No. 21-1522

In the Supreme Court of the United States

WAYNE TORCIVIA, *Petitioner*

v.

SUFFOLK COUNTY, NEW YORK, ET AL.

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

REPLY BRIEF FOR PETITIONER

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OCTOBER 21, 2022

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INTRODUCTION

Nothing in respondents' oppositions changes the fact that the Second Circuit applied the judge-made "special-needs exception" to the Fourth Amendment's warrant requirement to justify the seizure of weapons in petitioner's home, without anything resembling exigent circumstances. Nor can respondents dispute that "*Caniglia* [v. *Strom*, 141 S.Ct. 1596 (2021)] is strikingly on point" factually. IJ Amicus 19. Although respondents emphasize that the community-caretaking exception is not the special-needs exception, they do not meaningfully dispute that the supposed "need" in this case is indistinguishable from the community-caretaking justification this Court rejected in *Caniglia*. *Id.* at 19-20. In fact, County Respondents concede that petitioner's "conduct was *less* egregious than that of the domestic abuser plaintiff in *Caniglia*." County BIO 13 (emphasis added). If more egregious conduct cannot justify disregard of the warrant requirement in *Caniglia* then, *a fortiori*, the claimed "need" cannot justify a non-exigent warrantless search and seizure in this case.

Respondents also offer no way to narrow the special-needs exception to prevent it from swallowing the Fourth Amendment. If, absent exigency or consent, the government can overcome the warrant requirement that has traditionally protected the home merely by pointing to any non-exigent interest that the government pulls from a hat, the Fourth Amendment places no meaningful limit on government power. See FPC Amicus 4-8 (tracing common-law home protections). Because, on nearly

identical facts, *Caniglia* reached a conclusion incompatible with that of the Second Circuit here, this question is worthy of review or, at minimum, summary reversal.

This case also gives the Court a unique opportunity to address qualified immunity for non-police state actors, and at least begin to return 42 U.S.C. §1983 to its textual and historical roots. Although respondent Smith opposes certiorari on that question, she largely agrees with the petition that multiple reasons "may justify this Court['s] considering whether the qualified immunity doctrine applies or should be abrogated." Smith BIO 10. On the second question, too, the petition should be granted.

ARGUMENT

I. The Decision Below Warrants Review Because It Conflicts With This Court's Decision In *Caniglia* And Exacerbates A Lower-Court Conflict On An Important Fourth Amendment Issue.

None of respondents' arguments can reconcile the decision below with *Caniglia*'s rejection of a seizure in identical circumstances based on identical and non-exigent supposed needs. Rather, they simply offer an expansive framework for ignoring the text, history, and tradition of the Fourth Amendment.

1. The County and the State wrongly claim that the decision below complies with *Caniglia* because the Second Circuit cited a different judge-made exception to the Fourth Amendment's warrant requirement than the First Circuit did in *Caniglia*. But, as amicus Institute for Justice emphasizes (at 19-20), the

claimed "distinction" between community caretaking and special needs "is unconvincing." The lower courts in both *Caniglia* and this case used similar logic and the same underlying "need" to apply an alleged exception to the warrant requirement that is "anything but 'jealously and carefully drawn,'" as required by this Court's precedent. *Id.* at 21 (citing *Jones* v. *United States*, 357 U.S. 493, 499 (1958)).

Respondents also wrongly suggest that expanding the special-needs exception to include the homes of non-probationers and non-parolees is rooted in this Court's precedent. But past examples cited by state respondents (at 20) only applied the special-needs exception beyond parole or probation in settings outside the home. *Accord* Pet.25-26. Respondents provide no examples of non-exigent situations where the exception has allowed the seizure of items *in* a person's home. And this Court has never extended the exception to the homes of individuals not already subject to some level of government supervision. Pet.6-7.

Indeed, the County rightly recognizes that "*Griffin* [v. *Wisconsin*, 483 U.S. 868 (1987)] counsels that the exception is not to be applied without limit to the public at large." County BIO 22. Although the County then cites special-needs cases allowing searches of a "government employee's office," a "police officer's department issued device," and the "breath and urine tests of private railroad employees" and "public school student athletes," *id.* at 16, respondents cannot and do not maintain that those circumstances implicate the same privacy concerns as a seizure from the home—historically "first among equals" "when it comes to the

Fourth Amendment." *Florida* v. *Jardines*, 569 U.S. 1, 6 (2013).

2. Respondents likewise fail to refute the clear and deep conflict over extension of the special-needs exception to the homes of those not under penal custody.

As the petition explained (at 18-22), the Fourth, Fifth, and Tenth Circuits have split from the First, Second, and Ninth. *Accord* NCLA Amicus 17-22. And the New Jersey Supreme Court has expressly declined to apply the special-needs exception in those circumstances. The County's attempt to wave away *New Jersey* v. *Hemenway*, 239 N.J. 111 (2019), as if it held only that the special-needs exception could not justify a *warrant*, is both mystifying and incoherent. If the exception is insufficient even to justify obtaining a warrant, then it is necessarily insufficient to justify the greater constitutional offense of a non-exigent *warrantless* search of or entry into a home. The decision below thus cannot be reconciled with the New Jersey Supreme Court's square "reject[ion of] the State's argument that we should invoke the special needs doctrine to carve out a singular exception to the traditional constitutional protections afforded to the home[.]" *Id.* at 131.

The County's attempt to distinguish cases from the Fifth and Tenth Circuits fails for similar reasons. Even in attempting to narrow to its facts *Roska ex rel. Roska* v. *Peterson*, 328 F.3d 1230 (10th Cir. 2003), the County is forced to admit that the Tenth Circuit there declined, absent exigent circumstances, to find a special need even to remove a child from possible harm. County BIO 17. Furthermore, neither *Roska*

nor the Fifth Circuit decisions the petition cites can logically be limited to "child welfare investigations." County BIO 18. In any event, if a child-welfare "need" is insufficient to justify a non-exigent entry of a home, then surely the baseless and promptly rejected claimed needs in this case would fail the tests in those other circuits. Respondents merely highlight the depth of the split; they do not refute it.

3. Respondents also wrongly imply that *any time* firearms are present and there is a domestic altercation, the Fourth Amendment's warrant requirement should give way. County BIO 23; State BIO 19 ("[D]omestic violence and suicide emergencies are quintessential exigent circumstances[.]"). But they did not and could not conceivably establish exigency in this case, and they ignore this Court's guidance that "each case of alleged exigency" must be evaluated "on its own facts and circumstances." *Missouri* v. *McNeely*, 569 U.S. 141, 150 (2013) (citations omitted). Even the Second Circuit recognized that there was no "exigency" here because petitioner had already been transported away from his home and lacked access to his firearms. And, based on the evidence below, the Second Circuit correctly assumed that he was not released until "after the responsible physicians had decided that he was not a danger to himself" or others. Pet.App.34a-35a n.30; *accord* NCLA Amicus 2-5. That squarely forecloses respondents' late-breaking suggestion of exigency.

Indeed, if the Fourth Amendment allowed an *automatic* "special need" or exigency exception here, such a rule would place that amendment at war with the core *Second* Amendment right of "law-abiding,

responsible citizens to use arms in defense of hearth and home." *District of Columbia* v. *Heller*, 554 U.S. 570, 635 (2008). See GOA Amicus 19-24. The text, history, and tradition of the Fourth Amendment preclude such a "Second Amendment exception" to the Fourth Amendment, *id.* at 19, whether (as in *Caniglia*) a court calls it an exercise in "community caretaking" or (as here) tries to justify it as a "special need."

4. Respondents also attempt to hide behind the Second Circuit's conclusion that the county officers (somehow) *departed* from the county's policy of seizing firearms from the homes of those transported for a mental health evaluation following a domestic dispute. Pet.App.33a. Respondents thus suggest that resolving the question presented would have only academic consequences. County BIO 2; State BIO 17. The Petition, however, explains why this is wrong (at 14 n.3, 33): Because the County's policy itself was unconstitutional, training the officers to follow it showed a deliberate indifference to petitioner's constitutional rights.

The County is thus wrong to suggest that the Second Circuit dealt with inadequate training by finding that there was no evidence that the County knew the policy could be unconstitutionally applied. County BIO 2-3 n.1 (citing Pet.App.39a-40a). Because the special-needs exception can *never* apply to the home of non-parolees/non-probationers, the policy itself and any resulting training violated petitioner's rights.

5. The County also presses an argument implicitly rejected by the Second Circuit: that the police's entry

into petitioner's home was not raised below. County BIO 2. That contention remains meritless: It is undisputed that the guns at issue here were *inside* petitioner's home and, therefore, the reasonableness of their seizure is inexorably tied to the police's entry there. Indeed, petitioner devoted an entire section of his opening brief below to showing that the special-needs exception could not apply because he had no "reduced expectation of privacy" in his home. C.A.ECF 66 at 20-22. Moreover, citing this Court's decision in *Payton* v. *New York*, 445 U.S. 573, 585 (1980), petitioner explained that, because the "chief evil" that the Fourth Amendment was designed to prevent was "[p]hysical entry of the home," a "warrantless entry to search for weapons" was unconstitutional absent exigent circumstances. C.A.ECF 66 at 20-21. His brief below further explained the "long-recognized privacy and sanctity of the home" and the lack of any statutory authority for "the police to make a warrantless entry into the homes of gun owners." *Id.* at 21.

The County also ignores that the entry was challenged *in the complaint*, where petitioner—to support his claim against the seizure—alleged that "Defendants had no probable cause or privilege to seize Mr. Torcivia's firearms and/or long guns *from his home*." I C.A.E.R. A40 ¶107, A54 ¶¶ 215-216 (emphasis added). From the beginning, then, the entry into petitioner's home was a central factor undermining the reasonableness of the seizure of his firearms, which the County itself concedes was the subject of an expressly stated claim. County BIO 13.

The lower courts, even while reaching the wrong conclusions, also understood the importance of

petitioner's home to their analysis. The district court stated that the "Plaintiff's weapons were seized from his home" in concluding that the "intrusion here was not minimal." Pet.App.73a. The Second Circuit likewise explained that the special-needs exception has been recognized "in situations involving the warrantless search of a home," Pet.App.27a n.25, and that "government seizures * * * of property in a person's home without a warrant are presumptively unreasonable." Pet.App.22a (cleaned up). It then recognized that petitioner's "privacy interest in his home or his firearms" was not lost simply because he has a firearm license, Pet.App.31a, and that any urgency underlying the policy of "seizing firearms in the home" of people who had been transported away was diminished. Pet.App.30a. (After all that, it inexplicably came to the wrong conclusion anyway.)

The County's attempt to separate the seizure of the guns from their location in petitioner's home is thus a red herring. The first question presented was both pressed and passed upon below, and is squarely before the Court now.

6. State respondents press another argument that was not accepted by the Second Circuit—that petitioner consented to the seizure. State BIO 18. The courts below never decided that question; indeed, the Second Circuit noted that, aside from special needs, it did not apply "any other Fourth Amendment exception." Pet.App.26a n.25.

On these facts, moreover, application of the consent exception is risible: According to the hospital's own case-management document, Petitioner was locked away and told he would remain there until he

divulged the code to his gun safe. C.A.ECF 54 at E52 ("CPS worker inquired as to the status of the guns in the house and was told that the guns will be removed from the home by police before patient will be released."); C.A.ECF 54 at E53 (Petitioner "repeatedly refused to provide" the safe code and insisted "that police were 'not coming in [his] house'" and "'not gonna access [his] safe.'"); *accord* Pet.App.11a, 34a n.30; I C.A.E.R. A280-281. Acceding to unconstitutional blackmail is not consent. Indeed, the state respondents' own case recognizes that duress or coercion can undermine consent to a search. *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 248 (1973). Petitioner did not consent to the seizure of his firearms from his home. And, because the lower courts did not rely upon consent, that issue would not properly be before this Court if certiorari were granted.

In short, the first question is squarely presented, and the decision below is worthy of plenary review or even summary reversal if the Court does not also grant the second question.

II. This Court Should Also Grant Review Of The Second Question Presented.

Whether qualified immunity should apply to non-police officials also warrants this Court's review.

1. The state respondents wrongly argue that petitioner did not preserve this issue. Yet petitioner squarely "challenge[d] the District Court's determination that employees of the State-run mental health facility * * * were entitled to qualified immunity[.]" Pet.App.5a. The issue was clearly preserved.

2. State respondents are also wrong to claim that there is no reason to review the doctrine of qualified immunity as to non-police state actors because "qualified immunity is well rooted in the common law." See State BIO 13-14. As the petition explains, however, "'lawsuits against officials for *constitutional violations* did not generally permit a good-faith defense * * * during the early years of the Republic." Pet. 29 (quoting William Baude, *Is Qualified Immunity Unlawful?*, 106 Calif. L. Rev. 45, 55-58 (2018)) (emphasis added). Contrary to the state respondent's claim, no common-law roots support qualified immunity for constitutional violations.

3. The state respondents also cite a string of this Court's cases that, they say, recognize the "applicability of qualified immunity to a wide range of other government officials who [are] not police officers." State BIO 12. In the process, they fail to defend qualified immunity on its own terms.

Moreover, as this Court has long recognized, stare decisis can yield when the "rationale of [the prior case]

does not withstand careful analysis." *Lawrence* v. *Texas*, 539 U.S. 558, 577 (2003); *accord Janus* v. *AFSCME*, 138 S. Ct. 2448, 2479 (2018). This Court has also acknowledged that the now-governing "objective" standard "completely reformulated qualified immunity along principles not at all embodied in the common law." *Anderson* v. *Creighton*, 483 U.S. 635, 645 (1987). The cases on which state respondents rely are themselves prime examples of the Court's previously "substitut[ing its] own policy preferences for the mandates of Congress." *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1872 (2017) (Thomas, J., concurring in part and in the judgment). And this is a compelling vehicle with which to reconsider those decisions.

4. Nor does the fact that the qualified-immunity analysis permits lower courts to first answer constitutional questions, State BIO 14, remedy the harm that doctrine wreaks on the development of the law. As the petition explains (at 29-30), under the present qualified-immunity regime, courts often fail to exercise their discretion to address whether the behavior being challenged is unconstitutional. Constitutional rights warrant protection and guidance from the courts to deter future violations even if those rights have never been violated in exactly the same way.

Given these harms, even respondent Smith concedes (at 10) that the petition advances good reasons that "may justify this Court considering whether the qualified immunity doctrine applies or should be abrogated," but argues that this is not the case in which to do so. She, like the state respondents, argues that applying qualified immunity to non-police

healthcare workers *does* further the doctrine's purpose because those state actors make life-or-death decisions and need the freedom to act without fear of repercussions. The purpose of the doctrine, however, is not to free state actors to make life-or-death decisions, but rather to prevent "undue interference" from skewing the decisions of state officials. See *Harlow* v. *Fitzgerald*, 457 U.S. 800, 806 (1982). That rationale applies as much to state-employed healthcare workers as to any other state employees.

Furthermore, the public's interest in ensuring that non-police state actors, such as state hospital staff, can properly exercise judgment in their work can be addressed in ways other than qualified immunity. As explained in the petition, even "if qualified immunity did not protect non-police state actors, the law could continue to develop in cases brought against such employees, thereby providing better constitutional guidance to all public officials." Pet. 31. With such alternatives available for fulfilling these public interests, there is no need to rely on qualified immunity.

5. Smith is also wrong to argue that this case is not a good vehicle for addressing qualified immunity because of "the interrelated issues between the police actions and the CPEP actors." Smith BIO 10. But petitioner does not challenge qualified immunity for police officers, so any decision in this case will leave intact the "difficult and delicate" judgments this Court has found to justify qualified-immunity defenses asserted by the police. See *Foley* v. *Connelie*, 435 U.S. 291, 299 (1978).

For these reasons, the Court should grant review of the qualified-immunity question.

CONCLUSION

Respondents cannot escape that the Second Circuit applied the special-needs exception to a seizure of firearms located in the home of a person not on probation or parole. That extension cannot be squared with this Court's precedents or with the text, history, and tradition of the Fourth Amendment. It also deepens a well-developed split. Nor have respondents advanced any compelling reason why this Court should not use this case to revisit the application of qualified immunity to non-police state actors. The Court should grant both questions presented for plenary review or, at a minimum, summarily reverse as to the Fourth Amendment question because of the Second Circuit's clear departure from *Caniglia*.

Respectfully submitted,

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