No. _____

In The

Supreme Court of the United States

JOSE SUSUMO AZANO MATSURA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Should the Court grant review, vacate the judgment below, and remand to the Ninth Circuit based on this Court's holding in *Rehaif v. United States*, 139 S.Ct. 2191 (2019), requiring guilty knowledge of one's status as an element of a violation of 18 U.S.C. § 922(g)(5)(B)?

2. Are 18 U.S.C. § 922(g)(5)(B) and attendant regulations unconstitutionally vague on their face or as applied to petitioner?

PARTIES TO THE PROCEEDING

The United States was the plaintiff-appellee below Jose Susumo Azano Matsura and Ravneet Singh were the defendant-appellees below. Ravneet Singh is filing a separate petition for writ of certiorari.

RELATED CASES

United States v. Jose Susumo Azano Matsura and Ravneet Singh, No. 14 cr 0388 MAA, Southern District of Calif. Judgment entered October 27, 2017.

United States v. Jose Susumo Azano Matsura and Ravneet Singh, No. 17-50387, Appeal to the Ninth Circuit Court of Appeals, May 16, 2019, affirmed all but one count (Count 37). Mandate entered on August 7, 2019.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

Page

APPENDIX

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

INTRODUCTION

Petitioner, Jose Susumo Azano Matsura, respectfully prays that a writ of certiorari issue to review the final order of the Ninth Circuit Court of Appeals affirming petitioner's conviction on the charge of possession of a firearm by a lawful immigrant holding a valid visa. 18 U.S.C. § 922(g)(5).

Petitioner seeks relief from this decision. Petitioner notes that on October 7, 2019, this Court GVR'd a number of "*Rehaif*" and vagueness certiorari petitions involving section 18 U.S.C. § 922: *Cook v. United States*, No. 18-9707 (vagueness claim); *Duhart v. United States*, 18-9323 (same); *Greer v. United States*, No. 18-9444 (on the "knowing" provision of § 924(a)(2)); *Hale v. United States*, No. 18-9726 (knowledge of felon status and the firearm's movement in interstate commerce); *McCormick v. United States*, No. 19-5270 (remanded in light of *Rehaif*); *Parks v. United States*, No. 18-4369 (on the issue of knowledge of possession and status); *Gilbert v. United States*, No. 18-9589 (same); *Jackson v. United States*, No. 19-5260 (remanded in light of *Rehaif*).

On October 15, 2019, the Court similarly issued orders in *Donate-Cardona v. United States*, 19-5014 (remanded in light of *Rehaif*); *Isaac v. United States*, 19-5025; *Cox v. United States*, 19-5027; *McCants v. United States*, 19-5456; *Perez v. United States*, 19-5565; *Atkinson v. United States*, 19-5572; *Stacy v. United States*, 19-5383.

At a minimum, as with the above cases, petitioner requests that the Court grant, vacate and remand his case to the Ninth Circuit in light of *Rehaif*. Petitioner's case is most compelling for relief under *Rehaif* as there was no evidence petitioner, a valid visa holder in the United States, knew that his visa status precluded possession of a firearm. Nothing in the visa vetting process so informed him. Yet, at the same time, millions of visitors from "visa waiver" countries are in the United States with the right to possess firearms.

Petitioner raised the issue of the vagueness of the statute as applied to him while arguing that the statute's failure to require a guilty mens rea made the offense vague.

OPINION BELOW

On May 16, 2019, the Ninth Circuit issued an order affirming all but one of petitioner's convictions for conspiracy and for making campaign donations to a mayoral race in San Diego, California.[1] On one other count, the subject of this petition, he was convicted of

[1] The counts of conviction are: Ct. 1, Conspiracy to Commit Offenses Against the United States (18 U.S.C. § 371); Ct. 3, Campaign Donation or Contribution by a Foreign National Aggregating $25,000 or More (2 U.S.C. § 437g(d)(1)(A) & § 441e(a)(1)(A)); Ct. 4, Contribution in the Name of Another Aggregating $25,000 or More (2 U.S.C. § 437g(d)(1)(A) & § 441f); Cts. 5-37, Falsification of Records (18 U.S.C. § 1519 and § 2); Ct. 39, Alien in Possession of a Firearm (18 U.S.C. § 922(g)(5)(B)). The Court of Appeal reversed Count 37. App. 35. Counts 2 and 38 were dismissed during trial.

being an Alien in Possession of a Firearm under 18 U.S.C. § 922(g)(5)(B). *United States v. Singh & Azano*, 924 F.3d 1030, 1061 (9th Cir. 2019). See App. 1-52.

JURISDICTION

This petition is timely filed. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law."

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 922(g) states in relevant part:

It shall be unlawful for any person [to possess a gun] – . . . (5) who, being an alien –

(A) is illegally or unlawfully in the United States; or

(B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26)

of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(26));

. . . . to . . . possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

* * *

(y) Provisions relating to aliens admitted under nonimmigrant visas. . . .

(2) Exceptions. Subsections (d)(5)(B), (g)(5)(B), and (s)(3)(B)(v)(II) do not apply to any alien who has been lawfully admitted to the United States under a nonimmigrant visa, if that alien is –

(A) admitted to the United States for lawful hunting or sporting purposes or is in possession of a hunting license or permit lawfully issued in the United States; . . .

18 U.S.C. § 924(a)(2) states in pertinent part:

"Whoever knowingly violates subsection (a)(6), (d), (g), (h), (I), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both."

22 C.F.R. § 41.31 Temporary visitors for business or pleasure. "(a) Classification. An alien is classifiable as a nonimmigrant visitor for business (B-1) or pleasure (B-2) if the consular officer is satisfied that the alien qualifies under the provisions of INA 101(a)(15)(B), and that: . . . "

(b) Definitions

(2) The term "pleasure," as used in INA 101(a)(15)(B), refers to legitimate activities of a recreational character, including tourism, amusement, visits with friends or relatives, rest, medical treatment, and activities of a fraternal, social, or service nature.

STATEMENT OF THE CASE

A. Introduction and Summary of Argument

Petitioner's conviction for unlawful possession of a firearm is constitutionally invalid under *Rehaif v. United States*, 139 S.Ct. 2191 (2019). In *Rehaif*, this Court overruled longstanding precedent which had addressed the issue concerning the knowledge required to violate section 922(g). Before *Rehaif*, the government could secure an alien-in-possession conviction by proving only that the defendant knowingly possessed a firearm even if he did not know that his legal status did not allow such possession. Under *Rehaif*, the government "must show that the defendant knew he possessed the firearm and also that he knew he had the relevant status when he possessed it." 139 S.Ct. at 2194.

Petitioner was convicted via a charge and instruction that told the jury no knowledge of status was required to convict. Thus, petitioner, a person in the United States lawfully under his B1/B2 visa, was convicted of possessing a firearm in his home closet without any evidence he knew his visa status precluded it.

Petitioner had been admitted for many years into the United States on a non-immigrant "B1/B2" visa for "personal pleasure and limited business." App. 3.

B. Indictment to Trial

On October 27, 2016, after a lengthy trial and six days of jury deliberations, petitioner was convicted of 36 counts relating to local election money contributions in 2012 mayoral elections in San Diego. The firearms charge was unrelated to these charges. The court sentenced petitioner to thirty-six months custody on all counts concurrently, and fines totaling $560,955.00. Dist. Ct. Doc. 870.

C. Appeal

Petitioner appealed his convictions to the Ninth Circuit. The Ninth Circuit rejected petitioner's three arguments on appeal relating to the firearm count: that home possession was permitted for B1/B2 visa holders under the Second Amendment, that the statutory and regulatory provisions allowed visa holder to possess firearms for sporting or amusement purposes included petitioner's possession, and that the statute was vague as applied to petitioner for the above reasons and for lack of a mens rea. The Circuit Court rejected those arguments. *United States v. Singh & Azano*, supra, at 1055-1059 (9th Cir. May 16, 2019). App. 39-48.

D. Relevant Facts From Trial

Petitioner is a 52-year-old Mexican citizen with a U.S. citizen wife, children and a home in Coronado, California. He has no prior criminal record. He operated a successful security technology business in Mexico which conducted business worldwide. He had been lawfully residing in Mexico and the United States. In the United States, he possessed proper visas, but is considered a "foreign national" because he is not a U.S. citizen or permanent resident. App. 2, 7 fn. 2, 40.

His visa application was part of the record at trial and on appeal. Ninth Cir. Dkt. 55. That document noted he possessed a visa since 2000, that he had a very solvent company with over 400 employees, and required extensive background questions answered (e.g., about drug use, mental health issues, prior charges, affiliations with terrorists). Not a word on the application advised that a person in the United States on a B1/B2 visa could not possess a firearm.

The broader unrelated monetary donations case grew out of petitioner's alleged efforts to gain influence with San Diego mayoral candidates in 2012 by making campaign donations through "straw" donors, funding a political action committee and paying for "in kind" media services.

The pre-indictment search of petitioner's home was for the agents to look for evidence of the campaign finance offenses. As a regular precautionary measure prior to home searches, the agents asked petitioner if there were firearms in the home. Petitioner voluntarily

took them to a closet in his home and pointed out a handgun. Dist. Ct. Doc. 913, pp. 115-116. The empty gun was in a bedroom closet along with a clip of bullets. Appellant's Reply Excerpts, p. 30a.

Petitioner told the agents he was given the gun by a Customs Agent who presented it for his self-protection. He had never fired it. Dist. Ct. Doc. 914, p. 44.

Petitioner was thereafter charged in the multi-count indictment, and with regard to the firearm possession count 39, of being an Alien in Possession of a Firearm. 18 U.S.C. § 922(g)(5)(B).

Petitioner challenged the count prior to trial and on appeal. He argued either that the statute and regulations (22 C.F.R. § 41.31) permitted him possession pursuant to the Second Amendment under *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. Chicago*, 130 S.Ct. 3020, 3036 (2010), and that possession was also permitted under the statutory/regulatory provisions allowing visa holders to possess a firearm for "sporting and recreation" and "amusement" activities, or alternatively that prosecuting him for his home possession of the firearm constituted a prosecution under a statutory scheme that was void for vagueness on its face or as applied to him. App. 39-48. As to the latter issue, petitioner argued that the lack of a required mens rea further rendered the statute unconstitutional.

The government informed the district court that section 922(g), had no mens rea element: "This is not an intent statute." RT Aug. 28, 2017: 45-46. Although

the district court was troubled by the issues petitioner raised on the firearms count,[2] the government argument prevailed. The jury was instructed that petitioner only needed to know that he possessed a gun:

JURY INSTRUCTION NO. 14

"Defendant Jose Susumo Azano Matsura is charged with the possession of a firearm in violation of Section 922(g)(5)(B) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knowingly possessed a black Sig Sauer P225 bearing serial number M634983;

Second, the Sig Sauer P225 bearing serial number M634983 had been shipped or transported at some time in interstate or foreign commerce; and

Third, at the time the defendant possessed the Sig Sauer P225 bearing serial number M634983, the defendant was an alien admitted to the United States under a nonimmigrant visa." Doc. 805.

To make clear there was no requirement that petitioner knew his status prohibited him from possessing a firearm, the next instruction stated:

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[2] The court said, "Once again, interesting argument. Not necessarily black and white. . . ." 1 Appellant's Excerpt 104.

JURY INSTRUCTION NO. 15

"To establish 'knowingly' under the first element, the government need not prove that the defendant knew the law, but only that the defendant consciously possessed what he knew to be a firearm." Dist. Ct. Doc. 805.

Petitioner's various constitutional arguments against the charge failed before the district court and, after a hung jury and retrial, petitioner was convicted of the firearms count. The Ninth Circuit rejected the three firearms arguments on appeal. *United States v. Singh & Azano*, supra, at 1055-1059. App. 39-48.

REASONS FOR GRANTING REVIEW

The element of guilty knowledge for a violation of 18 U.S.C. § 922 must be charged and found by a jury else the resulting conviction cannot satisfy constitutional minimums which require the jury to find beyond a reasonable doubt that petitioner possessed knowledge that his immigration status as a visa holder precluded him from firearm possession. Further, the firearms statute is vague when applied to a lawful visa holder.

A. The Statute Requires Guilty Knowledge

To be convicted of illegal firearms possession under section 922(g)(5)(B), one must know that his status makes possession illegal. Mr. Rehaif had entered the

United States legally on a non-immigrant student visa to attend college, but he flunked out and the school told him that his legal immigration status would be terminated unless he transferred to a different school or left the country. He did neither. He visited a firing range and shot firearms leading to his arrest and conviction for possessing firearms while unlawfully in the United States in violation of 18 U.S.C. § 922(g). As here, Rehaif's jury was instructed that the Government need not prove Rehaif was aware his immigration status precluded gun possession. On direct appeal, he lost on this issue. The Circuit Court found the jury instruction was correct because the law generally does not require that someone be aware of his legal status.

This Court reversed holding that the wording of 18 U.S.C. § 924(a), the penalty provision for section 922(g) requires a person to "knowingly" possess a firearm with the knowledge that he is unlawfully in the United States. Thus, the case was reversed for lack of any requirement in Rehaif's trial that he possessed such knowledge.

If Mr. Rehaif is entitled to relief while being in the United States unlawfully, surely petitioner does given that he was at all times here lawfully with a proper visa. As this Court said in *Rehaif*: "we think that by specifying that a defendant may be convicted only if he 'knowingly violates' § 922(g), Congress intended to require the Government to establish that the defendant knew he violated the material elements of § 922(g)." 139 S.Ct. at 2196. Also: "Without knowledge of that status, the defendant may well lack the intent needed to

make his behavior wrongful. His behavior may instead be an innocent mistake to which criminal sanctions normally do not attach." 139 S.Ct. at 2197.

Under *Rehaif*, petitioner's conviction cannot stand. Indeed, petitioner's firearm possession was no more than an innocent mistake (assuming the law forbade his possession). There was not a scintilla of evidence petitioner had knowledge his immigration status precluded possession. Why would he? No one gave him notice. His visa application had no such warning. He was vetted for his visa by the government without a hint he could not possess a firearm. Meanwhile, millions of foreigners from over 30 "visa waiver" countries can freely possess guns in the United States.[3]

B. The Statute is Unconstitutionally Vague

Rehaif was not decided at the time of petitioner's trial, appellate briefs, or the May 16, 2019 decision by the Ninth Circuit. Petitioner argued that the statute was unconstitutionally vague, or at least vague as applied to him. He argued that the lack of any intent requirement (mens rea) was critical because courts have

[3] Nonimmigrant aliens lawfully admitted to the United States without a visa (under the Visa Waiver Program) are not prohibited from possessing firearms provided that they meet residency requirements of the State and are not otherwise prohibited. Questions and Answers-Revised ATF F4473 (Apr. 2012 Ed.), https://www.atf.gov/file/61841/download. In 2014, over 21 million foreigners entered the U.S. under the Visa Waiver Program. Every one of them may possess firearms. See Every CRS Report Visa Waiver Program, https://www.everycrsreport.com/reports/RL32221.html.

"long recognized that the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of mens rea." *Colautti v. Franklin*, 439 U.S. 379, 395 (1979). Appellant's Reply brief, p. 29. The Court did not discuss this mens rea issue in the opinion. App. 47-48.

Rehaif was decided after the decision of the Ninth Circuit. Petitioner argued in his petition for rehearing that the decision made even more compelling the vagueness argument. Petition for Rehearing, pp. 2, 19 n. 9. To no avail.

"In our constitutional order, a vague law is no law at all." *United States v. Davis*, 139 S.Ct. 2319, 2323 (2019). The Court of Appeal discussion of the statute's exception in subsection (y)(2)(A) makes manifest its intolerable vagueness as applied to valid visa holders such as petitioner. App. 47-48. The statutory exception allows gun possession "to any alien who has been lawfully admitted to the United States under a nonimmigrant visa, if that alien is – (A) admitted to the United States for lawful hunting or sporting purposes. . . ."

Under the applicable regulations regarding what visa holders may do in the United States, the visa appellant possessed for years permitted "activities of a recreational nature, including tourism, amusement. . . ." 22 C.F.R. § 41.31(b)(2).

The Court of Appeal finds that the statute and regulation did not apply to petitioner to permit firearm possession. App. 46-48. But to what visa holder would it apply? The Court of Appeal says visa holders like

petitioner may possess a firearm for sporting purposes, recreation and amusement. But there is no rule, requirement or procedure for a visa holder to indicate he wishes to possess his firearm for sporting or amusement purposes. Nor is there any warning on the visa or application about firearms possession.[4] Again, even without the knowledge of status defect in this case, the statute is still void for vagueness.

The Court of Appeal analysis is unpersuasive:

"We interpret 'sporting purposes' according to the narrow provision that includes it. The exception reasonably implies sporting activities that involve the use of guns, such as target shooting, or trap and skeet shooting. It does not suggest a broader definition including all recreational activities or possession of guns for pleasure." App. 47.

Yet, if visa holders are allowed to engage in "sporting activities that involve the use of guns, such as target shooting, or trap and skeet shooting," they necessarily have to possess the firearm to do so. Does this mean the exemption applies only while actively

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[4] The government told the district court the sporting purpose exemption should be declared upon entry: "There has to be some sort of factual documentation . . . perhaps . . . when they explain to the CBP [Customs and Border Patrol] officer when they were entering the United States. . . ." Appellant's Reply Br., Excerpts 25. But the law contains no such provisions by form or oral declaration. *Id*. at 40-47. With no advisal on the visa form or other provision regulating a shooting or "amusement" purpose, enforcement falls to the unbridled discretion of the agents – the hallmark of a vague statutory scheme.

engaged in such activities and that after target or skeet shooting the visa holder cannot store the firearm in a closet awaiting future use? No one knows except that the Court of Appeal gloss on the statute and regulation demonstrates the law is vague and arbitrarily enforceable at the whim of law enforcement. It is a trap for the unwary: how would a visa holder know when he could lawfully possess or not possess a firearm for sporting, recreation and amusement purposes?[5] What do those terms even mean?

In *United States v. Orellana*, 405 F.3d 360 (5th Cir. 2005), the court noted the ambiguity in 18 U.S.C. § 922(g)(5)(A), which prohibited aliens *illegally* in the United States from possessing firearms. Orellana entered illegally and later received TPS ("temporary protected status"). The Circuit Court found the application of § 922 to Orellana fatally ambiguous, applied the rule of lenity, and held Congress did not intend to criminalize the possession of firearms by aliens in Orellana's TPS position. "[W]e cannot say with certainty that Congress intended to criminalize the possession of firearms by aliens who have been granted temporary protected status." *Id.* at 371.

The same analysis applies here: given the vagueness of the statute and regulations pertaining to when

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[5] This is no abstract critique. Mr. Rehaif was prosecuted for possessing a firearm *at a shooting range*: "Rehaif subsequently visited a firing range, where he shot two firearms. The Government learned about his target practice and prosecuted him for possessing firearms." 139 S.Ct. at 2194.

visa holders may lawfully possess firearms, it is impossible to say with certainty Congress intended to criminalize persons in petitioner's status.

As James Madison wrote in Federalist No. 62:

"It will be of little avail to the people that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood. . . . Law is defined to be a rule of action; but how can that be a rule, which is little known and less fixed?"

C. The Error Was Not Harmless

A vague law is no law and thus prosecution under it renders a conviction a nullity. Additionally, *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), held that the Sixth and Fourteenth Amendments require any fact, other than the fact of a prior conviction, "that increases the penalty for a crime beyond the prescribed statutory maximum [must] be submitted to a jury, and proved beyond a reasonable doubt." Here, the failure to charge or prove the element of guilty knowledge of status was a fact not given the jury or proven beyond a reasonable doubt. It precludes conviction and punishment.

Alternatively, under a *Chapman v. California*, 386 U.S. 18 (1966), harmless error assessment, given the due process right to be tried on the elements of the offense, the missing guilty knowledge of status element was prejudicial error under the facts. The government cannot prove the error harmless beyond a

reasonable doubt. See *McDonnell v. United States*, 136 S.Ct. 2355, 2375 (2016): "Because the jury was not correctly instructed on the meaning of 'official act,' it may have convicted Governor McDonnell for conduct that is not unlawful. For that reason, we cannot conclude that the errors in the jury instructions were 'harmless beyond a reasonable doubt.' [Citation]."

Here, the element of guilty knowledge of status was not only missing from the charge, petitioner's jury was told that the issue was irrelevant and did not have to be proven. Petitioner never admitted knowledge of the unlawfulness of his firearm possession. Indeed, he received the firearm in question from a law enforcement officer for his protection and stored it in a safe place (the home bedroom closet shared with his wife), and freely pointed it out to the agents at the beginning of their search of his home.

CONCLUSION

It is respectfully requested that the Court grant certiorari and reverse the order of the Ninth Circuit. Alternatively, the Court should grant certiorari, vacate

the order below on the firearm count, and remand to the Circuit for reconsideration in light of *Rehaif*.

October 25, 2019

Respectfully submitted,

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