No. 12-7822

IN THE

Supreme Court of the United States

WALTER FERNANDEZ,
Petitioner,

v.

CALIFORNIA,
Respondent.

On Writ of Certiorari
to the California Court of Appeal,
Second District

BRIEF FOR PETITIONER

Jeffrey L. Fisher
Pamela S. Karlan
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Kevin K. Russell
GOLDSTEIN & RUSSELL,
P.C.
5225 Wisconsin Ave., NW
Suite 404
Washington, DC 20036

Gerald P. Peters
Counsel of Record
LAW OFFICE OF GERALD
PHILIP PETERS
P.O. Box 6759
Thousand Oaks, CA 91359
(818) 706-1278
gerald.peters@gmail.com

QUESTION PRESENTED

Once a co-tenant has expressly told police officers that they may not enter his home, does the Fourth Amendment allow the officers to obtain valid consent to do so by removing the objecting tenant from the scene against his will and then seeking permission from the other tenant shortly thereafter?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provision

Statutes

BRIEF FOR PETITIONER

Petitioner Walter Fernandez respectfully requests that this Court reverse the judgment of the California Court of Appeal, Second District.

OPINIONS BELOW

The opinion of the California Court of Appeal (J.A. 2-51) is published in relevant part at 208 Cal. App. 4th 100, 145 Cal. Rptr. 3d 151 (2012). The relevant order and oral explanation of the trial court (J.A. 150-52) is unpublished.

JURISDICTION

The opinion of the California Court of Appeal was issued on August 1, 2012. J.A. 2. The California Supreme Court denied petitioner's timely filed petition for review on October 31, 2012. J.A. 51. Petitioner filed a timely petition for a writ of certiorari on December 17, 2012, which this Court granted on May 20, 2013. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISION

The Fourth Amendment to 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, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

In *Georgia v. Randolph*, 547 U.S. 103 (2006), this Court held that "a physically present inhabitant's express refusal of consent to a police search [of his home] is dispositive as to him, regardless of the consent of a fellow occupant." *Id.* at 122-23. The question presented in this case is whether the same holds true when the police forcibly remove an objector from the scene before seeking permission to search from the fellow occupant. The California Court of Appeal held that *Randolph* does not apply in this situation – reasoning that the once the police elect to remove an objector against his will, they nullify the legal effect of his invocation of his constitutional right to privacy in his home.

1. One morning in 2009, Abel Lopez was robbed, cut with a knife, and then assaulted on a street corner in Los Angeles. The lead assailant was a man with light skin, a grey sweater, and a tattoo on his bald head. When this assailant confronted Lopez, he told Lopez that he was in his territory and that "D.F.S. rules here." J.A. 5. He then cut Lopez's wrist and, after being joined by three or four other men, knocked Lopez to the ground and hit and kicked him.

A police dispatcher summoned two officers to the scene, indicating a possible gang-related assault. The officers made their way to an alley where they knew that D.F.S., or "Drifters," gang members sometimes gathered. A person told the officers, "He's in there. He's in the apartment." J.A. 6. Immediately thereafter, the officers saw someone with a blue t-shirt run through the alley and into the apartment (one of several within a house), where the witness had been pointing. A moment later, the

officers heard sounds of yelling and fighting coming from within the apartment.

The two officers, along with three others who had arrived as backup, proceeded to knock on the door of the apartment, which was the domicile of petitioner, his girlfriend (Roxanne Rojas), the couple's two-month-old daughter, and Rojas's four-year old son. Rojas answered the door. She was holding the baby and crying. She had fresh bump on her nose, as well as some blood on her hand and shirt. In response to the officers' questions, Rojas explained that she had been in a fight.

Just as the officers asked Rojas to step outside so that they could continue their investigation, petitioner – who had a shaved head with a tattoo – stepped forward inside the kitchen. Dressed only in boxer shorts and sweating, he said, "You don't have any right to come in here. I know my rights." The officers then took a few steps into the home and physically "removed [petitioner] from the residence and took him into custody." J.A. 6. The officers led petitioner to the rear of the house, formally arrested him, and then hauled him down the stairs. Meanwhile, other officers conducted a protective sweep of the apartment and confirmed that no one else was there.

After removing petitioner from his residence, the police took him to participate in a field showup with Lopez, the robbery victim. Lopez identified him as the lead assailant. One of the officers then took petitioner to the stationhouse for booking.

Meanwhile, two officers returned to petitioner's apartment. About one hour had passed since petitioner's arrest, J.A. 81, and Rojas and the

children were still there. The officers separated Rojas and her son and began asking each about the altercation that had transpired in the apartment earlier. The officers also asked whether petitioner was affiliated with the Drifters. When Rojas objected to her son being questioned separately, one officer rebuffed the complaint, telling her that their investigation was "going to determine whether or not we take your kids from you right now or not." J.A. 93. Rojas then dropped the issue.

The four-year-old told the police that when petitioner had returned home earlier that day, he had fought with Rojas and hit her. According to the police, Rojas told them the same thing. 3 R.T. (Reporter's Transcript of Proceedings) 1335. Rojas testified at trial, however, that petitioner had never hit her. 3 R.T. 1272. Rather, she said that she had obtained her injuries during an earlier confrontation with a woman named Vanessa – an altercation that arose over Vanessa's flirting with petitioner. 3 R.T. 1258-62, 1287.

About 20-30 minutes into the police's questioning of Rojas, an officer "pulled out a paper for [her] to sign." J.A. 99. The paper was a consent-to-search form. According to Rojas, the officer "said we need you to sign this paper right here because, if not, if you don't give us consent, he said we could get a judge to do a search" – "to sign for a search." J.A. 100. Rojas "didn't want to sign" the form, but she did so anyway. *Id.* As she later explained, "I just wanted it to just end so I signed it." *Id.*

The officers then searched the apartment for a few hours. J.A. 94. They never sought or obtained a warrant. Among other things, the officers found and

seized a shotgun and ammunition; a knife allegedly used in the robbery; a grey sweater petitioner allegedly was wearing at the time of the robbery; a light blue shirt like the one the police had seen on a suspect running near the crime scene; and other clothing allegedly indicative of gang membership.

2. The State charged petitioner with second degree robbery; corporal injury on a child's parent; and three counts of illegally possessing firearms and ammunition. Petitioner responded by moving to suppress the evidence the police obtained during their warrantless search of his apartment.

The trial court held an evidentiary hearing and then denied the motion. Finding Rojas's testimony "believable at points and unbelievable at other points," the court ruled that it was "enough" to validate the search that she signed the consent-to-search form after petitioner had been arrested and removed from that scene. J.A. 152. The court continued: "She may have felt pressured, but pressure does not equal duress or coercion. She felt as pressured as anyone with a cop standing in your kitchen are [sic] going to feel, but that's not against the law to constitute duress." *Id.* The trial court never mentioned the fact that petitioner had equal property rights in the dwelling and had expressly objected to any warrantless search of his home.

A few months later, petitioner pleaded nolo contendere to the three firearms and ammunition charges, while effectively reserving his right to appeal the denial of his suppression motion as to

those claims.[1] After a trial on the remaining charges at which the prosecution introduced the knife, sweater, shirt, and allegedly gang-related clothing against petitioner, a jury found him guilty of the robbery and inflicting corporal injury. The jury also found that petitioner had used a deadly weapon while committing the robbery and committed that crime for the benefit of, or in association with, a criminal street gang. In light of these special findings, the court sentenced petitioner to fourteen years in prison on the robbery count. The court also imposed a three-year sentence for the corporal injury conviction and a two-year sentence for the firearms and ammunition convictions, both to run concurrently with the robbery sentence. J.A. 15.

3. The California Court of Appeal affirmed the robbery, firearms, and ammunition convictions. J.A. 50.[2]

---

[1] Under California law, a defendant "must 'be given the option of setting aside his plea'" if he shows on appeal that a trial court erred in declining to suppress relevant evidence obtained through an unconstitutional search. *People v. Galland*, 116 Cal. App. 4th 489, 495 (2004) (quoting *People v. LeBlanc*, 60 Cal. App. 4th 157, 169-70 (1997)). Obviously, the shotgun and ammunition that the police found during their search of petitioner's home were relevant to his conviction on the firearms and ammunition charges.

[2] The corporal injury conviction is now final as well. The Court of Appeal "conditionally reversed" that conviction and directed the trial court to review certain evidence in chambers to determine whether to reopen that count. J.A. 49. But on remand, the trial court ruled that the evidence did not warrant reopening the count. The court thus reinstated the conviction, *see* Minute Order Oct. 25, 2012, and petitioner did not appeal

As is relevant here, the Court of Appeal held that the trial court correctly refused to suppress the evidence seized during the warrantless search of petitioner's home. The Court of Appeal noted that under *Georgia v. Randolph*, 547 U.S. 103 (2006), the police cannot obtain valid permission from a co-occupant of a house to enter without a warrant when another co-occupant is physically present at the scene and expressly refuses to consent. And the Court of Appeal acknowledged that the Ninth Circuit has applied *Randolph* to hold that the police likewise cannot obtain valid consent to conduct a warrantless search of a home when, as here, a physically present resident refused to consent but the police arrested and removed him from the scene before asking another resident for consent. J.A. 22 (citing *United States v. Murphy*, 516 F.3d 1117 (9th Cir. 2008)). But the Court of Appeal sided with other federal courts that have held that physical presence is "determinative" under *Randolph,* even when the police have removed a previously present objector from the residence against his will. J.A. 31-32. Under this supposedly "clear" and "simple" rule, once the police take an objector away from his home, his refusal of consent becomes meaningless and the police may obtain valid consent from another resident with no greater authority over the premises. J.A. 32.

4. Petitioner sought discretionary review in the California Supreme Court, renewing his Fourth

---

that order. Thus, all that remains in this litigation is the federal question this Court has granted certiorari in order to resolve.

Amendment claim. That court denied review without comment. J.A. 51.

5. This Court granted certiorari. 133 S. Ct. 2388 (2013).

SUMMARY OF ARGUMENT

Where, as here, a physically present resident of a home expressly objects to the police entering his dwelling, the police do not nullify the legal effect of that objection by arresting and removing him from the scene.

I. At the moment petitioner told the police that they could not enter his home without a warrant, this Court's holding in *Georgia v. Randolph*, 547 U.S. 103 (2006), dictated that the police could not simply turn to his girlfriend to obtain valid permission to conduct a search for evidence. Petitioner had equal claim to authority over the property; he was physically present; and he was clearly and directly denying the police leave to enter his home.

Randolph equally dictates that the police did not obtain license to ignore petitioner's objection when they arrested and removed him from his home. *Randolph* instructs that once a physically present resident has put the police on notice that he objects to their entry, "a resolution must come through voluntary accommodation" between the objector and any cooperating cotenant, not through unilateral action by the cotenant. *Id.* at 114. That is, an objection triggering *Randolph* remains in effect until officers learn that *the objector* no longer wishes to keep the police out of his home. At the very least, this must be so where the police themselves are responsible for the objector's inability to remain

present and thus physically opposed to any warrantless entry. Any other rule would make a mockery of *Randolph.*

It also bears emphasis that – even more so than in *Randolph* – there is no need under these circumstances to strain consent law to ignore the defendant's timely objection to searching his home for evidence without a warrant. The factual basis for an arrest usually provides probable cause for a warrant to search the arrestee's house for evidence. The police can obtain warrants quickly (within hours or even minutes), and can remove residents from a house and seal it off while they do so. Alternatively, police officers unwilling or unable to obtain warrants can still obtain other kinds of helpful assistance from cooperating residents.

II. The California Court of Appeal nonetheless insisted, for two reasons, that a *Randolph* objection becomes meaningless once the objector is no longer physically present. Neither proffered justification for such a rule withstands scrutiny.

First, allowing a *Randolph* objection to retain legal force after an arrest and removal avoids administrative difficulties, rather than creating them. If the police procure a warrant, as they should in the vast majority of such situations, any objection is irrelevant. And even when the police do not to seek a warrant, all they have to do after receiving an objection is obtain assurance – either from the objector or any other tenant with apparent authority – that the objector no longer wishes to deny them entry. Officers and courts can easily manage this requirement.

By contrast, the Court's of Appeal's continuing presence test would raise vexing questions. It is anyone's guess, for example, whether someone remains "present" after asserting an objection if he excuses himself to take a phone call, or if he leaves that evening for five minutes to pick up take-out for dinner. What if, after a resident has asserted his objection, an officer asks him to step outside and into a squad car to talk things over, while another officer approaches a co-tenant in the doorway? Or what if police officers arrest and remove an objector with probable cause to do so, but really for the purpose of nullifying his objection? The Court of Appeal's mantra of "presence" offers no easy way to deal with such scenarios – even though Fourth Amendment doctrines are supposed to give officers clear directives and to minimize opportunities for manipulation.

Second, allowing a *Randolph* objection to retain legal force after an arrest and removal would not frustrate "the law enforcement prerogatives recognized by *Randolph*," J.A. 32. The *Randolph* doctrine is meant to separate scenarios where there is an "absence of reason to doubt" that one tenant's consent is good against the others from those scenarios in which the police should not assume that a consenting tenant speaks for his fellow residents. 547. U.S. at 112. When an occupant of a dwelling consents to a search and no one else is around, police may rely on that permission because "[t]here is no ready reason to believe" in many cases that tracking down and asking other residents whether they also consent would make a difference. *Id.* at 122. But where, as here, a resident with self-interest in objecting is in fact at the door and objects, the police clearly know that a tenant wishes to refuse them

entry into the dwelling. And that knowledge does not dissipate if the police arrest the objector (or otherwise reposition him away from his doorway). To the contrary, the police in these circumstances continue to have strong reason to believe that any subsequent invitation from another resident is "disputed," *id.* at 113, and that reality is dispositive here.

ARGUMENT

I. When A Person Objects To The Police Entering A Home He Shares With Another, The Police Do Not Negate The Legal Effect Of That Objection Simply By Arresting And Removing Him From The Scene.

At the moment petitioner told the police that they could not enter his home to search for evidence without a warrant, this Court's holding in *Georgia v. Randolph*, 547 U.S. 103 (2006), dictated that the police could not simply turn to his girlfriend to obtain valid permission to conduct such a search. And if this Court's precedent means anything, it likewise dictates that the police did not nullify the legal effect of petitioner's invocation of his constitutional right against a warrantless search of his home simply by arresting and removing him from the scene.

A. Petitioner's Refusal To Allow The Police To Enter Without A Warrant Triggered His Rights Under *Georgia v. Randolph*.

1. We begin with *Randolph*. In that case, a woman called the police after a domestic dispute. When officers arrived at her home, she told them that her husband (Randolph) was a cocaine user and that

"items of drug evidence" were in the house. 547 U.S. at 107. One officer then asked Randolph, who was also present, "for permission to search the house." *Id.* "[H]e unequivocally refused." *Id.* The officer immediately turned to his wife and asked her for consent to search. When she provided that consent, the officers entered without a warrant and found evidence later used to prosecute and convict Randolph of drug crimes.

This Court held that this search violated the Fourth Amendment because "a physically present inhabitant's express refusal of consent to a police search is dispositive as to him, regardless of the consent of a fellow occupant." *Id.* at 122-23. This Court based this holding on three primary rationales.

First, this Court emphasized the "special protection" the Fourth Amendment accords to the home "as the center of the private lives of our people." *Id.* at 115 (quoting *Minnesota v. Carter*, 525 U.S. 83, 99 (1998) (Kennedy, J. concurring)). "At the [Fourth] Amendment's 'very core' stands 'the right of a man to retreat into his own home and be free from unreasonable governmental intrusion.'" *Florida v. Jardines*, 133 S. Ct. 1409, 1414 (2013) (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)); *United States v. U.S. Dist. Court for the E.D. Mich.*, 407 U.S. 297, 313 (1972) ("physical entry of the home" is the "chief evil against which . . . the Fourth Amendment is directed"). Thus, it is an "ancient adage that a man's house is his castle [to the point that t]he poorest man may in his cottage bid defiance to all the forces of the Crown." *Randolph*, 547 U.S. at 115 (quoting *Miller v. United States*, 357 U.S. 301, 307 (1958)) (internal quotation marks omitted).

Second, this Court recognized "the great significance" that the Fourth Amendment gives to "widely shared social expectations." *Randolph*, 547 U.S. at 111; *see also Jardines*, 133 S. Ct. at 1416 (stressing importance of "background social norms"). And applying those expectations to the situation at hand, this Court explained 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.'" *Randolph*, 547 U.S. at 113.

This Court conceded when callers seek and obtain consent from a cotenant with authority to give it, social norms do not require the callers to take "affirmative steps" to test validity of that consent against other residents who are absent and have never spoken up. *Id.* at 122. People who share residences with others assume the risk 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." *Id.* at 111 (internal quotation marks omitted). Consequently, the police may rely on a cotenant's permission to search a shared home without asking another tenant asleep in a bedroom, *see Illinois v. Rodriguez*, 497 U.S. 177, 186 (1990), or in a nearby squad car, *see United States v. Matlock*, 415 U.S. 164, 169-71 (1974), whether they also consent.

But when, as in *Randolph* and here, a resident is present during "the threshold colloquy" with the police and objects to any warrantless entry, "the question [is] whether customary social understanding accords [a] consenting tenant authority powerful enough to prevail over the co-tenant's objection."

Randolph, 547 U.S. at 121. This Court concluded in *Randolph* that it does not. Once "a potential defendant with self-interest in objecting is in fact at the door and objects," the resolution of any disagreement between the residents on this score "must come through *voluntary accommodation*" between the cotenants. *Id.* at 114, 121 (emphasis added). That is, any consent under these circumstances must be a product of communication between the cotenants and include a voluntary decision on the part of the objector to allow the others' wishes to prevail. *Id.* at 114.

Third, this Court stressed in *Randolph* that law enforcement can generally achieve legitimate public safety objectives "without relying on a theory of consent that ignores an inhabitant's refusal to allow a warrantless search." *Id.* at 116. Police, for example, typically may obtain warrants to search the homes of suspected wrongdoers and can enter them without warrants (and without consent) when necessary to prevent the destruction of evidence or to quell domestic disturbances. *See, e.g.*, *Brigham City v. Stewart*, 547 U.S. 398, 403 (2006). And a cotenant "acting on his own initiative may be able to deliver evidence to the police" or otherwise provide helpful information. *Randolph*, 547 U.S. at 116. But "the Fourth Amendment's traditional hostility to police entry of a house without a warrant" renders a search unlawful when, as Justice Breyer put it, the police wished to search "solely for evidence"; they "did not justify their search on grounds of possible evidence destruction"; a resident was "present and made his objection known clearly and directly to the officers seeking to enter the house"; and "the officers" faced with this objection "might easily have secured the

premises and sought a warrant permitting them to enter." *Id.* at 125-26 (concurring opinion).

2. When petitioner told the police that they could not enter his home, he stood in exactly the same position as the defendant in *Randolph*. Petitioner had equal claim to authority over the property; he was physically present; and he was clearly and directly denying the police leave to enter his home. To the extent the police believed that entry was necessary to quell a domestic disturbance, they had authority to enter (and, in fact, briefly did so) to address that concern. *See id.* at 118; J.A. 6. But pursuant to *Randolph*, petitioner's invocation of his constitutional rights during the "threshold colloquy" denied the police at that moment the authority to enter without a warrant "to search for evidence." 547 U.S. at 118, 121.

The only question in this case, therefore, is whether the police negated that legal effect of petitioner's express denial of consent when they arrested and removed him from the premises – thereby enabling them to return one hour later and obtain valid consent from his cotenant. We now turn to that question.

B. The Legal Import Of Petitioner's Objection Was Not Nullified By His Arrest And Removal From The Scene.

The California Court of Appeal held that when the police returned after arresting petitioner and removing him from the premises, they obtained valid consent from petitioner's girlfriend notwithstanding his earlier objection because he was no longer "present" to enforce his rights. J.A. 31-33. This holding is incompatible with *Randolph*. Not only did

petitioner's interest in the privacy of his home remain identical after his arrest to Randolph's, but the social norms governing petitioner's situation and the law enforcement interests at stake were indistinguishable as well. Indeed, allowing police to negate the legal effect of an objection that triggers *Randolph* by removing the objector from the premises would make a mockery of this Court's precedent.

1. A Person Who Is Removed From His Home Against His Will Retains The Same Privacy Interest In His Home As When He Was Present.

A person's interest in the privacy of belongings he keeps inside his home does not diminish when he is away from his dwelling. It is thus a basic postulate of Fourth Amendment law that even when the police take someone into custody, "no search of his house [can be] made without a search warrant" or valid consent. *Chimel v. California*, 395 U.S. 752, 767 (1969); *accord Shipley v. California*, 395 U.S. 818, 819-20 (1969) (per curiam). Accordingly, nothing about petitioner's arrest and removal from his home lessened the legitimacy or force of his interest "against the government's intrusion into his dwelling place." *Randolph*, 547 U.S. at 115.

2. The Same Customary Social Norms That Informed This Court's Decision In *Randolph* Would Have Caused A Caller Here To Doubt He Had Permission To Enter.

The social norms governing the police's return to petitioner's home did not differ in any meaningful way from those in play in *Randolph* either. When a homeowner has expressly denied a caller leave to enter his dwelling and the caller returns shortly thereafter, social norms do not give that caller confidence that he may rely solely on another resident's permission to enter. Rather, as this Court indicated in *Randolph* itself, a typical caller will continue to doubt that he genuinely has permission to enter unless and until he is assured that *the objector* no longer wishes to deny him entry. This is especially so where, as here, the caller himself created the objector's absence from the home before returning and seeking the other resident's consent.

a. Once a resident objects to a caller's entry, customary social norms give the caller reason to doubt he has permission to enter the dwelling until the caller obtains assurance, either directly from the objector or from the co-tenant, that the objector no longer seeks to keep the caller out of the house. This social understanding follows directly from *Randolph*'s holding that once a physically present occupant objects to a caller's entry, "a resolution must come through voluntary accommodation," 547 U.S. at 114 – that is, through a voluntary decision on the part of the objector to relent. That being so, the only way for a caller's initial hesitation in the face of an objection to his entry to dissipate is for the caller to obtain

assurance of one form or another that *the objector* has decided that he no longer insists on keeping caller out of the house.

This social understanding is particularly vital in the context of police-citizen interactions. "In a society based on law, the concept of agreement and consent [to police action] should be given a weight and dignity of its own. . . . 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." *United States v. Drayton*, 536 U.S. 194, 207 (2002). This reinforcement mechanism requires the police to afford dignity not only to affirmative agreements but also to *refusals* to consent (which might also be thought of as invocations of constitutional rights) as well. *Cf. Salinas v. Texas*, 133 S. Ct. 2174, 2179 (2013) (highlighting the importance of "express invocation[s]" of constitutional right against self-incrimination during interactions with police officers); *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981) (same regarding right to counsel). When the police attempt to circumvent such refusals, they undermine not just social norms, but also individual dignity and the rule of law. All the more so when the police take such steps within the very hour of an objection.

Petitioner's invocation of his rights is also what distinguishes this case from *Matlock*, where the police arrested and removed a person from his home before seeking consent to search from his cotenant, but the person never told the police he did not want them to enter his home. *See* 415 U.S. at 166. If a tenant never tells the police he does not want them to enter his house, he "assume[s] the risk" that other

tenants will allow them to look inside. *Id.* at 169-71. But when a person clearly and directly invokes his right to privacy in his home, he expressly notifies the police that they may not fairly impute any cotenant's consent to him without some reason to believe that he no longer objects to their entry.

b. Even if, as a general matter, a police officer returning shortly after a resident denied him entry could obtain valid consent simply by getting permission to enter from the other resident, surely social norms do not allow an officer to rely on such permission when the police themselves create the objector's absence. When the police arrest an objector or otherwise remove him from the scene, they are responsible for his inability to remain present and thus physically opposed to any warrantless entry.

Equally important, the police under these circumstances make it impossible for the arrestee to reach any "voluntary accommodation," *Randolph*, 547 U.S. at 114, with his co-tenant concerning the police's wishes to search his house. At least for some period of time, a person who has been forcibly removed from his home cannot communicate with his co-tenant to discuss whether to allow the police inside. Forced removal and continuing incapacitation also prevents an objector 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.

Put another way, a person such as petitioner whom the police have arrested and removed from his home after he has unequivocally asserted his Fourth

Amendment rights cannot possibly be said to have voluntarily "assumed the risk" that the other co-tenant, despite his wishes, would allow the police to enter and rummage through his private belongings. *Matlock*, 415 U.S. at 171. "He has not assumed the risk that his co-tenant may subsequently admit the visitor, because all choice has been taken away from him in his involuntary removal from the premises." *United States v. Henderson*, 536 F.3d 776, 787-88 (7th Cir. 2008) (Rovner, J., dissenting); *see also Ginsberg v. New York*, 390 U.S. 629, 649 (1968) (Stewart, J., concurring in result) ("The Constitution guarantees . . . a society of free choice. . . . Such a society presupposes the capacity of its members to choose."). Accordingly, at least "where the police are responsible for the objecting tenant's removal from the premises, his objection ought to be treated as a continuing one" unless and until he changes his mind. *Henderson*, 536 F.3d at 787 (Rovner, J., dissenting).

3. Just As In *Randolph*, The Police In These Circumstances Had Alternative Means To Achieve Any Legitimate Public Safety Objectives.

Just as in *Randolph*, there is no need under the circumstances here to strain consent law ignore the defendant's timely objection to searching his home for evidence without a warrant. Indeed, even more so than in *Randolph*, other Fourth Amendment doctrines ensure here that the police can meet any legitimate public safety objectives.

In most instances in which police arrest someone, it will be easy for them to obtain a warrant to search the arrestee's home, thereby rendering any

objection from the arrestee's irrelevant. (This, of course, is how police officers already customarily proceed whenever they arrest someone who lives alone.) That is because the same "probable cause" that allows a person's arrest, *see Devenpeck v. Alford*, 543 U.S. 146, 152 (2004), usually provides "probable cause" for the police to get a warrant to search the arrestee's house for evidence, U.S. Const. amend IV. A warrant, therefore, was almost certainly attainable here and would have obviated any need for consent.

It might sometimes take longer to obtain a warrant than consent from a remaining homeowner, but that is no matter. Once the police have arrested and removed a suspect from his home, the risk that remaining residents will seek to conceal or destroy evidence while the officers procure a warrant is minimal. It is much more likely that remaining residents will steer the straight and narrow "to deflect suspicion raised by sharing quarters with a criminal," or simply to carry out their civic and legal duties to avoid interference with police investigations. *Randolph*, 547 U.S. at 116.

But if time is of the essence because the police fear that remaining occupants may seek to conceal or to destroy evidence, the police have numerous tools at their disposal. For one thing, warrants are available nowadays not only through traditional methods but also "remotely through various means, including telephonic or radio communication, electronic communication such as e-mail, and video conferencing." *Missouri v. McNeely*, 133 S. Ct. 1552, 1562 (2013). Hence, as this Court observed last Term, police can obtain warrants quite expeditiously

– when necessary, within hours or even minutes. *See id.* at 1561-62, 1567 n.11. Furthermore, under *Illinois v. McArthur*, 531 U.S. 326, 331 (2001), the police can seal off the premises (that is, take all occupants outside and refuse to let anyone else in) while they wait for the warrant to issue. Lastly, if the police – notwithstanding all of these available steps – need to enter a home immediately in order "to prevent the imminent destruction of evidence," the exigent circumstances doctrine allows them to do so without seeking any warrant at all (or obtaining homeowner consent). *Brigham City v. Stewart*, 547 U.S. 398, 403 (2006); *accord Kentucky v. King*, 131 S. Ct. 1849, 1856-57 (2011). The same is true if the police need "to render emergency assistance to an injured occupant or to protect an occupant from imminent injury." *Brigham City*, 547 U.S. at 403.

Even when police officers lack probable cause (and exigent circumstances are not present), law enforcement officers *still* have ample means, besides relying on disputed consent, to further legitimate interests. The police, for instance, can ask a non-objecting co-tenant to "tell the police what he knows, for use before a magistrate in getting a warrant." *Randolph*, 547 U.S. at 116. In addition, "[t]he co-tenant acting on his own initiative may be able to deliver evidence [directly] to the police." *Id.*; *see also Coolidge v. New Hampshire*, 403 U.S. 443, 487-89 (1971) (suspect's wife retrieved his guns from the couple's house and turned them over to the police).

All of these alternative avenues leave the question presented here making a difference only where the police have arrested someone but (i) they do *not* have probable cause to believe any evidence is

inside the house; (ii) there are *no* safety or medical considerations warranting immediate entry; and (iii) *no* remaining residents give any reason to believe that the house contains any evidence of criminality. That is exactly when an objector's right to exclude the police from his most private spaces is at its zenith and government's "need for such searches," *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973), is at its nadir. It thus is perfectly natural that the individual right to privacy would prevail here.

4. Allowing Involuntary Removals To Negate Objections To Police Entry Would Make A Mockery Of *Randolph*.

The California Court of Appeal's holding that an objector's continued presence is "indispensible" to preserving his right to prevent warrantless searches of his home, J.A. 33, would drain *Randolph* of genuine meaning or effect.

a. In *Randolph*, this Court acknowledged that there is some "formalism" involved in distinguishing between (i) a resident's acquiescence to a warrantless entry and search when no one else is present and (ii) a resident's acquiescence while another resident is present and objecting to such police action. 547 U.S. at 122. But this formalism has real substance behind it. When the only person the police ask for consent readily gives it and no one else is around, "[t]here is no ready reason to believe that efforts [to track down absent residents] to invite a refusal would make a difference in many cases." *Id.* By contrast, when "a potential defendant with self-interest in objecting is in fact at the door and objects" to a police request to enter, the police know that they are not welcome in

the dwelling. *Id.* at 121. In other words, the *Randolph* doctrine is meant to separate scenarios where there is an "absence of reason to doubt" that one tenant speaks for the others when he consents from those scenarios in which the police have good reason to doubt that the consenting tenant does so. *Id.* at 112.

The California Court of Appeal's exclusive focus on an objector's continued presence turns a blind eye to this distinction. Under a rule requiring continuing presence, the police presumably could return and get valid consent from an acquiescing resident as soon as the objector leaves to go to work or to pick up take-out for dinner. Indeed, the police could go sit in their squad car by the curb and – instead of phoning in for a warrant – simply wait for the objector to go upstairs to go to bed or to take a shower. No serious argument could be made under any of these scenarios that the police, upon returning to the front door, could think that the resident's objection had dissipated and that the remaining resident was speaking for both tenants. Yet through just a little bit of gamesmanship the police would be able to eviscerate the impact of any *Randolph* objection.

Worse yet, whenever, as here, the police have grounds to arrest and remove tenant, the Court of Appeal's continuous presence rule would not even require the police to leave the doorstep in order to cancel out an objection to their entry. The same would be true whenever the police merely have grounds (as they nearly always do) to physically reposition an objecting tenant away from the doorway, in order to exert "unquestioned command" over the investigative situation, *Michigan v.*

Summers, 452 U.S. 692, 703 (1981); *see also Maryland v. Wilson*, 519 U.S. 408, 414-15 (1997). Even if the police were to arrest or reposition an objector solely in order to enable a warrantless search of his home, the resulting search would presumably be valid so long as the officers had legal authority to detain the objector and a co-tenant consented after the arrest.

To be sure, this Court suggested in *Randolph* that the Fourth Amendment might not tolerate the police's "remov[ing] the potentially objecting tenant from the entrance for the sake of avoiding a possible objection." 547 U.S. at 121. But even if such motivation would void a tenant's subsequent consent when the police lacked any valid reason to take the cotenant into custody, this Court has consistently shunned such "subjective" inquiries whenever, as here, objectively legitimate grounds exist to detain someone. *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004) (arrest); *see also Whren v. United States*, 517 U.S. 806, 813 (1996) (temporary detention); *see generally King*, 131 S. Ct. at 1859 (subjective inquiries into police motivations are "fundamentally inconsistent with our Fourth Amendment jurisprudence"). This precedent strongly suggests – and the State has not thus far denied – that anytime the police have grounds to arrest (or otherwise remove) an objector, the Court of Appeal's rule would allow the police purposely to render the objector's prior assertion of his *Randolph* rights meaningless. Surely this Court's decisions – not to mention a person's express invocation of his constitutional rights – are entitled to more respect and practical import than that. *Cf. Missouri v. Seibert*, 542 U.S. 600 (2004) (invalidating police practice devised for

the purpose of circumventing the requirements of *Miranda*).

II. Neither Of The California Court Of Appeal's Reasons For Holding That *Randolph* Objections Are Extinguished Upon Arrest And Removal Has Merit.

The California Court of Appeal resisted crediting petitioner's express invocation of his constitutional rights in this case – opting instead to hold that *Randolph* ceases to apply once an objector is no longer "present" – for two reasons. First, the Court of Appeal opined that allowing *Randolph* objections to retain legal force after arrests and removals would pose administrative difficulties, while asserting that the rule it adopted "is a clear one" that hinges on the "simple" concept of "presence." J.A. 32 (internal quotation marks and citation omitted). Second, the Court of Appeal asserted that dispensing with presence as a requirement for enforcing one's *Randolph* rights would "permit[] a one-time objection by one cotenant to permanently disable the other [cotenant] from *ever* validly consenting to a search of their shared premises." J.A. 33 (internal alterations in original; internal quotation marks and citation omitted). Neither of the Court of Appeal's contentions withstands scrutiny.

A. Allowing A *Randolph* Objection To Retain Legal Force After An Arrest And Removal Avoids Administrative Difficulties, Rather Than Creating Them.

The California Court of Appeal suggested that applying *Randolph* after an arrest and removal would pose practical difficulties because it would always

"requir[e] officers who have already secured the consent of a defendant's cotenant to also secure the consent of an absent defendant." J.A. 32-33. But this suggestion misunderstands petitioner's argument. Petitioner concedes – and this Court has already made clear – that officers need not take "affirmative steps" to confirm a resident's authority to consent to a search merely because the resident lives with others (even if one of those others is in custody in a nearby squad car). *Randolph*, 547 U.S. at 122; *see also Matlock*, 415 U.S. at 169-71. Rather, petitioner maintains merely that after a resident has *expressly refused* to give consent, then officers may not conduct a warrantless search of the dwelling for evidence without obtaining assurance from the objector or another resident that the objector no longer objects to a warrantless search of his home. In other words, petitioner seeks only to require the police to treat a refusal to consent with the dignity that social and constitutional norms require.

Such an obligation would be neither confusing nor difficult to abide. The police already regularly seek and obtain various kinds of waivers from suspects in custody, as well as from those whom they have released from custody. It thus would not be hard for officers to ask suspects who previously objected to warrantless searches of their homes to reconsider that stance or to memorialize such reversals when obtained. Alternatively, the police could simply ask any other resident whether the previous objector still wished to deny the police entry. If the consenting resident assured the police that the other one no longer objected, this Court's holding in *Rodriguez* dictates that the police could reasonably rely on that assurance to proceed. *See* 497 U.S. at

182 (officers may rely on representations from anyone whom they have a reasonable belief has authority to give them). In short, administering *Randolph* after arresting an objector turns on nothing more than applying rules that already govern police-citizen communication in numerous settings.

Implementing the California Court of Appeal's continuous presence rule, by contrast, would be neither "clear" nor "simple," J.A. 32. In particular, the meaning of the word "present" in this context is not readily apparent or easy to pin down. Does an objector remain "present" if he excuses himself after he has asserted his objection to use the restroom? To take a phone call? What if, after a resident has asserted his objection, he steps outside onto the front lawn to talk to one officer while another officer approaches a co-tenant in the doorway? The Court of Appeal's mantra of "presence" offers no easy way to deal with such questions, even though they are sure to arise with regularity and to require just the sort of "highly fact specific" assessments and "ad hoc determinations on the part of officers in the field and reviewing courts" that the police and courts typically detest in the context of the Fourth Amendment, *Thornton v. United States*, 541 U.S. 615, 623 (2004). *See also New York v. Belton*, 453 U.S. 454, 458 (1981) (eschewing rules that require "the drawing of subtle nuances and hairline distinctions" because they "may be literally impossible of application by the officer in the field") (internal quotation marks and citation omitted)).

Worse yet, the Court of Appeal's continuing presence requirement would be subject to easy manipulation. If, for example, a court made clear

that an objector's abandonment of the doorway in favor of his front lawn terminated his "presence," then police officers could defeat *Randolph* objections simply by asking objectors to have a chat outside in the yard or next to the squad car. Such tactics would do nothing to generate a higher degree of certainty that another resident's permission to enter would accord with the objector's wishes. To the contrary, police would almost certainly know that they were asking the other resident to do something that his cotenant did not want to allow. But under the Court of Appeal's rule, the police would have no reason to care. Through a little bit of stage direction, officers could always evade any legal effect of a person's objection to a warrantless search of his home.

None of this is to deny that the *Randolph* opinion emphasized the objector's presence in that case, "'repeatedly refer[ring] to an "express refusal of consent by *a physically present* resident."'" J.A. 25 (quoting *United States v. Hudspeth*, 518 F.3d 954, 960 (8th Cir. 2008) (quoting in turn *Randolph*, 547 U.S. at 120)) (emphasis added by Eighth Circuit). But that prerequisite was satisfied here; indeed, it is satisfied whenever the police go to someone's home and someone inside denies them consent to entry. The question here involves what follows from that physically present resident's denial. Must the police respect the objector's denial unless he changes his mind, or may the police ignore the denial once the objector is no longer technically "present"? The *Randolph* opinion dictates the former rule, instructing that once a tenant denies the police entry, "a resolution must come through voluntary accommodation" between the cotenants, not by unilateral consent from another tenant. 547 U.S. at

114. This directive both tracks social custom and avoids daunting administrability issues.

B. Allowing A *Randolph* Objection To Retain Legal Force After An Arrest And Removal Does Not Permanently Disable The Police From Ever Obtaining Valid Consent From A Co-Tenant.

As explained above, the facts giving rise to probable cause to arrest a suspect will usually provide grounds for obtaining a timely warrant to search the arrestee's dwelling, thus rendering immaterial any objection the arrestee or any other resident may have to the search. See supra at 20-21. Thus, identifying the circumstances under which the police may obtain valid consent from a non-objecting resident after arresting another resident who objected to a warrantless search is, for all practical purposes, a largely academic issue. Even so, the police still have numerous options apart from seeking a warrant.

For one thing, the police can talk to the arrestee after he has initially objected and seek his consent. Many people, even after being arrested, decide once they cool down that it is in their best interest to assist in police investigations. And if the arrestee consents, then the police can return to the residence and, with the permission of the other resident, conduct a search of the dwelling.

Alternatively, the police can seek to enlist the cooperative resident in their cause. By giving that resident an opportunity to speak with the objector, the police could enable the two residents to agree to allow the police to conduct a warrantless search.

Furthermore, as noted *supra* at 22, the non-objecting resident might also be willing to share information that makes it easier for the police to obtain a warrant, *see Randolph*, 547 U.S. at 116 – or that persuades them that they no longer want to search the home after all. Finally, the other resident "acting on his own initiative may be able to deliver evidence [directly] to the police." *Id.*

The only thing the police may *not* do is completely ignore an arrestee's objection to a warrantless search – treating it as nullified once officers have involuntarily removed him from the scene. The privacy the Fourth Amendment guarantees in the home, and the dignity our legal system affords to assertions of constitutional rights, demand that once a resident objects to police entering his dwelling, officers may not conduct a warrantless search for evidence unless they obtain a warrant or some sort of assurance that the resident no longer objects. Anything less would not only disserve constitutional values but flout this Court's precedent.

CONCLUSION

For the foregoing reasons, the judgment of the California Court of Appeal should be reversed.

Respectfully submitted,

Jeffrey L. Fisher
Pamela S. Karlan
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Kevin K. Russell
GOLDSTEIN & RUSSELL,
P.C.
5225 Wisconsin Ave., NW
Suite 404
Washington, DC 20036

Gerald P. Peters
Counsel of Record
LAW OFFICE OF GERALD
PHILIP PETERS
P.O. Box 6759
Thousand Oaks, CA 91359
(818) 706-1278
gerald.peters@gmail.com

July 31, 2013