

No. \_\_\_\_\_

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IN THE  
SUPREME COURT OF THE UNITED STATES

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THINTINUS NOSETH TAYLOR,

Petitioner,

v.

UNITED STATES OF AMERICA  
Respondent.

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

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PETITION FOR A WRIT OF CERTIORARI

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DATE SENT VIA UPS Delivery: May 22, 2020

## QUESTION PRESENTED

The Due Process Clause protects individuals from conviction except upon proof beyond a reasonable doubt. In *re Winship*, 397 U.S. 358 (1970). Federal law 18 U.S.C. § 922(g)(1) prohibits individuals convicted of felonies or crimes punishable by imprisonment for a term exceeding one year from possessing firearms. However, § 922(g)(1) and its progeny, do not bar these prohibited possessors from cohabitating with individuals or family members who legally possess firearms or from living in a home where firearms are lawfully present. Nevertheless, the Ninth Circuit's use of lower burden of proof for constructive possession of firearms under § 922(g)(1) than for other contraband, criminalizes this otherwise noncriminal act. The result is the application of a criminal statute that violates an accused's Fifth Amendment rights and chills cohabitants' Second Amendment rights by leaving law-abiding gun owners unaware of how to possess and store their firearms without putting the accused at risk of prosecution and incarceration. The questions presented are:

1. Whether the Ninth Circuit's low burden of proof for possession of a firearm in cohabitation cases extends the scope of 18 U.S.C. § 922(g) beyond its purpose, violates Due Process and chills the exercise of Second Amendment rights of law-abiding individuals to keep and bear arms in defense of hearth and home. See *Henderson v. United States*, 575 U.S. 622 (2015); *In re Winship*, 397 U.S. 358 (1970); *District of Columbia v. Heller*, 554 U.S. 570 (2008).

## PARTIES TO THE PROCEEDING

All parties to the proceeding are listed in the caption. The petitioner is not a corporation.

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Petitioner, THINTINUS NOSETH TAYLOR, respectfully requests that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on December 26, 2019.

### OPINIONS BELOW

The court of appeal Memorandum affirming the conviction and the district court's judgment and orders are unreported and are reproduced in Appendix A, B, and C, respectively.

### JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on December 26, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Pursuant to this Court's order of March 19, 2020, the period in which to file a petition for writ of certiorari was extended from 90 to 150 days from the date of judgment.

## STATUTORY & CONSTITUTIONAL PROVISIONS

18 U.S.C. § 922(g)(1) provides in relevant part as follows:

It shall be unlawful for any person who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year to ship or transport in interstate or foreign commerce, or 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.

United States Constitution, Amendment II:

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

United States Constitution, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be put twice in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

## STATEMENT OF THE CASE

In the early morning hours of November 4, 2015, Alcohol, Tobacco and Firearms (“ATF”) agents, along with local police task force officers, conducted a search of appellant’s family home in Phoenix, Arizona. Appellant shared the home with his wife and their two children. Two firearms were found in a suitcase in an upstairs bedroom closet. In the master bedroom closet, shared by appellant and his wife, agents found three empty soft gun cases and two firearms – a shotgun inside a hard shotgun case, and a pistol inside a bag on a shelf. The firearms were found on the left side of the closet, surrounded by women’s shoes, accessories, and clothing.

Agents also found pistols, magazines, and ammunition in the master bathroom closet behind a sliding wood door. Some were in a women’s Nike shoe box on the right side of the closet, along with nail polish and other women’s items. Some were in a safe in the middle of the closet. In an open office area adjoining the master bedroom agents found a receipt for the purchase of firearms from Sierra Auctions, showing that Mia Taylor, appellant’s wife, purchased seven firearms on August 24, 2015. The receipt listed four of the pistols found during the search.

Agents also found an iPhone in the master bedroom during the search which had been registered to appellant since July 23, 2015. AFT extracted the contents of appellant’s iPhone, finding a picture of some of the seized firearms

and texts related to the purchase and sale of firearms. The government succeeded in introducing this as 404(b) evidence linking appellant to the seized firearms and ammunition.<sup>1</sup> However, both government and defense evidence showed that appellant and his wife, Mia, both used the iPhone. Mia used the iPhone for a variety of purposes, such as to communicate with her children's grandmother through Facetime, and to coordinate the purchase of firearms with Sierra Auction. In fact, the government failed to prove that it was appellant who sent the picture and texts.

### Procedural Summary

On June 6, 2017, a superseding indictment was filed charging appellant with one count of being a prohibited possessor of firearms or ammunition in violation of 18 U.S.C. § 922(g)(1) on or about November 4, 2015. After the close of evidence, petitioner made motions for directed verdict arguing that: (1) the government failed to prove petitioner's actual, joint or constructive possession of his wife's guns and ammunition which were found among her belongings in their marital residence on November 4, 2015; and (2) petitioner's wife had the constitutional right under the Second Amendment to buy, own and sell the guns. Counsel queried:

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<sup>1</sup> The erroneous admission of the 404(b) evidence was hotly contested, with Defense counsel arguing on appeal that this evidence lacked foundation, and that admission was an abuse of discretion, constituted prejudicial error, and required reversal of appellant's conviction.



But once again, why should my client be punished for his wife exercising her right to own firearms when the government does not have proof to show that my client had control or possession of these firearms on November 4, 2015.

(App. C, Doc 356 at 41-48, 64.)

A jury convicted appellant on November 3, 2017. On April 9, 2018, the district court sentenced appellant to 83 months of imprisonment and three years of supervised release. (App. B.)

Petitioner timely appealed. The Ninth Circuit upheld the his conviction and sentence finding in part that:

... the district court properly denied Taylor's motions for a directed verdict. Based on testimony from federal and local law enforcement agents describing the location of firearms and ammunition in areas of the home Taylor shared with his wife, as well as testimony that Taylor's personal effects were found in close proximity to the firearms and ammunition, a rational juror could have reasonably inferred Taylor's possession of the firearms and ammunition.

(App. A.)

## REASONS FOR GRANTING THE WRIT

1. Because the Ninth Circuit does not require a “substantial connection” between a defendant and contraband, the Fifth Amendment right to a conviction fair trial Second Amendment rights of cohabitants of prohibited possessors are being chilled. for constructive possession of a firearm in cohabitation cases extends the scope of 18 U.S.C. § 922(g) beyond its purpose and chills the exercise of Second Amendment rights of law-abiding individuals to keep and bear arms in defense of hearth and home.

“Constructive possession 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, 135 S. Ct. 1780, 1784, 191 L. Ed. 2d 874 (2015).

In order to prove someone knowingly has the “power and intent” for constructive possession, the Seventh Circuit requires a “substantial connection” between a defendant and the firearms or ammunition to sustain a conviction for 18 U.S.C. § 922(g)(1). *United States v. Davis*, 896 F.3d 784, 790–91 (7th Cir. 2018); *United States v. Musgroves*, 831 F.3d 454 (7<sup>th</sup> Cir. 2016); *United States v. Griffin*, 684 F.3d 691, 694–99 (7th Cir. 2012). The Ninth Circuit does not. The Ninth Circuit only requires circumstantial evidence to prove a “sufficient connection” between a defendant and the contraband.

“To prove constructive possession, the government must prove a sufficient connection between the defendant and the contraband to support the inference that the defendant exercised dominion and control over the firearms.” *United States v. Carrasco*, 257

F.3d 1045, 1049 (9th Cir.2001) (internal quotation marks omitted). “Dominion and control” means [the defendant] had knowledge of the weapons and the power and intent to exercise control over them. *United States v. Terry*, 911 F.2d 272, 278 (9th Cir.1990). The government may show such knowledge and intent through circumstantial evidence. *United States v. Thongsy*, 577 F.3d 1036, 1041 (9th Cir.2009).

*United States v. Vasquez*, 654 F.3d 880, 885-886 (9<sup>th</sup> Cir. 2011). In *Vasquez*, the guns were found in Vasquez's garage in close proximity to items belonging to Vasquez. In *Terry*, the Ninth Circuit found constructive possession where a gun was found in a closet shared by defendant and his wife surrounded by his clothes and men's boots). *Terry*, 911 F.2d at 278. In petitioner's case, the Ninth Circuit found that a rational juror could infer Taylor's possession of the firearms based merely on the items having been found in shared areas of the marital home and that stale evidence<sup>2</sup> from a shared cell phone “also indicated that [Taylor] had knowledge of the firearms and intended to control them.” (Appendix A at 2.)

The Ninth Circuit's decision not only diminishes the standard of proof for constructive possession by not requiring a “substantial connection” between petitioner and the firearms/ammunition found. But also is in conflict with that of its own precedent and its sister circuits. Only where a defendant

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<sup>2</sup> The Court was referring to unidentified text messages from the phone he shared with his wife from August and September 2015. The firearms and ammunition subject to the conviction were alleged to have been possessed by petitioner months later, i.e., on or about November 4, 2015.

has exclusive control of the premises on which a firearm is found, can constructive possession be properly inferred. *United States v. McCane*, 573 F.3d 1037, 1046 (10th Cir.2009); *United States v. Castillo*, 406 F.3d 806, 812 (7<sup>th</sup> Cir. 2005); see also *Evans v. United States*, 257 F.2d 121 (9th Cir. 1958). In *United States v. Bonham*, 477 F.2d 1137 (3d Cir.1973) (en banc), the Third Circuit explained:

“When a person is the sole occupant of a room and has the right to exclude all others from it, it may logically be inferred that he has knowing dominion and control over objects so situated in his room that he is likely to be aware of their presence. But the situation is different where two persons share the occupancy of a room and the right to exclude others from it. Depending on the circumstances, either or both may have knowing dominion and control over a particular chattel, and choice between these alternatives must be based on more than speculation.”

*Id.* at 1138 (internal citation omitted). Thus, the Ninth Circuit is applying cases construing what constitutes constructive possession under § 922(g)(1), in a way which is lowering the burden of proof in violation of defendants’ Fifth Amendment rights. *In re Winship*, 397 U.S. 358 (1970).

Here, it was undisputed that Mr. Taylor and his wife Mia, shared their marital home with their children. Evidence indicated that the firearms and ammunition were found among Mia’s items on her side of their closets, or in places without personal indicia, such as a safe. There was no direct evidence presented that appellant possessed any of the firearms or ammunition, such as eyewitness testimony; nor was there commonly found circumstantial

evidence, such as fingerprints or DNA. In affirming Mr. Taylor's conviction, the Ninth Circuit relied on the fact that the firearms and ammunition were found in areas of the home that appellant shared with his wife. This was not sufficient evidence to support a conviction based on a constructive possession theory. See *United States v. Katz*, 582 F.3d 749, 752 (7<sup>th</sup> Cir. 2009).

The Ninth Circuit's diminishment of the proof required to prove constructive possession results in extending § 922(g)'s scope far beyond its purpose. Congress enacted that ban to keep firearms away from felons for fear that they would use those guns irresponsibly. See *Henderson v. United States*, 575 U.S. \_\_\_, 13 S.Ct at 1786; see also *Small v. United States*, 544 U.S. 385, 393, 125 S.Ct. 1752, 161 L.Ed.2d 651 (2005). Congress did not enact the statute to chill the rights of law abiding citizens like Mia Taylor to be able to protect their homes and families.

The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free state, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. The Court, in *District of Columbia v. Heller*, 554 U.S. 570 (2008), held that the Second Amendment confers on "law-abiding, responsible citizens" an individual right "to use arms in defense of hearth and home." *Id.* at 635. The Court stated that the right is "not unlimited," and noted that certain longstanding prohibitions on firearms, including 18 U.S.C. § 922(g)(1), are "presumptively lawful"

infringements on an individual's Second Amendment Rights. *Id.* at 626-27, n.26.

Certainly, § 992(g)(1) does not prohibit appellant from living in a home where firearms are lawfully present. Nor does the statute prohibit a law-abiding gun owner from living in a home with a prohibited possessor. Nevertheless, Mr. Taylor's wife's legally purchased guns which were stored in their marital home resulted in his conviction and incarceration. The effect of this law being prosecuted in such a way is a chilling of the Second Amendment rights of anyone who cohabitates with a prohibited person under § 992(g)(1).<sup>3</sup> People who live with felons, who have committed no crimes themselves, are putting their spouses and loved ones at risk of being prosecuted if they decide to exercise their Second Amendment rights.

This case highlights the tension between § 992(g)(1), Second Amendment rights and the constitutionally protected institution of marriage. There is no bright line as to when a prohibited possessor is in constructive possession of a cohabitant's firearms. However, the line need not be so murky

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<sup>3</sup> The chilling effect doctrine is a concept the Court has utilized to protect First Amendment freedoms for decades, defending against the inhibition or discouragement of the legitimate exercise of natural and legal rights by the threat of legal sanction. See *Baggett v. Bullitt*, 337 U.S. 360 (1964); *Lamont v. Postmaster General*, 381 U.S. 301 (1965); *Dombrowski v. Pfister*, 380 U.S. 479 (1965). Although most often limited to the First Amendment, the logic of the doctrine clearly applies to the Second Amendment in cases such as this, and should be utilized by the Court in that context.

either. This Court should grant certiorari to direct the lower courts that in cases such as these, a “substantial” connection between an accused and the contraband is required for purposes of conviction under § 922(g)(1). Married couples<sup>4</sup> and other cohabitants should not have to choose between their Second Amendment rights and prosecution of their loved ones’ based on the different standards of proof for constructive possession which the circuit courts now apply.

Though longstanding and aggressively enforced,<sup>5</sup> the legality of § 922(g)(1) has been questioned following the Court’s decision in *Heller*. See *Binderup v. Attorney Gen. U.S.*, 836 F.3d 336 (3<sup>rd</sup>. Cir. 2016). *Heller* left large gaps in Second Amendment jurisprudence,<sup>6</sup> with the Court stating that it would “expound” on certain prohibitions and standards of constitutional scrutiny “if and when” they are challenged before the court.<sup>7</sup> It is time for the Court to provide guidance to federal courts, prosecutors, and citizens as to the proper prosecution of § 922(g)(1).

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<sup>4</sup> See *Maynard v. Hill*, 125 U.S. 190 (1888) (marriage is “the most important relation in life” and “the foundation of the family and society, without which there would be neither civilization nor progress.”)

<sup>5</sup> See Daniel Reiss & Melissa A. Anderson, *Post-Heller Second Amendment Litigation: An Overview*, U.S. ATTORNEYS’ BULL., Nov., 2015, at 1, 8 (noting “the relatively large number of person prosecuted each year under either provision, particularly section 922(g)(1)”).

<sup>6</sup> See *Heller*, 554 U.S. at 679 (Stevens, J., dissenting) (stating that *Heller* “leaves for future cases the formidable task of defining the scope of permissible regulations”).

<sup>7</sup> See *Id.* at 635 (majority opinion).

In sum, the Ninth Circuit's diminishment of the standard of proof for constructive possession in firearms cases is indicative of a slippery slope leading to incarceration of innocent individuals, the infringement of the Second Amendment rights of their domestic partners and the inevitable injury to the family unit.<sup>8</sup> Thus, certiorari should be granted.

### CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted on May 20, 2020,

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<sup>8</sup> Mr. Taylor shared the home with his wife and children and has been incarcerated since his arrest.