No. 13-1487

In the Supreme Court of the United States

TONY HENDERSON, PETITIONER

v.

UNITED STATES OF AMERICA

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

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The brief in opposition is most remarkable for what it does not say. It never denies that this issue recurs frequently. It scarcely could. The question whether a person convicted of a felony may transfer firearms without violating § 922(g)'s prohibition on "possessing" firearms has "generated a significant amount of litigation." Frederick C. Benson, Comment, *The Firearm-Disability Dilemma: Property Insights into Felon Gun Rights*, 80 U. Chi. L. Rev. 1231, 1245 (2013) In fact, *eight* federal courts of appeals have squarely ruled on it.[1]

Nor does the government deny that the question presented is important. Again, it scarcely could. More than *one million people* are convicted of felonies during an average year[2] and *one American in three* owns a firearm.[3] Nor does the government dispute that the Eighth and Eleventh Circuits' approach deprives convicted owners of the complete economic value of their firearms—common household assets often worth thousands of dollars that could apply to support dependents. See Pet. 30 (noting value of firearms in cases at issue in circuit split).

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[1] See Pet. 9-14 (outlining split); see also *United States* v. *Harvey*, 78 F. App'x 13, 14-15 (9th Cir. 2003) (rejecting argument that district court must order sale of firearms for convicted felon's benefit, citing *United States* v. *Felici*, 208 F.3d 667, 670 (8th Cir. 2000)).

[2] See U.S. Dep't of Justice, Bureau of Justice Statistics, *Felony Sentences in State Courts, 2006—Statistical Tables*, Table 1.1; U.S. Dep't of Justice, Bureau of Justice Statistics, *Federal Justice Statistics 2006—Statistical Tables*, Table 4.2.

[3] Lydia Saad, *Self-Reported Gun Ownership in the U.S. is Highest Since 1993*, GALLUP Politics (Oct. 26, 2011), http://goo.gl/28bQy5.

Nor does the government even deny that the circuits are "divided into two camps," with "some courts" permitting persons convicted of felonies to dispose of firearms "and others refusing to do so." Benson, 80 U. Chi. L. Rev. at 1245. In fact, the government itself has previously *acknowledged* that "[t]he Circuits and lower courts are divided * * * on the question of transfer to third parties." Gov't Br. at 76, *United States* v. *Zaleski*, 686 F.3d 90 (2d Cir.) (Nos. 11-1888, 11-660), cert. denied, 133 S. Ct. 554 (2012); accord Gov't C.A. Br. 16 (noting that cases on other side of split "expressly reject [*United States* v.] *Howell*"). As noted in the petition (12-13 n.2), the government itself has taken inconsistent positions on the merits of this issue, having agreed to facilitate such firearms transfers in some other cases.

Finally, the government does not deny that this Court can fully settle the conflict only by taking a case from a court, like the Eleventh Circuit, that also bars felons from recovery by virtue of their "unclean hands." The government does not even pretend to defend that alternative holding. It simply argues—incorrectly, see Pet. 28—that the Eighth Circuit *might* also adopt it, Br. in Opp. 17-18 (BIO).

Ultimately, the government can muster just three flimsy arguments against granting the writ. First, it argues that the courts are not divided "*on * * * the facts of petitioner's case*"—at least as the government has attempted to narrowly and peculiarly redefine his claim. BIO 7 (emphasis added). Second, it claims that "neither Rule 41(g) [of the Federal Rules of Criminal Procedure] nor any other provision *identified by petitioner* provides authority" for the transfer of the firearms. *Id.* at 8 (emphasis added). Third, it contends that transfer to a third party necessarily would attach constructive

possession to Mr. Henderson. *Id.* at 10. None of these arguments withstands even brief scrutiny, let alone cautions against this Court's review.

A. This Case Implicates a Recognized, Deep Circuit Split

The government concedes "that the Second, Fifth, and Seventh Circuits * * * have disagreed with aspects of the reasoning of the Eighth and Eleventh Circuits." BIO 13. The government, moreover, cannot dispute that *all* those cases would have come out differently had those courts applied the rule that prevails in the Eight and Eleventh Circuits. Instead, the government attempts to recharacterize petitioner's claim not as a right to receive the proceeds from a sale or arrange a transfer to a third party but peculiarly as a right "that the firearms be released to his relative or to a friend of his choosing," *id.* at 11, and then argues that none of the three circuits on the other side of the split has "held that courts must approve th[is particular] kind of request," *id.* at 13.

The government's argument is wrong. It mischaracterizes both what Mr. Henderson requested and what the Eleventh Circuit held. As to the former, the Eleventh Circuit understood Mr. Henderson to have asked "to transfer ownership to [a] buyer," Pet. App. 2a, not to "a friend," BIO 11, and record evidence indicates that Mr. Rosier, the final "buyer" Mr. Henderson identified, was from another city, an "acquaintance" of a highway patrol officer Henderson knew. Evidentiary H'rg 25, May 16, 2011, ECF No. 182.

None of the decisions below, moreover, relied on Rosier's status as a "friend." All held against petitioner on the ground that transferring the guns to *anyone* would violate § 922(g). See Pet. App. 3a-4a (holding that

"*Howell* controls," the case in which the court refused to have government "sell the firearms and distribute the proceeds to [defendant]," *United States* v. *Howell*, 425 F.3d 971, 977 (11th Cir. 2005)); *id.* at 13a-14a (magistrate judge holding that he was "bound by *Howell*[, which bars] transfer [of] ownership of the firearms to *another person*") (emphasis added); *id.* at 5a (district court adopting same).

As to the latter, the Eleventh Circuit expressly acknowledged the circuit split, Pet. App. 3a, and held for the government not because it believed the opposing view would have yielded the same decision in Mr. Henderson's case, but rather because "we find that our decision in *Howell* controls," *id.* at 4a.

It is simply wrong to claim that the opposing circuits would not have decided Mr. Henderson's case differently. See BIO 11. As Judge Easterbrook wrote for the Seventh Circuit in *United States* v. *Miller*, 588 F.3d 418 (2009), § 922(g) does not prohibit the government's selling firearms and giving the proceeds to the owner—or even transferring "the firearms to one of [the owner's] *friends or relatives*," provided the recipient acknowledges that he or she cannot return the firearms to the original owner or "honor[] his instructions" about them. *Id.* at 419-420 (emphasis added). It is irrelevant, moreover, that "[n]o such assurances existed here." BIO 15. In *Miller* itself, the district court had expressly adopted *Howell*'s approach and held that § 922(g) categorically barred a gun owner from receiving "the proceeds from a[ny] sale of the firearms." *United States* v. *Miller*, No. 3:04–CR–00138(2)RM, 2009 WL 1228560, at *4 (N.D. Ind. Apr. 28, 2009). Neither the owner nor the government argued (1) that the firearms could be given to the owner's "friends or relatives" with proper

precautions, (2) that they could be held in a trust, or (3) that the government could hold them for the duration of the owner's § 922(g) disability. See Def.'s C.A. Br., *Miller*, 588 F.3d 418 (No. 09-2265); Gov't C.A. Br., *Miller*, 588 F.3d 418. But the Seventh Circuit itself identified those alternative dispositions *sua sponte* and directed the district court to consider their appropriateness on remand. The *pro se* owner's failure to suggest those alternatives here thus does not make this case a "poor vehicle for resolving [the] dispute." BIO 17.

The government's imaginative reading of *United States* v. *Zaleski*, 686 F.3d 90 (2d Cir. 2012), suffers from the same flaws. The Second Circuit stated there that it was

> persuaded by the Seventh Circuit's reasoning in *Miller*. Although Section 922(g)(1) prohibits constructive possession, as well as actual physical possession, of firearms and ammunition, under limited circumstances a convicted felon may arrange to benefit from the sale of otherwise lawful, unforfeited firearms by a third person without actually or constructively possessing them.

Id. at 93 (citation and footnote omitted). In context, the words the government extracts and highlights—"*under limited circumstances*," BIO 13—at least include the broad range of options *Miller* required the district court to consider, and which Mr. Henderson would be entitled to pursue. Indeed, the government identifies no reason why Mr. Henderson (and others like him in the Eighth and Eleventh Circuits) should not be given the relief the Second Circuit approved, *i.e.*, an opportunity to show that: (1) the sale to a third party would "strip [him] of any power to exercise dominion and control over [the firearms];" (2) that the buyer is "not subject to [his]

control;" and (3) that "the arrangement is otherwise equitable." *Zaleski*, 686 F.3d at 93.

It is true (BIO 15-16) that the Fifth Circuit's decision in *Cooper* v. *City of Greenwood*, 904 F.2d 302 (1990), was a § 1983 damages action, and not a Rule 41(g) proceeding seeking a sale for the owner's benefit. But that is irrelevant. *Cooper*'s central holding—that § 922(g) strips owners of their possessory interest in firearms but leaves their other ownership interests intact, see Pet. 12-13—stands in direct conflict with the Eighth and Eleventh Circuits' contrary rule. The government offers no reason to believe that the Fifth Circuit would not hold the same way in a case involving a Rule 41(g) motion. Indeed, district courts within the circuit have consistently done so, on the authority of *Cooper*. See, *e.g.*, *United States* v. *Rodriguez*, No. EP–08–CR–1865–PRM, 2011 WL 5854369, at *9-10 (W.D. Tex. Feb. 18, 2011); *Watts* v. *United States*, No. 3–01–CV–2100–R, 2002 WL 999320, at *2-3 (N.D. Tex. May 10, 2002).

B. The Government's *Own* Characterization of Petitioner's *Pro Se* Pleading as a "Rule 41(g) Motion" Cannot Bar Transfer to Third Parties

On the merits, the government argues that Federal Rule of Criminal Procedure 41(g) does not "provid[e] authority for the action petitioner sought" because the Rule by its terms permits only the *return* of property, not transfer or sale to a third party. BIO 8. This argument, which the government advances for the first time in this Court, is odd indeed. Mr. Henderson styled his original motion as a "Motion to Return/Disposition of Property" and *nowhere* mentioned Rule 41(g). See Mot. to Return/Disposition of Prop. His authority for the transfer was the court's "equitable powers." *Id.* at 1 (citing case law). As the government admits, *it* restyled

his general equitable motion as "a motion pursuant to Fed. R. Crim. P. 41(g)." Gov't Resp. to Def.'s Mot. to Return/Disposition of Prop. 2; see BIO 4 (noting "the government construed the motion as having been filed under Rule 41(g)"). The government can hardly hold Mr. Henderson to (supposed) limitations in the terms of a rule that he did not invoke and that the government pressed on him.

But even if it could, that would make no difference. As the government well knows, "documents filed by pro se litigants are to be liberally construed." U.S. Br. as Amicus Curiae Supp'g Resp'ts, *Fed. Express Corp.* v. *Holowecki*, at 20 n.11, 552 U.S. 389 (2008) (No. 06-1322) (collecting authorities). "Federal courts sometimes will ignore the legal label that a *pro se* litigant attaches to a motion and recharacterize the motion in order to place it within a different legal category," *Castro* v. *United States*, 540 U.S. 375, 381 (2003), and generally will not deny relief "unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief," *Santiago* v. *Meinsen*, 89 F. Supp. 2d 435, 438 (S.D.N.Y. 2000). Indeed, this principle has "particular force"

> in the context of actions relating to seized property. Such actions, which inhabit a nebulous and mutable intersection of criminal prosecution and civil claims, are fraught with complexities, including constitutional doctrines, jurisdictional issues, and the arcane procedures of administrative, civil and criminal forfeiture. As such, when considering a *pro se* plaintiff's effort to recover seized property, it would appear that additional latitude should be afforded.

Sylla v. *Ruh*, No. CV 10–3325(JFB)(GRB), 2012 WL 4370187, at *2 (E.D.N.Y. Aug. 30, 2012).

The courts of appeals have therefore *uniformly* held that "a pleading by a *pro se* plaintiff which is styled as a Rule 41[(g)] motion should be liberally construed as seeking to invoke the proper remedy."[4] *United States* v. *Giraldo*, 45 F.3d 509, 511 (1st Cir. 1995) (per curiam); accord, *e.g.*, *United States* v. *Martinez*, 241 F.3d 1329, 1330 (11th Cir. 2001) (noting every court of appeals to address the issue "ha[s] treated such motions as civil proceedings for equitable relief"); *De Almedia* v. *United States*, 459 F.3d 377, 379-380 (2d Cir. 2006); *United States* v. *Woodall*, 12 F.3d 791, 794 n.1 (8th Cir. 1993), *abrogated on other grounds by Dusenbery* v. *United States*, 534 U.S. 161 (2002); *United States* v. *Duncan*, 918 F.2d 647, 654 (6th Cir. 1990). It is therefore doubly irrelevant that "Rule 41(g) [does not] provide[express] authority" for transfer or sale to a third party. BIO 8.

But even if the government could hold a *pro se* litigant to the limitations of a rule he did not invoke, that would *still* make no difference. It is well recognized that Rule 41(g) is "a crystallization of a principle of equity jurisdiction[and that t]hat equity jurisdiction exists as to situations not specifically covered by the Rule," *United States* v. *Castro*, 883 F.2d 1018, 1020 (11th Cir. 1989) (collecting authorities), and "[a]lternatively [that] the same result can be reached by a broad reading of the Rule," *United States* v. *Rapp*, 539 F.2d 1156, 1160 (8th Cir. 1976) (quoting *Smith* v. *Katzenbach*, 351 F.2d 810, 814 (D.C. Cir. 1965)); accord *Heebe* v. *United States*, Civ. No. 10–3452, 2010 WL 5376119, at *1 (E.D. La. Dec. 20, 2010); *Matthews* v. *United States*, 917 F. Supp. 1090, 1101

[4] "In December 2002 Rule 41(e) was relettered as Rule 41(g)." *United States* v. *Search of Law Office*, 341 F.3d 404, 408 n.3 (5th Cir. 2003).

(E.D. Va. 1996). Thus, *no* circuit, even those foreclosing government sales and third-party transfers, has considered the text of Rule 41 an obstacle. The sole obstacle is § 922(g)—except in the Eleventh Circuit where the doctrine of "unclean hands" also bars such transactions, see Pet. 14-16.

Although the government faults Mr. Henderson for "voluntar[il]y surrender[ing]" the firearms, BIO 7, it does not dispute that he acquiesced to the court's *request* to surrender them "for his safety," *ibid.* Its claim that "[t]he government did not affirmatively seek possession of the firearms," *id.* at 11 n.4, is hard to square with the prosecutor's statement that "the *FBI came to his house and took possession of* the firearms," Evidentiary H'rg 29, May 16, 2011, ECF No. 182 (emphasis added).

C. The Government's Transfer or Sale of the Firearms to a Third Party Would Not Impute Constructive Possession to Mr. Henderson

The government's sole remaining argument—that transfer to a third party would constitute constructive possession by Mr. Henderson—is simply wrong. First, the government suggests that Mr. Henderson's position is self-contradictory because "his transaction would vest * * * supposedly extinguished possessory interest[s] in a third party." BIO 9. But petitioner has never claimed that *all* possessory interests in the guns were extinguished—only that *his* were. The government now holds all possessory interests in the firearms Mr. Henderson owns. It is no contradiction to argue that the government could transfer the possessory interests *it* currently holds to a third party.

Second, the government argues that constructive possession bars any transfer because Mr. Henderson is

proposing transfer to a "person of [his] own choosing." BIO 9. Petitioner does not deny that a court could legitimately bar transfer to some people that the owner of firearms might choose. As in *State* v. *Fadness*, 268 P.3d 17 (Mont. 2012), the court could bar transfer to an owner's elderly parents, when it has reason to question whether the firearms would then be beyond the owner's influence or control. But as several circuits have recognized, transfer to a third party over whom the owner has no influence (or, under appropriate conditions, even transfer to one over whom the seller otherwise might have influence) does not constitute constructive possession under § 922(g). See *Zaleski*, 686 F.3d at 93; *Miller*, 588 F.3d at 419-420. The government identifies no evidence that Mr. Henderson exercised such influence over either of the proposed buyers here; even if it *had*, Mr. Henderson should be allowed to show that appropriate safeguards could effectively insulate the buyer from disqualifying influence. See *id.* at 420; cf. Fed. R. Crim. P. 41(g) (noting courts "may impose reasonable conditions to protect access to the property and its use in later proceedings").

Perhaps the government means to argue that determining who will possess property is itself constructive possession. But, as the petition explains (18-20), that cannot be right. A bailor who sells to a third party property held by a bailee does not enjoy possession; the bailee enjoys it until the bailment ends, when the property can be claimed by the new owner. Similarly, a landlord who sells property to a third party subject to a tenancy does not gain any possessory interest. The tenant enjoys it for the remainder of the term and then the new owner does.

In any event, Mr. Henderson has never opposed a government sale of his firearms at market value so long as it gives him the proceeds. The government does not even *attempt* to defend the conclusion that that transaction would impute constructive possession to him in violation of § 922(g). BIO 12 n.5. Section 922(g) plainly addresses the potential danger of felons *having access to* firearms. There is no indication Congress sought to prohibit them from using the proceeds from firearm sales to support their dependents.

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 2014