No. 20-157

In the Supreme Court of the United States

EDWARD A. CANIGLIA

Petitioner

v.

ROBERT F. STROM, ET AL.,

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR AMICI CURIAE SECOND AMENDMENT LAW CENTER, INC., CALIFORNIA RIFLE AND PISTOL ASSOCIATION, AND GUN OWNERS OF CALIFORNIA IN SUPPORT OF PETITIONER

STEPHEN P. HALBROOK*
3925 Chain Bridge Rd.
Suite 403
Fairfax, VA 22030
(703) 352-7276
protell@aol.com
*Counsel of Record

C.D. MICHEL
ANNA M. BARVIR
MATTHEW D. CUBEIRO
MICHEL & ASSOCIATES
180 E. Ocean Blvd.
Suite 200
Long Beach, CA 90802
(562) 216-4444

Counsel for Amici Curiae

QUESTION PRESENTED

Whether the "community caretaking" exception to the Fourth Amendment's warrant requirement extends to the home.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES Page

CONSTITUTIONS

STATUTES

LEGISLATIVE MATERIALS

OTHER AUTHORITIES

STATEMENT OF INTEREST OF AMICI CURIAE

The Second Amendment Law Center ("the Center") is a nonprofit corporation organized under § 501(c)(3) of the Internal Revenue Code and headquartered in Henderson, Nevada. The Center is dedicated to promoting and defending the individual rights to keep and bear arms for hunting, sport, self-defense, and other lawful purposes envisioned by the Founding Fathers. The purpose of the Center is to defend these rights in state and federal courts across the United States. The Center also seeks to educate the public about the social utility of private firearms ownership and to provide accurate and truthful historical, criminological, and technical information about firearms to policy makers, judges, attorneys, police, and the public.[1]

Founded in 1875, the California Rifle and Pistol Association ("CRPA") (https://crpa.org/) is a nonprofit organization that seeks to defend the Second Amendment and advance laws that protect the rights of individual citizens. CRPA regularly participates as a party or amicus in firearms-related litigation. CRPA works to preserve the constitutional and statutory rights of gun ownership, including the right to self-defense, the right to hunt, and the right to keep and bear arms. CRPA is also dedicated to

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[1] No counsel for a party authored this brief in whole or in part nor did such counsel or any party make a monetary contribution to fund this brief. Preparation and submission of this brief was funded by the California Rifle and Pistol Association Foundation. Petitioner and respondents gave consent for the filing of this amici curiae brief.

promoting the shooting sports, providing education, training, and organized competition for adult and junior shooters. CRPA's members include law enforcement officers, prosecutors, professionals, firearm experts, the public, and loving parents.

Gun Owners of California, Inc. ("GOC") (www.gunownersca.com) was incorporated in California in 1982 and is one of the oldest pro-gun political action committees in the United States. GOC is a nonprofit organization, exempt from federal taxation under §§ 501(c)(3) or 501(c)(4) of the Internal Revenue Code, and is dedicated to the correct interpretation and application of the constitutional guarantees related to firearm ownership and use. Affiliated with Gun Owners of America, GOC lobbies on firearms legislation in Sacramento and was active in the successful legal battle to overturn the San Francisco handgun ban referendum. GOC has filed amicus briefs in other federal litigation involving such issues, including *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

The above amici have a strong interest in this case as the issue involves whether the presumptive warrant requirement for searches and seizures in the home will be preserved, which in turn implicates whether the right to keep and bear arms may be infringed through unreasonable, warrantless searches and seizures. This brief brings to the attention of the Court relevant matter not already brought to its attention by the parties.

SUMMARY OF ARGUMENT

Application of warrantless "community caretaking" searches to houses would violate the explicit text of the Fourth Amendment, would be inconsistent with the common-law tradition that one's house is one's castle, would have been anathema to the Founders, and would mark an unprecedented, dangerous departure from this Court's jurisprudence. Existing exceptions to the warrant requirement more than suffice to meet society's needs consistent with the basic premise and sanctity of the Fourth Amendment.

Among the other privacy interests at stake is that of the right to keep and bear arms under the Second Amendment. As this Court's precedents demonstrate, there is no "gun" exception to the Fourth Amendment. The handful of lower courts that apply "community caretaking" to the home hold or suggest that a person has no right to his or her own firearm if seized, because one can buy another one. That makes a mockery both of the right to keep arms and the right against unreasonable searches and seizures. The traditional, narrow exceptions to these rights suffice without opening the floodgates to an exception that would swallow the rule.

The text, history, and tradition of the Fourth Amendment preclude another, newly minted exception to the warrant requirement. "Community caretaking" will leave no need for warrants based on probable cause supported by oath with the particularity requirements thereof, and every

warrantless search and seizure will be claimed as "reasonable."

The common law established that one's house is one's castle and that general warrants are invalid. Our Founders heightened those principles in opposing the writs of assistance, the first states declared against general warrants and in favor of the right to bear arms, a declaration of those rights was demanded when the Constitution was proposed without one, and the discussions on what became the Bill of Rights explain why those rights were considered so fundamental.

When slavery ended, the newly recognized rights of the freedmen were torn asunder by massive searches for and seizures of firearms in their houses. A primary goal of the Fourteenth Amendment was to protect Second and Fourth Amendment rights.

Finally, applying the "community caretaking" function to the home will be used as a pretext to conduct warrantless searches for firearms. That will particularly occur in the jurisdictions with the most onerous restrictions on firearms. As existing cases exemplify, officers will not bother to obtain warrants based on probable cause and instead will conduct searches based on speculation that a firearm might be present in a house and thus that someone might supposedly be in danger. The doctrine of exigent circumstances suffices to cover real emergencies without allowing the onslaught of warrantless searches that would follow if the "community caretaking" doctrine is applied to houses.

ARGUMENT

Law-abiding gun owners have a strong interest in preserving full Fourth Amendment protections in the home and in keeping "community caretaking" from being recognized as a new, standardless exception to the warrant requirement and existing exceptions thereto. This case and others like it involve whether police may enter homes and seize firearms when no crime has been committed and no recognized exigent circumstances are present.

This Court's prior recognition of a community-caretaking exception to the warrant requirement was founded on the narrowest of grounds. Recognizing "the distinction between motor vehicles and dwelling places," it explained that "the type of caretaking 'search' conducted here [was] of a vehicle that was neither in the custody nor on the premises of its owner," and the vehicle "had been placed where it was by virtue of lawful police action . . . ." *Cady v. Dombrowski*, 413 U.S. 433, 447-48 (1973).

While *Cady* involved the search for a firearm, the firearm was not stored at someone's home. The owner of the firearm was in police custody, while the vehicle was under control of the police, who suspected that the vehicle contained a revolver. Police thus searched the trunk out of "concern for the safety of the general public who might be endangered if an intruder removed a revolver from the trunk of the vehicle." *Id.* at 447. "Where, as here, the trunk of an automobile, which the officer reasonably believed to contain a gun, was vulnerable

to intrusion by vandals, we hold that the search was not 'unreasonable' . . . ." *Id.* at 448.

The question presented here is whether this "community caretaking" exception to the Fourth Amendment's warrant requirement should be extended to the home. As the court below explained, there was a warrantless seizure of the person of Petitioner Caniglia and a warrantless entry into the home and seizure of firearms. *Caniglia v. Strom*, 953 F.3d 112, 122 (1st Cir. 2020). In contrast to the specific requirements of the Fourth Amendment, the court wrote that "[p]olice officers enjoy wide latitude in deciding how best to execute their community caretaking responsibilities," which only need be "within the realm of reason." *Id.* at 123.[2]

The seizure of the firearm implicated not only the Fourth Amendment, but also the Second Amendment.

I. APPLICATION OF WARRANTLESS "COMMUNITY CARETAKING" SEARCHES TO HOUSES IMPLICATES SECOND AND FOURTH AMENDMENT RIGHTS

A. The Fourth Amendment Has No "Gun" Exception

[2] The police here received no "formal training on whether someone is imminently dangerous," which would be "a subjective decision" by the officer. Jt. App. 54. Sgt. Barth, the ranking officer at the scene, received no training outside the criminal context, and "learned about it ['community caretaking'] on Wikipedia in preparation for his deposition." *Id.* at 298-99.

There is no "gun" exception to the Fourth Amendment. Police should not conduct warrantless searches even in public places, much less in houses, based on unverified tips, hunches, or allegations that someone has a firearm and is thus a danger to self or others. As this Court in *Florida v. J.L.*, 529 U.S. 266, 272 (2000), explained:

> Firearms are dangerous, and extraordinary dangers sometimes justify unusual precautions. . . . But an automatic firearm exception to our established reliability analysis would rove too far. Such an exception would enable any person seeking to harass another to set in motion an intrusive, embarrassing police search of the targeted person simply by placing an anonymous call falsely reporting the target's unlawful carriage of a gun.

While the case above involved the unreliability of a tip that a person may have possessed a firearm unlawfully, "community caretaking" applied to the home opens the door for equally unreliable conjecture and piling inferences on inferences about whether ambiguous statements mean that a person might be a danger to self or others and that a search must be conducted for any possible firearms.

In an opinion by then-Judge Amy Coney Barrett, *United States v. Watson*, 900 F.3d 892, 893 (7th Cir. 2018), held a search to be unlawful where an informant's "sighting of guns did not describe a likely emergency or crime – he reported gun

possession, which is lawful." That the gun was possessed in an automobile in a high crime area did not change the result: "On the one hand, police are understandably worried about the possibility of violence and want to take quick action; on the other hand, citizens should be able to exercise the constitutional right to carry a gun without having the police stop them when they do so." *Id.* at 897.

The case against warrantless searches is all the more compelling when applied to houses. That is particularly the case in the "community caretaking" context, which expects police to be social workers or problem forecasters and then gives them license to search homes based on hunches and pretexts.

B. The Second Amendment Protects Against Searches for and Seizures of Firearms, With Traditional, Narrow Exceptions

This case, like others before it, involved a firearm possessed in a home. As this Court has held, "the enshrinement of constitutional rights necessarily takes certain policy choices off the table. These include the absolute prohibition of handguns held and used for self-defense in the home." *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008). Allowing police to seize firearms from the home without a warrant to serve a "community caretaking" function, based only on conjuncture and speculation by the police, is a policy choice that should likewise be kept off the table.

Like other physical objects, firearms may be searched for and seized under a search warrant

based on probable cause,[3] in a search incident to arrest,[4] as contraband in plain view,[5] and in exigent circumstances.[6] Opening the floodgates to a concept as amorphous as "community caretaking" as applied to searches and seizures in the home will allow unrestrained police intrusion based on subjective opinions and conjecture, not to mention – in the case of firearms – personal beliefs about gun control and whether the right to keep and bear arms should exist.

On petitioner's Second Amendment claim, the court below held that it need not decide whether seizing specific firearms from his home "infringes on this core right when, as in this case, a gun owner has not been barred from keeping or acquiring other firearms." *Caniglia*, 953 F.3d at 134. It added: "Regardless of whether the seizure of particular firearms can ever infringe the Second Amendment right . . . it was by no means clearly established . . . that police officers seizing particular firearms in

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[3] *Caron v. United States*, 524 U.S. 308, 311 (1998) ("agents executed a search warrant at petitioner's house, seizing six rifles").

[4] *Herring v. United States*, 555 U.S. 135, 137 (2009) ("A search incident to the arrest revealed methamphetamine in Herring's pocket, and a pistol (which as a felon he could not possess) in his vehicle.").

[5] *United States v. Hensley*, 469 U.S. 221, 235-36 (1985) (police who stopped "suspects who are reported to be armed and dangerous . . . were entitled to seize evidence revealed in plain view in the course of the lawful stop," including firearms, and to arrest defendant for being felon in possession of firearms).

[6] *United States v. Ramirez*, 523 U.S. 65, 71 (1998) (exigent circumstances justified no-knock entry to apprehend "a prison escapee with a violent past who reportedly had access to a large supply of weapons.").

pursuance of their community caretaking functions would, by doing so, trespass on the Second Amendment." *Id.* at 134.

Not only was there no precedent upholding the seizure in this context, but also what is clearly established may be known by the plain text of the Constitution. *See Groh v. Ramirez*, 540 U.S. 551, 563 (2004) (upholding liability for unlawful firearm seizures where: "Given that the particularity requirement is *set forth in the text of the Constitution*, no reasonable officer could believe that a warrant that plainly did not comply with that requirement was valid."). By the same token, the clear text of the Second Amendment provides that "the right of the people to keep and bear arms, shall not be infringed."

Other courts have also suggested that seizing one's firearm does not violate the arms right because he or she can obtain another one. *Rodgers v. Knight*, 781 F.3d 932, 941-42 (8th Cir. 2015) (observing that "even the unlawful retention of specific firearms does not violate the Second Amendment, because the seizure of one firearm does not prohibit the owner from retaining or acquiring other firearms");[7] *Houston v. City of New Orleans* ("*Houston I*"), 675 F.3d 441, 445, *op. withdrawn & superseded on reh*'g, 682 F.3d 361 (5th Cir. 2012).

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[7] *But see Walters v. Wolf*, 660 F.3d 307, 317-18 (8th Cir. 2011) (in contrast to where a firearm is lawfully seized, "[w]e do not foreclose the possibility that some plaintiff could show that a state actor violated the Second Amendment by depriving an individual of a specific firearm that he or she otherwise lawfully possessed for self-defense.").

But a newly acquired gun too could presumably be seized without a warrant under the purported "community caretaking" justification. In her dissent in *Houston I*, Judge Elrod wrote: "This exception to the Second Amendment cannot be reconciled with *Heller* and *McDonald*." 675 F.3d at 448 (Elrod, J., dissenting). For free speech and other constitutional rights, "an equivalent per se exception for particular exercises of the right at stake (so long as other exercises of that right are permitted) would be intolerable." *Id.* at 450.

Heller rejected an analogous argument: "It is no answer to say . . . that it is permissible to ban the possession of handguns so long as the possession of other firearms (i.e., long guns) is allowed." *Heller*, 554 U.S. at 629. More to the point, the right to "keep" arms surely protects the arms that one owns and possesses. Indeed, when adopting the Second Amendment, the Founders recalled how the British sought to confiscate their own firearms. *See infra* part II.C. These experiences no doubt informed the Founders' understanding of the rights they were enshrining in the Constitution.

The existence of constitutional rights should counsel against the invention of novel, policy-driven exceptions to those rights. In *McDonald v. City of Chicago*, 561 U.S. 742, 782 (2010), the municipalities sought to uphold handgun bans on the basis that "the Second Amendment differs from all of the other provisions of the Bill of Rights because it concerns the right to possess a deadly implement and thus has implications for public safety." This Court responded: "The right to keep and bear arms,

however, is not the only constitutional right that has controversial public safety implications. All of the constitutional provisions that impose restrictions on law enforcement and on the prosecution of crimes fall into the same category." *Id.* at 783. That is no reason to water down any of those provisions, both the Second and Fourth Amendments included.

II. THE TEXT, HISTORY, AND TRADITION OF THE FOURTH AMENDMENT PRECLUDE ANOTHER, NEWLY MINTED EXCEPTION TO THE WARRANT REQUIREMENT

A. The Text of the Fourth Amendment Is Inconsistent with Extending the "Community Caretaking" Exception to the Home

The Fourth Amendment 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." That plain text together with interrelated provisions of the Bill of Rights precludes application of warrantless "community caretaking" searches to the home.

The text is facially incompatible with the theory that police entry into a house would be reasonable absent a warrant under the standardless rubric of "community caretaking." "It is a 'basic principle of Fourth Amendment law' that searches

and seizures inside a home without a warrant are presumptively unreasonable." *Payton v. New York*, 445 U.S. 573, 586 (1980) (citing *Coolidge v. New Hampshire*, 403 U.S. 443, 474-75, 477-78 (1971)). Since the Amendment was ratified in 1791, this Court has suggested nothing remotely equivalent to a "community caretaking" exception to the warrant requirement as applied to anything but motor vehicles in the possession of the police reasonably suspected of containing a potentially-dangerous article. It has certainly not extended such a concept to the home. And for good reason. "Community caretaking" is such a broad exception that it would essentially swallow the rule of the presumption of the warrant requirement for in-home searches.

The sanctity of the home is also reflected in the Third Amendment: "No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law." The requirement of "the consent of the owner" under the Third Amendment has clear parallels to what is reasonable under the Fourth Amendment – consensual searches are reasonable, nonconsensual searches for the supposed good of the owner or occupants under the "community caretaking" theory are unreasonable.

Moreover, some "papers and effects" mentioned in the Fourth Amendment have enhanced protection under other parts of the Bill of Rights. The Fourth Amendment protects papers in general from unreasonable searches, but papers reflecting the free exercise of religion or freedom of speech and of the press have independent protection in the First

Amendment. For that reason, "[w]here the materials sought to be seized may be protected by the First Amendment, the requirements of the Fourth Amendment must be applied with 'scrupulous exactitude.'" *Zurcher v. Stanford Daily*, 436 U.S. 547, 564 (1978) (citing *Stanford v. Texas,* 379 U.S. 476, 485 (1965)).

The same reasoning applies to the Second Amendment, which provides that "the right of the people to keep and bear arms, shall not be infringed." One's arms are doubly protected by this right to keep arms and by the prohibition on unreasonable search and seizure. "[T]he most natural reading of 'keep Arms' in the Second Amendment is to 'have weapons.'" *Heller*, 554 U.S. at 582. Dictionaries from the time of the Amendment's adoption defined "keep" as "[t]o retain; not to lose," "[t]o have in custody," and "[t]o hold; to retain in one's power or possession." *Id.* With that understanding, it is clear that the specific arms one owns and possesses are protected by the Second Amendment. And so, absent a narrow exception to the warrant requirement, searches for and seizures of those firearms without a warrant supported by probable cause infringe on both the right to keep and bear arms *and* on the right to be secure from unreasonable searches and seizures.

B. The Common Law Established the Doctrine that One's House Is One's Castle

The common-law principle that a man's house is his castle was inexorably related to the right to

keep arms and to use them to protect the house. No principle existed that one who keeps arms is suspect and his house may be invaded without warrant to seize his arms ostensibly to keep him from hurting himself or others.

Sir Edward Coke reported the decision in *Semayne's Case* as follows: "That the house of everyone is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose . . . ." *Semayne's Case*, 5 Co. Rep. 91a, 91b, 77 Eng. Rep. 194, 195 (K.B. 1603). Moreover, "everyone may assemble his friends and neighbours to defend his house against violence; . . . and the reason of all this is because *domus sua cuique est tutissimum refugium* [his own house is the safest place of refuge]." *Id.* In his treatise, Coke added: "for where shall a man be safe, if it be not in his house. And in this sense it is truly said, *Armaque in Armatos sumere jura sinunt* [and the laws permit the taking up of arms against armed persons]." Coke, *Third Institute* 161-2 (1644).

The Restoration of the Stuarts saw enactment of laws in 1662 to authorize general warrants to search for arms of the political enemies of Charles II and subversive literature. The Militia Act authorized general warrants to empower the Lords Lieutenant "to search for and seize all arms in the custody or possession of any person or persons whom the said lieutenant or any two or more of their deputies shall judge dangerous to the peace of the kingdom . . . ." Militia Act, 13 & 14 Car. II c.3, § 13 (1662). "[I]n all places and houses whatsoever where search is to be

made as aforesaid it shall and may be lawfull in case of resistance to enter by force." *Id.* (annex).

General warrants were also authorized "to search all Houses and Shops where they shall knowe or upon some probable reason suspect any Books or Papers to be printed bound or stitched" and to seize printed matter that was unlicensed or suspected to contain matters "against the State and Government." An Act for preventing the frequent Abuses in printing seditious treasonable & unlicensed Bookes and Pamphlets, 13 & 14 Car. II c.33, § 14 (1662).

The power to issue warrants to search for and seize libelous papers was declared illegal in *Entick v. Carrington*, 95 E.R. 807, 817 (K.B. 1765), where Lord Camden wrote that "our law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave; if he does he is a trespasser, though he does no damage at all . . . ."

The above principles would find their way into the First, Second, and Fourth Amendments to the United States Constitution.

C. The Founders Sought to Establish Robust Protection Against General Warrants and Warrantless Searches

In his 1761 arguments against the writs of assistance, which allowed warrantless entry to search for untaxed goods, James Otis called the writs "the worst instrument of arbitrary power, the most destructive of English liberty and the

fundamental principles of law, that ever was found in an English law book"; they placed "the liberty of every man in the hands of every petty officer." Otis, Against Writs of Assistance, quoted in *Boyd v. United States*, 116 U.S. 616, 625 (1886).

As specifically applicable here, Otis argued: "Now one of the most essential branches of English liberty is the freedom of one's house. A man's house is his castle; and while he is quiet, he is as well guarded as a prince in his castle. This writ, if it should be declared legal, would totally annihilate this privilege." 2 *Legal Papers of John Adams* 142 (L. Wroth & H. Zobel eds. 1965). He explained that "officers may enter our houses when they please . . . may break locks, bars and everything in their way . . . *bare suspicion without oath is sufficient*." *Id.* (emphasis added).

In his notes on Otis' argument, John Adams repeated the above and contrasted the rule applicable to the rights of Englishmen: "For flagrant Crimes, and in Cases of great public Necessity, the Privilege may be [encroached?] on" "by a Special Warrant to search such an House, sworn to be suspected, and good Grounds of suspicion appearing." *Id.* at 126 (bracketed word & question mark in the original).

Application of "community caretaking" to the home eerily parallels the above: the home ceases to be one's castle and becomes yet another place for police intrusion, based on bare suspicion without oath or a warrant.

Based on Coke's statement in *Semayne's Case*, *supra*, and the above words from James Otis, this

Court found: "The zealous and frequent repetition of the adage that a 'man's house is his castle,' made it abundantly clear that both in England and in the Colonies 'the freedom of one's house' was one of the most vital elements of English liberty." *Payton*, 445 U.S. at 596-97.

As for Lord Camden's opinion in *Entick v. Carrington*, this Court held that "its propositions were in the minds of those who framed the fourth amendment to the constitution, and were considered as sufficiently explanatory of what was meant by unreasonable searches and seizures." *Boyd*, 116 U.S. at 626-27.

When "the Crown began to disarm the inhabitants of the most rebellious areas," it "provoked polemical reactions by Americans invoking their rights as Englishmen to keep arms." *Heller*, 554 U.S. at 594. After Lexington and Concord, British General Thomas Gage tricked the people of Boston into surrendering their arms "under the care of the selectmen, marked with the names of the respective owners," and "that the arms aforesaid at a suitable time would be return'd to the owners." Proceedings Between Gage & Selectmen, April 23, 1775, quoted in Stephen P. Halbrook, *The Founders' Second Amendment* 83 (2008). But Gage's Redcoats then seized the arms, which would never be returned. *See id.* at 82-92. The Continental Congress condemned Gage for "order[ing] the arms deposited as aforesaid, that they might be preserved for their owners, to be seized by a body of soldiers . . . ." The Declaration of Causes of Taking Up Arms of July 6,

1775, 2 *Journals of the Continental Congress, 1774-1779*, at 151 (1905).

Given these experiences, the predecessors of the Second and Fourth Amendments were expressed in the first state bills of rights. The Pennsylvania Declaration of Rights (1776) included the following two provisions guaranteeing rights that the Crown had violated:

> X. That the people have a right to hold themselves, their houses, papers, and possessions free from search and seizure, and therefore warrants without oaths or affirmations first made, affording a sufficient foundation for them, and whereby any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his or their property, not particularly described, are contrary to that right, and ought not to be granted. . . .
>
> XIII. That the people have a right to bear arms for the defence of themselves and the state . . . .

When the Constitution was proposed in 1787, the Antifederalists recalled the oppression by the British and demanded a bill of rights. John De Witt VI wrote in the *American Herald*, Nov. 19, 1787, fearing that the new government would repeat the experiences of British rule, which entailed "the right of entry into your habitations without your consent, not a lisp being mentioned as to the mode or time when such powers shall be exercised." 4

Documentary History of the Ratification of the Constitution 265 (1997). Similarly, an article in the *American Herald*, Jan. 14, 1788, addressed to the Convention of Massachusetts, predicted: "Your houses may cease to be your castles – the most unreasonable searches may be made on you, your papers, &c." 5 *Documentary History of the Ratification of the Constitution* 711 (1998).

In the Massachusetts ratification convention, Samuel Adams proposed amendments that read in part:

> And that the said Constitution be never construed to authorize Congress, . . . to prevent the people of the United States, who are peaceable citizens, from keeping their own arms; . . . or to subject the people to unreasonable searches & seizures of their persons, papers, or possessions.

6 *Documentary History of the Ratification of the Constitution* 1453 (2000).

In the Virginia ratification convention, George Mason recalled that "when the resolution of enslaving America was formed in Great Britain, the British Parliament was advised . . . to disarm the people; that it was the best and most effectual way to enslave them . . . ." 10 *Documentary History of the Ratification of the Constitution* 1271 (1993).

Patrick Henry warned that "excisemen . . . may, unless the General Government be restrained by a Bill of Rights, or some similar restriction, go into your cellars and rooms, and search, ransack and measure, every thing you eat, drink and wear." *Id.* at

1331. He thus proposed: "General warrants, by which an officer may search suspected places, without evidence of the commission of a fact, or seize any person without evidence of his crime, ought to be prohibited." *Id.* at 1474.

Several ratification conventions demanded adoption of a bill of rights to the proposed Constitution. Virginia's version included the following:

> 14th. That every freeman has a right to be secure from all unreasonable searches and seizures of his person, his papers, and property: all warrants therefore to search suspected places, or seize any freeman, his papers or property, without information upon oath . . . of legal and sufficient cause, are grievous and oppressive, and all general warrants to search suspected places, or to apprehend any suspected person without specially naming or describing the place or person, are dangerous and ought not to be granted.
>
> 17th. That the people have a right to keep and bear arms; that a well-regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free state . . . .

10 *Documentary History of the Ratification of the Constitution* 1552 (1993).

James Madison proposed what became the Bill of Rights in the House of Representatives on June 8, 1787, including: "The right of the people to keep and bear arms shall not be infringed; a well

armed, and well regulated militia being the best security of a free country . . . .” 4 *Documentary History of the First Federal Congress* 10 (1986). Further:

> The rights of the people to be secured in their persons, their houses, their papers, and their other property from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized.

Id. at 10-11.

Of Madison’s proposals, the Federalist Tench Coxe explained that “the people are confirmed . . . in their right to keep and bear their private arms.” *Federal Gazette*, June 18, 1789, at 2. He also wrote: “General warrants have been ever peculiarly alarming to the subjects of arbitrary princes, and proportionately odious to the citizens of free government.” Fortunately, “an explicit provision against that dangerous process has been proposed in Congress.” *Federal Gazette*, June 30, 1789, at 2.

After revisions in the House and Senate, the final, familiar version of the Bill of Rights was agreed upon. The above background resulting in the Fourth Amendment made clear the rejection of general warrants, not to mention the further rejection of searches without any warrant. While the prohibition on “unreasonable searches and seizures” might have allowed for certain warrantless searches

made reasonable by the existence of an emergency, the basic rule required a warrant.

Similarly, possession of arms was protected not just by prohibiting unreasonable searches and seizures, but also on prohibiting infringement of the right to keep and bear arms.

St. George Tucker, who authored the first commentaries on the Constitution, wrote about the Second Amendment:

> This may be considered as the true palladium of liberty . . . The right of self defence is the first law of nature . . . . Wherever . . . the right of the people to keep and bear arms is, under any colour or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction.

1 St. George Tucker, *Blackstone's Commentaries*, App. 300 (1803).

About the Fourth Amendment, Tucker alluded to *Entick v. Carrington* when he wrote: "The case of general warrants, under which term all warrants not comprehended within the description of the preceding article may be included, was warmly contested in England about thirty or thirty-five years ago, and after much altercation they were finally pronounced to be illegal by the common law. The constitutional sanction here given to the same doctrine . . . . can not be too highly valued by a free people." *Id.* at 301.

The rule against warrantless seizures easily ties in with the prohibition on infringement of the right to *keep* and bear arms. A search for arms that

a person has a right to keep, like papers protected by the free press guarantee, are subject to a higher standard for what constitutes an "unreasonable" search and seizure than other items not constitutionally guaranteed. The "community caretaking" theory applied to the home is doubly suspect in that it would so often countenance warrantless searches of homes to seize firearms based on hunches, conjecture, and an actual motive to fish for violations of victimless firearm restrictions.

D. The Fourteenth Amendment Sought to Address Warrantless Searches of Houses of Freedmen, Particularly to Seize Firearms

In *Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949), this Court held that the "core of the Fourth Amendment" was implicit in the concept of ordered liberty and thus "enforceable against the States through the Due Process Clause" of the Fourteenth Amendment. The *Wolf* opinion did not dig into the history of the Fourteenth Amendment, but *McDonald* did so in ascertaining the role the right to bear arms played in adoption of the Fourteenth Amendment. 561 U.S. at 771-78; *see also id.* at 827-50 (Thomas, J., concurring). A broader look at that history shows how intertwined were the rights to bear arms and against unreasonable searches as the basis for the Amendment.

In 1866, Senator Lyman Trumbull introduced S. 60, a bill to enlarge the powers of the Freedmen's Bureau, and S. 61, the Civil Rights Bill. Cong. Globe,

39th Cong., 1st Sess., 129 (1866). Both bills included protection of "all laws and proceedings for the security of person and estate." Representative L. H. Rousseau interpreted that language to include "the security to person and property from unreasonable search." *Id.*, App., at 69. Indeed, great concern was expressed regarding the violation of the Second and Fourth Amendment rights of the freed slaves.

Senator Henry Wilson complained that ex-Confederates were going "up and down the country searching houses, disarming people, committing outrages of every kind and description." Cong. Globe, 39th Cong., 1st Sess. 915 (1866). Senator Trumbull quoted a letter from Colonel Thomas in Vicksburg, Mississippi, that "nearly all the dissatisfaction that now exists among the freedmen is caused by the abusive conduct of this militia," which typically would "search negro houses for arms." *Id.* at 941.

Lt. Col. W.H.H. Beadle, superintendent of the Freedmen's Bureau in North Carolina, testified:

> Some of the local police have been guilty of great abuses by pretending to have authority to disarm the colored people. They go in squads and search houses and seize arms. . . . Houses of colored men have been broken open, beds torn apart and thrown about the floor, and even trunks opened and money taken. A great variety of such offenses have been committed by the local police . . . .

Report of the Joint Committee on Reconstruction, H.R. Rep. No. 30, 39th Cong., 1st Sess., pt. 2, at 272 (1866).

The Civil Rights Act of 1866 provided that "citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, . . . shall have the same right, . . . to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens . . . ." 14 Stat. 27 (1866). The Freedmen's Bureau Act was even more specific in declaring that the right "to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal, including the constitutional right to bear arms, shall be secured to and enjoyed by all the citizens of such State or district without respect to race or color or previous condition of slavery." 14 Stat. 173, 176-77 (1866).

In *McDonald*, this Court recognized how the Fourteenth Amendment sought to incorporate the rights expressed in the Freedmen's Bureau Act and the Civil Rights Act. 561 U.S. at 773-74. While that case focused on the Second Amendment, the Fourth Amendment was closely intertwined with the Second, in that illegal searches were being executed to seize firearms.

This Court should accord appropriate weight to the historical experiences regarding searches for and seizures of arms that prompted adoption of the Fourteenth Amendment. Recognizing "community caretaking" as an exception to the warrant

requirement for home searches would conflict with a significant purpose of the Amendment.

III. APPLYING THE "COMMUNITY CARETAKING" FUNCTION TO THE HOME WILL BE USED AS A PRETEXT TO CONDUCT WARRANTLESS SEARCHES FOR FIREARMS

In jurisdictions with the most onerous gun laws applicable to law-abiding citizens, police may be prone to assert the "community caretaking" function as an excuse or pretext to conduct warrantless searches of houses for firearms. If gun owners are considered suspect to begin with, officers may unjustifiably consider them a threat to themselves or others.

"There is a long tradition of widespread lawful gun ownership by private individuals in this country." *Staples v. United States*, 511 U.S. 600, 610 (1994). Moreover, "owning a gun is usually licit and blameless conduct. Roughly 50 per cent of American homes contain at least one firearm of some sort." *Id.* at 613-14. While most states respect Second Amendment rights, certain outlier states intentionally discourage and repress firearm ownership. As the following examples reveal, such jurisdictions employ searches for and seizures of firearms as one means of doing so.

"Under New York law, it is a crime to possess a firearm." *United States v. Sanchez-Villar*, 99 Fed. Appx. 256, 258 (2d Cir. 2004) (per curiam), *vacated & remanded*, 544 U.S. 1029 (2005). Having a license

is just an affirmative defense against the crime. Thus, police officers who merely "see [a] gun" are "justified in seizing it because of its 'immediately apparent' incriminating character." *Id.* at 258.

The Second Circuit held the prohibition not to offend the Second Amendment because "the right to possess a gun is clearly not a fundamental right." *Id.* at 258 n.1 (quoting *United States v. Toner,* 728 F.2d 115, 128 (2d Cir. 1984)). Of course, this Court held that gun possession is a fundamental right applicable to the states. *McDonald,* 561 U.S. at 767. But New York law on the subject has not changed one iota.[8]

New York City, specifically, seemingly suspects that the firearm owners to whom it issues licenses are on the verge of harming others if not themselves. Until it recently tweaked its law to avoid this Court's jurisdiction in *New York State Rifle & Pistol Ass'n, Inc. v. City of New York*, 140 S. Ct. 1525 (2020), the City did not even trust a licensee to take his or her unloaded, locked up, inaccessible firearm from the home to a shooting range outside the City or to a second home. According to the City's police expert, that prevented the licensee from "using it in a fit of rage after an auto accident or some other altercation that occurs along the way." *Id.* at 1542 (Alito, J., dissenting).

"Claim[ing] to apply heightened scrutiny," the courts below upheld the original version of the City's law but "there was nothing heightened about what they did." *Id.* at 1541-42. Given the suspicion with

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[8] N.Y. Penal Law § 265.01(1) (crime to possess firearm), § 265.20(3) (exception for license).

which the City views gun owners, it takes no stretch of the imagination to see that application of the "community caretaking" exception to the home is likely to be misused to expand warrantless searches under what will be a routine "firearm exception" to the Fourth Amendment.

By contrast, in States where gun owners do not have such a legal stigma, courts may be more likely to disapprove of Fourth Amendment intrusions. Given that "most people in West Virginia have guns," and "carrying a concealed weapon pursuant to a valid concealed carry permit is a lawful act," a no-knock search based on the excuse that the homeowner was a gun owner was ruled invalid. *Bellotte v. Edwards*, 629 F.3d 415, 423 (4th Cir. 2011). Police had a warrant, but it did not authorize a no-knock entry. *Id.* at 421.

The court in *Bellotte* added this sage advice: "We think a reasonable officer would have known that guns do not fire themselves, and that a justifiable fear for an officer's safety must include a belief, not simply that a gun may be located within a home, but that someone inside the home might be willing to use it." *Id.* Application of the "community caretaking" justification to the home will provide a perverse incentive to skip the second step and predicate danger on mere gun possession.

For a vivid example of why the "community caretaking" function should not be extended to the home, consider the facts in *Corrigan v. District of Columbia*, 841 F.3d 1022 (D.C. Cir. 2016). Mr. Corrigan, an Army Reservist employed by the federal government, was suffering from sleep

deprivation when he inadvertently phoned the National Suicide Hotline while trying to dial the Veterans Crisis Line. When he told the Hotline operator that he was a veteran diagnosed with PTSD, the operator asked if he owned guns; he admitted that he did and that they were safely stored. The operator repeatedly told him to "put [the guns] down" and asked if he would harm himself or others. Frustrated, Corrigan finally hung up and went to sleep. *Id.* at 1025-26.

Corrigan awoke to find a large police force outside his home. He exited with his hands up, locked his door, and spoke with police, who took him to a Veterans Hospital where he was admitted for PTSD symptoms. *Id.* at 1027. Police then broke into his house without a warrant and seized his firearms. After they arrested him for unregistered firearms, he spent several days in jail. When finally released, he found his house in shambles from the police raid. After the court granted his motion to suppress, he brought an action under 42 U.S.C. § 1983. *Id.* at 1028.

Even if the initial sweep of the home was justified to look for his ex-girlfriend (despite no evidence existing that she was even there), the D.C. Circuit found the further intrusive search to be unreasonable. The excuse that explosives may have been in the home "was based on runaway speculation." *Id.* at 1031-32. Officers were on the scene for five hours before beginning the second search without trying to seek a warrant, and then rifled through every concealed space in the home, breaking upon locked containers. *Id.* at 1032.

Corrigan had surrendered to police peaceably and was in their custody before being hospitalized. *Id.* at 1034. Even "assuming, without deciding, that the community caretaking doctrine applies to a home," "the officers engaged in raw speculation unsupported by either precedent or the information they had," and were not entitled to qualified immunity. *Id.* at 1035-36.

While *Corrigan* rejected application of the "community caretaking" justification as applied, it illustrates why that basis for warrantless intrusion into the home should not be recognized at all. Once Corrigan mentioned to the hotline that he had guns, police seemed hell-bent to "help" him by crashing into his home so they could charge him with unregistered firearms.

Recall that Corrigan admitted to the hotline that he had firearms, which likely prompted police to check its records to see if the firearms were registered and to assemble a virtual-SWAT squad when they learned that they were not. As the District argued in a different case, police check gun registration records to learn if a firearm is present when approaching a house. *Heller v. District of Columbia,* 670 F.3d 1244, 1294 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

People v. Ovieda, 250 Cal. Rptr.3d 754, 446 P.3d 262 (2019), further illustrates how some police may seek to excuse a warrantless search based on the potential presence of a gun in a house. In that case, a family member was reported to be suicidal and had a gun, relatives disarmed him, and the police came, handcuffed him, and took him away. *Id.*

at 1039. But then officers searched the premises in part to "make sure there was no one else inside who might be armed . . . ." *Id.* Among other contraband, they discovered what California calls an "assault weapon" and other firearms. *Id.* at 1040.

Ovieda upheld suppression of the evidence. While "[t]he officers cited concerns . . . that there may have been . . . loaded firearms inside," "possession of legal firearms in a home is generally lawful . . ., and their presence in an apparently empty home does not, without more, constitute exigent circumstances." *Id.* at 1043 (citing *Heller*, 554 U.S. at 576-635).

As for "community caretaking," the court "disagree[d] with the assumption that the warrantless search of a residence, under nonexigent circumstances, can be justified on the paternalistic premise that 'We're from the government and we're here to help you.'" *Id.* at 1046 (citation omitted). The court held that "the community caretaking exception asserted in the absence of exigency is not one of the carefully delineated exceptions to the residential warrant requirement recognized by" this Court. *Id.* at 1053.

The bottom line is that expansion of the "community caretaking" exception into the home will be used by police in jurisdictions with onerous or constitutionally-questionable firearm restrictions to turn every call to a house into a search for guns under the pretext of "helping" those present. The courts in the above two cases correctly refused to allow speculation about possession of guns to justify warrantless entries into homes. Not every court can

be expected to reject overzealous, warrantless searches by police based on real or pretextual concern about persons in a house where a gun may be present.[9] The doctrine of exigent circumstances suffices to cover real emergencies without allowing the onslaught of warrantless searches in homes that would follow if this Court extends the "community caretaking" doctrine to houses.

CONCLUSION

This Court should reverse the judgment of the court below and hold that no "community caretaking" justification exists for warrantless searches and seizures in homes and other private premises.

[9] *See N.Y. State Rifle & Pistol Ass'n, Inc. v. City of New York*, 140 S. Ct. 1525, 1527 (2020) (Kavanaugh, J., concurring) (expressing "concern that some federal and state courts may not be properly applying *Heller* and *McDonald*").

Respectfully submitted,

SECOND AMENDMENT LAW CENTER, INC.,
CALIFORNIA RIFLE AND PISTOL ASSOCIATION, and
GUN OWNERS OF CALIFORNIA
Amici Curiae

STEPHEN P. HALBROOK*
3925 Chain Bridge Road, Suite 403
Fairfax, VA 22030
(703) 352-7276
protell@aol.com
*Counsel of Record

C. D. MICHEL
ANNA M. BARVIR
MATTHEW D. CUBEIRO
Michel & Associates, P.C.
180 East Ocean Blvd., Suite 200
Long Beach, CA 90802
(562) 216-4444
cmichel@michellawyers.com
ABarvir@michellawyers.com
mcubeiro@michellawyers.com

Counsel for Amici Curiae