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 Appellate District

RESPONDENT'S BRIEF ON THE MERITS

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QUESTION PRESENTED

Whether petitioner's objection to police entry into his shared apartment barred the police from later conducting a warrantless search of the apartment based on the consent of his cotenant obtained after petitioner had been removed from the premises for a domestic violence investigation and then lawfully arrested for a prior robbery.

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STATEMENT OF THE CASE

Petitioner Walter Fernandez was charged with: armed robbery of Abel Lopez; domestic abuse of petitioner's girlfriend and cotenant, Roxanne Rojas; and illegal possession of a firearm and ammunition. The armed robbery charge was based on evidence that petitioner, a member of the Drifters criminal street gang, approached Abel Lopez on the street, issued a gang challenge, and tried to stab him. When Lopez resisted, petitioner called to some accomplices, who helped him subdue and rob the unarmed victim. The domestic abuse and possession charges were based on police officers' observations at petitioner's apartment at the time of his initial detention and their later warrantless search of that apartment with Rojas's consent.

Prior to his trial, petitioner moved to suppress the evidence—a sawed-off shotgun, ammunition, and a knife—seized during the warrantless search of the apartment following his arrest.

1. The evidence at the suppression hearing showed the following: At 12:15 p.m. on October 12, 2009, police officer Joseph Cirrito and his partner, Detective Kelly Clark, received a radio call about an assault with a deadly weapon[1] in Los Angeles—the Lopez robbery. Because the radio call reported that one of the assailants was a suspected member of the

[1] The reported crime was later reclassified as a robbery. J.A. 60, 66.

Drifters gang and had a gang-related tattoo on the top of his head, the officers drove to petitioner's apartment building, a known location for the Drifters. They parked in the alley behind the building, approximately a quarter mile from the robbery site. Officer Cirrito saw a man run across the alley toward the building, and up the exterior back stairs, and then enter a second-floor apartment. J.A. 57-60, 62, 71, 118.

Officer Cirrito soon heard loud male and female voices yelling and screaming from the same second-floor apartment. He and Detective Clark waited for backup officers and then walked up the back staircase with several other officers. Officer Cirrito knocked on the door of the unit from which he had heard the yelling—the same apartment where he had seen the man run inside. J.A. 61-62, 74, 76, 118.

Roxanne Rojas, a woman in her twenties, opened the door, holding an infant. She appeared upset. The bridge of her nose and her forehead were swelling, she was out of breath, and her shirt and hand were smeared with fresh blood. J.A. 62-63, 79, 120.

Officer Cirrito and Detective Corona, one of the backup officers, spoke to Rojas at the doorway of the apartment. Officer Cirrito questioned her about the blood and the yelling and asked whether there was anyone else in the apartment. Rojas told him (falsely) that only she and her children were inside the apartment. J.A. 121.

Officer Cirrito, however, saw petitioner inside. Petitioner was sweaty and appeared "real angry." Petitioner yelled, "Get out. I know my rights. You can't come in." J.A. 63-64. From the loud yelling and screaming and the way Rojas looked, the officer believed that a battery or domestic violence incident between them had just taken place. The officer decided that it was important to separate them. He was also concerned that there might be someone else in the apartment. J.A. 64-65, 122.

In order to investigate the suspected domestic-violence incident, Officer Cirrito asked petitioner to step out of the apartment. Petitioner refused, saying, "I know my constitutional rights. You can't come in." J.A. 76-77. Officer Cirrito and Detective Corona entered the apartment, and took petitioner outside. With the help of another officer, they handcuffed petitioner and escorted him down the back stairwell to keep him apart from Rojas. Meanwhile, other officers conducted a protective sweep of the apartment. J.A. 124-25, 136. From Officer Cirrito's perspective, he was conducting a domestic violence investigation. J.A. 65-66, 77, 122.

But as petitioner walked down the stairs, Officer Cirrito saw a tattoo on the top of petitioner's head. It appeared to match the description of the tattoo of the reported assault/robbery suspect. J.A. 65, 134. After Officer Cirrito confirmed the robbery suspect's description with the officers at the robbery scene, the police transported Lopez to the alley behind the apartment building. They arrived ten to fifteen

minutes later. Lopez identified petitioner as the person who had robbed him. J.A. 65, 78. At that point, the police transported petitioner to the police station. J.A. 6, 66, 78, 80-82, 151.

Approximately an hour after the police had taken petitioner downstairs, Officer Cirrito returned to the apartment. J.A. 66, 81, 137. Rojas told him that she lived in the apartment with petitioner and her children. Detective Clark asked for and received Rojas's oral and written consent to search the apartment. J.A. 66-67, 129. He obtained this consent before interviewing her about the domestic violence incident. Police officers entered and searched the apartment. They recovered clothing, a knife, a sawed-off shotgun, and ammunition. J.A. 68.

In response to Rojas's suppression-hearing defense testimony that she did not want to sign the consent form, and that she had felt that the officers "pretty much" pressured her into consenting, J.A. 94, 100, Officer Cirrito stressed that when Rojas first opened the door he believed he had encountered an ongoing domestic violence incident. His thoughts were swirling "like a hurricane." He saw "a female with an infant" and "blood, swelling, the yelling, the possibility someone's in there. Is she just trying to blow me off, or is there somebody in there? Are there children? Is he holding a child hostage?" When Officer Cirrito saw petitioner approaching from the kitchen area, he became concerned for officer safety because petitioner was visibly angry. J.A. 122-23.

Officer Cirrito explained, further, that only two officers had stepped inside to remove petitioner and that petitioner was never taken down onto the ground, pushed, or dragged down the stairs. J.A. 124-25. In obtaining Rojas's consent, the officers did not threaten her in any way. J.A. 129. Two days later, during an interview with the police, Rojas explained that she did not want to be a "rat," and said that petitioner would be very upset if he knew she was talking to the police. J.A. 7, 131.

2. The trial court denied the suppression motion. It found that the police had acted reasonably in investigating a potential crime—domestic violence—when they knocked on the apartment door after hearing the sound of a serious verbal altercation. Their legitimate suspicions were confirmed when Rojas answered and the officers saw her injuries. When petitioner approached them in a hostile manner, the court observed, the police had further cause to investigate the domestic-violence incident and a legitimate basis to detain petitioner briefly for officer-safety reasons. Therefore, the court ruled, the initial detention and handcuffing of petitioner amounted to a valid investigatory stop pursuant to *Terry* v. *Ohio*, 392 U.S. 1 (1968). At that point, held the court, the officers properly and reasonably conducted a protective sweep for the purpose of officer safety—to determine whether any other dangerous person was in the apartment.

The court further ruled that, upon Officer Cirrito's observation that petitioner had a tattoo like

the one worn by the Lopez robbery suspect, there arose cause to detain petitioner further to conduct the field show-up. When Lopez identified petitioner as his assailant, it gave the officers probable cause to arrest him. J.A. 150-52.

As to the apartment search, the trial court found that Rojas had given the officers her valid, voluntary consent. Based on the court's observation of her demeanor and on her repeated statements that she had thought about consenting before she decided to sign the form, the court found that, despite feeling some pressure, Rojas had not been coerced. J.A. 152.

3. After the trial court denied the suppression motion, petitioner pleaded no contest to three counts of firearm and ammunition possession. Following a trial on the remaining two counts, the jury found petitioner guilty of inflicting corporal injury on Rojas and of the second-degree robbery of Lopez. The jury also returned two sentence-enhancing findings—that petitioner had used a knife in committing the robbery and that he had committed it for the benefit of a criminal street gang. The trial court sentenced petitioner to prison for a term of fourteen years. J.A. 3.

4. On appeal, petitioner contended, in part, that the search of his apartment in which the weapons were discovered had been unreasonable under *Georgia* v. *Randolph*, 547 U.S. 103 (2006), because, despite Rojas's consent, he had refused consent at the apartment. J.A. 16-17. The California Court of Appeal rejected the contention, holding that Rojas's consent

to search the apartment she shared with petitioner was valid and justified the officers' actions. As the court explained, petitioner's "absence from the home when Rojas consented to a search of the apartment is, we believe, determinative. *Randolph* did not overturn prior cases holding that a co-inhabitant may give effective consent to search a shared residence; to the contrary, the *Randolph* court explicitly affirmed the vitality of those cases." J.A. 31. Moreover, the appellate court reasoned that "requiring officers who have already secured the consent of a defendant's cotenant to also secure the consent of an absent defendant would similarly and needlessly limit the capacity of law enforcement to respond to 'ostensibly legitimate opportunities in the field.'" J.A. 32-33 (quoting *Randolph*, at 122).

The state appellate court further explained that its holding was consistent with those of a large majority of federal courts of appeals. And it rejected the holding and rationale of a contrary opinion from the Ninth Circuit Court of Appeals, *United States* v. *Murphy*, 516 F.3d 1117 (9th Cir. 2008). The state court reasoned that *Murphy* would anomalously "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,'" and opined that "such a rule 'extends *Randolph* too far.'" J.A. 33 (quoting *United States* v. *Henderson*, 536 F.3d 776, 783 (7th Cir. 2008)).

5. The California Supreme Court denied further direct review. J.A. 51. This Court granted certiorari. 133 S. Ct. 2388 (2013).

SUMMARY OF ARGUMENT

When the police search a home pursuant to the consent of an occupant with authority to grant it, the search is valid under the Fourth Amendment without regard to the prior objection of a co-occupant who is not present at the residence. Under this Court's Fourth Amendment jurisprudence, a defendant's privacy expectations in such an instance are not privileged over those of the co-occupant with whom he shares a dwelling space. Here, Rojas was a cotenant whose authority to admit visitors and consent to searches was equal to petitioner's, and she gave the police voluntary consent to search when petitioner was not present due to his lawful arrest. The police acted reasonably in relying on her consent to search the premises.

a. In seeking to justify a rule that would allow his prior objection to disable Rojas from exercising her right to consent to a search of the shared premises, petitioner overlooks the bedrock Fourth Amendment principle that consent enjoys favored status. Consent is not a narrowly drawn exception to the warrant requirement, but a favored means of satisfying the Fourth Amendment's core mission of protecting the security of citizens' privacy against arbitrary

police intrusions. Consent functions as a constitutional and legitimate aspect of law enforcement that replaces any need for a warrant and probable cause. Consensual searches serve the important societal interests of providing an effective means of obtaining reliable evidence and preventing innocent persons from being charged with criminal offenses—and they do so while preserving Fourth Amendment rights.

The Fourth Amendment does not confer greater rights upon persons, like petitioner, who are subject to criminal investigation, over persons, like Rojas, who have equal privacy interests in their own house. Inherent in shared living arrangements is the mutual understanding that in one's absence the other may admit visitors into shared spaces.

In this case, Rojas had equal authority over the premises she shared with petitioner, and they assumed the reciprocal risk that, in the other's absence, one would admit visitors unwelcome to the other. Petitioner, in failing to consider Rojas's interests, misapplies the Fourth Amendment and this Court's precedent to impose a prospective veto on a cotenant's freedom to consent to entry.

b. *Georgia* v. *Randolph* does not compel invalidation of the search in this case. The Court's opinion in that case was narrowly crafted to preserve the well-settled law of co-occupant consent, including the recognition in *United States* v. *Matlock*, 415 U.S. 164 (1974), that co-occupants assume the risk that a cotenant might permit a search of the shared premises.

Randolph reached a special and admittedly formalistic accommodation in which the normal efficacy of a co-occupant's consent is suspended only when the other tenant is present and objects. When equally situated tenants dispute a police entry, *Randolph* reasoned, neither property law nor widely accepted social expectations provided a final answer to the question of whose interest prevails. In that unique circumstance, the police may not rely on the consent of one occupant to search the shared premises because such an entry would risk escalating the verbal dispute into a violent confrontation and would entail a direct affront to the objector.

However, when the objecting co-occupant is not present—especially when his absence is due to a lawful arrest—the concerns animating *Randolph*'s holding disappear, and the general rule in favor of co-occupant consent comes to the fore. To extend *Randolph*'s formalistic exception to circumstances in which the objector is not even present would set up a broad rule vesting the objector with a continuing absolute veto. That would disregard the unique reason for *Randolph*'s limited formalism and contradict this Court's intention of preserving its holdings in *Matlock* and *Illinois* v. *Rodriguez*, 497 U.S. 177, 183-84 (1990).

c. Neither "social expectations" nor property law considerations support extending *Randolph*'s suspension of cotenant consent beyond the circumstance of present and actively disputing cotenants. Petitioner can point to no widely accepted social

understanding that an absent co-occupant's prior objection prevails against a present co-occupant's consent. Nor do property law considerations support recognition of the power in one tenant to preclude another from inviting the guests of his choice in the other's absence.

Those contrary societal expectations are especially strong where a resident has been subjected to domestic abuse. Allowing an abusive tenant's preemptive objection to limit, if not deprive, an abused cotenant of his or her right to consent to police entry creates intolerable risks. Rojas likely felt unable to request police assistance in petitioner's presence. But, once he had been lawfully removed, she retained her right to disassociate herself from petitioner's gang-related criminality and to seek removal of the illegal firearm and ammunition petitioner had secreted on the premises.

d. Nor may petitioner claim unlawful conduct of the police in removing him. The officers' decision to take petitioner into custody was a lawful and reasonable exercise of law-enforcement prerogatives; a reasonable arrest cannot be an unreasonable seizure under the Fourth Amendment.

Similarly, the potential availability of alternative means for obtaining the right to search, including applying for a search warrant, is irrelevant when the search is consensual. The Fourth Amendment does not mandate that the police may investigate only in

ways that pose the most minimal potential effect on a person's privacy.

A rule confirming the tenant's right to consent in the absence of a cotenant is straightforward and easy to apply. The question of whether a defendant was physically present when consent was sought will be clear.

ARGUMENT

A Tenant's Consent To Search Given When An Objecting Cotenant Is Absent Satisfies The Fourth Amendment

By petitioner's lights, this case presents the specter of the police ignoring his prior objection and insulting his personal autonomy by failing to obtain his consent before searching the apartment. His discussion scants the most crucial element—domestic-violence victim Rojas, a person with equal dignity under the Fourth Amendment and equal control over the premises, voluntarily consented when he was no longer present because he had been lawfully arrested for the Lopez robbery. Not only that but, when petitioner objected to police entry, the officers were legally entitled, if not obligated, to disregard it.

This Court's longstanding precedents consistently favor cotenant consent because it protects privacy and autonomy interests at the core of the Fourth Amendment. This Court's Fourth Amendment jurisprudence, consistent with traditional property law,

recognizes that a tenant such as Rojas has an equal right to admit visitors of her choice, while a cotenant such as petitioner assumes the risk that in his absence she might admit persons he considers unwelcome. Petitioner can point to no widely held "social expectations" that would prevent a visitor from accepting an invitation from an authorized tenant just because an absent cotenant had previously objected.

When Rojas chose to consent in petitioner's absence with knowledge of his prior objection, she exercised her autonomy in the manner favored by this Court: She protected and distanced herself and her children from petitioner's criminal activity, and chose to assist the police in conducting a criminal investigation.

A. This Court's Fourth Amendment jurisprudence favors consent by cotenants because it is consistent with reasonable privacy expectations, protects personal autonomy, and furthers legitimate law enforcement

By beginning his Fourth Amendment analysis *in medias res* with *Randolph*, petitioner fails to place the limited holding of that case within the broader doctrinal context of consensual searches. That context is essential for understanding and applying *Randolph* in the limited way it was intended. By its express rationale and internal logic, *Randolph* was not a repudiation of the Court's fundamental recognition

that consensual searches are wholly consistent with the protection of Fourth Amendment interests. It was, rather, a special accommodation for a unique situation—the presence of cotenants who are actively disputing whether to consent or to insist on a warrant. Petitioner's approach overlooks the longstanding authority favoring consent that *Randolph* was at pains to preserve. He thereby misreads *Randolph* as creating a bright-line rule that would forever bar a cotenant from consenting to the search of shared premises until a previously objecting cotenant deigns to give leave.

1. Consent searches have a favored Fourth Amendment status

Randolph was not created in a vacuum. Rather, it grew out of, and fit within, a traditional analytical framework that favors consensual searches, including those given by "third parties." Such consensual searches are favored because they not only comport with the Fourth Amendment's core value of protecting privacy, but do so in a manner respectful of the proper relationship between citizens and the police under the rule of law.

a. Here, the officers did not search the apartment until they had received the voluntary consent of an authorized tenant. "In a society based on law, the concept of agreement and consent should be given a weight and dignity of its own. Police officers act in full accord with the law when they ask citizens for

consent. 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. When this exchange takes place, it dispels inferences of coercion." *United States* v. *Drayton*, 536 U.S. 194, 207 (2002).

Consent stands as an alternative means of protecting "one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment [and] is basic to a free society." *Coolidge* v. *New Hampshire*, 403 U.S. 443, 453 (1971) (quoting *Wolf* v. *Colorado*, 338 U.S. 25, 27-28 (1949)); see also *Maryland* v. *King*, 133 S. Ct. 1958, 1969 (2013) ("[T]he Fourth Amendment's proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner."). When a citizen voluntarily authorizes the police to enter and search, there can be no arbitrary invasion of privacy.

"Consent 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, 231-32 (1973). "[T]here is nothing constitutionally suspect in a person's voluntarily allowing a search." *Id.* at 242-43. As *Schneckloth* explained, "[A] search authorized by a valid consent may be the only means of obtaining important and reliable evidence." *Id.* at 227. It follows that "to place artificial restrictions upon such searches

would jeopardize their basic validity." *Id.* at 229; see also Lafave, SEARCH & SEIZURE: A TREATISE ON THE FOURTH AMENDMENT (2012), Ch. 8.1 ("The practice of making searches by consent is not a disfavored one."). Indeed, consent has a favored status because "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." *Schneckloth*, 412 U.S. at 243.

b. Although sometimes referred to as an exception to the Fourth Amendment's warrant requirement, voluntary consent for a search effectively stands as an independent justification that renders a search reasonable and obviates the need for a warrant and probable cause. Once a person consents to a search, he authorizes the police entry for the requested purpose, which "may be precisely the same as if the police had obtained a warrant." *Schneckloth*, 412 U.S. at 243; see *Illinois* v. *Rodriguez*, 497 U.S. 177, 183-84 (1990) (cotenant consent is an element "that can make a search of a person's house 'reasonable.'"). *Randolph* itself also "recognize[d] the validity of searches with the voluntary consent of an individual possessing authority." 547 U.S. at 109; see also *Kentucky* v. *King*, 131 S. Ct. 1849, 1858 (2011).

2. Co-occupant consent is equally favored under the Fourth Amendment

a. For purposes of the Fourth Amendment, the right to consent broadly empowers all co-occupants with equal access to the subject premises. Far from being construed narrowly, consent "extends even to entries and searches with the permission of a co-occupant whom the police reasonably, but erroneously, believe to possess shared authority as an occupant." *Randolph*, 547 U.S. at 109 (citing *Illinois* v. *Rodriguez*, 497 U.S. at 186).

The Fourth Amendment's proscription against unreasonable warrantless home entries to search no longer obtains once consent is given by "the individual whose property is searched or from a third party who possesses common authority over the premises." *Rodriguez*, 497 U.S. at 181 (citation omitted).

b. Under the Court's consent doctrine, persons with equal privacy interests in shared premises have equal authority to give consent. That is, as between persons with equal privacy expectations in the searched premises, the co-occupant subject to criminal investigation has no priority in law. As this Court explained in *United States* v. *Matlock*, 415 U.S. 164 (1974), a consenting tenant acts not as the defendant/cotenant's agent, but instead exercises his or her own right to consent or to deny entry to search.

In justifying this "third-party consent" rule—it is really a "primary party consent" rule—*Matlock* drew on the established distinction between consent to

search under the Fourth Amendment and the waiver of constitutional trial rights. The constitutional protection against unreasonable searches, in contrast to trial rights, has no special application to criminal defendants; it applies equally to similarly situated cotenants. "[T]he voluntary consent of any joint occupant of a residence to search the premises jointly occupied is valid against the co-occupant" largely because "a consent search is fundamentally different in nature from the waiver of a trial right." *Matlock*, 415 U.S. at 169-71 (citing *Frazier* v. *Cupp*, 394 U.S. 731, 740 (1969), *Coolidge* v. *New Hampshire*, 403 U.S. at 487, and *Schneckloth*, 412 U.S. at 219). For purposes of consent to search, the prosecution "is not limited to proof that consent was given by the defendant, but may show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected." *Id.* at 171 (footnote omitted).

In petitioner's solipsistic analysis, Rojas's rights and interests are irrelevant and displaced by his own. But, as explained above, this Court's consent doctrine is not informed by an agency theory, whereby Rojas would be charged with exercising petitioner's Fourth Amendment rights on his behalf. Instead, the "common authority" that justifies such consent rests "on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the coinhabitants 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." *Matlock*, 415 U.S. at 171-72 n.7 (emphasis added).

In short, the nature of shared authority confers on each co-occupant a personal right to authorize consent, which presupposes a reciprocal assumption of risk. As *Randolph* itself acknowledges, 547 U.S. at 111, that risk reflects a co-occupant's diminished expectation of privacy that is integral to the "widely shared social expectations" that help determine whether a cotenant's consent is consistent with the Fourth Amendment.

3. The search was reasonable because Rojas, an authorized tenant, voluntarily consented to it

The Fourth Amendment predicates for valid cotenant consent were present here. Rojas had apparent and actual authority to admit visitors and consent to a search. She gave Officer Cirrito her name and "stated that she lived there with her boyfriend, [petitioner,] and her children." J.A. 66. "When someone comes to the door of a domestic dwelling with a baby at her hip, . . . she shows that she belongs there, and that fact standing alone is enough to tell a law enforcement officer or any other visitor that if she occupies the place along with others, she probably lives there subject to the assumption tenants usually make about their common authority when they share

quarters." *Randolph*, 547 U.S. at 111. Accordingly, petitioner would understand that she "may admit visitors, with the consequence that a guest obnoxious to [him] may nevertheless be admitted in his absence by [her]." *Id.*

Nor is there any question before this Court of whether Rojas gave her consent voluntarily.[2] By consenting to a search, she was not only able to distance herself from petitioner's criminality, but to protect herself, her infant, and her four-year-old son from the danger inherent in having a sawed-off shotgun and ammunition stored in the family dwelling.[3]

When petitioner and Rojas became joint occupants of the apartment, petitioner had assumed the risk that, when he was absent, she might exercise her authority as a co-occupant and admit visitors of her choice. By failing to consider Rojas's interests, petitioner overlooks the necessary implication of extending *Randolph* in the way he proposes—it would read the Fourth Amendment to impose a prospective veto on a cotenant's freedom to consent to (or refuse) entry.

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[2] In its amicus brief supporting petitioner, the National Association of Criminal Defense Lawyers (NACDL) relies extensively on the suppression motion testimony by Rojas (NACDL Br. 4, 14-15), without acknowledging that Officer Cirrito denied her allegations of improper pressure, and that the trial court found her consent was given voluntarily without police coercion. No dispute about the fact that Rojas voluntarily consented is properly before this Court.

[3] Indeed, the four year old was the person who showed the police where the sawed-off shotgun was located. J.A. 84.

Nothing in this Court's consent jurisprudence would justify such a veto.

B. *Randolph* recognized only a narrow departure from the general validity of cotenant consent in a unique circumstance

Petitioner over-reads *Randolph* as creating a rule whereby a co-occupant's objection to police entry carries prospective force such that his subsequent absence due to lawful arrest precludes a cotenant from consenting to a search of their shared living space. That is, even after his removal and arrest, his objection would continue to bar a search with a tenant's consent until he also personally chooses to consent. His argument misreads *Randolph* in a fundamental way. *Randolph*'s lead opinion, reinforced by the rationale of Justice Breyer's concurrence, crafts only a narrow exception to the Court's prior holdings that the police may rely on consent by a cotenant having apparent authority to authorize entry into shared premises. That formalistic exception applies when consent to search is actively disputed by cotenants with equal apparent authority who are both present at the time consent is sought.

There is an obvious reason why resort to that narrow exception might be needed in that unique circumstance. Entry during an active dispute between co-occupants who are present at the doorstep would not only cause a direct affront to the objector but would risk escalating a verbal disagreement into

physical violence. In contrast, when the objecting tenant is no longer present, the prospect of violence disappears and the affront is attenuated. There vanishes any compelling need for a *Randolph*-type "formalism" circumscribing the present cotenant's fundamental rights to admit visitors and to distance himself or herself from the objector's criminality.

a. The narrowness of the Court's holding in *Randolph* was both explicit and inherent in the logic of the lead opinion. That opinion made it clear that the issue it was deciding was "the reasonableness of police entry in reliance on consent by one occupant subject to *immediate* challenge by another." *Randolph*, 547 U.S. at 113 (emphasis added). The existence of a contemporaneous dispute and the objector's physical presence were integral to *Randolph*'s holding that "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, moreover, was careful in *Randolph* to preserve the continued viability of the bedrock consent jurisprudence informing *Matlock*'s holding that, in co-occupancies, "'the consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared.'" *Randolph*, 547 U.S. at 110 (quoting *Matlock*, 415 U.S. at 170). *Randolph* specifically endorsed *Matlock*'s understanding that shared tenancy is commonly recognized as including an "'assumption of risk'" as to the efficacy of cotenant

consent "on which police officers are entitled to rely. . . ." *Id.* at 111.

b. *Randolph* also emphasized that the physical presence of disputing cotenants was the critical difference between *Matlock* and *Rodriguez* on the one hand and *Randolph* on the other. The latter case presented an active dispute by parties at the scene possessing equal authority over the shared premises, but with no clear external means of peaceful resolution. When two cotenants with equal authority disagree at the doorstep as to whether to admit visitors, property rights did not clearly and finally give one a privilege over the other so as to allow police entry under the Fourth Amendment.

Nor was there an accepted social understanding for preferring one occupant's claims over the other's. In that unique context, the 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'"—at least if there were no strong countervailing reasons, such as "[f]ear for the safety of the occupant issuing the invitation, or of someone else inside." *Randolph*, 547 U.S. at 113; see pages 26-28, *post*.

The lead opinion in *Randolph*, while preserving the *Matlock* and *Rodriguez* holdings, identified the objector's presence as the pivotal factor that suspended cotenant consent: "[I]f a potential defendant with self-interest in objecting *is in fact at the door and*

objects, the cotenant's permission does not suffice for a reasonable search, whereas the potential objector, nearby but not invited to take part in the threshold colloquy, loses out." *Randolph*, 547 U.S. at 121 (emphasis added). Resolution of this unique dilemma required the "drawing of a fine line" in an admitted recourse to "formalism." *Id.*

c. Perhaps it made sense to resort to a limited "formalism," departing from the general rule in favor of cotenant consent, when the police are confronted with an active dispute. But it would be another thing entirely to vest "the objector with an absolute veto" by "creating a rule of continuing objection." *United States* v. *Henderson*, 536 F.3d 776, 784 (7th Cir. 2008). If *Randolph* is read as creating a new bright-line rule to privilege an objecting tenant so that his wishes control, however, the formalism would take on a life of its own in needlessly denigrating cotenant rights.

In light of *Randolph*'s internal, limiting logic, there is no compelling reason to adopt the expansive reading petitioner advocates. The great majority of courts to interpret *Randolph* on this point agree. See, *e.g.*, *United States* v. *Shrader*, 675 F.3d 300, 307-08 (4th Cir. 2012); *United States* v. *Cooke*, 674 F.3d 491, 499 (5th Cir. 2012); *Henderson*, 536 F.3d at 783-84; *United States* v. *Hudspeth*, 518 F.3d 954, 960 (8th Cir. 2008) (en banc); *People* v. *Strimple*, 267 P.3d 1219, 1221 (Colo. 2012); *State* v. *St. Martin*, 800 N.W.2d 858, 859 (Wis. 2011); *People* v. *Olmo*, 846 N.Y.S.2d 568, 570 (N.Y. Sup. Ct. 2007). The California Court of Appeal agreed with this mainstream view. J.A. 33.

d. When the objecting tenant is no longer present, the risk of violence disappears. And any perceived unseemliness in a guest's embroiling oneself in an active dispute dissipates too. At that point, the cotenant's "legitimate self-interest in siding with the police to deflect suspicion raised by sharing quarters with a criminal," *Randolph*, 547 U.S. at 116; *Schneckloth*, 412 U.S. at 243, as well as his right to aid the police in apprehending criminals, *Coolidge*, 403 U.S. at 488, become paramount. This is especially so in light of the cotenant's fundamental property and associational rights to admit visitors of choice. See section C, *post*.

Contrary to petitioner's repeated insistence, Pet. Br., 8, 14, *Randolph* did not imply, much less hold, that, if one co-occupant has objected to entry, no subsequent consensual search is permissible until the disputing cotenants reach an agreement. The Court's reference to such mutual agreement was made in the context of an entry during an ongoing dispute as to consent between tenants present at the house with equal authority to admit visitors: "The visitor's reticence [to enter] without some such good reason would show not timidity but a realization that when people living together disagree over the use of their common quarters, a resolution must come through voluntary accommodation, not by appeals to authority." *Randolph*, 547 U.S. at 113-14.

Justice Breyer's concurring opinion in *Randolph* recognized and was conditioned on the understanding that the holding applied only to the specific facts of

the case: "I stress the totality of the circumstances, however, because, were the circumstances to change significantly, so should the result. That is, the Court's opinion does not apply where the objector is not present 'and object[ing].'" *Randolph*, 547 U.S. 126 (Breyer, J., concurring).

C. Neither "social expectations" nor property law considerations support extending *Randolph*'s suspension of cotenant consent beyond the circumstance of presently disputing cotenants

a. As noted above, *Randolph* relied on the social expectation that a visitor would be reluctant to accept a resident's invitation when it would require the face-to-face defiance of another resident's directive to stay out. But petitioner cannot show there is a common understanding that such a directive would maintain its proscriptive force even after its issuer leaves the scene. There simply is no such expectation.

It is hardly uncommon for a friend or relative of one spouse (say, the wife) to have a disagreement with the other spouse. It is reasonable to assume that the friend or relative would not hesitate to accept the wife's invitation into the premises, despite having been barred by the husband previously. Similarly, if visitors with differing political or religious views had clashed with one cotenant, they would not, after the cotenant has departed, consider themselves barred from entering to discuss those views with the

other tenant despite a prior order to stay out. Social expectations inevitably reflect such mundane decisionmaking.

Indeed, *Randolph* acknowledged the basic "assumption tenants usually make about their common authority when they share quarters"—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. It would be impossible to deny that visitors often *do* accept invitations when a previously objecting cotenant is absent without the sense that they are transgressing social norms. If there is any common understanding on that score, it would be that the same reticence to push past an objecting tenant would tend to counsel patient waiting until the objecting tenant has left the premises.

As the Seventh Circuit has pointed out, there is no accepted sense in which such forbearance would be understood as "breaking any unwritten social rules." *Henderson*, 536 F.3d at 784. To contend otherwise would run counter to *Randolph*'s own social-expectations rationale by imposing a code of conduct based solely on subjective notions of etiquette. Common sense and experience tell us that "[a] prior objection by an occupant who is no longer present would *not* be enough to deter a sensible third party from accepting an invitation to enter by a co-occupant who is present with authority to extend the invitation." *Id.* (emphasis added).

Petitioner thus fails to satisfy *Randolph*'s "common authority" inquiry, which focused on the expectations of a typical caller confronted with a dispute between cotenants as to his welcome, in yet another way. He adds the consideration of what would happen if the "caller himself created the objector's absence" before seeking consent from the remaining tenant. Pet. Br. 17; see *Randolph*, 547 U.S. at 114-16. Of course, it would not be the typical but the extraordinary visitor who would "cause" a cotenant's removal —and it would shed no light on how cotenants would respond to the *police's* removal of a tenant by lawful arrest. Petitioner cites no basis for any common acceptance of the notion that an intervening arrest would be widely understood to prevent a cotenant from later giving consent or the caller from accepting it.

b. Nevertheless, the amicus brief supporting petitioner argues that application of "longstanding property law" reflects an ingrained social understanding that one occupant's unequivocal objection to a stranger's entry renders a cotenant's subsequent invitation ineffective because no effective license to enter may be granted in the face of the prior objection. Brief of the Nat'l Assoc. of Crim. Defense Lawyers as Amicus Curiae in Support of Petitioner (NACDL Br.) 17-22. NACDL's conclusion is premised on inapposite authority and fundamentally misconstrues traditional concepts of property law.

NACDL's cited source for that dubious proposition itself presents no reliable authority for the

conclusion that there exists an "implied authority to revoke" a cotenant's grant of entry. 2 TIFFANY REAL PROP. § 457 (2012 ed.). The single case on which that source relies for that proposition, *Tompkins* v. *Superior Court of City & Cnty. of San Francisco*, 378 P.2d 113, 116 (Cal. 1963), is of insignificant relevance.

Tompkins acknowledged—as does the State—that a cotenant's rights to consent are not without limits. However, *Tompkins*'s protection of the objector was expressly limited to a situation where "one joint occupant . . . is away from the premises," "another joint occupant . . . is present," and there is "at least" "no prior warning . . . given, no emergency . . . and the officer fails even to disclose his purpose to the occupant who is present." 378 P.2d at 116; see *People* v. *Haskett*, 640 P.2d 776, 786 (Cal. 1982) (limiting *Tompkins* to these facts).

Contrary to NACDL's assertions, generally accepted principles of property law support Rojas's right to admit visitors of her choice in petitioner's absence; and the common law would preclude an action for trespass against such visitors. The right to admit visitors (no less than the right to exclude them) is a basic incident of ownership. It is a "fundamental maxim of property law that the owner of a property interest may dispose of all or part of that interest as he sees fit." *Phillips* v. *Washington Legal Foundation*, 524 U.S. 156, 167 (1998). *Randolph* itself recognized a "standard formulation of domestic property law, that '[e]ach cotenant . . . has the right to use and enjoy the entire property as if he or she were the sole

owner, limited only by the same right in the other cotenants.'" *Randolph*, 547 U.S. at 114 (quoting 7 R. POWELL, POWELL ON REAL PROPERTY § 50.03[1], p. 50-14 (M. Wolf gen. ed. 2005)). Thus, it is consistently acknowledged that "[e]ach cotenant has a right to enter upon, explore and possess the entire premises, *and to do so without the consent of his cotenants*. . . ." 2 TIFFANY REAL PROP. § 426 (2012 ed.) (emphasis added).

If basic property principles did not provide a clear solution to the *Randolph* dilemma, they certainly do not support the existence of a property-law exception to the general rule recognizing cotenant consent as sufficient for entry. As modern treatments of property law explain:

> [A] tenant in common may properly license a third person to enter on the common property. The licensee, in making an entry in the exercise of his or her license, is not liable in trespass to nonconsenting cotenants, particularly in the absence of excessive or negligent use of the right granted and in the absence of fraud in procuring the license.

86 C.J.S. TENANCY IN COMMON § 144 (1997).

NACDL observes, unremarkably, that a cotenant may not take actions that "prejudice" another cotenant's property in certain ways. But inviting a guest to enter temporarily is a far cry from "prejudice" as understood in the cited sources—binding one's cotenants, or corrupting or destroying shared property. See

NACDL Br. 20-21. Permitting entry is well within the licensor's own authority; corruption and destruction is not.

Thus, for NACDL's licensing limitation to apply, the cotenant must have done more than "prejudice" his cotenant in the sense of doing something the latter dislikes, such as admitting someone of whom the latter disapproves. Rather, the cotenant must do something "to the prejudice of the other, in reference to the property so situated." *Rothwell* v. *Dewees*, 67 U.S. 613, 619 (1863). NACDL's argument disregards this distinction.

There is no reason to derogate from property law's acknowledgment of the general right to invite guests of one's choice merely because the guest knows that his presence is obnoxious to a fellow tenant. Just as the guest avoids involvement in an argument by staying out when the objector is present, he does not allow his own assumptions about an absent co-occupant's current beliefs to override the invitation of a present co-occupant when it is extended.

In sum, property rules give the power to a co-occupant to extend an invitation, and no social expectations override those rules when the objector is absent. *Randolph*'s limited and formalistic accommodation might in some situations be a necessary balance of the autonomy interests of both parties—economic, political, and personal—in circumstances involving actively disputing cotenants at the doorstep. But not in this case. Rather than expect visitors

to investigate the current status of conflicts between co-occupants, social expectations permit them to accept an invitation to enter notwithstanding previous expressions of disapproval by another co-occupant.

c. Those societal expectations are especially strong where a resident has been subjected to domestic abuse. An abused cotenant who desires police intervention will be more likely to authorize entry when the abusive cotenant is no longer present.[4] Empirical studies recognize both the need for intervention to prevent future violence and follow-up visits to prevent repeat incidents of violence.[5] Police departments across the nation employ dedicated domestic-violence investigation units that conduct follow-up visits in order to determine whether the situation has been resolved. Permitting these units to enter with the permission of victims, to interview them and if necessary to carry out a follow-up investigation, is essential to protect the victims of domestic violence.[6]

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[4] Research "suggest[s] that three factors inhibit victims from calling the police on partners and family members (versus strangers): the desire for privacy, the desire to protect the offender, and, for partners, the fear of reprisal." Richard B. Felson, et al., *Reasons for Reporting and not Reporting Domestic Violence to the Police*, 40 CRIMINOLOGY, 617, 640 (2002).

[5] NATIONAL INSTITUTE OF JUSTICE, PRACTICAL IMPLICATIONS OF CURRENT DOMESTIC VIOLENCE RESEARCH: FOR LAW ENFORCEMENT, PROSECUTORS AND JUDGES 7 (2009).

[6] City of Portland, Domestic Violence Reduction Unit (D.V.R.U.), http://www.portlandoregon.gov/police/35679 (last accessed Aug. 14, 2013); Los Angeles Police Department, LAPD Domestic Violence/

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As this case shows, allowing an abusive tenant's preemptive objection to limit, if not deprive, an abused cotenant of his or her right to consent to police entry creates intolerable risks. The officers conducted the domestic violence investigation after Rojas had consented to the search. J.A. 128-29. If petitioner's application of *Randolph* were correct, however, the officers would have been required first to seek petitioner's leave before obtaining Rojas's consent. That would demean the domestic-abuse victim's compelling interests in protecting herself and her children. Rojas may well have felt unable to request police assistance in petitioner's presence. But once he had been removed, she had a right to disassociate herself from petitioner's gang-related criminality and to seek removal of the illegal firearm and ammunition petitioner had secreted on the premises.

Because of the apparent domestic abuse, the police were entitled to enter the house to remove him at the very time that petitioner voiced his objection. It would make little sense to invalidate Rojas's consent, made approximately one hour after the spousal battery and while her injuries were still fresh. It

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Major Assault Crimes Detectives, http://www.lapdonline.org/get_informed/content_basic_view/8882 (last accessed Aug. 14, 2013); San Francisco Police Department, S.V.C.D.: Domestic Violence/Elder Abuse Section, http://sf-police.org/index.aspx?page=62 (last accessed Aug. 14, 2013); Seattle Police Department, Domestic Violence Unit, http://www.seattle.gov/police/units/investigations/domestic_violence.htm (last accessed Aug. 14, 2013).

would make even less sense to employ a "formalism" to subordinate her consent to petitioner's objection to police entry—even after petitioner had departed the scene—when that objection itself was legally ineffectual for keeping the police outside in the first place.

D. Lawful and reasonable law enforcement actions cannot provide the predicate for a Fourth Amendment violation

Petitioner contends that his absence from the scene cannot work to validate Rojas's consent in the eyes of the police because it was the police who had removed him from the scene when they detained and then arrested him. In this way, he in effect says that his lawful arrest caused the supposed Fourth Amendment violation. That argument is self-refuting. Compliance with the Fourth Amendment cannot be condemned as violating the Fourth Amendment.

1. A lawful arrest cannot give rise to a Fourth Amendment violation

a. *Randolph* implicitly recognized that an objecting co-occupant's absence due to lawful arrest does not vitiate the reasonableness of relying on consent to search given by a present cotenant. To the contrary, *Randolph* identified only one situation in which police conduct might affect the analysis: The co-occupant's permission to search is valid "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." *Randolph*, 547 U.S. at 121. Even if a contrived removal of one tenant could be the basis for invalidating a cotenant's consent, *Randolph* does not imply that removal pursuant to a lawful arrest with probable cause would do so.

Here, petitioner was lawfully removed from the premises, detained, and then arrested. Petitioner does not contend otherwise. Nor does petitioner argue that the officers' subjective motivations—and they were honest here—should matter. He recognizes that the Court has repeatedly rejected Fourth Amendment inquiries into the officer's subjective motivations where probable cause supports an arrest. *E.g.*, *Florida* v. *Jardines*, 133 S. Ct. 1409, 1416 (2013); *Brigham City, Utah* v. *Stuart*, 547 U.S. 398, 404 (2006) ("The officer's subjective motivation is irrelevant.") (citation omitted).

Petitioner nevertheless reasons that his removal pursuant to a lawful arrest rendered the search illegal under *Randolph* because it deprived him of the opportunity to object (or consent) when the officers returned to conduct an evidentiary search. Pet. Br. 19-20, 24-26. That approach is untenable in light of the Court's insistence that a Fourth Amendment violation occurs only when the police action is objectively unreasonable. A lawful arrest upon probable cause comports with the Fourth Amendment. It cannot be said to violate it.

Upon petitioner's lawful arrest, he had no right to remain on the premises. The point is not that petitioner forfeited upon arrest his privacy expectations in the premises he shared with Rojas and her children. It is that, upon his arrest, he had no constitutional grounds for insisting that he remain at home to reach a voluntary accommodation with Rojas on whether the police have consent to search or for any other reason.

b. Petitioner retorts that approving such an arrest could provide an incentive for gamesmanship. That is, he seeks a prophylactic rule to prevent law enforcement encroachment on an arrestee's supposed *Randolph*-given right to prevent a cotenant from authorizing a search against his previously stated objection. But it makes little pragmatic or doctrinal sense to impose formalism on top of formalism, requiring the police to credit a refusal of entry with indefinite prospective force after the objector's departure from the scene. Detaining and separating petitioner from Rojas was part of the domestic violence protocol. J.A. 125. Indeed, under California law, officers are presumptively required to take into custody persons arrested for domestic violence. Cal. Penal Code §§ 853.6(a)(2), 13700, 13701. Petitioner's artful attempt to condemn the valid arrest because it "created" his absence from the residence, Pet. Br. 17, 19, should not obscure the fact that by any objective measure the police acted reasonably.

Certainly, from Rojas's perspective, there was nothing improper in the officers' returning to the

apartment to seek her consent. And the officers had good reason to believe there was evidence in the apartment. See *Brigham City, Utah* v. *Stuart*, 547 U.S. at 404; see also *Kentucky* v. *King*, 131 S. Ct. at 1858 ("If consent is freely given, it makes no difference that an officer may have approached the person with the hope or expectation of obtaining consent.").

c. In order to portray the police's reliance on Rojas's consent as a violation of his own rights, however, petitioner analogizes his "invocation" of the Fourth Amendment to invocations of the right against self-incrimination under the Fifth Amendment or to counsel under *Miranda* v. *Arizona*, 384 U.S. 436 (1966). As explained above, however, petitioner had no Fourth Amendment right to keep the police out of the house at that time, for they properly entered to remove him in furtherance of defusing the apparent domestic violence incident. In any event, the analogy is foreclosed by *Matlock*. There, this Court recognized that "a consent search is fundamentally different in nature from the waiver of a trial right." *Matlock*, 415 U.S. at 171 (citing *Frazier*, 394 U.S. at 740, *Coolidge*, 403 U.S. at 487, and *Schneckloth*, 412 U.S. at 219). As petitioner's own cited authorities demonstrate, the privilege against self-incrimination and *Miranda*'s protections are quintessential trial rights.[7] Stated

[7] Pet. Br. 18 (citing *Salinas* v. *Texas*, 133 S. Ct. 2174, 2179 (2013) (discussing the trial-centered rationale for the express invocation requirement as to self-incrimination privilege), and *Edwards* v. *Arizona*, 451 U.S. 477, 484-85 (1981) ("an accused

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another way, *Randolph* did not silently create a Fourth Amendment analogue to *Miranda*.

Indeed, as *Schneckloth* pointed out when explaining why voluntary consent to search under the Fourth Amendment did not require advising a third party of his right to refuse, *Miranda* itself acknowledged that the police interest in fact-finding is fundamentally different in the contexts of crime-scene investigation and custodial interrogation. *Schneckloth*, 412 U.S. at 231-32. *Miranda* was "'not intended to hamper the traditional function of police officers in investigating crime,'" and it recognized that "'[w]hen an individual is in custody on probable cause, the police may, of course, seek out evidence in the field to be used at trial against him. Such investigation may include inquiry of persons not under restraint.'" *Id.* at 232 (quoting *Miranda*, 384 U.S. at 477-78).

2. Artificially restricting one cotenant's right to consent in the other's absence would impose unjustified restrictions on crime prevention

Further, as the California Court of Appeal recognized, petitioner's argument for restricting the right of a sole tenant at a residence to consent to a search "would needlessly limit the capacity of the police to

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. . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation . . . unless the accused himself initiates further communication")).

respond to ostensibly legitimate opportunities in the field." J.A. 32-33 (citing *Randolph*, 547 U.S. at 122.) Such "needless[ ] limit[s]" inferably would include "requir[ing] the police to take affirmative steps to find a potentially objecting co-tenant before acting on the permission they had already received." *Id.* Thus, here, once the officers obtained Rojas's voluntary consent, a further requirement that they delay transporting petitioner to determine whether he objected to a search would impose an unjustified restriction on legitimate law enforcement prerogatives.

a. Petitioner misses the point when he argues that the police sometimes might obtain evidence by means other than a consensual search. Pet. Br. 22-23, 31. It is true that the exigent circumstances doctrine provides the police with some means of protecting citizens from imminent harm, and facts giving the officer probable cause to arrest will provide the basis for obtaining a search warrant. But it will often be the case, as explained above, see page 15, *ante*, that "a search authorized by a valid consent may be the only means of obtaining important and reliable evidence." *Schneckloth*, 412 U.S. at 227. And the police might have a variety of legitimate reasons to seek consent to search, rather than a warrant. *Kentucky* v. *King*, 131 S. Ct. at 1860-61.

Moreover, the Fourth Amendment does not mandate that the police may investigate only in ways that pose the most minimal potential effect on a person's privacy. Cf. *Colorado* v. *Bertine*, 479 U.S. 367, 373-74 (1987) (officers need not select only the least

intrusive way of fulfilling community caretaking responsibilities). Instead, the hallmark of Fourth Amendment compliance is simple reasonableness. And searching pursuant to valid consent by a tenant is reasonable. For example, the Court rejected any "police-created exigency doctrine" that would prohibit officers from "knock[ing] on the door and seek[ing] either to speak with an occupant or to obtain consent to search" if the officers had already "acquir[ed] evidence that is sufficient to establish probable cause to search particular premises." *Kentucky* v. *King*, 131 S. Ct. at 1860. "Faulting the police for failing to apply for a search warrant at the earliest possible time after obtaining probable cause imposes a duty that is nowhere to be found in the Constitution." *Id.* at 1861.

Similarly, the reasons set out in *Kentucky* v. *King* for proceeding without a warrant are at least as strong as in the consent context. Among the five legitimate reasons described in that case are two that fully apply here: "First, the police may wish to speak with the occupants of a dwelling before deciding whether it is worthwhile to seek authorization for a search. They may think that a short and simple conversation may obviate the need to apply for and execute a warrant. Second, 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. A consensual search also 'may result in considerably less inconvenience' and embarrassment to the occupants than a

search conducted pursuant to a warrant.'"[8] *King*, 131 S. Ct. at 1860 (citations omitted).

b. Moreover, the Court has never held that technological innovations that might increase speed and the availability of obtaining search warrants somehow must exert an inverse-proportion restriction on the viability of seeking consent as an alternative. In any event, such developments are no panacea even when the concern is timeliness. "Telephonic and electronic warrants may still require officers to follow time-consuming formalities designed to create an adequate record, such as preparing a duplicate warrant before calling the magistrate judge. And improvements in communications technology do not guarantee that a magistrate judge will be available when an officer needs a warrant after making a late-night arrest." *Missouri* v. *McNeely*, 133 S. Ct. 1552, 1562 (2013) (citation omitted).

3. The rule advocated by the State is straightforw and easy to apply

Contrary to petitioner's argument, interpreting *Randolph* as "dispositive" against a disputing fellow

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[8] See *United States* v. *Hudspeth*, 518 F.3d 954, 961 (8th Cir. 2008) (en banc) ("Mrs. Hudspeth, in the self-interest of herself and her children, consented to the seizure of the home computer to prevent the placement of an armed, uniformed law enforcement officer in her home to guard the evidence while a search warrant was obtained.").

occupant when both are present provides a straightforward rule that can be applied to a recurring factual situation in a manner that informs citizens of the scope of their constitutional protection and the police of the scope of their authority. Cf. *New York* v. *Belton*, 453 U.S. 454, 459-60 (1981) (emphasizing the importance of readily applicable Fourth Amendment standards). Notwithstanding petitioner's assertion, Pet. Br. 28, determining "presence" under various circumstances hardly would involve impracticable "ad hoc determinations" or "subtle nuances and hairline distinctions."

As the facts of this case and *Randolph* indicate, the question whether a defendant is present when consent is sought will typically be easy to resolve. If an objecting tenant excuses himself to use the restroom or answer a telephone call, or steps outside to talk to one officer while his cotenant talks to another in the doorway, the trial court would have to resolve the far-from-intractable question whether the officers could reasonably believe the tenant's post-objection conduct indicated an assumption of the risk that the cotenant would consent to the search. A guiding inquiry well might be whether the prospect of a physical altercation remains imminent.

In addition, while one tenant is actively attempting to authorize police entry, a tenant insisting on a warrant would have no reason to leave. In contrast, a decision to leave for a trip to the liquor store while the other cotenant was insisting on consent might well be construed as indifference.

In contrast, a rule giving continuing effect to a prior objection by an absent tenant would create unavoidable questions with no objective, much less doctrinal, basis for resolution.

How long does an objection last? It would be arbitrary to treat it as having no stopping point, for circumstances and minds naturally change over time.

Also, does the objection apply to officers who are unaware of the prior objection? Especially in the domestic violence context, there is the real possibility that different officers will be called to a particular location on repeated occasions.

And, when asking for consent to search apparently shared residences, must officers inquire whether a non-present co-occupant had previously objected? Narcotics investigations, for example, present the real possibility that multiple law enforcement agencies will be involved.

Anyway, given petitioner's concession that officers may rely on a cotenant's representation that the objecting tenant has changed his mind, the central concern driving petitioner's argument—respect for a defendant's personhood—becomes no more than a fig leaf. Whatever formalism was necessary in *Randolph*, it was not intended to extend that far.

* * *

Vesting an objecting tenant with prospective veto power over his cotenant's right to consent would undermine the Court's longstanding recognition that "[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*, 412 U.S. at 228-29, 231-32. Given the lack of any basis in property law or in social expectations for recognizing one tenant's right to exercise such veto power, petitioner's preemptive "invocation" does not trump Rojas's weighty interests in authorizing consent so as to distance and protect herself from petitioner and his instruments of criminality. The better, simpler rule is the one that recognizes the efficacy of cotenant consent flowing directly from *Schneckloth*, *Matlock* and *Rodriguez*.

CONCLUSION

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

Dated: September 25, 2013

Respectfully submitted,

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