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.)

REPLY BRIEF FOR APPELLANT

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SUMMARY OF ARGUMENT

Plaintiff Larry E. Hatfield is prohibited from possessing firearms by 18 U.S.C. § 922(g)(1) because he was convicted of violating 18 U.S.C. § 1001(a)(2), a federal felony punishable by imprisonment of up to five years. In *District of Columbia v. Heller*, 554 U.S. 570, 592, 626 (2008), the Supreme Court identified the Second Amendment right as belonging to "law-abiding, responsible citizens," *id.* at 635, and it emphasized 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 right to possess firearms thus resembles other fundamental rights that have traditionally been subject to forfeiture upon felony conviction. Consistent with that historical understanding, no court of appeals has held section 922(g)(1) unconstitutional as applied to any individuals who have been convicted of a federal felony.

Hatfield's claim that he nonetheless is entitled to Second Amendment protection misreads this Court's precedent and misunderstands the traditional scope of the right. Hatfield argues that this Court has held that felons are entitled to Second Amendment protection—but the Court has expressly declined to decide the question. And in related contexts, the Court has 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.'" *United States v. Yancey*, 621 F.3d 681, 684-85 (7th Cir. 2010) (per curiam). Hatfield also argues that his crime should not disqualify him from possessing firearms because it

was not one of the nine common-law felonies at the Founding. But the traditional forfeiture of firearms rights attaches to any crime deemed sufficiently serious by a legislature to be punishable by greater than one year of imprisonment and thus appropriately labeled a felony. And Hatfield cannot distinguish his challenge on the basis that he "seeks to exercise his core Second Amendment right, *i.e.*, the right to possess a firearm in his home for self-defense." Br. 21. The forfeiture of Second Amendment rights upon felony conviction includes the right to possess firearms in the home.

Even if Hatfield were entitled to Second Amendment protection, application of section 922(g)(1) to him would satisfy the means-end scrutiny applicable under this Court's precedent. Hatfield's argument that the Court should apply heightened intermediate scrutiny to his challenge is contrary to that precedent. And the same precedent forecloses Hatfield's proposed inquiry into the particular circumstances surrounding his conviction. In seeking to disarm those who have proven not law-abiding and responsible, Congress appropriately relied on the historical definition of a felony, which reflects the legislature's judgment about the seriousness of a crime embodied in the conclusion that the crime is punishable by more than one year of imprisonment. Application of section 922(g)(1) to convicted felons, like Hatfield, is plainly consistent with this Court's precedent.

ARGUMENT

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

A. Hatfield Forfeited the Right to Possess Firearms upon Being Convicted of a Felony.

1. As discussed in our opening brief (Gov't Br. 7-11), the right to keep and bear arms is analogous to civic rights that have historically been subject to forfeiture by individuals convicted of felonies, including the right to vote, serve on a jury, and hold public office. The Second Amendment 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 L. & Contemp. Probs. 143, 146 (Winter 1986)). Recognizing that the Second Amendment right belongs to "law-abiding, responsible citizens," the Supreme Court has described the prohibition on the possession of firearms by felons as a "permissible" measure that falls within "exceptions" to the right to bear arms. *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008).

Hatfield is subject to 18 U.S.C. § 922(g)(1)'s prohibition because he was convicted of violating 18 U.S.C. § 1001(a)(2), a federal felony punishable by imprisonment of up to five years. No court of appeals has held section 922(g)(1) unconstitutional as applied to an individual who was convicted of a federal felony. And 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.), *cert. denied*, 138 S. Ct. 500 (2017); *see United States v. Rozier*, 598 F.3d 768, 771 (11th Cir. 2010) (per curiam); *United States v. Scroggins*, 599 F.3d 433, 451 (5th Cir. 2010); *United States v. McCane*, 573 F.3d 1037, 1047 (10th Cir. 2009); *see also Binderup v. Attorney General*, 836 F.3d 336, 349 (3d Cir. 2016) (en banc) (Ambro, J.) (holding that "persons who have committed serious crimes forfeit the right to possess firearms"), *cert. denied*, 137 S. Ct. 2323 (2017); *United States v. Phillips*, 827 F.3d 1171, 1174 (9th Cir. 2016) (recognizing that individuals convicted of disqualifying crimes "are categorically different from the individuals who have a fundamental right to bear arms" (quoting *United States v. Vongxay*, 594 F.3d 1111, 1115 (9th Cir. 2010)); *Tyler v. Hillsdale Cty. Sherriff's Dep't*, 837 F.3d 678, 708 (6th Cir. 2016) (en banc) (Sutton, J., concurring in most of the judgment) (stating that section 922(g)(1) permissibly imposes a firearms disability "as a legitimate consequence of a felony conviction").

2. Hatfield does not engage with these decisions and argues instead that, in *United States v. Williams*, 616 F.3d 685, 692 (7th Cir. 2010), this Court implicitly held that felons are entitled to Second Amendment protection in the course of rejecting an as-applied challenge to section 922(g)(1) under intermediate scrutiny. Br. 23. Hatfield focuses on *Williams*'s description of "[t]he academic writing on" the historical disarmament of felons as "'inconclusive.'" 616 F.3d at 692 (quoting *United States v. Skoien*, 614 F.3d 638, 650 (7th Cir. 2010) (en banc) (Sykes, J., dissenting)). Plaintiff

urges that by describing the academic writing as "inconclusive," *Williams* effectively held that felons are entitled to Second Amendment protection because, in *Ezell v. City of Chicago*, 651 F.3d 684, 703 (2011), the Court stated that it would apply means-end scrutiny to a Second Amendment challenge if "the historical evidence is inconclusive or suggests that the regulated activity is *not* categorically unprotected."

Hatfield's argument is without support in the Court's opinion in *Williams*. There, the Court determined that the plaintiff's challenge was readily resolved under intermediate scrutiny. In so doing, it did not implicitly suggest that felons are therefore entitled to Second Amendment protection. On the contrary, the Court expressly declined to "address whether convicted felons fell outside the scope of the Second Amendment's protections." *Williams*, 616 F.3d at 692.

This Court's analysis in other cases is similarly incompatible with plaintiff's assertion that the Court has held that persons convicted of a felony retain Second Amendment protections. The en banc majority in *Skoien* emphasized that "[m]any of the states, whose own constitutions entitled their citizens to be armed, did not extend this right to persons convicted of crime." 614 F.3d at 640. And this Court has separately 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.'" *United States v. Yancey*, 621 F.3d 681, 684-85 (7th Cir. 2010) (per curiam) (quoting *Vongxay*, 594 F.3d at 1118).

Nor did this Court hold in *Ezell* that there must be uniform agreement among scholars for felons to fall outside the Second Amendment's protection. *Ezell* involved a Chicago ordinance that banned shooting ranges within the city, 651 F.3d at 690-91, not a law like section 922(g)(1) that the Supreme Court recognized as a permissible "longstanding prohibition[,]" *Heller*, 554 U.S. at 626-27 n.26. Moreover, the Court in *Ezell* engaged in a thorough historical analysis before concluding that the challenged law implicated the Second Amendment. *See Ezell*, 651 F.3d at 704-06. That analysis would have been unnecessary if Hatfield were correct that any doubt as to the scope of the Second Amendment must be resolved in a challenger's favor.

Hatfield makes little effort to reconcile his reading of *Williams* with the reasoning of *Heller*, which emphasized that "the right secured by the Second Amendment is not unlimited." 554 U.S. at 626. Contrary to Hatfield's contention, Br. 19, the Supreme Court's description of "longstanding prohibitions" like section 922(g)(1) as "presumptively lawful" does not suggest the statute must be subject to a successful as-applied challenge. *Heller*, 554 U.S. at 626-27 & n.26. In referring to an array of laws that might be subject to a variety of challenges (including challenges brought under constitutional provisions other than the Second Amendment), it would have been surprising for the Court to describe those prohibitions as invariably lawful. And any uncertainty as to the Supreme Court's meaning is answered by the Court's declaration that "nothing in [its] opinion should be taken to cast doubt" on "longstanding prohibitions on the possession of firearms by felons," *Heller*, 554 U.S.

at 626, and its description of such laws as falling within "exceptions" to the Second Amendment, *id.* at 635.

3. Hatfield's efforts to distinguish himself from other felons are also unavailing. He claims that his challenge implicates the "core Second Amendment right" because he seeks "to possess a firearm in his home for self-defense." Br. 21. But the exclusion of felons from the Second Amendment's protection depends on their status as felons, not on where or in what manner they seek to possess firearms. *See, e.g.*, *United States v. Moore*, 666 F.3d 313, 319 (4th Cir. 2012) (rejecting argument that a felon's conduct "implicate[d] the core right of the Second Amendment" because "he was carrying the weapon for protection"); *United States v. Marzzarella*, 614 F.3d 85, 94 (3d Cir. 2010) ("[I]t cannot be the case that possession of a firearm in the home for self-defense is a protected form of possession under all circumstances.").

Hatfield also suggests that his conviction should not be disqualifying because his crime was not one of the nine English common-law felonies recognized at the Founding. Br. 24-29. Hatfield acknowledges, however, that founding-era legislatures did not treat his crime lightly. Br. 26 n.5; *see* Gov't Br. 14 & n.2. And he identifies no reason why the common-law status of his crime at the Founding should be given more weight than the legislative treatment of his crime at that time.

It is not the case, as Hatfield suggests, "that everyone who ever broke the law is outside the scope of the Second Amendment." Br. 28. Section 922(g)(1) applies only to offenses deemed sufficiently serious by a legislature to be punishable by greater

than one year of imprisonment and thus appropriately labeled a felony, which "represents the sovereign's determination that the crime reflects 'grave misjudgment and maladjustment.'" *Hamilton*, 848 F.3d at 626. While Hatfield apparently believes some modern felonies are "minor legal and regulatory infractions," Br. 29, "[t]he judiciary should not substitute its judgment as to seriousness [of a crime] for that of a legislature" as reflected in the legislature's decision to make a crime punishable by more than one year—*i.e.*, the traditional definition of a felony. *Blanton v. City of North Las Vegas*, 489 U.S. 538, 541-42 (1989). And determining the seriousness of crimes solely by reference to English common law would raise significant concerns, because it would mean that crimes like drug trafficking, aiding foreign terrorist organizations, and stockpiling chemical weapons are treated less seriously merely by virtue of their more recent vintage. *See* Gov't Br. 15.

Indeed, the forfeiture of rights upon felony conviction has never been limited to English common-law felonies in the manner that Hatfield advocates here. Hatfield argues that the right to vote is distinguishable from the Second Amendment right because "[t]he exclusion of felons from the vote has an affirmative sanction in § 2 of the Fourteenth Amendment." Br. 30 (alteration in original) (quoting *Richardson v. Ramirez*, 418 U.S. 24, 54-55 (1974)). But disenfranchisement of felons preceded the Fourteenth Amendment's enactment. *See Richardson*, 418 U.S. at 48 & n.14. "[E]leven state constitutions adopted between 1776 and 1821 prohibited or authorized the legislature to prohibit exercise of the franchise by convicted felons," and "twenty-nine

states had such provisions when the Fourteenth Amendment was adopted." *Green v. Board of Elections of City of N.Y.*, 380 F.2d 445, 450 (2d Cir. 1967). Hatfield misses the point when he argues that the other consequences of a felony conviction are less significant than the loss of firearms rights (even assuming that the loss of the right to vote should be discounted in this manner). 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 voting, jury service, and certain professions.

Hatfield's focus on the non-violent nature of his crime is similarly misplaced. "Irrespective of whether his offense was violent in nature, a felon has shown manifest disregard for the rights of others," *United States v. Everist*, 368 F.3d 518, 519 (5th Cir. 2004), and has therefore removed himself from the class of "law-abiding, responsible citizens," *Heller*, 554 U.S. at 635. Applying that reasoning, the Fourth Circuit held that crimes like Hatfield's result in the permanent forfeiture of firearms rights, because "[t]heft, fraud, and forgery are not merely errors in filling out a form or some regulatory misdemeanor offense; these are significant offenses reflecting disrespect for the law." *Hamilton*, 848 F.3d at 627. Other courts have reached the same result. *See, e.g.*, *Phillips*, 827 F.3d at 1175-76 (holding that a "conviction for misprision of felony can constitutionally serve as the basis for a felon ban," despite being "not a violent crime"); *Scroggins*, 599 F.3d at 451 (reaffirming "that criminal prohibitions on felons (violent or nonviolent) possessing firearms did not violate" Second Amendment).

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

1. Even if the Court were to hold that application of section 922(g)(1) to Hatfield implicates Second Amendment rights, under this Circuit's precedent, the Court must then "turn to means-ends scrutiny of the regulation," *Horsley v. Trame*, 808 F.3d 1126, 1131 (7th Cir. 2015), and evaluate Hatfield's challenge by "using the intermediate scrutiny framework." *Williams*, 616 F.3d at 692. 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), but not otherwise, *see Thompson v. Western 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").

Hatfield argues that the Court should apply "heightened intermediate scrutiny" to his challenge. Br. 35-36. That assertion, however, is foreclosed by this Court's precedent. As Hatfield acknowledges, "the Court applied *standard* intermediate scrutiny" in *Williams* to that as-applied challenge to section 922(g)(1). Br. 36. He nevertheless argues that a higher level of scrutiny is appropriate here because his crime was not violent. But this too is foreclosed by circuit precedent because the Court applied a non-heightened intermediate scrutiny standard in *Yancey*, 621 F.3d at 683-84 (section 922(g)(3)), and in *United States v. Meza-Rodriguez*, 798 F.3d 664, 672-73

(7th Cir. 2015) (section 922(g)(5)), neither of which involved past instances of violence. Nor does this Court's decision in *Ezell* support Hatfield's argument. There the Court invalidated an ordinance barring shooting ranges. The Court expressly distinguished that case from challenges to section 922(g), explaining that "the plaintiffs [in *Ezell*] *are* the 'law-abiding, responsible citizens' whose Second Amendment rights are entitled to full solicitude under *Heller*." *Ezell*, 651 F.3d at 708. And after *Ezell*, this Court has continued to apply intermediate scrutiny to as-applied challenges to section 922(g). *See Meza-Rodriguez*, 798 F.3d at 672.

The same precedent precludes this Court from declining to engage in means-end scrutiny altogether and simply declaring section 922(g)(1) "*per se* unconstitutional" as applied to Hatfield. Pl. Br. 55-58. This Court has repeatedly rejected as-applied challenges to section 922(g) after assuming that the challenger was entitled to Second Amendment protection and then applying intermediate scrutiny. *See, e.g., Williams*, 616 F.3d at 692-93. Hatfield does not attempt to reconcile his proposed approach with those decisions, which are binding in this case.

2. As explained in our opening brief (Gov't Br. 17-22), application of section 922(g)(1) to Hatfield satisfies the standard required by this Court's precedent because it is substantially related to achieving Congress's important interest in disarming those who have proven not to be law-abiding and responsible, and the prohibition is not substantially more extensive than necessary to serve that interest. Hatfield's response misunderstands both the interests served by the statute and this Court's precedent.

The government's interest in "disarm[ing] 'unvirtuous citizens,'" *Yancey*, 621 F.3d at 684-85, has long been recognized, and section 922(g)(1) 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). The purposes served by section 922(g)(1), therefore, are not limited, as Hatfield insists, to "preventing armed mayhem." Br. 46 (quoting *Skoien*, 614 F.3d at 642). Hatfield questions whether Congress's interest in restricting firearms to the law-abiding and responsible is important. Br. 44-46. But this Court has recognized that "the government has a strong interest in preventing people who already have disrespected the law . . . from possessing guns," and it has identified felons subject to section 922(g)(1) as one such category of people. *Meza-Rodriguez*, 798 F.3d at 673.

In his brief on appeal, Hatfield expressly disavows any claim that this Court should engage in "a 'crime-by-crime evaluation' of as-applied challenges under § 922(g)(1)." Br. 41. As Hatfield appears to acknowledge, 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); *Sessions v. Dimaya*, 138 S. Ct. 1204, 1223 (2018). Congress appropriately declined, therefore, to hinge section 922(g)(1)'s prohibition on an open-ended, crime-by-crime evaluation of federal and state codes, and instead tied it to the historical definition of a felony (*i.e.*, a crime punishable by more than one year in prison).

Despite his recognition that this Court should not independently evaluate the seriousness of particular felonies, Hatfield urges that section 922(g)(1)'s application can be justified only by reference to "the nature of [a felon's] conviction or [his] propensity for gun violence." Br. 46. But contrary to Hatfield's contention (Br. 47-48), this Court does not need "empirical evidence of a public safety concern" to uphold the prohibition. *Moore v. Madigan*, 702 F.3d 933, 940 (7th Cir. 2012). In *Meza-Rogriguez*, 798 F.3d at 673, for example, the Court upheld section 922(g)(5) under intermediate scrutiny, despite finding "no data" "that unauthorized immigrants are more likely to commit future gun-related crimes than persons in the general population." Instead, the key question is whether Congress has determined that a particular crime is sufficiently serious as to warrant a sentence of greater than one year and, therefore, whether individuals convicted of such a crime lack the virtue necessary to exercise the right to bear arms.

Hatfield's claim that section 922(g)(1) is overbroad rests on the same misapprehension. In asserting that "[m]erely labeling an offense a 'felony' does not demonstrate that the offense bears any relation whatsoever to the propensity for gun violence," Br. 52, Hatfield ignores that, by treating a crime as a felony (and making it punishable by more than one year in prison), the legislature has determined that the crime is a serious one. Hatfield's concern "that a punishment should be proportionate to the crime," Br. 52 (quoting *Solem v. Helm*, 463 U.S. 277, 284-85 (1983)), is more properly directed at the legislatively prescribed term of

imprisonment. And perhaps because legislatures do not lightly subject a crime to a significant term of imprisonment, Hatfield does not identify any case holding that any other consequence of a felony conviction—including the loss of the right to vote—is disproportionate based on the nature of the felony.

Underscoring his mistake, Hatfield claims that section 922(g)(1) is under-inclusive because it does not include various misdemeanors he believes would serve as more suitable bases for a firearms prohibition, even though the misdemeanors are punishable by less than one year of imprisonment. Br. 54-55. In so arguing, Hatfield ignores the fact that Congress *has* enacted laws to disarm certain misdemeanants with a propensity toward violence. *See* 18 U.S.C. § 922(g)(9) (prohibiting the possession of firearms by domestic violence misdemeanants).

Hatfield's reliance on 18 U.S.C. § 921(a)(20)(A)'s exemption of antitrust violations and similar offenses from section 922(g)(1) is similarly misplaced. Br. 52-53. Congress included that exemption to "provide uniform treatment of such offenses, both State and Federal." S. Rep. No. 89-1866, at 77 (1966). When the Gun Control Act was enacted, "a limited number of States ha[d] statutes making such offenses felonies," but "antitrust-type violations [were] not felonies under Federal law." *Id.* Because Hatfield's crime has long been labeled and punished as a felony, *see* Gov't Br. 14-15, the reasons underlying that limited exemption do not apply here. In any event, Congress can permissibly narrow section 922(g)(1)'s application without thereby altering the scope of the Second Amendment or negating the traditional

understanding that felony convictions result in the forfeiture of various rights, including the right to possess firearms. For the same reason, it is irrelevant that Congress previously permitted individuals to seek relief from section 922(g)(1) by demonstrating to the Bureau of Alcohol, Tobacco, Firearms and Explosives that they were "not . . . likely to act in a dangerous to public safety," 18 U.S.C. § 925(c), but abandoned that regime in 1992 after finding it infeasible. *See* Gov't Br. 19-20.

3. Hatfield primarily argues on appeal that his "as-applied challenge turns on the *actual facts* of his conviction, not some hypothetical analysis about the seriousness" of his crime. Br. 42. But the constitutionality of section 922(g)(1)'s application to an individual felon does not depend on that individual's dangerousness: disarmament of any felon serves the government's interest in restricting firearms to those who are law-abiding and responsible. And although Hatfield objects that "[a]n as-applied challenge 'requires an analysis of the facts of a particular case,'" Br. 40 (quoting *Field Day, LLC v. County of Suffolk*, 463 F.3d 167, 174-75 (2d Cir. 2006)), the specific facts of Hatfield's felony conviction are irrelevant. As the Supreme Court has explained in the First Amendment context, intermediate scrutiny can be satisfied even if "applying the general statutory restriction to [a plaintiff], in isolation, would not more than marginally" serve the government interest. *United States v. Edge Broad. Co.*, 509 U.S. 418, 430 (1993). And, thus, 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. *Id.*

In evaluating section 922(g)(1) under intermediate scrutiny, this Court therefore proceeds on a categorical basis and does not engage in an ad hoc inquiry into an individual's crime and character. This Court has repeatedly made clear that "Congress is not limited to case-by-case exclusions of persons who have been shown to be untrustworthy with weapons, nor need these limits be established by evidence presented in court." *Skoien*, 614 F.3d at 641; *see id.* ("*Heller* did not suggest that disqualifications would be effective only if the statute's benefits are first established by admissible evidence."); *Yancey*, 621 F.3d at 683 ("We have already concluded . . . that some categorical firearms bans are permissible; Congress is not limited to case-by-case exclusions."); *Williams*, 616 F.3d at 692 (explaining that if a plaintiff "falls within one of the categorical bans, the Second Amendment does not apply to him, assuming, of course, that the ban satisfies 'some form of strong showing'").

The Second Amendment does not require courts to engage in an ad hoc and standardless inquiry into a felon's individual circumstances as a prerequisite for section 922(g)(1)'s application. Disarmament of felons is "substantially related to [the] important governmental objective" of keeping firearms out of the hands of individuals who have proven themselves not to be law abiding and responsible, *Skoien*, 614 F.3d at 641-42, and does not sweep substantially more broadly than necessary to serve that objective. Hatfield's challenge to section 922(g)(1) therefore fails.

CONCLUSION

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

Respectfully submitted,

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NOVEMBER 2018

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 4,153 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B), according to the count of Microsoft Word.

/s/ Patrick G. Nemeroff
Patrick G. Nemeroff

CERTIFICATE OF SERVICE

I hereby certify that on November 2, 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
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