No. 13-1487

In the Supreme Court of the United States

TONY HENDERSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE 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), however, 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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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is unreported but available at 2014 WL 292169. The order of the district court (Pet. App. 5a-6a) adopting the magistrate judge's report and recommendation is unreported. The magistrate judge's report and recommendation (Pet. App. 7a-14a) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 28, 2014. On April 17, 2014, Justice Thomas extended the time for filing a petition for a writ of certiorari until June 27, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION AND RULE INVOLVED

Section 922(g) of Title 18 of the United States Code provides, in pertinent part, that "[i]t shall be 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 in or affecting commerce[] any firearm or ammunition."

Rule 41(g) of the Federal Rules of Criminal Procedure provides, in pertinent part, that "[a] person aggrieved by * * * the deprivation of property may move for the property's return."

INTRODUCTION

This case concerns an important question at the intersection of criminal and property law. Title 18 U.S.C. § 922(g), the purpose of which is 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," *Small* v. *United States*, 544 U.S. 385, 393 (2005) (internal quotation marks omitted), bars a convicted felon from "*possess*[*ing*] * * * any firearm or ammunition," 18 U.S.C. § 922(g) (emphasis added). The government contends, however, that it also tacitly extinguishes a person's entire ownership interest in firearms that are unrelated to the offense of conviction.

Petitioner was a United States Border Patrol Agent who surrendered his firearms to the FBI as a condition of bond while unrelated marijuana charges were pending against him. Following petitioner's guilty plea and service of his six-month sentence, the FBI refused to transfer his personal firearms to an unrelated third party who had purchased them. In response, petitioner filed a motion asking that the guns be transferred to the buyer or, alternatively, to petitioner's wife. The courts below held that allowing petitioner to transfer his non-possessory interests in his firearms to an unrelated third party would be tantamount to giving him "constructive possession" over them. Pet. App. 4a (citing *United States* v. *Howell*, 425 F.3d 971, 976-977 (11th Cir. 2005)); *id.* at 13a-14a (same). Alternatively, they held, once petitioner was "convicted of a drug offense [he] had unclean hands to demand" transfer of his firearms, "even though [he] did not use those firearms in furtherance of his offense." *Id.* at 4a; *id.* at 11a-12a, 14a (same).

The Eleventh Circuit's decision is wrong. It allows the government to use a statute that bars *possession* of firearms to dispense with formal forfeiture procedures and effectively strip citizens of their entire ownership interest in what are often significant household assets even when their convictions have nothing to do with those assets. And it deprives them of assets they could use to contribute to the support of their dependents at the very

time that imprisonment prevents them from supporting the household with employment income. If taken seriously, moreover, the Eleventh Circuit's alternative holding—that a felon's unclean hands bar her forever and everywhere from equity—would reinstate "the ancient common-law doctrine of 'outlawry' * * *—a theory which could not be admitted without violating the rudimentary conceptions of the fundamental rights of the citizen." *Hovey* v. *Elliott*, 167 U.S. 409, 444 (1897). The result—that felons cannot *completely* alienate firearms that they own but do not possess—is particularly perverse since § 922(g)'s whole purpose is to keep guns out of the hands of potentially dangerous people. The judgment of the Eleventh Circuit must be reversed.

STATEMENT

A. Legal Background

"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. *LaFatch*, 565 F.2d 81, 83 (6th Cir. 1977))). Title 18 U.S.C. § 922(g), however, 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." This case involves the intersection of these two rules.

In *United States* v. *Howell*, 425 F.3d 971 (11th Cir. 2005), the Eleventh Circuit first held that § 922(g) bars a court from ordering the government to transfer firearms within its possession, but owned by a felon, to a third party. It rejected a Fifth Circuit precedent, *Cooper* v.

City of Greenwood, 904 F.2d 302 (5th Cir. 1990), in which the court had held that a felon's "claimed *ownership* interest in [his noncontraband] firearms survived his criminal conviction and could not be extinguished without according him due process." 425 F.3d at 976 (quoting *Cooper*, 904 F.3d at 304) (emphasis added). It adopted instead the holding and reasoning of *United States* v. *Felici*, 208 F.3d 667 (8th Cir. 2000). In that case, the Eighth Circuit rejected the argument that the government could transfer to a third-party trust noncontraband firearms it had seized from a person convicted of a felony. 208 F.3d at 670. The Eleventh Circuit adopted *Felici*'s holding that "[f]ederal law prohibits convicted felons from possessing guns. * * * [A] request [for transfer to a third party] suggests constructive possession. Any firearm possession, actual or constructive, by a convicted felon is prohibited by law." *Howell*, 425 F.3d at 976-977 (quoting *Felici*, 208 F.3d at 670).

In *Howell*, the Eleventh Circuit rejected third-party transfers for an alternative reason as well. "[I]n order for a district court to grant a Rule 41(g) motion," it held,

> the owner of the property must have clean hands. The doctrine of "unclean hands" is an equitable test that is used by courts in deciding equitable fate. The defendant in the instant case[, solely by virtue of his status as a felon,] has come into court with extremely "unclean hands." One engaged in this type of criminal conduct is hardly entitled to equitable relief.

425 F.3d at 974 (citation omitted). No other court of appeals takes this position. The courts of appeals routinely allow felons to seek the return or transfer of noncontraband property through Rule 41(g) or other

equitable mechanisms provided they meet applicable requirements. See Pet. 14-16.

B. Factual Background

1. In early June 2006, petitioner, who at the time was a United States Border Patrol Agent, was arrested and charged with distributing marijuana. Pet. App. 2a. At petitioner's bond hearing, the government requested and the magistrate judge required that petitioner surrender his firearm collection to the government as a condition of his bond. J.A. 23, 28, 30. That collection, which "ha[d] been owned by [his] family * * * for many years," J.A.159, included a crossbow, a "nonfunctional" antique "Japanese Arisika * * * rifle," a nonfunctional "wall [h]anger," and a "nonfunctional" "[h]omemade muzzle-loading rifle," see J.A. 45, 102, 103. None of those identified items is classified as a firearm under federal law, see 18 U.S.C. § 921(a)(3), and § 922(g) does not bar a felon from possessing any of them. Other firearms included three M1 Garand rifles dating from World War II and the Vietnam War, a group of .22 caliber rifles and pistols, two shotguns, a carbine, and several revolvers. J.A. 101-104. In all, petitioner turned over approximately eighteen firearms[1] and other items valued at $3,570.92[2]. See J.A. 50-56. On the "Receipt for Property" it issued petitioner, the FBI marked the box indicating that the items were "[r]eceived [f]rom" him; it left unmarked the box

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[1] The Eleventh Circuit's opinion refers to "nineteen personal firearms." Pet. App. 2a. The various inventories disagree, however, as to the exact number. The government agrees that the exact number of firearms is not material to the legal issue. Br. in Opp. 3 n.1.

[2] This total excludes the value of petitioner's service firearm, which is included in the government's appraisal. See J.A. 52 (listing value of service revolver at $ 136.44).

indicating that items were "[s]eized" from him. J.A. 43, 45.

Petitioner later pleaded guilty to one drug charge and was sentenced to six months' imprisonment and 24 months of supervised release, including four months of home detention. Clerk's Mins. Proceedings of Sentencing, D.C. Dkt. No. 144. The court later shortened his term of supervised release without opposition from the government or the Bureau of Prisons. Order, D.C. Dkt. No. 154.

2. Soon after he began serving his sentence, Mr. Henderson asked the FBI through his attorney "what steps need to be taken to transfer the firearms." J.A. 78; Pet. App. 9a. He received no response. *Ibid.* Shortly after serving his sentence, petitioner contacted the FBI again to arrange for the transfer of his firearms to a third party. *Ibid*; J.A. 80-81. Following the FBI's instructions, petitioner submitted a letter describing his case together with a bill of sale and the contact information for the buyer, William Boggs. Pet. App. 9a-10a; J.A. 80-84. When Mr. Boggs later chose to withdraw from the transaction, Mr. Henderson arranged to sell his ownership interest in the firearms to Robert Rosier and again submitted the requested paperwork to the FBI. Pet. App. 10a; J.A. 85-89.

After receiving no response for more than a month, petitioner wrote another letter to the FBI and on four different occasions between April and June 2009 attempted to contact an agent familiar with the case. Pet. App. 10a. Twelve months after submitting a signed bill of sale, petitioner received a letter from the Jacksonville FBI office asserting that the Bureau had "seized" his firearms on June 9, 2006—the date he complied with the

magistrate judge's order to surrender the firearms—and notifying him of the procedure for submitting claims. *Ibid.* In December 2009, petitioner and Mr. Rosier filed a claim with the FBI requesting that the agency transfer ownership to Mr. Rosier. Pet. App. 10a-11a. Four to five months later, the FBI rejected the claim, asserting that "the release of the firearms to you or your designee, Robert Rosier * * * would place you in violation of federal law as it would amount to constructive possession." J.A. 121 (citing *Howell*, 425 F.3d at 976-977, and *Felici*, 208 F.3d at 670). The letter advised that petitioner had 10 days to request reconsideration, which he did. J.A. 122-125.

C. Procedural History

1. After receiving no response for another month, petitioner, proceeding pro se, filed a motion in district court, asking that the firearms be transferred to Mr. Rosier or petitioner's wife. Pet. App. 2a; J.A. 38-56. In his motion, he invoked the federal courts' "equitable powers" as authority for ordering the transfer. J.A. 39-40 (citing cases). In its response, the government recharacterized Mr. Henderson's general equitable motion as "a motion pursuant to Fed. R. Crim. P. 41(g)," J.A. 59; see Br. in Opp. 4 (noting "[t]he government construed the motion as having been filed under Rule 41(g)"), a provision that petitioner had never invoked, see J.A. 38-56. The magistrate judge assigned to the case withheld action until the FBI issued a final agency decision on petitioner's request for reconsideration. Order Taking Under Advisement, D.C. Dkt. No. 160. Finally, in January 2011—more than two years after petitioner first sought to transfer his ownership interest in the firearms—the FBI issued its final decision denying his appeal. Pet. App. 11a; J.A. 74. Mr. Henderson then

renewed his motion before the district court. See J.A. 66-73. Again, he invoked the federal courts' "equitable powers" and did not mention Rule 41(g). See J.A. 72.

2. The magistrate judge took up petitioner's motion for return of property and, following the government's lead, treated it as if it had been filed under Rule 41(g). See Pet. App. 11a. That rule provides, in relevant part, that "[a] person aggrieved * * * by the deprivation of property may move for the property's return." Fed. R. Crim. P. 41(g). Although recognizing that federal courts were divided on whether firearms "to which a convicted felon has legal title, but not possession, can be sold for the owner's benefit" without attaching constructive possession to him, Pet. App. 13a, the magistrate judge recommended denying petitioner relief because it was "bound by *Howell*," *ibid.*, the controlling circuit precedent. "Although the firearms were neither seized from [petitioner], nor constituted contraband, nor were they forfeited," *id.* at 13a-14a, *Howell* dictated that "allowing a defendant to transfer the firearms or receive money from their sale would be constructive possession" prohibited by § 922(g), *id.* at 12a. The magistrate judge also noted that *Howell* had held "that to prevail under Rule 41(g), the owner must have 'clean hands' * * *, but a defendant convicted of a drug offense has 'unclean hands' and is not entitled to equitable relief." *Id.* at 11a-12a.

3. Mr. Henderson then filed objections to the magistrate judge's report and recommendation. J.A. 126-133. He mentioned Rule 41(g) only once—as a "mean[s] to provide equitable relief." See J.A. 131. He argued, among other things, that *Howell* was distinguishable, J.A. 127-132, and that the magistrate judge and the government were confusing possession of the firearms with their ownership, J.A. 130-131. In particular, he

claimed that the government was wrongly "equating criminal constructive possession with even the most minimal exercise * * * of ownership - transferring legal title (and, ironically, thereby divesting title to personal property that the owner may not lawfully possess)." J.A. 130. The district court, however, adopted the magistrate judge's report and recommendation as the opinion of the court and denied the motion. Pet. App. 5a-6a.

4. Still proceeding pro se, petitioner appealed. His brief mentioned Rule 41(g) only in a single argument header, see J.A. 177, and argued instead that general principles of equity supported relief, see, *e.g.*, J.A. 184 ("Equity forbids this result."); J.A. 189 ("[T]his court must look to an equitable solution."); J.A. 194-195 ("[F]ailing to grant equitable relief[] results in imposition of a fine or penalty not imposed by the sentencing judge[.] * * * Equity requires this Court to do better."). He also renewed his argument that § 922(g) extinguished only his possessory interests in his firearms, not the remaining ownership interests. J.A. 187, 190-192 (citing cases). In addition, he outlined several different equitable means through which the courts could grant him relief, including "order[ing] a sale [of the items covered by § 922(g)] for [his] account." J.A. 193 (citing *Miller*, 588 F.3d at 419). He argued that such a disposition

> would preclude me, as a convicted felon, from unilaterally dictating or directing disposition, * * * and it avoids the constitutional issues arising under the Takings Clause, while it fully protects my legitimate property interests. I [would] not [be] setting the value, directing the sale or purchase of the firearms, but [would be] merely compensated for the value of

> my property by a neutral third-party, subject to any commission for such sale.

J.A. 193-194 (emphasis omitted). He further noted that "[t]he court can set such conditions as it deems necessary." J.A. 194.

The court of appeals affirmed the district court's denial of relief. Pet. App. 1a-4a. The court held that granting petitioner's motion and transferring the firearms to a third party would violate 18 U.S.C. § 922(g) by placing him in constructive possession of the firearms he had surrendered to the FBI. See *id.* at 4a. Although acknowledging "cases from other circuit and district courts which afforded defendants relief," *id.* at 3a (citing, *inter alia*, *United States* v. *Zaleski*, 686 F.3d 90 (2d Cir. 2012), *United States* v. *Miller*, 588 F.3d 418 (7th Cir. 2009), and *Cooper*, 904 F.2d at 302), the court denied relief because "our decision in *Howell* controls," *id.* at 4a. The court, again following *Howell*, held in the alternative that petitioner could not invoke equity at all: "Mr. Henderson's equitable argument rings hollow. We held in *Howell* that a defendant convicted of a drug offense ha[s] unclean hands to demand return of his firearms even though, as with Mr. Henderson, th[e] defendant did not use those firearms in furtherance of his offense." *Ibid.*

SUMMARY OF ARGUMENT

Title 18 U.S.C. § 922(g) has a clear aim: 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." *Small* v. *United States*, 544 U.S. 385, 393 (2005) (internal quotation marks omitted and emphasis added). It achieves that aim straightforwardly by making it "unlawful for any [felon]

to * * * *possess* * * * any firearm." 18 U.S.C. § 922(g) (emphasis added). Neither its purpose nor its text, however, reaches any other property interest an owner has in her firearms, particularly the right to sell or transfer them to another person once the law no longer allows her to possess them.

I. The Eleventh Circuit prohibits a district court from ordering such a sale or transfer because it believes doing so would "deliver[] actual or constructive possession of firearms to [the] convicted felon" in violation of § 922(g). Pet. App. 4a. That premise is mistaken. It misunderstands the plain meaning of the statute's key term by confusing "possession" with other incidents of ownership, ignores the language of closely related statutory provisions, violates the statute's central purpose, allows the government to effectuate a forfeiture without satisfying any of that procedure's strict substantive or procedural requirements, and raises serious constitutional doubts.

A. If a "statut[e's] text is plain and unamibiguous[, the court] must apply the statute according to its terms." *Cacieri* v. *Salazar*, 555 U.S. 379, 387 (2009) (citations omitted). Section 922(g) bars a felon from "possess[ing]" a firearm. Its textual prohibition extends no further. On its face, then, it can bar sale or transfer of ownership only if the act of selling or transferring imputes possession at some point to the owner himself. In other words, it prohibits an owner from completely alienating his property interests in his firearms only if he somehow possesses them in the process of alienating them from himself.

Since a sale of firearms in the government's possession for the owner's benefit would entail no actual

possession on the owner's part, § 922(g)'s bar operates only if it attaches constructive possession to the owner. It does not. Possession and ownership are two separate sticks in the bundle of property rights and a person can transfer one right without affecting the other, as both bailment and landlord-tenant law demonstrate. Just as a bailor who sells property held by a bailee to a third party at no time enjoys possession—constructive or otherwise—so too a gun owner at no point enjoys possession when the government sells guns of his that it possesses to a third party and directs that payment be made to the owner. To say the owner does enjoy constructive possession misunderstands long-established and fundamental notions of property. Alienating the property gives the owner no control over it. It does, in fact, the opposite.

B. The Eleventh Circuit's understanding of possession is also inconsistent with the structure of the statute and several well-accepted canons of statutory interpretation. Other provisions in the same Act distinguish between possessing a gun, on the one hand, and owning, bartering, selling and disposing of it, on the other. In such cases, e*xpressio unius est exclusio alterius* strongly implies that § 922(g) reaches possession but not selling or owning a gun. Likewise, this Court's anti-surplusage doctrine indicates that possessing does not ordinarily comprehend owning, bartering, or selling. Otherwise, these other terms in the statute would be redundant.

C. Extending possession to transfer of ownership also does nothing to further § 922(g)'s purpose—keeping guns away from those likely to be dangerous. If the government sells for an owner's benefit guns she can no longer possess, it alienates her interest in them

completely. In fact, the Eleventh Circuit's rule has the perverse result of forcing felons to retain a property interest in firearms they wish to be completely rid of.

D. The Eleventh Circuit's broad theory of constructive possession also allows the government to accomplish a forfeiture of noncontraband firearms without providing the owner any process. Since, in this view, § 922(g)'s bar on possession also prohibits any sale or transfer of ownership, it effectively extinguishes all of the owner's interests in his property, rendering it completely without economic value to him. It does so, moreover, without according the owner any of the protections that the Constitution, statutes, and federal rules establish. These include such central requirements as notice, an impartial hearing, an opportunity to argue that the action is excessive under the Eighth Amendment, and a right to a trial by jury.

E. The Eleventh Circuit's interpretation of § 922(g) runs against the constitutional avoidance doctrine. Since it allows the government to extinguish an owner's interests in noncontraband firearms without any reason, it raises serious due process, takings, Fourth Amendment, Second Amendment, and Eighth Amendment concerns—all of which would be avoided by adhering to traditional notions of possession in the common law of property.

II. The Eleventh Circuit's alternative ground for its decision—that commission of a felony gives one "unclean hands" and forever disqualifies someone from seeking equitable relief of any kind—ignores the central requirement of that doctrine: that there be a close relationship between the past wrongdoing and the relief requested. The unclean hands doctrine does not destroy

all of a felon's equitable rights going forward and effectively make him an "outlaw." Taken to its logical conclusion, the Eleventh Circuit's rule would foreclose courts from ever considering a claim for return of property to someone convicted of a crime—even from another private party who stole it.

III. Traditional equitable principles allow the courts to authorize the government to sell or transfer firearms owned by a felon to an appropriate third party. Equity's long-recognized flexibility to fashion appropriate relief allows it to devise mechanisms, like these, that respect the owner's nonpossessory interests in his firearms, ensure that he has no control of them in the future, and avoid burdening the government. Indeed, lower courts have recognized that equity authorizes even transfers to third parties designated by the owner under specific conditions.

ARGUMENT

I. BECAUSE § 922(G) PROHIBITS ONLY POSSESSION, IT DOES NOT BAR THE TRANSFER OR SALE OF FIREARMS TO APPROPRIATE THIRD PARTIES

Section 922(g)'s purpose is 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." *Small* v. *United States,* 544 U.S. 385, 393 (2005) (internal quotation marks omitted). As the Eleventh Circuit recognized, that statute, by its terms, extends only to *possession* of firearms. Pet. App. 4a ("We den[y] Rule 41 relief * * * because of the concern with courts violating 18 U.S.C. § 922(g) by delivering *actual or constructive possession* of firearms to a convicted felon.") (emphasis added); *United States* v. *Howell*, 425 F.3d 971,

977 (11th Cir. 2005) ("Even though the defendant's [idea of a proposed sale] is interesting * * * any firearm *possession, actual or constructive,* by a convicted felon is prohibited by law.") (emphasis added). The court of appeals nonetheless held that a court cannot authorize the government to transfer or sell for the benefit of the convicted owner firearms it holds without him somehow "possessing" the firearms in the process.

The decision of the court of appeals is wrong. It disregards the clear meaning of the key statutory term by confusing "possession" with other incidents of ownership. It also ignores the language of closely related statutory provisions, violates the statute's central purpose, allows the government to effectuate a forfeiture without satisfying any of that procedure's strict substantive or procedural requirements, and raises serious constitutional doubts.

A. "Possession" Has A Clear, Long-Established Meaning Distinct From Other Incidents Of Ownership

If "the statutory text is plain and unambiguous [the court] must apply the statute according to its terms." *Carcieri* v. *Salazar*, 555 U.S. 379, 387 (2009) (citations omitted). This Court has also recognized that when "a federal criminal statute uses a common-law term of established meaning without otherwise defining it, the general practice is to give that term its common-law meaning." *United States* v. *Turley*, 352 U.S. 407, 411 (1957) (citations omitted).

Under the common law, a possessory interest commonly entails "the right to exclude others, by a person who is not necessarily the owner." *Black's Law Dictionary* 1284 (9th ed. 2009); Restatement (First) of

Prop.: Introduction & Freehold Estates § 7 (1936) ("A possessory interest in land exists in a person who has * * * a physical relation to the land of a kind which gives a certain degree of physical control over the land, and an intent so to exercise such control as to exclude other members of society in general from any present occupation of the land."). This understanding accords with the widespread understanding among the courts of appeals that "possession," including constructive possession, entails "dominion and control" over the property in question. See, *e.g.*, *United States* v. *Garrett*, 903 F.2d 1105, 1110 (7th Cir. 1990); *United States* v. *Pelusio*, 725 F.2d 161, 167 (2d Cir. 1983); *United States* v. *Laughman*, 618 F.2d 1067, 1077 (4th Cir. 1980); *United States* v. *Craven*, 478 F.2d. 1329, 1333 (6th Cir. 1973), abrogated on other grounds by *Scarborough* v. *United States*, 431 U.S. 563 (1977); *United States* v. *Virciglio*, 441 F.2d 1295, 1298 (5th Cir. 1971).

The Eleventh Circuit's rule—that the government's sale or transfer of a gun on behalf of an owner who has been convicted of a felony necessarily imputes constructive possession to the owner—violates this well-established understanding. To begin with, the government's transfer to a third party gives the owner no "right to control" or "right to exclude"—the two central indicia of possession. While the firearms are in the government's possession, the government, as bailee, enjoys the complete right to control and to exclude others, including the bailor himself. See John D. Lawson, *The Principles of the American Law of Bailments* § 15, at 34 (1895) ("The bailee not having the title, nevertheless has in addition to the possession of the chattel a special, limited or qualified property in it which gives him a right of action against any one, whether the bailor or a

stranger, interfering with his possession or doing damage to the bailed article.").[3] The convicted owner enjoys neither. He cannot use the firearms, access them, or decide where they are stored, how they are stored, or how they are maintained. Nor can he stop others whom the government permits from handling them.

Under general principles of law, a bailor can sell the property to a third party during the bailment period. See Lawson § 29(9), at 62. When he does, the bailor does not temporarily regain possession in violation of the bailment agreement; throughout the transaction, the bailee retains the same right to control the property and exclude others, including the bailor. *Id.* § 15, at 34. It is black-letter law that a bailment "will not be affected by a sale made by the bailor of his reversionary interest to a third person, for the reason that he can convey no greater interest than he possesses, and has not, during the bailment, a present right of possession." *Id.* § 29(9), at 62; see Philip T. Van Zile, *Elements of the Law of Bailments and Carriers, Including Pledge and Pawn and Innkeepers* § 21 (2d ed. 1908) ("[T]he bailor may, subject to the bailee's rights * * *, sell[,] mortgage[,] or * * * incumber [sic] its right, title, and interest in the property * * * bailed.").

That the convicted owner receives money from the sale (either through the government as intermediary or directly from the new owner) makes no difference to this analysis. His receipt of the proceeds gives him no right

[3] Once the firearms are transferred to a third party, the original owner can exercise no right to control or right to exclude. Only the new owner can by virtue of her newfound full ownership. She alone, not the original owner, can decide when, how, where, and by whom the firearms can be used. The sale has extinguished the original owner's property interest in them.

to control or right to exclude. The new owner gains these possessory rights and, in any event, she receives possession from the government, not the original owner. Although the sale transfers the possessory rights of control and exclusion from the government to the third party, at no time does the original owner enjoy the power to exercise either. He simply gains no constructive possession.

This conclusion is confirmed by examining another common situation of divided possession and ownership: a standard landlord-tenant lease. In it, the landlord who owns the property grants the right of possession to the tenant for a period of time. The owner no longer enjoys the right to possess and, indeed, the tenant (subject to certain express or implied contractual conditions) can even exclude the owner. Restatement (Second) of Prop.: Land. & Ten. § 1.2 cmt. a (1977). The owner typically retains the right to sell the property subject to the lease. *Id.* § 15.1. But in the process of selling the property then in possession of the tenant, the landowner does not, even temporarily, regain possession in violation of the tenant's rights under the lease. See *id.* § 15.2 cmt. a ("The enjoyment by the tenant of his rights and expectations under the lease usually does not depend significantly on the landlord continuing to own his reversionary interest in the leased property.").

Although the Eleventh Circuit has concluded that transfer or sale to a third party "suggests constructive possession," *Howell*, 425 F.3d at 977 (quoting *United States* v. *Felici*, 208 F.3d 667, 670 (8th Cir. 2000)), it has never explained exactly when (or *how*) the owner would enjoy constructive possession. This is no accident. It cannot articulate the point in the transaction where the convicted owner attains possession *because he never does*.

At no point during the transfer of possession of the firearm from the government to the new owner or the transfer of payment for it to the original owner does the felon control the firearms or have the right to exclude others from using them.

The Eleventh Circuit's notion of constructive possession conflicts with other long-settled views of the common law. Under common-law larceny, for example, "[p]roperty is deemed to remain in the constructive possession of the person who was last in actual possession until he has abandoned it, given it to another person, or until another person has otherwise acquired actual possession." 3 *Wharton's Criminal Law* § 369 at 349 (Charles E. Torcia ed. 1978); see *United States* v. *Sellers*, 670 F.2d 853, 854 (9th Cir. 1982) (per curiam) (same). In a court-ordered sale, in other words, the government as bailee would retain constructive possession of the firearms until the moment they are transferred to the new owner, who then immediately obtains possession. The former owner never enjoys possession—constructive or otherwise.

The Eleventh Circuit's misguided conclusion that such transfer fleetingly provides the convicted owner with constructive possession effectively destroys all his remaining nonpossessory interests in the property. Under this mistaken understanding, a person convicted of a felony cannot exercise his right to sell his property without violating the law's ban on the distinct right of possession. The rule effectively transforms a ban on possession into a ban on alienation and, in so doing, violates both the plain meaning of the statute and foundational principles of property law.

B. The Eleventh Circuit's Expansion Of Possession To Include Nonpossessory Interests Is Inconsistent With The Structure Of The Statute And Multiple Canons Of Statutory Construction

The Eleventh Circuit's bootstrapping of possession into ownership cannot be squared with Congress's careful statutory scheme. As this Court has recognized, possession is just one stick in the "bundle" of property rights, see *United States* v. *Craft*, 535 U.S. 274, 278 (2002), and this Court has distinguished possession, in particular, from the rights to use and dispose of property, see *Andrus* v. *Allard*, 444 U.S. 51, 65-66 (1979) (distinguishing between the right to sell and "the rights to possess and transport * * * property, and to donate or devise it"); see also *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) ("Property rights in a physical thing have been described as the rights to possess, use and dispose of it.") (internal quotation marks omitted).

Congress has observed these distinctions in its regulation of firearms. The Eleventh Circuit's expansive view of possession, however, would overturn all of Congress's careful drafting in a particularly pernicious way. Although Congress adopted the specific language to "possess" in § 922(g), it adopted entirely different and more inclusive language in several closely related provisions *in the very same Act*. And, as this Court has held, when "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (quoting *United States* v. *Wong Kim Bo*, 472 F.2d 720, 722 (5th. Cir. 1972).

Consider § 924(d)(1). This section, like § 922(g), was enacted as part of The Firearm Owner's Protection Act of 1986. See Pub. L. No. 99-308, §§ 102(6), 104(a)(3), 100 Stat. 452, 457. It provides, in relevant part, that when someone has forfeited guns allegedly involved in certain crimes, "upon acquittal of the *owner* or *possessor* * * *, the seized or relinquished firearms or ammunition shall be returned forthwith to the *owner* or *possessor*." 18 U.S.C. § 924(d)(1) (emphasis added). In this provision, Congress—the very same Congress acting at the same time it enacted § 922(g)—carefully distinguished between "owner[s]" and "possessor[s]" and provided that people with each of these different property interests must have their guns returned. It therefore must be "presumed that Congress act[ed] intentionally and purposely in the disparate * * * exclusion," *Russello*, 464 U.S. at 23 (citation omitted), of "owner[s]" from § 922(g)—in other words, that Congress did not intend this provision to extinguish gun owners' nonpossessory interests in their firearms. No good reason exists here for overriding the *Russello* presumption.

Consider as well § 922(j), which appears in the same U.S. Code provision as § 922(g). It makes it "unlawful for any person to receive, *possess*, conceal, store, *barter*, *sell*, or *dispose of* any stolen firearm." 18 U.S.C. § 922(j) (emphasis added). By distinguishing between possessing a firearm, and "barter[ing], sell[ing], or dispos[ing] of" it, Congress clearly indicated that a prohibition on possessing a firearm does not itself forbid disposing of it; by the same token, § 922(g)'s prohibition on "possession" of a firearm by a felon does not include nonpossessory incidents of ownership. Again, the exclusion of these terms from § 922(g) must be "presumed * * * intentional[] and purpose[ful]," *Russello*, 464 U.S. at 23,

under the doctrine of "*[e]xpressio unius est exclusio alterius*," *Leatherman* v. *Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993).

Congress has also expressly distinguished between possession and ownership in a number of other closely related provisions. Section 931(a), for example, makes it unlawful for a convicted felon "to purchase, *own*, or *possess* body armor," 18 U.S.C. § 931(a) (emphasis added); § 229(a)(1) makes it a crime to, among other things, "*own*, *possess*, or use * * * any chemical weapon," *id.* § 229(a)(1) (emphasis added); and § 229B(a) likewise provides that any person convicted under § 229A(a) must "forfeit * * * any property, real or personal, *owned*, *possessed*, or used by a person involved in th[at] offense," *id.* § 229B(a) (emphasis added). Each of these provisions specifically distinguishes between ownership and possession and includes both terms. Section 922(g) includes only the latter. Here too e*xpressio unius est exclusio alterius* indicates that § 922(g), unlike these other provisions, does not bar other rights of ownership but only possession.

The broad interpretation of "possession" embraced by the Eleventh Circuit would, moreover, render superfluous all the other terms Congress included in these other provisions, thereby violating yet another "cardinal principle of statutory construction," *Williams* v. *Taylor*, 529 U.S. 362, 404 (2000), that "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant," *Hibbs* v. *Winn*, 542 U.S. 88, 101 (2004) (quoting 2A Norman J. Singer, *Statutes and Statutory Construction* § 46.06, at 181-186 (rev. 6th ed. 2000)). "As [this Court] ha[s long] noted * * *, we are hesitant to

adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law." *Mackey* v. *Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 837 (1988).

Clearly, Congress understands the difference between ownership and possession and has used each term deliberately with its specific meaning in mind. Congress's decision in drafting § 922(g) to bar possession but not ownership, transfer, or sale means it intended to bar the one and not the others. "[C]ourts must presume that [the] legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992).

This is particularly true when, as the government itself has previously argued, "Congress crafted the * * * forerunner to Section 922(g)" with "detailed precision," U.S. Br. at 13, *Small* v. *United States*, 544 U.S. 385 (2005) (No. 03-750) (citing *Barrett* v. *United States*, 423 U.S. 212, 216-217 (1976)), and this Court has held that "Congress knew the significance and meaning of the language it employed" in § 922(g), *Barrett*, 423 U.S. at 217. In fact, this Court has noted, "[i]t is obvious" that the language employed "throughout * * * [was] chosen with care" and that the provisions represent "a carefully constructed package of gun control legislation." *Scarborough* v. *United States*, 431 U.S. 563, 570 (1977). Thus, Congress's bar of only possession must "mean[] exactly what it says," *Barrett*, 423 U.S. at 216 (quotation marks and citation omitted), and no more.

C. The Eleventh Circuit's Rule Turns § 922(g)'s Purpose On Its Head

Prohibiting those convicted of a felony from selling their firearms to third parties does nothing to advance

the recognized purpose of § 922(g). In enacting § 922(g), Congress sought 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." *Small* v. *United States,* 544 U.S. 385, 393 (2005) (internal quotation marks omitted); *Dickerson* v. *New Banner Inst., Inc.*, 460 U.S. 103, 112 (1983) (same). As this Court has noted, "keeping firearms out of the hands of those not legally entitled to possess them" was "[t]he principal purpose of the federal gun control legislation." *Huddleston* v. *United States*, 415 U.S. 814, 824 (1974) (internal quotation marks omitted).

The legislative history of § 922(g) and its predecessor makes clear that this purpose extended only to possession, not to ownership. That history not only speaks repeatedly of barring felons from possessing firearms, see, *e.g.*, 114 Cong. Rec. 13,868 (1968) (statement of Sen. Long) ("anybody who has been convicted of a felony * * * is not permitted to *possess* a firearm") (emphasis added); *id.* at 13,869 ("this simply strikes at the *possession* of firearms") (emphasis added); *ibid.* ("It places the burden and the punishment on the kind of people who have no business *possessing* firearms in the event they come into *possession* of them.") (emphasis added), but it also specifically contemplates allowing felons to own them.

In fact, the colloquy between the original sponsor, Senator Long, and Senator McClellan could not more clearly establish Congress's intent to extinguish only a felon's possessory interests in his firearms:

> Mr. McClellan. I have not had an opportunity to study the amendment. * * * The thought that occurred to me, as the Senator explained it, is that if a man had been in the penitentiary, had been a felon,

> and had been pardoned, without any condition in his pardon to which the able Senator referred, granting him the right to bear arms, could that man own a shotgun for the purpose of hunting?
>
> Mr. Long of Louisiana. No, he could not. He could own it, but he could not possess it.
>
> Mr. McClellan. I beg the Senator's pardon?
>
> Mr. Long of Louisiana. This amendment does not seek to do anything about who owns a firearm. He could not carry it around; he could not have it.

114 Cong. Rec. 14,774 (1968).

The government's view does nothing to promote the statute's purpose. Allowing felons to transfer their non-possessory interests to lawful purchasers poses no risk of putting firearms back in felons' hands. It merely allows those who own guns to dispose of their remaining property interests in them.

The government's view, in fact, turns the statute's purpose on its head. The government would bar a person convicted of a felony from *completely* alienating his interests in firearms he owns but does not possess, thereby forcing him to *retain* property rights in firearms he would like to be rid of. Nothing suggests Congress intended such a perverse result.

D. The Eleventh Circuit's Broad Theory Of Possession Allows The Government To Effectively Accomplish A Forfeiture Of Non-contraband Property Without Providing Any Process

The Eleventh Circuit's rule is erroneous for yet another reason: It allows the government to effectively extinguish all of an owner's interests in his property

without having to satisfy any of the strict substantive and procedural requirements for forfeiture. No one disputes that, by receiving the firearms from petitioner in accordance with the magistrate judge's request, the government acquired no ownership interest in petitioner's firearms. See Pet. App. 13a-14a & n.6. But the Eleventh Circuit's rule not only prevents a felon from *possessing* firearms, it also prevents him for all time from lawfully realizing the value of their sale. That effectively extinguishes all of the person's interests in his lawful property, rendering the property utterly without economic value to him.

It does so, moreover, without observing any of the requirements the Constitution, statutes, and federal rules establish for forfeiture. These requirements are not trivial. Rather, they "make federal civil forfeiture procedures fair to property owners and * * * give * * * [them] the means to recover their property and make themselves whole" after government seizures. H.R. Rep. No. 192, 106th Cong., 1st Sess. 11 (1999). In particular, the Eleventh Circuit's rule allows the government to dispense with giving notice and a hearing, as due process ordinarily requires, *United States* v. *James Daniel Good Real Prop.*, 510 U.S. 43, 48, 59 (1993), and denies the owner any opportunity to argue that the deprivation of all his ownership interests is excessive under the Eighth Amendment, see *Austin* v. *United States*, 509 U.S. 602 (1993). Nor is the government required to identify a statutory basis and "sufficiently detailed facts" to support its claim, Fed. R. Civ. P. Supp. G(2), show that the guns have some connection to a criminal act, see 18 U.S.C. § 924(d)(1), or prove that they were purchased with criminal proceeds, *id.* § 981(a)(1). It can, in fact, accomplish the equivalent

of forfeiture without satisfying § 924(d)(1)'s strict 120-day statute of limitations. *Id.* § 924(d)(1); see *Miller*, 588 F.3d at 419 (noting that government's view "nullifies the statute of limitations"). And, needless to say, the government can avoid the jury trial the rules make available. See Fed. R. Civ. P. Supp. G(9). Even when these strict procedural and substantive requirements are met, "[f]orfeitures are not favored; they should be enforced only when within both letter and spirit of the law." *United States* v. *One 1936 Model Ford V-8 De Luxe Coach, Motor No. 18-3306511*, 307 U.S. 219, 226 (1939). The Eleventh Circuit rule violates both.

The Eleventh Circuit's rule permits "increasing and virtually unchecked use of * * * civil forfeiture * * * and * * * disregard for due process that is [embedded] in th[e] statutes" that ordinarily govern it. *United States* v. *All Assets of Statewide Auto Parts, Inc.*, 971 F.2d 896, 905 (2d Cir. 1992). Since due process is "conferred, not by legislative grace, but by constitutional guarantee," *Arnett* v. *Kennedy*, 416 U.S. 134, 167 (1974) (opinion of Powell, J.), courts must prevent forfeiture from "becom[ing] more like a roulette wheel employed * * * [as] a tool wielded to punish * * * than a component of a system of justice," *Bennis* v. *Michigan*, 516 U.S. 442, 456 (1996) (Thomas, J., concurring). The court of appeals' interpretation "would permit the [government] to exercise virtually unbridled power to confiscate vast amounts of property," *id.* at 458 (Stevens, J., dissenting), running afoul of the safeguards in place to protect individuals' property rights.

Allowing the government to avoid the constitutional, statutory, and other protections that attach to forfeiture would permit arbitrary encroachment on an individual's lawful ability to rent, sell, or otherwise transfer property.

See *James Daniel Good Real Prop.*, 510 U.S. at 54 ("The seizure deprived Good of valuable rights of ownership, including the right of sale * * * and the right to receive rents."); *Fuentes* v. *Shevin*, 407 U.S. 67, 80-81 (1972) ("The purpose of [prior notice and hearing] is to protect his use and possession of property from arbitrary encroachment—to minimize substantively unfair or mistaken deprivations of property."). Forfeiture requirements "ensure the requisite neutrality that must inform all government decisionmaking" and prevent the government from unilaterally extinguishing the "[i]ndividual freedom [that] finds tangible expression in property rights." *James Daniel Good Real Prop.*, 510 U.S. at 55, 61.

Petitioner received none of these procedural protections in this case. The magistrate judge ordered Mr. Henderson to turn his firearms over to the government as a condition of bond. J.A. 28, 30. The government never contended that the guns were used in the commission of any crime or that the guns were subject to forfeiture under 21 U.S.C. § 853. The government, in fact, never commenced civil forfeiture proceedings. Rather, petitioner's property interests were effectively extinguished without *any* process whatsoever. The government applied none of the procedural or substantive requirements that ordinarily ensure the fairness of forfeiture. It simply took delivery of his guns and kept them.

E. The Eleventh Circuit's View Of Possession Must Be Rejected Because It Raises Serious Constitutional Doubts

1. The Eleventh Circuit's understanding of the felon-in-possession statute is utterly implausible. But even if it

were not, this Court has long held that "when deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail—whether or not those constitutional problems pertain to the particular litigant before the Court." *Clark* v. *Martinez*, 543 U.S. 371, 380-381 (2005). If forfeiture proceedings implicate the Due Process Clause of the Fifth Amendment, see, *e.g.*, *United States* v. *$8,850 in U.S. Currency*, 461 U.S. 555 (1983), retaining noncontraband property without any process at all implicates due process concerns *a fortiori*, see, *e.g.*, *Cooper* v. *City of Greenwood*, 904 F.2d 302, 304 (5th Cir. 1990). When "the [g]overnment seize[s] property not to preserve evidence of wrongdoing, but to assert * * * control over the property itself, [it] must comply with the Due Process Claus[e]." *James Daniel Good Real Prop.*, 510 U.S. at 52.

The rights that petitioner has been deprived of—for example, the right to transfer his property and to realize its economic value—are rights traditionally protected by due process. See *James Daniel Good Real Prop.*, 510 U.S. at 54-55 (holding that right merely to receive rent must receive due process protection). The Eleventh Circuit's rule flouts the rationale for "the prohibition against the deprivation of property without due process of law": "[t]he high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference," *Fuentes*, 407 U.S. at 81, and recognition that "[i]ndividual freedom finds tangible expression in property rights," *James Daniel Good Real Prop.*, 510 U.S. at 61. The government's continued retention of Mr. Henderson's

gun collection permanently and unnecessarily dispossesses him of *all* his rights in it.

Petitioner's right "to be free from governmental interference[ ] is [by itself] a private interest of historic and continuing importance." *James Daniel Good Real Prop.*, 510 U.S. at 53-54. The particular property interests that he was deprived of, however, are substantial. The government appraised his collection at $3,570.92. See *supra*, p. 5 & n.2. More generally, gun collections routinely attain values of thousands, if not tens of thousands, of dollars. *E.g.*, Larry Fitzpatrick, *No Heirs Found for Springfield Man Who Died Leaving Valuable Gun Collection*, Or. Herald, May 11, 2012, *available at* http://goo.gl/huSCek (reporting "a gun collection worth about half a million dollars").[4]

These property deprivations, moreover, are not rare occurrences. There were more than 1,200,000 felony convictions in 2006. U.S. Dep't of Justice, Bureau of Justice Statistics, *Felony Sentences in State Courts, 2006—Statistical Tables*, tbl. 1.1; U.S. Dep't of Justice, Bureau of Justice Statistics, *Federal Justice Statistics 2006 - Statistical Tables*, tbl. 4.2. Were the Court to approve the Eleventh Circuit's rule, every firearms

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[4] The cases involved in the circuit split reflect this fact. In one case, the Government sold the firearm collection for over $30,000, see *Cooper*, 904 F.2d at 304, and, in another, seized a collection valued at over $100,000, see *United States* v. *Zaleski*, 686 F.3d 90, 91 (2d Cir. 2012). And sizable collections were present in many of the other cases involved in the split. *E.g.*, *Miller*, 588 F.3d at 418 (34 firearms); *United States* v. *Roberts*, 322 F. App'x 175, 176 (3rd Cir. 2009) (10 firearms); *United States* v. *Headley*, 50 F. App'x 266, 267 (6th Cir. 2002) (14 firearms); Notice and Motion for Ct. Order to Return Personal Property at 4, *United States* v. *Brown*, No. 1:06-cr-00071-SM (D.N.H. Oct. 16, 2006), ECF No. 65 (30 firearms).

owner convicted of a felony would be prevented from realizing any value from legally-acquired property that may be that person's most valuable asset. See, *e.g.*, *Zaleski*, 686 F.3d at 91 (valuing a felon's legal firearm collection at over $100,000). In any event, firearms represent significant household assets. One commenter estimates the cost of a handgun—one of the least expensive types of firearms—with associated ammunition and equipment at $ 714. Dan Zimmerman, *The True Cost of Buying a Handgun*, The Truth About Guns.com (Oct. 20, 2013), http://goo.gl/vzrcV8. That sum represents two-thirds of the typical American household's monthly discretionary income.[5] Furthermore, many individuals purchase firearms as an investment, believing that "firearms [never] do anything but increase in value." Joe Mont, *Investing in Guns Beats Tech Stocks*, The Street (Apr. 13, 2011), http://goo.gl/MIQyID. And those who own firearms tend to own several. Allison Brennan, *Analysis: Fewer U.S. Gun Owners Own More Guns*, CNN (July 31, 2012), http://www.thestreet.com/story/11080515/1/investing-in-guns-beats-tech-stocks.html.

The Eleventh Circuit's approach also conflicts with this nation's long recognition of citizens' economic interest in firearms. Even during the Revolution, when the Continental Congress authorized the seizure of weapons held by Loyalists, it required that "the arms when taken be appraised by indifferent persons, and such as are applied to the arming the continental troops, be paid for by Congress, and the residue by the respective assemblies, conventions, or councils, or committees of

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[5] The typical American household has $12,800 in annual discretionary spending. Experian, *The 2011 Discretionary Spend Report* 3 (2011).

safety." 4 *Journals of the Continental Congress, 1774–1789*, at 201-205 (Worthington Chauncey Ford ed., Gov't Printing Office 1906). Contemporaneous state law likewise required compensation for arms taken from private persons. See, *e.g.*, An Act for Providing Against Invasions and Insurrections, 1777 Va. Acts ch. VII, *reprinted in* 9 *Hening's Statutes at Large* 291, 293-294 (1821) (directing that any arms taken for temporary state use and lost or damaged be paid for). Firearms were an important asset in Founding-era America. An examination of a national database of probate inventories from 1774 showed that there were more colonial American estates listing guns than estates listing bibles or coins or other money. James Lindgren, *Fall from Grace: Arming America and the Bellesiles Scandal*, 111 Yale L.J. 2195, 2208-2209 (2002).

2. The Eleventh Circuit's rule raises other constitutional concerns as well. The Fifth Amendment's Takings Clause "stand[s] directly in opposition to state action intended to deprive people of their legally protected property interests." *Hudson* v. *Palmer*, 468 U.S. 517, 539 (1984) (O'Connor, J., concurring). "The protections of the Takings Clause apply to * * * personal property," like a gun collection. *Huntleigh USA Corp.* v. *United States*, 525 F.3d 1370, 1377-1378 (Fed. Cir. 2008) (citing *Andrus* v. *Allard*, 444 U.S. 51, 65 (1979)). The courts have, therefore, recognized that when the government "effect[s] a *de facto* forfeiture by retaining the property seized indefinitely" its "continued retention * * * constitute[s] a taking without just compensation." *United States* v. *Premises Known as 608 Taylor Ave., Apartment 302, Pittsburgh, Pa.*, 584 F.2d 1297, 1302 (3d Cir. 1978); accord *State* v. *Fadness*, 268 P.3d 17, 29 (Mont. 2012) (same); *Lee* v. *City of Chicago*, 330 F.3d 456,

466 & n.5 (7th Cir. 2003) (same); see also *Andrus*, 444 U.S. at 65-66 (suggesting that the "denial" of the full "bundle" of property rights constitutes a taking). The Eleventh Circuit's rule, however, allows the government to effectively extinguish every one of Mr. Henderson's property interests in his firearms without providing any compensation whatsoever. "[A] State may not sidestep the Takings Clause by disavowing traditional property interests long recognized under state law." *Phillips* v. *Washington Legal Found.*, 524 U.S. 156, 167 (1998). The federal government likewise should not be able to sidestep the Takings Clause by rejecting a long-held distinction between possessory and nonpossessory property interests.

3. Furthermore, a continued holding of property may "constitute * * * a seizure [in addition to] a taking," raising Fourth Amendment concerns as well. *Presley* v. *City of Charlottesville*, 464 F.3d 480, 485 (4th Cir. 2006). When the government refuses to return property without legal justification, the aggrieved party will often be able to "prove that the government [is] *unreasonably* seiz[ing] property." *Ibid.* (emphasis in original). While the government may seize property for use in a criminal proceeding, it "cannot legally retain property indefinitely." *Mendez* v. *United States*, No. 1:99-cv-03496-JFK, 2003 WL 21673616, at *4 (S.D.N.Y. July 16, 2003). And if the government cannot offer a legal justification for continuing to retain property, "such retention would violate [the property owner]'s Fourth Amendment rights." *Ibid.*

4. The government's broad understanding of "possession" unnecessarily raises Second Amendment concerns by burdening those who fear the government may accuse them of a crime. Under the government's

theory of possession, a firearm owner that feels she may be charged with a felony has three bad options: voluntarily deliver her firearms to the government at her bond hearing and forfeit them without receiving any compensation in the event of conviction; sell or give away the firearms before she has even been accused, receiving compensation but leaving her unable to protect herself or her family; or keep the firearms, thus probably making bond impossible, and face possible liability under § 922(g) upon conviction. Even if she were to pawn her firearms and thus place them outside her possession and control, she would, under the government's view, automatically violate § 922(g) the moment she was adjudged guilty of the charged felony. See *United States* v. *Casterline*, 103 F.3d 76, 79 (9th Cir. 1996) ("If ownership were equated with possession, then one charged with a first felony, who had pawned his guns or otherwise put them out of his possession and control, but retained title, would automatically commit a second felony the moment he was adjudged guilty."). In other words, the government's preferred (and facially implausible) rule seriously harms a gun owner even before she is formally accused of a crime and even if she is eventually acquitted.

This burdening is inconsistent with the Second Amendment. The right to keep and bear arms for self-defense has been a fundamental right since the time of this country's founding. *McDonald* v. *City of Chicago*, 561 U.S. 742, 767-769 (2010). While it is presumptively permissible to prohibit those who have been convicted of felonies from possessing guns, *District of Columbia* v. *Heller*, 554 U.S. 570, 626-627 (2008), the Eleventh Circuit's reliance on § 922(g) to effectively proscribe owners from completely alienating their firearms after conviction unnecessarily burdens their right to protect

themselves. Any suggestion that Mr. Henderson could have avoided this dilemma by selling his firearms prior to being formally accused is no answer. Forcing that choice chills "the inherent right of self-defense [that] has been central to the Second Amendment." *Id.* at 628.

6. Finally, the Eleventh Circuit's rule raises grave concerns under the Excessive Fines Clause. That Clause "limits the government's power to extract payments, whether in cash or in kind, as punishment for some offense." *Austin* v. *United States*, 509 U.S. 602, 609-610 (1993) (internal emphasis and quotation marks omitted). And, this Court has held, "[a] forfeiture that reaches [property not actually used to commit an offense] is *ipso facto* punitive and therefore subject to review under the Excessive Fines Clause." *United States* v. *Bajakajian*, 524 U.S. 321, 333 n.8 (1998). Yet, by bootstrapping § 922(g)'s ban on possession into a ban on ownership, the Eleventh Circuit circumvents the "principle of proportionality," the "touchstone of the constitutional inquiry under the Excessive Fines Clause." *Id.* at 334. It imposes an additional fine on the gun owner by depriving her of the complete economic value of her firearms—no matter how great their value and how serious the felony. The Eleventh Circuit's rule places no limit whatsoever on the government's power to extract property as *de facto* punishment for an offense.

II. THE ELEVENTH CIRCUIT WRONGLY APPLIED THE DOCTRINE OF UNCLEAN HANDS

The Eleventh Circuit's alternative holding—that, as someone convicted of a felony, petitioner had "unclean hands" and was thus disqualified from seeking any equitable relief, see Pet. App. 4a—fares even worse

under scrutiny. Such a rule would bar anyone ever convicted of a crime from seeking equitable relief in *any suit* no matter how unrelated to the initial conviction.

This Court has squarely held that the unclean hands doctrine applies "only where some unconscionable act of one coming for relief has *immediate and necessary relation to the equity that he seeks in respect of the matter in litigation*." *Keystone Driller Co.* v. *Gen. Excavator Co.*, 290 U.S. 240, 245 (1933) (emphasis added); see also 1 Joseph Story & W.H. Lyon, *Commentaries on Equity* § 100, at 101 (14th ed. 1918); 2 John Norton Pomeroy, *A Treatise on Equity Jurisprudence* § 399, at 94-95 (Spencer W. Symons ed., 5th ed. 1941). This strict relational requirement has been a maxim of the doctrine since its inception in English law. See Zechariah Chafee, Jr., *Coming Into Equity With Clean Hands*, 47 Mich. L. Rev. 877, 880-882 (1949). Indeed, in the very first case to use the phrase "unclean hands," *Dering* v. *Earl of Winchelsea*, the Court of Exchequer explained, "a man must come into a Court of Equity with clean hands; but when this is said it does not refer to a general depravity; it must have an *immediate and necessary relation* to the equity sued for." (1787) 29 Eng. Rep. 1184 (Exch.) 1185; 1 Cox. Eq. Cas. 318, 319 (emphasis added). Thus, "illegality" cannot constitute a defense "when merely collateral to the cause of action sued on." *Loughran* v. *Loughran*, 292 U.S. 216, 228 (1934).

Because it requires a close relationship between past wrongdoing and the relief requested, the doctrine of unclean hands "does not go so far as to prohibit a court of equity from giving its aid to a bad or a faithless man or a criminal." 2 Pomeroy § 399, at 97. Thus, "[e]quity does not demand that its suitors shall have led blameless lives." *Loughran*, 292 U.S. at 229; see also *Precision*

Instrument Mfg. Co. v. *Auto. Maint. Mach. Co.*, 324 U.S. 806, 814-815 (1945) (affirming *Loughran*). The doctrine of unclean hands "is not a license to destroy the rights of persons whose conduct is unethical." Dan B. Dobbs, *Handbook on the Law of Remedies* § 2.4, at 46 (1973). "[C]ourts of equity," in short, "do not make the quality of suitors the test." *Keystone Driller*, 290 U.S. at 245; see also Dobbs § 2.4 at 46 (explaining that under unclean hands, "unrelated bad conduct is not to be considered against the plaintiff"); Henry L. McClintock, *Handbook of the Principles of Equity* § 26 at 63 (1948) ("[I]nequitable conduct which will defeat plaintiff's recovery must * * * refer[] to the transaction on which he bases his suit; relief will not be refused merely because of plaintiff's general bad character.").

No other court of appeals has endorsed the Eleventh Circuit's radical expansion of the unclean hands doctrine and most have implicitly rejected it. See Pet. 14-16. While courts occasionally use the language of unclean hands to deny Rule 41(g) or other equitable relief to persons convicted of crimes, they do so only when they seek the return of derivative contraband related to the offense. See, *e.g.*, *United States* v. *Kaczynski*, 551 F.3d 1120, 1129–1130 (9th Cir. 2009). Denying relief in such cases can be appropriate, because the actor's past criminal conduct "has [an] immediate and necessary relation to the equity that he seeks in respect of the matter in litigation." *Keystone Driller*, 290 U.S. at 245.

No such connection exists here. It is undisputed that the firearms at issue are not derivative contraband. Petitioner did not use a firearm—much less his entire collection of firearms—in committing the drug distribution offense to which he pleaded guilty. See Pet. App. 4a ("[petitioner] did not use those firearms in

furtherance of his offense"); *id.* at 13a-14a (finding that firearms were not "contraband"). Nor is there any evidence that he used any proceeds from marijuana sales to purchase them. *Ibid.* (same). The Eleventh Circuit based its holding of unclean hands solely on petitioner's status as a felon, *id.* at 4a, directly violating "[t]he general rule * * * that seized property, other than contraband, should be returned to its rightful owner once * * * criminal proceedings have terminated." *Cooper*, 904 F.2d at 304.

Taken to its logical conclusion, the Eleventh Circuit's rule would foreclose courts from *ever* considering a claim for return of property to a rightful owner convicted of a crime. The government could seize or hold property belonging to a person convicted of an offense knowing that he would have no status to invoke the courts' equitable powers to return it. It could thus impose upon a felon or even a misdemeanant an additional punishment beyond that imposed by law. More broadly, the Eleventh Circuit's rule could call into question the well-established principles of equity that shape the contours of many actions, particularly habeas corpus. See, *e.g.*, *McCleskey* v. *Zant*, 499 U.S. 467, 493 (1991) (explaining that habeas doctrines "invoke equitable principles to define the court's discretion to excuse pleading and procedural requirements"); Erica Hashimoto, *Reclaiming the Equitable Heritage of Habeas*, 108 Nw. U. L. Rev. 139, 142 (2013) (arguing that current doctrine "has obscured the importance of habeas's equitable roots").

Indeed, the logic of the Eleventh Circuit's rule would bar anyone convicted of a crime from ever invoking equity—as in a simple claim for conversion—even against private individuals. That would heap ever-increasing, heavy penalties upon those convicted, make them

defenseless against the world, and be tantamount to "outlawry"—a practice this Court has long condemned and rejected. *Ullmann* v. *United States*, 350 U.S. 422, 451 n.5 (1956) (Douglas, J., dissenting) ("The [Constitution] place[s] beyond the pale the imposition of infamy or outlawry."). "[A] person does not," this Court has held, "become an outlaw and lose all rights by doing an illegal act." *Nat'l Bank & Loan Co.* v. *Petrie*, 189 U.S. 423, 425 (1903).

Tellingly, this Court has held that claimants cannot be foreclosed from litigating their rights to property when the asserted bar rests on far more compelling claims of misconduct, including rebellion against the United States. See *Degen* v. *United States*, 517 U.S. 820, 828 (1996) (citing *McVeigh* v. *United States*, 78 U.S. (11 Wall.) 259, 267 (1870)). As this Court noted there, foreclosing a person from litigating his rights to property because of misconduct unrelated to the property is "an arbitrary response to the conduct it is supposed to * * * discourage." *Ibid.*

The Eleventh Circuit's narrow application of its "unclean hands" rule reflects an appreciation of its flaws. That court has applied the rule in only two cases—*United States* v. *Howell*, 425 F.3d 971, 974 (11th Cir. 2005), and this case, Pet. App. 4a—both of which involve non-contraband firearms. It has never applied the rule more broadly. Indeed, it routinely *allows* felons to invoke Rule 41(g) in seeking the return of other types of noncontraband property from the government. See, *e.g.*, *United States* v. *Melquiades*, 394 F. App'x 578, 579-580 (11th Cir. 2010). The Eleventh Circuit's unprincipled approach reflects little faith in the validity of its own rule.

III. RULE 41(G) AND EQUITY BOTH PERMIT THE COURTS TO ORDER THE TRANSFER OR SALE OF FIREARMS TO AN APPROPRIATE THIRD PARTY

Rule 41(g) is built upon the equitable principle that "all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction." *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 398 (1946). The Advisory Committee that proposed the 1989 Amendment to the rule expressly stated that "[n]o standard is set forth in the rule to govern the determination of whether property should be returned to a person aggrieved either by an unlawful seizure or by deprivation of the property" and "reasonableness under all of the circumstances must be the test when a person seeks to obtain the return of property." Fed. R. Crim. P. 41(g) advisory committee's note to the 1989 amendment. As this Court has previously held, without a "necessary and inescapable inference * * * restrict[ing] the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Porter*, 328 U.S. at 398. In order for equity to be "made on a case-by-case basis," *Holland* v. *Florida*, 560 U.S. 631, 649-650 (2010), courts can fashion *any* appropriate relief that comports with traditional equitable principles so long as there is no clear congressional command excluding it, *Porter*, 328 U.S. at 398; see also *Hunsucker* v. *Phinney*, 497 F.2d 29, 34 (5th Cir. 1974) ("Rule 41 is a crystallization of a principle of equity jurisdiction. That equity jurisdiction persists as to situations not specifically covered by the Rule.") (internal quotation marks omitted). Such "flexibility [is] inherent in equitable procedure [in order to] enable[e] courts to meet new situations [that] demand equitable intervention, and to accord all the relief necessary to correct par-

ticular injustices." *Holland*, 560 U.S. at 650 (internal quotation marks omitted and final alteration in original). By allowing district courts to fashion appropriate transfer mechanisms for the disposition of property owned by a defendant who is legally prohibited from *possessing* such property, courts can flexibly achieve "complete rather than truncated justice" through Rule 41(g). *Porter*, 328 U.S. at 398.

In order to honor the flexibility intended by Rule 41(g) and equity generally and to fashion appropriate relief, courts should not be confined to the constricting choices of either returning the firearms to the defendant—prohibited by § 922(g)—or destroying the firearms—a decision contrary to the equitable principle that courts must "impose the least drastic remedy available to achieve the desired goals," *Lawton* v. *Nyman*, 327 F.3d 30, 46 (1st Cir. 2003). Instead of being confined to these two choices, a court may and should "reach into its equitable tool-box to devise an alternate, less drastic [form of] relief tailored to the necessities and facts" of the case. *United States* v. *Rodriguez*, No. EP-08-CR-1865-PRM, 2011 WL 5854369, at *14 (W.D. Tex. Feb. 18, 2011). Courts that have done so have approved a variety of equitable remedies that would protect the property interests of the gun owner, ensure that he has no control over the firearms, and avoid burdening the government.

One mechanism courts have approved allows the government or a private party to sell the firearms for the benefit of the defendant. See *Cooper* v. *City of Greenwood*, 904 F.2d 302, 306 (5th Cir. 1990) ("We see no reason that a court * * * could not order a sale for the account of a claimant who * * * legally could not possess the firearms, were forfeiture to be denied for any

reason."); see also *United States* v. *Approximately 627 Firearms, More or Less*, 589 F. Supp. 2d 1129, 1140 (S.D. Iowa 2008) (holding that a court is "not prohibited from ordering the sale of [defendant's] personal firearms and the distribution of the proceeds to him"). The Second Circuit also approved this mechanism in *United States* v. *Zaleski*, when it allowed the owner's firearms to be transferred to a federally licensed gun dealer, who could then sell the weapons and transfer the proceeds to the defendant. 686 F.3d 90, 92 (2d Cir. 2012). The Second Circuit found that this third-party transfer and sale upheld the equitable principles of Rule 41(g) while not attaching constructive possession to the original owner in violation of § 922(g). *Id.* at 91, 93.

Transferring the firearms to a person of the defendant's choosing is also permissible so long as the transferee cannot be controlled or influenced by the defendant. See *United States* v. *Miller*, 588 F.3d 418, 420 (7th Cir. 2009) (approving "gift of the firearms to [third parties]" but allowing the court to "conditio[n]" transfer "on the recipient's written acknowledgement that returning the guns to [the original owner] or honoring his instructions would aid and abet [his] unlawful possession * * * and thus subject the recipient to criminal prosecution"); *United States* v. *Parsons*, 472 F. Supp. 2d 1169, 1175 (N.D. Iowa 2007) (allowing defendant to designate a third party to receive his weapons upon the third party's statement that he would sell a portion of the weapons and keep the remainder but never let the defendant see or possess them).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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DECEMBER 2014