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, No. 3:16-cv-383 (Gilbert, J.)

BRIEF FOR APPELLANT JEFFERSON B. SESSIONS, III

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STATEMENT OF JURISDICTION

The district court had jurisdiction over plaintiff's challenge under 28 U.S.C. § 1331. The district court entered final judgment on April 26, 2018, and the government timely appealed on June 25, 2018. *See* Fed. R. App. P. 4(a)(1)(B) (60-day time limit). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Federal law prohibits the possession of firearms by felons. 18 U.S.C. § 922(g)(1). Plaintiff Larry Hatfield is subject to that prohibition because he was convicted of violating 18 U.S.C. § 1001, a federal felony punishable by imprisonment of up to five years. The issue presented is whether the district court erred by holding that application of section 922(g)(1) to Hatfield violates the Second Amendment.

STATEMENT OF THE CASE

A. Statutory Background

Federal law has long restricted the possession of firearms by certain categories of individuals. One such disqualification, 18 U.S.C. § 922(g)(1), generally prohibits the possession of firearms by any person "who has been convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year," the traditional definition of a felony.

For purposes of section 922(g)(1), "[t]he term 'crime punishable by imprisonment for a term exceeding one year' does not include" a "State offense classified by the laws of the State as a misdemeanor and punishable by a term of

imprisonment of two years or less," 18 U.S.C. § 921(a)(20)(B), or "offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices," *id.* § 921(a)(20)(A). It also excludes "[a]ny conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored." *Id.* § 921(a)(20).

Congress previously allowed an individual to obtain relief from section 922(g)(1)'s firearms disability by demonstrating to the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) that "the circumstances regarding the disability, and [his] record and reputation, are such that [he] 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." 18 U.S.C. § 925(c). Since 1992, however, Congress has suspended that program by enacting annual provisions barring the use of appropriated funds to process applications for relief. *Logan v. United States*, 552 U.S. 23, 28 n.1 (2007). The Senate Appropriations Committee explained that determining whether applicants were "a danger to public safety" was "a very difficult and subjective task" that required "approximately 40 man-years . . . annually" and that "could have devastating consequences for innocent citizens if the wrong decision is made." S. Rep. No. 102-353, at 19-20 (1992). A later House Report added that "too many . . . felons whose gun ownership rights were restored went on to commit violent crimes with firearms." H.R. Rep. No. 104-183, at 15 (1996).

B. Facts and Prior Proceedings

1. Plaintiff Larry E. Hatfield pleaded guilty in 1992 to "knowingly and willfully . . . mak[ing] a[] materially false, fictitious, or fraudulent statement" to the federal government, in violation of 18 U.S.C. § 1001(a)(2), a crime punishable by imprisonment up to five years. Hatfield had falsely claimed to the Railroad Retirement Board that he was unemployed for a period of fifty-three days, thereby wrongfully obtaining $1,627. A33-34. As punishment for his conviction, Hatfield was ordered to pay restitution and was placed on three years' probation. A40-41. Prior to his felony conviction, Hatfield had pleaded guilty in 1989 to an Illinois misdemeanor offense of driving while intoxicated. A38. As a result of his federal felony conviction, Hatfield is subject to 18 U.S.C. § 922(g)(1)'s prohibition on the possession of firearms.

2. Hatfield filed this lawsuit, asserting that application of 18 U.S.C. § 922(g)(1) to him violates the Second Amendment. Hatfield sought declaratory and injunctive relief barring enforcement of the statute against him. A31-32.

The district court denied the government's motion for summary judgment and granted summary judgment to Hatfield.[1] The court explained that "[t]he Seventh

[1] In a separate order, the district court held that Hatfield had established Article III standing to challenge section 922(g)(1), despite the fact that he is also prohibited from possessing a firearm by Illinois law, under 430 Ill. Comp. Stat. Ann. § 65/10(c). The court explained that invalidation of section 922(g)(1) as applied to Hatfield would permit him to seek relief from the Illinois firearm disability. A23-24.

Circuit has . . . adopted a two-step inquiry for Second Amendment claims: (1) does the challenged statute cover conduct that falls within the Second Amendment's protection; and (2) if so, does the statute survive 'some level of heightened scrutiny'?" A5 (quoting *Baer v. Lynch*, 636 F. App'x 695, 698 (7th Cir. 2016)).

At the first step, the district court concluded that Hatfield's felony conviction does not disqualify him from Second Amendment protection, because Hatfield's crime was not one of the nine "English common-law felonies" recognized "at the time of the founding." A9. The court reasoned that "if the Founders intended to allow Congress to disarm unvirtuous felons, that intent would have necessarily been limited to individuals convicted of one of those nine felonies." *Id.*

At the second step, the district court acknowledged that the Seventh Circuit has applied intermediate scrutiny in evaluating as-applied challenges to section 922(g). A11. Relying on *Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011), which addressed a city ordinance that banned firing ranges while simultaneously imposing firearm training as a prerequisite for gun ownership, the court nonetheless applied a level of scrutiny "higher than intermediate scrutiny." A12. The court held that the government failed to satisfy its burden under that heightened level of scrutiny, because Hatfield had not been sentenced to time in prison for his felony conviction. A14. The court also relied on Congress's decision to defund the program to process applications for relief from the federal firearm disability, under section 925(c). A15-16.

SUMMARY OF ARGUMENT

Congress has restricted the possession of firearms by persons "convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year," 18 U.S.C. § 922(g)(1), the traditional definition of a felony. Hatfield is subject to that prohibition because he was convicted of violating 18 U.S.C. § 1001, a federal felony punishable by imprisonment of up to five years.

Application of section 922(g)(1) to Hatfield does not implicate the Second Amendment's protection of "the right of law-abiding, responsible citizens to use arms." *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008). The Supreme Court explained in *Heller* that "the right secured by the Second Amendment is not unlimited" and that "nothing in [its] opinion should be taken to cast doubt" on "longstanding prohibitions on the possession of firearms by felons." *Id.* at 626. Like civic rights such as the right to vote and the right to serve on a jury, the right to bear arms has historically been subject to forfeiture by individuals convicted of serious crimes. The district court in this case believed that only common-law felonies at the time of the founding should be disqualifying, but it identified no basis for assuming that the Second Amendment leaves no room for legislative judgments as to what crimes should be punishable as felonies. This Court should join those courts of appeals that have held that "conviction of a felony necessarily removes one from the class of 'law-abiding, responsible citizens' for the purposes of the Second Amendment." *Hamilton v. Pallozzi*, 848 F.3d 614, 626 (4th Cir. 2017).

Because Hatfield's disqualification for a felony conviction falls squarely within an exception to the Second Amendment right, this Court need and should go no further to reverse the judgment below. If, however, this Court determines felons are not all categorically excluded from the Second Amendment's scope, under binding circuit precedent, which Hatfield does not challenge here, section 922(g)(1) is subject to intermediate scrutiny. *United States v. Williams*, 616 F.3d 685, 692 (7th Cir. 2010). And the restrictions of section 922(g)(1) satisfy that standard because they further Congress's substantial interest in limiting firearm possession to those who are law abiding and responsible. "[T]he government has a[] strong interest in preventing people who already have disrespected the law . . . from possessing guns." *United States v. Meza-Rodriguez*, 798 F.3d 664, 673 (7th Cir. 2015). Irrespective of what sentence an individual received for his felony conviction, when he was convicted, or whether his particular crime can be characterized as nonviolent, a felony conviction has long been understood to distinguish convicts from the category of virtuous citizens who can be entrusted with the exercise of certain rights, including the fundamental right to vote and the right to possess arms. And that understanding is underscored by the lack of any administrable way to identify categories of felons who could reasonably be excepted from section 922(g)(1)'s scope.

STANDARD OF REVIEW

The Court reviews de novo the district court's decision granting summary judgment. *Horsley v. Trame*, 808 F.3d 1126, 1128 (7th Cir. 2015).

ARGUMENT

HATFIELD'S CONSTITUTIONAL CHALLENGE TO SECTION 922(g)(1) LACKS MERIT.

This Court has adopted a two-step approach to analyzing Second Amendment challenges. *See Horsley v. Trame*, 808 F.3d 1126, 1130 (7th Cir. 2015). First, the Court asks "whether 'the restricted activity [is] protected by the Second Amendment in the first place.'" *Id.* (quoting *Ezell v. City of Chicago*, 651 F.3d 684, 701 (7th Cir. 2011)). Next, if the challenged law implicates Second Amendment rights, the Court "turn[s] to means-ends scrutiny of the regulation" and "'evaluate[s] the regulatory means the government has chosen and the public-benefits end it seeks to achieve.'" *Id.* at 1131 (quoting *Ezell*, 651 F.3d at 703).

A. Application of Section 922(g)(1) to Hatfield Does Not Implicate the Second Amendment.

1. The Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation," but "[l]ike most rights, the right secured by the Second Amendment is not unlimited." *District of Columbia v. Heller*, 554 U.S. 570, 592, 626 (2008). The Supreme Court in *Heller* identified the right as belonging to "law-abiding, responsible citizens," *id.* at 635, and consistent with that understanding, it stated that "nothing in [its] opinion should be taken to cast doubt" on "longstanding prohibitions on the possession of firearms by felons," *id.* at 626. The Court described this "permissible" measure as falling within "exceptions" to the protected right to bear arms. *Id.* at 635. Two years later, a plurality of the Court

"repeat[ed]" its "assurances" that *Heller*'s holding "did not cast doubt on such longstanding regulatory measures as 'prohibitions on the possession of firearms by felons.'" *McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010) (quoting *Heller*, 554 U.S. at 626).

Applying *Heller*, this Court and other courts of appeals have rejected challenges to section 922(g)(1)'s prohibition on the possession of firearms by felons. *See United States v. Williams*, 616 F.3d 685, 693-94 (7th Cir. 2010); *see also, e.g.*, *United States v. Moore*, 666 F.3d 313, 316-17 (4th Cir. 2012) (collecting cases). Several courts of appeals have recognized that "conviction of a felony necessarily removes one from the class of 'law-abiding, responsible citizens' for the purposes of the Second Amendment." *Hamilton v. Pallozzi*, 848 F.3d 614, 626 (4th Cir. 2017); *see also United States v. Rozier*, 598 F.3d 768, 771 (11th Cir. 2010) (per curiam) (holding that "statutes disqualifying felons from possessing a firearm under any and all circumstances do not offend the Second Amendment"); *United States v. Scroggins*, 599 F.3d 433, 451 (5th Cir. 2010) ("reaffirm[ing]" the Fifth Circuit's pre-*Heller* jurisprudence holding "that criminal prohibitions on felons (violent or nonviolent) possessing firearms did not violate" the Second Amendment); *United States v. McCane*, 573 F.3d 1037, 1047 (10th Cir. 2009); *id.* at 1049-50 (Tymkovich, J, concurring).

No court of appeals other than the Third Circuit has held section 922(g)(1) unconstitutional in any of its applications. *See Binderup v. Attorney General*, 836 F.3d 336 (3d Cir. 2016) (en banc). And while the Third Circuit in *Binderup* held section

922(g)(1) unconstitutional as applied to the two state-law misdemeanants in that case, a majority of the court recognized that individuals convicted of serious crimes, whether violent or nonviolent, permanently forfeit their Second Amendment rights. *See Binderup*, 836 F.3d at 349 (Ambro, J.) (holding that "persons who have committed serious crimes forfeit the right to possess firearms" and "reject[ing] [the] claim that the passage of time or evidence of rehabilitation will restore the Second Amendment rights of people who committed serious crimes"); *id.* at 387 (Fuentes, J., concurring in part, dissenting in part, and dissenting from the judgments) (agreeing that "persons who commit serious crimes are disqualified from asserting their Second Amendment rights"). A majority of the court also suggested that any crime that is punishable and labeled as a felony would qualify as sufficiently serious to result in the forfeiture of Second Amendment rights. *See id.* at 353 n.6 (Ambro, J.) (observing that the burden on convicted felons to establish that their crimes were insufficiently serious would be "extraordinarily high . . . and perhaps even insurmountable").

The historical record supports the conclusion that felons are not entitled to Second Amendment protection. "*Heller* identified . . . as a 'highly influential' 'precursor' to the Second Amendment the Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to Their Constituents." *United States v. Skoien*, 614 F.3d 638, 640 (7th Cir. 2010) (en banc) (quoting *Heller*, 554 U.S. at 604). That report expressly recognized the permissibility of imposing a firearms disability on convicted criminals, stating that "citizens have a personal right

to bear arms 'unless for crimes committed, or real danger of public injury.'" *Id.* (quoting 2 Bernard Schwarz, *The Bill of Rights: A Documentary History* 662, 665 (1971)).

"[M]ost scholars of the Second Amendment agree that the right to bear arms was tied to the concept of a virtuous citizenry and that, accordingly, the government could disarm 'unvirtuous citizens.'" *United States v. Yancey*, 621 F.3d 681, 684-85 (7th Cir. 2010) (per curiam) (quoting *United States v. Vongxay*, 594 F.3d 1111, 1118 (9th Cir. 2010)) (citing Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 Tenn. L. Rev. 461, 480 (1995)); *see United States v. Carpio-Leon*, 701 F.3d 974, 979-80 (4th Cir. 2012) (same). The Second Amendment thus incorporates "a common-law tradition that permits restrictions directed at citizens who are not law-abiding and responsible" and it "'does not preclude laws disarming the unvirtuous (i.e. criminals.)'" *United States v. Bena*, 664 F.3d 1180, 1183-84 (8th Cir. 2011) (quoting Don B. Kates, Jr., *The Second Amendment: A Dialogue*, 49 Law & Contemp. Probs. 143, 146 (1986)); *NRA v. ATF*, 700 F.3d 185, 201 (5th Cir. 2012) (same); *United States v. Rene E.,* 583 F.3d 8, 15-16 (1st Cir. 2009) ("Perhaps the most accurate way to describe the dominant understanding of the right to bear arms in the Founding era is as . . . . limited to those members of the polity who were deemed capable of exercising it in a virtuous manner.") (quoting Saul Cornell, "*Don't Know Much About History": The Current Crisis in Second Amendment Scholarship,* 29 N. Ky. L. Rev. 657, 679 (2002)).

In this respect, the right to bear arms is a fundamental right analogous to civic rights that have historically been subject to forfeiture by individuals convicted of

crimes, including the right to vote, *see Richardson v. Ramirez*, 418 U.S. 24, 56 (1974), the right to serve on a jury, 28 U.S.C. § 1865(b)(5), and the right to hold public office, *Spencer v. Kemna*, 523 U.S. 1, 8-9 (1998). *Cf.* Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 Tenn. L. Rev. 480-81 ("[T]he franchise and the right to arms were 'intimately linked' in the minds of the Framers."). Just as Congress and the States have required persons convicted of felonies to forfeit civic rights, section 922(g)(1) permissibly imposes a firearms disability "as a legitimate consequence of a felony conviction." *Tyler v. Hillsdale Cty. Sherriff's Dep't*, 837 F.3d 678, 708 (6th Cir. 2016) (en banc) (Sutton, J., concurring in judgment).

2. As a person disqualified from possessing a firearm because of his felony conviction, Hatfield falls outside the scope of the Second Amendment protection. *See Heller*, 554 U.S. at 635 ("Assuming that Heller is not disqualified from the exercise of Second Amendment rights, the District must permit him to register his handgun and must issue him a license to carry it in the home."); *Hamilton*, 848 F.3d at 628 ("Hamilton is a state law felon" and therefore "cannot state a claim for an as-applied Second Amendment" challenge.). This Court therefore need not proceed to any means-end scrutiny to uphold application of section 922(g)(1) to Hatfield. *See Horsley*, 808 F.3d at 1130 ("If the challenged law regulates activity that falls outside the scope of the Second Amendment at the historically relevant time, then the regulated activity is not protected, and the analysis stops there.").

The district court held, however, that Hatfield's crime did not disqualify him from possessing firearms because he "violated a statutory felony that Congress created," 18 U.S.C. § 1001, not one of the nine "English common-law felonies" recognized "at the time of the founding." A9; *see id.* (explaining that the English common-law felonies consisted of "murder, rape, manslaughter, robbery, sodomy, larceny, arson, mayhem, and burglary").

The district court erred. The traditional forfeiture of firearms rights by felons, like forfeiture of the right to vote, is not limited to the specific common-law felonies recognized at the time of the Founding, but attaches to any crime deemed sufficiently serious by a legislature to be punishable by greater than a year imprisonment and thus appropriately labeled a felony. "Where the sovereign has labeled the crime a felony, it represents the sovereign's determination that the crime reflects 'grave misjudgment and maladjustment.'" *Hamilton*, 848 F.3d at 626. Section 922(g)(1) thus comports with the historical understanding of the Second Amendment because it applies only to offenses that satisfy the traditional definition of a felony: "a crime punishable by imprisonment for a term exceeding one year." 18 U.S.C. § 922(g)(1); *see id.* § 3559(a); 1 Wayne R. LaFave, *Substantive Criminal Law* § 1.6(a) (3d ed. 2017).

The district court expressed concern that Congress might "inadvertently disarm the people by passing gobs of statutory felonies not contemplated at the common law[.]" A10. But Congress is presumed to "understand[] the state of existing law when it legislates." *Bowen v. Massachusetts*, 487 U.S. 879, 896 (1988). There is no basis

to conclude that when Congress identifies a crime so serious as to be punishable by greater than one year and deemed a felony, it would be "inadvertently" subjecting individuals convicted of that crime to the restrictions of section 922(g)(1). In any event, the court could not properly constitutionalize its mistrust of the legislative branch, and, in other contexts, the Supreme Court has admonished that "[t]he judiciary should not substitute its judgment as to seriousness [of a crime] for that of a legislature, which is 'far better equipped to perform the task.'" *Blanton v. City of North Las Vegas*, 489 U.S. 538, 541-42 (1989) (offense "serious" for purposes of Sixth Amendment right to trial by jury if it "carries a maximum authorized prison term of greater than six months"); *see Branzburg v. Hayes*, 408 U.S. 665, 687 n.24 (1972) (offense an "infamous" crime triggering Fifth Amendment right to indictment by a grand jury if punishable by "imprisonment for a term exceeding one year").

The district court similarly erred in attaching overriding significance to the non-violent nature of plaintiff's felony conviction. Because the commission of any felony removes one from the class of "law-abiding, responsible citizens," *Heller*, 554 U.S. at 635, it is irrelevant whether a felony can be characterized as "non-violent," *United States v. Pruess*, 703 F.3d 242, 248 (4th Cir. 2012); *see United States v. Torres-Rosario*, 658 F.3d 110, 113 (1st Cir. 2011) (rejecting as-applied challenge to section 922(g)(1) by plaintiff with "no prior convictions for any violent felony"); *Rozier*, 598 F.3d at 769 & n.1 (same); *Scroggins*, 599 F.3d at 451 (reaffirming pre-*Heller* precedent establishing "that criminal prohibitions on felons (violent or nonviolent) possessing firearms did

not violate" right to bear arms); *United States v. Phillips*, 827 F.3d 1171, 1175 (9th Cir. 2016) (acknowledging misprision of felony "is not a violent crime," but finding "there is little question that" it "can constitutionally serve as the basis for a felon ban").

The district court's appeal to history fails to take into account the fact that the laws of the colonial period and the early republic did not treat Hatfield's crime lightly. For example, forgery—which the district court analogized to Hatfield's crime—was punishable at the founding by death in some states. *See* Thomas Herty, *A Digest of the Laws of Maryland* 255-56 (1799) (punishable by "death as a felon, without benefit of clergy"); *see* 2 *Laws of the State of New York* 74 (1791) (an individual convicted of forgery "shall be hanged by the neck until he . . . shall be dead").[2] Nor is the statute violated by Hatfield of recent vintage, having been enacted in 1863. *See Hubbard v. United States*, 514 U.S. 695, 704-05 (1995) (describing history of 18 U.S.C. § 1001). And, more generally, criminalization of fraud dates to before the founding. 3 *Wharton's Criminal Law* § 410 (15th ed. 2018) (a 1757 English statute established the crime of false pretense, subject to "imprison[ment] . . . for the term of seven years"). It thus has long been understood that "[t]heft, fraud, and forgery are not merely errors in

[2] *See also, e.g.*, 1 *The Laws of the Commonwealth of Massachusetts* 250, § 3 (1807) (forgery in 1785 punishable by "hard labor, for a term not exceeding seven years upon the first conviction, fourteen years upon the second conviction, and during life upon the third conviction"); *id.* § 5 (forgery of bank bills punishable by death); *Laws of the State of Maine* 72 (1830) (forgery of public records punishable "by solitary imprisonment, for a term not exceeding six months, and by confinement afterwards, to hard labor, for a term not less than two years, and not exceeding ten years")

filling out a form or some regulatory misdemeanor offense; these are significant offenses reflecting disrespect for the law." *Hamilton*, 848 F.3d at 627.

The implications of the district court's contrary reasoning also raise concerns. Under the district court's analysis, an individual would forfeit his Second Amendment rights for committing the common-law crime of robbery, but not for a conviction of drug trafficking, 21 U.S.C. § 848; assisting in the escape of a prisoner, 18 U.S.C. § 752(a); obtaining military training from a known foreign terrorist organization, *id.* § 2339D(a); stockpiling chemical weapons, *id.* § 229(a); kidnapping, *id.* § 1201(a); or taking hostages, *id.* § 1203(a). *See also United States v. Watson*, 423 U.S. 411, 440 (1976) ("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."); *see id.* at 440 n.9 (listing other common-law misdemeanors that now qualify as felonies). There is no support in law or logic for the proposition that commission of a crime deemed serious by 21st-century legislatures is a constitutionally infirm basis for forfeiting the right to possess firearms, just as it is a valid basis for forfeiting the right to vote and other rights of a "virtuous citizenry."[3]

[3] Hatfield's conviction would be disqualifying even under the Third Circuit's *Binderup* analysis, because he was convicted of a federal felony for conduct broadly understood to be criminal. *See Binderup*, 836 F.3d at 353 n.6 (Ambro, J.) (concluding that where the predicate offense "is considered a felony by the authority that created the crime," an individual seeking to bring an as-applied challenge to section 922(g)(1) faces an "extraordinarily high" burden that is "perhaps even insurmountable"); *id.* at 352-53 (describing absence of "cross-jurisdictional consensus" on seriousness of state offenses at issue).

B. Section 922(g)(1) Permissibly Restricts Firearms from Individuals by Virtue of Their Past Convictions.

1. Because Hatfield's disqualification for a felony conviction falls squarely within an exception to the Second Amendment right as originally understood, and as explicated in *Heller*, this Court need and should go no further to reverse the judgment below. If, however, this Court were to hold that application of the challenged law implicates Second Amendment rights, then under this Circuit's precedent, the Court must "turn to means-ends scrutiny of the regulation." *Horsley*, 808 F.3d at 1131. *See Williams*, 616 F.3d at 692 (evaluating as-applied "challenge to § 922(g)(1)" by "using the intermediate scrutiny framework").

In applying this analysis, the district court mistakenly interpreted *Ezell v. City of Chicago*, 651 F.3d 684, 708 (2011), as authorizing application of something "higher than intermediate scrutiny." A12. *Ezell* concerned a city ordinance that banned firing ranges while simultaneously imposing firearms training as a prerequisite for gun ownership, and the Court stressed that the plaintiffs were "the 'law-abiding, responsible citizens' whose Second Amendment rights are entitled to full solicitude under *Heller*." *Ezell*, 651 F.3d at 708. The Court in *Ezell* thus distinguished that case from challenges to prohibitions based on criminal conviction, explaining that, to the extent means-end scrutiny is necessary to resolve such challenges, "[i]ntermediate scrutiny [is] appropriate . . . because the claim [is] not made by a law-abiding, responsible citizen." *Id.* Consistent with that reasoning, after *Ezell*, this Court has

continued to apply intermediate scrutiny to as-applied challenges to section 922(g). *See United States v. Meza-Rodriguez*, 798 F.3d 664, 672 (7th Cir. 2015) (concluding that "some form of strong showing, akin to intermediate scrutiny, is the right approach").

Applying intermediate scrutiny in this context, this Court has recognized "that 'some categorical disqualifications [on firearms possession] are permissible,'" so long as they "satisfy 'some form of strong showing,'" *Williams*, 616 F.3d at 691 (quoting *Skoien*, 614 F.3d at 641). Under this standard, the Court will uphold a categorical disqualification if the government carries its burden of showing "that the challenged subsection of § 922(g) [is] substantially related to an important governmental objective," *Yancey*, 621 F.3d at 683 (citing *Williams*, 616 F.3d at 692-93; *Skoien*, 614 F.3d at 641-42); *see Board of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989) (intermediate scrutiny requires "a fit that is not necessarily perfect, but reasonable"), but not otherwise, *see Sorrell v. IMS Health Inc.*, 564 U.S. 552, 575 (2011) (holding that a "broad" regulation was significantly over-inclusive for the "few" applications implicating an interest asserted); *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 371-72 (2002) (explaining that, under intermediate scrutiny, a regulation may not be substantially "more extensive than necessary").

2. Application of section 922(g)(1) to Hatfield based on his felony conviction satisfies the standard required by circuit precedent. Hatfield's status as a felon distinguishes him from law-abiding and responsible citizens, and Congress has a compelling interest in excluding such individuals from the possession of firearms.

As already explained, the government's interest in "disarm[ing] 'unvirtuous citizens,'" *Yancey*, 621 F.3d at 684-85, and restricting firearms to "law-abiding, responsible citizens," *Heller*, 554 U.S. at 635, has long been recognized. Even if that traditional understanding of the Second Amendment does not remove section 922(g)(1) from means-end scrutiny altogether, it at least supplies a compelling justification for the disarmament of felons. "[T]he government has a strong interest in preventing people who already have disrespected the law . . . from possessing guns." *Meza-Rodriguez*, 798 F.3d at 673. And because "a felon has shown manifest disregard for the rights of others," he "may not justly complain of the limitation on his liberty when his possession of firearms would otherwise threaten the security of his fellow citizens." *United States v. Everist*, 368 F.3d 517, 519 (5th Cir. 2004); *see Scroggins*, 599 F.3d at 451 (reaffirming Fifth Circuit's pre-*Heller* precedent).

That is true "irrespective of whether [the felony] was violent in nature." *Everist*, 368 F.3d at 519. While "the government does not get a free pass simply because Congress has established 'a categorical ban,'" *Williams*, 616 F.3d at 692, application of section 922(g)(1) to nonviolent felons is substantially related to achieving Congress's interest in disarming those who have proven not to be law-abiding and responsible. Conviction of any felony reflects the absence of "good character," *Hawker v. New York*, 170 U.S. 189, 194 (1898), which has long been understood to justify exclusion from the fundamental right to vote, from jury service, and from a chosen profession, *see supra* pt. A.1. Section 922(g)(1) thus effectuates

Congress's "concern with keeping firearms out of the hands of categories of potentially irresponsible persons, including convicted felons." *Barrett v. United States*, 423 U.S. 212, 220 (1976); *see also Small v. United States*, 544 U.S. 385, 393 (2005) (Congress enacted section 922(g)(1) to "keep guns out of the hands of those who have demonstrated that they may not be trusted to possess a firearm.").

Congress appropriately declined to hinge section 922(g)(1)'s prohibition on an open-ended crime-by-crime evaluation of federal and state criminal codes. The problems inherent in such an approach are illustrated by the Supreme Court's recent decisions striking down statutory definitions of violent crimes as unconstitutionally vague. *See Johnson v. United States*, 135 S. Ct. 2551, 2558 (2015) (striking down Armed Career Criminal Act's residual clause, while citing the Court's "repeated attempts and repeated failures to craft a principled and objective standard" for defining what crimes qualify as violent); *Sessions v. Dimaya*, 138 S. Ct. 1204, 1223 (2018) (striking down similar provision in the Immigration Nationality Act); *see also id.* at 1232 (Gorsuch, J., concurring) (observing that such inquiries have no "obvious answers" and "leave[] the people to guess about what the law demands—and leave[] judges to make it up"). Congress likewise concluded that the prior regime, pursuant to which individuals could obtain relief from section 922(g)(1) by demonstrating to ATF that they would "not be likely to act" in a dangerous manner, 18 U.S.C. § 925(c), was infeasible. *See* S. Rep. No. 102-353, at 19 (concluding the scheme presented "a very difficult and subjective task which could have devastating consequences for innocent citizens if the

wrong decision is made"); *id.* at 19-20 (observing that ATF spent "approximately 40 man-years . . . annually to investigate and act upon these investigations and applications"); H.R. Rep. No. 104-183, at 15 (finding that, despite ATF's extensive investigations, "too many of the[] felons whose gun ownership rights were restored went on to commit violent crimes with firearms").

Although the district court believed that little significance should be attached to Hatfield's conviction under 18 U.S.C. § 1001, lying to the government reflects an inherent disregard for the law and lack of virtue. Indeed, section 1001 is regularly used to prosecute individuals who have lied about matters significant to the public interest. *See, e.g.*, *United States v. Phillipos*, 849 F.3d 464, 466, 474 (1st Cir. 2017) (upholding conviction under section 1001 for false statements regarding evidence related to the Boston Marathon bombing); *United States v. White*, 545 F. App'x 69, 70-71 (2d Cir. 2013) (upholding conviction under section 1001 for false statements about suspect's involvement in a murder). That statute also is regularly used to prosecute individuals who have lied in the course of investigations into their own potential participation in separate and serious wrongdoing. *See, e.g.*, *United States v. Benkahla*, 530 F.3d 300, 304-05 (4th Cir. 2008) (upholding conviction under section 1001 and other statutes for false statements related to defendant's attendance at a jihadist camp); *United States v. Simpson*, No. 10-cr-55, 2011 WL 905375, at *1-4 (D. Ariz. Mar. 15, 2011) (conviction under section 1001 for false statements related to defendant's discussions about "traveling to Somalia for the purpose of engaging in

violent jihad"). And a willingness to lie to authorities is particularly problematic in this context, because federal firearms background checks depend on honest reporting. *See, e.g.*, *United States v. Hernandez*, 719 F. App'x 441, 441-42 (5th Cir. 2018) (conviction of straw purchaser for making false statements during acquisition of firearm he knew would be "transported to Mexico for illegal purposes"). Consequently, someone who commits crimes like Hatfield's is the type of non-virtuous citizen who can be categorically deprived of firearms; it follows, therefore, that Congress has a substantial interest in depriving these individuals of firearms under this Court's intermediate scrutiny standard.

The district court also erred by focusing on the sentence Hatfield received for his conviction, *see* A13-14, rather than the potential sentence Congress prescribed for Hatfield's crime. The traditional consequences of felony convictions have never been understood to depend on the sentence actually imposed, and Congress reasonably tied section 922(g)(1)'s prohibition to the potential punishment established by the legislature. *See Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 113 (1983) ("It was plainly irrelevant to Congress whether the individual in question actually receives a prison term; the statute imposes disabilities on one convicted of 'a crime punishable by imprisonment for a term exceeding one year.'").

There are any number of reasons a convicted individual might avoid prison time that do not negate the seriousness of his crime. While a felon's sentence might legitimately be reduced based on his testimony against coconspirators, *see* U.S.

Sentencing Guidelines Manual § 5K1.1; 18 U.S.C. § 3553(e), or for other reasons unrelated to the seriousness of his crime, *see, e.g.*, 18 U.S.C. § 3553(a)(7) (need to provide restitution to victims); U.S. Sentencing Guidelines Manual § 5H1.6 cmt. n.1(B) (2016) (felon's caretaking and financial responsibilities), those factors would not warrant treating the felon differently with respect to his firearms rights. Congress therefore appropriately relied on legislative judgments about the seriousness of crimes, as embodied in the conclusion that such crimes are punishable by more than one year in prison, not the sentencing decisions of individual prosecutors and judges. Conviction of any crime a legislature has made punishable by more than an 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.

Finally, as a general matter, if a restriction satisfies the appropriate standard of means-ends scrutiny, an individual plaintiff cannot succeed in an as-applied challenge to the application of the restriction to his unique set of circumstances. *See United States v. Edge Broad. Co.*, 509 U.S. 418, 430 (1993); *Board of Trs. of State Univ. of N.Y.*, 492 U.S. at 480. Consequently, if, as this circuit has held, intermediate scrutiny applies, the facts surrounding Hatfield's specific felony conviction are irrelevant and, for the reasons described above, the application of section 922(g)(1) to Hatfield should be upheld.

CONCLUSION

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

Respectfully submitted,

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SEPTEMBER 2018

CIRCUIT RULE 30(d) STATEMENT

I hereby certify that the Appendix to this brief contains all the material required by Circuit Rules 30(a) and (b).

/s/ Patrick G. Nemeroff
Patrick G. Nemeroff

CERTIFICATE OF COMPLIANCE

I hereby certify this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font, and that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because it contains 5,778 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

/s/ Patrick G. Nemeroff
Patrick G. Nemeroff

CERTIFICATE OF SERVICE

I hereby certify that on September 5, 2018, I electronically filed the foregoing brief with the Clerk of this Court by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Patrick G. Nemeroff
Patrick G. Nemeroff

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, No. 3:16-cv-383 (Gilbert, J.)

APPENDIX

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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

LARRY EDWARD HATFIELD,

Plaintiff,

v.

JEFFERSON B. SESSIONS, III, *in his Official Capacity as the Attorney General of the United States*,

Defendant.

Case No. 3:16-cv-00383-JPG-RJD

MEMORANDUM & ORDER

J. PHIL GILBERT, DISTRICT JUDGE

Plaintiff Larry Edward Hatfield wants to keep a gun in his home for self-defense. But the Government bans him from doing so, because 28 years ago, Hatfield lied on some forms that he sent to the Railroad Retirement Board: a felony in violation of 18 U.S.C. § 1001(a). Hatfield later pled guilty to one count of violating the statute, an offense for which he received no prison time and a meager amount in restitution fees pursuant to a formal plea agreement with the Government. Now, Hatfield brings this as-applied challenge to 18 U.S.C. § 922(g)(1)—the statute that bans him from owning a gun—on the grounds that it violates his Second Amendment rights. Hatfield embeds his argument in *United States v. Williams*, 616 F.3d 685, 692 (7th Cir. 2010), which instructed that "[the Supreme Court's decision in *D.C. v. Heller*, 554 U.S. 570 (2008)] referred to felon disarmament bans only as 'presumptively lawful,' which, by implication, means that there must exist the possibility that the ban could be unconstitutional in the face of an as-applied challenge." If there is any case that rebuts that presumption, it is this one. So for the following reasons, the Court **GRANTS** summary judgment in favor of Plaintiff Larry E. Hatfield.

I. BACKGROUND

The facts of this case are undisputed. From August 5, 1989 to January 5, 1990, Hatfield completed several claim for benefits forms and sent them to the U.S. Railroad Retirement Board. (Def.'s Mot. Summ. J., Ex. A, ECF No. 41-1.) That agency administers benefits for unemployed railroad workers pursuant to the Railroad Unemployment Insurance Act. 45 U.S.C. § 351, *et seq.* (*Id.*) But Hatfield lied on the forms: he claimed that he was unemployed for 53 days when he was actually working for the Merchant Management Corporation of St. Louis, Missouri. Hatfield wrongfully obtained $1,627.73 from the Railroad Retirement Board because of the lie. (*Id.*) Shortly thereafter, the Government charged Hatfield with one count of making a false statement in violation of 18 U.S.C. § 1001(a): a felony.

Hatfield later pled guilty to the charge following formal plea negotiations with the Government. Even though 18 U.S.C. § 1001(a) provides for up to five-years imprisonment for each violation, the Government recommended in the amended plea agreement that the court only sentence Hatfield to three years' probation plus restitution in the amount of improper benefits received: $1,627.73. The court agreed, and ultimately sentenced Hatfield to those terms. (*See United States v. Hatfield*, No. 3:91-cr-30093.) Since that time, Hatfield has maintained a spotless record: he has no mental health issues, he does not drink, he has no drug addictions, and he does not even have any traffic citations since his felony conviction. The only other blight in his history is a driving while intoxicated charge from the 1980s, which predates the felony charge. (Hatfield Dep. 31:24–32:13, ECF No. 41-5.)

Fast forward nearly three decades and we have a problem. Even though Hatfield received a small fine and no prison time for his non-violent statutory felony, 18 U.S.C. § 922(g)(1) bans him from owning a gun. That statute makes it unlawful for a person to possess a gun if they have

been convicted of a crime that is technically punishable by more than one year (i.e. a felony)—regardless of the sentence that the individual actually received. Since making a false statement in violation of 18 U.S.C. § 1001(a) is punishable by up to five years, Hatfield falls within the gambit of § 922(g)(1).

Hatfield now brings an as-applied challenge to the statute, arguing that it violates his Second Amendment rights. His theory is straightforward: the Seventh Circuit has said that "there must exist the possibility that the [felon disarmament] ban could be unconstitutional in the face of an as applied challenge," *Williams*, 616 F.3d at 692, and Hatfield believes that he is the perfect challenger. He argues that the Government does not have an important interest in banning non-violent felons who received no prison time like him from having a gun. Hatfield also points out that while every state he researched has some sort of process to restore Second Amendment rights to felons on a case-by-case basis, the federal government does not. Curiously, 18 U.S.C. § 925(c) does provide a similar mechanism for a federal felon to restore their Second Amendment rights through an application to the Attorney General, but Congress has chosen to not fund § 925(c) since the early 1900s. Accordingly, the only other ways for a felon affected by § 922(g)(1) to restore his gun rights are (1) through a Presidential pardon, or (2) an expungement of the felony.

The Government moved for summary judgment, arguing that (1) the Second Amendment does not protect felons; and (2) even if it does, § 922(g)(1) satisfies intermediate scrutiny as-applied to felons like Hatfield. (Def.'s Mot. Summ. J., ECF No. 41-2.) The Court held oral argument on the matter, where Hatfield made a cross-motion for summary judgment for the reasons stated within his response brief. (*See* Pl.'s Resp. to Def.'s Mot. Summ. J., ECF No. 47.)

II. LEGAL STANDARDS

Summary judgment must be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Spath v. Hayes Wheels Int'l-Ind., Inc.*, 211 F.3d 392, 396 (7th Cir. 2000). The Court must construe the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in favor of that party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Chelios v. Heavener*, 520 F.3d 678, 685 (7th Cir. 2008); *Spath*, 211 F.3d at 396.

III. ANALYSIS

The Second Amendment commands: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." Second Amendment rights, however, are not dependent on militia service: the amendment chiefly protects "the right to keep and bear arms for the purpose of self-defense." *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 750 (2010) (citing *District of Columbia v. Heller*, 554 U.S. 570 (2008)). *Heller* explained that while the militia clause announced one purpose of the amendment's codification—to prevent the new federal government from disarming and oppressing the People, much like the English tried to do to the American Colonies—it had little to do with the central component of the "ancient right" to bear arms itself, which includes primary purposes like "self-defense and hunting." *Heller*, 554 U.S. at 599.

Heller gave birth to this case through a much-discussed footnote in the opinion. First, *Heller* instructs that nothing in the opinion "should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons." *Heller*, 554 U.S. at 626–27. But then, a footnote attached to that same paragraph reads: "We identify these **presumptively lawful**

regulatory measures only as examples; our list does not purport to be exhaustive." *Id.* at 627 n.26 (emphasis added). The Seventh Circuit has already noted this dichotomy:

> But 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. *Heller* referred to felon disarmament bans only as "presumptively lawful," which, by implication, means that there must exist the possibility that the ban could be unconstitutional in the face of an as-applied challenge. Therefore, putting the government through its paces in proving the constitutionality of § 922(g)(1) is only proper.

United States v. Williams, 616 F.3d 685, 692 (7th Cir. 2010) (internal citation omitted).

The Seventh Circuit has since adopted a two-step inquiry for Second Amendment claims: (1) does the challenged statute cover conduct that falls within the Second Amendment's protections; and (2) if so, does the statute survive "some level of heightened scrutiny"? *Baer v. Lynch*, 636 F. App'x 695, 698 (7th Cir. 2016). The case law applying this test, however, is messy. Some cases refuse to analyze step one and immediately jump to step two. *Id.*; *United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010) (*en banc*);[1] *Williams*, 616 F.3d 685; *Horsley v. Trame*, 808 F.3d 1126 (7th Cir. 2015). One case blends the two steps together. *United States v. Yancey*, 621 F.3d 681 (7th Cir. 2010). Another case jumps the ship and asks if the challenged regulation has "some reasonable relationship to the preservation or efficiency of a well regulated militia," a test which contradicts *Heller* itself. *Friedman v. City of Highland Park, Illinois*, 784 F.3d 406, 410 (7th Cir. 2015). There is only one case—*Ezell v. City of Chicago*, 651 F.3d 684, 700–04 (7th Cir. 2011)—that engages in a thorough analysis of both steps.[2]

[1] Judge Sykes, dissenting, stated that the *Skoien* majority "declines to be explicit about its decision method, sends doctrinal signals that confuse rather than clarify, and develops its own record to support the government's application of § 922(g)(9) . . . ." 614 F.3d at 647 (Sykes, J., dissenting).
[2] Judge Sykes wrote the majority opinion in *Ezell*—one year after her dissent in *Skoien*.

Despite this entanglement, it is possible to boil down the relevant case law to two steps. First, does the Second Amendment protect felons in the same class as Hatfield? Second, if the Second Amendment does protect felons like Hatfield, does § 922(g)(1) survive "some level of heightened scrutiny"?

A. Step One: The Second Amendment and Felons

The Second Amendment protects the "right of the people" to bear arms. The question at step one is simple: is Hatfield one of "the people" shielded by the amendment? Does the amendment protect all adult people in the United States? "The people" minus all felons? "The people" minus violent felons? Some other subset of "the people"?

The answer, unfortunately, is not so simple. In 2016, the Seventh Circuit stated:

> 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. *Williams*, 616 F.3d at 692; *see also United States v. Yancey*, 621 F.3d 681, 684–85 (7th Cir. 2010) (noting that "scholars continue to debate the evidence of historical precedent for prohibiting criminals from carrying arms").

Baer, 636 F. App'x at 698. *Baer* sums up the pattern in Seventh Circuit cases: avoid answering step one instead jump ahead to step two—the intermediate scrutiny analysis—because the challengers in those cases resoundingly failed there anyways. *See, e.g., Baer*, 636 F. App'x 695 (a convicted robber failing at the intermediate scrutiny stage); *Williams*, 616 F.3d at 693–94 (another convicted robber failing at the intermediate scrutiny stage); *Skoien*, 614 F.3d at 641–45 (a plaintiff with two convictions for misdemeanor crimes of domestic violence failing at the intermediate scrutiny stage of a § 922(g)(9) challenge); *Horsley*, 808 F.3d at 1131 ("We need not decide today whether 18–, 19–, and 20–year–olds are within the scope of the Second

Amendment . . . [e]ven if they are, our next step would be to turn to means-ends scrutiny of the regulation.") (internal citation omitted).

Ezell, 651 F.3d 684, is the only case to apply a strong framework to step one. This Court will follow *Ezell*'s lead. That case dealt with a challenge to a Chicago ordinance that banned firing-ranges in the city, but also mandated those applying for gun licenses to have firing-range training—effectively banning many people from obtaining gun licenses. *Id.* at 690–92. Accordingly, the question at step one was whether "range training is categorically unprotected by the Second Amendment." *Id.* at 704. The *Ezell* court centered the burden of persuasion on this question on the government:

> Accordingly, if the government can establish that a challenged firearms 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; the regulated activity is categorically unprotected, and the law is not subject to further Second Amendment review. If 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 for restricting or regulating the exercise of Second Amendment rights.

Id. at 702–03. So applying the *Ezell* framework to this case, the Government must prove at step one that nonviolent felons like Hatfield are categorically unprotected by the Second Amendment.

Heller is the first place to start when analyzing this question. Justice Scalia, writing for the majority, broke the amendment into several clauses—one of which was "Right of the People." *Heller*, 554 U.S. 579–80. This term of art appeared in three amendments: The First Amendment's Assembly-and-Petition Clause, the Second Amendment, and the Fourth Amendment's Search-and-Seizure Clause. *Id. Heller* explained that given the context of these amendments, the Second Amendment must necessarily protect an individually held right—just

like the First and Fourth Amendments—rather than some sort of collective right that requires participation in a group. And although "right of the people" appears in three other provisions of the Constitution—the preamble ("We the people"), Article I, and the Tenth Amendment—Heller placed those provisions in a separate category because they dealt with the exercise or reservation of powers—not individual rights. *Id.* at 580–81.

Next, Heller noted that in all of the above mentioned provisions of the Constitution, "the people" refers "unambiguously to all members of the political community, not an unspecified subset." *Heller*, 554 U.S. at 580.

> '[T]he people' seems to have been a term of art employed in select parts of the Constitution . . . [Its uses] sugges[t] that 'the people' protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.

Id. (quoting *United States v. Verdugo–Urquidez*, 494 U.S. 259, 265 (1990)). Accordingly, *Heller* announced a "strong presumption that the Second Amendment right is exercised individually and **belongs to all Americans**." *Id.* at 581 (emphasis added). That view comports with the predecessor to the Second Amendment: the 1689 English Declaration of Rights. The declaration states: "[t]hat the Subjects which are Protestants, may have Arms for their Defence suitable to their Conditions, and as allowed by Law." *Id.* at 592. *Heller* clarified that even though these rights were limited to Protestants, "it was secured to them as individuals, according to 'libertarian political principles,' not as members of a fighting force." *Heller*, 554 U.S. at 593. To summarize, if the Supreme Court has announced that there is a presumption that Second Amendment rights belong to all Americans—a category which would include felons—then this Court is bound to follow that presumption, unless the Government can rebut it.

The Government has pointed to several authorities in an attempt to carry their burden. One of these authorities is "The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to Their Constituents, 1787," which *Heller* identified as a "highly influential" precursor to the Second Amendment. *Heller*, 554 U.S. 570 at 604; *Skoien*, 614 at 640. It states that "the people have a right to bear arms for the defense of themselves and their own State, or the United States, or for the purpose of killing game; **and no law shall be passed for disarming the people or any of them unless for crimes committed, or real danger of public injury from individuals** . . . ." *Id.* (emphasis added). The Government also points to *Yancey*, which explained 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. That ties into another case—*United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001)—which explained that scholarly sources on this issue indicate that "Colonial and English societies of the eighteenth century . . . excluded . . . felons [from possessing firearms]" and "the Founders [did not] consider[] felons within the common law right to arms or intend[] to confer any such right upon them." 270 F.3d at 226 n.21.

The Government has fallen on their own sword by relying on these cases: at the time of the founding, English common-law felonies consisted of murder, rape, manslaughter, robbery, sodomy, larceny, arson, mayhem, and burglary. *Jerome v. United States*, 318 U.S. 101, 108 n.6 (1943); Wayne R. LaFave, Criminal Law, § 2.1(b) (5th ed. 2010). So if the Founders intended to allow Congress to disarm unvirtuous felons, that intent would have necessarily been limited to individuals convicted of one of those nine felonies. Hatfield, however, violated a statutory felony that Congress created in 1948: making a false statement in breach of 18 U.S.C. § 1001. That offense is most similar to the common law offense of forgery, which first arose in 1727 as a

misdemeanor—not a felony. *Jerome*, 318 U.S. at 109 n.7; LaFave, *supra*.[3] Critics of this approach may complain that we do not read constitutional rights this way—for example, the Fourth Amendment prohibition against unreasonable searches now applies to electronic devices that the Founders did not contemplate, and the First Amendment covers forms of communication that the Founders did not contemplate. But those scenarios are entirely different: they consider the *expansion* of constitutional rights that protect the people over time, whereas the Government here is attempting to *shrink* Second Amendment rights of the people.

And on a similar note, if the Court accepts the Government's position, it 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.

Even if the Founders did intend for such a result, the Government has certainly not carried their burden and established as much: they dedicate a mere two paragraphs of their motion for summary judgment to the historical record and have introduced zero evidence to actually develop that record. (Def.'s Mot. Summ. J. 14–15, ECF No. 41-1.) And even if the Court views the available historical record in the light most favorable to the Government, that

[3] "The essential elements of the common law crime of forgery are (1) a false making of some instrument in writing; (2) a fraudulent intent; [and] (3) an instrument apparently capable of effecting a fraud." *Vizcarra-Ayala v. Mukasey*, 514 F.3d 870, 874 (9th Cir. 2008) (internal citation omitted).

record is inconclusive—meaning the Government has failed at step one. *See Skoien*, 614 F.3d at 647 (Sykes, dissenting) ("the historical evidence [on whether the Second Amendment protected felons] is inconclusive at best."); *Yancey*, 621 F.3d at 684–85 (comparing academic sources on the matter); *Ezell*, 651 F.3d at 702–03 ("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 for restricting or regulating the exercise of Second Amendment rights.").

B. Step Two: "Second Amendment Scrutiny"

The next step is to determine whether § 922(g)(1) survives some form of heightened scrutiny as-applied to nonviolent felons like Hatfield. The Seventh Circuit has not been clear on which level of scrutiny to apply. *Skoien* points to intermediate scrutiny: the statute "is valid only if substantially related to an important governmental objective." *Skoien*, 614 F.3d at 641. *Williams* also instructs that intermediate scrutiny should apply. 616 F.3d at 692. But *Ezell*—which postdates both *Skoein* and *Williams*—complicated the matter:

> First, a severe burden on the core Second Amendment right of armed self-defense will require an extremely strong public-interest justification and a close fit between the government's means and its end. Second, laws 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. How much more easily depends on the relative severity of the burden and its proximity to the core of the right.

Ezell, 651 F.3d at 708. *Ezell* explained that intermediate scrutiny was appropriate in *Skoien* because that case did not involve the central self-defense component of the Second Amendment. *Id*. That distinguishes *Skoien* from this case: Hatfield wants to keep and bear arms in his home for self-defense. (Compl. ¶ 11, ECF No. 1.) Nevertheless, the Government asks the Court to apply intermediate scrutiny. (Def.'s Mot. Summ. J. 13, ECF No. 41-1.)

The Court, however, must apply an *Ezell* analysis. That case postdates and distinguishes itself from *Skoien*, and if the Court ignores it, then the Court would be in breach of its duty to follow Seventh Circuit precedent. Accordingly, the Government here must show (1) an extremely strong public-interest justification for banning non-violent felons who received no prison time from possessing firearms for self-defense purposes; and (2) a close fit between that purpose and § 922(g)(1). *Ezell*, 651 F.3d at 708. This standard is murky: it is higher than intermediate scrutiny—which only requires an important government interest that is substantially related to the challenged statute—but it is necessarily lower than strict scrutiny, which requires a compelling government interest and a statute that is narrowly tailored to meet that interest. *See Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2231, 192 L. Ed. 2d 236 (2015) (explaining strict scrutiny).

i. Purpose: an "extremely strong" public interest justification

The Government's argument here is simple: they have an "obviously important" interest in curbing crime by keeping firearms from criminals. *See Barrett v. United States*, 423 U.S. 212, 218 (1976) (the principal objective of § 922(g)(1) is "to keep firearms away from the persons Congress classified as potentially irresponsible and dangerous."); *Small v. United States*, 544 U.S. 385, 393 (2005) (§ 922(g)(1) "keep[s] guns out of the hands of those who have demonstrated that they may not be trusted to possess a firearm without becoming a threat to society."); *Hamilton v. Pallozzi*, 848 F.3d 614, 626 (4th Cir. 2017) ("Where the sovereign has labeled the crime a felony, it represents the sovereign's determination that the crime reflects grave misjudgment and maladjustment.") The Government believes that the distinction between violent and non-violent offenders is irrelevant here because "irrespective of whether the offense was violent in nature . . . a felon has shown manifest disregard for the rights of others." *United*

States v. Everist, 368 F.3d 517, 519 (5th Cir. 2004). Hatfield objects, arguing that since this is an as-applied challenge, the Government must focus on Hatfield's individual circumstances rather than felons—violent or not—in the aggregate.

Both parties have erred. As an initial matter, the Government is correct that they do not have to focus on Hatfield's specific circumstances: when combating as-applied challenges, the Court focuses "on the relation [the statute] bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interests in an individual case." *Ward v. Rock Against Racism*, 491 U.S. 781, 801 (1989); *see also United States v. Edge Broad. Co.*, 509 U.S. 418, 431 (1993). But here, the Government has characterized the "problem" far too broadly. 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. And even if the Court narrows the scope to non-violent felons, it is still not enough—there are scores of non-violent felons in this country, all with massive discrepancies in prison sentences, fines, restitution payments, and more. Accordingly, the Court holds that the "class" of as-applied challengers here should be more specific to Hatfield's general circumstances: non-violent felons who received no prison time and a small monetary fine for their offense. That distinguishes this case from a recently failed § 922(g)(1) challenge in the Eastern District of Wisconsin, where the challenger had received twelve months and one day in jail plus a $50,000 fine. *See Kanter v. Sessions*, No. 16-C-1121, 2017 WL 6731496, at *1 (E.D. Wis. Dec. 29, 2017).

With that principle in mind, 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. Rather, Hatfield is correct that the Government has engaged in an "abdication of their obligations" here: the Government—instead of focusing on a

narrow class of as-applied challengers—rests their position on the broad idea that since felons have shown a "manifest disregard for the rights of others," the Government may immediately strip them of their Second Amendment rights. The Government seems to think this is the case even if they cut a plea deal with the felon that recommended zero days in prison, like they did with Hatfield. 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 also (2) the felon is so dangerous that they should be stripped of their right to own a gun and defend their home. This type of logical inconsistency shows that the Government is not taking the Second Amendment seriously. The Second Amendment *has to mean something* as a matter of law, policy debates aside. Overbroad policies ignoring a constitutional amendment are inexcusable.

ii. The fit between the Government's purpose and § 922(g)(1)

Even if the Government demonstrated an extremely strong public interest justification, they nevertheless fail at the next requirement: a close fit between their purpose and § 922(g)(1). The Government's arguments on purpose and fit blend together: they rely on the same cases that explain § 922(g)(1) keeps guns away from those Congress has labeled as irresponsible and dangerous. *See, e.g.*, *Barrett*, 423 U.S. at 218; *Small*, 544 U.S.at 393; *Hamilton*, 848 F.3d at 626. The Government also commands that the Court should award Congress "substantial deference" here because Congress is "better equipped than the judiciary to make predictive judgments . . . upon complex and dynamic issues." *Turner Broad. Sys. Inc. v. FCC*, 520 U.S. 180, 195 (1997); *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 210, n.21 (5th Cir. 2012); (Def.'s Mot. Summ. J. 18, ECF No. 41-1.)

The history of § 922(g)(1) highlights the irrationality of the Government's position. The Federal Firearms Act of 1938—the first major piece of federal legislation on this matter—only banned those "convicted of a crime of violence" from owning guns. PL 75-785, June 30, 1938, 52 Stat. 1250. That legislation did not reach non-violent offenders, like Hatfield. In 1961, Congress amended the statute to substitute "crime punishable by imprisonment for a term exceeding one year" for "crime of violence"—meaning the statute now reached all felons, regardless of their underlying crime. *United States v. Weatherford*, 471 F.2d 47, 51–52 (7th Cir. 1972). The Senate Report indicates that the purpose of the amendment was to "make it more difficult for the criminal elements of our society to obtain firearms." *Id.*

The caveat: six years later, Congress passed the Omnibus Crime Control and Safe Streets Act of 1968. That Act cemented § 922(g)(1) into its current form. But the Act also crafted something else: 18 U.S.C. § 925(c), a relief valve for felons impacted by § 922(g)(1) to restore their firearm rights by application to the Attorney General. Specifically, if the Attorney General (through the Bureau of Alcohol, Tobacco, Firearms, and Explosives [ATF]) determines that a felon is not "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," then the Attorney General may restore the felon's firearm rights. The statute also provides for judicial review of the Attorney General's decision. § 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.

If the Government argued here that § 925(c) is a relief valve that saves § 922(g)(1)'s poor fit, then they could have won this case. But the Government was foreclosed from bringing that

argument because *Congress stopped funding* § 925(c) in 1992—transforming what should have been a simple administrative proceeding into constitutional litigation. *See* PL 102–393, October 6, 1992, 106 Stat. 1729; *United States v. Bean*, 537 U.S. 71, 74 (2002). For example, in *Bean*, the challenger applied to ATF for a restoration of his firearm rights pursuant to § 925(c). *Id.* at 73. ATF, however, was forced to return the application and explained that the appropriations laws prevented the Bureau from expending funds on § 925(c) applications. The challenger then filed suit in federal court, relying on the judicial review provision in the statute. The Supreme Court denied the challenge, and explained that pursuant to the Administrative Procedure Act, federal courts could not engage in judicial review of the agency decision without an actual denial by the agency. *Id.* at 76–77. And in *Bean*, ATF did not deny the application—they merely returned it to *Bean* because of a lack of funding for § 925(c).

The Government indicated at oral argument that *Bean* has resolved the § 925(c) issue. The Government is wrong. *Bean* was a pre-*Heller* decision that analyzed when judicial review of an agency decision was appropriate under the Administrative Procedure Act. This case is post-*Heller*, and instead centers on an as-applied constitutional challenge to § 922(g)(1). Hatfield has not asked for a review of any agency decision, but rather asks the Court to declare that § 922(g)(1) is unconstitutional as-applied to him—the only thing he can do at this point, short of a presidential pardon. And Hatfield is correct: the Government has not demonstrated (1) an extremely strong public-interest justification for banning non-violent felons who received no prison time from possessing firearms for self-defense purposes, and (2) a close fit between that purpose and § 922(g)(1).

CONCLUSION

In the end, the Government's position in this case was peculiar. In the early 1990s, they recommended to the sentencing court that Larry Hatfield should receive zero months in prison for his crime: making a false statement to the Railroad Retirement Board, a statutory felony arising over 150 years after the Founders penned the Second Amendment. Hatfield has maintained a spotless record since his felony conviction. But now, the Government argues that Mr. Hatfield—and nonviolent felons in similar shoes—are so dangerous to society that they simply should not be able to enjoy their constitutional right to keep a gun in their homes for self-defense. Those two positions are irreconcilable. And not only that, the Government insists that this is not a matter for the federal courts to touch, but rather should be left to the other branches of government via a mechanism like 18 U.S.C. § 925(c)—which Congress does not even fund anymore. But while reasonable minds throughout the Government and the people may disagree on gun rights as a policy matter, they cannot ignore the Second Amendment in the process.

So for the foregoing reasons, the Court **DENIES** the motion for summary judgment by Jefferson B. Sessions, III, in his Official Capacity as the Attorney General of the United States (Doc. 41), **GRANTS** Larry Edward Hatfield's motion for summary judgment (*See* Docs. 47, 48); and **DECLARES** that 18 U.S.C. § 922(g)(1) is an unconstitutional violation of the Second Amendment as-applied to Larry Edward Hatfield: a non-violent felon who received no prison time for his offense.

IT IS SO ORDERED.

DATED: APRIL 26, 2018

s/ *J. Phil Gilbert*
J. PHIL GILBERT
DISTRICT JUDGE

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

LARRY EDWARD HATFIELD,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 16-cv-00383-JPG-RJD
	)	
LORETTA LYNCH, in her capacity as Attorney General of the United States,	)	
	)	
Defendant.	)	

MEMORANDUM AND ORDER

This matter comes before the Court on Defendant Loretta Lynch's, in her official capacity as the Attorney General of the United States, Motion (Doc. 13) to Dismiss Plaintiff's Complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6). Plaintiff filed a timely Response (Doc. 17) and the Defendant filed a Reply (Doc. 21). Reply briefs are discouraged under Local Rule 7.1(c) and should only be filed only in exceptional circumstances. Further, a party is required to state the exceptional circumstance in its brief. Defendant's reply brief does not state an exceptional circumstance and therefore, is stricken for failure to comply with Local Rule 7.1(c).

1. Background.

The Plaintiff is a convicted felon having pleaded guilty to, and was convicted of, one count of making false statements with regard to benefit claims under the Railroad Unemployment Insurance Act in violation of Title 18, United States Code, § 1001 on February 28, 1992. *See Untied States v. Hatfield*, 91-cr-30093-WLB, SDIL. As such, plaintiff is an individual convicted of a crime punishable by imprisonment of more than one year.

18 U.S.C. § 922(g) states that it shall be unlawful for any person who has been convicted of a crime punishable by imprisonment for more than one year to possess a firearm or ammunition. Plaintiff brings this action to challenge the provisions of 18 U.S.C. § 922(g) arguing that if he had been convicted in state court, he could seek relief in order to reinstate his right to possess a firearm. He further argues that federal law provides a means to restore civil rights, but that lack of funding restricts the Department of Justice from processing any such petitions except for corporations.

Therefore, plaintiff's complaint alleges that he has a fundamental right to "keep and bear arms in the home for self-defense" and that as an individual with a, "relatively minor non-violent felony, nearly 25 years ago, who has not had any trouble with the law in the intervening 25 years, and who would be eligible to go through a process to restore his civil right, and thereafter to lawfully possess arms, were he convicted in state court" should have a federal means to restore his civil rights. As such, plaintiff is seeking this court to declare 18 U.S.C. § 922(g) unconstitutional as applied to the plaintiff. (Doc. 1).

Defendant moves to dismiss the plaintiff's complaint on two grounds. First, defendant argues that the plaintiff lacks standing and as such, this Court lacks jurisdiction. Second, defendant argues that categorical bans on felony possession of firearms are not barred by the Second Amendment and 18 U.S.C. § 922(g) is constitutional as-applied to the plaintiff as it relates to a compelling governmental interest.

2. **Motion to Dismiss pursuant to 12(b)(1) - Standing**.

The doctrine of standing is a component of the Constitution's restriction of federal courts' jurisdiction to adjudicate actual cases or controversies. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *see* U.S. Const. art. III, § 2. "In essence the question of standing is

whether the litigant is entitled to have the court decide the merits of the dispute or particular issues." *Warth v. Seldin,* 422 U.S. 490, 498, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). Standing contains three elements:

> First, the plaintiff must have suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical. . . . Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be fairly . . . trace[able] to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court. . . .. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan, 504 U.S. at 560-61 (internal citations, quotations and footnotes omitted); *accord Sierra Club v. Franklin County Power of Ill., LLC*, 546 F.3d 918, 925 (7th Cir. 2008).

The party invoking federal jurisdiction bears the burden of establishing the elements of standing. *See Lujan*, 504 U.S. at 561, 112 S.Ct. 2130. "Since [the elements of standing] are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.,* with the manner and degree of evidence required at the successive stages of litigation." *Id.* In ruling on a motion to dismiss for lack of standing, the well-pleaded allegations of the complaint must be accepted as true. *See Warth*, 422 U.S. at 501, 95 S.Ct. 2197.

However, "[w]here standing is challenged as a factual matter, the plaintiff bears the burden of supporting the allegations necessary for standing with 'competent proof.'" *Retired Chicago Police Ass'n v. City of Chicago,* 76 F.3d 856, 862 (7th Cir. 1996). "Competent proof" requires a showing by a preponderance of the evidence that standing exists. *Id.* "[S]tanding goes to the

jurisdiction of a federal court to hear a particular case, it must exist at the commencement of the suit." *Perry v. Vill. of Arlington Heights*, 186 F.3d 826, 829-830 (7th Cir. 1999).

Defendant argues that the Plaintiff lacks standing because, "invalidating § 922(g)(1) is unlikely to redress his alleged injury (the inability to possess a firearm) because it would still be unlawful for the Plaintiff to possess a firearm under Illinois law." (Doc. 13-1, pg 12).

The statutory scheme of federal and Illinois state law with regard to the possession of a firearm or ammunition by an individual convicted of a crime punishable by imprisonment for a term exceeding one year is as follows:

18 U.S.C.A. § 922 provides that, "it shall be unlawful for any person …who has been convicted in any court of, a crime punishable by imprisonment for term exceeding one year …to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce. What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held."

The only exception to § 922 is that "[a]ny conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms." 18 U.S.C.A. § 921 (West)

Federal law does provide a means of relief from § 922. 18 U.S.C.A. § 925 states that:

> A person who is prohibited from possessing, shipping, transporting, or receiving firearms or ammunition may make application to the Attorney General for relief from the disabilities imposed by Federal laws with respect to the acquisition,

> receipt, transfer, shipment, transportation, or possession of firearms, 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.

Further, "[a]ny 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. The court may in its discretion admit additional evidence where failure to do so would result in a miscarriage of justice." 18 U.S.C.A. § 925.

It would appear that there is a federal procedure, along with a means of review, to seek restoration of an individual's right to possess a firearm. However, since 1992, the Bureau of Alcohol, Tobacco and Firearms ("ATF") who has delegated authority to act on § 925 applications, has been barred by appropriations from investigating or acting upon applications by individuals for relief under § 925. ("That none of the funds appropriated herein shall be available to investigate or act upon applications for relief from Federal firearms disabilities under 18 U.S.C. 925(c)". Treasury, Postal Service, and General Government Appropriations Act, 1993, Pub.L 102–393, October 6, 1992, 106 Stat 1729.[1]) Therefore, such relief is actually unavailable to the plaintiff due to appropriation restrictions.

With regard to Illinois state law, "[i]t is unlawful for a person to knowingly possess on or about his person or on his land or in his own abode or fixed place of business any weapon prohibited under Section 24-1 of this Act or any firearm or any firearm ammunition if the person has been convicted of a felony under the laws of this State or any other jurisdiction. This Section shall not apply if the person has been granted relief by the Director of the Department of State

[1] To date, Congress has subsequently retained the restrictions of funds.

Police under Section 10 of the Firearm Owners Identification Card Act." 720 Ill. Comp. Stat. Ann. 5/24-1.1

Section 10 of the Firearm Owners Identification Card Act provides that:

> (c) Any person prohibited from possessing a firearm under Sections 24-1.1 or 24-3.1 of the Criminal Code of 2012 or acquiring a Firearm Owner's Identification Card under Section 8 of this Act may apply to the Director of State Police or petition the circuit court in the county where the petitioner resides, whichever is applicable in accordance with subsection (a) of this Section, requesting relief from such prohibition and the Director or court may grant such relief if it is established by the applicant to the court's or Director's satisfaction that: when in the circuit court, the State's Attorney has been served with a written copy of the petition at least 30 days before any such hearing in the circuit court and at the hearing the State's Attorney was afforded an opportunity to present evidence and object to the petition;
> (1) the applicant has not been convicted of a forcible felony under the laws of this State or any other jurisdiction within 20 years of the applicant's application for a Firearm Owner's Identification Card, or at least 20 years have passed since the end of any period of imprisonment imposed in relation to that conviction;
> (2) the circumstances regarding a criminal conviction, where applicable, the applicant's criminal history and his reputation are such that the applicant will not be likely to act in a manner dangerous to public safety;
> (3) granting relief would not be contrary to the public interest; and
> (4) granting relief would not be contrary to federal law.
>
> 430 ILCS 65/10.

In this case, plaintiff is a person prohibited from possessing a firearm under Section 24-1.1 and he appears to meet all requirements for requesting relief under Section 10 except – (4) granting state relief would be contrary to federal law, *i.e.,*18 U.S.C. § 922. Defendant argues that the plaintiff's relief request is only speculative because, regardless of whether the plaintiff meets

all the requirements for state relief, it does guarantee that the state of Illinois will grant the relief requested.

However, the Court disagrees with the defendant that the only relief sought by the plaintiff is possession of a firearm within the state of Illinois. His injury is the alleged unconstitutional application of § 922 that prohibits him from even seeking state relief. Plaintiff's prayer of relief does not request that this Court award him the right to possess a firearm within the State of Illinois, it requests that this Court find that 18 U.S.C. § 922 is unconstitutional as applied to the plaintiff. Therefore, it is not speculative that, if successful in this litigation, the bar to seeking state relief would be redressed and even if Illinois state relief was never granted, the restrictions of § 922 would no longer apply and plaintiff would be permitted to possess a firearm under federal law.

As such, the Court finds that the plaintiff has suffered an injury in fact (the federal prohibition to possess a firearm and the prohibition to seeking state relief) – that is connected to the challenged action (the alleged unconstitutional application of 18 U.S.C. 922(g) as applied to the plaintiff) of the defendant in her official capacity as the Attorney General of the United States; and that the plaintiff's injury would be redressed by a favorable decision (possession of a firearm under federal law and ability to seek state relief). Therefore, the Court finds that the plaintiff has standing.

3. **Motion to Dismiss pursuant to 12(b)(6) - failure to state a claim**.

When reviewing a Rule 12(b)(6) motion to dismiss, the Court accepts as true all allegations in the complaint. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). To avoid dismissal under Rule 12(b)(6) for failure to state a claim, a complaint must contain a "short and plain statement of the claim showing that the pleader is

entitled to relief." Fed. R. Civ. P. 8(a)(2). This requirement is satisfied if the complaint (1) describes the claim in sufficient detail to give the defendant fair notice of what the claim is and the grounds upon which it rests and (2) plausibly suggests that the plaintiff has a right to relief above a speculative level. *Bell Atl.*, 550 U.S. at 555; *see Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *EEOC v. Concentra Health Servs.*, 496 F.3d 773, 776 (7th Cir. 2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (citing *Bell Atl.*, 550 U.S. at 556).

In *Bell Atlantic*, the Supreme Court rejected the more expansive interpretation of Rule 8(a)(2) that, "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief," *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). *Bell Atlantic*, 550 U.S. at 561–63; *Concentra Health Servs.*, 496 F.3d at 777. Now "it is not enough for a complaint to avoid foreclosing possible bases for relief; it must actually suggest that the plaintiff has a right to relief . . . by providing allegations that 'raise a right to relief above the speculative level.'" *Concentra Health Servs.*, 496 F.3d at 777 (quoting *Bell Atl.*, 550 U.S. at 555).

Nevertheless, *Bell Atlantic* did not do away with the liberal federal notice pleading standard. *Airborne Beepers & Video, Inc. v. AT&T Mobility LLC*, 499 F.3d 663, 667 (7th Cir. 2007). A complaint still need not contain detailed factual allegations, *Bell Atl.*, 550 U.S. at 555, and it remains true that "[a]ny district judge (for that matter, any defendant) tempted to write 'this complaint is deficient because it does not contain . . .' should stop and think: What rule of law *requires* a complaint to contain that allegation?" *Doe v. Smith*, 429 F.3d 706, 708 (7th Cir. 2005) (emphasis in original). Nevertheless, a complaint must contain "more than labels and

conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl.*, 550 U.S. at 555. If the factual detail of a complaint is "so sketchy that the complaint does not provide the type of notice of the claim to which the defendant is entitled under Rule 8," it is subject to dismissal. *Airborne Beepers*, 499 F.3d at 667.

Defendant argues that categorical bans on felony possession of firearms have been found to be constitutional and as such, plaintiff's complaint fails to state a claim upon which relief can be granted.

As noted earlier, Plaintiff is not claiming that § 922 is *per se* unconstitutional, but instead he is arguing that it unconstitutional as applied to him. An as-applied challenge is not stating that the law is unconstitutional as written, but that the law's application to a particular person under certain circumstances deprive that individual person of a constitution right. In this matter, plaintiff is claiming that § 922, as applied to him individually, violate his Second Amendment rights.

The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." *D.C. v. Heller*, 554 U.S. 570, 576, 128 S. Ct. 2783, 2788, 171 L. Ed. 2d 637 (2008). However, "[l]ike most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. For example, the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues. Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, *nothing in our opinion should be taken to cast doubt on*

longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms. *Id.* at 626 (*internal citations and footnotes omitted – italics added*).

Therefore, "we follow the en banc majority's holding that some categorical bans on firearm possession are constitutional. But 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. *Heller* referred to felon disarmament bans only as "presumptively lawful," which, by implication, means that there must exist the possibility that the ban could be unconstitutional in the face of an as-applied challenge. Therefore, putting the government through its paces in proving the constitutionality of § 922(g)(1) is only proper." *United States v. Williams*, 616 F.3d 685, 693 (7th Cir. 2010)(referencing *D.C. v. Heller*, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008)).

The Seventh Circuit has also state that, "[w]e have left open the possibility that a felon might be able to rebut that presumption [that a categorical ban on firearm possession by a felon is presumptively valid] by showing that a ban on possession is overbroad as applied to him." *Baer v. Lynch*, 636 Fed. Appx. 695 (7th Cir. 2016).

As such, plaintiff's complaint sufficiently describes his constitutional claim in sufficient detail to give the defendant fair notice of what the claim is; the grounds upon which it rests; and plausibly suggests that the plaintiff has a right to relief above a speculative level since the categorical bans on firearm possession are presumptively constitutional valid, but are open to possible rebuttal. Whether the defendant can meet its burden of demonstrating that § 922, as

applied to the plaintiff, passes constitutional muster goes to the merits of this matter and is not ripe for analysis within a Rule 12(b)(6) motion.

4. Conclusion.

Defendant's reply (Doc. 21) is **STRICKEN** for failure to comply with Local Rule 7.1(c). Defendant Loretta Lynch's, in her official capacity as the Attorney General of the United States, Motion (Doc. 13) to Dismiss Plaintiff's Complaint is **DENIED**.

IT IS SO ORDERED.

DATED: 12/20/2016

s/J. Phil Gilbert
J. PHIL GILBERT
DISTRICT JUDGE

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

LARRY E. HATFIELD,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 16-cv-383**
	)	
LORETTA E. LYNCH, in her official capacity as attorney general of the United States,	)	
	)	
Defendant.	)	

COMPLAINT

Comes now Larry E. Hatfield, by and through his attorney, and for his cause of action, states as follows:

1. That at all times relevant Plaitniff Larry E. Hatfield ("Hatfield") is a citizen and resident of the United States and Illinois, and resides in the Southern District of Illinois.
2. That Defendant is the Attorney General of the United States, and is sued only in her official capacity. No individual claims are made in this case.
3. That this Court has subject matter jurisdiction pursuant to 28 USC 1331, as this action arises under the Constitution and laws of the United States.
4. That Plaintiff is a convicted felon, having pleaded guilty to, and been convicted, in 1992, in Southern District of Illinois Case No. 91-30093-01-WLB, of one count of making false statements, in violation of 18 USC 1001, resulting in a loss to the United States Government of $3,837.64, related to claims made for Railroad Retirement Benefits. Other than the above referenced charge, Plaintiff has never been charged or convicted of any offence which makes him in-eligible to possess firearms under 18 USC 922(g), or

state law, and but for the above referenced charge, no federal law would prohibit Plaintiff's possession of firearms.

5. That Plaintiff has never been convicted of any crime of violence or threatened violence.
6. That presently, Plaintiff is a law abiding citizen, and has been for several decades.
7. That had Plaintiff been convicted in state court, he could seek relief from his firearms disability, including disability under federal law, and provide evidence that his rights should be restored, and if successful, Plaintiff could lawfully possess firearms under both federal and state law.
8. However, because Plaintiff was convicted in a federal court, the state restoration system does not allow for Plaintiff to restore his rights in Plaintiff's particular case.
9. That federal law provides that Plaintiff can petition the Department of Justice to restore his civil rights, however, since about 1992, Congress has prohibited, by appropriation riders, the DOJ from processing petitions to restore civil rights, except for corporations.
10. That Plaintiff is not a corporation.
11. That Plaintiff has a fundamental right to keep and bear arms in the home for self-defense, and while it may not be a violation of the Second Amendment to presumptively disqualify convicted felons from possessing arms, as applied to Plaintiff, who committed a relatively minor non-violent felony, nearly 25 years ago, who has not had any trouble with the law in the intervening 25 years, and who would be eligible to go through a process to restore his civil rights, and thereafter to lawfully possess arms, were he convicted in state court, or where he a corporation, or if the Congress would fund the civil rights restoration scheme adopted at the same time as the federal ban on felons

possessing arms, by virtue of his *federal* conviction, there is no mechanism for Plaintiff to restore his civil rights, no matter the merits of his position.

12. Plaintiff does not challenge the ability to presumptively categorically prohibit him from possessing arms, rather, Plaintiff challenges the constitutionality of presumptively categorically prohibiting him from possessing arms, while at the same time affording him no opportunity, no matter the merits, short of a presidential pardon, for an individualized assessment to show he is capable of safely and lawfully possessing arms, and thus restoring his civil rights.
13. While a categorical felon ban on firearms is "presumptively lawful", that means that there must exist the possibility that the ban could be unconstitutional in the face of an as applied challenge.
14. To determine whether the presumption of lawfulness gives way, a court must apply Skoin's "strong showing" requirement.
15. That in order to pass muster, the government must show that its objective is an important one and that its objective is advanced by means substantially related to the objective.
16. Plaintiff acknowledges that the government has a valid objective to keep firearms out of the hands of *violent* felons. However, Plaintiff has no history of violence, thus, as applied to Plaintiff, the government's objective is not met.
17. In fact, Plaintiff's specific crime has no element of violence in it.
18. Furthermore, as Plaintiff has no history of violence, Defendant's objective is not advanced by prohibiting Plaintiff from possessing arms in his home.

WHEREFORE, Plaintiff Humbly requests that this Honorable Court declare and find that, as applied to Plaintiff, 18 USC 922(g), which prohibits possession of firearms and ammunition by

persons convicted of certain crimes, that 18 USC 922(g) is unconstitutional, as applied, and enjoining Defendant from enforcing 18 USC 922(g) against Plaintiff based on his 1992 Conviction, in Southern District of Illinois Case No. 91-30093-01-WLB, and awarding Plaintiff his reasonable costs and attorney fees.

Dated: April 6, 2016

Respectfully Submitted,
Larry E. Hatfield,

By: s/Thomas G. Maag

Thomas G. Maag
Maag Law Firm, LLC
22 West Lorena Avenue
Wood River, IL 62095

Phone: 618-216-5291

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

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LARRY EDWARD HATFIELD,

Defendant.

CRIMINAL NO. 91-30093-01-WLB

AMENDED
STIPULATION OF FACTS

The Railroad Unemployment Insurance Act (45 U.S.C. 351 et. seq.) provides benefits for unemployed railroad workers and is administered by the Railroad Retirement Board (RRB). In order to obtain benefits, a qualified claimant completes a claim for benefits form for a given period of time, "the registration period", indicating thereon which days he is entitled to unemployment benefits and which days he is not entitled to unemployment benefits. A claimant must then sign the claim for benefits form certifying that the information provided is true and correct. Benefits cannot be claimed or paid for any date on which a claimant worked and accrued or received compensation from any employer. Further, benefits cannot be claimed or paid for any of the seventy-five (75) days, beginning with the first day of any registration period, following any false claim made by a claimant during the registration period.

From August 5, 1989 to January 5, 1990, Larry Edward Hatfield completed several of the above described claim for benefits forms and certified them as true and correct by signing them. The Defendant then submitted the forms to the RRB in Wood River,

Madison County, Illinois or caused the forms to be submitted to the RRB from Wood River, Madison County, Illinois. During this time period, the Defendant knowingly and fraudulently claimed and received RRB employment benefits for fifty-three days (53) that he worked and accrued or received compensation from an employer, Merchant Management Corporation of St. Louis, Missouri. By knowingly making false claims on fifty-three (53) days, the Defendant wrongfully obtaining $1,627.73.

SO STIPULATED:

Larry E. Hatfield
LARRY EDWARD HATFIELD
Defendant

Kit R. Morrissey
KIT R. MORRISSEY
Assistant U.S. Attorney

Steven M. Bailey
STEVE BAILEY
Attorney for Defendant

Date: February 28, 1992 Date: February 28, 1992

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

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LARRY EDWARD HATFIELD,

Defendant.

CRIMINAL NO. 91-30093-01-WLB

AMENDED
PLEA AGREEMENT

Pursuant to Rule 11 of Federal Rules of Criminal Procedure, the attorney for the Government and the attorney for the Defendant have engaged in discussions and have reached an agreement that contemplates the entry of a plea of guilty by the Defendant in this cause.

The full and complete Plea Agreement is as follows:

I.

1. Defendant acknowledges that he has been advised and does fully understand the following:

(a) the nature of the charges to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law; and

(b) that he has the right to plead not guilty or to persist in that plea if it has already been made, and he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself; and

(c) that if he pleads guilty, there will not be a further trial of any kind, so that by pleading guilty, he waives the right to a trial; and

1987, (re: special assessment, fines and restitution) and that the Court will assess a "Special Assessment" of $50 per felony count (18 U.S.C. 3013).

6. Defendant understands that the Court will impose a term of "supervised release" to follow incarceration, if incarceration is imposed. (18 U.S.C. 3583; U.S.S.G. § 5D1.1).

7. Defendant understands that the Court may impose a fine, costs of incarceration, and costs of supervision (the estimated costs of imprisonment presently are $1,415.56 per month; supervision $96.66 per month).

8. Defendant and the Government agree that at the time of sentencing on the offense to which the Defendant agrees to plead guilty, the Government will recommend as follows:

(a) that the Defendant be sentenced to three (3) years' probation;

(b) that as a condition of probation the Defendant be ordered to make restitution in the amount of $1,627.73, payable to the Department of Justice through the United States Attorney's Office, Nine Executive Drive, Suite 300, Fairview Heights, Illinois 62208.

(c) that as a condition of probation, the defendant be ordered to complete community service work in the form of a payment of $2,209.91 to the Railroad Retirement Board.

9. The Defendant and the Government agree that the Defendant may request any sentence allowable by law.

10. The Defendant states that he has read this agreement and has discussed it with his attorney, and understands it.

II.

1. The Defendant will enter a plea of guilty to an

Information charging a violation of Title 18, United States Code, Section 1001, wherein the maximum penalty that can be imposed is five (5) years' imprisonment or a $250,000 fine, or both, and not more than three (3) years' supervised release, pursuant to Title 18, United States Code, Section 3583.

2. The Government and Defendant agree that it appears that under the Sentencing Guidelines, after all factors have been considered, Defendant will fall under a Level 6, Criminal History Category I, where the sentence is 0 - 6 months. The Government and Defendant also agree that this provision is not binding on the Court and that the Court ultimately will determine the guideline range after receiving the Presentence Report and giving both parties the opportunity to comment thereon. The Defendant expressly recognizes that, regardless of the guideline range found by the Court, he will not be permitted to withdraw his plea. The Government agrees to recommend sentencing to the low end of the range ultimately found by the Court. The Government specifically reserves the right to argue for, present testimony or otherwise support the Court's findings as to Offense Level and Criminal History Category (which may be in excess of any agreement entered into herein between the Defendant and the Government).

3. Defendant and the Government agree that the Offense Conduct is set forth at U.S.S.G. § 2F1.1(a), thereby creating an initial Guideline Offense Level of 6.

4. Defendant and the Government agree that the loss involved was $1,627.73; therefore, the Offense Level will not be increased.

(U.S.S.G. § 2F1.1(b)(1)(A).

5. Defendant and the Government agree that the offense involved more than minimal planning; therefore, the Offense Level will be increased 2 levels. (U.S.S.G. § 2F1.1(b)(2)(A).

6. Defendant and the Government agree that Defendant has not obstructed justice in this case; therefore, the Offense Level will not be increased. (U.S.S.G. § 3C1.1).

7. Defendant and the Government agree that his role in the offense is described at U.S.S.G. § 3B1.4; therefore, his Offense Level should be neither increased nor decreased.

8. Defendant and the Government agree that no victim-related adjustments apply to this offense (U.S.S.G. § 3A).

9. Defendant and the Government agree that the Sentencing Guideline calculation is based on a Criminal History as follows (as per U.S.S.G. § 4):

Charge	Disposition	Guideline	Score
DUI - Illinois Revised Statutes, Ch. 95 1/2, Par. 11-501	1 year probation $600 fine & costs	4A1.1(c)	1
		Total	1

Defendant expressly recognizes that this calculation is not binding on the Court and that the final calculation will be based on the Presentence Report. Defendant recognizes that, regardless of the criminal history found by the Court, he will not be able to withdraw his plea.

10. Defendant and the Government agree that Defendant has voluntarily demonstrated a recognition and affirmative acceptance

of personal responsibility for this criminal conduct, and the Government will recommend a reduction of two Levels, reducing the Offense Level to 6 from Offense Level 8, as computed in Part II paragraph 3 through 8.

III.

No matters are in dispute.

Larry E. Hatfield
LARRY EDWARD HATFIELD
Defendant

Kit R. Morrissey
KIT R. MORRISSEY
Assistant U.S. Attorney

Steven D. Bailey
STEVE BAILEY
Attorney for Defendant

Date: 2/28/92

Date: February 28, 1992

FILED

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS

FEB 28 1992

STUART J. O'HARE
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS
EAST ST. LOUIS OFFICE

DISPOSITION

DATE: February 28, 1992

CRIMINAL NO. 91-30093-01

U.S.A. VS. Larry Hatfield

JUDGE: William L. Beatty

DEFENSE COUNSEL: Steven Bailey

REPORTER: Teri Hopwood

GOVT. COUNSEL: Kit Morrissey

DEPUTY: Patty Brown

( ) EVIDENCE PRESENTED No

TIME: - 10:13.

( ) CUSTODY OF ATTORNEY GENERAL

( ) CUSTODY OF BUREAU OF PRISONS

SENTENCE: COUNT(S) 1

3 yrs Probation (usual conditions)

Restitution $1,627.73 payable Dept. of Justice through USA's office in amounts and schedule as determined by probation dept

(✓) COURT FINDS THAT DEFT'S FINANCIAL CONDITION IS SUCH THAT HE IS UNABLE TO PAY COSTS

(✓) SPECIAL ASSESSMENT OF $ 50.00

( ) COURT RECOMMENDATION:

(✓) APPEAL RIGHTS

( ) COUNT(S) _____ ARE DISMISSED ON MOTION OF USA.

( ) BOND ( ) REVOKED ( ) REMANDED TO CUSTODY ( ) CONTINUED, TO REPORT AS NOTIFIED
( ) DESIGNATED INSTUTUTION ( ) US MARSHAL ON _____

15

DOJ0280

AO 245 S (Rev. 4/90) Sheet 1 - Judgment in a Crim. Case

United States District Court

SOUTHERN District of ILLINOIS

UNITED STATES OF AMERICA

V.

LARRY EDWARD HATFIELD

(Name of Defendant)

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: 91-30093-01 WLB

Steven Bailey
Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s) 1 of the Amended Information.
☐ was found guilty on count(s) _____ after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18:1001	False Statements	01/05/90	1

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984..

☐ The defendant has been found not guilty on count(s) _____, and is discharged as to such count(s).
☐ Count(s) _____ (is)(are) dismissed on the motion of the United States.
☒ It is ordered that the defendant shall pay a special assessment of $ 50.00, for count(s) 1, which shall be due ☐ immediately ☐ as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: _____

Defendant's Date of Birth: _____

Defendant's Mailing Address:
108 Hodge
East Alton, IL 62024

Defendant's Residence Address:
same

February 28, 1992
Date of Imposition of Sentence

W. L. Beatty
Signature of Judicial Officer

William L. Beatty, District Judge
Name & Title of Judicial Officer

February 28, 1992
Date

eod 03-05-92 mcg

★U.S.GPO:1990-722-448/10286