) AND THE PRIVILEGES OR IMMUNITIES CLAUSE OF THE FOURTEENTH AMENDMENT.

The State of California permits a process in which persons convicted of non-violent felonies *in California*, and which did not result in a state prison sentence, may seek post-conviction reduction of the California conviction to a misdemeanor. And through that process, the State of California permits restoration of a California felon's civil rights, including the right to purchase and possess firearms. (Complaint, ¶¶ 69-70.) However, as shown, defendants are refusing to honor a comparable process when they emanate from other states. (Id., ¶ 72.) Plaintiffs allege that this disparate treatment of persons convicted in California and persons convicted of crimes in the other states violates two provisions of the Constitution, Article IV, § 2, cl. 1 (the "Privileges and Immunities Clause") and § 1 of the Fourteenth Amendment (the Privileges or Immunities Clause). These claims are rooted in not only the obligation of states to treat all U.S. citizens equally, but the well-established constitutional right to travel.

1. Plaintiffs Have Standing and Have Stated a Claim.

All plaintiffs, including individual plaintiffs Linton and Stewart, have standing to bring this claim. Defendants' motion does not cite any authority for the proposition that a resident of a state may not bring a claim for violation of the Clause. And both the Privileges and Immunities Clause (Art. IV), and the Privileges *or* Immunities Clause of the Fourteenth Amendment protect a constitutional right to travel, for which there is no residency standing requirement. Plaintiffs

have directly asserted deprivation of this right to travel in their Complaint. (Complaint, ¶ 74.) Even as a stand-alone claim involving the Privileges and Immunities Clause of Art. IV, as long as the plaintiffs have sufficiently alleged the three elements of Article III standing, it is immaterial where they currently reside. If defendants' discriminatory policies have treated them differently because of where they have come from, that is sufficient to allege standing. *See, e.g.*, *Walsh v. City and County of Honolulu*, 423 F.Supp.2d 1094 (D. Haw. 2006) (plaintiff had standing to challenge a residency requirement for state employment, under the Article IV Clause, notwithstanding that he subsequently moved to Hawaii.)

In the bigger picture, one *can* and in most instances *will* be a resident of the state that is discriminating against him or her, when such disparate treatment amounts to an impermissible infringement upon the constitutional right to travel protected by both the Article IV Clause, and the Fourteenth Amendment Clause. The right to travel, now long recognized and firmly established, was reaffirmed in *Saenz v. Roe*, 526 U.S. 489, 119 S.Ct. 1518 (1999). In *Saenz*, Justice Stevens, writing for the majority, noted that a right to travel, "firmly embedded in our jurisprudence[,]" embraces at least three different components. *Id.* at 498-99. The first component is the right of a citizen to enter and leave another state; the second is the right to be treated "as a welcome visitor rather than an unfriendly alien when temporarily present in the second stated, which is protected by the Privileges and Immunities Clause of Art. IV, § 2. The third component is the right of a newly arrived citizen to the same privileges and immunities enjoyed by citizens of that same state, a right protected not only by the new arrival's status as a state citizen, but also by his or her status as a citizen of the United States. *Id*. at 502. This is a right that is protected by the Privileges or Immunities Clause of the Fourteenth Amendment. Therefore, the statute unconstitutionally discriminated between established and newly-arrived residents of California. *Id*. at 505. Such discriminatory treatment of residents was subject to strict scrutiny. *Id.* (citing *Shapiro v. Thompson*, 394 U.S. 618, 634, 89 S.Ct. 1322, 1331 (1969)). Plaintiffs therefore have stated a claim and have demonstrated standing in contesting defendants' policies that infringe upon the constitutional right of travel.

2. The Privileges or Immunities Clause of the Fourteenth Amendment Protects all Constitutional Rights – Including Those Under the Second Amendment.

Finally, defendants argue that the right to keep and bear arms is not "implicated by the narrow category of rights protected under the Fourteenth Amendment." (Motion at 16:18-20.) This is a strange assertion to make in light of *McDonald v. City of Chicago*, 561 U.S. 742, 130 S.Ct. 3020 (2010). That the majority in *McDonald* elected to incorporate a right to bear arms to the states through the Due Process Clause of the Fourteenth Amendment, and expressly *declined* to decide the matter on the Privileges or Immunities Clause (see *McDonald*, 561 U.S. at 758), does not mean that the narrow-rights view of the Privileges or Immunities Clause expressed in the *Slaughter-House Cases* is creditable. In the end, it did not matter, because *McDonald* ultimately concluded, in a plurality opinion, that the right to keep and bear arms applies to the states through the Fourteenth Amendment's Due Process Clause, as it is "fundamental" to the American "scheme of ordered liberty." 561 U.S. at 767, 130 S.Ct. at 3036.

Here, it is simply enough to say that the Privileges or Immunities Clause provides the constitutional basis for plaintiffs' claims, and which undisputedly *includes* a right to travel and become a permanent resident of the state. "Despite fundamentally differing views concerning the coverage of the Privileges or Immunities Clause of the Fourteenth Amendment, most notably expressed in the majority and dissenting opinions in the *Slaughter–House Cases* […], it has always been common ground that this Clause protects the third component of the right to travel." *Saenz*, 526 U.S. at 503, 119 S.Ct. at 1526. Plaintiffs have therefore stated a Fourteenth Amendment claim on this ground alone.

IV. CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that this Court deny defendants' motion to dismiss, and permit this case to proceed.

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SEILER EPSTEIN ZIEGLER & APPLEGATE LLP

/s/ George M. Lee
George M. Lee
Attorneys for Plaintiffs