No. 19-1057

In the Supreme Court of the United States

LORI RODRIGUEZ, et al.,
Petitioners,

v.

CITY OF SAN JOSE, et al.,
Respondents.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. In a unanimous decision "particularly limited to the circumstances" before it, the Ninth Circuit held that police officers constitutionally seized weapons without a warrant in conjunction with their detention of a man in the midst of a dangerous mental health crisis. The question presented is whether the court erred in finding the urgent nature of the situation justified the immediate weapons seizure under the community-caretaking rubric of the Fourth Amendment.

2. Whether the Ninth Circuit erred in applying California law on issue preclusion to bar Rodriguez's Second Amendment claim, where Rodriguez fully litigated that claim in two state courts and where both courts issued final decisions rejecting the claim on its merits.

3. Whether this Court should review or stay this case based on Second Amendment concerns even though the Ninth Circuit did not decide a Second Amendment question.

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INTRODUCTION

Petitioners seek review based on two of the Ninth Circuit's holdings below. The first is a fact-bound application of unchallenged Fourth Amendment principles. The second is a straightforward application of California issue preclusion law. Both holdings are correct and consistent with all other apposite authority.

1. On the Fourth Amendment issue, the Ninth Circuit held that police officers constitutionally seized firearms without a warrant in conjunction with their detention of a man in the midst of a mental health crisis. The man officers detained—Petitioner Rodriguez's husband, Edward—had been ranting about "shooting up schools" and attempted to break his own thumb in front of officers. The officers concluded that it would be dangerous for Edward to access weapons, and they did not know when he might return from the hospital following his mental health evaluation, so they promptly removed several guns from the Rodriguez household.

Observing that its decision was "particularly limited to the circumstances" before it, the Ninth Circuit unanimously upheld the seizure on the grounds that it was necessary to serve an urgent public safety purpose. Pet. App. A31. The court's holding is in accord with *Cady v. Dombrowski*, 413 U.S. 433 (1973), and with the only two other decisions to deal with the analogous circumstance of a warrantless weapons seizure in conjunction with a mental health detention, both of which uphold the seizure on identical reasoning. *See Caniglia v. Strom*,

953 F.3d 112 (1st Cir. 2020); *Mora v. City of Gaithersburg*, 519 F.3d 216, 219 (4th Cir. 2008).

Petitioners do not challenge the Ninth Circuit's statement of Fourth Amendment law. They disagree only with the court's application of that law to the facts. Pointing out that Edward was on his way to the hospital at the precise moment officers seized the weapons, Petitioners argue that the situation lacked the requisite urgency. That argument is misplaced—given the danger Edward presented and the possibility that he might soon return home to access the guns, the court's finding of urgency was sound. In any event, this Court is not a forum of error correction, so Petitioners' disagreement on the facts does not warrant certiorari.

The Ninth Circuit's Fourth Amendment holding does not conflict with that of the California Supreme Court in *People v. Ovieda*, 7 Cal. 5th. 1034 (Cal. 2019), as Petitioners argue. The state court there held that police were required to get a warrant before searching a home because there was no pressing exigency to justify the search. That holding says nothing at all about whether the Fourth Amendment permits a warrantless weapons seizure where there *is* a pressing public safety need, as the Ninth Circuit held here. Far from presenting a conflict with the decision below, *Ovieda* merely states its corollary.

2. The Ninth Circuit also correctly precluded Rodriguez from bringing a Second Amendment claim she had already twice litigated unsuccessfully in state court. Petitioners' attack on the court's preclusion holding grossly distorts both the Ninth Circuit's decision and the holdings of the California state courts. Petitioners assert that the state courts

did not order forfeiture of Rodriguez's firearms and did not reach the merits of her Second Amendment claim. Both assertions are false. The entire point of Rodriguez's intervention in the state forfeiture proceeding was for her to press her Second Amendment claim in resisting forfeiture. The trial court found no Second Amendment violation and ordered the weapons forfeited, and the state appellate court affirmed that forfeiture order while expressly rejecting Rodriguez's Second Amendment claim on its merits.

In holding that Rodriguez was barred from pressing her Second Amendment claim yet a third time in federal court, the Ninth Circuit did not, as Petitioners assert, purport to balance Rodriguez's Second Amendment rights or any other substantive right. Rather, the court simply held that comity concerns counseled in favor of excusing Respondents' technical waiver of the issue-preclusion defense.

3. Petitioners' overarching theory that the Ninth Circuit's straightforward preclusion and Fourth Amendment holdings were in fact the fruits of a secret plot to overthrow the Second Amendment has no basis in reality. This case involves no Second Amendment holding, and the Ninth Circuit's decision does not show hostility to the Second Amendment or gun owners. It shows the opposite. For in the end, Petitioners' argument amounts to the borderline-frivolous claim that an otherwise lawful government forfeiture violates the Second Amendment every time the property forfeited consists of a gun. But a forfeiture no more violates the Second Amendment because the property forfeited is a gun than it violates the First Amendment because the property

forfeited is a copy of Shakespeare's *Hamlet*. The City of San Jose acted pursuant to a valid statute—a statute Petitioners do not challenge—in securing forfeiture of Rodriguez's firearms, and the procedures accompanying that forfeiture complied with due process. The forfeiture was thus constitutional, and the Ninth Circuit's decision to apply basic preclusion principles rather than make new Second Amendment precedent unfavorable to gun owners belies Petitioners' cartoonish portrait of a rogue court singularly bent on abrogating gun rights.

The Ninth Circuit correctly decided the two issues properly before it, and its decision created no circuit or other split. There is no basis for certiorari.

STATEMENT OF THE CASE

I. Factual background

1. In 2013, Lori Rodriguez (the principal Petitioner here) called the San Jose Police Department ("SJPD") to report that her husband, Edward, was in the midst of a mental health episode in the couple's shared home. Pet. App. A3, C2. This was not the first such call to police—SJPD had been to the home for similar reasons more than once in the past. *Id.* at A3. When officers arrived, Edward was ranting about the CIA, the army, and people watching him. He also mentioned "shooting up schools" and his "safe full of guns." *Id.* While officers were talking to him, Edward attempted to break his own thumb. *Id.*

The SJPD officers on scene concluded that Edward was a danger to himself or others on account of a

significant mental disturbance, so they detained him under California Welfare & Institutions Code § 5150. *Id.* That statute permits police officers to detain a person for a mental health evaluation when they have probable cause to believe the person is a danger to himself or others. Cal. Welf. & Inst. Code § 5150(a) (2019). A detention under § 5150 does not cause a person to be admitted or otherwise held at a hospital. The statute simply authorizes police officers to take initial custody of the person, after which the person must be evaluated within 72 hours to determine whether involuntary hospital admission is necessary. *Id.* Thus, the officers who detained Edward during his crisis did not know when he would return from his mental health evaluation. *See* Pet. App. A30.

2. A separate law, California Welfare and Institutions Code § 8102, requires a police officer who detains a person for mental health reasons to take custody of any gun or other deadly weapon in the detained person's possession, custody, or control. Cal. Welf. & Inst. Code § 8102(a) (2013) ("Whenever a person" detained for mental health reasons "is found to own, have in his or her position or under his or her control, any firearm [or] deadly weapon," the weapon "shall be confiscated . . . ."). Police officers seized twelve such guns from the Rodriguez home after Rodriguez permitted them to enter and opened a safe for them. Pet. App. A4. Although all the guns were in Edward's possession, custody, or control, Rodriguez likely had at least a community property interest in all of them, and one was registered in Rodriguez's name. *Id.*

II. Section 8102 forfeiture proceedings in California state court

1. California Welfare and Institutions Code § 8102 further directs police officers who have confiscated weapons in conjunction with a § 5150 detention to store the weapons for safekeeping. Cal. Welf. & Inst. Code § 8102(b). The relevant law enforcement agency (or City of which it is a part) may then petition the state superior court to order partial forfeiture of the weapons on the grounds that returning them would create a danger to the detained person or someone else. *Id.* at § 8102(c). If the agency proves that return of the weapons would indeed be dangerous, the superior court grants the forfeiture petition, and the weapons remain in the custody of the law enforcement agency for a defined period. *Id.* at § 8102(h). The owner of the weapons may arrange for them to be sold or transferred during this retention period, but the § 8102 forfeiture order permanently eliminates the owner's right to possession of the weapons. *Id.* If the owner fails to arrange a transfer or sale in time, the weapons may be destroyed. *Id.*

2. In early 2013, the City of San Jose petitioned for forfeiture under § 8102 as to the guns officers seized from the Rodriguez home. Pet. App. A5. After a hearing in which Rodriguez intervened and participated on her own behalf, the superior court granted the City's petition. *Id.* The court found that return of the 12 guns to the Rodriguez household would create a danger to Edward, Rodriguez, and to public safety generally. *Id.* at A5–A6. The court noted the prior disturbance calls to the home and expressed

concern that Edward—a large man—might overpower Rodriguez even if she attempted to keep the weapons out of his control. *Id.* at A5, E7. So while acknowledging that nothing would prevent Rodriguez from purchasing other weapons, the court found that public safety would be best served by eliminating the "low-hanging fruit" immediate return of the existing weapons would present to Edward. *Id.* at A5–A6. The court also rejected Rodriguez's argument that forfeiture would violate her Second Amendment rights. *Id.* The court thus ordered the weapons forfeited.[1] *Id.*

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[1] Petitioners frame the superior court's order as merely requiring the City "to retain the firearms" pending some "further resolution or disposition." Pet. 4. This is misleading. The court's order was, as § 8102 contemplates and the City requested in its petition, one of forfeiture. It permanently extinguished Rodriguez's right to possess the weapons, leaving her only the power to direct their transfer and sale. *See* Cal. Welf. & Inst. Code § 8102(h) (providing that a law enforcement agency "may destroy" any firearm following a judicial finding of danger unless the previous owner arranges for its transfer or sale). The judgment reflecting the court's forfeiture order included a sentence providing that the City agreed to "hold the weapons pending final disposition or resolution of this matter in according with its general practices," Pet. App. E7, but that language was to convey that the City would not moot any appeal by destroying the weapons while the appeal was pending. This followed Rodriguez's request at the § 8102 hearing for a stay of forfeiture pending appeal, which the court denied on the basis that the City was already required to retain the weapons without destroying them under § 8102(h), and to which the City responded by assuring the court that it would not ("in accordance with its general practices") destroy the weapons until Rodriguez completed the appellate process. *Id.*; *see also* Ninth Circuit Excerpts of Record ("ER") 74–77

3. Rodriguez sought review in the state court of appeal, and the appellate court affirmed the forfeiture order. As in the superior court, Rodriguez's "chief contention" on appeal was that forfeiture of her weapons violated the Second Amendment. Pet. App. E14. The appellate court rejected that constitutional claim. The forfeiture order did not impair Rodriguez's ability to purchase or possess weapons generally, the court noted, and there is no "Second Amendment right to . . . any particular firearms or firearms that have been confiscated from a mentally ill person." *Id.* at E15–E16.

In a passage Petitioners have mischaracterized before both the Ninth Circuit and this Court, the appellate court concluded its decision by considering the question whether California Penal Code § 33850 *et seq*.—a statute that prescribes the procedures a law enforcement agency must follow before releasing weapons *to a person otherwise legal entitled to possess them*—affected Rodriguez's claim. Pet. App. E17. The court held that Rodriguez failed to show that § 33850 *et seq*. supported her constitutional argument, both because Rodriguez had "not sought return" of the confiscated firearms following compliance with the statute and because she had not met her burden of showing that she would be unable to do so. *Id.* at E20. The court cited this failure to take the preliminary steps for the return of a firearm as an additional, ancillary reason why Rodriguez's Second Amendment claim failed. *Id.* The court

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[transcript of § 8102 proceeding], provided herewith as Supplemental Appendix 2–5.

consequently affirmed the superior court's forfeiture order. *Id.* at E21.

III. Proceedings in federal court

1. Rodriguez did not seek further review of the state appellate court's decision affirming forfeiture of her weapons. *Id.* at A7. Instead, she joined with the Second Amendment Foundation and Calguns Foundation (co-Petitioners here) to file a lawsuit in federal district court. Petitioners again argued that the forfeiture violated the Second Amendment. *Id.* Petitioners also claimed for the first time that the initial seizure of Rodriguez's weapons violated the Fourth Amendment. *Id.* The district court rejected both claims (along with a miscellany of others) and dismissed Petitioners' suit on summary judgment. *Id.* at A7–A8. Petitioners appealed.

2. The Ninth Circuit unanimously affirmed the district court's dismissal. Starting with the Second Amendment claim, the court noted that the "California state courts [had] addressed" and rejected the "claim at both the trial and appellate stages." *Id.* at A8. The court thus held that "[f]or reasons of comity," it would "apply issue preclusion to bar [] reconsideration of [Petitioners'] Second Amendment claim" a third time. *Id.*

The court considered whether to apply broader claim preclusion under California law to bar Petitioners' Fourth Amendment claim as well, but declined. The defendants did not raise a preclusion defense before the district court, so the Ninth Circuit determined whether it would overlook that waiver

"by balancing the public and private interests" at stake. *Id.* at A10. That "balancing in large part" depended on "the type of preclusion at stake," and the court was more likely to forgive waiver of issue preclusion than claim preclusion. *Id.* Whereas applying waiver to issue preclusion could create inconsistent judicial holdings and thus breed "corrosive disrespect," waiver under claim preclusion would have no such inimical effect. *Id.* at A10–A11. Thus, "[g]iven the significant public interests in avoiding a result inconsistent [with the California courts] on an important constitutional question and in not wasting judicial resources on issues that have already been decided by two levels of state courts," the court concluded that it would forgive the defendants' waiver as to issue preclusion but not claim preclusion. *Id.* at A11, A23.

Applying California law on issue preclusion, the court concluded that Rodriguez's Second Amendment claim was barred. Rodriguez had fully litigated the issue in both state courts below, and those courts issued final decisions rejecting the Second Amendment claim on its merits. *Id.* at A11–A13. The Ninth Circuit specifically considered Petitioners' argument that Rodriguez's compliance with California Penal Code § 33850 *et seq*. changed the circumstances so as to avoid the preclusive effect of the prior state judgment. *Id.* at A13. The court rejected the argument. The provisions of § 33850 *et seq*. simply state procedural requirements accompanying the release of a gun from law enforcement custody, so that statute could not have informed the state appellate court's Second Amendment holding. *Id.* at A15–A16. Rather, the

court noted, the state appellate court discussed § 33850 only as necessary to demonstrate that Rodriguez's compliance with that "administrative procedure was not necessary to" its Second Amendment holding. *Id.*

3. Turning to the Fourth Amendment, the Ninth Circuit began by observing that the question before it was limited to whether officers validly seized weapons in conjunction with Edward's § 5150 detention. *Id.* at A23. It was so limited because Rodriguez "ha[d] not challenged any search," and in fact "emphasized that 'there was not a search'" in her briefing. *Id.*[2]

The court concluded that the officers' seizure of weapons was reasonable under the circumstances. Reviewing precedent from in and out of the Ninth Circuit, the court held that police officers may constitutionally seize weapons without a warrant in conjunction with a detention for mental health reasons when they do so in response to "an immediate threat to community safety." Pet. App. A26–27. To court balanced three factors in making this determination: "(1) the public safety interest; (2) the urgency of that public interest; and (3) the individual property, liberty, and privacy interests." *Id.*

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[2] Petitioners' framing of the Fourth Amendment question presented as one involving "premises to be searched and items then seized" is thus misleading. Pet. i. The briefing of proposed *amici curiae* commits the same error. Am. Br. 7 ("This case shows how the Ninth Circuit has distorted Fourth Amendment jurisprudence when a warrantless search and seizure relates to firearms.").

The court acknowledged Rodriguez's "serious private interest" in her "personal property kept in the home." *Id.* at A29. At the same time, police officers had been to the Rodriguez residence to deal with Edward's mental health issues before, and Edward's ranting about the army and "shooting up schools" in conjunction with attempted self-harm gave police good reason to be "concerned by the prospect that Edward [might have] access to a firearm in the near future." *Id.* at A29–30. The court thus concluded that there were significant public safety and individual interests at stake, which meant that "the urgency of the public safety interest [was] the key consideration in deciding" reasonableness. *Id.* at A30.

The court found that, on balance, there was sufficient "urgency [in] the situation" officers faced when detaining Edward to justify the seizure. *Id.* This was because the "officers had no idea when Edward might return from the hospital" following his mental-health detention. *Id.* He "could have returned to the home at any time—making it uncertain" whether Edward would again gain access to the weapons if officers were required to forego seizing them for the time necessary to get a warrant. *Id.* The court was not persuaded by Rodriguez's argument that she could lock the guns away and change the safe combination, as it "was reasonable to believe that Edward, who weighed 400 pounds, could have overpowered her to gain access to the guns." *Id.* The court also dismissed Rodriguez's assertion during oral argument that the officers could have quickly obtained a telephonic warrant because there was no basis in the record for the assertion. *Id.* at A31.

The court concluded:

> Our holding that the warrantless seizure . . . did not violate the Fourth Amendment is limited to the particular circumstances here: officers have probable cause to detain involuntarily an individual [for mental health reasons], they expected the individual would have access to firearms and present a serious public safety threat if he returned to the home, and they did not know how quickly the individual might return.

Id.

REASONS FOR DENYING THE PETITION

The Ninth Circuit's decision below correctly applied the Fourth Amendment and California law. Its decision creates no circuit or other split, and there is no other basis for certiorari.

I. The Ninth Circuit's narrow and fact-bound decision correctly applies Fourth Amendment principles and presents no issue for certiorari

The Ninth Circuit's Fourth Amendment holding below was narrow. It involved no question regarding the lawfulness of a warrantless home entry or entry onto any other property. It involved no warrantless search or comparable invasion of personal privacy. The decision considered only the reasonableness of a particular seizure: the seizure of guns in conjunction with a lawful mental health detention.

Looking to the particular factual circumstances before, during, and after police officers' detention of Edward on account of an acute mental health crisis, the court held that the immediate seizure of weapons in Edward's household was reasonable. The court reaffirmed the default presumption that police officers must obtain a warrant before seizing property, even when undertaking a community caretaking function. *Id.* at A23. The court explored the boundaries of that presumption by looking to precedents involving warrantless community-caretaking seizures, and it distilled from them the basic rule that such seizures are permissible only in response to an urgent public safety need. *Id.* at A23–A26.

Having identified the correct legal principles governing the issue, the court then did what is the role of a court of first review to do: it applied those general principles to the particular facts before it. The court concluded based on those facts that the officers' warrantless seizure of the guns Edward had possessed or controlled, and could imminently again possess or control, was justified to forestall an urgent danger. *Id.* at A30.

The court did not hold that the Fourth Amendment authorizes officers to seize firearms without a warrant in all mental health scenarios. Indeed, the court did not speak to how the legal principles it identified might apply in the universe of other factual situations that might present themselves in other cases. And lest there were any doubt that its decision was fact-specific, the court's final word on the subject was to emphasize that its

holding was "limited to the particular circumstances" before it. *Id.* at A31.

A. Petitioners' disagreement with the Ninth Circuit's application of unchallenged legal principles does not warrant certiorari

1. Petitioners' principal basis for seeking review is their dissatisfaction with the Ninth Circuit's Fourth Amendment holding. But Petitioners do not challenge that holding as it states the governing Fourth Amendment law. They challenge only the application of that law to the facts of this case. That is, Petitioners do not disagree with the Ninth Circuit that the Fourth Amendment permits the warrantless seizure of firearms when there is an urgent public-safety reason for that seizure. They simply do not think things were quite urgent enough in this particular case. Pet. 9–10.

For one thing, Petitioners are wrong in suggesting that police officers faced no urgent public-safety considerations when they seized weapons from the Rodriguez home. As the Ninth Circuit observed, Edward was an unstable and dangerous man, and police officers had no way of knowing when he would return to the household following his mental health evaluation. Given that prospect, and in light of the facts and history known to the officers—facts the state trial court and federal district court conclusively found and that Petitioners did not dispute, Pet. App. A5–A6, E12—it would not have been reasonable for officers to forego taking the

weapons into custody for the purpose of separately obtaining a seizure-only warrant.

In any event, Petitioners' disagreement with the Ninth Circuit's application of law to the facts is not a basis for certiorari. This Court is not a court of simple error correction. *See* S. Ct. R. 10 (certiorari is "rarely granted when the asserted error" is "misapplication of a properly stated rule of law"); *Boag v. MacDougall*, 454 U.S. 364, 368 (1982) (Rehnquist, J., dissenting) ("[T]his Court is not a forum for the correction of errors.") (citing *Magnum Imp. Co. v. Coty*, 262 U.S. 159, 163 (1923)). Petitioners' implicit concession that the Ninth Circuit correctly stated the constitutional principles governing its inquiry is basis alone to deny their petition.

The concession, moreover, is warranted. This Court's decision in *Cady v. Dombrowski*, 413 U.S. 433 (1973), stands for exactly the proposition that police officers may constitutionally seize firearms without a warrant when there is a pressing public-safety reason for them to do so. Indeed, *Cady* is in many respects materially similar to this case.

The Court there held that police officers did not violate the Fourth Amendment when they seized a firearm from the locked trunk of a car. *Id.* at 446. The officers had no warrant to open the trunk or seize its contents, but they had good reason to believe a firearm was inside, and the car was in an unguarded lot where members of the public could access it. *Id.* at 437. The Court concluded that the officers' warrantless search and seizure in the course of fulfilling their "community caretaking functions" was reasonable because they were responding to an

"immediate . . . concern for the safety of the general public." *Id.* at 441, 446. That the officers could have gotten a warrant before opening the trunk was immaterial, because other considerations—such as diminished privacy expectations and the community-caretaking purpose of the police activity—made the search and seizure reasonable. *See id.* at 447 ("[T]hat the" officers could have accomplished their objectives "by 'less intrusive' means does not, by itself, render the search unreasonable.").

Remarkably, Petitioners do not even mention *Cady*, even as they petition this Court to review an application of the community-caretaking doctrine that case engendered. Instead, Petitioners invoke uncontroversial axioms about the importance of the Fourth Amendment's warrant requirement and then complain that the Ninth Circuit did not give due regard to that requirement in its decision. Pet. 12–13. But even that vague complaint is misplaced.

2. The Ninth Circuit began its entire Fourth Amendment analysis by specifying that warrantless seizures are "*per se* unreasonable" subject only to "limited exceptions." Pet. App. A23. The court reaffirmed that this baseline presumption applies in the "community caretaking" context, then bolstered that statement with citation to circuit precedent in which the court declined to approve a warrantless "community caretaking" search. *Id.* (citing *United States v. Erickson*, 991 F.2d 529, 531–32 (9th Cir. 1993) (holding that the "community caretaking function . . . cannot itself justify a warrantless search")).

It was only after these various statements recognizing the importance of the Fourth

Amendment's general warrant requirement that the court held the particular seizure at issue fell within an exception to the requirement in light of the urgent public safety considerations officers faced. This was not a "blanket exception" to the general warrant requirement permitting "a search for firearms." Am. Br. 8. It was the opposite—a fact-specific application of the public-safety exception recognized in *Cady* to one particular seizure. Again, Petitioners do not even contest the operative Fourth Amendment principle. Their complaint about the Ninth Circuit's application of it to these facts does not evince a failure by the court to respect the Fourth Amendment's warrant requirement.

3. Petitioners misstate matters when they assert that the Ninth Circuit "placed the burden on Petitioners to prove" telephonic warrants were available. Pet. 13. The Ninth Circuit did no such thing. The court made clear that the burden for establishing an exception to the Fourth Amendment's warrant requirement lay with the City. Pet. App. A24–A25 (with "exceptions to the warrant requirement . . . the government bear[s] the burden of showing that the search at issue meets [the applicable] parameters") (internal quotations omitted)). The issue of "telephonic warrants" only arose when Petitioners' counsel contended at oral argument that officers in San Jose can get such warrants quickly, and the court observed that there was no evidence in the record to support that specific contention. *Id.* at A31. That anodyne observation about the need for proper record evidence to support an argument on an appeal from summary judgment hardly constitutes impermissible burden-shifting.

B. The Ninth Circuit's decision does not conflict with California Supreme Court precedent and is consistent with every case to decide a similar issue

1. Petitioners also argue that the Ninth Circuit's Fourth Amendment holding conflicts with that of the California Supreme Court in *People v. Ovieda*, 7 Cal. 5th. 1034 (Cal. 2019). Pet. 10–11. Not so. The question presented in *Ovieda* was whether "a *nonemergency* community caretaking exception" could authorize a warrantless home entry and search under the particular circumstances before the court. *Ovieda*, 7 Cal. 5th at 1044 (emphasis in original). The court answered that question in the negative, holding that the search violated the Fourth Amendment because (1) individual "privacy expectations are most heightened" in the home; and (2) the officers faced no emergency or other exigency necessitating entry into the home to conduct the search. *See id.* at 1049–53. The court emphasized that it was considering invasion of the home and a "nonemergency" community-caretaking seizure at the outset and repeatedly throughout its opinion. *See id.* at 1044, 1048, 1050.

The Ninth Circuit's decision here, by contrast, involved no challenged home entry (or any other search implicating privacy interests, for that matter), and the entire premise of the court's Fourth Amendment holding was that officers *did* face urgent circumstances necessitating the immediate seizure of weapons. In fact, the Ninth Circuit favorably cited two federal companions to *Ovieda*—the Ninth

Circuit's *Erickson*, 991 F.2d at 531–32, and the D.C. Circuit's *Corrigan v. District of Columbia*, 841 F.3d 1022 (D.C. Cir. 2016)—both of which echo *Ovieda*'s holding that warrantless home entries in the absence of a sufficiently imminent threat are not justified under the community caretaking exception. *See* Pet. App. A24, A28.

Like the court in *Ovieda*, the panels in *Erickson* and *Corrigan* emphasized the heightened privacy interest in the home. *Erickson*, 991 F.2d at 532 ("The warrantless search of a private residence strikes at the heart of the Fourth Amendment's protections."); *Corrigan*, 841 F.3d at 365 ("[P]hysical entry of the home is the chief evil" against which the Fourth Amendment protects). And both courts likewise emphasized the lack of urgency or "exigent circumstances" as the basis for declining to apply the community-caretaking exception to the facts before them. *Erickson*, 991 F.2d at 533 (absence of exigency precluded warrantless home entry); *Corrigan*, 841 F.3d at 367 ("[T]here was no objectively reasonable factual basis for [officers] to believe an imminently dangerous hazard" necessitated home entry).

The Ninth Circuit's incorporation of these decisions into its holding here, along with its repeated observations that warrantless seizures require the very same emergency circumstances *Ovieda* found lacking, belies Petitioners' claim that the decisions conflict. On the contrary, the two decisions agree about the core legal principles that govern the Fourth Amendment analysis. They differ in outcome only because they apply those common legal principles to vastly different facts.

2. Contrasted against the non-urgent, warrantless home entries held unconstitutional in *Ovieda* and its federal analogs are two circuit decisions upholding warrantless weapons seizures under circumstances very similar to those here: *Caniglia v. Strom*, 953 F.3d 112 (1st Cir. 2020) and *Mora v. City of Gaithersburg*, 519 F.3d 216, 219 (4th Cir. 2008). The first—*Caniglia*—is remarkable for how closely its facts mirror those in this case.

The plaintiff there was a man who threatened suicide in the midst of a fight with his wife by throwing a gun onto the table and telling her to shoot him. *Caniglia*, 953 F.3d at 119. The wife hid the gun's magazine and later called police out of fear for her husband. *Id.* Responding police officers determined that the plaintiff was dangerous and transported him to a hospital for a mental health evaluation. *Id.* at 119–20. While the plaintiff was on the way to the hospital, the officers entered his home and, without first getting a warrant, seized two guns to which the plaintiff's wife directed them. *Id.* at 120. The plaintiff filed a lawsuit alleging that the officers' warrantless seizure of his guns violated the Fourth Amendment. *Id.* at 121.

The First Circuit disagreed. Citing both *Cady* and the Ninth Circuit's decision here, the court held that the officers' actions fell "comfortably within the ambit of the community caretaking exception to the warrant requirement." *Id.* at 126. That exception, the court held, permits a warrantless weapon seizure when officers have "an objectively reasonable basis for thinking" that an individual detained for mental health reasons "may use [the weapons] in the immediate future to harm himself or others." *See id.*

at 125, 131. In concluding that the officers had such a basis in the case before it, the court found unpersuasive the plaintiff's argument that his "already [having] been removed from the scene [and taken to the hospital] at the time of the seizure" negated the relevant threat. *Id.* at 131. "There is no evidence that the officers had any inkling when the plaintiff would return or what his mental state might be upon his return." *Id.* Thus, it was reasonable for the officers to conclude that "the plaintiff's departure had not [] dispelled the threat of harm." *Id.*

In another similar case, *Mora*, the Fourth Circuit upheld the warrantless seizure of forty-one weapons from the home of a man officers knew to have recently threatened suicide and to have said he "could understand shooting people at work." 519 F.3d at 220. As in this case, the officers had detained the man on a mental health hold and transported him to the hospital before the seizure. *See id.* The court held that the seizure was reasonable because the man's conduct suggested an "urgent threat," and officers could not be sure once the man was en route to the hospital whether "he might return [] more quickly than expected." *See id.* at 226, 228.

3. Far from presenting a conflict with the Ninth Circuit's holding here, case law from California and the federal circuit courts is in accord. As this Court established in *Cady*, the Fourth Amendment permits warrantless seizures when necessary to respond to an urgent public safety need. The outcome of the cases applying that standard necessarily varies depending on their facts, especially where they consider a home entry or comparable invasion of privacy. But the standard in every apposite case

mirrors the one the Ninth Circuit applied here. There is no split in authority.[3]

The Ninth Circuit's Fourth Amendment holding was proper, and Petitioners have established no basis for this Court to review it.

II. The Ninth Circuit correctly applied California preclusion law to foreclose Petitioners from raising the same Second Amendment claim for the third time

Petitioners' secondary claim in seeking certiorari is that the Ninth Circuit erred in its application of California preclusion law. There was no error. Before filing her federal case, Rodriguez twice pressed the claim that forfeiture of her property violated the Second Amendment. Both the state trial court and the state court of appeal expressly considered and rejected that claim on its merits. The Ninth Circuit accordingly held that issue preclusion barred Petitioners from again raising the Second Amendment claim on appeal. It is difficult to imagine

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[3] Proposed *amici* discuss a circuit split regarding "whether police may consider the mere presence of a firearm" dangerous enough to justify a detention or other Fourth Amendment intrusion. Am Br. 12. The Ninth Circuit's decision does not speak to that question. The court held that the Fourth Amendment authorized seizure of Rodriguez's firearms not because of their "mere presence" in her home, but because they were in the recent and imminent possession or control of a dangerous person experiencing a grave mental health crisis. The proffered circuit split about whether mere firearm possession can "empower police to conduct Fourth Amendment warrantless searches" or detentions, *id.*, is thus irrelevant.

a more straightforward application of basic preclusion principles, or a less appropriate decision for certiorari review than one by a circuit court interpreting the law of a state within that circuit.

Yet Petitioners urge just that. In Petitioners' telling, the Ninth Circuit's preclusion holding is the outgrowth of a nefarious plot to undermine the Second Amendment. As evidence of this scheme, Petitioners proffer that the court "contorted itself and the law of waiver . . . by balancing Petitioners' Second Amendment rights" against public-safety and judicial efficiency considerations. Pet. 18. Petitioners further protest that "[n]o honest reading" of the state courts' decisions could suggest those courts reached Rodriguez's Second Amendment claim. *Id.* at 14–15. Rather, Petitioners assert, the state courts' decisions involved only review of "an order precluding the return of firearms to [Rodriguez's] husband, not [Rodriguez] herself." *Id.* at 15.

Petitioners grossly misrepresent the Ninth Circuit's holding, the state courts' actions, and the record.

1. The Ninth Circuit did not "balance Petitioners' Second Amendment rights" against public safety or anything else. The only "balancing" the court did was with respect to waiver. As Petitioners repeatedly point out, counsel representing Respondents before the district court and in initial briefing before the Ninth Circuit did not assert a preclusion defense. Pet. App. A10. The court accordingly had to determine whether it would overlook Respondents' waiver of the defense, which under circuit precedent meant "balancing the public and private interests" in

favor of preclusion against the ordinary application of waiver rules. *Id.*

The "private interests" component of this circuit balancing doctrine does not refer to a plaintiff's constitutional rights or whatever other substantive law forms the basis of her claim. It refers to the private interests *served by preclusion*—i.e., the interests in "repose and in avoiding the cost of duplicative litigation"—that tip the balance in favor of forgiving waiver of the defense. *Id.* (citing *Clements v. Airport Auth. of Washoe Cty.*, 69 F.3d 321, 330 (9th Cir. 1995) ("The private values protected [by preclusion] include shielding litigants from the burden of re-litigating identical issues with the same party, and vindicating private parties' interest in repose.")). The "public interest" to which the doctrine refers is the promotion of "judicial economy" and, in the case of issue preclusion, avoiding the "corrosive disrespect that would follow" among courts and the public "if the same mater were twice litigated to inconsistent results." Pet. App. A11.

The court held that these interests were strong enough to overlook waiver as to issue but not claim preclusion. *Id.* Rodriguez had litigated her Second Amendment claim before two state courts, so the Ninth Circuit concluded that revisiting the issue a third time, with the possibility of a result at odds with those courts, would be inimical to comity and federalism considerations. *Id.* at A8–A11. The court therefore applied issue preclusion principles based on (and with continuous references to) the parties' full

briefing on the topic to hold that Petitioners' Second Amendment claim was barred.[4] *Id.* at A10–A22.

The Ninth Circuit's ordinary test for waiver has nothing to do with the Second Amendment or any other balancing of constitutional rights. Petitioners' extensive protest against the supposed judicial failure to accord Second Amendment rights sufficient weight is, like their other invocations of the Second Amendment in a case that involves no Second Amendment issue, one long attack on a straw man.

2. Most egregious, however, is Petitioners' characterization of what happened in the state courts. Petitioners assert that the state courts did not in fact order forfeiture of Rodriguez's weapons and did not in fact reject her Second Amendment claim on the merits. Pet. 19. Both assertions are demonstrably false.

The entire premise of Rodriguez's intervention in the state § 8102 forfeiture proceeding was that she had at least a community property interest in the seized guns. Pet. App. E4. Rodriguez argued that

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[4] Proposed *amici*'s reference to *United States v. Sineneng-Smith*, 140 S. Ct. 1575 (2020), is misplaced. Am. Br. 22. Unlike in that case, the Ninth Circuit here requested supplemental briefing from the parties—not outside organizations—regarding application of the *Rooker-Feldman* doctrine and preclusion principles. Pet. App. A8. The court did so both to ensure it had jurisdiction over the case and in the interest of avoiding a clash with California state courts. The court's holding that comity favored application of issue preclusion after full, adversarial briefing by the parties on the topic bears no resemblance to the appellate "panel's takeover of the appeal" in *Sineneng-Smith*. 140 S. Ct. at 1580–81 (disapproving panel decision to order supplemental briefing and argument from *amici* on a substantive constitutional claim not raised by the parties).

forfeiture was not necessary because she could lock the guns in a safe inaccessible to Edward. *Id.* Rodriguez also argued specifically that she had a Second Amendment right to the seized guns. The trial court was unpersuaded. *Id.*

The court ruled that the seizure and forfeiture of Rodriguez's firearms did not violate Rodriguez's constitutional rights. *Id.* at A5–A6. And given Edward's size and instability, and the history of household issues, the court concluded that return of the guns to the Rodriguez home would be dangerous. *Id.* at A5, E7. The court thus ordered the guns forfeited as to both Edward *and* Lori Rodriguez, noting specifically: "So with respect to the request to release the guns *back to Ms. Rodriguez*, I'm going to deny that request." *Id.* at A6, A30, E7; Supp. App. 4 (ER 75) (emphasis added).

Petitioners' claim that the trial court's forfeiture order did nothing more than authorize "the interim continued possession of the firearms by the City" (Pet. 16.) is nonsense. There is no such "interim" remedy under California Welfare and Institutions Code § 8102. The statute authorizes only two outcomes: if the trial court does not find danger, it must order return of the weapons; if the trial court finds danger, it must order forfeiture of the weapons, which means the City may destroy them after the time for the owner to arrange a transfer and sale has expired. Cal. Welf. & Inst. Code § 8102(e)–(h). To stop the forfeiture § 8102 requires was, indeed, the whole reason Rodriguez intervened in that proceeding to contest the danger finding and press her Second Amendment claim. It is disingenuous for Petitioners to suggest otherwise here.

Also disingenuous is Petitioners' representation that the state appellate court held merely that Rodriguez "had not established a [Second Amendment] violation because the . . . claim was not *ripe*." Pet. 15. Again, the whole point of Rodriguez's appeal to that court was to try having the forfeiture order vacated, based principally on her Second Amendment claim. Pet. App. E14 ("Lori's chief contention on appeal is that the trial court's [forfeiture] order . . . violates her Second Amendment right to keep and bear arms . . . ."). The court did not defer or otherwise reserve holding on that claim. It expressly rejected it. It held that forfeiture did not impair Rodriguez's ability to keep or bear arms and therefore affirmed.

Petitioners' continued assertion that California Penal Code § 33850 *et seq*. somehow negated the trial court's forfeiture order—and thus constituted a "change in the applicable legal context" for preclusion purposes, Pet. 16—misapprehends both § 33850 and the nature of California forfeiture proceedings. As the Ninth Circuit recognized, the provisions of § 33850 *et seq*. create not entitlements but *procedural obligations*. Pet. App. B3. They require law enforcement agencies to undertake certain steps before they may release firearms in their custody to a person otherwise legally entitled to them. *See* Cal. Penal Code § 33855 (2019) ("A law enforcement agency . . . that has taken custody of any firearm shall not return the firearm to any individual unless the following requirements are satisfied . . . ."). So, for example, if a police department has a gun in its custody from a past case investigation, it must require the owner of that gun to undergo a

background check and affirm eligibility to possess firearms before the department may give the gun back. *See* Cal. Penal Code § 33850 (2019); Cal. Penal Code § 33865 (2019).

These requirements have nothing to do with, and cannot affect, whether a person has a possessory ownership interest in the guns *in the first place*. Indeed, the statute's provisions expressly recognize that the "legal owner" of a firearm may be ineligible to possess a weapon in law-enforcement custody, in which case they specify the protocol for transfer and sale of the weapon. Cal. Penal Code § 33870 (2019) (providing that a "legal owner" of a firearm who is "prohibited from possessi[ng]" it "shall be entitled to sell or transfer it").

What all this means is that § 33850 *et seq.* is irrelevant in the § 8102 context. Because the state trial court granted the City's § 8102 forfeiture petition as to the particular guns officers seized, Rodriguez no longer had a possessory interest in them, so her ability to demonstrate compliance with § 33850 *et seq.* no more entitled her to the guns than it would a stranger off the street who demonstrated the same. *See* Cal. Penal Code § 33800(c) (2012) ("Nothing in this section is intended to displace any existing law regarding the seizure of firearms.").

Petitioners make much of the fact that the state appellate court discussed § 33850 in its decision affirming the trial court. But that discussion arose only as a final, ancillary reason for rejecting Rodriguez's Second Amendment claim. The court first listed the "several reasons" why the Second Amendment claim failed, including that the forfeiture order did not impair Rodriguez's ability to

acquire or possess firearms generally and that there was no Second Amendment right under this Court's case law to own "particular firearms." Pet. App. E15–E17. The court then separately considered whether § 33850 *et seq.* had any "impact on [Rodriguez's] Second Amendment claim." *Id.* at E17. The court concluded it did not because Rodriguez had not sought return of the firearms at issue or even made the claim that she was prohibited from doing so. *Id.* at E17–E20.

The court's conclusion was, in other words, simply that § 33850 *et seq.* could not affect its rejection of Rodriguez's Second Amendment claim. That conclusion hardly transmuted the provisions of § 33850 *et seq.* from a list of procedural obligations on law enforcement into a statutory scheme creating new property rights, or one reviving property rights already extinguished by judicial decree. Hence the appellate court's disposition affirming (not reversing or vacating) the trial court's order not to return the guns to Rodriguez. Pet. App. E21.

3. Petitioners' comparison of § 8102 forfeiture proceedings to the "Catch-22 of forced state-court adjudication" disapproved in *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019), is inapt. Pet. 17. Unlike in the inverse condemnation context, no rule required Rodriguez affirmatively to "bring[] [a] state lawsuit" as a prerequisite to any § 1983 claim. *Cf. Knick*, 139 S. Ct. at 2172–73. Rather, under California's § 8102, it is "the government [that] initiates proceedings" to forfeit the relevant property. *See id.* at 2168, 2172–73 (observing that "[i]nverse condemnation stands in contrast to direct condemnation," because the government initiates the latter and a plaintiff can

later attack it in federal court "without first bringing any sort of state lawsuit").

A person contesting § 8102 forfeiture on federal constitutional grounds may have to raise the claim defensively in the state § 8102 proceedings in lieu of a separate § 1983 action in federal court. Pet. 17. But that is true of any person against whom the state initiates criminal or administrative enforcement proceedings. *See Heck v. Humphrey*, 512 U.S. 477, 486–87 (1994) (barring § 1983 claims that collaterally undermine a state conviction absent exhaustion of state judicial remedies); *Younger v. Harris*, 401 U.S. 37, 49 (1971) (prohibiting federal interference with a pending state criminal proceeding); *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 604 (1975) (same in other proceedings); *Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc.*, 477 U.S. 619, 627 (1986) (same). Far from creating an impermissible Catch-22, that is the anticipated and proper working of the Madisonian Compromise. *See Haywood v. Drown*, 556 U.S. 729, 746 (2009) (Thomas, J., dissenting). And nothing prevented Rodriguez from seeking review of the state courts' rejection of her Second Amendment claim in this Court. 28 U.S.C. § 1257 (1988).

The Ninth Circuit properly applied California preclusion principles in declining to weigh in on a Second Amendment claim that Rodriguez had already twice litigated in state courts. The court's preclusion holding presents no question for certiorari.

III. This case involves no Second Amendment issue for the Court to review

Petitioners' last-ditch argument is that the Court should grant review to "correct the Ninth Circuit's circumvention of Second Amendment protections." Pet. 20. The Ninth Circuit did not circumvent anything, so there is nothing to correct. Petitioners' claim otherwise is based on the outlandish accusation, laced throughout their petition, that the jurists of the large and variegated Ninth Circuit have a particular proclivity to violate the law whenever they have occasion to consider a Second Amendment issue.

Were that true, one would think the panel here would have taken the opportunity to create new "anti-gun" precedent rather than declining to reach Petitioners' Second Amendment claim on preclusion grounds. This case certainly presented an easy opportunity to do so, for despite Petitioners' undeveloped assertions about the "obvious" merit to their Second Amendment argument (Pet. 2, 20, 21), the argument is in fact borderline frivolous. It amounts to the claim that an otherwise lawful government forfeiture violates the Second Amendment whenever the property forfeited consists of guns—notwithstanding that the forfeiture does nothing whatever to impair the previous owner's right to buy, possess, or use firearms, and notwithstanding that the owner may recover the full market value of the guns through their transfer and sale. *See* Cal. Welf. & Inst. Code § 8102(h).

But a forfeiture no more violates the Second Amendment because the property forfeited is a gun

than it violates the First Amendment because the property forfeited is a book or a painting. If the government has lawful authority to effect the forfeiture and observes the requirements of due process in so doing, it has complied with the Constitution. *See Bennis v. Michigan*, 516 U.S. 442, 446 (1996) (government forfeiture of innocent owner's property based on third-party conduct is constitutional so long as there are adequate procedures in place to prevent erroneous deprivation). The particular property involved in the lawful forfeiture is constitutionally irrelevant.

California law—specifically, § 8102—authorized forfeiture of Rodriguez's weapons here because they were associated with a dangerous mental health episode. Petitioners do not challenge § 8102 as unconstitutional or otherwise unlawful, and the procedures that accompany a forfeiture under the statute are more than adequate to comply with due process.[5] The forfeiture of Rodriguez's property was

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[5] Unlike the law at issue in *Panzella v. Sposato*, 813 F.3d 210 (2d Cir. 2017)—a due process case Petitioners cite, inappositely, in support of the claim that the forfeiture here violated the Second Amendment (Pet. 20)—§ 8102 requires the immediate return of weapons unless the city that seized them affirmatively initiates forfeiture proceedings and proves danger at an adversarial hearing. *Cf. Panzella*, 813 F.3d at 218 (holding that a New York weapon forfeiture law violated due process where it "place[d] the burden on the person whose property was taken" to initiate proceedings and did not provide for any hearing procedures). The statute therefore comports with due process. *See People v. One Ruger .22-Caliber Pistol*, 84 Cal. App. 4th 310, 313–14 (Cal. Ct. App. 2000) (upholding § 8102 against due process challenge).

thus constitutional. If anything, then, the Ninth Circuit's declining to use this opportunity to hold that the City's forfeiture process did *not* violate the Second Amendment (as did the five judges who considered the question before Petitioners' appeal) bespeaks judicial restraint, not impropriety.

In any event, concern about the direction of Second Amendment jurisprudence in other cases would not support the notion that the Court should review a case that does not develop or affect that jurisprudence. Petitioners adduce no precedent in which this Court has granted a certiorari petition out of concern for some particular issue in a case that involves no holding on that issue. Certainly there is no occasion for the Court to undertake that anomalous measure here, where the undecided Second Amendment issue is as anemic as the one Petitioners offer.

Petitioners suggest alternatively that the Court hold this case until it decides *New York State Rifle & Pistol Ass'n v. City of New York*, 140 S. Ct. 1525 (2020). The Court has since vacated that case as moot. *See id.* at 1526. In any event, even if the Court had reached a decision in the case, it is unclear what possible relevance *New York State*'s holding about a state law prohibiting the transport of firearms could have had to a case involving an unreached Second Amendment claim regarding a mental-health forfeiture of dangerous weapons. Neither *New York State* nor any other case in which a party has petitioned for certiorari on Second Amendment grounds presents an issue that could inform the questions presented in this non-Second-Amendment case.

CONCLUSION

Petitioners present no basis for certiorari. Respondents respectfully request that the Court deny their petition.

Respectfully submitted,

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June 2020

SUPPLEMENTAL APPENDIX

APPENDIX

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Transcript of Proceedings in the Superior Court of the State of California in and for the County of Santa Clara Excerpt (August 9, 2013) . . . . . Supp. App. 1

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SANTA CLARA

NO. 1-13-CV-241669

BEFORE THE HONORABLE PETER H. KIRWAN, JUDGE

DEPARTMENT 8

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CITY OF SAN JOSE, PETITIONER,	)
–VS–	)
E. RODRIGUEZ, RESPONDENT.	)

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REPORTER'S TRANSCRIPT OF PROCEEDINGS

AUGUST 9, 2013

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A P P E A R A N C E S:

FOR THE PLAINTIFF:	MARK VANNI Attorney at Law
FOR THE DEFENDANT:	DONALD KILMER Attorney at Law

OFFICIAL COURT REPORTER:

MELISSA CRAWFORD, CSR, RPR
CSR NO. 12288

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end of the day, is what my responsibility is, is public safety. And that's what guides me. And I'm not saying I'm ignoring her Constitutional Rights or anybody else's rights. But at the end of the day it's my call. I have to determine whether it's appropriate to release those guns given the facts in this particular case and the situation.

MR. KILMER: But, again, you're going to have to resolve the issue of what difference does it make which guns she has in her safe. You can't order the confiscation of the gun safe. Quite frankly, I'm surprised that the police didn't confiscate the ammunition as well because Mr. Rodriguez is also prohibited from having ammunition. They didn't think it was important enough to take the ammunition.

Now if you rule against her today she can walk out of here and into any gun store and qualify to buy a handgun or shotgun and ten days later go pick it up and put in that gun safe. And then the community is no safer than if you release these particular guns.

It's her decision, Your Honor. If she makes a decision at some point in the future that these guns need to be sold and "I'm going to get rid of the gun safe," that's her decision. If she decides she wants to keep one gun in her home for her safety, that's her

decision as well. That's what the Constitution says. And that's why --

THE COURT: And I don't deny that. But that's really not the issue before me. The issue before me is whether -- I can't order her not to do something she's got a right to do down the road. What I can do is I can prevent those guns from being

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returned to the home.

MR. KILMER: Okay. So what's to prevent -- I mean, Your Honor, how much sense does it make for you to order the guns sold and they go on consignment sale in the gun store and then she turns around and goes back and buys them?

THE COURT: Yeah. And I don't know the answer to that question.

MR. KILMER: The answer is that you can't prevent that.

THE COURT: Yeah. All right. Anything further?

MR. VANNI: No, Your Honor.

MR. KILMER: Submitted, Your Honor.

THE COURT: All right. So, I'm prepared to issue my decision. I'm not going to order the release of the guns to the respondent. I don't think it's appropriate under the circumstances. I appreciate all the comments that have been made. It's an interesting issue. I spent some time with this ahead of time. At the end of the

day there's enough concern on my part about the public safety that I'm not going to do that.

With that said, I think there are viable alternatives that need to be explored. This is the community possession of the respondent and whether it's by sale or release to a separate place. I'm going to let you folks work that out. So with respect to the request to release the guns back to Ms. Rodriguez, I'm going to deny that request, all right? I'm going to ask that the City prepare the order.

MR. KILMER: And may we have a stay on that decision for 60 days, Your Honor?

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THE COURT: And tell me why.

MR. KILMER: I respectfully disagree with the Court's conclusion. I'd like to take it up with the Court of Appeal and the Federal Court.

THE COURT: I think you have to ask for the stay through the Court of Appeal though. I mean the City is going to hold the guns anyway. I'm not sure what affect the stay would have here.

MR. KILMER: The problem is, Your Honor, at this point in time the government can't be charging my client storage fees or anything like that. Once you order disposition of the guns and they have to keep them in their evidence room they can start charging her fees for storage. I just don't want that to happen while we resolve this.

THE COURT: Do you want to comment on that?

MR. VANNI: I believe the City can charge and sometimes does charge for the storage of weapons in that circumstance. I can't promise that the police department won't do that, especially after a court order from this Court. So in that mind -- in that vein it's a substantial likelihood that Ms. Rodriguez might be charged for storage of those weapons.

THE COURT: So are you opposing the request for stay?

MR. VANNI: On the record I'll oppose it, yes, Your Honor. I do think the Court's decision is a valid decision and that returning the weapons will be a likely danger to the community at large.

THE COURT: I think -- I'm going to deny the stay without prejudice. I think probably the way to do this is if,

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in fact, you appeal this, Mr. Kilmer, you can request that the Court of Appeal issue a stay of the order, okay?

MR. KILMER: Thank you, Your Honor. THE

COURT: All right. Thank you.

(Whereupon, this matter adjourned.)

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STATE OF CALIFORNIA)
) ss.
COUNTY OF SANTA CLARA)

I, MELISSA CRAWFORD, HEREBY CERTIFY:

That I was the duly appointed, qualified shorthand reporter of said court in the above-entitled action taken on the above-entitled date; that I reported the same in machine shorthand and thereafter had the same transcribed through computer-aided transcription as herein appears; and that the foregoing typewritten pages contain a true and correct transcript of the proceedings had in said matter at said time and place to the best of my ability.

I further certify that I have complied with CCP 237(a)(2) in that all personal juror identifying information has been redacted, if applicable.

DATED: OCTOBER 17, 2013

_____

MELISSA CRAWFORD, CSR, RPR
CSR No. 12288

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