No. 21-_____

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

PETITION FOR A WRIT OF CERTIORARI

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MAY 31, 2022

QUESTION PRESENTED

This Court has long held that, without "consent" or "exigent circumstances," warrantless "entry into a home" is "unreasonable under the Fourth Amendment." *Steagald* v. *United States*, 451 U.S. 204, 211 (1981). It has further explained that the contours of "exigent circumstances" and "any other warrant exception permitting home entry are jealously and carefully drawn." *Lange* v. *California,* 141 S. Ct. 2011, 2018 (2021) (cleaned up). Accordingly, the Court has "repeatedly" declined to expand the scope of any exceptions to the warrant requirement for home entry. *Caniglia* v. *Strom*, 141 S. Ct. 1596, 1600 (2021).

Despite this Court's guidance, the Second Circuit, without relying "on any other Fourth Amendment exception," Pet. App. 26a n.25, held that a "special-needs exception" to the warrant requirement allows the government to enter a home to seize the firearms of a person suspected of no crime and who is not subject to penal control or supervision. And that court granted qualified immunity to non-police state officials who, after finding that Petitioner presented no risk to himself or others, continued to confine him in a mental hospital until his firearms were seized.

The questions presented are:

(1) Whether 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.

(2) Whether the Court should overrule the judge-made qualified immunity doctrine as to non-police state actors.

PARTIES TO THE PROCEEDING

Petitioner is Wayne Torcivia.

Respondents are Suffolk County, New York, Mary Catherine Smith, in her individual capacity, Kristen Steele, in her individual capacity, Dianna D'Anna, in her individual capacity, and Adeeb Yacoub, M.D., in his individual capacity.

RELATED PROCEEDINGS

This case is directly related to these proceedings in the Eastern District of New York, the U.S. Court of Appeals for the Second Circuit, and this Court:

Torcivia v. *Suffolk Cnty.*, No. 21A521 (Mar. 22, 2022) (granting application for extension of time);

Torcivia v. *Suffolk Cnty.*, No. 19-4167 (2d Cir. Dec. 29, 2021) [Doc. 154] (denying petition for rehearing *en banc*);

Torcivia v. *Suffolk Cnty.*, No. 19-4167 (2d Cir. Nov. 9, 2021) [Doc. 138-1] (affirming grant of summary judgment); and

Torcivia v. *Suffolk Cnty.*, No. 15-cv-1791 (E.D.N.Y. Mar. 29, 2019) [Doc. 148] (granting summary judgment in part).

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INTRODUCTION

On facts virtually identical to the warrantless search rejected in *Caniglia* v. *Strom*, 141 S. Ct. 1596 (2021), the Second Circuit allowed a warrantless search of Petitioner's home and seizure of his lawfully owned firearms by invoking a supposed "special-needs exception" to the Fourth Amendment's warrant requirement. And the Second Circuit justified the entry into Petitioner's home even though Petitioner was accused of no crime, Pet. App. 25a, the search and seizure occurred well after Petitioner had been removed from his home and from any possible access to those firearms, and even though the Second Circuit assumed—on the summary judgment record—that the firearms were seized "*after* the responsible physicians had decided that he was not a danger to himself" or others. Pet. App. 34a-35a n.30, 36a (emphasis added). This court rejected a comparable search under the so-called "community caretaking exception" in *Caniglia*, and the Second Circuit's rebranding of that rejected exception is outrageous. 141 S. Ct. at 1599-1600.

In fact, the special-needs exception previously recognized by this Court has been limited to circumstances where the government already has some preexisting level of heightened penal authority over the homeowner, such as with probationers or parolees. *E.g.*, *Griffin* v. *Wisconsin*, 483 U.S. 868, 873-874 (1987) (probationer); *Samson* v. *California*, 547 U.S. 843 (2006) (parolee). Expanding that limited exception to include the broader ground covered by the rejected "community caretaking" exception both blatantly disrespects this Court's decision in *Caniglia*

and deepens a pre-*Caniglia* split—between the Fourth, Fifth, and Tenth Circuits and the New Jersey Supreme Court on the one hand and the First, Second, and Ninth Circuits on the other—about when the special-needs exception applies.

Indeed, this case is a strong candidate for summary reversal given its utter disdain for this Court's recent *Caniglia* decision rejecting a warrantless search on nearly identical facts. In the process, the Second Circuit has not only exacerbated a pre-existing split, but it has also created "a new permission slip" for warrantless home entry that is foreclosed by this Court's precedents. *Lange* v. *California*, 141 S. Ct. 2011, 2019 (2021).

The Second Circuit's decision also highlights ongoing problems with this Court's qualified-immunity doctrine. Even though this Court's precedents have clearly established that a person cannot be detained in a mental hospital after being cleared of risk to himself or others, the Second Circuit still let hospital workers avoid liability for holding Petitioner just long enough to effectuate the seizure of his firearms. As Justice Thomas has explained, the doctrine of qualified immunity is not based in the text or history of 42 U.S.C. §1983, but is instead judge-made. *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring in part and in the judgment). Whatever the wisdom of maintaining such immunity in cases involving the police, there is no need to maintain atextual precedent that protects those employees that are not tasked with making "difficult and delicate judgments [police] officers must often make." *Foley* v. *Connelie*, 435 U.S. 291, 299 (1978).

OPINIONS BELOW

The Second Circuit's decision is reported at 17 F.4th 342 and reproduced at Pet. App. 1a-48a. The order denying the petition for rehearing *en banc* is unreported and reproduced at Pet. App. 49a-50a. The district court's summary-judgment opinion is reported at 409 F. Supp. 3d 19 and reproduced at Pet. App. 51a-110a.

JURISDICTION

The Second Circuit issued its opinion on November 9, 2021. Pet. App. 1a. The Second Circuit denied a timely petition for rehearing and rehearing *en banc* on December 29, 2021. Pet. App. 49a-50a. Justice Sotomayor granted Petitioner's timely request for a 60-day extension to file this petition, to and including May 31, 2022. No. 21A521 (Mar. 22, 2022).

This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant constitutional and statutory provisions are reproduced in the appendix at Pet. App. 111a-112a.

STATEMENT

A. Legal Background

1. *Exceptions to the Warrant Requirement.* The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. And this Court has explained that, "when it comes to the Fourth Amendment, the home is first among equals." *Florida* v. *Jardines*, 569 U.S. 1, 6 (2013). Warrantless searches of the home are per se unreasonable under the Fourth Amendment—subject only to a few "specifically established and well-delineated exceptions." See *Katz* v. *United States*, 389 U.S. 347, 357 (1967). And in *Steagald* v. *United States*, this Court explained just how narrow exceptions for home searches are when it held that "a search warrant *must* be obtained absent exigent circumstances or consent." 451 U.S. 204, 205-206 (1981) (emphasis added).

Just last Term, in *Caniglia* v. *Strom*, this Court addressed whether there was another exception that allowed police engaged in "caretaking" activities to enter the home. 141 S. Ct. at 1598. The Court held there was not. *Ibid.* In that case, Caniglia—during an argument with his wife—"retrieved a handgun" and "asked his wife to shoot him." *Ibid.* (cleaned up). She then left the house and called the police the next morning to request that they check on his welfare. *Ibid.* The police ultimately escorted Caniglia to a "hospital for a psychiatric evaluation" and, once he was out of the house, "seized the weapons." *Ibid.* Caniglia sued, and the district court granted summary judgment to the officers. *Ibid.* On appeal, the First

Circuit "assumed that respondents lacked a warrant or consent," "expressly disclaimed the possibility" that the policy was "reacting to a crime," and "declined to consider whether any recognized exigent circumstances were present because respondents had forfeited the point." *Id.* at 1599. But the First Circuit nevertheless justified that search under the "community-caretaking" exception that this Court had recognized in a different context in *Cady* v. *Dombrowski*, 413 U.S. 433 (1973). *Caniglia*, 141 S. Ct. at 1598.

This Court reversed, rejecting the existence of any such exception. *Caniglia,* 141 S. Ct. at 1600. In the process, the Court explained where the First Circuit went wrong: It had ignored how this Court had "repeatedly declined to expand the scope of *** exceptions to the warrant requirement to permit warrantless entry into the home." *Ibid.* (cleaned up; alteration in original). The Court's rejection of a new exception to the warrant requirement in *Caniglia* flowed logically from the Court's repeated instructions that any exception to the Fourth Amendment's warrant requirement be "jealously and carefully drawn." *Georgia* v. *Randolph*, 547 U.S. 103, 109 (2006).

In this case, rather than simply apply this Court's holding in *Caniglia*, the Second Circuit rebranded the community-caretaking exception by turning to another exception—dubbed the "special-needs" exception—and grossly expanded it to cover the very ground of warrantless searches fenced off by *Caniglia*. The special-needs exception had previously developed in relation to persons—such as parolees and

probationers—already under the ongoing supervisory authority of the government in lieu of incarceration. *Griffin* v. *Wisconsin*, 483 U.S. 868, 873-874 (1987). But this Court has never endorsed it as an exception to the Fourth Amendment for the homes of persons not already subject to penal custody or supervision.

In finding a special-needs exception in those narrow circumstances, the *Griffin* Court explained that a "State's operation of a probation system" justified the special-needs exception. Probation is "one point *** on a continuum of possible punishments ranging from solitary confinement in a maximum-security facility to a few hours of mandatory community service" that is "imposed by a court upon an offender after verdict, finding, or plea of guilty." 483 U.S. at 873-874 (cleaned up). The Court emphasized that, while probationer's homes carry some constitutional protection, "they do not enjoy 'the absolute liberty to which every citizen is entitled, but only *** conditional liberty properly dependent on observance of special [probation] restrictions.'" *Id.* at 874 (quoting *Morrissey* v. *Brewer*, 408 U.S. 471, 480 (1972) (both alterations in original)). Even for probationers, however, the Court emphasized that the "permissible degree" of impingement was "not unlimited." *Id.* at 875. The *Griffin* Court thus carefully tailored the application of the special-needs exception to a "probation regime" that would be "unduly disrupted by a requirement of probable cause." *Id.* at 878.

Similarly in *Samson* v. *California*, the Court concluded that "a condition of release can so diminish or eliminate a released prisoner's reasonable

expectation of privacy that a suspicionless search by a law enforcement officer would not offend the Fourth Amendment." 547 U.S. 843, 847 (2006). Although the Court did not mention the special-needs exception by name, it cited *Griffin* extensively and concluded that the same "concern" that justified the search in *Griffin* "applies with even greater force to a system of supervising parolees," *id.* at 854-855, because parolees "have been sentenced to prison for felonies and released before the end of their prison terms and are deemed to have acted more harmfully than anyone except those felons not released on parole," *id.* at 855 (citations omitted).

Other than those two narrow circumstances—parole and probation—this Court has "*never* invoked the special-needs doctrine" to allow the government to search a home and seize items located in it. See *New Jersey* v. *Harris*, 211 N.J. 566, 597, 50 A.3d 15, 33-34 (N.J. 2012) (Albin, J., dissenting) (emphasis added).

2. *Qualified Immunity*. The qualified-immunity doctrine narrows the text of 42 U.S.C. §1983, allowing relief against a government official only if, on an objective reading of the law: (1) the official violated a statutory or constitutional right, and (2) the right was "clearly established" at the time of the challenged conduct. *Ashcroft* v. *al-Kidd*, 563 U.S. 731, 735 (2011). That two-prong inquiry can be made in any order, meaning that the Court can grant qualified immunity even without deciding if a constitutional right was violated. *Pearson* v. *Callahan*, 555 U.S. 223 (2009). In one form or another, qualified immunity has protected governmental officials from liability under Section 1983 for the past fifty years. *Pierson* v. *Ray*, 386 U.S.

547 (1967). As Justice Thomas has explained, this Court has heretofore "appl[ied] this 'clearly established' standard 'across the board' and without regard to 'the precise nature of the various officials' duties or the precise character of the particular rights alleged to have been violated.'" *Ziglar*, 137 S. Ct. at 1871 (Thomas, J., concurring in part and in the judgment) (quoting *Anderson* v. *Creighton*, 483 U.S. 635, 641-643 (1987)).

B. Factual Background of This Case

Petitioner Wayne Torcivia is a 57-year-old man with no record of violence and no history of suicide attempts, depression, or mental health treatment. C.A. ECF 54 at E10-E12; II C.A.App. A431.[1] Early in the morning of April 6, 2014, his teenaged daughter called social services complaining that her father was yelling at her and acting weird. II C.A.App. A373-A375, A380; V C.A.App. A1254-A1255. Neither in that call nor at any point thereafter did she "claim that she had been assaulted, or that a firearm had been displayed or used in any way during the altercation." Pet. App. 25a. Although some of the remaining facts were disputed below, the Second Circuit acknowledged the following facts as being consistent with the summary-judgment record when viewed in the light most favorable to Petitioner, the nonmovant on the motion at issue here. See *Tolan* v. *Cotton*, 572 U.S. 650, 657 (2014) (per curiam).

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[1] Citations to the Record below are listed as [vol] C.A.App. [page]. Citations to the Second Circuit's docket are listed as C.A. ECF [document number] at [page].

Following the call from Petitioner's daughter, social services contacted the Suffolk County Police Department (SCPD or Department), which dispatched three officers to Petitioner's home. Each officer agreed that Petitioner committed no violation of law, and that the daughter's complaint was unsubstantiated. II C.A.App. A378; I C.A.App. A196-A197, A224-A225.

At one point in the discussion between Petitioner and one of the officers, the officer "turned slightly" and accidently dislodged magnetic drapes attached to the front door. V C.A.App. A1203. As Petitioner went to pick them up, *id.* at A1205, the officer "screamed" very loudly to Petitioner to get back and threatened to tase Petitioner if he did not, *id.* at A1206. Petitioner maintains that he told the officer not to tase him, because he has "a heart condition" and "could die." *Id.* at A1236.

The officers understood Petitioner's request *not* to be tased as the precise opposite, that is, as a supposed *desire* to die from tasing. Pet. App. 8a-9a. In response, they handcuffed Petitioner and transported him to Stony Brook Hospital's Comprehensive Psychiatric Evaluation Program (CPEP) for an emergency mental health evaluation. Pet. App. 7a, 9a.

Before leaving the home, two of the officers informed Mrs. Torcivia that they had responded to the daughter's complaint, that Petitioner was acting "irrational," and that they planned to transport him for a mental-health evaluation. V C.A.App A1351-A1353. Without asking whether the Torcivia family had firearms in the home, each officer then left. Only after dropping Petitioner off at CPEP did Officer James Adler learn, via a computer check, that

Petitioner held a New York State pistol license. II C.A.App. A390-A391.

That check was based on a Department policy requiring the seizure of all guns from a home when police respond to a domestic "incident" and a resident is transported to a comprehensive psychiatric emergency program. Pet. App. 19a, 57a. Accordingly, the officer contacted his sergeant, who instructed him to ask Mrs. Torcivia for the guns and, if unsuccessful, return to CPEP to seek consent to the seizure from Petitioner; each attempt failed. II C.A.App. A391-A392, A421. The police did not seek a warrant for Petitioner's firearms and no officer was posted at the home to secure the scene pending seizure of the firearms. *Id.* at A391-A393.

While Petitioner was at CPEP, he underwent an intake interview. II C.A.App. A435. The CPEP chart shows that Petitioner did not appear to be under the influence of drugs or alcohol, and it shows that he told them about the presence of firearms in the home. IV C.A.App. A941-A942. The workers at CPEP then assessed Petitioner under the Columbia Suicide Severity Rating and found that there was no risk or likelihood that he would commit suicide. *Id.* at A940-A941; C.A. ECF 54 at E11-E12. This conclusion was unsurprising—Petitioner has no history of mental-health issues at all, let alone suicidal ideation. C.A. ECF 54 at E10-E12; II C.A.App. A431.

Twelve hours later, Petitioner was evaluated by a psychiatric nurse practitioner. II C.A.App. A552. She concluded that Petitioner was not a danger to himself or others, and she recommended that he be discharged. *Id.* at A552-A553. As was the practice at

CPEP, Petitioner was then evaluated by the attending psychiatrist, who agreed that Petitioner posed no risk to himself or others. *Id.* at A556-A557. He then discharged Petitioner without conditioning his release on surrender of his firearms. *Ibid.*

After Petitioner was discharged, he called his wife to come pick him up. V C.A.App. A1367. The CPEP social worker then had a phone conversation with the Department. III C.A.App. A732. Following that call, she instructed her intern to obtain from Petitioner the combination to his gun safe. *Ibid.* Shortly thereafter, CPEP called Mrs. Torcivia and told her that there was a change of plans and that her husband would not be released while there were firearms in the home. V C.A.App. A1367.

The social-worker intern then passed that information on to Petitioner, explaining that, although he had already been cleared of all risk, he could not leave CPEP until he provided the combination to his gun safe. I C.A.App. A140-A142, A296-A297. She then explained that the police were on their way to his house to seize his firearms. *Id.* at A142, A298-A299. Though Petitioner at first refused (again) to give the combination, he eventually caved to the pressure resulting from his continued confinement and provided the combination to his wife, who produced Petitioner's handguns and long guns for the Department when they arrived without a warrant. *Id.* at A140-A142, A296-A299. Hours after his evaluation cleared him of posing any risk, and only after confirming that the Department had seized his firearms, Petitioner was allowed to exit the locked CPEP Unit. *Id.* at A300.

On May 6, 2014, Petitioner requested the return of his firearms from the Department. II C.A.App. A502. His pistol license was later revoked and, although there was a hearing over the loss of his license in late 2015, Petitioner never recovered his handguns. Pet. App. 59a. And it took over two years for the Department to release his long guns to a gun store, which then transferred them to Petitioner. *Ibid.*

C. Procedural History

Petitioner sued Suffolk County, New York and various individuals who participated in his confinement and the seizure of his firearms under §1983 for the violation of his First, Second, Fourth, and Fourteenth Amendment rights, as well as for violation of New York State law. I C.A.App. A53-A56. As relevant to this Petition,[2] Petitioner alleged that Suffolk County's policy of warrantless seizure of firearms in the kind of circumstances in this case violated the Fourth Amendment. *Id.* at A56; see *Monell* v. *Dep't of Soc. Servs.*, 436 U.S. 658 (1978). He also raised a §1983 claim against the state hospital workers who continued to confine him after he had been cleared, claiming that they violated the Fourth Amendment by "unreasonably prolonging his

[2] A jury trial against the County and the three police officers "resulted in judgment for the County Defendants" on claims not addressed by this petition, including a Fourth Amendment claim for the seizure of Petitioner himself and a First Amendment claim that he was confined in retaliation for exercising his free speech rights. Pet. App. 13a-15a. The verdict as to those claims resulted from the jury's conclusion that Petitioner had not established by a preponderance of the evidence that he did not make suicidal statements before his initial detention. Pet. App. 17a.

confinement at CPEP until he provided his gun safe combination to allow seizure of his firearms." Pet. App. 15a.

1. On cross-motions for summary judgment, the district court granted Suffolk County's motion in part and dismissed Petitioner's Fourth Amendment claims against the county. Pet. App. 109a-110a. The district court agreed, as a factual matter, that a jury could find that Suffolk County had a policy of "temporarily seizing *** an individual's firearms upon their transport to CPEP following a domestic dispute[.]" Pet. App. 66a. But the district court then found, *sua sponte*, that this policy is justified under a "special-needs exception" to the warrant requirement, Pet. App. 66a-76a, even though the county did not advance such a defense, Pet. App. 22a-23a n.24.

As to the state employees who worked at the hospital, the district court granted qualified immunity, finding that "no Second Circuit or Supreme Court precedent *** would have clearly established that, under the circumstances, the CPEP Defendants' conduct violated the Constitution." Pet. App. 101a. Thus, although the CPEP workers continued to detain Petitioner for more than three hours *after* determining he was not a danger to himself or others, the court shielded them from liability. Pet. App. 102a.

2. The Second Circuit affirmed the district court's dismissal of Petitioner's Fourth Amendment claim against the County. The Second Circuit agreed with the district court that there was sufficient evidence to support the existence of a "two-pronged policy" under which the county, for the duration of an investigation, would "temporarily seize[] firearms belonging to an

individual" (1) "who is transported for emergency mental health evaluation" (2) "following a domestic incident." Pet. App. 21a. And the Second Circuit not only agreed with Petitioner that the county's seizure of his guns was a seizure, but the court also "assume[d] the truth of Petitioner's claim that the guns were seized *after* the responsible physicians had decided that he was not a danger to himself." Pet. App. 34a-35a n.30 (emphasis added). That assumption was unassailably correct. See II C.A.App. A453, A455; III C.A.App. A710.

Despite that assumption, the Second Circuit held that a "special-needs exception" applied and that—under that exception—the County's firearm-seizure policy was "constitutionally reasonable" and thus did not "violate the Fourth Amendment." Pet. App. 32a.[3] The court explained that the policy's "immediate goal" was the need "to prevent self-harm and harm within a family when a mental health condition becomes acute,

[3] The Court also suggested that any constitutional violation resulting from the seizure stemmed from the county employees violating the County's policy by seizing Petitioner's firearms after the relevant investigation was complete. Pet. App. 33a, 39a. But there is no question that the employees seized his firearms *pursuant* to the County's policy, whether or not the investigation was still in process. And there is no question that the policy, if not justified by a special-needs exception, violates the Fourth Amendment. Thus, whatever the exact scope of the policy—an issue that is properly left to a jury—the harm to Petitioner resulted from the county's training its officers to follow an unconstitutional policy. *E.g.*, *City of Canton* v. *Harris*, 489 U.S. 378, 389 (1989).

when there may be a heightened risk of domestic violence or suicide, and when firearms are present." Pet. App. 24a.

In so holding, the Second Circuit largely ignored *Caniglia* and confined the only mention of it to a footnote. Pet. App. 26a-27a n.25. The court of appeals simply asserted that "the special needs exception" is "different" than the community caretaking exception at issue in *Caniglia*. *Ibid.* The court further maintained that the special-needs exception has been "repeatedly recognized" by this Court, "including" in *Griffin*, which involved "the warrantless search of a home." *Ibid.* The Second Circuit did not even attempt to address why a person like Griffin—subject to penal control because of a conviction—could be deemed comparable to an individual like Petitioner. The Second Circuit thus held that it could and would "not rely" on *Caniglia*'s rejection of the community-caretaking exception in its analysis. *Ibid.*

As to Petitioner's continued confinement by the non-police state employees, the Court agreed with the district court's grant of qualified immunity even though the parties disputed whether the state employees continued to confine Petitioner "for a few hours after he was medically cleared to be discharged" to effectuate the seizure of his weapons. Pet. App. 46a-47a, 11a-12a. And the court did so by concluding that the right against such confinement was not clearly defined. Pet. App. 46a. Although Petitioner identified this Court's decision in *O'Connor* v. *Donaldson*, 422 U.S. 563 (1975), in his brief, C.A. ECF 47 at 16-17, the Second Circuit ignored it entirely, relying instead on

two of its own decisions that dealt with seizures in entirely different circumstances. Pet. App. 46a-47a.

REASONS FOR GRANTING THE PETITION

Twice last Term, this Court rejected exceptions to the warrant requirement that would allow searches of or seizures in the home. Despite clear guidance from those cases, the Second Circuit concluded that a policy that allowed the initial and ongoing seizure of firearms "complies with the Fourth Amendment" and did not "cause a violation" of Petitioner's constitutional rights. Pet. App. 40a. That is wrong, and it exacerbates a split among the circuits (and state courts of last resort) on the applicability of the special-needs exception to the homes of individuals not in ongoing penal custody. This case also gives the Court a needed opportunity to narrow the judge-made qualified-immunity doctrine to allow claims for constitutional deprivations by non-police actors.

I. As To The First Question, The Court Should Summarily Reverse The Decision Below As Incompatible With *Caniglia*.

On the first question, the Second Circuit reached the wrong conclusion about the existence of a special-needs exception by, among other errors, actively disregarding this Court's decisions from as recently as last year. Compare Pet. App 26a n.25 with *Caniglia*, 141 S. Ct. at 1600. Despite this case's being a near carbon copy of *Caniglia* (which the Second Circuit merely characterized as "facts bearing some resemblance"), the Second Circuit dispensed with this Court's decision in *Caniglia* in a single footnote. Pet. App 26a n.25.

As in *Caniglia*, there was no dispute that the exigent-circumstances exception did not apply. Indeed, this case is even clearer than *Caniglia* as the officers (under the facts assumed below) concluded that the initial complaint that brought them to Petitioner's home was groundless, II C.A.App. A378; I C.A.App. A196-197, A224-A225, and because there was no history of mental illness or suicidal or violent thoughts or conduct, C.A. ECF 54 at E10-E12; II C.A.App. A431. Given the more worrisome initial triggering conduct in *Caniglia*—wherein Caniglia threw his gun on the table and affirmatively asked his wife to shoot him, *Caniglia*, 141 S. Ct. at 1598—the correct outcome of this case is beyond question. And the Second Circuit's efforts to distinguish it constitutes the plainest of plain error, if not outright resistance to this Court's authority.

Departures from precedent this egregious have warranted summary reversal in the past. *Caetano* v. *Massachusetts*, 577 U.S. 411, 411-412 (2016) (per curiam); *United States* v. *Ibarra*, 502 U.S. 1 (1991) (per curiam). It is warranted again here.

II. Even If *Caniglia* Does Not Require Summary Reversal, The First Question Presented Is Worthy Of Plenary Review.

Even if *Caniglia* does not unavoidably require reversal of the decision below, the case is worthy of full review because (a) the decision below deepens a pre-existing split regarding the scope of the special-needs exception, and (b) that decision wrongly decided an important question of constitutional law.

A. Courts are split about the scope of any special-needs exception to the warrant requirement.

Even if this Court disagrees that the Second Circuit's disregard for *Caniglia* warrants summary reversal, the case is worthy of review because the courts of appeals, along with one state court of last resort, are deeply divided over the scope of the special-needs exception to the Fourth Amendment's warrant requirement. In conflict with the decision below, the New Jersey Supreme Court, Fifth Circuit, and Tenth Circuit have declined to apply the special-needs exception to the homes to persons not in penal custody. In fact, the Fourth and Tenth Circuits have gone even further and limited application of that exception even to persons who were in such custody in some circumstances. In contrast, like the Second Circuit here, the First and Ninth Circuits have extended the special-needs exception to cases that did not involve probationers or parolees.

1. In a case much like this one, the New Jersey Supreme Court held that the special-needs exception could not be used to justify the seizure of firearms from the homes of individuals against whom a complaint of domestic violence was filed. *New Jersey* v. *Hemenway*, 239 N.J. 111, 138, 216 A.3d 118, 133 (N.J. 2019). The court emphasized that, because "law enforcement officers can execute a warrantless entry of a home to seize weapons based on exigent circumstances," there was no need to "carve out a singular exception to the traditional constitutional protections afforded to the home" by "invok[ing] the special needs doctrine." *Id.* at 135.

The Tenth and Fifth Circuits have likewise rejected the extension of the special-needs exception to the homes of persons not in penal custody even where suspected danger to family members is involved. Both circuits demand a warrant in such circumstances unless the search would satisfy the ordinary test for exigency.

In *Roska ex rel. Roska* v. *Peterson*, for example, the Tenth Circuit expressly declined to find a "special need that renders the warrant requirement impracticable when social workers *enter a home* to remove a child, absent exigent circumstances." 328 F.3d 1230, 1242 (10th Cir. 2003) (emphasis in original). The Fifth Circuit similarly has rejected attempts to apply the special-needs exception to social workers in those circumstances after finding that any such investigation is not sufficiently separate from the needs of law enforcement. See *Gates* v. *Tex. Dep't of Protective & Regul. Servs.*, 537 F.3d 404 (5th Cir. 2008); *Thomas* v. *Texas Dep't of Fam. & Protective Servs.*, 427 F. App'x 309 (5th Cir. 2011) (same).

2. The Tenth Circuit has gone even further in limiting the special-needs exception, concluding that the exception has limited applicability even as to persons who are in penal custody. In *United States* v. *Pacheco*, that court of appeals held that the special-needs exception could not be used to search a parolee's home after the parolee has been arrested, reasoning that any resulting seizure would be used "entirely for the purpose of using" the phone and its data "as evidence." 884 F.3d 1031, 1040 (10th Cir. 2018).

The Fourth Circuit has adopted the same approach. In *United States* v. *Hill*, it held that the

special-needs exception could not justify a home search, even though the homeowner was on supervised release, unless a condition of his release allowed for such searches. 776 F.3d 243, 249 (4th Cir. 2015).[4]

Under the "special-needs exemption" employed by the Second Circuit here, each of these searches would have been held compatible with the Fourth Amendment.

3. By contrast, the First and the Ninth Circuits have joined the Second Circuit in extending the special-needs exception in cases not involving probationers and parolees.

For example, in *Sanchez* v. *County of San Diego*, the Ninth Circuit held that a policy that allowed a warrantless administrative search of the home of welfare recipients fell under the special-needs exception. 464 F.3d 916, 926 (9th Cir. 2006). The Ninth Circuit reasoned that, because the primary purpose of those searches was not "investigating fraud," but rather to "verify eligibility for welfare benefits," the county had a special need. *Id.* at 926. The court further concluded that the home searches were reasonable considering that need: Not only did the court consider it "reasonable for welfare applicants who desire direct cash governmental aid to undergo eligibility verification through home visits," it also

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[4] The Seventh Circuit expressed "doubt" in the Fourth Circuit's reasoning in *United States* v. *Caya*, 956 F.3d 498 (7th Cir. 2020), but did not decide the question because the challenged search was performed subject to an express condition of release. *Id.* at 503-504.

relied on the fact that the search was limited to "areas of the home that [the investigators] believe will provide relevant information" and cited data showing that the searches had led to increased denial rates and an increased rate in withdrawn welfare applications. *Id.* at 927-928. On those facts—which undisputedly did not involve penal custody—the court held that the special-needs exception applied. *Ibid.*

Similarly, in *Henderson* v. *City of Simi Valley*, the Ninth Circuit extended the special-needs exception to the home after police entered a woman's home so that her daughter—who was protected by a temporary restraining order obtained by her father—could retrieve items over which the order gave her "exclusive temporary use, control, and possession." 305 F.3d 1052, 1054 (9th Cir. 2002). The court concluded that the homeowner's privacy interests were "tempered by the fact that she had notice of the court-ordered property disbursement when she was served with the Order." *Id.* at 1059. And that notice, according to the court, constituted a "special need" justifying a warrantless entry into a home.

Likewise, in *McCabe* v. *Life–Line Ambulance Service, Inc.*, the First Circuit allowed for a warrantless home entry to execute an involuntary civil commitment order that had been issued by a neutral medical expert. 77 F.3d 540, 553-554 (1st Cir. 1996). The Court reasoned that, because such orders "can only issue upon an expert medical finding that the subject presently poses a 'likelihood of serious harm' to herself or others," *id.* at 546, "officers in possession of [such an order], duly issued pursuant to [Massachusetts law], may effect a warrantless entry

of the subject's residence within a reasonable time after the [document] issues," *id.* at 554. Though the Court could have found that the facts of the case presented it with "exigencies," it declined to "enter the skirmish over the distinctions between 'emergencies' and 'exigent circumstances,'" finding instead that the special-needs exception applied. *Id.* at 546-547.

The decision below—with its capacious understanding of what can constitute a special need—thus joins the First and Ninth Circuits in finding a special-needs exception to enter the home of people who are neither probationers nor parolees. That decision also widens a split with the Fifth Circuit and the New Jersey Supreme Court, both of which have rejected a special-needs exception because of the existence of the exigent-circumstances exception. And it deepens a conflict with the Fourth and Tenth Circuits, which have declined to find a categorical special-needs exception even for searching the homes of those in penal custody.

This Court's review is needed to ensure that the applicability of the special-needs exception to a person's home does not turn on the state or circuit—or on the side of the Hudson River—in which the person lives.

B. The issue presented is important, and the court of appeals resolved it incorrectly.

Beyond exacerbating a split among the lower courts, the decision below also answers an important question of constitutional law in a way that cannot be squared with this Court's precedents or the common law.

1. The question presented is unquestionably important. As this Court has explained, the "physical entry of the home is the chief evil against which [the Fourth Amendment] is directed." *Lange*, 141 S. Ct. at 2018 (quoting *Payton* v. *New York*, 445 U.S. 573, 585 (1980)). Thus, cases like this one that create a rule that weakens the Fourth Amendment's protections for the home demand this Court's correction. As explained above, in this Court's cases, the home is the "first among equals." *Jardines*, 569 U.S. at 6. The Fourth Amendment's protections are at their apex during home searches because the home and its contents are "accorded the full range of Fourth Amendment protections." *Lewis* v. *United States*, 385 U.S. 206, 211 (1966).

Recognizing the central importance of the home, this Court has "jealously and carefully drawn" all exceptions to the Fourth Amendment's warrant requirement. That longstanding limitation is not only compelled by the history and tradition of that Amendment, but also prudent: As Justice Jackson explained, the government will "push to the limit" "any privilege of search and seizure without warrant which [the Court] sustain[s]." *Brinegar* v. *United States*, 338 U.S. 160, 182 (1949) (Jackson, J., dissenting).

Because the court of appeals' expansion of the special-needs exception to the home is anything but jealously and carefully drawn, this Court's review is necessary to narrow it.

2. Nor can the expansion of the special-needs exception be justified by *Griffin* given the limits of that decision and this Court's repeated admonition to read any exception to the warrant requirement narrowly. *Griffin* addressed the narrow and constitutionally different circumstances of persons who were still subject to a degree of penal custody, had lost many of their liberties because of their convictions, and hence had far different rights and expectations of privacy, even in their homes. 483 U.S. at 873-875. Such circumstances do not translate to persons who have not been found to have violated the law and thereby lost a substantial degree of their liberty. In *Caniglia*, this Court explained that "[n]either the holding nor logic of *Cady* justified" an extension of the community-caretaking exception to the home. *Caniglia*, 141 S. Ct. at 1599. The same can be said about applying *Griffin* to the home of those not in the state's penal custody.

Indeed, while the Court in *Griffin* recognized that the penal context is what justified the special-needs exception's application to a probationer's home, 483 U.S. at 873-874, this Court specifically warned that even in such penal circumstances the exception was "not unlimited." *Id.* at 875.

In the non-penal context, the exception should be non-existent given that the separate and stricter exigent circumstances exception is more than sufficient to address any genuine *need* to forego a warrant. Indeed, as Justices Alito and Kavanaugh explained in their *Caniglia* concurrences, exigent circumstances already justify home searches where there is a genuine exigency. *Caniglia*, 141 S. Ct. at

1602 (Alito, J., concurring); *id.* at 1603-1604 (Kavanaugh, J., concurring).

And in this case, there was no need, exigent, or otherwise. Petitioner was not even suspected of a crime and had not been punished by the state. Nothing that Petitioner had done suggested he was even dangerous. Indeed, as the Second Circuit admitted, there was no "claim that [Petitioner's daughter] had been assaulted, or that a firearm had been displayed or used in any way during the altercation." Pet. App. 25a.

By expanding the exception on those facts, the Second Circuit ignored all the reasons why the *Griffin* court found that probation justified an exception for special needs. Instead, the Second Circuit extended a decision in which, nearly 20 years ago, it had "h[e]ld that the special needs doctrine does not require, as a threshold matter, that the subject of the search possess a reduced privacy interest." *MacWade* v. *Kelly*, 460 F.3d 260, 270 (2d Cir. 2006); see Pet. App. 23a-24a.

That lowered threshold contravenes this Court's guidance. In other special-needs cases, this Court has explained that warrantless searches should be "limited" to those cases "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* v. *Ry. Lab. Execs.' Ass'n*, 489 U.S. 602, 606, 624 (1989) (involving blood and urine tests of railroad employees following train accidents and the violation of safety rules).

The Second Circuit's disregard for Petitioner's Fourth Amendment privacy interests in these non-exigent circumstances allowed the government to enter a place where Petitioner's privacy interests were at their apex: his home. And it allowed them to seize Petitioner's firearms from that home even though he had no criminal history, he had committed "no offense," was suspected of "no violation" of the penal law, II C.A.App. A378, and even though the seizure occurred *after* medical staff had determined not only that involuntary commitment was unnecessary, but also that the homeowner was "not imminently dangerous to himself or others." Pet. App. 11a (cleaned up).[5] This Court's special-needs decisions cannot justify such a result.

3. Moreover, no such exception was recognized at common law. Indeed, before the Founding, outside of certain rare circumstances, "the Crown could not intrude on the sanctity of the home without a warrant."[6] The home was not to be "violated" unless "absolute necessity" compelled this to "secure public benefit."[7] Otherwise, in "all cases where the law" was "silent" and "express principles d[id] not apply," the "extreme violence" of entering a home without

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[5] As this Court is acutely aware, New York's hostility to firearms may be the driving force behind the persistent disregard for all manner of constitutional rights in cases where guns make even a cameo appearance.

[6] Laura K. Donohue, *The Original Fourth Amendment*, 83 U. Chi. L. Rev. 1181, 1195-1196 (2016).

[7] 1 Joseph Chitty, *A Practical Treatise on the Criminal Law* 35 (London, A.J. Valpy 1819).

permission was forbidden.[8] The Fourth Amendment, "little more than the affirmance" of the common law,[9] was thus meant by the Framers to continue this tradition and prevent the "evil" of warrantless "physical entry of the home." *Welsh* v. *Wisconsin*, 466 U.S. 740, 748 (1984) (citations omitted). And the only circumstances in which the common law even contemplated such warrantless entry—pursuit of a fleeing felon or to stop an affray (i.e., current violence)—easily fall within what we would now characterize as exigent circumstances. *Lange*, 141 S. Ct. at 2022-2024 (collecting common-law sources).

In sum, no common-law authority would have allowed government officers to enter a person's home and seize his firearms because of the "special need" of the government to seize weapons from a person who had committed no wrong and posed no risk to himself or others. And the Second Circuit's extension of the special-needs exception to the home of a person who was not a probationer or parolee thus swallows the warrant requirement, contravenes the Court's other cases about the central importance of the home, and abandons common-law principles that have traditionally animated this Court's Fourth Amendment decisions. For these reasons, too, review is warranted.

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[8] *Ibid.*

[9] 3 Joseph Story, *Commentaries on the Constitution of the United States* 748 (Boston, Hilliard, Gray & Co. 1833).

III. The Qualified-Immunity Question Also Warrants This Court's Review.

Assuming the Court does not summarily reverse the Second Circuit's resolution of the first question, this Court's review is also warranted to revisit the application of the judge-made qualified-immunity doctrine to claims against non-police employees like the health-care officials who kept Petitioner in custody, long after any concerns about his danger had been resolved, to facilitate the police's warrantless seizure of his weapons.[10] As applied to such officials, the doctrine not only lacks any legal basis, it also does not further the policy interests it is designed to protect.

A. The qualified-immunity doctrine is atextual and lacks historical support.

Nearly 25 years ago, Justice Scalia explained that "the § 1983 that the Court created *** bears scant resemblance to what Congress enacted almost a century earlier." *Crawford-El* v. *Britton*, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting). He was correct.

The very idea of qualified immunity as a shield to §1983 liability is predicated on the notion that the statute incorporated the common law existing when the statute was enacted. See *Tenney* v. *Brandhove*, 341 U.S. 367, 376 (1951). But, in fact, the common law was "extremely harsh to the public official." David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. Colo. L. Rev. 1, 18 (1972).

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[10] Petitioner does not seek summary reversal as to the second question presented.

As Professor Baude has explained, at common law, "lawsuits against officials for constitutional violations did not generally permit a good-faith defense," the precursor to the modern qualified-immunity doctrine, "during the early years of the Republic." William Baude, *Is Qualified Immunity Unlawful?*, 106 Calif. L. Rev. 45, 55-58 (2018).

Nor was there any basis at common law for the present-day, "objective" qualified-immunity doctrine that replaced the good-faith defense. Indeed, this Court has explained that the now-governing "objective" standard "completely reformulated qualified immunity along principles not at all embodied in the common law." *Anderson*, 483 U.S. at 645; *accord Ziglar*, 137 S. Ct. at 1871 (Thomas, J., concurring in part and in the judgment). Thus, as it stands, the qualified immunity doctrine is an example of the Court's "substitut[ing] [its] own policy preferences for the mandates of Congress." *Ziglar*, 137 S. Ct. at 1872 (Thomas, J., concurring in part and in the judgment).

B. Qualified immunity allows significant violations of constitutional rights to go unanswered.

Modern qualified immunity doctrine also limits the establishment of the law, preventing individuals from vindicating their constitutional rights. Abrogating qualified immunity as to non-police state actors would go a long way to ameliorating that problem.

Absent qualified immunity, each case alleging a constitutional violation would clarify what the Constitution requires. Yet since this Court in *Pearson*

v. *Callahan*, 555 U.S. 223 (2009), permitted courts to conduct the two-pronged qualified immunity analysis in any order, courts have frequently granted qualified immunity without ever addressing whether the challenged behavior is unconstitutional. See Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. Calif. L. Rev. 1, 33-51 (2015). As a result, the law is never clarified,[11] and qualified immunity thus forever shields government actors from liability as "[i]mportant constitutional questions go unanswered precisely because no one's answered them before." *Zadeh* v. *Robinson*, 928 F.3d 457, 479 (5th Cir. 2019) (Willett, J., concurring in part, dissenting in part).

A limited abrogation of qualified immunity would allow more such questions to be answered, thereby giving greater guidance to all public officials.

C. Applying qualified-immunity doctrine to non-police state actors does not further the doctrine's purposes.

The purposes of qualified immunity also are not served by its application in cases like this. This Court has justified qualified immunity on the theory that, "[w]hen officials are threatened with personal liability for acts taken pursuant to their official duties, they may well be induced to act with an excess of caution or otherwise to skew their decisions in ways that result in less than full fidelity to the objective and independent criteria that ought to guide their conduct." *Forrester* v. *White,* 484 U.S. 219, 223 (1988).

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[11] See Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 Yale L.J. 2, 65-66 (2017).

Because non-police state actors are typically not faced with the kind of life-or-death situations that require immediate action, shielding them from liability makes little sense.

Here, the non-police state actors acted with no "caution" at all when they confined Petitioner longer than necessary to ascertain that he was not a threat to himself or others. His continued confinement violated the Constitution under this Court's precedents. *O'Connor*, 422 U.S. at 580; accord, *Zinermon* v. *Burch*, 494 U.S. 113, 134 (1990) ("[T]here is no constitutional basis for confining mentally ill persons involuntarily if they are dangerous to no one and can live safely in freedom." (cleaned up)). Yet the Second Circuit held that the "across the board" qualified-immunity doctrine still shielded them.

Nothing in the text or history of §1983 compels the application of the qualified-immunity doctrine to officials *not* tasked—as police are—with making discretionary calls at a moment's notice. Moreover, 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.

These considerations provide powerful additional reason for review of the qualified-immunity question presented here.

IV. This Case Is An Excellent Vehicle For Answering These Important Questions.

This case presents an ideal vehicle for this Court to answer both questions presented.

1. As to the special-needs exception: Petitioner does not ask this Court to overrule its prior holdings in *Griffin* or *Samson* that the special-needs exception can apply to the homes of those on probation or parole. Rather, Petitioner seeks a return to the well-established principles of those cases, and the narrow view of exceptions to the warrant requirement so recently reaffirmed in *Caniglia*. Petitioner simply asks that this Court revoke the Second Circuit's "new permission slip for entering the home without a warrant." *Lange*, 141 S. Ct. at 2019.

Furthermore, because the claim that is the subject of the first question is against the county alone, see Pet. App. 38a n.34, review of that question will not be hindered by the lower courts' finding of qualified immunity as to the individual police officers, like it would be in other cases. See, *e.g.*, *Torres* v. *Madrid*, 141 S. Ct. 989, 1003 (2021) ("We leave open on remand any questions regarding the reasonableness of the seizure, the damages caused by the seizure, and the officers' entitlement to qualified immunity.").

Further, the answer to the first question presented will decide the Fourth Amendment claim against the county. That is because, if its policy is not justified under the "special-needs exception," the warrantless seizure of Petitioner's firearms violated the Fourth Amendment, as the Second Circuit did not apply "any

other Fourth Amendment exception." Pet. App. 26a n.25.

Moreover, because the policy that the county maintained violated the Fourth Amendment, whether or not the officers complied punctiliously with that policy is irrelevant: Training officers to follow an unconstitutional policy "evidences" such "a deliberate indifference to the rights of" those who live in Suffolk County as to support *Monell* liability. See *City of Canton* v. *Harris*, 489 U.S. 378, 389 (1989) (cleaned up).

The facts in this case thus squarely present the question presented about the special-needs exception.

2. The case also presents an excellent vehicle to reconsider the wisdom of applying the qualified-immunity doctrine to non-police state actors. Other cases that come to this Court challenging the reasonableness of continued confinement after a person is determined not to be a risk to himself or others could well arise against police officers, not against state health-care workers. In those cases, review may be hindered by prior decisions holding that the "rationale for the qualified immunity historically granted to the police rests on the difficult and delicate judgments these officers must often make." *Foley*, 435 U.S. at 299.

Here, by contrast, the CPEP state defendants against whom the Fourth Amendment confinement claims were raised had no discretionary authority whatsoever. New York required Petitioner's release as soon as he was cleared by the physician. N.Y. Mental Hygiene Law §9.40(d) ("If at any time it is determined

that the person is no longer in need of immediate observation, care and treatment in accordance with this section and is not in need of involuntary care and treatment in a hospital, such person shall be released[.]"). Thus, by granting review of the second question presented here, the Court could limit the scope of the judge-made qualified immunity doctrine without having to revisit the "difficult and delicate" judgments that this Court has found to justify qualified immunity to claims against the police.

For these reasons, this case presents an excellent vehicle for deciding both questions presented.

CONCLUSION

The Second Circuit's extension of the special-needs exception to the home of a person not on probation or parole is dangerous and wrong. The Court should grant the petition to reverse that court's—and other federal Circuits'—erosion of the Fourth Amendment's protection for the home. The Court should also grant review of the second question presented and narrow the scope of the qualified-immunity doctrine in cases involving non-police state actors.

Respectfully submitted,

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MAY 31, 2022

APPENDIX

TABLE OF APPENDICES

Appendix A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[Filed November 9, 2021, Doc. 138-1]

August Term, 2020

Argued: December 9, 2020

Decided: November 9, 2021

Docket No. 19-4167

WAYNE TORCIVIA,

Plaintiff-Appellant,

-v.-

SUFFOLK COUNTY, NEW YORK, POLICE OFFICER JAMES ADLER, individually and professionally, POLICE OFFICER PHILIP HALPIN, individually and professionally, POLICE OFFICER ROBERT VERDU, individually and professionally, MARY CATHERINE SMITH, individually, KRISTEN STEELE, individually, DIANNA D'ANNA, individually, ADEEB YACOUB, M.D., individually,

Defendants-Appellees,

INVESTIGATOR THOMAS CARPENTER, individually and professionally, CAPTAIN WILLIAM SCRIMA, individually and professionally, POLICE OFFICERS JOHN DOE 1 & 2, individually and professionally, who responded to Plaintiff's home at 60 Creighton

Avenue, Lake Ronkonkoma, New York with Officer Adler around 12:00 a.m. on April 6, 2014, POLICE OFFICERS JOHN DOE 3 & 4, individually and professionally, who confiscated Plaintiff's weapons from his home on April 6, 2014, POLICE OFFICERS JOHN DOE 5-15, individually and professionally, BRIDGET WALSH, individually, MICHELLE SANCHEZ, individually, TIMOTHY J. AIELLO, individually, JOHN AND JANE DOES 1-10, individually,

Defendants.[*]

B e f o r e :

CABRANES, LYNCH, and CARNEY, *Circuit Judges*.

The primary issue presented by this appeal concerns the boundaries of the Fourth Amendment's prohibition on warrantless seizures. Shortly after midnight on April 6, 2014, Suffolk County police officers came to Plaintiff-Appellant Wayne Torcivia's home in response to what was described to them as a violent domestic incident, after Torcivia's daughter called an emergency child protection hotline. The officers determined that Torcivia, who admittedly had been drinking, needed to be transported to a State-run mental health facility for evaluation. While he was at the facility, the officers seized his firearms from his home pending further investigation. Torcivia argues that in doing so, the officers acted pursuant to an official County policy or custom that violated the Fourth Amendment, making the County subject to

[*] The Clerk of Court is directed to amend the case caption to conform to the above.

Monell liability for the seizure. *See Monell v. Dep't of Social Servs.*, 436 U.S. 658 (1978). We conclude that the District Court correctly determined that the County is not liable under *Monell* because its policy falls within the "special needs" exception to the Fourth Amendment's warrant requirement, and, under the circumstances presented, the County's policy did not cause a violation of Torcivia's Fourth Amendment rights. Torcivia further contends that certain evidentiary rulings made at trial on his remaining claims against three County police officers were erroneous. He also challenges the District Court's determination that employees of the State-run mental health facility (and an intern supervised by them) were entitled to qualified immunity under federal and New York law for claims related to their alleged failure to discharge Torcivia promptly. On review, we find no basis for reversal or for a new trial.

AFFIRMED.

AMY L. BELLANTONI, The Bellantoni Law Firm, PLLC, Scarsdale N.Y., *for Plaintiff-Appellant Wayne Torcivia.*

ARLENE S. ZWILLING (Dennis M. Cohen, *on the brief*), Office of the Suffolk County Attorney, Hauppauge, N.Y., *for Defendants-Appellees Suffolk County, New York, Police Officer James Adler, Investigator Thomas Carpenter, Captain William Scrima, Police Officer Philip Halpin and Police Officer Robert Verdu.*

DAVID LAWRENCE III, Office of the New York Attorney General, New York, N.Y., *for Defendants-Appellees Dianna D'Anna, Kristen Steele, and Adeeb Yacoub, M.D.*

SCOTT CHRISTESEN, Fumuso, Kelly, Swart, Farrell, Polin & Christesen LLP, Hauppauge, N.Y., *for Defendant-Appellee Mary Catherine Smith.*

CARNEY, *Circuit Judge*:

The primary issue presented by this appeal concerns the boundaries of the Fourth Amendment's prohibition on warrantless seizures.

Shortly after midnight on April 6, 2014, Suffolk County police officers came to the home of Plaintiff-Appellant Wayne Torcivia in response to what was described to them as a violent domestic incident. They were dispatched following Torcivia's teenaged daughter's call to an emergency hotline. After arrival and an initial assessment of the situation, the officers determined that Torcivia needed to be transported to a mental health facility for evaluation. Later the same day, they seized firearms from his home pending further investigation. Torcivia sought damages from the County, arguing that the officers acted pursuant to an official County policy or custom that violated the Fourth Amendment. We conclude that the District Court correctly determined that the County's policy falls within the "special needs" exception to the Fourth Amendment's warrant requirement, and that, on the facts presented here, actions taken under the County's policy did not violate Torcivia's Fourth Amendment rights.

Torcivia further contends that certain evidentiary rulings made at trial on his remaining claims against three County police officers were erroneous. He also challenges the District Court's determination that employees of the State-run mental health facility (and an intern supervised by them) were entitled to qualified immunity under federal and New York law for claims related to their alleged failure to discharge Torcivia promptly from the facility. On review, we find no basis for reversal or a new trial on any of these grounds.

BACKGROUND

I. Factual history

We recite the facts as set forth by the District Court in its ruling on summary judgment and based on the parties' Rule 56.1 submissions, deposition testimony, and exhibits to their Rule 56 cross-motions. As described below, the parties differ substantially as to the circumstances of Torcivia's transport to and his discharge from the State mental health facility. The events at issue were the subject of deposition testimony and testimony adduced at trial.[1]

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[1] The record before us contains excerpts of deposition testimony given by Wayne Torcivia, Jennifer Torcivia (Wayne's wife), Adrianna Torcivia (Wayne's daughter), Sergeant Walter Scott, Officer Robert Verdu, Officer Patrick Halpin, Officer James Adler, Dianna D'Anna, Dr. Adeem Yacoub, Mary Catherine Smith, Kristen Steele, Geraldine Azus, Jennifer Andriano, Bridget Walsh, and Timothy Aiello. It also includes exhibits attached to the parties' motions and the trial transcript, including the trial testimony of Wayne Torcivia, his wife (Jennifer), son (Joseph Torcivia), Dianna D'Anna, and Officers Adler, Halpin, and Verdu. Adrianna Torcivia gave extensive

A. The police response at Torcivia's home

Just before 1:00 a.m. on Sunday, April 6, 2014, the Suffolk County Police Department broadcast a call for officers to respond to what the dispatcher described as "a violent, domestic dispute of a 17-year-old female and an intoxicated father." App'x at 981. The request for police presence was made in response to a telephone call made sometime after midnight by Torcivia's daughter, Adrianna, attempting to reach the Suffolk County Department of Social Services' Child Protective Services ("CPS") through a Nassau County-based social service hotline that she dialed from the family home in Ronkonkoma, New York.[2] County Police Officers James Adler, Robert Verdu, and Patrick Halpin responded to the call.

The parties disagree about what happened next. In sum, Torcivia testified that, although he "drank a few cocktails" that evening, App'x at 1270, and was having a dispute with Adrianna related to her guinea pig, he was in control of himself. He heard Adrianna making a phone call but could not tell with whom she was speaking. Not much later, the doorbell rang. After he answered the door, Officers Adler and Halpin entered the house, a split-level ranch home. Officer Verdu, who arrived after the others, remained on the front

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deposition testimony, which is in the record, *see* App'x 585-629. Adrianna did not comply, however, with a subpoena to appear at trial.

[2] Adrianna and her younger brother Joseph were at home when she made the call. The youngest of the three Torcivia children was away. Only Adrianna interacted directly with the police upon their arrival. Neither Joseph nor Jennifer appeared until later, when Officer Adler returned to seize Torcivia's firearms.

stoop. While Officer Halpin went to speak with Adrianna on the house's lower level, Officer Adler remained on the landing just inside the front door. According to Torcivia, Officer Adler's shoulder then brushed against curtains on the front door window, causing them to fall. Torcivia stated that when he went to pick up the curtains from the floor, Officer Adler told him to get back, using a profanity. Torcivia further testified that he told Officer Adler that swearing was not allowed in his house, and an altercation between them ensued, during which Officer Adler "screamed," swore at Torcivia, and threatened to use a taser on him. Appellant's Br. at 5. To the alleged threat, Torcivia responded in part, "I wouldn't do that, I have a heart condition. I could die." *Id.* (citing App'x at 417, 1206-07). Officer Adler then consulted with Officer Verdu, who proposed that they transport Torcivia to Stony Brook University Hospital's Comprehensive Psychiatric Emergency Program Unit ("CPEP"), a local emergency mental health service run by New York State.[3] The officers then did so, handcuffing Torcivia first.[4]

The County Defendants (that is, Suffolk County

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[3] *See* NY Connects, *Program SBUH – Comprehensive Psychiatric Emergency Program (CPEP)*, https://www.nyconnects.ny.gov/services/sbuh-comprehensive-psychiatric-emergency-program-cpep-omh-pr-813707155450 (last visited Nov. 8, 2021).

[4] Torcivia's wife, Jennifer, although home at the time, was in a "deep sleep," she later said, and was not present for the events described in this paragraph. App'x at 1362-63. She gave no sworn statement about the officers' initial visit to the house. She later testified, however, both in a deposition and at trial about Adrianna and about the circumstances under which Officer Adler seized Torcivia's firearms.

and Officers Adler, Halpin, and Verdu) present a different account of the facts at issue. When the County Officers arrived at the house, Torcivia was in a highly agitated state: He would "jump up, yell, and scream," calm down, and then "explode again and start ranting and raving and screaming and flailing his arms." App'x at 1420-1421 (testimony of Officer Halpin); *see also id.* at 394, 1477 (testimony of Officer Adler). Torcivia was "intoxicated and threatening and belligerent" towards Adrianna, *id.* at 517, and "immediately aggressive" towards the police, *id.* at 1477 (testimony of Officer Adler). Officer Adler had a brief conversation with the individual working at the Nassau County hotline about Adrianna's call. According to Officer Adler, that individual told him that she could hear Torcivia "screaming at [Adrianna and] saying horrible things to her over and over again." *Id.* at 1464. Officer Adler further testified that, throughout their conversation, Torcivia was upset and "would stand up and clench his fists and get loud." *Id.* at 1470.

According to the officers, it was Officer Adler, not Officer Halpin, who went to speak with Adrianna on the house's lower level. Then, when Officer Adler returned to the upper level of the house to ask about the incident involving Adrianna and her guinea pig, Torcivia was said to declare, "All right. That's it. I want you guys to tase me. I have a heart condition. If you [t]ase me, it will kill me. Please [t]ase me and kill me." *Id.* at 1471 (testimony of Officer Adler); *see also id.* at 1477 (same).[5] Officers Halpin and Verdu

[5] Officer Adler testified that he did not recall a curtain or any kind of blinds falling off the door.

corroborated this testimony. *See id.* at 193 (testimony of Officer Verdu); *id.* at 1432 (testimony of Officer Halpin) ("Mr. Torcivia said he had enough and then again he said that he wanted us to taser him so that he could die."). According to the officers, this behavior and Torcivia's statements led them to conclude that they should transport Torcivia to CPEP for psychological evaluation. *See, e.g.*, *id.* at 193 (Officer Verdu describing Torcivia's request to be tased as "the magic phrase, the phrase that got him to the point where we needed to have him evaluated").

B. Torcivia's emergency psychological evaluation at CPEP

At about 2:00 a.m., Officer Adler arrived with Torcivia at CPEP.[6] There, he was evaluated by a CPEP team that included Dr. Adeeb Yacoub, psychiatric nurse practitioner Dianna D'Anna, and social worker Kristen Steele (together, the "State Defendants").[7] Unpaid CPEP intern Mary Catherine Smith ("Intern Smith"), then age 65 and a master's student in Stony Brook University's social work program, was shadowing Steele and assisted the State Defendants at times during their evaluation of

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[6] The State Defendants stated in their Local Civil Rule 56.1 statement in support of their motion for summary judgment that Torcivia "was transported to CPEP pursuant to New York State Mental Hygiene Law § 9.41." App'x at 518. County Officers are authorized by that law to "take into custody any person who appears to be mentally ill and is conducting himself or herself in a manner which is likely to result in serious harm to the person or others." N.Y. Mental Hyg. Law § 9.41.

[7] CPEP teams consist of a registered nurse, a social worker, a nurse practitioner, and an attending psychiatrist.

Torcivia.

In a measurement taken by the CPEP team at about 2:50 a.m., almost two hours after police arrived at his home early Sunday morning, Torcivia's blood alcohol level was found to be 152 mg/dL: "approximately double the legal limit . . . for driving a motor vehicle." App'x at 519.[8] Because CPEP policy does not permit its staff to conduct more than cursory evaluations of admitted persons until they are sober, the State Defendants first let Torcivia sleep. Then, beginning shortly after 2:00 p.m. on Sunday, they conducted a series of interviews with him comprising the formal evaluation.

C. Seizure of Torcivia's firearms and Torcivia's CPEP discharge

After transporting Torcivia to CPEP—but still in the middle of the night—Officer Adler returned to Torcivia's home to gather more information. Officer Adler first spoke with Adrianna,[9] and then returned to his patrol car, where he conducted a pistol license check and learned that Torcivia had such a license. Officer Adler informed his supervisor by phone about the license and was instructed to speak with Torcivia's wife and try to "safeguard" any firearms that were in Torcivia's home. App'x at 391 (testimony of Officer

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[8] This and other relevant medical information was recorded in Torcivia's CPEP chart, which is in the court record. *See* Plaintiff-Appellant's Appendix of Exhibits.

[9] The parties' accounts differ as to whether Officer Adler spoke with Adrianna on his first visit to the house (at 1:00 a.m.), on the second visit (at around 3:00 a.m.), on the third visit (at around 5:00 a.m.), or on more than one occasion.

Adler). Torcivia's wife denied knowing the combination to the gun safe in which Torcivia's firearms were stored, however, and as a result, at approximately 5:00 a.m. on April 6, Officer Adler returned to CPEP. Through a CPEP staff member, he transmitted his request that Torcivia divulge the combination to his gun safe. Torcivia did not do so—because he was either asleep or uncooperative—and Officer Adler departed.

At 2:20 p.m. on Sunday, after Torcivia had awakened, Nurse D'Anna met with him to conduct an emergency psychiatric evaluation.[10] She concluded that there was "no indication for acute psychiatric admission" and that Torcivia was "not imminently dangerous" to himself or others. App'x at 563. She then recommended to Dr. Yacoub that Torcivia be discharged. Having received Nurse D'Anna's evaluation and recommendation, and upon his own independent evaluation, Dr. Yacoub too formed the view that Torcivia did not require inpatient treatment and could safely be discharged.

The parties agree that Torcivia was not formally discharged until nearly 6:00 p.m. that day, after he gave his wife the combination to his gun safe and Suffolk County police seized his firearms.[11] Torcivia, the County Defendants, the State Defendants, and

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[10] CPEP staff had also done a quick initial triage evaluation when Torcivia first arrived at CPEP in the very early hours of April 6, just after 2:00 a.m.

[11] As a part of his discharge materials, CPEP staff gave Torcivia a list of recommended resources for obtaining treatment for substance or alcohol abuse, but made no additional recommendations for treatment.

Intern Smith disagree as to what occurred in the few hours before his discharge, and as to whether his release was delayed to permit the County to seize his firearms or was otherwise conditioned on their seizure. Torcivia asserts that Intern Smith conditioned his discharge on his surrender of his firearms. Intern Smith denies doing so, and the State Defendants maintain that even if she did, it was not pursuant to an order by Dr. Yacoub or Steele. No party disputes, however, that before Torcivia was released, a CPS caseworker contacted Intern Smith to express concerns for the safety of Adrianna, who had again called CPS to say that she was frightened by Torcivia's impending release and return to the Ronkonkoma home.[12]

II. Procedural history

A. The District Court action

Two years later, Torcivia brought suit in the U.S. District Court for the Eastern District of New York. In addition to unidentified defendant John Doe Police Officers, he proceeded primarily against eight defendants relevant to this appeal: the County Defendants (the County and Officers Adler, Halpin, and Verdu); the State Defendants (Dr. Yacoub, Kristen Steele, and Dianna D'Anna); and Intern Mary Catherine Smith.[13] In his first amended complaint,

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[12] Although the record is unclear about the exact number of times that Adrianna called CPS, Torcivia does not dispute Intern Smith's assertion that it was her understanding that Adrianna had called CPS four times.

[13] In addition to those defendants identified in the text, Torcivia sued CPEP employees Timothy Aiello, Bridget Walsh, and

operative here ("the complaint"), Torcivia advanced sixteen causes of action seeking compensatory and punitive damages and other relief for alleged violations of his rights under the First, Second, Fourth, and Fourteenth Amendments, all brought under 42 U.S.C. § 1983. He also presented claims for unlawful imprisonment, defamation, and negligence under New York common law.

Torcivia voluntarily dismissed some of his initial claims against certain parties in June 2018.[14] After this winnowing, the District Court disposed of most

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Michelle Sanchez. He voluntarily dismissed his action against them in December 2017. App'x at 14 (Dkt. 91, 92). He also named as defendants two more law enforcement personnel—Suffolk County Police Investigator Thomas Carpenter and Captain William Scrima—but in his brief he advises that he does not wish to appeal the District Court's determinations that they did not violate the Second Amendment or the Fourteenth Amendment by failing to provide a hearing before revoking his pistol license. *See* Appellant's Br. at 2 n.3; *see also* n.15, *infra*.

We note further that Torcivia sued the individual County Defendants in their "individual and personal capacities" as well as in their "official capacities." He sued the State Defendants and Intern Smith in their "individual and personal" capacities. App'x at 28-30. The caption of the First Amended Complaint also referred to the County Defendants as being sued in their "professional" capacities. *Id.* at 27. We understand the "professional" capacity designation to indicate that the particular defendant acted under color of state law, as required to obtain damages under § 1983.

[14] By letter dated June 12, 2018, Torcivia voluntarily dismissed his Second and Fourth Amendment § 1983 conspiracy claims against the State Defendants, his Fourth Amendment claim for seizure of property against Officer Adler, and his First Amendment retaliation claim against the County. *See* App'x at 125 n.1.

claims at summary judgment and of a few at trial, after a jury verdict on two fact questions resulted in judgment for the County Defendants on all remaining counts.

After further abandonment on appeal of the remaining Second Amendment counts,[15] the following claims are at issue on appeal:

- *Two claims against Suffolk County*: A § 1983 claim under *Monell v. Dep't of Social Servs*, 436 U.S. 658 (1978), based on features of the County's firearm-removal policy that Torcivia contends

[15] Torcivia initially brought Second Amendment claims arising from the County's revocation of his New York State pistol license in June 2014, approximately two months after he was taken to CPEP. App'x at 503-05. An administrative challenge to the revocation pursued by Torcivia was still unresolved as of the District Court's summary judgment decision and is not part of this appeal. Torcivia moved for partial summary judgment on (1) his *Monell* claim under the Second Amendment arising from the County's pistol licensing and revocation policies, and (2) his claims against Investigator Thomas Carpenter and Captain William Scrima arising from the pistol license revocation. In its summary judgment ruling, the District Court addressed Torcivia's Second Amendment arguments as assailing the County's "revocation and seizure policy" and concluded that the policy is "consistent with the Second Amendment." *Torcivia*, 409 F. Supp. 3d at 38. Torcivia makes no related claims in this appeal. *See* Appellant's Br. at 2 n.3 (advising the Court that "[c]laims involving the pistol licensing bureau, Thomas Carpenter, William Scrima, and Second Amendment Violations are not the subject of this appeal."). We therefore do not address these issues further, except insofar as they relate to the separate Fourth Amendment seizure claims. We note, however, that we are unaware of any steps taken by Torcivia to preserve these claims or arguments for subsequent proceedings in the face of the District Court's judgment and this subsequent appeal.

violate the Fourth Amendment's prohibition on unreasonable seizures made without a warrant; and a common law claim for false imprisonment based on Officers Adler's, Halpin's, and Verdu's transport of Torcivia to CPEP. *See* App'x at 56-57, 126.

- *Three parallel claims against Officers Adler, Halpin, and Verdu, individually, plus two apparently against Officer Adler alone*: A Fourth Amendment claim under § 1983 for "unlawfully seizing plaintiff and causing his confinement without any privilege"; a First Amendment claim under § 1983 for seizing him in retaliation for his exercise of free speech rights; and a New York common law claim for false imprisonment, *see* App'x 53–54, 57, 125. *Against Officer Adler alone:* a § 1983 stigma-plus claim and a state law defamation claim.[16]
- *Two claims against the State Defendants and Intern Smith*: A Fourth Amendment claim under § 1983 for unreasonably prolonging his confinement at CPEP until he provided his gun safe combination to allow seizure of his firearms; and a common law claim for false imprisonment based on alleged violations of state law regarding involuntary confinement. *See* App'x at 54, 125–

[16] Torcivia's June 2018 letter identified stigma-plus and defamation claims as remaining only as to Officer Adler. The District Court, however, addressed Torcivia's stigma-plus claim as if made with regard to both Officers Adler and Verdu. It rejected the County's defense that the allegedly defamatory statements were privileged, concluded that it was unable to rule on the claim as a matter of law, and remitted the issue for trial.

26.

Our discussion of the procedural history of this case is limited accordingly.

B. The parties' cross-motions for summary judgment

After discovery, the parties cross-moved for summary judgment. The County Defendants sought judgment on (1) the Fourth Amendment *Monell* claim regarding the seizure of Torcivia's guns; (2) the § 1983 stigma-plus claim, and (3) the common law claims for unlawful imprisonment. The State Defendants and Intern Smith sought summary judgment on all claims against them. Torcivia cross-moved for partial summary judgment against the County Defendants with respect to his Fourth Amendment *Monell* claim and his due process claims.

In an extensive opinion, the District Court (LaShann DeArcy Hall, *J.*) dismissed all federal claims against the State Defendants and Intern Smith based on federal qualified immunity and all state common law claims against them based on state qualified immunity. It denied in part and granted in part Torcivia's motion for partial summary judgment, granting his motion seeking judgment against the County as to his firearm-related Fourteenth Amendment Due Process claim regarding the seizure of his rifles.[17] (The County did not appeal this finding.)

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[17] In its summary judgment order, the District Court ordered the County to afford Torcivia a hearing regarding the deprivation of his longarms. It is not clear whether the County did so, but as explained below, the Court later awarded damages based on the

Finally, the District Court granted in part and denied in part the County Defendants' motion for summary judgment, dismissing Torcivia's Fourth Amendment *Monell* claim but permitting his unlawful imprisonment and the stigma-plus claims against the County Officers to proceed to trial along with the First Amendment retaliation, Fourth Amendment seizure of his person, and defamation claims that were not subject to a summary judgment motion.

C. The jury trial on Torcivia's remaining claims

The County Defendants and Torcivia consented to a jury trial before a U.S. Magistrate Judge (Gary Brown, *M.J.*). After a three-day jury trial, U.S. Magistrate Judge (now District Judge) Brown charged the jury with a special verdict form containing the following factual questions: (1) "Has plaintiff established by a preponderance of the evidence he did not make any suicidal statements in the presence of the defendant police officers, yes or no?", and (2) "Has plaintiff established by a preponderance of the evidence that the defendant police officers transported him to the CPEP to retaliate in whole or in part for statements he made?" App'x at 1747. The jury answered "No" to the two questions and the court entered a verdict in defendants' favor. *Id.* at 24 (Dkt. entry dated 11/08/2019 and Dkt. 179). The court then determined "given the sole evidence adduced at trial that damages for the recovery of the longarms was $100.00, said figure is the appropriate damage amount as to this claim," and entered judgment

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summary judgment order's finding of liability after the trial of Torcivia's other claims.

accordingly. *Id.* (Dkt. 183); *see also id.* at 1817. It also awarded Torcivia attorneys' fees on that claim.

Torcivia timely appealed both the District Court's summary judgment order and the judgment entered on the jury's verdict.

DISCUSSION

I. The County Defendants

Torcivia seeks reversal of the District Court's award of summary judgment to the County on his Fourth Amendment *Monell* claim, which he premises on Suffolk County's alleged firearm-removal policy. He also demands a new trial for his stigma-plus, defamation, First Amendment retaliation, and Fourth Amendment and common law unlawful imprisonment claims against Officers Adler, Verdu, and Halpin in light of three evidentiary rulings made at trial. We reject these arguments for the reasons set forth below.

A. The Fourth Amendment *Monell* claim

We review *de novo* a district court's order granting summary judgment. *Delaney v. Bank of Am. Corp.*, 766 F.3d 163, 167 (2d Cir. 2014) (*per curiam*); *Clear Channel Outdoor, Inc. v. City of New York*, 594 F.3d 94, 103 (2d Cir. 2010) (applying same standard to cross-motions for summary judgment).[18] The court may grant summary judgment only if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment

[18] Unless otherwise noted, in quotations from caselaw, this Opinion omits all alterations, brackets, citations, emphases, and internal quotation marks.

as a matter of law." Fed. R. Civ. P. 56(a). In deciding whether to award summary judgment, the court must construe the record evidence in the light most favorable to the non-moving party and draw all reasonable inferences in its favor. *Delaney*, 766 F.3d at 167.

To establish a claim for *Monell* liability, Torcivia must show that the Country had "(1) an official policy or custom that (2) cause[d] [him] to be subjected to (3) a denial of a constitutional right." *Wray v. City of New York*, 490 F.3d 189, 195 (2d Cir. 2007). The District Court determined that a reasonable juror could conclude Suffolk County has a custom or policy of seizing an individual's firearms to safeguard them when the owner has been transported for psychiatric evaluation following a domestic incident. Such a policy, it reasoned, "qualifies as a special-needs seizure." *Torcivia v. Suffolk Cnty., New York*, 409 F. Supp. 3d 19, 31 (E.D.N.Y. 2019). It then found "that the seizure in this case was reasonable" under the Fourth Amendment, in light of the State's "substantial and legitimate interest in insuring the safety of the general public," an interest that the District Court called "particularly acute in circumstances involving mental health and domestic violence." *Id.* On this basis, it concluded that the policy as applied to Torcivia did not unlawfully interfere with his Fourth Amendment rights.[19]

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[19] The District Court acknowledged that Torcivia sought to press both "facial" and "as-applied" challenges to the County's policy, but it rejected the facial challenge, observing that "a party 'who fails to demonstrate that a challenged law is unconstitutional as applied to [him] has necessarily fail[ed] to state a facial

1. The policy that Torcivia challenges

Torcivia alleges that "[i]t is the policy of the Suffolk County Police Department to seize all handguns and long guns from a home when a resident is transported to a comprehensive psychiatric emergency program." Appellant's Br. At 18; *see also Torcivia*, 409 F. Supp. 3d at 29 n.6. The District Court determined that a reasonable juror could conclude that a seizure policy exists, but only in a form "notably narrow[er]" than Torcivia contends. *Id.* at 29. The District Court concluded that the record evidence (specifically, the deposition testimony of Officer Adler, which was the only evidence supporting the existence of any such County policy) permitted a reasonable jury to find that it was a "standard procedure" of the Suffolk County Police Department for officers to temporarily take action to "safeguard weapons until whatever investigation is done" if two features are present: "there is a domestic incident *and* somebody is transported to CPEP." *Id.* at 29–30 (emphasis added); *see also* App'x at 391 (testimony of Officer Adler describing County's practice).[20]

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challenge, which requires [him] to establish that no set of circumstances exists under which the statute would be valid.'" *Torcivia*, 409 F. Supp. 3d at 35 n.10 (quoting *United States v. Decastro*, 682 F.3d 160, 163 (2d Cir. 2012)).

[20] The relevant part of Officer Adler's deposition testimony, which occurred during cross-examination, reads as follows:

> Q: What was the substance of the conversation with Sergeant Lawler?
>
> A: To give him a briefing of the situation, of the overall call and the fact that I do have a positive result for the pistol licenses.

We agree with the District Court, and the County does not appear to contest, that the record evidence would support the conclusion of a reasonable juror that the County maintains such a two-pronged policy or practice. As the District Court explained, Torcivia did not "provide[] any evidence to support th[e] broader policy" that he claimed exists, in which transport to an emergency mental health program alone would prompt the County to seize any firearms kept by the transported individual. *Torcivia*, 409 F. Supp. 3d at 29 n.6. Torcivia points to nothing that contradicts the District Court's conclusion in this respect; rather, he proceeds to challenge this narrower policy as also violative of the Fourth Amendment's constraints both in general, and specifically under the circumstances attending the seizure of his firearms.

We therefore proceed to assess the merits of his challenge to a policy pursuant to which the County temporarily seizes firearms belonging to an individual who is transported for emergency mental health

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> Q: What, if anything, did he say?
>
> A: He said we have to try our best, as best we can to safeguard the weapons which means going back to the house, attempt to safeguard the weapons. If that doesn't work go back to CPEP and try to talk to Mr. Torcivia himself and see if he will give you authorization to safeguard the weapons.
>
> Q: What was the purpose of safeguarding the weapons?
>
> A: When there is a domestic incident and somebody is transported to CPEP for evaluation that's standard procedure to safeguard weapons until whatever investigation is done.

App'x at 391.

evaluation following a domestic incident.[21] We start by evaluating the County's policy generally, and then turn to considering the seizure in Torcivia's case.[22]

2. The County's policy serves a special need

Under the Fourth Amendment,[23] government seizures of a person or of property in a person's home without a warrant are "presumptively unreasonable." *United States v. Andino*, 768 F.3d 94, 98 (2d Cir. 2014). Nonetheless, courts have long recognized several limited exceptions to this general rule. Among these is the special needs exception, which applies when "special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, *J.*, concurring); *see*

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[21] Although the County does not admit that such a policy or custom exists, on appeal the County does not challenge the District Court's conclusion that a reasonable jury could find that it does. Instead, it defends the District Court's dismissal of Torcivia's *Monell* claim on the ground such a policy or custom falls within the special needs exception. For simplicity, we will refer to the County's alleged firearm seizure policy or custom as described here as the County's "policy" in this Opinion.

[22] The only "search or seizure" at issue in this appeal related to Suffolk County's *Monell* liability is the seizure of Torcivia's firearms.

[23] The Fourth Amendment provides:

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

U.S. Const. amend. IV.

also Griffin v. Wisconsin, 483 U.S. 868, 873 (1987).[24]

To be covered by this exception, a seizure must at the threshold "serve as its immediate purpose an objective distinct from the ordinary evidence gathering associated with crime investigation." *MacWade v. Kelly*, 460 F.3d 260, 268 (2d Cir. 2006);

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[24] Torcivia observes—correctly—that, in the District Court, the County did not move for summary judgment on the basis of the special needs exception. He argues on this basis that the District Court erred in granting the County's motion in reliance on that exception. His argument has some force: as a general matter, our legal system "follows the principle of party presentation" by "rely[ing] on the parties to frame the issues for decision and assign[ing] to courts the role of neutral arbiter of matters the parties present." *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1576 (2020). But the "party presentation principle is supple, not ironclad[,]" and "a court is not hidebound by the precise arguments of counsel." *Id*. at 1579, 1581; *see also Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991) ("When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law."). Here, Torcivia has offered at most a cursory argument that the District Court erred by raising the special needs exception. Although the County did not present the exact theory the District Court relied on, the County had moved for summary judgment on the issue of its Fourth Amendment liability under *Monell* for the seizure of Torcivia's firearms. We observe further that Torcivia did not move for reconsideration on this issue before the District Court. Based on the record in this case, we conclude that the District Court did not depart "so drastically from the principle of party presentation as to constitute an abuse of discretion," *Sineneng-Smith*, 140 S. Ct. at 1578, by relying on the special needs exception. Additionally, any prejudice to Torcivia is mitigated by his full opportunity to be heard on this issue on appeal and this Court's *de novo* review of the District Court's grant of summary judgment.

see also Lynch v. City of New York, 589 F.3d 94, 100 (2d Cir. 2009) (noting that the special needs policy's primary purpose must be more than pursuing a general interest in crime control).

The County's policy permitting warrantless seizures of firearms is reasonably understood as applying to situations in which, following a "domestic incident [after which] somebody is transported to CPEP" for emergency psychiatric evaluation, App'x at 391, the police learn that there are guns at the residence shared by the parties to the incident. Based on the record, we understand the policy to be focused on the related concerns of prevention of domestic violence and prevention of suicide. Indeed, Torcivia acknowledges that "the purpose of the County's firearms seizure policy is to prevent an individual who has been transported for an evaluation from harming themselves or another person." Appellant's Br. at 19.

Torcivia nonetheless endeavors to label this policy as a form of "crime control." *Id*. But that general rubric obscures the immediate goal of the policy: to prevent self-harm and harm within a family when a mental health condition becomes acute, when there may be a heightened risk of domestic violence or suicide, and when firearms are present. On the record before us, we think it is accurately understood to address on an emergency basis public safety issues at the intersection of mental health and domestic violence. It envisions a temporary seizure of both person and firearms to defuse a critical situation in which an individual may pose a danger to himself and members of his household on account of mental instability or substance abuse and the presence in the home of

firearms.

In such circumstances, the urgency of the situation may limit the options available to a responding officer, despite the general risk of suicide or domestic violence involving firearms and the immediate need for mental health intervention. *See, e.g.*, *Griffin*, 483 U.S. at 876 (warrant and probable cause requirement impracticable for probation officer's search of home because of intrusion on the probation system and risk of delay). We expect and desire our law enforcement agents to respond effectively and quickly to such situations; because they can involve violence and firearms, dispatching a mental health professional alone may not be an adequate response.

By contrast, Torcivia points to nothing in the record to suggest that the primary purpose of the County's firearm-seizure policy is evidence-gathering or that it was "undertaken for the investigation of a particular crime." *Lynch v. City of New York*, 737 F.3d 150, 158 (2d Cir. 2013). Although the policy involves safeguarding firearms "until whatever investigation is done," we understand that investigation to be unrelated to any law enforcement investigation into whether the firearms have been used in a crime. Here, for example, there was no allegation that Torcivia had committed a crime: Adrianna did not claim that she had been assaulted, or that a firearm had been displayed or used in any way during the altercation, and the police verified before seizing the weapons that Torcivia possessed licenses for those weapons that required one.

Moreover, "[a] policy may have multiple purposes, including one directly related to crime control, but so

long as the primary purpose is a government interest other than crime control the mere fact that crime control is one purpose does not bar the application of the special needs doctrine." *Jones v. Cnty. Of Suffolk*, 936 F.3d 108, 115 (2d Cir. 2019). That preventing suicide and domestic violence perpetrated with firearms in a tinderbox situation may be said to "control crime" generally does not mean that the County's policy is excluded from the category of acute cases that warrant an urgent special needs exemption.

All in all, we agree with the District Court that Suffolk County's policy serves a special need beyond the normal need for law enforcement.[25]

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[25] In so concluding, we rely (as did the District Court) on the "special needs" exception as described in this Opinion, and not on any other Fourth Amendment exception, to address the County's policy. We understand the special needs exception to be different from a "community caretaking exception" that some circuits formerly drew from *Cady v. Dombrowski*, 413 U.S. 433 (1973). *Cady* allows certain warrantless searches of vehicles, *id.*, and some courts had read it also to permit certain warrantless searches of private premises, including homes. *See Caniglia v. Strom*, 953 F.3d 112, 124 (1st Cir. 2020) (collecting cases). Earlier this year, in *Caniglia v. Strom*, 141 S. Ct. 1596 (2021), the Supreme Court rejected that interpretation of *Cady*. Although *Caniglia* involved facts bearing some resemblance to those presented here, it did not address the special needs doctrine or a situation in which officers acted pursuant to a government seizure policy in specified circumstances; rather, the Supreme Court rejected the extension of the *Cady* community caretaking exception from searches of vehicles to searches and seizures in homes. *Id.* at 1599-1600. In doing so, it expressed concern about the breadth of the exception that the First Circuit articulated, noting that "[a]ll that mattered [to the court] was that respondents' efforts to protect petitioner and those around him were distinct from the normal work of criminal investigation, fell

3. The County's policy is constitutional

As the District Court recognized, searches and seizures covered by the special needs exception still must be "reasonable" to comport with the Fourth Amendment. *See Jones*, 936 F.3d at 118. Determining the reasonableness of seizures under the special needs

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within the realm of reason, and generally tracked what the court viewed to be sound police procedure." *Id*. at 1599.

Unlike the community caretaking exception, the special needs exception has been repeatedly recognized by the Supreme Court as permitting searches undertaken without a warrant, *see Skinner v. Ry. Lab. Executives' Ass'n*, 489 U.S. 602, 619–20 (1989) (collecting cases), including in situations involving the warrantless search of a home. *See Griffin*, 483 U.S. at 876; *see also Jones*, 936 F.3d at 119 (warrantless seizure of sex offenders at home falls within special needs exception). The special needs exception also involves a well-established four-factor balancing test, as discussed in this Opinion, contrary to the Supreme Court's concern that the community caretaking exception, as defined by the First Circuit in *Caniglia*, created "an open-ended license to perform [community caretaking functions] anywhere." *Caniglia*, 141 S. Ct. at 1600. We proceed on the understanding that "*Caniglia* did not disturb this Court's longstanding precedents that allow warrantless entries into a home in certain circumstances." *Sanders v. United States*, 141 S. Ct. 1646, 1647 (2021) (Kavanaugh, *J*., concurring in certiorari grant, vacatur, and remand in light of *Caniglia*); *see also id*. (explaining that the use of "a now-erroneous label does not mean that the [lower court] reached the wrong result"). Although exceptions to the Fourth Amendment's warrant requirement related to law enforcement's community caretaking responsibilities may be relevant in instances other than those presented in *Caniglia*, *see* 141 S. Ct. at 1601 (Alito, *J*., concurring), *id.* at 1603 (Kavanaugh, *J*., concurring), we do not conceive of the appeal before us as involving the community caretaking exception as broadly articulated by the First Circuit, and we do not rely on that doctrine in our analysis.

exception requires courts to balance four factors: "(1) the weight and immediacy of the government interest, (2) the nature of the privacy interest allegedly compromised by the [seizure], (3) the character of the intrusion imposed by the [seizure], and (4) the efficacy of the [seizure] in advancing the government interest." *MacWade*, 460 F.3d at 269. Balancing these factors, we conclude that the County's firearm-seizure policy is constitutionally reasonable.

The first and fourth factors weigh in favor of the County. The County has a substantial governmental interest in preventing suicide and domestic violence. *See Grand Jury Subpoena John Doe v. United States*, 150 F.3d 170, 172 (2d Cir. 1998) (*per curiam*) (recognizing "the preservation of life" and "prevention of suicide" as "compelling government interests"); *cf. Henry v. Cnty. of Nassau*, 6 F.4th 324 (2d Cir. 2021) ("It may be that the issuance of an *ex parte* order [related to a domestic violence incident] justifies a temporary license suspension and firearm confiscation to allow the County to investigate whether the subject of the order poses a threat to the safety of others.").

As the Supreme Court has recognized, "[d]omestic violence often escalates in severity over time, and the presence of a firearm increases the likelihood that it will escalate to homicide." *United States v. Castleman*, 572 U.S. 157, 160 (2014). The District Court detailed considerable research that domestic violence and gun violence are closely linked. Strikingly, more intimate-partner homicides have been committed with firearms than with all other weapons combined over the past 25 years. April M. Zeoli & Shannon Frattaroli, *Evidence for Optimism: Policies to Limit Batterers' Access to*

Guns, in Reducing Gun Violence in America: Informing Policy with Evidence and Analysis 53-63 (Daniel W. Webster and Jon S. Vernick eds., 2013).[26] In States that require individuals subject to restraining orders to relinquish firearms, intimate partner-homicide rates were fourteen percent lower than in States that did not have such requirements. *See* Carolina Díez et al., *State Intimate Partner Violence-Related Firearm Laws and Intimate Partner Homicide Rates in the United States, 1991 to 2015*, 167 Annals Internal Med. 536 (Oct. 17, 2017), https://annals.org/aim/fullarticle/2654047/state-intimate-partner-violence-related-firearm-laws-intimate-partner-homicide.

The District Court also persuasively detailed the

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[26] Torcivia criticizes the District Court's reference to this source and others cited in its opinion as using "purported statistics that Appellant had no opportunity to challenge." Appellant's Br. at 23; *see also* Appellant's Reply at 16 ("the district court referenced various articles, statistics, and anecdotal 'evidence', the reliability of which Mr. Torcivia never had the opportunity to challenge."). But Torcivia does not explain why the sources relied on by the District Court were not appropriate for judicial notice (at least as to their existence as academic commentary) or were otherwise unreliable. Nor does he offer any basis for treating the District Court's references to the sources as reversible error or claim that he sought and was denied an opportunity to rebut the conclusions of these analyses. Moreover, Torcivia does not challenge the substance of any of the sources relied on by the District Court, despite his opportunity to do so in this appeal. Accordingly, we identify no error in the District Court's reliance on these sources nor any grounds to question their accuracy. To the extent that we rely on the same sources and statistics as did the District Court, we do so because they are part of the appellate record and because we find them reliable and informative with regard to the issues on appeal.

troubling role of firearms in connection with suicide. According to recent research, on average more than 23,000 Americans committed suicide using firearms each year from 2014 to 2019, and almost two-thirds of gun deaths in the United States are suicides. Everytown for Gun Safety, *Firearm Suicide in the United States*, https://everytownresearch.org/report/firearm-suicide-in-the-united-states/ (last updated Sept. 1, 2021).[27] Tragically, about 90% of suicide attempts that employ a gun result in death, compared with less than 5% of attempts by different means. *Id*. The temporary removal of firearms in situations with heightened risk of domestic violence or suicide may reduce the risk of such tragic consequences.

The urgency of the County's interest in preventing self-harm or domestic violence is diminished by the County's policy of seizing firearms in the home in situations where a person is already physically "transported" away from the home for mental health evaluation, thus necessarily restricting the person's access to those firearms on a temporary basis. *See* App'x at 391 (testimony of Officer Adler). Still, the temporary separation of the person from his or her firearms notwithstanding, the possibility that the person regains access to the firearms before the conclusion of the investigation or that someone else gains access to the firearms in the meantime confirms that the policy advances the County's important interest in preventing self-harm or domestic violence.

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[27] This statistic is drawn from an updated version of a resource cited by the District Court. *See Torcivia*, 409 F. Supp. 3d at 31-32.

We therefore conclude that the County's policy serves an important and immediate government interest, and that the seizure of firearms under that policy represents a reasonable and effective method of advancing that interest.

The second factor, the nature of the privacy interest asserted, favors Torcivia. As the District Court acknowledged, the County's Pistol License Guidelines cautioned that "[i]f a police officer or member of the pistol license bureau requests you to surrender your license and firearm(s), and you refuse . . . you may be arrested." *Torcivia*, 409 F. Supp. 3d at 33. While the District Court found that since Torcivia was "put on notice that his firearms could be surrendered upon the revocation of his pistol license, he had a diminished privacy interest in his firearms," *id.* at 34, we are unpersuaded that the license created more than a marginal reduction in Torcivia's privacy interest. Indeed, unlike the reduced privacy expectations of a parolee, for example, whose terms of supervised release may feature unscheduled visits by parole officers, *see Griffin*, 483 U.S. at 873-75, we have never held that obtaining a license, such as Torcivia's, to maintain a firearm in one's home more than marginally reduces an owner's privacy interest in his home or his firearms, either by itself or by the terms of the license. *Cf. Palmieri v. Lynch*, 392 F.3d 73, 82–83 (2d Cir. 2004) (identifying reasons beyond appellant's application for a construction permit as important in concluding that he had a diminished expectation of privacy). Even so, a finding against the government on this second factor alone may not render warrantless seizures unreasonable. *Cf. MacWade*, 460 F.3d at 269, 272–73 (finding random,

suspicionless container searches on subway a reasonable measure to prevent terrorist attacks even though subway passengers have a legitimate expectation of privacy in their containers).

As to the third factor—the character of the intrusion—the County's policy provides for a minimal intrusion into the firearms of a person who is transported to CPEP following a domestic incident. Under the policy, the seizure of firearms is only temporary and is executed to "safeguard weapons until whatever investigation is done."[28] App'x at 391. Although the nature of the seizure is not so "brief and unobtrusive" as to have this factor weigh heavily in the government's favor, *see Jones*, 936 F.3d at 118, the temporary seizure pending an investigation is nonetheless narrowly confined to a relatively brief investigatory period, with the owner's rights to the firearms largely unaffected by the temporary seizure. We conclude that this factor is neutral.

In sum, the first and fourth factors favor the County; the second, Torcivia; and the third is neutral. Weighing these factors together, we conclude that the County's firearm-seizure policy speaks to a "special need" and is constitutionally reasonable. The County's

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[28] To the extent the County officers here acted pursuant to the policy—and, as discussed below, it is not clear that they did—it appears that the word 'investigation' has a broader meaning than *criminal* investigations. Rather, Torcivia received a psychiatric evaluation, followed by a prompt administrative proceeding revoking his pistol permits; he was never charged with a crime, and it is not clear that, after the guns were seized, the police undertook any further investigation into whether a crime had been committed.

policy does not violate the Fourth Amendment.

4. The policy's application to Torcivia does not establish Monell *liability*

Torcivia insists that the County's application of the policy was unreasonable and violated his Fourth Amendment rights on the specific facts of this case. The reasonableness of the County's seizure of Torcivia's firearms presents a close call because of some unusual features of the factual scenario. We ultimately need not resolve this issue, though, because, to the extent that the seizure of Torcivia's firearms was unreasonable under the facts of this case, we conclude that the seizure was caused by County officers' *departure* from the County's policy, not the policy itself.

The first and fourth reasonableness factors related to the seizure of Torcivia's firearms weigh in favor of the County, but to a more limited extent than they do for the policy in general. Against the broader context of domestic violence, suicide, and firearms as discussed above, the police were called to Torcivia's home around 1:00 a.m. at the end of a Saturday night to respond to what they were told was a "violent domestic dispute."[29] App'x at 981. After discovering that Torcivia had a pistol permit, the officers began to try to seize Torcivia's guns as a temporary safeguard while they investigated the domestic incident, a

[29] The officers dispatched to Torcivia's home told they were responding to a "violent domestic" dispute, described by one officer as an incident in which there "could have been violent behavior, whether it be physical or verbal." App'x at 191 (testimony of Officer Verdu).

seizure that they eventually accomplished. On this record, the officers' actions and eventual seizure of Torcivia's weapons served the important and immediate government interest of lowering the likelihood of firearm-related domestic violence and suicide upon Torcivia's return to his home and until the investigation was complete. Likewise, there is no doubt that the temporary removal of Torcivia's firearms was an effective method of advancing that interest by completely eliminating the firearms from the situation.

Torcivia contends that the seizure of his firearms was unreasonable because the mental health evaluation he received at CPEP found that he was not suicidal or an imminent danger to others before his firearms were seized. The parties dispute when Torcivia's medical evaluation and discharge occurred in relation to the seizure of his firearms.

We recognize that the County's interest in temporarily seizing Torcivia's firearms would have been somewhat reduced if medical professionals had already determined that he was not suicidal or a danger to others.[30] As reflected in his medical records,

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[30] The District Court acknowledged that, "if Plaintiff had adduced evidence that the County had a policy of seizing firearms from individuals who had already been medically discharged from CPEP, the Court might weigh these [reasonableness] factors differently." *Torcivia*, 409 F. Supp. 3d at 35. But it explained that, in its view, "the record indicates that Dr. Yacoub only determined that Plaintiff could be medically discharged after Plaintiff's firearms had already been seized." *Id.* n.11. The Rule 56.1 statement that the District Court cited to, however, does not actually address the timing of the medical discharge, and we conclude based on the record on appeal that this fact is in dispute.

at 3:21 p.m. Nurse D'Anna wrote that Torcivia "is not imminently dangerous to self and others."[31] Exhs. at 32. She discussed her assessment with Dr. Yacoub at some point later that day. Dr. Yacoub independently evaluated Torcivia, and stated in a note entered at 6:59 p.m. that Torcivia's "[r]isk is low at the present time but may increase if [he] use[s] alcohol and/or drugs." *Id.* A reasonable jury could infer that, based on his medical evaluation, Torcivia (after several hours of sleep and dissipation of the effects of his high blood alcohol level) posed less of a threat to his family and himself than the officers believed when they transported him to CPEP, and therefore that the weight and immediacy of the County's interest in seizing his firearms when the seizure actually took place had been reduced.

To be sure, the eventual results of the CPEP mental health evaluation and Torcivia's clearance for discharge do not necessarily mean that a temporary

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Accordingly, we assume the truth of Torcivia's claim that the guns were seized after the responsible physicians had decided that he was not a danger to himself. In any event, there is no evidence beyond what happened in this case to suggest that the County has a policy of seizing firearms from individuals who already had been medically discharged.

[31] Nurse D'Anna's notes reflect that, when she determined that Torcivia was not imminently dangerous, she had a (mistaken) understanding that Torcivia did not have access to firearms, presumably at his home. *See* Exhs. at 32 ("Access to lethal means: no gun."). That misunderstanding was corrected by a note entered at 6:14 p.m., which stated that Torcivia "did have guns at home," but that the guns had been removed. *Id.* Dr. Yacoub's note entered at 6:59 p.m. states, "As per the notes, guns are removed from the house." *Id.*

seizure of Torcivia's guns was unreasonable. When Torcivia's firearms were seized, the officers' investigation into the incident had yet to be completed, and its full circumstances were still not known. And, before Torcivia was released, Adrianna had again called CPS—up to four times, by Intern Smith's understanding—to say that she was frightened by Torcivia's impending release and return to their home. A CPS caseworker had expressed concern for her safety.

Moreover, as Dr. Yacoub stated, "There are certainly circumstances where a patient may not meet the standard for involuntary commitment but releasing him or her to a home with ready access to firearms would not be safe." App'x at 557; *see also Mora v. City Of Gaithersburg*, 519 F.3d 216, 228 (4th Cir. 2008) (police seizure of weapons justified despite the plaintiff's transport for mental health evaluation because "protecting public safety is why police exist, and nothing in Maryland's involuntary admission statute supports the remarkable suggestion that, by handing [the plaintiff] over to doctors, the officers relinquished authority over the thing for which they are under law chiefly responsible.").

Still, in the particular circumstances of Torcivia's case, medical staff had already determined not only that he did not need to be involuntarily committed, but also that he was not imminently dangerous to himself or others. Viewing the facts in the light most favorable to Torcivia, his claim that this determination had already been made before the firearms were seized—if proven—would lessen the weight and immediacy of the County's interest in seizing his firearms.

Accordingly, we conclude that the first and fourth factors weigh in favor of the County on the facts of this case, but to a lesser extent than when evaluating the County's policy in general.

For substantially the same reasons explained above, the second factor—the nature of the privacy interest asserted—favors Torcivia. Torcivia had a privacy interest in his firearms, and that interest was not more than marginally diminished by the terms of his pistol license.

The third factor—the character of the intrusion imposed by the seizure—favors Torcivia at least with respect to the seizure of his longarms.[32] Although the County's policy provided for only temporary safeguarding of the weapons pending investigation, in this case the County never returned Torcivia's longarms, even though they are not subject to a licensing requirement. Some of this intrusion may be properly attributed not to the initial seizure on April 6, 2014, but rather to the County's failure to provide adequate post-removal process.[33] Still, in light of the extended intrusion into Torcivia's privacy interest in his firearms that resulted from the seizure of his longarms, we conclude that this factor may weigh in

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[32] Torcivia's pistol license was promptly revoked as a result of the incident and was subject to an orderly review process that Torcivia does not challenge here, so the initial seizure on April 6, 2014, had only a nominal effect on his interest in his handguns.

[33] Torcivia has already received a remedy for the extended intrusion into his interest in his longarms because the District Court has entered judgment in his favor on his claim that the lack of post-removal process violated the Due Process Clause of the Fourteenth Amendment.

Torcivia's favor.

As the foregoing discussion suggests, viewing the facts in the light most favorable to Torcivia, the reasonableness of the seizure of his firearms would present a close call. But, again, in this instance, we ultimately need not resolve the issue because, to the extent that the seizure of Torcivia's firearms was unreasonable under the specific facts in this case, we can fairly conclude on the record that it was due to the officers' *departure* from the County's policy.

The County can be held liable under *Monell* only if its policy resulted in a violation of Torcivia's constitutional rights. *See Ricciuti v. N.Y.C. Transit Auth.*, 941 F.2d 119, 122 (2d Cir. 1991).[34] If the seizure did not comport with the County's policy, which itself is constitutional as discussed above, then the County is not subject to *Monell* liability: "constitutional torts committed by [municipal] employees without official sanction or authority do not typically implicate the municipality in the deprivation of constitutional rights, and therefore the employer-employee relationship is in itself insufficient to establish the necessary causation." *Amnesty Am. v. Town of W. Hartford*, 361 F.3d 113, 125 (2d Cir. 2004) (Sotomayor, *J.*).

Here, to the extent that the policy's application to Torcivia may have been unreasonable, that unreasonableness was attributable not to the County's policy, but to the individual decisions of subordinate

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[34] Torcivia does not bring a Fourth Amendment claim for the seizure of his firearms against any individual County Officers. *See* App'x at 125-26.

officers. Had the seizure of Torcivia's firearms occurred immediately after his transport to CPEP and before his medical evaluation, and had it been temporary—as provided in the County's policy—we would have no trouble concluding that it was reasonable. It presents a close call, at least taking the summary judgment record in the light most favorable to Torcivia, for reasons related primarily to two aspects of the seizure that did not comport with the County's policy: the indefinite seizure of Torcivia's longarms and that Torcivia's guns may have been seized after CPEP staff had already determined that Torcivia was not imminently dangerous to himself or others.

We are aware of no support in the record to indicate that the County's policy or custom was to seize the firearms of a person transported to CPEP after a domestic incident *despite* a medical assessment that the person posed no danger or to hold those firearms indefinitely. Indeed, as the District Court noted, the only evidence that Torcivia produced that the County had *any* policy or custom related to seizing firearms under these circumstances was Officer Adler's testimony.

Moreover, although *Monell* liability can be established "[w]here a [municipality's] official policy is constitutional, but [it] causes its employees to apply it unconstitutionally, such that the unconstitutional application might itself be considered municipal policy," *Amnesty Am.*, 361 F.3d at 125, the record here

does not support that theory of liability, either.[35] Torcivia points to 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," that the seizure in this case was undertaken by a "decisionmaker who possesses final authority to establish municipal policy with respect to the action ordered," or that "a policymaker ordered or ratified the subordinates' actions." *Id*. at 125–26. Indeed, while the parties agree that the County officers initially attempted to seize Torcivia's firearms shortly after transporting him to CPEP, Torcivia argues that the officers effectuated the actual seizure on the afternoon of Sunday, April 6, 2014, at the behest of the State Defendants and Intern Smith, and *not* because of the County's policy. Likewise, Torcivia does not argue that the County's policy is valid but its "actual practice" is unconstitutional, and he does not present any evidence that the County's actual practice is different than its policy beyond the disputed circumstances of this case. *Id*. at 126.

All in all, we conclude that the County's policy does not provide a basis for *Monell* liability because it complies with the Fourth Amendment and the policy

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[35] Torcivia had an opportunity to develop these potential bases for *Monell* liability before the District Court because the County Defendants moved for summary judgment on Torcivia's Fourth Amendment *Monell* claim in part on the ground that the County Officers did not act pursuant to a County policy or custom. Opposition argued that the County had a policy or custom of seizing firearms when an individual is transported to CPEP, as discussed above, but did not adduce evidence of the broader policy or provide any other basis for the County's *Monell* liability.

did not cause a violation of Torcivia's constitutional rights. For these reasons, we affirm the District Court's judgment in favor of the County on Torcivia's Fourth Amendment *Monell* claim.

B. A new trial is not warranted

We review a trial court's evidentiary decisions for abuse of discretion. *United States v. Atilla*, 966 F.3d 118, 131 (2d Cir. 2020). The standard is demanding: "[t]o find such an abuse we must be persuaded that the trial judge ruled in an arbitrary and irrational fashion." *Id.* A party seeking a new trial based on objections to evidentiary rulings must establish that the challenged rulings are both erroneous and harmful. *See Warren v. Pataki*, 823 F.3d 125, 138 (2d Cir. 2016); *Cameron v. City of New York*, 598 F.3d 50, 61 (2d Cir. 2010) (discussing "harmless" errors).

The trial focused on two issues: whether Torcivia had proven by a preponderance that he had not made suicidal statements to Officers Adler and Halpin, and whether he had shown that the officers brought him to CPEP in retaliation for his speech. Torcivia seeks a new trial on his claims against Officers Adler, Halpin, and Verdu based on the following asserted evidentiary errors: (1) admitting Torcivia's CPEP chart into evidence; (2) admitting evidence of Torcivia's blood alcohol content measured after he arrived at the CPEP; and (3) precluding Torcivia from offering a limited portion of Adrianna's sworn deposition testimony. We identify no error warranting a new trial.

As an initial matter, the trial court gave careful consideration to the challenged rulings and provided a

reasoned analysis for each, which undercuts Torcivia's position.

First, Torcivia's CPEP chart, which contained a compilation of medical information collected during Torcivia's time at CPEP, was not inadmissible insofar as it contains hearsay that falls outside the scope of Federal Rule of Evidence 803(4), which excludes from the rule against hearsay "[a] statement that: (A) is made for—and is reasonably pertinent to—medical diagnosis or treatment; and (B) describes medical history; past or present symptoms or sensations; their inception; or their general cause."[36] Contrary to Torcivia's arguments, the cases he relies upon are better read as providing *support* for the trial court's decision to permit the CPEP chart to be entered into evidence. *See, e.g.*, *Shea v. Royal Enterprises, Inc.*, No. 09-CV-8709 (THK), 2011 WL 2436709, at *11 (S.D.N.Y. June 16, 2011) ("There is no requirement that the statements be made by the patient, or that the statements be made to a physician."). And although Torcivia argues that the CPEP chart is unduly prejudicial, the County Defendants correctly note that Torcivia himself "opened the door and made the chart relevant by testifying to a 'breadth of the information' 'about his hospital stay and the reports in this case.'" County Br. at 28 (citing App'x at 1246). In light of this record, we conclude that the trial court did not abuse its discretion by admitting the CPEP chart into evidence.

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[36] Torcivia also contends that the CPEP chart was not authenticated, but the record shows otherwise. *See* App'x at 1244-48.

Second, evidence of Torcivia's high blood alcohol level, measured at 2:50 a.m., showed that—consistent with trial testimony—Torcivia had been drinking before the police arrived. It signaled that he had likely consumed more than the "few cocktails" he acknowledged. It bore directly on the accuracy of the officers' account of Torcivia's condition when they arrived at his home, and the credibility of his daughter's stated reasons for her call to CPS. Torcivia suggests that admitting the evidence was unduly prejudicial to him, but we see no reason to disturb the trial court's decision to admit it. Torcivia's attorney informed the court that Torcivia was not contesting the lab result as it was reflected in his CPEP chart. App'x at 1279. Furthermore, we do not find evidence of Torcivia's blood alcohol content to be unduly prejudicial given his testimony about drinking prior to the arrival of the County officers and the officers' testimony about Torcivia's intoxicated behavior.[37] We therefore identify no reversible error in the trial court's decision to admit evidence of Torcivia's blood alcohol level.

Third and finally, the trial court did not abuse its discretion by refusing to admit as evidence portions of the sworn deposition testimony of Adrianna, Torcivia's daughter whose phone call led to the police being

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[37] To the extent that Torcivia now objects to statements made at summation about his blood alcohol content, we easily reject his argument. *See Greenway v. Buffalo Hilton Hotel*, 143 F.3d 47, 51 (2d Cir. 1998) (applying plain error standard of review to statements made during closing argument when no objection was raised at trial).

dispatched to Torcivia's home.[38] Torcivia sought to introduce part of Adrianna's deposition testimony that, according to Torcivia, contradicts the County Defendants' narrative placing Officer Adler on the lower level of Torcivia's home with Adrianna rather than upstairs with Torcivia (where he alleges Officer Adler knocked down curtains from the front door window and sparked an altercation). After a colloquy with counsel for Torcivia and the County Defendants, the trial court reviewed the testimony that Torcivia sought to read into the trial record. Despite the issue presenting "a very close call," App'x at 1655, the trial court ultimately found that Adrianna's deposition was not reliable enough to establish the point for which Torcivia sought to use it. Instead, the court deemed it "sufficiently confusing under [Federal Rule of Evidence] 403"[39] such that admitting the testimony "would add more to the confusion of the case than it will clarify matters." App'x at 1653. Given our deference to the trial court's evidentiary rulings and Torcivia's failure to identify any case law supporting his position, we conclude that this evidentiary ruling did not constitute an abuse of discretion.

In light of the foregoing, a new trial is not

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[38] For the purpose of this evidentiary ruling, the trial court assumed that Adrianna was an unavailable witness pursuant to Fed. R. Evid. 804(a)(5). *See* App'x at 1653.

[39] Federal Rule of Evidence 403 provides: "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403.

warranted.

II. The State Defendants and Intern Smith

Torcivia also seeks reversal of the District Court's award of summary judgment to the State Defendants and Intern Smith based on qualified immunity for their conduct in managing Torcivia after police transported him to CPEP. Although Torcivia challenges the District Court's determination that his false imprisonment claim against the State Defendants and Intern Smith under New York law is barred by qualified immunity under state law, he did not advance this argument before the District Court.[40] "The law in this Circuit is clear that where a party

[40] Torcivia argues in his reply brief that the issue is not waived because, in their summary judgment motion, "the State Defendants did not assert any factual argument to support alleged 'discretionary functions' to support their qualified immunity defense.'" Appellant's Reply Br. at 9. Thus, he argues, this appeal presented his first opportunity to make the state qualified immunity argument he now advances. But the State Defendants raised the defense of state qualified immunity in their summary judgment motion and articulated the relevant standard under New York law. *See* No. 15-cv-1791, Dkt. 137 at 19 (State Defs.' Mem. Supp. S.J.) ("State law offers immunity for government officials in the performance of duties requiring discretionary conduct, which involves 'the exercise of reasoned judgment which could typically produce different acceptable results whereas a ministerial act envisions direct adherence to a governing rule or standard with a compulsory result.'" (quoting *Tango v. Tulevech*, 61 N.Y.2d 34, 40–41 (1983))). Although the State Defendants' argument on this point may have been brief, Torcivia entirely failed to respond to it in his opposition to the motion. *See* No. 15-cv-1791, Dkt. 142 at 15-17 (Pl.'s Opp'n S.J.) (arguing against qualified immunity in general terms, citing only federal cases, and making no mention of the "discretion" standard under New York law).

. . . advances arguments available but not pressed below, waiver will bar raising the issue on appeal." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 124 n.29 (2d Cir. 2005). We therefore find Torcivia's state law qualified immunity argument waived, and we address the substance of only his argument related to qualified immunity under federal law.

In determining whether state actors are entitled to qualified immunity under federal law, we consider two factors: (1) whether the facts presented "make out a violation of a constitutional right"; and (2) whether the right at issue was "clearly established" when it was allegedly violated. *Taravella v. Town of Wolcott*, 599 F.3d 129, 133 (2d Cir. 2010).[41] "Only Supreme Court and Second Circuit precedent existing at the time of the alleged violation is relevant in deciding whether a right is clearly established." *Moore v. Vega*, 371 F.3d 110, 114 (2d Cir. 2004). In evaluating these two factors, we look to "the specific context of the case" at bar rather than "broad general proposition[s]." *Mullenix v. Luna*, 577 U.S. 7, 12 (2015); *see also Kisela v. Hughes*, 138 S. Ct. 1148, 1152–53 (2019).

We agree with the District Court that Torcivia has identified no Second Circuit or Supreme Court precedent that "clearly established" that by failing to discharge him for roughly sixteen hours for emergent mental health evaluation, allowing him first to return to sobriety and possibly keeping him for a few hours

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[41] Courts are free to use their "sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). We elect here to focus on the second.

after he was medically cleared to be discharged, the State Defendants or Intern Smith violated Torcivia's constitutional rights.[42] On the contrary, we have rejected unlawful seizure claims made by plaintiffs detained for longer periods of time than Torcivia. *See, e.g.*, *Kia P. v. McIntyre*, 235 F.3d 749, 762-63 (2d Cir. 2000) (one- to two-day detention of infant child withheld from parents' custody was not unreasonable seizure under Fourth Amendment); *cf. Bryant v. City of New York*, 404 F.3d 128, 131, 139 (2d Cir. 2005) (affirming dismissal of § 1983 Fourth Amendment claim where plaintiffs were jailed overnight but released between 5 and 23 hours after arrest).

Torcivia argues that in so detaining him, the State Defendants and Intern Smith violated New York state law and that accordingly, they violated a clearly established federal constitutional right. Even assuming that these defendants did violate state law as he contends, Torcivia's argument fails. "Our precedents have firmly established that the mere violation of a state law does not automatically give rise to a violation of federal constitutional rights." *Zahra v. Town of Southold*, 48 F.3d 674, 682 (2d Cir. 1995); *see also United States v. Bernacet*, 724 F.3d 269, 277 (2d Cir. 2013) (explaining that "state restrictions do

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[42] Even assuming that Torcivia is correct that Intern Smith was acting under the color of state law pursuant to *Fabrikant v. French*, 691 F.3d 193 (2d Cir. 2012), as a state actor, she is entitled to qualified immunity for the same reasons as the State Defendants. Torcivia does not offer any argument why Intern Smith should not receive qualified immunity that is different than the reasons he advances with respect to the State Defendants.

not alter the Fourth Amendment's protections").

Because Torcivia has not shown that the State Defendants or Intern Smith violated a clearly established constitutional right by failing to discharge him for evaluation and because this factor is dispositive, no further analysis is necessary. We affirm the District Court's order granting summary judgment in favor of the State Defendants and Intern Smith on Torcivia's § 1983 claim.

CONCLUSION

For the reasons stated above, we conclude that the County is not subject to *Monell* liability for the seizure of Torcivia's firearms and that the District Court correctly determined that the doctrine of federal qualified immunity bars Torcivia's claims against the State Defendants and Intern Smith. We also find that Torcivia has waived his challenge to the District Court's state law qualified immunity determination, and we identify no reversible error in the trial court's evidentiary decisions. The order and judgment of the District Court are **AFFIRMED**.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
[Filed December 29, 2021, Doc. 154]

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 29th day of December, two thousand twenty-one.

Wayne Torcivia,

Plaintiff-Appellant,

v.

Suffolk County, New York, Police Officer James Adler, individually and professionally, Police Officer Philip Halpin, individually and professionally, Police Officer Robert Verdu, individually and professionally, Mary Catherine Smith, individually, Kristen Steele, individually, Dianna D'Anna, individually, Adeeb Yacoub, M.D., individually,

Defendants-Appellees,

Investigator Thomas Carpenter, individually and professionally, et al.,

Defendants.

ORDER

Docket No. 19-4167

Appellant, Wayne Torcivia, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

Appendix C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

[Filed March 29, 2019, Doc. 148]

WAYNE TORCIVIA,

Plaintiff,

-against-

SUFFOLK COUNTY, NEW YORK; Police Officer JAMES ADLER; individually and professionally; Investigator THOMAS CARPENTER, individually and professionally; Captain WILLIAM SCRIMA, individually and professionally; Police Officer PHILIP HALPIN, individually and professionally; Police Officer ROBERT VERDU, individually and professionally; Police Officers "JOHN DOE 3 & 4," individually and professionally, who confiscated Plaintiff's weapons from his home on April 6, 2014; Police Officers "JOHN DOE 5-15," individually and professionally; MARY CATHERINE SMITH, individually; KRISTEN STEELE,

MEMORANDUM OF DECISION AND ORDER

15-cv-1791 (LDH)(GRB)

individually; BRIDGET WALSH, individually; MICHELLE SANCHEZ, individually; TIMOTHY AIELLO, individually; DIANNA D'ANNA, individually; ADEEB YACOUB, M.D., individually; "JOHN AND JANE DOES 1-10," individually,

Defendants.

LASHANN DEARCY HALL, United States District Judge:

Plaintiff Wayne Torcivia brings the instant action against Defendants Suffolk County, New York (the "County"); Police Officer James Adler; Investigator Thomas Carpenter; Captain William Scrima, (together, with the County, the "County Defendants"); Kristen Steele; Dianna D'Anna; Dr. Adeeb Yacoub (together, the "CPEP" Defendants); Police Officer Philip Halpin; Police Officer Robert Verdu; Police Officers John Doe 3-15; and Mary Catherine Smith ("CPEP Intern Smith") (collectively "Defendants").[1]

[1] Plaintiff sues all police officer Defendants in both their individual and professional capacities, while suing the CPEP Defendants and CPEP Intern Smith in their individual capacities only. County Defendants argue that Officers Halpin and Verdu are not proper parties to this action because Plaintiff failed to serve them. Notably, Officers Halpin and Verdu were named in Plaintiff's amended complaint filed on February 23, 2017. Moreover, Officers Halpin and Verdu were each deposed in this matter and are represented by the same attorneys as the County

Plaintiff asserts, pursuant to 28 U.S.C. § 1983, that Defendants violated his rights under the First, Second, Fourth, and Fourteenth Amendments. Plaintiff also asserts that Defendants unlawfully imprisoned and defamed him in violation of New York state law.[2]

The parties cross-move for summary judgment pursuant to Federal Rule of Civil Procedure 56. The County Defendants move for partial summary judgment with respect to Plaintiff's *Monell* claims

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Defendants. And curiously, neither Officer Halpin nor Officer Verdu chose to raise this issue prior to summary judgment. The Second Circuit has found that such conduct can constitute waiver with respect to improper service. For example, in *Datskow v. Teledyne, Inc., Continental Products Division*, the Second Circuit found that a defendant's participation in a conference with a magistrate judge, scheduling discovery, and motion practice barred his complaint as to defective service. 899 F.2d 1298, 1303 (2d Cir. 1990); *see also Subway Int'l B.V. v. Bletas*, 512 F. App'x 82 (2d Cir. 2013) (affirming district court's determination that a plaintiff "forfeited her improper service defense by participating in a settlement conference and filing multiple motions without mentioning the defense.") This is particularly the case where neither Officers Halpin nor Verdu can claim that this court lacks personal jurisdiction. *See Datskow*, 899 F.2d at 1303 ("[T]his is not a case where a defendant is contesting personal jurisdiction on the ground that longarm jurisdiction is not available. We would be slower to find waiver by a defendant wishing to contest whether it was obliged to defend in a distant court.") Officers Halpin and Verdu are proper parties to this case.

[2] By letter dated June 12, 2018, Plaintiff voluntarily withdrew his Second and Fourteenth Amendment claims against the CPEP Defendants, Fourth Amendment unlawful-seizure-of-property claims against the CPEP Defendants and Defendant Adler, and First Amendment retaliation claim against the County. (*See* ECF No. 126.)

related to the seizure of Plaintiff's weapons, § 1983 stigma-plus claims, and unlawful-imprisonment claims under New York state law. Plaintiff moves for partial summary judgment against the County Defendants with respect to his *Monell* claims arising from the seizure of his weapons and the County's pistol licensing and revocation policies, and his claims against Defendants Carpenter and Scrima arising from the revocation of his pistol license. The CPEP Defendants and CPEP Intern Smith move for summary judgment to dismiss all claims against them, specifically Plaintiff's Fourth Amendment claims pursuant to § 1983 and unlawful imprisonment claims under New York law.[3]

BACKGROUND[4]

I. Plaintiff's Arrest

County police officers James Adler, Robert Verdu, and Patrick Halpin were summoned to Plaintiff's home in the early morning hours of April 6, 2014. (Pl.'s 56.1 Counterstatement Opp'n State Defs.' Mot. Summ. J. ("State Defs.' 56.1") ¶ 3, ECF No. 110-1.) The officers were responding to a phone call placed by Plaintiff's then-minor daughter to a social services hotline, which in turn contacted the County police department. (State Defs.' 56.1 ¶ 4.) The officers were informed that there was a violent domestic dispute ongoing between "a 17-year-old female and an intoxicated father" shortly before 1:00 a.m. (Pl.'s 56.1 Counterstatement

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[3] CPEP Intern Smith also moves under Rule 12(c) for judgment on the pleadings. For the reasons stated below, the Court does not reach this motion.

[4] The following facts are undisputed unless otherwise noted.

in Opp'n to Def. Smith's Mot. Summ. J. ("Smith's 56.1") ¶¶ 9, 10, ECF No. 108-1.) Plaintiff had consumed alcohol that evening. (Smith's 56.1 ¶ 7.) When Plaintiff's blood was drawn approximately two hours after this incident, he had a blood-alcohol content of twice the legal driving limit. (State Defs.' 56.1 ¶¶ 18-20.)

The parties dispute what occurred after the officers arrived at Plaintiff's home. The officers recall that Plaintiff was acting agitated, "yelling, walking back and forth, pacing and ranting." (Cty. Defs.' Reply Pl.'s. Additional Statement Material Facts Pursuant Local Rule 56.1 ("Cty. Defs.' Reply 56.1") ¶ 19, ECF No. 115.) The officers recall then instructing Plaintiff to sit down at the top of his stairs. (*Id.*) According to the officers, Plaintiff proceeded to demand that they "taser him so he could die." (*Id.* ¶¶ 24, 25.) The officers' recollections are reflected in the incident reports prepared contemporaneously with Plaintiff's arrest. (State Defs.' 56.1 ¶ 5.)

Plaintiff paints a different picture of what occurred in his home. Plaintiff recalls that when the officers arrived, Officer Adler knocked down drapes in the foyer. (Cty. Defs.' Reply 56.1 ¶ 21.) When Plaintiff attempted to assist Officer Adler in extricating himself from the drapes, Officer Adler swore at Plaintiff. (*Id.* ¶ 23.) When Plaintiff asked Officer Adler why he was swearing, Officer Adler threatened to "TASE" him. (*Id.* ¶ 24.) Plaintiff then informed Officer Adler that he should not "TASE" him because he has a heart condition. (*Id.* ¶ 25.)

Following an interview with Plaintiff's daughter, the police officers determined to transport Plaintiff to

Stony Brook University Hospital's Comprehensive Psychiatric Emergency Program ("CPEP") "because he appeared irrational and stated that he wanted to die." (*Id.* ¶ 30.) Plaintiff alleges that he was taken to CPEP in retaliation for informing the officers that "profanity is not allowed in [his] home." (*Id.*)

II. Plaintiff's Evaluation at CPEP and the Removal of Plaintiff's Weapons

Plaintiff was brought to CPEP at 2:12 a.m. on April 6, 2014. (State Defs.' 56.1 ¶ 12.) County police officers reported to CPEP staff that Plaintiff had "asked police to tase him so he would die," was intoxicated, and had acted threateningly and belligerently to his 17-year old daughter. (*Id.* ¶ 14.) This information was documented in Plaintiff's medical records. (*Id.*)

At CPEP, Plaintiff was evaluated by a team consisting of a nurse (Timothy Aiello), a nurse practitioner (Dianna D'Anna), one or more social workers (Kristen Steele and/or CPEP Intern Smith), and an attending doctor (Dr. Yacoub). (*Id.* ¶ 13.) D'Anna conducted an evaluation of Plaintiff at 2:20 p.m. (*Id.* ¶ 17.) D'Anna determined that there was "no indication for acute psychiatric admission," that Plaintiff was "not imminently dangerous" to himself or others, and signed an assessment to this effect at 3:21 p.m. (*Id.* ¶ 18.) At an unspecified time, D'Anna recommended to Dr. Yacoub, the attending psychiatrist, that Plaintiff be discharged. (*Id.* ¶¶ 18, 21.) After receiving D'Anna's recommendation, Dr. Yacoub conducted his own evaluation of Plaintiff and determined that Plaintiff could be discharged. (*Id.* ¶¶ 22-23.) It is not clear when Yacoub's evaluation

occurred, except that it occurred after D'Anna conducted her evaluation of Plaintiff at 2:20 p.m. Notably, by the time Dr. Yacoub determined that Plaintiff could be medically discharged, Plaintiff's firearms had already been removed from his home. (*Id.* ¶¶ 22-24.) At or around 3:12 p.m., CPEP Intern Smith conducted an interview of Plaintiff, during which Plaintiff referenced the fact that he owned guns. (*Id.* ¶¶ 27-28; Matthews Decl., Ex. 5 at *54-55, ECF No. 98-7.)

While Plaintiff was being evaluated at CPEP, Plaintiff's daughter contacted Child Protective Services ("CPS") and reported that she was unhappy with and frightened by the fact that Plaintiff was going to be released from CPEP. (Smith's 56.1 ¶¶ 85, 87, 89, 90. 91.) During her discussion with CPS, Plaintiff's daughter indicated that Plaintiff kept guns in the home. (Smith's 56.1 ¶ 78.) CPS subsequently contacted CPEP and spoke to CPEP Intern Smith. (Smith's 56.1 ¶¶ 84, 85.) CPS informed Smith that Plaintiff's daughter was concerned that Plaintiff was going to be released and had called CPS four times. (Smith's 56.1 ¶¶ 90, 91.) CPS further informed Smith that it had advised Plaintiff's daughter to leave the home and stay with a friend overnight. (Smith's 56.1 ¶ 92.)

Following Plaintiff's transport to CPEP, Officer Adler learned that Plaintiff had a New York State pistol license. (Cty. Defs.' 56.1 ¶ 34.) According to Officer Adler, "[w]hen there is a domestic incident and somebody is transported to CPEP for evaluation that's standard procedure to safeguard weapons until whatever investigation is done." (Decl. Elyce N.

Matthews Supp. State Mot. Summ. J. ("Matthews Decl."), Ex. 3 at 134:20-24, ECF No. 98-5.) Additionally, all paperwork involving a pistol licensee's transport to CPEP is forwarded to the Suffolk County Pistol Licensing Bureau for further investigation. (Cty. Defs.' 56.1 ¶ 38.)

Officer Adler informed his supervisor, Sergeant Lawler, of Plaintiff's pistol license. (*Id.* ¶ 35.) In response, Sergeant Lawler directed Officer Adler to safeguard Plaintiff's weapons. (*Id.* ¶ 36.) Officer Adler returned to Plaintiff's home in an attempt to secure Plaintiff's firearms, but could not do so because Plaintiff's wife did not have the combination to Plaintiff's gun safe. (*Id.* ¶¶ 39-40.) Officer Adler next went to CPEP to ask Plaintiff for the combination to the safe. (*Id.* ¶ 41.) Officer Adler claims that Plaintiff refused to speak with him, while Plaintiff claims that "he was non-responsive and possibly asleep." (*Id.* ¶¶ 41, 43.) Later that evening, police officers informed CPEP staff that they were attempting to remove firearms from Plaintiff's home and that Plaintiff's firearm permit was to be revoked. (State Defs.' 56.1 ¶ 16.) This information was also documented in Plaintiff's medical records. (*Id.*)

It is not clear at exactly what time Plaintiff was medically cleared to be discharged. (*See* State Defs.' 56.1 ¶¶ 18, 23; State Defs.' Resp. Pl.'s 56.1 Counterstatement ("State Defs.' Resp. 56.1") ¶¶ 53-56, ECF No. 116.) It is undisputed, however, that he was not discharged until after his wife surrendered his guns to County police officers. (State Defs.' Resp. 56.1 ¶¶ 64-65, 74.) It is not clear who, if anyone, made the determination that Plaintiff's guns had to be seized

before he would be released. The County police department recalls that CPEP personnel contacted them and requested that they seize Plaintiff's weapons. (Cty. Defs.' Reply Pl.'s 56.1 ("Cty. Defs.' Reply 56.1") ¶ 56, ECF No. 115.) The CPEP Defendants and CPEP Intern Smith dispute this. (Smith's 56.1 ¶¶ 114-16; State Defs.' 56.1 ¶¶ 38-40.)

III. The Revocation of Plaintiff's Pistol License

On June 13, 2014, Plaintiff's pistol license was revoked. (Cty. Defs.' Reply 56.1 ¶ 60.) Plaintiff requested a post-revocation administrative hearing on June 30, 2014. (*Id.* ¶ 61.) The hearing was held on December 16, 2015, approximately one-and-one-half years later. (*Id.* ¶ 62.) To date, Plaintiff has not been provided with any determination as a result of that hearing. (*Id.* ¶ 63.) With respect to his longarms, Plaintiff has not been provided with any hearing whatsoever. (*Id.* ¶ 64.) He has, however, since repurchased his longarms from a licensed reseller who came into possession of the longarms. (Decl. of Amy L. Bellantoni Supp. Mot. Summ. J. ("Bellantoni Decl."), Ex. 1 at 205:18-206:11, ECF No. 101-1).

Plaintiff timely filed a Notice of Claim against Suffolk County with respect to his claims against them. (Cty. Defs.' 56.1 ¶ 15.) The County served a notice of examination on Plaintiff on July 24, 2014, and scheduled a hearing for October 24, 2014. (Cty. Defs.' Reply 56.1, Ex. B ¶ 3, ECF No. 115-2.) This hearing was twice adjourned by the County. (*Id.* ¶ 6.) No hearing has ever been held. (*See generally id.* ¶¶ 6-9.)

STANDARD OF REVIEW

Summary judgment must be granted when there is "no genuine dispute as to any material fact and the movant[s] [are] entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *accord Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). A genuine dispute of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. At summary judgment, the movants bear the initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Feingold v. New York*, 366 F.3d 138, 148 (2d Cir. 2004). Where the non-movants bear the burden of proof at trial, the movants' initial burden at summary judgment can be met by pointing to a lack of evidence supporting the non-movants' claim. *Celotex Corp.*, 477 U.S. at 325.

Once the movants meet that burden, the non-movants may defeat summary judgment only by producing evidence of specific facts that raise a genuine issue for trial. *See* Fed. R. Civ. P. 56(c); *Anderson*, 477 U.S. at 248; *Davis v. New York*, 316 F.3d 93, 100 (2d Cir. 2002). The Court is to view all facts in the light most favorable to the non-movants, drawing all reasonable inferences in their favor. *Anderson*, 477 U.S. at 255. To survive summary judgment, the nonmovants must present concrete evidence and rely on more than conclusory or speculative claims. *Quinn v. Syracuse Model Neighborhood Corp.*, 613 F.2d 438, 445 (2d Cir. 1980) ("The litigant opposing summary judgment . . . 'may not rest upon mere conclusory allegations or denials'

as a vehicle for obtaining a trial." (quoting *SEC v. Research Automation Corp.*, 585 F.2d 31, 33 (2d Cir. 1978)).

DISCUSSION

I. Plaintiff's Claims Against the County Defendants

The County Defendants move for summary judgment with respect to Plaintiff's *Monell* claims arising from the seizure of Plaintiff's weapons, § 1983 stigma-plus claim, and New York common-law unlawful-arrest claim. (*See* Mem. Law Supp. Cty. Defs.' Mot. Partial Summ. J. ("Cty. Defs.' Mem.") at 2-3, ECF No. 138-6.) Plaintiff cross-moves for summary judgment with respect to his *Monell* claims arising from the seizure of his firearms, the revocation of his pistol license, the failure to hold a post-deprivation hearing, as well as his claims relating to the County's pistol revocation and licensing policies. (*See* Pl.'s Mem. Law Opp'n Suffolk Cty.'s Mot. Summ. J. ("Pl.'s Cty. Opp'n") at 19-25, ECF No. 140.)

A. Plaintiff's *Monell* Claims Arising from the Seizure of his Weapons

A municipality can only be held liable for a violation under § 1983, known as *Monell* liability, where a plaintiff proves "(1) an official policy or custom that (2) causes the plaintiff to be subjected to (3) a denial of a constitutional right." *Wray v. City of New York*, 490 F.3d 189, 195 (2d Cir. 2007) (quoting *Batista v. Rodriguez*, 702 F.2d 393, 397 (2d Cir. 1983)).[5]

[5] A plaintiff may demonstrate a policy or custom in one of four ways: (1) a formal policy officially endorsed by the municipality,

Plaintiff maintains that the County had a formal policy of seizing the firearms of individuals who are transported to CPEP and that this policy, on its face, violated Plaintiff's Fourth Amendment rights. (Pl.'s Cty. Opp'n at 20-25.) The County Defendants principally argue that Plaintiff fails to establish the existence of such a policy. (Cty. Defs.' Mem. at 3-5.) While the Court finds that Plaintiff has adduced sufficient evidence to demonstrate the existence of a policy (or at least a custom), the policy or custom evidenced by Plaintiff is notably narrow than that proposed by Plaintiff.

During his deposition, Officer Adler stated: "When there is a domestic incident and somebody is transported to CPEP for evaluation that's standard procedure to safeguard weapons until whatever investigation is done." (Matthews Decl., Ex. 3 at 134:20-24.) Officer Adler's testimony is supported by the undisputed facts related to Plaintiff's arrest. Following Plaintiff's transport to CPEP, Officer Adler learned that Plaintiff had a pistol license. (Cty. Reply 56.1 ¶ 34.) Officer Adler reported this to his superior officer, Sergeant Lawler. (*Id.* ¶ 35.) Sergeant Lawler

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Monell, 436 U.S. 658, 690 (1978); (2) actions taken by government officials responsible for establishing the municipal policies that caused the particular deprivation in question, *see Bd. of Cty. Comm'rs v. Brown*, 520 U.S. at 404–06; (3) a practice so consistent and widespread that, although not expressly authorized, constitutes a custom or usage, *see Bd. of County Comm'rs*, 520 U.S. at 403–04; or (4) a failure by policymakers to provide adequate training or supervision to subordinates to such an extent that it amounts to deliberate indifference to the rights of those who come into contact with the municipal employees, *see Bd. of County Comm'rs*, 520 U.S. at 407.

instructed Officer Adler to safeguard Plaintiff's weapons. (*Id.* ¶ 36.) A reasonable juror could conclude from these facts that Plaintiff's weapons were seized pursuant to a formal County policy, particularly where Officer Adler explicitly stated that he acted pursuant to "standard procedure."[6] (Matthews Decl., Ex. 3 at 134:20-24.) At the very least, a reasonable juror could find that this "standard procedure" constituted a County custom.

The County Defendants argue that the statements and actions of Officer Adler cannot bind the County because Officer Adler is not a policymaker. The County Defendants are correct that the actions of an individual below the policy-making level are generally insufficient to show a municipal policy. *See DeCarlo v. Fry*, 141 F.3d 56, 61 (2d Cir. 1998) ("[A] municipality may be not be held liable in an action under 42 U.S.C. § 1983 for actions alleged to be unconstitutional by its employees below the policymaking level solely on the

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[6] Plaintiff contends that the County maintains a broader policy than that described here. Specifically, Plaintiff claims that "[i]t is the policy of the Suffolk County Police Department that when an individual is transported to CPEP for an evaluation, the individual's firearms are seized." (Cty. Defs.' Reply 56.1. ¶ 37.) Plaintiff has not, however, provided any evidence to support this broader policy. Relatedly, County Defendants argue that the phrase "standard procedure" is ambiguous, and that Officer Adler could have been referring to "the procedure of his precinct, his command or his own personal procedure." (Cty. Defs.' Reply Mem. Law at 3, ECF No. 143.) But it is not for the Court to draw such conclusions at the motion for summary judgment stage. *See Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 150 (2000) (directing courts at summary judgment stage to "draw all reasonable inferences in favor of the nonmoving party, and . . . not [to] make credibility determinations or weigh the evidence").

basis of *respondeat superior*.") And if Plaintiff merely claimed that Officer Adler's seizure of Plaintiff's weapons on this single instance, in and of itself, constituted proof of a municipal policy, Plaintiff's claim would fail. But Plaintiff's claim does not rest solely on Officer Adler's actions with respect to Plaintiff's firearms. Instead, Plaintiff relies on Officer Adler's express statement that a municipal policy or custom existed.

The existence of a municipal policy or custom alone, however, is insufficient to establish *Monell* liability. Instead, where, as here, a plaintiff challenges a municipality's policy or custom as unconstitutional, the Court must still find that the policy or custom resulted in a violation of Plaintiff's constitutional rights. *See Ricciuti v. N.Y.C. Transit Auth.*, 941 F.2d 119, 122 (2d Cir. 1991). The purported policy or custom did not.

The Fourth Amendment provides:

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

U.S. Const. amend. IV. The "general rule" is that "absent an 'extraordinary situation' a party cannot invoke the power of the state to seize a person's property without a *prior* judicial determination that the seizure is justified." *United States v. Eight*

Thousand Eight Hundred & Fifty Dollars ($8,850) in U.S. Currency, 461 U.S. 555, 562 n.12 (1983) (quoting *Boddie v. Connecticut*, 401 U.S. 371, 378-79 (1971)). "[I]n the 'ordinary case,' seizures of personal property are 'unreasonable within the meaning of the Fourth Amendment,' without more, 'unless . . . accomplished pursuant to a judicial warrant,' issued by a neutral magistrate after a finding of probable cause." *Illinois v. McArthur*, 531 U.S. 326, 330 (2001) (quoting *United States v. Place,* 462 U.S. 696, 701 (1983)). The right to be free from a warrantless seizure is not, however, absolute.

Because the ultimate touchstone of a Fourth Amendment seizure is reasonableness, the Supreme Court has recognized certain exceptions under which a warrantless seizure may be considered "reasonable." *McArthur,* 531 U.S. at 330. These exceptions include (1) special law-enforcement needs, (2) an individual's diminished expectation of privacy, or (3) minimal or temporary seizures. *Id.* at 330-31. Of particular significance here, the special-needs exception applies where "special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985). To trigger this exception, a search or seizure "must 'serve as its immediate purpose an objective distinct from the ordinary evidence gathering associated with crime investigation.'" *MacWade v. Kelly*, 460 F.3d 260, 268 (2d Cir. 2006) (*quoting Nicholas v. Goord,* 430 F.3d 652, 663 (2d Cir. 2005) (internal brackets omitted)).

The seizure at issue in this case indisputably did not have as its immediate purpose "the ordinary

evidence gathering associated with crime investigation." *Id.* That is, there is nothing in the record to suggest that the seizure of Plaintiff's weapons was "undertaken for the investigation of a particular crime." *Lynch v. City of New York*, 737 F.3d 150, 158 (2d Cir. 2013). Indeed, because Plaintiff had a pistol license, and because a license is not required to possess longarms, his possession of firearms "provided no evidence of wrongdoing in and of [itself]." *Id.* Instead, as stated by Officer Adler, and as uncontroverted by Plaintiff, the seizure of Plaintiff's weapons was intended to safeguard them following his transport to CPEP following a domestic incident. (Matthews Decl., Ex. 3 at 134:18-24.) Therefore, the policy allegedly applied to Plaintiff—that is, a policy of temporarily seizing of an individual's firearms upon their transport to CPEP following a domestic dispute—qualifies as a special-needs seizure.

Still, the court must determine whether the seizure was reasonable. In assessing the reasonableness of the seizure at issue, the Court must balance: "(1) the weight and immediacy of the government interest, (2) the nature of the privacy interest allegedly compromised by the [seizure], (3) the character of the intrusion imposed by the [seizure], and (4) the efficacy of the [seizure] in advancing the government interest." *MacWade*, 460 F.3d at 269 (internal quotation marks and citations omitted). Considering these factors, the Court finds that the seizure in this case was reasonable.

First, as the Second Circuit found in *Bach v. Pataki*, "[t]he State has a substantial and legitimate interest in insuring the safety of the general public

from individuals who, by their conduct, have shown themselves to be lacking the essential temperament or character which should be present in one entrusted with a dangerous instrument." 408 F.3d 75, 91 (2d Cir. 2005) (quoting *In re Pelose*, 384 N.Y.S.2d 499 (N.Y. App. Div. 1976)), *overruled on other grounds by McDonald v. City of Chicago*, 561 U.S. 742 (2010) (holding that the Second Amendment applies to state regulations by virtue of the Fourteenth Amendment). *See also Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 97 (2d Cir. 2012) (finding, in the context of firearm regulation, that "New York has substantial, indeed compelling, governmental interests in public safety and crime prevention"). This interest is particularly acute in circumstances involving mental health and domestic violence.

The World Health Organization has found that more than ninety percent of those who commit suicide had a diagnosed mental disorder. *See* Jose Manoel Bertolote and Alexandra Fleischmann, *Suicide and Psychiatric Diagnosis: A Worldwide Perspective*, World Psychiatry, Oct. 2002, at 181-85, *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1489848/. And there is an epidemic of suicide by firearm in our country. From 2012 through 2017, more than 132,000 Americans committed suicide using a firearm—an average of more than 22,000 per year. *See Fatal Injury Reports, National, Regional and State, 1981 - 2017*, Centers for Disease Control and Prevention, https://webappa.cdc.gov/sasweb/ncipc/mortrate.html (hereinafter "CDC Fatal Injury Reports Web Tool") (last visited March 20, 2019). This firearm suicide rate is eight times that of other high-income countries. Erin Grinshteyn & Davis Hemenway,

Violent Death Rates: The US Compared with Other High-Income OECD Countries, 192 The Am. J. Med. 266-73 (2016). The problem is only getting worse: the U.S. firearm suicide rate increased by eleven percent from 2012 to 2017. *See* CDC Fatal Injury Reports Web Tool (calculating rates of suicide by firearm per 100,000 persons as 6.58 in 2012 and 7.32 in 2017). While less than five percent of those individuals who attempt suicide without a firearm are successful, eighty-five percent of those who attempt to do so with a firearm die. *See Firearm Safety in the United States*, Everytown for Gun Safety (Aug. 30, 2018), https://everytownresearch.org/firearm-suicide/. And studies suggest that having access to a firearm triples one's risk of death by suicide. *Id.* Indeed, a number of studies have demonstrated that the possession of a firearms increases the risk of suicide not just for the firearm owner, but for all individuals within the firearm owner's household. *See* Michael Siegel & Emily Rothman, *Firearm Ownership and Suicide Rates Among US Men and Women, 1981–2013*, 106 Am. J. Pub. Health 1316-22 (2016), https://ajph.aphapublications.org/doi/full/10.2105/AJPH.2016.303182.[7]

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[7] For these reasons, it is no surprise that the federal government, almost every single state, and the District of Columbia have laws limiting the possession of firearms by individuals who have been treated for mental health issues. *See* 18 U.S.C.§ 922(g); Ala. Code 1975 § 13A-11-72; Ariz. Rev. Stat. §§ 13-3101, 13-3102(A)(4); Ark. Code § 5-73-103; Cal. Welf. & Inst. Code §§ 8100, 8103; Conn. Gen. Stat. § 53a-217c; Del. Code tit. 11 §§ 1448, 1448A; D.C. Code § 7-2509.02(a)(3)(A); Fla. Stat. §§ 790.06, 790.065; Ga. Code § 16-11-129(b)(2)(J); Haw. Rev. Stat. § 134-7; Idaho Code § 18-3302(11); 720 Ill. Comp. Stat. §§ 5/24-3(A)(e), 3.1(a)(4); Kans.

Moreover, domestic violence and gun violence are inextricably linked. Homicide is the leading cause of death in the United States among African-American women aged fifteen to forty-five, and the seventh leading cause of death among all American women. Jacquelyn C. Campbell et al., *Risk Factors for Femicide in Abusive Relationships: Results from a Multistate Case Control Study*, 93 Am. J. Pub. Health 1089-97 (2003), https://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.93.7.1089 (hereinafter "Campbell, *Risk Factors*"). And, almost half of women murdered in the United States were murdered by intimate partners. *Id*. Over the past twenty-five years, more intimate-partner homicides have been committed with firearms than with all other weapons combined. *See* April M. Zeoli & Shannon Frattaroli, *Evidence for Optimism: Policies to Limit Batterers' Access to Guns*, *in Reducing Gun Violence in America: Informing Policy with Evidence and Analysis* 53-63 (Daniel W. Webster and Jon S. Vernick eds., 2013). Every month,

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Stat. § 216301(a)(13); La. Rev. Stat. § 40:1379.3(C)(5); Me. Stat. tit. 15 § 393; Md. Code Pub. Safety § 5-133; Mass. Gen. Laws ch. 140, § 131(d)(iii); Mich. Comp. Laws § 28.422(3)(g); Minn. Stat. § 624.713; Miss. Code § 45-9-101(2)(h); Mo. Rev. Stat. § 571.070; Mont. Code § 45-8-321(2)(g); Neb. Rev. Stat. § 69-2433(6); N.J. Rev. Stat. § 2c:583(c)(3); N.M. Stat. § 29-19-4(A)(8); N.Y. Penal Law § 400.00(1)(h); N.C. Gen Stat. § 14-404(c)(4); N.D. Cent. Code § 62.1-02-01(1)(c); Ohio Rev. Code § 2923.125(D)(1)(i); Okla. Stat. tit. 21, §§ 21-1289.10, 21-1289.12; Or. Rev. Stat. § 166.250; 18 Pa. Cons. Stat. § 6105(c)(4); 11 R.I. Gen. Laws § 11-47-6; S.C. Code §§ 16-23-30(A)(1), 44-23-1080; Tenn. Code Ann. § 39-17-1351(c)(12); Tex. Gov't Code § 411.172(a)(7), (d), (e); Utah Code Ann. § 53-5-704(2)(a)(vii); Va. Code Ann. § 18.2-308.1:2, 1:3; Wash. Rev. Code § 9.41.040(2)(a)(vi); W. Va. Code § 617-7(a)(4); Wis. Stat. §§ 941.29(1m)(e); Wyo. Stat. § 6-8-404(c)(iii).

on average, approximately fifty women in this country are shot to death by an intimate partner. *See Domestic Shooting Homicides*, Associated Press, http://data.ap.org/projects/2016/domestic-gun-homicides/ (last visited March 20, 2019). Individuals with a history of domestic violence are five times more likely to subsequently murder an intimate partner when a firearm is in the home. Campbell, *Risk Factors*. Further, in fifty-four percent of mass shootings occurring from 2009 to 2016, the shooters killed intimate partners or other family members. *See* Everytown for Gun Safety, *Mass Shootings in the United States: 2009-2016*, https://everytownresearch.org/reports/mass-shootings-analysis/. Moreover, these problems appear to be getting worse, not better. *See* Jacqueline Howard, *Gun Deaths in US Reach Highest Level in Nearly 40 Years, CDC Data Reveals*, CNN.com (Dec. 14, 2018, 2:13 PM), https://www.cnn.com/2018/12/13/health/gun-deaths-highest-40-years-cdc/index.html (noting that nearly 40,000 people died by guns in the United States in 2017, an increase of more than 10,000 deaths from 1999, with 23,854 of those deaths attributed to suicide).

Laws limiting the ability of those involved in domestic disputes or domestic violence to possess firearms are effective in reducing homicide rates. Researchers have found that states requiring that individuals subject to restraining orders relinquish firearms in their possession, had intimate partner-homicide rates fourteen percent lower than states that did not have such requirements. *See* Carolina Díez at al., *State Intimate Partner Violence-Related Firearm Laws and Intimate Partner Homicide Rates in the United States, 1991 to 2015*, 167 Annals Internal Med.

536 (Oct. 17, 2017), https://annals.org/aim/fullarticle/2654047/state-intimate-partnerviolence-related-firearm-laws-intimate-partner-homicide. They further found that there were seventy-five fewer intimate-partner homicides in the U.S. in 2015, than there would have been in the absence of such restrictions. *Id.* These researchers projected that if all fifty states had similar restrictions in place, there would have been an additional 120 fewer intimate-partner homicides in 2015. *Id.* The government has a compelling interest in ensuring that individuals involved in domestic disputes and suffering from mental health issues do not have access to firearms.

Second, while Plaintiff undoubtedly has a privacy interest in his firearms, that right is somewhat diminished because he was expressly made aware that his weapons could be seized at any time. In *United States v. Biswell*, the Supreme Court upheld as constitutional warrantless searches of licensed firearm dealers. 406 U.S. 311, 316 (1972). The Court found that the firearms dealers' privacy interests were diminished because "[w]hen a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection. Each licensee is annually furnished with a revised compilation of ordinances that describe his obligations and define the inspector's authority." *Id*; *see also United States v. Streifel*, 665 F.2d 414, 419 n.8 (2d Cir. 1981) (noting that "gun dealers or liquor purveyers, have a greatly reduced expectation of privacy because they know that they are subject 'to a full arsenal of governmental regulation'") (quoting *Marshall v. Barlow's Inc.*, 436

U.S. 307, 313 (1978)).

The same is true here. Pursuant to New York law, whenever an individual's pistol license is suspended or revoked, that individual is required to surrender "*any and all* firearms, rifles, or shotguns." N.Y. Penal Law § 400.00(11)(c) (emphasis added). That is, a pistol license holder, like Plaintiff, was on notice that his firearms were subject to seizure under specified conditions. Moreover, Plaintiff was expressly informed of this requirement by the County's Pistol License Guidelines, which state: "IF A POLICE OFFICER OR MEMBER OF THE PISTOL LICENSE BUREAU REQUESTS YOU TO SURRENDER YOUR LICENSE AND FIREARM(S), AND YOU REFUSE, . . . YOU MAY BE ARRESTED." (Bellantoni Decl., Ex. 10 at 22, ECF No. 101-9.) Plaintiff chose to apply for a pistol license, subjecting himself to the requirements of New York Penal Law and the County's Pistol License Guidelines, aware that by doing so he would be subject to the seizure of all of his firearms. Because Plaintiff was expressly put on notice that his firearms could be surrendered upon the revocation of his pistol license, he had a diminished privacy interest in his firearms. *See Palmieri v. Lynch*, 392 F.3d 73, 83 (2d Cir. 2004) (finding a plaintiff's privacy interest in his own home diminished because he "was on notice" that his home could be inspected).

Third, the Court must examine the nature and extent of the intrusion. In examining this factor in the context of special-need seizures, the Supreme Court has highlighted the duration of the seizure, the length of interaction with police officers, and the degree to which police officers are permitted to exercise

discretion in manners that could lead to harassment or discrimination. An examination of the facts here reveals that the nature and extent of the intrusion in this case was not minimal. The seizure of Plaintiff's weapons was not brief. Indeed, the seizure of Plaintiff's weapons persists to this day. Further, Plaintiff's weapons were seized from his home, taken from a locked safe, outside of his presence, and only after he directed his wife to provide the weapons to police officers. While the parties dispute whether Plaintiff's instruction to his wife was voluntary, the interaction between police officers and both Plaintiff and his wife extended over the course of several hours. Taken together, these facts support a finding that the intrusion here was not minimal.[8]

Fourth, the Court must consider the efficacy of the policy at issue, or the "degree to which the seizure advances the public interest." *MacWade*, 460 F.3d at 273 (citation omitted). In conducting this analysis, the Supreme Court has cautioned that courts are not "to transfer from politically accountable officials to the courts the decision as to which among reasonable alternative law enforcement techniques should be employed to deal with a serious public danger." *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 453 (1990). Instead, the Court need only satisfy itself

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[8] By contrast, in *Illinois v. Lidster*, the Supreme Court found that the seizure of vehicles at a traffic stop was reasonable where "each stop required only a brief wait in line[,] . . . [c]ontact with the police lasted only a few seconds[,] . . . [p]olice contact consisted simply of a request for information and the distribution of a flyer . . . [, and] there [wa]s no allegation . . . that the police acted in a discriminatory or otherwise unlawful manner while questioning motorists during stops." 540 U.S. 419, 427–28 (2004).

that the policy at issue represents "a reasonably effective means of addressing" the government's interest in public safety. *Bd. of Educ. v. Earls*, 536 U.S. 822, 837 (2002).

Here, the temporary seizure of an individual's firearms pending an investigation by the Pistol Licensing Bureau following that individual's transport to CPEP after a domestic dispute is a reasonably effective means of addressing the government's interest in public safety. The purported policy would permit the temporary seizure of an individual's firearms if (1) he is transported to CPEP, (2) following a domestic dispute. Notably, an officer is only permitted to transport an individual to CPEP where that officer finds that the individual "appears to be mentally ill and is conducting himself or herself in a manner which is likely to result in serious harm to the person or others." N.Y. Mental Hyg. Law § 9.41. Where an officer has made such a finding, particularly in the context of a domestic dispute, temporarily removing that individual's firearms pending an investigation is a reasonably effective means of furthering the government's interest in public safety.[9]

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[9] Plaintiff contends that there are specific provisions of New York law providing a basis upon which firearms must be surrendered, and that, because none of these provisions apply here, the seizure of Plaintiff's firearms was necessarily unconstitutional. (Pl.'s Cty. Opp'n at 9-10.) But the fact that a County policy is not specifically authorized by state law does not mean that such a policy is unconstitutional. Indeed, Plaintiff fails to cite a single case in support of this proposition. This is not surprising because "[o]ur precedents have firmly established that the mere violation of a state law does not automatically give rise to a violation of federal constitutional rights." *See Zahra v. Town of Southold*, 48 F.3d

Weighing these factors together, the Court finds the purported policy or custom of temporarily seizing firearms under these circumstances is a reasonable one.[10] While the intrusion imposed upon Plaintiff's privacy rights by the County's policy is not insignificant, Plaintiff's privacy rights are somewhat diminished, and the government has a compelling interest in limiting the ability of those potentially suffering from mental illness or involved in incidents of domestic violence to access firearms. Therefore, the Court finds that the County's purported policy or custom did not violate Plaintiff's Fourth Amendment rights. The Court's decision is based upon a *temporary* custom or policy of seizing weapons. If Plaintiff had

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674, 682 (2d Cir. 1995). Plaintiff has brought a constitutional challenge against the County's policy, and therefore it is the Constitution, and not state law, that provides the relevant standard. Moreover, the fact that firearms are extensively regulated within New York State, *see generally* N.Y. Penal Law § 400.00; N.Y. Crim. Proc. Law § 33.20(2-a), only further supports the Court's conclusion that Plaintiff's privacy rights with respect to his firearms are somewhat diminished.

[10] Plaintiff challenges the County's policy both as applied to Plaintiff and on its face. It has long been established "that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivable be applied unconstitutionally to others, in other situations not before the Court." *United States v. Decastro*, 682 F.3d 160, 163 (2d Cir. 2012) (quoting *Parker v. Levy*, 417 U.S. 733, 759 (1974)). Therefore, a party "who fails to demonstrate that a challenged law is unconstitutional as applied to [him] has 'necessarily fail[ed] to state a facial challenge, which requires [him] to establish that no set of circumstances exists under which the statute would be valid.'" *Id.* (quoting *Diaz v. Paterson*, 547 F.3d 88, 101 (2d Cir.2008)). Because Plaintiff's as-applied challenge fails, so too does his facial challenge.

adduced evidence of a policy or custom of *permanently* seizing firearms under these circumstances, its weighing of these factors might well yield a different result. Similarly, if Plaintiff had adduced evidence that the County had a policy of seizing firearms from individuals who had already been medically discharged from CPEP, the Court might weigh these factors differently.[11]

B. Plaintiff's Second Amendment Claims Against the County

Plaintiff contends that his Second Amendment rights were violated by certain County policies. (Pl.'s Cty. Opp'n at 20-22, 24-25.) Specifically, Plaintiff alleges that the County's Pistol License Policies requiring the revocation of a pistol license where (1) the licensee resides with an individual who has been treated for mental health issues, (2) the licensee has been transported to a mental health facility, and (3) the licensee fails to notify the Licensing Bureau that police responded to his home violated his Second Amendment rights. (*Id.* at 24-25.) Plaintiff also claims that the County's policy of temporarily seizing an individual's firearms when that individual is transported to CPEP and involved in a domestic dispute violated his Second Amendment rights. (*Id.* at 20-21.) The Court refers to these four policies collectively as the "Revocation and Seizure Policies." Additionally, Plaintiff alleges that certain policies which do not appear to have been applied to him also

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[11] The record indicates that Dr. Yacoub only determined that Plaintiff could be medically discharged after Plaintiff's firearms had already been seized. (*See* State Defs.' 56.1 at ¶¶ 21-25.)

violate the Second Amendment, particularly policies (1) requiring the surrender of a pistol license and all firearms upon demand by a police officer or member of the Licensing Bureau; (2) requiring firearms to be kept unloaded and locked in a location separate from their ammunition; (3) requiring firearms to be kept unloaded with a locking device attached and hidden in a secure location. The Court refers to these policies collectively as the "Storage and Surrender Policies." (*Id.* at 25.)

1. The Revocation and Seizure Policies

The Second Amendment of the U.S. Constitution provides: "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. In *Heller,* the Supreme Court found that the Second Amendment guarantees "the individual right to possess and carry weapons in case of confrontation." 554 U.S. at 592. While the Supreme Court recognized an individual right to "keep and bear arms," it made clear that this right "was not unlimited." *Id.* at 595.

Following the Supreme Court's decision in *Heller*, the Second Circuit has applied a twostep inquiry in determining the constitutionality of firearm restrictions. *First*, a court must consider "whether the restriction burdens conduct protected by the Second Amendment. If the challenged restriction does not implicate conduct within the scope of the Second Amendment, our analysis ends and the legislation stands." *N.Y. State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 254 (2d Cir. 2015). *Second*, where a restriction burdens conduct protected by the Second

Amendment, a court must determine the level of scrutiny to apply to that restrictions.[12] *Id.*

There can be no question that the Revocation and Seizure Policies implicated conduct within the scope of the Second Amendment. At least one of the Policies resulted in the revocation of Plaintiff's pistol license and the temporary seizure of Plaintiff's firearms, and limited Plaintiff's ability to possess handguns.[13] That the seizure occurred in Plaintiff's home only bolsters the Court's conclusion. *See Heller*, 554 U.S. at 635 (holding that the Second Amendment "elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.") That said, the Court finds that the Revocation and Seizure Policies only moderately burden Plaintiff's Second Amendment right.

While the Revocation and Seizure Policies prevent Plaintiff from possessing a handgun, they do not

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[12] Plaintiff contends that *Heller* stands for the proposition that a complete ban on handguns is *per se* unlawful and the revocation of Plaintiff's pistol license and his inability to possess a handgun is therefore also unlawful. (Pl.'s Opp'n at 24-25.) The Court in *Heller* dealt with a city-wide ban on handguns for all individuals. 554 U.S. at 574. The revocation provisions at issue here, however, provide guidelines based on which a licensing official may conclude that a specific individual is not qualified to possess a handgun. Such guidelines do not amount to a countywide handgun prohibition for all individuals, and therefore do not raise the same Second Amendment concerns. Thus, *Heller* is of no avail to Plaintiff.

[13] The *Heller* court noted that handguns can raise particular concerns with respect to the Second Amendment. *See Heller*, 554 U.S. at 629 (observing that "the American people have considered the handgun to be the quintessential self-defense weapon").

prevent him from possessing firearms altogether. Under New York law, no license is required to possess a shotgun with a barrel eighteen inches or longer, a rifle with a barrel sixteen inches or longer, or antique firearms. *See* N.Y. Penal Law §§ 265.00(3) (defining the term "firearm"), 400.00 (setting standards for firearms licensing). Indeed, as Plaintiff conceded at the May 30, 2018 pre-motion conference and at his deposition, he was able to repurchase his Remington Model 1100 3006 and his Para Ordnance P12 semiautomatic rifles and currently is in possession of both. (Bellantoni Decl., Ex. 1 at 205:18-206:11; Pre-Mot. Conf. Tr. 43, May 30, 2018 (rough draft on file with the court reporter).) The Second Amendment is "not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Heller*, 554 U.S. at 626. And it certainly is not a constitutionally guaranteed right to possess any weapon of Plaintiff's choice. Because Plaintiff currently lawfully possesses two firearms, he cannot plausibly claim that the Revocation and Seizure Policies pose a substantial or significant burden on his Second Amendment right. *See, e.g.*, *Perros v. Cty. of Nassau*, 238 F. Supp. 3d 395, 401 (E.D.N.Y. 2017) (dismissing Second Amendment claims where "Plaintiffs are still able to obtain a gun license to own a shotgun or a rifle"); *Vaher v. Town of Orangetown*, 916 F. Supp. 2d 404, 430 (S.D.N.Y. 2013) (dismissing Second Amendment claims where "there is no allegation that Defendants' actions have affected Plaintiff's ability to retain or acquire other firearms."); *McGuire v. Village of Tarrytown*, No. 8-cv-2049, 2011 WL 2623466, at *7 (S.D.N.Y. June 22, 2011) (holding that because "defendants did not prevent [plaintiff]

from acquiring another weapon, they did not impede plaintiff's 'right to bear arms'").

In the Second Amendment context, the Second Circuit has instructed that "heightened scrutiny is triggered only by those restrictions that (like the complete prohibition on handguns struck down in *Heller*) operate as a substantial burden on the ability of law-abiding citizens to possess and use a firearm for self-defense (or for other lawful purposes)." *United States v. Decastro*, 682 F.3d 160, 166 (2d Cir. 2012). As the Second Circuit has explained, a "law that regulates the availability of firearms is not a substantial burden on the right to keep and bear arms if adequate alternatives remain for law-abiding citizens to acquire a firearm for self-defense." *Id.* at 168. Accordingly, the Second Circuit has applied intermediate, rather than strict scrutiny, to policies, like those here, that only moderately burden the Second Amendment right, by limiting the availability of some, but not all, firearms. *See N.Y. State Rifle & Pistol Ass'n*, 804 F.3d at 260–61 (applying intermediate scrutiny to assault-weapon and large-capacity-magazine ban because "[t]he burden imposed by the challenged legislation [wa]s real, but . . . not 'severe'").

In applying intermediate scrutiny, the Court must determine whether the Revocation and Seizure Policies are "substantially related to the achievement of an important governmental interest." *Id.* at 261 (quoting *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 96 (2d Cir. 2012)). The Court easily concludes that they are.

For reasons similar to those set forth with respect to Plaintiff's Fourth Amendment claims, the Revocation and Seizure Policies substantially relate to the government's important interest in limiting the ability of those individuals who suffer from mental health issues or are involved in domestic incidents to access firearms. The fact that the pistol licensing provisions are discretionary, and not mandatory, only strengthens the Court's conclusion. By permitting a licensing official to make a case-by-case, individualized determination as to an individual's fitness to hold a license, these provisions permit the government to more narrowly prescribe the circumstances under which an individual's Second Amendment rights may be burdened. *See Kachalsky v. Cacace*, 817 F. Supp. 2d 235, 271 (S.D.N.Y. 2011) (upholding New York handgun licensing provisions under intermediate scrutiny based, in part, on the fact that "the statute does not function as an outright ban on concealed carry, but rather calls for individualized, case-by-case determinations regarding whether full-carry permit applicants have an actual and articulable—rather than merely speculative, potential, or even specious—need for self-defense."), *aff'd sub nom. Kachalsky v. Cty. of Westchester*, 701 F.3d 81 (2d Cir. 2012). Therefore, the Court concludes that the Revocation and Seizure Policies are consistent with the Second Amendment.

2. The Storage and Surrender Policies

The Storage and Surrender Policies are found in the County's Pistol License Information Handbook. That Handbook contains the following statement:

The following safety measures will be accepted as

standard practice for the safeguarding of firearms:

i. **UNLOADED** and locked in a metal container.
ii. **UNLOADED** and secured in a safe.
iii. **UNLOADED** with a locking device attached and hidden in a secure location.

(Bellantoni Decl., Ex. 10 at 23.) The Handbook also contains the following disclaimer:

> IF A POLICE OFFICER OR MEMBER OF THE PISTOL LICENSE BUREAU REQUESTS YOU TO SURRENDER YOUR LICENSE AND FIREARM(S), AND YOU REFUSE, SUCH CONDUCT WILL BE SUFFICIENT CAUSE FOR THE REVOCATION OF YOUR LICENSE, AND YOU MAY BE ARRESTED AND CHARGED WITH A VIOLATION OF SECTION 400.00, SUB. 11(c), A CLASS A MISDEMEANOR.

(*Id.* at 22.)

With respect to the Storage and Surrender Policies, Plaintiff lacks standing to challenge these policies because he has not adduced any evidence that he was harmed by these policies or that some of these policies even exist. "To establish Article III standing, an injury must be 'concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.'" *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (quoting *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149 (2010)). As the Supreme Court has explained, "[a]lthough imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its

purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is *certainly* impending." *Id.* at 409 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 n.2 (1992)). Therefore, "threatened injury must be *certainly impending* to constitute injury in fact." *Id.* (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)). Importantly, the claim of a "*possible* future injury" is not sufficient to confer standing. *Id.* Where, as here, a plaintiff claims injury from the future threat of arrest and prosecution, the Supreme Court has instructed that a plaintiff may evidence "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, [with] . . . a credible threat of prosecution thereunder." *Babbitt v. Farm Workers,* 442 U.S. 289, 298 (1979). A plaintiff may demonstrate a credible threat of prosecution by evidencing a "history of past enforcement." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 164 (2014). For example, in *Knife Rights, Inc. v. Vance*, the Second Circuit found that plaintiffs had demonstrated a credible threat of prosecution where a plaintiff "was officially charged, paid fines, surrendered property in purported violation of law, implemented a prosecution-approved compliance program, and entered into a deferred prosecution agreement that expressly threatened future charges if its terms were not satisfied." 802 F.3d 377, 385 (2d Cir. 2015); *see also Steffel v. Thompson*, 415 U.S. 452, 456 (1974) (finding credible threat of prosecution where the parties stipulated that if the plaintiff failed to stop handbilling, a warrant would issue and he might be arrested and charged). Here, Plaintiff has failed to adduce any credible threat of prosecution based on the

Storage and Surrender Policies.

The Handbook's storage and safeguarding provisions do not appear to constitute binding requirements. Instead, the phrase "[t]he following safety measures will be accepted as standard practice for the safeguarding of firearms" suggests that these provisions represent best practices rather than enforceable mandates. (Bellantoni Decl., Ex. 10 at 23.) Moreover, Plaintiff has failed to adduce any evidence that these provisions have been the basis for the revocation of his or anyone else's pistol license, the seizure of his or anyone else's weapons, or the arrest of Plaintiff or any other individual. That is, Plaintiff has failed to demonstrate any history of enforcement, or any credible threat of future enforcement. Notably, while Officer Adler claimed that Plaintiff initially refused to turn over his weapons, it is undisputed that Plaintiff was not charged with any crime and his purported refusal to surrender his weapons was not one of the grounds upon which his license was revoked. (*See* Bellantoni Decl., Ex. 14, ECF No. 109-15.) That is, Plaintiff expressly engaged in conduct that would purportedly cause him to be arrested or prosecuted and yet he was neither arrested nor prosecuted. Therefore, Plaintiff has failed to demonstrate a credible threat of future prosecution and lacks standing to prosecute these claims.[14]

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[14] Plaintiff also claims that the Pistol Licensing Bureau has a "policy requiring firearms to be kept unloaded and locked in a location separate from their ammunition." (Pl.'s Cty. Opp'n at 25.) In addition to the deficiencies noted above, Plaintiff's only evidence of this policy is his own deposition testimony. Such testimony, however, would constitute inadmissible hearsay and

C. Plaintiff's Pistol License Due Process Claims

On June 13, 2014, Plaintiff's pistol license was revoked. (Cty. Defs.' Reply 56.1 ¶ 60.) Although Plaintiff was provided with a post-revocation hearing on December 16, 2015, today, more than three years later, he has still not been provided with any decision from that hearing. (*Id.* ¶¶ 61-63.) Plaintiff claims that the Fourteenth Amendment guaranteed him a right to a hearing prior to the revocation of his pistol license. (Pl.'s Cty. Opp'n at 23-24.)

In *Spinelli v. City of New York*, however, the Second Circuit rejected this very claim. 579 F.3d 160, 170 (2d Cir. 2009). There, the NYPD suspended a gun-shop owner's gun license and seized her firearms. *Id.* at 164-65. The gun-shop owner argued that she was entitled to notice and a hearing prior to revoking her license and seizing her firearms. *Id.* at 170. The Second Circuit found that, "although notice and a pre-deprivation hearing are generally required, in certain circumstances, the lack of such pre-deprivation process will not offend the constitutional guarantee of due process, provided there is sufficient post-deprivation process." *Id.* (alterations and citation omitted). As the Second Circuit explained, the

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therefore Plaintiff has failed to create a triable issue of fact with respect to this claim. *See Raskin v. Wyatt Co.*, 125 F.3d 55, 66 (2d Cir. 1997) ("[O]nly admissible evidence need be considered by the trial court in ruling on a motion for summary judgment."); *Edwards v. Castro*, No. 16-CV-2383, 2018 WL 4680996, at *11 (S.D.N.Y. Sept. 28, 2018) (holding that plaintiff's own deposition statements constituted inadmissible hearsay on motion for summary judgment).

"necessity of quick action by the State or the impracticality of providing any meaningful pre-deprivation process, when coupled with the availability of some meaningful means by which to assess the propriety of the State's action at some time after the initial taking, can satisfy the requirements of procedural due process." *Id.* (alterations and citation omitted).

This reasoning applies with equal force here. The government has a compelling and pressing interest in quickly removing firearms, and the license permitting the carrying of firearms, from those whom it deems unqualified to carry firearms. By necessity, such seizures must be carried out quickly and, in the interest of the safety of all involved, without lengthy notice and debate. Here, the County has established a post-deprivation procedure which provides an individual notice and an opportunity to be heard. (*See* Cty. Defs.' 56.1 ¶¶ 66-67.) Indeed, Plaintiff took advantage of this very procedure. (*Id.* ¶¶ 68-69.). Therefore, under these circumstances, Plaintiff was not entitled to pre-deprivation process.[15]

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[15] While the Court assumes that Plaintiff has a protected property interest in his pistol license, it is not clear that this is the case. "A procedural due process claim is composed of two elements: (1) the existence of a property or liberty interest that was deprived and (2) deprivation of that interest without due process." *Bryant v. N.Y. State Educ. Dep't*, 692 F.3d 202, 218 (2d Cir. 2012). "To establish deprivation of a property interest, a plaintiff must demonstrate an interest "in a benefit that is 'more than an abstract need or desire for it . . . [He] must, instead, have a legitimate claim of entitlement to it' under state or federal law in order to state a § 1983 claim." *Finley v. Giacobbe*, 79 F.3d 1285, 1296 (2d Cir. 1996) (quoting *Bd. of Regents v. Roth*, 408 U.S. 564,

Plaintiff next argues that the County's failure to render a decision in the three years following his December 16, 2015 license revocation hearing violates due process. (Pl.'s Cty. Opp'n at 23-24.) Plaintiff does not challenge the County's license-revocation-hearing procedures. Instead, Plaintiff complains that the County's procedures have not proceeded quickly enough. But where procedures exist under state law but simply have not proceeded expeditiously, the Second Circuit has found that such delays do not constitute a due process violation. *See, e.g.*, *N.Y. State Nat'l Org. for Women v. Pataki*, 261 F.3d 156, 168 (2d Cir. 2001) (finding no due process violation based on delays in processing discrimination claims because "[o]nce the delay in the processing of any claim . . . became unreasonable, each [plaintiff] could have brought an Article 78 proceeding to mandamus . . . to proceed expeditiously to resolve the discrimination claim."); *Orange Lake Assocs., Inc. v. Kirkpatrick*, 21 F.3d 1214, 1221, 1224 (2d Cir. 1994) (stating that zoning board's delay did not violate due process because Article 78 procedure constituted adequate

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577 (1972)). "[A] benefit is not a protected entitlement if government officials may grant or deny it in their discretion." *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756 (2005). Under New York law, "[i]t is well-settled that the possession of a handgun license is a privilege, not a right." *Papaioannou v. Kelly*, 788 N.Y.S.2d 378, 378 (N.Y. App. Div. 2005) (collecting cases). And pistol-licensing officers have fairly broad discretion in determining whether to issue or revoke a pistol license. *See* N.Y. Penal Law § 400.00(3)(a). Therefore, because it is a discretionary decision on the licensing officer's part whether to revoke a pistol license, Plaintiff may not necessarily have a protected property interest in the license.

process); *C.C.S.com USA, Inc. v. Gerhauser*, 518 Fed. App'x 1, 3-4 (2d Cir. 2013) (finding that plaintiff who "never inquired into the status of its application or pursued an Article 78 hearing to compel" a decision from a local entity could not demonstrate denial of due process based on delay). Instead, the Second Circuit has found that "an Article 78 proceeding is a perfectly adequate postdeprivation remedy" under these circumstances. *Hellenic Am. Neighborhood Action Comm. v. City of New York*, 101 F.3d 877, 881 (2d Cir. 1996); *see also Alfaro Motors, Inc. v. Ward*, 814 F.2d 883, 888 (2d Cir. 1987) (holding that "adequate state procedures," such as an Article 78 proceeding, were "sufficient to protect claimed property interest"). Here, Plaintiff can file an Article 78 mandamus proceeding to compel a decision. Because he has a constitutionally-acceptable avenue to challenge the delayed decision regarding his pistol license, his due process claim must be dismissed.[16]

D. Plaintiff's Other Firearms Due Process Claims

Plaintiff similarly maintains that the seizure of his longarms without a hearing violated his due process

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[16] Moreover, concerns of federalism also warrant deference to the Article 78 procedures. New York State has designated a local agency with responsibility for making pistol license determinations. That local agency, with expertise in the relevant pistol licensing provisions, has already held a hearing. Deferring to that agency, and New York State's Article 78 procedures, "is more consistent with the 'spirit' of federalism than is unnecessarily subjecting [a] state agenc[y] to intrusive federal court intervention under the guise of § 1983." *N.Y. State Nat'l Org. for Women*, 261 F.3d at 169.

rights. (Pl.'s Cty. Opp'n at 22-23.) Unlike with Plaintiff's pistol license and handguns, Plaintiff was provided with no hearing related to the seizure of his longarms. (Cty. 56.1 ¶ 71.) County Defendants argue that no hearing was required because Plaintiff consented to the County's seizure of his longarms by instructing his wife to provide them to police officers. (Cty. Defs.' Reply at 6.) In other words, County Defendants argue that if property is lawfully seized, it need never be returned.

County Defendants' argument is bunk. It confuses the legality of the initial seizure of Plaintiff's firearms with the legality of the County's continued withholding of those firearms. While the County was justified in temporarily seizing Plaintiff's firearms, this does not mean that the County is justified in forever retaining those firearms. Indeed, the Second Circuit has long found due process violations where an individual's property was lawfully seized, but later not returned. For example, in *McClendon v. Rosetti*, the Second Circuit found that the procedures governing the return of non-contraband property to arrestees was unconstitutional. 460 F.2d 111, 116 (2d Cir. 1972). At the time, the police required an arrestee to pursue a civil claim against the police department to have their property returned. *Id.* at 113. As the Second Circuit held, "[i]t seems plain enough that absent evidence of unlawful conduct, criminal sanctions may not be imposed, nor property forfeited." *Id.* at 115 (internal citation omitted).

The Second Circuit recently addressed a claim similar to Plaintiff's in *Panzella v. Sposato*, 863 F.3d 210 (2d Cir. 2017). In *Panzella*, the plaintiff's

longarms were seized and held by the Nassau County Sheriff's Department following an order of protection entered against the plaintiff by New York Family Court. *Id.* at 214. After the Family Court order had been rescinded, the plaintiff repeatedly requested the return of her longarms. *Id.* In response, Nassau County instructed her that her only options were to seek a court order directing their return or appeal through an Article 78 proceeding. *Id.* at 214-15, 218. The Second Circuit found that the plaintiff's right to post-deprivation due process had been violated by the County's retention of her longarms. *Id.* at 219. In so finding, the Court employed the balancing test established by the Supreme Court in *Mathews v. Elridge*, 424 U.S. 314, 335 (1976), and weighed (1) the plaintiff's property interest, (2) the risk of erroneous deprivation based on Nassau County's procedures, and (3) the government's interest, including any additional burdens imposed on the government as a result of any supplementary procedures. *Panzella*, 863 F.3d at 218-19. The Second Circuit found that the plaintiff's property interest outweighed the government's interest in public safety, particularly because the plaintiff was permitted by law to purchase new longarms. *Id.*

Panzella is indistinguishable from the facts here. Plaintiff indisputably had a property interest in his longarms. It is undisputed that the County seized Plaintiffs' longarms and did not return them. The County has failed to articulate any government interest in keeping Plaintiff's longarms. Like in *Panzella*, Plaintiff's firearms were not contraband and were not the evidence of any crime. Indeed, it appears that the County simply gave the longarms away and

Plaintiff has since repurchased them. Therefore, the County has no justification for refusing to hold a post-deprivation hearing or return Plaintiff's property.[17]

The Court orders that the County provide Plaintiff with a hearing that meets the following conditions: (1) held before a neutral decision-maker; (2) limited to longarms that were not related to the commission of a crime or otherwise could be held lawfully by the plaintiff; (3) the County will have the burden of proving that it is likely to succeed in court on a cause of action to maintain possession of the seized

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[17] The Court notes that there is some tension between its determination that Article 78 provides adequate process for Plaintiff's pistol license claims but not for Plaintiff's longarms claims. Plaintiff's due process claim arising from his longarms are distinguishable in at least three ways from his due process claim arising from his pistol license. *First*, the Second Circuit appears to have drawn a distinction between cases in which a state has established procedures but has simply failed to expeditiously follow those procedures and those in which a state has not established procedures at all. *Compare N.Y. State Nat'l Org. for Women*, 261 F.3d at 168 (finding no due process violations arising from delays in state agency's claim processing given the availability of Article 78 procedures) *with Panzella*, 863 F.3d at 216 (finding Article 78 insufficient given the absence of any procedure for the return of longarms). *Second*, unlike pistols or handguns, no license is required to possess longarms like shotguns or rifles. *See* N.Y. Penal Law §§ 265.00(3), 400.00. Therefore, while the County's Pistol Licensing Bureau could ultimately determine that Plaintiff is not entitled to the restoration of his pistol license, and therefore the return of his handguns, the County does not appear to have any justification for failing to return his longarms. *Third*, the same federalism concerns are not implicated with respect to Plaintiff's longarms due-process claims, because unlike the County Pistol Licensing Bureau in Plaintiff's pistol-license claims, there is no state agency with which the court would be interfering.

longarms; (4) if Plaintiff prevails at the hearing, the neutral decision maker will determine what, if any, relief to grant Plaintiff.

E. Plaintiff's Stigma-Plus Claims

Plaintiff alleges that the County officers' false statements give rise to a stigma-plus claim under § 1983. (Pl.'s Cty. Opp'n at 12-13.) To succeed on a stigma-plus claim, "a plaintiff must show (1) the utterance of a statement sufficiently derogatory to injure his or her reputation, that is capable of being proved false, and that he or she claims is false, and (2) a material state-imposed burden or state-imposed alteration of the plaintiff's status or rights." *Disability Advocates, Inc. v. McMahon*, 124 F. App'x 674, 677 (2d Cir. 2005) (quoting *Sadallah v. City of Utica*, 383 F.3d 34, 38 (2d Cir. 2004) (internal quotation marks omitted)). "The state-imposed burden or alteration of status must be *in addition* to the stigmatizing statement." *Sadallah*, 383 F.3d at 38 (internal quotation marks omitted). This is commonly referred to as the "plus prong." As relevant here, "[b]urdens that can satisfy the 'plus' prong . . . include the deprivation of a plaintiff's property." *Id.* (quoting *Greenwood v. New York, Office of Mental Health*, 163 F.3d 119, 124 (2d Cir. 1998)).

Plaintiff points to two separate sets of allegedly derogatory statements in support of his stigma-plus claim. *First*, Plaintiff has adduced evidence that Officers Adler and Verdu informed CPEP employees that he was suicidal. Specifically, the officers reported to CPEP employees that Plaintiff had "asked police to tase him so that he would die." (State Defs.' 56.1 ¶ 5.) *Second*, Plaintiff has adduced evidence that the

officers filed written reports, which were ultimately provided to the County Pistol Licensing Bureau, and which reflected that Plaintiff had "made suicidal statements[,] . . . was highly irrational[,] and clearly a danger to himself." (Bellantoni Decl., Ex. 14.) Plaintiff claims that these allegedly defamatory statements resulted in his confinement in the CPEP unit, the revocation of his pistol license, and the seizure of his firearms. (Pl.'s Cty. Opp'n at 12-13.)

The County Defendants argue that Plaintiff's stigma-plus claim fails because the statements were privileged (because they were made for the purposes of medical treatment) and because none of these statements were publicly disseminated. (County Defs.' Mem. at 5, 7.) The Court is not persuaded by the County Defendants' arguments.

Although courts in this circuit have identified certain privileges sufficient to defeat a stigma-plus claim, this is not such a case. For example, courts have found that statements made in open court during judicial proceedings are absolutely privileged, without regard to falsity. *See Sharpe v. City of New York*, No. 11-cv-5494, 2013 WL 2356063, at *7 (E.D.N.Y. May 29, 2013), *aff'd,* 560 F. App'x 78 (2d Cir. 2014). Similarly, New York courts recognize a qualified privilege protecting "communication[s] made by one person to another upon a subject in which both have an interest," such as performace evaluations in the employment context. *Albert v. Loksen*, 239 F.3d 256, 272 (2d Cir. 2001) (quoting *Stillman v. Ford*, 238

N.E.2d 304, 306 (N.Y. 1968)).[18] Defendants cite to no precedent, however, for the proposition that false statements made to medical providers enjoy such a privilege, nor has the Court identified any.

The County Defendants' argument that the allegedly defamatory statements at issue were not publicly disseminated is similarly lacking. While the Second Circuit has recognized that "a statement made only to the plaintiff, and only in private," is insufficient to support a stigma-plus claim, a statement need only "be sufficiently public to create or threaten a stigma." *Velez v. Levy*, 401 F.3d 75, 87 (2d Cir. 2005). Plaintiff has adduced evidence that the officers made these statements to CPEP employees and also incorporated these statements in documents transferred to the County Pistol Licensing Bureau. The statements did not merely reside in internal reports kept securely within the County police department's files. Instead, these statements were shared with medical staff and a separate County department. While this dissemination is somewhat limited, Plaintiff has adduced evidence that this dissemination caused Plaintiff stigma. Specifically,

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[18] Even assuming the officers' statements to CPEP could qualify for such treatment, this qualified privilege gives way where a plaintiff alleges that statements were made "with actual malice, which is defined as personal spite, ill will, or culpable recklessness or negligence." *Friedman v. Ergin*, 487 N.Y.S.2d 109, 111 (N.Y. App. Div.), *aff'd*, 485 N.E.2d 1029 (N.Y. 1985). Here, Plaintiff alleges that the officers knowingly and falsely claimed that Mr. Torcivia was suicidal and a danger to himself for the purpose of fabricating probable cause. (Am. Compl. ¶¶ 64-65.) Such an allegation, if ultimately proven at trial, would defeat any qualified privilege.

Plaintiff was confined overnight in CPEP and his pistol license and weapons were seized as a result.

The cases cited by Defendants in support of their contention that the statements at issue were not publicly disseminated are inapposite. For example, in *Ingber v. New York City Department of Education*, the district court noted, without deciding, that allegedly defamatory statements were likely not sufficiently public to support a stigma-plus claim where the plaintiffs alleged that "red flags" were placed in their personnel file but failed to allege that anyone outside a specific department could even access such "red flags." No. 14-cv-3942, 2014 WL 6888777, at *3 (S.D.N.Y. Dec. 8, 2014). Similarly, in *Febres v. City of New York*, the district court dismissed stigma-plus claims where the plaintiff failed to allege that any information had actually been disclosed outside of an internal NYPD report and therefore failed to allege that he was harmed by any disclosure. 238 F.R.D. 377, 388 (S.D.N.Y. 2006). And, in *Petrone v. Hampton Bays Union Free School District*, the district court dismissed stigma-plus claims where the statements at issue were made within a private board meeting and Plaintiff failed to evidence any harm resulting from these statements. No. 03-cv-4359, 2013 WL 3491057, at *35 (E.D.N.Y. July 10, 2013), *aff'd,* 568 F. App'x 5 (2d Cir. 2014). Here, where Plaintiff has cited evidence that the allegedly defamatory statements at issue were shared outside the police department and resulted in concrete harm to him, the Court cannot resolve Plaintiff's stigma-plus claim as a matter of law.

F. Plaintiff's False-Imprisonment Claim Against the County Defendants

Section 50-h permits a municipality to demand an examination of an individual who files a notice of claim. N.Y. Gen. Mun. Law § 50-h. If a municipality makes such a demand, no action may be commenced against the municipality until a plaintiff complies with the demand. *Id.* If the examination is not conducted within ninety days of service of the demand, however, a plaintiff may commence his action. *Id.* Section 50-h further provides that if a plaintiff fails to appear at the hearing or requests an adjournment or postponement of the hearing, that plaintiff may not commence the action until he complies with the demand, even if the hearing ultimately takes place more than ninety days after the service of the demand. *Id.*

The County Defendants argue that Plaintiff failed to appear for a hearing pursuant to § 50-h and never rescheduled that hearing, therefore he was not permitted to file in federal court. (Cty. Defs.' Mem. at 7.) The parties do not dispute that the County twice adjourned the scheduled § 50-h hearing, and that the hearing was never rescheduled. (Cty. Defs.' Reply 56.1, Ex. B ¶¶ 3-9.; Pl.'s Cty. Opp'n at 13-14.) The County Defendants argue that Plaintiff had the burden to reschedule the hearing prior to filing in federal court. (Cty. Defs.' Mem. at 7). Plaintiff contends that because the County Defendants adjourned and ultimately never rescheduled the hearing, Plaintiff was excused from complying with § 50-h. (Pl.'s Cty. Opp. at 13-14.) Plaintiff is correct.

New York courts that have construed § 50-h under similar circumstances have found that a municipality's failure to promptly reschedule a hearing relieves a plaintiff of his burden under § 50-h. For example, in *Southern Tier Plastics, Inc. v. County of Broome*, a New York Appellate Division court excused a plaintiff's failure to attend a § 50-h hearing under strikingly similar circumstances. 862 N.Y.S.2d 175, 176 (N.Y. App. Div. 2008). There, a plaintiff requested the adjournment of a § 50-h hearing. *Id.* While the municipality agreed to adjourn the hearing, it instructed the plaintiff to contact it "as soon as possible" to reschedule the hearing. *Id.* The plaintiff did not reschedule the hearing and the municipality made no attempt to do so. *Id.* On these facts, the Appellate Division found: "When the hearing has been indefinitely postponed and the municipality does not serve a subsequent demand, a plaintiff's failure to appear for a hearing will not warrant dismissal of the complaint." *Id*; *see also Vargas v. City of Yonkers*, 883 N.Y.S.2d 720, 721 (N.Y. App. Div. 2009) (finding that where a plaintiff "adjourned the scheduled hearing date and no new hearing date was selected. . . , and the defendant did not serve a subsequent demand, the plaintiffs' failure to appear for a hearing did not warrant dismissal of the complaint"). Here, where it is undisputed that the County, and not Plaintiff, adjourned the § 50-h hearing, it was incumbent upon the County to reschedule the hearing or serve a subsequent demand. Therefore, Plaintiff's failure to be examined in a § 50-h hearing does not require the

dismissal of Plaintiff's common-law claims.[19]

II. Plaintiff's Claims Against the CPEP Defendants and CPEP Intern Smith

Plaintiff asserts two claims against the CPEP Defendants and CPEP Intern Smith arising from Plaintiff's confinement in CPEP: (1) a § 1983 claim based on alleged violations of the Fourth Amendment, and (2) an unlawful imprisonment claim under New York common law. (*See* Am. Compl. ¶¶ 217-18, 235-36; June 12, 2018 Ltr., ECF No. 126 (identifying remaining claims)). The CPEP Defendants and CPEP Intern Smith argue that summary judgment should be granted because none of the CPEP Defendants or CPEP Intern Smith were personally involved in any violation of Plaintiff's rights, there is no evidence that any of the CPEP Defendants or CPEP Intern Smith conditioned Plaintiff's discharge on the surrender of

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[19] County Defendants cite a number of cases in support of their contention that the burden was on Plaintiff to reschedule the § 50-h hearing. (Cty. Defs.' 8-9.) But, as Plaintiff notes, in every one of these cases, the plaintiff, and not the municipality, was the cause of the adjournment or postponement. *See, e.g.*, *Przybyla v. County of Suffolk*, No. 09-cv-5129, 2017 WL 1274051, *2 (E.D.N.Y. Mar. 3, 2017) (finding that where a plaintiff refused to answer questions at a 50-h hearing requiring its adjournment, it was plaintiff's responsibility to reschedule the hearing); *Kemp v. Cty. of Suffolk*, 878 N.Y.S.2d 135, 136 (N.Y. App. Div. 2009) (finding that "where the plaintiff invoked his Fifth Amendment privilege against self-incrimination at the . . . § 50-h [hearing], . . . the plaintiff, not the County defendants, was obligated to reschedule"); *Bernoudy v. Cty. of Westchester*, 837 N.Y.S.2d 187, 188 (N.Y. App. Div. 2007) (affirming dismissal "since the hearing pursuant to General Municipal Law § 50-h was adjourned at the plaintiff's request, and he commenced this action without rescheduling a new hearing date after the last adjournment").

his firearms, and even if Plaintiff's release were conditioned on the surrender of his firearms, his detainment would not violate the Fourth Amendment. (*See* Mem. Law Supp. Def. Mary Catherine Smith's Mot. Summ. J. ("Smith Mem.") at 9-21, ECF No. 129; State Defs.' Mem. Law Supp. Their Mot. Summ. J. ("State Defs.' Mem.") at 9-16, ECF No. 137.) The CPEP Defendants and CPEP Intern Smith also argue that they are entitled to qualified immunity. (Smith Mem. at 21-25; State Defs.' Mem. at 16-20.) Even assuming that the CPEP Defendants and CPEP Intern Smith were personally involved in any false arrest or imprisonment of Plaintiff, the Court finds that they are entitled to qualified immunity under federal and state law.

A. Qualified Immunity Under Section 1983 for the CPEP Defendants

"The doctrine of qualified immunity entitles public officers to be shielded from liability for damages unless their conduct violates clearly established constitutional rights of which a reasonable person would have known, or unless it was objectively unreasonable for them to believe that their acts did not violate those rights." *Gomez v. Pellicone*, 986 F. Supp. 220, 226 (S.D.N.Y. 1997) (internal citations omitted). "This standard is 'forgiving and protects all but the plainly incompetent or those who knowingly violate the law.'" *Burgess v. Town of Wallingford*, 569 F. App'x 21, 22 (2d Cir. 2014) (summary order) (quoting *Amore v. Novarro,* 624 F.3d 522, 530 (2d Cir. 2010)). Public officers are even entitled to qualified immunity if "officers of reasonable competence could disagree on the legality of the action at issue in its

particular factual context." *Walczyk v. Rio,* 496 F.3d 139, 154 (2d Cir. 2007) (internal quotation marks omitted). The Supreme Court has "repeatedly . . . stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991).

Courts in the Second Circuit apply a two-pronged analysis to claims of qualified immunity: "whether the facts shown 'make out a violation of a constitutional right,' and 'whether the right at issue was clearly established at the time of defendant's alleged misconduct.'" *Taravella v. Town of Wolcott*, 599 F.3d 129, 133 (2d Cir. 2010) (quoting *Pearson v. Callahan*, 555 U.S. 223, 232 (2009)). "Only Supreme Court and Second Circuit precedent existing at the time of the alleged violation is relevant in deciding whether a right is clearly established." *Moore v. Vega*, 371 F.3d 110, 114 (2d Cir. 2004). The Supreme Court has repeatedly instructed courts "not to define clearly established law at a high level of generality." *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (citation omitted). Instead, this inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Id.* (citation omitted). This is especially true "in the Fourth Amendment context, where the Court has recognized that it is sometimes difficult for an officer to determine how the relevant legal doctrine . . . will apply to the factual situation the officer confronts." *Kisela v. Hughes*, 138 S. Ct. 1148, 1152-53 (2018) (*quoting Mullenix*, 136 S. Ct at 308)). Further, "even if the right was 'clearly established,'" a court must consider, "whether it was 'objectively reasonable' for the officer to believe the conduct at issue was lawful." *Gonzalez v. City of Schenectady*, 728 F.3d 149,

154 (2d Cir. 2013) (quoting *Taravella*, 599 F.3d at 133–34).

Plaintiff argues that the CPEP Defendants unlawfully detained him in violation of the Fourth Amendment for "more than three hours" to permit the seizure of Plaintiff's weapons after determining that he was not in need of care or treatment and was not a danger to himself or others. (Pl.'s Mem. Opp'n State Defs.' Mot. for Summ. J. ("Pl.'s State Opp'n") at 24, ECF No. 142.) Plaintiff contends that "it has been clearly established that the State cannot involuntarily confine a person unless it has probable cause to believe that the person poses a danger to themselves or to others." (*Id.* at 16.) But even taking the facts in a light most favorable to Plaintiff, and even assuming that the conduct at issue violated the Fourth Amendment, the Court cannot conclude that the CPEP Defendants violated clearly established constitutional law, or at least that the CPEP Defendants' conduct was unreasonable under the circumstances.[20]

As an initial matter, Plaintiff points to no Second Circuit or Supreme Court precedent that would have clearly established that, under the circumstances, the CPEP Defendants' conduct violated the Constitution. Instead, Plaintiff cites to generalized standards governing the confinement of individuals in hospitals.

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[20] Notably, there is evidence in the record that the CPEP Defendants did not condition Plaintiff's discharge on the removal of his firearms. Specifically, it is undisputed that Dr. Yacoub made the final determination as to Plaintiff's medical discharge and that by the time Dr. Yacoub conducted his evaluation of Plaintiff, Plaintiff's firearms had already been removed. (State Defs.' 56.1 at ¶¶ 21-25.)

(Pl.'s State Opp'n at 16.) For example, Plaintiff cites to *O'Connor v. Donaldson*, in which the Supreme Court found the confinement for *almost 15 years* of a mentally ill but harmless individual who was capable of living independently to be unconstitutional. 422 U.S. 563, 564, 576 (1975). This decision, however, would not put the CPEP Defendants on notice that the confinement of an individual for *three hours* while police officers seized his firearms was unconstitutional. Nor would *Glass v. Mayas*, where the Second Circuit found that hospital defendants were objectively reasonable in continuing to hospitalize an individual whom they believed to be dangerous. 984 F.2d 55, 58 (2d Cir. 1993). This finding would not indicate to the CPEP Defendants that their conduct here was *not* objectively reasonable. Indeed, to rely on these cases would violate the Supreme Court's clear instruction "not to define clearly established law at a high level of generality." *al-Kidd*, 563 U.S. at 742.[21]

By contrast, the CPEP Defendants point to the Second Circuit's decision in *Kia P. v. McIntyre*, 235 F.3d 749, 762–63 (2d Cir. 2000). There, a newborn infant was withheld from the custody of her parents

[21] The same is true for *Anthony v. City of New York*, another case cited by Plaintiff, in which the Second Circuit found that police officers' seizure of an individual who was sitting calmly and quietly based on a 911 call was objectively reasonable. 339 F.3d 129, 137-38 (2d Cir. 2003). Plaintiff also cites to a variety of district and state court cases. But "[o]nly Supreme Court and Second Circuit precedent existing at the time of the alleged violation is relevant in deciding whether a right is clearly established." *Moore*, 371 F.3d at 114. Therefore, the Court need not consider these cases.

by a hospital after a toxicology test indicated the presence of methadone in her urine. *Id.* at 751. The hospital held the child against the stated wishes of the mother for a total of ten days, notwithstanding the fact that the hospital no longer had a medical reason for doing so after the eighth or ninth day. *Id.* During the day or two that followed, the hospital debated what to do with the child out of an apparent concern for parental abuse. *Id.* at 762-63. The Second Circuit found that this one-or two-day detention did not violate the Fourth Amendment because it was reasonable. *Id.* As the Second Circuit explained, to hold otherwise "would have put the Hospital defendants in an impossible position to have required them to decide whether further action and its attendant legal proceedings were advisable without allowing them some time in which to make that decision." *Id. Kia P.* is admittedly not on all fours with this matter, particularly because it involves the detainment of a newborn child. But it is certainly closer than the general principles of law cited by Plaintiff. In the absence of Supreme Court or Second Circuit precedent indicating otherwise, the CPEP Defendants did not violate a clearly established right.[22]

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[22] Plaintiff also argues that the CPEP Defendants' failure to immediately release Plaintiff upon a determination that he was not a danger to himself or others violated New York Mental Hygiene Law § 9.40(d), and therefore was objectively unreasonable in violation of the Constitution. (Pl.'s State Opp'n at 3-5.) Even if the CPEP Defendants and CPEP Intern Smith violated New York state law, it does not mean that they violated the federal constitution. To the contrary, the Second Circuit's "precedents have firmly established that the mere violation of a

Moreover, at the time that the CPEP Defendants purportedly determined to detain Plaintiff to allow his weapons to be seized they were aware of the following information: (1) County police officers had made a determination to transport Plaintiff to CPEP; (2) County police officers had reported that Plaintiff had acted suicidal; (3) County police officers reported that Plaintiff had acted belligerently and threateningly to his 17-year old daughter; (4) Plaintiff had been intoxicated; (5) Plaintiff's daughter reported to CPS that she was unhappy and frightened that Plaintiff was going to be released from CPEP; (6) Plaintiff's daughter referenced the fact that Plaintiff kept firearms in his home; (7) Plaintiff's daughter had called CPS four times; (8) CPS had advised Plaintiff's daughter to leave home and stay with a friend overnight; and (9) Plaintiff's daughter had previously been transported to CPEP on a few occasions. (State Defs.' 56.1 ¶¶ 2-5, 7, 14, 15, 16, 30; Smith's 56.1 ¶¶ 68-69, 75-78, 85, 87, 89-93.) Under these circumstances, state hospital employees could reasonably believe that they were not violating the Fourth Amendment by detaining Plaintiff for an additional three hours to allow County police officers to seize his weapons.

For all of these reasons, the Court finds that the CPEP Defendants are entitled to qualified immunity.

B. Qualified Immunity Under § 1983 for CPEP Intern Smith

While it is undisputed that the CPEP Defendants

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state law does not automatically give rise to a violation of federal constitutional rights." *Zahra v. Town of Southold*, 48 F.3d 674, 682 (2d Cir. 1995).

are state actors, and therefore can benefit from qualified immunity, the parties dispute whether CPEP Intern Smith is a state or private actor, and whether she qualifies for immunity.[23] (*See* Smith Mem. at 12-13, 21-24; Pl.'s Mem. Opp'n Def. Smith's Mot. Summ. J. ("Pl.'s Smith Opp'n") at 18-21.) To the extent that CPEP Intern Smith is a state actor, she is entitled to qualified immunity for the same reasons as the CPEP Defendants. Even if CPEP Intern Smith is a private actor, however, she nonetheless is entitled to qualified immunity. Courts have extended qualified immunity to private actors where their conduct was: "isolated, taken at the specific direction of the government, or done without profit or other marketplace incentive." *Estiverne v. Esernio-Jenssen*, 833 F. Supp. 2d 356, 377 (E.D.N.Y. 2011). For example, in *Pani v. Empire Blue Cross Blue Shield*, the Second Circuit found that private administrators of federal Medicare claims could benefit from qualified immunity because their efforts to detect Medicare fraud were required by law and they had no personal interest in the pursuit of such fraud. 152 F.3d 67, 73 (2d Cir. 1998). These considerations apply with equal force here.

CPEP Intern Smith interned at CPEP for approximately 8 months. (Def. Smith's Reply Pl.'s 56.1 Counterstatement ("Def. Smith's Reply 56.1") ¶ 173,

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[23] Plaintiff argues that CPEP Intern Smith is a state actor, and therefore can be held liable under § 1983, but is not entitled to qualified immunity for the same reasons as the CPEP Defendants. (Pl.'s Smith Opp'n at 18-21.) CPEP Intern Smith argues that she is not a state actor, but at the same time should benefit from qualified immunity. (Smith Mem. at 12-13, 21-24.)

ECF No. 117.) It is undisputed that, on April 7, 2014, when Plaintiff was brought to CPEP, CPEP Intern Smith did not have the ability to diagnose Plaintiff. (Def. Smith's 56.1 ¶ 121.) It is similarly undisputed that Smith did not have the authority to discharge Plaintiff or any other patient. (*Id.* ¶¶ 117-18.) Indeed, CPEP Intern Smith had "no role with regards to the medical aspect or medical decisions related to patients." (*Id.* ¶ 136.) Instead, the final decision to discharge a patient would rest with Dr. Yacoub, a state official. (*Id.* ¶¶ 123-24.) And if Dr. Yacoub decided to discharge a patient, his staff, including CPEP Intern Smith, were supposed to follow such an order. (*Id.* ¶ 125.) Therefore, with respect to Plaintiff and any other patient, CPEP Intern Smith only acted at the specific direction of state officials, like Dr. Yacoub and others. She had little to no discretion in carrying out her instructions. Moreover, as a medical intern, CPEP Intern Smith's conduct was done without monetary or market incentives. That is, CPEP Intern Smith would not be compensated based on how well or how poorly she treated a patient like Plaintiff. Therefore, based on these factors, the Court finds that CPEP Intern Smith is entitled to qualified immunity. Indeed, it would be incredibly unjust under the circumstances to find that a student intern could not qualify for qualified immunity while her supervisors—at whose direction she worked— could. Because CPEP Intern Smith qualifies for immunity either as a state or private actor, for the reasons stated above, she is also entitled to qualified immunity for any violation of Plaintiff's rights.

C. Qualified Immunity under New York Law

New York state common law provides parallel immunity to "public employees 'from liability for discretionary actions taken during the performance of governmental functions' and 'is intended to ensure that public servants are free to exercise their decision-making authority without interference from the courts.'" *United States v. City of New York*, 717 F.3d 72, 94 (2d Cir. 2013) (quoting *Valdez v. City of New York*, 18 N.Y.3d 69, 75-76 (2011)). Courts have observed that New York common-law immunity "affords public officials considerably greater protection from individual capacity suits than the federal doctrine of qualified immunity." *Hirschfeld v. Spanakos*, 909 F. Supp. 174, 180 (S.D.N.Y. 1995). Determining whether immunity applies under New York common law, "requires analysis of the functions and duties of the actor's particular position and whether they inherently entail the exercise of some discretion and judgment." *Mon v. City of New York*, 579 N.E.2d 689, 691 (N.Y. 1991). If the functions and duties at issue are essentially "clerical or routine, no immunity will attach." *Id.* at 692. On the other hand, when "official action involves the exercise of discretion or expert judgment in policy matters, and is not exclusively ministerial, a municipal defendant is generally not answerable in damages for the injurious consequences of that action." *Id.* (quoting *Haddock v. City of New York*, 553 N.E.2d 987, 991 (N.Y. 1990)).

Courts have previously found that state and city doctors can qualify for this type of immunity. *E.g.*, *Newtown v. City of New York*, 738 F. Supp. 2d 397, 411-12 (S.D.N.Y. 2010) (finding that laboratory

scientist was entitled to immunity); *Babi-Ali v. City of New York*, 979 F. Supp. 268, 278-79 (S.D.N.Y. 1997) (finding that a doctor conducting a medical examination was absolutely immune from claims of malicious prosecution); *Newkirk v. Allen*, 552 F. Supp. 8, 11 (S.D.N.Y. 1982) (finding that Veterans Administration hospital employees were absolutely immune from state law claims).

The CPEP Defendants' conduct here was indisputably discretionary in nature. The CPEP Defendants each met with and evaluated Plaintiff, relying on their respective expertise as a nurse practitioner, social worker, or attending physician. Following these evaluations, these subject-matter experts exercised their judgment and discretion in determining that retaining Plaintiff for an additional few hours to permit County police officers to seize his firearms would be reasonable under the circumstances. In other words, the CPEP Defendants "made a decision based upon [their] interpretation of the facts as presented." *Babi-Ali*, 979 F. Supp. at 278. In doing so, they "exercised [their] medical discretion." *Id.*

CPEP Intern Smith did not have the authority to diagnose or discharge Plaintiff. (State Def.'s 56.1 ¶¶ 117-18, 121, 136.) Therefore, she necessarily exercised less discretion that the CPEP Defendants. At the same time, however, the Court cannot say that a social work intern assisting a licensed social worker in treating an individual is engaged in purely ministerial tasks. CPEP Intern Smith conducted an interview of Plaintiff, took notes during the interview, and entered notes from that interview into Plaintiff's treatment

plan. (Def. Smith's 56.1 ¶¶ 47-53; State Defs.' 56.1 ¶ 27-28.) Conducting an interview for the purposes of medical treatment and determining the salient information from that interview to include in a patient's treatment plan undoubtedly requires the exercise of expertise and discretion. And, as noted above, it would be incredibly inequitable to grant CPEP Intern Smith's supervisors qualified immunity while not granting her the same immunity for substantially similar tasks.

In determining whether to apply common law immunity, the Second Circuit has posited the following question: "[I]s the act complained of the result of a judgment or decision which it is necessary that the Government official be free to make without fear or threat of vexatious or fictitious suits and alleged personal liability?" *Ove Gustavsson Contracting Co. v. Floete*, 299 F.2d 655, 659 (2d Cir. 1962). Here, the answer to that question is an unqualified yes. For these reasons, the Court grants the CPEP Defendants and CPEP Intern Smith qualified immunity.

CONCLUSION

For the foregoing reasons, the County Defendants' motion for summary judgment is denied in part and granted in part. Plaintiff's *Monell* claims arising from the seizure of Plaintiff's weapons, Second Amendment claims, and all claims against Thomas Carpenter and William Scrima are dismissed. Plaintiff's motion for summary judgment is denied in part and granted in part. The Court finds that the County Defendants deprived Plaintiff of post-deprivation due process under the Fourteenth Amendment by failing to hold a

hearing with respect to his longarms. All of Plaintiff's remaining Fourteenth Amendment due process claims are dismissed. The CPEP Defendants' and CPEP Intern Smith's motions for summary judgment are granted in full and all claims against them are dismissed.

SO ORDERED:

/s/ LDH
LASHANN DEARCY HALL
United States District Judge

Dated: Brooklyn, New York
March 31, 2019

[Filed March 29, 2019, Document 148]

Appendix D

CONSTITUTIONAL AND STATUTORY PROVISIONS

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

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

Section 1 of the Fourteenth Amendment to the U.S. Constitution provides, in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the

party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.