No. _____

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Fourth Amendment allows an exception to its warrant requirement for so-called "community caretaking" where the alleged danger to the community has been resolved and the premises to be searched and items then seized do not contain or pose an immediate threat making it impossible to obtain a timely warrant?

2. Whether issue preclusion can bar a claim for deprivation of a constitutional right where the prior decision discussing the constitutional issue did not depend on resolving the merits of that issue, found state-law procedures remained that could moot the claimed infringement, and thus could not have been further reviewed in this Court given that the constitutional claim would be seen as unripe and potentially avoided by adequate and independent state grounds?

3. Whether this Court should exercise its supervisory powers to review the improper circumvention of Second Amendment protections in the Ninth Circuit or, at a minimum, hold this case for No. 18-280, *New York State Rifle & Pistol Association, Inc.* v. *City of New York*?

PARTIES TO THE PROCEEDINGS BELOW

Petitioners are Lori Rodriguez, the Second Amendment Foundation, and the California Gun Rights Foundation. They were plaintiffs in the district court and plaintiff-appellants in the court of appeals.

Respondents are the City of San Jose, the City of San Jose Police Department, and San Jose Police Officer Valentine. They were defendants in the district court and defendant-appellees in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Second Amendment Foundation, Inc., (SAF) is a non-profit membership organization incorporated under the laws of Washington with its principal place of business in Bellevue, Washington. SAF is not a publicly traded corporation and has no parent corporation and no publicly held company owns 10 percent or more of its stock.

The California Gun Rights Foundation, (CGF) is a non-profit organization incorporated under the laws of California. Its principal place of business in Sacramento, California. CGF is not a publicly traded corporation and has no parent corporation and no publicly held company owns 10 percent or more of its stock.

RELATED CASES

State Court Proceedings:

- *City of San Jose* v. *Edward V. Rodriguez*, No. 1-13-CV-241669, Santa Clara Superior Court, Filed February 22, 2013; decided September 30, 2013 (Permitting City to maintain possession of firearms seized from Petitioner Rodriguez's gun safe pending final disposition or resolution of the dispute).

- *City of San Jose* v. *Edward V. Rodriguez*, No. H040317, Court of Appeal of California (6th Dist.), decided April 2, 2015, attached at App. E1-E21 (affirming Superior Court decision).

Application to Justice Kagan:

- *Rodriguez* v. *City of San Jose*, No. 19A653, Supreme Court of the United States. Application for an extension of time to file petition for writ of certiorari granted December 12, 2019, to and including February 21, 2020.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Order of the District Court for the Northern District of California granting defendants summary judgment and denying plaintiffs summary judgment is available at 2017 U.S. Dist. Lexis 162977 and is attached at Appendix C1-C8.

The decision of the Ninth Circuit affirming the district court's decision on the Fourth Amendment and Second Amendment claims is available at 930 F.3d 1123 and is attached at Appendix A1-A31.

The decision of the Ninth Circuit affirming the district court decision on the Fifth Amendment Takings and Fourteenth Amendment Due Process claims is unpublished but available at 773 Fed. Appx. 994 and is attached at Appendix B1-B4.

The Order of the Ninth Circuit denying the petition for rehearing or rehearing *en banc* is unpublished but is attached at Appendix D1.

JURISDICTION

The Ninth Circuit issued its decision and judgment affirming the district court's grant of summary judgment to defendants on July 23, 2019. Petitioners filed a timely petition for rehearing and rehearing *en banc*, which the Ninth Circuit denied on September 24, 2019. On December 12, 2019, Justice Kagan granted Petitioners an extension of time to file this Petition to and including February 21, 2020. This

Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Relevant constitutional and statutory provisions are reproduced at Appendix F1-F5.

STATEMENT OF THE CASE

This case involves the unconstitutional seizure and retention of legal firearms from a person legally entitled to have them, both at the time of the seizure and now. The initial seizure violated the Fourth Amendment because it was made without a warrant for lawfully possessed firearms that posed no imminent danger.

The continuing refusal to return such firearms, despite it being undisputed that it is entirely lawful for Petitioner Rodriguez to purchase and possess firearms and her complete compliance with state law and procedures for ensuring the safe storage and control of such firearms violates the Second Amendment under any conceivable standard given its complete irrationality. Indeed, because Petitioner stated such an obviously meritorious Second Amendment claim, the Ninth Circuit manufactured a meritless issue preclusion defense in a now-familiar bid to circumvent the Second Amendment. At a minimum, this case should be held for a decision in No. 18-280, *New York State Rifle & Pistol Association, Inc.* v. *City of New York*, which could provide intervening authority bearing favorably on the Second Amendment question and

thus eliminate any prospect of issue preclusion even as improperly manufactured by the Ninth Circuit.

1. On January 24, 2013, Petitioner Lori Rodriguez called the San Jose Police Department for help because her husband was exhibiting erratic behavior. The police came and took custody of her husband and put him in an ambulance so that he could be placed on a mental health hold under California's WELFARE & INSTITUTIONS CODE (CAL. WIC) § 5150.

While that mental health episode disqualified her husband from owning or possessing firearms, CAL. WIC § 8100, *et seq*., it did not disqualify Petitioner Rodriguez. Despite the limited scope of the disqualification, and after Petitioner's husband had already been removed from the premises and secured in the ambulance, the officer at the scene, Respondent Valentine, falsely told Petitioner Rodriguez that he had a legal duty to confiscate *all* firearms in her home and that she was required to surrender the firearms by providing the combination to the gun safe. None of the firearms were outside of the safe until it was opened. Petitioner Rodriguez's gun safe was and is compliant with state law for the safe storage of firearms. App. E4. [1]

Petitioner Rodriguez objected to the seizure of the firearms from the gun safe in her home and, in particular she objected to the seizure of a firearm individually owned by and registered to her. Respondent Valentine persisted in demanding the firearms and, in compliance with such insistence, Petitioner provid-

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[1] See also ER 60-61, 221, 245-48, 255, 261, 268-69, 278-79. (ER refers to the Excerpts of Record in the Ninth Circuit.)

ed the combination to the gun safe. Respondent then seized the several firearms therein without a warrant and over Petitioner's continued objection. Petitioner's husband was admitted for a mental health evaluation and released one week later. App. A4.

In seeking the informal return of her firearms, Petitioner Rodriguez assured Respondents that she would take all necessary steps safely to secure the firearms against access by her husband. She agreed to have the safe combination changed, she acknowledged that she knew and understood her duty to prevent her husband from gaining access to them, and she agreed to condition the return of the firearms upon successful transfer of title of the jointly-owned guns. Despite such assurances, Respondent City refused to return the firearms or even to agree to return them upon completion of any and all required safety measures.

2. On February 22, 2013, the City filed an action against Petitioner's husband under CAL. WIC § 8102 seeking to maintain possession of the firearms. App. E7. Petitioner Rodriguez intervened in that action to assert her own rights and interests notwithstanding her husband's change of status. She confirmed to the trial court that she would take any required steps to comply with the limitations on her husband's ownership or possession of firearms. Despite uncontradicted evidence that Lori could legally go and purchase a *new* firearm given that she was not prohibited herself and owned an approved gun safe, App. E12, the trial judge ordered the City to retain the firearms until further resolution or disposition of the firearms. Respondent appealed.

3. While the case was pending in the California Court of Appeal, California amended its laws to further address the secure storage of firearms when a lawful gun owner lives with a prohibited person. The new CALIFORNIA PENAL CODE § 25135 was signed into law on October 11, 2013 and required 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.

4. On April 2, 2015, the California Court of Appeal affirmed on the limited question of whether the firearms should be returned "to the previously detained person," *i.e.*, Petitioner's husband rather than Petitioner herself, App. E13, and the propriety of the City's continued possession of the firearms pending further resolution of the parties' dispute. The court eventually held, however, that Petitioner Rodriguez could still seek to recover her property because "the record on appeal shows that the procedure provided by [Penal Code] section 33850 *et seq*. for return of firearms in the possession of law enforcement remains available to Lori." App. E20-E21.

Regarding Petitioner's Second Amendment argument, the court found no violation had yet occurred because the trial court order did not "require forfeiture or destruction of the confiscated firearms" and she had not (yet) complied with the available state-law procedures in § 33850 for return of firearms to her, rather than to her husband. App. E17-E18. It further noted that nothing in the trial court's order "preclude[s] a person who claims title to the confiscated" firearms from seeking their return under

§ 33850, that such procedure "remains available to" her, and "therefore" she had failed to show that the trial court order "preclude[ed] her from keeping firearms for home protection" or that her Second Amendment rights were "actually violated by the trial court's" order. App. E20-E21. It expressed no opinion on whether the City's subsequent refusal to return firearms that she owned to her *after* she complied with available procedures would violate the Second Amendment.

5. Following that ruling, Petitioner Rodriguez complied with the specified procedures to seek return of firearms that she owned, including showing that she was in compliance with the safe-storage laws as amended in PENAL CODE § 25135, and possessed the necessary transfer and release certificates from California's Department of Justice. App. A7.[2] Despite having done precisely what the court of appeals had described, Respondents continued to refuse to return the Petitioner's firearms to her. In the face of such recalcitrance, Petitioner Rodriguez, now joined by the institutional Petitioners, sued in federal court on August 12, 2015, alleging violations of the Second, Fourth, and Fifth, and Fourteenth Amendments, as well as pendent state law claims under CALIFORNIA PENAL CODE § 33850.

6. Over a year later, the case was argued on cross-motions for summary judgment. Nearly a year after that, on October 2, 2017, the district court issued a brief six-page Order denying summary judgment to Petitioners and granting summary judgment to Re-

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[2] ER 194-217, 303-47.

spondents. The court summarily rejected the Fourth Amendment claim regarding the warrantless search and seizure by merely citing CAL. WIC § 8102 directing police officers to confiscate any firearm "own[ed]" or in the "possession" or "under [the] control" of a person detained for examination of a mental health condition. App. C5. The court did not discuss the undisputed fact that the firearms in question were not in the possession or control of Petitioner's husband at the time of their seizure, at least one of the firearms was not owned by him, even in part, and Petitioner subsequently had undertaken to ensure that he would neither own, possess, nor control any of the firearms.

The district court also rejected the Second Amendment claim by holding that because the City agreed that Petitioner Rodriguez could lawfully purchase *other* guns for self-defense, forfeiture of these particular guns did not violate the Second Amendment. App. C4-C5. That such concession by the City also meant Respondents had no valid interest in depriving her of the confiscated firearms was not even mentioned by the court. The court did not find, and no party had ever argued, that the Second Amendment issues were barred by issue preclusion.[3] Petitioners appealed.

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[3] The district court also rejected Petitioner's Fifth Amendment takings claim with the circular conclusion that because the confiscation of the firearms was supposedly lawful, the refusal to return the firearms could not be a compensable taking. Suffice it to say, that holding is embarrassingly wrong, contradicts the City's concessions that Petitioner retained a property interest in the firearms, App. E8, E17, but is not independently cert.-worthy. It does reinforce, however, the disdain with which the

7. While the case was pending on appeal, and after the case was fully briefed and set for oral argument, the Ninth Circuit, *sua sponte*, ordered the parties to file simultaneous briefs on issues relating to affirmative defenses – *Rooker-Feldman* and issue preclusion – that were never raised by Respondents in the district court.

On July 23, 2019, the Ninth Circuit affirmed the district court's grant of summary judgment to defendants, in part on grounds that had not been raised or ruled upon below.

In a published opinion the court held that the Respondents were excused from obtaining a warrant to seize Petitioner Rodriguez's property under a "community caretaking" exception. It also shifted the burden to Petitioner to prove the availability of telephonic warrants and ignored the City's complete lack of explanation or excuse for its failure to seek a warrant. App. A23-A31.

In a separate unpublished memorandum opinion, filed the same day, the panel affirmed the district court's rejection of Petitioners' Fifth and Fourteenth Amendment claims and her pendant state law claims. App. B1-B4.

8. Petitioners timely sought rehearing or rehearing *en banc*, which was denied on September 24, 2019. App. D1.

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rights of firearms owners are treated by some judges in the Ninth Circuit. The Fourteenth Amendment procedural due process claim and the pendent state law claim were summarily dismissed and are not at issue in this Petition.

REASONS FOR GRANTING THE WRIT

This Court should grant the Petition in order (1) to resolve a conflict between the decision below and decisions by the California Supreme Court and this Court regarding the scope of an exigent circumstances or community caretaking exception to the Fourth Amendment's warrant requirement; (2) to resolve a conflict between the decision below and this Court's decisions regarding issue preclusion; and (3) to exercise its supervisory authority to check the Ninth Circuit's increasingly bold disregard of the constitutional rights, under the Second Amendment and other provisions, of firearms owners.

At a minimum, this Court should hold this Petition for the eventual decision in No. 18-280, *New York State Rifle & Pistol Association, Inc.* v. *City of New York*. The outcome of that case could effectively eliminate the issue preclusion concerns by providing pertinent intervening precedent, and could provide guidance to deter – or at least throw into sharper relief – the Ninth Circuit's naked hostility towards the Second Amendment and other rights of firearms owners.

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

This Court should grant certiorari to review the Ninth Circuit's conclusion that the Fourth Amendment permits a warrantless seizure where there was no imminent danger and the only conceivable source of the danger was already in custody and out of the home, with no imminent access to the firearms seized.

A. The Decision Below Improperly Permits Warrantless Searches and Seizures in Non-Exigent Circumstances, in Conflict with the California Supreme Court's Decision in *People* v. *Ovieda*.

In its unbounded antipathy towards the Second Amendment, the Ninth Circuit has now taken to distorting other Amendments when it comes to cases involving firearms. By ruling that the Fourth Amendment allows a warrantless seizure where the supposed danger has passed and there is no urgency precluding officers from obtaining a warrant, the Ninth Circuit has done great violence to the warrant requirement of that Amendment.

Not only is that decision wrong, it also has created inconsistent standards in the federal and state courts within the Ninth Circuit, conflicting with the California Supreme Court's decision in *People* v. *Ovieda*, 446 P.3d 262 (Cal. 2019).[4]

In *Ovieda*, the California Supreme Court held that the so-called "community caretaking" exception to the Fourth Amendment's warrant requirement was limited to vehicle searches and otherwise violated the Fourth Amendment when applied to a residential search absent an emergency. 446 P.3d at 276. After reviewing cases from this Court, the *Oveida* court concluded that "the community caretaking exception asserted in the absence of exigency is not one of the

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[4] That conflict was brought to the attention of the circuit court while the petition for rehearing or rehearing *en banc* was pending. Ninth Cir. Dkt. Entry 79.

carefully delineated exceptions to the residential warrant requirement recognized by the United States Supreme Court." *Id.* at 273-76.

Ovieda cannot be reconciled with the decision below. Indeed, that case involved guns as well, yet the court held that "possession of legal firearms in a home is generally lawful (see *District of Columbia* v. *Heller* (2008) 554 U.S. 570, 576–635 * * *), and their presence in an apparently empty home does not, without more, constitute exigent circumstances. There was no indication that firearms were accessible to others or that they posed a threat to officers or the public." 446 P.2d at 269. Because the decision below creates inconsistent constitutional standards between state and federal courts in California, this Court should grant cert. to provide uniformity and ensure that constitutional rights are not gained or lost by the fortuity or strategic election of which court hears a case.

B. The Decision Below Conflicts with this Court's Decisions Holding that the Fourth Amendment Requires a Warrant where there Is No Imminent Danger Leaving No Time To Apply for a Warrant.

It is not surprising that the California Supreme Court has recognized the continuing applicability of the Fourth Amendment's warrant requirement in circumstances such as found in this case. The question is not particularly close.

This Court has long held that a warrant is required to search a home and seize items therein un-

less there is genuine exigency coupled with an inability to timely comply with the warrant requirement. *McDonald* v. *United States*, 335 U.S. 451, 454-56 (1948).

> Time and again, this Court has observed that searches and seizures conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment – subject only to a few specially established and well delineated exceptions.

Minnesota v. *Dickerson*, 508 U.S. 366, 372 (1993) (citations and internal quotation marks omitted). This Court likewise has made clear that there is no "firearm exception" to the Fourth Amendment. *Florida* v. *J.L.*, 529 U.S. 266, 272-73 (2000).

And this Court has repeatedly emphasized that the warrant requirement is not a mere frivolity. "We are not dealing with formalities. The presence of a * * * warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police." *McDonald*, 335 U.S. at 455-56. Indeed, the utility of a having such a neutral arbiter is apparent from the facts of this case – the officer on the scene would not have been able to mislead a magistrate, as he did Petitioner Rodriguez, regarding his supposed duty to search the house and seize even safely secured firearms belonging to a lawful owner who had done nothing wrong. Furthermore, a warrant would, at a minimum, have imposed limits on the scope of the search and seizure.

Because the Ninth Circuit upheld the warrantless seizure in this case without even the pretense of satisfying this Court's narrow exception for genuinely exigent circumstances, the decision below conflicts with this Court's cases.

The Ninth Circuit further compounded the error in not requiring genuine exigency by shifting the burden of proof regarding whether a timely warrant procedure was unavailable to the officer on site. Rather than requiring Respondents to prove that timely telephonic warrants were unavailable it instead placed the burden on Petitioners to prove such warrants *were* available. App. A30-31. That shifted burden is especially disingenuous given that it is well-established in the Ninth Circuit that telephonic warrants are generally available to the City of San Jose. *Fisher* v. *City of San Jose*, 558 F.3d 1069, 1089 & n. 3 (9th Cir. 2009) (Paez, J., dissenting). And it is even better established that the burden rests on the government to present evidence to prove exigency sufficient to preclude compliance with the warrant requirement, not on the citizen to prove the government was indeed capable of obeying the Constitution. *Welsh* v. *Wisconsin*, 466 U.S. 740, 750 (1984) ("Before agents of the government may invade the sanctity of the home, the burden is on the government to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries."). Constitutional amendments are not mere suggestions. The ability to comply with express requirements demanded by the Constitution should at least be *presumed*, and any governmental claim of necessity to ignore such require-

ments should be subject to a strict standard and burden of proof.

The undisputable lack of exigent circumstances, the failure of Respondents even to proffer evidence that a telephonic warrant was unavailable, and the Ninth Circuit's complete disregard for such facts and established burdens of proof all amount to that court applying its now-well-known gun exception to the Constitution. See *infra*, at 21-23. When even the California Legislature, the California Department of Justice, and the California Supreme Court are more solicitous of the constitutional rights of firearms owners than the Ninth Circuit, it should be obvious that there is a serious problem. This Court should grant review to resolve the conflict between the Ninth Circuit and the California Supreme Court, to resolve the conflict between the decision below and this Court's cases narrowing the exceptions to the warrant requirement, and to remind the court of appeals that there is no Ninth-Circuit-policy-preference-exception to the Fourth Amendment or any other part of the Constitution.

II. The Decision Below Distorts Preclusion Law To Prevent Petitioners from Raising Meritorious Second Amendment Claims.

The Ninth Circuit's holding that Petitioner Rodriguez's Second Amendment claim was precluded by an earlier state court decision is a particularly troubling example of how far some panels of that court will go to deny or circumvent rights under the Second Amendment. No honest reading of the California Court of Appeal decision could view it as having pre-

determined the Second Amendment claim in this subsequent case. Rather, the court recognized that its review was limited to an order precluding the return of firearms to Petitioner's husband, not to Petitioner herself, App. E13, found that she had not pursued available procedures to seek return of her property to her, and thus concluded that she had not demonstrated that the order under review in fact infringed upon her Second Amendment rights, App. E20-E21. In essence the court concluded that she had not established a violation because the deprivation remained speculative and the claim was not *ripe*. It expressed no opinion on how it would resolve the claim if, after she used available procedures, Respondents still refused to return her firearms.

Given that holding, it is hardly surprising that no Respondent subsequently asserted issue preclusion on summary judgment or in their initial briefing on appeal. Rather, the Ninth Circuit *sua sponte* invented this supposed problem to avoid a self-evidently unjustifiable burden on the Second Amendment, and then it grossly distorted the holding of the California Court of Appeal in order to reach a predetermined conclusion that Second Amendment rights will find no welcome in the Ninth Circuit. While that may sound hyperbolic, it is simply of a piece with a longstanding Ninth Circuit campaign of resistance to the Second Amendment, well recognized by members of this Court. Here, however, the Ninth Circuit went beyond mere disdain for the facts, the prior ruling, or the adversarial process and distorted the law of preclusion, providing a still further grounds for review.

Starting with the Ninth Circuit's distortion of the law, the decision below simply disregarded the role of intervening facts and law as an exception even to an otherwise proper preclusion analysis. In *Herrera* v. *Wyoming*, for example, this Court recognized that "[e]ven when the elements of issue preclusion are met," an "exception may be warranted if there has been an intervening ' "change in [the] applicable legal context." ' " 139 S. Ct. 1686, 1697 (2019) (quoting *Bobby* v. *Bies*, 556 U.S. 825, 834 (2009), which in turn quoted RESTATEMENT (SECOND) OF JUDGMENTS § 28, Comment c (1980)). The "change-in-law exception recognizes that applying issue preclusion in changed circumstances may not 'advance the equitable administration of the law.' " *Herrera*, 139 S. Ct. at 1697 (citation omitted).

Various legal and other factors on which the state court decisions relied had changed since the California Court of Appeal decision. For example, while the Court of Appeal was aware of the new firearm safety requirements and procedures for persons in Petitioner's position, and recognized the availability of procedures for complying with those requirements, it noted that Petitioner had not yet taken advantage of those procedures and then, not surprisingly, affirmed the interim continued possession of the firearms by the City. By the time of the Ninth Circuit appeal, however, that new law had a chance to operate, Petitioner had a chance to comply, and hence the legal and factual context had dramatically changed. Furthermore, the ownership of several jointly owned firearms had been transferred to the exclusive and lawful ownership of Petitioner Rodriguez, App. A7, thus

eliminating the last vestige of justification for their seizure and continued retention by Respondents. The decision below cannot be reconciled with this Court's change in circumstance exception to issue preclusion.

The decision below likewise implicates the fundamental Catch-22 of forced state-court adjudication of federal rights recognized in this Court's decision in *Knick* v. *Township of Scott*, 139 S. Ct. 2162, 2167 (2019). Petitioner Rodriguez did not choose to initiate an action in state court but was forced to intervene defensively in an action brought against her husband, who was indeed barred from ownership and possession of firearms. As in *Knick*, she now faced the danger that, having gone to state court and supposedly lost, her "claim will be barred in federal court. The federal claim dies aborning." *Id.* That she merely sought to limit the scope of any order validly blocking possession by her husband so that it did not *invalidly* preclude her own lawful possession of her firearms places this case on a comparable footing to the concerns in takings jurisprudence recognized in *Knick* and illustrates the problems with the Ninth Circuit's broad extension of issue preclusion.[5]

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[5] One danger of the panel's decision to give preclusive effect to the results of defensive intervention in state-court proceedings involving relatives facing potential firearms disqualification is that it will force lawful owners facing collateral consequences to their Second Amendment rights to routinely file suit in federal court to preserve those rights rather than initially rely on state courts appropriately to narrow any restrictions to the disqualified persons themselves. Numerous state proceedings in addition to mental health evaluations would now act as a trigger for such protective federal suits. See, *e.g.*, CAL. FAM CODE § 6218 (domestic violence restraining orders); CAL. CODE OF CIV. PRO.

Moving on to the circumstances and substance of the decision below, the court of appeals contorted itself and the law of waiver to introduce an issue that no party hade even imagined was properly presented by the case. There is no dispute that Respondents failed to raise this affirmative defense either on summary judgment or in initial briefing on appeal. App. A10. Yet the court of appeals *sua sponte* excused that waiver by balancing Petitioner's Second Amendment rights, App. A10, its unsupported views regarding public safety, and the supposed interests in efficiency that Respondents themselves never thought serious enough to raise on their own.

Worse still, seeking to balance away Respondent's Second Amendment rights against other ill-defined judicial and administrative values is yet another end-run around Second Amendment rights and a proper degree of scrutiny. It is hardly a surprise that in any such a balancing test, much of the Ninth Circuit will consider the weight of Second Amendment rights to be minimal and the competing interests more important. Allowing *ad hoc* judicial balancing to creep back in the guise of preclusion and other conveniently interjected doctrines is but one more way to effectively undo the choices made in the Constitution. Cf. *District of Columbia* v. *Heller*, 554 U.S. 570, 634-35 (2008) ("We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing' approach. The

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§ 527.6 (harassment restraining orders); CAL. WIC § 15657.03 (elder abuse restraining orders); CAL. CODE OF CIV. PRO. § 527.7 (workplace safety restraining orders); CAL. PENAL CODE § 18100 *et seq.* (gun violence restraining orders, *aka* Red Flag Law).

very enumeration of the right [to keep and bear arms] takes out of the hands of government – even the Third Branch of Government – the power to decide on a case-by-case basis whether the right is really worth insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all.").

Finally, the Ninth Circuit grossly misrepresented the decision of the California Court of Appeals in order to manufacture its desired preclusion. As noted, the California Court of Appeals held that Respondent Rodriguez had not demonstrated that her Second Amendment rights had actually yet been infringed given the availability of specific state-law procedures for the return of her firearms that she had not yet followed. App. E20-21. The appellate court only affirmed the trial court's limited order barring return of the firearms to Petitioner's *husband*, App. E13, and allowing the City to hold the guns until the further final disposition as contemplated in that judgment. That final disposition meant complying the procedures identified by the Court of Appeal and then seeing whether she had any continuing injury. Petitioner subsequently perfected her Second Amendment claim by following the procedures available through § 33850 and then still having Respondents refuse to return her firearms.

To avoid the obviously non-preclusive holding and intent of the state appellate court, the Ninth Circuit argued that compliance with CALIFORNIA PENAL CODE § 33850 would not alter the Court of Appeal's Second Amendment analysis. App. A15. But if that interpretation of the decision were correct, it was entirely

pointless for the Court of Appeal to discuss the procedures available to Petitioner Rodriguez. On the Ninth Circuit's theory resort to such procedures would be entirely futile and thus had no bearing on the Second Amendment claims. That bold nullification of the most salient part of the state court's appellate holding is not even a facially plausible reading of the earlier decision, and once again deeply undermines the genuineness and result of the Ninth Circuit's ultimate decision.

III. This Court Should Use Its Supervisory Power To Correct the Ninth Circuit's Circumvention of Second Amendment Protections and Should, at a Minimum, Hold this Case for No. 18-280, *New York State Rifle & Pistol Association, Inc.* v. *City of New York*.

The Ninth Circuit panel dodged the substantive Second Amendment issue in this case by manufacturing a false preclusion defense that had been waived by Respondents. Had it reached the Second Amendment issue however, it seems obvious that Petitioners would have prevailed. In *Panzella* v. *Sposato*, 863 F.3d 210 (2nd Cir. 2017), the Second Circuit held that it violated due process to refuse to return seized firearms to an owner lawfully entitled to possess them. Using the test from *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), the court found that Panzella was entitled to a prompt post-deprivation hearing, could not be relegated to a long and arduous administrative process for the return of her firearms, and that the government could not rely on any safety interest, given

that Panzella can buy another longarm, or any other legal firearm for that matter." 863 F.3d at 219.

While *Panzella* involved a procedural due process challenge, its reasoning is even stronger when applied to substantive Second Amendment rights. And the lack of a sufficient government interest in depriving her of those substantive rights is even clearer in this case given that not only was Respondent Rodriguez free to acquire and possess other firearms, the California Department of Justice expressly cleared Petitioner for ownership and possession of firearms, notwithstanding her husband's disqualified status. App. E7, E18.

Given the obvious merits of Petitioner's Second Amendment claim, it should come as no surprise to anyone that the Ninth Circuit went looking for alternative ways of ruling against her. Indeed, the Ninth Circuit's recalcitrance towards and seeming contempt for the Second Amendment and firearm owners in general is well documented and noted by jurists on this and other courts. See, *e.g.*, *Silvester* v. *Becerra*, 138 S. Ct. 945, 950 (2018) (Thomas, J., dissenting from denial of cert.) ("The Ninth Circuit's deviation from ordinary principles of law is unfortunate, though not surprising. Its dismissive treatment of petitioners' [Second Amendment] challenge is emblematic of a larger trend."); *Peruta* v. *California*, 137 S. Ct. 1995, 1997, 1999 (2017) (Thomas, J., dissenting from denial of cert.) ("The approach taken by the *en banc* court is indefensible, and the petition raises important questions that this Court should address."; "The Court's decision to deny certiorari in this case reflects a distressing trend: the treatment of the Sec-

ond Amendment as a disfavored right."); *Voisine* v. *United States*, 136 S. Ct. 2272, 2291 (2016) (Thomas, J., dissenting) ("We treat no other constitutional right so cavalierly"); *Friedman* v. *Highland Park*, 136 S. Ct. 447 (2015) (Thomas, J., dissenting from denial of certiorari) ("Because noncompliance with our Second Amendment precedents warrants this Court's attention as much as any of our precedents, I would grant certiorari in this case."); *cf. Caetano* v. *Massachusetts*, 136 S. Ct. 1027 (2016) (GVR of State court opinion that gave essentially no respect to this Court's decision in *Heller*); *id.* at 1030, 1033 (Alito, J., concurring) ("Although the Supreme Judicial Court [of Massachusetts] professed to apply *Heller*, each step of its analysis defied *Heller*'s reasoning."; "The lower court's ill treatment of *Heller* cannot stand."); *Silveira* v. *Lockyer*, 328 F.3d 567, 568-69 (2003) (Kozinski, J., dissenting from the denial of rehearing *en banc*) ("It is wrong to use some constitutional provisions as spring-boards for major social change while treating others like senile relatives to be cooped up in a nursing home until they quit annoying us. * * * Expanding some to gargantuan proportions while discarding others like a crumpled gum wrapper is not faithfully applying the Constitution; it's using our power as federal judges to constitutionalize our personal preferences."), *cert. denied*, 540 U.S. 1046 (2003).

The Ninth Circuit's shabby treatment of Second Amendment claims here is nothing new. Many of the Second Amendment cert. petitions coming to this Court arise from the Ninth Circuit and have provoked the above-cited strong dissents from denial of cert. And when, by some happenstance, a Second

Amendment challenge succeeds before a panel, the *en banc* Ninth Circuit is quick to dispose of the outlier. See *Peruta* v. *Cty. of San Diego*, 824 F.3d 919 (9th Cir. 2016) (*en banc*), *cert. denied*, 137 S. Ct. 1995 (2017). This case goes further still, distorting other areas of the law to avoid reaching a strong Second Amendment claim at all, and perhaps thereby hoping to avoid scrutiny by this Court.

One solution here would be to grant cert. on the questions presented involving issues the Ninth Circuit used as an end-around, and thus directly address the effects of this new strategy in context. Alternatively, this Court could simply hold this Petition for an eventual decision in No. 18-280, *New York State Rifle & Pistol Association, Inc.* v. *City of New York*. If that decision reaches the Second Amendment question therein and provides a more focused set of rules for protecting Second Amendment claims or a much-needed rebuke of the shabby treatment often accorded such claims, then a simple GVR would suffice to eliminate issue preclusion through the very intervening authority of such new decision and would perhaps chasten and deter the Ninth Circuit from continuing its campaign of massive resistance.

* * * * *

Numerous law-abiding citizens who are entitled to own and possess firearms under state and federal law now face the risk that in the Ninth Circuit such firearms can be confiscated based on adverse action against a family member, even if firearms owners comply with all the necessary steps to secure their firearms from persons not qualified to possess them.

Ironically, this could lead to the very persons potentially most in need of self-defense to face confiscation of one means of self defense and greater costs and hurdles to exercising their Second Amendment rights. And the mere threat of such unconstitutional confiscations could easily have the further consequence of causing law-abiding gun owners to delay seeking mental health treatment for loved ones out of fear that they will lose their own rights, their own means of self-defense, and valuable property they might be hard pressed to replace. Such arbitrary and unjustified burdens would be intolerable in the context of almost any other constitutional right and should not be tolerated in this case, regardless how the Ninth Circuit disingenuously chose to impose the burden.

CONCLUSION

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

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