No. 19-6249

IN THE

Supreme Court of the United States

MICHAEL TERRILL FAIRCLOTH,

Petitioner,

v.

UNITED STATES,

Respondent.

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

REPLY BRIEF FOR PETITIONER

WILLIAM M. KENT
RYAN MCFARLAND
KENT & MCFARLAND
ATTORNEYS AT LAW
24 N. Market Street,
Suite 300
Jacksonville, FL 32202
(904) 398-8000

CARTER G. PHILLIPS*
JEFFREY T. GREEN
DAVID A. GOLDENBERG
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
cphillips@sidley.com

SARAH O'ROURKE SCHRUP
NORTHWESTERN SUPREME
COURT PRACTICUM
375 East Chicago Avenue
Chicago, IL 60611
(312) 503-0063

Counsel for Petitioner

* Counsel of Record

February 13, 2020

TABLE OF CONTENTS

TABLE OF AUTHORITIES

REPLY BRIEF

I. THERE IS A CLEAR AND ENTRENCHED SPLIT ON THE AVAILABILITY OF THE INNOCENT TRANSITORY POSSESSION DEFENSE

The Eleventh Circuit has acknowledged that it and the D.C. Circuit are squarely at odds over the availability of the innocent transitory possession defense instruction. In the court's own words, the "D.C. Circuit held that a defendant could successfully invoke the 'innocent transitory possession' defense . . . . This Court, however . . . has recently outright rejected [the innocent transitory possession defense]." Pet. App. at 4a–5a.

The government's suggestion that there is no circuit split is simply incorrect. Not only has the Eleventh Circuit recognized it, the government's brief itself actually acknowledges the split. While maintaining, "no significant conflict exists between the decision below and the D.C. Circuit," the government points out that the D.C. Circuit permits the innocent transitory possession defense, which the Eleventh Circuit has categorically rejected. Compare Opp. at 5–6 ("[T]he court of appeals correctly recognized that 18 U.S.C. 922(g)(1) does not contain such [an innocent-possession] defense, [and Mr. Faircloth] declined to raise a common-law defense such as necessity." (citing *United States* v. *Vereen*, 920 F.3d 1300 (11th Cir. 2019))), with Opp. at 11 ("[T]he D.C. Circuit allowed a form of an 'innocent possession' defense in *Mason*." (citing *United States* v. *Mason*, 233 F.3d 619 (D.C. Cir. 2000))). The government further acknowledges the split by expressing the hope that "given the broad consensus rejecting its position on this issue, the D.C. Circuit might revisit *Mason* in an appropri-

ate case." Opp. at 12. If there were no square conflict, then the government's hope that "the D.C. Circuit might revisit *Mason* in an appropriate case" would be unnecessary. *Id.*

Nor can the circuit split be reconciled by the necessity or justification defenses. The innocent transitory possession defense is related to, but distinct from, the necessity and justification defenses. The government is flatly wrong that the court of appeals in *Mason* acknowledged the "'possib[ility] that, under the facts in *Mason*, the defense of necessity or justification would have been available to the defendant.'" *United States* v. *Vereen*, 930 F.3d 1300, 1310 (11th Cir. 2019), *petition for cert. filed*, No. 19-6405 (U.S. Oct. 25, 2019). The opposite is true, and the government's attempt to insert the necessity and justification defenses is simply a red herring. As the *Mason* court made clear, "[t]he present case, however, does not implicate the justification defense, because there was no evidence of an imminent threat of death or bodily injury to Mason or others." *United States* v. *Mason*, 233 F.3d 619, 623 (D.C. Cir. 2000). The D.C. Circuit thus treats the innocent transitory possession defense as fundamentally distinct from the justification or necessity defenses and available where those defenses are not. As in *Mason*, petitioner was not able to raise a necessity or justification defense. But, as in *Mason*, the D.C. Circuit would have allowed Mr. Faircloth to present an innocent transitory possession defense to the jury. That is precisely the kind of circuit conflict that this Court reviews.

Neither is the government's argument that the D.C. Circuit might revisit its decision in *Mason* a compelling reason to deny certiorari. *Mason* was decided 20 years ago. This Court decided *Dixon* and *Baker* over ten years ago. The D.C. Circuit has had ample time

and opportunity to revisit its decision in *Mason* and has not done so. There is good reason for that, given that the D.C. Court of Appeals also permits defendants to raise the defense in local courts. Instead, *Mason* continues to be the law of the circuit. There is no reason even to suspect that the D.C. Circuit would change its mind about the innocent transitory possession defense. Finding a defendant guilty of being a felon in possession for removing a gun and ammunition in a bag near a school is just as "harsh and absurd" today as it was then. *Mason*, 233 F.3d at 623; see also *United States* v. *Baker*, 523 F.3d 1141, 1141 (10th Cir. 2008) (McConnell, J., dissenting from the denial of reh'g en banc) ("[A] felon who spots ammunition on a playground and who picks it up for the purpose of conveying it to a responsible law enforcement authority, could be held guilty of the crime. That is a sufficiently important and troubling result that it warrants en banc review."). Judge McConnell's reasoning equally supports certiorari.

If anything, the split might widen. Other circuits have indicated an openness to adopting the innocent transitory possession defense. Contrary to the government's argument, both the Sixth and Seventh Circuits have taken positions consistent with the underpinnings for the innocent transitory possession defense. Mr. Faircloth recognizes that neither the Sixth nor the Seventh Circuit has expressly adopted the innocent transitory possession defense as articulated by the D.C. Circuit. Rather, both circuits have recognized a "justification" defense, which is similarly rooted in the common law. See *United States* v. *DeJohn*, 368 F.3d 533, 546 (6th Cir. 2004); *United States* v. *Jackson*, 598 F.3d 340, 349–50 (7th Cir. 2010). At bottom, the reality is that Mr. Faircloth's trial would have been significantly different had it

been tried in Chicago, Cleveland or the District of Columbia and that is reason enough for this Court to intervene.

II. THE INNOCENT TRANSITORY POSSESSION DEFENSE IS ROOTED IN THE COMMON LAW

Contrary to the government's argument, the innocent transitory possession defense is rooted in the common law and best understood as a derivative of, although distinct from, the justification and necessity defenses. The government states that only the justification and necessity defenses are available as "traditional and 'strongly rooted' common-law affirmative defenses." Opp. at 9. The government's position, however, discounts this Court's opinions in *Dixon* and *Oakland Buyers*. As this Court recognized, there is a full background of common law that Congress is presumed to legislate against. See *United States* v. *Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 490 n.3 (2001); *Dixon* v. *United States*, 548 U.S. 1, 17 (2006). The innocent transitory possession defense is in line with this Court's recognition that, at common law, affirmative defenses are permissible, even where the statute is silent, to prevent harsh results for a statute that broadly criminalizes mere possession.

This is not a case in which Congress has expressly authorized certain affirmative defenses, meaning those not mentioned should not be read in. The government uses the example of *mens rea* and the written exception for child pornography. Opp. at 8. But having an affirmative defense written into a statute, such as the exception for child pornography, does not preclude recognizing common law affirmative defenses. Here, the statute is silent as to all affirmative defenses and the result of not allowing a defense leads to the absurd suggestion that Congress would prefer

to incarcerate an individual than to allow him or her to protect children from a firearm. This Court should decide that question.

III. THIS CASE IS AN IDEAL VEHICLE

A decision in Mr. Faircloth's favor would not be meaningless. The government points out that the district court held that Mr. Faircloth would not be entitled to an innocent transitory possession defense, even were one available. The Eleventh Circuit, however, did not affirm that part of the district court's decision.[1] Instead, the Eleventh Circuit rested its ruling on the lack of the transitory possession defense as a matter of law. On remand, the Eleventh Circuit would correctly recognize that Mr. Faircloth's innocent transitory possession is a question of fact for the jury.

---

[1] Nor would it have. Mr. Faircloth presented uncontroverted testimony that he intended to deliver the gun he discovered to his neighbor. Additionally, but for trial counsel's ineffective assistance, Mr. Faircloth would have presented evidence at trial that he wrote a note to his wife evidencing his intention to deliver the gun to his neighbor. Pet. App. at 74a. Mr. Faircloth's testimony was sufficient to entitle him to an affirmative defense instruction. *See United States* v. *Young*, 464 F.2d 160, 164 (5th Cir. 1972).

CONCLUSION

For the foregoing reasons and those stated in the petition, this Court should grant the petition.

Respectfully submitted,

WILLIAM M. KENT
Ryan McFarland
KENT & MCFARLAND,
ATTORNEYS AT LAW
24 N. Market Street,
Suite 300
Jacksonville, FL 32202
(904) 398-8000

CARTER G. PHILLIPS*
JEFFREY T. GREEN
DAVID A. GOLDENBERG
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
cphillips@sidley.com

SARAH O'ROURKE SCHRUP
NORTHWESTERN SUPREME
COURT PRACTICUM
375 East Chicago Avenue
Chicago, IL 60611
(312) 503-0063

Counsel for Petitioner

February 13, 2020

*Counsel of Record