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 United States Court of Appeals for the Second Circuit

Motion for Leave to File Brief *Amicus Curiae* and Brief *Amicus Curiae* of Gun Owners of America, Inc., Gun Owners Foundation, Gun Owners of California, Tennessee Firearms Association, Virginia Citizens Defense League, Heller Foundation, America's Future, and Conservative Legal Defense and Education Fund in Support of Petitioner

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July 5, 2022

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Pursuant to subparagraph 2(b) of Rule 37, U.S. Supreme Court Rules, Gun Owners of America, Inc., Gun Owners Foundation, Gun Owners of California, Tennessee Firearms Association, Virginia Citizens Defense League, Heller Foundation, America's Future, and Conservative Legal Defense and Education Fund hereby move the Court for leave to file an *amicus curiae* brief in support of the petition for *certiorari*.

This brief is being filed timely, "within 30 days after the case is placed on the docket or a response is called for by the Court, whichever is later." Rule 37(2). The petition was docketed on June 3, 2022. This *amicus* brief is being filed on July 5, 2022, which is within 30 days after docketing. In support of their motion, these *amici* state:

Identity and Experience of *Amici Curiae*

Gun Owners of America, Inc. is a not-for-profit corporation organized under the law of California, and is exempt from federal income taxation under Internal Revenue Code section 501(c)(4). It has filed at least 85 *amicus* briefs in this Court.

Gun Owners Foundation is a not-for-profit corporation organized under the law of Virginia, and is exempt from federal income taxation under Internal Revenue Code section 501(c)(3). It has filed at least 90 *amicus* briefs in this Court.

Gun Owners of California is a not-for-profit corporation organized under the law of California, and is exempt from federal income taxation under Internal Revenue Code section 501(c)(4). It has filed at least 11 *amicus* briefs in this Court.

Tennessee Firearms Association is a not-for-profit corporation organized under the law of Tennessee, and is exempt from federal income taxation under Internal Revenue Code section 501(c)(4). It has filed at least 3 *amicus* briefs in this Court.

Virginia Citizens Defense League is a not-for-profit corporation organized under the law of Virginia, and is exempt from federal income taxation under Internal Revenue Code section 501(c)(4). It has filed at least 6 *amicus* briefs in this Court.

Heller Foundation is a not-for-profit corporation organized under the law of the District of Columbia,

and is exempt from federal income taxation under Internal Revenue Code section 501(c)(3). It was founded by Dick Heller, plaintiff in *District of Columbia v. Heller*, 554 U.S. 570 (2008). It has filed at least 18 *amicus* briefs in this Court.

America's Future is a not-for-profit corporation organized under the law of Delaware, and is exempt from federal income taxation under IRC section 501(c)(3). It has filed at least 7 *amicus* briefs in this Court.

Conservative Legal Defense and Education Fund is a not-for-profit corporation organized under District of Columbia law, and is exempt from federal income taxation under Internal Revenue Code section 501(c)(3). It has filed at least 128 *amicus* briefs in this Court.

Relevance of *Amicus* Brief to Petition for *Certiorari*

This Court's rules provide: "An *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court." Rule 37. These *amici* believe that this *amicus* brief below meets this test. A study of cert.-stage *amicus* briefs conducted some years ago demonstrated both their routine nature and their significance. Political science professors Greg Caldeira and Jack Wright described cert.-stage *amicus* briefs as "'costly signals' of a petition's importance, arguing that simply by meeting the expense of the filing, *amici* demonstrate

the interest in and significance of a particular case."[1]

It is believed that *amicus* briefs filed by these *amici* in prior cases have been useful to the Court, including at the petition stage. For example, one or more of these *amici* filed the only *amicus* brief at the petition stage in the following three cases where a writ of *certiorari* was issued:

- *Altitude Express v. Zarda*, 140 S.Ct. 1731 (2020) (*amicus* brief filed July 2, 2018);
- *Collins v. Commonwealth of Virginia*, 138 S. Ct. 1663 (2018) (*amicus* brief filed March 27, 2017); and
- *United States v. Antoine Jones*, 565 U.S. 400 (2012) (*amicus* brief filed May 16, 2011).

On February 19, 2018, *Empirical SCOTUS* rated *amicus* briefs to this Court in a survey entitled "Amicus Policy Success in Impactful Supreme Court Decisions," ranking those briefs filed by the lead *amici* herein, Gun Owners of America, Inc., as one of the most successful in cases where this Court struck down statutes as unconstitutional or overturned its own precedents. Interestingly, an *amicus* brief filed on December 23, 2015 by four of these *amici* in a Second Amendment case, *Voisine v. United States*, 136 S. Ct. 2272 (2016), reportedly was the basis for questions posed by Justice Thomas during oral argument held on

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[1] A. Chandler, "Cert.-stage Amicus Briefs: Who Files Them and To What Effect?" *SCOTUS Blog* (Sept. 27, 2007).

February 29, 2016.[2]

In this case, the brief submitted by *amici* provides context to the petition for *certiorari* and provides authorities and makes argument on the important issues presented which are not addressed fully by Petitioner. These include whether the exercise of a Second Amendment right to possess a firearm should justify an exception to Fourth Amendment protection against warrantless searches.

These *amici* have filed *amicus* briefs in cases involving similar issues, all of which involved warrantless government intrusions into the home:

- *Rodriguez v. City of San Jose*, No. 19-1057 (*amicus* brief filed May 20, 2020);
- *Lange v. California*, 141 S.Ct. 2011 (2021) (*amicus* brief filed December 11, 2020); and
- *Caniglia v. Strom*, 141 S. Ct. 1596 (2021) (*amicus* brief filed January 15, 2021).

In *Rodriguez v. City of San Jose*, a case involving a similar community-caretaking seizure of firearms from a home, Respondents also declined to consent to the filing of an *amicus* brief by some of these *amici*, but this Court granted that motion to file an *amicus* brief in support of the Petitioner. *See Rodriguez v. City of San Jose*, No. 19-1057 (petition denied, Oct. 13, 2020).

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[2] *See, e.g.*, S. Mencimer, "Clarence Thomas Just Did Something He Hasn't Done in a Decade," *Mother Jones* (Feb. 29, 2016).

The Positions of the Parties

Although Respondents Suffolk County and Mary Catherine Smith declined to consent, these *amici* obtained the consent of counsel for Petitioner and the State Respondents.

Conclusion

For the foregoing reasons, these *amici* respectfully request the Court to grant them leave to file their brief *amicus curiae*, which is appended hereto.

Respectfully submitted,

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July 5, 2022

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INTEREST OF THE *AMICI CURIAE*[1]

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

STATEMENT OF THE CASE

In 2014, Petitioner Wayne Torcivia's teenage daughter called social services claiming that Petitioner was intoxicated, yelling, and acting weird, but at no point did she allege either that she had been assaulted or that a firearm was any part of the incident. Petition for Certiorari ("Pet. Cert.") at 8; *Torcivia v. Suffolk*

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[1] It is hereby certified that counsel for Petitioner and State Respondents have consented to the filing of this brief, but counsel for the other Respondents did not consent; that counsel of record for all parties received notice of the intention to file this brief at least 10 days prior to its filing; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

County, 17 F.4th 342, 349 (2d Cir. 2021). Three officers responded to the Torcivia home. The parties disagreed about the facts of the encounter. When sued, the police claimed the "magic phrase" that made them decide to send Petitioner for a psychiatric evaluation was "I want you guys to tase me ... kill me." *Torcivia* at 350. The testimony of the police that Petitioner was asking to be killed was contradicted by Petitioner as well as by the assessment of the psychiatric evaluation that he was a threat neither to himself or anyone else. *See* Pet. Cert. at 9-10.

The defendant police officers testified that Petitioner would "'yell and scream,'" "'explode,'" "'start ranting and raving and screaming....'" *Id*. at 349-50. That testimony was contradicted by the fact that the Petitioner's wife remained asleep in the house during the entire encounter with the police. *Id*. at 349 n.4.

At some point, the police handcuffed Petitioner, and transported him to a hospital for an emergency mental health evaluation, which demonstrated that he was neither a suicide risk nor a risk to others, and recommended he be discharged. *Pet. Cert.* at 10. Nevertheless, while Petitioner was at the hospital, officers learned from a computer check that Petitioner possessed a New York State pistol license. *Id*. at 9-10. Although both Petitioner and his wife refused multiple requests for the combination of the firearms safe to facilitate their seizure, eventually Petitioner was coerced by the threat of continued confinement until he provided the combination for his firearms safe. *Id*. at 11. Officers returned to Petitioner's home and seized his firearms without a warrant. *Id*.

SUMMARY OF ARGUMENT

The circuit court below upheld the warrantless invasion by police into Petitioner's home to seize his firearms based on an expansion of the judicially created "special needs exception" to the Fourth Amendment. A narrow version of this exception was created by this Court in the 1980s at a time when courts only considered whether a search or seizure violated a reasonable expectation of privacy. Since then, this Court restored the original property basis of the Fourth Amendment beginning in *United States v. Jones*, 565 U.S. 400 (2012), but the Court has not had an opportunity to reconsider whether the special needs exception comports with the property principle. This case presents a good vehicle to test the special needs exception against the property principle. *See* Section I, *infra*.

As applied below, the special needs exception was applied through the use of an interest balancing test, pitting constitutional rights against governmental interests. That interest balancing allowed the reviewing judges to determine "reasonableness" based on their own view of what they described as a Fourth Amendment "privacy" interest of possessing firearms, concluding that the government should be empowered to seize the firearms. This Court should grant review to reject judge-empowering interest balancing and respect the balancing already done by the framers to protect against searches and seizures as the Court has done to protect other constitutional rights. *See* Section II, *infra*.

This case represents a growing trend in the lower courts to reduce Fourth Amendment protections when firearms are involved. There is no basis for courts to create various types of firearms exceptions to the Fourth Amendment. It is well established that the exercise of one constitutional right cannot be conditioned upon the forfeiture of another constitutional right. *See* Section III, *infra*.

ARGUMENT

I. THE PETITION SHOULD BE GRANTED TO REVIEW WHETHER THE "SPECIAL NEEDS EXCEPTION" VIOLATES PROPERTY RIGHTS PROTECTED BY THE FOURTH AMENDMENT.

A. The "Special Needs Exception" under Privacy Principles.

The Second Circuit found a way to excuse the government's search for and seizure of Petitioner's firearms by applying, and expanding, the so-called "special needs exception" to the Fourth Amendment identified by this Court in several cases, including *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602 (1989). The court below employed a balancing test, concluding that the search and seizure was "reasonable" because the government's desire to prevent violence in a domestic setting was superior to and trumped any "expectation of privacy" in firearms under the Fourth Amendment. Petitioner explains why the Second Circuit's use of the special needs exception was flawed and should not be sanctioned —

Pet. Cert. at 16-27 — a position these *amici* fully support.

Additionally, these *amici* contend that the Second Circuit's analysis, which focused on "privacy rights" protected by the Fourth Amendment, ignored entirely the Fourth Amendment's protection of property rights, leading it to reach the wrong decision. The *Skinner* decision was issued during a time after *Warden v. Hayden*, 387 U.S. 294 (1967), where the original property principle of the Fourth Amendment was set aside by this Court to focus almost exclusively on the new atextual "reasonable expectation of privacy" test.

In *Hayden*, Justice Brennan jettisoned the time-honored rule that a search for "mere evidence" was *per se* "unreasonable" because of supposed dissatisfaction with the "fictional and procedural barriers rest[ing] on property concepts." *Hayden* at 304. Justice Brennan claimed that the distinction between (i) "'mere evidence'" and (ii) "instrumentalities [of crime], fruits [of crime] or contraband" was "**based on premises no longer accepted** as rules governing the application of the Fourth Amendment." *Id.* at 300-01 (emphasis added). Discarding the notion that the Fourth Amendment requires the government to demonstrate that it has a "superior property interest"[2] in the thing to be seized which underlay the "mere evidence rule," Justice Brennan promised that his new privacy rationale would free the Fourth Amendment from

[2] *Id.* at 303-04.

"irrational,"[3] "discredited,"[4] and "confus[ing]"[5] decisions of the past, and thereby would provide for a more meaningful protection of "the principal object of the Fourth Amendment [—] the protection of privacy rather than property." *Id.* at 304.

The Court's motivation for the change in *Hayden* was not some new insight or scholarship as to the original meaning of the Fourth Amendment in 1791, as the seed of what has become the "right of privacy" was contained in a law review article by Samuel D. Warren and Louis D. Brandeis published nearly a century after ratification of the Fourth Amendment. In "The Right to Privacy," 4 HARV. L. REV. 193 (1890), Warren and Brandeis proposed the "next step" in the development of common law was to **create** a cause of action for violation of a person's "right to privacy." The right of privacy was not discussed as being in existence (either during the common law or as a right contemplated by the authors of the Constitution) but rather as one that should be fashioned by courts in the future.

Concurring in the result, but not in the reasoning, Justice Abe Fortas (joined by Chief Justice Earl Warren) stated that he "cannot join in the majority's broad — and ... totally unnecessary — repudiation of the so-called 'mere evidence' rule." *Hayden* at 310

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[3] *Id.* at 302.

[4] *Id.* at 306.

[5] *Id.* at 309.

(Fortas, J., concurring). Resting his concurrence on the time-honored "'hot pursuit' exception to the search-warrant requirement," Justice Fortas sought to avoid creating what he feared would be "an enormous and dangerous hole in the Fourth Amendment"[6]:

> [O]pposition to general searches is a fundamental of our heritage and of the history of Anglo-Saxon legal principles. Such searches, pursuant to "writs of assistance," were one of the matters over which the American Revolution was fought. The very purpose of the Fourth Amendment was to outlaw such searches, which the Court today sanctions. **I fear that in gratuitously striking down the "mere evidence" rule**, which distinguished members of this Court have acknowledged as essential to enforce the Fourth Amendment's prohibition against general searches, the Court today **needlessly destroys, root and branch, a basic part of liberty's heritage**. [*Id.* at 312 (Fortas, J., concurring) (emphasis added).]

Justice Brennan frankly admitted that, by erasing the property protection from the Fourth Amendment, his newly minted privacy-based *Hayden* rule "**does enlarge the area of permissible searches**." *Hayden* at 309 (emphasis added). He apparently assumed that the newly permitted intrusions for "mere evidence" would be checked by the warrant, probable cause, and magistrate requirements of the

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[6] *Id.* at 312 (Fortas, J., concurring).

Amendment's second phrase. *See id.* However, as many subsequent cases have proven, Justice Brennan's Fourth Amendment revolution empowered government to conduct what the Founders would have viewed to be inherently "unreasonable" searches and seizures just because modern federal judges personally felt them "not unreasonable," frequently based on application of some type of balancing test.

Having abandoned the property-based "mere evidence" rule in favor of the "reasonable expectation of privacy" guideline, the *Hayden* Court unleashed law enforcement searches and seizures subject only to an amorphous and frequently changing impression of what type is expectation of privacy seems to a judge to be "reasonable." That was the state of Fourth Amendment jurisprudence when the special needs exception was carved out of the Fourth Amendment. The special needs exception was birthed with Justice Blackmun's concurrence in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), and then implemented two years later in *Griffin v. Wisconsin*, 483 U.S. 868 (1987) (involving the search of a home of a probationer).

Justice Marshall's dissent in *Skinner* explained how the "special needs exception" had been extended during the 1980s to cover four categories of property expressly protected by the Fourth Amendment: "searches of 'persons,' [*Skinner*] at 613-614; 'houses,' *Griffin v. Wisconsin*, 483 U.S. 868 (1987); 'papers,' *O'Connor v. Ortega*, 480 U.S. 709 (1987); and 'effects,' *New Jersey v. T. L. O.*, 469 U.S. 325 (1985)." *Skinner* at 636-37 (Marshall, J., dissenting). Justice Marshall

was disturbed by these decisions weakening Fourth Amendment protections.

B. The Special Needs Exception under Property Principles.

Fortunately, since those special needs exception cases were decided in the 1980s, the pendulum has swung back, and this Court wisely returned to the Founder's understanding that the Fourth Amendment first and foremost protected property — beginning in *United States v. Jones*, 565 U.S. 400 (2012), and firmly established in *Florida v. Jardines*, 569 U.S. 1 (2013). *Jones* and *Jardines* represented a return to textualism, where the Fourth Amendment would be understood to provide the protections that the Founders sought to establish. As Justice Scalia explained:

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

In *Jones*, this Court relegated to second place the Fourth Amendment's protection of "privacy" from *Katz v. United States*, 389 U.S. 347 (1967). *See Jones* at 409 ("But as we have discussed, the Katz reasonable-expectation-of-privacy test has been *added*

to, not *substituted for*, the common-law trespassory test.").[7]

As the Petition explains, the Second Circuit stretched the special needs exception well beyond its already understood bounds. Pet. Cert. at 20-27. This Court previously recognized a special needs exception to sanction a search within a home, but that was a very different circumstance — the home of a parolee where the government had a superior property interest based on conditions of release — a "special need." *See Griffin v. Wisconsin, supra.* Here, however, the Second Circuit erroneously expanded that rule to sanction a search and seizure of a citizen with full rights, based on the need to protect against violence and the risk of suicide — with no **special** justification of the type previously identified by this Court when applying the special needs exception. Since *Jones* and *Jardines*, this Court has not had occasion to reconsider whether the special needs exception is consistent with the protection of homes from government searches and seizures. The circuit court did not pause to consider how property principles and *Jones* might have changed the special needs exception calculus. Particularly because of the split of circuits identified by Petitioner (*see* Pet. Cert. at 18-22), this case presents an opportunity for this Court to reconsider the special needs exception in light of textual property principles recognized in *Jones* and *Jardines*, and use of what

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[7] *See also* H. Titus & W. Olson, "*United States v. Jones*: Reviving the Property Foundation of the Fourth Amendment," CASE WESTERN RESERVE J. OF LAW, TECHNOLOGY & THE INTERNET, vol. 3, no. 2 (Spring 2012).

Justice Scalia correctly described as a "judge-empowering 'interest balancing inquiry.'" *See Heller* at 634.

Reexamination of the special needs exception should not be avoided since it could be disruptive to "settled" areas of Fourth Amendment law. Indeed, some of the same results reached by application of the vague and atextual special needs exception might be reached even with the application of property principles. For example, searches of its employees' offices, desks, or file cabinets could be justified as the government would have the rights of a proprietor of that property. With respect to prisoners and probationers, agreement to the terms of release could constitute consent to certain searches and seizures. On the other hand, the blood and urine tests that Justice Marshall found violative of the Fourth Amendment, but which were upheld by the majority in *Skinner,* might need to be re-evaluated based on the Fourth Amendment recognized principle that each person has a property interest in his own body, as well as a privacy interest. *See generally Grady v. North Carolina*, 575 U.S. 306 (2015).

II. THE CIRCUIT COURT JUDGES USED INTEREST BALANCING TO ELEVATE THEIR PERSONAL OPINIONS OVER THE CONSTITUTIONAL TEXT.

To be sure, the Second Circuit set out the text of the Fourth Amendment in a footnote, but then expended no effort to evaluate from context, history, or tradition the scope of the Fourth Amendment's

protection of homes from warrantless searches and seizures of firearms. Likewise, it made no effort to explain why this Court's recent decision in *Caniglia v. Strom*, 141 S. Ct. 1596 (2021), was not binding on the court, erroneously describing its virtually identical facts as "bearing some resemblance" to *Torcivia*. *Torcivia* at 358 n.25. Rather, the court focused on how it could use interest balancing to expand a modern judge-made rule (the special needs exception) to apply to the facts of the case below.

The circuit court relied on prior Second Circuit decisions to establish a four-factor test, loosely built on this Court's decision in *Skinner*, and then sought to re-balance those four factors to cover the current factual situation. Most judges love interest balancing because it allows them to reach the decisions they prefer, while giving the appearance of rendering a neutral, judicial decision. With the Fourth Amendment, most judges believe the only issue is whether the search seems "reasonable" to them — but never search out what the Framers of that language believed an "unreasonable" search to be:

> Determining the reasonableness of seizures under the special needs exception requires courts to balance four factors... Balancing these factors, we conclude that the County's firearm-seizure policy is constitutionally reasonable. [*Torcivia* at 359.]

While interest balancing has a long pedigree in First Amendment jurisprudence, there is good reason to contend that no constitutional rights should be

measured based on a balancing of interests. The most thoughtful and complete rejection of interest balancing in recent years was performed with respect to the Second Amendment in *D.C. v. Heller* and reaffirmed in *New York State Rifle & Pistol Association v. Bruen*, 2022 U.S. LEXIS 3055 (2022). This Court explained in *Heller*:

> We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding "interest-balancing" approach. The very enumeration of the right takes out of the hands of government — even the Third Branch of Government — the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad. [The Second Amendment] ... is the very *product* of an interest balancing by the people.... [*Heller* at 634-635.]

This Court's recent decision in *Bruen* related to the Second Amendment is just as relevant in the Fourth Amendment context as well:

> [W]hile ... judicial deference to legislative interest balancing is understandable — and,

> elsewhere, appropriate — it is not deference that the Constitution demands here. The Second Amendment "is the very *product* of an interest balancing by the people...." It is this balance — struck by the traditions of the American people — that demands our unqualified deference. [*Id*. at 431.]

This Court made clear in *Bruen* that "we have generally assumed that the scope of the protection applicable to the federal government and States is pegged to the public understanding of the right when the Bill of Rights was adopted in 1791. See, *e.g.*, ... *Virginia v. Moore*, 553 U.S. 164, 168-169 ... (2008) (**Fourth Amendment**)...." (*Bruen* at *46) (emphasis added) (also collecting cases relating to other amendments).

This Court noted in *Bruen* that it has previously applied the original meaning of the Fourth Amendment's text — and the understanding the Framers would have had at the time of ratification — as the standard for determining Fourth Amendment "reasonableness":

> Although its meaning is fixed according to the understandings of those who ratified it, the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated. See, *e.g.*, *United States v. Jones*, 565 U. S. 400, 404-405, 132 S. Ct. 945, 181 L. Ed. 2d 911 (2012) (holding that installation of a tracking device was "a physical intrusion [that] would have been

> considered a 'search' **within the meaning of the Fourth Amendment when it was adopted**"). [*Bruen* at *34 (emphasis added).]

Just as judicial interest balancing tests have been rejected in the context of the Second Amendment, the same result should obtain with respect to the Fourth Amendment. At no point did the circuit court analyze the text or context of the Fourth Amendment, to say nothing of seeking to analyze or understand it as written. Instead, it shoehorned the obviously real governmental concern for the prevention of violence and suicide into the special needs exception through the interest balancing to validate the search of the home and the seizure of the firearms.

The court explained that constitutional protections for the home must yield to the "substantial governmental interest in preventing suicide and domestic violence." *Torcivia* at 359. The Court concluded: "Weighing these [four] factors together, we conclude that the County's firearm-seizure policy speaks to a 'special need' and is constitutionally reasonable." *Id*. at 361.

The police may have felt they had a "special need" to violate the Fourth Amendment, but no police have the authority to act in a manner which violates the original public meaning of the Fourth Amendment. Even though its preference of government power was based on a policy the lower courts preferred, that policy was precluded when the Bill of Rights was crafted by the Framers and ratified by the People. The court may have rationalized its decision as being done

in support of a substantial governmental interest, but its decision was *ultra vires*, as neither that court nor this has authority to diminish the People's protections set out in the Fourth Amendment.

Justice Robert Jackson had personally seen what the loss of freedom from unreasonable searches and seizures had done to the German people when he served as U.S. Chief Counsel for the prosecution of Nazi war criminals. From that experience in Germany, he brought back with him a fresh understanding of the significance of the Fourth Amendment to the preservation of a free people. He wrote his dissent in *Brinegar v. United States*, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting), to instruct on the corrosive effect of a government which does not respect the property rights of the people. Justice Jackson knew, and asserted, that Fourth Amendment rights:

> belong in the catalog of **indispensable freedoms**. Among deprivations of rights, none is so effective in **cowing a population, crushing the spirit of the individual and putting terror in every heart**. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every **arbitrary** government. And one need only briefly to have **dwelt and worked** among a people possessed of many admirable qualities but deprived of these rights to know that the **human personality deteriorates** and **dignity and self-reliance disappear** where **homes, persons and possessions** are

> subject at any hour to unheralded **search and seizure by the police**. [*Id.* at 180-81 (emphasis added).]

Also, in one of this Court's early decisions recognizing the special needs exception, dissenting Justice Thurgood Marshall warned of the danger of balancing away Fourth Amendment rights due to public interests deemed to be "special needs." In *Skinner*, the Court upheld warrantless blood and urine testing for individuals subject to regulation under the Federal Railroad Administration:

> Precisely because the need for action against the drug scourge is manifest, the need for vigilance against unconstitutional excess is great. History teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure.... In permitting the Government to force entire railroad crews to submit to invasive blood and urine tests, even when it lacks any evidence of drug or alcohol use or other wrongdoing, the majority today joins those **shortsighted courts which have allowed basic constitutional rights to fall prey to momentary emergencies**. [*Skinner* at 635 (Marshall, J., dissenting) (emphasis added).]

Although Justice Marshall was focused on the probable cause requirement for a warrant and this was in the pre-*Jones* era before the property basis was

restored, Marshall's concerns against balancing away Fourth Amendment rights continue to be relevant:

> I have joined dissenting opinions in each of these cases [which applied the special needs exception], protesting the "jettison[ing of] . . . the only standard that finds support in the text of the Fourth Amendment" and predicting that the majority's "Rohrschach-like 'balancing test'" portended "a dangerous weakening of the purpose of the Fourth Amendment to protect the privacy and security of our citizens." *T. L. O.*, *supra*, at 357-358 (opinion of Brennan, J.). The majority's decision today bears out that prophecy. [*Skinner* at 639.]

Justice Marshall also understood that even perceived exigencies — which were not present in this case — should not outweigh the clear language of the Fourth Amendment:

> The fact is that the malleable "special needs" balancing approach can be justified only on the basis of the policy results it allows the majority to reach. The majority's concern with the railroad safety problems caused by drug and alcohol abuse is laudable; its **cavalier disregard for the text of the Constitution** is not. There is no drug exception to the Constitution, any more than there is a communism exception or an exception for other real or imagined sources of domestic unrest. [*Id*. at 641 (emphasis added).]

Just as Justice Marshall found no drug exception to the Constitution, there is no firearms exception to the Fourth Amendment. This disturbing trend to riddle the Fourth Amendment with atextual exceptions needs to be re-examined by this Court.

III. THE SECOND CIRCUIT CREATED A "SECOND AMENDMENT EXCEPTION" TO THE FOURTH AMENDMENT.

A. The Second Circuit's Disdain for Firearms Provided the Basis for Its Expansion of the Special Needs Exception so They Could Be Seized.

Petitioner's firearms were in no way involved in the events that led the police to visit his home on the night in question. His daughter "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 ... that Torcivia possessed licenses for those weapons...." *Torcivia* at 358. Additionally, Petitioner's Second Amendment claims were abandoned by the time this case reached the court of appeals. Nevertheless, Petitioner's right to possess firearms became the central focus of the case.

After Petitioner's detention and removal from the home, one of the detaining officers conducted a pistol license check where he first learned that Petitioner owned firearms. *Torcivia* at 351; Pet. Cert. at 9-10. At 2:20 p.m., mental health professionals determined that there was "'no indication for acute psychiatric

admission'" for Petitioner, and that he was not "'imminently dangerous'" to others or himself. *Torcivia* at 351; Pet. Cert. at 10-11. However, since Petitioner's wife did not have the combination to the safe in which the firearms were stored, and Petitioner had not provided it, there is every indication that the police and the hospital made clear that he would not be released until he gave the combination to his gun safe, and he was not allowed to return home until about 6:00 p.m. *See Torcivia* at 351; Pet. Cert. at 11. Facing the threat of prolonged detention, Petitioner provided that combination, and the police searched for and seized both his handguns and long guns, after which he was released. Subsequently, his pistol license was revoked for reasons that are not reflected in the Circuit Court Opinion. *Id*. at 353, 352 n.15; Pet. Cert. 12.

The Second Circuit made clear its view that possession of firearms in the home is a suspect behavior even where the firearms owner was determined to be no threat to himself or others. Even while admitting that Petitioner's firearms were duly licensed (*Torcivia* at 358), the Court laid out a long-winded policy analysis of the use of firearms in homicides and in suicides. *Torcivia* at 359-360. Among the "authorities" of which it took "judicial notice" (*Torcivia* at 359 n.26) was the work of the notoriously anti-Second Amendment activist group "Everytown for Gun Safety." The circuit court assumed the truth of platitudes such as: "'[D]omestic violence often escalates in severity over time, and the presence of a firearm increases the likelihood that it will escalate to homicide.'" *Id.* at 359 (citation

omitted). "[D]omestic violence and gun violence are closely linked." *Id.* "'[M]ore intimate-partner homicides have been committed with firearms than with all other weapons combined over the past 25 years.'" *Id.* at 359. The specter raised by the court evidently justified the seizure of any firearms, based only upon "the possibility that the person regains access to the firearms ... or that **someone else gains access** to the firearms...." *Torcivia* at 360 (emphasis added). Based on such generalizations, the court assumed that even "the possibility that the person ... or ... someone else gains access to the firearms" is a sufficient government interest to outweigh the protections afforded by the Founders to Petitioner under both the Second Amendment and Fourth Amendment. *Torcivia* at 359-360.

Indeed, it was the very presence of the firearms at Petitioner's home on which the Second Circuit relied to find the government had a special need to search Petitioner's home and seize his firearms — all without a warrant and without any claim of exigent circumstances. The policy that the police implemented may not require taking a homeowner to a hospital for a mental health evaluation — just a home disturbance of some type. Under the Second Circuit's reasoning, it is difficult to imagine a circumstance in which a warrantless search and seizure of firearms any time the police were called to a home would **not** be found "reasonable," as virtually any governmental interest other than a general interest in law enforcement provides a special need.

As discussed in Sections I and II, *supra*, the circuit court gave absolutely no consideration to the text, context, or history of the Fourth Amendment, beyond the finding of three judges that a particular search seemed not "unreasonable." And, furthermore the circuit court gave absolutely no consideration to the fact that the search and seizure it sanctioned violated even what some have termed the "core" of the protection afforded by *Heller* — a handgun in the home.

B. The Exercise of Second Amendment Rights Does Not Trigger a Waiver of Fourth Amendment Rights.

The fact that the police searched for and seized not just any personal property, but rather firearms — the possession of which the U.S. Constitution recognizes and protects — provides an important overlay to this case ignored by the circuit court. The Second Circuit was oblivious to the fact that its decision violated the principle that a citizen cannot be required to surrender one constitutional right in order to claim the protections of another.

In *Simmons v. United States*, 390 U.S. 377 (1968), to assert a Fourth Amendment violation, a criminal defendant was required to testify that an object belonged to him, and that admission was later used against him at trial. Thus, he was forced to surrender his Fifth Amendment right against self-incrimination in order to assert his Fourth Amendment right. This Court noted that "this Court has always been peculiarly sensitive" to such constitutional

deprivations. *Id.* at 393. This Court prohibited such a Catch-22, holding that it is "intolerable that one constitutional right should have to be surrendered in order to assert another." *Id.* at 394. Yet under the Second Circuit's application of the special needs exception, once Petitioner chose to keep a firearm in his house, he forfeited some of the important protections the Fourth Amendment afforded him against warrantless searches and seizures in his home.

Similarly, in *Perry v. Sindermann*, 408 U.S. 593 (1972), this Court ruled that government may not deny a person a benefit "on a basis that infringes his constitutionally protected interests.... For if the government could deny a benefit to a person because of his constitutionally protected [rights], his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.' ... Such interference with constitutional rights is impermissible." *Id.* at 597. Here, Petitioner's Fourth Amendment right to be "secure in [his] house[] ... against unreasonable searches and seizures" was taken away because he exercised his Second Amendment right to "keep ... arms...."

Particularly after *Heller* and *McDonald*, as recently reaffirmed by *Bruen*, the government certainly cannot prevent Petitioner from exercising his Second Amendment right to keep firearms in the home. And the Second Circuit may not use Torvicia's exercise of that constitutional right to render him vulnerable to government searches and seizures of his firearms which violate Fourth Amendment protections

but for some atextual, judge-invented special needs exception.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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