[ORAL ARGUMENT NOT YET SCHEDULED]

No. 11-5352

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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JEFFERSON WAYNE SCHRADER et al.,

Plaintiffs-Appellants,

v.

ERIC H. HOLDER, JR., Attorney General of the United States, et al.,

Defendants-Appellees.

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ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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# BRIEF FOR APPELLEES

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STUART F. DELERY
*Acting Assistant Attorney General*

RONALD C. MACHEN JR.
*United States Attorney*

MICHAEL S. RAAB
(202) 514-4053
ANISHA S. DASGUPTA
(202) 514-5428
*Attorneys, Appellate Staff*
*Civil Division, Room 7230*
*U.S. Department of Justice*
*950 Pennsylvania Ave, NW*
*Washington, D.C. 20530-0001*

*Of Counsel:*

JANE M. LYONS
(202) 514-7161
R. CRAIG LAWRENCE
(202) 514-7159
*Assistant U.S. Attorneys*
*U.S. Attorney's Office*
*555 Fourth Street, N.W.*
*Washington D.C. 20530*

## CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), the undersigned counsel hereby certifies as follows:

A. Parties and Amici.

The plaintiffs-appellants are Jefferson Wayne Schrader and the Second Amendment Foundation, Inc. The defendants-appellees are Eric Holder, Jr., as Attorney General of the United States, the Federal Bureau of Investigation, and the United States of America. There have been no amici curiae.

B. Rulings Under Review.

The ruling under review is a memorandum and order (per Hon. Rosemary M. Collyer), dated December 23, 2010. *Schrader v. Holder*, No. 10-1736, — F. Supp. — (D.D.C. 2010). *See* Joint Appendix 142-157.

C. Related Cases.

This case has not previously been before any court other than the district court and there are no currently pending related cases.

Respectfully submitted,

s/ Anisha S. Dasgupta
ANISHA S. DASGUPTA
Attorney for Appellees

# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

Cases: Page



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* Authorities chiefly relied upon are marked with an asterisk.

**Statutes:**

**Regulations:**



**Rules:**



**Legislative Materials:**

**Other Authorities:**

# GLOSSARY

| | |
|---|---|
| FBI | Federal Bureau of Investigation |
| JA | Joint Appendix |
| NICS | National Instant Criminal Background Check System |
| SAF | Second Amendment Foundation, Inc. |

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## STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction pursuant to 28 U.S.C. § 1331. Joint Appendix ("JA") 32. On December 23, 2011, the district court entered a final order granting defendants' motion to dismiss. *Id.* at 157. Plaintiffs filed a timely notice of appeal on December 23, 2011. *See id.* at 6; Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction

pursuant to 28 U.S.C. § 1291.

## STATUTES AND REGULATIONS

Pertinent statutes are reproduced in the addendum to this brief.

## QUESTION PRESENTED

Whether the district court correctly dismissed this as-applied challenge to 18 U.S.C. § 922(g)(1) for failure to state a claim.

## STATEMENT OF THE CASE

This is an action for declaratory relief filed by plaintiffs Jefferson Wayne Schrader and the Second Amendment Foundation, Inc. Plaintiffs challenge the applicability and constitutionality of a federal criminal statute limiting the purchase of firearms by a person "who has been convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year," 18 U.S.C. § 922(g)(1). *See* JA 35–36. The district court dismissed plaintiffs' suit, holding that plaintiffs had failed to state a valid legal claim. *Id.* at 155. Plaintiffs then filed this timely appeal.

### A. Statutory and Regulatory Background.

1. Following a multi-year inquiry into violent crime that included "field investigation and public hearings," S. Rep. No. 88-1340, at 1 (1964),

Congress found "that the ease with which" handguns could be acquired by "criminals . . . and others whose possession of such weapons is similarly contrary to the public interest[,] is a significant factor in the prevalence of lawlessness and violent crime in the United States," Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, Title IV, § 901(a)(2), 82 Stat. 197, 225. Congress found "that there is a widespread traffic in firearms moving in or otherwise affecting interstate or foreign commerce, and that the existing Federal controls over such traffic do not adequately enable the States to control this traffic within their own borders through the exercise of their police power." *Id.* § 901(a)(1), 82 Stat. at 225. Congress determined "that only through adequate Federal control over interstate and foreign commerce in these weapons . . . can this grave problem be properly dealt with, and effective State and local regulation of this traffic be made possible." *Id.* § 901(a)(3), 82 Stat. at 225.

Congress's investigations revealed "a serious problem of firearms misuse in the United States," S. Rep. No. 89-1866, at 53 (1966), and a "relationship between the apparent easy availability of firearms and criminal behavior," *id.* at 3. Law enforcement officials testified to the

"tragic results" of firearm misuse by persons with prior criminal convictions. S. Rep. No. 88-1340, at 12, 18. Statistical evidence showed "the terrible abuse and slaughter caused by virtually unrestricted access to firearms by all individuals, regardless of their backgrounds." 114 Cong. Rec. 13219 (May 14, 1968) (statement of Sen. Tydings).

Congress accordingly aimed to "regulate more effectively interstate commerce in firearms so as to reduce the likelihood that they fall into the hands of the lawless or those who might misuse them," S. Rep. No. 89-1866, at 1. "[P]ersons with records of misdemeanor arrests" were among those whose access to firearms concerned Congress. S. Rep. No. 88-1340, at 4.

To that end, Congress included in both the Omnibus Crime Control Act and the Gun Control Act of 1968, Pub. L. No. 90-618, Title I, § 101, 82 Stat. 1213, statutory provisions limiting firearm access by persons with "criminal background[s]," S. Rep. No. 90-1097, at 28 (1968). These provisions include 18 U.S.C. § 922(g)(1), which provides that "[it] shall be unlawful for any person . . . who has been convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year . . . to

receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."

"The term 'crime punishable by imprisonment for a term exceeding one year' does not include" a "State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less." *Id.* § 921(a)(20)(B). Also excluded is "[a]ny conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored . . . unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms." *Id.* § 921(a)(20).[1]

2. "The Brady Handgun Violence Prevention Act of 1993 required the Attorney General to establish a 'national instant criminal background check system,' known as the NICS, to search the backgrounds of prospective gun purchasers for criminal or other information that would disqualify them from possessing firearms." *Nat'l Rifle Ass'n of America,*

[1] Congress also excluded from the statutory term "crime punishable by imprisonment for a term exceeding one year" any "Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices." 18 U.S.C. § 921(a)(20)(A).

*Inc. v. Reno*, 216 F.3d 122, 125 (D.C. Cir. 2000); Pub. L. No. 103-159, § 103(b), 107 Stat. 1536. "A computerized system operated by the FBI, the NICS searches for disqualifying information in three separate databases," including a database "containing criminal history records." 216 F.3d at 125. "Before selling a weapon, firearm dealers must submit the prospective purchaser's name, sex, race, date of birth, and state of residence to the NICS operations center at the FBI." *Ibid.*; 28 C.F.R. § 25.7. If a search reveals that the prospective purchaser may not legally possess a firearm, the dealer receives a purchase "denied" response from the NICS operations center. 216 F.3d at 125; 28 C.F.R. § 25.6(c)(1)(iv).

**B. Facts and Prior Proceedings.**

1. This is an action for declaratory relief filed by plaintiffs Jefferson Wayne Schrader and the Second Amendment Foundation, Inc., "on behalf of itself and its members." JA 32. Plaintiffs challenge the applicability and constitutionality of a federal criminal statute limiting the purchase of firearms by a person "who has been convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year." 18 U.S.C. § 922(g)(1). *See* JA 35–36.

The complaint alleges that Schrader, a "citizen of the State of Georgia and of the United States," JA 31, "presently intends to purchase and possess a handgun and long gun for self-defense within his own home, but is prevented from doing so only by defendants' active enforcement" of the challenged statute, *id.* at 31–32. The defendants in this action are the Attorney General of the United States, the Federal Bureau of Investigation, and the United States of America. *Id.* at 32.

According to the complaint, Schrader was convicted of misdemeanor assault and battery in the State of Maryland in 1968, after an altercation in which he punched an individual on the street. *Id.* at 33. He was "ordered to pay a $100 fine, plus court costs of $9, or upon default serve thirty days in jail." *Ibid.* "At the time of Schrader's misdemeanor assault conviction, and until recently, Maryland law did not set forth any maximum sentence for the crime of misdemeanor assault." *Id.* at 34. Thus, the only limitation on sentencing for Schrader's offense of conviction "was the right secured by the Eighth Amendment to the United States Constitution." *Ibid.*

The complaint alleges that in January 2009, Schrader attempted to

purchase a handgun from a local firearms dealer to "keep for self-defense" but the transaction "resulted in a denial decision by the FBI when the [NICS] system indicated that Mr. Schrader is prohibited under federal law from purchasing firearms." JA 34. Schrader was advised that the transaction was "rejected pursuant to 18 U.S.C. § 922(g)(1) on the basis of his 1968 Maryland misdemeanor assault conviction." *Ibid.*[2]

According to the complaint, the Second Amendment Foundation "is a non-profit membership organization" whose "purposes . . . include education, research, publishing and legal action focusing on the Constitutional right to privately own and possess firearms, and the consequences of gun control." *Id.* at 32. The complaint alleges that "Plaintiff SAF's members and supporters, including Plaintiff Schrader, are directly impacted by application of 18 U.S.C. § 922(g)(1) to misdemeanor

[2] The complaint additionally alleges that, in November 2008, Schrader's companion attempted to purchase a shotgun for him as a gift but that transaction "resulted in a denial decision by the FBI when the [NICS] computer system indicated that Mr. Schrader is prohibited under federal law from purchasing firearms." JA 34. Defendants, in opposing plaintiffs' motion for summary judgment, disputed plaintiffs' factual allegations relating to this alleged transaction and subsequent communications from the FBI. *See, e.g.*, *id.* at 16-17. In any event, the NICS system background checks focus only on the prospective firearm purchaser. *See, e.g.*, 18 U.S.C. § 922(t)(1).

offenses" and that "Plaintiff SAF routinely expends resources responding to inquiries about the applicability of 18 U.S.C. § 922(g)(1) under a variety of circumstances, including those similar to plaintiff Schrader's." JA 35.

Plaintiffs' first claim for relief seeks "removal of [Schrader's] firearms disability from NICS, and a declaratory judgment that his 1968 Maryland common law misdemeanor assault conviction is not a disabling offense for purposes of 18 U.S.C. § 922(g)(1)." JA 35. Plaintiffs' second claim seeks declaratory and injunctive relief barring defendants "from enforcing 18 U.S.C. § 922(g)(1) on the basis of simple common-law misdemeanor offenses carrying no statutory penalties." JA 36.

2. The district court dismissed the suit, holding that Schrader had standing but the complaint failed to state a valid legal claim. *Id.* at 155. The court reasoned that "[t]he FBI explained its denial decision in 2009 and Mr. Schrader sued in 2010," thus this "is not a 'pre-enforcement challenge' as to which the Circuit has concluded a plaintiff lacks standing due to the absence of an injury-in-fact." *Id.* at 148.[3]

[3] The district court noted that "[b]ecause the Second Amendment Foundation has not raised issues separate from those raised by Mr. Schrader, the Court need not decide whether it has standing." JA 148.

In holding that Schrader failed to state a claim as to the applicability of 922(g)(1), the court rejected "[h]is argument that the lack of *statutory* criteria makes a common law crime not 'punishable' within the meaning of federal law." *Id.* at 150. The court reasoned that "[t]he absence of a legislatively-defined sentence leaves sentencing to the discretion of the judge, limited only by constitutional (federal or State) provisions," and that "Mr. Schrader does not argue, nor could he, that a Maryland State court judge could not have sentenced him, or another offender of the same common law crime, to more than two years in jail." *Ibid.*

The court also concluded that Schrader's constitutional challenge to the disqualification at 922(g)(1) failed to state a claim under the Second Amendment. The district court rested its analysis on this Court's observation that "'convicted felons may be deprived of their right to keep and bear arms'" because "regulations on the use and ownership of guns 'promote the government's interest in public safety consistent with our common law tradition . . . [and] do not impair the core conduct upon which the right was premised.'" JA 154 (quoting *Parker v. District of Columbia*, 478 F.3d 370, 399 (D.C. Cir. 2007), *aff'd sub nom. Dist. of Columbia v.*

*Heller*, 554 U.S. 570 (2008)). The court further noted that the Supreme Court, in *Heller*, included "*prohibitions on the possession of firearms by felons*" within a list of "presumptively lawful regulatory measures." JA 154 (quoting *Heller*, 554 U.S. at 626–27 & n.26).

## SUMMARY OF ARGUMENT

Plaintiff Jefferson Wayne Schrader contends that he is entitled to purchase a firearm notwithstanding 18 U.S.C. § 922(g)(1), which limits the purchase of firearms by persons who have been convicted of state misdemeanor offenses punishable by imprisonment for a term exceeding two years. Schrader contends that § 922(g)(1) does not encompass his prior misdemeanor conviction or, alternatively, that the statute violates the Second Amendment. The district court properly rejected those arguments.

Schrader was convicted by a Maryland state court of misdemeanor assault and battery — offenses for which the court was authorized to impose a term of imprisonment of any length, subject only to the limits imposed by the Eighth Amendment to the United States Constitution. He is therefore squarely within "[t]he plain wording" of Section 922(g)(1),

which "applies equally when the potential term of imprisonment is established by the common law and limited only by the prohibition on cruel and unusual punishments as when the range of possible terms of imprisonment is determined by a statute." *United States v. Coleman*, 158 F.3d 199, 204 (4th Cir. 1998) (*en banc*).

Plaintiffs' constitutional challenge to Section 922(g)(1) also lacks merit. Section 922(g)(1) applies solely to persons with prior criminal convictions; it does not implicate the Second Amendment's protection of "the right of law-abiding, responsible citizens to use arms in defense of hearth and home," *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008). Indeed, no court of appeals has applied *Heller*'s analysis to conclude that a person disqualified from firearms access on the basis of a prior criminal conviction possesses "Second Amendment rights [that] are intact" or that such a person "is entitled to some measure of Second Amendment protection to keep and possess firearms in his home for self-defense," *United States v. Staten*, 666 F.3d 154, 160 (4th Cir. 2011). In any event, even if plaintiffs' suit implicates the Second Amendment, the application of Section 922(g)(1) to a person convicted of a misdemeanor criminal

assault offense punishable by a term of imprisonment of more than two years readily withstands heightened scrutiny. Following a multi-year inquiry into violent crime that included "field investigation and public hearings," S. Rep. No. 88-1340, at 1 (1964), Congress found "that the ease with which" handguns could be acquired by "criminals . . . and others whose possession of such weapons is similarly contrary to the public interest[,] is a significant factor in the prevalence of lawlessness and violent crime in the United States," Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, Title IV, § 901(a)(2), 82 Stat. 197, 225 (June 19, 1968). Congress accordingly aimed to "regulate more effectively interstate commerce in firearms so as to reduce the likelihood that they fall into the hands of the lawless or those who might misuse them," S. Rep. No. 89-1866, at 1 (1966). "[P]ersons with records of misdemeanor arrests" were among those whose access to firearms concerned Congress. S. Rep. No. 88-1340, at 4 (1964).

The Supreme Court's cases have "recognized and given weight" to Congress's "broad prophylactic purpose" in enacting the provisions at Section 922(g). *See Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103,

118 (1983), overruled on other grounds by Firearms Owners' Protection Act of 1986, 18 U.S.C. § 921(a)(20). As the Supreme Court has explained, Congress "was concerned with the widespread traffic in firearms and with their general availability to those whose possession thereof was contrary to the public interest." *Dickerson*, 460 U.S. at 118 (quoting *Huddleston v. United States*, 415 U.S. 814, 824 (1974) (quotation marks omitted)). "'The principal purpose of federal gun control legislation, therefore, was to curb crime by keeping "firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency."'" *Ibid.* (quoting *Huddleston*, 415 U.S. at 824 (quoting S. Rep. No. 90-1501, at 22 (1968)).

Schrader was convicted by a Maryland court of a misdemeanor criminal assault offense that was punishable by a term of imprisonment exceeding two years and qualifies as a "crime of violence" under Maryland law. Based on this conviction, Schrader is independently barred from possessing a firearm in several states and the District of Columbia. Applying Section 922(g)(1) in these circumstances is "substantially related to an important governmental objective," *Clark v. Jeter*, 486 U.S. 456, 461

(1988). There is a "close fit," *Heller v. District of Columbia*, 670 F.3d 1244, 1258 (D.C. Cir. 2011) ("*Heller II*"), between the restrictions at Section 922(g)(1) and the governmental interest in public safety, which the Supreme Court has recognized as "compelling," *United States v. Salerno*, 481 U.S. 739, 750 (1987).

## STANDARD OF REVIEW

This Court reviews *de novo* a dismissal under Fed. R. Civ. P. 12(b)(6) for failure to state a claim. *Hettinga v. United States*, — F.3d. — , 2012 WL 1232592, at *3 (D.C. Cir. Apr. 13, 2012).

## ARGUMENT

### Because 18 U.S.C. § 922(g)(1) Properly Applies To Schrader, The Complaint Fails To State A Valid Claim For Relief.

### A. Schrader's Misdemeanor Assault Conviction Was Punishable By A Term Of Imprisonment Exceeding Two Years And Is Therefore Not Statutorily Exempted From The Scope Of 18 U.S.C. § 922(g)(1).

1. Schrader was convicted by a Maryland state court of misdemeanor assault and battery — offenses for which the court was authorized to impose a term of imprisonment of any length, subject only to the limits imposed by the Eighth Amendment to the United States Constitution. JA 33. Schrader is thus squarely within the ambit of Section 922(g)(1), which

applies to a person "who has been convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year." Although Congress has defined the statutory term "crime punishable by imprisonment for a term exceeding one year" to exclude a "State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less," 18 U.S.C. § 921(a)(20)(B), Schrader does not qualify for this exception. As the district court correctly noted, "Mr. Schrader does not argue, nor could he, that a Maryland State court judge could not have sentenced him, or another offender of the same common law crime, to more than two years in jail." JA 150.

Plaintiffs seek to avoid the fact that Schrader's offense was plainly "'punishable' by a term of more than two years in jail," *ibid.*, by contending (Appellant Br. 17) that the absence of "any particular statutory criteria" for punishment places "uncodified common law offenses" such as Schrader's assault and battery conviction outside the purview of Section 922(g)(1). But the text of Section 922(g)(1) focuses on the maximum potential punishment for a prior criminal conviction, not on whether a maximum penalty has been codified by the legislature.

As the Fourth Circuit has explained, "[t]he plain wording of the statute applies equally when the potential term of imprisonment is established by the common law and limited only by the prohibition on cruel and unusual punishments as when the range of possible terms of imprisonment is determined by a statute." *United States v. Coleman*, 158 F.3d 199, 204 (4th Cir. 1998) (*en banc*).

In *Coleman*, the Fourth Circuit rejected the same argument that plaintiffs present here — that Maryland common-law assault "does not constitute a crime punishable by imprisonment for a term exceeding one year." *Id.* at 203 (quotation marks omitted). The Fourth Circuit observed that "[w]hile a Maryland conviction for common-law assault is classified as a misdemeanor, the offense carries no maximum punishment; the only limits on punishment are the Cruel and Unusual Punishment Clauses of the Maryland and United States Constitutions." *Ibid.* "As such," the Fourth Circuit reasoned, "a Maryland common-law assault clearly is punishable by more than two years imprisonment and is not excluded from the definition of a crime punishable by imprisonment for a term exceeding one year by the misdemeanor exclusion" to Section 922(g)(1). 158 F.3d at

203 (internal quotation marks omitted).[4]

2. Plaintiffs' remaining arguments for excepting Schrader from Section 922(g)(1) merely establish the error of their position. In support of their request for this Court to imply a textually-unsupported exception for common law offenses, plaintiffs emphasize "the federal scheme's structural reliance on the judgment of the convicting jurisdiction's legislature." (Appellant Br. 19.) They urge deference to the legislature's "explicit judgment about the seriousness" of an offense and ask this Court to give weight to Maryland's treatment of offenses such as Schrader's in

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[4]Plaintiffs appear to have abandoned the claim (JA 35) that Schrader's "conviction for misdemeanor assault cannot be the basis for a firearms disability under 18 U.S.C. § 922(g)(1), because Schrader was not actually sentenced to a term of imprisonment exceeding two years." And in any event, that argument fails because "the statutory language of § 921(a)(20)(B) unambiguously indicates that the critical inquiry in determining whether a state offense fits within the misdemeanor exception" to Section 922(g)(1) "is whether the offense is 'punishable' by a term of imprisonment greater than two years — not whether the offense 'was punished' by such a term of imprisonment." *Coleman*, 158 F.3d at 203–04. "It was plainly irrelevant to Congress whether the individual in question actually receives a prison term; the statute imposes disabilities on one convicted of 'a crime *punishable* by imprisonment for a term exceeding one year.'" *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 113 (1983), overruled on other grounds by Firearms Owners' Protection Act of 1986, 18 U.S.C. § 921(a)(20) (quoting 18 U.S.C. § 922(g)); *accord United States v. Jones*, 195 F.3d 205, 207 (4th Cir. 1999).

"Maryland's own state gun control laws." *Id.* at 19–21.

But as the district court observed, "the choice of a State legislature to rely on judicial discretion at sentencing on certain common law misdemeanors represents a legislative choice just as the adoption of a statute would." JA 151. "Giving 'punishable' its common sense definition does not undermine Maryland's ability to choose how to punish its citizens who are convicted of State crimes." *Ibid.*

In any event, the considerations that plaintiffs identify only reinforce the propriety of applying Section 922(g)(1) to Schrader. As the district court noted, "since Mr. Schrader's conviction in 1968, the State of Maryland has codified the common law crime of assault," establishing First Degree Assault as a felony punishable by up to 25 years imprisonment, Md. Criminal Law Code Ann. § 3-202 (assault that causes or attempts to cause serious physical injuries or that is carried out with a firearm) and Second Degree Assault as a misdemeanor punishable by up to 10 years imprisonment, *id.* § 3-203 (covering all other forms of assault). JA 151 n.5. Maryland's legislature has thus determined that the conduct giving rise to Schrader's offense of conviction is sufficiently serious to

trigger the firearm disqualification at Section 922(g)(1).[5]

Plaintiffs are also incorrect in suggesting (Appellant Br. 21) that Schrader could lawfully possess a firearm under Maryland law. "Under the Maryland firearms law, a person who has been convicted (or adjudicated delinquent) of a 'crime of violence' may not possess a regulated firearm" such as a handgun. 85 Md. Op. Atty. Gen. 259, Op. No. 00-024 (Sept. 28, 2000), *available at* 2000 WL 1511520, at *1; *see also* Md. Public Safety Code § 5-133(b), (c)(1)(i); *id.* § 5-101(g)(1), (p) (definitions). And "a conviction for common law assault or common law battery is included in the definition of 'crime of violence'" for purposes of Maryland's restrictions on the possession of regulated firearms. 85 Md. Op. Atty. Gen. 259, Op. No. 00-024, *available at* 2000 WL 1511520, at *4.; *see also id.* at *2.[6]

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[5] Maryland's codification "subsumed all previous statutory assault provisions as well as the common law into a single scheme and established a two-tiered regimen." *Robinson v. State*, 353 Md. 683, 694 (Md.1999). "*Any and all assaults*, no matter how simple or aggravated" now fall within the category of first degree assault or second degree assault. *Id.* at 695.

[6] Plaintiffs are in any event mistaken in their assertion (Appellant Br. 21) that "[i]t would make little sense" to place "within the reach of a federal gun control scheme that specifically depends on the reach of State law" persons whom a State excepted from "the scope of its own gun control laws." As the Supreme Court has observed when construing Section

Plaintiffs' arguments for an exception from Section 922(g)(1) thus fail completely even on plaintiffs' own terms. The district court was therefore correct in concluding that the complaint failed to state a claim with respect to plaintiffs' request for "removal of [Schrader's] firearms disability from NICS" and a declaratory judgment that Schrader's Maryland conviction for common law misdemeanor assault "is not a disabling offense for purposes of 18 U.S.C. § 922(g)(1)." JA 35.

### B. Plaintiffs' Constitutional Challenge To Section 922(g)(1) Lacks Merit

In *Heller*, the Supreme Court recognized that "[l]ike most rights, the right secured by the Second Amendment is not unlimited." 554 U.S. at 626. The Court provided a non-"exhaustive" list of "presumptively lawful regulatory measures," including "longstanding prohibitions on the possession of firearms by felons." 554 U.S. at 626 & 627 n.26. The Court explained that "nothing in [its] opinion should be taken to cast doubt on" such measures, *id.* at 626, "repeat[ing] those assurances" in *McDonald v.*

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922(g)(1), "[i]f federal law is to provide the missing 'positive assurance,' it must reach primary conduct not covered by state law." *Caron v. United States*, 524 U.S. 308, 315 (1998). "Any other result would reduce federal law to a sentence enhancement for some state-law violations, a result inconsistent with the congressional intent . . ." *Id.* at 316.

*City of Chicago*, 130 S. Ct. 3020, 3047 (2010) (plurality).

This Court, in *Heller II*, accordingly adopted "a two-step approach to determining the constitutionality of the District's gun laws." 670 F.3d 1244, 1252 (D.C. Cir. 2011). The Court "ask[ed] first whether a particular provision impinges upon a right protected by the Second Amendment," stating that "if it does, then we go on to determine whether the provision passes muster under the appropriate level of constitutional scrutiny." *Ibid.*

Section 922(g)(1) limits the possession of firearms by persons who have been "convicted in any court of[] a crime" punishable by imprisonment for a term exceeding two years in the case of state misdemeanor offenses, 18 U.S.C. § 921(a)(20)(B), or "exceeding one year" in the case of other covered offenses, *id.* § 922(g)(1). The statute regulates conduct falling outside the scope of the Supreme Court's holding in *Heller* and, in any event, readily withstands heightened scrutiny.

### 1. Application Of 18 U.S.C. § 922(g)(1) To Schrader Does Not Implicate The Second Amendment.

The Supreme Court's holding in *Heller* was limited to recognition of "the right of law-abiding, responsible citizens to use arms in defense of

hearth and home." 554 U.S. at 635; *see also id.* at 625 ("[T]he Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes."). As the Court stated, "*[a]ssuming that Heller is not disqualified from the exercise of Second Amendment rights*, the District must permit him to register his handgun and must issue him a license to carry it in the home." *Id.* at 635 (emphasis added).

Accordingly, no court of appeals has applied *Heller*'s analysis to conclude that a person disqualified from firearm access on the basis of a prior criminal conviction possesses "Second Amendment rights [that] are intact" or that such a person "is entitled to some measure of Second Amendment protection to keep and possess firearms in his home for self-defense," *United States v. Staten*, 666 F.3d 154, 160 (4th Cir. 2011); *see also United States v. Moore*, 666 F.3d 313, 319 (4th Cir. 2012) (rejecting as-applied challenge to Section 922(g)(1) on the basis that person with prior convictions "simply does not fall within the category of citizens to which the *Heller* court ascribed the Second Amendment protection of 'the right of *law-abiding responsible* citizens to use arms in defense of hearth

and home'" (quoting 554 U.S. at 635)).

The historical record supports the caution with which courts have approached requests to extend *Heller's* holding by recognizing Second Amendment protections for persons with prior criminal convictions. "[M]ost scholars of the Second Amendment agree that the right to bear arms was tied to the concept of a virtuous citizenry and that, accordingly, the government could disarm 'unvirtuous citizens.'" *United States v. Yancey*, 621 F.3d 681, 684–85 (7th Cir. 2010) (quoting *United States v. Vongxay*, 594 F.3d 1111, 1118 (9th Cir. 2010)). *"Heller* identified, as a 'highly influential' 'precursor' to the Second Amendment the Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to Their Constituents." *United States v. Skoien*, 614 F.3d 638, 640 (7th Cir. 2010) (*en banc*) (quoting 554 U.S. at 604, internal citation omitted). "The report asserted that citizens have a personal right to bear arms 'unless for crimes committed, or real danger of public injury.'" *Ibid.* (quoting Bernard Schwartz, 2 *The Bill of Rights: A Documentary History* 662, 665 (1971)). Another of the "Second Amendment precursors" referenced in *Heller*, 554 U.S. at 603, "Samuel Adams' proposal in

Massachusetts," *id.* at 604, "would have precluded the Constitution from ever being 'construed' to 'prevent the people of the United States, *who are peaceable citizens*, from keeping their own arms,'" *id.* at 716 (Breyer, J., dissenting) (quoting 6 *Documentary History of the Ratification of the Constitution* 1453 (J. Kaminski & G. Saladino eds. 2000)) (emphasis added).

"Many of the states, whose own constitutions entitled their citizens to be armed, did not extend this right to persons convicted of crime." *Skoien*, 614 F.3d at 640. Indeed, Schrader's Maryland assault conviction would restrict him from possessing firearms under the laws of at least several states and the District of Columbia.[7]

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[7] *E.g.*, DC ST § 22-4503(a)(1) (disqualifying persons "convicted in any court of a crime punishable by imprisonment for a term exceeding one year"); Ga. Code Ann. § 16-11-131 (prohibiting firearm possession by persons "convicted of a felony by a court of this state or any other state" and providing that "'[f]elony' means any offense punishable by imprisonment for a term of one year or more"); Iowa Code Ann. §§ 724.25, .26 (prohibiting firearm possession by "[a] person who is convicted of a felony in a state or federal court" and providing that "the word 'felony' means any offense punishable in the jurisdiction where it occurred by imprisonment for a term exceeding one year, but does not include any offense, other than an offense involving a firearm or explosive, classified as a misdemeanor under the laws of the state and punishable by a term of imprisonment of two years or less"); 15 Maine Rev. Stat. Ann § 393 (prohibiting possession of concealed firearms and imposing limitations on

Thus, as a person disqualified from possessing a firearm under federal and state law because of a prior criminal conviction, Schrader falls outside the scope of the Supreme Court's analysis in *Heller*. *E.g.*, 554 U.S. at 635 ("Assuming that Heller is not disqualified from the exercise of Second Amendment rights, the District must permit him to register his handgun and must issue him a license to carry it in the home."). *Heller* accordingly offers no basis for challenging defendants' application of Section 922(g)(1) to Schrader.

**2. Even If The Second Amendment Is Implicated, The Law Is Constitutional.**

Even assuming arguendo that plaintiffs' suit implicates the Second Amendment, the Court nonetheless should reject plaintiffs' constitutional challenges. As explained below, Section 922(g)(1) readily withstands

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possession of other firearms by persons convicted of "[a] crime under the laws of any other state that, in accordance with the laws of that jurisdiction, is punishable by a term of imprisonment exceeding one year" except if that crime "is classified by the laws of that state as a misdemeanor and is punishable by a term of imprisonment of 2 years or less"); Mass. Gen. Law 140 § 129B (prohibiting possession of firearms by a person who has "in any other state or federal jurisdiction, been convicted . . . for the commission of . . . a misdemeanor punishable by imprisonment for more than two years"); *see also supra* at pp. 20–21 (discussing Schrader's disqualification under Maryland law).

intermediate scrutiny.[8]

### a. At Most This Court Should Apply Intermediate Scrutiny

"[C]ourts of appeals have generally applied intermediate scrutiny to uphold Congress' effort under § 922(g) to ban firearm possession by certain classes of non-law-abiding, non-responsible persons who fall outside the Second Amendment's core protections." *United States v. Mahin*, 668 F.3d 119, 123 (4th Cir. 2012). Plaintiffs offer no serious arguments in support of their request for this Court to depart from that practice and apply strict scrutiny instead.

Plaintiffs recognize that "courts typically apply intermediate scrutiny to claims by individuals with a criminal record" (Appellant Br. 58), but urge the Court to apply strict scrutiny on the basis that Section 922(g)(1) purportedly burdens "the core rights of responsible, law-abiding citizens to exercise all firearms-related Second Amendment rights" (Appellant Br. 51–52). Section 922(g)(1), however, applies solely to persons who have been "convicted in any court of[] a crime" punishable by imprisonment for

[8] The challenged federal laws would also satisfy strict scrutiny for the reasons set forth below.

a term exceeding two years in the case of state misdemeanor offenses, 18 U.S.C. § 921(a)(20)(B), or "exceeding one year" in the case of other covered offenses, *id.* § 922(g)(1).

Plaintiffs' complaint acknowledges that Schrader is such a person, and that his "Maryland assault and battery conviction actually involved violence," JA 152. Thus, because Schrader is outside the core of right recognized in Heller — "the right of law-abiding, responsible citizens to use arms in defense of hearth and home," 554 U.S. at 635 — the application of 922(g)(1) to him is subject to at most intermediate scrutiny.

**b. The Challenged Federal Laws Satisfy Intermediate Scrutiny**

A law satisfies intermediate scrutiny if it is "substantially related to an important governmental objective." *Clark v. Jeter*, 486 U.S. 456, 461 (1988); *see also Heller II*, 670 F.3d at 1258. Applying intermediate scrutiny here, plaintiffs' constitutional challenge fails to state a valid claim because the application of Section 922(g)(1) to a person convicted of a misdemeanor criminal assault offense punishable by a term of imprisonment of more than two years, *see* 18 U.S.C. § 921(a)(20)(B), "'promotes a substantial governmental interest that would be achieved less

effectively absent the regulation, and the means chosen are not substantially broader than necessary to achieve that interest,'" *Heller II*, 670 F.3d at 1258 (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 782-83 (1989)).

1. Following a multi-year inquiry into violent crime that included "field investigation and public hearings," S. Rep. No. 88-1340, at 1 (1964), Congress found "that the ease with which" handguns could be acquired by "criminals . . . and others whose possession of such weapons is similarly contrary to the public interest[,] is a significant factor in the prevalence of lawlessness and violent crime in the United States," Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, Title IV, § 901(a)(2), 82 Stat. 197, 225. Congress found "that there is a widespread traffic in firearms moving in or otherwise affecting interstate or foreign commerce, and that the existing Federal controls over such traffic do not adequately enable the States to control this traffic within their own borders through the exercise of their police power." *Id.* § 901(a)(1), 82 Stat. 225. Congress determined "that only through adequate Federal control over interstate and foreign commerce in these weapons . . . can this grave

problem be properly dealt with, and effective State and local regulation of this traffic be made possible." *Id.* § 901(a)(3), 82 Stat. at 225. Congress's investigations revealed "a serious problem of firearms misuse in the United States," S. Rep. No. 89-1866, at 53 (1966), and a "relationship between the apparent easy availability of firearms and criminal behavior," *id.* at 3. Law enforcement officials testified to the "tragic results" of firearm misuse by persons with prior criminal convictions. S. Rep. No. 88-1340, at 12, 18. Statistical evidence showed "the terrible abuse and slaughter caused by virtually unrestricted access to firearms by all individuals, regardless of their backgrounds." 114 Cong. Rec. 13219 (May 14, 1968) (statement of Sen. Tydings).

Congress accordingly aimed to "regulate more effectively interstate commerce in firearms so as to reduce the likelihood that they fall into the hands of the lawless or those who might misuse them," S. Rep. No. 89-1866, at 1. "[P]ersons with records of misdemeanor arrests" were among those whose access to firearms concerned Congress. S. Rep. No. 88-1340, at 4.

To that end, Section 922(g)(1) provides that "it shall be unlawful for

any person . . . who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." The statute does not apply where the offense of conviction is a state misdemeanor offense "punishable by a term of imprisonment of two years or less," 18 U.S.C. § 921(a)(20)(B), or an "offense[] pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offense[] relating to the regulation of business practices," *id.* § 921(a)(20)(A). The statute also does not apply to "[a]ny conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored . . . unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms." *Id.* § 921(a)(20).

2. "[T]he Government's general interest in preventing crime is compelling," *United States v. Salerno*, 481 U.S. 739, 750 (1987), and the Supreme Court's cases have "recognized and given weight" to Congress's "broad prophylactic purpose" in enacting the provisions at Section 922(g),

*Dickerson*, 460 U.S. at 118. As the Supreme Court has explained, "[t]he history of the 1968 Act reflects" Congress's "concern with keeping firearms out of the hands of categories of potentially irresponsible persons, including convicted felons." *Barrett v. United States*, 423 U.S. 212, 220 (1976).

Congress "was concerned with the widespread traffic in firearms and with their general availability to those whose possession thereof was contrary to the public interest." *Dickerson*, 460 U.S. at 118 (quoting *Huddleston v. United States*, 415 U.S. 814, 824 (1974) (quotation marks omitted)). "'The principal purpose of federal gun control legislation, therefore, was to curb crime by keeping "firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency."'" *Ibid.* (quoting *Huddleston*, 415 U.S. at 824 (quoting S. Rep. No. 90-1501, at 22 (1968)).

The Supreme Court has further observed that "[i]n order to accomplish this goal, Congress obviously determined that firearms must be kept away from persons, such as those convicted of serious crimes, who might be expected to misuse them." *Id.* at 119. "Congress is not limited

to case-by-case exclusions of persons who have been shown to be untrustworthy with weapons, nor need these limits be established by evidence presented in court." *Skoien*, 614 F.3d at 641. "*Heller* did not suggest that disqualifications would be effective only if the statute's benefits are first established by admissible evidence." *Ibid.*

Schrader was convicted by a Maryland court of a misdemeanor criminal assault offense that was punishable by a term of imprisonment exceeding two years and qualifies as a "crime of violence" under Maryland law. *See supra* Section A. Based on this conviction, Schrader is independently barred from possessing a firearm in several states and the District of Columbia. *See supra* at p. 26.

Applying Section 922(g)(1) in these circumstances is "substantially related to an important governmental objective," *Clark*, 486 U.S. at 461. There is a "close fit," *Heller II*, 670 F.3d at 1258, between the restrictions at Section 922(g)(1) and the governmental interest in public safety, which the Supreme Court has recognized as "compelling," *Salerno*, 481 U.S. at 750. As the district court observed, "because Mr. Schrader's Maryland assault and battery conviction actually involved violence, which he admits,

his offense was of a kind to which § 922(g)(1) speaks to keep firearms out of the hands of violent offenders." JA 152.[9]

## CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

STUART F. DELERY
*Acting Assistant Attorney General*

RONALD C. MACHEN JR.
*United States Attorney*

Of Counsel:

JANE M. LYONS
(202) 514-7161
R. CRAIG LAWRENCE
(202) 514-7159
*Assistant U.S. Attorneys*
*United States Attorney's Office*
*555 Fourth Street, N.W.*
*Washington D.C. 20530*

MICHAEL S. RAAB
(202) 514-4053
/s/ Anisha S. Dasgupta
ANISHA S. DASGUPTA
(202) 514-5428
*Attorneys, Appellate Staff*
*Civil Division, Room 7230*
*U.S. Department of Justice*
*950 Pennsylvania Ave, NW*
*Washington, D.C. 20530-0001*

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[9] The district court dismissed the complaint under Federal Rule of Civil Procedure Rule 12(b)(6) without reference to matters outside the pleadings. A remand for fact-finding by the district court is therefore appropriate if this Court disagrees with the district court's determination that the allegations in plaintiffs' complaint fail to state a valid as-applied challenge to Section 922(g)(1).

## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 6798 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Century font with 14-point type.

s/ Anisha S. Dasgupta
Anisha S. Dasgupta
Attorney for Appellees

## CERTIFICATE OF SERVICE

I hereby certify that on June 5, 2012, I filed and served the foregoing Brief for Appellees with the Clerk of Court by using the appellate CM/ECF system. I also hereby certify that on or before June 8, 2012, I will cause eight copies to be delivered to the Court via hand delivery. I further certify that counsel for plaintiffs-appellants is a registered CM/ECF user and will be served via the CM/ECF system.

/s/ Anisha S. Dasgupta

Anisha S. Dasgupta
Attorney for Appellees
Civil Division, Room 7230
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, DC 20530-0001
202-514-5428
anisha.dasgupta@usdoj.gov

# Addendum

# TABLE OF CONTENTS

## 18 U.S.C. § 921 – Definitions

(a) As used in this chapter –

* * *

(20) The term "crime punishable by imprisonment for a term exceeding one year" does not include--

(A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices, or

(B) any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.

What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

## 18 U.S.C. § 922(g)(1) – Unlawful acts

(g) 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.