No. 20-7234

In the

# Supreme Court of the United States



Kerrin Barrett

*Petitioner,*

v.

PAE GOVERNMENT SERVICES, INC.; AREYAL HALL, Officer, Arlington County Police Department; WILLIAM K. LIETZAU; SEAN HORNER; SHANEDRIA WILBORN; BRIAN GALWAY; JOSHUA LUZIER, Officer,

*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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Date: February 11, 2021

## QUESTION PRESENTED

1. ***Whether the temporal scope of the emergency doctrine governing warrantless seizures for "community caretaking" extends beyond the immediate circumstances presented to police?***

## LIST OF PARTIES

Petitioner is Kerrin A Barrett. Respondents are PAE Government Services, Inc.; William K. Lietzau, individually and in his capacity as an employee of PAE; Sean Horner, individually and in his capacity as an employee of PAE; Shanedria Wilborn, individually and in her capacity as an employee of PAE; Areyal Hall, individually and in her official capacity as an Officer of the Arlington County Police Department; Joshua Luzier, individually and in his official capacity as an Officer of the Arlington County Police Department; Brian Galway, individually and in his official capacity as county mental health assessor for the Arlington County Department of Human Services.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Kerrin A. Barrett, *pro se*, respectfully petitions for a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, filed on September 15, 2020.

## INTRODUCTION

In *Missouri v. McNeely* (2013), the Supreme Court clarified, "A variety of circumstances may give rise to an exigency sufficient to justify a warrantless search, including law enforcement's need to provide emergency assistance to an occupant of a home . . . engage in "hot pursuit" of a fleeing suspect . . . or enter a burning building to put out a fire and investigate its cause." Lower courts are primarily in agreement that these "exigencies" are defined by their very immediacy; if action is not taken at once, serious consequences will follow in short order. However, these circumstances deemed sufficient to justify a warrantless search, to include seizures, vary considerably throughout the lower courts concerning the issue of temporality. Where exigent circumstances should be bounded by the immediate circumstances in which officers find themselves, this definition has been stretched by Courts, including the Fourth Circuit, to include circumstances and allegations that occurred days, weeks and even months before the "exigent" circumstance. This expansion of the Court's intent in *Missouri v. McNeely* must be reined in to prevent the continued erosion of Fourth Amendment protections.

The Fourth Amendment in this case as it applies to a warrantless seizure is based upon constitutional law and the Civil Rights Act of 1871, which was based on the Federal Civil Rights Act of 1866, as well as the passage of the Fourteenth Amendment. This history

can be traced back to and include the Charter of Liberties from Great Britain in the 1100s. These fundamental legal protections were specifically intended to prevent the intentional misuse of governmental power.

"The [Fourth] Amendment was in large part a reaction to the general warrants and warrantless searches that had so alienated the colonists and had helped speed the movement for independence. In the scheme of the Amendment, therefore, the requirement that 'no Warrants shall issue, but upon probable cause,' plays a crucial part." (*Chimel v. California*, 395 U.S. 752, 761 (1969).)

By 1992, it was no longer the case that the "warrants-with-narrow-exceptions" standard normally prevails over a "reasonableness" approach (*Constitution Annotated: Amdt4.2.1 Scope of the Rights Protected by the Fourth Amendment: Overview*, Congress.gov). Exceptions to the warrant requirement have multiplied since that time, and with it the role of the police in community caretaking continues to expand.

Despite these bedrock Fourth Amendment principles, some lower courts, including the Fourth Circuit below, have expanded the definition of probable cause in warrantless searches and seizures well beyond the immediate and reasonable.

The notion of temporality necessarily intersects with reasonableness and totality of the circumstances, which establish probable cause. Thus, a lack of a definition of temporality in exigent circumstances muddies the waters of reasonableness and totality, potentially establishing probable cause where there is none. Either a situation is an emergency *right now*, or it is not an emergency. Short of a Schrödinger's cat situation, an emergency does not exist in the future.

The U.S. Supreme Court has not written much about community caretaking and has referred to only three times: *Cady v. Dombrowski* (1973), *South Dakota v. Opperman* (1976) and *Colorado v. Bertine* (1987). All three decisions involved searches of automobiles.

Moreover, it has been more than 40 years since this Court issued its landmark ruling on involuntary commitment (*Addington v. Texas, 1979*). The Court held that "the individual's liberty interest in the outcome of a civil commitment proceeding is of such weight and gravity...that due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence," drawing a bright line for this type of warrantless seizure under the Fourth Amendment. Since *Addington*, Circuits have varied widely in their interpretation of the Fourth and Fourteenth Amendments as they apply to "mental evaluation" warrantless seizures under the community caretaking exception to the Fourth Amendment.

Still today there remains a gaping hole in the Fourth Amendment concerning community caretaking "mental health evaluations," with the number and breadth of these warrantless seizure exceptions growing steadily. State statutes vary widely and lower court decisions are uneven on applying Fourth Amendment protections to citizens seized by police under the guise of a "mental health evaluation."

Multiple judges have written separately on the sharply defined requirement for the "exigent" and "emergency" circumstances necessary for police to have probable cause in their community caretaking role to seize a citizen for a "mental health evaluation." Yet the criteria for what actually comprises "exigent" and "emergency" remains elastic throughout

the circuits, and only this Court can now clarify the temporal requirements for a warrantless "mental health" seizure.

The decision below should be reversed.

## OPINIONS BELOW

The District Court's order granting Respondents' Motions to Dismiss is unpublished (*Barrett v. PAE Government Services*, Inc., Case No. 19-1394 WL 10814589 E.D. Va., Jan 25, 2019)). (Pet. App. B, aVI-32) and the District Court's order granting Respondents' Motion for Summary Judgment is unpublished (*Barrett v. PAE Government Services*, Inc., Case No. 19-1394 WL 10814594 E.D.Va., Apr. 09, 2019)). (Pet. App. B, aVI-48). The Fourth Circuit's opinion affirming the District Court's judgment (Pet. App. A, VI-1) is published at 975 F.3d 416.

The opinion of the Court of Appeals for the Fourth Circuit that is the subject of this petition is reported in *Barrett v. PAE Government Services, Inc.* 975 F.3d 416 (4th Cir. 2020), and is reprinted in the appendix hereto, p. aVI-1-31, *infra*.

The documents deemed relevant to this Petition are reprinted in the Appendix. (Appendix Vol. I and Vol. II).

## STATEMENT OF JURISDICTION

The Fourth Circuit entered judgment on September 15, 2020. This petition is timely under Rule 13 of the Supreme Court Rules and within the 150 day deadline currently in

effect under the Supreme Court's March 29, 2020 Order. The Court has jurisdiction of this appeal under 28 U.S.C. §1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS

**The Fourth Amendment to the U.S. Constitution provides:**

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

## STATEMENT OF THE CASE

### A. Petitioner reports a stalking incident to her immediate supervisor

On July 13, 2017, Dr. Barrett was a 59-year-old, Harvard-educated researcher with a Ph.D. who was working, as she had for much of her professional life, on behalf of the United States on sensitive projects related to national security and nation-building. (Pet.App. C aVI-70) JA19-21; JA458-59; JA731. On July 6, 2017, Dr. Barrett left PAE's Arlington offices and began walking to a nearby Starbucks coffee shop. As she did so, she passed through the courtyard outside of her building, which an adjacent building shared. There, Dr. Barrett noticed a South Asian man look at her and then urgently take out his cell phone and make a call. JA122:3-21; JA512. She told Mr. Lietzau, her manager, about this incident and asked him what she should do, and he suggested that she speak to Mr. Horner, a security manager at PAE. Since working with Mr. Lietzau in May of 2016, Dr. Barrett had told him about stalking she had experienced in Dubai and then in the United States. JA455:8-13; JA456:11-

17; JA561:8- 562:8; JA566:12-19. On July 10, 2017, Dr. Barrett met with Mr. Horner and told him about the incident that she shared with Mr. Lietzau. JA423:5-12; JA425:14-426:4; JA494:13-495:14. The following day, Ms. Wilborn, a human resources manager at PAE, met with Dr. Barrett. Dr. Barrett had never met either Mr. Horner or Ms. Wilborn before July 10, 2017. JA522:1-8; JA523:18-524:8.

**B. Petitioner's employer engages with local police and county health officials repeatedly over a period of days**

On July 12, 2017, Mr. Horner telephoned the non-emergency line for the Arlington County Police Department and asked to speak to a police officer about Dr. Barrett. JA427:2-7; JA428:4-14; JA429:22-430:3. Mr. Horner testified he did not do so to alert the police that Dr. Barrett posed a danger to herself or others but to inquire whether they would be able to assist her, including help her investigate her stalking claims. JA435:4-436:5. On July 12, 2017, Officer Hall and Officer Luzier were dispatched to respond to Mr. Horner's non-emergency call. JA601:12-14; JA694:20-695:2. The police dispatcher did not indicate that the call from Mr. Horner was an emergency. JA603:2-11. Neither Officer Hall nor Officer Luzier traveled to PAE's offices with their emergency lights or sirens activated in their police cars. JA602:17- 603:1; JA696:4-7.

Mr. Horner told Officers Hall and Luzier that Dr. Barrett said that she owned a gun but that she knew she was not permitted to bring it inside PAE's offices. At that time, Dr. Barrett owned one Glock handgun, which she had purchased on the advice of a co-worker in 2006 while living in Albuquerque. JA468:19-469:2; JA470:7-21; JA516; JA 158:3-10; JA699:1-7.

Mr. Horner also told Officers Hall and Luzier that Dr. Barrett had contacted another police department to report that she was being stalked. JA607:14-608:4. Officer Luzier and Officer Hall never spoke to anyone at the Fairfax County Police Department regarding Dr. Barrett's police reports despite having the information to do so, and neither did Mr. Horner. JA701:22-702:5; JA703:19-704:8. Mr. Horner also testified that he did not say to Officer Luzier and Officer Hall on July 12, 2017 that he was concerned that Dr. Barrett would harm herself or others. JA607:6-9. Mr. Horner hoped that Officers Hall and Luzier would speak to Dr. Barrett on July 12, 2017. JA436:7-10.

But because Dr. Barrett was not in PAE's offices on July 12, 2017, Mr. Horner agreed with Officer Hall and Officer Luzier to contact the police when Dr. Barrett was in PAE's offices and able to speak to the police. Mr. Horner also agreed, in the meantime, to contact the Arlington County Department of Human Services ("DHS"). JA433:6-21. After she left PAE's offices on July 12, 2017, Officer Hall did not have enough information to determine if Dr. Barrett was being stalked, JA700:4-12, and Officer Hall admitted that she had no basis to know whether or not individuals were following Dr. Barrett, as Dr. Barrett described. JA709:5-8. Nevertheless, after Officer Hall and Officer Luzier left PAE's offices on July 12, 2017, Officer Hall took no further actions regarding Dr. Barrett that day. JA701:22-702:5. In an email to both officers that afternoon, Mr. Horner apologized for Dr. Barrett's absence that morning, stating that if they "did not take care of her", PAE would take care of her "privately." Later on July 12, 2017, after Officer Hall and Officer Luzier had left PAE's offices, Mr. Horner telephoned Alexis Mapes, a supervisor at DHS's Emergency Services. JA152:2-153:1.

C. **The officers seize Petitioner from her office without a warrant under the community caretaking exception despite the lack of any exigent circumstances**

On the morning of July 13, 2017, after Mr. Horner learned from Dr. Barrett's manager, Allison Eastridge, that Dr. Barrett was at PAE's offices attending a budget meeting, he called the Arlington County Police Department non-emergency telephone number to request that the officers he had spoken to the day before return to PAE's offices to speak to Dr. Barrett. JA439:18-440:10; JA441:6-9; JA441:19-442:4; JA443:5-20. Mr. Horner testified that when he telephoned the police on July 13, 2017, he did not believe that Dr. Barrett posed any emergency. JA439:12-16. Officer Hall and Officer Luzier were dispatched to PAE's offices again on July 13, 2017. JA611:7-9; JA704:16-705:4. The radio dispatch call did not indicate that the call was high priority. JA612:7-20. As Officer Hall and Officer Luzier drove to PAE's offices, they did not turn on their emergency lights or sirens. JA612:21-613:2; JA706:16-22.

When Officer Hall and Officer Luzier arrived at PAE's offices on July 13, 2017, they spoke with Ms. Wilborn. JA614:12-615:4. Dr. Barrett was then lured into a PAE conference room by Ms. Wilburn, ostensibly to give a police report, where she met Officer Hall and Officer Luzier. JA618:15-20. Dr. Barrett was dressed in business attire at that time, appeared even-keeled and not disheveled. JA618:5-14. Ms. Wilborn then sat next to Dr. Barrett around the conference table. JA618:21-619:12.

Officer Luzier asked Dr. Barrett to describe her concerns or situations that she had experienced in the past few days. JA623:2:6. Dr. Barrett described being followed by black SUVs and having people ringing her doorbell. JA624:3-17. She also said that she had

contacted the police about those incidents and they were investigating her claims. JA624:17-19; JA635:1-5.

Dr. Barrett also told Officer Hall and Officer Luzier that she had seen a man outside of PAE's offices watching her while using his phone. JA625:7-13. Dr. Barrett described to Officer Luzier and Officer Hall how she had asked the security guard in the lobby of the building adjacent to PAE's offices about the man who had been watching her. JA537:10-15.

While speaking to Officer Hall and Officer Luzier, Dr. Barrett remained calm, did not exhibit any violent actions, never threatened herself or others, and never said that she wanted to hurt others. When asked by Officer Hall or Officer Luzier whether she intended to harm herself or others, Dr. Barrett said she did not. JA629:9-630:16; JA707:5-10; JA708:17-19.

Nevertheless, a paperless ECO was issued against Dr. Barrett, ostensibly because Dr. Barrett posed a risk both to herself and to others. Officer Hall then drove Dr. Barrett to the Virginia Hospital Center ("VHC") emergency room. JA634:5-18. There is no evidence in the record – and none in this case – of Dr. Barrett ever confronting anyone about her stalking, nor of any reports by her (actual) co-workers that she was acting in a threatening manner.

After Petitioner was seized, Ms. Wilborn prepared a statement to the police, at the request of Officer Luzier, purporting to relate what Dr. Barrett had told Ms. Wilborn on July 11, 2017. JA539:1-6. Officer Hall never saw the statement before issuing the ECO. In deposition, Ms. Wilborn stated she did not prepare the statement until after the ECO was issued. That statement was stapled to the police report. The police report itself did not contain any references to Dr. Barrett posing a threat to herself or others.

At the VHC, Mr. Galway was designated by the Arlington County CSB to examine Dr. Barrett. JA644:7-10. In evaluating Dr. Barrett, Mr. Galway spoke to Ms. Wilborn and Mr. Lietzau. JA645:13-646:21; JA647:6:9; JA653:20-654:13. During his telephone call with Mr. Lietzau, Mr. Galway said that he did not see much reason to keep her and was thinking of releasing her. JA581:2-21. Mr. Galway asked Mr. Lietzau if that concerned him. Mr. Lietzau said that it did not. JA582:1-13.

On the afternoon of July 13, 2017, five minutes after speaking with "HR," Mr. Galway signed a Petition for Involuntary Admission for Treatment to keep Dr. Barrett confined in VHC's psychiatric ward. JA661:19-662:5; JA725-26. Later on July 13, 2017, a magistrate judge issued a Temporary Detention Order. JA728-29. Notably, in his petition, Mr. Galway did not check the preceding box to indicate that Dr. Barrett "has a mental illness."[1]

On the morning of July 17, 2017, an independent mental health evaluator examined Dr. Barrett and concluded that she did not meet the criteria for mental health involuntary commitment. JA666:13-668:21; JA731-33. Dr. Barrett remained in VHC's psychiatric ward

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[1] The General District Court, specifically, Magistrate Jason Brayton-Lewis, signed and issued the TDO at 5:15 p.m. on July 13th. Mr. Galway, however, did not complete and sign the preadmission screening report until 6:55 p.m., and the report was not finally approved until 7:07 p.m., nearly two hours after the General District Court issued the TDO. Contrary to Mr. Galway's representation, it was not possible for his preadmission screening report to be attached to his petition for a TDO, as his petition stated it was. Because Mr. Galway's TDO petition could not have included the preadmission screening report (which separately reported his examination of Dr. Barrett) when he presented his TDO petition to the Magistrate, nothing on the face of the TDO petition, and no attachments to the TDO petition, indicated that Mr. Galway had examined Dr. Barrett, even though the TDO states that an evaluation had been done by Mr. Galway as a precondition for the issuance of the TDO. The TDO also indicated that it was issued "upon the sworn petition of Brian Galway" and that Mr. Galway had concluded in his TDO petition that Dr. Barrett suffered from a mental illness, when in fact Mr. Galway's TDO petition did not reflect any such conclusion. (Second Amended Complaint, pp. 37-38).

until later on July 17, 2017, following a commitment hearing before a special justice, who dismissed Dr. Barrett's case. JA56-57 ¶ 230; JA57-58 ¶ 237.

**D. The lower courts uphold the warrantless seizure despite the lack of an emergency or exigent threat from Petitioner**

Petitioner sued PAE Government Services, Inc. and several of its employees, along with Arlington County and the individual officers under 42 U.S.C. § 1983 in the Federal District Court for the Eastern District of Virginia. Petitioner alleged that Respondents violated her rights under the Fourth Amendment. See *id.* at 53a. She also brought claims under Virginia law. The parties cross-moved for summary judgment. The District Court granted summary judgment for both PAE and Arlington County. The Fourth Circuit affirmed.

At issue here is Petitioner's claim that her seizure from the office violated her Fourth Amendment rights. Respondents' only justification for their nonconsensual, warrantless entry and seizure was the exigent circumstances exception to the warrant requirement based on "the totality of the facts and circumstances". Pet. App. aVI-18, 20.

The District Court gave credence to the county mental health assessor's claim that despite his doubts, he needed to detain her to address a "perceived acute risk." But it was unreasonable for him to perceive an "acute" risk. Nothing had occurred in the preceding months, weeks and days that established any such risk. The incident-free week after the events of July 6 should have indicated to assessor (and earlier, to police officers) that Dr. Barrett was not substantially likely to harm herself or others in the near future. That finding of a threat of immediate harm, as required by statute, Va. Code Ann.§ 37.2-809(B), was

missing from the assessor's conclusion. By petitioning to confine her under a Temporary Detention Order (TDO) anyway, Petitioner was falsely imprisoned and her Fourth Amendment rights violated.

The issuance of a paperless ECO against Petitioner, contrary to the finding of the District Court, JA778, violated clearly established law, as shown from a comparison of Petitioner's circumstances to existing cases in which the plaintiff was also subject to involuntary hospitalization. Such law exists from the Fourth Circuit's examination of mental health detentions. Pet. App. aVI-129. In these Fourth Circuit rulings (Pet. App. D), exigent circumstances were enveloped by threatening behaviors emanating directly from the person at the time the police arrived on scene. In contrast, Petitioner made no threats against the police, and the police learned that Dr. Barrett had no history of encounters with the Arlington DHS. JA637:16-638:9.

In affirming the decision of the lower court, the Fourth Circuit's Opinion claims that "the question of whether probable cause existed is based upon the totality of the facts and circumstances presented to the Arlington County defendants, including the reports of all of the persons involved when *they made the difficult judgment call* to detain Plaintiff for the emergency mental health evaluation." Pet. App. aVI-20 (emphasis added). Here, probable cause hinges on making "a difficult judgement call," providing clear evidence that this seizure was not based on exigent circumstances as required by under the Fourth Amendment. Were this an actual emergency, there would have been no hesitation to seize Petitioner to protect her life or the lives of those in the office.

The court framed their opinion by stating that

> The Fourth Amendment protects the people "against unreasonable searches and seizures." U.S. Const. amend. IV. Determining whether a person's Fourth Amendment rights have been violated in the mental health context requires us to determine whether the officials had probable cause to seize the person for an emergency mental evaluation. See *Bailey v. Kennedy*, 349 F.3d 731, 739 (4th Cir. 2003). Such probable cause exists "when the facts and circumstances within the defendant's knowledge and of which the defendant had reasonably trustworthy information were sufficient to warrant a prudent man to believe that the person poses a danger to himself or others." *Goines v. Valley Cmty. Servs. Bd.*, 822 F.3d 159, 172 (4th Cir. 2016) (internal quotation marks omitted). "Because probable cause deals with probabilities and depends on the totality of the circumstances, it is a fluid concept that is not readily, or even usefully, reduced to a neat set of legal rules." Wesby, 138 S. Ct. at 586 (internal citations and quotation marks omitted). Pet. App. aVI-17-18

The court's opinion hinges exclusively on alleged statements made by Petitioner to PAE Defendants in the days previous; the Petitioner's *own words* to county officials were never threatening at any time, in particular on the day of her seizure and detention. Applying the "totality of the circumstances" to establish probable cause for Petitioner's warrantless seizure, the court gives credence to the words of only two individuals: "There is no evidence that the officers had reason to question the veracity of the information that the PAE

defendants reported to them. The reporting persons were management officials—a PAE security manager and human resources manager." Pet.App. aVI-22. The two PAE employees feared that Petitioner might harm another employee. *Id.* Since that information was suppositional and predictive, there was no evidence of an exigent circumstance necessary for probable cause.

In arriving at its decision, the court conflated Petitioner's words with those of the Defendants, "[i]n the end, therefore, the statements of the PAE defendants and Plaintiff were remarkably consistent." Pet. App. aVI-22] The court repeated itself stating that "[a] decision had to be made, and the officers made the reasonable, *albeit difficult*, judgment call that Plaintiff posed a danger to herself and others and should be transported to the hospital for a mental health evaluation." (emphasis added)

In its opinion, the court cited Va. Code Ann. § 37.2-808.A; see also *id.* § 37.2-808.G ("A law-enforcement officer who, based upon his observation or the reliable reports of others, has probable cause to believe that a person meets the criteria for emergency custody . . . may take that person into custody") to justify the seizure of Petitioner.

In extending qualified immunity to the mental health assessor, the court again applied the totality argument, to wit, "we must evaluate whether Galway had probable cause to detain Plaintiff based upon the *totality* of the facts and circumstances known to him when he made his decision, and not based upon a culling of the more favorable reports that he received." Pet. App. aVI-23.

In sum, in issuing its opinion, the court relied solely on the words of only two people in its decision, which even liberally construed cannot equate to the "totality of the circumstances and facts."

Absent clear guidance on temporality concerning what constitutes an "exigent" circumstance under exceptions to the warrant clause of the Fourth Amendment, Defendants had carte blanche to seize and detain Petitioner.

## SUMMARY OF ARGUMENT

### Introduction

Respondents violated Petitioner's Fourth Amendment rights when they conspired together and seized her from her office without a warrant. The justification Respondent's offered is that she was "dangerous" to others under Va. Code Ann. § 37.2-809(B), and, if not immediately removed from the office, could cause serious harm to another employee. But that justification was based solely on reports from only two other employees who were coached by the company's legal team; Petitioner had never threatened anyone at any time, nor had exhibited any threatening behavior either before or during her interactions with police and county officials. The courts have been clear that the warrantless seizures exception to the Fourth Amendment requires exigent circumstances. Yet these rulings conflict with the majority of state statutes for community caretaking seizures involving "mental health evaluations," which extend the timeline of "exigent circumstances" to well beyond the arrival of the police and their investigation. This boundless "community caretaking" function grants police and other officials acting under the color of law a blank check to intrude upon a citizen's right to privacy. The result contradicts this Court's

precedent, is antithetical to the Fourth Amendment, and does not aid in protecting people in need.

I. Exceptions to the warrant requirement are now evaluated by criteria other than exigent circumstances, resulting in a considerable expansion, beyond what existed prior to *Katz v. United States*, 389 U.S. 347 (1967), of the power of the police and other authorities to conduct searches and seizures.

II. In an attempt to check the unfettered growth in warrantless searches and seizures, *United States v. United States District Court,* 407 U.S. 297, 318 (1972) made clear the gravity of a warrantless searches and seizures in stating, "[p]rior decisions of this Court ... have emphasized that exceptions to the warrant requirement are 'few in number and carefully delineated' ... and that the police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches and arrests."

III. The nature of warrantless seizures based on exigent and emergency situations is temporal by definition, yet state statutes vary widely in their criteria for "mental health seizures," with the majority excluding temporal criteria altogether, and in many cases expanding the timeline to meet the criteria well beyond the immediate circumstances, both past and future.

IV. The lower courts that have extended exceptions to the warrant requirement for "mental health seizures" beyond exigent circumstances have not even tried to reconcile their rulings with the core principles underlying the Fourth Amendment. Instead, they emphasize the importance of police officers' caretaking responsibilities.

Yet they fail to acknowledge the many existing tools that law enforcement and others have available. Finally, although courts have identified some purported limits on warrantless "mental health" seizures, those limits are illusory, and in any event cannot redeem statutes that are fundamentally incompatible with foundational Fourth Amendment principles.

## ARGUMENT

Exceptions to the warrant requirement for seizures under the Fourth Amendment are limited to exigent circumstances, yet the temporal definition of what exactly constitutes an "emergency" in order to justify probable cause for seizing a citizen varies considerably among state statutes and lower court rulings. This definitional deficiency contributes to the unbridled expansion of the power of the police to seize citizens, eroding Fourth Amendment protections.

### I. The Fourth Amendment Demands that Probable Cause Exist Regardless of Whether Or Not A Warrant Is Issued

#### A. The Common Law Spurned Warrantless Seizures of Persons

Expanding the timeline for warrantless seizures is an inverse relationship to Fourth Amendment protections dating back to the country's founding. In *Boyd v. United States*, 116 U.S. 616 (1886), Court held that "a search and seizure [was] equivalent [to] a compulsory production of a man's private papers" and that the search was "an 'unreasonable search and seizure' within the meaning of the Fourth Amendment." In the published opinion, after citing Lord Camden's judgment in *Entick v Carrington*, 19 Howell's State Trials 1029, 95 Eng. 807 (1705), Justice Bradley said: "The principles laid down in this opinion affect the very essence

of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life."

B. The Fourth Amendment Prohibits Warrantless Seizures in The Absence of Consent or Exigent Circumstances

The Supreme Court has held that normally, a police seizure of either evidence of a crime in a constitutionally protected area or a possible criminal defendant must be based on probable cause (J.F. Decker, *Emergency Circumstances, Police Responses, and Fourth Amendment Restrictions,* 89 J. Crim. L. & Criminology 433, 1999). The Court has repeatedly stated that a government search or seizure on private premises without a warrant is presumptively unreasonable (*Payton v. New York*, 445 U.S. 573, 586 (1980); *Coolidge v. New Hampshire*, 403 U.S. 443, 474-75 (1971)) under the Fourth Amendment (*U.S. Const. amend. IV*) unless it falls within one of the "carefully delineated" (*Welsh v. Wisconsin*, 466 U.S. 740, 749-50 (1984) (quoting *United States v. United States District Court*, 407 U.S. 297, 318 (1972)) exceptions to the Fourth Amendment warrant clause.

Further, under the Fourth Amendment, a police officer may stop a suspect on the street and frisk him or her without probable cause to arrest, if the police officer has a reasonable suspicion that the person has committed, is committing, or is about to commit a crime and has a reasonable belief that the person "may be armed and presently dangerous." *Terry v. Ohio*, 392 U.S. 1 (1968). This landmark case bounded "stop and frisk" police actions with reasonableness and immediacy, i.e., "presently dangerous."

Nearly 50 years later, "totality of the circumstances" and "reasonableness" have become the arbiters of probable cause, significantly blurring the bright line drawn initially by the court on the need for exigent and emergency circumstances to effect a warrantless seizure. No where is this more true than in the circumstances of a "mental health seizure." Yet the state statutes for those seizures are in direct contradiction to the established case law on what constitutes objectively reasonable seizures based on the totality of the circumstances, especially in the case of a warrantless seizure. The "Terry stop" requirement for "presently dangerous" has expanded backward and forward in time when it comes to community caretaking seizures.

*Tennessee v. Garner*, 471 U.S. 1 (1985) established that once a Fourth Amendment seizure occurs, the determination as to whether or not that seizure is objectively reasonable rests on two prongs: 1) is the person in *imminent* threat of death or serious bodily harm; or, 2) is the person attempting to flee. (emphasis added). In *Graham v. Connor,* 490 U.S. 386 (1989) the Court decided to add a "totality of the circumstances" test as known or reasonably perceived by a police officer *at the moment* the seizure occurred. (emphasis added)

As provided by the Court, and later by *Illinois v. Gates,* 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527, 1983, the notion of totality of the circumstances in essence is as follows: 1) did the officer reasonably perceive the person who was about to be seized as an imminent threat; 2) was the person actively resisting the seizure; 3) was the person causing circumstances that were tense, uncertain, and were rapidly evolving; 4) what was the severity of the crime at issue; and 5) whether or not the person was attempting to evade seizure by flight. As one example, where an anonymous tip is substantiated with actual police findings,

a "totality of the circumstances" approach is a suitable method of determining probable cause instead of using the earlier two-pronged test of "veracity/reliability" and "basis of knowledge" from *Spinelli v. United States*, 393 U.S. 410 (1969). These well-established guidelines provide the guardrails that are missing from state statutes concerning community caretaking "mental health seizures," as they were from the judgment in Petitioner's case.

As examples of emergency exceptions that were properly invoked using totality of the circumstances, in *Klauss*, the court emphasized that the officers were acting not just on the girlfriend's report, but on the totality of the circumstances. (Decker, *Id.*) *State v. Klauss*, 562 A.2d 558, 561 (Conn. App. Ct. 1989). The defendant was reported to be intoxicated and upset. There was a report of gunfire, and guns were confirmed as being present in the house. Additionally, the defendant's whereabouts were unknown. In *Isaac*, the situation was escalated from a mere report of a man with a gun to an emergency situation when the officers heard screams and saw an injured woman inside the apartment. (*Id.*) *People v. Issac*, 599 N.Y.S.2d 113, 114 (N.Y. App. Div. 1993). These cases also appear to suggest that an unsubstantiated or anonymous tip of firearms or gunfire alone is not enough to permit use of the emergency exception, because a tip could be fabricated by officers or others with improper motives. (*Id.*) In each of these cases, there were multiple indicators as soon as the police arrived that an emergency was underway. Across the board in state mental health seizure statutes, the requirement for the presence of multiple indicators is missing, most notably those that comprise exigent circumstances.

Approval of warrantless searches pursuant to arrest first appeared in dicta in several cases. *Weeks v. United States*, 232 U.S. 383, 392 (1914); *Carroll v. United States*, 267 U.S.

132, 158 (1925); *Agnello v. United States*, 269 U.S. 20, 30 (1925). Whether or not there is to be a rule or a principle generally preferring or requiring searches pursuant to warrant to warrantless searches, however, has ramifications far beyond the issue of searches pursuant to arrest. *United States v. United States District Court*, 407 U.S. 297, 320 (1972).

In *United States v. United States District Court*, (*Id.*), Justice Powell explained that the "very heart" of the Amendment's mandate is "that where practical, a governmental search and seizure should represent both the efforts of the officer to gather evidence of wrongful acts and the judgment of the magistrate that the collected evidence is sufficient to justify invasion of a citizen's private premises or conversation." Thus, what is "reasonable" in terms of a search and seizure derives content and meaning through reference to the warrant clause. *Coolidge v. New Hampshire*, 403 U.S. 443, 473–84 (1971). See also *Davis v. Mississippi*, 394 U.S. 721, 728 (1969); *Katz v. United States*, 389 U.S. 347, 356–58 (1967); *Warden v. Hayden*, 387 U.S. 294, 299 (1967).

Supreme Court rulings have long recognized "extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." (*Boddie v. Connecticut*, 401 U.S. 371, 379 (1971); see also *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 569-70 (1972)) ("When protected interests are implicated, the right to some kind of prior hearing is paramount.").)

These "extraordinary situations" have been described by court rulings in various ways, [See, e.g., *Roth*, 408 U.S. at 570 n.7 ("rare and extraordinary situations"); *Fuentes v. Shevin*, 407 U.S. 67, 90 (1972) ("truly unusual" situations); *Bell v. Burson*, 402 U.S. 535, 542 (1971) ("emergency situations")];but it has grouped them into two categories: (1) occasions

"where a State must act quickly" and (2) those "where it would be impractical to provide predeprivation process." [*Gilbert v. Homar*, 520 U.S. 924, 930 (1997); see also *Parratt v. Taylor*, 451 U.S. 527, 539 (1981), overruled on other grounds by *Daniels v. Williams*, 474 U.S. 327 (1986) (stating that "either the necessity of quick action by the State or the impracticality of providing any meaningful predeprivation process, when coupled with the availability of some meaningful means by which to assess the propriety of the State's action at some time after the initial taking, can satisfy the requirements of procedural due process").]

Relevant to community caretaking seizures, in *Fuentes v. Shevin*, 407 U.S. 67 (1972) the Court identified three factors necessary to justify a deprivation before a full hearing takes place. (Joseph Blocher and Jacob D. Charles, *Firearms, Extreme Risk, And Legal Design: "Red Flag" Laws And Due Process First*, 106 Va. L. Rev. 1285 (2020)) in each case the seizure must be "directly necessary to secure an important governmental or general public interest." Next, there must be "*a special need for very prompt action.*". (emphasis added) Importantly, in prior cases approving such seizures, "the State ha[d] kept strict control over its monopoly of legitimate force; the person initiating the seizure ha[d] been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance." As legal experts have noted, the cases *Fuentes* cited that justified seizures prior to a hearing "involved immediate, irreparable, grave and widespread harm." (*Quasi in Rem Jurisdiction and Due Process Requirements*, 82 Yale L.J. 1023, 1028 (1973).)

A stark example of warrantless seizures involving "immediate, irreparable, grave and widespread harm" is civil commitment, which, for any purpose, constitutes a significant deprivation of liberty that requires due process protection. See *Addington v. Texas*, 441 U.S. 418, 425 (1979). Thus, the Fourth Amendment's protection against unreasonable search and seizure requires probable cause before involuntary hospitalization may be ordered. *Bailey*, 349 F.3d at 740. "The law does not permit 'random or baseless detention of citizens for psychological\evaluations.'" *Id.* (quoting *Gooden v. Howard County*, 954 F.2d 960, 968 (4th Cir. 1992)). Thus, an individual may be detained for an involuntary hospitalization "only if there are reasonable grounds for believing that the person seized is subject to seizure under the governing legal standard." *Villanova v. Abrams*, 972 F.2d 792, 795 (7th Cir. 1992), quoted in *Raub v. Campbell*, 3 F. Supp. 3d 526, 532 (E.D. Va. 2014).

Established case law under the Fourth Amendment is clear on the grave consequences of any form of civil commitment, yet the expanding universe of community caretaking "mental health seizures," especially under proliferating "red flag gun laws," remains seemingly immune to the restrictions placed on such warrantless seizures by the courts.

C. The Expectation of Privacy Within the Home Extends to the Office

The Court has ruled that, "the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office." *Opperman*, 428 U.S. at 367; see *Harris v. United States*, 390 U.S. 234, 236 (1968); *Cooper v. California*, 386 U.S. 58, 61-62 (1967). Because the courts have equated home and office, Petitioner's seizure within her office calls into question the right to privacy under the Fourth Amendment. Privacy interests

intersect with the temporality of "exigent" circumstances, in that citizens have a reasonable expectation to be free from government intrusion in their area of work.

In *Katz (Id.)*, the court ruled on whether there is an expectation of privacy upon which one may "justifiably" rely. Justice Harlan created a two pronged test for determining whether the privacy interest is paramount: "first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" *Id.* at 361. In short, Fourth Amendment protections follow the person, and not the place.

Petitioner had a right to privacy in her office, where there was a reasonable expectation of freedom from governmental intrusion. (*Mancusi v. DeForte*, 392 U.S. 364, 368 (1968) (official had a reasonable expectation of privacy in an office he shared with others, although he owned neither the premises nor the papers seized).) Yet no place-bound exceptions are found in any state statute regarding community caretaking. (*Caniglia v. Strom*, 2020). In essence, current state laws on "mental health seizures" are a free-for-all in terms of where and when an individual is subject to seizure, even in one's own home or office.

In Petitioner's case, instead of applying the rules found in *Goines (Id.)*, (Pet. App. aVII), *Gooden (Id.)* (Pet. App. aVII-74) and *Cloaninger v. McDevitt*, 555 F.3d 324 (4th Cir. 2009) (Pet. App. aVII-55) or using the roadmap established in *Raub v. Campbell,* 3 F. Supp. 3d 526 (E.D. Va. 2014), *Raub v. Campbell,* 785 F.3d 876 (4th Cir. 2015) (Pet. App. aVII-1), the court decided to affirm a carefully constructed defense narrative, crafted by a corporate legal team, that took place over days and fails to evaluate the reason for police presence on a

constitutionally protected area – the office. The court also expanded the timeline of the implied "dangerousness" for law enforcement purposes well beyond the immediate tranquil situation found in that office on July 13, 2017.

II. The Temporal Nature of "Emergency And Exigent Threat" in Warrantless Seizures Under the Fourth Amendment is Ill-Defined

Exigent circumstances were defined in *United States v. McConney,* 728 F. 2d 1195 (1984) as "circumstances that would cause a reasonable person to believe that entry (or other relevant prompt action) was necessary to prevent physical harm to the officers or other persons, the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts." In *Missouri v. McNeely,* 569 U.S. 141 (2013) the Supreme Court clarified, "A variety of circumstances may give rise to an exigency sufficient to justify a warrantless search, including law enforcement's need to provide emergency assistance to an occupant of a home . . . engage in "hot pursuit" of a fleeing suspect . . . or enter a burning building to put out a fire and investigate its cause." Although both cases suggest a clear element of immediacy to police action, the temporal aspect remains undefined, and merely suggested by unfolding events.

In *People v. Ramey*, 545 P.2d 1333,1341 (Cal. 1976), the court defined "exigent circumstances" as "an emergency situation requiring *swift action* to prevent imminent danger to life or serious damage to property, or to forestall the imminent escape of a suspect, or destruction of evidence." (emphasis added) In adding "swift action" as a requirement, in this instance the court at least attempted to frame police action within time limits.

Under the "emergency doctrine" approach there must exist an objectively reasonable basis for a belief in an immediate need for police assistance for the protection of life or substantial property interests (Decker, *Id.*). In *United States v. Bute*, 43 F.3d 531, 540 (10th Cir. 1994) the court ruled that "a warrantless entry only is permitted under the Fourth Amendment when the officer has an objectively reasonable belief that an emergency exists requiring immediate entry to render assistance or prevent harm to persons or property within." As Decker explains (*Id.*), "the first condition that must appear before police can take action under the authority of the emergency doctrine is the presence of a true emergency situation where a police officer has an objectively reasonable basis for a belief that there is an immediate need for police assistance for the protection of human life or property." Here, the court has defined at least entry to require "immediate" action, establishing temporal limits. In Petitioner's case, the police went to her office the day before she was seized on a non-emergency call, and then returned the following day, again on a non-emergency call, clearly establishing a non-emergency situation according to *U.S. v. Bute* (*Id.*).

There is great potential risk in expanding or over-applying exigency exceptions in such a way as to swallow the exclusionary rule, of which community caretaking "mental health seizures" is a perfect example. Fourth Amendment case precedent demands that "emergency" and "exigent" circumstances for warrantless seizures are bounded bv the timeframe of the arrival of police and their subsequent investigation in their community caretaking role *at that time.* This definition necessarily removes past and future actions a citizen might have taken/would take from the equation (both immediate and longer-term), both of which are unknowns. Either a situation is an emergency *right now*, or it is not an

emergency. Logically, an emergency does not exist in the future. With no temporal guardrail for warrantless searches and seizures, alleged facts are easily crafted into false narratives implicating innocent citizens.

In 2020, none other than the Fourth Circuit expressed its hesitation in applying the "emergency-as-exigency" exception to facts involving a Terry stop saying, "Though the emergency-as-exigency approach may sound broad in name, it is subject to important limitations and thus is quite narrow in application. For example, the requirement that the circumstances present a true emergency is strictly construed—that is, an emergency must be enveloped by a sufficient level of urgency. Indeed, standing alone, even a possible homicide does not present an emergency situation demanding immediate [warrantless] action." (*United States v. Curry*, 965 F.3d 313, 322–23 (4th Cir. 2020) (quotation marks and citations omitted). The Fourth Circuit has described the "intended role" of the Fourth Amendment as "the bulwark against 'overbearing or harassing' police conduct." *United States v. Wilson*, 953 F.2d 116, 126 (4th Cir. 1991) (citing *Terry v. Ohio*, 392 U.S. 1, 15 (1968)).

In an earlier decision, the Fourth Circuit acknowledged "that in the context of a warrantless entry and search, little, if any, distinction exists in Virginia law between the circumstances governing the application of the community caretaking doctrine and those governing the application of the 'emergency' exception to the warrant requirement." *Wood v. Commonwealth*, 484 S.E.2d. 627, 630 (Va. Ct. App. 1997). Logically, then there should be the same "envelope" standard applied to community caretaking "mental health seizures" as other warrantless seizures. The additional of a temporal guideline for the former would serve to equalize criteria for both community caretaking and criminal police actions.

Despite articulating this "envelope" approach to urgency, no temporal timeline was given as to what exactly constitutes an "envelope" or a "sufficient level of urgency," leaving ample room for abuse of police power under loosely defined state statutes on community caretaking "mental health seizures."

A. The Court Has Never Provided Guidance on the Actual Timespan Constituting "Emergency And Exigent Threat" Circumstances, in Particular With Regard to Community Caretaking and Seizures for "Mental Health Evaluations"

There is no bright line definition of a timeline for what constitutes "dangerousness" in the context of warrantless "mental health evaluation" seizures either in state statutes or any of the Circuits. Adding to the problem is that the existence of exigent circumstances is a mixed question of law and fact. (*United States v. Anderson*, 154 F. 3d 1225 (10th Cir, 1998) cert. denied 119 S. Ct. 2048 (1999) (citations omitted)) Experts at the intersection of the justice system with mental illness have long observed that police are often uninformed and overzealous in arresting people perceived to suffer from mental illness. (*Criminalizing mental disorder. The comparative arrest rate of the mentally ill.* Teplin LA, Am Psychol. 1984 Jul; 39(7):794-803.) Bittner's 1967 seminal work on police and mentally ill citizens underscored that the temporal nature of arrest is heavily dependent upon the seriousness of crime committed. (*Horizons of Context: Understanding the Police Decision to Arrest People With Mental Illness.* Melissa Morabito, 2007). The landmark U.S. Supreme Court decision in *O'Conner v. Donaldson*, 422 U.S. 563 (1975) ruled that if an individual is not posing a

danger to self or others and is capable of living safely by themselves, the state has no right to commit the individual to a facility against their will.

Since the "dangerousness" criteria was implemented in the 1970s for warrantless community caretaking seizures, there have been limited attempts to define what that notion means in the context of the Fourth Amendment, primarily because even experts in psychiatry have yet to create a predictive model. As Bernadette Dallaire, et. al. reported in their research study on civil commitment,

> "[i]n a general sense, the notion of dangerousness is used to characterise a situation, a thing or a person presenting a danger for the physical or human environment, or for oneself. This notion refers to the potential, possibility or probability of an undesirable, unrealised event; not a current event but rather a risk and, by extension, to the capacity to foresee such eventuality (Litwack 1994). In the opinion of several analysts, dangerousness and its substrate - danger - are `fuzzy' concepts: ... " (*Civil commitment due to mental illness and dangerousness: the union of law and psychiatry within a treatment-control system*, Sociology of Health & Illness, Vol. 22 No. 5, 2000, pp. 679-699.).

Given this "fuzziness" even amongst experts, Fourth Amendment protections for this type of warrantless seizure must be strengthened.

Lower court decisions vary significantly on the issue of community caretaking and "mental health seizures." In *State v. Vargas*, 63 A. 3d 175, 213 NJ 301, the New Jersey Supreme Court found that "the police did not have an objectively reasonable basis to believe

that an emergency threatening life or limb justified the warrantless entry into Vargas' apartment." Yet the court conceded that "the breadth of the community caretaking doctrine has been the subject of much discussion." In *Aouatif v. City of New York*, (No. 07-CV-1302, United States District Court, E.D. New York) Aouatif argued that she did not pose a risk of harm to herself or others, emphasizing that she displayed no violent behavior. The court disagreed, ruling that "the Fourth Amendment, however, requires only a 'probability or substantial chance of dangerous behavior, not an actual showing of such behavior' to support a seizure for involuntary transport. *Brown v. Catania*, No. 3:06-CV-73 (PCD), 2007 WL 879081, (D. Conn. Mar. 21, 2007)".

In *State of Oregon v. M.A.*, a male Saudi national was seized under the exigency exception after an altercation while boarding a plane. On appeal, the Oregon Court of Appeals reversed the lower court, stating "in sum, although the record establishes that appellant was delusional, had engaged in inappropriate behaviors, and had struggled when being taken into custody, it does not establish that there was a "particularized and highly probable threat to [his] safe survival," *State of Oregon v. M.A*, 240 Or.App. at 84, 245 P.3d 697. In another community caretaking case involving an altercation with police, *Simon v. Cook*, No. 08-253, 2008, WL 3977596, Simon, an attorney in Florida, was seized by police for a "mental health evaluation" after police officer Cook refused to take his complaint and then Simon pointed his finger at the police officer, which was interpreted as being a "dangerous" act. Simon spent 72 hours in detention in the hospital. These few examples indicate the stark differences in judicial treatment across the lower courts, given the nebulous guidelines for defining and predicting "dangerousness" to self and others.

B. State Statutes, in Particular, for Warrantless "Mental Health Seizures", Run the Gamut from Amorphous Definitions of "Recent Threatening Behavior" to Crystal Ball Predictions Of "Near Future" Threats

State statutes vary widely on what constitutes seizures for "mental health evaluations," with no temporal guidelines. According to a 2016 research study by a team of psychiatry professionals and lawyers:

> All states and Washington, D.C., allow a person to be placed and held in a health care facility for treatment, observation, or stabilization without consent. Current laws vary on how and for what reason a person can be held, whether or not judicial review of the emergency hold is required, how long a hold can last, and the rights to which a person is entitled during and after the emergency hold. The most prevalent reason for an emergency hold is being a danger to oneself or others, ... Police in all jurisdictions have the authority to detain a person who *appears to pose an imminent danger*, and 38 states explicitly authorize police and peace or parole officers to initiate the emergency hold process. (Hedman, L., et. al., *State Laws on Emergency Holds for Mental Health Stabilization,* 2016) (emphasis added).

The study observed that "[t]he legitimacy and value of these interventions depend on several factors: the statutory criteria and their application, [and] *the accuracy of the process for triggering an emergency hold*..." (emphasis added)

A troubling result of the study revealed that "[t]he data presented here document the expansion of emergency hold criteria *outside of the danger standard.* Most of these

additional criteria are consistent with the standard in O'Connor, but both legal and clinical questions remain unanswered." (emphasis added)

Legal expert Richard Boldt also found significant variation from state to state in the statutory provisions governing the initiation and management of the civil commitment process (Richard C. Boldt, 10 Drexel L. Rev. 1 (2017)). He observes that, "[o]ver the years, litigants have sought to establish a constitutional basis for requiring a preliminary judicial hearing to review emergency psychiatric detentions early enough in the process to be a meaningful check on the exertion of state authority." *Id.*

In *Humphrey v. Cady,* 405 US 1972, the court observed that commitment to a mental hospital produces "a massive curtailment of liberty." But the court's ordinary preference for pre-deprivation procedural protections, recognized in other parts of its procedural due process jurisprudence, has not found favor with respect to emergency civil commitments. *Id.*

For example, Virginia's state statute is in direct contradiction to previous rulings in this court and the lower courts on what constitutes "exigent" and "emergency" circumstances in that their criteria includes "in the near future," without defining that temporal guideline.

Virginia statute Va. Code Ann. § 37.2-808(A) provides:

> Under Virginia law, the police may take a person into custody and transport that person involuntarily for a mental health evaluation pursuant to an "emergency custody order" ("ECO") only if there is probable cause to believe the following: that [the] person (i) has a mental illness and that there exists a substantial likelihood that, as a result of mental illness, the person will, *in the near future*, (a) cause serious physical harm to himself or others as

> evidenced *by recent behavior* causing, attempting, or threatening harm and other relevant information, if any, or (b) suffer serious harm due to his lack of capacity to protect himself from harm or to provide for his basic human needs, (ii) is in need of hospitalization or treatment, and (iii) is unwilling to volunteer or incapable of volunteering for hospitalization or treatment. (emphasis added)

Similarly, under the current Colorado mental health laws, to be placed in a seventy-two-hour involuntary hold, the adult must be gravely disabled or pose an imminent danger to themselves or someone else. (R. Tanner Sledge, Denver Law Review, *Expanding Mental Health Autonomy in Colorado* (2019)) While "imminent danger" is a high standard to meet, police officers, therapists, counselors, nurses, and other mental health experts can place an involuntary transportation hold on the adult if it appears that the adult *could cause* "physical or psychiatric harm to others or to himself or herself." *Id.* ...the evaluator must have a much higher degree of certainty that the adult will cause danger to himself or others through a "*recent* overt act, attempt, or threat."*Id.* (emphasis added). No definitions are provided for what constitutes "could cause" harm, or how recent is "recent." Like Virginia's statute, the timeline and probabilities intersect to broaden probable cause well beyond established case law for exigent circumstances.

Ultimately, the Supreme Court may need to wade into the troubled waters of "mental health seizures" to explain the notion of community caretaking it identified 40 years ago and set time limits on just what exactly comprises a true emergency situation.

C. The Community Caretaking Exception comprising "emergency" and "exigent" circumstances is Antithetical to the Fourth Amendment's Protection of the Rights of Citizens to be Free from Government Seizure

The Fourth Amendment is eviscerated by the broad and highly variable scope of state statutes involving warrantless mental health seizures for purposes of community caretaking.

The First Circuit recently ruled that in community caretaking seizures "imminent" does not mean "the degree of immediacy typically required under the exigent circumstances and emergency aid exceptions." (*Caniglia v. Strom*, 2021 WL 122908). In this similar case to Petitioner's, twelve hours had passed since a supposed suicidal statement, hardly an "exigent" situation, yet Caniglia was still seized by police "despite his relative calm demeanor."

In Petitioner's case, the Fourth Circuit's decision relied heavily on the Defendants stating that they told the police what was written in Defendant Wilborn's handwritten police report (the alleged "kill statements"), which Defendants then contradicted in their sworn testimony, stating that they did not tell the police Petitioner was "dangerous." Regardless of this factual discrepancy, this meeting between police and Defendants took place the day before Petitioner was seized. Following that meeting, both police officers left PAE's offices and took no action.

Previous rulings by this Court and the Circuits have laid out general factors comprising exigent circumstances, but there remains a large gap in interpretation of what constitutes "clear indications" in between and amongst the circuits. This lack of guidance allows for the opportunity to go back in time for an undetermined period and make a case for

a warrantless seizure, thus constructing a narrative that creates probable cause where none actually exists.

The Virginia statute is in conflict with existing case law concerning the requirements for a warrantless seizure by including the terms "near future" and "recent behavior," neither of which are given a specific timeframe. Nor is the type of "dangerous" behavior made clear in this extended timeline, clearly well beyond "exigent" circumstances. Yet Virginia is only one of many state statutes with extended timelines for determining "dangerousness."

> For example, the New York state mental hygiene law definition of:
>
> "likelihood to result in serious harm" or "likely to result in serious harm" means (a) a substantial risk of physical harm to the person as manifested by threats of or attempts at suicide or serious bodily harm or other conduct demonstrating that the person is dangerous to himself or herself, or (b) a substantial risk of physical harm to other persons as manifested by homicidal or other violent behavior by which others are placed in reasonable fear of serious physical harm. (N.Y. Mental Hyg. Law § 9.01 and 9.39)

In this state statute example, "likelihood" and "likely to result" are not temporally defined, creating another escape clause for poor judgment calls on the part of government officials concerning probable cause.

Petitioner's case centers on a constructed narrative by that takes place over months, weeks and days before her seizure from the office. Thus, the exigent circumstances are contrived; there was no actual "emergency" necessary to meet the probable cause standard for warrantless seizures.

A clear gap in the Fourth Amendment case law gives "reasonableness" and "totality of the evidence" the upper hand, where "reasonableness" is vaguely defined and "totality" equally amorphous. In community caretaking warrantless seizures, bounding both concepts with temporal guidelines will necessarily limit the ever-expanding exceptions clause.

The lower courts continue to struggle with the notion of "dangerousness" and "reasonableness" in community caretaking roles of police and other governmental officials, in large part because the timeframe for what constitutes "dangerousness" in the mental seizure context has not been clearly defined by the courts.

Although the lower courts, and this Court, have written extensively on the requirement for an "emergency" and "exigent circumstances" before a warrantless seizure for community caretaking can take place, those time-bound requirements lack definition, and as such, leave the door wide open for abuse by unscrupulous individuals and organizations.

State statutes for warrantless seizures for "mental health evaluations" vary considerably, and rulings by the lower courts are mixed in terms of application of those statutes. Underscoring the lower court rulings is a lack of guidance from this Court on what exactly constitutes an "emergency" or "exigent circumstances" in terms of temporality. Some Courts have ruled that the "emergency" encompasses the circumstances upon arrival of the police (*State of Oregon v. M.A., Id.*), while others include a timespan of events that can take place over weeks and months leading up to the warrantless seizure (*Raub, Id.*), and still others include factoring in the "probability" that the citizen will become dangerous if they are not seized immediately (*Caniglia, Id.*).

III. Law Enforcement Officers and Others Need Clarification on the Temporal Aspect of The "Objectively Reasonable Standard" That Constitutes An "Emergency" For Community Caretaking Purposes

Clarification is needed on "an objectively reasonable standard" of what constitutes an "emergency" for community caretaking purposes, in particular for "mental health seizures." The over-broad definition of what constitutes "dangerousness" in state statutes must be constrained by the immediate threat posed by an individual at *the moment in time* the police arrive in their "community caretaking" role. Clarifying temporal responsibility for what constitutes "dangerousness" removes much of the guesswork from decision-making on whether or not to seize citizens based on the danger they pose to themselves or others in the community, strengthening civil rights while protecting the most vulnerable.

## REASONS FOR GRANTING THE PETITION

I. The Judgment of the Fourth Circuit is a Significant Departure from Controlling Supreme Court Precedent

II. The Decision Below Obfuscates Established Precedent in Defining what Constitutes Exigency and Emergency Exceptions to the Fourth Amendment

The totality of circumstances in exigent and emergency situations bounded by present time, and especially so in community caretaking "mental health seizures." Expanding the timeline indefinitely is in stark contrast to existing case precedent limiting exigent circumstances to the extraordinary.

## III. The Decision Below Opens the Floodgates to Continued Expansion of the Exigency and Emergency Exceptions to the Fourth Amendment, Eviscerating a Bedrock Constitutional Protection

There remains a glaring gap in the Fourth Amendment's warrantless seizure exception concerning the temporal nature of emergency and exigent circumstances that demands clarity and definition.

The continued expansion of the warrant exception based on a panoply of loosely defined state statutes for involuntary commitment seizures continues to erode Fourth Amendment protections.

This court must provide bright line guidance on exceptions to warrants, particular in the case of involuntary commitment, which, despite its temporal nature, does permanent and far-reaching damage to an individual.

The sheer numbers of ordinary citizens placed on "involuntary holds" as a result of warrantless seizures is staggering, in the thousands in nearly every state, every year. Bounding the temporal definition of "exigent" and "emergency" will serve to significantly reduce this number and with it, the burden on police and hospitals in order to care for the truly ill.

With no temporal guardrail for warrantless searches and seizures, alleged facts are easily crafted into false narratives implicating innocent citizens, including and especially women reporting gender based violence. Thus, those temporal "guardrails" must be clarified for exceptions to the warrant requirement under the Fourth Amendment or courts will see many more cases like Petitioner's, especially under the new "red flag gun laws."

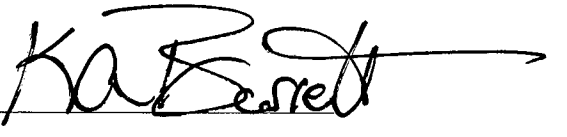
The continued lack of temporal definition of "exigent circumstances" is an invitation to careen down a slippery slope toward a Soviet-style gulag state, where "facts" supporting the removal of individuals from the safety of their homes and offices and into state-sponsored institutions serves a singular and terrible end.

## CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted. The judgment below should be reversed.

Dated: February 11, 2021

Respectfully submitted,

By: 

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