Case Nos. 13-5714

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

EDWARD L. YOUNG

Appellant

On Appeal from the United States District Court
For the Eastern District of Tennessee

BRIEF *AMICUS CURIAE*, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, IN SUPPORT OF APPELLANT

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   No.

Dated: October 4, 2013

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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

Amicus curiae National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of approximately 10,000, including private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers.

NACDL files numerous amicus briefs each year in the United States Supreme Court and other courts, in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. In particular, NACDL has a long-standing institutional commitment to rational and humane sentencing practices that affirm the dignity of the individual and files amicus briefs in cases which directly implicate those concerns

[1] Pursuant to Fed. R. App. P. 29(c)(5), counsel for *amicus curiae* state that no counsel for a party authored this brief in whole or in part, and that no person other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

ARGUMENT

I. The Eighth Amendment limits excessive mandatory federal punishments widely rejected by state laws and practices such as was imposed on Mr. Young for his harmless possession of shotgun shells in violation of 18 U.S.C. § 922(g)(1).

The "Eighth Amendment's prohibition of cruel and unusual punishment guarantees individuals the right not to be subjected to excessive sanctions." *Miller v. Alabama*, 132 S. Ct. 2455, 2463 (2012). As the Supreme Court has stressed, "the Amendment embodies broad and idealistic concepts of dignity, civilized standards, humanity, and decency . . . against which we must evaluate penal measures." *Estelle v. Gamble*, 429 U.S. 97, 102 (1976). *Accord Roper v. Simmons*, 543 U.S. 551, 560 (2005) (explaining that the Eighth Amendment "reaffirms the duty of the government to respect the dignity of all persons"); *Brown v. Plata*, 131 S. Ct. 1910, 1928 (2011) ("[Offenders] retain the essence of human dignity inherent in all persons. Respect for that dignity animates the Eighth Amendment prohibition against cruel and unusual punishment.").

Giving effect to the Constitution's limits on the application and severity of criminal sanctions — especially with respect to ***federal*** punishments created by Congress and advocated by the Justice Department — is a critical federal judicial responsibility: the Framers included the Eighth Amendment in the Bill of Rights to ensure federal judges would serve as an integral check and final safeguard against

any federal legislative and executive branch efforts to prosecute oppressively and to punish excessively. *See* Michael J. Zydney Mannheimer, *Cruel and Unusual Federal Punishments*, 98 Iowa L. Rev. 69, 100-10 (2012) (setting forth detailed historical account of the Eighth Amendment as a key "constraint on the federal government's power to punish"); *see also* John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 Virginia L. Rev. 899, 947 (2011) (highlighting that "the evidence from the ratification debates shows that Americans saw ... it was necessary to add a prohibition of cruel and unusual punishments to the Constitution to prevent Congress from abandoning traditional common law limitations on criminal punishment"); Declaration of Independence (complaining that tyrannical leaders have "erected a multitude of New Offices, and sent hither swarms of Officers to harass our people, and eat out their substance").

In the required judicial constitutional evaluation of criminal punishments — *i.e.*, when federal judges are called upon to evaluate a challenged penal measure in light of the "concepts of dignity, civilized standards, humanity, and decency" embodied in the Eighth Amendment — courts are to be "guided by objective indicia of society's standards, as expressed in legislative enactments and state practice," as well as by an "understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose." *Kennedy v. Louisiana*, 554

U.S. 407, 421 (2008). As the Supreme Court has most recently explained, courts must "look to these 'objective indicia' to ensure that [judges] are not simply following [their] own subjective values or beliefs" when ruling on Eighth Amendment claims, and also because "tangible evidence of societal standards enables [judges] to determine whether there is a 'consensus against' a given sentencing practice" rendering the punishment "unusual" for constitutional purposes. *Miller*, 132 S. Ct. at 2477-78.

In light of these well-established Eighth Amendment doctrines, as well as the judiciary's obligation to give these doctrines some enforceable effect in rare cases involving extreme applications of harsh federal sentencing laws, this Court must declare excessive and unconstitutional Mr. Young's fifteen-year mandatory federal prison term based on his harmless violation of 18 U.S.C. § 922(g)(1) involving the mere possession of a few shotgun shells. Indeed, federal prosecutors' efforts in this unique case to demand the imposition of a mandatory fifteen-year federal prison term is itself constitutionally oppressive and violates the Eighth Amendment "concepts of dignity, civilized standards, humanity, and decency." Moreover, as detailed below, all "objective indicia of society's standards, as expressed in legislative enactments and state practice" countermand any contention that it is constitutionally permissible to subject Mr. Young to a

mandatory fifteen-year federal prison term based only on his possession of a few shotgun shells.

A. States generally do not prohibit the possession of shotgun ammunition by convicted felons, nor do they authorize a lengthy mandatory prison sentence for any comparable offense.

In sharp contrast to federal law, the vast majority of U.S. states do not even criminalize possession of shotgun shells by a convicted felon – likely because mere passive possession of ammunition alone is neither inherently dangerous nor a ready instrument of crime absent possession of a firearm. *See generally* Ammunition Regulation Policy Summary by the Law Center to Prevent Gun Violence, available at http://smartgunlaws.org/ammunition-regulation-policy-summary/ (posted on May 21, 2012) (noting that only 11 states even "prohibit certain persons from purchasing or possessing ammunition" and that only "California, Delaware, Florida, Hawaii, Illinois and North Dakota prohibit the purchase or possession of ammunition by the same categories of persons who are ineligible to purchase or possess firearms under state law"). Consequently, Mr. Young's offense behavior could not have subjected him to any possible criminal prosecution, let alone a lengthy mandatory term of imprisonment, in the vast majority of states – including his home state of Tennessee because its laws do not

prohibit Mr. Young's possession of shotgun shells.[2]

Moreover, even had Mr. Young's conduct included actual possession of a shotgun, his behavior would have been legal or likely subject only to a relatively limited period of imprisonment in most other U.S. jurisdictions: preliminary research by Amicus into relevant legislative enactments and state sentencing practices concerning shotgun possession by convicted felons suggest that such conduct typically is not subject to mandatory minimum sentencing terms and will not even expose the very worst offenders to more than a ***maximum*** five-year term of imprisonment.[3] In other words, even if Mr. Young's offense conduct involved a much more serious violation of 18 U.S.C. § 922(g)(1), such as the active

[2] In fact, had Mr. Young even possessed a shotgun to accompany the shells, in his own state he still would not have committed a criminal offense. *See* Tenn. Code Ann. § 39-17-1307(c) ("A person commits a [Class E felony] offense who possesses a *handgun* and has been convicted of a felony" (emphasis added)). Tennessee does assign higher penalties to persons who possess a firearm after conviction of a felony involving the use of force, violence, or a deadly weapon or those convicted of a felony drug offense, *see* Tenn. Code. Ann. § 39-17-1307(b), but none of these provisions appears to be applicable to the specifics of Mr. Young's prior offenses.

[3] Amicus focused its research specifically on the states of the Sixth Circuit, and found that Tennessee allows possession of a shotgun by convicted felons, and that Kentucky, Ohio and Michigan would subject unlawful shotgun possession by a convicted felon to sentencing ranges of five years' imprisonment or less. *See* Ky. Rev. Stat. Ann. §§ 527.040 & 532.060(2) (defining offense and classifying felony levels); Mich. Comp. Laws § 750.224f; Ohio Rev. Code Ann. §§ 2923.13(A)(2) & 2929.14(3)(b) (defining offense and setting out available sentences for applicable felony level).

possession of a shotgun, he would be facing in most states, at worst, a discretionary prison term of a few years and he would be able to argue for, and a judge would be authorized to impose, a sentence involving little or no period of incarceration term. These state criminal sentencing realities further demonstrate that a rigid federal statutory scheme which subjected Mr. Young in this case to a ***mandatory minimum*** fifteen-year federal prison term for a violation of 18 U.S.C. § 922(g)(1) involving the mere passive possession of a few shotgun shells is oppressive and excessive in light of objective indicia of society's standards as expressed in legislative enactments and state practice.

Amicus does not assert that the objective indicia of society's standards reflected in state laws and practices precludes federal prosecution or any prison term for Mr. Young — even though the number of states with laws directly contrary to the extreme federal penal measure challenged here is far greater than what was deemed sufficient "evidence of national consensus against" a punishment in recent Eighth Amendment rulings in *Roper v. Simmons*, 543 U.S. 551 (2005) and *Atkins v. Virginia*, 536 U.S. 304 (2002). Rather, Amicus only contends that because a ***mandatory fifteen-year sentence*** for Mr. Young is significantly longer than any prison sentence he would receive in state courts — in fact, many times longer than even the longest possible sentence a state judge would be authorized to

ascribe — the imposition of the fifteen-year mandatory federal prison term based on Mr. Young's offense conduct violates the Eighth Amendment's prohibition of cruel and unusual punishments. *See Kennedy*, 554 U.S. at 426 (precluding application of punishment under the Eighth Amendment in part because defendant could not have received contested punishment "in 45 jurisdictions"); *Solem v. Helm*, 463 U.S. 277, 299-303 (1983) (finding Eighth Amendment violation when offender "has been treated more harshly than he would have been in any other jurisdiction, with the possible exception of a single State"); *Gonzalez v. Duncan*, 551 F.3d 875, 887-89 (9th Cir. 2008) (emphasizing, when finding mandatory punishment unconstitutional under the Eighth Amendment, that defendant's offense conduct would not have been a criminal offense in some states and that the defendant's sentence "is at the margin of what the states have deemed an appropriate penalty" for similar behavior); *see also* Mannheimer, *Cruel and Unusual Federal Punishments*, *supra*, 98 Iowa L. Rev. at 100-126 (explaining at great length why the most appropriate way to "operationalize [the Framers'] view of the Cruel and Unusual Punishments Clause [is] as both a reservation of state sovereignty and as a reference to state common law on criminal punishments" so as to limit any severe federal punishments that would be excessive in reference to state sentencing laws and norms).

B. State laws and federal practices are evolving away from severe extreme mandatory prison terms for low-level offenses

The Eighth Amendment's restriction on excessive sanctions, as the United States Supreme Court has explained, "flows from the basic precept of justice that punishment for crimes should be graduated and proportioned to both the offender and the offense." *Miller v. Alabama*, 132 S. Ct. 2455, 2463 (2012). The Supreme Court has further stressed that "the concept of proportionality is central to the Eighth Amendment," *id*., and this concept is to be viewed "less through a historical prism than according to the evolving 'standards of decency that mark the progress of a maturing society.'" *Id.* (quoting *Estelle v. Gamble*, 429 U.S. 97, 102 (1976)).[4]

[4] Though some courts and commentators have sometimes quite wrongly suggested that enforcement of Eighth Amendment proportionality requirements is only robust with respect to the application of the death penalty, Supreme Court rulings from both long ago and more recently have made crystal clear that the Eighth Amendment always has and always will impose significant constitutional limits on extreme severe sentencing outcomes, especially with regard to sentences that impose life-altering burdens such a lengthy mandatory prison term. *See, e.g.*, *Weems v. United States*, 217 U.S. 349 (1910) (declaring unconstitutional a 12-year prison term for less serious offense "cruel in its excess of imprisonment and that which accompanies and follows imprisonment" while noting that there are "degrees of homicide that are not punished so severely"); *Trop v. Dulles*, 356 U.S. 86 (1958) (declaring unconstitutional denationalization because this punishment constitutes "total destruction of the individual's status in organized society"); *Solem v. Helm*, 463 U.S. 277 (1983) (declaring unconstitutional life without parole sentence for defendant's seventh nonviolent felony); *Graham v. Florida*, 130 S. Ct. 2011 (2010) (declaring unconstitutional life without parole sentence for all juvenile nonhomicide offenses); *see also Miller v. Alabama*, 132 S. Ct. 2455 (2012) (declaring unconstitutional life without parole sentence for juvenile murderers if and whenever imposed without consideration of mitigating factors).

Consequently, this Court must judge whether Mr. Young's fifteen-year mandatory federal prison term is excessive and unconstitutional "not by the standards that prevailed in 1685 when Lord Jeffreys presided over the 'Bloody Assizes' or when the Bill of Rights was adopted [or even the standards when 18 U.S.C. § 922(g)(1) was enacted], but rather ***by those that currently prevail***." *Atkins*, 536 U.S. at 311 (emphasis added).

The continuing evolution of societal and legal standards as evidenced by sentencing reform developments and practices at both the federal and state level — especially with respect to embracing alternatives to incarceration for low-level offenses and avoiding the application of extreme lengthy mandatory prison terms for less-serious repeat offenders — demonstrate that the evolving standards of decency marking our society's progress provide even more support and justification for declaring unconstitutional Mr. Young's extreme fifteen-year mandatory federal prison term based on his harmless violation of 18 U.S.C. § 922(g)(1) involving the mere possession of a few shotgun shells.

Lawmakers on both sides of the political aisle in states nationwide have in recent years restricted the application of long prison term by revising or repealing mandatory sentencing provisions for lower-level and/or non-violent offenders. *See* Families Against Mandatory Minimums, *Recent State-Level Reforms to Mandatory Minimum Laws*, *available at* http://famm.org/wp-content/uploads/2013/08/FS-List-

of-State-Reforms-6.30.pdf (last updated June 2013) (listing 19 states having significantly reformed mandatory minimum sentencing laws in recent years); Bob Egelko, *Prop. 36's '3 Strikes' Change Working, Lawyers Say*, S.F. Chron., Sept. 9, 2013 (discussing California's Proposition 36 which "passed with a 69 percent majority in November [2013 and] abolished life terms for criminals whose third strikes were neither serious nor violent and instead sentenced them to twice the normal term"); *see also Conservatives Join Push to Roll Back Mandatory Prison Sentences*, FoxNews.com, http://www.foxnews.com/politics/2013/09/29/ conservatives-join-push-to-roll-back-mandatory-prison-sentences/ (last visited Oct. 4, 2013) ("A grassroots effort to roll back mandatory prison sentences — based on such conservative principles as less government and personal responsibility — appears to be gaining momentum by winning changes in several states and following a similar trend in Washington.");

Marc Mauer & Ryan S. King, The Sentencing Project, *A 25-Year Quagmire: The "War On Drugs" and Its Impact on American Society* at 25-26 (Sept. 2007) (detailing "evolving momentum for reform" as "legislative bodies [have been] reconsidering the wisdom of mandatory sentencing laws").

In the federal system in recent years, we have seen leaders of all three branches of government reforming, and/or advocating forcefully for alternatives to, mandatory prison terms of incarceration for low-level offenses and offenders, even

for repeat offenders like Mr. Young. Most tangibly, through passage of the Fair Sentencing Act of 2010, Congress significantly reduced sentences mandated and recommended for all less serious crack offenses not only for first offenders, but also for persons with even a significant criminal history. And, surely in part because this statutory reform has been so well received, leading members of Congress representing both major political parties are advancing additional legislation that would more broadly repeal or restrict the applicability of mandatory prison terms for low-level offenses and offenders like Mr. Young. *See generally* The Smarter Sentencing Act of 2013, S. 1410, 113th Cong. (2013) (co-sponsored by Senators Richard Durbin and Mike Lee), *available at* http://www.govtrack.us/congress/bills/113/s1410/text; The Justice Safety Valve Act of 2013, S. 619, 113th Cong. (2013) (co-sponsored by Senators Patrick Leahy and Rand Paul), *available at* http://www.govtrack.us/congress/bills/113/s619/text.

In addition, the Obama Administration has even more recently demonstrated the executive branch's eagerness to move away from the broad application of lengthy mandatory prison terms: Attorney General Eric Holder announced in August 2013 that the Justice Department will no longer pursue mandatory minimum sentences for certain low-level, nonviolent offenders, including for some offenders with even a significant number of prior convictions. *See* Attorney

General Eric Holder, *Memorandum to the United States Attorneys and Assistant Attorney General for the Criminal Division: Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases* (August 12, 2013) [hereinafter Holder, *Memorandum*]; Attorney General Eric Holder, *Remarks at the Annual Meeting of the American Bar Association's House of Delegates* (Aug. 12, 2013) [hereinafter Holder, *Remarks to ABA*], *available at* http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130812.html]. In his Memorandum to U.S. Attorneys, Attorney General Holder articulated the widely-recognized reality that in "some cases, mandatory minimum and recidivist enhancement statutes have resulted in unduly harsh sentences and perceived or actual disparities." Holder, *Memorandum* at 1. In his Remarks to the American Bar Association, Attorney General Holder lamented that "too many Americans go to too many prisons for far too long, and for no truly good law enforcement reason," and that "statutes that mandate inflexible sentences regardless of the individual conduct at issue in a particular case … oftentimes generate unfairly long sentences [and] breed disrespect for the system." Holder, *Remarks to ABA*.

CONCLUSION

The basic facts of this case read like a fictional story about a totalitarian dystopian state imagined by the likes of Franz Kafka or George Orwell: as a

punishment for unintentionally coming into possession of a few shotgun shells, federal law gave the judge no choice but to order that Edward Young spend the next 15 years of his life locked in a cage. And yet, remarkably, this story is not only true, but it is one of many similar and tragic stories taking place in the United States of America — a country which Abraham Lincoln famously said in his Gettysburg Address was "conceived in liberty" and which still has its school children pledge a commitment to "liberty and justice for all." Pledge of Allegiance (codified in Title 4 of the United States Code § 4).

Fortunately, thanks to the grand design of the Constitution and the Framers' creation of a system of judicial review in which independent judges must check and balance the exercise of governmental power by other branches, this Court need not and must not tolerate this state of affairs. The Eighth Amendment's prohibition on cruel and unusual punishment not only guarantees Americans the right not to be subjected to excessive sanctions, but also empowers and obligates the judiciary to declare unconstitutional the kind of oppressive prosecution and sanction that this case represents. Indeed, to parrot the recent remarks of the U.S. Attorney General, for this Court to "settle for [upholding] such an unjust and unsustainable status quo [in this case] …would be to betray our history, our shared commitment to justice, and the founding principles of our nation." Holder, Remarks to ABA.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with Federal Rules of Appellate Procedure 29(c)-(d) and 32(a)(7)(B)(i). This brief was prepared in Microsoft word, using Times New Roman 14-point font. According to the word count function, the word count, including footnotes and headings, is 3252.

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CERTIFICATE OF SERVICE

It is hereby certified that on October 4, 2013, the foregoing brief was electronically filed with the Clerk of the Court by using the ECF system. Counsel for the appellants and appellees are registered ECF users and will be served by the ECF system.

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