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 *AMICI CURIAE* CRPA FOUNDATION, GUN OWNERS OF CALIFORNIA, CALGUNS SHOOTING SPORTS ASSOCIATION, AND KANSAS STATE RIFLE ASSOCIATION IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

CRPA Foundation is a nonprofit organization, exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code ("IRC"). CRPA Foundation promotes and encourages firearms and hunting safety and education; educates individuals with respect to firearms, firearm history, firearms technology, hunting, safety and marksmanship; and supports law enforcement and various charitable, educational, scientific, and other firearms-related public interest activities that support and defend the Second Amendment rights of all law-abiding Americans. CRPA Foundation has filed many *amicus curiae* briefs in federal courts, and has previously filed a brief in support of petitioners in *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

Gun Owners of California ("GOC") is a nonprofit organization exempt from federal income tax under IRC section 501(c)(4). GOC is the leading voice in the state of California, supporting the rights to self-defense and to keep and bear arms guaranteed by the Second Amendment. GOC monitors government

[1] It is hereby certified 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. Petitioner has filed with the Clerk a letter granting blanket consent to the filing of *amicus curiae* briefs. The Respondent's letter granting consent to file this brief is on file with the Clerk.

activities at the national, state, and local levels that may affect the rights of the American public to choose to own a firearm. GOC has previously filed *amicus curiae* briefs in federal court, including a brief in support of respondents in the watershed Second Amendment case *District of Columbia v. Heller*, 554 U.S. 570 (2008).

Calguns Shooting Sports Association ("CGSSA") is a nonprofit organization exempt from federal income tax under IRC section 501(c)(4). CGSSA seeks to encourage firearms owners to meet at ranges to promote a constantly developing community; to empower this community with information about the political landscape and the future of shooting sports options in California; and to encourage the community to reach out to others through education and community development events. CGSSA has filed *amicus curiae* briefs in federal courts.

Kansas State Rifle Association ("KSRA") is a 501(c)(4) member association, formed for the purpose of communication and cooperation for all those interested in shooting, reloading, collecting, and other endeavors related to firearms. KSRA seeks to promote and encourage firearm safety, education, shooting competitions, wildlife conservation, and other firearm-related pursuits. KSRA's fundamental goal is to preserve the American heritage as exemplified and engendered in the Declaration of Independence, the Constitution, and the Bill of Rights for all citizens of the United States. KSRA has previously filed *amicus curiae* briefs in federal court, including briefs

in support of respondents in *District of Columbia v. Heller* and petitioners in *McDonald v. City of Chicago*.

SUMMARY OF ARGUMENT

The *amici* organizations write to respectfully direct the Court's attention to two fundamental errors underlying the Eleventh Circuit's decision.

First, the court incorrectly found that firearm owners are precluded from transferring firearms to third parties following a felony conviction because of a concern that the individual might retain possession of the firearms. The court's conclusion stemmed from a mistaken belief that the transfer would place him in constructive possession of firearms in violation of 18 U.S.C. § 922(g). This view conflicts with a wealth of case law holding that, absent evidence the prohibited individual would actually exert dominion or control over the firearm, such transfers would not place him or her in constructive possession.

Second, the court effectively endorsed the continued ownership of firearms by felons while their guns are held by the government, either indefinitely or pending a forfeiture proceeding. In light of the clear purpose of Section 922(g) to remove firearms from felons, the Eleventh Circuit's decision should be reversed to allow recently convicted individuals to divest themselves of any ownership interest in their firearms. This will also encourage recently convicted

individuals to comply with federal law by turning their firearms over to law enforcement, rather than concealing possession or transferring them through unlawful channels.

Reversal is necessary to ensure that prohibited individuals are permitted to transfer their firearms to appropriate third parties, thus preventing these individuals from being deprived of the value of their property, while simultaneously encouraging compliance and promoting transparent firearm transactions.

ARGUMENT

I. ALLOWING MR. HENDERSON TO SELL OR TRANSFER HIS LAWFULLY OWNED, NON-CONTRABAND FIREARMS TO AN APPROPRIATE THIRD PARTY WOULD NOT GIVE HIM CONSTRUCTIVE POSSESSION OF A FIREARM IN VIOLATION OF 18 U.S.C. § 922(g)

In this case, the Eleventh Circuit held that the government cannot transfer or sell a firearm on behalf of an individual who has recently become prohibited from possessing firearms as a result of a conviction. The court's decision was based, in large part, upon a concern that doing so would deliver "constructive possession of firearms to a convicted felon" in violation of 18 U.S.C. § 922(g). *United States v. Henderson*, 555 Fed. App'x 851, 853 (11th Cir. 2014) (citing *United States v. Howell*, 425 F.3d 971, 976-77

(11th Cir. 2005)). This holding was in error. Although the court did not articulate why the transfer would amount to constructive possession, it is well settled that such possession requires a finding that the individual intends to exert some control over the arms at issue. Because there is no evidence that Mr. Henderson would retain any control over his firearms if they are transferred to an appropriate third party, the court erred in concluding that the government is foreclosed from transferring them on his behalf.

"'Constructive possession is a legal fiction created by courts to find possession where it does not exist in fact.'" *United States v. Jenkins*, 90 F.3d 814, 822 (3d Cir. 1996) (citing Michael S. Deal, Note, *United States v. Walker: Constructive Possession of Controlled Substances: Pushing the Limits of Exclusive Control*, 2 J. Pharmacy & L. 401 (1994)). This judicial doctrine was created to enable "law enforcement officials to prosecute individuals in situations where the inference of possession is strong, yet actual possession at the time of arrest [could not] be shown." Mark I. Rabinowitz, Note, *Criminal Law Constructive Possession: Must the Commonwealth Still Prove Intent? – Commonwealth v. Mudrick*, 60 Temple L.Q. 445, 449-50 (1987).

Courts are generally in agreement that, for purposes of Section 922(g), constructive possession exists when a defendant "knowingly has the power or right, and intention to exercise dominion and control over [a] firearm," either directly, or through others. *United States v. Perez*, 661 F.3d 568, 576 (11th Cir.

2011); *see also United States v. Caldwell*, 423 F.3d 754, 758 (7th Cir. 2005); *Jenkins*, 90 F.3d at 817-18; *United States v. Payton*, 159 F.3d 49, 56 (2d Cir. 1998); 94 C.J.S. *Weapons* § 45 (2014). Whether constructive possession exists, however, is necessarily a fact-specific inquiry, requiring courts to examine the totality of the circumstances and determine whether there is substantial evidence that the person had dominion and control over the firearm. *See United States v. Lawing*, 703 F.3d 229, 240 (4th Cir. 2012); 94 C.J.S. *Weapons* § 46 (2014). Such a finding "must be based on more than speculation." *United States v. Bonham*, 477 F.2d 1137, 1138 (3d Cir. 1973) (en banc).

To date, the Eleventh Circuit has not reasoned why a prohibited person would be placed in constructive possession of a firearm as a result of transferring his or her firearms to a third party. Nor has any other circuit. But it is evident that the concern lies in the risk that the recipient might either return the firearm to the now-prohibited owner or follow his directions. Indeed, as the government argues: allowing a convicted felon to transfer his firearms to a third party "create[s] a significant risk that [he] would retain custody or control over the firearms, in violation of Section 922(g)." Resp't Br. Opp'n Cert. at 9.

Although it is certainly true that a convicted felon would retain constructive possession over a firearm if it is transferred to someone who accepts the felon's instructions as to the disposition of the firearm, *see United States v. Miller*, 588 F.3d 418, 419 (7th Cir. 2009), no other court has found a convicted

felon to be in constructive possession simply because there is a *risk* that he or she *might* exert control over it. To the contrary, courts have routinely found that constructive possession does not exist absent evidence the defendant knowingly and intentionally exerted dominion and control over the firearm, even in cases where there is a risk a person could access or control it.

For example, in *United States v. Griffin*, 684 F.3d 691 (7th Cir. 2012), the Seventh Circuit found that a felon who lived in his parents' home was not in constructive possession of his father's shotgun that was stored behind the kitchen door and easily accessible to him. *Id*. at 693-94, 698-99. Although there was certainly a risk that the individual could access the shotgun, the court explained that this was insufficient to establish that the defendant "intend[ed] to exercise control over" the firearm – as constructive possession requires. *Id.* at 698.

Similarly, in *United States v. Grubbs*, 506 F.3d 434 (6th Cir. 2007), the Sixth Circuit found that a felon who was temporarily staying in his mother's house did not constructively possess a firearm that was discovered unsecured in his brother's room. *Id*. at 436-37, 440. Despite the clear risk that the individual could access the firearm, the Sixth Circuit reversed the defendant's conviction because these circumstances were insufficient to establish that he in fact exercised dominion and control over it. *Id*. at 440-41. As the court explained, although the defendant was sleeping on a couch down the hall from the firearm,

nothing more than "mere conjecture" connected the defendant to his brother's gun at the time of arrest. *Id*. at 440. Without any evidence establishing the defendant knowingly had control over the firearm, the court held there was no evidence the defendant constructively possessed it. *Id.* at 443.[2]

The Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") has issued advisory opinions further confirming the risk that a person might exert dominion and control over firearms does not amount

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[2] *See also*, *e.g.*, *United States v. Gunn*, 369 F.3d 1229, 1235-36 (11th Cir. 2004) (defendant not in constructive possession of a firearm when he knew about the firearms, but they were located in another person's car because there was no evidence that he intended to exert dominion and control over them); *United States v. Thomas*, 321 F.3d 627, 636 (7th Cir. 2003) (noting that even when a felon "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) without a showing that he exercised control over the firearms"); *United States v. Mills*, 29 F.3d 545, 549-50 (10th Cir. 1994) (defendant not in constructive possession of a firearm when the defendant's housemate removed firearms from the garage of the house and placed them in a compartment of the dining table because there was no evidence that the defendant knowingly exercised dominion and control over them); *United States v. Zeigler*, 994 F.2d 845, 848 (D.C. Cir. 1993) (defendant not in constructive possession of cocaine that was locked in the laundry room of her boyfriend's apartment where there was no evidence that she had the ability to exert dominion over the drugs); *United States v. Kelso*, 942 F.2d 680, 681-82 (9th Cir. 1991) (rejecting government's argument, offered in support of sentencing enhancement, that the defendant passenger constructively possessed a firearm discovered behind the driver's seat because there was no evidence of dominion and control).

to constructive possession. *See* 1 Stephen P. Halbrook, *Firearms Law Deskbook* 219-20 (2014-2015 Ed., 2013). For instance, in one opinion letter, the ATF explained:

> [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 and control over them. For example, if the firearm is located in a locked enclosure to which the person has no access, the prohibited person *would not be considered to be in actual or constructive possession of the firearm*.

Id. at 219 (citing Acting Assistant Director, Criminal Enforcement, CC-32, 505, FE:LLEN (Mar. 30, 1983), in ATF Responses to Freedom of Information Act Request, CM:D:EAO, 920582 (Oct. 30, 1992)) (emphasis added).

In each of the scenarios discussed above, there would be a significant risk that a prohibited individual might possess the firearms or retain control over their disposition. Yet, these circumstances alone did not amount to constructive possession because there was no evidence that these individuals had the knowledge or intent to exert dominion and control over them.

Here, Mr. Henderson requested that his firearms be transferred to his wife or to a third party acquaintance, both of whom are suitable recipients.

See Miller, 588 F.3d at 420 (finding Section 922(g) does not prohibit the government from transferring or gifting the firearms to "friends or relatives"). There is no evidence that Mr. Henderson would exert any dominion or control over the firearms once they are transferred. And there is no indication that either of the recipients would be subject to Mr. Henderson's direction or control.

The only argument offered by the government to support a theory of constructive possession is the contention that the transfer could "possibly" allow Mr. Henderson to exert control over the firearms. Resp't Br. Opp'n Cert. at 9. Again, this is simply not sufficient to place him in constructive possession. But even if "risk" or "possibility" were the correct legal standard, such risk could be alleviated through means much less severe than the effective forfeiture of the value of one's firearm collection. For example, the firearms could be transferred to a licensed dealer for resale. To state the obvious, authorizing the government to transfer firearms to a third party retailer that is of no relation to the prohibited individual would not create a risk or possibility that the individual would retain control over the firearms.

Understandably, the courts may be concerned that authorizing the transfer of a convicted felon's firearms to a third party raises the potential that the prohibited individual may someday come into actual or constructive possession of those firearms again. But courts are well within their powers to implement appropriate safeguards to "prevent [a felon] from

constructively possessing the weapons and to ensure that they are properly sold and not otherwise misused." *United States v. Zaleski*, 686 F.3d 90, 93-94 (2d Cir. 2012). As Judge Easterbrook explained while writing for the Seventh Circuit, a court can condition the transfer "on the recipient's written acknowledgement that returning the guns to [the felon] or honoring his instructions would aid and abet" a felon in the unlawful possession or attempted possession of a firearm. *Miller*, 588 F.3d at 420. Further, procedures could be established to account for sales and disbursements, and a deadline for their sale could be imposed. *Zaleski*, 686 F.3d at 93-94.

But categorically prohibiting the government from transferring or selling firearms on behalf of a convicted felon, such as Mr. Henderson, to a third party based on speculation that the individual could constructively possess the firearms, would "stretch the concept of 'constructive possession' . . . much too far. . . ." *United States v. Brown*, 754 F. Supp. 2d 311, 315 (D. N.H. 2010) (McAuliffe, C.J.). As the Second Circuit correctly explained, there is no concern over constructive possession if the transfer "would in fact strip [the individual] of any power to exercise dominion and control over" the firearms directly or through the recipient. *Zaleski*, 686 F.3d at 93 (italics omitted).

Because there is no evidence that Mr. Henderson would exert dominion and control over the firearms or that a third party recipient would be under his control, the court's concerns over constructive possession were unfounded, and its decision was in error. *Amici*

respectfully request that the Court reverse the decision of the Eleventh Circuit, thus restoring the rights of recently prohibited individuals to transfer their lawfully acquired, non-contraband firearms to appropriate third parties.

II. BARRING A PROHIBITED PERSON FROM TRANSFERRING OR SELLING HIS LAWFULLY OWNED FIREARMS CONTRAVENES SECTION 922(g)'s LEGISLATIVE INTENT AND OTHER IMPORTANT POLICY CONSIDERATIONS

Title 18 U.S.C. § 922(g) has one clear purpose: "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). But it was not intended to completely bar an individual from divesting himself of his firearms by transferring or selling them to a third party following a conviction that forbids firearm possession.

In enacting the Gun Control Act of 1968 – of which Section 922(g) is a part – Congress expressed a deep concern with the availability of firearms "to those whose possession thereof was contrary to public interest." *Huddleston v. United States*, 415 U.S. 814, 824 (1974). As this Court has recognized, Congress passed the Gun Control Act because of a:

> concern with keeping firearms out of the hands of categories of potentially irresponsible

> persons, including convicted felons. Its broadly stated principal purpose was "to make it possible to keep firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency." S. Rep. No. 1501, 90th Cong., 2d Sess., 22 (1968). *See also* 114 Cong. Rec. 13219 (1968) (remarks by Sen. Tydings); *Huddleston v. United States*, 415 U.S., at 824-825. Congressman Cellar, the House Manager, expressed the same concern: "This bill seeks to maximize the possibility of keeping firearms out of the hands of such persons." 114 Cong. Rec. 21784 (1968); *Huddleston v. United States*, 415 U.S., at 828.

Barrett v. United States, 423 U.S. 212, 220-21 (1976).

Given this principal purpose, Congress plainly did not intend to prevent persons prohibited from possessing firearms from ridding themselves of any ownership interest in their firearms entirely. *Cf. United States v. Mason*, 233 F.3d 619, 625 (D.C. Cir. 2000) (recognizing that "it is the retention of [a firearm], rather than the brief possession for disposal, . . . which poses the danger which is criminalized by felon-in-possession statutes.") (internal quotes omitted). Indeed, allowing an individual to transfer or sell his or her firearms following a conviction *furthers* the spirit of the Act. It would terminate any property interest an individual has in the firearms, ensuring that they are kept from persons that "Congress [has] classified as potentially irresponsible and dangerous." *Barrett*, 423 U.S. at 218.

The Eleventh Circuit's decision strays from this purpose. By prohibiting Mr. Henderson from transferring his firearms to a third party, the court effectively *requires* him to retain an ongoing property interest in his firearms indefinitely.[3] And it requires him to do so even though he has voluntarily sought to remove the firearms from his ownership and possession altogether. It strains reason to suggest that the goal of keeping firearms out of the hands of prohibited individuals would be furthered by forcing them to retain ownership interests in the very arms they are legally barred from possessing. *See* 18 U.S.C. § 922(g)(1). By forbidding individuals from completely divesting themselves of their firearms following a prohibiting conviction, the Eleventh Circuit's decision runs counter to congressional intent.

Authorizing individuals to transfer away their firearms following a prohibiting offense would also advance other important policy goals. It would encourage individuals to voluntarily turn their firearms over to the government, as they would no longer fear losing the economic value of their collections. And it would encourage them to transfer away any ownership interests in the firearms to a third party through

[3] Currently, Mr. Henderson could seek to restore his firearm rights by requesting a pardon. 18 U.S.C. § 921(a)(20). *See Miller*, 588 F.3d at 420 (explaining the options for restoring a convicted felon's firearm rights, and that appropriations riders have hampered the ability to seek other forms of rights restoration).

lawful means – as opposed to selling them on the black market to recover their value.

From the government's perspective, it would reduce the cost of storing a person's firearms for an indefinite period of time.[4] Moreover, it would avoid any unnecessary litigation to recover the value of the firearms. *See Miller*, 588 F.3d at 419-20 (recognizing that while courts have agreed that a person could bring a claim to recover the value of firearms destroyed or held by the government, "[i]t is hard to see how either the United States or [the defendant] can be made better off by replacing an actual sale with litigation. . . ."); *see also Howell*, 425 F.3d at 977 n.4 (implying that the defendant could file another action under 42 U.S.C. § 1983 for the value of the firearms).

In sum, it makes little sense to require a convicted felon to retain ownership over firearms he has voluntarily sought to divest himself of outright. Authorizing the proper transfer of firearms to non-prohibited third parties will promote Section 922(g)'s goal of foreclosing firearm ownership by prohibited persons, while simultaneously encouraging statutory compliance and promoting judicial economy.

[4] Although the government could institute forfeiture proceedings, it must do so within 120 days of seizure. 18 U.S.C. § 924(d)(1).

CONCLUSION

For these reasons, the decision of the Eleventh Circuit should be reversed.

Respectfully submitted,

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December 15, 2014