Case 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 *AMICUS CURIAE* CALIFORNIA RIFLE & PISTOL ASSOCIATION, INCORPORATED IN SUPPORT OF PLAINTIFF-APPELLEE LARRY E. HATFIELD AND AFFIRMANCE

C. D. Michel
Sean A. Brady
Alexander A. Frank
MICHEL & ASSOCIATES, P.C.
180 East Ocean Blvd., Suite 200
Long Beach, CA 90802
(562) 216-4444
cmichel@michellawyers.com

Counsel for Amicus Curiae
California Rifle & Pistol Association, Incorporated

October 12, 2018

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 18-02385

Short Caption: Sessions v. Hatfield

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.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

[ ] PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

California Rifle & Pistol Association, Incorporated

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Michel & Associates, P.C.

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

None

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

None

Attorney's Signature: s/ C.D. Michel Date: 10/12/2018

Attorney's Printed Name: Carl D. Michel

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** ____

Address: 180 East Ocean Boulevard, Suite 200
Long Beach, CA 90802

Phone Number: (562) 216-4444 Fax Number: (562) 216-4445

E-Mail Address: cmichel@michellawyers.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Rule 29(c)(4) of the Federal Rules of Appellate Procedure, California Rifle and Pistol Association, Incorporated respectfully submits this amicus curiae brief, with the consent of all parties, in support of Appellees.

Founded in 1875, the California Rifle and Pistol Association ("CRPA") is a non-profit organization that seeks to defend the Second Amendment and advance laws that protect the rights of individual citizens. CRPA regularly participates as a party or amicus in firearms-related litigation. CRPA works to preserve the constitutional and statutory rights of gun ownership, including the right to self-defense, the right to hunt, and the right to keep and bear arms. CRPA is also dedicated to promoting the shooting sports, providing education, training, and organized competition for adult and junior shooters. CRPA's members include law enforcement officers, prosecutors, professionals, firearm experts, the general public, and loving parents.

INTRODUCTION & SUMMARY OF ARGUMENT

In the landmark Second Amendment case *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court established that the Second Amendment protects an individual right to keep and bear arms. However, the Court declined to state what precise level of scrutiny should be used to evaluate Second Amendment restrictions. *Id.* at 634. Since *Heller*, courts have struggled to determine the proper analytical approach. Most have implemented traditional modes of review akin to strict or intermediate scrutiny, while some have seized upon *Heller* dicta to establish entirely

different and aberrant tests. *See, e.g. Kolbe v. Hogan*, 849 F. 3d 114, (4th Cir. 2017) (en banc); *Worman v. Healey*, 293 F. Supp. 3d 251 (D. Mass. Apr. 5, 2018).

Notwithstanding the Supreme Court's reticence to definitively announce a level of scrutiny, *Heller*'s holding permits at least one conclusion: a total deprivation of the fundamental right to own an operable firearm is unconstitutional under "any of the standards of scrutiny that we have applied to enumerated constitutional rights." *Heller*, 554 U.S. at 628-29. That is what was at play in *Heller*. The law struck down there *completely* deprived Mr. Heller of his ability to possess a firearm in his home. Here, Plaintiff-Appellee Larry Hatfield challenges 18 U.S.C. § 922(g)(1) for the same reason—as applied to him, it amounts to a *complete* deprivation of his Second Amendment rights.

To be sure, Mr. Heller came to the court situated differently than Mr. Hatfield. Mr. Hatfield, unlike Mr. Heller, was convicted decades ago for lying about his employment status on a railroad unemployment benefit form. This violation of 18 U.S.C. § 1001 is *punishable* by imprisonment for more than one year, triggering §922(g)(1)'s firearm prohibition, despite the fact that Hatfield did not *receive* any jail time in his sentence at all. Appellee's Brief "AB" at 1, 5, 7. Seizing upon dicta in the *Heller* opinion, the Government asserts that Mr. Hatfield's conviction dispositively decides this case against him because felons are categorically excluded from the Second Amendment's protections. Government's Brief "GB" at 4 (citing *Heller*, 554 U.S. at 629 n. 4). But the Government reads this dicta too broadly.

There is no doubt that Hatfield's conviction complicates the analysis considerably. After all, *Heller* did refer to "longstanding prohibitions on the possession

of firearms by felons" as being "*presumptively* lawful." *Heller*, 554 U.S. at 627 n. 26. But this language necessarily means that the presumption may be rebutted. Consequently, the scope of the felon prohibition remains an open question that permits the very sort of *as applied* challenge here before the Court.

How that challenge is to be evaluated by this Court is another question. While Amicus believes that *Heller* requires Courts to "assess gun bans and regulations based on text, history, and tradition, not by balancing tests such as strict or intermediate scrutiny," *Heller v. District of Columbia*, 670 F.3d 1244, 1271 (D.C. Cir. 2011) (Kavanaugh, J., dissenting), Amicus appreciates that Seventh Circuit precedent requires application of those traditional forms of scrutiny. According to that precedent, this Court must "first determine if the challenged restriction covers conduct falling within the scope of the Amendment's protection. If it does, then the restriction must satisfy some level of heightened scrutiny, depending on whether the conduct in question falls at the core or at the periphery of the Amendment's protection." *Baer v. Lynch*, 636 F. App'x 695 (7th Cir. 2016); *See also United States v. Skoien*, 614 F. 3d 638 (7th Cir. 2010); *Ezell v. City of Chicago*, 651 F.3d 888 (7th Cir. 2011).

As to the first question, although the historical record concerning the right of violent felons to own firearms may be "inconclusive at best," AB 23 (citing *United States v. Williams* 616 F.3d 685 at 692 (7th Cir. 2010) (citation omitted), the record on non-violent felons, like Mr. Hatfield, seems much clearer. Amicus agrees with the district court that Mr. Hatfield's offense would not have been considered a felony at

common law, AB 24; ECF No. 49, 9-10, and thus could not be among the "longstanding prohibitions" on felons *Heller* contemplated.

While much can be said on that subject, that topic is not the focus of this brief. This brief is instead limited to a discussion about the proper application of the intermediate scrutiny test. Amicus believes that holding the Government to its burden of proving that 18 U.S.C. § 922(g)(1)'s application to Mr. Hatfield satisfies the "fit" requirement of that test will necessarily result in this Court affirming the district court's grant of summary judgment in Appellee's favor. For, the Government must do more than simply assert that all felons are dangerous and because Mr. Hatfield is a felon, prohibiting him serves the public good. Rather, it must *prove* why a conviction from several decades ago for a non-violent offense that did not even result in incarceration warrants eternal loss of Second Amendment rights. That it has not and, frankly, cannot do. As such, this Court should affirm the ruling below.

ARGUMENT

Entirely Denying Hatfield Second Amendment Rights Due to His Decades-Old Conviction for a Non-Violent Crime Fails Intermediate Scrutiny

The Government acknowledges that intermediate scrutiny is proper if the Second Amendment is implicated but takes issue with the district court's application of that test. GB 16-17. The district court applied the test correctly. Under intermediate, the law is constitutional if there is a "substantial relation" between the challenged law and an "important governmental objective." *United States v. Skoien*, 614 F.3d 638. 642 (7th Cir. 2010); *See also Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993) (holding that the law must be "substantially related" to an important government interest). The challenged law need not be the absolute least restrictive means, but it

should be "closely drawn" to achieve its objectives without "unnecessary abridgment" of constitutionally protected conduct. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1456-57 (2014) (quoting *Buckley v. Valeo*, 424 U.S. 1, 25 (1976)). The ultimate goal of the fit analysis is not simply to determine whether a law reasonably advances the state's interests; a court must also determine whether the government action "burden[s] substantially more [protected conduct] than is necessary to further" that interest. *Turner Broad. Sys., Inc. v. F.C.C.*, 520 U.S. 180, 213-14 (1997). It is the Government's burden to show that the law will serve its aim and is appropriately constructed. *See, e.g. R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). Application of Section 922(g)(1) to Hatfield fails review under intermediate scrutiny because the Government simply cannot satisfy these burdens.

The Government Has Not Shown That the Law Will Serve Its Aim

The Government's argument why banning Hatfield from possessing firearms serves its public safety goals relies almost entirely on conclusory and circular contentions that completely ignore the circumstances unique to his as-applied challenge. Despite claiming that it is aware that it "does not get a free pass because Congress has established 'a categorical ban,'" that is precisely what it is arguing. GB 18 (citing *United States v. Williams*, 616 F.3d at 692). Indeed, the Government is essentially arguing that everyone who has ever been convicted of any crime that can be described as a felon is categorically unfit to exercise Second Amendment rights. *Id.* It simply states that "application of section 922(g)(1) to nonviolent felons is substantially related to achieving Congress' interest in disarming those who have proven not to be law abiding and responsible," GB 18, and that "conviction of any

crime a legislature has made punishable by more than an [sic] year and labeled as a felony demonstrates a lack of virtuousness, and the resulting forfeiture of firearms rights is reasonably tailored to the government's interest in restricting firearms to those who are law abiding and responsible." GB 22. These contentions clearly show that the Government is substituting the label "*felon*" for a substantive analysis of the circumstances of the felony act in question here.

What is missing is any thread linking Hatfield's decades' old conviction to his propensity for violence in the present. What is standing in its place is merely the fixation on the *felony* classification. The Government's insistence that the circumstances of Mr. Hatfield's felony conviction are irrelevant underscores this point. But simply invoking the word "felon" cannot suffice when the Supreme Court has said that longstanding felon restrictions are only *presumptively* lawful. *Heller*, 554 U.S. at 627 n. 26. A justification for the specific restriction must be made.

There is little doubt that keeping guns out of the hands of people who have given society good reason to doubt their trustworthiness with a firearm promotes public safety and is a valid governmental concern. However, the connection that the Government tries to draw between that abstract concept and Mr. Hatfield is not enough to pass intermediate scrutiny. For it requires the Government to show that its law is founded on substantial evidence. *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 666 (1994). The Government's position that Hatfield is a felon and "Congress has a compelling interest in excluding such individuals from the possession of firearms," GB 17, is not enough to declare an absolute prohibition is the only way to serve the government's interest. GB 17.

The Government Makes No Effort to Narrow the Fit

In addition to its failure to explain why Hatfield is the sort of felon worthy of permanent prohibition on his Second Amendment right, the Government also fails to defend the fit of the law to its aim. All of the reasons the Government presents in defense of its fit are unavailing.

Even if it is true that "lying to the government reflects an inherent disregard for the law and lack of virtue," there is no clear reason why someone who lied to the government a single time over a relatively trivial amount of money poses a threat of violence to society decades later. GB 20. It is also unclear why a person who commits the same crime in the context of antitrust, where the potential repercussions to society are far more significant, remains exempt from the ambit of this law. See 18 U.S.C. § 921(a)(20)(A). Indeed, such glaring and inexplicable inconsistencies here illustrate precisely how egregiously this law can lack fit in certain contexts. And, the caselaw examples that the Government presents to show the alleged gravity of Hatfield's crime likewise highlight the lack of fit here. Almost all of those cases involve crimes of immense moral turpitude with far reaching societal consequences, such as jihadist terrorism. GB 20, citing *United States v. Phillipos*, 849 F. 3d 464, 466, 474 (1st Cir. 2017); *United States v. White*, 545 F. App'x 69, 70-71 (2nd Cir. 2013); *United States v. Benkhala*, 530 F.3d 300, 304-305 (4th Cir. 2008); *United States v. Simpson*, No. 10-cr-55, 2011 WL 905375, at *1-4 (D. Ariz. Mar. 15, 2011). Lying to collect a few extra disability dollars decades ago is one thing; recently obstructing a terrorism investigation or lying about one's intention to travel abroad to receive jihadist training is quite another. It is obvious why someone in the present day who lies about

traveling to Somalia to attend a jihadist training camp should be convicted of a felony and subsequently denied the right to possess a firearm. Lumping Hatfield's situation in with these sort of situations, declaring him a "non-virtuous citizen" and then concluding that "Congress has a substantial interest in depriving [him] of firearms" is all the evidence this Court should need to find a lack of fit as applied to Hatfield and why the Government cannot satisfy the rigors of intermediate scrutiny here. GB 21. It flouts them.

Additionally, the fact that it may be conceptually difficult to crystallize what constitutes a violent crime, as the Government contends, has no bearing on this case before the Court. GB 19. And the fact that Congress decided that continued operation of the "relief valve" of 18 U.S.C. § 925(c) was "infeasible" has absolutely no bearing on whether § 922(g)(1) is constitutional. *Id.* The fact that Congress created this avenue in the first place is proof that Congress was aware how blunt a law it had created with § 922(g)(1) and its need to create a mechanism for worthy people to seek relief from it. In any event, the unconstitutionality of a law should not be justified on the basis that constructing or applying the law more narrowly is simply too expensive. Fundamental Constitutional rights have never hung in the balance based on their respective price tag.

CONCLUSION

Amicus does not take lightly the problem of gun violence or seek to foreclose the Government from applying 18 U.S.C. § 922(g) in a manner consistent with the Constitution. "But the enshrinement of constitutional rights necessarily takes certain policy choices off the table," *Heller*, 554 U.S. at 634-65, and permanently prohibiting

Mr. Hatfield from exercising his Second Amendment rights as a result of a single, decades' old conviction for fibbing to the government for some ill-gotten pocket money is one of them. Because 18 U.S.C. § 922(g)'s application here does exactly that, it is unconstitutional in this situation. Amicus requests that this Court affirm the decision below.

Dated: October 12, 2018

MICHEL & ASSOCIATES, P.C.

/s/C.D. Michel
Attorney for Amicus Curiae
California Rifle & Pistol Association, Inc.

CERTIFICATE OF COMPLIANCE

This brief complies with the length limits permitted by Federal Rules of Appellate Procedure, rule 29(d) because this brief contains 2,334 words, excluding the parts of the brief exempted by Federal Rules of Appellate Procedure, rule 32(f).

This brief complies with the typeface requirements of Federal Rules of Appellate Procedure, rule 32(a)(5), and the type style requirements of Federal Rules of Appellate Procedure, rule 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Garamond type.

Dated: October 12, 2018

MICHEL & ASSOCIATES, P.C.

/s/C.D. Michel
Attorney for Amicus Curiae
California Rifle & Pistol Association, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on October 12, 2018, an electronic PDF of BRIEF OF *AMICUS CURIAE* CALIFORNIA RIFLE & PISTOL ASSOCIATION, INCORPORATED IN SUPPORT OF PLAINTIFF-APPELLEE LARRY E. HATFIELD AND AFFIRMANCE was uploaded to the Court's CM/ECF system, which will automatically generate and send by electronic mail a Notice of Docket Activity to all registered attorneys participating in the case. Such notice constitutes service on those registered attorneys.

Dated: October 12, 2018

MICHEL & ASSOCIATES, P.C.

/s/C.D. Michel
Attorney for Amicus Curiae
California Rifle & Pistol Association, Inc.