No. 18-2385

In The United States Court of Appeals

For the Seventh Circuit

LARRY E. HATFIELD

Plaintiff-Appellee,

v.

JEFFERSON B. SESSIONS, III, ATTORNEY GENERAL OF THE UNITED STATES

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS
Case No. 3:16-cv-00383 (The Honorable J. Phil Gilbert Presiding)

BRIEF OF AMICUS CURIAE
THE NATIONAL RIFLE ASSOCIATION OF AMERICA, INC.
IN SUPPORT OF PLAINTIFF-APPELLEE AND AFFIRMANCE

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Appellate Court No: 18-2385

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INTEREST OF AMICUS

The National Rifle Association of America, Inc. ("NRA") is the oldest civil-rights organization in America and the Nation's foremost defender of the right to keep and bear arms. Founded in 1871, the NRA has approximately five million members and is America's leading provider of firearms marksmanship and safety training for civilians.

The outcome of this case will determine who can be deprived of their Second Amendment right to possess a firearm; the NRA has a strong interest in it accordingly.

In accordance with Federal Rule of Appellate Procedure 29, the NRA certifies that this brief was not written in whole or in part by counsel for any party, that no party or party's counsel made any monetary contributions to the preparation and submission of this brief, and that no person or entity other than the NRA, its members, and its counsel has made any monetary contributions. All parties have consented to the filing of this brief.

INTRODUCTION

Twenty-eight years ago, Larry Hatfield applied for benefits from the U.S. Railroad Retirement Board. In doing so, he falsely claimed to have been unemployed for 53 days and received $1,627.73 to which he was not entitled. For his misrepresentations, Mr. Hatfield pleaded guilty to 18 U.S.C. § 1001(a), which

is punishable by up to five years in prison. In accordance with his plea agreement, he received three years' probation and paid restitution. He has had a spotless record since then. He is, nevertheless, statutorily prohibited from possessing a firearm because of his conviction under 18 U.S.C. § 922(g)(1). Mr. Hatfield brought the present action, raising one claim: can he be permanently deprived of his Second Amendment rights because of a single, decades-old, non-violent, minor offense? The answer is no.

In *District of Columbia v. Heller*, the Supreme Court held that the Second Amendment "conferred an individual right to keep and bear arms" that applies to firearms "typically possessed by law-abiding citizens for lawful purposes." 554 U.S. 570, 595, 625 (2008). That right was "enshrined with the scope [it was] understood to have when the people adopted [it], whether or not future legislatures or (yes) even future judges think that scope too broad." *Id*. at 634-35. That necessarily takes "out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." *Id.* at 634 (emphasis in original).

Heller further noted that "the right secured by the Second Amendment is not unlimited" and that "longstanding prohibitions on the possession of firearms by felons" are "presumptively lawful regulatory measures." *Id*. at 626, 627 n.26. The Court repeated that assertion two years later in *McDonald v. City of Chicago, Ill.*,

561 U.S. 742, 786 (2010). But historically, violent felons were not disqualified from possessing a firearm under federal law until 1938. Non-violent felons were not disqualified under federal law until 1961. The current federal felon-prohibition definitions—which now include anyone convicted of a crime punishable by imprisonment exceeding one year, or two years in the case of a state misdemeanor—were not enacted until 1968 and 1986, respectively. Thus, the felon-in-possession disqualification as applied to non-violent, minor offenders like Mr. Hatfield is certainly not one of the longstanding prohibitions referenced by the Supreme Court in *Heller* and *McDonald*.

Because of the recent statutory amendments and the increase in crimes punishable under the United States Code,[1] the federal felon prohibition is broad and is not narrowly tailored, especially as applied to Mr. Hatfield. Appropriate as-applied challenges, like the present one, must be allowed, lest government be able to deprive Americans of the protections afforded by the Second Amendment by simply continuing to expand the definition of the federal felon prohibition and the

[1] A 2008 report by the Heritage Foundation found that there were roughly 3,000 federal offenses in the United States Code in the early 1980s, 4,000 offenses at the start of 2000, and 4,450 in 2007. John Baker, *Revisiting the Explosive Growth of Federal Crimes*, The Heritage Foundation, June 16, 2018. Available at https://www.heritage.org/report/revisiting-the-explosive-growth-federal-crimes (last visited 10/8/2018).

number of disqualifying offenses to include "stealing a lollipop." *United States v. Phillips*, 827 F.3d 1171, 1176 n.5 (9th Cir. 2016).

The Court should therefore affirm the lower court's decision and hold that § 922(g)(1) does not pass muster as applied to Mr. Hatfield.

ARGUMENT

I. As-applied challenges to 18 U.S.C. § 922(g)(1) are not foreclosed.

Neither the Supreme Court nor this Court has held that § 922(g)(1) cannot be challenged as applied under the Second Amendment. To be sure, § 922(g)(1) was not challenged in *Heller* or *McDonald*. And it is well settled that the Supreme Court can "only … decide a controversy … by affirming, reversing or modifying the order or judgment before [it] for review." *United States v. Rice*, 327 U.S. 742, 747 (1946). Thus, while *Heller* and *McDonald* provide guidance on § 922(g)(1)'s constitutionality, they did not foreclose the issue.

This Court has not foreclosed the issue either. The Court first touched on it in *United States v. Williams*, 616 F.3d 685 (7th Cir. 2010). Williams raised an as-applied defense to § 922(g)(1)'s prohibition. *Id*. at 691.[2] And the Court ultimately

[2] That Williams raised the issue as a defense is a key distinction between this case and majority of as-applied challenges to § 922(g)(1). Here, Mr. Hatfield brought a civil action: he is asking the court's permission to possess a firearm, where the majority of others were begging the court's forgiveness for possessing a firearm as a prohibited person. The others necessarily have a much more difficult time showing that they are responsible citizens under those circumstances.

found that § 922(g)(1) passed muster as applied to Williams, whose predicate conviction, felony robbery, "is violent by definition." *Id*. at 693. But in doing so, the Court "recognize[d] that § 922(g)(1) may be subject to an overbreadth challenge at some point because of its disqualification of all felons, including those who are non-violent." *Id*. And this Court reiterated that point two years ago: "We have not decided if felons historically were outside the scope of the Second Amendment's protection and instead have focused on whether § 922(g)(1) survives intermediate scrutiny." *Baer v. Lynch*, 636 F. App'x 695, 698 (7th Cir. 2016) (citing *Williams*, 616 F.3d at 692 and *United States v. Yancey*, 621 F.3d 681, 684-85 (7th Cir. 2010)).[3]

Accordingly, as-applied challenges to § 922(g)(1), like the present one, are not barred by this Court's precedent either.

II. Section 922(g)(1) is unconstitutional as applied to Mr. Hatfield.

Courts generally agree that the two-step test for reviewing Second Amendment challenges is the appropriate standard for as-applied challenges to § 922(g)(1). *See Williams*, 616 F.3d at 691-92; *Binderup v. Attorney General United*

[3] Likewise, this Court expressly left the question before it today open when reviewing a challenge to § 922(g)(9): "whether a misdemeanant who has been law abiding for an extended period must be allowed to carry guns again." *United States v. Skoien*, 614 F.3d 638, 645 (7th Cir. 2010) (holding that § 922(g)(9), which prohibits individuals with misdemeanor domestic-violence convictions from possessing firearms, passes constitutional muster).

States of America, 836 F.3d 336, 346-47 (3d Cir. 2016) (en banc). Under the first step, "if the government can establish that a challenged firearm law regulates activity falling outside the scope of the Second Amendment right as it was understood at the relevant historical moment—1791 or 1868—then the analysis can stop there." *Ezell v. City of Chicago*, 651 F.3d 684, 702-03 (7th Cir. 2011). But "[i]f the government cannot establish this—if the historical evidence is inconclusive or suggests that the regulated activity is *not* categorically unprotected—then there must be a second inquiry into the strength of the government's justification," i.e., some form of "means-end scrutiny." *Id*. at 703 (emphasis in original). Courts have, however, struggled with their application of the two-step test. *See, e.g., Hatfield v. Sessions*, No. 3:16-cv-00383-JPG-RJD, 2018 WL 1963876, at *3 (S.D. Ill. Apr. 26, 2018), DoJ App'x at A5[4] (noting that the precedent is "messy" because courts frequently skip step one). This section of the brief attempts to clarify that process.

a. The Court should apply the two-step test to Mr. Hatfield as an individual.

The trial court held that it did not have to "focus on Hatfield's specific circumstances: when combating as-applied challenges, the Court focuses 'on the

[4] For the Court's convenience, the NRA will provide pinpoint citations from the unofficial page numbers on Westlaw and the copy of the *Hatfield* opinion in the Appendix to the DoJ's brief (Doc. 13).

relation the statute bears to the overall problem the government seeks to correct, not the extent to which it furthers the governments' interest in an individual case."' *Id*. at *7, DoJ App'x at A13 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 801 (1989)). This approach is wrong for several reasons.

First, *Ward*, the case on which the trial court relied, was a facial challenge, 491 U.S. at 790; the particulars were irrelevant there. In contrast, "[a]n as-applied challenge is one that charges an act is unconstitutional as applied to a plaintiff's *specific activities* even though it may be capable of valid application to others." *Surita v. Hyde*, 665 F.3d 860, 875 (7th Cir. 2011) (emphasis added) (citing *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 803 & n.22 (1984)); *see also Binderup*, 836 F.3d at 345-46 (noting that as-applied challenges review the individual's "particular circumstances"). Indeed, this Court and the Third Circuit both look to the individual's particular circumstances when evaluating as-applied challenges to § 922(g)(1). *Williams*, 616 F.3d at 693; *Binderup*, 836 F.3d at 353-54.

Second, other forms of constitutional relief that restore firearms rights are individual in nature, too. By statute, convictions for which the individual has received a presidential pardon are excluded from § 922(g)(1). 18 U.S.C. § 921(a)(20). But a pardon would provide the recipient with individualized constitutional relief regardless of the statutory exclusion. *Bjerkan v. United States*,

529 F.2d 125, 128 n.2 (7th Cir. 1975) (noting that a presidential pardon removes all disqualifications that flow from the conviction).

An expungement is individual in nature and would grant the individual relief from his or her disability, too. *See, e.g.*, *Wyoming ex rel. Crank v. United States*, 539 F.3d 1236, 1244-45 (10th Cir. 2008); *Expunge*, Black's Law Dictionary 662 (9th ed. 2009). But "[t]here is no specific constitutional or general statutory right to expungement." *United States v. Carson*, 366 F. Supp. 2d 1151, 1154 (M.D. Fla. 2004) (citing *Sealed Appellant v. Sealed Appellee*, 130 F.3d 695, 699-700 (5th Cir. 1997)). And federal courts now generally agree that they cannot expunge a conviction using their ancillary jurisdiction. *United States v. Wahi*, 850 F.3d 296, 298, 303 (7th Cir. 2017) (collecting authorities). Moreover, the fact that expungements are no longer available supports the trial judge's findings that Mr. Hatfield lacks post-deprivation relief. *Hatfield*, 2018 WL 1963876, at *2, 8 DoJ App'x at A3, A15-16 (noting that Congress has not appropriated funds for the Bureau of Alcohol, Tobacco, Firearms and Explosives to process applications for relief from firearms disabilities under 18 U.S.C. § 925(c), which deprived Mr. Hatfield of a "relief valve").

Third, if the Court chooses to apply the two-step test to a group of people that Mr. Hatfield represents (and affirms the judgment), then those other members of the group would not need to come before the courts for declaratory judgment

like Mr. Hatfield did. Section 922(g)(1) would necessarily be unconstitutional as applied to them as members of that group. And that would be inconsistent with "the fundamental principle of judicial restraint": "courts should [not] … formulate a rule of constitutional law broader than … required by the precise facts to which it is to be applied." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450 (2008) (internal quotation marks and citations omitted). It would also be very difficult for administrative and law-enforcement agencies to tell who was a member of that class without individual declaratory judgments.

Thus, as-applied challenges to § 922(g)(1) should be done on an individual basis.

b. Mr. Hatfield is not outside the scope of the Second Amendment and passes step one.

Both *Heller* and *McDonald* noted that laws prohibiting felons from possessing firearms were presumptively lawful. *McDonald*, 561 U.S. at 786 (quoting *Heller*, 554 U.S. at 626-27). But they did not say why or provide a framework for reviewing Second Amendment challenges. Indeed the two-step framework for reviewing Second Amendment challenges was developed by the Third and Fourth Circuits and then adopted by others. *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013). Accordingly, it is unclear if § 922(g)(1) is

"presumptively lawful" because it is outside the scope of the Second Amendment under step one or if it passes constitutional muster under step two.

1. This Court's prior rulings require it to proceed to step two.

This court has repeatedly concluded that the evidence of felons being outside the scope of the Second Amendment "is 'inconclusive at best.'" *Williams*, 616 F.3d at 692 (quoting *Skoien*, 614 F.3d at 650 (Sykes, J., dissenting)); *Baer*, 636 F. App'x at 698 ("'[S]cholars continue to debate the evidence of historical precedent for prohibiting criminals from carrying arms.'") (quoting *Yancey*, 321 F.3d at 684-85). And "if the historical evidence is inconclusive … then there must be a second inquiry into the strength of the government's justification." *Ezell*, 651 F.3d at 703. Accordingly, the Court should proceed to step two under *Ezell*.

Alternatively, *Williams* held that "categorical bans," such as the felon-in-possession ban, take the individual outside the scope of the Second Amendment—provided "that the ban satisfies 'some form of strong showing.'" 616 F.3d at 692 (quoting *Skoien*, 614 F.3d at 641 and *McDonald*, 561 U.S. at 786). "[T]he government does not get a free pass simply because Congress has established a 'categorical ban.'" *Id*. Instead, the government must show that § 922(g)(1) "pass[es] constitutional muster under intermediate scrutiny." *Id*. Thus, the Court should proceed to step two under *Williams*, too.

The Court is required to follow those precedents here: "a panel decision is binding on another court panel unless overruled with the approval of the en banc court." *Matter of Skupniewitz*, 73 F.3d 702, 705 (7th Cir. 1996). It should proceed to step two accordingly.

2. This Court should reject the flawed approaches taken by other courts and proceed to step two because Mr. Hatfield retained his Second Amendment rights.

If, however, the Court decides to revisit the issue here, it should reject the flawed approaches adopted by other courts, find that Mr. Hatfield retained his Second Amendment rights, and proceed to step two.

Courts often engage in circular reasoning when determining if a particular conviction puts an individual outside the scope of the Second Amendment. They begin with the premise that those convicted of serious offenses are outside the scope of the Second Amendment. *Binderup*, 836 F.3d at 350-51; *Hamilton v. Pallozzi*, 848 F.3d 614, 625-26 (4th Cir. 2017). Then they hold that the offense is a serious crime because the legislature determined that it should be a felony, punishable by one year or more. *Binderup*, 836 F.3d at 350-51 (rejecting this approach); *Hamilton*, 848 F.3d at 626 (holding that felony status takes one outside the scope of the Second Amendment). That approach is flawed for several reasons.

First, all individuals prohibited under § 922(g)(1) were convicted of crimes punishable by one year or more. They, therefore, were convicted of a "serious

offense." And under that analysis, there are no set of circumstances under which § 922(g)(1) is unconstitutional; all that needs to be shown is that the person is statutorily prohibited. *Hamilton*, 848 F.3d at 626; *Binderup*, 836 F.3d at 350-51. This approach incorrectly gives "the government a free pass simply because Congress has established a 'categorical ban,'" which this Court expressly rejected. *Williams*, 616 F.3d at 692.

Second, it is unquestionable that the judiciary's role is to determine what is and what is not within the scope of the Constitution, not the legislature's. *See, e.g.*, *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 340 (2006) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)); *see also* Hatfield Br. at 29 (Doc. 20) (collecting authorities). And by deferring to the legislature's judgment that an offense is serious and therefore takes the offender outside the Second Amendment's scope, those courts effectively place their duty of interpreting the Constitution on the legislature. *See Binderup*, 836 F.3d at 351 ("A crime's maximum possible punishment is 'purely a matter of legislative prerogative.'") (quoting *Rummel v. Estelle*, 445 U.S. 263, 274 (1980)). That is why the Third Circuit rejected this approach, calling it an "end-run around the Second Amendment [to] undermine the right to keep and bear arms in contravention of *Heller*." *Binderup*, 868 F.3d at 350-51. Put differently, it subjects an enumerated constitutional right to rational-basis review, *id*. at 351, which effectively "treat[s]

the right recognized in *Heller* as a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees." *McDonald*, 561 U.S. at 780.

Third, this approach also relies on the classifications between misdemeanors and felonies, which cannot be used to support § 922(g)(1)'s constitutionality. Congress generally uses felony and misdemeanor classifications for sentencing clarity, not as a reflection of how serious the offense is. *See, e.g., United States v. Graham*, 169 F.3d 787, 793 n.5 (3d Cir. 1999).[5] And as the DoJ and Amici Everytown for Gun Safety ("Everytown") both point out, § 922(g)(1) is primarily concerned with the predicate offense's maximum potential punishment—not whether a crime is labeled a felony or misdemeanor. DoJ Br. at 21; Everytown Br. at 7 (Doc. 16) (both briefs citing *Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 113 (1983)).[6] To be sure, Congress excluded state misdemeanor offenses that are "punishable by a term of imprisonment of two years or less" from § 922(g)(1)'s prohibition. 18 U.S.C. § 921(a)(20). Thus, in Congress's view, a predicate

[5] It is also possible that Congress decided to impose harsher punishments as a deterrent rather than a determination that the crime is serious.

[6] Both briefs cite *Dickerson* for the premise that whether the petitioner received any prison time is irrelevant in assessing whether § 922(g)(1) is constitutional. *Dickerson* does not support that premise. It merely holds that one need not receive any prison time to fall under § 922(g)(1)'s prohibition; one only needs to be convicted of a crime that is punishable by a year or more. 460 U.S. at 113.

"misdemeanor" offense punishable by two years or more is just as serious as a traditional "felony" offense. The government cannot use the felony-misdemeanor distinction to justify § 922(g)(1)'s constitutionality here, when Congress did not draw that distinction.

Worse still, this approach leads to arbitrary constitutional jurisprudence. As Judge Hardiman pointed out in his *Binderup* concurrence, simple possession of marijuana is a felony offense in Arizona. *Binderup*, 836 F.3d at 372 n.20 (Hardiman, J., concurring) (citing Ariz. Rev. Stat. Ann. § 13-3405). Yet "30 U.S. states now have broad legislation in place that allows of [sic] the use of marijuana." Keith Speights, *Timeline for Marijuana Legalization in the United States: How the Dominoes Are Falling,* Yahoo Finance (Sept. 23, 2018).[7] Thus, whether a recreational marijuana user can be constitutionally deprived of their right to keep and bear arms would be entirely dependent on how their state legislature decided to punish and label the offense. That is not what the founders intended. *Heller*, 554 U.S. at 634 ("The very enumeration of the right takes out of the hands of government … the power to decide on a case-by-case basis whether the right is *really worth* insisting upon.") (emphasis in original).

[7] Available at https://finance.yahoo.com/news/timeline-marijuana-legalization-united-states-004214322.html (last visited Oct. 10, 2018).

There are too many flaws with this approach, which is why the Third Circuit ultimately rejected it. *Binderup*, 836 F.3d at 350-51.

Instead, the court held that "a person who did not commit a serious crime retains his Second Amendment rights." *Id*. at 349. But the court disagreed on what constitutes a serious crime. Judge Ambro's opinion noted that "there are no fixed criteria for determining whether crimes are serious enough to destroy Second Amendment rights." *Id*. at 351. So he looked to several factors: the state's classification of the crime as a misdemeanor or felony, whether violence or attempted violence was an element of the crime, the sentence that the challenger received, and any cross-jurisdictional consensus on the severity of the crime. *Id*. at 351-53.

The problem with this approach is that the first and last factors (whether the legislature labeled the offense a misdemeanor or felony and how legislatures in other jurisdictions label and punish similar offenses) both look to what the legislatures determined the crime should be punishable by. And as explained above, that approach is deeply flawed. Indeed, Judge Ambro—in the same section of the opinion—expressly rejects deferring to the legislature's decision to label a crime a felony to determine if it is serious enough to take the offender outside the scope of the Second Amendment. *Id.* at 350-51 (noting that this would create an "end-run around the Second Amendment" by subjecting it to rational-basis

review). Moreover, Judge Ambro appears to think that some misdemeanor offenses, despite being labeled misdemeanors, are dangerous enough to be serious offenses that take the offender outside the scope of the Second Amendment. *Id*. at 351 (citing *Baldwin v. New York*, 399 U.S. 66, 70 (1970) and *Tennessee v. Garner*, 471 U.S. 1, 14 (1985)).

This Court should not adopt such an inconsistent and flawed approach.

Judge Hardiman took a superior approach in his concurrence. He provides a detailed discussion on why the historical evidence supports disarming those who are prone to violence and pose a danger to society. *Id*. at 367-70. He also explains that there is little historical support for the position that only "virtuous" citizens can possess a firearm. *Id.* at 370-74. And after deciding that individuals who are prone to violence or pose a danger to society are outside the scope of the Second Amendment, he turns to the elements of and circumstances surrounding the challengers' predicate offense to see if they have lost their Second Amendment rights. *Id*. at 374-76.

Judge Hardiman's approach lacks the fundamental flaws that other approaches do, is easier to administer, and is similar to this Court's approach. *Williams*, 616 F.3d at 693; *Baer*, 636 F. App'x at 698 (Both determined that prior violence and the use of force were fatal to the challengers' claims.). It is also similar to the approach that the trial court took. *Hatfield*, 2018 WL 1963876, *4,

DoJ App'x at A7 (noting that the critical issue "at step one [is whether] nonviolent felons like Hatfield are categorically unprotected by the Second Amendment").

In the present case, violence is not an element of Mr. Hatfield's predicate offense, 18 U.S.C. § 1001. *United States v. Ringer*, 300 F.3d 788, 791 (7th Cir. 2002).[8] Nor did Mr. Hatfield engage in or further any violence when he made his statements to the Railroad Retirement Board. Thus, his conviction did not take him outside the Second Amendment's scope under this Court's precedent or under Judge Hardiman's approach.

c. Section 922(g)(1) fails intermediate scrutiny as applied to Mr. Hatfield.

Courts generally agree that intermediate scrutiny is the appropriate standard under which as-applied challenges to § 922(g)(1) should be reviewed. *Williams*, 616 F.3d at 692; *Binderup*, 836 F.3d at 353. "In order to survive intermediate scrutiny, a law must be 'narrowly tailored to serve a significant governmental interest.'" *Packingham v. North Carolina*, 137 S. Ct. 1730, 1736 (2017) (quoting *McCullen v. Coakley*, 573 U.S. ——, ——, 134 S. Ct. 2518, 2534 (2014)). "[T]he law must not 'burden substantially more [conduct] than is necessary to further the

[8] A conviction under 18 U.S.C. § 1001 "requires proof that [the defendant] (1) made a statement; (2) that was false; (3) that was material; (4) that was made knowingly and willingly; and (5) that concerned a matter within the jurisdiction of a federal department or agency." *Id*. (citing *United States v. Hoover*, 175 F.3d 564, 571 (7th Cir. 1999)).

government's legitimate interests."' *Id.* (quoting *McCullen*, 134 S. Ct. at 2535); *see also Ezell*, 651 F.3d at 708.

The NRA does not dispute that the government generally has a significant interest in prohibiting individuals who lost their Second Amendment rights from possessing firearms because of their prior acts of violence. By enacting § 922(g)(1), Congress sought to promote public safety by preventing individuals who pose a danger to society from possessing firearms. *See, e.g., Small v. United States*, 544 U.S. 385, 393 (2005); *Barrett v. United States*, 423 U.S. 212, 218 (1976). And the government's interest in "the safety of the community" and "preventing crime [are] compelling." *United States v. Salerno*, 481 U.S. 739, 750 (1987); *see also Binderup*, 836 F.3d at 353 (quoting *Skoien*, 614 F.3d at 652).

But the government has no interest in depriving Mr. Hatfield of his Second Amendment rights because he poses no danger to society. Section 922(g)(1) therefore fails under intermediate scrutiny as applied because its means—a flat ban on Mr. Hatfield who did not lose his Second Amendment rights for his non-violent offense and poses no danger to society—do not proportionally fit the interest of promoting public safety. In other words, § 922(g)(1) is overbroad. *Williams*, 616 F.3d at 693.

The government met its burden in *Williams*. Williams was convicted of felony robbery, which is by definition a crime of violence. *Id.*; *see also Baer*, 636

Fed. App'x at 698 (Baer was convicted of robbery under Florida law, which has a use-of-force requirement.). Williams "beat[] the victim so badly that the victim required sixty-five stitches." *Id*. Williams had a violent past, which defeated his claim "that § 922(g)(1) is not substantially related to preventing him from committing further violence." *Id*.

Mr. Hatfield, however, was not convicted of a crime of violence. Indeed, "section 1001 is intended to promote the smooth functioning of government agencies and the expeditious processing of the government's business by ensuring that [people provide the government with reliable information]." *United States v. Arcadipane*, 41 F.3d 1, 4 (1st Cir. 1994). Nor did he engage in or further any violence when he lied on his benefits forms. Thus, Mr. Hatfield's predicate offense does not defeat his claim here.

Mr. Hatfield has lived a "squeaky clean" life for the last 28 years. *United States v. Harvey*, No. 2:16CR109-PPS, 2018 WL 2933743, at *2 (N.D. Ind. June 11, 2018). And while this Court left open the question of "whether [one] who has been law abiding for an extended period must be allowed to carry guns again," *Skoien*, 614 F.3d at 645, the Third Circuit answered it. Courts can consider "the likelihood that the Challengers will commit crimes in the future" under step two, and "the passage of time since a conviction can be a relevant consideration in assessing recidivism risks." *Binderup*, 836 F.3d at 354 n.7. The Third Circuit also

concluded that the challengers in *Binderup* were not likely to commit future crimes because they had led clean lives for 20 and 26 years, which is less than Mr. Hatfield's 28 years. *Id*. at 354; *but see Baer*, 636 F. App'x at 698 n.3 (holding that being out of prison for four years was not long enough). And just as it did in *Binderup*, 836 F.3d at 353-56, the government, here, failed to provide the Court with any "meaningful evidence" that Mr. Hatfield will commit any acts of violence in the future or that he poses a danger to society. Accordingly, the government has failed to make its "strong showing" that § 922(g)(1) passes muster. *Williams*, 616 F.3d at 692.

Thus, § 922(g)(1) is unconstitutional as applied to Mr. Hatfield.

CONCLUSION

For the foregoing reasons, the district court's opinion should be affirmed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with 7th Cir. R. 29; it contains 4,270 words, excluding portions of the brief that are exempt under Fed. R. App. P. 32(f), using Microsoft Word's word-counting function. This brief also complies with Fed. R. App. P. 32(a)(5)-(6); it is written in 14-point Times New Roman, a proportionally spaced font using Microsoft Word.

/s/ *Michael T. Jean*
Michael T. Jean

CERTIFICATE OF SERVICE

I hereby certify that on October 12, 2018, I electronically filed this brief with the Clerk of the Court through the appellate CM/ECF system. All participants in this case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ *Michael T. Jean*
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