No. 20-157

IN THE
Supreme Court of the United States

EDWARD A. CANIGLIA, *Petitioner*,

v.

ROBERT F. STROM, *ET AL.*, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

Brief *Amicus Curiae* of Gun Owners of America, Inc., Gun Owners Foundation, The Heller Foundation, and Conservative Legal Defense and Education Fund in Support of Petitioner

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January 15, 2021

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INTEREST OF THE *AMICI CURIAE*[1]

Gun Owners of America, Inc. is a nonprofit social welfare organization, exempt from federal income tax under Internal Revenue Code ("IRC") section 501(c)(4). Gun Owners Foundation, The Heller Foundation, and Conservative Legal Defense and Education Fund are nonprofit educational and legal organizations, exempt from federal income tax under IRC section 501(c)(3). *Amici* organizations were established, *inter alia*, for the purpose of participating in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law.

These *amici* recently filed an *amicus* brief in support of a Petition for Certiorari in a similar case, Rodriguez v. San Jose, No. 19-1057 (Brief *Amicus Curiae* of Gun Owners of California, Inc., *et al.* in Support of Petitioners), 208 L. Ed. 2d 196 (cert. denied).

STATEMENT OF FACTS

The First Circuit purported to "rehearse the relevant facts in the light most congenial to the summary judgment loser (here, the plaintiff)...."

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[1] It is hereby certified that counsel for Petitioner and Respondents have consented to the filing of this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

Caniglia v. Strom, 953 F.3d 112, 118-119 (1st Cir. 2020). Actually, it did the opposite. For that reason, these *amici* attempt to set out the same facts recorded in the panel's decision, but in a manner that actually is most favorable to the plaintiff, as required.

A. Events Leading to the Warrantless Search and Seizure.

A husband and wife, Edward and Kim Caniglia, were having marital troubles after 27 years of marriage. Edward was a "68-year-old man with no criminal history and no record of violence, misuse of guns, or self harm." Petitioner's Brief at 3. At one point, to illustrate how deeply hurt he felt, Edward went to the bedroom, took an unloaded handgun, threw it on a table, and said something like "shoot me now and get it over with." Caniglia at 119. Edward then left the house to go for a drive so as to reduce the tension in the home, and while he was gone, Kim hid the handgun. *Id.* After Edward returned, the couple began arguing again. This time, it was Kim who decided to leave to reduce the tension in the home and stayed at a motel for the night. *Id.* The two spoke by telephone that night, and Kim thought Edward sounded upset. At no time did Edward take any violent or threatening action, physical or verbal, toward Kim or himself, nor did Kim take any aggressive action toward Edward. *Id.*

The next morning, Kim tried to call Edward on the phone, and unable to reach him, recruited two police officers to accompany her to her house to check on her husband. *Id.* Kim told the officers that the handgun

had not been loaded and made clear that at no point was she concerned for her own safety, but only for Edward. The officers found Edward on the back porch, while Kim waited in her car. *Id.* Edward calmly explained to the officers that he made the dramatic gesture with the handgun because he was sick of having arguments with his wife. He denied he was suicidal and appeared completely normal to one of the officers, but may have been upset because his wife involved the police in their marital dispute. *Id.* Based on these facts, the senior officer somehow concluded that Edward was imminently dangerous to himself and others and insisted Edward be taken by ambulance to a hospital for a psychiatric evaluation, which Edward cooperatively agreed to do after the officers lied to him that they would not take his firearms if he went to the hospital. *Id.* at 119-20.

The police somehow learned there was a second handgun in the house, and after Edward left for the hospital, an officer searched for, seized, and took away both handguns, as well as magazines and ammunition. *Id.* at 120. At no point did Kim ask the police to remove the guns, but rather, the officers lied to her as well, telling her that Edward had consented to them taking the firearms. *Id.* After an examination, Edward was promptly released, with the examining medical staff concluding that Edward was not a threat to himself or to anyone else. *Id.* at 120, 129.

Despite having searched for and seized his firearms, the police failed to provide Edward with any notice of a way to obtain their return, and when he sought their return, the police arbitrarily refused to

return them until Edward filed suit.[2] For this violation of Edward's due process rights, the district court awarded Edward only "nominal damages." *Id*. at 120, n.2.

B. Did the Court View Facts in a Light Most Favorable to the Plaintiff?

Despite these being the facts on which the court of appeals should have based its decision, it chose to defer to the imagined concerns of the police officers and sanction their Fourth Amendment violation of Edward's home because deferring to police upholds the "roles that they play in preserving and protecting communities." *Id*. at 118.

To justify its decision, the court of appeals either ignored or tried to rationalize away facts that were favorable to the plaintiff. For example, the court disregarded the fact that Edward "was neither admitted to the hospital nor deemed suicidal by medical personnel" because "the defendants' actions must be measured by the facts in the officers' possession at the time of the seizure." *Id*. at 129. But

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[2] The Court of Appeals used a convoluted, but colorful, rhetorical configuration to explain the sequence of events: "Shortly before his firearms were returned, the plaintiff repaired to the federal district court, pressing a salmagundi of claims stemming from the defendants' alleged seizures of his person and his firearms." *Id*. at 120. A more candid way of stating the sequence of events would be, say: "The Police refused to return his handguns until the plaintiff filed suit based on the non-consensual and warrantless search of his home and seizure of his person and his handguns from his home."

neither did the "facts in the officers' possession" demonstrate a suicidal individual, as the conclusion by the hospital staff occurred directly after Edward was taken from his home. How medical personnel evaluated Edward that night was highly relevant to assessing the police search and seizure.

Lastly, the Court drew inferences from those facts not most favorable to the plaintiff, but most favorable to the decision it had wanted to reach. For example, on the one hand, the Court stated that the police were fully justified in finding an "obvious risk of self-harm" based on Kim's decision to leave and spend "the night at a hotel and request[] a wellness check on her husband...." *Id.* at 127. However, on the other hand, the Court felt the police were justified in disregarding Kim's repeated assurances that she did not fear for her own safety and still concluding that "she too might be at near-term risk." *Id.* at 131.

SUMMARY OF ARGUMENT

The First Circuit's decision in Caniglia v. Strom, 953 F.3d 112 (1st Cir. 2020), employs a crowbar to take the crack that this Court placed in the Fourth Amendment in Cady v. Dombrowski, 413 U.S. 433 (1973), 47 years ago, to pry it well open and disfigure it beyond anything that this Court could have anticipated or imagined when Cady was decided. It would be one thing if the decision below were based on new scholarship about the text, history, and tradition of the Fourth Amendment. But it is quite another when the basis for the decision is the "'evolving'" view of the "'wide range of responsibilities that police

officers must discharge.'" Caniglia at 123. And making it worse is the fact that the lower court's new "evolved" interpretation of the Fourth Amendment is based on one word repeated again and again — the "reasonableness" of the seizure — not as viewed by the Framers, but as viewed by three modern judges.[3] *Id.* at 125, 127. And completing its trifecta of interpretative error, the First Circuit employs a practical approach to constitutional interpretation through the use of interest balancing. *Id.* at 125.

While the issue presented — whether the "community caretaking" exception to the Fourth Amendment's warrant requirements is limited to vehicles or is expanded to homes — may seem reasonably discrete, it is not. On one level, this Court will decide whether Americans will continue to have meaningful Fourth Amendment protection in their own home or sacrifice it on the altar of the modern state. But on a grander level, the issue is how the Fourth Amendment is to be understood and applied. An originality approach would examine the text and original public meaning of the Amendment. The First Circuit ignored the text, never considered the Amendment's original public meaning, and made its decision on what seemed "reasonable" to modern judges based on balancing. For many reasons, the First Circuit's decision cannot be allowed to stand.

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[3] The Fourth Amendment does include the word "unreasonable," but it is a term of art designed to describe certain types of prohibited searches.

Although the sole issue presented in this case involves the Fourth Amendment, the decision below also revealed the disdain with which many lower federal courts have viewed the right to keep and bear arms, even in the context of other constitutional rights. This Court should not allow lower courts to continue to treat the Second Amendment as a second-class right.

ARGUMENT

I. THE COURT OF APPEALS DECISION UNDERMINES FOURTH AMENDMENT PROTECTIONS FOR THE HOME.

A. This Court's Decision in Cady Relied on Fourth Amendment Property Principles that Were Wholly Ignored by the Court Below.

The First Circuit's decision in Caniglia v. Strom, 953 F.3d 112 (1st Cir. 2020) constitutes not just an expansion of this Court's holding in Cady v. Dombrowski, 413 U.S. 433 (1973), but rather a repudiation of the principles articulated there. It extended the "community caretaking exception" from disabled vehicles over which the police exercised custody and control to occupied homes over which it exercised neither, based on what it perceived to be the policy underlying the Cady decision.

The Court of Appeals reasoned that because the police play an important role "in preserving and protecting communities ... it is unsurprising" that the Cady case "determined, in the motor vehicle context,

that police officers performing community caretaking functions are entitled to a special measure of constitutional protection." *Id.* at 118. The court observed that the community caretaking doctrine has been an "evolving principle," which, to achieve its policy more fully, should now apply to homes.

> Understanding the **core purpose of the doctrine** leads inexorably to the conclusion that it **should not be limited** to the motor vehicle context. Threats to individual and community safety are not confined to the highways. Given the **doctrine's core purpose**, its **gradual expansion** since Cady, and the practical realities of policing, we think it plain that the community caretaking doctrine may, under the right circumstances, have purchase outside the motor vehicle context. We so hold. [*Id.* at 124 (emphasis added).]

The technique utilized by the court of appeals to "evolve" and "expand" the Cady holding is not unique, but it should be analyzed to see how it was utilized to reach results that could never be reached by analysis based on "text, history, and tradition." Heller v. District of Columbia, 670 F.3d 1244, 1271 (2011) (Kavanaugh, J., dissenting). The technique is to assign a new and elastic name to the holding, call it a doctrine, and then allow modern judges to explore the parameters of that new doctrine. Since the doctrine has no independent historical basis, it has no objective meaning. Therefore, a search for its meaning is completely arbitrary — allowing the lower courts to

give it whatever meaning the judge requires to reach his or her desired result.[4]

For a half century, the Fourth Amendment was largely understood as a protection of privacy. However, in United States v. Jones, 565 U.S. 400 (2012), and Florida v. Jardines, 569 U.S. 1 (2013), this Court re-established the original basis of the Fourth Amendment as the protection of property.[5] As Justice Scalia explained:

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[4] Another application of this principle, in the area of the First Amendment, is the trend to ignore the separate, well-established historical, common law meaning of "the Freedom of Speech" and "[the Freedom] of the Press" — each separately identified in the First Amendment — amalgamize the two freedoms, and call it the Doctrine of Freedom of Expression. Since the phrase "Freedom of Expression" has neither historical basis nor independent meaning, it provides a judge seeking out its parameters with latitude to ignore the fact that neither the Freedom of Speech nor the Freedom of the Press ever protected obscenity, and then find that the Doctrine of Freedom of Expression robustly protects nude dancing. *See* California v. LaRue, 409 U.S. 109, 113 (1972) ("The District Court majority upheld the appellees' claim that the regulations in question unconstitutionally abridged the freedom of expression guaranteed to them by the First and Fourteenth Amendments to the United States Constitution.")

[5] In Jones, this Court relegated to second place the Fourth Amendment's protection of "privacy" memorialized in Katz v. United States, 389 U.S. 347 (1967). *See* Jones at 409 ("But as we have discussed, the Katz reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test."). *See also* H. Titus & W. Olson, "*United States v. Jones*: Reviving the Property Foundation of the Fourth Amendment," CASE WESTERN RESERVE J. OF LAW, TECHNOLOGY & THE INTERNET, vol. 3, no. 2 (Spring 2012).

> The text of the Fourth Amendment reflects its close connection to property, since otherwise it would have referred simply to "the right of the people to be secure against unreasonable searches and seizures"; the phrase "in their persons, houses, papers, and effects" would have been superfluous. [Jones at 405.]

Although Cady was decided four decades before Jones, the Cady Court addressed the property principle. The Cady Court justified the warrantless search in large part because the police had exercised a significant degree of custody and control over Cady's automobile before it was searched. In evaluating the search of the car, the Court identified "two factual considerations [that] deserve emphasis," the first of which was:

> the police had exercised a form of **custody or control** over the 1967 Thunderbird. Respondent's vehicle was disabled as a result of the accident, and constituted a nuisance along the highway. Respondent, being intoxicated (and later comatose), could not make arrangements to have the vehicle towed and stored. **At the direction of the police**, and for elemental reasons of safety, the automobile was towed to a private garage.... [Cady at 442-43 (emphasis added).]

The Court went on to explain that while "[t]he police did not have actual physical custody of the vehicle [as in two earlier cases] the vehicle had been towed there at the officers' directions.... Rather, like an obviously

abandoned vehicle, it represented a nuisance...." *Id*. at 446-47 (emphasis added). Had the court below evaluated the search of the home and seizure of petitioner and his guns based on property principles, it would have found the police had no custody or control over the home as was present in Cady.

The Cady Court stressed the distinction which the court below crushed. "'[F]or the purposes of the Fourth Amendment there is a constitutional difference between houses and cars.'" Cady at 439 (citations omitted). And the Cady Court relied on that distinction:

> The Court's previous recognition of the **distinction** between motor vehicles and dwelling places leads us to conclude that the type of caretaking "search" conducted here of a vehicle that was neither in the custody nor on the premises of its owner, and that had been placed where it was by virtue of lawful police action, was not unreasonable solely because a warrant had not been obtained. [Cady at 447-48 (emphasis added).]

The court of appeals erred when it failed to analyze the property principles undergirding the Fourth Amendment and to follow the distinction repeatedly stressed in Cady between vehicles and homes.

B. If "Reasonableness" Is the Standard by which the Fourth Amendment Is to Be Interpreted, that Amendment Ceases to Have Any Objective Meaning and No Longer Provides the American People Any Protection from the Government.

The court below asserted that "probable cause" is used to evaluate "seizures of the person pursuant to civil protection statutes, but generally have scrutinized community caretaking activities for reasonableness." *Id*. at 127 (citation omitted). The court went on to posit that seizing "an individual for transport to the hospital for a psychiatric evaluation and of firearms within a dwelling — are of a greater magnitude than classic community caretaking functions like vehicle impoundment. In such circumstances, **it may be that some standard more exacting than reasonableness must be satisfied** to justify police officers' conduct." *Id*. (emphasis added.) However, here the court did not decide what test to apply because it believed that the officers' conduct met both tests. In its analysis, it uses "variations of the term 'reasonable' ... [f]or ease in exposition." *Id*. Indeed, the court's opinion is replete with references to the reasonableness of the police officers' actions, along with statements that they are within the "realm of reason." *Id.*

To be sure, the Fourth Amendment contains the word "unreasonable," but that does not mean that its entire meaning can be reduced down to a simple test as to whether a warrantless search is deemed "reasonable" by a modern judge.

> 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. [Fourth Amendment (emphasis added).]

For most of the existence of the nation, an "unreasonable search and seizure" was decided according to the principles articulated in Boyd v. United States, 116 U.S. 616 (1886), Weeks v. United States, 232 U.S. 383 (1914), and Gouled v. United States, 255 U.S. 298 (1921), known as the "mere evidence rule."

A reasonable search and seizure was a search for an item in which the object of the search did not have a superior property interest. One commentator described the items which could be searched for and seized as: "(1) fruits of the crime, (2) instrumentalities of the crime, (3) contraband, and (4) weapons or any other means of escape." "Mere Evidence" Rule Discarded and Held Inapplicable to Exclude Evidence Lawfully Seized, St. John's Law Review, vol. 42, no. 3, 425, 426 (Jan. 1968). All other searches, such as searches for mere evidence, were *per se* unreasonable, even if conducted with a warrant. This understanding of the Fourth Amendment, based on common law and property principles, was generally observed until Warden v. Hayden, 387 U.S. 294 (1967).

Once the notion of an inherently unreasonable search and seizure (warrant or not) was lost, courts increasingly came to believe that if warrants were obtained, virtually anything could be seized. and even if warrants were not obtained, anything falling within "exceptions" to the Fourth Amendment could be seized anyway. The community caretaking doctrine is perhaps the most troubling of those exceptions, as it could cover a wide variety of pretextual searches. If it is allowed to expand as the court below decided, it seriously undermines the protections of the Fourth Amendment intended by its Framers.

C. Interest Balancing Lawlessly Elevates the Personal Opinions of Modern Judges over the Text of the Framers, which Was Consented to by the People.

The Court of Appeals believed that there was no fixed Fourth Amendment rule protecting homes from warrantless searches and seizures based on the community caretaking exception. Rather, it believed that every fact situation was different, requiring judges to carefully balance the interests of the people versus the interests of the government. Not surprisingly, the court below took the side of the government over the people. Employing the wrong approach, the court below reached the wrong result:

> [A]ny assessment of the **reasonableness** of caretaking functions requires the **construction of a balance** between the need for the caretaking activity and the affected individual's interest in freedom from

> government intrusions. This **balancing test** must, of course, be **performed anew in each individual case**..... Although an individual has **robust interests** in preserving his bodily autonomy, the sanctity of his home, and his right to keep firearms within the home for self-protection, these interests **will sometimes have to yield** to the public's powerful interest "in ensuring that 'dangerous' mentally ill persons [do] not harm themselves or others." [Caniglia at 125 (emphasis added) (citations omitted).]

In calling for interest balancing, the court was granting to itself the right to override the constitutional text, cloaking that usurpation in the garb of legalese. While interest balancing has a long pedigree in First Amendment jurisprudence, truly no constitutional rights should be measured based on a balancing of interests. The most thoughtful and complete rejection of interest balancing in recent years was performed in District of Columbia v. Heller, 554 U.S. 570 (2008), there with respect to the Second Amendment. The way that this Court rejected interest balancing should be instructive here.

When Heller was argued to the Supreme Court, the Solicitor General — contending for the United States as *amicus curiae* — urged the Court to employ a type of interest balancing (specifically, "intermediate scrutiny") in reviewing the D.C. ban on handguns, believing that if that standard were employed correctly, the statute would be upheld. *See* District of Columbia v. Heller, Docket No. 07-290, Oral Argument

Transcript, pp. 44-45. During oral argument, Chief Justice Roberts expressed his doubts of the utility of this approach:

> [T]hese various phrases under the different standards that are proposed, "compelling interest," "significant interest," "narrowly tailored," none of them appear in the Constitution; and I wonder why in this case we have to articulate an all-encompassing standard. Isn't it enough to determine the scope of the existing right that the amendment refers to, look at the various regulations that were available at the time, including you can't take the gun to the marketplace and all that, and determine how ... this restriction and the scope of this right looks in relation to those? I'm not sure why we have to articulate some very intricate standard. I mean, **these standards** that apply in the First Amendment just kind of developed over the years as sort of **baggage that the First Amendment picked up**. But I don't know why when we are starting afresh, we would try to articulate a whole standard that would apply in every case? [Heller Oral Argument Transcript, p. 44 (emphasis added).]

Indeed, when Heller was decided, the approach telegraphed by Chief Justice Roberts during oral argument was exactly the approach taken by the majority.

> We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding "**interest-balancing**" approach. The very enumeration of the right takes out of the hands of government — even the Third Branch of Government — the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. **A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all**. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) **even future judges** think that scope too broad.... The Second Amendment ... is the very *product* of an **interest balancing by the people**.... [Heller at 634-35 (italics original) (emphasis added).]

Indeed, Justice Scalia correctly described interest balancing as a "judge-empowering [test]." Heller at 719. That is exactly why judges like, no love, interest balancing. By it they grant to themselves raw power to do what they believe should be done, unconstrained by the constraints imposed by the Constitution's written text.

The same rejection of balancing tests that was applied to the Second Amendment should apply to the Fourth Amendment. At no point did the court below even quote the text of the Fourth Amendment, to say nothing of seeking to analyze or understand it as

written. It made no search for its original public meaning. It simply took the Cady case and viewed the doctrine as undergoing "evolution" and a "gradual expansion," because the judges felt the need to expand the doctrine beyond its scope in Cady based on what could be termed a policy argument. That policy elevated the powers of the police above the protection of the people.

The court explained that constitutional protections for the home must yield to the "'special role' that police officers play in our society" including acting "as a master of all emergencies," and giving "police elbow room to take appropriate action when unforeseen circumstances present some transient hazard that requires immediate attention." Caniglia at 124. The Court concluded: "[u]nderstanding the core purpose of the [community caretaking] doctrine leads inexorably to the conclusion that it should not be limited to the motor vehicle context." *Id*. And, "[g]iven the doctrine's core purpose, its gradual expansion since Cady, and the practical realities of policing, we think it plain that the community caretaking doctrine may, under the right circumstances, have purchase outside the motor vehicle context. We so hold." *Id*.

In Cady, the Supreme Court described the role police play as "community caretakers." This was expanded upon by the court below, which waxed a bit poetic in asserting "[t]he police play a vital role as guardians of the public weal. They must, therefore, be granted some measure of discretion." Caniglia at 132. But even if the police were to be considered "guardians of the galaxy," they are still constrained by the U.S.

Constitution. The Constitution remains the law which governs the government.

The police may have a "measure of discretion," but that discretion is not to act in a manner which violates the text, context, history, and tradition, and original public meaning of the Fourth Amendment. The decision of the court below granted discretion to police to expand the powers of police and diminish the protection of the People under the Fourth Amendment. Even though its preference of government power was based on a policy it preferred, that policy was precluded when the Bill of Rights was crafted by the Framers and ratified by the People. The court may have rationalized its decision as being done in the best interests of the community, but its decision was *ultra vires*, as neither that court nor this has authority to diminish the People's protections set out in the Fourth Amendment.

II. THE FIRST CIRCUIT DECISION TREATS THE SECOND AMENDMENT AS A SECOND CLASS RIGHT.

A. The First Circuit's Attitude toward Firearms May Have Contributed to Its Weakening of the Fourth Amendment.

Although there was no Second Amendment issue expressly presented by Petitioner in this case, Petitioner's right to keep and bear arms was certainly affected by the court of appeals decision. The court of appeals viewed the central fact that led up to the police seizing petitioner and sending him to a hospital

for a psychiatric evaluation as he "had recklessly thrown a firearm." Caniglia at 128. Then, the police felt at liberty to seize some of the personal property of petitioner. But the only property seized was the type of property that this Court has said was given the highest protection by the U.S. Constitution — a handgun in the home.

A Second Amendment claim was before the court below, and that court's analysis of the gun issue revealed the court's negative presumptions about guns, which tainted its analysis of Petitioner's Fourth Amendment claim. The court cited First Circuit authorities that demonstrate how suffocatingly narrow that Circuit views the Second Amendment: "the core of the Second Amendment right is **confined to self-defense in the home by law-abiding citizens**." *Id.* at 134 (emphasis added). Because the First Circuit has not yet considered "the seizure of specific firearms from the home in pursuance of a legitimate police function," the court found there was no binding precedent and upheld the grant of summary judgment on the Second Amendment claim on the ground of qualified immunity. *Id.*

On the Fourth Amendment claim relating to the seizure of the firearms, the court conflated the need to seize firearms (which the court treated as being inherently dangerous) with the need to protect the public or the "community." The court cited the Seventh Circuit for the "cogently reasoned" principle of public relations rather than jurisprudence, that "'[o]ne need only imagine the public outcry ... had the police left the gun[s]' in place and the plaintiff

'returned home and then used the gun[s]' to inflict harm." *Id*. at 132-33 (citing Sutterfield v. Milwaukee, 751 F.3d 542, 570 (7th Cir. 2014)). This case should be resolved with cognition, not precognition.

The court below described the presence of the firearm as a "danger" that was "immediate," yet at the same time acknowledged the defendants' concession that "neither the exigent circumstances exception nor the emergency aid exception could have justified the seizure of the plaintiff's firearms after he had been removed from the scene." Caniglia at 131, n.9, 132. This concern for immediate dangerousness is belied by the fact that the focus was on the firearms themselves and that the court below considered it a virtue that the police did not "engage in a frenzied top-to-bottom search for potentially dangerous objects." *Id*. at 133. On the contrary, if the police were genuinely conducting a community caretaking seizure, it seems as though they would have sought to remove other apparently obvious dangers such as kitchen knives or the keys to the cars (which also could pose a danger to the public at large).

Likewise, the cases cited by the court of appeals in support of its position that the community caretaking exception applies to seizures in the home by and large involve the presence of a firearm. *See* Caniglia at 124. In the Ninth Circuit's recent decision in Rodriguez v. San Jose, 930 F.3d 1123 (9th Cir. 2019), the facts were somewhat similar to this case in that firearms were seized from a home following the removal of the husband who was suffering a mental breakdown. (That case also involved lies from police in order to

seize lawfully owned firearms in a non-exigent circumstance.)

The court below expressed little concern for protection of Second Amendment rights, and that lack of concern facilitated its willingness to weaken Fourth Amendment protections against searches and seizures. Indeed, in this case, the courts justified a seizure of property without a warrant based entirely on the nature of the property itself: firearms. Throughout its opinion, the court below expressed its low regard for the protected nature of firearm ownership, showing how Fourth Amendment jurisprudence has been distorted by the various lower courts when a warrantless search and seizure relates to firearms. In this case, after applying the community caretaking exception in the context of a firearm in a home, the court felt the need to at least acknowledge the harm it was doing to the right to keep arms in the home[6]:

> We add a coda. In upholding the defendants' actions under the community caretaking doctrine, we **in no way trivialize** the constitutional significance of **warrantless entries into a person's residence**, disruption of the right of law-abiding citizens to keep firearms in their homes, or involuntary

[6] On the panel below, sitting by designation, was retired Supreme Court Associate Justice David Souter, who had joined the dissenting opinions in District of Columbia v. Heller, 554 U.S. 570 (2008), that the Second Amendment does not protect the individual right to keep and bear arms.

> seizures of handguns. [Caniglia at 133 (emphasis added).]

But the court below did just what it said it would "in no way" do.

As the Ninth Circuit concluded in Rodriguez, "the urgency of a significant public safety interest was sufficient to **outweigh** the significant **privacy interest** in **personal property** kept in the home...." Rodriguez at 1140-41 (emphasis added).

B. The Exercise of Second Amendment Rights Must Not Result in the Forfeiture of Other Constitutional Rights.

The First Circuit's decision violates the principle that the exercise of one constitutional right may not permissibly be conditioned on the forfeiture of another constitutional right. For example, in Simmons v. United States, 390 U.S. 377 (1968), in order for a criminal defendant to claim a Fourth Amendment violation, he was forced to testify that an object belonged to him, and that testimony was later used against him at trial. In essence, he was forced to forfeit his Fifth Amendment right to keep silent in order to assert his Fourth Amendment right. The Court called such a situation a "condition of a kind to which this Court has always been peculiarly sensitive." *Id.* at 393. The Court denounced such a Catch-22, stating that it is "intolerable that one constitutional right should have to be surrendered in order to assert another." *Id.* at 394. Yet that is what has happened in this case. Under the First Circuit's new firearms

jurisprudence, once Petitioner chose to keep a firearm in his house, he forfeited his Fourth Amendment right not to have his property seized within his home without a warrant, because the presence of the firearm alone justified the seizure under the community caretaking rubric.

Similarly, in Perry v. Sindermann, 408 U.S. 593 (1972), this Court held that the government may not deny a person a benefit "on a basis that infringes his constitutionally protected interests.... For if the government could deny a benefit to a person because of his constitutionally protected [rights], his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.' ... Such interference with constitutional rights is impermissible." *Id*. at 597. Here, Petitioner was deprived of his Fourth Amendment right to be "secure in his house ... against unreasonable searches and seizures" because he exercised his Second Amendment right to "keep ... arms...." After Heller, Respondents cannot prohibit Petitioner from exercising his Second Amendment right to keep a firearm in his home for self-defense, and the First Circuit may not allow the City to deprive Petitioner of the "benefit" of the warrant requirement so as to allow his firearms to be seized.[7]

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[7] *See amicus curiae* brief of Gun Owners of America, *et al*., New York Rifle & Pistol Association v. New York City at 23-26 (Oct. 9, 2019).

CONCLUSION

For the foregoing reasons, the decision of the lower court should be reversed.

Respectfully submitted,

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