

No. 13-1487

---

---

**In the Supreme Court of the United States**

TONY HENDERSON,  
*Petitioner,*

v.

UNITED STATES,  
*Respondent.*

---

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

---

**BRIEF OF AMICI CURIAE COMMONWEALTH  
SECOND AMENDMENT, INC.; NEW YORK STATE  
RIFLE & PISTOL ASSOCIATION, INC.; ILLINOIS  
STATE RIFLE ASSOCIATION; AND ILLINOIS CARRY  
IN SUPPORT OF PETITIONER**

---

David D. Jensen  
*Counsel of Record*  
DAVID JENSEN PLLC  
111 John Street, Suite 420  
New York, New York 10038  
(212) 380-6615  
david@djensenpllc.com

*Counsel for Amici Curiae*

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... ii

INTERESTS OF THE *AMICI* ..... 1

SUMMARY OF ARGUMENT ..... 3

ARGUMENT ..... 4

I. The Laws of the Jurisdictions that Prohibit  
the Unlicensed “Possession” of Firearms  
Universally Recognize a Disqualified Owner’s  
Non-Possessory Interests ..... 4

    A. States that Presumptively Prohibit  
    Possession ..... 5

    B. NFA Firearms ..... 7

II. Most State Supreme Courts Reject the Lower  
Court’s Expansive Interpretation of  
Possession ..... 8

III. The Lower Court’s Approach Would Have  
Severe and Untenable Ramifications for  
People Living in the Jurisdictions of the  
*Amici* ..... 13

CONCLUSION ..... 18

## TABLE OF AUTHORITIES

### CASES

<i>Banks v. Detroit Police Dept.</i> , 454 N.W.2d 198 (Mich. Ct. App. 1990) . . . . .	10
<i>Butner v. United States</i> , 440 U.S. 48 (1979) . . . . .	9
<i>Cooper v. Greenwood</i> , 904 F.2d 302 (5th Cir. 1990) . . . . .	4
<i>Dorman v. State</i> , 34 Ala. 216 (1859) . . . . .	12
<i>Eaton v. B.C. &amp; M.R.R.</i> , 51 N.H. 504 (1872) . . . . .	12
<i>Gibbs v. Tally</i> , 65 P. 970 (Cal. 1901) . . . . .	12
<i>Iowa v. Ludtke</i> , 446 N.W.2d 797 (Iowa 1989) . . . . .	10, 11
<i>Kelso v. Kelso</i> , 15 N.E.3d 767 (Mass. App. Ct. 2014) . . . . .	16
<i>Lindsay v. Alabama</i> , 958 So. 2d 346 (Ala. Civ. App. 2006) . . . . .	13
<i>Maine v. Pouliot</i> , 832 A.2d 755 (Me. 2003) . . . . .	11
<i>McCullough v. Brown</i> , 19 S.E. 458 (S.C. 1894) . . . . .	12
<i>McKinster v. Sager</i> , 72 N.E. 854 (Ind. 1904) . . . . .	12

<i>Michigan v. Minch</i> , 825 N.W.2d 560 (Mich. 2012) .....	10
<i>Montana v. Fadness</i> , 268 P.3d 17 (Mont. 2012) .....	9
<i>Pennsylvania v. Howard</i> , 713 A.2d 89 (Pa. 1998) .....	11
<i>Ruckelshaus v. Monsanto Co.</i> , 467 U.S. 986 (1984) .....	98
<i>Salt Lake City Water &amp; Elec. Power Co. v. Salt Lake City</i> , 67 P. 791 (Utah 1902) .....	12
<i>Serio v. Baltimore Co.</i> , 863 A.2d 952 (Md. 2004) .....	9
<i>Smith v. Goguen</i> , 415 U.S. 566 (1974) .....	17
<i>St. Louis v. Hill</i> , 22 S.W. 861 (Mo. 1893) .....	12
<i>State ex rel. George v. City Council of Aiken</i> , 20 S.E. 221 (S.C. 1894) .....	12
<i>State v. Ruggiero</i> , 35 A.3d 616 (N.H. 2011) .....	16
<i>Staton v. Norfolk &amp; C. R.</i> , 16 S.E. 181 (N.C. 1892) .....	12
<i>Taylor v. Wyoming</i> , 7 P.3d 15 (Wyo. 2000) .....	12, 13
<i>Tod v. Wick Bros. &amp; Co.</i> , 36 Ohio St. 370 (1881) .....	12

<i>United States v. Bagley</i> , 899 F.2d 707 (8th Cir. 1990) . . . . .	14, 17
<i>United States v. Felici</i> , 208 F.3d 667 (8th Cir. 2000) . . . . .	13, 14
<i>United States v. Headley</i> , 50 Fed. Appx. 266 (6th Cir. 2002) . . . . .	14
<i>United States v. Howell</i> , 425 F.3d 971 (11th Cir. 2005) . . . . .	13, 14
<i>United States v. Smith</i> , 142 Fed. Appx. 100 (3d Cir. 2005) . . . . .	14
<i>Wilcox v. Penn Mut. Life Ins. Co.</i> , 55 A.2d 521 (Pa. 1947) . . . . .	12
<i>Williams v. United States</i> , 341 U.S. 97 (1951) . . . . .	17
<i>Wynehamer v. People</i> , 13 N.Y. 378 (1856) . . . . .	12

## **STATUTES AND REGULATIONS**

18 U.S.C. § 922 . . . . .	10
18 U.S.C. § 922(d)(8) . . . . .	16
18 U.S.C. § 922(g) . . . . .	9, 10
18 U.S.C. § 922(g)(1) . . . . .	9, 13
26 U.S.C. § 5845(a) . . . . .	7
26 U.S.C. § 5861(d) . . . . .	7
27 C.F.R. § 72.39(a)(2) . . . . .	8
D.C. Code § 7-2502.01(a) . . . . .	5

D.C. Code § 7-2502.10(a) . . . . .	15
D.C. Code § 7-2502.10(c) . . . . .	6
D.C. Code § 7-2503.01(b) . . . . .	7
D.C. Code § 7-2507.6(a) . . . . .	5
430 Ill. Comp. Stat. 65/2(a)(1) . . . . .	5
430 Ill. Comp. Stat. 65/8.2 . . . . .	16
430 Ill. Comp. Stat. 65/9 . . . . .	15
430 Ill. Comp. Stat. 65/9.5(a)(2) . . . . .	6
430 Ill. Comp. Stat. 65/12 . . . . .	76
430 Ill. Comp. Stat. 65/14(e) . . . . .	5
La. Civil Code Ann. art. 477(A) . . . . .	12
Mass. Gen. Laws ch. 140, § 129B(1)(viii) . . . . .	16
Mass. Gen. Laws ch. 140, § 129B(4) . . . . .	15, 16
Mass. Gen. Laws ch. 140, § 129B(5) . . . . .	15
Mass. Gen. Laws ch. 140, § 129C . . . . .	5
Mass. Gen. Laws ch. 140, § 129C(n) . . . . .	7
Mass. Gen. Law ch. 140, § 129D . . . . .	6
Mass. Gen. Laws ch. 140, § 131(d)(vi) . . . . .	16
Mass. Gen. Laws ch. 140, § 131(f) . . . . .	15, 16
Mass. Gen. Laws ch. 269, § 10(a)(1) . . . . .	5
Mass. Gen. Laws ch. 269, § 10(h)(1) . . . . .	5
N.Y. Crim. Proc. Law § 530.14(1) . . . . .	16

N.Y. Penal Law § 265.00(3) . . . . . 5  
N.Y. Penal Law § 265.01-b . . . . . 5  
N.Y. Penal Law § 265.02(7) . . . . . 5  
N.Y. Penal Law § 265.20(a)(1)(f) . . . . . 76  
N.Y. Penal Law § 265.20(a)(3) . . . . . 5  
N.Y. Penal Law § 265.00(22) . . . . . 5  
N.Y. Penal Law § 400.00(11) . . . . . 15  
N.Y. Penal Law § 400.00(11)(c) . . . . . 6  
N.Y. Penal Law § 400.05(6) . . . . . 6

**OTHER AUTHORITIES**

ATF, *Transfers of National Firearms Act Firearms in Decedents' Estates* (Sept. 5, 1999), available at <https://www.atf.gov/press/releases/1999/09/090599-openletter-nfa-estate-transfers.html> (last visited Dec. 25, 2014) . . . . . 8  
1 William Blackstone, *Commentaries* . . . . . 12  
<http://jamesdjulia.com/auction/369-october-2014-firearms-auction/?prices=1> (last visited Dec. 15, 2014) . . . . . 7  
Memorandum from Bobby S. Tyler, Regional Counsel, ATF, to Denver, Colo. Resident Agent (Feb. 6, 1987), available at [http://www.titleii.com/bardwell/atf\\_letter28.txt](http://www.titleii.com/bardwell/atf_letter28.txt) (last visited Dec. 15, 2014) . . . . . 8

Restatement (3d) of Property (Wills and Other Donative Transfers) (2011)	
§ 24.1 .....	12
§ 24.2 .....	12
Restatement of Property (1936)	
§ 5 .....	12



**INTERESTS OF THE *AMICI***<sup>1</sup>

The *Amici* are all organizations that represent the interests of lawful gun owners in their respective states of Massachusetts, New York, and Illinois – states that prohibit the unlicensed “possession” of firearms. The issue before the Court has particular significance for individuals living in these jurisdictions, and the Court’s resolution of this case could have far-reaching impacts on the organizations’ membership.

*Amicus* Commonwealth Second Amendment, Inc. (“Comm2A”) is a Massachusetts nonprofit corporation dedicated to preserving and expanding the Second Amendment rights of individuals residing in Massachusetts and New England. Comm2A works locally and with national organizations to promote a better understanding of the rights that the Second Amendment guarantees. Comm2A has previously submitted *amicus curiae* briefs to this Court and to state supreme courts, and it has also sponsored litigation to vindicate the rights of lawful Massachusetts gun owners. Comm2A receives and responds to many queries from the public regarding firearms laws and licensing in Massachusetts, and particularly, regarding the ramifications of losing a Massachusetts firearms license.

*Amicus* New York State Rifle & Pistol Association, Inc. (“NYSRPA”) is a non-profit member organization

---

<sup>1</sup> No counsel for any party authored this brief in whole or in part, nor did any counsel or party make any monetary contribution intended to fund the preparation or submission of this brief. All parties’ counsel of record received timely notice of the intended filing of this brief, and all consented to its filing.

first organized in 1871 in New York City. NYSRPA is the oldest firearms advocacy organization in the United States, and it is the largest firearms organization in the state of New York. NYSRPA provides education and training in the safe and proper use of firearms, promotes the shooting sports, and supports the right to keep and bear arms through both legislative and legal action.

One of the nation's largest state gun rights organization, *amicus* Illinois State Rifle Association ("ISRA") is a non-profit 30,000-plus member association. Organized in 1913, ISRA seeks to support and protect the Second Amendment right to keep and bear arms of all citizens, particularly those living in Illinois. With its five lobbyists in the State capital, and a strong attorney referral program, ISRA works to protect the rights and interests of law-abiding citizens who use guns to protect their families, to hunt, and for sporting purposes such as target shooting. ISRA provides instruction in the safe use of firearms, and it works to promote and improve marksmanship skills. ISRA also endeavors to ensure that shooting ranges are safe, preserved, and available, including its newly improved outdoor range in Kankakee, Illinois.

Finally, *amicus* Illinois Carry is an all-volunteer member organization incorporated in Illinois. Illinois Carry is dedicated to preserving the right to keep and bear arms that the Second Amendment secures, and its core purposes include educating the public about Illinois laws governing the purchase, transportation, carry and use of firearms, and otherwise aiding the public in every way within its power in matters relating to these activities. Illinois Carry supports the

right to keep and bear arms through both legislative and legal action.

### **SUMMARY OF ARGUMENT**

The issue before the Court has significant ramifications for people living in the U.S. jurisdictions that prohibit the unlicensed “possession” of firearms: Illinois, Massachusetts, New York, and Washington, D.C. It also has significant ramifications for people who lawfully own firearms subject to the National Firearms Act (“NFA”), as these guns are also illegal to “possess” in the absence of a valid registration in the individual’s name. An expansive concept of “possession” would have untenable ramifications for the lawful gun owners who are subject to these regimes.

This *amici curiae* brief shows that the laws in these four jurisdictions universally recognize that an individual’s ownership interest in firearms survives the individual’s loss of the right to possess the firearms, and that a person prohibited from possession still has the right to transfer the property to another party or to sell it. Moreover, guidance provided by the Bureau of Alcohol, Tobacco, Firearms, and Explosives (“ATF”) for NFA firearms likewise recognizes that ownership is distinct from possession, and that a person who can no longer possess a validly registered NFA firearm still has the right to lawfully sell or transfer the property.

At least seven state supreme courts have addressed how to deal with the firearms of individuals who have become prohibited – and the clear majority rule is that such individuals still retain ownership in their firearms and the ability to transfer or dispose of them in some manner. Indeed, the only state high court that

has held to the contrary did so by relying on Eighth Circuit authority, and without acknowledging the competing rulings of other Circuit Courts of Appeals.

Aside from being wrong and patently inconsistent with pertinent state laws, the lower court's expansive concept of constructive possession would result in untenable consequences in the U.S. jurisdictions that have adopted licensing schemes. Most notably, the loss of a firearms license would become tantamount to forfeiture of a gun collection – regardless of the basis for the loss. Moreover, the children, parents, spouses, roommates, and heirs of lawful gun owners would be in constant jeopardy of criminal liability. For people living in the jurisdictions of the *amici*, reducing the entire bundle of property rights to the mere right of possession would severely increase the risk of erroneous or unjust property deprivations, as well as creating substantial uncertainty about what is and is not lawful.

## ARGUMENT

### **I. The Laws of the Jurisdictions that Prohibit the Unlicensed “Possession” of Firearms Universally Recognize a Disqualified Owner’s Non-Possessory Interests**

While it is true in most of the United States that “firearms are not contraband per se,” *Cooper v. Greenwood*, 904 F.2d 302, 304 (5th Cir. 1990), the proposition does not hold absolutely. First, three U.S. states and the District of Columbia all make it a crime to “possess” a gun, unless one has a license or registration. And second, federal law makes it a crime to “possess” certain types of guns unless they are

registered under the National Firearms Act (“NFA”). What is significant is that each of these jurisdictions have provisions – whether by statute, regulation, or policy – that recognize an individual’s ongoing property interests in the arms subject to licensing or registration when the individual becomes incapable of legally possessing them.

### **A. States that Presumptively Prohibit Possession**

In Illinois, Massachusetts, New York, and Washington, DC, it is a crime to possess a gun without a mandatory license or registration – meaning that guns are, by default, unlawful. *See* D.C. Code § 7-2502.01(a); 430 Ill. Comp. Stat. 65/2(a)(1); Mass. Gen. Laws ch. 140, § 129C; N.Y. Penal Law §§ 265.01-b, 265.20(a)(3).<sup>2</sup> The basic crime of unlawfully possessing a gun is either a misdemeanor or a felony, depending variously on the jurisdiction, the situs of possession, and the type of firearm. *See* D.C. Code § 7-2507.6(a) (misdemeanor); 430 Ill. Comp. Stat. 65/14(e) (misdemeanor); Mass. Gen. Laws ch. 269, §§ 10(a)(1), 10(h)(1) (felony to possess a handgun away from the home and otherwise a misdemeanor); N.Y. Penal Law § 265.01-b (felony to possess a handgun). In these places, the loss of a license – for whatever reason, whether a revocation for cause or an unwitting failure

---

<sup>2</sup> New York prohibits the possession of unlicensed and/or unregistered handguns and “assault weapons,” but it does not license or register other rifles and shotguns. *See* N.Y. Penal Law §§ 265.00(3), (22) (defining “firearm” as, *inter alia*, “any pistol or revolver,” and “assault weapon” to exclude a gun registered with state police); 265.01-b, 265.02(7), 265.20(a)(3).

to renew on time – equates to the loss of one’s ability to lawfully “possess” firearms.

Yet, the statutory laws in *all* of these jurisdictions recognize that a gun owner’s property interests extend beyond possession – and that a person who loses a license still retains title to his or her property. For example, when authorities revoke a gun license in Illinois, state law grants the licensee 48 hours to place his or her guns in the “custody” of another person who is eligible to possess them. *See* 430 Ill. Comp. Stat. 65/9.5(a)(2). In Massachusetts, a person who loses his or her license must “without delay deliver or surrender” his or her guns to a law enforcement agency, but state law expressly qualifies that the person “shall have the right, at any time up to one year after said delivery or surrender, to transfer such [guns] to any licensed dealer or any other person legally permitted to purchase or take possession. . . .” Mass. Gen. Law ch. 140, § 129D. New York requires a person to “surrender[ ]” guns to law enforcement in the event of a suspension or denial, but the statute similarly protects the owner’s “right to arrange for the sale, or transfer, of such firearm to a dealer in firearms . . . or for the transfer of such firearm to himself or herself” if he or she becomes licensed again. *See* N.Y. Penal Law §§ 400.00(11)(c), 400.05(6). And finally, in the event of a denial or revocation in the District of Columbia, the law provides seven days in which a person can choose to “surrender” his or her guns to the police, “remove [them] from the District,” or “[o]therwise lawfully dispose of his interest.” D.C. Code § 7-2502.10(c). Moreover, each of these jurisdictions also provides statutory exceptions that allow unlicensed executors to take custody of guns after their licensed owners pass

away. *See id.* § 7-2503.01(b); 430 Ill. Comp. Stat. 65/12; Mass. Gen. Laws ch. 140, § 129C(n); N.Y. Penal Law § 265.20(a)(1)(f).

Thus, in all four of the U.S. jurisdictions that license the possession of firearms, the law is clear that the loss of a license does *not* result in the loss of title to firearms, even though it becomes a crime to “possess” them.

### **B. NFA Firearms**

The National Firearms Act makes it illegal for anyone to “receive or possess” certain types of firearms – such as machineguns, silencers, and “sawed off” shotguns – unless (among other things) the person has registered them with the Bureau of Alcohol, Tobacco, Firearms, and Explosives. 26 U.S.C. § 5861(d); *see also id.* § 5845(a) (“firearm” definition). Thus, when the owner of a registered NFA firearm dies, there is no one left with an exemption from the federal law that makes it a felony to “receive or possess” the NFA firearm. This creates the potential for the loss of significant value from estates, as NFA firearms can be very valuable. For example, individual NFA-registered machineguns sold for between \$3,680 and \$100,625 in the October 2014 James D. Julia auction in Fairfield, Maine. *See* <http://jamesdjulia.com/auction/369-october-2014-firearms-auction/?prices=1> (last visited Dec. 15, 2014).

But again, directives from ATF reflect the understanding that a person’s interest in NFA firearms extends beyond the single attribute of possession to also include the right to sell or bequest the property. First, ATF has for many years advised the families of

NFA firearm owners that while the “[p]ossession of an NFA firearm not registered to the possessor is a violation of Federal law . . . we do allow the executor a reasonable time to arrange for the transfer of the registered firearms. . . .” ATF, *Transfers of National Firearms Act Firearms in Decedents’ Estates* (Sept. 5, 1999), available at <https://www.atf.gov/press/releases/1999/09/090599-openletter-nfa-estate-transfers.html> (last visited Dec. 15, 2014). Additionally, on at least one occasion ATF has authorized the attorney of a person recently convicted of a felony to take custody of the person’s registered NFA firearms, pursuant to an order of the convicting court, and to sell them for the person’s benefit. See Memorandum from Bobby S. Tyler, Regional Counsel, ATF, to Denver, Colo. Resident Agent (Feb. 6, 1987), available at [http://www.titleii.com/bardwell/atf\\_letter28.txt](http://www.titleii.com/bardwell/atf_letter28.txt) (last visited Dec. 15, 2014). This guidance plainly reflects the latent understanding that the loss of the legal ability to possess an article does not end other property rights in the article. Not insignificantly, ATF’s own regulations governing the return of seized property provide that one option available to ATF is to “order the property . . . sold for the account of the petitioner.” 27 C.F.R. § 72.39(a)(2).

## **II. Most State Supreme Courts Reject the Lower Court’s Expansive Interpretation of Possession**

The predicate to determining what interests an individual loses when he or she becomes ineligible to “possess” a firearm is identifying the interests that the individual holds to start out with. Federal law is not the source of these property interests, but “[r]ather,



they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.” *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984) (internal quotations and alteration omitted); *see also, e.g., Butner v. United States*, 440 U.S. 48, 57 (1979) (“Property interests are created and defined by state law.”).

At least seven state supreme courts have addressed the scope of possession in the context of firearms and prohibited persons, and the clear majority rule is that a lawful gun owner who loses his or her right to possess firearms still retains an ownership interest in them and can transfer them to a third party. First is the Supreme Court of Montana’s ruling in *Montana v. Fadness*, 268 P.3d 17 (Mont. 2012), that, notwithstanding 18 U.S.C. § 922(g)(1), it is acceptable “to release [a prohibited individual’s] weapons to [a third party] for them to sell on his behalf” so long as it does not result in the prohibited person’s actual or constructive possession of the guns. *See id.* at 30. The Montana high court discussed the circuit split and rejected the claim that a third party’s possession of the individual’s guns would necessarily involve constructive possession. *See id.* at 22, 29-30.

The Court of Appeals of Maryland has likewise ruled that, even though an individual is “not permitted to possess” firearms on account of a felony conviction, the person still “retains an ownership property interest in them.” *Serio v. Baltimore Co.*, 863 A.2d 952, 966 (Md. 2004). The immediate issue there was a state law that made it illegal for felons to “possess” certain firearms, but the court referenced § 922(g) and relied substantially on authorities that addressed the exact

same issue under the federal statute. *See id.* at 964-65. The Maryland high court counseled a court-ordered auction of the firearms with the proceeds paid to the prohibited owner. *See id.* at 967-68.

The Supreme Court of Michigan has also held that even though a state felon-in-possession law “suspends a felon’s possessory interest in his or her firearms . . . , nothing in the statute severs a felon’s ownership interest in his or her firearms.” *Michigan v. Minch*, 825 N.W.2d 560, 562 (Mich. 2012). “Thus, it would be lawful for another third party, including defendant’s mother, to assume possession of these firearms as bailee.” *Id.* at 563. The *Minch* court relied significantly on authorities construing § 922(g) and found that its resolution was “consistent with many federal cases addressing the issue.” *See id.* at 562 n.9. Notably, a mid-level Michigan appellate court had previously concluded that while § 922 prevented “turn[ing] over the firearms to plaintiff directly,” the plaintiff could still “designate an individual to receive the guns or produce the owners of the guns to reclaim them.” *See Banks v. Detroit Police Dept.*, 454 N.W.2d 198, 200 (Mich. Ct. App. 1990), *overruled in part by Minch*, 825 N.W.2d 560. In *Minch*, the Michigan high court overruled this decision to the extent it allowed an agent, rather than a bailee, to take possession – but critically, it recognized that ownership interests are distinct from, and survive the loss of, possessory interests. *See Minch*, 825 N.W.2d at 562-63 & n.9.

The high courts of Iowa and Maine have also both rejected the lower court’s expansive interpretation of possession in the context of firearms and felon-in-possession prohibitions. In *Iowa v. Ludtke*, 446 N.W.2d

797 (Iowa 1989), the Supreme Court of Iowa concluded that even though an individual could not “possess” firearms under state law on account of his felony conviction, “the State has not acquired ownership of the firearms through either the abandonment of seized property or by a forfeiture proceeding.” *Id.* at 800. The court found the state did not own the guns, but instead needed to retain them “until they can be returned to a person who demonstrates a right to possession or until the property has been deemed abandoned and ownership established in the seizing agency.” *Id.* And in *Maine v. Pouliot*, 832 A.2d 755 (Me. 2003), the Supreme Judicial Court of Maine upheld a trial court’s conclusion that a convicted felon had *not* constructively possessed firearms – even though he had a key for the locked room in which his parents kept them. *See id.* at 757.

Finally, in *Pennsylvania v. Howard*, 713 A.2d 89 (Pa. 1998), the Supreme Court of Pennsylvania ruled that even though the terms of an individual’s criminal sentence prevented the “possession” of firearms, this did not prevent delivering the firearms “to an authorized dealer who would liquidate them and pay him the proceeds.” *Id.* at 91; *see also id.* at 93 (granting petition). The court observed that guns not involved in the criminal conduct that led to a criminal conviction “do not become contraband merely because their owner engaged in criminal conduct.” *Id.* at 93.

These decisions are entirely consistent with the elemental and longstanding rule that the essential attributes of personal property include not just possession, but also the rights of use, enjoyment, and disposition – as Petitioner has demonstrated, and as

the above discussion of pertinent state laws shows. *See* Restatement (3d) of Property (Wills and Other Donative Transfers) § 24.1 & cmts. d-e (2011); Restatement of Property § 5 & cmt. e (1936); *see also* *Wynehamer v. People*, 13 N.Y. 378, 396 (1856) (property is “[t]he third absolute right of every Englishman . . . which consists in the free use, enjoyment and *disposal* of all his acquisitions. . . .” (quoting 1 William Blackstone, *Commentaries* \*138)); *accord* *Wilcox v. Penn Mut. Life Ins. Co.*, 55 A.2d 521, 528 (Pa. 1947); *McKinster v. Sager*, 72 N.E. 854, 857 (Ind. 1904); *Salt Lake City Water & Elec. Power Co. v. Salt Lake City*, 67 P. 791, 795 (Utah 1902); *Gibbs v. Tally*, 65 P. 970, 971-72 (Cal. 1901); *McCullough v. Brown*, 19 S.E. 458, 469 (S.C. 1894), *overruled on other grounds by State ex rel. George v. City Council of Aiken*, 20 S.E. 221 (S.C. 1894); *St. Louis v. Hill*, 22 S.W. 861, 862 (Mo. 1893); *Staton v. Norfolk & C. R.*, 16 S.E. 181, 184 (N.C. 1892); *Tod v. Wick Bros. & Co.*, 36 Ohio St. 370, 385 (1881); *Eaton v. B.C. & M.R.R.*, 51 N.H. 504, 511 (1872); *see also* *Dorman v. State*, 34 Ala. 216, 239 (1859). Indeed, this basic understanding of the nature of property is also present in civil law systems. *See* La. Civil Code Ann. art. 477(A); *see also* Restatement (3d) of Property (Wills and Other Donative Transfers) § 24.2 reporters’ note 4 (2011).

In contrast, counsel’s research has disclosed only *one* state high court that has adopted the lower court’s expansive interpretation – and it is not even clear that this court did so. In *Taylor v. Wyoming*, 7 P.3d 15 (Wyo. 2000), the Supreme Court of Wyoming ruled that “the district court did not err in ordering [firearms] to remain in the possession of law enforcement” because the defendant could no longer possess them pursuant

to 18 U.S.C. § 922(g)(1). *Id.* at 24. However, the court never addressed whether the person could transfer the guns to another party. *See id.* The Wyoming high court cited Eighth Circuit authority, but made no reference to the split between the circuits on this point. *See id.* This same theme of cursory analysis, coupled with a quick citation to Eighth or Eleventh Circuit authority, appears in a decision from a mid-level Alabama appellate court. In *Lindsay v. Alabama*, 958 So. 2d 346 (Ala. Civ. App. 2006), the court reasoned that, pursuant to *United States v. Felici*, 208 F.3d 667 (8th Cir. 2000), and *United States v. Howell*, 425 F.3d 971 (11th Cir. 2005), a person convicted of a felony “would not be entitled to have any firearms seized from his residence held in trust for him by a third party, *i.e.*, his brother, because such a request would permit a convicted felon’s constructive possession of a firearm.” *Lindsay*, 958 So. 2d at 348 n.1. The court did not address the fact that other Circuit Courts of Appeals have reached the opposite conclusion. *See id.*

### **III. The Lower Court’s Approach Would Have Severe and Untenable Ramifications for People Living in the Jurisdictions of the *Amici***

The lower court’s construction of “possession” would be more than just incongruent with the regulatory regimes that apply in the places where firearms are presumptively illegal to possess: this construction, if adopted, would have absurd and untenable consequences for individuals living in these jurisdictions. And it should be clear that this Court’s exposition on the scope of bans on firearms “possession” will significantly influence the manner in which state

courts address this issue in substantially analogous contexts in the future.

The lower court's view is that "return of seized firearms, either directly or indirectly" would violate the federal law prohibiting possession, and that this includes "plac[ing] the firearms in the possession of a relative in trust or [to] sell the firearms and distribute the proceeds to him." *Howell*, 425 F.3d at 976-77. The Eighth Circuit, which supplied the authority on which the lower court ultimately relied, *see id.*, reasons similarly that "hav[ing] the firearms held in trust . . . by a third party . . . suggests constructive possession," and that "[a]ny firearm possession, actual or constructive, by a convicted felon is prohibited by law," *Felici*, 208 F.3d at 670 (emphasis added); *see also United States v. Smith*, 142 Fed. Appx. 100, 102 (3d Cir. 2005); *United States v. Headley*, 50 Fed. Appx. 266, 267-68 (6th Cir. 2002). By the Eighth Circuit's view, "to allow [an individual] to reap the economic benefit from ownership of weapons . . . which it is illegal for him to possess would make a mockery of the law." *United States v. Bagley*, 899 F.2d 707, 708 (8th Cir. 1990) (quoting district court opinion).

*Amici* agree with Petitioner's able demonstration that this expansive construction of possession is wrong because it violates the fundamental and longstanding principle that possession is but one "stick" in the bundle of property rights. But setting this aside, it is important to note that this expansive concept of possession would have untenable results that would render it unworkable in application – particularly in the states in which the *Amici* reside.

Perhaps the most apparent untenable result is that the loss of a firearm license – for any reason, including not just suspension or revocation, but also an unintentional failure to renew the license or to update one’s address – would equate to the complete loss of a person’s property interests in his or her firearms. After all, each of these jurisdictions makes it illegal to “possess” a gun without a license, and if a legal prohibition on possession prohibits *any* arrangement that involves third parties holding the guns or that otherwise allows the owner to recover their economic value, then the result is that the loss of a license prevents a person not only from possessing guns – but also from transferring them to third parties, or otherwise receiving their economic benefit. Thus, the only option would be to relinquish possession of the guns to authorities, which would immediately result in the loss of all right, title, and interest to them.

This situation would be particularly unjust when one considers the fact that (at least in certain circumstances) authorities can suspend or revoke firearms licenses on an *ex parte* basis, without providing any prior notice to the owner. *See, e.g.*, 430 Ill. Comp. Stat. 65/9; Mass. Gen. Laws ch. 140, §§ 129B(4)-(5), 131(f); N.Y. Penal Law § 400.00(11). *But see* D.C. Code § 7-2502.10(a) (requiring 15 days’ prior notice). Thus, as a practical matter, anyone who desired could strip a lawful firearms owner of his or her entire gun collection merely by making false assertions about the individual’s competency to possess firearms. Or, a person with a grudge could instead seek a temporary (*ex parte*) order of protection on falsified

grounds.<sup>3</sup> While federal law imposes a ban on possession only after the individual has been afforded a hearing, *see* 18 U.S.C. § 922(d)(8), the laws in Illinois and Massachusetts suspend a gun license immediately upon the issuance of any order of protection, including an *ex parte* one, and New York law also allows (but does not require) immediate suspension on the issuance of an *ex parte* order, *see* 430 Ill. Comp. Stat. 65/8.2; Mass. Gen. Laws ch. 140, §§ 129B(1)(viii) & (4), 131(d)(vi) & (f); N.Y. Crim. Proc. Law § 530.14(1).

Another untenable result is the impact that an overly expansive definition of constructive possession would have on unlicensed individuals living in the same household as licensed individuals. If *any* ability to direct the actions of a third party relative to a firearm, or to receive the proceeds derived from the sale of a firearm, constituted constructive possession, then any unlicensed child, spouse, or roommate would face the constant threat of criminal prosecution. For example, even though a child, spouse, or roommate might be unlicensed, they might still have the ability to direct or request the licensed individual to move the guns or to store them in a different manner – which, according to the Eighth and Eleventh Circuits, is constructive possession. Or, suppose a married couple decided to invest some of their savings in a collection of firearms with the understanding that they would sell the firearms in the future and jointly share the proceeds – under the Eighth Circuit’s rationale in

---

<sup>3</sup> This possibility is far from hypothetical, as demonstrated in *State v. Ruggiero*, 35 A.3d 616 (N.H. 2011) and *Kelso v. Kelso*, 15 N.E.3d 767 (Mass. App. Ct. 2014), where separated spouses obtained orders of protection by submitting falsified evidence to authorities.



*Bagley*, the mere fact that both spouses had an interest in the proceeds would make them both constructive possessors in need of a license. And closely related to this is the issue of future interests. If a parent's will directed the sale of a gun collection for the benefit of a child, then again, the child's interest in the financial proceeds of the guns would make that child a constructive possessor in need of a license – meaning that the bequest would be forfeited if the child did not have a license.

It would certainly be possible for lower courts to develop new and creative exceptions that would avoid or at least ameliorate these results – but the more pertinent observation is that these absurd results occur only if courts eschew the traditional understanding of constructive possession for the expansive one applied below. *Cf. Smith v. Goguen*, 415 U.S. 566, 577-78 (1974) (“To be sure, there are statutes that by their terms or as authoritatively construed apply without question to certain activities, but whose application to other behavior is uncertain.”); *Williams v. United States*, 341 U.S. 97, 101 (1951) (“Many criminal statutes might be extended to circumstances so extreme as to make their application unconstitutional.”). The traditional and customary definition of constructive possession that the Second, Seventh, and Fifth Circuits recognize – along with a strong majority of state supreme courts – avoids these absurdities and provides the only means of resolving this issue in a manner that is consistent and harmonious with other laws governing the possession of firearms.

**CONCLUSION**

The lower court's judgment disregards the foundational concept that possession is but one stick in the bundle of property rights and, if adopted, this constructive possession rationale would lead to absurd and untenable results. This Court should reverse.

Respectfully submitted,

DAVID D. JENSEN

*Counsel of Record*

DAVID JENSEN PLLC

111 John Street, Suite 420

New York, New York 10038

(212) 380-6615

david@djensenpllc.com

*Counsel for Amici Curiae*