

No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

DANIEL KITTSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

18 U.S.C. § 922(o)(1) makes it is unlawful to transfer or possess a machine gun, except “with respect to” “a transfer to or by, or possession by or under the authority of, the United States or any department or agency thereof or a State, or a department, agency, or political subdivision thereof[.]” 18 U.S.C. § 922(o)(2)(A).

Under the plain text of § 922(o)(2)(A), must a transfer of a machine gun to a government agent be “under the authority of” the United States for the exemption to apply, or does the statute broadly exempt any “transfer to . . . the United States” because the “under the authority of” limitation is attached only to the separate possession clause?

PARTIES TO THE PROCEEDINGS

Petitioner Daniel Kittson was the appellant below. Respondent United States of America was the appellee below.

RELATED PROCEEDINGS

- United States Court of Appeals: *United States v. Kittson*, 161 F.4th 619 (9th Cir. 2025)
- United States District Court: *United States v. Kittson*, No. 3:21-cr-00075-IM (D. Or.)

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The petitioner, Daniel Kittson, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on December 10, 2025.

Opinions Below

The opinion of the court of appeals was published at 161 F.4th 619, and is in Appendix A. App. A. at 1. The Ninth Circuit denied a timely petition for rehearing or rehearing en banc on March 18, 2026, available in Appendix B. App. B at 1.

Jurisdictional Statement

The Ninth Circuit entered its final order in this case on December 10, 2025, and denied a timely motion for panel or en banc rehearing on March 18, 2026. This petition is timely under Supreme Court Rule 13.3. This Court has jurisdiction under 28 U.S.C. § 1254(1).

Relevant Statutory and Constitutional Provisions

18 U.S.C. § 922(o)

(o)(1) Except as provided in paragraph (2), it shall be unlawful for any person to transfer or possess a machinegun.

(2) This subsection does not apply with respect to--

(A) a transfer to or by, or possession by or under the authority of, the United States or any department or agency thereof or a State, or a department, agency, or political subdivision thereof; or

(B) any lawful transfer or lawful possession of a machinegun that was lawfully possessed before the date this subsection takes effect.

Introduction and Summary of Reasons for Granting the Writ

Over at least the last 15 years, this Court has repeatedly overturned criminal convictions resulting from overly broad interpretations of federal statutes. *See, e.g., McDonnell v. United States*, 579 U.S. 550, 580–81 (2016) (rejecting a broad definition of “official act” despite the “tawdry” facts of the case); *Yates v. United States*, 574 U.S. 528, 548 (2015) (holding that a tangible object does not include fish); *see also Garland v. Cargill*, 602 U.S. 406 (2024) (holding that a bump-stock device does not meet the statutory definition of a machinegun and that in issuing a contrary rule, ATF exceeded its

statutory authority). In this series of opinions, the Court has emphasized that the plain text of a statute controls. Grounding the scope of criminal liability on statutory text, rather than policy outcomes, protects the separation of powers and the integrity of the courts. It guards against government overreach, and it protects the rights of individual citizens to fair notice of what conduct is subject to criminal punishment.

This case reflects the importance of those principles. Daniel Kittson aided another individual in transferring a firearm to an ATF agent. Both Kittson and his now deceased accomplice believed the agent to be an illicit firearms dealer, meaning that they attempted to transfer the weapon to a private individual in violation of 18 U.S.C. § 922(o). But § 922(o) does not include attempt liability, and it further exempts from its scope “*a transfer to or by, or possession by or under the authority of, the United States or any department or agency thereof or a State, or a department, agency, or political subdivision thereof[.]*” 18 U.S.C. § 922(o)(2)(A) (emphasis added). Because a jury acquitted Kittson of possessing the machinegun, only the transfer clause, not the possession clause, was at issue.

A split panel of the Ninth Circuit, in a published opinion, held that the statutory transfer exemption applies only to a transfer that is “authorized by the government for the benefit of federal, state, or local government entities.” App. A at 12. Although the statute on its face places “under authority of” in a separate clause, offset with commas, applicable only to the possession (not transfer) of a machinegun, the majority deemed Kittson’s reading of the statute to be overly technical. The court looked instead to

perceived congressional intent and the longstanding use of sting operations by law enforcement and held that “questionable comma placement” could not override what it saw as “common sense.” App. A at 21. The Ninth Circuit further justified this broadening of criminal liability on policy grounds, contending that a contrary interpretation would grant immunity to dangerous criminals akin to the “Legion of Doom.” App. A at 22.

The dissenting judge, by contrast, concluded that a “plain application” of § 922(o)(2)(A) “excepts from liability any machinegun transfer to the government,” and that Mr. Kittson had been “convicted of a crime that doesn’t exist.” App. A at 31 (VanDyke, J. dissenting).

This Court should grant certiorari to once again rein in government overreach and require criminal liability to be based on the words Congress has written, rather than the Ninth Circuit’s policy preferences. The text of § 922(o)(2)(A) is clear. The non-textual factors like congressional intent, law enforcement traditions, and policy concerns, articulated in the majority opinion cannot trump the clear statutory text. And the Ninth Circuit stands alone in its broadening of § 922(o)’s reach; because defendants rarely are culpable for transferring a firearm without also possessing it, no other court has reached the question of whether the transfer exemption, standing alone, must also be “under authority of” the United States to satisfy § 922(o)(2)(A).

Statement of the Case

A. A jury found Kittson guilty of aiding the transfer of a machinegun to an undercover agent, but acquitted him of possessing the gun.

In January of 2020, Bureau of Alcohol Tobacco and Firearms (ATF) Agent Jason Weber, acting undercover, was introduced to Daniel Kittson by an informant. By phone and text message, Agent Weber negotiated with Mr. Kittson for the purchase of a World War II era PPSH-41 machinegun. On the day the purchase was to be finalized, Agent Weber picked Mr. Kittson up from his home and followed Mr. Kittson's directions to a residence where another person, Ray Bohanan, sold him the PPSH-41.

The government filed a two-count indictment against Mr. Kittson.¹ Count 1 charged him with aiding and abetting the possession or transfer of a machinegun, in violation of 18 U.S.C. § 922(o) and 18 U.S.C. § 2. Count 2 charged him with possessing a firearm after having been convicted of a felony, in violation of 18 U.S.C. § 922(g)(1). Both counts referred to the same firearm.

Mr. Kittson stipulated to his prior felony conviction but otherwise maintained his innocence of the crimes charged and proceeded to trial. At trial, his sole defense to Count 2 was that he never possessed the machinegun, which was controlled by Bohanan. As to Count 1, Mr. Kittson moved for a directed verdict under Federal Rule of Criminal Procedure 29, arguing that the transfer of the machinegun to a government agent fell within the exemption set out in 18 U.S.C. § 922(o)(2)(A) for "a transfer [of a

¹ Ray Bohanan passed away after the events at issue.

machinegun] to or by . . . the United States[.]” Mr. Kittson also requested that the jury be instructed regarding the statutory exemption. Both requests were denied. The district court concluded as a matter of law that the exemption for a transfer to the United States applies only if the defendant knows the agent’s status as a government agent, which Mr. Kittson did not.

The evidence at trial showed that the agent never saw Mr. Kittson hold or handle the machinegun. Instead, only Bohanan had physical possession of it. The purchase occurred at a residence to which Bohanan had keys and to which Kittson had no independent access. Bohanan also had other firearms, including one other machinegun of the same model. He instructed Agent Weber to continue to go through Mr. Kittson if he wished to purchase other firearms Bohanan had for sale.

The jury was instructed that Mr. Kittson could be found guilty of Count 1, the § 922(o) count, if he aided and abetted the transfer of the firearm. The jury was not instructed regarding the exemption for a transfer to the United States. The jury found Mr. Kittson guilty of Count 1 for the machinegun transfer, but acquitted him of Count 2, the charge of being a felon in possession of a firearm. In other words, the jury found that Mr. Kittson aided the *transfer* of a machinegun, but did not *possess* it.

B. The Ninth Circuit held, contrary to the statute’s plain language, that the transfer exemption requires a transfer “under authority of” the United States.

On appeal, Mr. Kittson argued as a matter of statutory interpretation that 18 U.S.C. § 922(o) excludes from criminal liability any machinegun transfer to the United States,

including the transfer from Bohanan to undercover Agent Weber. Mr. Kittson argued that § 922(o)(2)(A) creates two distinct exemptions from criminal liability: (1) a transfer exemption that applies to “a transfer to or by . . . the United States”; and (2) a possession exemption that applies to “possession by or under the authority of . . . the United States[.]” Mr. Kittson noted that the statute distinguishes the two exemptions by separating them with commas, and only the possession exemption requires that possession be “under the authority of” the United States. At most, the defense argued, Mr. Kittson’s conduct amounted to an *attempted* unlawful transfer, because he believed that the transfer was to a private actor and did not know Agent Weber’s true identity. But § 922(o) does not criminalize attempts, nor does it require knowledge of the transferee’s identity for the exemption to apply.

The government, for its part, did not dispute that the transfer and possession exemptions are separate provisions, but it defended the district court’s rationale that a reverse mens rea element—proof of an *innocent* state of mind—should apply to the transfer exemption to avoid granting “complete immunity” to culpable conduct. Citing *Ruan v. United States*, 597 U.S. 450, 457 (2022), the government argued that § 922(o)(2)(A) should be construed to apply only if the defendant knew he was transferring the gun to a government agent.

A divided panel of the Ninth Circuit affirmed Mr. Kittson’s conviction. However, the two-judge majority rejected the extra-textual reverse mens rea requirement proposed by the government and the district court. App. A. at 23. Instead, the majority found that

Kittson’s proposed distinction between the transfer and possession exemptions was illusory. The court concluded that, like possession, a transfer is exempted under § 922(o)(2)(A) only if it is “authorized by the government for the benefit of federal, state, or local government entities.” App. A. at 12. Under the majority’s analysis, the exemption does not apply to a transfer to an undercover agent.

In its reasoning, the majority first identified statutes and regulations predating the Firearm Owners Protection Act of 1986 and § 922(o), which it held confirmed that Congress intended to closely regulate machine guns. App. A at 8. And the panel discussed a history of undercover agents “regularly target[ing] those involved in the transferring of machineguns.” App. A at 10. The majority opinion viewed the regulatory background and law enforcement history as “context,” which supported reading “transfer” in § 922(o)(2)(A) as a transfer that meets all regulatory requirements and is approved by the Secretary of the Treasury, none of which would occur in a transfer to an undercover agent. App. A at 18–19.

Looking to the provision’s text, the majority asserted that Mr. Kittson’s focus on the placement of the commas in § 922(o)(2)(A) was overly technical: “We do not believe that questionable comma placement trumps decades of case law, history, or common sense.” App. A at 21. The majority also believed that Mr. Kittson’s reading of the statute could not have been what Congress intended, because it would protect a so-called “Legion of Doom” of bad actors:

a sophisticated arms dealer who uses a third party to transfer the machinegun to a terrorist organization who will attack a Veterans Day Parade, the cartel leader who orders his foot soldiers to transfer a machinegun to the sicario, a white supremacist who commands his new recruit to trade the machinegun for fentanyl, and so on.

App. A at 22.

The dissenting judge, by contrast, concluded that a “plain application” of § 922(o)(2)(A) “excepts from liability any machinegun transfer to the government”—including Mr. Kittson’s transfer to an undercover agent. App. A at 32 (VanDyke, J. dissenting). The dissent argued that the “use of commas to offset the possession and transfer clauses evinces that these clauses are disjunctive and must be read distinctively.” App. A at 45 (VanDyke, J. dissenting). Because a transfer must only be “to” the government, while possession must be pursuant to government authority, the dissent concluded that transfer need not be authorized to be protected. App. A at 55 (VanDyke, J. dissenting).

With respect to the majority’s analysis of congressional intent, the dissent noted that the hypotheticals were overstated because it was unlikely that a real arms trafficker could orchestrate sales without constructively possessing the guns and, in any event, would only be protected if the government received the firearms. App. A at 53 n.11 (VanDyke, J. dissenting). The dissent pointed out that interpreting the transfer provision as Mr. Kittson proposed would facilitate removal of machineguns from circulation by allowing individuals to transfer machineguns to the government without worrying about criminal liability for failure to comply with licensing or paperwork requirements. App. A

at 54–55 (VanDyke, J. dissenting). The dissent concluded, therefore, that Mr. Kittson was “convicted of a crime that doesn’t exist.” App. A at 31 (VanDyke, J. dissenting).

Reasons for Granting the Petition

This Court should grant certiorari to prevent the courts from broadening criminal liability beyond what Congress has proscribed and to prevent the government from convicting individuals of a crime that does not exist. Based on its plain text, § 922(o)(2)(A) exempts from criminal liability the transfer of a machinegun to the United States, like the transfer that occurred here. The Ninth Circuit’s contrary conclusion—holding that only “authorized” transfers are exempted—centered on non-textual factors like law enforcement’s traditional practices and supposed congressional intent that cannot trump unambiguous statutory text. Moreover, the majority’s policy-based rationales are not only overstated, they are improper bases for statutory construction. The Ninth Circuit stands alone in its expansion of § 922(o) beyond its text. This Court should grant certiorari to restrict criminal liability to the statute as enacted by Congress.

A. The plain language of 18 U.S.C. § 922(o)(2)(A) protects all transfers “to” the government.

Statutory interpretation starts with the text of the statute. *Bartenwerfer v. Buckly*, 598 U.S. 69, 74 (2023). “Only the written word is the law, and all persons are entitled to its benefit.” *Bostock v. Clayton County*, 590 U.S. 644, 653 (2020). “[T]he text of a law controls over purported legislative intentions unmoored from any statutory text.” *Oklahoma v. Castro-Huerta*, 597 U.S. 629, 642 (2022). Courts may not “rewrite a

constitutionally valid statutory text” simply because of “what Congress might have done had it faced a question that, on everyone’s account, it never faced.” *Henson v. Santander Consumer USA Inc.*, 582 U.S. 79, 89 (2012) (citing *Magwood v. Patterson*, 561 U.S. 320, 334 (2010)).

Here, 18 U.S.C. § 922(o)(1) makes it a crime to possess or transfer a machinegun “except” for certain statutory exclusions. Specifically, § 922(o)(2) provides:

(2) This subsection does not apply with respect to--

(A) a transfer to or by, or possession by or under the authority of, the United States or any department or agency thereof or a State, or a department, agency, or political subdivision thereof; or

(B) any lawful transfer or lawful possession of a machinegun that was lawfully possessed before the date this subsection takes effect.

Under § 922(o)(2)(A), criminal liability does not extend to “a transfer to or by, or possession by or under the authority of, the United States[.]” The use of the disjunctive “or” between the transfer clause and the possession clause indicates two distinct, alternative statutory exclusions; one that protects certain transfers and one that protects certain possessions. *Campos-Chaves v. Garland*, 602 U.S. 447, 458 (2024) (explaining that or “is almost always disjunctive” and generally indicates “an alternative”) (quoting *Encino Motorcars, LLC v. Navarro*, 584 U.S. 79, 87 (2018) and Webster’s New Third International Dictionary 1585 (1993)); *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241–42 (1989) (considering the setting off of a phrase by a comma and the surrounding language as dispositive of the plain text of a statute).

The two exemptions have distinct requirements. While the possession clause only protects individuals who possess firearms “under the authority” of the government, no such limitation is included in the transfer clause. In order to give effect to the different phrasing Congress used, the statute must mean that a “transfer to” the government is exempted, regardless of whether it is “authorized” by the United States, whereas possession is exempt only when an individual has governmental authority. *See Feliciano v. Department of Transportation*, 605 U.S. 38, 51–52 (2025) (discussing the surplusage canon). The rule of the last antecedent also confirms that reading: the limiting clause “under the authority of” modifies only the immediately preceding “possession” clause, rather than the more remote “transfer” clause. *See Barnhart v. Thomas*, 540 U.S. 20, 26 (2003) (discussing the “‘rule of the last antecedent,’ according to which a limiting clause or phrase [. . .] should ordinarily be read as modifying only the noun or phrase that it immediately follows[.]”) (citing 2A N. Singer, Sutherland on Statutory Construction § 47.33, p. 369 (6th rev. ed. 2000)). Reading the statute to define two distinct exemptions with different criteria accounts both for Congress’s comma placement and its use of different words to describe the “transfer” clause versus the “possession” clause.

Moreover, looking at the statute more broadly, the contrasting terminology between § 922(o)(2)(A) and § 922(o)(2)(B) also confirms that Congress did not intend to exempt only transfers that are “authorized” or “lawful” as the Ninth Circuit concluded. In § 922(o)(2)(B) Congress used the term “lawful” three times; exempting the “*lawful* transfer or *lawful* possession of a machinegun that was *lawfully* possessed” prior to

enactment of the machinegun ban. 18 U.S.C. § 922(o)(2)(B) (emphasis added). But the term “lawful” appears nowhere in § 922(o)(2)(A), confirming that the exemption for a transfer to the government exempts *any* transfer to the government, not only lawful transfers. “When Congress includes particular language in one section of a statute, but omits it from a neighbor, we normally understand that difference in language to convey a different meaning.” *Bittner v. United States*, 598 U.S. 85, 94 (2023).

In sum, § 922(o) is unambiguous. It imposes criminal liability for transferring a machinegun, but exempts a transfer to the United States, without requiring that the transfer be “lawful” or “authorized.” Because Mr. Kittson aided the transfer of a machinegun to a government agent, he was convicted of a crime that does not exist.

B. The Ninth Circuit’s approach departs from the plain meaning of the statutory text and improperly expands criminal liability based on non-textual factors.

1. The Ninth Circuit allowed presumed congressional intent and law enforcement practices to trump the law’s plain text.

The Ninth Circuit opinion adopts an approach to criminal law that is not grounded in the text of the statute but instead focuses on law enforcement’s “history and tradition” of sting operations and the court’s own view of congressional intent. App. A at 20-21. Because law enforcement traditionally uses sting operations to enforce firearm regulations, and Kittson’s case arose during a sting operation, the majority began with the assumption that Kittson committed a crime and then worked backward to construe § 922(o) consistently with that premise. App. A at 21. That approach was error.

First, the majority wrongly criticized a plain text approach to statutory construction as overly restrictive, akin to having the law decided by computers. App. A at 18 (“Simply put, context matters, which is why we still have human beings interpret statutes, rather than MU-TH-UR 6000, Skynet, or Hal 9000 donning black robes.”). The plain text of the statute is the lodestone for determining criminal liability. Statutory analysis should begin with the three “basic rules of statutory interpretation”: “(1) Read the statute; (2) read the statute; (3) read the statute!” Justice Amy Coney Barrett, *Listening To the Law: Reflections on the Court and Constitution* 212 (2025)). “Only the written word is the law, and all persons are entitled to its benefit.” *Bostock v. Clayton County*, 590 U.S. 644, 653 (2020).

Relatedly, the Ninth Circuit’s devotion to discerning congressional intent rather than applying recognized canons of statutory construction to § 922(o)’s text misunderstood the court’s role. To be sure, congressional intent is relevant to construing a statute, but the search for intent cannot be unmoored from statutory text. “After all, Congress expresses its purpose by words.” *62 Cases, More or Less, Each Containing Six Jars of Jam v. United States*, 340 U.S. 593, 596 (1951). The role of a court is “to ascertain” that meaning, “neither to add nor to subtract, neither to delete nor to distort.” *Id.* Therefore, it is the “text of a law [that] controls over purported legislative intentions unmoored from any statutory text.” *Oklahoma v. Castro-Huerta*, 597 U.S. 629, 642 (2022). Congressional intent standing alone “is a non-sequitur; it is not a factor that should affect the determination of whether a statute’s plain meaning is ambiguous.” *Guido*

v. Mount Lemmon Fire District, 859 F.3d 1168, 1173 (9th Cir. 2017) (citing Antonin Scalia & Bryan A. Garner, *Reading the Law: The Interpretation Of Legal Texts* 391 (West 2012)).

Moreover, discerning congressional intent is not a straightforward matter, as this case demonstrates. The Ninth Circuit decided that the transfer protection in § 922(o)(2)(A) was limited to machinegun transfers that comply with all other statutes and regulations because, in its view, any broader exemption would lead to “absurd” results—namely, exempting liability for some wrongdoers. App. A at 21. But the absurdity doctrine is applicable only where “no reasonable person” could have intended the result required by the text. *See* A. Scalia & B. Garner, *supra*, at 237. As the dissent noted, a broad exemption for transfers to the government would facilitate removal of machineguns from circulation. App. A at 54–55 (VanDyke, J. dissenting). By contrast, the Ninth Circuit’s construction means that even a person who purposefully transfers a machinegun to a government agent would be subject to prosecution so long as the transferor failed, even accidentally, to comply with any other statute or regulation. Neither approach is facially “absurd,” and the choice between them was rightfully that of Congress, not the Ninth Circuit.

Finally, the need to hew closely to statutory text is particularly important in criminal cases where freedom is on the line and due process protections are at their peak. *See United States v. Davis*, 588 U.S. 445, 464 (2019) (“Respect for due process and the separation of powers suggests a court may not, in order to save Congress the trouble of

having to write a new law, construe a criminal statute to penalize conduct it does not clearly proscribe.”). Since this country’s founding, penal laws have been strictly construed against the government. *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 434 (2024) (Gorsuch, J., concurring). The rule of lenity “upholds due process by safeguarding individual liberty in the face of ambiguous laws. And it fortifies the separation of powers by keeping the power of punishment firmly in the legislative, not in the judicial department.” *Id.* at 434–45 (simplified). Therefore, any ambiguity in the scope of § 922(o)(2)(A) must be strictly construed against the government and against criminal culpability.

The Ninth Circuit’s intent-based approach also has implications beyond the specific facts of this case. It suggests that the plain language of a statute can be expanded by a court to accommodate conduct that, in the court’s view, Congress likely would have deemed culpable. In this case, Mr. Kittson may have intended to violate § 922(o) by transferring a firearm to a private individual, which would make him guilty if § 922(o) covered attempts. But Congress has never created a general federal attempt statute. Therefore, a defendant can be found guilty of attempt only when the statute defining the offense expressly proscribes attempts. *See United States v. Hopkins*, 703 F.2d 1102, 1104 (9th Cir. 1983) (citing *United States v. Joe*, 452 F.2d 653, 654 (10th Cir. 1971)); *see also United States v. Hite*, 769 F.3d 1154, 1162 (D.C. Cir. 2014); *Liu v. Amerco*, 677 F.3d 489, 494 (1st Cir. 2012) (“there is no general federal attempt statute”); *United States v. Duka*, 671 F.3d 329, 355 (3rd Cir. 2011) (discussing the lack of a generic federal attempt

statute); *United States v. Douglas*, 525 F.3d 225, 250–51 (2nd Cir. 2008) (rejecting the proposition that a defendant can be convicted of an attempt without specific statutory language); *United States v. Anderson*, 89 F.3d 1306, 1314 (6th Cir. 1996); *United States v. Rovetuso*, 768 F.2d 809, 821 (7th Cir. 1985); *United States v. York*, 578 F.2d 1036, 1038 (5th Cir. 1978). Here, § 922(o) criminalizes only completed offenses and does not include attempt or any other inchoate theory of liability. Thus, Kittson cannot be liable for an attempt to violate the statute.

The Ninth Circuit’s decision to construe § 922(o)(2)(A) based on perceived congressional intent and the “history and tradition” of sting operations departed from the law’s plain meaning and accepted canons of construction and improperly expanded criminal liability beyond the text of the statute.

2. The Ninth Circuit’s reliance on policy concerns was both improper and overstated.

The Ninth Circuit bolstered its extra-textual interpretation of § 922(o)(2)(A) based on its concern that, if the court adhered to the law’s plain text, wrongdoers would escape prosecution. In particular, the majority worried that “a sophisticated arms dealer” could transfer a firearm to “a terrorist organization” for use in a violent attack but avoid all liability simply by using “a third party.” App. A at 22. The criminal masterminds in this theoretical “Legion of Doom” would “reasonably feel emboldened” by the plain language of the transfer prohibition, the majority concluded, because if they were caught in a sting operation, they would be free from prosecution. *Id.* These policy concerns were central to

the court's construction of the statute. *Id.* Yet the court's focus on policy overstepped its proper role.

Where "the natural reading of the text" provides a clear answer, it does not matter that another view might produce "a better policy outcome." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 13 (2000). Policy rationales cannot substitute for the government's obligation to show that a defendant's conduct violated the will of Congress as expressed through statutory text, and not merely the law Congress may have meant to enact if it had considered a particular case. That is because policy is the province of the legislative branch, not the judicial branch. *Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (per curiam) ("Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice"). This Court has called policy appeals "the last line of defense for all failing statutory interpretation arguments" because such concerns play no role in statutory construction:

Gone here is any pretense of statutory interpretation; all that's left is a suggestion we should proceed without the law's guidance to do as we think best. But that's an invitation no court should ever take up. The place to make new legislation, or address unwanted consequences of old legislation, lies in Congress. When it comes to statutory interpretation, our role is limited to applying the law's demands as faithfully as we can in the cases that come before us.

Bostock, 590 U.S. at 680–81.

Moreover, the majority's concerns are vastly overstated. In fact, the overwhelming majority of prosecutions under 18 U.S.C. § 922(o) would be unaffected. Even though the

transfer exemption in § 922(o)(2)(A) would be in play in a sting operation, the *possession* protection extends only to possession pursuant to government authority. Thus, any individual who possesses a machinegun during a sting operation would be guilty of violating § 922(o). Of course, possession includes not only physical possession but constructive possession, which is established “when a person, though lacking such physical custody, still has the power and intent to exercise control over the object.” *Henderson v. United States*, 575 U.S. 622, 626 (2015). An arms trafficker who uses an underling as a catspaw to complete the transfer of a firearm would also be liable for possessing, without lawful authority, the firearm over which they maintained control. *Id.* at 627 (stating that constructive possession is designed to “reach beyond puppets to puppeteers”).

The issue arises in this case only because of the unique circumstances of the case. Kittson, acting as essentially a broker for a transfer of another person’s firearm, never possessed the firearm either personally or constructively and so was acquitted of possessing the firearm. Contrary to the majority’s vision of widespread immunity, the situation involving transfer without possession is so rare that not a single case has ever considered the scope of the transfer provision of § 922(o)(2)(A) standing alone. *See App. A* at 33 (“[I]t doesn’t appear that any court—ours or otherwise—has considered a case like this: where a defendant did not possess the machinegun that he transferred to a federal agent.”) (Vandyke, J., dissenting).

What is more, exempting conduct from liability under § 922(o) does not preclude the government from invoking the multitude of other statutory and regulatory prohibitions available to prosecute illegal arms trafficking. For example, 18 U.S.C. § 933(a)(1) prohibits the transfer of a firearm to a person when there is “reasonable cause to believe” that the transferee would commit a felony by possessing the firearm, subject to a potential fifteen-year sentence. Unlike § 922(o), that statute specifically includes attempts. Accordingly, a transfer to a person that the defendant believes, or should believe, is prohibited from possessing a firearm would qualify as an attempted violation of § 933(a)(1). Furthermore, a § 933 violation is a predicate offense for federal money laundering under 18 U.S.C. § 1961(c)(7)(D), making it nearly impossible to use the proceeds of any such transaction without incurring additional criminal liability.

And sting operations are not the only investigative tool available to officers seeking to disrupt arms trafficking and violent crimes. Modern investigative methods include wire taps, sophisticated forensic tools and tracing databases. In the context of firearms, specifically, sting operations also include inherent risk and the tactic has sometimes involved considerable controversy. *See Attkisson v. Holder*, 925 F.3d 606, 610 (4th Cir. 2019) (summarizing Operation Fast and Furious which resulted in the shooting of a border patrol agent).

Accordingly, even if policy concerns could trump the plain import of § 922(o)’s text, the government has an arsenal of powerful tools to investigate and prosecute individuals illegally trafficking in firearms. Fundamentally, though, Congress has already

addressed the issue. Because § 922(o)(2)(A) plainly states that “a transfer [of a machinegun] to . . . the United States” is exempt from the scope of criminal liability under the statute, the role of the courts should be to enforce the statute as written.

C. No other court has adopted the Ninth Circuit’s liability-expanding interpretation of the transfer provision in § 922(o)(2)(A).

The majority opinion argued that “decades of case law” support its narrowing of § 922(o)(2)(A)’s broadly worded transfer exemption. App. A at 17. In reality, no case has ever addressed the transfer provision standing alone. In every case involving the statutory exclusion in § 922(o)(2)(A), the individual who transferred the firearm also possessed it, making the distinction between the transfer and possession clauses of § 922(o)(2)(A) irrelevant.

For example, in *United States v. Bailey*, 123 F.3d 1381, 1389 (11th Cir. 1997), relied on extensively by the majority, the defendant was convicted of “four counts of possessing a machinegun” rather than unlawful transfer. In that case the defendant did not argue the statutory exclusion applied to him and the “for the benefit” language included in that opinion was written in response to a challenge to the constitutionality of the statute under the Commerce Clause. *Id.* at 1393. In *United States v. Neuner*, 535 F. App’x 373, 374–75 (5th Cir. 2013), the defendant personally converted firearms to be fully automatic and was convicted solely for “possession of a machine gun.” *Neuner* does not discuss the defendant’s liability for transfer at all, yet the majority relied on its footnote mentioning

possession and transfer to label Mr. Kittson’s argument (an argument *Neuner* never even considered) “absurd.” App. A at 16.

The majority also claimed support from cases addressing a different firearms statute: 18 U.S.C. § 925(a)(1). But that statute is distinguishable. Although it creates an exemption from liability, its structure is different from § 922(o). Section 925(a)(1) states:

The provisions of this chapter . . . shall not apply with respect to the transportation, shipment, receipt, possession, or importation of any firearm or ammunition imported for, sold or shipped to, or issued for the use of, the United States or any department or agency thereof or any State or any department, agency, or political subdivision thereof.

The Ninth Circuit had previously held that § 925(a)(1) does “not exempt a sale” to an undercover agent. *Perri v. Department of the Treasury*, 637 F.2d 1332, 1337 (9th Cir. 1981) (citing *United States v. Brooks*, 611 F.2d 614 (5th Cir. 1980)). Unlike § 922(o)(2)(A), however, the structure of § 925(a)(1) makes clear that the exemption applies only if it involves *both* the listed conduct *and* the necessary attendant circumstances:

Conduct required for exemption	Circumstances required for exemption
[the provisions] shall not apply with respect to the transportation, shipment, receipt, possession, or importation of any firearm or ammunition	[if the firearm or ammunition is] imported for, sold or shipped to, or issued for the use of, the United States or any department or agency thereof or any State or any department, agency, or political subdivision thereof.

Because sales do not appear in the exempted conduct in § 925(a)(1), they are not protected at all, regardless of whether the attendant circumstances are otherwise satisfied. *See Brooks*, 611 F.2d at 617 (“This subsection does not exempt *any* sale or delivery of

firearms[.]” (emphasis added)). Section 922(o)(2)(A) is not similarly structured. It has only two exempted types of conduct—transfer and possession—with different qualifications attached to each by the use of separating commas.²

Thus, as the dissenting judge recognized, the majority’s claim of an “overwhelming consensus” of authority in fact involved no cases that turned on § 922(o)(2)(A)’s transfer exception independently of possession. App. A at 38–39 (VanDyke, J. dissenting). The Ninth Circuit stands alone in construing § 922(o)(2)(A) to exempt a transfer of a machinegun to the United States only if the transfer meets an authorization standard that Congress expressly chose to require only for machinegun possession.

Conclusion

For the foregoing reasons, the Court should issue a writ of certiorari to address the proper interpretation and scope of 18 U.S.C. § 922(o)(2)(A).

Respectfully submitted this 15th day of June 2026.



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² The majority asserted that the Fifth Circuit in *Brooks* held that the limiting clause, “for the use of,” in the second part of § 925(a)(1) applies to all of the listed clauses in “imported for, sold or shipped to, or issued for the use of, the United States,” despite the commas separating that provision. App. A at 19–20. But the Fifth Circuit never reached the question of how to interpret the attendant circumstances, given its conclusion that sales were not included in the list of exempted conduct in the first part of the statute.