No. 13-1487

In The
Supreme Court of the United States

TONY HENDERSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF AMICUS CURIAE NATIONAL RIFLE ASSOCIATION OF AMERICA, INC. IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

"The general rule is that seized property, other than contraband, should be returned to its rightful owner once * * * criminal proceedings have terminated." *Cooper v. City of Greenwood*, 904 F.2d 302, 304 (5th Cir. 1990) (quoting *United States v. Farrell*, 606 F.2d 1341, 1343 (D.C. Cir. 1979) (quoting *United States v. La Fatch,* 565 F.2d 81, 83 (6th Cir. 1977)). 18 U.S.C. § 922(g) makes it "unlawful for any person * * * who has been convicted in any court of [ ] a crime punishable by imprisonment for a term exceeding one year * * * to * * * possess * * * any firearm."

The question presented is whether such a conviction prevents a court under Rule 41(g) of the Federal Rules of Criminal Procedure or under general equity principles from ordering that the government (1) transfer non-contraband firearms to an unrelated third party to whom the defendant has sold all his property interests or (2) sell the firearms for the benefit of the defendant. The Second, Fifth, and Seventh Circuits and the Montana Supreme Court all allow lower courts to order such transfers or sales; the Third, Sixth, Eighth and Eleventh Circuits, by contrast, bar them.

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INTEREST OF AMICUS CURIAE[1]

The National Rifle Association of America, Inc. ("NRA") is a nonprofit, voluntary membership corporation qualified as tax-exempt under 26 U.S.C. § 501(c)(4) with its headquarters in Fairfax, Virginia. Founded in 1871, the NRA is America's foremost and oldest civil rights organization and defender of Second Amendment rights. Its approximately five million members are individual Americans bound together by a common desire to ensure the preservation of the Second Amendment right to keep and bear arms. The first purpose and objective of the NRA, as outlined in NRA By-Laws art. II, § 1, is:

> [t]o protect and defend the Constitution of the United States, especially with reference to the inalienable right of the individual American citizen guaranteed by such Constitution to acquire, possess, collect, exhibit, transport, carry, transfer ownership of, and enjoy the right to use arms, in order that the people may always be in a position to exercise their legitimate individual rights of self-preservation and defense of family, person,

[1] Pursuant to Supreme Court Rule 37.6, Amicus Curiae NRA states that no counsel for any party authored this brief in whole or in part, and that no entity or person, aside from Amicus Curiae, its members, and/or its counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2, counsel of record for all parties received timely notice of Amicus Curiae's intent to file and have consented to this filing in letters on file with the Clerk's office.

> and property, as well as to serve effectively in the appropriate militia for the common defense of this Republic and the individual liberty of its citizens.

The NRA has a particular interest in this case, as the courts below improperly expanded 18 U.S.C. § 922 so that it adversely affects law-abiding citizens in contravention of the Second Amendment. Furthermore, the current circuit split has created a climate of uncertainty regarding the lawful acquisition, possession and transfer of ownership of firearms.

SUMMARY OF THE ARGUMENT

On July 16, 2010, Petitioner Henderson filed a "Motion for the Return/Disposition of Property" requesting that the non-contraband firearms he voluntarily surrendered to the FBI be transferred from the possession of the FBI to an identified third-party purchaser or Henderson's wife. Relying on *United States v. Howell*, 425 F.3d 971 (11th Cir. 2005), the Magistrate judge recommended that the motion be denied because, even though the firearms were not seized, forfeited or contraband, Henderson had not initiated a transfer until after he was disqualified from possession.[2] Pet. App. 11a-14a.

[2] In its Brief in Opposition, the Government contends that a motion under Fed. R. Crim. P. 41(g) is a motion in equity. U.S.

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The District Court adopted the Magistrate Judge's report and recommendation, and the Court of Appeals affirmed. The Government now argues that Henderson's request for the transfer to a third-party purchaser or Henderson's wife, among other things, "would not even rule out the possibility that his wife or friend would subsequently allow him further control over [the firearms]" and that "[u]nder the circumstances, both of petitioner's proffered options created a significant risk that petitioner would retain custody or control over the firearms in violation of Section 922(g)." U.S. Br. in Opp'n. at 9.

Based upon its unsubstantiated speculation that Henderson might somehow retain control over the firearms he had sold to a third party, the Government seeks to distinguish the proposed transfer from other potential sales of firearms on behalf of convicted felons, such as a situation in which firearms are transferred "to a federally licensed gun dealer who

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Br. in Opp'n. at 9-10. In terms of equity, it is important to note that the Government seeks to apply Section 922(g) to bar the instant requested transfer even though: 1. the transfer could not have been barred if it had been conducted prior to Henderson's becoming a prohibited person; 2. the Government seeks to draw a spurious distinction between the instant transfer and a transfer to a FFL unrelated to Henderson; and 3. it is inarguable that, under the facts of this case, both the third-party purchaser and Henderson's wife could legally acquire and possess firearms other than those in the possession of the FBI. In short, the "constructive possession" argument advanced by the Government is wholly illusory, and equity would in fact counsel the relief requested by Henderson.

would sell them, comply with any procedures required by the court, and remit the proceeds to the defendant." *Id*. at 13. The Government's argument on this score thus has nothing to do with the character of the felon prohibited from possessing firearms, but rather focuses on the *non-felon*, *non-prohibited possessor's* relationship to that felon. The result is that the Second Amendment rights of certain law-abiding, responsible citizens – such as family members or friends of individuals who have been convicted of a felony – are accorded less weight than the Second Amendment rights of other law-abiding citizens, including those who do not propose to use the firearms in question for the purpose of self-defense in the home.

The Government's position adopted by the Court of Appeals effectively expands the scope of 18 U.S.C. § 922(g)(1) beyond its terms to reach wholly innocent conduct by law-abiding citizens. Section 922(g)(1) prohibits anyone "who has been convicted in any court of a crime, punishable by imprisonment for a term exceeding one year . . . to . . . possess . . . any firearm[.]" It does not prohibit the family members or friends of such individuals from possessing firearms, nor could it without running afoul of the Second Amendment. Yet the Government argues that the transfer of firearms to an acquaintance or family member of a felon is inherently suspect without any demonstration that the felon has any power or intention to exercise dominion or control over the firearm. The courts below erred in accepting this position and

misapply the concept of constructive possession to bar the proposed transfer.

Broadening the scope of Section 922(g)(1), by effectively expanding the class to whom it applies to include non-felons, punishes a non-felon as a principal under a statute which, by its express terms, is applicable only to felons. Especially where, as here, the non-felon's allegedly culpable activity is the core protected conduct of possessing a firearm in the home, this is an improper, and unsustainable, interpretation of Section 922(g)(1). The Government's position thus runs roughshod over the admonition that courts must be "mindful of the risk that felon dispossession statutes . . . may be misused to subject law-abiding cohabitants to liability simply for possessing a weapon in the home," *United States v. Huet*, 665 F.3d 588, 601 (3d Cir. 2012), imposes an unconstitutional burden on the Second Amendment rights of law-abiding citizens, and creates a means for the Government to cause the constructive forfeiture of personal property not subject to the due process protections required by that process.

The logical extension of the constructive possession theory applied by the Court of Appeals is to disable not just friends and family members of a disqualified person, but also third-party purchasers for value, from exercising their fundamental rights. Even if Section 922(g)(1) extended that far, which it does not, the Second Amendment would bar such an extension.

ARGUMENT

I. Applying constructive possession to prohibit a bona fide transfer of non-contraband firearms creates an extension of Section 922(g)(1)'s prohibition to law-abiding citizens in violation of the Second Amendment and the intent of the law.

It has been six years since this Court concluded in *District of Columbia v. Heller*, 554 U.S. 570 (2008), that the Second Amendment secures an individual right to keep and bear arms, and four years since the Court underscored that this individual right is fundamental in *McDonald v. City of Chicago*, 561 U.S. 742 (2010). While the vast majority of subsequent jurisprudence has focused on one aspect of those decisions – that individual self-defense is "the *central component*" of the Second Amendment right, *Heller*, 554 U.S. at 599 – the issue presented by this case calls for focus on both that issue and the additional core issue presented in *Heller*: the District of Columbia's unconstitutional prohibition on the possession of operable and immediately accessible firearms in the home.

The Government's present position, that a prohibited persons' transfer of non-contraband firearms to a lawful third party creates a heightened level or risk absent assurances of lawfulness not only belies *Heller*'s recognition of the fundamental right to keep and bear arms by non-prohibited persons, but it also attempts to extend impermissibly 18 U.S.C. § 922(g)(1) by implying guilt on the innocent.

This Court in *Heller* did not attempt to delve into the entire field of firearms law throughout this country. Focusing on the issues at hand in the case, the opinion noted that:

> [a]lthough we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of firearms.

Heller, 554 U.S. at 626-627.

Highlighting the longstanding prohibition on the possession of firearms by felons, *Heller* seemingly recognized the facial validity of the prohibition contained in 18 U.S.C. § 922(g)(1); however, the opinion also enshrined the fact that "the inherent right of self-defense has been central to the Second Amendment right" and nowhere is the right more acute than in the home, "where the need for defense of self, family, and property is more acute." *Id.* at 628. "In sum, we hold that the District's ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable *for the purpose of immediate self-defense.*" *Id.* at 635 (emphasis added).

Neither party to this case has challenged the validity of 18 U.S.C. § 922(g)(1)'s prohibition, and that issue falls outside the scope of this brief.[3] However, the Court should be "mindful of the risk that felon dispossession statutes . . . may be misused to subject law-abiding cohabitants to liability simply for possessing a weapon in the home." *Huet*, 665 F.3d at 601.

As this Court noted following its review of "the legislative history in its entirety" behind the felon-in-possession prohibition, "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); *see also Lewis v. United States*, 445 U.S. 55, 66 (1980) ("The legislative history of the gun control laws discloses Congress' worry about the easy availability of firearms, especially to those persons who pose a threat to community peace."). Despite this

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[3] Even if Section 922(g)(1) were facially constitutional, it is possible that it could have unconstitutional applications. For example, finding that a felon convicted of possession of a firearm should have been permitted to present a justification defense, the Court in *United States v. Gomez*, 92 F.3d 770, 774 n.7 (9th Cir. 1996), notes that "18 U.S.C. § 922(g)(1) might not pass constitutional muster were it not subject to a justification defense" and that "the Second Amendment might trump a statute prohibiting the ownership and possession of weapons that would be perfectly constitutional under ordinary circumstances. Allowing for a meaningful justification defense ensures that 18 U.S.C. § 922(g)(1) does not collide with the Second Amendment."

broad purpose, however, nowhere is there any indication that the law was envisioned to infringe on the rights guaranteed by the Second Amendment by burdening the possession of firearms by friends and family members of convicted felons.

The premise now before the Court invokes the theory that the transfer of firearms to a non-prohibited third party by an individual prohibited under 18 U.S.C. § 922(g)(1) invokes constructive possession, which in turn creates "a significant risk" that the prohibited person "would retain custody or control over the firearms, in violation of Section 922(g)." U.S. Br. in Opp'n. at 9.

This premise, and the Government's argument, is in essence a plea for this Court to extend Section 922(g)(1)'s prohibition to non-felons without any nexus between the firearms and the prohibited individual's possession beyond mere association and/or presence in a shared residence – a position which infringes on lawful firearms owners' Second Amendment rights and other fundamental liberty interests and turns a blind eye to both existing precedent and the purpose behind the law. *See, e.g.*, *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984) ("The Court has long recognized that, because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State.").

II. The case law is clear that a non-prohibited person acquainted or sharing a residence with a prohibited person does not affirmatively participate in the prohibited person's unlawful possession of a firearm by possessing a firearm themselves.

The Government's position is a subterfuge under which it can limit or restrict a law-abiding citizen's Second Amendment rights for simply associating with a prohibited person under the theory of constructive possession without having to establish any of the elements required by Section 922(g)(1).

There exists substantial case law demonstrating unequivocally that a prohibited person may reside or be present in the home of a lawful firearms owner without exercising dominion or control over the firearms in violation of Section 922(g). *See United States v. Thomas*, 321 F.3d 627, 636 (7th Cir. 2003) ("[e]ven when a defendant continues to have weapons in his home that he legally obtained before his felony convictions, he is not guilty of violating 18 U.S.C. § 922(g)(1) without a showing that he exercised control over the firearms"); *United States v. Griffin*, 684 F.3d 691, 697 (7th Cir. 2012) ("when [a] defendant jointly occupies a residence, proof of constructive possession of contraband in the residence requires the government to demonstrate a 'substantial connection' between the defendant and the contraband itself, not just the residence[.]"); *id.* at 695 ("Constructive possession may be established by demonstrating that the defendant knowingly had both the power and the

intention to exercise dominion and control over the object, either directly or through others. . . . This required 'nexus' must connect the defendant to the contraband, separating true possessors from mere bystanders.") (internal citations omitted); *see also United States v. Cardenas*, 864 F.2d 1528, 1533 (10th Cir. 1989) ("In addition to knowingly holding the ability to control an object, there must be an act by which that ability is manifested and implemented[.]"); *United States v. Flenoid*, 718 F.2d 867, 868 (8th Cir. 1983) (finding that mere physical proximity to the contraband is insufficient to establish constructive possession).

In addition, advisory opinions of the Bureau of Alcohol, Tobacco, Firearms and Explosives ("BATFE"), *see* 1 Stephen P. Halbrook, Firearms Law Deskbook, Federal and State Criminal Practice § 2:20 (2014-2015 ed.) (2014), contradict the Government's contention that mere possession of a firearm, let alone the return of the non-contraband firearms, creates a "significant risk that petitioner would retain custody or control over the firearms in violation of Section 922(g)." U.S. Br. in Opp'n. at 9.

> Federal law places no restrictions on the receipt or possession of firearms by the spouse or children of a prohibited person. However, those individuals' rights to possess firearms may not be used as a subterfuge to enable a prohibited person to possess firearms. . . . Based upon these principles of possession, a prohibited person could reside in a residence where firearms were maintained without

> being considered in possession of those firearms if they are stored or located where the prohibited person is without the ability to exercise dominion or control over them. For example, if the firearm is located in a locked enclosure to which the prohibited person has no access, the prohibited person would not be considered to be in actual or constructive possession of the firearm.

Halbrook, at 228 (internal citation omitted).

While the BATFE's opinions all contain similar language noting that the firearm be stored or located where the prohibited person is without the ability to exercise dominion or control over them, such as in a locked enclosure or vault,[4] the opinions do not take into account *Heller*'s recognition that non-prohibited persons must be permitted to keep lawful firearms in the home accessible and operable "*for the purpose of immediate self-defense*." *Heller*, 554 U.S. at 635 (emphasis added). Obviously, a firearm that is under lock and key is not immediately accessible, and any such requirement would frustrate *Heller*'s holding and the core right protected by the Second Amendment.[5]

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[4] *See id.* at 228-229.

[5] "We must also address the District's requirement (as applied to respondent's handgun) that firearms in the home be rendered and kept inoperable at all times. This makes it impossible for citizens to use them for the core lawful purpose of self-defense and is hence unconstitutional." *Heller,* 554 U.S. at 630.

Griffin illustrates that such measures are not required to ensure that a cohabitating family member does not retain constructive possession over firearms in violation of Section 922(g). In *Griffin*, the defendant, a prohibited person, resided in the home of his father following his release from confinement. An avid hunter, Griffin's father possessed several firearms and ammunition stored at varying locations throughout the home. Upon the execution of an unrelated search warrant, Griffin was arrested for a violation of Section 922(g)(1) upon the discovery of such items. While several of the firearms and ammunition were stored in common areas and easily accessible to Griffin, the court found that "'the Government must establish the likelihood that in some discernible fashion the accused had a *substantial* voice vis-à-vis the items in question'" and that "easy access does not mean that he actually violated the felon-in-possession statute by intending to exercise control over any of the firearms." *Griffin,* 684 F.3d at 698 (quoting *United States v. Ford*, 993 F.2d 249, 252 (D.C. Cir. 1993)). Ultimately, his conviction was reversed as the Government failed to establish "that Griffin intended to exercise control over his father's shotgun and the nearby ammunition." *Id.* at 699.

Griffin is remarkable in two aspects. Not only does it uphold the established principle that a prohibited person can reside in a residence where firearms are present, it also preserves the integrity of *Heller* by recognizing that cohabitants, and specifically cohabitating family members, can possess immediately

accessible firearms in the home under the core right of the Second Amendment without exposing prohibited persons to a violation of 922(g)(1)'s prohibition on possession, whether actual or constructive. As this Court emphasized, "whatever else it leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Heller*, 554 U.S. at 635. Furthermore, law-abiding citizens must be given a *meaningful* right to use arms to defend themselves. Thus, this Court held "that the District's ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of *immediate* self defense." *Id.* (emphasis added).

In sum, *Griffin* belies the Government's contention that the simple possession of firearms in the home amounts to either actual or constructive possession of those firearms by others present in the home without a further demonstration of intent to exercise dominion or control over them. *Griffin,* 684 F.3d at 698.

III. Requiring assurances from lawful firearms owners that they will not aid a prohibited person in violating the law cannot be a constructive discretionary licensing system.

While the Government recognizes that a prohibited person's transfer to a law-abiding third party

does not *per se* run afoul of Section 922(g)(1)'s prohibition on possession, or even violate the Government's theory of constructive possession, it argues that a transfer only be approved following a decision maker's review of "sufficient assurances that the [prohibited person] would not retain effective custody and control over the weapons." U.S. Br. in Opp. at 15.

It is improper to require assurances in a manner that grants government officials unfettered discretion in determining whether a law-abiding citizen will be allowed to take possession of lawful firearms for use in the home.

In *Staub v. City of Baxley*, 355 U.S. 313, 322 (1958), this Court invalidated a city ordinance due to the unfettered discretion granted in the decision maker as a result of a lack of "definitive standards or other controlling guides[.]" At issue in *Staub* was a challenge to an ordinance making it an offense to solicit membership in an organization without first obtaining a permit from the Mayor and Council of the City.[6] The *Staub* Court further held that:

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[6] "This ordinance in its broad sweep makes it an offense to 'solicit' citizens of the City of Baxley to become members of any 'organization, union or society' which requires 'fees (or) dues' from its members without first applying for and receiving from the Mayor and Council of the City a 'permit' (Sections I and II) which they may grant or refuse to grant (Section V) after considering 'the character of the applicant, the nature of the organization for which members are desired to be solicited, and

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> [i]t is settled . . . that an ordinance which, like this one, makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official – as by requiring a permit or license which may be granted or withheld in the discretion of such official – is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.

Id. at 322.

While the "substantial assurance" requirement the Government now appears to support may not be a *per se* permitting system, *Staub* is instructive in light of the lack of "definitive standards or other controlling guides governing the action" of the decision maker in approving transfers, such as those the Government now proposes. *Id.* at 322.

And, while *Staub* was a First Amendment case, *Heller* similarly makes clear that "[t]he very enumeration of the [Second Amendment] right" likewise "takes out of the hands of government . . . the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." *Heller,* 554 U.S. at 634. The Government does not outline in the present case how the "reasonable assurances" it calls for are to be adjudicated, thereby failing to establish "definitive standards or other controlling guides governing the

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its effects upon the general welfare of (the) citizens of the City of Baxley' (Section IV)." *Id.* at 321.

action," *Staub*, 355 U.S. at 322, and risking that the ultimate decision would result in the application of unfettered discretion by the decision maker.

Tellingly, the NRA is not aware of any law, state or federal, that imposes a discretionary permitting regime upon the right of law-abiding citizens to possess protected arms in the home. Indeed, only a small minority of states impose such a permitting system for the carrying of firearms *outside* the home, and there is a Circuit split regarding their constitutionality. *See Peruta v. County of San Diego*, 742 F.3d 1144, 1173-1175 (9th Cir. 2014). What is more, the courts that have upheld those laws have emphasized that the laws *do not* apply to possession in the home. *See Woollard v. Sheridan*, 712 F.3d 865, 869 (4th Cir. 2013) ("[P]ermits are *not* needed . . . by persons . . . who are wearing, carrying, and transporting handguns in their own homes.") (emphasis added); *Drake v. Filko*, 724 F.3d 426, 428 (3d Cir. 2013) ("Individuals who wish to carry a handgun *in public* for self-defense must first obtain a license.") (emphasis added); *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 83 (2d Cir. 2012) ("Plaintiffs . . . all seek to carry handguns *outside the home* for self-defense.") (emphasis added). This Court should make clear that the government cannot impose, through the misapplication of Section 922(g) or otherwise, a may-issue regime for possession of firearms in the home.

IV. The Government seeks to create a separate class of individuals entitled to diminished Second Amendment rights solely by virtue of their relationship to a prohibited person.

The expansion of Section 922(g)(1) to place obstacles on the possession of firearms by acquaintances and family members of prohibited possessors, and even third-party purchasers, creates a separate class of individuals apart from all other lawful firearms owners protected under the Second Amendment. Through this expansion, the Government seeks to restrict firearms ownership by non-prohibited third parties solely on the unjustified premises that association with a prohibited person creates a heightened risk of aiding them with a violation of the law. Such a theory is comparable to the interest-balancing approach proposed by Justice Breyer, and rejected by this Court, in *Heller*. *See Heller,* 554 U.S. at 634-635. This approach is completely antithetical to the Second Amendment and this Court's decisions in both *Heller* and *McDonald*, which provide ample support for the proposition that strict scrutiny applies to all laws that burden the fundamental right of law-abiding, responsible citizens to possess arms protected by the Second Amendment in their homes. While *Heller* did not recognize an unalienable right of every citizen to possess any type of firearm in any place and in any manner whatsoever, it did establish that the core of the Second Amendment right – at a minimum – protects a law-abiding, responsible citizen's ability

to possess common firearms in the home for personal protection. Whatever else it means for a constitutional right to be ranked as "fundamental," it surely means that the right is enjoyed by all law-abiding adults equally. Thus, a regulatory system that subjects a certain class of law-abiding citizens to special burdens when seeking to exercise Second Amendment rights must at a minimum be subject to strict scrutiny.[7]

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[7] When a law interferes with "fundamental constitutional rights," it is subject to "strict judicial scrutiny." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16 (1973); *see also Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 54 (1983) ("strict scrutiny [is] applied when government action impinges upon a fundamental right protected by the Constitution"). This observation is a mainstay of this Court's jurisprudence. *See, e.g., Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 n.14 (1985) ("governments are entitled to attack problems piecemeal, save where their policies implicate rights so fundamental that strict scrutiny must be applied"); *Reno v. Flores*, 507 U.S. 292, 302 (1993) (due process "forbids the government to infringe certain 'fundamental' liberty interests . . . unless the infringement is narrowly tailored to serve a compelling state interest"); *Clark v. Jeter*, 486 U.S. 456, 461 (1988) ("classifications affecting fundamental rights . . . are given the most exacting scrutiny"); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) ("There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution. . . ."); *see also Lawrence v. Texas*, 539 U.S. 558, 586 (2003) (Scalia, J., dissenting) ("the standard of review that [is] appropriate" for "a fundamental right" is "strict scrutiny"); *Foucha v. Louisiana*, 504 U.S. 71, 115 (1992) (Thomas, J., dissenting) ("Certain substantive rights we have recognized as 'fundamental'; legislation trenching upon these is subjected to 'strict scrutiny'. . . .").

The classification proposed by the Government in this case cannot survive such exacting scrutiny.

CONCLUSION

For the foregoing reasons, this Court should rule in Petitioner's favor and reject the Government's position that it may burden the Second Amendment rights of law-abiding, responsible citizens because they are acquaintances or family members of prohibited persons, or even third-party purchasers.

Dated this 15th day of December 2014.

Respectfully submitted,

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