No. 12-7822

In the Supreme Court of the United States

WALTER FERNANDEZ, PETITIONER

v.

STATE OF CALIFORNIA

ON WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL,
SECOND APPELLATE DISTRICT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether an individual's consent to search her residence may be prospectively negated by the earlier objection to search of another resident now physically absent because of a lawful arrest.

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INTEREST OF THE UNITED STATES

In *Georgia* v. *Randolph*, 547 U.S. 103 (2006), this Court held that a physically present resident's express refusal to consent to a search of a shared dwelling overrides consent to search given by another resident. This case presents the question whether that rule applies where the nonconsenting resident has been arrested and removed from the scene. Federal law enforcement officers frequently conduct searches of premises based on an occupant's consent. In addition, the federal government prosecutes cases in which evidence has been obtained pursuant to consent searches conducted by state authorities. The United States therefore has a significant interest in the Court's disposition of this case.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment of the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."

STATEMENT

1. On October 12, 2009, Abel Lopez was approached by a man, whom Lopez later identified as petitioner, after Lopez had cashed a check. J.A. 4. Petitioner told Lopez he was in petitioner's "territory" and demanded Lopez's money. J.A. 4-5. After Lopez hesitated, petitioner pulled a knife and attempted to stab Lopez in the chest, cutting his wrist instead when Lopez raised his arm in defense. J.A. 5. Lopez ran away while calling 911, and a group of men who had appeared after petitioner whistled for them gave chase. *Ibid.* The men caught Lopez, beat him, took his wallet and phone, and then ran away. *Ibid.*

While other Los Angeles police officers responded to the scene of the attack, officers Joseph Cirrito and Kelly Clark drove to a nearby alley. J.A. 5. They went there because members of the Drifters gang, which the police dispatcher said might have been involved in the attack, often gathered in that location. *Ibid.* As the officers stood in the alley, two men walked by. *Ibid.* One of them, who appeared frightened, told the officers, "[t]he guy is in the apartment." J.A. 5-6. After walking away quickly, the man returned and said "[h]e's in there. He's in the apartment." J.A. 6.

Officers Cirrito and Clark then saw a man run across the alley and enter the house identified by the man. The house, which had been divided into apart-

ments, was a known gang location. Shortly thereafter, Officer Cirrito "heard sounds of screaming and fighting from the apartment building into which the suspect had run." J.A. 6.

After additional officers arrived, Cirrito and Clark knocked on the door of the apartment from which the screaming had come. Roxanne Rojas, who was holding a baby, opened the door. She appeared to be crying; her face was red; she had a "big bump" on her nose; and she had blood on her shirt and hand "that appeared to come from a fresh injury." Cirrito asked Rojas to step outside so that he could "conduct a sweep of the apartment." J.A. 6.

At that point, petitioner came to the door. J.A. 6. He was dressed only in boxer shorts, was sweaty, and looked "real angry." J.A. 64. Cirrito asked petitioner to step outside because the police suspected he had battered Rojas and wanted to separate the two. *Ibid.* Petitioner yelled "[y]ou don't have any right to come in here. I know my rights." J.A. 6. The officers then restrained petitioner because of the evidence of domestic violence and escorted him out of the apartment. *Ibid.*; see J.A. 65, 77.

As officers took petitioner down the stairs, Cirrito saw a tattoo on top of petitioner's head that matched the description of a tattoo worn by one of the robbery suspects. J.A. 65. Lopez was brought to the location and identified petitioner as the person who had robbed him. J.A. 78, 81.

After Cirrito returned to the apartment, he told Rojas that petitioner had been identified as a suspect in the robbery and asked for consent to search. J.A.

6-7.[1] Rojas consented both orally and in writing. J.A. 7. Officers then searched the apartment and found Drifters gang paraphernalia, a knife that might have been used in the robbery, and a sawed-off shotgun. J.A. 7, 68.

The officers also asked Rojas about her injuries. She said that when petitioner entered the apartment, she confronted him about his relationship with a woman named Vanessa. Petitioner and Rojas argued, and petitioner hit Rojas in the face. During an interview two days later, Rojas told Cirrito that she did not want to be a "rat" and that if petitioner knew she was talking to the police he would be very upset. At that interview, she denied that petitioner had struck her, and instead insisted that it was Vanessa who had caused her injuries. J.A. 7.

2. Petitioner was charged with robbery (Cal. Penal Code § 211 (West 2008)), infliction of corporal injury on a spouse, cohabitant, or child's parent (*id.* § 273.5(a) (West Supp. 2013)), possession of a firearm by a felon (*id.* § 12021(a)(1) (West 2009)), possession of a short barreled shotgun (*id.* § 12020(a)(1) (West

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[1] At petitioner's suppression hearing, Rojas claimed that before seeking consent, the officers warned her that she might lose custody of her children. J.A. 99-100. Officer Cirrito, however, testified that the conversation about Rojas's children occurred after the consent search. J.A. 129. He testified that he told Rojas he was going to notify protective services because her four-year-old son had had access to petitioner's gun. *Ibid.* The trial court found Rojas's testimony "believable at points and unbelievable at other points." J.A. 152. The court concluded that Rojas "felt as pressured" to sign the consent form "as anyone with a cop standing in [her] kitchen [would] feel" but explained that "pressure does not equal duress or coercion." *Ibid.*

2009)), and felony possession of ammunition (*id.* § 12316(b)(1) (West 2009)). J.A. 3.

Petitioner moved to suppress the evidence seized during the search of his apartment. J.A. 15. The superior court denied the motion, concluding that Rojas had voluntarily consented to the search. J.A. 150-152. Petitioner entered pleas of nolo contendere to the three firearms charges. J.A. 14. He proceeded to trial on the robbery and infliction of corporal injury counts. He was convicted and sentenced to 14 years of imprisonment. J.A. 3.

3. The California Court of Appeal affirmed. J.A. 2-50. As relevant here, the court rejected petitioner's argument that, under *Georgia* v. *Randolph*, 547 U.S. 103 (2006), his initial refusal to allow the officers entry into the apartment prospectively negated Rojas' later consent to search the apartment. J.A. 15-33. The court found *Randolph* inapplicable because petitioner (unlike the defendant in *Randolph*) was absent at the time Rojas consented. J.A. 31. The court noted that "*Randolph* did not overturn prior cases holding that a coinhabitant may give effective consent to search a shared residence." *Ibid.*

The California Supreme Court denied review. J.A. 51.

SUMMARY OF ARGUMENT

An occupant of a residence may validly consent to its search even if a different occupant, now absent because of his arrest, had previously objected.

1. This Court has long recognized that consent searches are an important and valuable tool for law enforcement. It has accordingly avoided imposing "artificial restrictions" on such searches that would discourage their use. *Schneckloth* v. *Bustamonte*,

412 U.S. 218, 229 (1973). Of particular relevance here, the Court has held that anyone jointly occupying a premises may validly consent to its search. *E.g.*, *United States* v. *Matlock*, 415 U.S. 164, 171 (1974).

2. In *Georgia* v. *Randolph*, 547 U.S. 103 (2006), the Court established a narrow exception to that general rule, holding that such consent is invalid when a physically present co-occupant contemporaneously objects. Both the Court's description of that exception and the logic underlying it rested on the physical presence of the objector. If the objecting co-occupant is absent, the general rule, rather than its *Randolph* exception, applies, and the consent of any co-occupant is valid. To hold that the absent co-occupant's objection can prospectively veto any subsequent consent by another resident would unreasonably impinge on the authority of the consenting co-occupant to make her own decisions about whom she will admit into her own home.

Randolph's physical presence requirement is consistent with the "widely shared social expectations" that informed that decision's analysis. 547 U.S. at 111. The Court in *Randolph* stated that one visiting an acquaintance would generally not feel free to enter her residence over the objection of a co-occupant standing in the doorway, and it adopted a mirroring rule of Fourth Amendment consent. *Id.* at 113. The social calculus, however, is different when the objecting co-occupant is absent. Under those circumstances, most would feel free to enter a residence at the invitation of the individual actually present, and the Fourth Amendment should reflect the same understanding.

3. To adopt petitioner's rule permitting a co-occupant's objection to trump later consent by another resident would create serious problems of administra-

bility. Unless a prior objection were *permanently* controlling, such that it could defeat consent from another resident given years later, courts would have to decide on an expiration date for the objection. But any particular cut-off date would be arbitrary and unrelated to any Fourth Amendment value.

4. Petitioner's alternative argument that the objection of an absent co-occupant should control when his absence is caused by an arrest fares no better than his principal submission. So long as the police have an objective basis for removing a defendant, *e.g.*, probable cause that he has committed a crime such as a domestic battery, their subjective motivation for doing so should not be relevant. And if a defendant's arrest is legally justified, then the resulting absence should have the same effect as any other absence: it leaves the decision whether to consent to a search in the hands of the remaining co-occupant.

5. Finally, petitioner's contention that police can settle for alternative means of securing evidence if an absent co-occupant's objection is given ongoing effect provides no reason for adopting that rule. Such alternative means will not always be available, and, in any event, this Court has clearly and repeatedly held that consent searches are a valid tool for law enforcement. A consent search is not invalid just because police might have been able to obtain evidence in some other way.

ARGUMENT

OFFICERS MAY SEARCH A RESIDENCE BASED ON THE CONSENT OF ONE OCCUPANT FOLLOWING THE LAWFUL ARREST OF ANOTHER OCCUPANT WHO OBJECTED TO THE SEARCH

The Fourth Amendment of the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." Although the "Fourth Amendment generally prohibits the warrantless entry of a person's home," the "prohibition does not apply * * * to situations in which voluntary consent has been obtained." *Illinois* v. *Rodriguez*, 497 U.S. 177, 181 (1990). A search based on voluntary consent, or the reasonable belief that a person with apparent authority has consented, is constitutionally "reasonable." *Id.* at 183-184.

When, as here, two persons possess joint authority over the premises, either may give effective consent for a search. *United States* v. *Matlock*, 415 U.S. 164, 169-172 (1974). In *Georgia* v. *Randolph*, 547 U.S. 103 (2006), the Court established a narrow exception to that general rule, holding that "a warrantless search of a shared dwelling for evidence over the express refusal of consent by a *physically present* resident cannot be justified as reasonable as to him on the basis of consent given to the police by another resident." *Id.* at 120 (emphasis added). The physical presence of the objecting co-occupant was the critical fact for the Court in *Randolph*, and the logic of that decision does not extend to situations, like that here, where the objecting resident has been lawfully arrested and removed from the premises.

A. An Occupant Of Premises Shared With Another May Validly Consent To A Search

As this Court has long recognized, "[c]onsent searches are part of the standard investigatory techniques of law enforcement agencies" and are "a constitutionally permissible and wholly legitimate aspect of effective police activity." *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 228, 231-232 (1973). In some situations, "a search authorized by a valid consent may be the only means of obtaining important and reliable evidence." *Id.* at 227. And "the community has a real interest in encouraging consent, for the resulting search may yield necessary evidence for the solution and prosecution of crime, evidence that may insure that a wholly innocent person is not wrongly charged with a criminal offense." *Id.* at 243.

The Court has thus sought to avoid "artificial restrictions" on consent searches that "would jeopardize their basic validity." *Schneckloth*, 412 U.S. at 229. For example, the Court has said that, unlike in the case of "those constitutional guarantees that protect a defendant at trial," it would be improper to require that "every reasonable presumption * * * be indulged" against a finding of consent to search. *Id.* at 243. The Court has similarly declined to require the government to prove that a consenting individual was aware of his Fourth Amendment rights and voluntarily waived them. *Id.* at 227-248 (distinguishing *Johnson* v. *Zerbst*, 304 U.S. 458 (1938)). Instead, the Court requires only that consent to search be "voluntary," as determined by examination of "the totality of all the circumstances." *Id.* at 227.

1. Consistent with its rejection of artificial rules that would inhibit consent searches, this Court has

long held that anyone who jointly possesses premises or effects may validly consent to their search and, correspondingly, that the consent of absent possessors is not required. For example, in *Frazier* v. *Cupp*, 394 U.S. 731 (1969), the Court upheld a search of the defendant's duffel bag because his cousin, who "was a joint user of the bag" and thus "clearly had authority to consent to its search," had agreed to the search. *Id.* at 740. The defendant had insisted that the cousin "only had actual permission to use one compartment of the bag and that he had no authority to consent to a search of the other compartments." *Ibid.* The Court declined to "engage in such metaphysical subtleties in judging the efficacy of [the cousin's] consent." *Ibid.* Instead, the Court rested on the proposition that, "in allowing [his cousin] to use the bag and leaving it in his house," the defendant "must be taken to have assumed the risk that [his cousin] would allow someone else to look inside." *Ibid.*

In *United States* v. *Matlock*, 415 U.S. 164 (1974), the Court followed the same approach when considering a consent search of a house. In that case, the defendant was arrested in his front yard and restrained in a squad car a short distance from his house. *Id.* at 166; see *id.* at 179 (Douglas, J., dissenting). "Although the officers were aware at the time of the arrest that [the defendant] lived in the house," they did not ask him for consent to search. *Id.*at 166. Instead, they sought and received consent from his girlfriend, who also lived there. *Ibid.* The Court held that the girlfriend's consent was sufficient to authorize the search. The Court explained that "when the prosecution seeks to justify a warrantless search by proof of voluntary consent," it need not

show that "consent was given by the defendant, but may show that permission to search was obtained from a third party who possessed common authority or other sufficient relationship to the premises." *Id.* at 171.

The Court in *Matlock* explained that the common "authority which justifies the third-party consent does not rest upon the law of property, with its attendant historical and legal refinements." 415 U.S. at 171 n.7. The authority "rests rather on mutual use of the property by persons generally having joint access or control for most purposes." *Ibid.* In such circumstances, "it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched." *Ibid.*

In *Rodriguez*, the Court addressed a search based on consent by the defendant's girlfriend. 497 U.S. at 179. The defendant was sleeping in the apartment at the time the police entered, but the Court did not hold that officers should have roused him to seek his consent. *Id.* at 180. Nor was the girlfriend's consent vitiated because she did not actually have authority over the premises. The Court instead held that warrantless entry is "valid when based upon the consent of a third party whom the police, at the time of the entry, reasonably believe to possess common authority over the premises, but who in fact does not do so." *Id.* at 179; see *id.* at 183-189.

2. In *Randolph*, the Court addressed the question whether one occupant can give valid consent to a search of shared premises when a physically present co-occupant contemporaneously refuses consent. 547

U.S. at 106. There, police officers went to the Randolphs' home in response to a report of a domestic dispute, and were met by Janet Randolph. *Id.* at 107. She complained that her husband had taken their son away and further advised that her husband used cocaine and that drugs were on the premises. *Ibid.* Scott Randolph subsequently arrived, and declined to consent to a search of the house. *Ibid.* Janet Randolph, however, "readily" consented, and the police searched for and found evidence of drug use. *Ibid.*

The Court held that the officers could not rely on Janet Randolph's consent to justify the search: "[A] warrantless search of a shared dwelling for evidence over the express refusal of consent *by a physically present resident* cannot be justified as reasonable as to him on the basis of consent given to the police by another resident." 547 U.S. at 120 (emphasis added). That conclusion rested on the Court's perception of "widely shared social expectations." *Id.* at 111. The Court explained that it is generally understood "that a solitary co-inhabitant" typically has an absolute entitlement to "admit visitors, with the consequence that a guest obnoxious to one may nevertheless be admitted in his absence by another." *Ibid.*

The Court concluded, however, that the situation is different where one inhabitant's consent is "subject to immediate challenge by another." *Randolph*, 547 U.S. at 113. The court reasoned that "a caller standing at the door of shared premises would have no confidence that one occupant's invitation was a sufficiently good reason to enter when a fellow tenant stood there saying, 'stay out.'" *Ibid.* Under those circumstances, the Court explained, "[w]ithout some very good reason, no sensible person would go inside." *Ibid.*

The Court acknowledged in *Randolph* that it was drawing a "fine line" between its holding and the previous decisions in *Matlock* and *Rodriguez*, both of which upheld consent searches despite the fact that "a potential defendant with self-interest in objecting [was] * * * nearby but not invited to take part in the threshold colloquy." *Randolph*, 547 U.S. at 121. The Court emphasized that it was not altering the rule applied in those cases. It accordingly limited its holding to circumstances (like those in *Randolph* itself) where "a potential defendant with self-interest in objecting is in fact at the door and objects." *Ibid.*

By contrast, the Court explained that it was leaving undisturbed the rule that "the potential objector, nearby but not invited to take part in the threshold colloquy, loses out." *Randolph*, 547 U.S. at 121. The Court concluded that the "formalism" of this distinction was "justified" in the interest of "the simple clarity of complementary rules": "one recognizing the cotenant's permission when there is no fellow occupant on hand" ("[s]o long as there is no evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection") and the other rule "according dispositive weight to the fellow occupant's contrary indication when he expresses it." *Id.* at 121-122.

B. An Occupant's Consent To Search Is Not Rendered Invalid By The Previous Objection Of A Now-Absent Co-Occupant

Petitioner argues (Br. 15) that his objection to the officers' presence when they first appeared at his door operated as a continuing veto over Rojas's subsequent consent, which she gave as the sole occupant after petitioner was arrested and removed from the scene.

As the large majority of lower courts have concluded, see 4 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 8.3(d) n.54, at 205 (5th ed. 2012) (collecting cases), that contention is inconsistent with *Randolph* and the common social understandings underlying that decision.

1. The physical presence of the objecting occupant was a necessary and central component of the Court's holding in *Randolph*.

a. *Randolph*'s reliance on presence is revealed most strikingly by the Court's repeated use of the phrase "physically present" (or its substantive equivalent) throughout the opinion. At the very beginning, the Court described the question presented as whether "an evidentiary seizure is * * * lawful with the permission of one occupant when the other, who later seeks to suppress the evidence, is *present* at the scene and expressly refuses to consent." *Randolph*, 547 U.S. at 106 (emphasis added); see *id.* at 119 (similarly describing "the question in this case" as "whether a search with the consent of one co-tenant is good against another, *standing at the door* and expressly refusing consent") (emphasis added).

The Court then built physical presence into the articulation of its holding: "We hold that, in the circumstances here at issue, a *physically present* co-occupant's stated refusal to permit entry prevails." *Randolph*, 547 U.S. at 106 (emphasis added); see *id.* at 120 ("We therefore hold that a warrantless search of a shared dwelling for evidence over the express refusal of consent by a *physically present* resident cannot be justified as reasonable as to him on the basis of consent given to the police by another resident.") (emphasis added).

The Court's supporting analysis likewise turned dispositively and explicitly on the physical presence of the objecting defendant. For example, when reviewing its prior decisions, the Court noted that "[n]one of our co-occupant consent-to-search cases * * * has presented the further fact of a second occupant *physically present* and refusing permission to search." *Randolph*, 547 U.S. at 109 (emphasis added); see *id.* at 113 (noting that previous cases "have not dealt directly with the reasonableness of police entry in reliance on consent by one occupant subject to *immediate challenge* by another") (emphasis added); *id.* at 121 (distinguishing *Matlock* as involving an "'*absent*, nonconsenting' resident) (quoting *Matlock*, 415 U.S. at 170) (emphasis added).

The Court likewise anchored its examination of social practice to physical presence, stating that a "cotenant wishing to open the door to a third party has no recognized authority in law or social practice to prevail over a *present* and objecting co-tenant." *Randolph*, 547 U.S. at 114 (emphasis added); see *id.* at 121 (explaining that "to ask whether the consenting tenant has the right to admit the police when a *physically present* fellow tenant objects is not to question whether some property right may be divested by the mere objection of another") (emphasis added).[2]

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[2] The opinion includes numerous other references to physical presence as well. See *Randolph*, 547 U.S. at 108 (explaining that the Georgia Supreme Court had held that consent was not valid "in the face of the refusal of another occupant who is *physically present*" and had "stressed that the officers in *Matlock* had not been 'faced with the *physical presence* of joint occupants.'") (citations omitted; emphasis added); *ibid.* (noting Court had granted certiorari to resolve a "split of authority on whether one occupant may give law enforcement effective consent to search shared premises,

Justice Breyer, whose vote was necessary to the majority in *Randolph*, wrote a concurrence that expressly characterized the Court's holding as resting on the objecting co-tenant's physical presence. He first explained that "[i]f Fourth Amendment law forced [the Court] to choose between two bright-line rules, (1) a rule that always found one tenant's consent sufficient to justify a search without a warrant and (2) a rule that never did, [he] believe[d] [the Court] should choose the first." *Randolph*, 547 U.S. at 125. Justice Breyer explained that he would make that choice because "a rule permitting such searches can serve important law enforcement needs (for example, in domestic abuse cases), and the consenting party's joint tenancy diminishes the objecting party's reasonable expectation of privacy." *Ibid.*

But Justice Breyer explained that he did not read the Fourth Amendment as requiring a choice of such "bright-line rules" and instead permitted judgment based on the "totality of the circumstances." *Randolph*, 547 U.S. at 125-126. The first circumstance in *Randolph* noted by Justice Breyer was that the "objecting party was present and made his objection known clearly and directly to the officers seeking to enter the house." *Ibid.* Justice Breyer stressed, how-

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as against a co-tenant who is *present* and states a refusal to permit the search") (emphasis added); *id.* at 121 ("[I]f a potential defendant with self-interest in objecting is in fact *at the door* and objects, the co-tenant's permission does not suffice for a reasonable search.") (emphasis added); *ibid.* (co-tenant can validly consent "where there is no fellow occupant *on hand*") (emphasis added); *id.* at 122 ("This case invites a straightforward application of the rule that a *physically present* inhabitant's express refusal of consent to a police search is dispositive as to him.") (emphasis added).

ever, that "were the circumstances to change significantly, so should the result." *Id.* at 126. For example, Justice Breyer stated, "[t]he Court's opinion *does not apply* where the objector is not present 'and object[ing].'" *Ibid.* (quoting *id.* at 121) (second set of brackets in original; emphasis added).

b. The repeated references to a physically present co-occupant by both the Court and Justice Breyer in *Randolph* were hardly inadvertent. Rather, the "fact of a second occupant physically present and refusing permission to search" was what distinguished *Randolph* from the Court's earlier "co-occupant consent-to-search cases." 547 U.S. at 109. As examination of *Randolph* side-by-side with those cases makes clear, the specific Fourth Amendment intrusion in *Randolph* was *not* that the search occurred in the absence of the defendant's consent. *Matlock* and *Rodriguez*—both of which *Randolph* expressly preserved—expressly allowed searches based solely on the consent of a co-occupant (or putative co-occupant) and required no effort to seek the consent of the nearby defendant even though it would have been easy to do so.

Nor under the logic of *Randolph* can the simple fact of a co-occupant's objection, whenever or wherever expressed, render a search with the consent of another occupant unlawful. Were that the case, the opinion in *Randolph* would have had no need to emphasize (repeatedly) that the objecting occupant was "physically present." The *Randolph* Court could easily have disposed of the case simply by holding that, once voiced, the objection of an occupant trumps *any* subsequent consent by a co-occupant.

The *Randolph* Court instead went to great pains to emphasize that the objecting co-occupant was both

present at the time of the search and contemporaneously objecting to it. The Court's focus on an objector who is "physically present" accordingly makes clear that the unreasonableness of a search over such objection flows not from the override of the defendant's wishes, but rather from the indignity suffered when such an override occurs before the defendant's eyes while he stands in the sanctuary of his own home. See *United States* v. *Henderson*, 536 F.3d 776, 783-784 (7th Cir. 2008), cert. denied, 558 U.S. 830 (2009). That specific dignity interest is not implicated when the search takes place in the defendant's absence.

c. Petitioner's rule—that one tenant can foreclose a co-tenant's ability to give valid consent, regardless of whether he is physically present—would unreasonably impinge on the dignity interests of the *consenting* co-occupant. As this Court has explained, "[i]n a society based on law, the concept of agreement and consent should be given a weight and dignity of its own." *United States* v. *Drayton*, 536 U.S. 194, 207 (2002). "It reinforces the rule of law for the citizen to advise the police of his or her wishes and for the police to act in reliance on that understanding." *Ibid.*

In the particular context of consent searches involving co-tenants, this Court has applied that principle by holding that each co-tenant "has the right to permit the inspection *in his own right*." *Matlock*, 415 U.S. at 171 n.7 (emphasis added). Yet the unilateral ability of an objecting occupant to prospectively invalidate a search authorized by another resident affords the objecting tenant a permanent pocket veto over his co-tenant's wishes. That outcome effectively eliminates the co-tenant's independent right to permit the search and unreasonably impinges on her dignity

interest in making her own decisions about whom she will admit to her home.

Petitioner's rule would also hinder one co-tenant's ability to have contraband or evidence of crime removed from her house and thus "deflect suspicion raised by sharing quarters with a criminal." *Randolph*, 547 U.S. at 116. Indeed, the innocent co-tenant's need to consent for this reason may be more imperative when the guilty co-tenant is absent, thus leaving her in exclusive control of the premises and raising a stronger inference that items found there are hers. And in this case, Rojas had the additional legitimate interest in having a sawed-off shotgun removed from the residence in which she lived with her young children.

The interests of the remaining occupant are particularly compelling in a case like this one (and many others involving consent searches) that involve domestic violence. In *Randolph*, the Chief Justice noted in his dissent that the courts had faced "recurring cases in which abused spouses seek to authorize police entry into a home they share with a nonconsenting abuser." 547 U.S. at 127. He criticized the majority's rule for "forbid[ing] police from entering to assist with a domestic dispute if the abuser whose behavior prompted the request for police assistance objects." *Id.* at 139 (Roberts, C.J., dissenting). In response, the majority "recognize[d] that domestic abuse is a serious problem in the United States" but explained that it did not believe that the rule it was adopting had "bearing on the capacity of the police to protect domestic victims." *Id.* at 117-118. In particular, the majority acknowledged "the possibility that a battered individual will be afraid to express fear candidly" but thought *Ran-*

dolph's holding would not influence her choices because such a fearful individual would be unlikely to consent to a search with her abuser standing nearby and objecting. *Id.* at 119 n.7.

That calculus by the victim may change, however, when the abuser is absent. Here, for example, Rojas consented to a search of the apartment after petitioner had been arrested and removed from the scene, thus ensuring that (at least temporarily) he was no longer a threat to her. It would disserve the interests of Rojas (and those of other victims of domestic violence) to hold that her abuser's previous objection would continue to control her choices about whom she admitted to her own home even after he was gone.

2. This understanding of the *Randolph* exception as requiring the physical presence of the objector is reinforced by that decision's focus on "widely shared social expectations." 547 U.S. at 111.

a. As the Court in *Randolph* explained, *Matlock* held that the reasonableness of searches based on third-party consent "is in significant part a function of commonly held understanding about the authority that co-inhabitants may exercise in ways that affect each other's interest." 547 U.S. at 111. Thus, *Randolph* explained, *Matlock* made clear that when people share quarters, they understand that "any one of them may admit visitors" and assume the risk that "a guest obnoxious to one may nevertheless be admitted in his absence by another." *Ibid.*

Randolph stated that social expectations are different when an invitation to enter extended by one occupant is immediately disputed by a physically present co-occupant. "[I]t is fair to say," the Court reasoned, "that a caller standing at the door of shared

premises would have no confidence that one occupant's invitation was a sufficiently good reason to enter when a fellow tenant stood there saying, 'stay out.'" 547 U.S. at 113. In those circumstances, the Court concluded, "[w]ithout some very good reason, no sensible person would go inside." *Ibid.*

No such social expectation of exclusion holds when the objecting occupant is absent when a co-occupant invites a caller inside. Without the objector's presence, a caller would feel free to enter, especially where the likelihood is small that the objecting co-occupant will immediately return. Under those circumstances, the normal rule that "a guest obnoxious to one may nevertheless be admitted in his absence by another" holds. *Randolph*, 547 U.S. at 111.[3] And, under the Fourth Amendment, that means that the absent resident has "assumed the risk" that his

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[3] See *United States* v. *Cooke*, 674 F.3d 491, 499 (5th Cir.) ("[S]ocial convention normally allows for a visitor to feel invited into a home when invited by a physically-present resident, even if an absent cotenant objects to it, rather than the visitor's assuming he is *verboten* forever until the objector consents."), cert. denied, 133 S. Ct. 756 (2012); *Henderson*, 536 F.3d at 783 (While "a third party, attuned to societal customs regarding shared premises, would not * * * enter when faced with a disputed invitation between cotenants," "[t]he calculus shifts * * * when the tenant seeking to deny entry is no longer present."); *id.* at 785 ("We know of no social convention that requires the visitor to abstain from entering once the objector is no longer on the premises; stated differently, social custom does not vest the objection with perpetual effectiveness"); *United States* v. *Hudspeth*, 518 F.3d 954, 960 (8th Cir. 2008) (en banc) (Because defendant, who had earlier objected at the police station to a search of his residence, was not physically present when his wife gave consent to a police search, the police officers, unlike in *Randolph*, "were not confronted with a 'social custom' dilemma").

co-tenant "might permit the common area to be searched." *Matlock*, 415 U.S. at 171 n.7.

Here, for example, suppose a friend of Rojas's, whose entry petitioner had earlier barred, appeared on the doorstep soon after petitioner had been arrested and removed from the scene. If Rojas explained that petitioner had just been arrested and invited her friend inside to talk about it, the friend would have felt free to enter. This is particularly so because it would have been plain to both Rojas and her friend that petitioner's return was not imminent. The logic of *Randolph*'s analysis of social expectations thus leads to the conclusion that Rojas could likewise admit the police.[4]

b. Petitioner argues (Br. 17-18) that once a tenant objects to a caller's entry, the societal understanding is that, even in the objector's absence, the caller will entertain doubts as to his permission to enter that cannot be dispelled until he has obtained "assurance,

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[4] Amicus National Association of Criminal Defense Lawyers (NACDL) argues that the relevant inquiry is whether there is any social expectation permitting a social visitor to remove the objector from the scene and then seek consent to enter from a co-occupant. *E.g.*, NACDL Br. 8. But the relevant inquiry is not whether there exists any societal understanding that would allow a social visitor to mimic police action in any given situation. Instead, the inquiry is based on social expectations about admission of guests into a residence. This Court in *Randolph*, explaining its earlier decision in *Matlock*, said that the rule that any co-tenant can consent to a search was based on the social understanding that any resident of a shared premises "may admit visitors, with the consequence that a guest obnoxious to one may nevertheless be admitted in his absence by another." 547 U.S. at 111. The Court did not require a common social understanding that a co-tenant may admit a visitor to search her roommate's effects for evidence of a crime.

either directly from the objector or from the co-tenant, that the objector no longer seeks to keep [him] out of the house" (Br. 17). Petitioner relies (*ibid.*) on the Court's observation in *Randolph* (547 U.S. at 114) that, if a caller is greeted at the door of shared premises and one occupant invites him in and the other tells him to stay out, a resolution of the disagreement "must come through voluntary accommodation, not by appeals to authority."

Contrary to petitioner's suggestion, the Court's point was that, unless the physically present, disagreeing occupants voluntarily agree on whether or not to admit the caller, the caller would not feel free to enter *at that time.* The Court was surely not characterizing common social understandings as embodying a rule that an occupant cannot *ever* give consent to entry—even in the objecting occupant's absence—unless the objecting occupant has changed his mind.

c. Amicus National Association of Criminal Defense Lawyers (NACDL) discusses property law principles at length in an attempt to support the proposition that the "prior objection of one co-tenant renders a later invitation from another ineffective." NACDL Br. 17; see *id.* at 17-23. That discussion is not informative because this Court has squarely held that the common "authority which justifies the third-party consent does *not* rest upon the law of property, with its attendant historical and legal refinements." *Matlock*, 415 U.S. at 171 n.7 (emphasis added); see *Randolph*, 547 U.S. at 110 ("[T]he third party's 'common authority' is not synonymous with a technical property interest.").

In any event, the bulk of the authority cited by NACDL involves irrelevant issues, such as the inabil-

ity of one joint tenant to enter into contracts that would destroy or encumber another joint tenant's interest in property. *E.g.*, NACDL Br. 20 ("The common law * * * has forbidden co-tenants from corrupting or destroying shared property."). This case does not implicate those property-law principles because it involves mere entry into shared premises. In that situation, "[i]t is ordinarily held" under property law "that a tenant in common may properly license a third person to enter on the common property" and that "[t]he licensee, in making an entry in the exercise of his or her license, is not liable in trespass to nonconsenting cotenants." 86 C.J.S. *Tenancy in Common* § 144, at 354 (2006); see *Buchanan* v. *Jencks*, 96 A. 307, 309, 310-311 (R.I. 1916) ("[I]t would seem unreasonable to say that a cotenant could not authorize another to go upon the common land and do anything that he might do himself."); *Lee Chuck* v. *Quan Wo Chong*, 28 P. 45, 46 (Cal. 1891); see also *Dinsmore* v. *Renfroe*, 225 P. 886, 888-889 (Cal. Dist. Ct. App. 1924); *Causee* v. *Anders*, 20 N.C. (3 & 4 Dev. & Bat.) 388 (N.C. 1839) (affirming that tenant in common has right to enter property and take with him a guest).[5]

C. Reading The Physical Presence Requirement Out Of *Randolph* Would Raise Questions Incapable Of Easy Or Principled Resolution

1. To read the physical presence requirement out of *Randolph* would raise numerous questions that

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[5] NACDL cites a property treatise for the contrary proposition, see Br. 18 (quoting 2 H. Thorndike Tiffany & B. Jones, *The Law of Real Property* § 457 (3d ed. 1939) (Tiffany)), but that treatise qualifies its point by acknowledging that it had located "little authority" on the question, Tiffany § 457, at 274.

could not be resolved without arbitrary, irrational, or confusing answers. In particular, "[i]f an objecting co-occupant's presence is not required, are there any limits to the superiority or duration of his objection?" *Henderson*, 536 F.3d at 784. On the one hand, courts could adopt a categorical rule that an occupant's objection controls forever. So, for example, cold-case investigators returning to a house ten years after a co-occupant (now incarcerated on different charges) had objected to a search could not validly obtain the consent of his girlfriend to search. Such a rule would plainly be unreasonable.

On the other hand, courts could attempt to specify a period of time within which one occupant's refusal of consent would trump the consent of a co-occupant. But adoption of such an expiration-date approach would present its own difficulties. While the Court on occasion has "set forth precise time limits governing police action," it is "certainly unusual" for it to do so. *Maryland* v. *Shatzer*, 559 U.S. 98, 110 (2010); see *County of Riverside* v. *McLaughlin*, 500 U.S. 44, 56 (1991) ("[W]e hesitate to announce that the Constitution compels a specific time limit [as to what is permissible under the Fourth Amendment]."). Here, no Fourth Amendment principle would permit courts to say how long the controlling force of an objection would linger.

If an objection by one occupant prevails in his absence over a co-occupant's consent, other questions would have to be addressed as well. For example, "[w]hat circumstances (if any) operate to reinstate a co-occupant's authority to consent to a search?" *Henderson*, 536 F.3d at 784. "Must a suspect expressly indicate that he has changed his mind in the future, or

may that be assessed from the totality of the circumstances?" *United States* v. *Shrader*, 675 F.3d 300, 307 (4th Cir.), cert. denied, 133 S. Ct. 757 (2012). What if the officers who seek the consent of a co-occupant are not the ones who earlier sought consent from the defendant and heard his objection? Would an earlier group of officers have a Fourth Amendment obligation to convey that fact to a later group? In addition, "[m]ay an occupant arrested or interviewed away from the home preemptively object to a police request to search and effectively disable his co-occupants from consenting even in his absence?" *Henderson*, 536 F.3d at 784.

Existing Fourth Amendment principles would not provide ready answers to such questions. The need to answer them would thus produce an outpouring of fine-spun and likely conflicting judicial decisions on suppression motions, leaving officers without clear guidance as to when—or if—they can ask another occupant for consent to search following the objection of one occupant. Cf. *New York* v. *Belton*, 453 U.S. 454, 458 (1981) ("A single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.") (alteration and citation omitted).

The resulting confusion would wholly undermine *Randolph*'s stated goal of adhering to "the simple clarity of complementary rules." 547 U.S. at 121; see *State* v. *Martin*, 800 N.W.2d 858, 861 (Wis. 2011) ("[T]he 'simple clarity' of [the] rules [in *Matlock* and *Randolph*] is lost if the requirement that the resident is 'physically present' is not actually applied."), cert. denied, 132 S. Ct. 1003 (2012); see also *Shrader*,

675 F.3d at 307-308 ("[Petitioner's] interpretation of *Randolph* would involve courts in such questions, diverting attention from the basic social expectations that underlie not only the opinion in *Randolph*, but the larger corpus of Fourth Amendment jurisprudence.").

2. Petitioner makes his own administrability arguments, suggesting (Br. 24-25) that allowing an occupant's objection to trump a co-occupant's consent only so long as the objector remains physically present would invite the police to seek consent from a co-occupant after the objector had moved to another part of the house. That concern is unfounded. *Randolph* plainly contemplates that when an occupant on the scene has voiced an objection to a search, that objection will trump a co-occupant's consent so long as the objecting occupant remains on the premises.

Petitioner separately professes concern that the police might wait until the objector voluntarily leaves the premises before seeking a co-occupant's consent, thus making a "mockery of *Randolph*" (Br. 9). But the permissibility of soliciting consent under those circumstances is the necessary result of the "formalism" deliberately adopted by *Randolph*. 547 U.S. at 121. The Court there made clear that "the potential objector, nearby but not invited to take part in the threshold colloquy loses out," *ibid.*, and that result was a logical consequence of preserving the rule that each co-occupant can consent to search in her own right. That rule would dictate the result in petitioner's hypothetical as well. When the objecting occupant is no longer present, a search conducted pursuant to a co-occupant's consent does not intrude on the objector's right to experience privacy in his home free

from the presence of unwanted guests. At the same time, permitting a search under such circumstances recognizes the separate interests of the remaining resident in authorizing entry into her home.

D. That It Is The Police Who Remove The Objector From The Scene Does Not Invalidate A Co-Occupant's Subsequent Consent

Petitioner alternatively argues (Br. 19-20) that even if, as a general matter, the police can return to a residence after the objecting occupant is no longer present and obtain consent to enter from a co-occupant, they may not validly obtain such consent when they have created the objector's absence by arresting him. Petitioner is mistaken.

In *Randolph*, the Court explicitly preserved the rule that a "co-tenant's permission" would be dispositive "when there is no fellow occupant on hand" but qualified that statement as follows: "[s]o long as there is no evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection." 547 U.S. at 121. That qualification was dictum; the defendant in *Randolph* had not been removed and, as the Court repeatedly emphasized, was physically present and objecting. Nor do the facts of this case implicate the *Randolph* dictum. Petitioner has not alleged that the police removed him from the scene for the purpose of vitiating his previous objection to search.

In any event, the statement in *Randolph* about police removal is best understood as reserving the possibility that if the police remove an objecting occupant from the residence for the purpose of avoiding an objection, but have no objective justification for doing so, consent obtained from another tenant in his ab-

sence will not be valid. A contrary reading of the *Randolph* dictum making the officers' subjective intent dispositive would conflict with settled Fourth Amendment law.

As petitioner himself acknowledges (Br. 25), this Court has long "been unwilling to entertain Fourth Amendment challenges based on the actual motivations of individual officers." *Whren* v. *United States*, 517 U.S. 806, 813 (1996). The Court thus has "repeatedly rejected" Fourth Amendment tests that turn on a police officer's subjective intent. *Kentucky* v. *King*, 131 S. Ct. 1849, 1859 (2011).

No different rule should apply to searches conducted pursuant to an occupant's consent when an objecting co-occupant's absence was caused by his arrest. Where, as here, the police have probable cause to arrest the objecting occupant, no inquiry into their subjective motives is warranted. See *Shrader*, 675 F.3d at 307 (Because the police went to the house to execute a valid warrant for defendant's arrest, "his subsequent arrest and removal from the premises cannot be considered a pretext for later seeking consent from his aunt.").[6] And when the objector is absent, whether the absence is caused by a legal arrest or some other reason, he is "subject to the assumption tenants usually make about their common authority when they share quarters," *i.e.*, that "any one of them may admit visitors, with the consequence that a guest obnoxious to one may nevertheless be admitted in his absence by another." *Randolph*, 547 U.S. at 111.

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[6] In this case, the police had two independent bases for arresting petitioner: the evidence of his battery of Rojas and the robbery victim's identification. See p. 3, *supra*.

Petitioner asserts (Br. 19) that by forcibly removing him from the home, the police prevented him "from taking any unilateral steps that a person might typically take in this situation to protect the privacy of his belongings—for example, locking up personal items, removing them from the premises, or even moving out and finding a new place to live." But the police never prevented petitioner from taking these precautionary steps to protect his privacy interests. The police did not cause petitioner to enter into a living arrangement in which Rojas could admit visitors or consent to a search of the common areas, and they did not prevent him from extricating himself from that arrangement if he no longer wished Rojas to have such authority. Nor was it police conduct that gave rise to probable cause for an arrest and to the need to remove him from the scene of domestic violence. Petitioner produced those justifications on his own.

Petitioner's argument, moreover, rests on the mistaken assumption that, by arresting him, the police *unfairly* deprived him of advance notice he needed to thwart the search. The Fourth Amendment is not designed to protect an individual's ability to remove or destroy evidence or contraband. See *Segura* v. *United States*, 468 U.S. 796, 815-816 (1984) (rejecting argument that illegal entry was "'but for' causes of the discovery of the evidence in that, had the agents not entered the apartment," the defendants "could have removed or destroyed the evidence" on the ground that exclusionary rule should not be "extend[ed]" to "further 'protect' criminal activity").

E. The Possibility Of Alternative Means Of Obtaining Evidence Does Not Undermine Legitimate Third Party Consent

Petitioner (Br. 14, 30-31) argues that, given "the Fourth Amendment's traditional hostility to police entry of a house without a warrant," and given the availability to the police of less intrusive means to acquire the evidence in question, it was unreasonable for the police to have sought Rojas's consent knowing that petitioner had effectively objected to a search. Thus, both petitioner (Br. 30-31) and NACDL (Br. 24-30) assert that, because the probable cause that supported petitioner's arrest also provided grounds to obtain a warrant, the police should have been required to do so.

That suggestion provides no basis for a Fourth Amendment rule precluding a consent search. As an initial matter, when the police seek a co-occupant's consent in the absence of the objector, the objector's absence will not always be explained by his arrest. The police thus may not have the requisite probable cause to obtain a warrant. In that case, a consent search may be the only means available to bring an investigation to a successful close.

More fundamentally, this Court has explained that "[t]here are many entirely proper reasons why police may not want to seek a search warrant as soon as the bare minimum of evidence needed to establish probable cause is acquired." *King*, 131 S. Ct. at 1860. For example, "the police may want to ask an occupant of the premises for consent to search because doing so is simpler, faster, and less burdensome than applying for a warrant." *Ibid.* Moreover, if police conduct a consent search that "proves fruitless," they may decide

that "a far more extensive search pursuant to a warrant is not justified." *Schneckloth*, 412 U.S. at 228. A consent search, in short, "may result in considerably less inconvenience for the subject of the search." *Ibid.*

Petitioner further urges (Br. 20-23) that, even absent the probable cause necessary to obtain a warrant, the police may have other alternatives to obtain evidence. One option, he suggests, would be for the police to talk to the arrestee and try anew for his consent. Another would be for the police to enlist a cooperative co-tenant to speak to the objector to facilitate agreement. Or, he posits, the non-objecting tenant might be willing either to share information that would enable the police to obtain a warrant, or to deliver evidence directly to the police.

Defendants "engaged in *post hoc* evaluation of police conduct can almost always imagine some alternative means by which the objectives of the police might have been accomplished." *United States* v. *Sharpe*, 470 U.S. 675, 686-687 (1985). But this Court "has 'repeatedly refused to declare that only the 'least intrusive' search practicable can be reasonable under the Fourth Amendment.'" *City of Ontario* v. *Quon*, 130 S. Ct. 2619, 2632 (2010) (quoting *Vernonia Sch. Dist. 47J* v. *Acton*, 515 U.S. 646, 663 (1995)). Such a rule, the Court has explained, "would unduly hamper the police's ability to make swift, on-the-spot decisions * * * and it would require courts to indulge in unrealistic second-guessing." *United States* v. *Sokolow*, 490 U.S. 1, 11 (1989) (internal quotation marks and citation omitted). Indeed, "[t]he logic of such elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers." *United*

States v. *Martinez-Fuerte*, 428 U.S. 543, 557 n.12 (1976); see *Quon*, 130 S. Ct. at 2632.

Moreover, petitioner's argument proceeds from the premise that a consent search conducted over the objection of an absent tenant should be discouraged. The Fourth Amendment recognizes the profound interests in privacy centering on an individual's home. See, *e.g.*, *Florida* v. *Jardines*, 133 S. Ct. 1409, 1414 (2013); *Randolph*, 547 U.S. at 109. But the Fourth Amendment does not erect a barrier against an entry into a home with the consent of an occupant. Rather, seeking consent—even third-party consent—"is a constitutionally permissible and wholly legitimate aspect of effective police activity." *Schneckloth*, 412 U.S. at 228; see *Henderson*, 536 F.3d at 785 ("[C]onsent searches are in no general sense constitutionally disfavored."). Nothing in the Fourth Amendment is designed to discourage citizens from consenting to searches to aid in the apprehension of criminals. "Rather," as the Court in *Schneckloth* observed, "the community has a real interest in encouraging consent, for the resulting search may yield necessary evidence for the solution and prosecution of crime, evidence that may insure that a wholly innocent person is not wrongly charged with a criminal offense." 412 U.S. at 243.

CONCLUSION

The judgment of the California Court of Appeal should be affirmed.

Respectfully submitted.

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