No. 21-1522

IN THE
Supreme Court of the United States

WAYNE TORCIVIA,
Petitioner,
v.

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

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF *AMICUS CURIAE* OF THE NEW CIVIL LIBERTIES ALLIANCE IN SUPPORT OF PETITIONER

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July 5, 2022

MOTION FOR LEAVE TO FILE BRIEF OF NEW CIVIL LIBERTIES ALLIANCE AS *AMICUS CURIAE* IN SUPPORT OF PETITION

Pursuant to Rule 37.2 of the Rules of this Court, the New Civil Liberties Alliance respectfully moves for leave to file the attached brief as *amicus curiae* in support of Petitioner. Counsel for Petitioner has consented to the filing of this brief, as has counsel for State Respondents (D'Anna, Steele, and Yacoub); Counsel for the remaining Respondents (the County defendants and Ms. Smith) declined the request for consent. Accordingly, this motion for leave to file is necessary.

The New Civil Liberties Alliance (NCLA) is a nonpartisan, nonprofit civil-rights organization chiefly devoted to defending constitutional freedoms from violations by the administrative state.

NCLA has appeared before this and other courts in numerous cases involving the protection of core constitutional principles from unlawful administrative power: Jury trial, due process of law, the right to be tried in front of an impartial and independent judge, freedom of speech, and the right at issue in this petition—"the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. *See, e.g. Jessup v. City of Fresno*, 936 F.3rd 937 (9th Cir. 2019).

NCLA believes that the Second Circuit's decision represents a major erosion of both the people's right to be secure in their homes from unreasonable searches and seizures, and the

Judiciary's constitutional obligation to safeguard the people against abuses by the Executive (here, the police). NCLA believes it can provide the Court with a perspective not shared by any of the parties.

For the foregoing reasons, NCLA requests that it be allowed to participate in this case by filing the attached brief.

Respectfully submitted,

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QUESTIONS PRESENTED

This brief addresses only the first of the two questions presented by the petitioner:

(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?

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INTERESTS OF AMICUS CURIAE

The New Civil Liberties Alliance (NCLA) is a nonpartisan, nonprofit civil-rights organization devoted to defending constitutional freedoms from violations by the administrative state.[1] The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself: Jury trial, due process of law, the right to be tried in front of an impartial and independent judge, freedom of speech, the right to live under laws made by the nation's elected lawmakers through constitutionally prescribed channels, and the right at issue in this petition—"the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures." U.S. Const. amend. IV.

Though long-rooted in our culture, these self-same rights are also very contemporary—and in dire need of renewed vindication—because Congress, federal administrative agencies, and even sometimes the courts have diminished or neglected them.

NCLA strongly supports judicial enforcement of separation-of-powers principles, including, as in this case, where separation functions to protect an enumerated Constitutional right.

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[1] Pursuant to Supreme Court Rule 37.6, NCLA states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than NCLA and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. More than 10 days prior to the due date, counsel for *amicus* provided counsel for Respondents with notice of their intent to file.

The police power—which includes the power of the state to enter a home and seize property—is a function of the executive, whether a state or federal executive. To protect the homeowner's rights, the Constitution designates the judiciary to be a control on this police power to enter and seize. Absent exigency or homeowner consent, the executive may not enter a home and seize property without a warrant—the authorization of a neutral and detached magistrate. U.S. Const. amend. IV.

The seizure at petitioner's home occurred without judicial authorization. NCLA's brief focuses solely on whether that entry and seizure violated petitioner's Fourth Amendment rights. (Question One). NCLA does not address the other Question Presented by the petition.

STATEMENT OF THE CASE

I. OVER TWELVE HOURS AFTER BRINGING PETITIONER TO A PSYCHIATRIC HOSPITAL, WHERE HE WAS DETERMINED NEITHER TO BE A RISK TO HIMSELF NOR OTHERS, THE POLICE ENTERED PETITIONER'S HOME WITHOUT A WARRANT TO REMOVE HIS LAWFULLY-OWNED FIREARMS FROM A LOCKED SAFE

At 1:00 a.m. on a Sunday morning, police officers responded to petitioner's home after a call reporting a violent domestic dispute between an intoxicated father (petitioner) and his 17-year-old

daughter. Pet.App.6a and 54a.[2] After speaking with petitioner and his daughter, the officers handcuffed petitioner and, at 2:12 a.m., brought him to a local hospital for a psychiatric evaluation. Pet.App.7a, 9a, and 55a-56a.[3]

Due to the high alcohol level in petitioner's blood—approximately twice the legal limit for driving a motor vehicle—the hospital staff adjourned petitioner's psychiatric evaluation until he could sleep off his drunkenness. Pet.App.10a.

After depositing petitioner at the hospital, the officers conducted a background check and learned that petitioner had a pistol license. Pet.App.10a and 57a. Aware of the County police policy under these circumstances—"[w]hen there is a domestic incident and somebody is transported to [the hospital] for evaluation that's standard procedure to safeguard weapons until whatever investigation is done"—the officers informed their superior of petitioner's gun ownership. The superior ordered the officers to comply

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[2] Factual citations are to the facts relied upon by the district court and the Second Circuit Court of Appeals. "Pet.App." refers to the Petitioner's Appendix.

[3] Petitioner was transported to the hospital pursuant to New York State Mental Hygiene Law § 9.41 which authorizes County Officers 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 persons or others." N.Y. Mental Hyg. Law § 9.41.

The petition does not challenge the lawfulness of the seizure and transport of petitioner's person.

with county policy, and return to petitioner's home to seize his firearms. Pet.App.10a and 57a–58a.

The officers returned but could not seize petitioner's pistol and other firearms: the firearms were locked in a safe, and petitioner's wife denied knowing the combination. Pet.App.10a to 10b, and 58a. Around 5:00 a.m., the officers returned to the hospital where they tried, unsuccessfully, to convince the groggy petitioner to surrender the combination to his safe. Pet.App.58a.

By 2:20 p.m. Sunday afternoon (thirteen hours after being handcuffed) petitioner, awake and sober, was subject to an emergency psychiatric evaluation. A nurse practitioner conducted the evaluation. Pet.App.11a. In a written assessment signed at 3:21 p.m., the nurse practitioner concluded that petitioner showed "no indication for acute psychiatric admission," and "was 'not immediately dangerous' to himself or others." Pet.App.11a and 56a. The nurse practitioner recommended to the attending psychiatrist that petitioner be discharged. At a later unspecified time, the attending psychiatrist evaluated petitioner and agreed that discharge was appropriate. Pet.App.56a–57a.

While petitioner was awaiting discharge, the police continued to negotiate the seizure of petitioner's firearms with petitioner and his wife. The district court found that the negotiations extended "over the course of several hours." Pet.App.73a. Petitioner was not discharged until 6:00 p.m., after he had given the safe combination to his wife, and the police had

entered petitioner's home and seized his firearms. Pet.App.11a, and 58a–59a.[4]

II. THE DISTRICT COURT AFFIRMS THE LAWFULNESS OF THE WARRANTLESS HOME ENTRY AND PROPERTY SEIZURE AS A "LAW ENFORCEMENT SPECIAL NEEDS EXCEPTION" TO THE FOURTH AMENDMENT WARRANT REQUIREMENT

Based on the seizure of his firearms, petitioner brought a § 1983 claim against the County and its agents. It was alleged that defendants had violated petitioner's Fourth Amendments rights by, without a warrant, entering his home and seizing his property.

The defendants moved for summary judgment on this Fourth Amendment claim. The district court granted the motion.

The district court found that the County had a policy allowing the police to seize a person's firearms whenever that person is taken to a hospital for psychiatric evaluation after a domestic dispute. Pet.App.62a. This policy had been applied to petitioner, and was the County's basis for the warrantless home entry and seizure of petitioner's firearms. Pet.App.66a. The district court concluded that the application of the policy complied with the

[4] The County never returned petitioner's rifles. Petitioner repossessed his rifles when he purchased them from a licensed reseller. Pet.App.59a.

Fourth Amendment: The warrantless entry and seizure was a "law enforcement special needs exception" to the Fourth Amendment warrant requirement. Pet.App.65a.

The district court explained that "the special needs exception applies where 'special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.' To trigger this exception, a search or seizure 'must serve as its immediate purpose an objective distinct from ordinary evidence gathering associated with crime investigation.'" The standard for constitutionality was whether, under the circumstances, the entry and seizure were reasonable. Pet.App.65a (citations omitted).

To determine reasonableness, the district court cited Second Circuit precedent to explain the four factors to be balanced: (1) the weight and immediacy of the government interest in the seizure, (2) the nature of the privacy interest being 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. Pet.App.66a.

Having balanced the factors, the district court found that the warrantless entry and seizure at petitioner's home was reasonable, and, therefore, constitutional. Pet.App.75a.

True, the district court noted, entering petitioner's home to seize property was an invasion of privacy that was "not brief," "not minimal" and "not

insignificant." Pet.App.73a and 75a. But the offense of the intrusion, in the district court's judgment, was less than the social purpose being served by the County policy—taking guns out of the hands of "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." Pet.App.67a.

III. THE SECOND CIRCUIT COURT OF APPEALS AFFIRMS THAT THE WARRANTLESS ENTRY AND SEIZURE MET THE "SPECIAL NEEDS EXCEPTION" TO THE FOURTH AMENDMENT WARRANT REQUIREMENT

Petitioner appealed, and the U.S. Court of Appeals for the Second Circuit affirmed. To conclude that the entry and seizure were lawful without a warrant, that court accepted the "special needs exception" analysis of the district court. Pet.App.19a.

According to the Second Circuit, the Suffolk County policy was "two-pronged": To enter a home and seize firearms whenever "there is a domestic incident and someone is transported" for psychiatric evaluation. Pet.App.20a-21a. This combination of "mental health and domestic violence" created an "urgency" to act which "limits the options available to a responding officer," including the option of applying for a warrant. Pet.App.25a. Premised on this urgency to act, the Second Circuit concluded that "the County's firearm-seizure policy speaks to a 'special need' and is therefore constitutionally reasonable." Pet.App.32a.

In reaching this conclusion, the Second Circuit was aware of this Court's then-recent decision in *Caniglia v. Strom*, 141 S. Ct. 1596 (2021).

A. In *Caniglia*, This Court Held That Police "Community Caretaker" Activity Is Not an Exception to the Constitutional Mandate That the Executive Must Obtain Judicial Authorization (a Warrant) to Enter a Home to Make a Seizure

Caniglia also involved a warrantless home entry and firearms seizure arising from a domestic dispute. Caniglia and his wife had an argument during which Caniglia displayed a gun (unloaded), and asked her to "shoot [him] now and get it over with." After spending the night at a hotel, the wife was unable to reach her husband by phone. Concerned for his safety, she asked the police to conduct a welfare check on him. *Caniglia*, 141 S. Ct. at 1598.

Responding to the address, the police interviewed Caniglia on his porch. Agreeing to be psychiatrically evaluated, Caniglia went by ambulance to a hospital. After the ambulance left, the police entered Caniglia's home and seized his two handguns. *Id.*

Caniglia sued. He claimed that the warrantless entry and seizure violated the Fourth Amendment. The First Circuit Court of Appeals affirmed the dismissal of Caniglia's claim. The First Circuit assumed that the police lacked a warrant or consent

to seize the weapons, and that there were no exigent circumstances. *Id.* at 1599.

The First Circuit justified the warrantless entry and seizure "solely on the ground that the decision to remove petitioner and his firearms from the premises fell within a 'community caretaking exception' to the warrant requirement." *Id.* at 1598. The First Circuit derived the "community caretaking" concept from *Cady v. Dombrowski*, 413 U.S. 433 (1973), which had "held that a warrantless search of an impounded vehicle for an unsecured firearm did not violate the Fourth Amendment." *Caniglia*, 141 S. Ct. at 1598.

This Court reversed: "*Cady* … involved a warrantless search for a firearm. But the location of that search was an impounded vehicle—not a home." *Id.* at 1599. "What is reasonable for vehicles is different from what is reasonable for homes. *Cady* acknowledged as much, and this Court has repeatedly 'declined to expand the scope of exceptions to the warrant requirement to permit warrantless entry into the home.'" *Id.* at 1599–1600 (citation omitted).

B. The Second Circuit Distinguishes *Caniglia*, Arguing That the "Special Needs" Warrant Exception and the

"Community Caretaker" Warrant Exception Are Different

Aware of this Court's holding in *Caniglia*, the Second Circuit nonetheless approved the warrantless home entry and seizure of petitioner's firearms:

> 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 … . Unlike the community caretaking exception, the special needs exception has been repeatedly recognized by the Supreme Court as permitting searches undertaken without a warrant (citations omitted). 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."

Pet.App.26a (footnote 25).

The Second Circuit concluded, "[w]e proceed on the understanding that '*Caniglia* did not disturb this Court's longstanding precedents that allow warrantless entries into a home in certain circumstances.'" Pet.App.27a (footnote 25).

SUMMARY OF ARGUMENT

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." This right "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 "very core" of the Fourth Amendment is "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Florida v. Jardines*, 569 U.S. 1, 6 (2013); *Payton v. New York*, 445 U.S. 573, 585 (1980) ("The physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.") (citation omitted).

The historic usurper of the people's right is the executive—most typically, the police. The branch of government that the Constitution entrusts as guarantor that the people's right "shall not be violated" is the judiciary—the only branch empowered to issue a warrant that permits a home entry and seizure. *See Collins v. Virginia*, 138 S. Ct. 1663, 1667 (2018).

Not all home intrusions require a warrant. The Court has held that law enforcement officers may enter private property without a warrant when

exigent circumstances exist. Such exigencies may occur during an officer's core crime prevention function, such as hot pursuit of a person who has committed a crime. Or the exigency may occur during the non-crime police activity which occupies most of an officer's day: responding to calls about missing persons, family disputes, the need to "render emergency assistance to an injured occupant or to protect an occupant from imminent injury." *Kentucky v. King*, 563 U.S. 452, 460, 470 (2011); *see also Brigham City v. Stuart*, 547 U.S. 398, 403–04 (2006) (listing other examples of exigent circumstances).

The justification for an officer's warrantless home entry is the necessity of immediate conduct to protect life—"when police have an objectively reasonable basis to believe that there is a current, ongoing crisis for which it is reasonable to act now." *Caniglia*, 141 S. Ct. at 1604 (Kavanaugh, J., concurring). Simply, warrantless entry is permitted when danger is present and there is no time to request judicial approval.

In practice, this requirement of immediacy—there is no time to obtain judicial approval—has been eroded. As in *Caniglia*, officers have made home entries and seizures when there was time to obtain the review, and authorization, of a magistrate.

Entry without exigency is what occurred here. Once petitioner was seized and removed from his home, the firearms locked in his safe were not an immediate danger to himself or others. Indeed, the police took, in the district court's words, "several

hours"—at least, more than twelve hours—to implement the County policy of warrantless entry and removal. Pet.App.73a.

The Constitution is clear about the process to be followed in the absence of immediate necessity to protect life. The executive—the police—must submit to the judiciary an application "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 decision whether to enter petitioner's home and seize his property belonged to the judiciary, not the executive.

REASONS FOR GRANTING THE WRIT

I. ABSENT EXIGENCY OR CONSENT, A "SPECIAL NEEDS EXCEPTION" TO THE WARRANT REQUIREMENT FOR HOME ENTRY VIOLATES THE CONSTITUTION'S MANDATE THAT THE JUDICIARY CONTROLS THE EXECUTIVE'S POWER TO ENTER AND SEIZE

The Fourth Amendment protects the individual's privacy in a variety of settings—no setting is more clearly defined than that bounded by the unambiguous physical dimensions of an individual's home. Absent exigent circumstances or consent, the threshold of the home may not be crossed without a warrant. *Collins,* 138 S. Ct. at 1670 (2019) (The home entry and property seizure "is presumptively unreasonable absent a warrant"); *see*

also Steagald v. U.S., 451 U.S. 204, 211-212 (1981) ("The search at issue here took place in the absence of consent or exigent circumstances. Except in such special situations, we have consistently held that the entry into a home to conduct a search or make an arrest is unreasonable under the Fourth Amendment unless done pursuant to a warrant").

According to the Second Circuit, however, "special needs" is a long-established third exception to the warrant requirement for a home entry and seizure: "[C]ourts 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.'" Pet.App.22a (citations omitted).

The Second Circuit misreads this Court's use of the "special needs" phrase. Other than for prisoners on probation, *see e.g., Griffin v. Wisconsin*, 483 U.S. 868 (1987), this Court has not applied a "special needs" argument to permit a warrantless home entry and seizure in the absence of exigency or consent. Indeed, in *Griffin*, the underlying rationale for the "reasonableness" of the warrantless entry and seizure was consent.

The issue in *Griffin* was the warrantless entry into the home of a felon on probation. Having received a tip that the probationer was illegally in possession of a handgun, officers went to Griffin's apartment and, without a warrant, entered and seized the weapon. *Griffin,* 483 U.S. at 870.

The Court determined that the warrantless entry and seizure were reasonable. Probation is one point on a continuum of punishments accorded to those convicted of crimes. The continuum runs from solitary confinement in a maximum-security prison to home confinement, with probation—a non-incarceration sentence—somewhere in the middle. *Id.* at 874.

In order to be permitted to serve the rest of one's sentence on probation, the prisoner must agree to specific conditions. Griffin's probation was conditioned on his agreement to not commit additional crimes and to consent to have his home searched for evidence of additional crimes. *Id.* at 870–71, 876 ("These restrictions are meant to assure that the probation serves as a period of genuine rehabilitation and that the community is not harmed by the petitioner's being at large").

The Court did discuss how this level of supervision was necessary for the probation system to accomplish its function of rehabilitation: "Supervision, then, is a 'special need' of the State, permitting a degree of impingement upon privacy that would not be constitutional if applied to the public at large." *Id.* at 875.

The warrantless home search in *Griffin* occurred within the context of a "special need"—the supervision required when a prisoner is allowed to serve a non-incarceration sentence. However, the lawfulness of the warrantless entry into Griffin's home is best understood as being grounded on

Griffin's consent. He had a choice. He could complete his sentence in prison. Or he could complete his sentence outside of prison, subject to conditions (including his agreement to allow warrantless home entries by the authorities).

Griffin agreed to the conditions under which he would be allowed the non-incarceration sentence of probation: "… the probationer would be in violation of his probation conditions (and subject to the penalties that entails) if he failed to consent to any search that the regulation authorized… ." *Id.* at 875 n.3.

Griffin's consent may have been given grudgingly. But nonetheless it had been given in exchange for something of value—being permitted to serve his prison time while being free in society, instead of confined behind bars.

"Special needs" is a phrase descriptive of the state's supervisory needs regarding non-incarcerated prisoners. It is not a free-standing all-purpose exception to the warrant requirement. In the absence of exigency or consent, the Court has not used "special needs" as a reason to allow the executive to usurp the judiciary's responsibility to authorize home entries and seizures.

II. THE CIRCUIT COURTS ARE IN CONFLICT REGARDING WHETHER AND WHEN "SPECIAL NEEDS" JUSTIFY A HOME ENTRY AND SEIZURE WITHOUT A WARRANT

Lower courts are divided about whether, or when, in the absence of exigency or consent, there is a "special needs" exception to the warrant requirement for a home entry and seizure.

The Tenth Circuit does not apply the exception in the absence of exigency. In *Roska*, it declined to apply the "special needs" exception to justify the warrantless entry into a home by social workers to remove a 12-year-old suspected of suffering a medical condition. *See Roska ex rel. Roska v. Peterson*, 328 F.3d 1230, 1242 (10th Cir. 2003) ("We find no special need that renders the warrant requirement impracticable when social workers *enter a home* to remove a child, absent exigent circumstances") (emphasis in the original).

In *United States v. Hill*, 776 F.3d 243, 245 (4th Cir. 2015), the Fourth Circuit declined to permit a "special needs" warrantless home entry and search in the absence of exigency or consent. Similar to *Griffin*, Hill was on probation. His conditions of probation permitted "probation officers to visit him at home at any time and confiscate contraband in plain view." *Hill*, 776 F.3d at 245. Officers visited and, without seeing contraband in plain view, conducted a full apartment search. *Id.*

The Fourth Circuit held that the warrantless search was beyond the scope permitted by a "special needs" warrant exception. *Id.* at 249 ("[T]he supervision condition to which the defendants agreed in this case required them to submit to a probation officer's visit and allowed an officer to confiscate contraband in plain view. But no condition authorized warrantless searches."). Since Hill had not consented to the extensive search that had been conducted, and there was no exigency, the search was deemed unlawful in the absence of a warrant. *Id.*

Other Circuits have applied the "special needs" exception to permit a warrantless home entry when, as in *Griffin*, there had been consent.

For example, the Ninth Circuit has permitted the warrantless searches of the homes of welfare recipients. *See Sanchez v. County of San Diego*, 464 F.3d 916, 926 (9th Cir. 2006) ("[B]ecause the underlying purpose of the home visits is to verify eligibility for welfare benefits, and not for general law enforcement purposes, we conclude that San Diego County has articulated a valid 'special need.'").

However, "special needs" was not the basis for the warrantless home entry. As in *Griffin*, the homeowners had consented to the warrantless search. *Sanchez*, 464 F.3d at 924 ("Applicants are given notice that they will be subject to a mandatory home visit and visits generally occur only during normal business hours. When the investigators arrive to conduct the visit, they must ask for consent to enter the home. If the applicant does not consent to the visit,

or withdraws consent at any time during the visit, the visit will not begin or will immediately be terminated, as the case may be").

Some Circuits have applied a "special needs" exception to permit a warrantless home search in the absence of exigency or consent, and when there was ample time to seek judicial approval.

Henderson v. City of Simi Valley, 305 F.3d 1052 (9th Cir. 2002), involved a family dispute. A minor daughter had left home and obtained a temporary restraining order that, among other things, gave her exclusive possession to various items of personal property that were identified as being in her bedroom when she left her mother's home. With police, the daughter went to her mother's home to retrieve the items in her bedroom. The mother refused to allow the police or daughter into the house and became obstreperous. After the mother's arrest, the police and daughter entered the home and took the items identified in the temporary restraining order. *Id.* at 1054-1055.

The Ninth Circuit viewed the police action as a "special need" that justified the warrantless entry and seizure. According to the court, requiring a warrant was not only "impracticable, but superfluous." *Id.* at 1058-1059. The officers already had a court document—the temporary restraining order: "[r]equiring an additional warrant to effectuate the exercise of court–ordered property rights would accomplish no objective that was not already considered and incorporated into the Order." *Id.* at

1058. Additionally, seeking a warrant would have been life-threatening: "the delay inherent in obtaining a warrant would make it more difficult for officers to respond quickly to potentially violent violations of the court order." *Id.*

The First Circuit has adopted an analysis similar to the Ninth Circuit's. Based on information received from family members and neighbors, a licensed psychiatrist had issued an order for a ten-day involuntary commitment of an elderly woman. The police knocked on the woman's door to serve the order. On receiving no response, the police broke in and, locating the woman, physically seized her. She died of a heart attack. *See McCabe v. Life-Line Ambulance Serv., Inc.*, 77 F.3d 540, 542 (1st Cir. 1996).

The First Circuit justified the police's warrantless entry as being of "a recognized class of *systemic* 'special need' searches which are conducted without warrants in furtherance of important administrative purposes." *Id.* at 546.

That the police had had ample time to obtain a warrant to enter was irrelevant. According to the First Circuit, when determining whether the "special needs" warrant exception applied, the analysis reviews the "essential systematic attributes" of the special needs exception, not the particular facts of a given claim. *Id. at* 549.

Similarly, once the "special needs" exception was in play, the court thought it unnecessary to engage in an intellectual "skirmish" regarding the

presence of an exigency to justify the warrantless entry. *Id.* at 546.

The Circuits are in conflict regarding the meaning and application of "special needs" as an exception to the warrant requirement for a home entry and seizure. The Tenth and Fourth Circuits will only apply the doctrine where there is exigency or consent (thereby rendering the "special needs" exception unnecessary). The Ninth and First Circuits apply the doctrine when there was time to obtain a warrant, as did the Second Circuit in petitioner's case.

The "special needs" concept is unnecessary and the source of confusion. The rule consistent with the Fourth Amendment's right of the people to be secure in their homes is straightforward and clear: absent exigency or homeowner consent, the executive may not enter a home and seize property without a warrant—which ensures authorization from a neutral and detached magistrate.

The Court should take the opportunity, as it did with the "community caretaking" exception, to end the confusion by ending the unnecessary exception that has no basis in Fourth Amendment jurisprudence.

III. THE INDIVIDUAL'S ENUMERATED RIGHT TO BE FREE FROM WARRANTLESS HOME ENTRIES MUST BE DETERMINED BY A PARTICULARIZED REVIEW OF SPECIFIC FACTS, NOT A GENERALIZED INTEREST-BALANCING ANALYSIS

The Second Circuit's decision merits review for several reasons. On a legal question of significant importance, it conflicts with other Circuit Courts of Appeal. It is against this Court's reasoning in *Caniglia*. Finally, it is premised on a disfavored process of jurisprudence—the "judge-empowering 'interest-balancing inquiry'" by which judges ride roughshod over constitutional rights that they disfavor. *New York State Rifle & Pistol Assn., Inc. v. Bruen*, No. 20-843, Slip Op. at 13 (U.S. June 23, 2022).

As did the district court, the Second Circuit spent an inordinate number of pages weighing the general wisdom of the County's "enter and seize" policy against the Fourth Amendment mandate that, absent exigency or consent, a warrant must be obtained to enter a home. Pet.App.22a-33a.

There was lengthy discussion, for example, of the "substantial government interest in preventing suicide and domestic violence," with reference to articles and statistics. *See e.g.*, Pet.App.28a and 30a ("Tragically, about 90% of suicide attempts that employ a gun result in death, compared with less than 5% attempts by different means.").

In balancing the interests, the Second Circuit

found that the government's interest outweighs that of any individual. As a result, the particularized facts of this individual petitioner's case were lost amid the generalized analysis.

The questions that the court should have asked were not asked: What conceivable risk did petitioner pose after being diagnosed as not being a threat to himself and others, and what risk were his weapons—physically removed from his presence and locked in a safe? And—aside from the fact that the police lacked the specific facts to convince a court to issue a warrant to enter and seize—what prevented the police from using their twelve plus free hours to locate a judge, and attempt to convince him?

The particularized analysis to which petitioner was entitled was swept away by the Second Circuit's generalized four-part balancing inquiry. The Second Circuit's "interest-balancing inquiry" operates as a device that allows a judge to ignore enumerated constitutional rights in favor of public policies that the reviewing court may favor. An enumerated right in the Constitution should not be subject to a court's deciding "on a case-by-case basis whether the right is really worth insisting upon." *See, e.g., District of Columbia v. Heller*, 554 U.S. 570, 634 (2008) ("A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all.").

Aside from being mistaken, the Second Circuit's decision merits review and reversal to re-emphasize that a core constitutional right is not

subject to the whims of a generalized "interest balancing" analysis. The only exception to the warrant requirement for home entry and seizure is particularly established exigency or consent—neither of which was present here. *Steagald*, at 211-12.

CONCLUSION

The Court should grant the petition, at least with respect to the first Question Presented.

Respectfully submitted,

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Dated: July 5, 2022