No. 19-1057

IN THE
Supreme Court of the United States

LORI RODRIGUEZ, *ET AL.*, *Petitioners*,

v.

CITY OF SAN JOSE, CALIFORNIA, *ET AL.*, *Respondents*.

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

Motion for Leave to File Brief *Amicus Curiae* and Brief *Amicus Curiae* of Gun Owners of California, Inc., Gun Owners of America, Inc., Gun Owners Foundation, Heller Foundation, and Conservative Legal Defense and Education Fund in Support of Petitioners

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Pursuant to subparagraph 2(b) of Rule 37, U.S. Supreme Court Rules, Gun Owners of California, Inc., Gun Owners of America, Inc., Gun Owners Foundation, Heller Foundation, and Conservative Legal Defense and Education Fund hereby move the Court for leave to file an *amicus curiae* brief in support of the petition for *certiorari*.

This brief is being filed timely, "within 30 days after the case is placed on the docket or a response is called for by the Court, whichever is later." Rule 37(2). The petition was docketed on February 21, 2020, but no response, or waiver of the right to file a response, was filed by Respondent. This *amicus* brief is being filed on May 20, 2020, which is within 30 days after the date on which the Court requested a response from Respondents, which is now due June 22, 2020.

In support of their motion, these *amici* state:

Identity and Experience of *Amici Curiae*

Gun Owners of California, Inc. is a not-for-profit corporation organized under the law of California, and is exempt from federal income taxation under Internal Revenue Code section 501(c)(4). It has filed at least seven *amicus* briefs in this Court.

Gun Owners of America, Inc. is a not-for-profit corporation organized under the law of California, and is exempt from federal income taxation under Internal Revenue Code section 501(c)(4). It has filed 76 *amicus* briefs in this Court.

Gun Owners Foundation is a not-for-profit corporation organized under the law of Virginia, and is exempt from federal income taxation under Internal Revenue Code section 501(c)(3). It has filed 81 *amicus* briefs in this Court.

The Heller Foundation is a not-for-profit corporation organized under the law of Virginia, and is exempt from federal income taxation under Internal Revenue Code section 501(c)(3). It was founded by Dick Heller, plaintiff in District of Columbia v. Heller, 554 U.S. 570 (2008). It has filed 11 *amicus* briefs in this Court.

Amicus briefs filed by these four *amici* principally have addressed Second Amendment and Fourth Amendment issues, both of which are present in this case.

Conservative Legal Defense and Education Fund is a not-for-profit corporation organized under District of

Columbia law, and is exempt from federal income taxation under Internal Revenue Code section 501(c)(3). It has filed 114 *amicus* briefs in this Court.

To the best of counsel's knowledge, there has been only one occasion since 1983 in which a party's counsel has refused to consent to the filing of any of these parties' *amicus* briefs in this Court, and in that case, this Court granted the motion for leave to file. *See* Trump v. International Refugee Assistance Project, *et al.*, Nos. 16-1436 and 16A1190 (June 27, 2017).

Relevance of *Amicus* Brief to Petition for *Certiorari*

This Court's rules provide: "An *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court." Rule 37. Indeed, a study of cert.-stage *amicus* briefs conducted some years ago demonstrated both their routine nature and their significance. Political science professors Greg Caldeira and Jack Wright described cert.-stage *amicus* briefs as "'costly signals' of a petition's importance, arguing that simply by meeting the expense of the filing, amici demonstrate the interest in and significance of a particular case."[1]

It is believed that *amicus* briefs filed by these *amici* in prior cases have been useful to the Court, including at the petition stage. For example, one or more of

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[1] A. Chandler, "Cert.-stage Amicus Briefs: Who Files Them and To What Effect?" SCOTUSBlog (Sept. 27, 2007).

these *amici* filed the only *amicus* brief at the petition stage in the following three cases where a writ of *certiorari* was issued:

- Altitude Express v. Zarda, No. 17-1623 (*amicus* brief filed July 2, 2018) (argued October 8, 2019);
- Collins v. Commonwealth of Virginia, 138 S. Ct. 1663 (2018) (*amicus* brief filed March 27, 2017); and
- United States v. Antoine Jones, 565 U.S. 400 (2012) (*amicus* brief filed May 16, 2011).

On February 19, 2018, Empirical SCOTUS rated *amicus* briefs to this Court in a publication entitled "Amicus Policy Success in Impactful Supreme Court Decisions," ranking those briefs filed by Gun Owners of America, Inc. as tied for 13th in cases where this Court struck down statutes as unconstitutional or overturned its own precedents. An *amicus* brief filed on December 23, 2015 by four of these *amici* in a Second Amendment case, Voisine v. United States, 136 S. Ct. 2272 (2016), reportedly was the basis for questions posed by Justice Thomas during oral argument held on February 29, 2016.[2]

In this case, the brief submitted by *amici* provides context to the petition for *certiorari*, and provides authorities and makes argument on the important issues presented which are not addressed fully by petitioners. These include whether the exercise of a

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[2] *See, e.g.*, S. Mencimer, "Clarence Thomas Just Did Something He Hasn't Done in a Decade," *Mother Jones* (Feb. 29, 2016).

Second Amendment right to possess a firearm should justify an exception to Fourth Amendment protection against warrantless searches, and the application to this case of this Court's decision in United States v. Sineneng-Smith, 590 U.S. ___, 2020 U.S. LEXIS 2639 (May 7, 2020).

The Positions of the Parties

These *amici* obtained the consent of counsel for Petitioners. In response to *amici*'s letter seeking consent, counsel for Respondents stated:

> Respondents do not so consent. I appreciate the mission of the organizations you represent, but none appears likely to provide briefing that will be of substantial assistance to the Court in evaluating the petition. The case presents no Second Amendment question, and the Fourth Amendment question presented is a narrow one on which the parties' briefing adequately conveys all relevant matter.

First, this case involves the refusal of San Jose to return firearms seized by its agents from a home without a warrant in violation of the Fourth Amendment. Counsel for Respondents asserts that the case "presents no Second Amendment question," yet questions two and three of the questions presented to the Court by Petitioner involve the Second Amendment. *See* Petition for Writ of Certiorari, Questions Presented, Nos. 2 and 3. To be sure, the U.S. Court of Appeals for the Ninth Circuit rejected the Second Amendment issue entirely, asserting a

defense of issue preclusion that had not been raised by Respondents either in their motion for summary judgment in the district court or the initial briefing in the court of appeals. Certainly, it can be expected that the Respondents will seize upon that new defense to the Second Amendment issues raised by Plaintiffs below, but that does not mean this case presents no Second Amendment question. The relevance of this *amicus* brief supporting this Court's review of the questions Petitioners present does not cease because it clashes with Respondents' newly embraced theory of the case.

Second, counsel for Respondents' doubts that this *amicus* brief will be of "substantial assistance to the Court" should be evaluated in light of the fact that Respondents did not even file a response, or a waiver of the right to respond, to the petition for *certiorari*, which they have now been ordered to file by the Court.

Lastly, as to the Fourth Amendment issues in this case, these *amici* have been leaders in urging this Court to return to the historical textual property approach undergirding that amendment, including their *amicus* brief in United States v. Antoine Jones, discussed above, and many subsequent cases.[3]

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[3] *See* H. Titus & W. Olson, "*United States v. Jones*: Reviving the Property Foundation of the Fourth Amendment," *Case Western Reserve University School of Law, Journal of Law, Technology & the Internet*," vol. 3, no. 2 (Spring 2012).

Conclusion

For the foregoing reasons, these *amici* respectfully request the Court to grant them leave to file their brief *amicus curiae*, which is appended hereto.

Respectfully submitted,

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MISCELLANEOUS

INTEREST OF THE *AMICI CURIAE*[4]

Gun Owners of California, Inc. and Gun Owners of America, Inc. are non-for-profit social welfare organizations, exempt from federal income tax under Internal Revenue Code ("IRC") section 501(c)(4). Gun Owners Foundation, Heller Foundation, and Conservative Legal Defense and Education Fund are not-for-profit educational and legal organizations, exempt from federal income tax under IRC section 501(c)(3).

Amici organizations were established, *inter alia*, for the purpose of participating in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law.

STATEMENT OF THE CASE

On January 24, 2013, Petitioner Lori Rodriguez called the San Jose Police for assistance with her husband, Edward, who was exhibiting signs that he was having "an acute mental health crisis." Rodriguez v. City of San Jose, 930 F.3d 1123, 1127-28 (9th Cir.

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[4] It is hereby certified that counsel for Petitioners have consented to the filing of this brief, but counsel for Respondents did not consent; that counsel of record for all parties received notice of the intention to file this brief at least 10 days prior to its filing; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

2019). No firearms were involved in the incident. *See* City of San Jose v. Rodriguez, 2015 Cal. App. Unpub. LEXIS 2315, *4 (Ct. App., 6th Ap. Dist.) (Apr. 2, 2015). Edward was removed from the home, and was "transported to Santa Clara Valley Medical Center for 72-hour treatment and evaluation." *Id*. at *1.

Immediately thereafter, a San Jose Police officer, in the absence of a warrant, "told Lori that he was required to confiscate guns in the house." Rodriguez v. City of San Jose, 2017 U.S. Dist. LEXIS 162977 at *2 (N.D.CA. 2017). The police demanded that Petitioner unlock her gun safe so they could remove all firearms. Petitioner objected to the search and seizure, but complied, after which the police removed all firearms from the house, including one exclusively owned by and registered to Petitioner, having been acquired prior to her marriage to her husband. *See* Rodriguez, 930 F.3d. at 1128. Several other firearms seized were registered jointly to Petitioner and her husband, or presumed to be the community property of Petitioner and her husband. *See id.* at 1133.

The search and seizure occurred without a warrant issued by a neutral magistrate. At the time of the seizure, it appears to be undisputed that there was no immediate danger presented by the firearms, either to Petitioner, her husband, the police, or the public. And, although the City of San Jose could have returned at least the firearm owned exclusively by Petitioner, it has refused to do so in the more than seven years since the seizure. *See* Rodriguez, 2017 U.S. Dist. LEXIS 162977 at *2.

As a result of his involuntary mental health incident, Edward became a "prohibited person" who was disqualified from owning or possessing firearms for five years under state law. The City of San Jose filed a state court action seeking forfeiture of all firearms that had been seized, including the ones owned exclusively by Petitioner. Petitioner intervened in that forfeiture action to protect her ownership interest in the firearms. The California trial court, however, refused to order the return of any of the firearms, and thereafter, the Court of Appeal ruled that, since Petitioner still could apply for return of the firearms from the police, there had not yet been a Second Amendment violation.

"In May 2013, Lori received notification from the California Department of Justice Bureau of Firearms that she is eligible to both possess and purchase firearms." City of San Jose, 2015 Cal. App. Unpub. LEXIS 2315 at *8. Even though Petitioner had complete ownership of one firearm, and had obtained complete ownership of the remainder of the seized firearms, and had complied with all state firearm laws, and had applied to the San Jose Police for return of the firearms that had been seized, the City of San Jose continued to refuse to return the firearms.

Petitioner then filed suit in the U.S. District Court for the Northern District of California, asserting a violation of her rights under the Second, Fourth, Fifth, and Fourteenth Amendments. After only a conclusory analysis, devoting only one paragraph to the Second Amendment claim and three paragraphs to the Fourth Amendment claim, the district court rejected her

arguments, granting summary judgment to Respondent City of San Jose. Rodriguez, 2017 U.S. Dist. LEXIS 162977 at *3-*6.

The Ninth Circuit rejected Petitioners' Second Amendment argument without considering it, based on a defense that had neither been raised by Respondent City of San Jose, nor considered by the district court — issue preclusion. Taking on the role of a party litigant, the Ninth Circuit asserted a defense on behalf of the Respondent City and ruled that, since the California Court of Appeal had ruled upon the Second Amendment in the forfeiture action brought by the Respondent City, the U.S. Court of Appeals was precluded from considering that issue again. The Ninth Circuit opinion did not address the fact that the California court's ruling on the Second Amendment appears to have been that the amendment had not been violated as of that date, because state law provides a procedure "for return of firearms in the possession of law enforcement," and that procedure "remains available to Lori." City of San Jose, 2015 Cal. App. Unpub. LEXIS 2315 at *26.

Similarly, the Ninth Circuit rejected Petitioners' Fourth Amendment claim based on an admitted newly minted expansion of the so-called "community caretaking" exception to the Fourth Amendment warrant requirement. The court ruled that the presence of firearms in a locked safe, when the individual creating any emergency had already been removed from the environment, still justified a warrantless seizure of those firearms to protect the public, no matter who owned the firearms.

At any stage in more than seven years of proceedings, the City of San Jose could have returned Petitioner's lawfully owned firearms, but has refused to do so, even though Respondent City has conceded that Petitioner could lawfully purchase and possess other firearms at any time. *See* Rodriguez, 930 F.3d at 1129.

SUMMARY OF ARGUMENT

The petition for *certiorari* filed in this case seeks review of a longstanding dispute between Respondents and Petitioner Lori Rodriguez, one of its residents, arising out of the unconstitutional seizure of firearms in 2013 by San Jose Police, and Respondent City's seven-year-long refusal to return those firearms to their lawful and law-abiding owner. At no time during seven years of Bleak-House style litigation did Respondent City assert that Petitioner was:

- not entitled to own and possess a firearm, or
- that the firearms she owned and possessed were not lawfully owned and registered, or
- that she was barred from purchasing additional firearms, or
- that the firearms had been involved in any crime or other incident, or
- that she could not sell the firearms that had been seized by Respondent City of San Jose to a licensed dealer and then buy them back from that dealer, or
- that she had not taken appropriate steps to prevent her husband, a "disqualified person," from having access to her firearms in a locked

safe for which her husband did not have the combination.

First, the Ninth Circuit has allowed the presence of firearms at the home to empower Respondents to undermine Petitioner's Fourth Amendment rights. But the exercise of Second Amendment rights does not constitute the forfeiture of Fourth Amendment rights. The community caretaking exception provides no justification for weakening the warrant requirement. That doctrine was developed in the Cady case involving a missing revolver, in an automobile trunk where it could be found and misused by a vandal. This case involves a firearm locked in a safe located in a house that presented no such risk. The Ninth Circuit disrespects the original property-principles undergirding the Fourth Amendment, under which Respondents actions would constitute an unlawful common law trespass. *See* Section III, *infra*.

Second, the Ninth Circuit had no valid rationale for disregarding the Second Amendment claim brought by Petitioner. The notion that the Second Amendment was not violated because Petitioner could have purchased another firearm was precluded by Heller. *See* Section II, *infra*.

Third, the Ninth Circuit's issue preclusion ruling is based on an erroneous understanding of the California Court of Appeals decision, and violates this Court's recently re-affirmed principle of party presentation. *See* United States v. Sineneng-Smith, 220 U.S. LEXIS 2639 (May 7, 2020). *See* Section III, *infra*.

ARGUMENT

I. THE PETITION SHOULD BE GRANTED TO REJECT THE NINTH CIRCUIT'S FIREARMS EXCEPTION TO THE FOURTH AMENDMENT.

A. The Ninth Circuit Distorted the Fourth Amendment to Provide Reduced Protection for Owners of Firearms.

Petitioners appropriately note the "Ninth Circuit's shabby treatment of Second Amendment claims" and how that circuit's hostility to this Court's holdings in D.C. v. Heller, 554 U.S. 570 (2008) and McDonald v. City of Chicago, 561 U.S. 742 (2010) is "distorting other areas of the law." Petition at 22-23. This case shows how the Ninth Circuit has distorted Fourth Amendment jurisprudence when a warrantless search and seizure relates to firearms. Since 2008, the Ninth Circuit has developed a type of "firearms jurisprudence" — the ability to push aside other constitutional doctrines in order to uphold virtually any restriction on the right to keep and bear arms, despite that right being expressly recognized by and protected under the Second Amendment.[5]

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[5] Similarly, in another area of law, some members of this Court have noted the formation of "abortion jurisprudence" — distortions of generally applicable principles of law when that politically charged issue is involved. *See* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2324 (2016) (Thomas, J., dissenting). Justice Scalia described abortion jurisprudence as an "'ad hoc nullification machine' that the Court has set in motion to push aside whatever doctrines of constitutional law stand in the

Here, the Ninth Circuit noted that a "'seizure conducted without a warrant is "*per se* unreasonable under the Fourth Amendment,'" with some limited exceptions." Rodriguez at 1136 (quoting Minnesota v. Dickerson, 508 U.S. 366, 372 (1993)). It then purported to find a blanket exception for a search for firearms under the "community caretaking exception" to the Fourth Amendment warrant requirement, which originated in Cady v. Dombrowski, 413 U.S. 433 (1973).

The Ninth Circuit never tried to explain how Cady applied here. The facts of the Cady case are entirely dissimilar to the present case. In Cady, the warrantless search was for a missing firearm in an automobile trunk before being discovered by a vandal. Here, the warrantless search was for firearms in a locked safe located in a home, which were fully protected from unauthorized use.

The Ninth Circuit concluded that "the urgency of a significant public safety interest was sufficient to outweigh the **significant privacy interest** in **personal property** kept in the home...." Rodriguez, 930 F.3d at 1140-41 (emphasis added). However, privacy and property are different concepts. This strange conflation of originalist property principles with more modern notions of privacy, which began with Olmstead v. United States, 277 U.S. 438 (1928) and continued with Katz v. United States, 389 U.S. 347 (1967), reveals that the Ninth Circuit is confused

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way of that highly favored practice." Hill v. Colorado, 530 U.S. 703, 741 (2000) (Scalia, J., dissenting).

as to the original property-based protection provided by the Fourth Amendment. As this Court clarified in United States v. Jones, 565 U.S. 400, 405, 409 (2012), "the Katz reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test" which had been tied to Fourth Amendment jurisprudence, "at least until the latter half of the 20th century." Indeed, the Katz reasonable expectation of privacy test was **never** at issue in this case. Instead, the police seizure of the firearms from a locked safe in the home — particularly that owned by Petitioner — constituted a *per se* trespass, and there was no rationale to bring this case under the Cady case and thus exempt it from the warrant requirement.

The Ninth Circuit explained there were only two types of police action that it had recognized previously as justifying a warrantless search or seizure under the "community caretaking" exemption: (i) "home entries to investigate safety or medical emergencies"[6] and (ii) "impoundments of hazardous vehicles." Rodriguez, 930 F.3d at 1137. The circuit court then admitted that it had never before applied this exception to **seizures** in the category of home entries, only **searches**. *Id*. at

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[6] Not all circuits have permitted the "community caretaking" exception to be applied to warrentless home trespasses. "Because the Supreme Court's reasoning in Cady focused on attributes unique to vehicles, some circuits have confined the community caretaking exception to automobiles." Corrigan v. District of Columbia, 841 F.3d 1022, 1034 (D.C. Cir. 2016) (declining to decide whether the community caretaking exception applies in homes). *See also* United States v. Johnson, 365 F. Supp. 3d 89, 99 (D.D.C. 2019).

1138. The Ninth Circuit's analysis reveals it decided to expand the doctrine not to protect the public, but for only one reason — the private property seized by the police were firearms.

However, the reasons given by the Court applied only to Edward, not to the Petitioner, and none of these reasons justify the city's continued refusal to return those firearms long after the incident occurred.

B. The Exercise of Second Amendment Rights Does Not Constitute a Forfeiture of Other Constitutional Rights.

The Ninth Circuit's decision violates the principle that the exercise of one constitutional right may not permissibly be conditioned on the forfeiture of another constitutional right. For example, Simmons v. United States, 390 U.S. 377 (1968), in order for a criminal defendant to claim a Fourth Amendment violation, he was forced to testify that an object belonged to him, and that testimony was later used against him at trial. In essence, he was forced to forfeit his Fifth Amendment right to keep silent in order to assert his Fourth Amendment right. The Court called such a situation a "condition of a kind to which this Court has always been peculiarly sensitive." *Id.* at 393. The Court denounced such a Catch-22, stating that it is "intolerable that one constitutional right should have to be surrendered in order to assert another." *Id.* at 394. Yet that is what has happened in this case. Under the Ninth Circuit's new firearms jurisprudence, once Petitioner chose to keep a firearm in her house, she forfeited her Fourth Amendment right not to have

her property seized within her home without a warrant.

Similarly, in Perry v. Sindermann, 408 U.S. 593 (1972), this Court held that the government may not deny a person a benefit "on a basis that infringes his constitutionally protected interests.... For if the government could deny a benefit to a person because of his constitutionally protected [rights], his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.' ... Such interference with constitutional rights is impermissible." *Id*. at 597. Here, Petitioner was deprived of her Fourth Amendment right to be "secure in [her] house ... against unreasonable searches and seizures" because she exercised her Second Amendment right to "keep ... arms...." After Heller, Respondent City of San Jose cannot prohibit Rodriguez from exercising her Second Amendment right to keep a firearm in her home for self-defense, and the Ninth Circuit may not allow the City to deprive Petitioner of the "benefit" of the warrant requirement so as to allow her firearms to be seized.[7]

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[7] *See amicus curiae* brief of Gun Owners of America, *et al*., New York Rifle & Pistol Association v. New York City at 23-26 (Oct. 9, 2019).

C. This Court Should Resolve a Circuit Split that the Exercise of Second Amendment Rights Diminishes Fourth Amendment Rights.

The Ninth Circuit's opinion joins several other circuits which are split on whether police may consider the mere presence of a firearm at a given location to create a public danger that gives them powers over the gun owner they otherwise would not have. In this case, the Ninth Circuit determined that firearms in a locked safe inside a home posed "a significant public safety interest." Rodriguez, 930 F.3d at 1140. Other circuit court decisions arose in the context of open or concealed carry. The Fourth and Tenth Circuits have ruled that the mere presence of a firearm justified the police treating the individual carrying a concealed firearm as an armed and dangerous criminal. On the other hand, the Third, Sixth, and Seventh Circuits have held that mere possession of a firearm even outside the home does not.[8] The two circuits which allow the presence of firearms to empower police to conduct Fourth Amendment warrantless searches are discussed first.

In the Fourth Circuit, a three-judge panel initially held that "Because the carrying of a concealed firearm is not itself illegal in West Virginia, and because the

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[8] Along these lines, Justice Thomas explained, "mere possession of a [even] short-barreled shotgun does not, in the ordinary case, pose a serious risk of injury to others." Johnson v. United States, 135 S. Ct. 2551, 2565 (2015) (Thomas, J., concurring in the judgment).

circumstances did not otherwise provide an objective basis for inferring danger, we must conclude that the officer who frisked Robinson lacked reasonable suspicion that Robinson was not only armed but also dangerous." United States v. Robinson, 814 F.3d 201, 204 (4th Cir. 2016) (emphasis added). The court explained "[t]oday in West Virginia ... there is **no reason to think that public gun possession is unusual**, or that a person carrying or concealing a weapon during a traffic stop is anything but a law-abiding citizen who poses no danger to the authorities." *Id.* at 208 (emphasis added). However, the Fourth Circuit granted *en banc* review of this decision and a divided court reached a different conclusion: "It is also inconsequential that the passenger may have had a permit to carry the concealed firearm. The danger justifying a protective frisk arises from the combination of a forced police encounter and the **presence of a weapon**, **not from any illegality** of the weapon's possession." United States v. Robinson, 846 F.3d 694, 696 (4th Cir. 2017) (*en banc*) (emphasis added). The Court held that any person carrying a gun is "armed and thus dangerous" — "even when the firearm is legally possessed." *Id*. at 700-01.

Similarly, in United States v. Rodriguez, 739 F.3d 481 (10th Cir. 2013), the Tenth Circuit ruled that any time the police believe a person is carrying a concealed weapon, they are justified in detaining the person and seizing his firearm "even where it might be more likely than not that the individual is **not involved in any illegality**." (Emphasis added.) In that case, the Tenth Circuit simply rolled the two Terry criteria

(armed and dangerous) into one, allowing the police to assume that any person who is armed is automatically dangerous. The Court even went so far as to assert that "concealed weapons create an immediate and severe danger to the public." *Id.* at 490.

Three other circuits came to a very different conclusion, not allowing the presence of firearms to undermine Fourth Amendment protections. In United States v. Ubiles, 224 F.3d 213 (3d Cir. 2000), the Third Circuit held that "It is not necessarily a crime to possess a firearm in the Virgin Islands ... nor does a mere allegation that a suspect possesses a firearm, as dangerous as firearms may be, justify an officer in stopping a suspect." Instead, the Third Circuit likened possession of a gun to possession of a wallet: "This situation is no different than if Lockhart had told the officers that Ubiles possessed a wallet, a perfectly legal act in the Virgin Islands, and the authorities had stopped him for this reason. Though a search of that wallet may have revealed counterfeit bills — the possession of which is a crime under United States law, see 18 U.S.C. §§ 471-72 — the officers would have had no justification to stop Ubiles based merely on information that he possessed a wallet...."

In Northrup v. City of Toledo Police Dep't, 785 F.3d 1128 (6th Cir. 2015), the Sixth Circuit noted that "Ohio law permits the open carry of firearms ... and thus permitted Northrup to do exactly what he was doing." Therefore, "[c]learly established law required Bright to point to evidence that Northrup may have been 'armed and dangerous.' Yet all he ever saw was that Northrup was armed — and legally so. To allow

stops in this setting 'would effectively **eliminate Fourth Amendment protections for lawfully armed persons**.'" *Id*. at 1132 (emphasis added). The Court concluded: "There is no 'automatic firearm exception' to the *Terry* rule.... While open-carry laws may put police officers (and some motorcyclists) in awkward situations from time to time, the Ohio legislature has decided its citizens may be entrusted with firearms on public streets.... The Toledo Police Department has no authority to disregard this decision — not to mention the protections of the Fourth Amendment — by detaining every 'gunman' who lawfully possesses a firearm." *Id*. at 1132-33.

Finally, in United States v. Leo, 792 F.3d 742 (7th Cir. 2015), the Seventh Circuit held that a warrantless search of a backpack during a Terry stop was not justified based on only the belief that there might have been a firearm in a backpack. The court stated "that the Supreme Court has made clear that the Second Amendment protects the individual right to keep and bear arms.... Considering these important developments in Second Amendment law together with Wisconsin's gun laws, we cannot accept the government's contention that the possibility of a gun in Leo's backpack posed a unique threat that justified a full search of the bag on less than probable cause." *Id*. at 752.

Although these other circuit court cases involve open or concealed carry, the principle that the exercise of a Second Amendment right should not diminish a person's Fourth Amendment protections is the same, and perhaps is stronger in the home. Thus, there

currently is a circuit split between courts which feel that every armed citizen poses a threat to the police and the public and those who recognize that the exercising of one's Second Amendment rights does not require that he forfeit his Fourth Amendment rights. The Court should grant the petition to resolve this split and confirm that those who exercise their Second Amendment rights are not second-class citizens.

II. THE NINTH CIRCUIT'S "LOW HANGING FRUIT" EXCEPTION TO THE SECOND AMENDMENT MUST BE REJECTED.

The infringement of Petitioner's Second Amendment rights by Respondent City was wholly disregarded by all state and federal courts involved: the California Superior Court, the California Court of Appeal, the federal district court, and, finally, the Ninth Circuit uniformly failed to protect Petitioner's rights. The seizure and retention of Petitioner's firearms has been problematic constitutionally from the outset, and presents a type of infringement of Petitioner's Second Amendment rights never before sanctioned by this Court.

Petitioner is not and has never been a disqualified person. Yet, Petitioner's firearms were seized pursuant to a California statute which "requires law enforcement officers to confiscate any firearm ... that is owned, possessed, or otherwise controlled by an individual who has been detained" as Petitioner's husband Edward had been. *See* Rodriguez, 930 F.3d at 1128. Even if this language covered jointly owned firearms, it did not provide a statutory basis for the

seizure of Petitioner's solely owned firearm — which was seized by police after her husband had been removed for a 72-hour period of observation. Certainly, after the Petitioner changed the combination on her safe, and acquired full ownership of the firearms, any possible rationale for refusing to return the seized firearms ended. Second, the Ninth Circuit explained that the California Superior Court, which considered Respondent City's petition for an order of forfeiture, had "acknowledged that Lori could legally "'walk ... into any gun store and qualify to buy a handgun ... and put [it] in that gun safe.'" Rodriguez, 930 F.3d at 1129. Third, the federal district court noted that, not only was Petitioner not disqualified from acquiring new firearms under California law, but also "Lori could sell the firearms at issue to a licensed dealer .... Apparently, Lori could then purchase those guns from the dealer." Rodriguez, 2017 U.S. Dist. LEXIS 162977, *4 n.1.

How could all four courts conclude that refusing to return Petitioner's own firearms to her — a lawful gun owner — anything other than an infringement of her Second Amendment rights? Different courts offered different rationales — none of which is adequate to the task.

The California Court of Appeal denied Second Amendment relief because "the Supreme Court decisions in *Heller* and *McDonald* did not state that the Second Amendment right to keep and bear arms extends to keeping and bearing either **any particular firearms** or firearms that have been **confiscated from a mentally ill person**." City of San Jose, 2015

Cal. App. Unpub. LEXIS 2315 at *20 (emphasis added). Thus, the California court believes that a person has no right to own his own firearms, but could acquire other firearms. Then the court conflated erroneously the right of Petitioner (who was entitled to possess firearms) to reclaim her firearms with the right of her husband (who was not entitled to possess firearms).

Similarly, the federal district court refused to order the return of the firearms based on its view that, even though a person may have a right to possess a handgun in the home under District of Columbia v. Heller, that right is not specific to any firearm that a person may own. It stated: "The Second Amendment protects the right to keep and bear arms **in general**, but it does not protect the right to possess **specific firearms**...." Rodriguez, 2017 U.S. Dist. LEXIS 162977 at *4 (emphasis added). Under this curious understanding of Heller, the Respondent City allowing Petitioner to buy any gun, or even sell and buy back her own firearms, but not obtain a return of her own firearms directly from the City of San Jose police.

As authority for its proposition, the district court's relied on City of San Diego v. Boggess, 216 Cal. App. 4th 1494, 1503, 157 Cal. Rptr. 3d 644 (2013), a case upholding a City's refusal to return firearms to a person who had been determined to be suicidal. In Boggess, the California court concluded that neither Heller nor McDonald "prohibits the government from regulating the possession of guns by persons proven to be dangerous due to mental illness or suggests that those regulations are in direct conflict with the Second

Amendment." *Id*. at 1506. Again, the courts conflate the power to refuse to return firearms to those who are mentally ill with its authority to refuse to return firearms to those who the state has authorized to purchase and possess firearms.

Moreover, the district court proposition is precluded by Heller. The district court states that California may seize and refuse to return all the firearms that a person owns, so long as the person retains the right to go out and purchase another firearm. Such a statement of the Second Amendment right violates the principle set out in Heller, that "[i]t is no answer to say, as petitioners do, that it is permissible to ban the possession of handguns so long as the possession of other firearms (*i.e.,* long guns) is allowed." *Id*. at 629.

Additionally, neither the district court nor the Ninth Circuit court ever considered any financial constraint on Petitioner purchasing new, replacement firearms. Thus, the court seemed to assume that all residents of San Jose are wealthy, or at least have available the resources to spend several hundreds of dollars to obtain a replacement firearm. The reality is that, after an individual's firearms collection is confiscated by the state, it is not possible for many, if not most, individuals to find the resources to go out and buy one replacement firearm, to say nothing of the dozen that were seized in this case. Respondent's imposition of such a financial burden on the possession of a firearm is an "infringement" prohibited by the Second Amendment.

So the question becomes, on what theory would the courts below allow the Respondents to withhold the illegally seized and constitutionally protected firearms? The answer appears to be revealed in one phrase of the Ninth Circuit's opinion describing the rationale of the California Superior Court:

> it held that the City was nevertheless authorized to take the '**low hanging fruit**' of the guns the Rodriguezes already owned, irrespective of Lori's ability to buy more, because of the danger that Edward presented. [Rodriguez, 930 F.3d at 1129 (emphasis added).]

Since the danger that Edward may once have presented was long over, and he had no access to the firearms in Lori's safe, the Ninth Circuit could be understood to have sanctioned a new exception to the "shall not be infringed" language of the Second Amendment — the "low hanging fruit" exception. In truth, none of the rationales offered by Respondent City or the courts below are persuasive, and certainly no "low hanging fruit" rule should be tolerated.[9]

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[9] Petitioners had asked, alternatively, that the Court hold consideration of their petition pending the outcome in New York State Rifle & Pistol Association — another case in which these *amici* had filed *amicus* briefs at both the petition and merits stages. However, that case was decided on April 27, 2020, without providing the lower courts with further guidance as to how to evaluate Second Amendment claims. As of this date, there are nearly a dozen petitions for *certiorari* pending that raise Second Amendment issues. Should the Court grant review in one or more of those cases before ruling on this petition, these *amici* urge the

Lastly, if allowed to stand, the Ninth Circuit ruling would make it seemingly impossible for a married woman to defend against state violations of her Second Amendment right to "keep and bear arms," without being subjected to forcible confiscation and retention of her firearms by the state should her husband become a "disqualified person." Indeed, in this case, the Ninth Circuit has *sub silentio* adopted this anti-woman policy despite Petitioner's full compliance with California Penal Code § 25135, which, as the Petition explains, requires "that firearms be secured in an approved gun safe when a lawful gun owner lives with another person who is prohibited from possessing, receiving or purchasing a firearm." Petition at 5. Other courts have recognized that law-abiding girlfriends, boyfriends, and other housemates are able to safely possess firearms in their homes, despite the presence of a "disqualified person" also living in the household. *See, e.g.,* United States v. Huet, 2010 U.S. Dist. LEXIS 12359 (W.D. Pa 2010). Married women in California should be treated no less favorably than the "paramour" whose interests were recognized and protected by the district court in Pennsylvania. *See also*, E. Volokh, "Second Amendment Protects Gun Possession by Housemates of Felons," *The Volokh Conspiracy* (Nov. 24, 2010).

Court to hold this petition pending resolution of any such other case.

III. THE COURT SHOULD ADDRESS THE SECOND AMENDMENT ISSUE IN THIS CASE DESPITE THE NINTH CIRCUIT'S ISSUE PRECLUSION AVOIDANCE TECHNIQUE.

Respondents never raised an issue preclusion argument in their motion for summary judgment in district court or in their opening brief on appeal. And they never took the initiative to assert that defense on appeal until it was raised by the court for them seeking supplemental briefing. Thus, it had been forfeited, and in a case not involving firearms, it would never be considered by the Ninth Circuit. That court not only raised the issue for respondents, it then disregarded Respondents' forfeiture of the argument, allowing the court to avoid directly addressing the Second Amendment issue. In asserting a defense on behalf of a party, the Ninth Circuit did something similar to what this Court recently unanimously chastised the Ninth Circuit for doing in United States v. Sineneng-Smith, 590 U.S. __, 2020 U.S. LEXIS 2639 (May 7, 2020), where Justice Ginsburg explained:

> In our adversarial system of adjudication, we follow the principle of party presentation. As this Court stated in *Greenlaw v. United States*, 554 U. S. 237 (2008), "in both civil and criminal cases, in the first instance and on appeal. . . , we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *Id.*, at 243. [Sineneng-Smith at *6.]

Although that case involved appointment of *amici* to argue issues raised *sua sponte* by the Ninth Circuit, the point is the same here. In ordering supplemental briefing on an issue not raised (and no doubt forfeited) by the parties, the Ninth Circuit violated the "principle of party presentation."[10]

CONCLUSION

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

Respectfully submitted,

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[10] As pointed out by Petitioner, the Ninth Circuit's issue preclusion doctrine would make it impossible for individuals later to challenge in federal court actions taken by states to deprive them of the right to keep and bear arms under so-called red flag orders, thereby precipitating potentially unnecessary federal litigation. *See* Petition at 17 n.5.