No. 18-2385

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JEFFERSON B. SESSIONS, III, Attorney General of the United States,

Defendant-Appellant

v.

LARRY E. HATFIELD,

Plaintiff-Appellee.

Appeal From The United States District Court
for the Southern District of Illinois,
Case No. 3:16-cv-383
The Honorable J. Phil Gilbert, Presiding

BRIEF OF PLAINTIFF-APPELLEE LARRY E. HATFIELD

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 18-02385

Short Caption: Hatfield v. Sessions

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

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Attorney's Signature: s/ Thomas G. Maag Date: October 5, 2018

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Attorney's Signature: s/ Peter J. Maag Date: October 5, 2018

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Attorney's Signature: s/ Krystal B. Swendsboe Date: October 5, 2018

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PRELIMINARY STATEMENT

This case asks whether a citizen convicted of any felony—regardless of the seriousness of the crime or the sentence—can be barred for life from exercising his fundamental Second Amendment right to possess a firearm for self-defense. The District Court rejected that notion. It found that as applied to Appellee Larry E. Hatfield, 18 U.S.C. § 922(g)(1) is unconstitutional under the Second Amendment.

Mr. Hatfield pled guilty twenty-eight years ago to a violation of 18 U.S.C. § 1001 for "l[ying] on some [Government] forms," A1-A2, to receive $1,627.73 in railroad retirement benefits. Upon the Government's recommendation, he received no jailtime for his nonviolent offense, served three years' probation, and paid restitution in the amount of the improper benefits received. Section 922(g)(1) would bar Mr. Hatfield for life from possessing a firearm, and the statutorily-prescribed avenue for him to restore his rights is foreclosed by an appropriations limitation. This result unjustly deprives Mr. Hatfield of a fundamental right and is grossly disproportionate to his offense.

Appellant Jefferson B. Sessions, III ("the Government") contends that Mr. Hatfield has no business complaining about his lifetime firearm ban. To the Government, the facts surrounding Mr. Hatfield's conviction are irrelevant, because the Second Amendment does not protect citizens at all once they have been convicted of a felony. It does not matter that the nature and number of felonies has

expanded dramatically in American criminal law. Nor does the underlying crime matter, because the Government does not distinguish terrorism convictions from convictions for making false statements on a form. *See* Appellant's Opening Brief at 15, Dkt. No. 12 (hereinafter "Gov't Brief"). The Government does not believe it bears any burden to justify Mr. Hatfield's lifetime ban, and it is content with the inequity of a regime in which Mr. Hatfield is barred for life from possessing a firearm but those convicted of serious business felonies and violent misdemeanors are not.

The Government's extreme position here stands in stark contrast to the balanced approach taken by Congress in the Omnibus Crime Control and Safe Streets Act of 1968 ("1968 Act"), which enacted § 922(g)(1) in its current form. Pub. L. 90-351, 82 Stat. 197. In that statute Congress created an administrative program through which felons could petition to restore their Second Amendment rights. But Congress has defunded that program—which cost a mere $3.75 million per year to administer—since 1992, thereby converting § 922(g)(1) to a lifetime firearm ban for all felons. It is only because Congress has defunded the program that Mr. Hatfield was forced to file this case.

The Government's position is also contrary to this Court's precedent. In *United States v. Williams*, 616 F.3d 685 (7th Cir. 2010), this Court expressly found that § 922(g)(1) is susceptible to the type of as-applied challenge brought here.

Congress's decision not to fund the restoration of rights program does not justify ignoring Mr. Hatfield's circumstances and turning away his as-applied challenge. Indeed, the lack of an administrative review process makes judicial review essential.

At bottom, the Government asks this Court to circumscribe the scope of the Second Amendment based on the labeling of any crime—no matter how minor—a felony. That position is incompatible with the fundamental nature of the Second Amendment right. The District Court recognized the inherent illogic and unfairness of the Government's position and the application of § 922(g)(1) to Mr. Hatfield. This Court should affirm.

JURISDICTIONAL STATEMENT

The Government's jurisdictional statement was incomplete because it did not "identify the provision of the constitution or federal statute involved if jurisdiction is based on the existence of a federal question." *See* 7th Cir. R. 28(a)(1); Dkt. No. 18. The Government filed an amended jurisdictional statement, Dkt. No. 19, which is complete and correct.

STATEMENT OF THE ISSUE

The Supreme Court held in *District of Columbia v. Heller*, that the Second Amendment to the United States Constitution "guarantee[s] the individual right to possess and carry weapons in case of confrontation." 554 U.S. 570, 592 (2008). However, under § 922(g)(1), any individual "who has been convicted in any court

of, a crime punishable by imprisonment for a term exceeding one year"—which includes all individuals convicted of a felony, subject to some exceptions discussed below—is effectively banned from possessing a firearm for life.

Title 18, section 925(c) creates an administrative program for such individuals whereby they can petition the Department of Justice ("DOJ") to restore their Second Amendment rights. But Congress has defunded that program since 1992, foreclosing any administrative review process for citizens seeking to restore their fundamental right to possess a firearm. *See United States v. Bean*, 537 U.S. 71, 74-75 (2002).

Mr. Hatfield is subject to § 922(g)(1)'s firearm ban because he pled guilty to a violation of § 1001 for "l[ying] on some forms that he sent to the Railroad Retirement Board" to receive $1,627.73 in retirement benefits. A1-A2. Mr. Hatfield repaid the money and served no jail time. *Id.*

The issue presented is whether, as the District Court held, § 922(g)(1)'s lifetime firearm ban, as applied to Mr. Hatfield and without the restoration of rights program provided by § 925(c), is unconstitutional under the Second Amendment.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

The following facts are undisputed. Larry Hatfield is over seventy years old, a retired railroad worker, and United States military war veteran. For the past

twenty-eight years, he has been a law-abiding citizen, and he has abstained from alcohol for over two decades. A46 at 46:20-25.[1] A lieutenant in the local police department described Mr. Hatfield as "an upstanding citizen" who "helped save [his] life" and has "done a lot to help people in the community." A50 at 22:17-20.

Twenty-eight years ago, Mr. Hatfield made a mistake. At the time, he worked for the Illinois Central Gulf Railroad. During the winter of 1989-90, Mr. Hatfield was laid off, making him eligible for unemployment benefits from the Railroad Retirement Board. *See* Railroad Unemployment Insurance Act, 45 U.S.C. § 351. Unemployment benefits were $250 every two weeks, which "wasn't much money even, you know, for those days." A43 at 24:25-25:1. To claim benefits, Mr. Hatfield had to certify that he had not worked any other job on the days for which he was claiming benefits.

When Mr. Hatfield became eligible for benefits, he was working another part-time job. Because of the benefits, he explained to his boss that he would have to quit. In response, his boss suggested that if Mr. Hatfield continued working for him, he would pay Mr. Hatfield only after clocking forty hours, so that Mr. Hatfield could claim benefits in the weeks he was not paid.

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[1] Citations to A42 through A56 refer to the Supplemental Appendix, submitted in conjunction with Appellee's brief, which contains material not included in the Appendix previously filed by the Government. *See* 7th Cir. R. 30(e).

Mr. Hatfield explained this plan to an employee at the Railroad Retirement Board, who said to "go ahead and do it" and "[d]on't worry about it." A43 at 24:11-12. The employee later denied ever authorizing Mr. Hatfield's actions. As Mr. Hatfield explained in his deposition:

> So they had a Railroad Retirement Board down I think it was 22nd or 23d Street in Granite City. They sent me a thing for me to come down there. I went down there and I talked to a lady. And I don't know why I remember this name after all these years because I'm not good at names but her name was Sharon Johnson. I'll never forget this woman. And I explained to her just what I told you. And she said, "Well," she said, "off the record, I'd say go ahead and do it. Don't worry about it." I said, "Okay." So I did it. And when it come time for all this to come down, I told them, I said, "Well, you know, she did tell me it was all right to do it." And when someone asked her about it, she said, "I never said that." So she hung me out to dry. And it was really a weird experience, I'll tell you.

A43 at 24:4-18.

In total, Mr. Hatfield received $1,627.73 in ineligible payments from the Railroad Retirement Board. A34. After these payments were discovered, a United States Marshal asked Mr. Hatfield to meet at the local McDonald's. A43 at 25. She told him that if he "signed this paper and paid this $5,000" that "would be as far as it goes and everything would be fine." *Id.* at 26:13-15. But "back in the '80s, $5,000 was a lot of money," so Mr. Hatfield said "[l]isten, I never got nobody for no $5,000" and refused to sign the paper. *Id.* at 26:17-18. As a result, the Government decided to prosecute.

Mr. Hatfield pled guilty to a violation of § 1001 for making false statements to the Government. A35-A41. The Government recommended that Mr. Hatfield serve no jail time, and he was accordingly sentenced to probation and restitution in the amount of the improper benefits received ($1,627.73). A40. Since pleading guilty, Mr. Hatfield has had no further run-ins with the law, and he has not possessed a firearm, as required by § 922(g)(1).

II. STATUTORY BACKGROUND

The text of § 922(g)(1) makes it unlawful for any person "who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year" to possess a firearm. § 922(g)(1). Its history demonstrates that Congress never intended for individuals like Mr. Hatfield to be banned from possessing a firearm for life.

In 1938, Congress passed the National Firearms Act, which introduced § 922(g)(1) to federal law. In its original form, § 922(g)(1) was narrower in scope, banning only those "convicted of a crime of violence" from owning a gun. *See* National Firearms Act of 1938, Pub. L. No. 75-785, 52 Stat. 1250, 1251. Thus, as originally enacted, § 922(g)(1) would not have applied to Mr. Hatfield.

In 1961, Congress amended § 922(g)(1) by replacing "crime of violence" with "crime punishable by imprisonment for a term exceeding one year," thereby expanding the ban to everyone convicted of a felony. Act of Oct. 3, 1961, Pub. L.

No. 87-342, 75 Stat. 757. But just seven years later in 1968, Congress again narrowed the statute's reach. Congress demonstrated, in two ways, its recognition that a complete firearm ban for felony offenders was overbroad.

First, Congress included a limitation on the felonies that trigger § 922(g)(1). The statute exempts from § 922(g)(1) "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." Gun Control Act of 1968, Pub. L. No. 90-618 § 102, 82 Stat. 1213, 1216 (codified at 18 U.S.C. § 921(a)(20)(A)). Although these serious felonies can cause millions of dollars in damages and result in significant prison sentences, Congress determined that they do not warrant lifetime disarmament. *See* United States Sentencing Guidelines App. C, Amend. 678 (2011) (amending the antitrust sentencing guidelines to provide additional offense levels for offense that involves more than $1,500,000,000, in response to data "indicating that the financial magnitude of antitrust offenses has increased significantly"); 15 U.S.C. § 1 (punishing a Sherman Act § 1 violation with up to $1 million fine, ten years imprisonment, or both).

Second, Congress provided "a relief valve for felons . . . to restore their firearm rights by application to the Attorney General." A15 (citing the 1968 Act). Specifically, § 925(c) provides:

> A person who is prohibited from possessing, shipping, transporting, or receiving firearms or ammunition may make application to the

> Attorney General . . . and the Attorney General may grant such relief if it is established to his satisfaction that the circumstances regarding the disability, and the applicant's record and reputation, are such that 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.

This restoration of rights program ensured that a citizen with a felony conviction but posing no threat of gun violence—like Mr. Hatfield—could restore his Second Amendment rights by presenting his individual circumstances to the Attorney General.

The statute also provides for judicial review of the Attorney General's decision. *See id.* ("Any person whose application for relief from disabilities is denied by the Attorney General may file a petition with the United States district court for the district in which he resides for a judicial review of such denial."). This review is deferential and is "usually limited to determining whether agency action is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Bean*, 537 U.S. at 77 (quoting 5 U.S.C. § 706(2)(A)).[2]

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[2] *Bean* held that judicial review of a "relief valve" application is unavailable until the Attorney General either approves or denies the application, which it cannot do without funding. This does not affect judicial review in this case. As the District Court pointed out, *Bean* is a "pre-*Heller* decision that analyzed when judicial review of an agency decision was appropriate under the Administrative Procedure Act," whereas this case is "post-*Heller*, and instead centers on an as-applied constitutional challenge to § 922(g)(1)." A16.

Although the "relief valve" remains in the statute, beginning in 1992—before *Heller*—Congress attached an appropriations rider specifying that no funds can be used to administer the program. *See* Treasury, Postal Service, and General Government Appropriations Act, 1993, Pub. L. No. 102-393, 106 Stat. 1729; *Bean*, 537 U.S. at 75-76, n.3 (describing appropriation decisions). This has foreclosed the use of the relief valve and converted § 922(g)(1) to a lifetime firearm ban for all felons regardless of their individual circumstances. *See Bean*, 537 U.S. at 78.

III. DISTRICT COURT DECISION

Mr. Hatfield brought this as-applied challenge to § 922(g)(1), arguing that the lifetime ban on firearm possession, based on his nonviolent felony conviction, is unconstitutional in the absence of the relief valve provided in § 925(c). The District Court agreed and granted summary judgment in Mr. Hatfield's favor.

The District Court began by repeating this Court's conclusion that the reference in *Heller* "to felon disarmament bans only as 'presumptively lawful,'. . . by implication, means that there must exist the possibility that the ban could be unconstitutional in the face of an as-applied challenge." A1 (quoting *Williams*, 616 F.3d at 692). Because Mr. Hatfield was convicted of a nonviolent offense for which he received no jail time, and because he has "maintained a spotless record since," the District Court concluded that "[i]f there is any case that rebuts that presumption, it is this one." A17, A1.

The District Court then applied the two-step analysis the Seventh Circuit has generally used in Second Amendment challenges. First, the District Court examined whether Mr. Hatfield falls within the scope of the Amendment's protection. Starting with *Heller*'s "strong presumption that the Second Amendment right is exercised individually and *belongs to all Americans*," A8 (quoting *Heller*, 554 U.S. at 580), the District Court considered whether the Government had demonstrated that Mr. Hatfield fell outside the Amendment's protection.

The District Court held that it had not. Specifically, the court rejected the Government's argument that all felons were historically outside the scope of Second Amendment protection, because the Government had "introduced zero evidence to actually develop [the historical] record," and because "felonies" at common law referred to nine specific crimes (*e.g.*, murder, burglary), none of which encompassed lying on a government form. A9-A10. According to the court, the Government's position

> would lead to a harebrained outcome in which the Founders meant to allow Congress to inadvertently disarm the people by passing gobs of statutory felonies not contemplated at the common law, such as making a false statement (18 U.S.C. § 1001(a)); depositing merchandise in a building upon the boundary line between the United States and any foreign country (18 U.S.C. § 547); operating or holding any interest in a gambling establishment on a ship (18 U.S.C. § 1082); transporting lottery tickets across state lines when one state forbids lottery tickets (18 U.S.C. § 1301); mailing indecent matter on the outside of an envelope (18 U.S.C. § 1463); possessing contraband smokeless tobacco (18 U.S.C. § 2342(a)); defacing any marks or numbers placed upon packages in a warehouse (18 U.S.C. § 548); and more.

A10.

Having concluded that Mr. Hatfield is within the scope of the Second Amendment's protections, the District Court moved to the second step of the analysis and reviewed the application of § 922(g)(1) under heightened judicial scrutiny. The court first rejected the Government's argument that standard intermediate scrutiny should apply, instead applying the heightened intermediate scrutiny this Court applied in *Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011) (*Ezell I*). The District Court applied this higher level of scrutiny because Mr. Hatfield "wants to keep and bear arms in his home for self-defense," such that his challenge implicates the core of the Second Amendment. A11.

Applying heightened intermediate scrutiny, the District Court held that "the Government has failed to show an 'extremely strong public-interest justification' for banning non-violent felons who received no prison time from owning a gun for self-defense purposes." A13. The court noted that it is "absolutely impossible to reconcile the Government's positions here that (1) a specific felon is so harmless that the felon does not need to go to prison for their felony conviction," but (2) is also "so dangerous that they should be stripped of their right to own a gun and defend their home" and lamented that this "logical inconsistency shows that the Government is not taking the Second Amendment seriously." A14.

Finally, the District Court held that even if the Government had a sufficient interest, it had failed to show a close fit between that interest and the application of § 922(g)(1) to Mr. Hatfield. As the Court explained:

> § 925(c) is a tacit admission by Congress that § 922(g)(1) is overbroad by facially applying to all felons regardless of their underlying crime or circumstances—indicating a bad fit between § 922(g)(1) and the Government's purpose of keeping firearms out of the hands of dangerous criminals who may create armed mayhem.

A15. Had the Government been able to point to a working safety valve, "then they could have won this case." A15. But without that, the District Court held that § 922(g)(1) is unconstitutional as applied to Mr. Hatfield.

SUMMARY OF ARGUMENT

In its landmark *Heller* decision, the Supreme Court held that the Second Amendment protects an individual right to keep and bear arms. *See Heller*, 554 U.S. at 635; *McDonald v. City of Chicago*, 561 U.S. 742, 744 (2010). Mr. Hatfield seeks to exercise that fundamental right by keeping a firearm in his house for self-defense. But he cannot because of § 922(g)(1).

The District Court correctly held that § 922(g)(1)'s lifetime firearm ban, as applied to Mr. Hatfield, violates his fundamental Second Amendment rights. The District Court's judgment should be affirmed for two reasons. First, the ban is unconstitutional under this Court's two-step framework for analyzing Second

Amendment claims. Second, a lifetime ban on exercising a fundamental right is *per se* unconstitutional.

In this Court's two-step framework, the Court first must consider whether the restricted activity or individual falls within the scope of the Second Amendment's protections. *Ezell I*, 651 F.3d at 701. Under this Court's binding precedents, Mr. Hatfield is within the Amendment's reach.

To begin with, it is undisputed that Mr. Hatfield seeks to exercise his core Second Amendment right, *i.e.*, the right to possess a firearm in the home for self-defense. Thus, the activity at issue is at the core of the Second Amendment's protections.

Moreover, as the Supreme Court has explained, there is a "strong presumption" that the fundamental right to keep and bear arms "belongs to all Americans." *Heller*, 554 U.S. at 581. As a result, this Court has treated all Americans as within the scope of the Second Amendment, unless the Government can conclusively show otherwise. Where "the historical evidence is inconclusive," the Second Amendment applies. *Ezell I*, 651 F.3d at 703.

Mr. Hatfield plainly falls within the Amendment's scope. This Court has already considered whether violent felons fall outside the Second Amendment and held that the historical evidence is "inconclusive at best." *See Williams*, 616 F.3d at 692. For this reason alone, Mr. Hatfield is covered. Moreover, to the extent there is

any doubt regarding the historical record with respect to violent felons, the historical record is conclusive that nonviolent felons like Mr. Hatfield are protected by the Second Amendment.

Because Mr. Hatfield is within the scope of the Second Amendment, the lifetime firearm ban is subject to judicial means-end scrutiny, the second step of this Court's analysis. And because Mr. Hatfield raises an as-applied challenge, the Court must apply that scrutiny to the facts surrounding his conviction, rather than the entire class of felons. Focusing on felons generally rather than Mr. Hatfield specifically, as the Government suggests, would improperly convert Mr. Hatfield's challenge to a facial challenge. *Cf. Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 883 (1997).

The District Court correctly applied heightened intermediate scrutiny to the facts surrounding Mr. Hatfield's conviction. But even if this Court were to apply standard intermediate scrutiny, as the Government requests, § 922(g)(1) is still unconstitutional as applied to Mr. Hatfield. Under intermediate scrutiny, "the government has the burden of demonstrating that its objective is an important one and that its objective is advanced by means substantially related to that objective." *Williams*, 616 F.3d at 692. The Government has failed to meet these requirements and cannot justify its disarming of Mr. Hatfield.

Foremost, the Government has no reasonable interest in disarming a citizen like Mr. Hatfield, who pled guilty to a nonviolent felony and has presented no

heightened risk of violence or misuse of firearms. Nor does the Government try to claim such an interest or show any heightened risk. This makes sense given the facts of Mr. Hatfield's conviction. When Mr. Hatfield was sentenced for his felony conviction decades ago, the Government advocated no jail time—a recommendation that the sentencing judge accepted. As the District Court noted, it is "absolutely impossible to reconcile" the Government's sentencing recommendation and its position here. A14.

But even if the Government had a legitimate and important interest, there is no fit between that interest and the lifetime ban under § 922(g). Section 922(g)(1) is both over- and under-inclusive. It is over-inclusive because it captures many nonviolent felons whose convictions have no clear or credible link to gun violence or dangerousness—which is why Congress created the restoration of rights program in § 925(c). And it is under-inclusive because it exempts more serious felonies and does not cover many violent offenses and firearm offenses.

For example, a federal firearms licensee who lies in connection with a regulated gun sale, is guilty of a misdemeanor. *See* 18 U.S.C. § 924(a)(3). The same is true of a person who knowingly brings a gun into a federal building. *See* 18 U.S.C. § 930(a). In either event, § 922(g)(1) would not apply. Nor does § 922(g)(1) apply to a person convicted of certain white-collar crimes, *see* § 921(a)(20)(A), even if he caused tens of millions of dollars in loss.

This regime is untenable as applied to Mr. Hatfield. A person convicted of sneaking guns into federal buildings, a licensed gun seller convicted of lying in connection with a gun sale, or a person convicted of multi-million-dollar business crimes can buy a gun at any time after their conviction, but Mr. Hatfield cannot possess a gun *for the rest of his life*. This inequity presents serious equal protection issues and demonstrates that the ban is not tailored to the Government's stated interest in banning a nonviolent felon like Mr. Hatfield from possessing firearms. It also demonstrates that the punishment here—a lifetime firearm ban—is in no way proportionate to Mr. Hatfield's offense.

Finally, Mr. Hatfield's lifetime ban is unconstitutional for an independent reason—a lifetime ban on exercising a fundamental right is *per se* unconstitutional. "Both *Heller* and *McDonald* suggest that broadly prohibitory laws restricting the core Second Amendment right—like the handgun bans at issue in those cases, which prohibited handgun possession even in the home—are categorically unconstitutional." *Ezell I*, 651 F.3d at 703 (citing *Heller*, 554 U.S. at 628-35; *McDonald*, 561 U.S. at 786-77). Under this approach, the only question this Court must answer is whether Mr. Hatfield—as a citizen who committed one nonviolent felony—falls within the Second Amendment's protection. As explained above, he does. His lifetime ban is unconstitutional.

ARGUMENT

The Government must demonstrate that § 922(g)(1) is constitutional as applied to Mr. Hatfield. Although the Supreme Court made clear that the "right secured by the Second Amendment is not unlimited," *Heller*, 554 U.S. at 626, it is the *Government's burden* to demonstrate that a limitation on an individual's fundamental Second Amendment right is constitutional. *See, e.g.*, *Ezell I*, 651 F.3d at 703; *Williams*, 616 F.3d at 692. And as the District Court pointed out, *Heller* articulated a "strong presumption that the Second Amendment right is exercised individually and *belongs to all Americans*." A8 (quoting *Heller*, 554 U.S. at 581).

The Government, however, attempts to turn that presumption on its head. Relying on dicta in *Heller*, the Government contends that "longstanding prohibitions on the possession of firearms by felons" are lawful. *See* 554 U.S. at 626. According to the Government, § 922(g)(1) is such a "longstanding prohibition[]," and because Mr. Hatfield is a former felon, he can be deprived of his Second Amendment rights.

But Mr. Hatfield is not challenging the "longstanding prohibitions on the possession of firearms by felons." That is, Mr. Hatfield has not raised a facial challenge seeking to strike down § 922(g)(1) in its entirety. Instead, he contends that § 922(g)(1) is overbroad and unconstitutional *as applied to him*. And as the Seventh Circuit has previously found, *Heller* expressly contemplated such as-applied challenges.

Heller states that "longstanding" felon-in-possession laws are only "*presumptively* lawful." 561 U.S. at 627 n.26 (emphasis added). As the Seventh Circuit explained, this means that "by implication . . . there must exist the possibility that the ban could be unconstitutional in the face of an *as-applied challenge*." *Williams*, 616 F.3d at 692 (emphasis added). Therefore, it is still the Government's burden to demonstrate the constitutionality of a limitation on fundamental Second Amendment rights when confronted with such an as-applied challenge. *See Williams*, 616 F.3d at 692 (explaining that the "government does not get a free pass simply because Congress has established a 'categorical ban'; it still must prove that the ban is constitutional, a mandate that flows from *Heller* itself").

Here, as the District Court held, the Government has failed entirely to satisfy its burden. Specifically, the Government failed to demonstrate that § 922(g)(1) satisfies the Seventh Circuit's two-step framework for analyzing Second Amendment claims. Moreover, although the District Court reached the correct result, it did not even need to conduct a means-ends analysis because § 922(g)(1) operates as a complete firearm ban as applied to Mr. Hatfield such that it is necessarily unconstitutional. The District Court's decision should be affirmed.

I. SECTION 922(G)(1) IS UNCONSTITUTIONAL AS APPLIED TO MR. HATFIELD UNDER THE SEVENTH CIRCUIT'S TWO-STEP FRAMEWORK FOR ANALYZING SECOND AMENDMENT CLAIMS.

As the District Court explained, the Seventh Circuit has generally applied a two-step framework in reviewing laws that implicate the Second Amendment. A5-A6 (citing *Ezell I*, 651 F.3d at 701-03). Here, the District Court correctly held that the Government failed entirely to satisfy its burden under that framework to demonstrate that § 922(g)(1) is constitutional as applied to Mr. Hatfield. Specifically, the Government has failed to demonstrate either (A) that Mr. Hatfield falls outside the scope of the Second Amendment, or (B) that application of § 922(g)(1) to Mr. Hatfield satisfies heightened judicial scrutiny.

A. Mr. Hatfield Falls Within the Scope of the Second Amendment.

The Government spends most of its brief attempting to demonstrate that Mr. Hatfield falls outside the scope of the Second Amendment. *See* Gov't Br. at 7-15. But the Government's argument is contrary not only to Seventh Circuit precedent, but to the history of the Second Amendment itself.

Under this Court's two-step framework, "the threshold inquiry . . . will be a 'scope' question: Is the restricted activity [or individual] protected by the Second Amendment in the first place?" *Ezell I*, 651 F.3d at 701. Answering this question "requires a textual and historical inquiry into [the] original meaning" of the Second Amendment as it was understood when it was adopted. *Id.* (citing *Heller*, 554 U.S.

at 634-35; *McDonald*, 561 U.S. at 785). As *Heller* explains, courts must consider the intended scope of the Second Amendment at the time it was ratified because the provision codified a "*pre-existing* right." *Heller*, 554 U.S. at 592; *see also Ezell I*, 651 F.3d at 701.

The Government fails to demonstrate that the Second Amendment is inapplicable. First, (1) there is no dispute that Mr. Hatfield seeks to exercise his core Second Amendment right, *i.e.*, the right to possess a firearm in his home for self-defense. Moreover, (2) as the District Court explained, the Government has not shown that the commission of one nonviolent felony for which he served no jail time takes Mr. Hatfield entirely outside of the Second Amendment's protections.

1. Mr. Hatfield Seeks to Exercise His Core Second Amendment Rights.

The Supreme Court held in *Heller* that the Second Amendment protects an individual right to keep and bear lawful firearms in the home for self-defense. *See Heller*, 554 U.S. at 635-36. As the Court later explained, this individual right is a "fundamental right[,] necessary to our system of ordered liberty." *McDonald*, 561 U.S. at 778.

There is no dispute that Mr. Hatfield seeks to exercise this fundamental right, *i.e.*, to possess a lawful firearm for self-defense. A11 (citing Dist. Ct. Dkt. No. 1 ¶ 11). Thus, there is no dispute that the activity at issue here falls within the core of the Second Amendment's protections.

In that way, this case differs markedly from nearly every other Second Amendment challenge to § 922(g)(1) previously decided by this Court. In most of this Court's previous § 922(g)(1) cases, the felon was not seeking to exercise his core Second Amendment rights, but rather, was challenging a conviction for unlawfully possessing a firearm under § 922(g)(1). By contrast, Mr. Hatfield seeks to lawfully obtain a firearm for lawful and constitutionally-protected purposes.[3]

2. Mr. Hatfield's Nonviolent Felony Conviction Does Not Exclude Him from the Second Amendment's Protections.

Because Mr. Hatfield seeks to engage in an activity falling squarely within the core of the Second Amendment's protections, the Government must demonstrate that Mr. Hatfield's twenty-eight-year-old, nonviolent felony conviction disqualifies him entirely from exercising his fundamental Second Amendment rights. The Government fails to meet its burden. First, (a) the Seventh Circuit has already held that the historical record is inconclusive with respect to whether *violent* felons fall outside the scope of the Second Amendment, and that alone means that the Government has failed to establish that Mr. Hatfield has forfeited his Second Amendment rights. And regardless, (b) the historical record *is* conclusive that *nonviolent* felons like Mr. Hatfield are covered by the Second Amendment.

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[3] *Baer v. Lynch*, an unpublished decision, considered a direct challenge to § 922(g)(1), but the appellant in that case had a "felony conviction for robbery, which is a violent crime." 636 F. App'x 695, 698 (7th Cir. 2016).

a. The Historical Record Is Inconclusive Regarding Whether *Violent* Felons Are Protected by the Second Amendment.

This Court has found that where "the historical evidence is inconclusive or suggests that the regulated activity is *not* categorically unprotected," then the Second Amendment applies. *Ezell I*, 651 F.3d at 703. Despite having addressed Second Amendment challenges involving violent felons on several occasions, this Court has never held that *violent* felons, let alone *nonviolent* felons like Mr. Hatfield, fall outside the scope of the Second Amendment. *See Williams*, 616 F.3d at 691. To the contrary, this Court has emphasized that the historical record about whether violent felons are within the scope of the Second Amendment is "inconclusive at best." *Williams*, 616 F.3d at 692 (quoting *United States v. Skoien*, 614 F.3d 638, 650 (7th Cir. 2010) (Sykes, J., dissenting)).

The Government failed to provide new or unique historical evidence to rebut this precedent. The only historical evidence cited by the Government, "The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to Their Constituents, 1787," *see* Gov't Br. at 9, was addressed in *Skoien*, 614 F.3d at 640, and was part of the historical evidence that both *Skoien* and *Williams* found "inconclusive." *Williams*, 616 F.3d at 692. For this reason alone, the Government has failed to meet its burden to show that Mr. Hatfield, a citizen with one nonviolent felony conviction, lacks Second Amendment protection.

b. The Historical Record Is Conclusive that *Nonviolent* Felons Fall Squarely Within the Second Amendment's Protections.

In any event, the historical record is conclusive that *nonviolent* offenders like Mr. Hatfield fall within the protective scope of the Second Amendment. As the District Court explained, even if the Founders intended to exclude "felons" from the Second Amendment,[4] at the time of the Founding, the only English common-law felonies were "murder, manslaughter, arson, burglary, robbery, rape, sodomy, mayhem and larceny." *Jerome v. United States*, 318 U.S. 101, 108 n.6 (1943) (citing Wharton, Criminal Law (12th ed.) § 26; *Bannon v. United States*, 156 U.S. 464, 467 (1895)); Wayne R. LaFave, 1 Subst. Crim. L. § 2.1(c) (3d ed. 2017); *see also* A9. Thus, only individuals who committed such violent crimes would have been excluded from the Second Amendment at the time of the Founding.

All other crimes were misdemeanors at common law. *See United States v. Watson*, 423 U.S. 411, 440-41 (1976) (Marshall, J., dissenting) ("Only the most serious crimes were felonies at common law, and many crimes now classified as felonies under federal or state law were treated as misdemeanors."). As one commentator explained:

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[4] In fact, the historical record demonstrates the opposite. *See C. Kevin Marshall, Why Can't Martha Stewart Have a Gun?*, 32 Harv. J.L. & Pub. Pol'y 695, 728-35 (2009).

> At common law an assault was a misdemeanor and it was still only such even if made with the intent to rob, murder, or rape. Affrays, abortion, barratry, bribing voters, challenging to fight, compounding felonies, cheating by false weights or measures, escaping from lawful arrest, eavesdropping, forgery, false imprisonment, forcible and violent entry, forestalling, kidnapping, libel, mayhem, maliciously killing valuable animals, obstructing justice, public nuisance, perjury, riots and routs, etc. were misdemeanors . . . .

Horace L. Wilgus, *Arrest Without a Warrant*, 22 Mich. L. Rev. 541, 572-573 (1924); *see also Watson*, 423 U.S. at 439-41 (Marshall, J., dissenting).

Importantly, the Supreme Court has found that the closest historical analog to Mr. Hatfield's offense of making a false statement on a Government form—*i.e.*, forgery—was a misdemeanor at common law. *Jerome*, 318 U.S. at 108 n.6. And "most of the characteristics of criminal proceedings did not attach to misdemeanours." *United States v. Chovan*, 735 F.3d 1127, 1144-45 (9th Cir. 2013) (quoting Theodore Frank Thomas Plucknett, *A Concise History of the Common Law* 456 (1956)). That is, "there was a fundamental difference between felons and misdemeanants." *Chovan*, 735 F.3d at 1144. Whereas the word "felony" "[was] used to designate such serious offenses as were formerly punishable by death, or by forfeiture of the lands or goods of the offender," *Bannon*, 156 U.S. at 468 (citing *Ex parte Wilson*, 114 U.S. 417, 423 (1885)), misdemeanors carried far less serious consequences. *See Baldwin v. New York*, 399 U.S. 66, 70 (1970) (explaining "that a felony conviction is more serious than a misdemeanor conviction"). Therefore, disqualification of common law misdemeanants from the

protection of the Second Amendment does not "make[] sense from a[] historical perspective." *Chovan*, 735 F.3d at 1145.[5]

The Government glosses over the important distinction between felonies and misdemeanors by arguing that the Founders understood that all "unvirtuous citizens" fall outside the Second Amendment. Gov't Br. at 10. But as Judge Hardiman stated on behalf of four other judges in the *Binderup* majority:

> We have found no historical evidence on the public meaning of the right to keep and bear arms indicating that "virtuousness" was a limitation on one's qualification for the right—contemporary insistence to the contrary falls somewhere between guesswork and *ipse dixit.*

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[5] The Government contends that the common law felonies are irrelevant and that "[t]he traditional forfeiture of firearms rights by felons . . . attached to any crime deemed sufficiently serious by a legislature to be punishable by greater than a year imprisonment and thus appropriately labeled a felony." Gov't Br. At 12. It then points to some state laws that punished forgery harshly at the time of the Founding. *See* Gov't Br. At 14-15. As an initial matter, the Government ignores *Jerome*, in which the Supreme Court found that forgery was a misdemeanor. 318 U.S. at 108 n.6. But regardless, the Government points to *nothing* in the historical record indicating that the Founders viewed the scope of the Second Amendment as turning on a crime's potential punishment, as opposed to whether it was a felony at common law. *See Bannon*, 156 U.S. at 467 ("If such imprisonment were made the sole test of felonies, it would necessarily follow that a great many offenses of minor importance . . . would be treated as felonies, and the persons guilty of such offenses stigmatized as felons."). Indeed, the "punishable by imprisonment for a term exceeding one year" construct does not even appear in § 922(g)(1) until Congress amended that section in 1961. Act of Oct. 3, 1961, 75 Stat. at 757.

Binderup v. Att'y Gen., 836 F.3d 336, 372 (3d Cir. 2016).[6] Put differently, "if the Founders intended to allow Congress to disarm unvirtuous felons, that intent would have necessarily been limited to individuals convicted of one of th[e] nine [common law] felonies." A9.[7]

The Government also argues that under *Heller*, only "law-abiding, responsible citizens" are entitled to keep and bear arms under the Second Amendment. *See* Gov't Br. at 5-8, 13. Therefore, according to the Government, because Mr. Hatfield

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[6] Judge Hardiman further concluded that "[t]his 'virtue' standard—especially in the pliable version articulated by the Government—is implausible because the 'civic republican' view of the scope of the Second Amendment is wrong." *Binderup*, 836 F.3d at 371. That view is "closely related" to the collective rights interpretation of the Second Amendment that was rejected in *Heller*, and "stems from a misreading of an academic debate" concerning "the *rationale* for having a right to keep and bear arms in the first place" rather than who possesses the right. *Id.*

[7] The Government cites this Court's decision in *Yancey v. United States*, 621 F.3d 681 (7th Cir. 2010), to support its "virtuous citizen" argument. *See* Gov't Br. at 10. But unlike this case, *Yancey* involved a facial challenge to § 922(g)(3), which prohibits firearm possession by habitual drug users, and does not involve a lifetime firearm ban. In stating that "most 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,'" 621 F.3d at 684-85, this Court was simply making the noncontroversial point that as a facial matter, the Second Amendment does not foreclose disarming certain nonviolent individuals that may be more likely than the average citizen to commit gun violence. *See id.* The Court did not hold that every nonviolent felon falls outside the scope of the Second Amendment or reject the availability of an as-applied challenge to § 922(g). Indeed, the Court left open the question regarding the "pedigree of the rule against even nonviolent felons possessing weapons." *Id.* at 684.

committed a felony decades ago, he is neither "law-abiding" nor "responsible," and he forfeited his Second Amendment rights for life. *See id.* at 8, 13, 17.

But *Heller* cannot be interpreted to mean that everyone who ever broke the law is outside the scope of the Second Amendment. Indeed, such an interpretation would lead to the absurd result that anyone who has ever sped on the highway is not a "law-abiding" citizen because they broke the law at one time. *Heller* does not define "law-abiding." And that is why this Court has warned that "the opinion is not a comprehensive code; it is just an explanation for the Court's disposition." *Skoien*, 614 F.3d at 640. Whether or not Mr. Hatfield falls within the scope of the Second Amendment depends on the historical record from the time of the Founding, *see Ezell I*, 651 F.3d at 704, not whether Mr. Hatfield is "law-abiding" in some generic sense. Because the historical record demonstrates that Mr. Hatfield would have been within the scope of the Second Amendment's protections, the Government has failed to meet its burden under the first step of this Court's Second Amendment framework.

In effect, the Government would allow legislatures to define the scope of the fundamental right enshrined in the Second Amendment by defining what constitutes a felony. But the Government offers not a shred of historical evidence to support that argument. And that is unsurprising considering that such a result would contravene the purpose of the Bill of Rights, in which "[t]he very enumeration of the right takes [it] out of the hands of government . . . ." *Heller*, 554 U.S. at 634. As

Judge Hardiman explained in *Binderup*, "[w]hen the Second Amendment applies, its core guarantee cannot be withdrawn by the legislature or balanced away by the courts." *Binderup*, 836 F.3d at 365 (footnote omitted); *see also Chovan*, 735 F.3d at 1148 (Bea, J., concurring) ("The boundaries of this right are defined by the Constitution. They are not defined by Congress." (citation omitted)); *City of Boerne v. Flores*, 521 U.S. 507, 545 (1997) (O'Connor, J., dissenting) ("Congress lacks the ability independently to define or expand the scope of constitutional rights by statute."); *United States v. Soderna*, 82 F.3d 1370, 1386 (7th Cir. 1996) (Kanne, J., concurring in part and dissenting in part) ("A legislature cannot by statutory enactment define the limits of a constitutional right."). Indeed, given their understanding of misdemeanors, the Founders could never have intended for the minor legal and regulatory infractions which now constitute felonies, *see infra* § I.A.2.bii, to narrow the scope of the Second Amendment as the Government contends here.

c. Fundamental Second Amendment Rights Are Not Analogous to Other Non-Fundamental Rights that Can Be Forfeited by Citizens Upon Conviction for a Felony.

To compensate for its lack of historical evidence, the Government contends that the Second Amendment right is "analogous to civic rights that have historically been subject to forfeiture by individuals convicted of crimes." Gov't Br. at 10-11. But the right to bear arms is an enumerated fundamental right guaranteed in the Bill

of Rights. *See McDonald*, 561 U.S. at 778. By contrast, "[t]he right to serve on a jury, of course, is not among the rights afforded explicit protection under our federal constitution." *United States v. Conant*, 116 F. Supp. 2d 1015, 1021 (E.D. Wis. 2000) (footnote omitted). Likewise, "[t]he right to run for or hold public office is not a fundamental right . . . ." *Parker v. Lyons*, 757 F.3d 701, 707 (7th Cir. 2014) (citing *Brazil-Breashears v. Bilandic*, 53 F.3d 789, 792 (7th Cir. 1995)).

Moreover, although the right to vote is a recognized fundamental right, *see Segovia v. United States*, 880 F.3d 384, 390 (7th Cir. 2018) (citing *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964)), "[t]he exclusion of felons from the vote has an affirmative sanction in § 2 of the Fourteenth Amendment," *Richardson v. Ramirez*, 418 U.S. 24, 54-55 (1974) ("We hold that the understanding of those who adopted the Fourteenth Amendment, as reflected in the express language of § 2 and in the historical and judicial interpretation of the Amendment's applicability to state laws disenfranchising felons, is of controlling significance in distinguishing [laws disenfranchising felons] from those other state limitations on the franchise which have been held invalid under the Equal Protection Clause by this Court."). No similar "affirmative" constitutional sanction exists in the Second Amendment for removing the fundamental right to bear arms from felons. Thus, the Government's ability to withdraw some civic rights of citizens convicted of felonies does not

support a blanket ban preventing all nonviolent felons from exercising their fundamental right to bear arms.

d. The Case Law Cited by the Government Is Inapplicable or Distinguishable.

The Government similarly attempts to distract the Court from its lack of historical evidence by citing to a litany of cases from "this Court and other courts of appeals [that] have rejected challenges to § 922(g)(1)'s prohibition on the possession of firearms by felons." Gov't Br. at 8. Unlike this case, most were direct appeals from criminal convictions for violating § 922(g)(1), in which a citizen, after flouting the prohibition, challenged the statute. Not surprisingly those claims were rebuffed. Importantly, none of the cases cited support the Government's contention that Mr. Hatfield falls outside the scope of the Second Amendment.

As an initial matter, the Government relies on the *Williams* case from this Court. But as explained *supra*, in that case, this Court refrained from "deciding the question of whether those convicted of violent crimes were outside the scope of the Second Amendment's protection at the founding." *Williams*, 616 F.3d at 691. Moreover, the plaintiff in *Williams* was convicted of felony robbery, a violent felony. *Id.* at 693. The decision thus says nothing about whether Mr. Hatfield falls within the scope of the Second Amendment. As explained *supra*, *Williams* supports Mr. Hatfield's claim, because the decision expressly contemplated an as-applied challenge to § 922(g)(1) by a nonviolent felon. *Williams*, 616 F.3d at 692-93.

The Government also cites out-of-circuit cases finding felons to be outside of the Second Amendment's protection. These cases are, of course, not binding on this Court. *See Atchison, Topeka & Santa Fe Ry. Co. v. Pena*, 44 F.3d 437, 443 (7th Cir. 1994). Because the Seventh Circuit has already held that the historical record is inconclusive, and the Government has provided no additional evidence, as to whether violent felons fall within the scope of the Second Amendment, this Court must disregard any out-of-circuit decisions to the contrary. *Cf. Hamilton v. Pallozzi*, 848 F.3d 614, 618 (4th Cir. 2017) (holding that all felons fall outside the scope of the Second Amendment).

But more importantly, like *Williams*, several of the Government's cases involve violent felons and thus say nothing about whether *nonviolent* felons, like Mr. Hatfield, are covered by the Second Amendment. *See United States v. Moore*, 666 F.3d 313, 315 (4th Cir. 2012) (cocaine sales, three common law robberies, and two assaults with a deadly weapon on a government official); Criminal Complaint at 4, *United States v. Scroggins*, No. 3:07-cr-258 (N.D. Tex. Aug. 6, 2007), ECF No. 1 (aggravated robbery and possession of a controlled substance); Docket, *Oklahoma v. McCane*, CF-1991-4839 (assault and battery with a deadly weapon); Docket, *Oklahoma v. McCane*, CF-2003-4332 (larceny of an automobile).

The Government's reliance on *United States v. Pruess*, 703 F.3d 242, 248 (4th Cir. 2012), for the proposition that the nonviolent character of a crime is "irrelevant,"

is particularly misplaced. Pruess had been previously convicted of twenty arms-dealing felonies, which included dealing in stolen guns and using an altered firearms license. *Id.* at 244. The Fourth Circuit observed that "receiving stolen weapons [is] closely related to violent crime." *Id.* (citation omitted). *Pruess* does not suggest that any nonviolent felony automatically takes a citizen outside the Second Amendment.

United States v. Rozier, 598 F.3d 768, 769 (11th Cir. 2010), and *United States v. Torres-Rosario*, 658 F.3d 110, 113 (1st Cir. 2011), are similarly unhelpful to the Government. They involved constitutional challenges made in direct criminal appeals by individuals who had been convicted of multiple prior serious drug felonies.[8] The *Torres-Rosario* court specifically cited the connection between drug dealing and violence to reject that Second Amendment challenge, recognizing that *some* nonviolent felony convictions may not forfeit the Second Amendment's protections. 658 F.3d at 113 ("Assuming *arguendo* that the Supreme Court might find some felonies so tame and technical as to be insufficient to justify the ban, drug

[8] Those defendants had flouted § 922(g)(1)'s ban on possession after prior serious felonies and were caught. *Rozier*, 598 F.3d at 769-70 ("Austin and Rozier began to argue, and Austin hit Rozier in the face with a cement statue. Rozier responded by pulling out a handgun. . . . The Broward County Sheriff's Office executed a search warrant on Rozier's house . . . deputies discovered crack cocaine, marijuana, $7,000, and ammunition. A .38 caliber revolver was found buried in a shallow hole in the backyard."). Such criminal appeals seek to reverse convictions and are unlike the as-applied challenge brought by Mr. Hatfield, who has abided by § 922(g)(1) since his conviction and only recently has sought the opportunity to restore his rights.

dealing is not likely to be among them."). In both cases, the courts turned away constitutional challenges because there was a fit between the government's goal of public safety and disarming convicted drug felons. In short, the cases cited by the Government do not support its position that Mr. Hatfield—an individual with one nonviolent felony who does not even consume alcohol, let alone abuse drugs—falls outside the protections of the Second Amendment.

B. As Applied to Mr. Hatfield, § 922(g)(1) Cannot Survive the Requisite Judicial Scrutiny.

Because Mr. Hatfield falls within the scope of the Second Amendment, the Government must demonstrate that the application of § 922(g)(1) to Mr. Hatfield satisfies a heightened level of means-ends scrutiny. That is, the Court must "evaluate the regulatory means the government has chosen and the public-benefits end it seeks to achieve." *Ezell I*, 651 F.3d at 703. Again, it is *the Government's burden* to satisfy the level of scrutiny applied by the court. *Id.* at 703.

The Government cannot carry its burden. As the District Court correctly held, (1) heightened intermediate scrutiny applies because Mr. Hatfield is a nonviolent felon seeking to exercise his core Second Amendment rights. And regardless, (2) the Government cannot even satisfy standard intermediate scrutiny—*i.e.*, the standard of review advanced by the Government—let alone the heightened intermediate scrutiny appropriate here.

1. The District Court Correctly Applied Heightened Intermediate Scrutiny.

Both the Supreme Court and this Court have made clear that heightened scrutiny—*i.e.*, some level of scrutiny greater than rational-basis review—is required for laws regulating conduct or individuals that are covered by the Second Amendment. *See Heller*, 554 U.S. at 628 n.27; *Skoien*, 614 F.3d at 641 ("If a rational basis were enough, the Second Amendment would not do anything."). The exact level "depend[s] on how close the law comes to the core of the Second Amendment right and the severity of the law's burden on the right." *Ezell I*, 651 F.3d at 703 (citations omitted). "[L]aws restricting activity lying closer to the margins of the Second Amendment right, laws that merely regulate rather than restrict, and modest burdens on the right may be more easily justified." *Id.* at 708; *see also Ezell v. City of Chicago*, 846 F.3d 888, 892 (7th Cir. 2017) (*Ezell II*).

The District Court applied heightened intermediate scrutiny to Mr. Hatfield's as-applied challenge. Under that standard, the Government must demonstrate "a strong public-interest justification for its ban." *Ezell I*, 651 F.3d at 708-09. That is, the Government must show "an extremely strong public-interest justification" for banning Mr. Hatfield from possessing a firearm for self-defense purposes, and it "must establish a close fit between [§ 922(g)(1)] and the actual public interests it serves." *Id.* The District Court held that the Government failed to meet this standard.

The Government argues that the District Court should have applied only standard intermediate scrutiny. Gov't Br. at 16-17. Under standard intermediate scrutiny, the Government must demonstrate that the firearm prohibition was substantially related to an important government objective. *Williams*, 616 F.3d at 687. But the Seventh Circuit has never specifically analyzed where a complete firearm ban for nonviolent felons like Mr. Hatfield falls on the Second Amendment spectrum. And in fact, two Seventh Circuit cases undermine the Government's position.

First, in *Williams*, the Court applied *standard* intermediate scrutiny to a *violent* felony offender. *See id.* at 692 ("In *Skoien* we declined to adopt a level of scrutiny applicable to every disarmament challenge, although we hinted that it might look like what some courts have called intermediate scrutiny."). There, the conviction for felony robbery involved "beating the victim so badly that the victim required sixty-five stitches." *Id.* at 693. And as the District Court here pointed out, Williams did not seek to exercise his right to keep and bear arms in the home for the purpose of self-defense, A11, but rather was convicted of unlawfully possessing a firearm during an arrest, *Williams*, 616 F.3d at 687. Notwithstanding the vicious crime at issue, and the fact that Williams's conduct was nowhere near the core of the Second Amendment's protections, the Seventh Circuit still found that Williams was entitled to standard intermediate scrutiny.

Second, in *Ezell I*, this Court applied *heightened* intermediate scrutiny to regulations banning shooting ranges—which infringed on citizens' Second Amendment rights to engage in range training and target practice—because that claim came "much closer to implicating the core of the Second Amendment right." *Ezell I*, 651 F.3d at 708. Although the range ban was not a complete ban of Second Amendment rights, it constituted "a severe burden on the core Second Amendment right of armed self-defense," and thus the Government was required to demonstrate that the prohibition "create[d] such genuine and serious risks to public safety" that it was justified. *Id.* at 709.

In light of *Williams* and *Ezell I*, the District Court correctly applied heightened intermediate scrutiny in this case. As an initial matter, because this Court has already applied standard intermediate scrutiny to a violent felon who possessed a firearm for reasons other than self-defense,[9] it necessarily follows that Mr. Hatfield, a nonviolent felon who seeks to exercise his core Second Amendment rights, is entitled to heightened scrutiny. Put differently, Mr. Hatfield is nothing like Williams. Having no history of violence, Mr. Hatfield—who wishes to possess a firearm in his home for self-defense—is at or near the core Second Amendment

[9] Notably, the Seventh Circuit has also applied standard intermediate scrutiny to habitual drug users. There is no evidence in the record that Mr. Hatfield has any history of drug use. *Yancey*, 621 F.3d at 683-84.

right. *See Heller*, 554 U.S. at 628 ("[T]he inherent right of self-defense has been central to the Second Amendment right.").

Moreover, the burden on Mr. Hatfield's Second Amendment rights is absolute. For Mr. Hatfield, § 922(g)(1) operates as a complete lifetime firearm ban, making the law even more onerous than the shooting range ban at issue in *Ezell I*. In other words, the plaintiffs in *Ezell* could obtain a firearm for defense in the home, but Mr. Hatfield is prohibited from ever doing so. This complete stripping of the Second Amendment rights of an individual who was convicted of a single, nonviolent felony should be subject to heightened intermediate scrutiny, and the District Court properly rejected the Government's argument that standard intermediate scrutiny should apply in this matter.

2. The Application of § 922(g)(1) to Mr. Hatfield Does Not Even Satisfy Standard Intermediate Scrutiny.

The District Court correctly held that the Government cannot satisfy heightened intermediate scrutiny with respect to its disarming of Mr. Hatfield. But even if this Court were to apply less-exacting *standard* intermediate scrutiny as the Government suggests, the Government still cannot carry its burden. The Government argues that "Hatfield's status as a felon distinguishes him from law-abiding and responsible citizens," and that Congress "has a compelling interest" in disarming felons. Gov't Br. at 17. But (a) this Court must consider Mr. Hatfield's individual conviction—and not simply his "status as a felon"—in analyzing his as-

applied challenge. And with respect to Mr. Hatfield specifically, the Government has failed to demonstrate either (b) an important government objective, or (c) that application of § 922(g)(1) to Mr. Hatfield is substantially related to the Government's objective. *See Williams*, 616 F.3d at 692-93. The District Court's decision should thus be affirmed.

a. In Evaluating Mr. Hatfield's As-Applied Challenge, the Court Should Consider the Facts Surrounding Mr. Hatfield's Conviction.

The Government contends that "the facts surrounding Hatfield's specific felony conviction are irrelevant." Gov't Br. at 22. According to the Government, the District Court's focus on Mr. Hatfield's conviction amounted to "open-ended crime-by-crime evaluation" that was improper under the Supreme Court's decisions in *Johnson v. United States*, 135 S. Ct. 2551 (2015) and *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018). *See* Gov't Br. at 19. As a result, the Government declined to provide any analysis of whether the facts underlying Mr. Hatfield's conviction are sufficiently related to the Government's interests to justify the ban of his Second Amendment rights.[10] Instead, the Government argues that the Court need only

[10] As a result, the Government has waived any argument that the § 922(g)(1) is constitutional as applied to the facts surrounding Mr. Hatfield's specific felony conviction. *See, e.g., Hickey v. A.E. Staley Mfg.*, 995 F.2d 1385, 1392 (7th Cir. 1993) ("[T]his court has repeatedly stated that arguments raised for the first time on appeal are waived." (citations omitted)).

analyze whether disarming felons as a class satisfies intermediate scrutiny. Gov't Br. at 17-22.

The Government's position fails. An as-applied challenge "requires an analysis of the facts of a particular case to determine whether the application of a statute, even one constitutional on its face, deprived the individual to whom it was applied of a protected right." *Field Day, LLC v. Cty. of Suffolk*, 463 F.3d 167, 174-75 (2d Cir. 2006) (citing *Wis. Right to Life, Inc. v. FEC*, 546 U.S. 410 (2006)); *see also Almengor v. Schmidt*, 692 F. Supp. 2d 396, 397 (S.D.N.Y. 2010) (defining an as-applied challenge as a "claim that the manner in which a statute or regulation was applied to a plaintiff in particular circumstances violated the Constitution" (citing *Southworth v. Bd. of Regents of the Univ. of Wis. Sys.*, 307 F.3d 566, 592 (7th Cir. 2002))), *aff'd sub nom. Schain v. Schmidt*, 396 F. App'x 713 (2d Cir. 2010). While it is true "that some categorical disqualifications [on firearm possession] are permissible," Gov't Br. at 17 (quoting *Williams*, 616 F.3d at 691), the Government asks this Court to define the category so broadly that it would be co-extensive with the breadth of § 922(g)(1) and render Mr. Hatfield's as-applied challenge indistinguishable from a facial challenge. *See* A13 ("If the Court only considers felons in the aggregate, then there would be no distinction between an as-applied challenge to § 922(g)(1) and a facial challenge.").

Here, § 922(g)(1) bans Mr. Hatfield from possessing a firearm based on his underlying conviction, *i.e.*, his violation of § 1001 for lying on his railroad compensation forms. In other words, it is the felony conviction that triggers the ban. Thus, in evaluating whether § 922(g)(1) is constitutional as applied to Mr. Hatfield, this Court should focus on whether the facts of Mr. Hatfield's underlying conviction are sufficiently related to the Government's stated interest advanced by § 922(g). *See id.* Indeed, that is how this Court analyzed the as-applied challenge in *Williams*. There, this Court focused on the fact that the challenger's "specific crime involved his beating the victim so badly that the victim required sixty-five stitches," which the Court held "defeat[ed] any claim he has that § 922(g)(1) is not substantially related to preventing him from committing further violence." *Williams*, 616 F.3d at 693.

The Government's "crime-by-crime" argument is a red herring. Neither the District Court in its decision, nor Mr. Hatfield here, advocates a "crime-by-crime evaluation" of as-applied challenges under § 922(g)(1). To the contrary, both have argued, consistent with *Williams* and the law governing as-applied challenges generally, that the Court should focus on the *facts* in the record regarding Mr. Hatfield's conviction.

As such, *Johnson* and *Dimaya* are inapposite. Those cases involved Due Process vagueness challenges to the residual clauses of the Armed Career Criminal

Act ("ACCA") and the Immigration and Nationality Act ("INA"). The ACCA residual clause defined a "violent felony" to include any crime that "otherwise involves conduct that presents a serious potential risk of physical injury to another." ACCA, 18 U.S.C. § 924(e)(2)(B). The INA residual clause defined an "aggravated felony" to include any felony that "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." INA, 8 U.S.C. § 101(a)(43)(F). The Supreme Court held that both clauses were void for vagueness because the statutes "require[] a court to picture the kind of conduct that the crime involves in 'the ordinary case,' and to judge whether that abstraction presents a serious potential risk of physical injury." *Johnson*, 135 S. Ct. at 2557.

By contrast, Mr. Hatfield's as-applied challenge turns on the *actual facts* of his conviction, not some hypothetical analysis about the seriousness of a § 1001 violation. The Supreme Court has expressly recognized this distinction. In *Johnson*, the Court found that "the residual clause leaves grave uncertainty about how to estimate the risk posed by a crime. It ties the judicial assessment of risk to a judicially imagined 'ordinary case' of a crime, *not to real-world facts or statutory elements*." *Id.* at 2557-58 (emphasis added). The Court explained that it was "critical[]" to its holding that "picturing the criminal's behavior is not enough." *Id.* Likewise, the Court pointed to the same issue in *Dimaya*, which turned, not on "'*the*

particular facts' underlying a conviction," but on whether "the ordinary case" of an offense posed the requisite risk. 138 S. Ct. at 1211 (emphasis added).

This is exactly why the Government's parade of horribles, *see* Gov't Br. at 19-20, is inapposite. The Government argues that Mr. Hatfield's conviction under § 1001 "reflects an inherent disregard for the law and lack of virtue" because it is "regularly used to prosecute individuals who have lied about matters significant to the public interest," such as the Boston Marathon bombing, engaging in terrorism, and illegally transporting guns to Mexico. Gov't Br. at 20. But Mr. Hatfield did not lie about committing a violent act or gun violation, he lied about working while collecting benefits. By focusing on hypothetical worst-case crimes rather than the facts underlying Mr. Hatfield's conviction, the Government adopts the analysis rejected in *Johnson* and *Dimaya*.

For the same reasons, the Court should consider Mr. Hatfield's sentence. *See* Gov't Br. at 22. The Government contends that the fact that Mr. Hatfield received no jailtime is irrelevant, because the sentencing factors applied by courts do not necessarily "negate" the seriousness of the crime and thus do not speak to an individual's fitness to possess a firearm. *See* Gov't Br. at 21-22. But once again, this hypothetical analysis ignores the *facts* in this case. Mr. Hatfield received no jailtime because "*the Government* recommended in [Mr. Hatfield's] amended plea agreement that the court only sentence Hatfield to three years' probation plus

restitution in the amount of improper benefits received," A2 (emphasis added), and that Mr. Hatfield plainly was not a threat to society after having "l[ied] on some forms," A1. Thus, the facts surrounding Mr. Hatfield's actual sentence demonstrate that § 922(g)(1) is unconstitutional as applied to him.

At bottom, the Government contends that § 922(g)(1) can constitutionally disarm all felons—and thereby extinguish their Second Amendment's protections—simply because they are felons. Gov't Br. at 17. This approach would effectively render step two of the Seventh Circuit's Second Amendment framework a nullity. Such a result is directly contrary to this Court's precedent. As the Court in *Williams* found, "the government does not get a free pass simply because Congress has established a 'categorical ban'; it still must prove that the ban is constitutional, a mandate that flows from *Heller* itself." 616 F.3d at 692. As explained in the next two sections, the Government has utterly failed to prove that the ban is constitutional as applied to Mr. Hatfield.

b. The Government Has Failed to Demonstrate that Disarming Mr. Hatfield Advances an Important Government Objective.

Because the Government characterizes Mr. Hatfield's as-applied challenge too broadly, it likewise characterizes its interest in disarming Mr. Hatfield too broadly. That is, the Government contends that it has an interest in "disarming unvirtuous citizens and restricting firearms to law-abiding, responsible citizens."

Gov't Br. at 18 (internal quotation marks and citations omitted). But as the District Court explained, for purposes of Mr. Hatfield's as-applied challenge, the Government must demonstrate that it has an interest in disarming individuals like Mr. Hatfield—*i.e.*, nonviolent, one-time felons who served no jailtime. And the Government has failed to do so here.

The District Court held that the Government failed to establish an "extremely strong public interest justification" under heightened intermediate scrutiny, A13. And the court's common-sense, straightforward analysis likewise demonstrates that the Government has failed to establish even an "important government objective." That is, to the extent the Government takes the position that "a specific felon is so harmless that the felon does not need to go to prison for their felony conviction," it cannot credibly argue that "the felon is so dangerous that they should be stripped of their right to own a gun and defend their home." A14. For this reason alone, the Government has failed to meet its burden under step two of the analysis, and the District Court's opinion should be affirmed.

Moreover, even if the District Court defined the interest too narrowly, the Government has failed to demonstrate that its stated public interest of "disarming unvirtuous citizens and restricting firearms to law-abiding, responsible citizens," Gov't Br. at 18 (internal quotations marks and citations omitted), is "important." The Government contends, in effect, that it has an interest in disarming felons

because they are felons. But this is both self-serving and circular, and again, renders step two a nullity. To satisfy its burden, the Government must demonstrate why it has an interest in disarming all felons regardless of the nature of their conviction or their propensity for gun violence. *See Ezell I*, 651 F.3d at 702-03; *Williams*, 616 F.3d at 692. And conclusory statements about the "absence of good character," *see* Gov't Br. at 18, cannot satisfy that burden. For this additional reason, the District Court's decision should be affirmed.

c. Even if the Government Can Establish an Important Objective, It Cannot Establish that the Application of § 922(g)(1) to Mr. Hatfield Is Substantially Related to that Objective.

Although the Government makes no mention of it here, this Court has stated that felon-in-possession laws generally advance an important government interest in "preventing armed mayhem." *Skoien*, 614 F.3d at 642. But even if that correctly describes the Government's interest, the Government utterly fails here to demonstrate that disarming Mr. Hatfield—a one-time offender who served no jailtime—in any way relates to that interest. In addition, "the statute is both underinclusive and overinclusive," and therefore cannot be sustained. *Cf. First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 766 (1978).

i. *The Government Fails to Provide Evidence Demonstrating a Substantial Relationship Between Disarming Individuals Like Mr. Hatfield and Curbing Armed Mayhem.*

To carry its burden, the Government "must present some meaningful evidence, not mere assertions, to justify its predictive [and here conclusory] judgments." *Binderup*, 836 F.3d at 354 (citation and internal quotation marks omitted) (alterations in original); *Ezell I*, 651 F.3d at 709 (finding that, as in the First Amendment context, "the government must supply actual, reliable evidence to justify" its basis for restricting Second Amendment rights). But the Government has provided no such evidence here.

As an initial matter, as explained *supra*, the Government never even bothered to address Mr. Hatfield's specific conviction, let alone provide evidence that disarming an individual with a nonviolent conviction resulting in no jailtime is substantially related to curbing "armed mayhem." Meanwhile, there is evidence in the record contradicting the Government's position. A sheriff's deputy testified that based on his "training and experience as a police officer[,] 70-year-olds with no violent criminal history do not pose a threat to the community," and therefore, he did not believe that "Larry E. Hatfield poses any threat to the community." A53 at 41:9-12, A54 at 45:5-6.

Moreover, even if this Court lumped all nonviolent felons together as the Government requests, the Government still has failed to offer evidence that

disarming nonviolent felons as a class prevents "armed mayhem." That is, the Government has offered no evidence indicating that nonviolent felons are substantially more likely than the average person to commit gun violence. Based on this complete failure by the Government to carry its burden, this Court should affirm the District Court's decision.

ii. *The Restoration of Rights Program Amounts to a Congressional Recognition that the Statute Is Overbroad.*

Even if the Government could provide evidence that nonviolent felons are substantially more likely than the average person to commit gun violence, § 922(g)(1) is still overbroad. Soon after Congress expanded § 922(g)(1) to apply to nonviolent felons in 1961, it added the "relief valve" in § 925(c), recognizing that individuals like Mr. Hatfield should have the opportunity to have their Second Amendment rights restored. As the District Court astutely pointed out, this amounts to a "tacit admission" that there is "a bad fit between § 922(g)(1) and the Government's purpose of keeping firearms out of the hands of dangerous criminals who may create armed mayhem." A15.

If the restoration of rights program provided for in § 925(c) was still operational, § 922(g)(1) would likely be constitutional. But when Congress defunded the program in 1992 and foreclosed that avenue of relief, it opened the door to the exact type of challenge raised here. *See Binderup*, 836 F.3d at 355

(finding that § 922(g) was unconstitutional as applied, in part, because this avenue of relief is "closed . . . altogether" and that the limited availability of expungement, pardon, or civil rights restoration "do not satisfy even intermediate scrutiny"). Or, as the Seventh Circuit predicted in *Williams*, § 922(g)(1) is "subject to an overbreadth challenge at some point because of its disqualification of all felons, including those who are non-violent." 616 F.3d at 693; *see also id.* ("[T]he government may face a difficult burden of proving § 922(g)(1)'s 'strong showing' in future cases."); *Yancey*, 621 F.3d at 685 (noting that "felon-in-possession laws could be criticized as 'wildly overinclusive' for encompassing nonviolent offenders . . .").

The Government's attempts to justify the rider do not remedy its unconstitutional effects. The cost of the program—a mere $3.75 million annually, H.R. Rep. No. 104-183, at 15—cannot excuse stripping the Second Amendment rights of deserving individuals like Mr. Hatfield.[11] Moreover, the Government cites

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[11] In any event, absent clear and intentional action to amend, repeal, or suspend a statute, Congress's failure to fund a statutory program provides no indication of its intent regarding that statute. *See Bean v. Bureau of Alcohol, Tobacco, and Firearms*, 253 F.3d 234, 238 (5th Cir. 2001) (discussing cases), *reversed on other grounds by United States v. Bean*, 537 U.S. 71, 78 (2002). Indeed, Congress has explicitly declined to repeal or withdraw the relief available under § 925(c). In 1992, the Stop Arming Felons (SAFE) Act was introduced in the senate. *See* 138 Cong. Rec. S2674-04, S2675-04. This bill sought to end the practice of "restoring the firearm

to the House Report to argue that "too many" felons with restored rights went on to commit gun crimes. That House Report, however, offers no evidence to support this conclusory assertion, let alone does it offer evidence that *nonviolent* felons were likely to engage in gun violence. *See* Gov't Br. at 2.

iii. *The Statute Is Also Overbroad Because Felonies Do Not Always Constitute Serious Crimes.*

Section 922(g)(1) is also overbroad because felonies now include myriad offenses that no reasonable person would consider to be serious crimes. Almost eighty years ago, the Supreme Court noted that "[f]elony . . . is a verbal survival which has been emptied of its historic content." *Adams v. United States ex rel. McCann*, 317 U.S. 269, 272 n.2 (1942); *see Watson*, 423 U.S. at 438 (Marshall, J., dissenting) ("For the fact is that a felony at common law and a felony today bear only slight resemblance . . . ."). Today, that is a massive understatement. By some estimates, there are over 4,000 statutes and more than 300,000 regulations at the federal level alone that may be enforced criminally. *See* John S. Baker, *Revisiting the Explosive Growth of Federal Crimes*, Heritage Foundation (June 16, 2008),

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rights of individuals convicted of violent felonies," and, in part, stood for the proposition that "convicted violent felons should not be allowed to possess firearms." *Id.* This bill was swiftly dispatched and never reported out of the Senate Judiciary Committee. The SAFE Act was reintroduced a year later on August 6, 1993 as S. 1400, but this bill also failed. Therefore, Congress's failure to fund § 925(c) does not demonstrate any intent to abrogate an individual's right to seek restoration of his or her firearm rights. *See Bean*, 253 F.3d at 239.

https://www.heritage.org/report/revisiting-the-explosive-growth-federal-crimes; *see also* Harvey Silverglate, *Three Felonies a Day: How the Feds Target the Innocent* (2011); Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (2009). Criminal laws now cover a broad array of conduct that most people would not recognize as criminal, let alone felony behavior that reflects a propensity for gun violence and can support a lifetime ban on firearm possession.

Examples of such felonies abound. For instance, in *Yates v. United States*, 135 S. Ct. 1074, 1079-80 (2015), the Supreme Court reversed a conviction for impeding a federal investigation, a violation of 18 U.S.C. § 1519, for a fisherman's disposal of three undersized grouper that were 1.25 inches under the required 20-inch size. *See also United States v. McNab*, 331 F.3d 1228, 1232 (11th Cir. 2003) (affirming convictions for felonies related to importing under-sized and improperly packaged Honduran lobsters); *United States v. Hoflin*, 880 F.2d 1033, 1034 (9th Cir. 1989) (affirming conviction for felony offense of aiding and abetting the disposal of leftover road paint without a proper permit under 42 U.S.C. § 6928(d)(2)(A)); *Binderup*, 836 F.3d at 340 (reviewing consequences of conviction for corrupting a minor arising out of a consensual sexual relationship with a seventeen-year-old who was over the state's legal age of consent (sixteen)).

Under the Government's position, any of these minor crimes can properly result in a lifetime firearm ban without implicating the Second Amendment at all. If

the Government decided to label jaywalking a felony, jaywalkers would lose their Second Amendment rights. But the Constitution cannot support such an absurd result. Merely labeling an offense a "felony" does not demonstrate that the offense bears any relation whatsoever to the propensity for gun violence.

Put differently, a lifetime ban of a fundamental right is grossly disproportionate to the nature of these offenses. The "principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common-law jurisprudence." *Solem v. Helm*, 463 U.S. 277, 284-85 (1983) (citing the Magna Carta and First Statute of Westminster, 3 Edw. I, ch. (1275) (holding that a life without parole sentence for defendant's seventh felony—passing a worthless check— violated the Eighth Amendment because it "involved neither violence nor threat of violence to any person")). The Government's position that Mr. Hatfield should be barred for life from possessing a firearm because he "l[ied] on some forms," A1, flies in the face of this important principle.

iv. *The Statute Is Also Unconstitutionally Under-Inclusive.*

At the same time § 922(g)(1) encompasses myriad felonies that have no relationship to gun violence whatsoever, it also expressly excludes from its coverage certain serious nonviolent, white-collar crimes. Specifically, the definition of the term "felony" used in § 922 excludes "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." § 921(a)(20)(A). This exclusion further demonstrates the lack of relationship between the suppression of gun violence and disarming individuals like Mr. Hatfield. *Cf. Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2231 (2015) ("Assuming for the sake of argument that those are compelling governmental interests, the Code's distinctions fail as hopelessly underinclusive.").

Felons convicted of antitrust and other white-collar crimes are not "law-abiding." Nor are they virtuous citizens in the Government's view. There is thus no principled basis for the argument that Mr. Hatfield's nonviolent felony is indicative of a propensity for gun violence and the nonviolent felonies listed in § 921(a)(20)(A) are not. A person convicted of an antitrust felony causing millions of dollars in harm will not have any restrictions on his right to own a firearm, whereas Mr. Hatfield, who wrongfully obtained $1,627.73, is subject to a lifetime ban on gun ownership. A34. At the very least, the Government would need to offer evidence to justify treating Mr. Hatfield differently than an antitrust felon. But it has completely failed to do so. This distinction is not only an unconstitutional application of the Second Amendment; its arbitrariness raises Equal Protection concerns.

Moreover, § 922(g)(1) also excludes most violent misdemeanors. In other words, while Mr. Hatfield's nonviolent felony precludes him from having a firearm, numerous *violent* misdemeanors do not result in a lifetime ban on gun ownership

under § 922(g). For example, the following violent federal misdemeanors do not result in any impairment of the right to own a gun:

- Simple assault of an immediate family member of a federal judge, a federal law enforcement officer, the President, Vice President, or a member of Congress. 18 U.S.C. § 115(b)(1)(B)(i).
- Simple assault of federal employees in the performance of their official duties. 18 U.S.C. § 111(a).
- Simple assault or assault by striking, beating, or wounding within the maritime jurisdiction and territorial jurisdiction of the United States. 18 U.S.C. § 113(a)(4)-(a)(5).
- Knowingly assaulting, beating, or wounding a process server. 18 U.S.C. § 1501.
- Assaulting members of the presidential and vice-presidential staff. 18 U.S.C. § 1751(e).
- Use of force or violence, or threat of the use of force or violence, to restrain, coerce, or intimidate, or attempt to restrain, coerce, or intimidate any member of a labor organization for the purpose of interfering with or preventing the exercise of any right to which he is entitled. 29 U.S.C. § 530.
- Willfully intimidating, coercing, threatening, or harassing a foreign official. 18 U.S.C. § 112(b).

Section 922(g)(1) also excludes multiple misdemeanors involving the *illegal use of a firearm*. For example, a federally licensed firearms dealer who, like Mr. Hatfield, makes a false statement, but does so in connection with the sale of a firearm, is guilty of only a misdemeanor under § 924(a)(3), and thus would not be subject to *any* ban on gun ownership. Meanwhile, Mr. Hatfield is subject to a *lifetime* firearm ban for false statements having no connection to guns or violence.

Similarly, a person who knowingly and illegally brings guns into a federal building is guilty of a misdemeanor. *See* § 930(a). Like the firearms dealer above, this person would not be subject to *any* restriction on the right to own a gun. As these examples show, the Government cannot demonstrate a means-end fit with respect to Mr. Hatfield. For this additional reason, the District Court's decision should be affirmed.

II. SECTION 922(G)(1) IS *PER SE* UNCONSTITUTIONAL AS APPLIED TO MR. HATFIELD BECAUSE IT IMPOSES A COMPLETE BAN ON MR. HATFIELD'S SECOND AMENDMENT RIGHTS.

The District Court correctly applied the Seventh Circuit's two-step framework for analyzing Second Amendment claims, and for that reason alone, the decision can be affirmed. But as the District Court also noted, the Seventh Circuit has not consistently applied this two-step framework. A5-A7, A11. And in fact, in *Ezell I*, the Court held—consistent with *Heller*—that complete bans of activity protected by the Second Amendment are *per se* unconstitutional. *Id.* at A7; *Ezell I*, 651 F.3d at 704-06. As the *Ezell* Court has explained, "[b]oth *Heller* and *McDonald* suggest that broadly prohibitory laws restricting the core Second Amendment right—like the handgun bans at issue in those cases, which prohibited handgun possession even in the home—are categorically unconstitutional." *See Ezell I*, 651 F.3d at 703 (citing *Heller*, 554 U.S. at 628-35; *McDonald*, 561 U.S. at 786-87). In other words, in

considering whether a complete firearm ban is unconstitutional, there is only one question: does it implicate the core Second Amendment right?[12]

Here, as applied to Mr. Hatfield, § 922(g)(1) operates as a complete ban of his core Second Amendment rights because Congress has defunded the restoration of rights program established in § 925(c). That is, there is no dispute that Mr. Hatfield is banned from possessing a firearm for the purpose of self-defense. Therefore, the only question this Court must answer is whether Mr. Hatfield—as a citizen who committed one nonviolent felony—falls within the Second Amendment's protection. As explained above, he plainly does, and the inquiry should simply end there. As *Heller* explained, no "interest balancing" is necessary or appropriate. 554

[12] Other circuit courts have agreed. *See Wrenn v. Dist. of Columbia*, 864 F.3d 650, 665 (D.C. Cir. 2017) ("'[C]omplete prohibition[s]' of Second Amendment rights are always invalid." (citing *Heller*, 554 U.S. at 629)); *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 961 (9th Cir. 2014) ("A law that imposes such a severe restriction on the core right of self-defense that it 'amounts to a destruction of the [Second Amendment] right,' is unconstitutional under any level of scrutiny." (citing *Heller*, 554 U.S. at 629)); *see also Heller*, 554 U.S. at 629 (citing *State v. Reid*, 1 Ala. 612, 616–617 (1840) ("A statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would be clearly unconstitutional.")); *Binderup*, 836 F.3d at 364 (Hardiman, J., concurring) ("[A] law that burdens persons, arms, or conduct protected by the Second Amendment and that does so with the effect that the core of the right is eviscerated is unconstitutional" (footnote omitted)).

U.S. at 634. For this additional reason, the Court should declare § 922(g)(1) unconstitutional as applied to Mr. Hatfield.

CONCLUSION

For the foregoing reasons, the judgment of the United States District Court for the Southern District of Illinois should be affirmed.

October 5, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and Seventh Circuit Rule 32 because it contains 13,812 words, excluding the portions of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) and Seventh Circuit Rule 32 because this brief has been prepared in a proportionally spaced typeface using 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on October 5, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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No. 18-2385

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JEFFERSON B. SESSIONS, III, Attorney General of the United States,

Defendant-Appellant

v.

LARRY E. HATFIELD,

Plaintiff-Appellee.

Appeal From The United States District Court
for the Southern District of Illinois,
Case No. 3:16-cv-383
The Honorable J. Phil Gilbert, Presiding

SUPPLEMENTAL APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

LARRY E. HATFIELD,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 16-CV-383
	)	
JEFFERSON B. SESSIONS, III, in his official capacity as Attorney General of the United States,	)	
	)	
Defendant.	)	

Deposition of Plaintiff,
LARRY EDWARD HATFIELD,
on behalf of Defendant

November 16, 2017

receive before any kind of a court-martial. They have three levels of court-martial so.

Q. So other than the Article 15 at Wolters, Texas, were you the subject of any other disciplinary actions during your time in the army?

A. No.

Q. And your punishment, for lack of a better word, for the Article 15 was extra duty on designated weekends.

A. Yes. I think it was six weekends, I think it was. It seemed like an awful long time, I can tell you that. But we were confined to the post for the whole six weeks. And we didn't have to pay no fine and lose no rank or anything like that.

But I thought it was really unfair because we called in and let them know, you know. The deputy always told us if you've got a problem, call in. Everything will be fine. That ain't true.

Q. I want to ask you a couple questions about your federal conviction. You were convicted of making false statements under 18 U.S.C. Section 1001; is that correct?

A. I don't know what all that stands for so I can't say whether that's correct or not. I don't know what that means.

Q. Do you remember what you were convicted for in the federal level?

A. Well, it's for -- I was drawing railroad unemployment and I was working for another outfit so they got me for fraud is what they said. But the place I was working at, I was only working part time and I was only getting enough hours that it was just kind of messing my employment up, you know.

So I went to Mike Brown's, the guy's name. He used to work for the Illinois Central Gulf railroad as a claim man. I don't know what they called them back them, claim man. They call them risk managements now.

But I told him, I said, "Mike," I said, "You know, I'm going to have to quit this job because it ain't doing nothing but messing up my -- I'm just working enough hours." You know, I'd be east track inspector, foreman on the track for any work that was being done and I was switching for them in the evening for sometimes two nights a week.

And it's wintertime. And a lot of times, the roads were bad. I had to come down over and into downtown St. Louis. And I told him, I said, "I just think it's best for me, you know, to give this job up."

So he says, "Well, how about if we do this? So you keep track of your hours until you got 40 hours and you turn them in. And then we'll give you a check for 40 hours and you cannot claim that 40 hours."

I said, "Well, I don't know." So I had to go -- the

railroad had just started us you having to do, like, a state fill out a form that we've been looking for work and where we've been looking for work.

So they had a Railroad Retirement Board down I think it was 22nd or 23d Street in Granite City. They sent me a thing for me to come down there. I went down there and I talked to a lady. And I don't know why I remember this name after all these years because I'm not good at names but her name was Sharon Johnson. I'll never forget this woman.

And I explained to her just what I told you. And she said, "Well," she said, "off the record, I'd say go ahead and do it. Don't worry about it." I said, "Okay."

So I did it. And when it come time for all this to come down, I told them, I said, "Well, you know, she did tell me it was all right to do it." And when someone asked her about it, she said, "I never said that." So she hung me out to dry. And it was really a weird experience, I'll tell you.

Q. What was -- can you remind me of Sharon Johnson's job again? Who did she work for?

A. She worked for the Railroad Retirement Board --

Q. Okay.

A. -- where we went and turned -- filled out our papers and turned them in so we could get our unemployment. We was only getting $250 every two weeks back then. That wasn't

much money even, you know, for those days, you know.

Q. And was Sharon Johnson, like, a clerk at the front desk?

A. Yeah, she was -- she was one of the claims people, you know, that you take -- fill out your paper and turn it in to her so you can get your claim processed.

Q. Okay.

A. That's what she was. Whatever her title was, I don't know.

Q. How did you first become aware that there was a legal proceeding against you for the false statements?

A. Well, I was contacted, I can't remember, must have been by phone I think. And I got a letter or something, I don't know. But it must have been by phone because I talked to this lady, said she was a U.S. Marshal. And she wanted to talk to me about a matter about my unemployment.

So I kind of had an idea what we was going to be talking about. And, for some reason, I can't remember at this point what for, but I met her at the McDonald's restaurant in Edwardsville. Matter of fact, it was two women, two females there.

And she had a briefcase and put this tape recorder out and said, "You know, is it all right if we tape record this interview?" And I said -- she said, "We can stop it at any time. You want to stop, we can stop." I said, "Okay."

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So we started discussing and doing this and that and I don't remember all that, but she started to -- trying to pinpoint me down on certain dates. "Can you explain to me about this date," and all this.

I said -- by this time, it had already been, like, over a year, you know. And I said, "Listen, if you want to get down to specific dates," I said, "I don't see that we're --" I was afraid to say yes or no because I couldn't remember, you know. Did I claim this date or did I not? Did I claim this? I said, "I don't know. I can't remember."

And they had down there at the time on her papers, I think they had -- they wanted me -- they was going to give me a deal. If I signed this paper and paid this $5,000, you know, that would be as far as it goes and everything would be fine.

And I tell you what, back in the '80s, $5,000 was a lot of money. I said, "Listen, I never got nobody for no $5,000." And I said, "I ain't paying back no $5,000." I said, "We might as well stop this right here and I'm done with this."

And she said, "Mr. Hatfield, I strongly advise that you go ahead with this and sign these papers." And I stood up and I said, "What are you going to do, arrest me or something?" I was a tough guy back then. She opened up her purse and there she had a big old, gold badge, a 38.

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And she says, "Well, we might." And I said, "Wait a minute, I just kidding, I just kidding." And so I said, "I'll have my lawyer contact you about it." And he didn't want to get involved in no federal case so he told me to get a different lawyer so.

I don't know, I don't know what -- exactly what happened, if it just got dropped or if I assumed that was the end of it or what. I don't really know until all of a sudden, man, this notification come, you know.

And I had to go to East St. Louis to the courthouse over there, you know. And so I think I called and talked to the judge or talked to somebody. I think it was a judge. When I told him I was going to represent myself, he said, "Mr. Hatfield, I will not allow you in my courtroom without a legal representation."

I said, "Oh." So the court appointed me a guy, you know. And he made the judge mad right off the bat, didn't know what was going on. He said he just got handed the case the day before.

And what they ended up doing is I had to pay $3,000 in restitution but they tacked a $2200 fine on so they got their $5,000 anyway. I should have signed the paper, you know what I mean? I was stupid back then.

Q. Other than Sharon Johnson and the government officials you interacted with and your lawyer, are there any other individuals who have -- who were involved at the time of your conviction and have knowledge about it?

A. Well, there's one guy. Oh, my youngest daughter went to court with me that day. And my AA sponsor, Kenny Kloke, he went over with me because my idea before, before this stage of my life, my idea was you get in hot water, you move. You know, you don't stick around. You take off. Okay. Maybe they won't find you.

He told me, he said, "No, that's not what we're going to do." He says, "You face your problems in life and take responsibility for them." So that's what I did.

Q. Until he told you that, were you contemplating leaving Illinois to avoid the federal charge?

A. Well, I don't know. But, you know, there's a lot of thoughts goes through your head when your back's up against the wall, you know, survival of the fittest I guess you would say, I don't know. But anytime I got myself in a situation that I wasn't comfortable with, it was always a cut and run, you know, or something, I don't know.

Q. I'm sorry, it was always what?

A. Cut and run, you know --

Q. Cut and run.

A. -- instead of facing the situation. And it's not like that today. But I don't know that I would have. It was just a thought.

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Q. Is there an example of when you've done that in your life, cut and run?

A. Well, I don't know that -- I don't know that I've ever actually done it. It was kind of a -- I think you thought about it. But as far as actually doing it, I don't think that would be the case. I don't -- I don't recall anything like that.

Q. So the names of the individuals, one you mentioned, I think you said Kenny Kloke, Klokey?

A. Kloke.

Q. How do you spell his last name, do you know?

A. K-l-u-c-k-y -- c-k-e -- c-k. That's funny, I don't --

Q. Sorry, can you say it one more time, how to spell it?

A. C -- or, no, K-l-u -- no, K-l-o-k-e, Kloke. Twenty -- twenty-seven years I've known the guy. I just call him Goose. That's his nickname.

Q. And where does Mr. Kloke live?

A. He lives in Hartford, Illinois.

Q. And you said he's your AA sponsor; is that correct?

A. Yes, he's been my AA sponsor the whole 27 years I've been in the program.

Q. Does he still live in Hartford, Illinois?

A. Yes.

Q. And who else was involved at the time with your federal conviction?

if you're not the type of guy who would go out and seek attention?
A. Well, some guys when they get to drinking like to fight. I wasn't one of them.
Q. How would you describe your behavior when you would drink?
A. I don't know, just, you know, make jokes and have a good time, like, play pool, play darts, stuff like that.
Q. Have you ever been -- aside from the felony conviction for making false statements, the DUI offense and your claim against the railroad for compensation for your injury and this lawsuit, setting aside those four proceedings, have you been involved in any other legal proceeding?
A. No, not that I can recall, no.
Q. Have you ever sought a civil protection order?
A. One time. That was a big mistake, Jesus.
Q. When -- do you remember when that was?
A. Well, it had to be around the year 2000, somewhere around there. We bought our house in 1998. Maybe it was 2000 or 2001, somewhere like that, somewhere in that neighborhood.
Q. And why did you seek a protective order?
A. Well, see, I was out of town all week working on the railroad. My wife, she worked during the day. Kids were going to school. And my wife's ex-husband was -- he was

into drugs and stuff like that.
And so, anyway, my garage got broken into and $6,000 worth of my tools and stuff stolen out of that garage. And I knew immediately who it was. And her oldest son, too, he was involved in drugs at that time and he's dead now, overdosed on heroin.
But I don't remember the details. I couldn't figure out. But the State of Illinois sent me a letter and stated to the fact that I should seek the thing of protection against her oldest son. I didn't want him on my property. I told him to stay away from the house and all that kind of stuff.
I didn't solicit that. So I went to Edwardsville at the courthouse and I filled out a paper, put down everything. They wanted to know why do you want an Order of Protection against this person. He never assaulted me or made any threats.
This lady judge -- no offense -- I tell you what, I never felt so violated in all my life in that courtroom that day. I mean, I was mad because she'd asked me a question. I filled out a form. And she's the judge going to make the determination whether I should get this Order of Protection, right?
All she need to do is just read that form. If there was something on there that wasn't clear to her, ask the

question. She started asking all kinds of questions and I just couldn't answer a yes or no to. And when I would try to answer the way I thought I should, she would ask me things like, "What's your primary language?" I said, "What?"
"What is your country of origin?" Now, here I am, an army veteran, you know. I mean, she just -- boy, she made me mad, I ain't kidding you. And all she had to do is say there's nothing here to warrant an Order of Protection and that would have been the end of it, right?
Nah, she thought she was Judge Judy or somebody. So, anyway -- and he's sitting right there in the courtroom that day, too, and that even made it worse. But, anyway, I'd already taken a day off of work, missed a day of work to, you know.
And I thought, well, if I'm going -- it cost me money to come over here for this? We bought this house and we didn't get the property tax notice on it the first year. And I don't know what the deal was but I went up to check about it. And it was just right before the deadline to pay them taxes.
So I got to pay my taxes before there was a penalty on. That's the good I brought out of that day, see? You always got to look for the good.
Q. So just to clarify, you sought the protection order

against your son-in -- stepson.
A. Yeah, the State sent me a daggone letter telling me I should.
Q. Okay.
A. I didn't understand why but --
Q. Was your stepson living with you at the time?
A. He had been living with us but he wasn't at that time.
Q. Where was he living at the time you sought the protection?
A. His grandma's.
Q. And he was not the one who had broken into your garage.
A. He's one of them. There's three of them all together.
Q. Okay.
A. That's what he told me later.
Q. Who were the three?
A. Him, his dad and then some friend of his dad's. I mean, they hauled off a big roller toolbox and you wouldn't believe all the stuff they took out of there, broad daylight.
Q. Did you -- do you recall requesting that your stepson receive alcohol counseling as part of the protection order?
A. I didn't, no. He didn't really have a problem with alcohol. His problem was with drugs. But he'd been -- he'd had numerous opportunities, you know.
I tried to help him a little bit but I wasn't the -- I

wasn't really well versed on drugs and that situation so I couldn't help him much. Besides, I think I was too close to the problem to be of any help.

Q. What was your -- what's your stepson's name?

A. Steven Gold. He's deceased, also. Man, everybody I know is now dead.

Q. Have you ever sought a protection order against anybody else?

A. No.

Q. Has anybody sought a protection order against you?

A. No.

Q. Have you ever been involved in an incident of domestic abuse?

A. No.

Q. Even one that wasn't brought to the level of the -- to the attention of the police?

MR. MAAG: Objection, asked and answered. You can answer, though.

WITNESS: No, I've never had any of that, no.

Q. (By Mr. Swinton) And you mentioned that you've had treatment or you've been going to AA since November 1990. Are you still sober?

A. Yes.

Q. Have you had any sort of alcohol since November 1990?

A. I wouldn't be considered sober if I had.

Q. So that's a no?

A. I have not.

Q. Other than AA and the outpatient facility in Alton, have you had any other treatment for alcohol?

A. No.

Q. Have you had any other treatment for substance abuse?

A. I never had no substance abuse. I didn't have that problem.

Q. Have you ever used any drugs?

A. No.

Q. Have you ever used marijuana?

A. I don't remember, maybe.

Q. Do you remember when it would have been?

A. While I was in the army. The good old government supplied it for me.

Q. The government provided you with marijuana?

A. Well, went to Vietnam. That's where most guys got started at.

Q. So if -- do you recall having marijuana when you were in Vietnam?

A. I don't recall it. I don't see the point myself. I like to drink beer. That's good enough for me.

Q. Did you ever have marijuana when you were in the United States and you were in the army?

A. Not that I can remember.

Q. Have you ever used cocaine?

A. No.

Q. Have you ever used heroin?

A. No, hell, no.

Q. Have you ever used meth?

A. No. I tell you, I'm not even -- I wouldn't even -- if you wanted to pay me to take it, I wouldn't do it.

Q. Have you ever sought mental health treatment?

A. No.

Q. Have you ever been to a counselor?

A. I have.

Q. And what was that? What did you seek counseling for?

A. I don't know. My primary care over at the VA asked me if I thought I needed it, and I said I don't see why. I mean, this has been almost 40 years, you know, after the fact.

I said, "Don't you think that's a long time ago? I should be probably past that by now." She said, "Well, the mind's a funny thing." About the third time I said, "If you think I need to talk to somebody, make me an appointment."

So I went there and they talked. And they didn't talk about nothing, just sat there and talked. You know, I didn't understand the point anyway. And they said, "Well, Mr. Hatfield, we don't feel that you need to come back. If you want to make an appointment, you can. But we're not

going to make another appointment, and that was the end of that so.

Q. So it was an official at the VA who recommended that you receive counseling.

A. Yes, my primary. I thought she was a doctor but she's a nurse practitioner, Nancy Rodenberg. She's getting ready to retire; Rodenberg like Clinton, Clinton's name, Rodenberg. But, anyway, she's getting ready to retire December 31.

Q. When did you attend counseling?

A. Oh, Lord, probably 10 years ago maybe, I don't know. I think it was -- I think it was after I left the railroad maybe. It will be 10 years for that this February. I had a hard time with timeframe but it's been a long time ago anyway.

Q. So it was around the time that you left the railroad.

A. I don't think I was working. I think it was right after I left the railroad or something, you know, because --

Q. And did you attend just one counseling session?

A. Yes.

Q. Have you attended counseling on any other occasion?

A. No, not that I can -- I haven't. I don't know. I was -- I have never had any counseling for anything that I can think of except before I got married, the preacher had us go through those course thing or something I guess you could

Q. And where does he live?
A. Farmington, Missouri.
Q. Do you know anybody by the name James Hatfield?
A. No.
Q. Do you know anybody by the name Dennis Hatfield?
A. No.
Q. So your only brother's name is Kenneth.
A. Kenneth Wayne. He's named after my father but there wasn't no junior attached to it. They didn't never have called him that anyway.
Q. Does your brother have -- does your brother know about the facts related to this lawsuit?
A. Not entirely.
Q. What does he know?
A. Well, it's kind of hard to -- it's hard for me to know what he knows exactly because I don't know how much he knew when this was actually going down but --
Q. I'm sorry, when what was going down?
A. When this whole thing originated.
Q. And this thing, you mean this current lawsuit?
A. Yeah.
Q. Okay.
A. Because I did borrow some of the money that they assessed me. I did borrow some of that money from him.
Q. Oh, so you're talking about the federal conviction --

A. Yes.
Q. -- not the current lawsuit that we're involved in.
A. Oh, he didn't know anything about it until somehow or other he got dragged into this thing. And he called me and asked me about it. I didn't go into great detail about it because, you know, what do you say.
Q. So, I'm sorry, but for the federal conviction, you said you borrowed -- for the false statements, you said you borrowed money from him.
A. Some of it.
Q. Okay.
A. A couple thousand dollars or something like that.
Q. But he didn't -- did he know why you were borrowing -- did you tell him why you were borrowing that money?
A. Well, I'm pretty sure I did because his wife was real concerned about it. She works at a bank. Anything that involves money, she wants to know about it so I know she was interested in what it was for, how long it was going to take to get it back and all that kind of stuff. So we made some, you know, agreements on that.
Q. Did you tell him what it was for?
A. I'm sure I did; otherwise, he wouldn't loan me the money I guess. I mean, I wasn't going to lie to my brother, you know. If I'm going to ask for a couple thousand dollars, he ought to at least know why he's loaned it to me.

It wasn't for a down payment on a car, that's for sure.
Can I ask you a question?
MR. MAAG: No, you can't.
Q. (By Mr. Swinton) Not yet, after the deposition's over.
A. I'm just dying to ask you a question.
Q. Just give me one second.
A. Okay.
Q. I want to check a few things.
(Discussion off the record.)
Q. I don't have any further questions, Mr. Hatfield.
A. Well, I just curious --
MR. MAAG: Okay. Well --
MR. SWINTON: We're not quite done yet.
WITNESS: Oh, I'm sorry. I thought that was my go-ahead sign.
MR. MAAG: I don't have any questions.
(Instruction off the record.)
WITNESS: I don't necessarily want to read it, to be honest with you. I think she's probably pretty proficient at her job.
MR. MAAG: So then you'll waive.
WITNESS: Yes.
(The deposition concluded at 10:15 a.m. and the signature was waived.)

REPORTER'S CERTIFICATE

I, LAURA LYNN MURPHY, CCR No. 764, Certified Court Reporter and Registered Merit Reporter, do hereby certify; that the foregoing proceedings were taken before me at the time and place therein set forth, at which time the witness was put under oath by me;

that the testimony of the witness, the questions propounded and all objections and statements made at the time of the examination were reported by stenographic means by me and were thereafter transcribed;

that the foregoing is a true and correct transcript of my shorthand notes so taken.

I further certify that I am not a relative or employee of any attorney of the parties nor financially interested in the action.

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

Dated this 12th day of December, 2017.

_____
LAURA LYNN MURPHY, CCR No. 764

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

LARRY E. HATFIELD,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 16-CV-383
	)	
JEFFERSON B. SESSIONS, III, in his official capacity as Attorney General of the United States,	)	
	)	
Defendant.	)	

Deposition of Witness,
LIEUTENANT GARY WAYNE CRANMER,
on behalf of Defendant

November 15, 2017

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Q. Okay. So lots of discussion about motorcycles?
A. Yes.
Q. Do you know other things about Mr. Hatfield aside from motorcycles?
A. No.
Q. Do you know about his family?
A. I don't know about his family. I know he's got a brother I think. He's mentioned having a brother and a daughter in Texas, but I really don't know him to that level.
Q. Do you know about other hobbies other than riding motorcycles?
A. He's retired, he doesn't do anything. It's incredible. I can't wait to get there. But, no, not really, he doesn't really do much other than he goes to A -- a lot of AA meetings. He eats out a lot, I know that. And he rides bikes.
Q. Do you do anything with him other than -- so you stop by his house sometimes and sometimes you'll ride motorcycles or you'll see him at AA meetings.
A. (Witness nodded.)
Q. Are there any other occasions on which you see him?
A. No, if it's not something to do with our motorcycle club. What -- we have meetings once a month, I forgot to tell you that, where we'll meet at a restaurant and we

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discuss matters and what we were going to donate money to, which charity and stuff like that.
Q. And that's for the motorcycle club?
A. Yes.
Q. So you know him through a motorcycle club as well as the Coalition.
A. I -- well, yes, we belong to the same motorcycle organization. It's called the Outlanders. It's a -- everybody in it's in sobriety essentially.
Q. Do you consider Mr. Hatfield to be a close friend?
A. I do. He's helped me a lot.
Q. And you mentioned that he told you about his felony offense. You said it was, as you understand it, it's something about him stealing some money.
A. Yeah, I -- not physically stealing it but I think he -- I guess he claimed, had something to do with being injured or something on the job. I don't -- I didn't ask too much about it but it was a theft essentially.
Q. Did he tell you why he did that?
A. No.
Q. Do you know any other information about that offense?
A. Other than the fact it was federal. I mean, he said something about it being federal because it was the railroad; otherwise, it would have been a state charge and we probably -- you know, we wouldn't be talking about it at

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the federal level. That's what -- all I know. And I don't know if that's true or not.
Q. Do you know anything else about Mr. Hatfield's criminal history?
A. I don't.
Q. Do you know if he's had any other convictions?
A. I don't.
Q. So --
A. Well, hold on, hold on, stop. I know he mentioned a DUI and I don't -- we're all drunks. Okay. So I'm sure he's had a -- the DUI. I know he's had alcohol-related charges. I thought he said he had a DUI, but I think most of his stuff centers around alcohol. But I -- I've never looked at the criminal history. I wouldn't know so --
Q. Okay.
A. -- you know.
Q. You said that you know he had or you think he has a DUI.
A. Yeah, because he mentioned it. I know he mentioned getting a DUI. This is sometime, I mean, years and years ago.
Q. Do you know about his arrest history?
A. I do not.
Q. And do you know -- the federal charge you referred to, do you know the specific law he was convicted of violating?

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A. No.
Q. What do you know about the current case? I think we asked that before. It's where we started. But what specifically about the case do you know?
A. This is what I perceive this whole thing to be, okay, I thought we were just trying -- in my mind, and I didn't ask the question and maybe I should have, in my mind, this was some type of a -- maybe an expungement type of deal that typically they do at, like, the state level.
That's what I thought we were going after here, to -- because he has an attorney -- to regain his ability to get a FOID card. That's what I thought we were doing. That's all I know about it. We haven't really -- we -- nobody's really talked to me outside of that really.
Q. Why did you think it was an application for an expungement?
A. Because I think in order for you to ever get a FOID card again, you can't have a felony conviction. And an expungement will get rid of that, at least it does at the state level.
Q. Were you ever told that he was seeking an expungement?
A. No, I was not. That was in just what I was thinking was going on.
Q. What do you understand your role in the case to be?
A. I thought all I was doing was testifying to the fact

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that what I know from -- about Larry Hatfield is he's not a violent individual that would be posing any type of a threat to society from what I know to just being around him for the few years I've been around him in order to get his FOID card reinstated. That's it.

Q. Do you have a different understanding of your role now that you understand that he's not seeking expungement in this case?

A. I don't know what he's seeking.

Q. Okay.

A. That's -- if it's not expungement, what is it? I don't even know what would -- what else it could be.

Q. Okay. When did you first learn about the case?

A. Back when he asked me to be a character reference for him.

Q. And do you remember when that was?

A. It's been some months back. I don't remember exactly. It would have been around the time I would have did the letter.

Q. And what -- remind me, what did Mr. Hatfield tell you about the case exactly?

A. That he had taken money somehow or -- from the railroad. I thought it had to do with an injury, I'm not -- I can't be for sure, and that he had paid the money back. And it was a long, long time ago. And he was trying to get

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his FOID card reinstated and asked me if I'd be a character reference and I said sure.

Q. Did you verify the information that Mr. Hatfield told you about his criminal history?

A. No.

Q. And I think we said this before but I just want to be clear, did you check Mr. Hatfield's criminal history in any way?

A. No, I couldn't. I'd lose my job and go to jail for that, no.

Q. Did you ask him any questions about his past?

A. Outside the -- when he mentioned the DUI, other than that, no, I really didn't.

Q. Did you talk to anybody about Mr. Hatfield?

A. No.

Q. Do you have any knowledge of federal gun laws?

A. I thought I did but, apparently, I don't after being on the phone with you for a short amount of time. I had no idea that we're lumping everybody together. I didn't know how this worked out. So I know enough to be dangerous but that's probably about it.

Q. What do you mean to --

A. I mean --

Q. -- enough to be dangerous?

A. -- I mean, I know that a felon can't be in possession

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of a weapon, I know that. I know it's a 10-year minimum mandatory at the federal level because I've testified in federal court 6,000 times, but I don't -- I know they can't be in possession of a firearm. I know they can't own a firearm. I got -- I know that. That's about what I know. I -- if that makes sense.

Q. Yep, sure. Do you know the specific law that prohibits Mr. Hatfield from having a gun?

A. I do not.

Q. Do you consider yourself to be an expert on gun laws?

A. No.

Q. Do you think your opinion about Mr. Hatfield is based on any sort of specialized knowledge?

A. No.

Q. And you said being a charac -- what was your understanding of what being a character witness in this case would involve?

A. Would be testifying to the fact of what I know currently about or my opinion of a gentleman or a woman, whatever. It's just a generalized opinion of being around them and what I think about them.

Do I think they're a problem? Do I think they could be a problem? Do I think they, you know, would be an issue with something like this? It's basically a reference about what I know about their character as it stands today.

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Q. And what did you think made you qualified to give that opinion about Mr. Hatfield's character?

A. That I've known him for a number of years.

Q. Since 2014.

A. (Witness nodded.)

Q. Is that correct?

A. Yes, that's correct, yes.

Q. And you said you thought your role would involve providing testimony, correct?

A. Right.

Q. When you were first asked to be a character witness, did you understand that your role would be to provide testimony?

A. No, actually I didn't. Actually I thought I was just going to -- I thought this was going to be something that would be submitted to the courts and a decision would be made. When you called me, I'm, like, this is odd. But I don't mind doing it, I mean.

Q. Did you -- at the time you talked to Mr. Hatfield, did he mention signing some sort of a document?

A. Yeah, I signed it at his office but that was it.

Q. Do you remember when you signed that document?

A. I have to refer to the attorney. I don't remember exactly when.

Q. Do you remember it being close in time to when you

with you.
Q. Well, I mean, right now.
A. Oh, yeah, yes.
Q. Is there anything in those documents that is inconsistent or different than what Larry told you about his federal conviction that you see?
MR. SWINTON: Objection to form. You can answer.
Q. (By Mr. Maag) You can answer.
A. I can answer? No, it seems -- again, I only knew it in brief but it looks like a theft to me.
Q. So having had a chance to read the paperwork from the underlying federal felony criminal case, that it's consistent with your understanding of what Mr. Hatfield's conviction was for?
A. Yes.
Q. Anything about what you just read or saw there that changes any of your testimony that you've given today?
A. No.
Q. Do you have any information -- and I understand that you cannot lawfully do certain checks. But has any -- are you aware or has anybody provided you any information that Mr. Hatfield has any, let's say, felony conviction other than this railroad retirement conviction?
A. Not that I'm aware of, no, nobody's told me anything about that.

Q. Has anything told you or do you have any information that Mr. Hatfield has any domestic violence convictions?
A. I wouldn't know, no.
Q. So not that you're aware of.
A. No.
Q. And are you aware or anybody told that you Mr. Hatfield has any mental health history problems?
A. No.
Q. You have testified that Mr. Hatfield I think told you that he was charged with DUI in the past.
A. He mentioned a DUI.
Q. Do you have an understanding of when that was?
A. I have no idea, a long time ago, more than 27 years I would imagine.
Q. As you sit here today from your observations of Mr. Hatfield, do you think it's -- and I understand that in AA, nobody's ever cured. But presently do you think Mr. Hatfield has an alcohol problem?
A. Absolutely not.
Q. Do you have any information that Mr. Hatfield is a user of any illicit drugs?
A. No.
Q. As you sit here today knowing what you know, do you have any reason to believe that Larry Hatfield, if he were allowed to lawfully possess firearms and/or ammunition,

would pose a threat to the community or any person or group of persons?
A. No.
Q. As you sit her today, do you believe that Larry Hatfield poses any greater threat to anyone or anything than a person who was not convicted of the -- of a similar charge that Mr. Hatfield was for the Railroad Retirement Board?
MR. SWINTON: Objection to form.
WITNESS: No.
MR. MAAG: No further questions.
MR. SWINTON: Nothing further from me. Go off the record.
(Instruction off the record.)
WITNESS: I don't want to read it. I'll waive.
(The deposition concluded at 12:12 p.m. and the signature was waived.)

REPORTER'S CERTIFICATE

I, LAURA LYNN MURPHY, CCR No. 764, Certified Court Reporter and Registered Merit Reporter, do hereby certify; that the foregoing proceedings were taken before me at the time and place therein set forth, at which time the witness was put under oath by me; that the testimony of the witness, the questions propounded and all objections and statements made at the time of the examination were reported by stenographic means by me and were thereafter transcribed; that the foregoing is a true and correct transcript of my shorthand notes so taken.
I further certify that I am not a relative or employee of any attorney of the parties nor financially interested in the action.
I declare under penalty of perjury under the laws of Missouri that the foregoing is true and correct.
Dated this 8th day of December, 2017.

LAURA LYNN MURPHY, CCR No. 764

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

LARRY E. HATFIELD,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 16-CV-383
	)	
JEFFERSON B. SESSIONS, III, in his official capacity as Attorney General of the United States,	)	
	)	
Defendant.	)	

Deposition of Witness,
LIEUTENANT JAMES LEROY GOEKEN,
on behalf of Defendant

November 15, 2017

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possess a firearm. And just with my dealings with him, that I've -- that I just believed that he wouldn't be a threat to the community if he did possess a firearm.

Q. And looking at the document now, do you recall writing this document yourself?

A. I didn't write it myself, no.

Q. Do you know who wrote it?

A. I believe it was through his attorney.

Q. And did you make any edits to it?

A. I don't believe so.

Q. So you received this document from Mr. Hatfield and you believed it was written by his attorney and you signed it without editing it.

A. Yeah, I didn't make any corrections or anything of that -- that nature to it. I wouldn't have edited it. I would have looked at it, though, before I signed it.

Q. Did you make any changes to it in any way?

A. I don't believe so.

Q. Did you receive this document from Mr. Hatfield, himself?

A. I met with Mr. Hatfield at his attorney's office.

Q. And his attorney, Mr. Maag, was there?

A. Yes.

Q. Was anybody else there?

A. Lieutenant Cranmer.

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Q. And what did you discuss when you met with Mr. Hatfield, his attorney, and Lieutenant Cranmer?

A. Just that he was going -- he was in the process of trying to get his FOID card back and that they were filing suit.

Q. How long did this meeting last?

A. Oh, it was only 10 minutes, 5, 10 minutes.

Q. And you mentioned that when you received this document, you read it through before signing it; is that correct?

A. Yes.

Q. Did you do anything else before you signed it?

A. I don't believe so.

Q. Did you ask any questions about what was written in the document?

A. I don't think so.

Q. Did you check Mr. Hatfield's criminal history?

A. Not at that time, no.

Q. Did you consult any other materials?

A. I don't believe so.

Q. Did you do any research?

A. Not at that time, no.

Q. Did you ask Mr. Hatfield any questions before you signed it?

A. I don't believe so.

Q. Did you ask Mr. Hatfield's attorney any questions before you signed it?

A. I don't believe so.

Q. Did you talk to Lieutenant Goeken -- or, excuse me, did you talk to Lieutenant Cranmer before you signed this?

A. I don't believe so.

Q. So just to sum it up, you received a drafted affidavit from Mr. Hatfield. You believed it was written by his attorney and you signed it without checking any sources, speaking to anybody or making any changes to the document; is that correct?

A. Correct.

Q. And previously we established that you have known Mr. Hatfield since 2015; is that correct?

A. Correct.

Q. And I think in the second paragraph, the copy on file with the court is faded like this so it's a little bit hard to read.

A. Right.

Q. But it says you've known Plaintiff Larry E. Hatfield since January of 2015.

A. Correct.

Q. Is that correct?

A. Correct.

Q. And this document is dated November 21, 2016; is that correct?

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A. Right.

Q. I think it's on the second page.

A. Right.

Q. So that means at the time you signed this, you had known Mr. Hatfield for about 1 year and 11 months.

A. Correct.

Q. I want to look at a few of the statements you made in the affidavit. Paragraph 4 I think -- it's hard to see 4 -- it says, "In my training and experience as a police officer, that 70-year-olds with no violent criminal history do not pose a threat to the community."

A. Correct.

Q. Is that what it says?

A. Yes.

Q. Do you mean this statement to say that a 70-year-old with no violent criminal history can never pose a threat to the community?

A. No.

Q. So, in other words, it's possible that a 70-year-old with no violent criminal history can pose a threat to the community.

A. That would be possible, yes.

Q. What do you -- actually -- and what is this statement based on?

A. Based on my training and experience and my dealings with

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Mr. Hatfield, just based upon my training and experience that a 70-year-old with no criminal history, no violent criminal history, does not necessarily pose a threat to any community. I mean, that's -- that's what that would mean.

Q. Do you -- in your time as a police officer, have you ever dealt with a 70-year-old with no violent criminal history?

MR. MAAG: Objection, vague and ambiguous.

WITNESS: Well, yeah, I deal with people from 5 years old to 90 years old on a daily basis so it would be safe to say that I've dealt with 70-year-olds with no violent history.

Q. (By Mr. Swinton) Can you recall one in particular?

A. Can't really recall one.

Q. Do you typically know when you're dealing with people as a police officer if they have a violent criminal history?

A. Only from past experiences if we've been to that place before or if we've dealt with that person before; other than that, no.

Q. Did you do any research in order to formulate this statement in paragraph 4?

A. No.

Q. Did you talk to anybody about this -- your conclusion in this statement?

A. I don't believe so.

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Q. Did you check to make sure Mr. Hatfield has no history of violence before you signed the document with this statement?

A. At that time, no. It was based on my dealings with Mr. Hatfield. That was my dealings with him, no violent history or anything of that nature that I was aware of.

Q. Did you know for a fact that Mr. Hatfield had no violent criminal history at the time you signed this?

A. Not in his history, no.

Q. So you didn't know as a fact that Mr. Hatfield had no violent criminal history at the time you signed this.

A. No, I didn't.

Q. What does it mean to pose a threat to the community?

A. If, by your actions, you're -- you endanger yourself or others, that would be imposing a threat to the community.

Q. And we talked before about the types of sources you might check before you determined whether someone poses a threat to the community. I think you said before, you would consider their prior criminal history; is that correct?

A. That would be one way, yes.

Q. And you would look at their current criminal record; is that correct?

A. Correct.

Q. And you would consider their mental health; is that correct?

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A. I'm not a mental health -- but that is one if -- you know, if they're displaying signs of possibly a mental health issue or if they've had mental health issues, then that would be a determination, yes.

Q. And you also consider whether they had a history of domestic violence; is that correct?

A. To pose a -- you're asking the question to pose a threat to the community?

Q. Correct.

A. Well, that part of the history so, yeah, if it's domestic-related then.

Q. But before signing this statement, you didn't obtain Mr. Hatfield's criminal history, correct?

A. No.

Q. Did you inquire about his mental health?

A. No.

Q. Did you learn of any history of domestic violence?

A. No.

Q. Did you try to learn about any history of domestic violence?

A. Before this, no. Like I said, my signing this document was based upon my involvement with Mr. Hatfield in the year before.

Q. Did you try to determine whether he had recently committed any crimes before you signed this document?

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A. No. Like I said, I didn't do any history or criminal history prior to this document.

Q. I want to go on to the next paragraph, paragraph No. 5. It says, "That based on my person knowledge of Larry E. Hatfield, I do not believe that Larry E. Hatfield poses any threat to the community." Is that correct?

A. Correct.

Q. And I think when you said based on my person knowledge, did you mean personal knowledge?

A. Yes.

Q. What do you mean by -- when you said poses any threat to the community, what does that phrase mean?

A. In my dealings with Mr. Hatfield, I've never observed or saw anything that would make me believe or lead me to believe that he was a threat to the community.

Q. And these would be your dealings through the Drug Alton -- the -- I'm sorry --

A. Through the Coalition.

Q. -- the Coalition for Drug Free Alton.

A. Yes.

Q. And that would be at this time where you had interacted with him at most once a month at the meetings?

A. Correct.

Q. And when you were talking with him at these meetings, it would be about the functions of the Coalition.

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A. Correct.
Q. And when you signed this statement about Mr. Hatfield not posing any threat to the community, it's based only on your personal knowledge obtained through the interactions with him on the Coalition.
A. Correct.
Q. When you signed this, you hadn't conducted any background checks of Mr. Hatfield; is that correct?
A. Correct, I had not.
Q. Or considered his mental health.
A. Correct.
Q. Or any history of domestic violence.
A. Correct.
Q. Or his current -- whether he had recently committed any crimes.
A. Correct.
Q. And you hadn't talked to anybody about Mr. Hatfield; is that correct?
A. Correct.
Q. And I want to go on to the next paragraph, No. 6. It says, "That I have no information that Larry E. Hatfield, if he were to possess firearms and ammunition, would pose any risk to any person or group of persons." Did I read that correctly?
A. Correct.

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Q. What did you mean in this sentence by pose any risk?
A. Just at that time, I had no information that would lead me to believe that he would pose any risk, that he would be a risk to -- or his actions didn't pose any risk or risk to any person or a group of persons.
Q. How would a person pose a risk to someone else or with people?
A. Well, for example, if you're in a group of people and you're confrontational in that group, always picking a fight, arguing with people, that could escalate to pose a risk to the safety of others. That could be a risk to the community.
Q. And at the time you wrote this statement, it was based on your interactions with Mr. Hatfield at the monthly Coalition meetings.
A. Yes.
Q. Is that correct?
A. Yes.
Q. You hadn't interacted with Mr. Hatfield outside of the Coalition.
A. No.
Q. Correct?
A. Correct.
Q. And you hadn't checked his criminal history, correct?
A. Correct.
Q. And you hadn't inquired about his mental health, correct?

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A. Correct.
Q. And you hadn't inquired about whether he had any domestic violence offenses, correct?
A. Correct.
Q. And you hadn't checked whether he had recently committed any crimes.
A. Correct.
Q. And you hadn't talked to anybody else about Mr. Hatfield at the time you --
A. Correct.
Q. -- signed this statement. So let's move on to the last paragraph, No. 7. It says, "That I believe that were Larry E. Hatfield allowed to lawfully possess firearms and ammunition, that it would post no risk to public safety." Did I read that correctly?
A. Correct.
Q. And I think when you said post, did you mean pose?
A. Pose no risk.
Q. What did you mean here by lawfully possess?
A. If he were allowed to -- if he was allowed to possess a firearm lawfully which he's gone through, have FOID card or meet all the requirements to possess a firearm, that I believe it wouldn't be a risk to the community.
Q. But if the federal law currently precludes Mr. Hatfield from possessing firearms, does that change your statement in this sentence?
A. No, that would -- if the -- if federal law says that he can't have one, then that would be lawfully he cannot possess a firearm. But if it were changed or made to where he could and he could do it lawfully and which is the only way it appears that he's trying to do this because he's not going out and buying guns or -- that I'm aware of or that he poss -- I'm not aware that he possesses a gun illegally or unlawfully.
Q. And what did you mean by risk to public safety?
A. Just that I don't believe that his actions or he would act in a manner that would put the community at risk.
Q. And what does risk to public safety mean? As you've written it here, what do you mean by risk to public safety?
A. That he would be a threat or a risk or that he would do anything that would pose a threat to risk of harm to anybody else.
Q. And is it fair to say that this statement is based on your interactions with Mr. Hatfield at most once a month through the Drug Free Alton Coalition?
A. Correct.
Q. And you didn't review Mr. Hatfield's criminal history before you signed this, before you attested to this state -- sentence?

firearms instructor, Madison County Sheriff's Lieutenant, police officer since 1995 and with all the knowledge, training, experience you have based on your person, is there anything about Larry Hatfield that you have seen or observed or have learned that you believe it would be dangerous to Mr. Hatfield or anyone else above the level of a person without this felony conviction for Mr. Hatfield to possess firearms?

MR. SWINTON: Objection to form.

WITNESS: No.

MR. MAAG: No further questions.

MR. SWINTON: Off the record.

(Instruction off the record.)

WITNESS: Yeah, we can waive that.

(The deposition concluded at 11:18 a.m. and the signature was waived.)

REPORTER'S CERTIFICATE

I, LAURA LYNN MURPHY, CCR No. 764, Certified Court Reporter and Registered Merit Reporter, do hereby certify; that the foregoing proceedings were taken before me at the time and place therein set forth, at which time the witness was put under oath by me;

that the testimony of the witness, the questions propounded and all objections and statements made at the time of the examination were reported by stenographic means by me and were thereafter transcribed;

that the foregoing is a true and correct transcript of my shorthand notes so taken.

I further certify that I am not a relative or employee of any attorney of the parties nor financially interested in the action.

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

Dated this 6th day of December, 2017.

_____

LAURA LYNN MURPHY, CCR No. 764