No. 13-1487

IN THE

Supreme Court of the United States

TONY HENDERSON, *Petitioner*,
v.
UNITED STATES, *Respondent*.

On Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

Brief *Amicus Curiae* of
Gun Owners of America, Inc., Gun Owners Foundation, U.S. Justice Foundation, Lincoln Institute for Research and Education, Abraham Lincoln Foundation, Institute on the Constitution, Conservative Legal Defense and Education Fund, and Policy Analysis Center in Support of Petitioner

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MISCELLANEOUS

INTEREST OF THE *AMICI CURIAE*[1]

Gun Owners of America, Inc. and The Abraham Lincoln Foundation for Public Policy Research, Inc. are nonprofit social welfare organizations, exempt from federal income tax under Internal Revenue Code ("IRC") section 501(c)(4). Gun Owners Foundation, U.S. Justice Foundation, The Lincoln Institute for Research and Education, Conservative Legal Defense and Education Fund, and Policy Analysis Center are nonprofit educational organizations, exempt from federal income tax under IRC section 501(c)(3). Institute on the Constitution is an educational organization.

These organizations were established, *inter alia*, for educational purposes related to participation in the public policy process, which purposes include programs to conduct research and to inform and educate the public on important issues of national concern, the construction of state and federal constitutions and statutes related to the rights of citizens, and questions related to human and civil rights secured by law, including the defense of the rights of crime victims, the rights to own and use firearms, and related issues. Each organization has filed many *amicus curiae* briefs in this and other courts.

These *amici* filed *amicus curiae* briefs in the following recent asset forfeiture cases in this Court:

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[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

- Kaley v. United States, ___ U.S. ___, 188 L.Ed.2d 46 (2014)[2]

- Luis v. United States, No. 14-419, On Petition for *Certiorari* (pending) (Nov. 26, 2014)[3]

SUMMARY OF ARGUMENT

The Government has erroneously assumed that, upon conviction of a felony, the federal ban on a convicted felon "possess[ing]" a firearm automatically erases all rights of ownership to all of the convicted felon's firearms. Thus, the Government would deprive any such felon of any opportunity even to convey title to those firearms — even though the firearms were not involved in any crime and even though the person to whom the firearms are to be conveyed is lawfully permitted to receive them. According to the Government's theory, any such conveyance would necessarily violate 18 U.S.C. § 922(g)(1) because the felon could not convey title to the firearms without taking "constructive possession" of them and, therefore, such a conveyance cannot be countenanced as a matter of public policy.

The Government has given no reason why a proposed transfer of title of a felon's firearms must be deemed an act of "constructive possession." To the

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[2] http://www.lawandfreedom.com/site/constitutional/KaleyvUS_amicus.pdf.

[3] http://www.lawandfreedom.com/site/constitutional/Luis%20USJF%20Amicus%20Brief.pdf.

contrary, the Government has assumed that "constructive possession" is the equivalent of "actual possession." In fact, however, "constructive possession" is a legal fiction to be discriminately applied to only those cases where, on the basis of the specific policies at issue in each case, a person's relationship to the property in question cannot constitute anything but physical possession.

Such is not the case where, as here, a felon seeks only to exercise his ownership right to convey title, without being in actual possession of the thing conveyed. Moreover, such is not the case where, as here, the act dispossesses the felon of the firearms, thus actually furthering the policy of 18 U.S.C. § 922(g)(1) to keep firearms out of the hands of persons deemed by the Government to threaten public safety.

Not only does the Government's "constructive possession" argument fail to further the underlying policy of federal firearms laws, but also as employed here, it would undermine the nation's property forfeiture laws, completely bypassing the substantive and procedural protections designed to afford due process of law before depriving a person of his property rights. Indeed, application of the constructive possession doctrine to the facts of this case would enable the Government to deprive the rightful owner of private property which is neither contraband, nor an instrumentality of a crime, nor the fruit of any criminal activity. It would enable the Government to take that property without even a smidgeon of evidence that the Government has a superior property right.

Finally, the Government's misuse of the "constructive possession" doctrine infringes the Second Amendment right to keep and bear arms. The federal felony ban was enacted into law in 1968 on the erroneous assumption that the right to keep and bear arms was not an individual right, and that ownership rights in firearms were subject to the discretion of the Government. In 2008, this Court ruled to the contrary. The Government's use of the "constructive possession" doctrine here infringes on the marketplace of constitutionally protected arms secured to the People by the Second Amendment.

Moreover, rather than treating firearms as a class of property entitled to special constitutional protection, the courts below isolate firearms for *de facto* forfeiture to the federal Government, treating them as a most highly disfavored category of personal property. According to the rule approved below, any gun owner indicted for a felony would need to preemptively forfeit his Second Amendment rights and dispose of his entire firearms collection upon indictment in order to protect his and his family's financial well-being.

ARGUMENT

I. THE DOCTRINE OF "CONSTRUCTIVE POSSESSION" DOES NOT APPLY WHERE A CONVICTED FELON SEEKS A FIREARMS TRANSFER TO RID HIMSELF OF ALL INCIDENTS OF OWNERSHIP.

Without question, upon Petitioner Henderson's conviction for violating 21 U.S.C. § 841(a)(1),

Henderson did not physically "possess" any of the firearms at issue in this case. Indeed, he was attempting to dispossess himself of them. In compliance with a request of the U.S. Magistrate Judge, Henderson had relinquished physical possession, transferring his firearms to the Federal Bureau of Investigation ("FBI"). However, after conviction and after serving his sentence, Henderson requested transfer of his firearms to a purchaser, but the Government took the position that such a transfer would require Henderson to unlawfully "possess" those firearms in violation of 18 U.S.C. § 922(g)(1).[4] Employing a new variant of the doctrine of "constructive possession," the Government successfully blocked the transfer, convincing the courts below that it was possible for Henderson to unlawfully "possess" his firearms even without actual physical possession.

The Government has erroneously assumed that, for the purpose of enforcement of 18 U.S.C. § 922(g)(1), what it terms "constructive possession" is the legal equivalent of "actual possession." *See* Brief for the Government in Opposition ("Govt. Br.") at 6. *See also* United States v. Zaleski, 686 F.3d 90, 92-93 (2d Cir. 2012). For this proposition, the Government relies heavily upon United States v. Felici, 208 F. 3d 667 (8th Cir. 2001), which summarily stated that a felon's

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[4] The Government did not charge Henderson with violation of section 922(g)(1) for making the attempt to transfer his firearms collection to a third party, but the Government's creative theory of constructive possession is so encompassing that it could be applied to criminalize the assertion of control over the firearms inherent in even making such a request.

request "to have the firearms held in trust for him by a third party ... **suggests** constructive possession." *Id.* at 670 (emphasis added).

Overlooked by the Government is the fact that the unmodified term "possession" as used in section 922(g)(1) and "constructive possession" are not interchangeable. Harvard Professors A. James Casner and W. Burton Leach describe "constructive possession" as a doctrine where "'possession' is used in a Pickwickian sense, signalized by the word 'constructive.'" Whenever this "legal fiction" is employed, they caution, it is "important [to] diagnose the ends they seek to attain and the methods by which they operate."[5] A. J. Casner & W. B. Leach, Cases and

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[5] The doctrine of constructive possession of firearms has been invoked previously by the Government in a variety of situations which involve physical possession — which is absent in the instant case.

The court allowed possession of a firearm to be proved by defendant's dominion and control over the residence where the firearm was located. The Government "presented evidence from which a jury reasonably could conclude that Turnbough exercised dominion and control over the residence. ... This evidence, when taken together, was sufficient for a reasonable jury to conclude that Turnbough ... possessed the handgun." United States v. Turnbough, 1997 U.S. App. LEXIS 11886, *6-7 (7th Cir. 1997).

A similar doctrine was invoked in an effort to criminalize the simultaneous possession of firearms-related items, each of which may be possessed lawfully, but which could be combined in a variety of ways, including into an unlawful firearm. However, this Court rejected the Government's broad theory, requiring only that "a set of parts that could be used to make **nothing but** a short-barreled rifle ... must fall within the definition of 'making' such a rifle." United States v. Thompson/Center Arms Co., 504 U.S. 505, 510 (1992) (emphasis added).

Text on Property, at 53-54 (Little, Brown: 2nd ed. 1969).

Truly, lawful application of the "constructive possession" doctrine requires more than a "suggest[ed]" link between actual physical possession and constructive possession. Instead, any such application of the doctrine requires careful and precise analysis of the specific property interests involved. *See, e.g.,* Zaleski, 686 F.3d at 93-94.

However, following the Government's lead, the courts below contented themselves with the most cursory of analyses. In its opposition brief, the Government, quoting United States v. Howell, 425 F. 3d 971 (11th Cir. 2005), blankly asserted that considerations of "the public policy behind the law" justified reliance upon the "constructive possession" doctrine. Govt. Br. at 6. But neither the Government nor the Howell court troubled itself to ascertain what public policy actually lay behind 18 U.S.C. § 922(g)(1), much less to explain why that policy would justify the Government's claim against Henderson's right to transfer complete title to another person.

The 18 U.S.C. § 922(g)(1) ban on felon possession of a firearm was originally enacted into law as part of the Gun Control Act of 1968 ("GCA") "to provide support to Federal, State, and local law enforcement officials in their fight against crime and violence." Public Law 90-618, 82 Stat. 1213. According to House Report 1577, the "principal" purpose of the Gun Control Act was twofold:

> to strengthen Federal controls over interstate and foreign commerce in firearms and to assist the States effectively to regulate firearms traffic within their borders. [House Report No. 1577, reprinted in 3 U.S.C.C.A.N. at 4411(90th Cong. 2d Sess.:1968).]

GCA, in turn, reinforced the Omnibus Crime Control and Safe Streets Act of 1968, the purposes of which were to aid the state and local governments to [i] "keep firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency, and [ii] assist law enforcement authorities ... in combating the increasing prevalence of crime in the United States." *See* Senate Report ("S. Rep.") No. 1097, reprinted in 2 U.S.C.C.A.N. at 2113-14 (90th Cong., 2d Sess. 1968).

Exercising its power to regulate interstate and foreign commerce, Congress expressly designed the ban on felony firearms possession "to enable the States to [more] effectively cope with the firearms traffic within their own borders through the exercise of their police power." *Id.* at 2114. Thus, 18 U.S.C. § 922(g)(1) was never an absolute ban on all felon possessions of firearms, but only on those felons who "possess" firearms that "affect[] commerce," or on those firearms "receive[d]" by a felon, having previously "been shipped or transported in interstate or foreign commerce." With the federal Government having no plenary police power, Congress relied only on its authority under the Commerce Clause when it enacted this provision of the GCA. *See* United States v. Lopez, 514 U.S. 549 (1995). *See also* 18 U.S.C. § 922(q)(3)(A).

The policy underlying the federal ban, then, is not to penalize or punish a person for an act of intrinsic wrongdoing, as the Government and the Eleventh Circuit would have this Court believe. *See* Govt. Br. at 12 and Howell at 975-76. Rather, as this Court previously recognized: "Congress sought to rule broadly — to keep guns out of the hands of those who have demonstrated that 'they may not be trusted to possess a firearm without becoming a threat to society.'" Scarborough v. United States, 431 U.S. 563, 572 (1977). Furthermore, the original felony ban no longer applies to persons convicted of felonies such as "antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices." *See* 18 U.S.C. § 921(a)(20)(A). Rather, by narrowing the felon possession ban, Congress has reinforced the notion that the 18 U.S.C. § 922(g)(1) ban is a prophylactic measure to assist state and local governments to better fight crime by reducing the risk of harm to the public safety that is purportedly created by the flow of firearms coming from outside a state. *See* United States v. Stanko, 491 F.3d 408, 419-20 (8th Cir. 2007) (Bright, J., dissenting).

Allowing Henderson to exercise his ownership rights by effecting a sale of his firearms would have no adverse impact upon public safety whatsoever. Such a sale could be expected to be monitored by the FBI to ensure, through a National Instant Criminal Background Check System ("NICS") check, that the recipient is not prohibited from receiving the firearms. As the U.S. Court of Appeals for the Seventh Circuit has observed, although a person's firearms rights have

been "curtailed" by a conviction of violating 18 U.S.C. § 922(g)(1), the convicted person's "property interest in the firearms continues." United States v. Miller, 588 F.3d 418, 420 (7th Cir. 2009). And as the Seventh Circuit further points out, there are a number of alternatives — other than the one which would place the firearms into a convicted felon's possession — to effect a transfer of title of those firearms. *Id.* There is, then, no legitimate public policy reason to invoke the "constructive possession" doctrine in this case, for it is well-recognized that actual physical possession is not necessary to convey one's "title and ownership" in property. *See* J. Cribbet, Property Law at 13. In sum, the proposed sale of Henderson's firearms would not propel Henderson — or anyone else facilitating the transfer — into acting in violation of 18 U.S.C. § 922(g)(1).

II. THE GOVERNMENT HAS NO AUTHORITY TO CONVERT PETITIONER HENDERSON'S FIREARMS COLLECTION TO ITS OWN USE.

The Report and Recommendation of the U.S. Magistrate Judge who heard Petitioner Henderson's Motion to Return/Disposition of Property explained the course of criminal charges below. Shortly after his arrest on a controlled substance charge, which was alleged by a complaint, Henderson turned over his firearms collection to the FBI "as a condition of bond for pretrial release." Pet. App. 7a. Henderson was then the subject of an initial and two superseding felony indictments. "Each indictment contained a forfeiture provision seeking forfeiture of a house owned by Petitioner and his wife, but none of the indictments

sought forfeiture of the firearms."[6] Pet. App. 8a. Henderson pled guilty to a drug charge, and pursuant to that plea was adjudicated guilty of one felony drug charge. However, "[f]orfeiture was not pursued as to the house or other property," including Henderson's firearms.[7] *Id.*

Federal forfeiture powers, both civil and criminal, have mushroomed since they entered modern federal practice in 1970. *See generally* S. Cassella, "Overview of Asset Forfeiture Law in the United States," U.S. Attorneys' Bulletin (Nov. 2007).[8] The federal government provides prosecutors three types of forfeiture powers: administrative, criminal, and civil. *Id.* at 12-16. One statute alone — 18 U.S.C. § 981(a)(1)(C) — "authorizes the forfeiture of the proceeds of more than 200 different state and federal crimes." *Id.* at 10.[9] However, the Government's

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[6] In addition to taking possession of Henderson's firearms, the FBI reportedly attempted to confiscate the entire contents of his safe, including baseball trading cards and coins, beyond what the court ordered as conditions for bond. J.A. 179, n.1.

[7] The record does not reveal why forfeiture was not initially sought against the firearms, even though the Government had full knowledge (and indeed actual possession) of those firearms. Nor does the record reflect why forfeiture was not pursued against Petitioner's home or any of his other assets.

[8] http://www.justice.gov/sites/default/files/usao/legacy/2007/12/21/usab5506.pdf.

[9] The judiciary has already been too deferential to exercises of arbitrary power under asset forfeiture laws against the people, resulting in current policy being critically re-examined in

failure to pursue any of its vast array of forfeiture powers over Henderson's firearms collection reveals that the Government may not have believed that it could have obtained forfeiture of those firearms under any federal statute. Or, the Government may not have believed it necessary to comply with the statutory formalities of asset forfeiture because — as this case also demonstrates — the very same result could be obtained without compliance with the any of the federal statutes or rules governing forfeiture proceedings.

Although Henderson's status as a convicted felon deprived him of the right to "possess in or affecting commerce, any firearm or ammunition...." under 18 U.S.C. § 922(g), that statute grants the Government no interest in his firearms; indeed, the Government has not relied upon any statute to assert any possessory interest in the firearms. Rather, the Government has asserted only the possessory interest of a bailee. *See* Pet. Br. at 17.

Indeed, based on common law property principles, the Government could not claim a superior property interest in Henderson's firearms collection. There is no indication that any of the firearms in his collection were themselves unlawful *per se*, and thus they did not

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Congress, by the press, and even by former U.S. Department of Justice lawyers who once enforced asset forfeiture laws. *See, e.g.*, J. Yoder & B. Cates, "Government self-interest corrupted a crime-fighting tool into an evil," *Washington Post* (Sept. 18, 2014), http://goo.gl/pZmqLY.

constitute contraband.[10] There is no indication that any of the firearms in his collection were employed to facilitate a crime involving a controlled substance, and thus they were not the instrumentality of any crime.[11] How Henderson came to own these firearms is detailed below, providing no indication that these firearms were the fruits of a crime. *See* Appeal of Denial of Motion to Return Property under Rule 41(g), J.A. 178. Failing these three tests, the Government had no common law right whatsoever to the property, and certainly no property right superior to that of Henderson.

Indeed, the U.S. Magistrate Judge concluded that "the firearms were neither seized from Henderson...., nor constituted contraband, nor were they forfeited." Pet. App. 13a-14a. Nevertheless, the Magistrate Judge ruled that the firearms could not be sold by Henderson solely because he "did not attempt to transfer ownership of [them] to another person until *after* he had been adjudicated guilty and was a convicted felon." Pet. App. 14a.

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[10] "We do not deal with contraband, which the Government is free to seize because the law recognizes no right to possess it." Caplin & Drysdale v. United States, 491 U.S. 617, 653 n.15 (1989) (Blackmun, J., dissenting).

[11] "Nor do we deal with instrumentalities of crime, which may have evidentiary value, and may also traditionally be seized by the Government and retained even if the defendant is not proved guilty, unless a party with a rightful claim to the property comes forward to refute the Government's contention that the property was put to an unlawful use." *Id*.

Thus, the Government resorted to a curious legal theory that Henderson may not sell or transfer the firearms without taking "constructive possession" of the firearms — while the firearms remain in the custody of the FBI. Yet nowhere in the record below is there any evidence that the Government acquired title to these firearms or even made any other claim of a legal interest in these firearms. If Henderson's claim as their last rightful owner is denied, there being no other rightful claimant, it would be safe to assume that the Government will retain possession of the Henderson firearms collection, manifesting total dominion and control over the firearms at the conclusion of this case — if it has not done so already.

The U.S. General Services Administration has promulgated regulations that (i) govern the "disposition of seized, forfeited, voluntarily abandoned, and unclaimed personal property under the custody of any Federal agency located in the United States," and that (ii) provide, *inter alia*, that various types of firearms are transferred to the Department of Defense or other agencies. Part 102-41.[12] One could reasonably expect the Government to justify its full ownership of the Henderson firearms collection based on that collection having been "voluntarily abandoned" or being "unclaimed." Because there is no accountability to the Court or to the public for what becomes of these firearms, Henderson's firearms certainly could be sold, traded, or used in a variety of

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[12] http://www.gsa.gov/portal/ext/public/site/FMR/file/Part102-_41.html/category/ 21858/.

ways by Government officials.[13] For example, the firearms might be placed at a federal training facility or a museum, or they might be transferred to local law enforcement. And it is possible that they might be destroyed.

In any of these scenarios, the Government will *de facto* have assumed full rights of ownership of these firearms, just as if title to those firearms had been forfeited to the state. Petitioner rightly points out that such a forfeiture would occur without any of the procedural protections that apply to statutory forfeitures. *See* Pet. Br. at 25-28. However, the problem is not just procedural, but also substantive, as this type of *de facto* forfeiture will have occurred without any common law justification or statutory authority. In a very real sense, the Government's pseudo-legal claim to possession may be succinctly described as: "Might Makes Right."

Petitioner also points out that 1.2 million felony convictions occur annually in the United States and that many of these persons own firearms. Pet. Br. at 30. For such persons, it no longer would matter that Congress has crafted carefully limited asset forfeiture

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[13] An investigation into the disposition of guns seized by Oklahoma police revealed that many are sold to firearms dealers, or traded for other guns. A. Iwasinski, "News 9 looks into what happens to guns seized by Oklahoma Police," News 9.com (Nov. 5, 2013), http://www.news9.com/story/23887989/news-9-looks-into-what-happens-to-guns-seized-by-oklahoma-police. *See also* "Your local police may be selling confiscated guns," Lawyers.com. http://criminal.lawyers.com/criminal-law-basics/your-local-police-may-be-selling-confiscated-guns.html.

statutes, for there would be no need for the Government to follow the law of asset forfeiture when the same result could be achieved, as it was here, in a much more facile fashion. In the absence of any such statutory authority, the Government never acquires lawful title to those firearms, but nonetheless asks the judiciary for license to act exactly as though it has exclusive title.[14]

Allowing the federal Government to engage in such *de facto* forfeiture creates a perverse financial incentive to indict and convict, which should never factor into the equation when a prosecutor is pursuing his duty.[15] Self-interest only serves to corrupt the

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[14] In a recent case to come before this Court, two defendants were successfully charged with converting used medical property which was not wanted or claimed by the hospital which previously had owned it and allowed the defendants to take it. To justify a charge against the couple involved in the subsequent sale of that property, the Government relied on the theory that even unclaimed property could be converted, using a creative theory of constructive trust. *See* United States v. Kaley, 677 F.3d 1316, 1319 (11th Cir. 2012). *See also* Kaley v. United States, ___ U.S. ___, 188 L.Ed.2d 46, 64 (2014). If Henderson is barred from making any lawful claim to regain his collection, it is not immediately apparent why that theory used in Kaley would not criminalize the disposition of Henderson's firearms collection by Government officials.

[15] Tumey v. Ohio, 273 U.S. 510 (1927) addressed a state statute which empowered a village mayor to function as a judge with respect to minor offenses, including determining guilt and the amount of the fine. Some of the fines generated were paid to the mayor personally, and some to the village over which he presided. The Court viewed the judge's interest in the financial prosperity of his employer, the village, just as problematic as the judge's

"spirit of fair play and decency that should animate the federal prosecutor." Attorney General Robert H. Jackson, The Federal Prosecutor (Apr. 1, 1940).

Having not invoked any asset forfeiture statute, and having alleged no superior property interest, the Government has no authority to convert Henderson's firearms collection to its own use.

III. THE GOVERNMENT'S INDISCRIMINATE USE OF THE "CONSTRUCTIVE POSSESSION" DOCTRINE INFRINGES SECOND AMENDMENT RIGHTS.

The ban on felon possession of firearms was enacted at a time when few believed that the Second Amendment secured an individual right to keep and bear arms. Indeed, relying on court decisions up to 1968, the Senate Report on the Omnibus Crime Control and Safe Streets Act stated that "the second amendment, unlike the first, was not adopted with the individual rights in mind, but is a prohibition upon Federal action which would interfere with the organization of militia by the states of the Union." *See* S. Rep. 1097 at 2 U.S.C.C.A.N. at 2169 (1968). Thus, the Report concluded that the then-current court "decisions make it plain that the amendment presents no obstacle to the enactment and enforcement of this title." *Id.* "To the contrary," the Senate Report

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personal self-interest. Thus, the judge was disqualified both "because of his direct pecuniary interest in the outcome, and because of his official motive to convict and to graduate the fine to help the financial needs of the village." *Id.* at 535.

concluded, the court decisions at that time "afford ample precedent for" the law, and "that no body of citizens other than the organized State militia, or other military organization provided for by law, may be said to have a constitutional right to bear arms." *Id.*

In 1986, in the Firearms Owners Protection Act ("FOPA"), Congress shifted its Second Amendment view somewhat, stating that it was a "right[] of citizens ... to keep and bear arms under the second amendment to the United States Constitution." *See* Public Law 99-308, Section 1(b)(1)(A), 100 Stat. 449 (1986). Pursuant to this finding, FOPA amended "18 U.S.C. § 925(c) to make any person prohibited from firearm ... possession ... eligible to apply for relief [i]n light of evidence ... that [GCA] charges have been abused in the past, with resultant convictions of persons not inclined to engage in any criminal activity." *See* Senate Committee of the Judiciary Report No. 98-583 at 26 (98th Cong., 2d Sess., 1986). While "making [such] relief available" was considered by the Senate Committee Report to be "essential," it was not made a matter of right, even though the Senate Judiciary Committee found that persons have been "arbitrarily" denied their rights. *Id.* Yet none of the promised discretionary relief has been forthcoming, Congress having barred the use of any appropriations to implement the relief afforded by this FOPA section. *See* United States v. Bean, 537 U.S. 71 (2002).

Instead, it has taken another 22 years for the Second Amendment to be recognized as a

constitutionally "enumerated ... right [which] takes out of the hands of government — even the Third Branch of Government — the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." District of Columbia v. Heller, 554 U.S. 570, 634 (2008). Yet, that is what the Government is attempting to do in this case, exercising unfettered discretion to take away Henderson's ownership rights in certain firearms on the pretext that, in order for him to sell those rights, he must be deemed to be illegally in possession of those firearms in order to effectuate that sale.

What is at stake here is not just Henderson's personal property rights, but the right of the People to have access to firearms on the open market among persons who are in no way disqualified from possessing a firearm. If Henderson's firearms cannot be sold, then they are subject to Government use or destruction, likely being taken out of the trade and commerce of constitutionally-protected firearms. In Heller, this Court ruled emphatically that the Second Amendment, like the First, Fourth, and Ninth, refers "unambiguously ... to individual rights, not 'collective' rights, or rights that may be exercised only through participation in some corporate body." *Id.* at 579. In protecting an individual right to keep and bear arms, the Second Amendment secures a right of private property in those arms that are protected by the Amendment. Specifically, the Heller Court asserted that the right to "keep" is a right "'[t]o have in custody[,]' '[t]o hold; to retain in one's power or possession.'" *Id.* at 582. "'Keep arms,'" the Court concluded, "was simply a common way of referring to

possessing arms, for militia men *and everyone else*." *Id.* at 583.

Because the Second Amendment recognizes a right of private property in a protectable arm, it follows that such arms, like other private property, may be kept in one's home, and thus must be the subject of trade and commerce. *Id.* at 583, n.7. This right, in turn, is reinforced by the Second Amendment text securing the right "to bear," that is, "to carry." *Id.* at 584. Rejecting the notion that "bear" was limited to the carrying of a weapon "in an organized military unit," the Heller Court asserted that the Second Amendment secured the carrying of a protected arm for personal "confrontation," and thus, in one's ordinary clothing, not in military garb or other military issue. *See id.* at 584-590. Indeed, the Court found that the right to keep and bear arms was a preexisting right "secured to [the people] as individuals, according to 'libertarian political principles,' not as members of a fighting force" controlled by either the state or federal government. *Id.* at 593.

At the heart of the underlying libertarian political principles was the right of the people to be "trained in arms ... [the] better able to resist tyranny," as members of "a citizen militia, which might be necessary to oppose an oppressive military force if the constitutional order broke down." *Id.* at 598-99. As a "right protecting against both public and private violence" (*id.* at 594), it is an essential principle that the Second Amendment protect the right of private property in firearms or, otherwise, "tyrants" would be free to "simply tak[e] away the people's arms" on the

basis of any pretext. *Id.* at 598. That prospect of a disarmed people at the discretion of the Government is precisely why the Second Amendment was inserted into the federal Bill of Rights. *Id.* at 598-600.

While Henderson's cache of firearms could be viewed to be of minimal significance in the overall availability of constitutionally-protected firearms in the marketplace, Petitioner rightfully points out that "property deprivations," such as Henderson's here, "are not rare occurrences": "There were more than 1,200,000 felony convictions in 2006." Pet. Br. at 30. "Were the Court to approve the Eleventh Circuit's rule," not only would all firearms owners convicted of a felony lose their economic interests in firearms, but the People would be deprived of a significant source of firearms for self-defense and defense of family and home.

The Government and the courts below would have this Court interpret section 922(g)(1) so broadly that anyone, immediately upon conviction of a felony, not only loses his right to possess firearms, but also loses the right to sell his firearms, and also forfeits all of his firearms to the Government, even though the firearms had no relation to the crime. To read the statute in such a way violates the Second Amendment, imposing a financial penalty on those Americans who enter the crosshairs of federal prosecutors, simply because they chose to exercise their constitutional right to keep and bear arms.

The knowledge that persons who are convicted of some felony are immediately dispossessed of both the

right to possess and to dispose of their firearms creates a substantial disincentive to the ownership and collection of firearms in the first place. As Petitioner points out, under the rule applied below, a person charged with a crime — rightly or wrongly — has the unenviable choice either to sell his firearms before the verdict, or else throw the dice and risk the forced loss of his firearms if convicted. Pet. Br. at 34.

Of course, liquidating a personal collection of firearms may be easier said than done. Used firearms typically do not command as great a price as new firearms, and thus a person may not obtain anywhere near the value he paid to obtain them. Many firearms are uncommon or rare, or of great value, and thus time is required to find the right buyer and obtain maximum value — time a person might not have when defending against criminal charges. Since firearms ownership is heavily regulated by federal law, persons under indictment likely would not wish to run the risk of selling their guns themselves, lest they make a mistake and face yet additional criminal charges.[16] Thus, the safest option would be to sell one's firearms through an auction house or auction website, each of which would take a healthy cut of the proceeds, or sell to a Federal Firearms Licensee at a deep discount. Finally, some percentage of criminal defendants are incarcerated during the course of the proceedings against them, and are simply unable to arrange to have their firearms sold in such circumstances. Taken

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[16] Indeed, in this case, the first person to whom Henderson was trying to sell his firearms collection backed out under pressure from the Government. J.A. 151.

as a whole, these and other factors mean that a person, simply by having been charged with a crime, would be forced to immediately liquidate his entire collection of firearms, possibly for substantially far less than their actual value, or else run the risk of losing them and their value forever. As Petitioner notes, this places a chilling effect[17] on the exercise of Second Amendment rights at the outset. Pet. Br. at 35.

This problem is further compounded by a criminal justice system (i) where grand juries almost never fail to indict,[18] (ii) where the federal criminal code is so vast that even law-abiding people with the best of intentions can commit serious federal crimes,[19] and (iii) where prosecutors "stack" charges and over-charge in an effort to coerce guilty pleas regardless of actual guilt.[20]

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[17] For another illustration of imposing an impermissible "chilling effect" on the exercise of constitutionally protected rights, *see, e.g.*, United States v. Jackson, 390 U.S. 570 (1968) (statute that required imposition of death penalty if recommended by the jury was unconstitutional because it discouraged criminal defendants from invoking their Sixth Amendment right to demand a jury trial).

[18] P. Bump, "The rarity of a federal grand jury not indicting, visualized," *The Washington Post* (Nov. 24, 2014), http://goo.gl/XdlbP1

[19] *See* H. Silverglate, Three Felonies A Day: How the Feds Target the Innocent (Encounter Books: 2011).

[20] *See* M. Finkelstein, "A Statistical Analysis of Guilty Plea Practices in the Federal Courts," 89 HARVARD L. REV. 293 (Dec. 1975) at 294.

It is debatable whether the text of the Second Amendment even permits the prohibition against convicted felons possessing firearms after they have served their time. *See* H. Titus, "Second Amendment: Rule by Law or By Judges," 8 LIBERTY UNIV. L. REV. 577, 599-603 (2014). However, it is abundantly clear that the Second Amendment does not permit a person's right to keep and bear arms to be extinguished simply because he has been accused of a crime. Yet if the Eleventh Circuit's decision is allowed to stand, a person's Second Amendment rights are put at risk if he chooses to await the disposition of the case against him. If he wishes to protect his ownership of his assets from potentially being terminated, he must voluntarily terminate ownership before a verdict, even if he has done nothing wrong. Even though convicted of no crime, he may no longer be able to assume the risk of keeping or bearing his firearms while awaiting trial — not even to protect himself and his family, or to hunt for food to feed them. Rather than have constitutionally protected status, firearms are singled out for confiscation and conversion. Such a perverse result should not be countenanced.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

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