No. 21-1522

In The
Supreme Court of the United States

WAYNE TORCIVIA,

Petitioner,

v.

SUFFOLK COUNTY, NEW YORK, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF *AMICI CURIAE* FIREARMS POLICY COALITION AND FPC ACTION FOUNDATION IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF *AMICI CURIAE* FIREARMS POLICY COALITION AND FPC ACTION FOUNDATION IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2(b), Firearms Policy Coalition and FPC Action Foundation respectfully request leave to submit a brief as *amici curiae* in support of the Petition for Writ of Certiorari.

As required under Rule 37.2(a), *amici* provided timely notice to all parties' counsel of their intent to file this brief more than 10 days prior to the brief's due date. Petitioner and Respondents Steele, D'Anna, and Yacoub consented to the brief. Respondents Smith, Adler, Carpenter, Scrima, Halpin, Verdu, and Suffolk County, New York denied consent.

Both *amici* are nonprofit organizations dedicated to protecting constitutional rights and preserving the original understanding of the Constitution.

Firearms Policy Coalition (FPC) is a 501(c)(4) nonprofit membership organization incorporated under the laws of Delaware, with its principal place of business in Sacramento, California, and with members and supporters throughout the country. FPC's primary mission is to protect and defend the rights guaranteed by the United States Constitution. FPC accomplishes its mission through legislative and grassroots advocacy, legal and historical research, litigation, education, and outreach programs.

FPC Action Foundation (FPCAF) is a 501(c)(3) nonprofit public benefit organization dedicated to preserving the rights and liberties protected by the Constitution. FPCAF serves its members and the public through charitable programs including research, education, and legal efforts intended to inform the public about the importance of constitutional rights.

Amici's interests will be substantially affected by the outcome of this case. The Fourth Amendment rights of *amici*'s members will be severely limited by a broad "special needs" exception that allows warrantless intrusions into the home. Additionally, the Castle Doctrine is fundamental to many of the other constitutional rights that *amici* are devoted to defending in addition to the Fourth Amendment, including the First, Second, Fifth, and Fourteenth Amendments. *Amici* have a significant interest in ensuring that the historical foundations of the Castle Doctrine are understood and that the sanctity of the home is properly protected.

Amici respectfully submit that they offer unique perspectives and information that will assist the Court beyond the help the parties will provide. Both *amici* regularly litigate constitutional issues and research the original understanding of constitutional rights. *Amici* thus have extensive knowledge of the history of unlawful home intrusions, how deeply rooted the Castle Doctrine is in American law, and what governmental actions the Fourth Amendment was designed to prevent.

Specifically, in the brief, *amici* cover the history of protections against home intrusions by government actors from fifteenth-century England through colonial and founding-era America to the debates surrounding the ratification of the Constitution and Bill of Rights. The brief demonstrates that the "special needs" exception to the Fourth Amendment applied by the lower court would allow many of the home intrusions the founders vehemently opposed, undermining the Constitution and centuries of tradition.

Because these concerns affect the constitutional rights of *amici*'s members as well as *amici*'s core purposes of defending constitutional rights, *amici* respectfully seek leave to file their brief in support of the Petition for Writ of Certiorari.

Respectfully submitted,

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INTEREST OF THE *AMICI CURIAE*[1]

Firearms Policy Coalition (FPC) is a nonprofit organization devoted to advancing individual liberty and defending constitutional rights. FPC accomplishes its mission through legislative and grassroots advocacy, legal and historical research, litigation, education, and outreach programs. FPC's legislative and grassroots advocacy programs promote constitutionally based public policy. Its historical research aims to discover the founders' intent and the Constitution's original meaning. And its legal research and advocacy aim to ensure that constitutional rights maintain their original scope.

FPC Action Foundation (FPCAF) is a nonprofit organization dedicated to preserving the rights and liberties protected by the Constitution. FPCAF focuses on research, education, and legal efforts to inform the public about the importance of constitutional rights—why they were enshrined in the Constitution and their continuing significance. FPCAF is determined to ensure that the freedoms guaranteed by the Constitution are secured for future generations.

The scholarship or *amicus* briefs of the Foundation's Director of Constitutional Studies, Joseph Greenlee, was cited in *N.Y. State Rifle & Pistol Ass'n v.*

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[1] All parties received timely notice of this brief. Petitioner and Respondents Steele, D'Anna, and Yacoub consented to the brief. Respondents Smith, Adler, Carpenter, Scrima, Halpin, Verdu, and Suffolk County, New York denied consent. No counsel for any party authored the brief in any part. Only *amici* funded its preparation and submission.

Bruen, 597 U.S. __ (2022), slip op. at 21; *Chiafalo v. Washington*, 140 S. Ct. 2316, 2325 (2020); and *N.Y. State Rifle & Pistol Ass'n v. City of N.Y.*, 140 S. Ct. 1525, 1541 (2020) (Alito, J., dissenting).

Amici are interested in this case because it concerns the sanctity of the home and the original meaning of the United States Constitution.

SUMMARY OF ARGUMENT

The sanctity of the home is central to American freedom. It has been central to the idea of freedom since the Roman Republic, and it was cherished by Englishmen for centuries leading up to the American Revolution.

Embodied in the Castle Doctrine, the inviolability of the home was celebrated by leading English legal authorities, including Edward Coke, William Hawkins, and William Blackstone. As William Pitt the Elder famously declared, even the poorest soul in the country had the right to defy the king in his own home.

American colonists had no tolerance for home intrusions. Violations of the home often resulted in hostility. Eventually, the colonial response to abusive home intrusions became so violent that many lawful searches could not be conducted.

American resistance to home invasions ultimately led to the American Revolution. According to John Adams, when James Otis delivered his fiery speech against writs of assistance, American independence was born.

Many debates over the United States Constitution and the Bill of Rights focused on the need for robust and explicit protections for the home. Ultimately, the home became central to the Bill of Rights, as the First through Fifth Amendments collectively create a zone of safety and protection in the home. Thus, the home

has remained every American's castle throughout American history.

The Second Circuit's application of the "special needs" exception—the rejected "community caretaking" exception by another name—would allow many of the home intrusions the founders vehemently opposed, undermining the Constitution and centuries of tradition. Its dismissive treatment of the Fourth Amendment is part of a larger trend in which lower courts are undermining the Bill of Rights to avoid protecting firearms and firearm owners.

Plenary review is warranted because the Second Circuit wrongly decided an important question of constitutional law. But because the lower court disregarded this Court's recent *Caniglia v. Strom* decision, the relevant facts are undisputed, and the decision below is clearly in error, this case is also a strong candidate for summary reversal.

ARGUMENT

I. The sanctity of the home has long been viewed as essential to liberty.

Marcus Tullius Cicero once asked: "What is more sacred, what more inviolably hedged about by every kind of sanctity, than the home of every individual citizen?" He continued: "Within its circle are his altars, his hearths, his household gods, his religion, his observances, his ritual; it is a sanctuary so holy in the eyes

of all." Marcus Tullius Cicero, CICERO, THE SPEECHES, WITH AN ENGLISH TRANSLATION 263 (N.H. Watts ed., 1923).

Nearly two millennia later, William Blackstone, "agreeing . . . with the sentiments of ancient Rome," explained that "the law of England has so particular and tender a regard to the immunity of a man's house, that it stiles it his castle, and will never suffer it to be violated with impunity." 4 William Blackstone, COMMENTARIES 223 (3d ed. 1769). "For this reason," Blackstone explained, "no doors can in general be broken open to execute any civil process." *Id.* And "a man may assemble people together lawfully (at least if they do not exceed eleven) without danger of raising a riot, rout, or unlawful assembly, in order to protect and defend his house." *Id.* at 223-24; *see also* 1 William Hawkins, A TREATISE OF THE PLEAS OF THE CROWN 158 (3d ed. 1739) ("an Assembly of a Man's Friends in his own House, for the Defence of the Possession thereof . . . is indulged by Law; for a Man's House is look'd upon as his Castle").

The inviolability of the home was expressed in English law since the fifteenth century. "As early as the 13th Yearbook of Edward IV (1461-1483), at folio 9, there is a recorded holding that it was unlawful for the sheriff to break the doors of a man's house to arrest him in a civil suit in debt or trespass." *Miller v. United States*, 357 U.S. 301, 307 (1958). The same opinion prevailed in the decades leading up to the American Revolution. *See* 2 Hawkins, PLEAS OF THE CROWN, at 86-87 ("[W]here one lies under a probable Suspicion only, and

is not indicted . . . no one can justify the Breaking open Doors in Order to apprehend him.").

The Castle Doctrine was formalized by the early sixteenth century. The adage that "a man's house is his castle" comes from a 1499 case; it emphasized that Englishmen had a right to self-defense in the home:

> If one is in his house, and hears that such a one will come to his house to beat him, he may assemble folk of his friends and neighbors to help him. . . . [A] man's house is his castle and defense, and where he has a peculiar right to stay.

Y.B. Trin. 14 Henry 7 (1499), reported in Y.B. 21 Henry 7, fol. 39, Mich., pl. 50 (1506) ("Anonymous." No case name).

Later that century, a leading Justice of the Peace manual noted that "our law calleth a man's house, his castle, meaning that he may defend himselfe therein." William Lambarde, EIRENARCHA 257 (1591).

The best-known Castle Doctrine decision is *Semayne's Case*, from 1604. George Berisford died while still owing a debt to Peter Semayne, so Semayne secured a writ for the Sheriff of London to seize Berisford's goods and papers from his home to satisfy the debt. But Berisford's home now belonged to Berisford's former joint tenant, Richard Gresham, who refused to let the sheriff in. When Semayne sued Gresham for frustrating the execution of the warrant, the King's Bench ruled in Gresham's favor. Edward Coke

summarized the court's decision by emphasizing that one's home is his "castle," "fortress," and "surest refuge":

> That the house of everyone is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose . . . if thieves come to a man's house to rob him, or murder, and the owner of his servants kill any of the thieves in defence of himself and his house, it is not felony, and he shall lose nothing . . . every one may assemble his friends and neighbours to defend his house against violence . . . because domus sua cuique est tutissimum refugium [to everyone his house is his surest refuge].

Semayne's Case, 77 Eng. Rep. 195, 5 Coke Rep. 91a (K.B. 1604).

The home did not only protect against violence and, sometimes, arrest. It protected against all types of intrusion. William Pitt the Elder (Prime Minister 1766-68) famously explained in 1763,

> The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail—its roof may shake—the wind may blow through it—the storm may enter—the rain may enter—but the King of England cannot enter!—all his force dares not cross the threshold of the ruined tenement!

William Pittenger, ORATORY SACRED AND SECULAR 146 (1878).

The home was also sacred for protecting property. As Lord Camden—popular in America and an inspiration for the Fourth Amendment—put it: "The great end for which men entered into society was to secure their property . . . every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my license, but he is liable to an action, though the damage be nothing . . . for bruising the grass and even treading upon the soil." *Boyd v. United States*, 116 U.S. 616, 627 (1886) (quoting *Entick v. Carrington*, 19 How. St. Tr. 1029 (1765)).

Unless there was a warrant based on solid evidence, the home was also protected from government officials in pursuit of criminals. According to Coke, "for justices of the peace to make warrants upon surmises, for breaking the houses of any subjects to search for felons, or stoln goods, is against Magna Carta" as well as statutory law. Edward Coke, THE FOURTH PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 176-77 (1797); *see also* Michael Foster, CROWN LAW 321 (1762) ("bare Suspicion touching the Guilt of the Party will not warrant a Proceeding to this Extremity [entering the home without consent], though a Felony hath been actually Committed.").

II. American colonists did not tolerate violations of the home.

A. Colonial Resistance.

Colonists viewed their homes as their inviolable castles. "[E]arly American colonists reviled search and

seizure on the grounds that they unduly interfered with private life. Colonial enmity extended beyond general warrants to any government entry into the home. Response to such searches tended to be immediate and visceral." Laura Donohue, *The Original Fourth Amendment*, 83 U. CHI. L. REV. 1181, 1240 (2016). "The question was not whether a warrant was general or specific; efforts to serve either kind of instrument resulted in hostility." *Id.* at 1240-41.

In 1663, a Rhode Island constable executing a search warrant in the king's name was refused by three men with axes. The men explained that they respected the king and court, but no one had authority over their home: "ther answer was that the king they owned and the Court they owned but they would not come out: but weare [resolved] to knocke Downe any man that should pry in upon them for ther howse was ther Castle and this was the min[d] of one and all." 2 RHODE ISLAND COURT RECORDS 1662-1670, at 16 (1922). They were never convicted for violently preventing the search. *Id.* at 16-18.

"Between 1678 and 1681, the citizens of Schenectady and Albany repeatedly stopped Sheriff Richard Pretty from searching their houses and carts to police the Indian trade." William J. Cuddihy, THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING, 602-1791, at 207 (2009) (citing 2 MINUTES OF THE COURT OF ALBANY, RENSSELAERSWYCK AND SCHENECTADY, 1675-80, at 361-62 (A.J.F. Van Laer ed., 1928)).

When a New Hampshire sheriff went house-to-house attempting to collect money and seize goods to cover taxes that had been imposed without consent in 1684, "the sheriff was resisted and driven off with clubs; the women having prepared hot spits and scalding water to assist in the opposition . . . he was beaten, and his sword was taken from him; then he was seated on an horse, and conveyed out of the province to Salisbury with a rope about his neck and his feet tied under the horse's belly." 1 Jeremy Belknap, THE HISTORY OF NEW HAMPSHIRE 110-11 (John Farmer ed., 1831); *see also* 1 DOCUMENTS AND RECORDS RELATING TO THE PROVINCE OF NEW HAMPSHIRE 1623-1686, at 551 (Nathanial Bouton ed., 1867). None of the townspeople involved in running the sheriff out of town were convicted. *Id.* at 551-54.

In 1698, when customs officers searched a New York City home for illegally imported East India goods, "a Tumult of the Merchants was made who came to [the] house, and . . . the said officers were locked up and imprisoned for three hours" in the home. 4 DOCUMENTS RELATIVE TO THE COLONIAL HISTORY OF THE STATE OF NEW YORK 324 (E.B. O'Callaghan ed., 1854).

Four years later, Jonathan Mendum of York, Massachusetts, prevented the constable from executing a general warrant and searching his home for stolen goods. Mendum received a light punishment: public admonition and a small fine. 4 PROVINCE AND COURT RECORDS OF MAINE 277-78 (Neal Allen ed., 1958). "The leniency with which . . . truculent houseowners were punished demonstrated the popularity of excluding the

constable from one's dwelling in colonial New England." Cuddihy, FOURTH AMENDMENT, at 185.

In 1733, the home of Thomas Cresap—who later organized and led Maryland's Sons of Liberty, *see* Mynna Thruston, COL. THOMAS CRESAP 9 (1923)—was surrounded by the sheriff of Lancaster County and dozens of Pennsylvanians who challenged his claim to the land. Refusing to surrender, "Cresap declared his house was his Castle and he would Defend it." 28 PROCEEDINGS OF THE COUNCIL OF MARYLAND, 1732-1753, at 62 (1908). When the men broke in, Cresap shot one before they overwhelmed him. In the end, some of the intruders, rather than Cresap, were convicted for the incident.

The following year, a sea captain was killed in Charleston, South Carolina while trying to prevent a marshal from boarding his vessel by firing a cannon at him. The public rallied in support of the captain. One among those assembled declared,

> [M]y house is my castle, and so is my ship, and therefore . . . I lay it down as a fundamental Law of Nations, that if the greatest Officer the King has, was to come with a thousand Warrants against me for any crime whatsoever, if he offers to take me out of my castle, I can kill him, and the law will bear me out.

Cuddihy, FOURTH AMENDMENT, at 188 (quoting THE SOUTH CAROLINA GAZETTE, no. 40, Oct. 26-Nov. 2, 1734, at p.2, col.1).

While the incidents of self-help against home intrusions by government officials were inherently disorderly and a last resort, failure to prevent forcible intrusions sometimes resulted in violence against the occupants of the home.[2]

B. The Road to Revolution.

In 1761, Parliament authorized writs of assistance, allowing the British army to conduct warrantless searches to repress the widespread smuggling (for import/export tax avoidance) occurring in New England. Massachusetts Advocate-General James Otis refused to defend the legality of the writs of assistance. Instead, he resigned and represented pro bono the Americans challenging the writs in *Paxton's Case*, 1 Quincy 51 (Mass. 1761). Otis's oral argument against the writs became the most famous legal speech in colonial America:

> Now, one of the most essential branches of English liberty is the freedom of one's house. A man's house is his castle; and whilst he is quiet, he is as well guarded as a prince in his castle. This writ, if it should be declared legal, would totally annihilate this privilege.

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[2] A Virginian in 1702 complained to the governor that a sheriff forcibly entered his home to collect a tax he had already paid, and "beat [his] wife very much and abuse her after a very Grievous manner and wounded her in severall places and threaten her so much that she is afraid to stay att home." The sheriff later returned to "breake open a doore of [the] house" and nearly killed a young child in the process. 16 VIRGINIA COLONIAL ABSTRACTS: RICHMOND COUNTY RECORDS 1692–1704, at 82 (1961).

> Custom-house officers may enter our houses when they please; we are commanded to permit their entry. Their menial servants may enter, may break locks, bars, and everything in their way; and whether they break through malice or revenge, no man, no court can inquire. Bare suspicion without oath is sufficient.

James Otis, Against Writs of Assistance (Feb. 24, 1761, argument before Superior Court of Massachusetts), *in* 2 Charles Francis Adams, THE WORKS OF JOHN ADAMS 524 (1856) (John Adams's notes recording Otis's speech). John Adams later recalled, "American independence was then and there born. Every man of an immense, crowded audience appeared to me to go away, as I did, ready to take up arms against writs of assistance." 2 John Stetson Barry, THE HISTORY OF MASSACHUSETTS 266 (1856).

In 1765, customs officer John Robinson conducted large-scale warrantless searches after a crowd recaptured goods he had previously seized. With roughly 70 armed men, he searched "all the Houses and stores wherever he pleased." Cuddihy, FOURTH AMENDMENT, at 493. Robinson's search produced intense backlash from the public as well as officials. *Id.* at 491-96.

The best-known search in colonial America occurred at Daniel Malcom's Boston home in 1766. Law enforcement believed that Malcom's cellar contained smuggled liquor, so several officers searched Malcom's home under the authority of a writ of assistance the comptroller had obtained the year before. Malcom

refused to open the cellar. When the officers threatened to break into the cellar, Malcom armed himself with pistols and a sword and threatened them. The officers left to regroup, and by the time they returned, Malcom had barricaded his home. Unable to force their way in, the officers ordered Malcom's neighbors to help—but the neighborhood overwhelmingly sympathized with Malcom and refused. The officers eventually gave up. *Id.* at 496-501. Malcom was not prosecuted for refusing the search. *Id.* at 530.

Afterwards, Malcom continued to deny the smuggling accusations, but explained that he refused the search anyway because "he thought it cruel hard that the private recesses of his house should be liable to be searched on every trifling Information, be it true or false." *Id.* at 550. Malcom exclaimed that "he knew the Laws and that no body had a right to come into his House." *Id.* at 551. As one witness explained, Malcom "looked upon his House as his Castle" and was "determined to know if the Officers had any right to break [it] open." *Id.* Another witness explained that "the breaking open a man's House . . . was not common in this Country." *Id.*

"Although extreme, Malcom's views typified the mood of the day in Massachusetts." *Id.* Captain William MacKay of Boston echoed Malcom's sentiment:

> I always understood a man's House was his Castle and that it could not be broke open unless for murder, Treason, and Theft. . . . There never was such a thing as Private Dwellings

> being search'd before and if such things were allow'd, there was an end of everything.

Id. The writ of assistance issued in Malcom's case was apparently the last one issued in Boston. "The Malcom episode was . . . a tombstone on the productive use of writs of assistance in Massachusetts." *Id.* at 501.

Parliament's Townshend Revenue Act of 1767 allowed customs officers "to enter houses or warehouses, to search for and seize goods prohibited to be imported or exported . . . or for which any duties are payable, or ought to have been paid." DOCUMENTARY SOURCE BOOK OF AMERICAN HISTORY, 1606-1913, at 146 (William MacDonald ed., 1918).

Patriot lawyer John Dickinson called the Townshend Acts an "engine of oppression," because "the officers of the customs [were] impowered to enter into any HOUSE . . . in America to search for or seize prohibited or unaccustomed goods, etc." Dickinson argued that "such a power was dangerous to freedom, and expressly contrary to the common law, which ever regarded a man's house as his castle, or a place of perfect security." John Dickinson, LETTERS FROM A FARMER IN PENNSYLVANIA, TO THE INHABITANTS OF THE BRITISH COLONIES 70-71 (Books on Demand 2020). Dickinson "had a pervasive, deep impact on colonial legal opinion and provided one of the foremost American precedents for the Fourth Amendment. . . . [his] influence reached throughout the colonies." Cuddihy, FOURTH AMENDMENT, at 546.

Soon after, in 1772, Boston's "Committee of Correspondence"—twenty-one patriots including Samuel Adams, James Otis, and Joseph Warren—created "The Boston Pamphlet." "[S]tat[ing] the Rights of the Colonists," the Boston Pamphlet articulated rights later identified in the Declaration of Independence and the Constitution, and complained of "the Infringements and Violations thereof." *The Votes and Proceedings of the Freeholders and Other Inhabitants of the Town of Boston, In Town Meeting Assembled, According to Law*, at iii (1772). The Pamphlet explained, "The Supreme Power cannot justly take from any Man, any Part of his Property without his consent." *Id.* at 10. For the government to "have a Right, at Pleasure, to give and grant the Property of the Colonists" was "utterly irreconcilable to the[] Principles" of "natural Law and Justice, and the great Barriers of all Free States." *Id.* "What Liberty can there be," it asked, "where Property is taken away without Consent?" *Id.* at 11.

Regarding searches and seizures, the Pamphlet lamented that Board of Custom Commissioners had been:

> invested with Powers altogether unconstitutional, and entirely destructive to that Security which we have a right to enjoy; and to the last degree dangerous, not only to our property, but to our lives. . . . his Majesty gives and grants unto his said Commissioners . . . and to all and every the . . . Deputy Collectors . . . full Power and Authority . . . to go into any House, Shop, Cellar, or any other Place, where any Goods, Wares or Merchandizes lie

> concealed, or are *suspected* to lie concealed, whereof the customs and other duties, have not been, or shall not be, duly paid . . . ; and the said House, Shop, Warehouse, Cellar, and other Place to search and survey, and all and every the Boxes, Trunks, Chests and Packs then and there found to break open.
>
> . . . .
>
> These Officers may under color of Law and the cloak of a general warrant, break through the sacred Rights of the Domicil, ransack Mens Houses, destroy their Securities, carry off their Property, and with little Danger to themselves commit the most horrid Murders.

Id. at 15-17. Six hundred pamphlets were distributed throughout Massachusetts. *Id.* at 36.

The Committee's arguments were echoed by the First Continental Congress in 1774, which complained that "[t]he Commissioners of the Customs are empowered to break open and enter houses without the authority of any Civil Magistrate founded on legal information." *Memorial to the Inhabitants of the British Colonies*, FIRST CONTINENTAL CONGRESS (Oct. 21, 1774), *in* 1 Peter Force, AMERICAN ARCHIVES: FOURTH SERIES 925 (1837).

Days later the Congress notified Quebecers that British legislation allowed excisemen into "houses, the scenes of domestic peace and comfort and called the castles of English subjects in the books of their law." *A Letter to the Inhabitants of the Province of Quebec*, Oct.

26, 1774, *in* 1 JOURNALS OF THE AMERICAN CONGRESS: FROM 1774 TO 1788, at 41 (1823).

Among the grievances the New Jersey Assembly sent to the king in 1775 was that "The Officers of Customs are impowered to break open and enter Houses without the Authority of any Civil Magistrate founded on legal information." VOTES AND PROCEEDINGS OF THE GENERAL ASSEMBLY OF THE COLONY OF NEW-JERSEY [JAN. 11-FEB. 13, 1775], at 59 (1775).

C. Ratification of the Constitution.

The debates over ratifying the Constitution often focused on the need for a Bill of Rights to protect the sanctity of the home.

As the first state to call a convention, Pennsylvania led the national debate. At its convention, Antifederalist leader Robert Whitehill complained that "[t]here is no security, by this Constitution, for people's houses or papers." 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 526 (John Kaminski et al. eds., 1978). Thus, "[h]ouses may be broke open by the officers of the general government," and "[a] wicked use may be made of search warrants." *Id.* at 514, 526.

In his influential *Centinel I* letter, Samuel Bryan warned that the home may no longer be inviolable after ratification: "How long those rights will appertain to you, you yourselves are called upon to say, whether your *houses* shall continue to be your *castles*; whether your *papers*, your *persons* and your *property* are to be

held sacred and free from *general warrants*, you are now to determine." *Id.* at 158.

Philadelphia's *The Independent Gazetteer* sarcastically included "[g]eneral search warrants" as "[a]mong the blessings of the new-proposed government." *Blessings of the New Government*, THE INDEPENDENT GAZETTEER, Oct. 6, 1787 *in* 13 THE DOCUMENTARY HISTORY, at 345.

Luther Martin represented Maryland at the Constitutional Convention but walked out before it ended because it made the federal government too powerful. Explaining himself to Maryland's House of Assembly, Martin described "the power to lay excises" as "a power very odious in its nature, since it authorises officers to go into your *houses*, your *kitchens*, your *cellars*, and to examine into your *private concerns*." Luther Martin, *The Genuine Information Delivered to the Legislature of the State of Maryland Relative to the Proceedings of the General Convention Lately Held at Philadelphia*, *in* 2 THE COMPLETE ANTI-FEDERALIST 55 (Herbert J. Strong ed., 1981). Martin worried that every item could be subjected to excise, leaving homes vulnerable to constant abuse. Cuddihy, FOURTH AMENDMENT, at 679.

Martin's fellow Marylander, writing as "A Farmer," agreed. Arguing against general warrants, he emphasized that a dwelling was the "asylum of a citizen" and "the sanctuary of a freeman." *Id.* (quoting A Farmer, *no. 1*, MARYLAND GAZETTE, Feb. 15, 1788, at p.2, col.2).

Another writer, "A Farmer and Planter," warned: "Excise is a new thing in America . . . but it is not so in

Old England, where I have seen the effects of it, and felt the smart. . . . [E]xcise-officers have the power to enter your houses at all times . . . under the pretense of searching for exciseable goods . . . break open your doors, chests, trunks, desks, boxes, and rummage your houses from bottom to top." 5 THE COMPLETE ANTI-FEDERALIST, at 75.

Maryland's state convention "considered indispensable" clear language safeguarding the home: "for, Congress having the power of laying excises, (the horror of a free people,) by which our dwellinghouses, those castles considered so sacred by the English law, will be laid open to the insolence and oppression of office, there could be no constitutional check provided that would prove so effectual a safeguard to our citizens." 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 551 (Jonathan Elliot ed., 1836).

In neighboring Virginia, Patrick Henry argued that "unless the General Government be restrained by a Bill of Rights," excisemen will "go into your cellars and rooms, and search, ransack and measure, every thing you eat, drink and wear." 10 THE DOCUMENTARY HISTORY, at 1331. Henry later confessed that "I feel myself distressed" by the proposed Constitution, because without a Bill of Rights, "any property may be taken, in the most arbitrary manner, without any evidence or reason. Every thing the most sacred, may be searched and ransacked by the strong hand of power." *Id.* at 1474-75.

A fellow Virginian, "Cato Uticensis"—believed to be George Mason—warned that without a Bill of Rights, "you subject yourselves to see the doors of your houses, them impenetrable Castles of freemen, fly open before the magic wand of the exciseman." Cato Uticensis, VIRGINIA INDEPENDENT CHRONICLE (Oct. 17, 1787), *in* 8 THE DOCUMENTARY HISTORY, at 75. At Virginian's Convention, Mason warned that "the exciseman . . . may search and ransack as he pleases." 9 THE DOCUMENTARY HISTORY, at 1157.

In the *New York Journal*, "A Son of Liberty" expressed fear that the Constitution without a Bill of Rights would allow "our bed chambers . . . to be searched by brutal tools of power" and that "the most delicate part of our families [would be] liable to every species of rude or indecent treatment." A Son of Liberty, NEW YORK JOURNAL, Nov. 8, 1787, *in* 13 THE DOCUMENTARY HISTORY, at 481-82. "Men of all ranks and conditions [would be] subject to have their houses searched by officers . . . under various pretences, whenever the fear of their lordly masters shall suggest, that they are plotting mischief against their arbitrary conduct." *Id.* at 481.

Mercy Otis Warren, noting that Massachusettsans had not forgotten the atrocities that led to her brother's famous speech, argued that the Constitution's failure to secure the home was an egregious omission:

> There is no provision by a bill of rights to guard against the dangerous encroachments of power in too many instances to be named:

> but I cannot pass over in silence the insecurity in which we are left with regard to warrants unsupported by evidence—the daring experiment of granting writs of assistance in a former arbitrary administration is not yet forgotten in the Massachusetts; nor can we be so grateful to the memory of the patriots who counteracted their operation, as so soon after their manly exertions to the insolence of any petty revenue officer to enter our houses, search, insult, and seize at pleasure.

A Columbian Patriot: Observations on the Constitution, *in* 16 THE DOCUMENTARY HISTORY, at 281.

III. The First through Fifth Amendments collectively secure the home.

Americans ultimately ratified the Constitution with the understanding that a bill of rights would secure the sanctity of the home. The first five amendments collectively create a zone of safety and protection in the home.

The First Amendment provides protections for people to publicize objections to home intrusions (as colonists often did), freely exercise religion in their homes, and even possess obscene materials in their homes. *Stanley v. Georgia*, 394 U.S. 557, 565 (1969) ("If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch."). The Second Amendment ensures that people may defend their homes with arms. *District of*

Columbia v. Heller, 554 U.S. 570, 635 (2008). The Third Amendment restricts the quartering of soldiers "in any house." The Fourth Amendment guards all "houses" against irregular intrusions, including those not supported by probable cause. And the Fifth Amendment limits government power to seize one's home or the property in it—if a home must be taken, "just compensation" ensures that a new home can be acquired.

IV. Lower courts are undermining the Bill of Rights to avoid protecting firearms and firearm owners.

The Second Amendment has been called "the Rodney Dangerfield of the Bill of Rights," *Mance v. Sessions*, 896 F.3d 390, 396 (5th Cir. 2018) (Willett, J., dissenting), but some believe even that is too generous, *see Rhode v. Becerra*, 445 F. Supp. 3d 902, 947 (S.D. Cal. 2020) ("Mr. Dangerfield can feel better about himself now, because . . . the Second Amendment gets even less respect than he does."). In any event, it is widely acknowledged that the Second Amendment has been a disfavored right in the lower courts. *See Silvester v. Becerra*, 138 S. Ct. 945, 950 (2018) (Thomas, J., dissenting from denial of certiorari) ("[T]he lower courts are resisting this Court's decisions . . . and are failing to protect the Second Amendment."). According to some judges, this is due to a prejudice against guns and gunowners. *See*, *e.g.*, *Duncan v. Bonta*, 19 F.4th 1087, 1159 (9th Cir. 2021) (en banc) (VanDyke, J., dissenting) ("The majority of our court distrusts gun owners").

That prejudice is now diminishing other constitutional rights. For example, the Ninth Circuit held that no Fourth or Fifth Amendment violations occurred when San Jose officials seized without a warrant the firearms of an individual legally entitled to possess them and then refused to return them. *Rodriguez v. City of San Jose*, 930 F.3d 1123, 1136 (9th Cir. 2019); *Rodriguez v. City of San Jose*, 773 F. App'x 994 (9th Cir. 2019); *see also Duncan v. Bonta*, 19 F.4th 1087, 1111 (9th Cir. 2021) (en banc) (law requiring residents to surrender, destroy, or sell their lawfully acquired firearm magazines does not violate Fifth Amendment). When New York City forbade residents to leave the city with their handguns, thereby requiring them to practice with their handguns at local firing ranges only, the Second Circuit held that it did not violate the Commerce Clause or the right to travel. *N.Y. State Rifle & Pistol Ass'n v. City of N.Y.*, 883 F.3d 45 (2d Cir. 2018), *vacated*, 140 S. Ct. 1525 (2020). The Supreme Court of Nebraska held that the Sixth Amendment is not implicated by a criminal law allowing juveniles to be deprived of Second Amendment rights until the age of 25 based on adjudications in which the accused has no right to a jury trial. *In re Zoie H.*, 304 Neb. 868 (2020).

It is thus no surprise that the Second Circuit previously warned that "assum[ing] that the principles and doctrines developed in connection with the First Amendment apply equally to the Second . . . could well result in the erosion of hard-won First Amendment rights." *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 92 (2d Cir. 2012).

Here, the Second Circuit's holding has resulted in the erosion of hard-won Fourth Amendment rights—rights recognized by this Court as recently as last year. *Caniglia v. Strom*, 141 S. Ct. 1596 (2021) ("community caretaking" exception used to enter the home without a warrant and confiscate a firearm violated the Fourth Amendment). And while this Court has held that there is no "firearm exception" to the Fourth Amendment's ban on searches based on unverified anonymous tips, *Florida v. J.L.*, 529 U.S. 266 (2000), the Second Circuit here has created a firearm exception to "the chief evil against which the wording of the Fourth Amendment is directed": "physical entry of the home," *United States v. U.S. Dist. Court for E. Dist. of Mich., S. Div.*, 407 U.S. 297, 313 (1972).

The right to keep and bear arms and the arms it protects are so disfavored by some lower courts that they are willing to erode the entire Bill of Rights to avoid protecting them.

V. Summary reversal is warranted because the court below failed to follow *Caniglia*, which involved nearly identical facts.

Summary reversal is appropriate "for cases where the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error." *Pavan v. Smith*, 137 S. Ct. 2075, 2079 (2017) (Gorsuch, J., dissenting) (quotation omitted). It "sends a corrective message, particularly in the face of resistance."

Edward Hartnett, *Summary Reversals in the Roberts Court*, 38 CARDOZO L. REV. 591, 613 (2016).

Summary reversal was appropriate where lower courts failed to apply the appropriate standard under the Antiterrorism and Effective Death Penalty Act, *White v. Wheeler*, 577 U.S. 73 (2015), where the lower court "failed to apply the correct prejudice inquiry we have established," *Sears v. Upton*, 561 U.S. 945, 946 (2010), and where "the opinion below reflect[ed] a clear misapprehension of summary judgment standards in light of our precedents," *Tolan v. Cotton*, 572 U.S. 650, 659 (2014).

Here, the Second Circuit failed to follow this Court's clear precedent set in *Caniglia*, which involved very similar facts. Summary reversal is therefore a proper remedy.

CONCLUSION

"We have . . . lived our whole national history with an understanding of the ancient adage that a man's house is his castle." *Georgia v. Randolph*, 547 U.S. 103, 115 (2006) (quotation marks and citations omitted). But the decision below threatens that tradition. The petition for writ of certiorari should be granted to secure it.

Respectfully submitted,

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