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**IN THE SUPREME COURT OF THE UNITED STATES**

**October Term 2022**

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**JOSE LUIS NUNEZ,**  
***Applicant / Petitioner,***

*v.*

**UNITED STATES OF AMERICA,**  
***Respondent.***

\_\_\_\_\_  
**Application for Extension of Time Within Which to File  
a Petition for a Writ of Certiorari to the  
United States Court of Appeals for the Ninth Circuit**

\_\_\_\_\_  
**APPLICATION TO THE HONORABLE  
ELENA KAGAN AS CIRCUIT JUSTICE**

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March 9, 2023

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## **APPLICATION FOR EXTENSION OF TIME**

To the Honorable Elena Kagan, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Ninth Circuit:

Pursuant to Rule 13.5 of the Rules of this Court and 28 U.S.C. § 2101(c), Applicant Jose Luis Nunez prays for a 60-day extension of time within which to file a petition for a writ of certiorari in this Court, to and including May 22, 2023.

### **JUDGMENT FOR WHICH REVIEW IS SOUGHT**

The judgment for which review is sought is *United States v. Jose Luis Nunez*, No. 21-50131 (9th Cir. Dec. 23, 2022), a copy of which is attached as Exhibit A.

### **JURISDICTION**

The United States Court of Appeals for the Ninth Circuit denied rehearing en banc and amended its decision on December 23, 2022. This Court will have jurisdiction over any timely filed petition for certiorari in this case pursuant to 28 U.S.C. § 1254. Under Rules 13.1, 13.3, and 30.1 of this Court, Applicant's time to petition for a writ of certiorari expires on March 23, 2023.

In accordance with Rule 13.5, Applicant has filed this application more than 10 days in advance of that date.

### **REASONS JUSTIFYING AN EXTENSION OF TIME**

An extension is warranted because of the importance of the issues presented and undersigned counsels' need for additional time to prepare a petition that will assist the Court in deciding whether to grant certiorari.

This case involves important constitutional questions on which the lower courts have differed: (i) whether the “protective sweep” exception to the Fourth Amendment’s warrant requirement permits the warrantless entry and search of a home several blocks from an arrest, from which no danger was posed to the arresting officers; and (ii) whether the “inevitable discovery” exception to the exclusionary rule allows the government to circumvent the warrant requirement where its officers purportedly have sufficient probable cause for a warrant but fail to seek one.

In 1990, this Court held that protective sweeps are permissible during an in-home arrest “when the searching officer possesses a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene.” *Maryland v. Buie*, 494 U.S. 325, 337 (1990). While *Buie* was silent as to whether protective sweeps incident to arrests made outside the home are permissible, most circuits have extended *Buie*’s reasoning to allow such searches in the area *immediately* adjacent to an arrestee. See *United States v. Delgado-Perez*, 867 F.3d 244 (1st Cir. 2017); *United States v. Oguns*, 921 F.2d 442 (2d Cir. 1990); *United States v. White*, 748 F.3d 507 (3d Cir. 2014); *United States v. Colbert*, 76 F.3d 773 (6th Cir. 1996); *United States v. Biggs*, 70 F.3d 913 (6th Cir. 1995); *United States v. Pile*, 820 F.3d 314 (8th Cir. 2016) (per curiam); *United States v. Basurto*, 497 F.2d 781 (9th Cir. 1974); *United States v. Tisdale*, 921 F.2d 1095 (10th Cir. 1990); *United States v. Yarbrough*, 961 F.3d 1157 (11th Cir. 2020); *United States v. Henry*, 48 F.3d 1282 (D.C. Cir. 1995).

Here, a suspect ran through Applicant's home while trying to evade the police, and was eventually arrested a few blocks away. Despite having no plausible basis to fear an attack from Applicant's home that could reach the arrest location, officers returned to, entered, and searched the home without Applicant's consent or a warrant, during which they found unrelated firearms that served as the basis for Applicant's subsequent conviction. Departing from this Court's precedents and other circuits' applications of *Buie*, the Ninth Circuit held that the officers' warrantless entry and search passed constitutional muster, even though the arrest did not occur in (nor even immediately adjacent to) the home and even though no danger was or could have been posed to the arresting officers at the arrest location.

Compounding this expansion of the protective-sweep exception, the Ninth Circuit held, in the alternative, that the search was justified under the "inevitable discovery" exception. That ruling, too, conflicts with longstanding precedent holding that the inevitable discovery doctrine does not apply where officers purportedly have probable cause to obtain a warrant but fail to do so.

Mr. Nunez respectfully requests additional time to file his petition for certiorari for the following reasons:

1. An extension of time is warranted because Applicant's counsel of record has only recently become involved in this case. New counsel requires additional time to become familiar with the record in order to adequately present the significant legal issues for this Court's consideration.

2. In addition, pre-existing professional commitments will limit counsel's ability to prepare a petition for certiorari on or before March 23, 2023. In particular, in addition to other pending appellate and trial matters, Mr. Hochman has lead responsibility for preparing a reply brief in the Delaware Supreme Court in *Holifield v. XRI Investment Holdings*, No. 407, 2022, currently due on or before March 9, 2023, as well as a reply brief in the United States Court of Appeals for the Eighth Circuit in *Ford v. TD Ameritrade Holding Corp.*, No. 22-3232, currently due on or before March 16, 2023. Likewise, Mr. Carpenter has lead responsibility for preparing a reply brief in the United States Court of Appeals for the Ninth Circuit in *Lytte v. Nutramax Laboratories, Inc.*, No. 22-55744, currently due on or before April 17, 2023. And Mr. Wedel has lead responsibility for preparing a petition for rehearing *en banc* in the United States Court of Appeals for the Tenth Circuit in *Honie v. Powell*, No. 19-4158, currently due on or before March 13, 2023, and (together with Messrs. Hochman, Carpenter, and Talai) is also preparing a petition for certiorari in this Court in *United States v. Anderson*, No. 20-50207 (9th Cir.), currently due on or before April 6, 2023.

3. An extension of time is warranted given the exceptionally important constitutional issues Applicant's petition raises. The Ninth Circuit's protective-sweep ruling creates a virtually un-cabined loophole for the government to conduct warrantless home searches whenever an officer has a reasonable suspicion that a firearm is present in the home—an outcome that cannot be squared with the Fourth Amendment. Worse, the Ninth Circuit's simultaneous expansion of the inevitable discovery doctrine further erodes—indeed, functionally nullifies—the warrant

requirement by permitting an invasive array of otherwise-unconstitutional searches to be salvaged by post-hoc probable-cause rationalizations that should have been presented to a magistrate *before*, not after, a search. Counsel therefore respectfully asks this Court for the additional time needed to adequately prepare the petition.

4. Applicant has notified Respondent of this request for extension of time, but Respondent has yet to confirm whether it consents to the request.

### CONCLUSION

For these reasons, Applicant respectfully requests that an order be entered extending the time to file his petition for a writ of certiorari to and including May 22, 2023.

Respectfully submitted,

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