No. 21-1522

IN THE

Supreme Court of the United States

WAYNE TORCIVIA,

Petitioner,

—v.—

SUFFOLK COUNTY, NEW YORK, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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SUMMARY OF ARGUMENT

Petitioner's proposed first question seeks review of a decision of the Court of Appeals for the Second Circuit affirming the conclusion of the United States District Court for the Eastern District of New York that Respondent, the County of Suffolk ("the County"), was not liable under 42 U.S.C. § 1983 for the seizure of his firearms by non-party police officers who were present in his home. The Second Circuit held that the County's firearms seizures policy was permissible under the special needs exception to the Fourth Amendment's warrant requirement, but that the seizure was due to the officers' departure from County policy. The lower courts did not pass upon whether the officers' entry into the home comported with the Fourth Amendment since Petitioner did not challenge the entry, only the removal of his guns.

This Court's precedents regarding entry of the home and searches of one's person, including *Caniglia v. Strom*, 141 S.Ct. 1596 (2021) and *Griffin v. Wisconsin,* 483 U.S. 868 (1987), do not control this case. No split of authority between the Circuits or with the Supreme Court of New Jersey was heightened by the decision below. The Court of Appeals' application of the special needs exception did not extend the doctrine.

There is no need for the Court to review the first question framed by Petitioner.

STATEMENT OF THE CASE

A. Legal Background

In his own words, Petitioner seeks certiorari of the question "[w]hether a so-called 'special-needs exception' to the Fourth Amendment exists and allows

warrantless entry into the home of someone who is not subject to penal control or supervision?" Certiorari of this question should be denied because Petitioner did not sue for the entry of his home. As the Court of Appeals for the Second Circuit noted, "[t]he only 'search or seizure' at issue" in the appeal before it related to "the seizure of Torcivia's firearms." Pet. App. 21a n.22. Until he filed his Petition, Petitioner never remotely suggested that the entry of his home by the non-party police officers who removed his weapons was a violation of his constitutional rights.

Furthermore, the question of whether the special needs exception correctly applies to the County's firearms seizure policy is purely academic. Although the Second Circuit considered the policy to be covered by the exception, that consideration was not dispositive of the appeal before it. Instead, the determinative factor was the lower court's conclusion that the seizure "was caused by County officers' departure from the County's policy, not the policy itself." Pet. App. 33a-38a. It saw the seizure as not comporting with County policy in two respects: the seizure of Petitioner's longarms was indefinite; and his guns may have been taken after it was medically determined that he was not imminently dangerous to himself or others. Pet. App. 38a-39a. Thus, even if the Court of Appeals' assessment of the policy was wrong, the County would still not be liable under §1983. *Monell v. Department of Social Services of the City of New York,* 436 U.S. 658, 694 (1978) (employing municipality is not liable for employee's constitutional violations not committed "in execution of government's policy or custom").[1]

[1] As a fallback position, Petitioner suggests that the County could be liable on the alternative basis that the training of its officers

B. Factual Background

In the early morning hours of April 6, 2014, James Adler, Patrick Halpin and Robert Verdu, officers with the Suffolk County Police Department, responded to the home Petitioner shared with his wife ("Mrs. Torcivia") and children in Ronkonkoma, New York. The officers were dispatched to answer a call for assistance from Petitioner's teenage daughter Adrianna to a social services agency, which was relayed to the Suffolk County Police Department. The dispatcher's broadcast to the officers was of a violent domestic dispute between Petitioner and Adrianna. Pet. App. 4a, 6a.

On arrival, the officers learned that Petitioner had been consuming alcohol. After speaking with Adrianna, it was ascertained that Petitioner had not committed a crime. He was agitated,"yelling, walking back and forth, pacing and ranting." He demanded that they "taser him so he could die." Following an interview with Petitioner, the police officers determined that they needed to transport him to Stony Brook University Hospital's Comprehensive Psychiatric Emergency Program ("CPEP") for emergency psychiatric evaluation, as he appeared irrational and stated that he wanted to die. Pet. App. 6a-9a.

Petitioner was evaluated at CPEP by a team consisting of a nurse, a nurse practitioner, one or more social workers, and an attending doctor psychiatrist,

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is deficient. Clearly, it cannot be, for as the Second Circuit observed, there was "no record evidence suggesting that the County was 'aware that its policy may be unconstitutionally applied by inadequately trained employees but ... consciously [chose] not to train them.'" Pet. App. 39a-40a.

Dr. Yacoub. The professional team determined that Petitioner did not require an acute psychiatric admission and was not imminently dangerous. Pet. App. 9a-10a, 11a-12a.

Before Petitioner could be released from CPEP, Adrianna contacted Child Protective Services ("CPS") and reported that she was unhappy with and frightened by his impending release. She told CPS that Petitioner kept guns in the home. CPS informed the CPEP staff that Adrianna had called them four times and was concerned that he was going to be released. CPS further informed CPEP that it had advised Adrianna to leave the home and stay with a friend overnight. Pet. App. 12a n.12, 35a-36a

While Petitioner was at CPEP, Officer Adler conducted a computer check pursuant to Suffolk County Police Department policy, that in his understanding, required the removal of all firearms from homes in which a domestic incident occurs and someone is taken to CPEP. Pet. App. 57a. He learned that Petitioner had a New York State pistol license. Officer Adler informed his supervisor, non-party Sergeant Lawler, of the results of the computer check. The sergeant directed him to obtain custody of Petitioner's firearms in order to safeguard them. Officer Adler attempted to do so, but was unsuccessful as Mrs. Torcivia was unable to provide him the combination to the gun safe. After Officer Adler tried but failed to get the gun safe combination from Mrs. Torcivia, he returned to CPEP to ask Petitioner for the combination. According to the officer, Petitioner refused to speak with him. Petitioner admits that he did not speak with the officer, but claims it was because "he was non-responsive and possibly asleep." Pet. App. 10a-11a.

CPEP advised Petitioner that he was being released. He called his wife to ask her to pick him up. After he spoke with her, he was informed by the hospital that he would not be released until his guns had been surrendered. Pet. App. 11a-12a. After receiving this additional information, Petitioner again spoke with his wife by phone and gave her the code to open the gun safe. He told her, "You have to get into the safe. You have to open the safe." Referring to the police, he also told her "You've got to give them the guns. You've got to give them all the guns."

Mrs. Torcivia then removed the long gun that Petitioner kept under their bed. She opened the gun safe. She removed his handguns and another long gun. She put the four weapons on the floor to await the arrival of the police. Non-party Suffolk County Police Sergeant Scott and non-party Suffolk County Police Officer Andreano arrived at Petitioner's home. Mrs. Torcivia directed them toward the guns on the floor. She handed the guns to the officers. The officers did not take any weapons out of the safe or go near the safe. They gave her a receipt for the weapons they removed. I C.A.App. A142-A155, A169- A170.[2]

Petitioner's firearms had already been removed from his home by the time Dr. Yacoub determined that he could be medically discharged,

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[2] Citations to the Record before the Court of Appeals for the Second Circuit are given as [vol] C.A.App. [page]. Citations to the Second Circuit's docket are given as C.A. ECF [entry number] at [page number]. Citations to the District Court docket are given as D.Ct. ECF [entry number] at [page number].

C. Procedural Background

Petitioner commenced this action on February 2, 2015 with the filing of his Complaint. The Complaint did not contain a claim pursuant to 42 U.S.C § 1983 for the entry of his home by the non-party police officers who removed his firearms, or a claim for trespass. Sergeant Scott and Officer Andreano, the police who removed the weapons, were not named as defendants in the Complaint. D.Ct. ECF 1.

On February 13, 2017, Petitioner filed his Amended Complaint. The Amended Complaint set forth the following claims pursuant to 42 U.S.C § 1983:

a) for violation of Petitioner's Fourth Amendment rights by virtue of the seizure of his person and his confinement at CPEP.

b) for violation of his First Amendment rights based on an asserted retaliatory seizure and confinement of his person.

c) for violation of his Fourth Amendment rights based on the seizure of his guns.

d) for violation of his Second Amendment rights due to the seizure of his weapons and suspension of his pistol license.

e) for violation of his right to due process under the Fourteenth Amendment based on the removal of his weapons and suspension of his pistol license without a hearing.

f) a Fourteenth Amendment "stigma plus" claim.

g) for violation of his First Amendment right to family association.

h) claim against the County pursuant to *Monell v. Dep't. of Social Services of City of New York,* 436 U.S. 658 (1978).

The Amended Complaint also included pendent claims for unlawful imprisonment, defamation and negligence. Despite re-pleading the claim for the seizure of his weapons, Petitioner opted not to add to the Amended Complaint a claim that the entry of his home abridged his constitutional rights or amounted to a trespass. Likewise, he again refrained from adding as defendants the police personnel who took his weapons. D.Ct. ECF 66, I C.A.App. A27-A59.[3]

In June 6, 2018, Petitioner withdrew a number of his claims and informed District Court that he wished to proceed upon only the following claims (D.Ct. ECF 126, I C.A.App. A125-126):

a) § 1983 First and Fourth Amendment claims for his seizure and confinement at CPEP, along with a corresponding pendent claim for unlawful imprisonment.

b) § 1983 "stigma plus" and pendent defamation claims.

c) § 1983 Second, Fourth and Fourteenth Amendment claims for the seizure of his weapons and the suspension of his pistol license without a hearing.

All parties then sought summary judgment. By Memorandum of Decision and Order issued March 31,

[3] Because the officers who took the weapons were never parties to this case, District Court did not, and could not, grant them qualified immunity as Petitioner states at page 32 of the Petition.

2019, District Judge LaShann DeArcy Hall dismissed Petitioner's *Monell* claim for the seizure of his weapons. District Court rejected Petitioner's assertion that County policy directed the seizure of weapons of persons transported for psychiatric evaluation for lack of evidence. The Court instead concluded that a reasonable juror could find that the policy permitted weapons seizures from persons who had both been taken to CPEP *and* were involved in a domestic incident. Such a policy the Court said, "indisputably did not have as its immediate purpose 'the ordinary evidence gathering associated with crime investigation.'" Rather, the removal of Petitioner's guns was "intended to safeguard [the weapons] following his transport to CPEP following a domestic incident." Accordingly, Judge DeArcy Hall reasoned, the policy qualifies as one of special needs seizures. Pet. App. 65a-66a.

After the remaining parties consented to the case being referred to Magistrate (now District) Judge Gary R. Brown for all further proceedings, the trial proceeded before a jury on November 6, 7 and 8, 2019. V C.A.App. A1141-A1142, A1162.

At the conclusion of the evidence, summations, and charge, the jury was given a Verdict Sheet with the following interrogatories for them to answer:

1) Has plaintiff established by a preponderance of the evidence that he did not make any suicidal statements in the presence of defendant police officers?

2) Has plaintiff established by a preponderance of the evidence that the defendant police officers transported plaintiff to [CPEP] to retaliate in whole or in part for criticisms plaintiff made?

The jury was sent out to deliberate at 1:25 P.M. VI C.A.App. A1745. Their first and only note was sent out shortly before 2:40 P.M., stating that a verdict had been reached. The jury answered "no" to both questions.VI C.A.App. A1747.

On November 12, 2019, District Court entered a Stipulation and Order reflecting that the parties had consented to allow the Magistrate Judge to calculate the damages to be awarded Petitioner upon his Fourteenth Amendment due process claim, and finding $100.00 to be the appropriate amount. D.Ct. ECF entry after 182.

On November 14, 2019, a Clerk's Judgment was entered providing that Petitioner was to recover from the County the sum of one hundred dollars ($100.00) for his Fourteenth Amendment due process claim, pursuant to District Judge DeArcy Hall's April 2, 2019 Order on Summary Judgment and (then) Magistrate Judge Brown's Order dated November 14, 2019; and to recover nothing on all his other claims. D.Ct. ECF 183; IV C.A.App. A1817.

Petitioner then appealed from the summary judgment order and the jury verdict. In his brief, he raised a single Fourth Amendment issue for review: Did the district court erroneously analyze the County's seizure of firearms policy under the "special needs" exception to a warrantless search? C.A. ECF 66 at 1, 69. Inconsistently, he also contended that the seizure of his weapons was conducted at the behest of CPEP medical personnel and not because of the County policy. Pet. App. 40a.

The dismissal of the Fourth Amendment *Monell* claim was affirmed by the Second Circuit. Preliminarily, the Court of Appeals defined the Fourth Amendment task before it as "assess[ing] the merits of

[Petitioner's] challenge to a policy pursuant to which the County temporarily seizes firearms belonging to an individual who is transported for emergency mental health evaluation following a domestic incident." Pet. App. 21a.[4] It noted that "the only 'search or seizure' at issue…related to Suffolk County's *Monell* liability is the seizure of [Petitioner's] firearms." Pet. App. 22a n.22.[5]

The appellate court concluded that District Court had "correctly determined that the County's policy falls within the 'special needs' exception" and that "on the facts presented" actions taken under the policy did not transgress Petitioner's Fourth Amendment rights. Pet. App. 4a. It found that the primary purpose of the policy was not crime control, but rather "to prevent self-harm and harm within a family, when there may be a heightened risk of domestic violence or suicide, and when firearms are present." The County's interest in preventing suicide and domestic violence, the Second Circuit observed, is "substantial" and "urgent." Its policy "serves an important governmental interest, and [ ] the seizure of firearms under that policy represents a reasonable and effective method of

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[4] On appeal, Petitioner maintained his factual claim, rejected by District Court for the absence of evidence, that County policy was to take the weapons of all persons who were transported to CPEP. C.A. ECF 69. The Second Circuit also rejected this characterization of the policy for lack of evidence. Pet. App. 20a-21a.

[5] The Court of Appeals also found that there was no evidence to support alternative theories that the policy was to seize the weapons of persons transported for emergency psychiatric evaluations after a domestic incident despite a medical assessment that the person posed no danger, or to keep the weapons indefinitely, or that the County was 'aware that its policy may be unconstitutionally applied by inadequately trained employees but ... consciously [chose] not to train them.'" Pet. App. 20a-21a, 39a-40a.

advancing that interest." The policy, it reasoned, causes a "minimal intrusion" into the firearms of a person taken for mental health evaluation following a domestic incident. Pet. App. 25a-33a.

In so ruling, the Court of Appeals explained that it was not relying on any Fourth Amendment exception other than the special needs exception, and in particular, not the community caretaking exception. Further, the Second Circuit stated that it did not "conceive of the appeal ...involving the community caretaking exception..." Although extension of the community caretaking exception to homes was rejected by this Court in *Caniglia v. Strom*, 141 S.Ct. 1596 (2021), the panel noted that *Caniglia* did not address the "special needs doctrine" or a situation where officers acted pursuant to a government seizure policy. Nor did *Caniglia* "disturb [the Second Circuit's] longstanding precedents that allow warrantless entries in a home in certain circumstances" such as where an occupant is threatened with injury. Pet. App. 25a-27a, 27a n. 25.

The appellate court acknowledged that unlike the community caretaking exception, the special needs exception has been 'repeatedly recognized' by this Court as permitting searches without a warrant, including the search of a home in *Griffin* v. *Wisconsin,* 483 U.S. 868 (1987), and searches of persons not subject to penal control, in *Skinner v. Ry. Lab. Executives' Ass'n*, 489 U.S. 602, 619–30 (1989). Further contrasting the two exceptions, the Second Circuit observed that the special needs exception "involves [the] well-established four factor balancing test" of *MacWade v. Kelly*, 460 F.3d 260, 269 (2d Cir. 2006), as opposed to an "open-ended license to perform [community caretaking functions anywhere]" disapproved in *Caniglia.*

Notwithstanding, the Second Circuit held that the County was not liable for the seizure as it "was caused by County officers' departure from the County's policy, not the policy itself." Pet. App. 33a-38a. The court below saw the seizure as not comporting with County policy in two respects: the seizure of Petitioner's longarms was indefinite and his guns may have been taken after it was medically determined that he was not imminently dangerous to himself or others. Pet. App. 38a-39a.

REASONS TO DENY THE PETITION FOR CERTIORARI

In essence, Petitioner's plea is that certiorari is warranted by virtue of the Fourth Amendment limitations erected by *Caniglia*, and to some extent, *Lange v. California*, 141 S.Ct. 2011 (2021). In *Caniglia*, the pertinent question was framed as whether the community caretaking exception of *Cady v. Dombrowski*, 413 U.S. 433 (1973) "creates a standalone doctrine that justifies warrantless searches and seizures in the home." *Caniglia*, at 1598. Noting the distinction *Cady* drew between houses and vehicles, and its historic hesitation "to expand the scope of…exceptions to the warrant requirement to permit warrantless entries into the home," *Id.* quoting *Collins v. Virginia*, 584 U.S. 1, 138 S.Ct.1663, 1670-1671 (2018), this Court impliedly answered the question in the negative. Similarly, in *Lange v. California*, 141 S.Ct. 2011 (2021), the issue was also one concerning a law enforcement entry of the home: "whether the pursuit of a fleeing misdemeanor suspect always…qualifies as an exigent circumstance." This Court concluded that the "flight of a suspected misdemeanant does not always justify a warrantless entry into a home."

It cannot be overstated that Petitioner has not made any claim that the police improperly came into his home. His decision not to plead such a claim appears to be a deliberate choice in that he included in both his Complaint and Amended Complaint a § 1983 claim for the alleged seizure of his weapons, but none for the entry of the home. No argument was made at summary judgment, trial or on appeal that the entry was illegal and consequently neither District Court nor the Second Circuit passed upon whether the entry comported with the Fourth Amendment.

Absent a claim contesting the entry of Petitioner's home, *Caniglia* and *Lange* do not call for review by this Court.

I. The Second Circuit's Decision is Not Incompatible with *Caniglia*

Because his conduct was less egregious than that of the domestic abuser plaintiff in *Caniglia*, Petitioner argues that summary reversal is warranted. This conduct comparison is superficial and legally insignificant. Reversal cannot be justified based on *Caniglia* because *Caniglia* is inapposite.

To begin, the exception to the warrant requirement interpreted by this Court in *Caniglia* played no role in the decision below. *Caniglia* examined the parameters of community caretaking doctrine and that doctrine alone. The appeals court did not analyze whether the community caretaking exception was applicable. Rather, it determined that the County's policy fit the special needs exception to the Fourth Amendment. *Caniglia* did not address the special needs exception at all. Notwithstanding Petitioner's effort to minimize the distinction, the Second Circuit explicitly differentiated this case from *Caniglia* as one not

involving the community caretaking exception. Pet. App. 26a-27a. n.25 ("...we do not conceive of the appeal before us as involving the community caretaking exception...and do not rely on that doctrine in our analysis"). Plainly, Petitioner's argument that the appellate court merely "rebranded" the community caretaking exception as a special needs exception is insupportable.

Next and pivotally, *Caniglia's* limitation of the community caretaking exception is rooted inseparably in the fact that the seizure at issue therein was made possible only by an allegedly unconstitutional entry of the home. That the differentiating factor of a claimed unlawful entry led to the result in *Caniglia* is clear from the Opinion's several citations to precedents that turn on the concept of the sanctity of the dwelling. *Caniglia,* 141 S.Ct at 1599 citing *Collins v. Virginia*, 584 U.S. 1, 138 S. Ct. 1663 (2018) (Fourth Amendment applies to search in partially enclosed driveway); *Kentucky v. King*, 563 U.S. 452 (2011) (Fourth Amendment analysis of marijuana seizure following questioned entry of home); and *Brigham City, Utah v. Stuart*, 547 U.S. 398 (2006) (challenge to evidence seized after warrantless entry to home). See also *Id.* quoting *Fla. v. Jardines*, 569 U.S. 1, 6 (2013) (The "very core" of the Fourth Amendment is "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.") (internal quotations omitted). Yet, unlike plaintiff Caniglia, Petitioner has never challenged the entry to his home.

Indeed, the distinction that *Caniglia* drew with *Cady* by its statement that "what is reasonable for vehicles is different from what is reasonable for homes" may be the crux of its holding. In sum, *Caniglia* goes no further than to preclude the extension of the community caretaking exception to

home entries that lead to searches. *Caniglia* does not bear upon whether police officers who are lawfully present in a citizen's home may seize items found inside without a warrant. It sheds no light upon whether the non-party officers who, given the lack of contrary evidence, must be presumed to have lawfully entered Petitioner's house, were within Fourth Amendment bounds in removing his weapons.

In any event, the question of whether the taking of Petitioner's guns was constitutionally acceptable is entirely hypothetical since it cannot affect the correct outcome of this case. As the Second Circuit concluded, the seizure was caused by a departure from County policy. As the seizure was not the result of municipal policy, but at odds with it, the County cannot be held liable for the policy under § 1983 even the policy is flawed. The necessary element of causation is lacking. *Polk Cnty. v. Dodson*, 454 U.S. 312 (1981) quoting *Monell v. Department of Social Services of the City of New York,* 436 U.S. 658, 694 (1978) ("official policy must be the moving force of the constitutional violation").

Last, that Petitioner's conduct was purportedly less severe than Caniglia's is also an incidental distinction without legal significance. He chose not to sue for the entry of his home by the non-party police who removed his weapons. That choice renders the nature of his conduct toward his family immaterial to the proper resolution of this case.

II. The Question as Framed is Not Otherwise Worthy of Review.

A. There is no conflict of law requiring resolution by this Court

The Second Circuit broke no new ground in applying the special needs exception to a policy that affects persons not under penal control. Similarly, the appellate court created no uncertainty or conflict as to the scope of the exception in ruling that the exception is broad enough to cover a municipal policy that calls for weapons to be taken from persons not subject to penal supervision.

The application of the special needs exception to persons not under law enforcement supervision is not new. Over three decades ago, this Court began applying the special needs doctrine outside of the realm of parole and probation. See e.g., *O'Connor v. Ortega*, 480 U.S. 709, 725–726 (1987) (exception applied to search and seizure from government employee's office); *Skinner v. Ry. Lab. Executives' Ass'n*, 489 U.S. 602, 619–30 (1989) (special needs exception permits breath and urine tests of private railroad employees); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 665 (1995) (public school student athletes from public schools may be urine tested under special needs doctrine); *City of Ontario, Cal. v. Quon,* 560 U.S. 746, 760-61 (2010) (exception permits search of text messages on police officer's department issued device).

The Circuit Courts of Appeal and the New Jersey Supreme Court are not meaningfully divided over the breadth of the special needs exception. The Fourth, Fifth and Tenth Circuits have not confined the application of the exception to probationers and

parolees. *State v. Hemenway*, 239 N.J. 111, 216 A.3d 118 (2019) did not discuss the question of whether the special needs exception applies to persons not under law enforcement supervision.

The question passed upon by the Supreme Court of New Jersey in *Hemenway* was whether the New Jersey Domestic Violence Act comported with the Fourth Amendment insofar as the statutory scheme authorized the issuance of warrants to enter homes to search and seize weapons on less than probable cause. The court did not, as Petitioner posits, categorically reject the "special needs exception" on the theory that the exigent circumstances doctrine rendered it superfluous and unnecessary. Instead, it only held that the exception could not be invoked to justify the issuance of warrants on less than probable cause. *Hemenway*, 239 N.J. at 117.

In *Roska ex rel. Roska v. Peterson*, 328 F.3d 1230 (10th Cir. 2003), the Tenth Circuit did not go beyond explaining that no special need exists that would render the warrant requirement impracticable "when social workers *enter a home* to remove a child, absent exigent circumstances." *Id.* at 1242 (emphasis in original). The appeals court did not formulate a blanket prohibition of all warrantless entries to homes by social workers who look out for the best interests of children. It clarified that exceptions to the warrant requirement remained available where a child was "in imminent danger." *Ibid.* Neither *Gates v. Texas Dep't of Protective & Regul. Servs.* 537 F.3d 404 (5th Cir. 2008) nor *Thomas v. Texas Dep't of Fam. & Protective Servs.*, 427 F. App'x 309 (5th Cir. 2011) suggest that the Fifth Circuit has restricted the special needs exception to persons under penal control by the Fifth Circuit. Those decisions did not address the

exception's application outside the context of child welfare investigations.

Relatedly, *United States v. Pacheco,* 884 F.3d 1031 (10th Cir. 2018) and *United States v. Hill,* 776 F.3d 243 (4th Cir. 2015) cannot soundly be construed as cabining the special needs exception to persons under penal supervision. The Tenth Circuit ruled that the exception did not apply to parolee Pacheco's seized phone because it was taken for use "as evidence at [his] criminal trial" and not "for any identifiable special need 'beyond the normal need for law enforcement.'" *Pacheco,* at 1040 quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987). This conclusion however aligns with the general principle that the exception is not applicable where an item is seized for law enforcement purposes. See *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring) ("Only in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interest for that of the Framers.")

In *Hill*, the government did not assert that the "special needs exception" applied and so the Fourth Circuit did not pass upon its relevance.

Decisions by the First, Second and Ninth Circuits have actually examined the question of whether the special needs exception applies outside of the context of persons subject to penal control and answered it in the affirmative. As early as 2002, the Ninth Circuit applied the exception to a warrantless home entry made by police to assist a child in retrieving her belongings from her mother's home pursuant to a California Protection Act order. *Henderson v. City of Simi Valley*, 305 F.3d 1052 (9th Cir. 2002). The

exception pertained, the appeals court reasoned, because "[k]eeping the peace while a minor child exercises her rights pursuant to a court order is not akin to typical law enforcement functions. Rather, the officers were serving as neutral third parties acting to protect all parties." *Id.* at 1057. Subsequently, in *Sanchez v. Cnty. of San Diego*, 464 F.3d 916 (9th Cir. 2006), the Ninth Circuit concluded that the special needs doctrine authorized reasonably conducted administrative searches of welfare recipients' homes "because the underlying purpose of the home visits is to verify eligibility for welfare benefits, and not for general law enforcement purposes," *Id.* at 926. Thereafter, the Ninth Circuit took the opportunity to reaffirm the existence of the exception in *United States v. Heckenkamp*, 482 F.3d 1142 (9th Cir. 2007). In *Heckenkamp*, the remote search of a state university student's computer was upheld as a special needs search since it was performed by the university's systems administrator whose "actions were not motivated by a need to collect evidence for law enforcement purposes or at the request of law enforcement agents" but to secure the school's mail server. *Id.* at 1147. As far back as 1996, the First Circuit determined that a municipal police policy that permitted warrantless forcible home entries to enforce involuntary mental health commitment orders "falls squarely within a recognized class of *systemic* 'special need' searches which are conducted without warrants in furtherance of important administrative purposes." *McCabe v. Life-Line Ambulance Serv., Inc.*, 77 F.3d 540, 546 (1st Cir. 1996). Such entries qualify as proper special needs searches, the appellate court wrote, despite "the mere fact that law enforcement officials serve as the agents" who execute the orders. *Id.* at 553.

The Second Circuit has determined that various types of searches are sanctioned under the special needs exception, including visits to homes of sex offenders to verify their addresses in order to reduce recidivism, *Jones v. Cnty. of Suffolk*, 936 F.3d 108 (2d Cir. 2019); searches to protect a federal building by checking persons entering for fake law enforcement badges, *Dickerson v. Napolitano*, 604 F.3d 732 (2d Cir. 2010); random searches of subway passengers' bags to prevent terrorist attacks, *MacWade v. Kelly*, 460 F.3d 260 (2d Cir. 2006); and the taking of DNA from felons to create a data base to assist in solving crimes, *Nicholas v. Goord*, 430 F.3d 652 (2d Cir. 2005). The Court of Appeals found that law enforcement was not the immediate purpose of the contested government actions in all of these cases.

Plainly, the special needs doctrine is well-developed and longstanding in the First, Second and Ninth Circuits, as well as in this Court. The contours of the exception have been repeatedly delineated and were not exceeded or expanded by the Second Circuit's decision in this case. No conflict between the Circuits was generated by Second Circuit's decision. Relevant precedents reaching back over thirty years have applied the exception to persons not under law enforcement supervision. Nothing in the jurisprudence of the Fourth, Fifth and Tenth Circuits precludes applying the exception to the removal of firearms from the home of a person transported for emergency psychiatric evaluation following a domestic dispute, let alone limits it to searches of homes of persons under penal control. Indeed, *Roska* affirmatively indicates that the exception is available to protect a child who is in imminent danger from a family member. Surely, given the absence of an actual conflict requiring resolution, review of the Second

Circuit's decision would be a wholly unnecessary expenditure of this Court's limited and wisely conserved resources.

B. The Court of Appeals did not decide the issue framed by Petitioner

Petitioner urges this Court to accept for consideration the question of whether the Court of Appeals improperly expanded the special needs exception by applying it to the entry of his home. He cites *Lange v. California*, 141 S. Ct. 2011, 2016 (2021) ("question presented...is whether the pursuit of a fleeing misdemeanor suspect always ...qualifies as an exigent circumstance" permitting an entry without a warrant); *Fla. v. Jardines*, 569 U.S. 1 (2013) (use of drug-sniffing dog on homeowner's porch is an entry under Fourth Amendment); and *Lewis v. United States*, 385 U.S. 206 (1966) (question is whether the Fourth Amendment required suppression of marijuana sold by criminal defendant to undercover agent who gained entry to home by misrepresenting his identity). His reliance on authorities that define the boundaries of the Fourth Amendment's protection of the home leaves no doubt that his request for review is grounded upon the inviolability of the home against unwanted entry.

The foundational and obvious flaw in the question proffered is that, at the risk of repetition, this case presents no issue concerning the police officers' entry into his home. While District Court applied the special needs exception to the seizure of his firearms, it did not examine the entry of Petitioner's home. In affirming District Court, the Second Circuit likewise did not examine the entry.

The question that Petitioner urges this Court to review has never been raised, much less ruled upon in

this litigation. Analysis of the question for the first time and without a full evidentiary record as to how the entry came about is not warranted, particularly since the record that does exist suggests that the officers came into the home with the consent of Petitioner and his wife. I C.A. App. A142-A155, A169-A170. See *Payton v. New York,* 445 U.S. 573, 583 (1979) (Fourth Amendment prohibition against warrantless entry of home does not apply where voluntary consent is given). See also *Fla. v. Jardines,* 569 U.S. 1, 8 (2013) (quoting *Kentucky v. King,* 563 U.S. 452, 470 (2011) ("police officer not armed with a warrant may approach a home and knock, precisely because that is 'no more than any private citizen might do'")

C. The Second Circuit did not expand the special needs exception to cover Petitioner's home

Petitioner contends that given *Caniglia*'s holding and the fact that he is not under penal control, the application of the special needs exception to the seizure of his guns cannot be rationalized under *Griffin v. Wisconsin*, 483 U.S. 868 (1987). Both *Caniglia* and *Griffin* however, turn on whether law enforcement violated the Fourth Amendment by entering citizens' homes. Once again, Petitioner brought no claim for an unconstitutional entry of his home. Neither District Court nor the Second Circuit examined the lawfulness of the entry because it is not an issue in this case. Assuming arguendo that *Caniglia* could be analogized to *Griffin* as Petitioner proposes, it still would not be relevant to the litigation at hand.

At any rate, the proffered comparison is untenable. Granted, *Griffin* counsels that the exception is not to be applied without limit to the public at large. *Griffin*, 483

U.S. at 875. However, in concluding that the exception fit the County's policy, the Second Circuit did not recommend its application to a broad community. Instead, it noted that the policy pertained to a small and well-defined category of persons in aggravated situations rife with the possibility of violence and harm: persons who had been involved in a domestic incident *and* then transported for emergency psychiatric evaluation. Pet. App. 21a-22a. Petitioner's argument that no need or exigency warrants seizure of weapons held by this limited group flies in the face of the realities of domestic abuse, gun violence and mental illness acknowledged by District Judge DeArcy Hall, Pet. App. 67a-71a, as well as by the Second Circuit. Pet. App. 24a-25a. To the contrary, these are precisely the sort of infrequent, serious and "limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion." *Skinner*, 89 U.S at 624. Besides, it is far from clear, to say the least, that *Caniglia*'s view of the community caretaking exception can be appropriately extrapolated to cover the special needs exception.

Getting down to brass tacks however, there is no need to determine whether the County's policy is permissible under the special needs exception because even a determination that the policy is unconstitutional cannot not alter the outcome of this action. That is because the policy did not lead to the seizure of Petitioner's weapons, or the entry of his home for that matter. As the Second Circuit determined, the seizure was a departure from the policy, not in furtherance of it. Pet. App. 33a. As the policy was not the "moving force" behind the alleged

violation of Petitioner's rights, the County cannot be held liable under §1983. *Monell* at 694.

III. Review of The First Question Framed by Petitioner is Unnecessary

This Court would judiciously refrain from accepting the first question proposed for consideration. Petitioner's plea for certiorari rests on the notion the principles of *Caniglia*, *Griffin* and *Samson v. California*, 547 U.S. 843 (2006) require it, but those principles only govern entries of the home and searches of one's person. This case however, does not involve an entry of a home or the search of one's person. It concerns only whether police personnel, already present in Petitioner's home, could properly seize weapons from him. The authorities relied upon by Petitioner simply do not relate at all to that scenario, much less dictate its correct analysis.

Moreover, it cannot be presumed that answering the first question will definitively resolve the Fourth Amendment claim, as the question of whether the seizure was permissible under an exception other than the special needs exception--such as the exigent circumstances exception—would remain unaddressed. The Second Circuit did not examine this question, confining its ruling to merely affirming that District Court's application of the special needs exception.

Lastly, whether or not Petitioner's constitutional rights were abridged by the non-party officers' removal of his firearms is indeed an essential issue in this case. If the particular seizure did not transgress the Fourth Amendment, the wisdom of the County's policy is inconsequential. Inarguably, the County cannot be liable under § 1983 absent a constitutional violation by one of its employees. *City of Los Angeles v. Heller*, 475

U.S. 796 (1986) (municipality not liable where officer "inflicted no constitutional harm.").

This case, which concerns only the taking of weapons by non-party police officers, is not an appropriate vehicle for reviewing the Fourth Amendment restrictions on the entries of homes and searches of one's person.

CONCLUSION

The Second Circuit did not extend the special needs exception to permit law enforcement to enter the homes of persons not on parole or probation without a warrant, and did not heighten any split of authority as to the scope of the exception. The lawfulness of the police entry of Petitioner's home is not at issue in this case and accordingly, was not passed upon by the courts below. Respectfully, this Court should deny the Petition.

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Respectfully submitted,

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