No. 19-1418

In the
# Supreme Court of the United States

ZOIE H.,

*Petitioner*,

v.

STATE OF NEBRASKA,

*Respondent*.

**On Petition for Writ of Certiorari to the Supreme Court of Nebraska**

## REPLY BRIEF FOR PETITIONER


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## REPLY BRIEF

The state does not discuss the merits of the decision below until page 26 of a 32-page brief. That is understandable. This Court has made clear both that the Sixth Amendment guarantees a right to a trial by jury for all "serious" offenses, and that the "seriousness" of an offense must be assessed by reference to the severity of the consequences the legislature authorizes for its commission. As the Nevada Supreme Court correctly concluded when confronted with the same question, the loss of Second Amendment rights is a consequence sufficiently severe to necessitate a right to trial by jury. The Nebraska Supreme Court's contrary conclusion not only conflicts with that decision and with this Court's precedent, but devalues both Sixth and Second Amendment rights.

Rather than defend that decision or its deeply flawed reasoning (which would allow the Sixth Amendment jury-trial guarantee to be eviscerated simply by separately codifying serious collateral consequences), the state tries to change the subject, insisting that juvenile proceedings are *categorically* different and *never* trigger the Sixth Amendment. The Nebraska Supreme Court did not embrace that sweeping position; nor could it, for it is refuted by decades of this Court's precedent. And whatever else may be said of the juvenile justice system, once a state uses juvenile "convictions" to deprive individuals of constitutional rights *well into adulthood*, it can no longer reasonably be deemed a purely "rehabilitative" and "non-punitive" system.

With nothing else left to offer, the state suggests that petitioner does not have Article III standing to challenge her own conviction. But all of its "justiciability" arguments rest on the flawed premise that this is a lawsuit to reinstate petitioner's Second Amendment rights. It is not. It is a direct appeal of a conviction obtained without the protection of a jury trial. The remedy petitioner seeks is not reinstatement of Second Amendment rights, but vacatur of a conviction obtained in derogation of both the Second and Sixth Amendments. The defendant's standing to seek that relief is unimpeachable, and this case remains an ideal vehicle to determine whether a state can disenfranchise a defendant without providing the minimal guarantee of a jury trial. In concluding that Nebraska may do so, the decision below not only breaks with decisions of both this Court and others, but manages to systematically disregard two constitutional guarantees at once.

## I. The Decision Below Squarely Conflicts With Decisions Of This Court And Other Courts.

1. The decision below holds that an individual may be deprived of her fundamental right to keep and bear arms based on a finding that she committed an offense for which she was not provided the fundamental right to a jury trial. As the Nevada Supreme Court correctly recognized in *Andersen v. Eighth Judicial District Court*, 448 P.3d 1120 (Nev. 2019), neither the Second nor the Sixth Amendment tolerates that result. Indeed, by holding that the loss of Second Amendment rights is *irrelevant* to the Sixth Amendment analysis simply because the Nebraska legislature chose to impose it "collaterally" through a

separate statute, the Nebraska Supreme Court embraced reasoning that not only flouts settled Sixth Amendment jurisprudence, but systematically disadvantages Second Amendment rights, which are almost always lost via operation of separate prohibited-person statutes.

The incompatibility of that reasoning and this Court's precedents and *Andersen* is undeniable. In *Blanton*, for example, this Court considered the suspension or revocation of a driver's license as part of its severity analysis even though it was a "collateral" consequence that stemmed from a *civil* statute housed in a separate title of the relevant code. *See Blanton v. City of N. Las Vegas*, 489 U.S. 538, 543-44 (1989); *cf. Padilla v. Kentucky*, 559 U.S. 356 (2010) (Sixth Amendment entitles defendants to be advised of "collateral" immigration consequences of conviction imposed by separate sovereign). Likewise, the firearm prohibition in *Andersen* was housed in a separate statute, yet that did not stop the Nevada Supreme Court from holding that it was a sufficiently severe penalty to necessitate a jury trial. 448 P.3d at 1124.

The state tries to distinguish *Andersen* on the ground that this case arises in the juvenile context. But the decision below did not rest its analysis on some special aspect of the juvenile justice system. Instead, the court rested its analysis on *State v. Peters*, 622 N.W.2d 918 (Neb. 2001), a case that arose in the *adult* context and held that a "prohibition on possessing firearms" should not, as a *general* matter, be considered "part of the punishment imposed for that prior felony conviction" if it appears in a separate statute. Pet.App.12-13. It was that purportedly

"collateral" nature of the deprivation of Second Amendment rights, not the fact that the deprivation resulted from a juvenile adjudication, that drove the court to invoke *Peters* and embrace a rule that ensures that deprivations of Second Amendment rights are virtually *never* counted in the Sixth Amendment analysis for adults and juveniles alike.[1]

The state emphasizes that the offense in *Andersen* (misdemeanor domestic battery) carried the potential for a jail sentence of up to six months, and that the deprivation of Second Amendment rights was permanent. BIO.14-15. But those details did not figure into the Nebraska Supreme Court's decision here or the Nevada Supreme Court's decision in *Andersen*. Indeed, just a few years earlier, the Nevada Supreme Court held that the same offense was *not* sufficiently severe to warrant a jury trial when it was punishable by up to six months in jail *without* disenfranchisement of Second Amendment rights. *Amezcua v. Eighth Jud. Dist. Ct.*, 319 P.3d 602 (Nev. 2014), *superseded by Andersen*, 448 P.3d 1120. What triggered the Sixth Amendment was the

[1] The state suggests that the court "identified two reasons" for its holding: "first, the purpose of juvenile adjudications is not punitive, [Pet.App.]10–11; and second, the purpose of offender-in-possession statutes is not punitive, [Pet.App.]12-13." BIO.25. That is incorrect. With respect to *this particular* consequence, the court held only that the Sixth Amendment does not attach because it is "a collateral consequence." Pet.App.12. The court then rejected the *alternative* argument that it should "extend[] the right to jury trial to juvenile adjudications" writ large, as some states have done, because the juvenile system as a whole has become predominately "punitive." Pet.App.14. This case is about the former holding, not the latter.

disenfranchisement of Second Amendment rights worked by a separate statute.

The state next emphasizes that several courts have rejected the conclusion *Andersen* reached even in the context of adult misdemeanor proceedings. BIO.15-16. But it is hard to understand why the state thinks that helps its cause. The fact that *multiple* courts have undervalued the Second and Sixth Amendments only reinforces the split with *Andersen* and the need for this Court's review.

Finally, the state tries to distinguish cases holding that the patently "collateral" consequence of removability (generally by a separate sovereign) *is* sufficiently serious to trigger the Sixth Amendment, on the ground that it is "obvious that removal" is more severe than being deprived of the right to possess a firearm for "six years of adulthood." BIO.16. That underscores the state's systematic undervaluation of *constitutional* rights. While removal is undoubtedly a severe consequence as a practical matter, non-citizens have no constitutional right to remain in the United States. This Court has already made clear that the Second Amendment is not a second-class constitutional right, *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010) (plurality op.), so demoting it below the non-constitutional rights of non-citizens should be a non-starter.

2. The state's belated efforts to defend the decision below on its merits fare no better. The state first posits that the deprivation of Second Amendment rights as a consequence of a juvenile offense is *categorically* different because juvenile proceeding are *categorically* "not punitive." But that argument was

not embraced by the court below; nor could it have been, for it is circular in the extreme.

To be sure, juvenile proceedings do not typically require a jury trial. *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971). But that is because the consequences of a juvenile conviction are typically different from the consequences of an adult conviction. They are "aimed at rehabilitation" and generally "will last no longer" than the individual's minority. *Id.* at 552 (White, J., concurring). Indeed, until the recent addition of the firearm-possession restriction, that was the rule in Nebraska. *See* Neb. Rev. Stat. §§43-280, 43-289.

But this Court has long cautioned that courts cannot place dispositive weight on "the 'civil' label-of-convenience which has been attached to juvenile proceedings," and must instead "candidly appraise[]" their actual nature when "determining the applicability of constitutional rights." *Breed v. Jones*, 421 U.S. 519, 529 (1975). It could hardly be otherwise, for if juvenile proceedings were immune from constitutional safeguards simply because a state declared them to be "non-punitive," then a state could imprison a 14-year-old for 30 years as a result of a juvenile bench adjudication, and the Sixth Amendment would have nothing to say about it.

Whatever may be said of imposing restrictions on the liberty and other constitutional rights of juveniles *while they are juveniles*, depriving a juvenile of constitutional rights *well into adulthood* is fundamentally different. That Nebraska imposes various restrictions on possession or use of firearms *by minors* is therefore beside the point. The constitutional problem here is that the state seeks to

impose restrictions—indeed, prohibit petitioner from exercising her Second Amendment rights *at all*—for six years *after* petitioner becomes an adult. Nebraska itself implicitly recognizes the importance of that distinction by requiring the state to try a juvenile as an adult if it wants to deprive her of her liberty after she reaches the age of majority. *See* Neb. Rev. Stat. §43-289. The state should not get greater latitude just because the liberty it is depriving is expressly protected by the Second Amendment as well as the Fourteenth.

The state next argues that this *particular* constitutional disenfranchisement cannot be considered a "penalty" because its "purpose was 'not punitive.'" BIO.2. But that could be said of virtually every felon-in-possession statute, whether attached to a juvenile offense or an adult one. Such statutes are always (at least ostensibly) grounded in public safety concerns, not a bare desire to punish. It could also be said of criminal sentences (which are rarely viewed as purely retributive) and all manner of other consequences of conviction, including the suspension of driving privileges this Court considered in *Blanton*. The Court considered those consequences nonetheless because the Sixth Amendment inquiry is objective. *See* 489 U.S. at 543-44. It does not turn on abstract legislative purposes, which are indeterminate and contestable. A rule under which the rights of the accused rose and fell with a law's purported "purposes" would be all too easy to manipulate. Simply insert language about rehabilitation or public safety in a statute's preamble (or worse, its legislative history) and—*voila*—a law that punishes under any objective measure could evade the Sixth Amendment.

Nor does it make a difference that petitioner may petition a court to reinstate her Second Amendment rights once she turns 19. *See* BIO.27. The relevant benchmark is the *maximum* penalty the legislature has authorized for the offense. *Blanton*, 489 U.S. at 541-43. The prospect of later amelioration in another proceeding without a jury-trial right does not affect the calculus. Just as the possibility of early release by a parole board does not make an offense punishable by a year-long prison sentence non-severe for Sixth Amendment purposes, the possibility of later reinstatement of Second Amendment rights by a court is no substitute for a jury trial and does not render their deprivation non-severe. Moreover, the legislature's decision to make disenfranchisement *automatic*, albeit subject to potential reinstatement, makes it more severe than penalties that will follow only if a judge chooses to impose them at sentencing.

The state laments that accepting petitioner's view would "stifle States' freedom" and "force States to forfeit the benefits" they derive from "'inexpensive nonjury adjudications.'" BIO.25-26. But states' "freedom" for experimentation and dispensing with "expensive" jury trials ends where fundamental rights begin. Moreover, if the state wants to enjoy the cost savings of trying juveniles by bench trials, then it has an easy solution: Do not make the loss of fundamental rights well into adulthood a consequence of a juvenile adjudication.

That is the solution the state has arrived at with respect to incarceration. If the state considers a juvenile's conduct so serious as to warrant confinement after the age of majority, then it

recognizes that it must try her as an adult. It is also the solution the state has arrived at when it wants to deprive *adults* of Second Amendment rights, for every adult offense that carries that consequence (including the very offense of which petitioner was accused) is one for which the state provides a right to trial by jury. Here too, if the state deems the commission of certain offenses by a juvenile so serious as to necessitate the loss of Second Amendment rights into adulthood, it is free to impose that consequence. All it must do is provide the accused with the most basic of procedural rights: the right to a jury trial.

## II. This Case Is An Excellent Vehicle To Resolve The Question Presented.

The state wisely does not deny that these issues, going to the heart of the Second and Sixth Amendments' guarantees, are exceptionally important. Instead, it raises a smorgasbord of purported "justiciability" issues. But each rests on a common and mistaken premise: that this is a lawsuit initiated by petitioner to reinstate her Second Amendment rights. It is not. Petitioner is a defendant challenging a conviction on direct appeal that was entered without honoring her Sixth Amendment right to a jury trial. To be sure, if that adjudication is invalidated for failing to respect her constitutional rights, then *all* the consequences it carries, including disenfranchisement well into adulthood, will fall as well. But petitioner is not seeking simply to have her Second Amendment rights reinstated, or even to deprive the state of its ability to strip individuals who commit serious offenses of their Second Amendment rights. She is simply making the modest point that if

the state wants to do so, then it must provide the procedural protection of a jury trial.

That readily disposes of the state's strained Article III contentions. The state first asserts that petitioner lacks "standing" because she failed to "allege" with sufficient particularity either "that she wants to possess firearms" or "when, where, or for what purpose" she wants to do so. BIO.18. But petitioner was unambiguous about preserving her Sixth Amendment objection to her bench trial and quite clear about when and where she wanted a jury trial. That is more than enough to preserve her constitutional argument and give her standing. She is, after all, not a plaintiff, but a defendant objecting to the state's deprivation of her liberties in ways that exceed constitutional limits. *See, e.g.*, *Bond v. United States*, 564 U.S. 211 (2011); *accord Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2195 (2020).

The state next suggests that this case is "moot" because "petitioner's subsequent adjudication for another felony means that she will be subject to the juvenile-offender-in-possession statute even if she prevails here." BIO.19. But petitioner was deprived of a jury trial in that proceeding as well. Moreover, a constitutional challenge to a conviction obtained in derogation of the Constitution is not insulated from review just because the state may have an alternative basis to detain the defendant or continue to disenfranchise her, let alone when that alternative basis suffers the same constitutional defect. To the contrary, "[a]n incarcerated convict's … challenge to the validity of his conviction *always* satisfies the case-or-controversy requirement," even if that conviction is

not the only thing keeping him in prison, *Spencer v. Kemna*, 523 U.S. 1, 7 (1998) (emphasis added).

The state also suggests that the question presented is not "ripe" "because petitioner has not introduced any evidence about her intent to possess firearms or the circumstances of her intended possession." BIO.20. That objection is, if possible, even more misguided. First, and most obviously, petitioner's Sixth Amendment objection was fully ripe when the state insisted on depriving her of her Second Amendment rights well into adulthood via a bench trial. Second, the state's mootness objection, like the merits analysis in the decision below, is more broadly incompatible with the Sixth Amendment and this Court's precedents protecting it. Many consequences of conviction do not have their full impact until after a sentence is served. Incarcerated individuals cannot use their driving licenses and generally do not face removal until after they have served their sentences. That hardly makes a Sixth Amendment objection to a proceeding that imposes such consequences unripe.

Finally, the state suggests that this is a "poor vehicle" because Nebraska's "approach to the juvenile-offender-in-possession issue" is more "moderate" than that of several other states. BIO.23. But the fact that more than a dozen states deprive juveniles of Second Amendment rights into adulthood—some for even longer than Nebraska—without the protection of a jury trial only enhances the need for this Court's review. *See* BIO.App.8a-9a. If (as petitioner contends) Nebraska's approach is unconstitutional, then by the state's own admission, these other less "moderate" approaches would fail *a fortiori*. Again, none of that is

to say that states lack the power to keep firearms out of the hands of adults who committed serious crimes while they were juveniles. It is simply to say that if a state deems a juvenile offense sufficiently serious to warrant disenfranchisement well into adulthood, then it must provide the protection that the Constitution guarantees for serious offenses with serious, long-term consequences: the right to a trial by jury.

## CONCLUSION

For the foregoing reasons, the Court should grant the petition.

Respectfully submitted,

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