

In the Supreme Court of the United States

AMY YOUNG and JOHN SCOTT, as Co-Personal
Representatives of the Estate of Andrew Lee Scott,
Deceased, and MIRANDA MAUCK, individually,
Petitioners,

v.

GARY S. BORDERS, in his official capacity as
Sheriff of Lake County, Florida, and
RICHARD SYLVESTER, in his individual capacity,
Respondents.

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

**RESPONDENTS' OPPOSITION RESPONSE TO MOTION FOR LEAVE
TO FILE BRIEF OF THE SECOND AMENDMENT FOUNDATION, INC. AS
AMICUS CURIAE IN SUPPORT OF PETITIONERS**

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Pursuant to Supreme Court Rule 37.5, the Respondents, Sheriff of Lake County, Florida, in his official capacity,¹ and Richard Sylvester, in his individual capacity, hereby file their response opposing the Court granting leave to the Second Amendment Foundation, Inc. (“SAF”) to file its *amicus curiae* brief in this case. Rule 37.1 provides that an *amicus curiae* brief that does not bring to the Court’s attention relevant matter not already brought to its attention by the parties is merely a burden on the Court.

1. The most basic reason the motion should be denied is discussed thoroughly in the Respondents’ Brief In Opposition: the Second Amendment is not an issue in this case. It was not raised below by the Petitioners in any of their district court pleadings or in the Eleventh Circuit pleadings on the merits. So, of course, such a claim was not addressed by those courts. The first mention of the “Second Amendment” was just in passing in the Petitioners’ Initial Brief to the Eleventh Circuit when the two words appeared in the statement of the issue—no argument regarding it was presented and there was no reference to it in the Reply Brief. (Eleventh Circuit Case No. 14-14673.) Brief mentions of it appear in their Petition for Rehearing En Banc, but it is not a basis of their request for rehearing. (BIO App. 21-22, 26-27.)² A Second Amendment argument was not presented to the district

¹ Gary S. Borders, the former Sheriff of Lake County, was the Sheriff on the incident date.

² References to the District Court docket are “(Doc. #)”; to the Brief in Opposition Appendix are “(BIO App. #)”; to the Motion for Leave are “(Mot. #)”; and to the Brief of *Amicus Curiae* are “(ACB #)”.

court and if it had been, it was abandoned on appeal. *See Gipson v. Jefferson Cty. Sheriff's Office*, 613 F.3d 1054, 1056 n.3 (11th Cir. 2010) (argument not presented to district court is waived on appeal), *vacated on other grounds*, 649 F.3d 1274 (11th Cir. 2011); *Marek v. Singletary*, 62 F.3d 1295, 1298 n.2 (11th Cir. 1995) (issues not clearly raised in the briefs are considered abandoned), *cert. denied*, 519 U.S. 838 (1996).

The motion for leave to file the brief states “this case...[addresses] the interplay between Second and Fourth Amendment rights,” and SAF can “assist the Court” in “address[ing] the matter.” (Mot. 3.) This is not accurate, as the Second Amendment was never raised as an issue in the case, and the case does not provide a proper vehicle for the Court’s review.

Furthermore, the right of the decedent, Andrew Scott, to own a gun and to bring it with him when he answered the door was not a disputed issue in the case. The Petitioners’ pleadings frequently referred to his “lawfully-owned firearm,” and Sheriff Borders, in his deposition, agreed that he had those rights. (Doc. 37, p. 48.) The Plaintiffs understood this was the Defendants’ position and confirmed that understanding in their Motion for Partial Summary Judgment. (Doc. 35, p. 10: citing the deposition of Defendant Expert Steve Ijames, Doc. 40, deposition p. 7.) The proposed amicus brief, just as the Petition for Writ of Certiorari, attempts to now conflate the case’s Fourth Amendment issues with their newly-proposed Second Amendment issues. *See Cty. of Los Angeles v. Mendez*, 137 S. Ct. 1539, 1547 n.* (2017) (the Court declined to grant certiorari on a question not addressed below and

declined to address it in its opinion) (*citing McLane Co. v. EEOC*, 137 S. Ct. 1159, 1170 (2017) (“We are a court of review, not of first view.”)). The motion for leave to file the amicus brief should be denied. The brief’s focus is not an issue in the case and would not assist the Court.

2. The amicus brief bases its contentions on mischaracterizations of the deputies’ actions, calling the knock-and-talk a “raid” and a “warrantless entry,” just as the Petition does, and ignores the totality of the circumstances. It claims to “cut through the clutter”—meaning disregard the facts—and merely argues the deputies’ procedure was improper and Sylvester was improperly granted qualified immunity. (ACB 8.) Its “analysis” and opinion in this regard do not assist the Court.

3. The brief’s further argument is that the lower courts need guidance in understanding the relationship between the Second and Fourth Amendments. So, it launches into a discussion of the unconstitutional conditions doctrine and cases dealing with what is permissible for a stop-and-frisk when the citizen has a presumptively legal firearm. Apparently, the amicus considers those cases analogous to this one, in which the deputy had knowledge the apartment occupant might be armed and involved in an earlier assault, and the occupant opens the door with a (presumptively legal) pistol in hand then starts moving over behind the door, and the deputy shoots him because he fears for his life. Notably, the Court recently declined to hear a Fourth Circuit stop-and-frisk case that the brief discussed negatively. (ACB 14-15.) *See U.S. v. Robinson*, 846 F.3d 694 (4th Cir. 2017) (en banc), *cert. denied*, ___ S. Ct. ___, 2017 WL 2692399 (Oct. 30, 2017).

In this case, the parties agree that Scott had the right to bring his gun to the door. Sylvester's fear that Scott was moving into position to shoot him was objectively reasonable under the circumstances, as the court below determined, and he had the right to defend himself. That a firearm is legally-owned does not eliminate risk to an officer. The amicus brief does not offer the Court relevant matter not already presented by the parties and the motion for leave to file it should be denied.

Respectfully submitted,

/s/ Linda L. Winchenbach

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CERTIFICATE OF SERVICE

I, Linda L. Winchenbach, a member of the Bar of this Court, hereby certify that on November 16, 2017, in *Young, et al. v. Borders, et al.*, Case No. 17-249, a copy of the Respondents' Opposition Response to Motion for Leave to File Brief of the Second Amendment Foundation, Inc. as *Amicus Curiae* in Support of Petitioners was sent by third-party commercial carrier for two-day delivery and via email to Petitioners' Counsel of Record, Dorothy F. Easley, Easley Appellate Practice, PLLC, 1200 Brickell Ave., Ste 1950, Miami, FL 33131, admin2@easleyappellate.com, administration@easleyappellate.com. A copy was sent via email to Counsel of Record for the Second Amendment Foundation, Inc., Alan Gura, at alan@gurapllc.com. I hereby certify that all parties required to be served have been served.

/s/ Linda L. Winchenbach
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