No. 17-249

In The
Supreme Court of the United States

AMY YOUNG and JOHN SCOTT, as Co-Personal Representatives of the Estate of Andrew Lee Scott, deceased, and MIRANDA MAUCK, individually,

Petitioners,

v.

GARY S. BORDERS, in his official capacity as Sheriff of Lake County Florida, and RICHARD SYLVESTER, in his individual capacity,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* AND BRIEF OF THE SECOND AMENDMENT FOUNDATION, INC., AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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September 2017

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MOTION OF THE SECOND AMENDMENT FOUNDATION, INC., FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2(b), the Second Amendment Foundation, Inc. (SAF) respectfully moves for permission to file the attached brief *amicus curiae*. Per Rule 37.2(a), SAF provided timely notice to counsel for all

parties of its intent to file a brief. Petitioners have consented to SAF's filing of a brief, but Respondents have declined to consent.

Founded in 1974, SAF is a non-profit tax-exempt educational foundation, with over 650,000 members and supporters throughout the United States. Through its legal action programs, SAF is a leading defender of Second Amendment rights. Among its notable achievements, SAF prevailed before this Court in *McDonald* v. *City of Chicago*, 561 U.S. 742 (2010), establishing that the Fourteenth Amendment applies the right to keep and bear arms as against states and localities. SAF's significant legal victories also include (but are not limited to) *Wrenn* v. *District of Columbia*, 864 F.3d 650 (D.C. Cir. 2017); *Ezell* v. *City of Chicago*, 846 F.3d 888 (7th Cir. 2017); *Moore* v. *Madigan*, 702 F.3d 933 (7th Cir. 2012); *Ezell* v. *City of Chicago*, 651 F.3d 684 (7th Cir. 2011); and *Palmer* v. *District of Columbia*, 59 F. Supp. 3d 173 (D.D.C. 2014). Additionally, SAF sponsors and assists landmark civil rights cases where it cannot appear directly as a plaintiff, see, *e.g.*, *Binderup* v. *Att'y Gen.*, 836 F.3d 336 (3d Cir. 2016) (en banc), and frequently participates as an *amicus curiae* before this Court, the lower federal courts, and state courts.

SAF has significant expertise and unique insight relating to issues raised by the petition which merit further development. SAF and its members also have a direct interest in the outcome of this matter. The decision below denigrates the status of Second Amendment rights, and endangers the lives of law-abiding,

responsible citizens who access their fundamental right to keep and bear arms.

This case is but the latest of many addressing the interplay between Second and Fourth Amendment rights. Some courts correctly view these rights as complementary. Others, like the court below, view them as mutually exclusive. This case provides this Court a good vehicle by which to address the matter, which is of the highest importance to public safety. SAF is well-positioned to assist the Court in this undertaking. Accordingly, SAF respectfully moves this Court to accept the filing of the attached *amicus curiae* brief in support of granting this petition.

Respectfully submitted,

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Founded in 1974, SAF is a non-profit tax-exempt educational foundation, with over 650,000 members and supporters throughout the United States. Through its legal action programs, SAF is a leading defender of Second Amendment rights. Among its notable achievements, SAF prevailed before this Court in *McDonald* v. *City of Chicago*, 561 U.S. 742 (2010), establishing that the Fourteenth Amendment applies the right to keep and bear arms as against states and localities. SAF's significant legal victories also include (but are not limited to) *Wrenn* v. *District of Columbia*, 864 F.3d 650 (D.C. Cir. 2017); *Ezell* v. *City of Chicago*, 846 F.3d 888 (7th Cir. 2017); *Moore* v. *Madigan*, 702 F.3d 933 (7th Cir. 2012); *Ezell* v. *City of Chicago*, 651 F.3d 684 (7th Cir. 2011); and *Palmer* v. *District of Columbia*, 59 F. Supp. 3d 173 (D.D.C. 2014). Additionally, SAF sponsors and assists landmark civil rights cases where it cannot appear directly as a plaintiff, see, *e.g.*, *Binderup* v. *Att'y Gen.*, 836 F.3d 336 (3d Cir. 2016) (en banc), and frequently participates as an *amicus curiae* before this Court, the lower federal courts, and state courts.

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[1] All parties received timely notice of intent to file this brief. As related in the attached motion, Petitioners consented to the filing of this brief, but Respondents have withheld consent. No counsel for any party authored any part of this brief and no person or entity other than *amicus* funded its preparation or submission.

The decision below denigrates the status of Second Amendment rights, and endangers the lives of law-abiding, responsible citizens who access their fundamental right to keep and bear arms. Accordingly, SAF and its members have a direct interest in the outcome of this matter.

STATEMENT OF THE CASE

May the police raid a dwelling after midnight—without a warrant, without probable cause, without an exigent circumstance, without announcement—and immediately shoot dead the home's law-abiding resident solely because he kept a gun for self-defense?

The courts below think so. This Court should set the matter straight.

At about 1:30 a.m., four police officers aimed guns and flashlights at, and began pounding on, Andrew Scott's front door. Scott opened his door, holding a handgun at his side pointing straight down. He immediately retreated, but it was no use. Within two seconds of Scott having opened his door, Lake County, Fla., Sheriff's Deputy Richard Sylvester fired six bullets, hitting Scott three times and killing him inside his home. Scott was suspected of no crime. The police would later claim that this was their method of gathering information about a speeding motorcyclist who might have parked in front of Scott's home.

Of all the things that might be said about this incident, the district court *blamed the victim, Scott*—and the Second Amendment. "[T]he most critical fact in this case" was that "Scott answered the door to [his home] holding a gun in his hand." Petition Appendix ("App.") 54. Scott "may"—*may?*—"have been lawfully entitled to do so," but Sylvester didn't violate Scott's rights in "respon[ding] to the rapidly escalating situation"—Scott's opening his door—by shooting him dead within two seconds. *Id.*

Per the district court, it is only a "*sentiment* held by *some* in the community who *believe* that an innocent person who answered a late-night knock at his door was needlessly killed by the police." App. 58 (emphasis added).

> But Andrew Scott made a fateful decision that night: he chose to answer his door with a gun in his hand. That changed everything. That is the one thing that—more than anything else—led to this tragedy.

App. 58-59. The Eleventh Circuit affirmed.

* * *

By suggesting that Americans should reasonably expect to be shot dead by police for possessing guns in their homes, the opinion below arguably sets a new record for hostility to the Second Amendment among the lower federal courts—no mean feat. It warrants review on that ground alone, nevermind its other deficiencies

dissected by the cogent dissents below, Petitioners' exhaustive survey, and other anticipated *amici*. As Judge Martin explained:

> If Mr. Scott was subject to being shot and killed, simply because (as the District Court put it) he made the "fateful decision" to answer a late-night disturbance at the door to his house, and did so while holding his firearm pointed safely at the ground, then the Second Amendment (and *Heller*) had little effect.

App. 110 (citing *District of Columbia* v. *Heller*, 554 U.S. 570 (2008)).

SUMMARY OF ARGUMENT

1. The problem here was not Andrew Scott's choice to keep a gun for self-defense. Sylvester proved, after all, that Scott could be subjected to unlawful violence in his home late at night, even if Scott had no realistic chance of defending himself against a "tactical" police raid. Rather, the proximate cause of Scott's death was Sylvester's over-the-top decision to play soldier and raid a random home, unannounced, in the dead of night. He should be held accountable.

2. That the court below would shift the blame from Sylvester to his victim, for the latter's deigning to access the Second Amendment, is but the latest episode in the courts' struggle to describe the relationship between the right to keep and bear arms and the right to be free of unreasonable searches and seizures. Some

courts hold that only one of these rights may be exercised at any one time and place. This is just another way of denying the existence of the Second Amendment right via an interest-balancing test of sorts, by reasoning that the danger posed by gun possession justifies the government's killing of those who would possess guns. A better line of cases holds that police must accommodate themselves to the fact that gun possession is acceptable in our society and, in any event, that it is a fundamental right.

3. The time has arrived for this Court to weigh in on the subject. The decision below is not merely wrong and unjust. It is dangerous.

ARGUMENT

I. Deputy Sylvester Is Solely Responsible for Andrew Scott's Needless Death.

The dissents below, the petition, and the anticipated efforts of other *amici*, describe fully the lower courts' departures from this Court's qualified immunity doctrine and from the precedents of other circuits. However, the lower courts' attempt to shift the blame for Scott's death to the Second Amendment constrains SAF to rebut that assertion.

The district court's syntax does too much work in absolving the officer. Sylvester did not "respond" to a "rapidly-escalating situation." App. 54. The phrasing suggests that the "situation" was just something that

magically apparated through some cosmic agency or of its own volition, trapping the officer into his response. No. The "situation," in its escalated form, consisted *entirely* of Sylvester's deliberate conduct. Sylvester *chose*—calculatingly and methodically, not "rapidly" and not as a "split-second" matter, App. 51—to raid Andrew Scott's home. Scott is the one who responded, prudently, to the attack on his home.

The district court and Judge Hull's concurrence together employed the term "split-second" thirteen times in describing Sylvester's decision to shoot Scott. But as a suggestion that Sylvester merits the benefit of the doubt, the term is unavailing. It assumes that Sylvester was beamed down into the "situation" at the moment Scott opened the door, as though Sylvester had made no other "fateful" decisions that night, *e.g.*, the decision to raid the home, the decision to make no announcement, the decision to start banging on the door, etc. Those decisions were not "split-second," they were objectively incompetent under the circumstances, and they proximately caused Scott's death—even if it was reasonable for Sylvester to shoot Scott at the moment he did so (a debatable point in and of itself).

Just this past term, this Court foreclosed the argument that the analysis begins and ends at the moment Sylvester killed Scott. In *Cty. of Los Angeles* v. *Mendez*, 137 S. Ct. 1539 (2017), this Court rejected the notion that a police officer would lose qualified immunity for a reasonable use of force, on the theory that his proper seizure was provoked by an earlier, unreasonable action. Sylvester might have wished *Mendez*

stopped there. But this Court continued, and clarified that the plaintiffs could still "accomplish [their] objective" because they can "generally recover damages that are proximately caused by *any* Fourth Amendment violation." *Id.* at 1548 (emphasis added).

"[I]f the plaintiffs in this case cannot recover on their excessive force claim, that will not foreclose recovery for injuries proximately caused *by the warrantless entry*," *id.*, a question which had to be answered on remand. Likewise here, the issue may not be whether Scott's holding of a gun absolved Sylvester of liability during the two seconds it took him to kill Scott. *Mendez* makes clear that Sylvester could be held liable for the shooting as a proximate cause of his decision to raid the home. The provocation theory *Mendez* rejected may be too attenuated, but established proximate cause doctrine still requires reviewing Sylvester's entire course of conduct.

The court below correctly observed that the "situation" "escalated"—from Scott enjoying a quiet night at home playing videogames with his girlfriend after work, to being shot dead by Sylvester. But how? Did *Scott* escalate the situation by arming himself, or was his choice to get his gun merely responsive to the threat suddenly thrust at his door? Did Scott escalate the situation by opening his door and retreating in the shadow of Sylvester's gun? Scott was dead within two seconds of opening his door. *Sylvester* "escalated" the "situation" by choosing to raid Scott's home on the flimsiest of pretexts, and shooting him on sight.

Cutting through the clutter, the officers performed an unannounced "tactical" raid because (1) Sylvester had earlier chased a motorcycle for speeding and eluding; (2) an armed motorcyclist—maybe the same one Sylvester chased, maybe not—was wanted by another department; and (3) there was a warm motorcycle—maybe one of these sought-after motorcycles, or maybe sometimes a motorcycle is just a motorcycle—parked nearest to Scott's home.[2] No judge should have issued a warrant to raid Scott's home on these facts. No judge did.

Indeed, Sylvester's conflicting post-hoc rationalizations tend to confirm his liability. The home's occupants were not suspected of any crime, so this was just a friendly "knock and talk." But it had to be conducted "tactically" and with loaded guns drawn and on a split-second hair trigger, because a dangerously mysterious motorcyclist might have been lurking behind the door. Hence, blasting away as soon as the door opened was objectively reasonable. As a means of just gathering some information from non-suspects about a traffic violator.[3]

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[2] Sylvester never identified the make, model, or color of the motorcycle he chased. App. 97 n.3. The most that he could say about it was that it was a dark-colored "sport-bike," App. 69, a description perhaps almost as narrow as "dark-colored SUV." The county alone has over 12,000 registered motorcycles. App. 96 n.2.

[3] As Judge Martin noted, "there was no talk here. This was a knock and shoot." App. 111 n.3. Under no conceivable privacy or property rationale was Scott's front door available to a "tactical" 1:30 a.m. operation involving multiple people drawing guns in alleged search of a dangerous suspect. *Florida* v. *Jardines*, 569 U.S.

What would a reasonable, thinking person have expected to transpire under the circumstances, but the exact scenario that played out? How would a typical person react to loud banging at her door in the dead of night? Would Sylvester, in *his* home at 1:30 a.m., answer loud banging on *his* door unarmed?

The police got exactly what they had come for in raiding Scott's home: not the motorcyclist, but the only reasonably predictable outcome of their recklessness—a violent confrontation. Sylvester might have preferred apprehending (or shooting) the motorcyclist, but he wasn't there to chat with him. In any event, the prospect that an armed criminal motorcyclist might have been in the home was a red herring. This is Florida. *Anyone* might have a gun in the home, precisely to deal with armed men pounding on the door at 1:30 a.m.

And so, also unsurprisingly, the alert and excited officers, guns drawn and ready for any hypothetical threat, got the first shot off against the startled resident. And for good measure, the next shot, and the next, and the next, and the final shot. Because once they began the confrontation, they had to end it. That, too, was known before the officers assumed their tactical positions. The decision to raid Scott's apartment, guns drawn and ready for action, was akin to playing Russian Roulette with half the

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1 (2013); *id.* at 12-16 (Kagan, J., concurring). Had the mystery motorcyclist answered the door to Scott's apartment, would Sylvester have engaged him in neighborly conversation?

chambers loaded. Death is not then merely the unfortunate result of an unlucky spin, but a foreseeable and proximate consequence of choosing to play a reckless game.

Scott answered the loud banging at his door in the dead of night as would many if not most Americans: armed. Since Scott's gun was pointed safely straight down, App. 43-44, a jury might conclude that Scott died because Sylvester *overreacted* to the mundane presence of a gun in the home. Or maybe a jury would conclude that Sylvester would have fired regardless of whether Scott had a gun, judging by Sylvester's extreme decisions prior to the door's opening. But even assuming Sylvester reacted defensively to Scott's gun, it was Sylvester's premeditated decision to raid Scott's home unannounced that proximately caused Scott's death.

Sylvester's poor decisions—not Andrew Scott's fundamental rights—killed Andrew Scott.

II. The Lower Courts Require Guidance in Understanding the Relationship Between Second and Fourth Amendment Rights.

"The first ten amendments and the original Constitution were substantially contemporaneous and should be construed *in pari materia*." *Patton* v. *United States*, 281 U.S. 276, 298 (1930), *overruled on other grounds, Williams* v. *Florida*, 399 U.S. 78 (1970).

The Second and Fourth Amendments particularly complement each other, in that both provisions provide security against unlawful intrusions. The Fourth Amendment bars government agents from perpetrating unreasonable home invasions and personal seizures. The Second Amendment codifies the ancient right guaranteeing access to the means of securing "one's person or house." *Heller*, 554 U.S. at 585 (internal quotation marks omitted).

Unfortunately, as this case demonstrates, courts remain conflicted as to whether a tension exists between the two rights.

Courts have historically understood that exercising the right to arms is not *per se* evidence of criminality.

> [T]he carrying of a gun per se constitutes no offence. For any lawful purpose—either of business or amusement—the citizen is at perfect liberty to carry his gun. It is the wicked purpose—and the mischievous result—which essentially constitute the crime.

State v. *Huntly*, 25 N.C. (3 Ired.) 418, 422-23 (1843).

Even without reference to the right to arms, courts had long held that the presumptive lawfulness of gun possession barred, in the absence of other reasons, a search or seizure under the Fourth Amendment. This Court has rejected the notion that firearms' inherent dangerousness justifies a "firearm exception" to the reliability requirements of a stop-and-frisk. *Florida* v. *J. L.*, 529 U.S. 266, 272-73 (2000). The Tenth Circuit has

advised that it would not "effectively eliminate Fourth Amendment protections for lawfully armed persons." *United States* v. *King*, 990 F.2d 1552, 1559 (10th Cir. 1993); *St. John* v. *McColley*, 653 F. Supp. 2d 1155 (D.N.M. 2009); see also *United States* v. *Ubiles*, 224 F.3d 213 (3d Cir. 2000) (gun possession insufficient to justify stop, as gun possession is generally legal); *United States* v. *Roch*, 5 F.3d 894 (5th Cir. 1993) (same). When a "legislature has decided its citizens may be entrusted with firearms on public streets," police "ha[ve] no authority to disregard this decision—not to mention the protections of the Fourth Amendment—by detaining every 'gunman' who lawfully possesses a firearm." *Northrup* v. *City of Toledo Police Dep't*, 785 F.3d 1128, 1133 (6th Cir. 2015) (citations omitted).

But where the Second Amendment was forgotten, the equation changed. By 1994, the District of Columbia's highest court could declare that handgun possession amounted to probable cause, as it was "common knowledge . . . that with very rare exceptions licenses to carry pistols have not been issued in the District of Columbia for many years and are virtually unobtainable." *Bsharah* v. *United States*, 646 A.2d 993, 996 n.12 (D.C. 1994).

For courts who treat *Heller* as more than "symbolic," Richard Re, *Narrowing Supreme Court Precedent from Below*, 104 Geo. L. J. 921, 962-63 (2016), the traditional balance is easier to apply. Citing the Second Amendment, the Seventh Circuit rejected the idea that the prospect of gun possession justified searching a backpack. *United States* v. *Leo*, 792 F.3d 742, 752 (7th

Cir. 2015). Illinois laws barring the carrying of handguns having been declared unconstitutional, that state's intermediate appellate court recently held that "the possible observation of a handgun is not in itself, without any other evidence of a crime, sufficient to provide an officer with probable cause for arrest." *People* v. *Horton*, 2017 IL App. (1st) 142019, ¶ 50, 78 N.E.3d 489, 498. "[A]s some individuals are legally permitted to carry guns pursuant to the Second Amendment of the Constitution, a reasonable suspicion that an individual is carrying a gun, without more, is not evidence of criminal activity afoot." *United States* v. *Garvin*, 2012 U.S. Dist. LEXIS 76450 (E.D. Pa. May 31, 2012), *aff'd*, 548 Fed. Appx. 757 (3d Cir. 2013).

But the courts' approach is inconsistent. While firearm possession does not justify an arrest in Illinois under *Horton*, that state's Supreme Court holds that firearm possession justifies a protective frisk. *People* v. *Colyar*, 2013 IL 111835, 996 N.E.2d 575. Notwithstanding its opinion in *King* barring searches and seizures on account of nothing more than lawful open gun-carrying, the Tenth Circuit recently held that *concealed* gun carrying justifies a seizure because that mode of carrying is licensed. *United States* v. *Rodriguez*, 739 F.3d 481 (10th Cir. 2013). That approach conflicts with the law of at least four circuits. "Where it is lawful to possess a firearm, unlawful possession 'is not the default status.'" *Northrup*, 785 F.3d at 1132 (quoting *United States* v. *Black*, 707 F.3d 531, 540 (4th Cir. 2013)); *Leo*, 792 F.3d at 752; *Ubiles*, 224 F.3d at 218.

The Fourth and Ninth Circuits, however, share the lower courts' belief that people remove themselves from the ambit of Fourth Amendment protection by exercising Second Amendment rights. *United States* v. *Orman*, 486 F.3d 1170, 1176 (9th Cir. 2007) ("reasonable suspicion that [an individual is] carrying a gun . . . is all that is required for a protective search"). In *Black*, that court refused to approve of seizing individuals for doing nothing more than lawfully carrying handguns, even referencing the "constitutional right to bear arms." *Black*, 707 F.3d at 540. But it apparently reversed course in *United States* v. *Robinson*, 846 F.3d 694 (4th Cir. 2017) (en banc), *petition for certiorari pending*, No. 16-1532 (filed June 22, 2017).

In *Robinson*, the Fourth Circuit held that even lawful firearm carriers are subject to being searched and disarmed, on that ground alone, in connection with a traffic stop. Judge Wynn concurred, acknowledging that *Heller* "recognized the individual right to carry firearms." *Robinson*, 846 F.3d at 705 (Wynn, J., concurring in the judgment). But consistent with the Fourth Circuit's basic stance that the right to arms is worthless, see, *e.g.*, *Woollard* v. *Gallagher*, 712 F.3d 865 (4th Cir. 2013) (police can generally bar the people from bearing arms for lack of a "good and substantial reason" to access the right), Judge Wynn viewed recognition of the Second Amendment as only confirming a liability. The right's value stems from the fact that arms are dangerous, and so, Judge Wynn reasoned, anyone carrying a gun is "inherently dangerous" and subject to search and seizure on that ground. *Robinson*,

846 F.3d at 705 (Wynn, J., concurring in the judgment). The court's decision

> necessarily leads to the conclusion that individuals who elect to carry firearms forego other constitutional rights, like the Fourth Amendment right to have law enforcement officers "knock-and-announce" before forcibly entering homes.

Id. at 706 (Wynn, J., concurring in the judgment) (citation omitted).

Judge Harris, joined by three of her colleagues, dissented.

> [U]nless and until the Supreme Court takes us there, I cannot endorse a rule that puts us on a collision course with rights to gun possession rooted in the Second Amendment and conferred by state legislatures. Nor would I adopt a rule that leaves to unbridled police discretion the decision as to which legally armed citizens will be targeted for frisks, opening the door to the very abuses the Fourth Amendment is designed to prevent.

Id. at 707 (Harris, J., dissenting). At least three state high courts would agree with the *Robinson* dissenters. See *State* v. *Serna*, 235 Ariz. 270, 274, 331 P.3d 405, 409 (2014); *State* v. *Bishop*, 146 Idaho 804, 820, 203 P.3d 1203, 1218 (2009); *State* v. *Vandenberg*, 2003-NMSC-030, ¶ 30, 134 N.M. 566, 572.

The courts below here are among those who are not merely wrong about the Second Amendment's value in our society. They have lost sight of the unconstitutional conditions doctrine. The doctrine holds that the government may not impose conditions upon the exercise of rights, or the receipt of benefits, that it could not impose directly. Nor can the government force individuals to choose among their rights. "Every citizen is entitled . . . to invoke the protection which all the laws . . . may afford him. A man may not barter away his life or his freedom, or his substantial rights." *Home Ins. Co.* v. *Morse*, 87 U.S. (20 Wall.) 445, 451 (1874).

Perhaps nowhere is the unconstitutional conditions doctrine more clearly implicated than where the government encourages individuals to choose from among their constitutional rights. In *Simmons* v. *United States*, 390 U.S. 377 (1968), this Court held that a criminal defendant who wishes to assert Fourth Amendment rights in challenging the admissibility of evidence cannot be expected to do so at the risk that such potentially self-incriminating testimony might be used against him later at trial. "In these circumstances, we find it intolerable that one constitutional right should have to be surrendered in order to assert another." *Id.* at 394. As the Third Circuit later observed:

> A defendant in a criminal proceeding is entitled to certain rights and protections which derive from a variety of sources. He is entitled to all of them; he cannot be forced to barter one for another. When the exercise of one right

> is made contingent upon the forbearance of another, both rights are corrupted.

United States ex rel. Wilcox v. *Johnson*, 555 F.2d 115, 120 (3d Cir. 1977); *Miller* v. *Smith*, 115 F.3d 1136, 1150-51 (4th Cir. 1997) ("Forcing an [individual] to choose between two rights guaranteed by the Constitution results in the denial of one right or the other. [It] affronts our notions of basic fairness.").

Indeed, while the government may discourage people from standing on their rights, as in plea bargaining, *Corbitt* v. *New Jersey*, 439 U.S. 212, 218-20 (1978), coercing the forfeiture of fundamental rights by holding out the prospect of death at the hands of the state—as the court below spelled out with respect to keeping a gun for self-defense—goes too far. *United States* v. *Jackson*, 390 U.S. 570 (1968). In *Jackson*, this Court struck down a provision which directed that a defendant could only be sentenced to death upon a jury's recommendation. Though perhaps well-intended, the law discouraged defendants from exercising their Fifth Amendment right to enter a not guilty plea, and their Sixth Amendment right to trial by jury. A defendant who insisted upon either right did so at the additional risk of hanging, a condition that would tend to encourage coercive guilty pleas and forfeiture of the jury trial right. The effect of chilling access to fundamental rights was deemed "unnecessary and therefore excessive." *Id.* at 582 (citations omitted).

This Court provided another useful example of the constitutional conditions doctrine in *Aptheker* v.

Secretary of State, 378 U.S. 500 (1964), where it struck down a law forbidding international travel on account of one's association with communist organizations. *Aptheker* specifically rejected the argument that plaintiffs had voluntarily forfeited their fundamental Fifth Amendment right to international travel by choosing to exercise their right of free association:

> The restrictive effect of the legislation cannot be gainsaid by emphasizing, as the Government seems to do, that a member of a [communist] organization could recapture his freedom to travel by simply in good faith abandoning his membership in the organization. Since freedom of association is itself guaranteed in the First Amendment, restrictions imposed upon the right to travel cannot be dismissed by asserting that the right to travel could be fully exercised if the individual would first yield up his membership in a given association.

Id. at 507 (footnote omitted).

In *Aptheker*, the government could invoke national security in seeking to bar subversive elements from traveling overseas. Here, the courts approved of eroding Fourth Amendment protections as a consequence of keeping guns. But this was just another way of saying that some rights are not "*really worth* insisting upon." *Heller*, 554 U.S. at 634.

The Bill of Rights, including the Second and Fourth Amendments, is a package deal. The lower courts should be reminded of that fact.

III. The Decision Below Is Not Merely Wrong, but Dangerous.

If the Second Amendment means anything, it means that the police must respect people's ability to keep guns for self-defense—not shoot them dead over it. Yet the decision below greenlights the notion that any American who keeps arms might for that reason alone be subjected to summary, consequence-free extra-judicial killing in his home by agents of the state.

This decision not only contradicts the people's right to be secure in their homes against unreasonable seizures, but is incompatible with a legal system that holds the right to keep and bear arms to be fundamental. Yet even were the Second Amendment repealed tomorrow, many Americans would still calculate that it is better to remain armed for self-defense. They should not be killed for making that choice.

Robinson portends where this "either/or" approach to Second and Fourth Amendment rights is headed. If it was acceptable to shoot Andrew Scott, because it was unaccountably dangerous for him to have a gun in his home when Deputy Sylvester dropped by at 1:30 a.m., then perhaps the officers who stopped Shaquille Robinson would have enjoyed qualified immunity for shooting him dead in the car on the same theory.

This is not conjecture, and not only because the facts below in this case are extreme enough. Not without justification, much of American society remains inflamed over the recent shooting death of Philando Castile, a motorist lawfully carrying a handgun for

self-defense, at the hands of a police officer who allegedly pulled him over for a broken taillight.[4] But even if the acquittal of Castile's killer was unjust, at least he stood trial. And Castile's family was able to settle their wrongful death claim for $3 million.[5]

In contrast, Andrew Scott's loved ones have nothing. "No policy changes occurred since" Scott's killing, and "Deputy Sylvester was not disciplined for his actions that evening." App. 18-19. The police might claim to regret the outcome, but then, they also appear prepared to repeat this sequence against Lake County's remaining inhabitants.

As is too often the case, the *only* corrective consequence for the reckless officers and their department, the *only* possible measure of punishment and deterrence for this highest form of law-breaking (if the Constitution, with its Bill of Rights, is our highest law), will come with civil liability. If "it is not the role of this Court to pronounce the Second Amendment extinct," *Heller*, 554 U.S. at 636, or for that matter, to pronounce the Fourth Amendment extinct, then this Court should

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[4] *See generally* Mitch Smith, *Video of Police Killing of Philando Castile Is Publicly Released*, N.Y. Times, June 20, 2017, available at https:// www.nytimes.com/2017/06/20/us/police-shooting-castile-trial-video.html?mcubz=3(last visited Sept. 14, 2017).

[5] Mitch Smith, *Philando Castile Family Reaches $3 Million Settlement*, N.Y. Times, June 26, 2017, available at https://www.nytimes.com/2017/06/26/us/philando-castile-family-settlement.html (last visited Sept. 14, 2017).

also not stand by as the lower courts effectuate such pronouncements.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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