No. 18-2385

In the United States Court of Appeals for the Seventh Circuit

LARRY H. HATFIELD,
Plaintiff-Appellee,

v.

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

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS
CASE NO. 3:16-CV-383 (THE HON. J. PHIL GILBERT)

BRIEF OF *AMICUS CURIAE* EVERYTOWN FOR GUN SAFETY IN SUPPORT OF DEFENDANT-APPELLANT AND REVERSAL

ERIC TIRSCHWELL
MARK ANTHONY FRASSETTO
WILLIAM J. TAYLOR, JR.
EVERYTOWN FOR GUN SAFETY
SUPPORT FUND
132 East 43rd Street, #657
New York, NY 10017
etirschwell@everytown.org

DEEPAK GUPTA
JOSHUA MATZ
GUPTA WESSLER PLLC
1900 L Street NW, Suite 312
Washington, DC 20036
(202) 888-1741
deepak@guptawessler.com

Counsel for Amicus Curiae Everytown for Gun Safety

September 12, 2018

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 18-2385

Short Caption: Hatfield v. Sessions

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

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

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

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

Everytown for Gun Safety

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

Gupta Wessler PLLC

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

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

No parent corporations

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

Everytown for Gun Safety has no stock, and hence, no publicly held company owns 10% or more of its stock

---

Attorney's Signature: s/ Deepak Gupta Date: 9/12/2018

Attorney's Printed Name: Deepak Gupta

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

Address: 1900 L Street NW, Suite 312
Washington DC 20036

Phone Number: 202-888-1741 Fax Number: 202-88-7792

E-Mail Address: deepak@guptawessler.com

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 18-2385

Short Caption: Hatfield v. Sessions

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

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

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

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

Everytown for Gun Safety

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

Gupta Wessler PLLC

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

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

No parent corporations

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

Everytown for Gun Safety has no stock, and hence, no publicly held company owns 10% or more of its stock

---

Attorney's Signature: s/ Eric Tirschwell Date: 9/12/2018

Attorney's Printed Name: Eric Tirschwell

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

Address: 132 East 43rd Street, #657
New York, NY 10017

Phone Number: 646-324-8222 Fax Number: ____

E-Mail Address: etirschwell@everytown.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and regulations

Historical materials

Other authorities

INTEREST OF *AMICUS CURIAE*[1]

Everytown for Gun Safety is the nation's largest gun-violence-prevention organization, with over five million supporters. It was founded in 2014 as the combined effort of Mayors Against Illegal Guns, a national, bipartisan coalition of mayors combating illegal guns and gun trafficking, and Moms Demand Action for Gun Sense in America, an organization formed after the murder of twenty children and six adults in an elementary school in Newtown, Connecticut. Everytown also includes a network of gun-violence survivors who are empowered to share their stories and advocate for common-sense gun laws. Everytown's mission includes defending gun laws through the filing of amicus briefs that provide historical context and doctrinal analysis that might otherwise be overlooked. Everytown has filed such briefs in several recent cases. *See, e.g.*, *Kanter v. Sessions*, No. 18-1478 (7th Cir. June 15, 2008); *Culp v. Madigan*, No. 17-2998, 2018 WL 1951490 (7th Cir. Apr. 16, 2018); *Gould v. Morgan*, No. 17-2202 (1st Cir. June 21, 2018); *Wrenn v. District of Columbia*, No. 16-7025, 2016 WL 3928913 (D.C. Cir. July 20, 2016).

INTRODUCTION AND SUMMARY OF ARGUMENT

This case is about the right of the people to be free from gun violence and their power to pass laws to protect that freedom. Prohibitions on firearm possession by felons are a core part of both state and federal firearms regulation. They are at the heart of background-check systems, concealed-carry licensing schemes, and many arrests and prosecutions for firearms offenses. If accepted by this Court, Hatfield's arguments would significantly undermine these systems. As the Supreme Court made clear in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), this is not a result that the Second Amendment compels.

[1] Hatfield and the United States have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person other than the *amicus curiae* or its counsel made a monetary contribution to the preparation or submission of this brief.

Everytown submits this brief in support of the United States to make four points. *First*, the Court should affirm the judgment below on the ground that Hatfield, as a convicted felon, is disqualified from exercising Second Amendment rights. *Second*, if the Court concludes or assumes that Hatfield falls within the scope of the Second Amendment, it should follow nearly every other court and adjudicate this as-applied challenge by reference to the class that sweeps Hatfield within 18 U.S.C. § 922(g)(1)'s prohibition, rather than by reference to his individual circumstances. *Third*, under intermediate scrutiny, the application of § 922(g)(1) to felons convicted of deliberately lying to the government about issues material to a governmental inquiry is fully justified. *Finally*, Hatfield is no beneficiary of *Heller*'s statement about "presumptively lawful" regulations; to the contrary, that language dooms his position and requires reversal of the judgment below.

ARGUMENT

Hatfield's as-applied challenge to 18 U.S.C. § 922(g)(1) must fail for two independently sufficient reasons: Hatfield is wholly disqualified from exercising Second Amendment rights and, in any event, the application of § 922(g)(1) survives intermediate scrutiny.

I. Hatfield is disqualified from exercising Second Amendment rights.

"Like most rights, the right secured by the Second Amendment is not unlimited." *Heller*, 554 U.S. at 626. One of the most well-recognized and longstanding limits is reflected in § 922(g)(1) and its many state-law equivalents, which forbid felons from possessing firearms. The Supreme Court thus emphasized in *Heller* that "prohibitions on the possession of firearms by felons and the mentally ill" are "presumptively lawful." *Id.* at 626, 627 n.26; *see also McDonald*, 561 U.S. at 786 ("[O]ur holding [in *Heller*] did not cast doubt on such longstanding regulatory measures as 'prohibitions on the possession of firearms by felons and the mentally ill.'"). In this case, that presumption compels affirmance of the judgment below. As a felon, Hatfield is necessarily

disqualified from exercising Second Amendment rights. And even if some felons *could* exercise those rights, Hatfield's case presents no special circumstances showing his entitlement to do so.

A. Felons are categorically disqualified from exercising Second Amendment rights.

In *Heller*, the Supreme Court recognized that "prior convictions" have historically been understood to "disqualif[y]" a person from exercising Second Amendment rights. *United States v. Skoien*, 614 F.3d 638, 639 (7th Cir. 2010) (en banc) (quoting *Heller*, 554 U.S. at 635). The Court added that felon prohibitions, among other limitations on firearm ownership, are "permissible" regulations that stand as "exceptions" to the right to bear arms. *Heller*, 554 U.S. at 635; *see also McDonald*, 561 U.S. at 786. Consistent with that admonition, several courts of appeals have held that felons are categorically disqualified from invoking the Second Amendment. *See Hamilton v. Pallozzi*, 848 F.3d 614, 626 (4th Cir), *cert denied*, 138 S. Ct. 500 (2017); *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 id.* at 1050 (Tymkovich, J., concurring).

As the United States convincingly explains, that principle forecloses Hatfield's position. *See* DOJ Br. 7–15. By virtue of his felonious conduct, Hatfield excluded himself from the historically understood scope of the Second Amendment and therefore may not invoke it here.

B. At the very least, felons must rebut a substantial presumption against their retention of Second Amendment rights—and Hatfield cannot make that showing.

Hatfield and the district court appear to believe that it is the government's burden to demonstrate that prior felony convictions place a challenger outside the scope of the Second Amendment's protections. But that is not the law. Even if this Court were to hold that felons are not *categorically* disqualified from invoking the Second Amendment, it should reaffirm the

proposition that *Heller* places a thumb on the scale against a felon's entitlement to challenge "presumptively valid" prohibitions. *Baer v. Lynch*, 636 F. App'x 695, 697 (7th Cir. 2016).[2]

As the Fourth Circuit has explained, the burden in Second Amendment cases like this one is on the felon: "In order for [a party] to rebut the presumption of lawfulness regarding § 922(g)(1) as applied to him, he 'must show that his factual circumstances remove his challenge from the realm of ordinary challenges.'" *Hamilton*, 848 F.3d at 623; *see also United States v. Moore*, 666 F.3d 313, 319 (4th Cir. 2012) (explaining that *Heller*'s presumption of validity "reinforces the fact that a litigant claiming an otherwise constitutional enactment is invalid as applied to him must show that his factual circumstances remove his challenge from the realm of ordinary challenges"). Sitting en banc, the Third Circuit, too, recently embraced a version of this requirement:

> [A] challenger cannot prevail merely on his say-so. Courts must find the facts to determine whether he has adequately distinguished his circumstances from those of persons historically excluded from Second Amendment protections. Not only is the burden on the challenger to rebut the presumptive lawfulness of the exclusion at [this step], but the challenger's showing must also be strong. That's no small task. And in cases where a statute by its terms only burdens matters (*e.g.*, individuals, conduct, or weapons) outside the scope of the right to arms, it is an impossible one.

Binderup v. Sessions, 836 F.3d 336, 347 (3d Cir. 2016) (en banc), *cert. denied* 137 S. Ct. 2323 (2017); *accord United States v. Brooks*, No. 17-cr-250, 2018 WL 2388817, at *8 (W.D. Pa. May 24, 2018) (requiring a criminal defendant "to rebut the presumptive lawfulness of his exclusion from enjoying Second Amendment rights under § 922(g)(1), which is 'no small task'").

In this case, Hatfield was convicted of a serious felony. That type of felony is of longstanding vintage and undoubted seriousness. He has made no showing about his underlying

[2] The district court cited this Court's decision in *Ezell v. City of Chicago*, 651 F.3d 684, 702–03 (7th Cir. 2011), for the opposite proposition. *See Hatfield v. Sessions*, No. 3:16-cv-383, 2018 WL 1963876, at *4 (S.D. Ill. Apr. 26, 2018). But *Ezell* is inapposite. It was a case about the City of Chicago's blanket ban on firing ranges. It neither addressed nor resolved the question of where the burden lies in cases, like this one, involving challenges to regulations that *Heller* deemed "presumptively lawful." *Accord* DOJ Br. 16–17.

felony or any other conceivably relevant circumstances that would render his case exceptional. As a result, even if some truly extraordinary felons might be permitted to exercise Second Amendment rights under *Heller*, Hatfield is not among them.[3]

II. The application of § 922(g)(1) in this case survives intermediate scrutiny.

A. Under intermediate scrutiny, as-applied challenges to § 922(g)(1) do not turn on the challenger's individual circumstances and perceived future dangerousness.

If the Court nonetheless concludes that Hatfield retains his Second Amendment rights, it must engage in intermediate scrutiny. *See Williams*, 616 F.3d at 692. Generally speaking, there are two starkly divergent views of how that analysis should unfold. One view—embraced below by Hatfield—demands an intensely individualized, fact-specific inquiry. On that view, the Court must somehow take the measure of a felon's life experiences, including his convictions and subsequent conduct, and arrive at its own predictions about the risks of recidivism and future dangerousness. In so doing, the Court may rely on a cold, incomplete record and no other information. The Court must then take an equally exacting measure of the policies underlying § 922(g)(1), avoiding reference to broad empirical claims and generalized legislative determinations. And finally, the Court must balance its stripped-down account of the legislative goals against its own speculative conclusions about the real-world risks of allowing the felon to arm himself.

---

[3] In a series of cases filed by violent felons and domestic-violence misdemeanants, this Court has declined to address whether felons retain their Second Amendment rights. *See United States v. Williams*, 616 F.3d 685, 692 (7th Cir. 2010); *Skoien*, 614 F.3d at 640–41. Instead, on the assumption that felons *do* have such rights, it has held that challenged applications of § 922(g)(1) satisfy intermediate scrutiny. *See Williams*, 61 F.3d at 692. As we explain below, the same result should follow here if the Court concludes that it must resort to means-ends scrutiny. But, to the extent the Court is concerned that engaging in intermediate scrutiny might present harder or more intractable questions in the context of false-statement offenses, it would be appropriate to resolve this case by answering the threshold question whether felons retain their right to bear arms.

The United States takes a very different position and champions a superior methodology that has been accepted by most federal courts. *See* DOJ Br. 16–22. As the United States explains, Hatfield's individual circumstances are irrelevant. Instead, the key question is whether § 922(g)(1) is constitutional as applied to felons (or non-violent felons) as a class. This approach is justified by the very nature of intermediate scrutiny, which does not mandate that a firearm regulation be perfectly tailored to every single offender that it covers, but rather "permits categorical regulation of gun possession by classes of persons." *United States v. Booker*, 644 F.3d 12, 23 (1st Cir. 2011); *see also United States v. Chapman*, 666 F.3d 220, 231 (4th Cir. 2012) (recognizing that not every person covered by § 922(g)(8)(A)–(B) & (C)(ii) may be likely to misuse a firearm, but nonetheless upholding the provision because this "merely suggests that the fit is not a perfect one," and "a reasonable fit is all that is required under intermediate scrutiny"); *United States v. Yancey*, 621 F.3d 681, 683 (7th Cir. 2010) (holding that "categorical firearms bans are permissible" and emphasizing that "Congress is not limited to case-by-case exclusions"). Critically, on this view, the ultimate question is whether a person committed a felony justifying revocation of access to firearms. It is not "what sentence an individual received for his felony conviction, when he was convicted, or whether his particular crime can be characterized as nonviolent," since that inquiry collapses the analysis into an individualized assessment, with all the pitfalls of such an approach. *See also* DOJ Br. 6.

Here, the district court sought to identify a middle ground position between Hatfield's individualized approach and the Government's view (which, again, has been accepted by most federal courts). To start, the district court asserted that it would not perform an analysis focused on Hatfield's individual circumstances. *See* 2018 WL 1963876, at *7. It then stated, however, that the category of "non-violent" felons is too broad for an as-applied analysis. *Id.* Finally, without explanation, it identified two considerations that it deemed controlling: (1) whether Hatfield's felony was "non-violent" and (2) whether Hatfield had "received no prison time" and paid only a

"small monetary fine." *Id.* This novel approach requires courts to decide which felonies count as "non-violent," even though federal courts have famously struggled to ascertain which crimes (and which instances of certain crimes) qualify as crimes of violence. *See, e.g.*, *Sessions v. Dimaya*, 138 S. Ct. 1204, 1223 (2018); *Johnson v. United States*, 135 S. Ct. 2551, 2558 (2015). It then places dispositive weight on the sentence imposed, disregarding legislative judgments about the seriousness of offenses and rendering the Second Amendment analysis wholly dependent on whatever factors the original tribunal was allowed to consider in imposing a sentence. *But 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.'").

As a result, the district court's approach would require federal courts to elaborate a body of law governing which state and federal felonies qualify as "non-violent"—hardly an obvious judgment for many drug offenses and property crimes. And it would create arbitrary outcomes, in which the particular circumstances of a felon's sentencing effectively dictate which felons may possess firearms and which may not. These sentencing determinations reflect a variety of factors, including the defendant's cooperation with authorities, prior criminal history, sentences handed down to co-conspirators or accomplices, the jurisdiction in which the offense was committed, or even the defendant's race. Moreover, judicial discretion over sentences is limited by a series of predicate determinations made by prosecutors, including whether to bring charges in the first instance, what charges to bring, and whether to forgo more serious charges in exchange for a guilty plea on a lesser charge. *See* Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 Calif. L. Rev. 1471, 1505 (1993) ("Attaching specific sentences to criminal statutes so amorphous that any one of several can apply to a given course of criminal conduct yields a system in which the prosecutor, through his ability to control the charge, controls the sentence."). Prosecutorial

discretion, in turn, is often based on factors unrelated to the seriousness of the crime—for example, avoiding the burden and risk of going to trial on a more serious charge. *See* Gleeson, *The Sentencing Commission and Prosecutorial Discretion: The Role of the Courts in Policing Sentence Bargains*, 36 Hofstra L. Rev. 639, 640 (2008) (discussing prosecutors' reasons for negotiating sentences with defendants). Likely for these reasons, no other courts have accepted or articulated a test like this one. Indeed, as explained below, even the bare handful of outlier courts that have upheld as-applied attacks on § 922(g)(1) have employed analyses more restrictive (and more cautious) than that used below.

In contrast, the approach endorsed by the United States is true to precedent, workable, and consistent with separation of powers and due-process values. This explains why nearly every federal court—including this one—has rejected inquiries of the sort urged by Hatfield and the district court. For good reason, the prevailing rule in Second Amendment cases across the federal circuits is that as-applied challenges are properly adjudicated by reference to the class that sweeps the challenger within the prohibition—here, false-statement offenders. To demonstrate this consensus and show how it works in practice, we will discuss the circuits in sequence:

First Circuit. The First Circuit addressed the constitutionality of § 922(g)(1) in *United States v. Torres-Rosario*, 658 F.3d 110 (1st Cir. 2011). There, the defendant had committed drug offenses—not any violent felonies—but the court easily held that § 922(g)(1) could be applied to him. *See id.* at 113. Although the First Circuit then speculated that "the Supreme Court may be open to claims that some felonies . . . cannot be the basis for applying a categorical ban," the court promptly cast doubt on that possibility: "[S]uch an approach, applied to countless variations in individual circumstances, would obviously present serious problems of administration, consistency and fair warning." *Id.* Since *Torres-Rosario*, the First Circuit has evaluated as-applied challenges to § 922(g) without reference to the challenger's individual

circumstances. It has considered only whether the challenger belongs to a class—*e.g.*, "domestic violence misdemeanants"—to whom the federal firearms prohibitor may permissibly be applied. *See, e.g.*, *United States v. Carter*, 752 F.3d 8 (1st Cir. 2014); *United States v. Armstrong*, 706 F.3d 1, 8 (1st Cir. 2013), *cert. granted, judgment vacated*, 134 S. Ct. 1759 (2014) ("[Defendant's] arguments fail as an 'as-applied' challenge because a sufficient nexus exists here between the important government interest and the disqualification of domestic violence misdemeanants *like [defendant]*." (emphasis added)).

Second Circuit. The Second Circuit upheld the constitutionality of § 922(g)(1) in *United States v. Bogle*, 717 F.3d 281 (2d Cir. 2013). Citing *Heller*'s language about "longstanding prohibitions," it held that "§ 922(g)(1) is a constitutional restriction on the Second Amendment right of convicted felons." *Id.* at 281–82. Although this analysis was very short, it suggests that the Second Circuit may not see § 922(g)(1) as a burden on Second Amendment rights.

To the extent an as-applied challenge to § 922(g)(1) may nonetheless remain possible in the Second Circuit, it would be analyzed under *Kachalsky v. County of Westchester*, 701 F.3d 81 (2d Cir. 2012). There, the plaintiffs challenged New York's handgun licensing scheme, which required applicants to demonstrate "proper cause" to obtain a license to carry a concealed handgun in public. The plaintiffs argued "that the proper cause provision, on its face *or as applied to them*, violates the Second Amendment." *Id.* at 84 (emphasis added). In evaluating this as-applied challenge, the Second Circuit did not consider the plaintiffs' particular reasons for seeking firearms, their background, or the state's basis for denying their license applications. Instead, on the assumption that the Second Amendment applied, the court undertook an intermediate scrutiny analysis that considered only the law's general justifications and degree of fit to people such as the plaintiffs. *See id.* at 98 ("New York's law need only be *substantially related* to the state's important public safety interest. A perfect fit between the means and the governmental objective

is not required."). On this basis, it held that New York's regime was "constitutional under the Second Amendment as applied to Plaintiffs." *Id.* at 101; *see also United States v. Jimenez*, 895 F.3d 228, 236–37 & n.2 (2d Cir. 2018) (holding that defendant's as-applied challenge to § 922(g)(6) failed because, it found, "the statute is constitutionally applied to those, like [defendant], who have been dishonorably discharged for felony-equivalent conduct").

Third Circuit. Among the federal courts of appeals, the Third Circuit has proven most willing to consider the individual circumstances of people challenging § 922(g)(1). But even under that court's test, Hatfield's claim would not succeed. Two years ago, in a fractured en banc decision, a majority of the Third Circuit adopted a two-step framework for resolving as-applied challenges to presumptively valid firearms regulations. *See Binderup*, 836 F.3d 336. At the first step, the challenger must show that the regulation burdens Second Amendment rights. This requires the challenger to demonstrate, among other things, that he did not commit a "serious" criminal offense. *See id.* at 349. If the regulation *does* burden an individual's Second Amendment rights, then the analysis turns to means-ends scrutiny. *See id.*

Notably, the first step under *Binderup* does not consider the challenger's individual circumstances at all. It considers only whether his or her offense was "serious." And a majority of the *Binderup* court made clear that felonies are, virtually without exception, "serious." *See id.* at 353 n.6 (Ambro, J.); *see also id.* at 387–88 (Fuentes, J., concurring in part, dissenting in part, and dissenting from the judgments). As a result, even if Hatfield had brought his claim in the Third Circuit, that court would refuse to consider his individual circumstances and would instead dismiss his claim on the ground that he is disqualified from exercising Second Amendment rights.

In a dissent on behalf of seven judges, Judge Fuentes elaborated on the perils of requiring a hyper-individualized judicial assessment in every as-applied challenge to § 922(g)(1). *See id.* at 408–11. In particular, he emphasized the following concerns:

- The institutional limitations of federal courts would prohibit them from undertaking the wide-ranging interviews, document-collection efforts, and empirical analyses necessary to make a safe, reasoned determination about whether to re-arm a particular person.
- In garden-variety criminal prosecutions under § 922(g)(1), as-applied Second Amendment challenges would become routine and district courts would quickly become overwhelmed and unable to make intelligible constitutional distinctions based on individual circumstances within a rapidly evolving morass of precedents.
- A regime of individualized challenges would inevitably create such extreme arbitrariness that "compliance with principles of due process will quickly prove impossible."
- The same person could bring an endless series of challenges, arguing each time that he had been rehabilitated since the last one and should be allowed to possess a gun.
- The judiciary's recent experience with the residual clause of the Armed Career Criminal Act had revealed the impossibility of creating new categories—*e.g.*, "serious offense" or "violent felony"—and seeking to decide cases along those unstable lines. *See Johnson v. United States*, 135 S. Ct. 2551 (2015) (finding the residual clause void for vagueness).

Fourth Circuit. The Fourth Circuit has embraced the view that a defendant's individual circumstances are nearly always irrelevant. In *Hamilton*, the court "recognized the possibility that an as-applied challenge to a felon disarmament law could succeed in rebutting" *Heller*'s presumption of lawfulness. 848 F.3d at 622–23. But the court then pointedly observed that no challenge of that kind had ever succeeded:

> [W]e have rejected challenges to disarmament laws from domestic violence misdemeanants, *United States v. Staten*, 666 F.3d 154 (4th Cir. 2011), persons subject to domestic violence protective orders, *United States v. Chapman*, 666 F.3d 220 (4th Cir. 2012), and undocumented aliens, *United States v. Carpio–Leon*, 701 F.3d 974 (4th Cir. 2012). With respect to felon disarmament provisions, we have rejected challenges from not only

> felons with "violent" predicate offenses, *e.g.*, [*United States v. Smoot*, 690 F.3d 215 (4th Cir. 2012)], but also felons with "non-violent" predicate offenses, *United States v. Pruess*, 703 F.3d 242 (4th Cir. 2012).

Id. at 623. On that basis, *Hamilton* reaffirmed that "conviction of a felony necessarily removes one from the class of 'law-abiding, responsible citizens' for the purposes of the Second Amendment, absent the narrow exceptions mentioned below." *Id.* at 626. The only exceptions noted in the opinion are circumstances in which "the felony conviction is pardoned or the law defining the crime of conviction is found unconstitutional or otherwise unlawful." *Id.* at 626. Accordingly, the Fourth Circuit has focused on the application of § 922(g)(1) to the broader class of felons—both violent and non-violent—rather than to the particular circumstances of any individual felon.

Sixth Circuit. The Sixth Circuit has followed a similar course. In *United States v. Carey*, 602 F.3d 738, 741 (6th Cir. 2010), it held that "prohibitions on felon possession of firearms do not violate the Second Amendment," adding that Second Amendment rights are "specifically *limited* in the case of felon prohibitions." This language suggests that § 922(g)(1) may be valid in *all* applications. In that vein, the Sixth Circuit has specifically rejected the argument that individuals challenging the application of § 922(g)(9) are entitled to any sort of individualized assessment:

> To the extent [the plaintiff] argues for a chance to demonstrate in court that he no longer poses a risk of future violence, we have declined to "read *Heller* to require an individualized hearing to determine whether the government has made an improper categorization" and questioned "the institutional capacity of the courts to engage in such determinations." Our statement echoes the Supreme Court's doubt that courts have the capacity to determine whether an individual is "likely to act in a manner dangerous to public safety" because "an inquiry into [an individual's] background [is] a function best performed by the Executive, which, unlike courts, is institutionally equipped for conducting a neutral, wide-ranging investigation." *United States v. Bean*, 537 U.S. 71, 77 (2002).

Stimmel v. Sessions, 879 F.3d 198, 210 (6th Cir. 2018) (selected citations omitted).

Seventh Circuit. This Court, too, has refused to require the government to prove that § 922(g)(1) is precisely tailored to every single person it covers. In *Skoien*, the Court held that "some

categorical disqualifications are permissible: 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." 614 F.3d at 641; *see also id.* ("*Heller* did not suggest that disqualifications would be effective only if the statute's benefits are first established by admissible evidence."). Although *Skoien* left open the possibility that a "misdemeanant who has been law abiding for an extended period must be allowed to carry guns again," it did not resolve that issue. *See id.* at 645.

Since *Skoien*, this Court has rejected several as-applied challenges to § 922(g)(1). *See United States v. Shields*, 789 F.3d 733, 750–51 (7th Cir. 2015); *Williams*, 616 F.3d at 694; *Baer*, 636 F. App'x at 698. In each of these opinions, the Court described the particular offenses committed by the individual challengers, but then based its holding on the general proposition that § 922(g)(1) is constitutional as applied to anyone convicted of a "violent felony." *See Shields*, 789 F.3d at 750–51 ("Because Mr. Shields was convicted of three violent felonies, applying § 922(g)(1) here is substantially related to the Government's important interest in keeping firearms away from violent felons."); *Williams*, 616 F.3d at 694 ("Because Williams was convicted of a violent felony, his claim that § 922(g)(1) unconstitutionally infringes on his right to possess a firearm is without merit"); *Baer*, 636 F. App'x at 698 ("As to violent felons, the statute does survive intermediate scrutiny, we have concluded, because the prohibition on gun possession is substantially related to the government's interest in keeping those most likely to misuse firearms from obtaining them.").

Critically, this Court's analysis asks whether § 922(g)(1) is constitutional as applied to the class encompassing the challenger (*e.g.*, violent felons). It does not ask whether § 922(g)(1) is constitutional as measured against the challenger's individual circumstances. The Court made this point explicit in *Baer*: "In place of a categorical ban on gun possession by all felons, Baer proposes individualized determinations. But Congress already has spoken and was not limited to

case-by-case exclusions of people who have been shown to be untrustworthy with weapons. In any event, there are mechanisms in place for felons who wish to be excepted from coverage by the challenged federal and state prohibitions on gun possession." *Id.* at 697 n.1 (citations omitted).

Eighth Circuit. The Eighth Circuit has created rules with a similar upshot. In *United States v. Hughley*, 691 F. App'x 278 (8th Cir. 2017), the court observed that "we have rejected as-applied challenges to § 922(g)(1) when the challenger had a violent felony or was otherwise among those historically not entitled to Second Amendment protections." *Id.* at 279 (citing *United States v. Woolsey*, 759 F.3d 905, 909 (8th Cir. 2014)), *cert denied*, 138 S. Ct. 983 (2018). *Hughley*, in turn, extended that logic to a challenger who had committed *nonviolent* felonies. It reasoned that the defendant had not "shown that he is no more dangerous than a typical law-abiding citizen." *Id.* In so doing, the court rejected the defendant's arguments about the age of his felonies, the absence of a mechanism for restoration of rights, and the practically permanent nature of the ban. *Id.* at 280. Indeed, *Hughley* rejected as irrelevant or insufficient the individual circumstances most frequently cited in challenges to § 922(g)(1). Thus, in practice, *Woolsey* and *Hughley* held § 922(g)(1) constitutional as applied to virtually all felons—and did so with hardly any reference to the circumstances of individual challengers.

Ninth Circuit. The Ninth Circuit, too, has rejected individualized assessments of § 922(g)(1). The leading case is *United States v. Vongxay*, 594 F.3d 1111 (9th Cir. 2010). There, the court began by observing that "felons are categorically different from the individuals who have a fundamental right to bear arms." *Id.* at 1115. The court then reaffirmed *United States v. Younger,* 398 F.3d 1179, 1192 (9th Cir. 2005), which upheld § 922(g)(1) and rejected any distinction between violent and nonviolent felons. *See id.* at 1116. This conclusion, *Vongxay* added, was consistent with a long history of denying arms to "unvirtuous citizens." *Id.* at 1118. In subsequent opinions, the Ninth Circuit has repeatedly read *Vongxay* as standing for the proposition that § 922(g)(1) is always

constitutional as applied to the class of people it covers. *See, e.g.*, *Michaels v. Sessions*, 700 F. App'x 757, 758 (9th Cir. 2017); *Van Der Hule v. Holder*, 759 F.3d 1043, 1050–51 (9th Cir. 2014); *United States v. Schrag*, 542 F. App'x 583 (9th Cir. 2013); *United States v. Small*, 494 F. App'x 789 (9th Cir. 2012); *United States v. Duckett*, 406 F. App'x 185 (9th Cir. 2010). Notably, none of these cases involved consideration of the defendant's individual circumstances. Instead, each opinion reasoned that the defendant's conduct was not protected by the Second Amendment at all. Accordingly, there was no reason to engage in interest balancing or further scrutiny.

D.C. Circuit. Finally, the D.C. Circuit has upheld § 922(g)(1) on its face while suggesting a measure of sympathy for the approach adopted by the Third Circuit in *Binderup*. In *Schrader v. Holder*, 704 F.3d 980 (D.C. Cir. 2013), an individual convicted more than forty years earlier of common law misdemeanor assault and battery advanced a broad challenge to § 922(g)(1). The D.C. Circuit rejected his arguments but, at the end of its opinion, noted that the plaintiff had gestured to the argument that § 922(g)(1) was unconstitutional as applied to him specifically. *See id.* at 991. The court held that this argument was not properly before it, but then added this dicta:

> Were this argument properly before us, *Heller* might well dictate a different outcome. According to the complaint's allegations, Schrader's offense occurred over forty years ago and involved only a fistfight. Schrader received no jail time, served honorably in Vietnam, and, except for a single traffic violation, has had no encounter with the law since then. To the extent that these allegations are true, we would hesitate to find Schrader outside the class of "law-abiding, responsible citizens" whose possession of firearms is, under *Heller*, protected by the Second Amendment. *Heller,* 554 U.S. at 635[.]

Id. at 991. *Schrader* thus suggested—though it did not hold—that individual circumstances may, in some cases, preclude the application of § 922(g)(1) to particular misdemeanants.

In *Medina v. Sessions*, 279 F. Supp. 3d 281 (D.D.C. 2017), *appeal docketed*, No. 17-5248 (D.C. Cir. Oct. 26, 2017), Judge Cooper addressed the question left open by *Schrader*. The plaintiff (Medina) had been convicted decades earlier of making a false statement to a lending institution

in order to influence a lending decision. *See id.* at *1. As a result, Medina was barred by § 922(g)(1) from possessing a firearm. *See id.* Judge Cooper upheld this application of § 922(g)(1). He first held that Medina—as a convicted felon—fell outside the Second Amendment's protection. *See id.* at *5. He then held that, even if the Second Amendment did apply to felons, the application of § 922(g)(1) survived intermediate scrutiny. Here, Judge Cooper squarely rejected Medina's invitation to focus on his individual circumstances. To start, Judge Cooper emphasized that "'Congress is not limited to case-by-case exclusions of persons who have been shown to be untrustworthy with weapons.'" *Id.* at *7 (quoting *Schrader*, 704 F.3d at 991). He added that "the kind of individualized assessment regime that Medina envisions would prove a logistical and administrative nightmare for the courts." *Id.* at *8. Any such regime, he warned, would pose serious problems of consistency and fair warning, and might well be impermissibly vague under the Due Process Clause. *See id.* Further, it would involve the courts in highly subjective determinations that could have devastating consequences. *See id.*

This opinion captured the broad-based consensus among federal courts. In adjudicating as-applied Second Amendment challenges to § 922(g)(1), courts are never (or almost never) required to speculate about an individual challenger's likely future dangerousness and risk of recidivism. Consistent with *Heller*'s presumption of lawfulness, the nature of intermediate scrutiny, the limited institutional competence of the judiciary, and the legislative branch's settled prerogative to draw reasonable classifications, courts instead ask two broader questions: (1) is the challenger disqualified from exercising Second Amendment rights?; and (2) does § 922(g)(1) survive means-ends scrutiny as applied to people like him? These questions are properly resolved without an individualized assessment or a determination of whether the challenger received a light sentence for a "non-violent felony." Instead, courts ordinarily consider the class covering the

challenger. This holds the government accountable while respecting Congress's prerogative to avoid case-by-case determinations of when to deprive felons of lethal weapons.

B. As applied to felons convicted of false-statement offenses, § 922(g)(1) survives intermediate scrutiny.

In this case, the question is whether § 922(g)(1) may constitutionally be applied to individuals like Hatfield—in other words, to felons convicted of deliberately lying to the government about something material to a governmental inquiry. *See United States v. Gaudin*, 515 U.S. 506, 509 (1995). The answer to that question is yes. As the United States explains, there are powerful justifications for applying § 922(g)(1) to felons like Hatfield. *See* DOJ Br. 20–22; *see also id.* at 20 ("[L]ying to the government reflects an inherent disregard for the law and lack of virtue.").

Those arguments are bolstered by the historical record, which demonstrates that there is a substantial basis in tradition for holding that § 922(g)(1) properly covers those who knowingly lie to the government about material issues in a governmental inquiry. Indeed, the original antecedent of 18 U.S.C. § 1001 dates to 1863, *see United States v. Bramblett*, 348 U.S. 503, 504 (1955), and the history of punishing perjury, false statements, and comparable offenses runs back all the way to English common law, see *Gaudin*, 515 U.S. at 515–19 (tracing the history of perjury and false-statement offenses in Anglo-American law). Specifically, during the founding period, making false statements to receive a pension was a capital crime under English law. *See* Old Bailey Session Papers, *available at* https://bit.ly/2rKEhAS (documenting 48 examples of defendants being given capital sentences for fraud crimes, which generally consisted of misleading government officials to receive a government pension).

For purposes of intermediate scrutiny (as well as for assessing whether Hatfield falls within the scope of the Second Amendment right), this historical material sheds valuable light on a centuries-old judgment by Americans from all walks of life about the seriousness of false-

statement offenses and the importance of substantial consequences for their commission. *See, e.g.*, *Phillips*, 827 F.3d at 1175–76 (Bybee, J.) ("Because actions of the First Congress provide contemporaneous and weighty evidence of the Constitution's meaning, we are hard pressed to conclude that a crime that has always been a federal felony cannot serve as the basis of a felon firearm ban." (citations omitted)).

Thus, history and tradition—as well as common sense and the government's substantial empirical presentation—support the view that Hatfield is properly subject to § 922(g)(1). *See Phillips*, 827 F.3d at 1175. Fraudsters like Hatfield do not present any extraordinary circumstance requiring a judicial invalidation of Congress's effort to safeguard the public from further criminal mayhem.

C. *Heller*'s emphasis on the "presumptively lawful" status of felon-prohibitor statutes confirms that § 922(g)(1) may be constitutionally applied to Hatfield.

Hatfield may seek to rely on *Heller*'s statement that "prohibitions on the possession of firearms by felons" are "*presumptively* lawful." 554 U.S. at 626, 627 n.26 (emphasis added). Like other plaintiffs in Second Amendment cases, he may point out that presumptions are not unyielding: under the right circumstances, they can be rebutted. And so, he might reason, every firearm prohibitor governing felons—including § 922(g)(1)—*must* be unconstitutional in some applications. From that slender premise, he might even reverse-engineer a broad explanation of why § 922(g)(1) is unconstitutional as applied to him (and to many others, if he is right).

That argument is familiar to Second Amendment lawyers. And so are its many errors. To start, there are many reasons why the Supreme Court, in referring to a diverse array of "longstanding" firearms regulations, would refer to them as "presumptively" rather than "invariably" lawful. For example, a firearm regulation might be lawful unless it intrudes on other constitutional rights (*e.g.*, equal protection, due process). Or it might be lawful at the state level

but unlawful if enacted by Congress (due to limitations grounded in federalism). Or some of the "longstanding" regulations listed by the Supreme Court might always be lawful as a matter of the Second Amendment, while others may occasionally be unconstitutional as applied (or even on their face, if poorly drafted). *Heller*'s admonition regarding "presumptively lawful" regulations speaks in generalities rather than specifics; it hardly follows from this language that there *must* be reasons internal to the Second Amendment why every kind of regulation listed in *Heller* is, in fact, unconstitutional in some applications. *See Skoien*, 614 F.3d at 640 ("We do not think it profitable to parse these passages of *Heller* as if they contained an answer to the question whether § 922(g)(9) is valid . . . What other entitlements the Second Amendment creates, and what regulations legislatures may establish, were left open.").

In any event, while there might conceivably be some cases in which § 922(g) is unconstitutional as applied, this is not one of them. Hatfield was convicted of a felony, not a misdemeanor. Many courts would treat that fact as sufficient to end the inquiry, and this Court should follow their reasoning. But even if the Court were to probe further, the relevant question is *not* whether Hatfield's life story—as assessed on a cold record by three federal judges—suggests an idiosyncratically low risk of recidivism and future dangerousness. As explained above, analyzing this case in that manner would invite grave practical consequences and lead this Court to split from nearly all of its sister circuits. Instead, the crucial question is whether § 922(g)(1) can properly be applied to people like Hatfield—in other words, people who have committed this kind of crime. Just as some courts have tested the application of § 922(g) specifically to violent felonies, *e.g.*, *Williams*, 616 F.3d at 694, drug-related felonies, *e.g.*, *Torres-Rosario*, 658 F.3d 110, and domestic violence misdemeanors, *e.g.*, *Skoien*, 614 F.3d at 641–43, so too would it be appropriate for this Court to test the application of § 922(g)(1) to false-statement felonies. In that event, for the

reasons given above and by the United States, Hatfield's challenge must fail. As a matter of history, policy, and data, false-statement felonies easily justify application of § 922(g)(1).[4]

This approach to § 922(g)(1) preserves an important role for as-applied analysis. If any legislative body veers starkly from our history and traditions—and from sound public policy—in declaring conduct felonious, there might well be grounds to conclude that the felony prohibitor is unconstitutional as applied to people convicted of that crime. *See Williams*, 616 F.3d at 694. For example, it is hardly self-evident that the government could justify the application of the felony prohibitor to a person convicted of a single violation of a minor traffic law, a noise ordinance, or an anti-littering requirement. *See, e.g.*, *Phillips*, 827 F.3d at 1176 n.5 ("Can Congress or the States define petty larceny as a felony? Of course. Can a conviction for stealing a lollipop then serve as a basis under § 922(g)(1) to ban a person for the rest of his life from ever possessing a firearm, consistent with the Second Amendment? That remains to be seen.").

But this case does not involve a felony properly described as bizarre, unprecedented, or manifestly unrelated to any of the broad policies underlying felony prohibitors. Hatfield deliberately lied to change the result of a government process—and then benefited from his own lie. To suggest that a "presumptively lawful" restriction on firearm possession by felons cannot be applied to Hatfield is to turn *Heller*'s presumption on its head. If § 922(g)(1) is unconstitutional as applied here, it is surely unconstitutional in thousands of other cases—and is thus "presumptively" *unlawful* across a huge swath of its applications. That result would defy text,

[4] In the alternative, this Court could follow the approach marked by the Fourth and Ninth Circuits, and simply conclude that § 922(g)(1) is generally constitutional as applied to non-violent felons. *See, e.g.*, *Pruess*, 703 F.3d at 242; *Vongxay*, 594 F.3d at 1115–16; *see also Hughley*, 691 F. App'x at 279–80 (Eighth Circuit decision articulating an approach to non-violent felons that all but ensures that § 922(g)(1) is always constitutional as applied to them).

history, precedent, and common sense. For those reasons, Hatfield's claim should be rejected and the district court's decision upholding it should be reversed.

CONCLUSION

For the foregoing reasons, *amicus* Everytown for Gun Safety respectfully submits that the judgment below should be affirmed.

Respectfully submitted,

/s/ Deepak Gupta

DEEPAK GUPTA
JOSHUA MATZ
GUPTA WESSLER PLLC
1900 L Street NW, Suite 312
Washington, DC 20036
(202) 888-1741
deepak@guptawessler.com

ERIC TIRSCHWELL
MARK ANTHONY FRASSETTO
WILLIAM J. TAYLOR, JR.
EVERYTOWN FOR GUN SAFETY SUPPORT FUND
132 East 43rd Street, #657
New York, NY 10017
etirschwell@everytown.org

Counsel for Everytown for Gun Safety

September 12, 2018

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 6,997 words, excluding the parts of the brief exempted by Rule 32(f). This brief complies with the typeface requirements of Circuit Rule 32(b) because it has been prepared in proportionally spaced typeface in 12-point Baskerville font using Microsoft Word.

/s/ Deepak Gupta
Deepak Gupta

CERTIFICATE OF SERVICE

I hereby certify that on September 12, 2018, I electronically filed this brief with the Clerk of the Court for the U.S. Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system. I certify that all participants are registered CM/ECF users, and that service will be accomplished by the appellate CM/ECF system.

/s/ Deepak Gupta
Deepak Gupta