IN THE UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

CLIFFORD CHARLES TYLER, Plaintiff, v. ERIC HOLDER, Attorney General of the United States *et al.*; Defendants.	)	Case No. 1:12-CV-00523-GJQ

PLAINTIFF'S RESPONSE TO THE FEDERAL DEFENDANT'S MOTION TO DISMISS

Now comes Plaintiff, by and through his undersigned counsel, and hereby requests that the Federal Defendants' Motion to Dismiss filed October 1, 2012 be dismissed in its entirety as to the Federal Defendants in their official capacity for the reasons set forth in the attached Memorandum of Law in Support of Plaintiff's Response.

Dated: October 30, 2012

Respectfully submitted,

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MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S RESPONSE

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BACKGROUND

On January 2, 1986, Plaintiff was involuntarily committed by order of the Hillsdale County Probate Court for a period of time not to exceed 30 days. Compl. 6. The primary reason for commitment was a risk that Plaintiff might commit suicide due to an emotionally devastating divorce. Compl. 6. Plaintiff currently is not a risk to himself or to other people. Compl. 6. On or about February 7, 2011, Plaintiff attempted to purchase a firearm, but was informed by Defendant Hillsdale County Sheriff's Office that he was denied from obtaining a firearm under Title 18, United States Code, Section 922 (2006)(g)(4). Compl. 6.

On or about August, 2011, Plaintiff submitted an appeal of his denial to purchase a firearm with the NICS Section of Defendant FBI. On or about January 6, 2012, the NICS Section of Defendant FBI mailed a letter confirming that Plaintiff was federally prohibited from acquiring a firearm under 18 §922(g)(4). Compl. 7.

18 U.S.C. § 922(g) (2006) provides the following:

> (g) It shall be unlawful for any person–
>
> . . .
>
> (4) who has been adjudicated as a mental defective or who has been committed to a mental institution;
>
> . . .
>
> 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.

Under 18 U.S.C. § 925(c) (2006), an individual prohibited from acquiring a firearm may apply to the Attorney General for relief from the prohibition, which the Attorney General may grant if "the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest." However, the United States Congress has specifically denied any funding "to investigate or act upon applications for relief from Federal firearms disabilities under 18 U.S.C. 922(c)." The Consolidated Appropriations Act, 2010, Pub. L. No. 111–117, 123 Stat. 3034, 3128. Because Congress has denied funding for a review for relief from a federal prohibition on acquiring or possessing a firearm, Plaintiff cannot avail himself of any federal procedure to regain his Second Amendment rights on the grounds that he does not present a threat to himself or others.

ARGUMENT

The Federal Defendants' Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) should be denied. However, Plaintiff does not contest the Federal Defendants' claim that individual capacity claims have not or may not be asserted here. Plaintiff does deny the Federal Defendants' argument that Plaintiff's Second and Fifth Amendment claims lack merit. "In deciding a Rule 12(b)(6) motion, a district court must (1) view the complaint in the light most favorable to the plaintiff and (2) take all well-pleaded factual allegations as true." *Tackett v. M & G Polymers, USA, LLC*, 561 F.3d 478, 488 (6th Cir. 2009). Given that the facts alleged in Plaintiff's Complaint must be treated as true, Plaintiff has certainly stated claims upon which relief can be granted.

I. PLAINTIFF HAS CERTAINLY STATED A LEGAL SECOND AMENDMENT CLAIM FOR RELIEF.

Plaintiff has certainly provided a legal claim for relief based upon a Second Amendment challenge to the Federal Defendants' overbroad regulation of firearms. Plaintiff agrees with the Federal Defendants' summary of the Sixth Circuit's two prong approach to Second Amendment challenges. *See* Mem. Law Supp. Fed. Defs.' Mot. Dismiss 15 (citing *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012); *see also, e.g.*, *Ezell v. City of Chicago*, 651 F.3d 684, 701-03 (7th Cir. 2011); *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010); *United States v. Reese*, 627 F.3d 792, 800-01 (10th Cir. 2010)). "Under the first prong, the court asks whether the challenged law burdens conduct that falls within the scope of the Second Amendment right, as historically understood." *Greeno*, 679 F.3d at 518. If so, then the court considers the second prong: whether the statutory provision is constitutional when applying "the appropriate level of scrutiny" *Id.* In this case, Plaintiff's claim for relief clearly meets both prongs.

A. A BLANKET PROHIBITION UNDER SECTION 922(G)(4) WITHOUT ANY SUBSEQUENT REVIEW CERTAINLY BURDENS CONDUCT WITHIN THE SCOPE OF THE SECOND AMENDMENT.

Plaintiff's claim for relief clearly meets the first prong of the *Greeno* test for three reasons. First, the challenged statutory scheme burdens conduct protected by the Second Amendment. Second, the historical limitations on bearing firearms have been for individuals who present a real danger, not law-abiding responsible citizens like Plaintiff. Finally, for this 12(b)(6) motion, the facts must be viewed in the light most favorable to the Plaintiff.

Plaintiff's claim is that a prohibition on his possession of a firearm without means for a review of his current fitness to possess a firearm burdens the conduct recognized as protected under the Second Amendment in *District of Columbia v. Heller*, 554 U.S. 570, 634-35 (2008). Plaintiff's claim is not that the second amendment protects the right of the mentally ill to possess

a firearm, as the Federal Defendants seem to suggest is Plaintiff's position. *See* Mem. Law Supp. Fed. Defs.' Mot. Dismiss 16. Indeed, Plaintiff and the Federal Defendants appear to be in happy agreement that the Second Amendment does not generally prevent "longstanding prohibitions on the possession of firearms by . . . the mentally ill." *Heller*, 554 U.S. at 626-27 & n.26; *see* Mem. Law Supp. Fed. Defs.' Mot. Dismiss 16.

Instead, the gist of Plaintiff's claim is that despite having once been committed, he is nonetheless now a sane, stable, law-abiding, responsible citizen. As such, the Second Amendment affords Plaintiff the same core right held as protected in *Heller*: the right of "law-abiding, responsible citizens to use arms in defense of hearth and home." *Heller*, 554 U.S. at 634-35. The Federal Defendants' failure to permit Plaintiff a review for potential relief from Section 922(g)(4) clearly impedes his right to firearms "in defense of hearth and home," *see id.*, by prohibiting Plaintiff from owning or possessing a firearm despite his current fitness to do so. Because Plaintiff alleges that the challenged statutory scheme burdens the conduct within the scope of the Second Amendment, Plaintiff's claim certainly meets the first prong of the *Greeno* test.

The Federal Defendants have argued that historical examples show that "gun possession by individuals who have been committed to a mental institution . . . plainly falls outside the scope of the historical understanding of the Second Amendment." Mem. Law Supp. Fed. Defs.' Mot. Dismiss 15. However, none of the historical examples cited by the Federal Defendants stand for the proposition that once someone is committed they are then treated as forever mentally ill and unable to bear arms. *See* Mem. Law Supp. Fed. Defs.' Mot. Dismiss 13-21. Instead, they all stand for the relatively uncontroversial principle that certain individuals who

present a danger to the public may be prevented from possessing a firearm. *See* Mem. Law Supp. Fed. Defs.' Mot. Dismiss 13-21.

Thus, Plaintiff agrees that historically society "could and did disarm 'any person or persons' judged 'dangerous to the Peace of the Kingdome' under the 1662 Militia Act." *See* Mem. Law Supp. Fed. Defs.' Mot. Dismiss 17 (quoting 13 & 14 Car. 2, c. 3, § 1 (1662) (Eng.)). Plaintiff is not such a dangerous person. Plaintiff agrees that "[t]he right to bear arms was viewed as 'limited to those members of the polity who were deemed capable of exercising it in a virtuous manner." ' Mem. Law Supp. Fed. Defs.' Mot. Dismiss 18 (quoting Saul Cornell, *"Don't Know Much About History" The Current Crisis in Second Amendment Scholarship*, 29 N. KY. L. REV. 657, 671 (2002)). Plaintiff is certainly capable of exercising his right to bear arms in a virtuous manner. Plaintiff agrees that the right to bear arms has been limited when an individual presents a "*real danger of public injury from individuals*." Mem. Law Supp. Fed. Defs.' Mot. Dismiss 18 (citing The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to Their Constituents, 1787, *reprinted in* 2 Bernard Schwartz, THE BILL OF RIGHTS, A DOCUMENTARY HISTORY 665 (1971) (emphasis added)). Plaintiff simply does not present such a *real* danger of public injury.

The difference between the parties' positions on the first *Greeno* prong seems to arise due to the attempts of the Federal Defendants to conflate two different categories of individuals: (1) those who—in the past—were committed and (2) those who—in the present—are mentally ill. However, the Federal Defendants have provided no historical support for conflating these two groups of individuals. Rather, the focus of the historically examples they cited were on whether someone presents a real danger. The Federal Defendants' first *Greeno* prong argument fails, therefore, because there is no historical support for the position that someone such as the

Plaintiff—a law-abiding, responsible citizen who does not present a real danger—may be disarmed.

Besides lacking historical support, the Federal Defendants' argument also fails because for the Federal Defendants' 12(b)(6) motion, the factual allegations of the parties must be treated in the light most favorable to the Plaintiff. *Tackett*, 561 F.3d at 488. The Federal Defendants' arguments boil down to the extraordinary factual assertion that all individuals who were once committed are therefore forever mentally ill. In contrast, Plaintiff is asserting that he is the safe, mentally stable individual his doctors have diagnosed him as being. Compl. 6. Presented with these divergent assertions, this Honorable Court must assume for the purposes of this motion that Plaintiff is indeed the sort of sane, stable, law-abiding, responsible citizen Plaintiff claims he is in his Complaint. Therefore, the failure to provide a review of Plaintiff's fitness as a law-abiding, responsible citizen to possess a firearm for defense of hearth and home clearly burdens conduct within the scope of the Second Amendment, and this Court must therefore consider the second *Greeno* prong.

B. A BLANKET PROHIBITION UNDER SECTION 922(G)(4) WITHOUT ANY SUBSEQUENT REVIEW IS NOT SUBSTANTIALLY RELATED TO PREVENTING FIREARM VIOLENCE.

A blanket prohibition on the possession of firearms by individuals who have once been committed without a review process to consider current fitness is not substantially related to the important governmental interest of preventing firearm violence. Plaintiff agrees with the Federal Defendants that the appropriate level of scrutiny under the second *Greeno* prong is intermediate scrutiny. Mem. Law Supp. Fed. Defs.' Mot. Dismiss 22-25. Under intermediate scrutiny, "a

statutory classification must be substantially related to an important governmental objective." *Clark v. Jeter*, 486 U.S. 456, 461 (1988); *Craigmiles v. Giles*, 312 F.3d 220, 223 (6th Cir. 2002).

Plaintiff readily agrees that preventing firearm violence is an important governmental interest. *See* Mem. Law Supp. Fed. Defs.' Mot. Dismiss 25. Plaintiff also agrees that in general the prohibition under Section 922(g)(4) is valid and that Congress may reasonably choose to "piggyback" on a state court commitment proceeding in an effort to prevent firearm violence. *See* Mem. Law Supp. Fed. Defs.' Mot. Dismiss 28. Plaintiff further states that a continuing "prophylactic" prohibition on firearm possession under Section 922(g)(4) following a commitment is not necessarily unconstitutional. *See* Mem. Law Supp. Fed. Defs.' Mot. Dismiss 30. Plaintiff's sole contention is that for a continuing prohibition under Section 922(g)(4) to be substantially related to preventing firearm violence, an option to request a post-commitment review to determine current fitness and potentially obtain relief from Section 922(g)(4) must exist.

Hence, Plaintiff does not contest the Federal Defendants concerns regarding mentally ill individuals obtaining firearms; those concerns are not relevant to Plaintiff's situation because he is not mentally ill. In fact, all the cases cited in the Federal Defendants' brief are not especially relevant here because they were in general cases about the validity of a Section 922(g)(4) prohibition when no federal review for relief from Section 922(g)(4) had been sought. *E.g.*, *Dickerson v. New Banner Inst.*, 460 U.S. 103, 112 n.6 (1983) (considering criminal conviction expungement under state procedure); *Barrett v. United States*, 423 U.S. 212, 220 (1976) (determining whether Section 922 applied to intrastate purchases from a dealer of weapons that had been transported interstate); *United States v. Chamberlain*, 159 F.3d 656, 660 (1st Cir. 1998), *overruled on other grounds by United States v. Rehlander*, 666 F.3d 45 (1st Cir. 2012)

(determining whether a commitment under Section 922(g)(4) had occurred); *United States v. Rehlander*, 666 F.3d 45 (1st Cir. 2012) (determining whether a commitment under Section 922(g)(4) had occurred*); United States v. Chamberlain*, 159 F.3d 656 (1st Cir. 1998) (considering appeal for conviction of possessing a firearm in violation of Section 922(g)(4)). None of those cases involved the claim Plaintiff is making here: a Section 922(g)(4) prohibition is not substantially related to preventing firearm violence when it prohibits mentally stable, law-abiding, responsible citizens from possessing firearms because of a failure to provide a review process to reconsider an individual's current fitness.

Where Plaintiff and the Federal Defendants truly are in disagreement is on whether the fact that "there is no mechanism for him to seek relief from his § 922(g)(4) disability" reflects a reasonable determination by Congress "that 'such a person, though unfortunate, was too much of a risk to be allowed firearms privileges.' *See* Mem. Law Supp. Fed. Defs.' Mot. Dismiss 29 (*citing Dickerson*, 460 U.S. at 116). The Federal Defendants appear to rely principally on *Dickerson* for the proposition that Congress may fail to provide a mechanism to seek relief from Section 922(g)(4). However, such a position is a misreading of *Dickerson.* In *Dickerson*, in fact, the Supreme Court merely stated in dicta that the sole fact that an individual may be cured and released from commitment does not in itself relieve such an individual of Section 922(g)(4). *Dickerson*, 460 U.S. at 116. This dicta statement was given in connection with an analysis of whether a state criminal expungement may relieve an individual of a federal firearm prohibition. *Id.* At 115-17.

Dickerson is not therefore truly on all fours with the case at hand. Plaintiff is not making any claim that any prior finding of competence or any release from commitment is in itself sufficient for relief from Section 922(g)(4). The issue of whether a state expungement or release

from commitment would relieve someone from a federal firearm prohibition is a very different question than whether the Second Amendment requires a federal review of a federal firearm prohibition. Plaintiff would agree that a state proceeding or determination would not relieve an individual of a federal 922(g)(4) prohibition unless it is the sort of ATF approved program allowed under the NICS Improvement Amendments Act of 2007 ("NIAA"). Pub L. No. 110-180, 121 Stat. 2559 (2008) (codified at 18 U.S.C. § 922 note). Plaintiff instead contends here that it is unconstitutional to fail to provide him—as a law abiding, responsible citizen—a federal review specifically on his continued federal 922(g)(4) prohibition.

Similarly, the Federal Defendants reliance on *Redford*, *Buffaloe*, and *Jones* is misplaced. *See* Mem. Law Supp. Fed. Defs.' Mot. Dismiss 29-30 (citing *Redford v. U.S. Dep't of Treasury*, 691 F.2d 471 (10th Cir. 1982); *United States v. Buffaloe*, 449 F.2d 779 (4th Cir. 1971) (per curiam); *United States v. Jones*, 569 F. Supp. 395, 398–99 (D.S.C. 1983)). Plaintiff is not challenging his commitment like the appellant in *Redford*. *See Redford*, 691 F.2d at 472. He is also not claiming, unlike the appellants in all three cases, that the mere fact that considerable time has passed since his commitment and that he is in good mental health prevents Section 922(g)(4) from being applied to him. *See Redford*, 691 F.2d at 473; *Buffaloe*, 449 F.2d at 779; *Jones*, 569 F. Supp. at 396. Plaintiff is merely requesting a review to consider granting him relief from Section 922(g)(4). While Plaintiff agrees, unlike the appellants in *Redford* and *Buffaloe*, that his Section 922(g)(4) prohibition remains in full force and effect, he is presenting here the novel claim that in light of the recent *Heller* decision, he must be afforded an opportunity to review his continuing prohibition. None of the cases the Federal Defendants cite address Plaintiff's claim.

Failing to provide a federal review to consider relief from 922(g)(4) is clearly not substantially related to preventing firearm violence. While the broad prophylactic rule of Section 922(g)(4) certainly may bar many individuals who may be a danger to the public if armed, many other individuals falling under Section 922(g)(4) may no longer present any heightened risk to themselves or the general public. In fact, that some individuals barred by Section 922(g)(4) present no special risk of dangerousness appears to be a matter of agreement between the parties: "Federal Defendants recognize that some individuals to whom § 922(g)(4) is applicable will not engage in, or even contemplate, gun violence." Mem. Law Supp. Fed. Defs.' Mot. Dismiss 29. Clearly, barring individuals who will not engage in gun violence from possessing a gun is not substantially related to preventing gun violence.

The Federal Defendants argue, however, that a blanket bar under Section 922(g)(4) without relief for law abiding, responsible citizens is appropriate because it is difficult to predict whether a person will be dangerous, citing the Supreme Court decisions in *Estel v. Smith* and *Barefoot v. Esel*. Mem. Law Supp. Fed. Defs.' Mot. Dismiss 29 (citing *Estelle v. Smith*, 451 U.S. 454, 472 (1981); *Barefoot v. Estelle*, 463 U.S. 880, 899-901 & n.7 (1983)). However, those cases do not stand for the proposition that making such a determination is too difficult to bother doing. The Supreme Court in *Estel* was considering the role of experts in predicting whether a person will be dangerous, not that such a prediction is impossible. *Estel*, 451 U.S. at 466. In *Estel*, in fact, the Supreme Court quoted in length its opinion in *Jurek v. Texas*:

> In responding to the argument that foretelling future behavior is impossible the joint opinion stated:
>
> > [P]rediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system. The

> decision whether to admit a defendant to bail, for instance, must often turn on a judge's prediction of the defendant's future conduct. And any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose. For those sentenced to prison, these same predictions must be made by parole authorities. The task that a Texas jury must perform in answering the statutory question in issue is thus basically no different from the task performed countless times each day throughout the American system of criminal justice.

Id. (quoting *Jurek v. Texas*, 428 U.S. 262, 275-276, 96 S.Ct. 2950 (1976)). Predicting future dangerousness through a review of an individual's continued prohibition under 922(g)(4) is exactly the sort of determination our legal system must make every day.

If anything, an argument that predicting future dangerous is too difficult to make undermines the Federal Defendants' argument. For one thing, such an argument undermines the legitimacy of Plaintiff's original commitment, which was based on a prediction that he presented a risk to himself. For another, such an argument undermines how prophylactic we could conclude 922(g)(4) might be if we truly were unable to make future dangerousness predictions. Section 922(g)(4) cannot be substantially related to reducing future firearm violence if we cannot make some predictions on future behavior. Our ability to predict future dangerousness would be strangely selective if we can competently make such predictions when limiting Second Amendment rights but then become incapable of such predictions when considering restoring them.

Because prohibiting law-abiding, responsible citizens from owning firearms is clearly not substantially related to preventing gun violence, a Section 922(g)(4) prohibition applied to law-abiding, responsible citizens is certainly not either. Of course, the Federal Government cannot perfectly deduce when someone limited by Section 922(g)(4) is a law-abiding, responsible citizen. However, a blanket prohibition under Section 922(g)(4) without any subsequent review is not a reasonable balance of the interests of the government and the individual. Given the important constitutional right at stake, Section 922(g)(4) is only reasonable if individuals may petition for some sort of review to determine whether they are a law-abiding, responsible citizen who ought not to be subject to Section 922(g)(4).

C. THE EMPIRICAL STUDIES CITED BY THE FEDERAL DEFENDANTS PROVIDE NO SUPPORT FOR THEIR POSITION.

The Federal Defendants' contention that empirical studies support their position, Mem. Law Supp. Fed. Defs.' Mot. Dismiss 37-38, fails for three reasons. First, the issue before this Court is only whether Plaintiff has made a legal claim for relief. The Federal Defendants will have ample opportunity to provide factual evidence through the course of this case. For the Federal Defendants' 12(b)(6) motion, however, the issue is whether assuming the allegations in Plaintiff's Complaint are correct, Plaintiff made a claim upon which relief can be granted. *Tackett*, 561 F.3d at 488. As argued above, Plaintiff has certainly made a valid claim for relief, and this Honorable Court should deny the Federal Defendants' motion without consideration of the empirical studies they cited.

Second, even if this Court were to consider the studies, scattered studies without an overall analysis by an expert are nearly meaningless. On any number of issues, conflicting

scientific studies may be found. Whether the studies the Federal Defendants have cited represent the current consensus of those who are experts in the relevant fields is unknowable without the testimony of an expert. Without an expert to put such studies into perspective, the studies cannot be relied upon as accurate summaries of the current scientific understanding on the relevant issues.

Finally, the Federal Defendants reliance on such studies suffers from the same difficulties evident elsewhere in their argument: (1) the Federal Defendants conflate mentally ill individuals with stable, law-abiding, responsible citizens like Plaintiff and (2) the studies are not relevant to Plaintiff's situation. For instance, Plaintiff does not dispute studies suggesting "that persons who suffer from significant mental illness pose an increased risk of harm to themselves or others." Mem. Law Supp. Fed. Defs.' Mot. Dismiss 33-35. Relying on such studies conflates the mentally ill with law-abiding, responsible citizens such as Plaintiff. Such studies are therefore somewhat irrelevant to the issue of whether Plaintiff is entitled to a review of his Section 922(g)(4) prohibition. Even if Plaintiff were allowed a determination on his current fitness, Plaintiff does not expect relief from Section 922(g)(4) if he is diagnosed as having schizophrenia, major depression, or some other mental illness.

Plaintiff also does not dispute the somewhat common sense studies showing that "firearms are much more likely to cause injury or death than other available weapons, such as knives." Mem. Law Supp. Fed. Defs.' Mot. Dismiss 35-36. Firearms in general can certainly be dangerous, but we do not therefore prohibit everyone from owning a gun. *See* U.S. Const. amend. II. Plaintiff contends that he is as mentally stable and fit to possess a firearm as any other law-abiding, responsible citizen. Therefore, the fact that guns are dangerous, and even more so in

the hands of the mentally ill, is not especially relevant to the question of whether someone who is not mentally ill should be allowed relief from Section 922(g)(4).

The Federal Defendants cite other studies that at first seem relevant to the following proposition: "Statistics involving persons involuntarily committed confirm that relapse is common." Mem. Law Supp. Fed. Defs.' Mot. Dismiss 37-39. However, these studies all relate to individuals who have severe mental disorders or who have been committed within the past couple years. None of them involve individuals such as Plaintiff who is not mentally ill and who was involuntarily committed twenty-six years ago.

Furthermore, those studies also do not stand for the general proposition that all involuntary committed individuals commonly have relapses. Even if "55 percent of those committed for short periods were rehospitalized within 22 months," that stills leaves 45 percent who might have recovered from their disability. *See* Mem. Law Supp. Fed. Defs.' Mot. Dismiss 37 (citing V.A. Hiday, *Civil Commitment: A Review of Empirical Research*, 6 BEHAV. SCI. & L. 15, 33 (Winter 1988). Plaintiff agrees that many individuals who were once committed may never be fit to possess a firearm again. Admitting that many individuals once committed may never warrant relief from Section 922(g)(4) says nothing, however, about whether those individuals who no longer suffer from any illness ought to possess a firearm. While Section 922(g)(4) may apply both to stable individuals like Plaintiff and also to mentally ill individuals, those two groups are distinctly different, and Plaintiff reasonably should be allowed the opportunity to demonstrate which group he is in.

Plaintiff, as a law-abiding, responsible citizen, has a protected right under the Second Amendment to possession of a firearm. Certainly, his commitment in 1986 was sufficient to trigger the provisions of Section 922(g)(4). Plaintiff agrees that he remains prohibited from

possessing a firearm to this day. However, preventing individuals who present no special risk of danger from possessing a firearm is not substantially related to preventing gun violence. A reasonable balance of the Government's interest in preventing gun violence and Plaintiff's Second Amendment right would at least entail providing Plaintiff with an opportunity for a review of his current status under Section 922(g)(4). A review of Plaintiff's current dangerousness is no more impossible than it was when the Hillsdale Probate Court did such a review in 1986. Plaintiff's request for a review is reasonable, and he should be is afforded one if Section 922(g)(4) will continue to prohibit his possession of a firearm.

II. PLAINTIFF HAS CERTAINLY STATED A LEGAL FIFTH AMENDMENT CLAIM FOR RELIEF.

Plaintiff has certainly alleged legal claims for relief under both the Equal Protection Clause and the Due Process clause of the Fifth Amendment. His claim under the Equal Protection Clause is that Section 922(g)(4) burdens his fundamental right under the Second Amendment and that his separate treatment from other law-abiding, responsible citizens has no rational basis when he is not provide an opportunity to review his current fitness to possess a firearm. Plaintiff's claim under the Due Process clause is that he must at least be provided an opportunity for a hearing to demonstrate that he is not a danger to himself or others and thus not the sort of individual for whom Section 922(g)(4) was intended.

A. PLAINTIFF HAS ALLEGED A VALID EQUAL PROTECTION CLAIM.

Plaintiff has certainly alleged a legal claim for relief pursuant to the Equal Protection Clause of the Fifth Amendment. Plaintiff agrees with the Federal Defendants as to the applicable test: "To state an equal protection claim, a plaintiff must adequately plead that the government

treated the plaintiff disparately as compared to similarly situated persons and that such disparate treatment either burdens a fundamental right, targets a suspect class, or has no rational basis." *Ctr. for Bio-Ethical Reform, Inc. v. Napolitano*, 648 F.3d 365, 379 (6th Cir. 2011) (internal quotation omitted).

Here, the government clearly treats plaintiff differently from other similarly situated individuals. The Federal Defendants argue that Plaintiff is not treated differently than any other individuals for whom no relief from Section 922 is permitted. However, the other individuals falling under Section 922 are not similarly situated to Plaintiff. Plaintiff is not a fugitive from justice, a felon, an illegal alien, or any of the other categories of individuals collected under Section 922. The individuals who are most similarly situated to Plaintiff are law-abiding, responsible citizens not suffering from mental illness.

As argued above, the Section 922(g)(4) firearm prohibition without a review to determine current fitness burdens Plaintiff's fundamental right as a "law-abiding, responsible citizen[] to use arms in defense of hearth and home." *See Heller*, 554 U.S. at 634-35. Certainly, the Section 922(g)(4) was initially appropriate once its provisions were triggered in 1986. Twenty-six years later, however, Plaintiff presents no special risk of harm to himself or others. After such a long period, the involuntary commitment that triggered Plaintiff's Section 922(g)(4) cannot outweigh Plaintiff's current mental health as a measure of his fitness to possess a firearm. Continuing the Section 922(g)(4) without an opportunity for review clearly overburdens Plaintiff's Second Amendment right and has no rational basis to the law's purpose of preventing future gun violence.

B. PLAINTIFF HAS ALLEGED A VALID DUE PROCESS CLAIM.

Plaintiff has also clearly stated a legal claim for relief based on the Due Process Clause of the Fifth Amendment. Plaintiff does not rest his claim on his lack of knowledge that Section 922(g)(4) made it illegal for him to own or possess a firearm. Instead, Plaintiff's principle contention is that he should be provided a hearing or other opportunity to show that he is not a danger to himself or others and thus not the sort of individual for whom Section 922(g)(4) was intended.

The Federal Defendants argue that *Connecticut Department of Public Safety v. Doe* and *Black v. Snow* forestall Plaintiff's claim because the Section 922(g)(4) prohibition was based "on the fact of previous [commitment], not on the fact of current dangerousness." *See Connecticut Department of Public Safety v. Doe*, 538 U.S. 1, 123 S.Ct. 1160, 1163 (2003); *Black v. Snow*, 272 F. Supp. 2d 21 (D.D.C. 2003); Mem. Law Supp. Fed. Defs.' Mot. Dismiss 48-49. However, both those cases were released prior to *Heller*, which recognized the Second Amendment right of "law-abiding, responsible citizens to use arms in defense of hearth and home" *Heller*, 554 U.S. at 634-35.

In light of *Heller*, the fact of a prior commitment alone is an insufficient basis to limit Plaintiff's Second Amendment rights. As argued above, *mentally ill individuals* were not historically recognized as having a right to possess a firearm—not *previously committed individuals*. While using a prior commitment as a prophylactic safeguard can be reasonable, the Second Amendment requires that individuals have an opportunity to demonstrate that they are not in fact mentally ill. Hence, *Connecticut Department of Public Safety*, which did not involve regulation of Second Amendment rights, does not forestall Plaintiff's claim here. Unlike in *Connecticut Department of Public Safety*, current dangerousness must be a material consideration under Section 922(g)(4) for the statue to avoid running afoul of the Second

Amendment. Therefore, Plaintiff has alleged legal claims for relief under both the Equal Protection Clause and the Due Process Clause of the Fifth Amendment.

CONCLUSION

For the reasons stated above, the Federal Defendants Motion to Dismiss should be denied in its entirety as to the Federal Defendants in their official capacity.

Dated: October 30, 2012

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