No. 19-1057

In The

Supreme Court of the United States

LORI RODRIGUEZ; SECOND AMENDMENT FOUNDATION, INC.; and CALIFORNIA GUN RIGHTS FOUNDATION,

Petitioners,

v.

CITY OF SAN JOSE; SAN JOSE POLICE DEPARTMENT; and STEVEN VALENTINE,

Respondents.

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

This case remains a glaring example of the Ninth Circuit distorting the law to avoid protection of Second Amendment rights. The City of San Jose only compounds the offense by adopting the court's inversion of the burden of proof regarding whether a timely warrant was available and its indefensible reading of the decision of the California Court of Appeal to preclude Petitioner's Second Amendment claim here. Whether this Court grants plenary review, summarily reverses, or GVRs this case, it should act to check the Ninth Circuit's lawless disposition of cases involving the Second Amendment.

REASONS FOR GRANTING THE WRIT

Nobody disputes that Petitioner's husband, Edward, was lawfully prohibited from possessing firearms and thus held to forfeit his ownership and possession of firearms under California's WELFARE & INSTITUTIONS CODE (CAL. WIC) § 8102. There likewise is no genuine dispute that such forfeiture order did not and cannot apply to Petitioner herself, who is not a prohibited person, retains the right to own and possess firearms, and is fully compliant with CALIFORNIA PENAL CODE § 25135, which sets the conditions for safe gun ownership and possession by persons living with a prohibited person. Indeed, the California Department of Justice approved the transfer to Petitioner of the once jointly owned firearms in this case. Pet. App. A7. And the district court acknowledged that the guns at issue could have been sold to a gun dealer and lawfully repurchased by Petitioner, Pet. App. C4 n.1, a move that would accomplish nothing beyond imposing pointless and onerous transac-

tion costs on Petitioner's recovery of firearms she already owns.

Given Petitioner's right to own and possess firearms, any justification for depriving her of these specific firearms unless she jumps through the burdensome dog-hoops of sale and repurchase is baseless. After the enactment of the safe-storage provisions of § 23135, there is no valid interest in depriving Petition of these or any other lawful firearms. That unavoidable conclusion explains the contortions the Ninth Circuit took to reach a different result.

I. The Decision Below Incorrectly Found a Community Caretaking Exception to the Fourth Amendment.

The fundamental legal flaw in the Fourth Amendment ruling below is that the Ninth Circuit applied an incorrect burden of proof, refusing to require the government to establish the continued existence of any emergency or the lack of time to obtain a warrant. That faulty placement of the burden on Petitioner, rather than the government, Pet. App. A31, dictated the flawed result in this case and generated the split identified by Petitioner. Respondents offered no evidence that a telephonic warrant could not have been obtained before Edward returned from his involuntary mental health evaluation. Only by shifting the burden of proof to Petitioner could the court below pretend there was a continuing emergency leaving no time to obtain a warrant.[1]

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[1] Contrary to Respondents' assertion, at 11, coercing Petitioner into opening a locked gun safe constitutes a search in addi-

Respondents' effort, at 2, 13, to portray this as a fact-bound question misses the point. Like any case involving the burden of proof, it of course concerns how various facts are treated, but allocating the burdens of proof remains a legal issue. All they say about the Ninth Circuit imposing the burden on Petitioner is that the availability of such warrants only arose at oral argument and the court found "no evidence" to support their availability. BIO 18. Of course, the comment at argument simply highlighted that Respondents had never met their burden of proving there was no time to get a warrant, referencing a well-know and speedy means of doing so. *Fisher* v. *City of San Jose*, 558 F.3d 1069, 1089 & n. 3 (9th Cir. 2009) (Paez, J., dissenting). That the court demanded such evidence from Petitioner, rather than from Respondents, is precisely the problem.

As for Respondents' effort to debate the facts and claim a supposed concern with the "urgent danger" posed by Edward's "imminent[]" return, BIO 14, they cite no evidence establishing the timing or likelihood of such supposed return, and no evidence that a warrant could not be obtained within such timeframe. Such concerns involve only speculation that is, on its face, unbelievable.[2]

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tion to the subsequent seizure. Regardless, the warrant requirement applies to both searches and seizures.

[2] Given the circumstances of his detention and removal, BIO 4-5, it is inconceivable that any medical professional would have released Edward without an overnight evaluation. He was in fact held for a full week. Inchoate and implausible "concern" is not proof of emergency or exigency leaving no time to seek a warrant. And the police could have remained on scene while

That the Ninth Circuit correctly recited *other* aspects of Fourth Amendment jurisprudence, BIO 17-18, only highlights its subsequent failure to apply the proper burden of proof. Respondents agree that, even for community caretaking, a warrant may be foregone "only in response to an urgent public safety need." BIO 14. They do not suggest that "urgent" need is somehow different from exigent circumstances or dispute that an urgent need to forego a warrant is judged relative to the time it would take to obtain a warrant. The only dispute is whether the government should have borne the burden of proving that a warrant was not available in time to avert any immediate danger.

The cases cited by Respondents confirm the fundamental deviation of the decision below.

Cady v. *Dombrowski*, 413 U.S. 433, 447-48 (1973), for example, confirms that there must be a valid "concern for the safety of the general public" to forego a warrant, even in the more lenient context of a custodial search of an automobile. *Cady* does not purport to alter the government's burden of proof of eligibility for such an exception and found in the record "uncontradicted testimony to support the findings of" the courts below. *Id.*

People v. *Ovieda*, 446 P.3d 262 (Cal. 2019), cited by Petitioner as conflicting with the decision below, Pet. 10-11, expressly distinguishes *Cady* as inapplicable to the home, finds no pressing need to forego a warrant

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seeking a telephone warrant, eliminating any danger from the fanciful possibility Edward might return before a warrant could issue.

when the person posing a danger has been removed from the home and placed into custody, and maintains the burden of proof on the government to prove otherwise. Respondents' claim, at 2, 19, that *Ovieda* did not involve an emergency begs the question of who must prove a continuing "emergency" that "leaves police insufficient time to seek a warrant." 446 P.3d at 268 (citation and internal quotation marks omitted). *Ovieda* required genuine proof through "specific and articulable facts" of such circumstances, rejected mere concerns, suspicions, or hunches, and found that the government fell short. *Id*. at 269. There could not be a starker contrast in the burdens of proof there and here.

Respondents' suggestion, at 19-20, that the Ninth Circuit's citations to *United States* v. *Erickson*, 991 F.2d 529, 531-32 (9th Cir. 1993), and *Corrigan* v. *District of Columbia*, 841 F.3d 1022 (D.C. Cir. 2016), incorporated the proper burden of proof for exigent circumstances is incorrect. The court below cited *Erickson* for the bare proposition that community caretaking does not automatically trump the warrant requirement, Pet. App. A24, but never cited any discussion of burdens of proof. Indeed, in *Erickson* the government *conceded* that there were no exigent circumstances, 991 F.2d at 531, hence the burden of proving such circumstances never arose.

The Ninth Circuit's attempt, Pet. App. A28-A30, to distinguish *Corrigan* confirms that it adopted an incorrect burden of proof. *Corrigan* rejected a warrantless search in a situation nearly the same as existed here, acknowledging the need for "evidence" to show exigent circumstances and the "heavy burden" borne

by police to demonstrate a "*compelling need*" and "*no time* to secure a warrant." 841 F.3d at 1030 (citations and quotation marks omitted; emphasis in original). *Corrigan* similarly rejected government reliance "on nothing more than 'a bare possibility'" and "runaway speculation." *Id.* at 1032 (citation omitted); *see also id.* at 1033 (test for "actual exigency" is whether objective facts establish "an 'urgent need' or 'an immediate major crisis in the performance of duty affording neither time nor opportunity to apply to a magistrate [for a search warrant].' ") (citation omitted). And, assuming the community caretaking exception even applied, *Corrigan* held that it likewise turned on "circumstances requiring immediate action" and would not apply where there was "ample time and opportunity * * * to seek a search warrant." *Id.* at 1034.

By contrast, the Ninth Circuit here relied on the speculative assertion that officers "had no idea" when Edward might return from his mental health evaluation, thus "making it uncertain that a warrant could have been obtained quickly enough to prevent the firearms from presenting a serious threat to public safety." App. A30. The court placed the burden on Petitioner to negate such speculation and offer evidence regarding the timely availability of telephone warrants. Pet. App. A31. The allocation of burdens in *Corrigan* and here stand in sharp conflict.

Finally, Respondents' citation, at 21, to cases applying more lenient standards merely provides the other side of the split, strengthening the need for this Court's review. *Caniglia* v. *Strom*, 953 F.3d 112, 123 n. 5, 126, 131 (1st Cir. 2020) (questioning whether

community caretaking requires proof of urgency that "makes resort to the warrant process impractical"; declining to apply exigency test to community caretaking)) (citation and internal quotes omitted), *cert. pet. filed*, Docket No. 20-157 (Aug. 10, 2020); *Mora* v. *City of Gaithersburg*, 519 F.3d 216, 228 (4th Cir. 2008) (allowing exception broader than exigent circumstances, relying on speculation, and failing to discuss or require proof of continuing threat or inability to obtain a warrant).

II. The Decision Below Distorts Preclusion Law To Prevent Petitioner from Raising a Meritorious Second Amendment Claim.

Respondents join the Ninth Circuit's disingenuous claim that the California Court of Appeals resolved Petitioner's Second Amendment claim on the merits. While they initially discuss the erroneous Second Amendment holding of the trial court, BIO 7, they ignore that the California Court of Appeal offered a more limited basis for sustaining the § 8102 forfeiture order against Edward.

The Court of Appeal expressly emphasized the limited applicability *to Edward* of the forfeiture order, noting it did not forfeit Petitioner's rights. *See* Pet. App. E12-E13 (Section 8120 applies only to "the return of firearms * * * to the person who was detained under section 5150" and is "silent as to the return of confiscated firearms to any other person"; on appeal the "reviewing court decides the narrow issue" regarding "return of the firearms to the person who was detained"). Contrary to Respondents' assertion, at 28, Petitioner did not contest the order as applied to

Edward, only as it might be overapplied to her. And the premise of the court's opinion was that Petitioner had ample paths to seek return of her firearms or those transferred to her, and hence nobody had permanently dispossessed her of them. Its sole concern with whether return to her might provide access to Edward as a prohibited person was later vitiated by her compliance with the newly enacted CAL. PENAL CODE § 25135, setting conditions for safe possession of firearms while living with a prohibited person.

Respondents, at 8, seize upon the state appellate court's passing observation that there is no "Second Amendment right to * * * any particular firearms or firearms that have been confiscated from a mentally ill person," Pet. App. E15-E16. But that comment did not purport to say that nobody could ever claim the right to a firearm once seized from a prohibited person, and the statute allows the sale or transfer of such a weapon to a lawful recipient such as Petitioner.[3]

Notwithstanding Respondents' Ophelia-like protestations, at 2, that *Petitioner* distorts the various appellate decisions here, it remains frivolous to suggest, at 29, that the California Court of Appeals held that the forfeiture order as to Edward removed *Petitioner's* "possessory interest" in her property notwith-

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[3] The California Court of Appeal's holding regarding still-available procedures for return of the firearms to Petitioner is not merely an "ancillary reason" for rejecting the Second Amendment claim, BIO 8-9, it is a reason why the claim has yet to ripen and would have made any California or U.S. Supreme Court petition to challenge the supposed Second Amendment merits impossible, making collateral estoppel inappropriate.

standing her Second Amendment claims. That is the false characterization that drove the Ninth Circuit's preclusion holding and that cannot remotely be reconciled with the actual opinion of the state appellate court. Coupled with the Ninth Circuit's refusal to acknowledge subsequent steps taken by Petitioner at the state court's suggestion, which would make issue preclusion inapplicable in any event, Pet.16-17, the Ninth Circuit improperly circumvented full litigation of Petitioner's meritorious Second Amendment claim and should be reversed.

III. This Court Should Use Its Supervisory Power To Correct the Ninth Circuit's Circumvention of Second Amendment Protections.

The Ninth Circuit's many contortions in this case can only be understood as a results-driven effort to avoid an even less credible Second Amendment holding. Pet. 21-22. Once it is conceded that Petitioner can purchase and own any otherwise legal firearm (including repurchasing her own firearms at added burden and expense), that the California DOJ has approved transfer to her of the firearms forfeited by Edward, and that she has fully complied with California's safe-storage requirements for persons in her situation, then there is literally no valid government interest in denying her the return of her firearms. *Panzella* v. *Sposato*, 863 F.3d 210, 219 (2nd Cir. 2017) ("government could not rely on any safety interest, given that Panzella can buy another longarm, or any other legal firearm for that matter").

Contrary to Respondents' suggestions, BIO 3, 32, every confiscation of a firearm *because* it is a firearm indeed implicates the Second Amendment and requires valid justification, just as every confiscation of a book *because* it is a book (rather than for a neutral reason) implicates the First Amendment. The further suggestion, at 30, that Petitioner has no right to any particular firearm is both wrong and proves too much. She certainly has a right to keep an otherwise lawful firearm she already owns, and the government cannot arbitrarily confiscate particular firearms on the bare theory that the owner can simply buy another. *Cf. District of Columbia* v. *Heller*, 554 U.S. 570, 629 (2008) (rejecting claim that banning handguns is permissible so long as possession of other firearms is allowed). On such reasoning, confiscating a particular Koran or Bible from a disfavored religious person would similarly be permissible if they could simply buy another.

The government may not impose disingenuous costs and burdens on gun ownership by seizing the "low-hanging fruit" of a particular firearm, Pet. App. A5, and requiring the owner to buy another without a valid basis for distinguishing the seized from the new firearms. Where, as here, the government has no remaining valid basis for depriving Petitioner of this or any other lawful firearm, refusing to return her firearms is simply harassment and hostility towards her Second Amendment rights.

Respondents, at 3, curiously chide Petitioner for supposedly asserting a false "secret plot to overthrow the Second Amendment." Suffice it to say, Petitioner makes no claim of a secret plot because there is noth-

ing at all "secret" about the Ninth Circuit's well-documented disdain for the Second Amendment. And while not *every* Ninth Circuit judge is so disposed – there are regular and vocal dissenters, after all, and the occasional rogue panel decision, Pet. 22-23; *Mai* v. *United States*, 2020 WL 5417158 (9th Cir. Sept. 10, 2020) (8 Judges dissenting from denial of rehearing *en banc*); *Duncan* v. *Becerra*, 970 F.3d 1133 (9th Cir. 2020) (affirming favorable Second Amendment decision) – it is certainly a widespread and corrosive feature of that circuit. While it may seem impertinent or impolite to point it out, Petitioner takes comfort and support from the many Justices and Judges who have recognized and acknowledged the same. Pet. 21-23.

If the Ninth Circuit (and Respondents) object to being the subject of a "cartoonish portrait," BIO 4, then perhaps they should stop their cartoonish treatment of the Second Amendment. Petitioner can only call them as she and myriad others see them.

It is ultimately up to this Court to correct the ongoing maladministration of justice and disdain for Second Amendment rights in the Ninth Circuit. In determining how best to address this case, this Court has a range of options. It could simply grant plenary review to address the Fourth Amendment split and the Ninth Circuit's abusive behavior in context. Alternatively, it could summarily reverse on the facially erroneous reading of the California Court of Appeal decision in order to deny Petitioner full consideration of her Second Amendment claim. Or it could GVR this case for consideration of various intervening developments, including this Court's decision in *United States* v. *Sineneng-Smith*, 140 S. Ct. 1575, 1581

(2020) (rejecting circuit court interposing arguments not raised by parties), or the recent Ninth Circuit panel decision in *Duncan* v. *Becerra*, *supra*, setting intervening and favorable Second Amendment precedent (if it survives), thus altering the issue preclusion analysis.[4] Or it could hold this case for joint consideration with the petition in *Caniglia* v. *Strom*, No. 20-157 (Aug. 10, 2020), a case cited by Respondents and which raises a significant question on whether the community caretaking exception applies to the home at all. But doing nothing would merely reward abusive behavior in the Ninth Circuit and undermine the administration of justice.

CONCLUSION

For the reasons above, this Court should grant the petition for a writ of certiorari.

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[4] Petitioner previously suggested holding this case for the decision in No. 18-280, *New York State Rifle & Pistol Association, Inc.* v. *City of New York*. That case, of course, was dismissed as moot, albeit with ample discussion of the mistreatment of Second Amendment in the lower courts.

Respectfully submitted,

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Dated: September 22, 2020